Current Commercial Cases

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A SURVEY OF THE CURRENT CASE LAW

written by

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MERWE JA concurring)
SUPREME COURT OF APPEAL
16 SEPTEMBER 2019

2019 (6) SA 381 (SCA)

Property

A person who concludes an agreement with an estate agent designed to assist the estate agent in the marketing of property is not an estate agent as defined in the Estate Agency Affairs Act (no 112 of 1976).

THE FACTS

On 9 July 2015, an agreement was concluded between Atlantic Beach Homeowners Association NPC (ABHOA), represented by Mr White, and Pam Golding, duly represented by Ms Campbell. The agreement, styled Property Partner Agreement (PPA), was for a three-year period and provided for the appointment of Pam Golding as ABHOA's property partner, on a non-exclusive basis, for the marketing of properties forming part of the estate for which ABHOA had been established.

In terms of the agreement, ABHOA agreed to grant Pam Golding certain marketing benefits. These included that ABHOA would, at its cost and expense: display Pam Golding's name and branding on ABHOA's marketing pamphlet and map of the estate; on a weekly basis cause one property to be advertised in a local newspaper and in ABHOA's newsletter; display a 'for sale' sign branded with Pam Golding's name and corporate logo on the relevant property; provide access to ABHOA's electronic-media advertising template; entitle Pam Golding to indicate on its corporate stationery that it was associated with ABHOA; provide residents of the estate with a fridge magnet which included Pam Golding's contact details; provide a link from ABHOA's website to that of Pam Golding in respect of properties for sale; and display Pam Golding's contact details and logo at all entrances to the Estate.

In consideration for these marketing benefits, Pam Golding would pay ABHOA a marketing fee equal to 1%, excluding value-added tax, of the gross purchase price of each property sold by Pam Golding up to a purchase price of R5m, and 0,5% of anything above that price. In addition to payment of the marketing fee, Pam Golding would be obliged at all times to use its best endeavours to promote and extend sales of properties in the estate and enhance its reputation by making all efforts to promote it. Pam Golding also warranted that its sole business was to operate as an estate agency and that all the necessary licences, certificates and permits to operate the business of an estate agency were in place.

A complaint was lodged with the Estate Agency Affairs Board that ABHOA granted to Pam Golding the exclusive right to market properties within the estate, in consideration for commission of 1% of the purchase price of any property sold in the estate through Pam Golding. No complaint was laid against ABHOA and Mr White.

The Board then charged ABHOA and Mr White on three counts. The first count was an alleged contravention of section 26 of the Estate Agency Affairs Act (no 112 of 1976), which requires any person who performs any act as an estate agent to be a holder of a valid fidelity fund certificate. It was alleged that during July 2015 ABHOA and Mr White, without holding a valid fidelity fund certificate issued by the Board, operated or held themselves out to be estate agents and signed the PPA in terms of which they agreed to act as 'spotters'.

ABHOA applied for an order declaring that it and White were not estate agents as defined in section 1 of the Act.

THE DECISION

An estate agent is defined in the Act as any person who for the acquisition of gain holds himself out as a person who advertises

that he, on behalf of any other person —

(i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor; or

(ii) lets or hires immovable property . . . ; or

(iii) collects or receives any moneys payable on account of a lease of immovable property . . . ; or

(iv) renders any such other service as the Minister on the recommendation of the board may specify from time to time in the Gazette'.

The issue to be decided was whether ABHOA or Mr White had in any manner, directly or indirectly, held themselves out as persons who sell properties of others for commission, or advertised themselves as persons who do so.

A careful perusal of the property partner agreement and the evidence of implementation thereof did not reveal that ABHOA or Mr White in any manner held themselves out or advertised that they sought mandates to sell property. There was no evidence that ABHOA or Mr White solicited approaches from the general public to purchase or sell properties on their behalf for commission. The property partnership agreement involved nothing more than the provision by ABHOA to Pam Golding of marketing benefits, which were specified in the agreement, in return for the consideration specified in the PPA.

There was nothing to suggest that, by concluding and implementing the property partner agreement, ABHOA or Mr White held themselves out or advertised themselves as persons that sought to sell the properties of others for commission. There was no evidence that they acted as estate agents as defined. In the result they should not be subjected to the envisaged disciplinary proceedings.

A careful perusal of the property partner agreement and the H evidence of implementation thereof does not reveal that ABHOA or Mr White in any manner held themselves out or advertised that they sought mandates to sell property. There is no evidence that ABHOA or Mr White solicited approaches from the general public to purchase or sell properties on their behalf for commission. The property partnership agreement involved nothing more than the provision by ABHOA to Pam Golding of marketing benefits, which are specified in the agreement, in return for the consideration specified in the PPA.

KRETZMANN *v* KRETZMANN

A JUDGMENT BY EKSTEEN J
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH
27 AUGUST 2019

2020 (1) SA 162 (ECP)

An option agreement need not comply with the requirements of section 2(1) of the Alienation of Land Act (no 68 of 1981). However, an option which includes the terms upon which a sale is to be concluded upon its exercise cannot be validly exercised, whether orally or in writing.

THE FACTS

In an action brought by him and a co-plaintiff, Kreztmann alleged that they attempted to purchase a property situated in Port Elizabeth. They were unable to raise a bond to enable them to purchase the property. They then concluded an oral agreement with the defendant in terms of which the defendant undertook to raise the capital and to purchase the property in his own name, but for their benefit, which he duly did. The property was accordingly registered in the name of the defendant.

The particulars of the plaintiffs' claim recorded that after being unable to raise the necessary finance to purchase the property, the plaintiffs entered into an oral option agreement with the defendant. The option was to the effect that the defendant gave to the plaintiffs an option to purchase the property, for a period of 5 years from the date of transfer into his name, by entering into a written agreement of sale with him for its purchase, for a price consideration equal to the amount owing on the associated mortgage bond at the exercise of the option. The plaintiffs undertook to pay various costs associated with the property, including the municipal rates and the defendant's mortgage bond payments.

The transfer of the property into the defendant's name was registered on 17 January 2014.On or about 13 July 2018, the plaintiffs duly exercised their option as aforesaid by providing to the defendant, a signed agreement of sale for the property reflecting a purchase price of R2 550 000,00, being the amount owing by the defendant to Investec Private Bank in respect of the property at the exercise of the option.

The defendant raised an exception to the claim. He contended that the particulars of claim lacked averments necessary to sustain a cause of action, inter alia, because the plaintiff's case was premised on an 'oral option agreement' in terms of which it was alleged that the defendant gave the plaintiffs an option, for a period of five years from the date of transfer of the property in question, to purchase the property on certain conditions. However, section 2(1), read with the definition of 'alienate', of the Alienation of Land Act (no 68 of 1981) provides that no alienation of land shall . . . be of any force of effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority. The alleged agreement fell foul of this section because it was not reduced to writing and signed by the parties

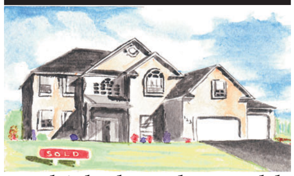
THE DECISION

The plaintiffs' case as pleaded was therefore founded on an oral agreement in terms of which the defendant granted them an option for a period of five years to purchase the property on certain terms which were orally agreed upon by them.

The sole issue was whether the agreement contended for was required by law to be in writing for it to be enforceable.

An option to purchase, however, is a different phenomenon. An option to purchase is comprised of two distinct parts: an offer to purchase; and an agreement to keep that offer open, usually for a fixed period.

Formalities prescribed for the substantive contract ought not to apply to option agreements relating to such a contract. However, as a general rule, pacta



de contrahendo have to conform to formalities prescribed for the substantive contract envisaged by the parties and therefore option contracts to purchase land must conform to the applicable statutory formalities.

However, whilst an option agreement (the pactum de contrahendo) relating to the sale of land need not be in writing, it can only be validly enforced if the offer to which it relates complies with the provisions of section 2(1) of the Act. In this case, however, the plaintiffs' case as pleaded was that both the option agreement and the agreement relating to the terms upon which the sale would occur were orally concluded. An option of that nature relating to land cannot be validly exercised, whether orally or in writing. The option agreement therefore had to fail.

The exception was upheld

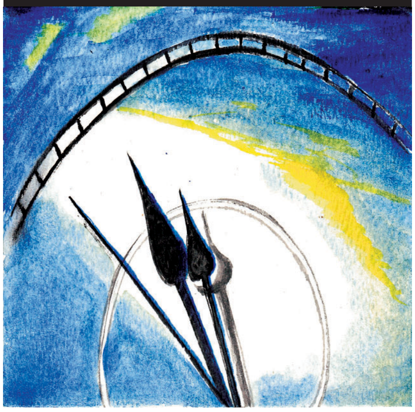
Whilst an option agreement (the pactum de contrahendo) relating to the sale of land need not be in writing, it can only be validly enforced if the offer to which it relates complies with the provisions of s 2(1) of the Act. In this case, however, the plaintiffs' case as pleaded is that both the option agreement and the agreement relating to the terms upon which the sale would occur were orally concluded. An option of that nature relating to land cannot be validly exercised, whether orally or in writing.

BOTHA v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY CACHALIA JA (SALDULKER, PLASKET AND DLODLO JJA and WEINER AJA concurring)
SUPREME COURT OF APPEAL
6 SEPTEMBER 2019

2019 (6) SA 388 (SCA)

Prescription



The prescription period applicable to a debt secured by a mortgage bond is fixed at the date on which the debt becomes due and does not alter its character merely because the bond is subsequently cancelled.

THE FACTS

Botha's husband concluded a home loan agreement with the Standard Bank of South Africa Ltd. The agreement required him to register a mortgage bond over his property for an amount of R450 000 in the bank's favour and also to obtain a suretyship from Botha. Clause 18 contained two 'special conditions'. The first was that the loan would be consolidated with an existing loan secured by the property offered as mortgage security for repayment over the period of the loan. The second was that the mortgage bond would stipulate that the bank secure an additional sum, equivalent to 25 per cent of the bond amount. This would represent further security (cover) for situations where the bank would be obliged to pay amounts on the principal debtor's behalf for which he would be liable.

Botha's husband, the principal debtor, then registered three mortgage bonds over his property in favour of the bank to secure the loan and his indebtedness to the bank arising from the home loan agreement. Botha bound herself in favour of the bank as surety and co-principal debtor. Botha accepted that any acknowledgment of indebtedness by the principal debtor of proof of a claim against his insolvent estate would be binding upon her.

On 28 November 2011 the principal debtor's estate was finally sequestrated and trustees appointed to administer it. The bank sought to recover the full outstanding balance then owing to it by the principal debtor from the insolvent estate. On 27 September 2012 the bank proved its claim against the estate in an amount of R2 315 043. The principal debt, and thus the surety's debt, then became due, and prescription began to run against the debt as contemplated by section 12(1) of the Prescription Act (no 68 of 1969). But, since the principal debt was the object of the bank's claim in the principal debtor's insolvent estate, it constituted an impediment to the continued running of prescription in terms of section 13(1)(g). This impediment ceased to exist on 26 January 2015 when the Master accepted the trustees' final liquidation account. Consequently, prescription then began running again.

Botha contended that prescription ran for one more year by operation of s 13(1)(i) when the principal debt prescribed on 26 January 2016. The bank contended that prescription continued to run beyond this date because the 30-year period, and not the three-year period, applied.

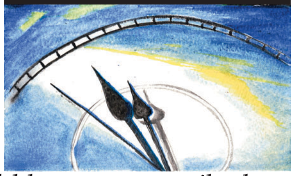
On 26 July 2016, the bank issued summons claiming a shortfall of R1 285 871 from Botha as surety for the principal debt.

THE DECISION

The first question was whether the cancellation of the bonds changed the prescription period applicable to the debt from 30 years to three years.

Oliff v Minnie 1953 (1) SA 1 (A) established that the prescription period applicable to a debt secured by a mortgage bond is fixed at the date on which the debt becomes due and does not alter its character merely because the bond is subsequently cancelled. The classification of the debt conclusively determines the period of prescription, not the fate of the security.

It is incorrect to say that once the security ceases to exist, the debt is no longer secured. The



true position is that it is only when the right of action accrues and the debt is due that the prescription period is determined. And once determined, the period is fixed and immutable; it is not alterable retroactively through the subsequent cancellation of the bond.

If Botha's submission that the cancellation of the security altered the prescription period were to be upheld, it would mean that the period applicable to the secured debt may be altered retroactively in mid-stream, after prescription has begun to run against the debt. The same debt would then be governed by two different prescription periods. The anomalous consequence would be that where three years have already run against a 30-year debt then, in the absence of any delay or interruption, the debt would become prescribed immediately, thus leaving the creditor remediless through no dilatoriness on its part. This would undermined the purpose of the Act, which designates categories of debt according to classes of written instrument and ascribes particular prescription periods to them in order to ensure legal certainty.

The bank's claim succeeded.

The terms of the loan agreement, which include the suspensive and special conditions relating to the mortgage bond referred to earlier, make it artificial to separate the antecedent contract of loan from the bond agreement. Once the suspensive and special conditions under the loan agreement were fulfilled, there was in fact only one agreement and not two coexisting agreements. The debt secured under this agreement was the mortgage debt, which became due and to which the 30-year period of prescription applied. This was also how the bank described the debt in its claim to the trustees of the insolvent estate, which counsel for the appellant properly accepted posed a difficulty for her.

FERROSTAAL GMBH v TRANSNET SOC LTD

A JUDGMENT BY BOZALEK J
WESTERN CAPE DIVISION, CAPE TOWN
29 AUGUST 2019

2019 (6) SA 490 (WCC)

Companies

The determination in terms of section 153(7) of the Companies Act (no 71 of 2008) that a vote against the adoption of a business rescue plan was inappropriate is based on a value judgment made after consideration of all the facts and circumstances.

THE FACTS

Ferromarine Africa (Pty) Ltd's (FMA) only business, and principal asset, was a head lease it had over certain of Transnet Soc Ltd's property located at the port of Saldanha. The lease was for a period of 15 years terminating in September 2022. The primary use to which FMA put the premises was to lease it out to various subtenants, and the only revenue which it derived from the property was that which it earned from such subleases. FMA had no employees and had two directors.

As at mid-2018 the monthly rental payable by FMA to Transnet was approximately R1.5m per month. Notwithstanding that Transnet opposed both an initial and a revised business rescue plan, the business rescue proceeding proceeded without being driven to a head until August 2018. At that stage Transnet brought proceedings to set aside the resolution in terms of which the voluntary business rescue proceedings were commenced, declaring that they had ended and converting the FMA's business rescue status to one of liquidation. The application was brought on the basis that there was no reasonable prospect of rescuing FMA. Those proceedings were opposed. The hearing of the matter was postponed, part heard, to 6 and 7 August 2019.

On 19 July 2010 FMA concluded, in principle, a sublease with ArcelorMittal, which envisaged ArcelorMittal installing a spiral welding mill valued in excess of $10m on the leased premises at the port of Saldanha, which will be used for the production of steel pilings to be used in the marine construction industry.

As a result of this development the business rescue practitioner issued a revised business plan which took into consideration the additional income to be generated for FMA from the proposed subleases. That plan was considered at a meeting of creditors on 31 July 2019 but was voted down by Transnet. Since Transnet held the majority of the creditors' voting interests, the consequence of its vote was that the plan was rejected.

The business rescue practitioner took the view that the vote was inappropriate, as contemplated in section 153(1)(a) of the Companies Act (no 71 of 2008). FMA's shareholders, ie Ferrostaal Gmbh and the second applicant, then brought an application to set aside the vote taken against the revised business rescue plan.

THE DECISION

Section 153(1)(a) provides that if a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may —

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or I shareholders, as the case may be, on the grounds that it was inappropriate.

Section 153(7) provides that on an application contemplated in subsection (1)(a)(ii) or (b)(i)(bb), a court may order that the vote on a business plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to —

(a) the interests represented by the person or persons who voted against the proposed business rescue plan;

(b) the provision, if any, made in the proposed business rescue

plan with respect to the interests of that person or those persons; and

(c) B a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

The determination that the vote was inappropriate must be based on a value judgment made after consideration of all the facts and circumstances.

The moratorium which FMA enjoyed in respect of its extremely substantial arrear rentals would endure for another three years if the revised plan was adopted and would only be addressed as and when any extension to the head lease was negotiated at the end of that period. It was striking that no explanation was furnished as to why Transnet could not begin to address the arrears immediately, but only in three years' time. The business rescue practitioner's revised business plan provided no explanation in this regard. The question could well be asked, what will change in three years' time to then place FMA in a more advantageous position to address the arrear rentals issue?

A further critical element to the proposed plan was that even after the head lease expired in three years' time, the plan offered little certainty as to how these arrears could be effectively addressed.

There was weight in Transnet's argument that the revised business rescue plan made any prospect of repayment of any portion of the arrear rental indebtedness uncertain and dependent upon the happening of an uncertain future event, namely, agreement on a 15-year head lease extension.

A second important issue in assessing the reasonableness of the revised business rescue plan and the resulting vote was the question of future rental in terms of the existing head lease. Payment of the agreed rental for the remainder of the three-year period did not appear to be clearly provided for or guaranteed by the revised plan. Clause 13.2 of the revised plan made reference to FMA being 'confident' that it will be able to continue making payment of the full rental what appears to be possible future subleases.

Having regard to all these circumstances and competing interests and notwithstanding the uncertainty should FMA be placed into liquidation, it could not be found that the result of the vote was inappropriate and, in particular, that, when regard is had to the various interests in section 153(7)(a), (b) and (c), it was 'reasonable and just' to set aside the result of the disputed vote.

The application failed.

MOUTON v PARK 2000 DEVELOPMENT 11 (PTY) LTD

Companies

A JUDGMENT BY SHER J
WESTERN CAPE DIVISION, CAPE TOWN
23 JULY 2019

2019 (6) SA 105 (WCC)

Business rescue proceedings commenced in contravention of section 129(2)(a) of the Companies Act (no 71 of 2008) are defective and may be set aside.

THE FACTS

In July 2018 Mouton obtained a writ of execution which authorised the attachment and sale of Park 2000 Development 11 (Pty) Ltd's immovable properties. An advertisement then notified of their intended disposal by way of public auction on 12 December 2018.

The day before the auction was to be held, Mouton's attorneys received notification by email from attorneys Lucas Dysel Crouse Inc that an entity known as Meiprops Twee en Twintig (Pty) Ltd, had launched an application for the liquidation and winding-up of Park 2000, which application was enrolled for hearing on 14 December 2018. Lucas Dysel Crouse Inc represented Park 2000, and also a business rescue practitioner, Stewart.

About 15 minutes after receiving notification of the intended liquidation of Park 2000 Mouton's attorneys received email correspondence from an entity known as Smoken Consulting (Pty) Ltd, through which Stewart offered consulting and 'business rescue' services, in which they were also informed that Park 2000 had made application that same day to be placed under business rescue. Two days later the Companies and Intellectual Property Commission (the CIPC) duly appointed Stewart as the business rescue practitioner. In the meantime, the liquidation application was withdrawn the day after it was launched.

Notwithstanding that Park 2000 had sought to place itself in business rescue on 11 December 2018, and despite a demand which was made by Stewart that the auction was to be cancelled as a result thereof, it went ahead on the instructions of Mouton's attorneys, as they were of the view that the business rescue proceedings were irregular and Park 2000 had not legitimately and validly been placed in business rescue, whereupon the two properties were sold at the auction.

Mouton brought an application for an order declaring that the resolution which was adopted on 11 December 2018 by Park 2000 to commence business rescue proceedings, was invalid, and consequently that such resolution and the proceedings which followed it, including the appointment of Stewart as the business rescue practitioner, should be set aside.

THE DECISION

The principal question which arose for determination was whether or not the business rescue proceedings were defective because they were launched at a time when liquidation proceedings had already been 'initiated' against Park 2000, or whether the resolution by means of which the business rescue proceedings were launched was null and void because it was not taken by the requisite majority.

One of the crucial questions which required determination was which of the business rescue and liquidation applications preceded the other? Section 129(1) of the Companies Act (no 71 of 2008) provides that the voluntary placement of a company under business rescue 'begins' when its board takes a resolution to such effect, if it has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing it. But in terms of section 129(2)(a) such a resolution may not be adopted if liquidation proceedings have (already) been 'initiated'.

The word 'initiated' in section

129(2)(a) is intended to refer to a preceding act or conduct by which liquidation proceedings are set in motion and is not intended to signify the moment in time when the proceedings are deemed to have formally 'commenced'. The word 'initiated' does not bear the same meaning as the word 'commenced' in sections 348 and 352 of the previous Act, and it was never intended that it should have the same meaning. When referring to the 'initiation' of liquidation proceedings in section 129(2)(a) the legislature intended to refer to the preceding causative act or conduct whereby the legal process in relation to such proceedings was set in motion.

The liquidation proceedings against Park 2000 were 'initiated' when the resolution to launch them was taken, and not when the liquidation application was filed with the court. That occurred in the morning of 11 December 2018 and before the subsequent resolution which was adopted to place the company under business rescue. The resolution to launch business rescue proceedings must have been taken after the resolution to launch liquidation proceedings, and not before. Given that the liquidation proceedings were 'initiated' by the adoption of the necessary resolution in this regard, it followed that the business rescue resolution was adopted in breach of the provisions of section 129(2)(a) of the Act. Consequently, Mouton was entitled to an order setting the resolution aside. It followed from this that the business rescue would come to an end and Stewart's appointment as business rescue practitioner had to fall away.

Given non-compliance with the provisions of section 129(2)(a), an order setting aside the resolution will be just and equitable.

The word 'initiated' in s 129(2)(a) is therefore intended to refer to a preceding act or conduct by which liquidation proceedings are set in motion and is not intended to signify the moment in time when the proceedings are deemed to have formally 'commenced'. In my view, H therefore, the word 'initiated' does not bear the same meaning as the word 'commenced' in ss 348 and 352 of the previous Act, and it was never intended that it should have the same meaning.

VAN VUUREN v ROETS

A JUDGMENT BY SUTHERLAND J (CARELSE J and MAIER-FRAWLEY AJ concurring)
GAUTENG LOCAL DIVISION, JOHANNESBURG
3 SEPTEMBER 2019

2019 (6) SA 506 (GJ)

Credit Transactions

There is no authority conferred on any court to make an order releasing the consumer in respect of whom the magistrate has made an order in terms of section 87(1) of the National Credit Act (no 34 of 2005).

THE FACTS

In 2015, Van Vuuren applied for debt review . Roets, a registered debt counsellor, accepted the application. In due course, Roets decided that Van Vuuren was indeed overindebted. Roets then notified the creditors and the credit bureaux of the application. Such notice of the acceptance of an application has the effect of suspending legal process in respect of the debtor's obligations. Van Vuuren's matter was sent to the magistrates' court and an order was granted by the magistrate, as contemplated in section 87(1)(b)(ii) of the National Credit Act (no 34 of 2005), rearranging his repayment obligations. Van Vuuren complied with the order.

In 2016, 18 months after the initial application, Van Vuuren's financial circumstances improved so that he was able to pay his creditors on the original terms of the agreements and no longer needed to rely on the debt review relaxations of the order. Van Vuuren asked Roets to take the relevant steps to release him from debt review. Roets refused on the grounds that the circumstances did not entitle him to issue a clearance certificate. Moreover, Roets told him that the magistrates' court had no power to release him; hence, the only option was to approach the High Court to do so.

A similar situation was presented to the court by a second applicant, Nel. However, in this case, no order had yet been made by a magistrate. Both contended that they were trapped in debt review when they no longer need to facilitate their financial rehabilitation through that process. They contended that upon a proper interpretation of the Act that, the High Court had jurisdiction to acknowledge they no longer needed to be subjected to the effects of debt review, ie barred from incurring further credit, and in consequence, the High Court should therefore order the termination of their status as persons subject to debt review.

THE DECISION

There is no authority conferred on any court to make an order releasing the consumer in respect of whom the magistrate has made a section 87(1) order from the effects of that order.

Where a section 87 order by a magistrate was made, the consumer is bound to the provisions of s 88(1)(c) and 88(2) until all the consumer's obligations under a rearrangement are discharged or all novated obligations in terms of a consolidation agreement are discharged.

Another provision regulates an exit: section 71, in which it is provided that a consumer whose debts have been re-arranged must be issued with a clearance certificate by a debt counsellor within seven days after the consumer has satisfied all the obligations under every credit agreement that was subject to that debt re-arrangement order or agreement, in accordance with that order or agreement. The section requires that a debt counsellor, under the stipulated conditions, may issue a clearance certificate. If the debt counsellor fails to give a clearance certificate, the consumer must lodge a complaint with the Tribunal. The Tribunal does not to deal with a rescission of the magistrate's order — the order is per se undisturbed.

If, on the facts alleged by Van Vuuren, he can satisfy section 71(1)(b), he can exit debt review. If the facts do not meet the prescripts, he cannot. However,

no court has jurisdiction to order a release.

The critical point for a consumer in the position of Van Vuuren is satisfying section 71(1)(b)(iii), ie 'that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full'.

An exit from debt review where a magistrate has made an order in terms of section 87, is by a clearance certificate being issued by the debt counsellor. Where no section 87 order is made, the debt counsellor's proposal, together with other information evidencing the inappropriateness of an order, is placed before the magistrate to facilitate a rejection of the proposal.

A High Court is not able to make an order confirming that an applicant is no longer overindebted, where no valid declaration of overindebtedness is before court.

Ostensibly, the critical point for a consumer in the position of Van Vuuren is satisfying s 71(1)(b)(iii), ie 'that all obligations under every credit agreement included in the re-arrangement order or agreement, other than those contemplated in subparagraph (i), have been settled in full'. According to his allegations, he is at present satisfying the original agreements' obligations, but has not extinguished the indebtedness yet. If Van Vuuren cannot satisfy those requirements, he has, within the scheme of the statute and its policy choices, no right to exit. This outcome seems to be a policy choice by the legislature.

Moreover, there is an additional problematic aspect of the text to A consider. As pointed out by the Banking Association of South Africa, s 88(1) and s 71(1) are not synchronised. A paradox results in terms of which the credit record is sanitised in terms of s 71, but the consumer remains frozen out of the credit market in terms of s 88(1). This anomaly is most probably the result of an oversight when amendments were effected in 2014 and the need to correlate the outcomes was overlooked. Plainly the position could not have been intended and legislative repairs are needed.

NATIONAL CREDIT REGULATOR v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY KEIGHTLEY J
GAUTENG LOCAL DIVISION, JOHANNESBURG
27 JUNE 2019

2019 (5) SA 512 (GJ)

The correct interpretation of section 124 of the National Credit Act (no 34 of 2005) is that it excludes the operation of common-law set-off in all credit agreements that are regulated by the Act.

THE FACTS

The Standard Bank of South Africa Ltd applied set off against amounts standing to the credit of its customers in order to settle indebtedness of such customers. The indebtedness arose from credit agreements which were subject to the National Credit Act (no 34 of 2005).

Section 90(2)(n) of the Act provides that a provision in a credit agreement is unlawful if it purports to authorise or permit the credit provider to satisfy an obligation of the consumer by making a charge against an asset, account, or amount deposited by or for the benefit of the consumer and held by the credit provider or a third party, except by way of a standing debt arrangement, or to the extent permitted by section 124.

Section 124(1) provides that it is lawful for a consumer to provide, a credit provider to request or a credit agreement to include an authorisation to the credit provider to make a charge or series of charges contemplated in section 90(2)(n), if such authorisation meets all the following conditions:

(a) the charge or series of charges may be made only against an asset, account, or amount that has been —

(i) deposited by or for the benefit of the consumer and held by that credit provider or that third party; and

(ii) specifically named by the consumer in the authorisation;

(b) the charge or series of charges may be made only to satisfy —

(i) a single obligation under the credit agreement; or

(ii) a series of recurring obligations under the credit agreement, specifically set out in the authorisation;

(c) the charge or series of charges may be made only for an amount that is —

(i) calculated by reference to the obligation it is intended to satisfy under the credit agreement, and

(ii) specifically set out in the authorisation;

(d) the charge or series of charges may be made only on or after a specified date, or series of specified dates —

(i) corresponding to the date on which an obligation arises, or the dates on which a series of recurring obligations arise, under the credit agreement; and

(ii) specifically set out in the authorisation; and

(e) any authorisation not given in writing, must be recorded electromagnetically and subsequently reduced to writing.

Section 124(2) provides that before making a single charge, or the initial charge of a series of charges, to be made under a particular authorisation, the credit provider must give the consumer notice in the prescribed manner and form, setting out the particulars as required by this subsection, of the charge or charges to be made under that authorisation.

The National Credit Regulator brought an application for an order declaring that in light of sections 90(2)(n) and 124 of the National Credit Act, the common law right to set-off was not applicable in respect of credit agreements which were subject to the National Credit Act.

The bank opposed the application on the grounds that on a plain reading of section 90(2)(n), it is only express provisions of a credit agreement that will be unlawful if they do not accord with sectio n 124. As the common-law principle of set-off did not have to be expressed in a credit agreement, it did not fall within the ambit of this section at all.

THE DECISION

The bank's position seemed to be that it is unlawful for a credit provider to actually tell a consumer in the credit agreement that it will be relying on common-law set-off by including a provision to this effect in the credit agreement. However, it is perfectly lawful for the credit provider to keep the consumer in the dark by making no reference to set-off in the agreement at all, and then to rely on common-law set-off nonetheless.

But this position was fundamentally irrational, and contrary to section 3 of the Act that provides, as one of the general purposes of the Act, the promotion of a transparent credit market.

The real starting point of the inquiry was section 124, and not section 90(2)(n). It is section 124 that establishes what form of set-off is lawful in respect of credit agreements regulated by the Act. It is not limited to set-off provisions contained in a credit agreement only. Instead, section 124 covers a broader field incorporating different possible lawful 'repayment practices'. The system of set-off established under section 124 is plainly designed to represent a complete break from the past application of the common-law principle of set-off, and its overt purpose is to safeguard the rights of consumers in the set-off process. Section 124 has at its heart the requirement that the consumer who owes a credit provider must have a say in, and must authorise, whether and how set-off is to be applied in respect of credit balances in their accounts. It gives the consumer a say in how their debts are to be met, rather than leaving it to the sole discretion of the credit provider to deduct money from their accounts.

If the Bank's interpretation was accepted, the effect was to render s 124 ineffective. This was the inescapable effect of reading section 124 as retaining common-law set-off alongside set-off under the Act. The two mechanisms are so divergent that there is very little overlap between them. Given this divergence, there would seem to be absolutely no incentive at all for credit providers to elect to regulate set-off under section 124 rather than resorting to their common-law rights if these were still available.

The purpose of section 124 was precisely to effect that break from the common-law past that was necessary in order to achieve the underlying objects of the Act. When section 124 provides that '(i)t is lawful C for . . . a charge or series of charges contemplated in section 90(2)(n)' to be made on the conditions set out thereunder, it means that these are the only conditions under which set-off may lawfully be applied in respect of credit agreements under the Act. While it does not expressly oust the continued application of common-law set-off in parallel with section 124, its meaning and effect are to do so. These provisions were plainly intended to alter, and to oust, the common-law position as regards credit agreements regulated by the Act.

The correct interpretation of section 124 is that it excludes the operation of common-law set-off in all credit agreements that are regulated by the Act.

LIBERTY GROUP LTD v MALL SPACE MANAGEMENT CC

A JUDGMENT BY ZONDI JA (LEACH JA, TSHIQI JA, SWAIN JA and MOCUMIE JA concurring)
SUPREME COURT OF APPEAL
1 OCTOBER 2019

2020 (1) SA 30 (SCA)

Contract

A principal is entitled to revoke a mandate of agency. It would be against public policy to coerce a principal into retaining an individual as his agent, when he no longer wishes to retain him as such.

THE FACTS

Mall Space Management CC acted as an agent for Liberty Group Ltd, facilitating the conclusion of contracts with exhibitors for rental of mall space or exhibition courts at four shopping centres, for which it was paid commission. The contract between the parties was one of mandate in terms of which Mall Space facilitated the conclusion of the agreements for the hire of the exhibition courts at the request or on the instruction of Liberty Group.

Mall Space failed to account properly to Liberty Group for the rental income it received from the tenants and fell into arrears with the payment of such income to Liberty Group. As a result, it became indebted to Liberty Group and its agent in the amounts of R566 274,76 and R3 634 491, respectively, for which it signed acknowledgements of debt.

On 29 August 2017 JHI Retail, on behalf of Liberty Group, wrote a letter to Mall Space informing it that its services to lease rental court space to tenants in the relevant shopping centres would no longer be required with effect from 4 September 2017. Liberty then conferred on the fifth appellant, Excellerate, the mandate which Mall Space had until then performed.

Mall Space contended that since the mandate agreement did not provide for a notice to be given for its termination, it was subject to an implied or tacit term that it was terminable on reasonable notice. It contended this would require at least six months' notice.

Mall Space sought an order (a) directing Liberty to allow it access to rental court space at the relevant shopping centres in order to carry out its mandate; (b) interdicting the Liberty from terminating the mandate agreement; and (c) restraining the fifth appellant from competing unlawfully with it by wrongfully interfering with its rights in the marketing, planning and coordinating of promotional events and exhibitions at the shopping centres concerned.

THE DECISION

Under the common law Liberty Group, as principals, were free to terminate their mandate.

Liberty Group terminated their mandate for a good reason. There was no unlawful infringement of Mall Space's rights. The evidence established that Mall Space failed properly to account to Liberty Group for the rental income it received from the tenants. Mall Space was substantially in arrears with its payment of the moneys due to them as its principals. In fact, it signed acknowledgements of debt.

Mall Space had to show that the contractual right it obtained from Liberty Group protected an interest that was also enforceable against Excellerate, with which it had no contractual relationship; that Excellerate unlawfully infringed or threatened to infringe that right; and that there was no adequate alternative remedy. Mall Space failed to establish a clear right. First, the mandate it obtained from Liberty Group did not give it an exclusive right to operate at the relevant shopping malls and it claimed no entitlement to exclusivity. Secondly, Excellerate was duly appointed by Liberty Group to assume the functions and responsibilities which were hitherto performed by Mall Space after termination of its mandate. There was no ground upon which the alleged interference with Mall Space's rights could be said to be unlawful. An interdict cannot be

granted where there is no actual or threatened unlawfulness in the infringement of a right.

In the present case there was no term of a contract alleged to be contrary to good faith, fairness and equity. The relevant rule of the common law was that a principal is entitled to revoke a mandate of agency. It would be against public policy to coerce a principal into retaining an individual as his agent, when he no longer wishes to retain him as such. If the termination of the mandate has prejudiced the agent his remedy lies in a claim for damages and not in an order compelling the principal to retain him as his agent in the future.

In this case, Liberty Group, as principals, terminated their mandate as they were not happy with the quality of services they received from Mall Space. There was no obligation on them to have given Mall Space six months' notice before doing so. They had a valid reason to cancel the mandate. Liberty Group, as principals, were entitled to terminate their mandate when it became clear to them that Mall Space could not deliver on their mandate. Mall Space failed to account properly to them and they could not be expected to wait for the worst to happen before taking action to protect their own financial interests, which had been placed in jeopardy by Mall Space's mismanagement of the contract.

The order sought by Mall Space was refused.

In this case, Liberty Group, as principals, terminated their mandate as they were not happy with the quality of services they received from Mall Space. There was no obligation on them to have given Mall Space six months' notice before doing so. They had a valid reason to cancel the mandate. Liberty Group, as principals, were entitled to terminate their mandate when it became clear to them that Mall Space could not deliver on their mandate. Mall Space failed to account properly to them and they could not be expected to wait for the worst to happen before taking action to protect their own financial interests, which had been placed in jeopardy by Mall Space's mismanagement of the contract.

LUNDY v BECK

A JUDGMENT BY SNYCKERS AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
22 MAY 2019

2019 (5) SA 503 (GJ)

Insolvency

A sequestration application should not be brought for an ulterior purpose.

THE FACTS

Lundy purchased a house under a sale in execution. The house had belonged to Beck. It was sold in execution pursuant to a judgment obtained by a bank against Beck.

Lundy and Beck concluded lease and sale agreements in respect of the property, with Lundy as lessor and seller, and Beck or the trust as tenant and purchaser. Beck remained in occupation of the property. Disputes arose between Lundy and Beck relating to their agreements about the property. Beck remained on the property but Lundy received no value in relation to the property he had purchased. Lundy instituted proceedings for 'access to the property'. These proceedings resulted in judgments in Lundy's favour, including costs awards which led to a taxed bill in his favour.

Lundy then brought an application for a provisional order for the compulsory sequestration of the estate of Beck. A final order of sequestration was then sought. Lundy founded his application on section 8(b) of the Insolvency Act (no 24 of 1936). The alleged act of insolvency invoked was based on the sheriff's return of service. The writ (warrant of execution) was in respect of the sum of R78 123. The return of service stated that the approximate value of the disposable property was R20 000 and Beck declined to disclose any further disposable property when requested to do so.

The amount of R78 123 was later paid to Lundy's attorneys.

THE DECISION

It is commonly accepted that if a respondent pays the full debt on which a writ was issued that yielded the nulla bona return which is invoked as a s 8(b) act of insolvency, then the act of insolvency can no longer be relied on as a basis for sequestration. However, this is not necessarily so, given that an act of insolvency is a proxy for actual insolvency, and its subsequent 'cure' does not necessarily undo its effects for the purposes of what it is deemed to prove.

The question then arose as to what comprised the debt embodied in the writ which yielded the nulla bona return in the present case. The act of insolvency had to be determined with reference to the debt stated to be due as and when due on the day execution was sought, and not with reference to debts that could accrue subsequent to that day.

However, the process of sequestration was employed for an ulterior purpose, to use as a tool to procure the vacation of the property by Beck, and then to secure a settlement of holding-over charges. It was not brought to secure payment of the costs-award debt by the process of sequestration. This brought the sequestration application within the category of cases of ulterior purpose such as envisaged in *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W).

The application was dismissed.

TJEKA TRAINING MATTERS (PTY) LTD v KPPM CONSTRUCTION (PTY) LTD

Insolvency

A JUDGMENT BY SUTHERLAND J
GAUTENG LOCAL DIVISION, JOHANNESBURG
21 JUNE 2019

2019 (6) SA 185 (GJ)

Liquidation proceedings contemplated in section 129(2) of the Companies Act (no 71 of 2008) must be served on the company, not merely issued, to meet the requirements of the section.

THE FACTS

On 18 April 2019 Tjeka Training Matters (Pty) Ltd obtained the issue of a liquidation application in the High Court. On 15 May 2019 KPPM Construction (Pty) Ltd filed a resolution as contemplated in section 129(2) of the Companies Act (no 71 of 2008). On 28 May 2019 the liquidation application was served on Tjeka..

Section 129(1) provides that subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that —

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company.

Section 129(2) provides that a resolution contemplated in subsection (1) —

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.

The parties were in dispute as to whether the resolution prevented the liquidation application which, though issued before the resolution was filed, was not yet served.

THE DECISION

The question was: did the mere issue of the liquidation application satisfy the meaning to be attributed to the phrase 'proceedings have been initiated . . . against the company'?

The board of KPPM was bona fide ignorant of the issue of the liquidation application by Tjeka. It may reasonably be supposed that a prudent self-examination of the straits in which the company found itself included an appreciation that the risk of further creditors bringing liquidation applications was possible. However, the very decision by a company to deliberate whether to place itself into business rescue is precisely that kind of risk; thus, no fair rebuke was conceivable.

It was contended that although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him. This contention could be accepted because the 'involvement' in litigation is by means of a 'formal claim'.

The liquidation proceedings contemplated in section 129(2) of the Act must be served on the company, not merely issued, to meet the requirements of the section.

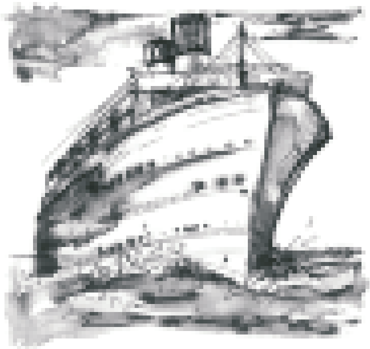
The resolution of 15 May 2019 trumped the liquidation proceedings served on 28 May 2019.

MV MADIBA 1
VAN NIEKERK v MV MADIBA 1

A JUDGMENT BY LE GRANGE J
WESTERN CAPE DIVISION, CAPE TOWN
6 AUGUST 2019

2019 (6) SA 551 (WCC)

Shipping



There must be a meaningful maritime connection between the maritime claim, the ship and the owner of the ship to impart to the claim a maritime character which would render it appropriate to adjudicate the claim in accordance with maritime law.

THE FACTS

In August 2016, a loan agreement was entered into between Van Niekerk as lender, the owner of the *Madiba 1*, Iscorp Investments (Pty) Ltd and bareboat charterer Meltt (Pty) Ltd as borrower. Van Niekerk lent and advanced to the bareboat charterer the capital loan amount of R1 900 000 to pay for the design, construction and equipping of the vessel so as to be put into service for the transportation of passengers.

Van Niekerk brought an admiralty action in rem against the vessel for repayment of the loan in the amount of R1 900 000 plus interest from the maturity date, alternatively such rate as may be deemed appropriate in terms of section 5(2)(f) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983).

The defendant took exception in accordance with rule 9(5)(b) of the Admiralty Rules to the particulars of claim in their existing form, on two grounds. The first was that the claim advanced in the particulars of claim was not a maritime claim as defined in section 1(1) of the Act.

THE DECISION

The question which had to be considered was whether the claim was such that its relationship with 'marine or maritime' matters was sufficiently close that it is necessary to be heard as a maritime claim. There must be a meaningful maritime connection between the maritime claim, the ship and the owner of the ship to impart to the claim a maritime character which would render it appropriate to adjudicate the claim in accordance with maritime law.

In assessing the underlying cause of the action in the present case, the loan agreement clearly achieved the purpose of establishing a link between the ship, the owner of the ship and the maritime claims, namely the design, construction, repair or equipment of the ship and the earnings of the ship. The loan could therefore be regarded as a maritime claim, provided that the necessary link was established. To view it differently would essentially mean that a matter with meaningful maritime connection would be dealt with within the usual jurisdiction of the High Court. This would undermine the special rules and procedures relating to the exercise of admiralty jurisdiction justified by, and intended to accommodate, the particular needs associated with maritime matters.

The contention that the loan agreement could only be regarded as a maritime claim if a mortgage was registered over the defendant, was unsound and not supported by case law.

The exception was dismissed.

SOUTH AFRICAN RESERVE BANK v BANK OF BARODA (SOUTH AFRICA)

A JUDGMENT BY LOUW J
(LANGA AJ concurring)
GAUTENG LOCAL DIVISION,
PRETORIA
2 APRIL 2019

2019 (6) SA 174 (GP)

Banking

A bank is only obliged to report to the South African Reserve Bank multiple transactions of amounts less than R24 999,99 if it appears that such a transaction is linked to others which exceed that amount. If a transaction has been flagged by the bank's automated system as suspicious or unusual but is found by the bank's employees not to be such, the transaction need not be documented as required by regulation 27 of the regulations promulgated under the Financial Intelligence Centre Act (no 38 of 2001).

THE FACTS

The South African Reserve Bank (the SARB) conducted an inspection at the Bank of Baroda (the bank) to determine compliance by the bank with the provisions of the Financial Intelligence Centre Act (no 38 of 2001) and the Money Laundering and Terrorist Financing Control Regulations promulgated in terms of Act. The SARB advised the Bank that it had made fourteen findings of non-compliance.

In terms of findings 3 and 4, the SARB found that the bank had failed to comply with the requirement of the Act, that it report all cash transactions exceeding the prescribed threshold of R24 999,99 within two business days of the transaction occurring. It found that the bank had either incorrectly reported or omitted to report seven cash transactions in excess of the threshold amount (finding 3), and had failed to file cash-threshold reports within the prescribed time (finding 4). In regard to finding 3, the bank's alleged non-compliance consisted of various deposits by the Consulate General of India. The Consulate made more than one deposit on certain days, one of which exceeded R24 999.99 the others of which did not. Only the larger deposit was reported.

In terms of findings 6, 7 and 8, the SARB found that the bank had failed to formulate and implement internal rules, processes and working methods, as required by the Act, to enable it to detect and report suspicious and unusual transactions. It firstly found that in cases where the bank's automated transaction-monitoring system flagged possibly suspicious and unusual transactions, the bank's process of investigating such alerts was inadequate in instances when it decided against reporting a transaction, as it failed to document its reasons for so deciding (finding 6). Secondly, the SARB found that the bank's internal rules were imported from its data centre in India and were not customised for the South African environment (finding 7). Thirdly, it was found that the bank had not applied sufficient scrutiny or care when processing transactions involving loans and fund transfers among entities within the same group and had failed to review its system alerts in respect of intergroup transactions to determine whether such alerts were reportable under section 29 of the Act (finding 8).

An Appeal Board upheld the bank's appeal in respect of findings 6, 7 and 8 and set an administrative penalty of R10m aside. The appeal in respect of findings 3 and 4 was partly upheld and the administrative penalty of R1m which was imposed was set aside and substituted with an administrative penalty of R400 000.

SARB appealed.

THE DECISION

SARB'S contention was that the aggregate of the amounts deposited should have been reported and that the failure to report all of the amounts constituted non-compliance with the Act. However, on a plain reading of the applicable provisions in particular regulation 22B, it was only required of an accountable institution that it report multiple transactions of amounts less than R24 999,99 'if it appears' to the accountable institution that the transactions are linked and to be considered fractions of one

transaction. There was no evidence that the deposits were linked. It followed that the Appeal Board correctly held that the SARB erred when it took the six transactions into account when it imposed the R1m penalty.

As far as findings 6, 7 and 8 were concerned, regulation 27(a) provides that the internal rules of an accountable institution concerning reporting of suspicious and unusual transactions must provide for the necessary processes and working methods which will cause suspicious and unusual transactions to be reported without undue delay.

SARB argued that regulation 27(a) requires that an accountable institution's internal rules must provide for the 'necessary' processes and working methods and that the regulation should, therefore, be interpreted to necessarily include an obligation to document reasons for deciding not to report a transaction which was flagged as suspicious or unusual by the bank's automated system. This argument requires a purposive interpretation of the regulation. But the Act and the regulations must be restrictively interpreted. But even if purposively interpreted, the regulation could not be interpreted to require of an accountable institution to document its reasons for deciding against reporting transactions that had been flagged as possibly suspicious or unusual. What it requires, is that the internal rules must provide for the necessary processes and working methods which will cause transactions which have been found to be suspicious and unusual to be reported without undue delay. That does not permit of an interpretation that, if a transaction has been flagged by the bank's automated system as suspicious or unusual but is found by the bank's employees not to be such, the bank has an obligation to document the reasons for such finding.

The appeal was dismissed.

CMC DI RAVENNA SC v COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

A JUDGMENT BY POTTERILL J
GAUTENG LOCAL DIVISION, PRETORIA
19 OCTOBER 2019

2020 (2) SA 109 (GP)

Companies

An external company cannot be subject to business rescue proceedings.

THE FACTS

CMC Di Ravenna SC was incorporated in Italy, and registered as an external company in South Africa. On 14 December 2018 CMC's board resolved to place CMC under voluntary business rescue in South Africa. On 24 December 2018 CMC filed its CoR123.1 with all the necessary documentation attached. On 15 January 2019 the notice of the resolution and its effective date were published, and business rescue practitioners were appointed.

On 15 February 2019 the Companies and Intellectual Property Commission (CIPC) withdrew the business rescue proceedings. Its reason for doing so was that in terms of the Companies Act (no 71 of 2008) an external company cannot be placed into business rescue as envisioned under Chapter 6 of the Act. It stated that registration as an external company by the CIPC does not result in the incorporation of a secondary legal entity. Since Chapter 6 of the Act only refers to a company CMC legally could not have commenced business rescue proceedings, and the processing of the CoR123.1 and supporting documents was invalid. CIPC stated that it would proceed to withdraw the processing of the CoR123.1 and update the external company status to 'in business'.

CMC applied for an order declaring that it was validly under business rescue as contemplated in terms of section 129 of the Act pursuant to the resolution adopted by the board of directors on 17 December 2018.

THE DECISION

The language of the definition of 'company' in the Act does not specifically include an external company. Section 129 of the Act does not expressly include an external company. It was relevant that the old Companies Act, 1973, under section 2(2), had a catch-all phrase which provided that the sections of that Act would apply to every company, including external companies. The 2008 Act has no such catch-all section. The 2008 Act made only specified sections of the Act applicable to external companies. The legislature would have been aware of the catch-all section, but chose to only make certain sections applicable to external companies. The background to business rescue proceedings with regard to an external company was thus that, despite the old Act making provision for an external company, the new Act did not. The inference to be drawn was that the legislature intentionally did not include an external company.

The CIPC is the Commission which dealt with, inter alia, the function of registering companies and business rescue proceedings. It could therefore be assumed that it would have the required knowledge applicable to the amendment of the status of a company. The court could thus take cognisance of its opinion that the registration of an external company does not result in incorporation of that company or juristic person within South Africa. This stance enforced the interpretation that an external company cannot apply for business rescue proceedings.

Section 1(a)(i) of the Act excluded an external company as defined in the Act. Since external companies are specifically excluded from the definition of a company, an external company cannot make use of business rescue provisions contained in chapter 6. The business rescue

provisions were therefore not applicable to external companies, since an external company is not 'a juristic person incorporated in terms of this Act', as contemplated in that definition, but is a foreign company that merely registers with the commission in terms of section 23(1).

The application was dismissed.

FURNITURE BARGAINING COUNCIL v AXZS INDUSTRIES (PTY) LTD

A JUDGMENT BY LEVENBERG AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
15 OCTOBER 2019

2020 (2) SA 215 (GJ)

A voluntary winding up resolution is ineffective when passed after an application for the winding up of the company has already been brought by a creditor of the company.

THE FACTS

For a number of accounting periods, AXZS Industries (Pty) Ltd deducted moneys from its employees' salaries, but failed to pay over those moneys to the Furniture Bargaining Council as it was obliged to do under a collective bargaining agreement. Its failure to pay over the moneys it deducted from its employees' salaries resulted in an arbitration. The arbitration was resolved by way of an interim settlement. In terms of the interim settlement, AXZS agreed to make a full and proper accounting for purposes of the quantification of the moneys it was obliged to pay over to the Council.

AXZSfailed to pay over moneys in terms of the award. The Council brought an application out of the Labour Court to have the arbitration award made an order of court.

AXZS consented to a judgment in an amount of R4 107 705,07 plus interest. No portion of this indebtedness was paid. The sheriff rendered a return of service which certified that AXZS had no attachable assets — ie a nulla bona return. Accordingly, by operation of section 345(1)(b) of the Companies Act (no 71 of 1973), AXZS was deemed unable to pay its debts.

On 29 October 2018, the Council brought an application for the winding up of the company. At the hearing of the matter, it appeared that the company was in voluntary liquidation. The date of the voluntary liquidation was 28 August 2019.

THE DECISION

The central question was whether the supervening voluntary winding-up prevented the court from granting a compulsory winding-up order.

It is only once the winding-up order has been granted that the winding-up is retroactively deemed to have commenced at the date of presentation of the application. Accordingly, if the court granted a winding-up order at this stage, this winding-up will be deemed to have commenced when the winding-up application commenced, being 29 October 2018.

It followed that, if the court granted a winding-up order, the compulsory winding-up would be deemed to have commenced on 29 October 2018

In terms of section 80 of the Companies Act (no 71 of 2008) and section 352 of the Companies Act (no 71 of 1973), the voluntary winding-up does not commence until the special resolution has been filed with the Companies and Intellectual Property Commission (the CIPC). It appeared that the effective date of the voluntary winding-up (under whatever section of whatever Companies Act it was brought) was 28 August 2019. This meant that, if a liquidation order was granted, the voluntary winding-up would be deemed to have commenced after the date of commencement of the compulsory winding-up proceeding. The effect of the granting of a winding-up order would therefore be to invalidate and void the voluntary winding-up.

At the time when liquidation became inevitable, the company withdrew its opposition and commenced a voluntary winding-up. In the circumstances of this case, the inference was inescapable that the purpose of commencing a voluntary winding-up was to delay or prevent an enquiry into the reasons for the company's failure. If the commencement of a voluntary winding-up in these circumstances had the effect of bringing the compulsory winding-up proceeding to an end, the entire legislative scheme of the Old and New Companies Acts with regard to liquidations of insolvent companies would be subverted.

An order winding up the company was granted.

In the present case, where there is good reason to suspect wrongdoing, the inability of the liquidator or creditors to follow the streamlined enquiry procedure set out in ss 417 and 418 of the Companies Act is a matter of serious concern. The inference is inescapable that the shareholders chose to voluntarily wind the company up in order to avoid an enquiry. The timing of the voluntary winding-up and the background facts of this case suggest that there has been an abuse of process by the respondent and its officers.

DRUMMOND CABLE CONCEPTS v ADVANCENET (PTY) LTD

A JUDGMENT BY VALY J
GAUTENG LOCAL DIVISION, JOHANNESBURG
14 DECEMBER 2018

2020 (1) SA 546 (GJ)

Contract

A party claiming restitution as a result of a breach of contract must tender return of whatever was received from the bargain. If the claim is for damages, that party must indicate what the value of its patrimonium is as a result of the breach and what it would have been had no breach occurred.

THE FACTS

Drummond Cable Concepts brought an action against Advancenet (Pty) Ltd claiming damages. It alleged that the parties entered into a contract in terms of which Advancenet would install electrical equipment at certain premises. The equipment would comply with the Molex Cabling Standard and Drummond would pay Advancenet certain amounts for the work.

Drummond performed all its obligations, which included paying Advancenet a sum of R357 521,10. Advancenet breached the contract by failing to comply with the Molex Cabling Agreement. Drummond afforded Advancenet an opportunity to remedy the breach by performing remedial work at the premises. Advancenet failed to take advantage of this opportunity. Drummond was therefore obliged to employ a third party to remedy Advancenet's breach. As a result of the breach, Drummond suffered damages amounting to R357 521,10 being the total amount paid in respect of the Cabling Agreement.

Accordingly, Drummond claimed the sum of R357 521,10.

Advancenet excepted to the claim. It contended that as Drummond accepted that the work done was not 'wholly unsuitable for its purposes', it could not claim the full contract price it had paid. It contended that the full contract price could not be the damages Drummond was alleged to have suffered by virtue of the alleged breach. Hence Advancenet claimed that Drummond failed to plead, as it was required to do:

(a) what remedial work it had secured and/or what goods it had purchased or supplied in order to remedy the work performed by Advancenet; and,

(b) what costs it incurred to have the work remedied.

Consequently, the Particulars of Claim did not identify a nexus between the remedial work undertaken and/or the costs incurred and the amount claimed. This lack of a nexus meant that the Particulars of Claim did not contain necessary averments to sustain a cause of action.

THE DECISION

The pertinent question was what must a plaintiff who sues for damages arising from a breach of contract plead in order to ensure that all the relevant facts are placed before court?

The relevant facts should specify the amount of damages that arose 'naturally and generally from the kind of breach of contract in question' or the amount of damages endured which, though 'too remote to be recoverable', were 'actually or presumptively contemplated' to be the probable result of the breach. The plaintiff must also indicate what was done to mitigate loss. Should the defendant contend that there were less costly remedies which the plaintiff ought to have adopted, then it would bear the onus of showing that there were such remedies open to the plaintiff.

Drummond argued that its claim was for restitution of the price paid. However, a claim for restitution is not a claim for contractual damages. It is a separate and distinct contractual remedy. For a claim of restitution, to succeed the plaintiff must tender return of whatever was received from the bargain. If the plaintiff received no benefit at all, it must plead this fact. Further, the plaintiff is also relieved of this duty to restore any benefit received on the

ground of impossibility. In this case the plaintiff must plead the impossibility. None of this was in the pleadings of the plaintiff in this case. Without averments to this effect, the cause of action relied upon could not be sustained. The exception had to succeed.

If the claim was to be assessed on the basis that it was one for damages, then it too failed to contain the necessary averments to sustain a cause of action. The plaintiff must indicate what the value of its patrimonium is as a result of the breach and what it would have been had no breach occurred. This it had not pleaded.

The exception was upheld.

SWIFAMBO RAIL LEASING (PTY) LTD v PRASA

A JUDGMENT BY LEWIS JA (PONNAN JA, ZONDI JA, MAKGOKA JA and SCHIPPERS JA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2019

2020 (1) SA 76 (SCA)

A contract which is concluded by 'fronting' as defined in the Broad-Based Black Economic Empowerment Act (no 53 of 2003) may be set aside.

THE FACTS

Prasa was an organ of state funded by national treasury, and was mandated to provide rail services throughout South Africa. In July 2009, Prasa published a request for expressions of interest in the supply of locomotives for the haulage of passenger trains on various national routes. In May 2011, a Spanish company, Vossloh Espa|fna SAU, inspected Prasa's fleet, and made recommendations as to what Prasa needed in the short, medium and long terms.

The specifications for the locomotives to be supplied were drawn by an executive manager of Prasa, Mr Mtimkulu. The specifications contravened various requirements of the procurement policy. But they matched those of Vossloh locomotives manufactured in Spain. The specifications had been tailored by Mtimkulu to ensure that the entity importing the locomotives from Vossloh would be awarded a bid for the supply of the locomotives. Swifambo Rail Leasing (Pty) Ltd submitted a bid for the award of the tender.

Swifambo's bid did not comply with the requirements of the request for proposals in a number of material respects. Despite material non-compliance with the request for proposals the Bid Evaluation Committee of Prasa recommended to the Bid Adjudication Committee that the bid be awarded to Swifambo. On 24 July 2012, the Board of Prasa approved Swifambo as the preferred bidder for the procurement of dual diesel-electric locomotives. A contract between Prasa and Swifambo was concluded on 25 March 2013. On 4 July 2013, a contract for the supply of locomotives was concluded between Swifambo and Vossloh.

On discovering the fraudulent conduct leading to the conclusion

of the contract, a newly reconstituted board of control of Prasa applied to the High Court to have the contract declared invalid and for an order setting it aside. Swifambo opposed the application on the grounds that it was not aware of the fraudulent conduct.

THE DECISION

Prasa alleged that Swifambo was a 'front' for Vossloh, who would not have been able to bid itself because it was not based in South Africa and did not meet the requirements of the procurement policy nor the request for proposals that necessitated that it be Broad-Based Black Employment Equity (BBBEE)-compliant. Swifambo, on the other hand, had a level 4 BBBEE rating.

Swifambo argued that it was not knowingly a party to 'fronting', a practice defined in the Broad-Based Black Economic Empowerment Act (no 53 of 2003) as a transaction, arrangement or other act or conduct that undermines the achievement of the objectives of the Act. Section 1(c) refers to the —

'conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person'.

Swifambo submitted that Vossloh was the entity with the skills and assets and it contracted with it, a black-owned entity which was BBBEE-compliant. This argument ignored the purpose of the BBBEE Act, which is to transfer capital and skills to black people. Swifambo personnel played no real role insofar as Prasa was concerned, and so there was no skills transfer and no change of asset- holding. Vossloh had complete control over every aspect of the contract between Swifambo and Prasa, including the appointment of members of the steering committee overseeing the acquisition and commissioning of locomotives. Swifambo's real role was undoubtedly to enable Vossloh to become the real bidder for the tender.

Accordingly, the High Court did not err in finding that Swifambo was a party to a fronting practice, and was not an innocent tenderer.

Swifambo's chief complaint appears to be that allegations of fraud and corruption should not be made lightly, and should be based on hard facts, or amount to the 'clearest evidence' or 'clear and satisfactory evidence'. It argues that no such evidence was tendered by Prasa. Molefe's conclusion, in the replying affidavit, that there were 'irregular and corrupt practices at Prasa', is criticised on the basis that there is no direct evidence supporting it. However, Swifambo in its heads of argument on appeal gives no detail as to what evidence it objected to. Moreover, it did not take issue with the conclusion itself, professing ignorance as to the practices within Prasa. Swifambo did not contest the merits of the application, and did not generally dispute the factual allegations made by Molefe.

MABUDUGA v NEDBANK LTD

A JUDGMENT BY LE GRANGE AJ
GAUTENG LOCAL DIVISION, PRETORIA
26 JULY 2019

2020 (1) SA 599 (GP)

Credit Transactions

Once a debt review application has been instituted and a debt counsellor appointed, the consumer may not withdraw from the debt review process.

THE FACTS

Nedbank Ltd brought an action against Mabuduga was for the enforcement of a credit agreement. The agreement was subject to the National Credit Act (no 34 of 2005). Judgment was granted after Mabuduga had applied for debt review in terms of section 86(1) of the Act and subsequent to Nedbank receiving a form 17.4 notice of termination from the debt counsellor. The notice stated that: 'This notice serves to advise you that the application for Debt Counselling dated 15 May 2014 has been voluntarily withdrawn by the consumer.' This notice of withdrawal of the application for debt counselling led to action being instituted by Nedbank and default judgment being granted.

Mabuduga applied for rescission of the judgment given against him.

The court raised the question whether a consumer is entitled to exit, withdraw from, or terminate, the debt review process after an application in terms of s 86(1). This was relevant because:

(i) if it is found that the credit agreement is not subject to pending debt review or before a debt counsellor the parties will be at liberty to settle their dispute amongst themselves, without the intervention and oversight of the debt counsellor or the application of the debt-review-process provisions of the Act, and should the order correspond therewith; and

(ii) if the credit agreement is, however, before a debt counsellor or subject to pending debt review, the aggregate debt-review-process provisions of the Act must be adhered to, and should the court order correspond accordingly.

THE DECISION

There is no provision in the Act that empowers the consumer to 'withdraw' an application or from the debt review process after the consumer's section 86(1) application.

The unambiguous effect of the provisions of this section was that (i) when Mabuduga filed his application in terms of s 86(1), it was out of the his hands to withdraw his application, or from the debt review process. The withdrawal was therefore ultra vires and of no force and effect; and(ii) from date of receiving notice in terms of section 86(4)(b)(i), Nedbank was barred from instituting action, which made its summons premature.

The debt review process then had to resume from where it derailed, ie in the application process, and while the matter was in the statutory hands of the debt counsellor.

The judgment was rescinded and the parties ordered to take all necessary steps to facilitate the restructuring of the home loan agreement.

MURRAY & ROBERTS LTD v ALSTOM S&E AFRICA (PTY) LTD

A JUDGMENT BY
UNTERHALTER J
GAUTENG LOCAL DIVISION, JOHANNESBURG
2 SEPTEMBER 2019

2020 (1) SA 204 (GJ)

If the nature of an obligation which a party must perform is not precisely clear, this does not constitute a ground for avoiding the performance of the obligation on the grounds of impossibility of performance.

THE FACTS

Alstom S&E Africa (Pty) Ltd was appointed by Eskom Holdings Soc Ltd to undertake certain works at the Kusile power station. The works included the erection of large vessels, referred to as absorbers.

Alstom appointed Murray &Roberts (M&R) as its subcontractor to erect the absorbers. Alstom supplied the steel plates to be used by M&R for the erection of the absorbers. A dispute arose between the parties in respect of the materials supplied by Alstom. Each of the steel plates supplied by Alstom was to have had a marking that corresponds to a material certificate that specified the composition of the steel so as to establish that the steel compliesdwith the required specifications. Certain of the steel plates supplied did not have the required markings and could not be traced to material certificates or were not accompanied by material certificates.

M&R contended that Alstom was obliged to provide the material certificates in respect of the steel it supplied to M&R. Without the certificates, M&R was not obliged to proceed to erect the absorbers. M&R notified Alstom of a dispute. In terms of the subcontract, the dispute was referred to the Dispute Adjudication Board (the Board) for adjudication. The adjudicator ruled in favour of M&R.

M&R then brought the application to secure compliance with the adjudicator's decision. Alstom did not dispute that the adjudicator's decision was final and binding and gave rise to contractual obligations. Alstom submitted that if these obligations could not be performed, then a court will not enforce such obligations. It averred that a court will not order the specific performance of obligations arising from the adjudicator's decision that were impossible of performance.

THE DECISION

Alstom was obliged to have the material subjected to appropriate testing that would positively identify the material and provide Murray and Roberts with the testing records. Alstom stated that the adjudicator had imposed upon it a testing obligation and a certification obligation. As to the testing obligation, Alstom contended that no testing method would positively identify the particular grade of steel. That could only be done with full material traceability. Tests can only identify the mechanical and chemical properties so as to conclude that the materials tested are of similar grade to the material specified. As to the certification obligation, Alstom contended that only the original manufacturer can issue a certificate and then only when the material is under the control of the original manufacturer. Since this could not be done, Alstom could not provide these certificates.

If Alstom resisted doing the testing that M&R said was appropriate, the matter could be determined by the adjudicator,. No impossibility arose because the adjudicator had yet to decide what precise testing is required.

The real dispute was not as to what tests could be done, nor what they could show. M&R did not suggest the tests could always identify the grade of steel. Alstom recognised that chemical analysis and tensile-strength testing could identify mechanical and chemical properties, but not the grade of steel. The dispute

concerned whether the tests would properly identify the material as required by the decision. Alstom contended they would not because the identity of the material is its grade. M&R said the identity of the material is its properties from which one can determine whether the material conforms to the specification.

Alstom could simply accept the obligation to undertake the testing that M&R said would suffice to comply with the decision. That was not impossible. Alstom could not avoid compliance altogether by holding out for a test that could not be done. This resolution was also consistent with what the adjudicator had in mind. He recognised there may be disagreement as to precisely what testing is required. But that did not prevent Alstom from accepting a test of less rigour that M&R was happy to accept. And, if Alstom nevertheless resisted this solution, it could take up the adjudicator's invitation to have the matter further clarified.

The application was granted.

Counsel's argument on behalf of Holdings was that the moment of inability of the Group to pay its debts had not yet arrived when the resolutions placing the companies in voluntary winding-up were passed. The bank accounts had not yet been closed and at that time they could pay their debts, although an inability to pay was imminent once the Group's access to banking facilities was terminated. Although Mr Gumede did not say when the banking facilities would be terminated, he did say that when that occurred the Group would be unable to pay its employees and suppliers, which suggested that it might be as early as the end of that month. It was conceded in the heads of argument that the Group would be unable to continue to do business and it would have to be liquidated. The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company 'is able to meet its current liabilities, including contingent and prospective liabilities as they come due'. Put slightly differently, it is whether the company —

'has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading — in other words, can the company meet current demands on it and remain buoyant?'

Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading.

NPGS PROTECTION & SECURITY SERVICES CC v FIRSTRAND BANK LTD

A JUDGMENT BY DAVIS AJA
(NAVSA ADP, MBHA JA,
MOKGOHLOA AJA concurring,
MAKGOKA JA dissenting)
SUPREME COURT OF APPEAL
6 JUNE 2019

2020 (1) SA 494 (SCA)

In the case of an application for summary judgment, provided the creditor has complied with the requirements of rule 46A, there is an onus on the debtor, at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionality between the execution and other possible means to exact payment of the judgment debt.

THE FACTS

Firstrand Bank Ltd and NPGS Protection & Security Services CC concluded a written credit-facility agreement in terms of which the bank advanced an amount of R250 000 to NPGS.. The loan under the credit facility was secured by a covering mortgage bond registered by the second appellant over his residential immovable property, in favour of the bank.

On 4 May 2017 the bank issued summons in the court a quo 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 a 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.

NPGS opposed an application for summary judgment on two grounds. The court dismissed these grounds as bona fide defences and granted judgment in favour of the bank. It also gave an order declaring the mortgaged property executable

NPGS appealed. The appeal court considered whether or not the order declaring the property executable should have been given.

THE DECISION

Rule 46(1) of the Rules of Court and its replacement, rule 46A, afford a judgment debtor an opportunity to oppose the grant of an order of special execution against a residential home. The requirements contained in rule 46A make it clear that a judgment debtor must be informed before an application to execute is heard, that he or she has a right to set out grounds of opposition to such an application. Faced with an application to execute in respect of a residential home, a court is required to examine the specific circumstances of the debtor, as they apply at the time the order is to be made, whether there are alternative means by which the debt may be repaid, taking into account whether the remedy to be granted meets a test of proportionality between the legitimate contractual rights of the creditor and the rights of the debtor in terms of section 26(1) of the Constitution.

In a case of an application for default judgment, a court, in its discretion, needs to ensure that it is possessed of adequate information to enable it to grant a remedy which complies with these requirements. In the case of an application for summary judgment, provided the creditor has complied with the requirements of rule 46A, there is an onus on the debtor, at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionality between the execution and other possible means to exact payment of the judgment debt.

It was apparent from the judgment of the court below that the only, and limited, manner in which the question of the property being the primary residence of the second appellant was raised, was by way of a

submission from the bar by counsel representing him. No attempt was made to provide even the most basic information in relation thereto. A further affidavit could have been submitted. An opportunity could have been sought for the second appellant to testify.

In the absence of such evidence, an order declaring the property executable was properly granted.

SHABANGU v LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA

A JUDGMENT BY FRONEMAN J (MOGOENG CJ, CAMERON J, JAFTA J, KHAMPEPE J, MADLANGA J, MATHOPO AJ, MHLANTLA J, THERON J and VICTOR AJ concurring)
CONSTITUTIONAL COURT
29 OCTOBER 2019

2020 (1) SA 305 (CC)

If it is clear that a surety has bound itself only for the indebtedness arising between the principal debtor and creditor, and no subsequent acknowledgement of indebtedness given by the principal debtor to the creditor, then the surety's liability does not extend to the later indebtedness of the principal debtor.

THE FACTS

Shabangu and the other respondents stood written surety for loans advanced by the Land and Agricultural Development Bank of South Africa to Westside Trading 570 (Pty) Ltd for the development of urban property. In terms of clause 2 of the suretyship agreement, the sureties agreed to be bound only for the 'indebtedness' which flowed from the loans. Their release as sureties, in terms of clause 10 of the suretyship agreement, coincided with the full repayment of the amount of 'indebtedness'. Clause 2 was subject to clause 10 of the suretyship agreement.

The Land Bank was subsequently advised that the loan agreement was beyond its statutory powers Upon receipt of this advice, the Land Bank stopped advancing funds to Westside. By then R51m had been spent by Westside on purchasing properties. The Land Bank asserted that together with interest, Westside owed it some R95m. Westside disputed this amount. Its financial director then signed an acknowledgment of debt in which Westside accepted liability to repay R82m to the Land Bank in full and final settlement of its indebtedness.

Westside failed to repay the amounts claimed by the Land Bank. The Land Bank then instituted proceedings against Westside and the sureties for payment. After the institution of proceedings, Westside was liquidated. The Land Bank then amended its claim. It did not pursue its claim against Westside but persisted in a claim against the sureties — not directly based on the original principal debt under the loan agreement for payment of R82m, but on the sureties' alleged liability for the R82m acknowledgement of debt.

The sureties submitted that the only debt acknowledged in the acknowledgement of debt was the alleged liability of Westside under the invalid loan agreement. It did not cover any possible enrichment claim. The

acknowledgment of debt thus suffered from the same taint as the invalid loan agreement. No ancillary obligation under the suretyship could accordingly extend to any obligation arising from the similarly invalid acknowledgement of debt.

THE DECISION

The debt of R82m related to the invalid loan initially advanced to Westside by the Land Bank.

A subsequent agreement between private parties that seeks to resuscitate an invalid agreement itself remains tainted with invalidity, even if the invalidity does not stem from illegality or immorality.

The acknowledgement of debt could have embraced a valid principal obligation, in respect of which the sureties could have been liable, in relation to a claim for unjust enrichment if it were premised on there being an absence of a relationship of other legal indebtedness. It could have validly grounded a principal obligation if it recognised the invalidity of the debt in terms of the loan agreement. On its terms, however, it did not do so: it was common cause that the acknowledgement did not cover any enrichment claim.

If a compromise or settlement of that kind is sought to be made an order of court, it will only be sanctioned if it accords with the Constitution and the law. If it is not sought to be made an order of court it risks later challenge. But this does not impact on the ability of the state to enter into compromise agreements in respect of indubitably invalid original agreements when there are uncertain associated claims that may be founded on unjust enrichment or the no-profit principle. It is important that it was common cause in this matter that the acknowledgement of debt did not cover any enrichment claim.

Simply put, if no claim lay against Westside, no claim could possibly lie against the sureties. However, it was important to elucidate why the suretyship agreement did not cover the acknowledgement of debt. In terms of clause 2 of the suretyship agreement, the sureties agreed to be bound only for the 'indebtedness' which flowed from the invalid agreement. This was further evident from the fact that their release as sureties, in terms of clause 10 of the suretyship agreement, coincided with the full repayment of the amount of 'indebtedness'. Clause 2 was subject to clause 10 of the suretyship agreement. This clearly showed an intention by the sureties to be bound only for the 'indebtedness' arising out of the invalid agreement.

BODY CORPORATE OF MARINE SANDS v EXTRA DIMENSIONS 121 (PTY) LTD

A JUDGMENT BY PONNAN JA (MOCUMIE JA, TSOKA AJA, KOEN AJA and WEINER AJA concurring)
SUPREME COURT OF APPEAL
28 NOVEMBER 2019

2020 (2) SA 61 (SCA)

Property

If the liability of an owner in a sectional title scheme is increased by virtue of a resolution having been passed increasing levies, that owner is adversely affected by such a decision of he body corporate. Accordingly in terms of section 32(4) of the Sectional Titles Act (no 95 of 1986) that owner's consent must be obtained.

THE FACTS

Since 18 December 2002, Extra Dimensions 121 (Pty) Ltd, had owned six of the nine non-residential units in a sectional title scheme known as Marine Sands. Prior to the extension of the scheme, the participation quota of those units was 5,4979%. Thereafter it was reduced to 4,8409%. In June 2012 the managing agent commenced charging levies in accordance with the participation quota percentage of each section. The result was that the monthly basic levy of Extra Dimensions was reduced from R16 201,36 in May 2012 to R9 134,15 in June of that year.

In January 2013 Body Corporate of the scheme commenced charging Extra Dimensions a basic monthly levy of R19 878,17. It did so on the basis of a special resolution that was adopted at the annual general meeting of the members of the body corporate on 23 August 2012. The effect of the adoption of the resolution, and the subsequent amendment of the conduct rules, was that Extra Dimensions began to be charged levies amounting to 10,5349% of the total levies for the scheme. Its total registered participation quota was unchanged at 4,8409%. This had the effect that Extra Dimensions's levies more than doubled in January 2013 to R19 878,17 from R9 134,15 the previous month.

Extra Dimensions took the view that in terms of section 32(4) of the Sectional Titles Act (no 95 of 1986) the basis for the liability of owners for levy contributions cannot be modified without the written consent of any owner who is adversely affected by such modification. As the effect of the modification of levy contributions was to increase its levies by more than 100%, it was 'adversely affected' by such modification, within the meaning of the first proviso to section 32(4) of the Act. Extra Dimensions had not given its written consent to the special resolution to modify the liability for levy contributions or to amend the conduct rules in this regard.

On 31 July 2014 Extra Dimensions applied to court for an order declaring the special resolution invalid, and declaring that consequent amendments to the conduct rules of the scheme were invalid.

THE DECISION

Section 32(4) of the Act provides that the members of the body corporate may by special resolution, make rules by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions is modified, provided that where an owner is adversely affected by such a decision of the body corporate, his written consent must be obtained.

It was necessary to ascertain the meaning of the expression 'adversely affected' in the particular context of the statute in which it appeared. If one considered the proviso in the context of the Act as a whole, a number of considerations were relevant. The Act draws a distinction between residential and non-residential schemes with regard to the calculation of the participation quota. In a scheme for residential purposes only, the Act has adopted the floor area of a section as the basis for calculating the participation quota. Since the formula of relative floor area was considered too rigid for calculating the participation quotas for sections in schemes not used solely for residential purposes, the Act provides that the determination of the

participation quotas of non-residential sections should be left to the discretion of the developer. The importance of the participation quota is that it determines the extent of the undivided share of a sectional owner in the common property and therefore forms an indivisible part of the ownership of a sectional-title unit.

The ordinary meaning of the expression 'adversely affected' had to be determined. The meaning of 'adverse' is 'unfavourable, disadvantageous, to the detriment of, having a negative effect'. And 'affect' means 'to make a difference to' or 'to cause something to change'. Here the difference or change to Extra Dimensions was that its proportional liability for the total levies of the scheme had more than doubled. This was unfavourable, not only because it paid more but also because the increased levy liability, which attached to the ownership of the units, made them less attractive investments.

In the context of a resolution to modify an owner's liability for levies, it was a simple matter of logic that an owner whose liability for levies increases is adversely affected thereby. That being so, the clear intention of the legislature was that the written consent of such a member must be obtained, so as to observe the audi alteram partem rule and to prevent a diminution of property rights being imposed on a minority by the majority.

It followed that Extra Dimensions was 'adversely affected' within the meaning of that expression by the resolution and that its written consent was required. The resolution was therefore ultra vires the Act and void, and the consequent amendment to the conduct rules was likewise void.

The order sought by Extra Dimensions should have been granted.

If one considers the proviso in the context of the STA as a whole, the following considerations are pertinent: The STA draws a distinction between residential and non-residential schemes with regard to the calculation of the participation quota. In a scheme for residential purposes only, the STA has adopted the floor area of a section as the basis for calculating the participation quota. Since the formula of relative floor area was considered too rigid for calculating the participation quotas for sections in schemes not used solely for residential purposes, the STA provides that the determination of the participation quotas of non-residential sections should be left to the discretion of the developer. The importance of the participation quota is that it determines the extent of the undivided share of a sectional owner in the common property and therefore forms an indivisible part of the ownership of a sectional-title unit. The participation quota as determined in accordance with ss 32(1) and (2) is included in a schedule to the registered sectional plan. The schedule specifies the quota of each section as well as the total of the quotas of all sections.

TELKOM SA SOC LTD v CAPE TOWN (CITY)

A JUDGMENT BY WALLIS JA (LEACH JA, TSHIQI JA, MOCUMIE JA and DLODLO JA concurring)
SUPREME COURT OF APPEAL
25 SEPTEMBER 2019

2020 (1) SA 514 (SCA)

Licensees empowered by statute to execute their purpose, such as Telkom Ltd, may not invoke a constitutional right to ignore municipal by-laws to execute that purpose unless such by-laws are applied to thwart that purpose.

THE FACTS

Telkom SA Soc Ltd wished to erect a freestanding base telecommunication station on a property owned by the estate of Mr B Kalu, the second respondent, situated in the suburb of Heathfield, Cape Town. As part of the overall zoning of the city the Municipal Planning By-Law made provision for the establishment and erection of such a station. The estate's property was zoned Single Residential Zone 1 under the bylaw, a zoning that did not permit the erection of either the station or a rooftop base telecommunication station.

Telkom applied for the rezoning of a portion of the estate's property to Utility. This permitted the establishment and erection of a station. It proceeded to build the station without permission. The City then informed Telkom that it was in breach of the bylaw and should seek an administrative penalty, before pursuing its application. Telkom declined to do so, but brought an application to challenge the constitutional validity of the bylaw and the City's related Telecommunications Mast Infrastructure Policy.

The City opposed the application and counter-applied for an order that the station had been erected without its consent first being obtained, in breach of the National Building Regulations and Building Standards Act (no 103 of 1977).

Telkom accepted that the erection of masts without first obtaining the approval of the City under the Act was unlawful. Telkom based its case on section 22(1) of the Electronic Communications Act (no 36 of 2005). It provides that an electronic communication network service licensee may —

(a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;

(b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, and railway and any waterway of the Republic; and

(c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

Telkom contended that this section empowered it to enter upon any land selected by it and erect base stations, without seeking the consent of the owner or anyone else, including the City. Insofar as the bylaw prevented it from doing that in certain zones, without obtaining municipal consent to a rezoning or consent to the property's use for that purpose, it contended that it was in conflict with section 22(1) of the Act and was therefore invalid.

THE DECISION

Telkom contended that the City of Cape Town had no legislative competence over telecommunication. To the extent, therefore, that the by-law regulated the roll-out of telecommunications infrastructure, it was beyond the municipality's competence and therefore invalid.

The flaw in the argument was that, if it were correct, the breadth of the legislative competence of national and provincial legislatures when

compared to municipalities, would subordinate the latter to the former to a point where the municipal competence would be deprived of any useful content and become a shell.

The primary argument, that the City had no competence to make a by-law dealing, by way of zoning, with where telecommunications infrastructure could be erected, had to be rejected. Such a bylaw does not involve legislation on telecommunications matters, but matters of municipal planning.

As far as section 22(1) was concerned, this provision does not operate to exclude from the ambit of municipal planning matters concerning the construction of telecommunications infrastructure. The reason is that this is a planning function, not a regulation of telecommunications.

Telkom depended on a dictum of *Tshwane City v Link Africa* 2015 (6) SA 440 (CC) which stated 'These provisions indicate that licensees, though empowered by national legislation, must abide by municipal bylaws. *The only limit is that bylaws may not thwart the purpose of the statute by requiring the municipality's consent*. If bylaws exist that regulate the manner ... in which a licensee should exercise its powers, the licensee must comply.'

However, from reading the particular sentence as a whole, bearing in mind that planning can sometimes be used as a means of obstruction, a warning was inserted in this sentence that, in the context of the power to consent to various developments and the construction of various buildings, the ability to grant or withhold consent should not be used to thwart the purpose of section 22(1). The warning invoked a well-established principle of law that, where a power to regulate is given, it may not be used to prohibit, either in whole or in substantial measure, the activity in question. In the present case, there was not the slightest suggestion by Telkom that the City was thwarting its purpose.

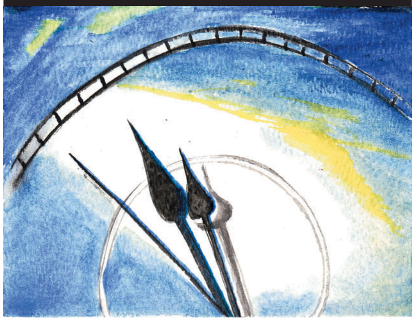
Telkom's application was dismissed and the counter-application upheld.

NATIVA MANUFACTURING (PTY) LTD v KEYMAX INVESTMENTS 125 (PTY) LTD

A JUDGMENT BY KEIGHTLEY J
GAUTENG LOCAL DIVISION, PRETORIA
29 AUGUST 2019

2020 (1) SA 235 (GP)

Prescription



Service of an application for joinder on a party does not constitute service of process whereby a creditor claims payment of a debt as required by section 15(1) of the Prescription Act (no 68 of 1969). Consequently, service of a joinder application does not interrupt the running of prescription.

THE FACTS

Nativa Manufacturing (Pty) Ltd was a tenant of unit 5 of property owned by Keymax Investments 125 (Pty) Ltd. Nativa used the premises as a warehouse for purposes of packaging pharmaceutical material. A fire broke out at the premises and in due course, Nativa sued Keymax for damages caused by the fire.

Marce Marketing CC was alleged to have been a tenant of unit 10, which it had recently vacated. The fire broke out in unit 10, and spread to unit 5. It was started by a workman carrying out repair work in unit 10 following Marce's departure. Nativa initially instituted a claim against Keymax on the basis that it had contracted with Anvocon to carry out the repair work; and against Anvocon on the basis that it had employed or contracted with the workman concerned to do the repairs.

Nativa did not originally proceed against Marce as a defendant. It says that this was because preceding the institution of the action Marce had told Nativa that it had vacated unit 10 and had had nothing to do with the work carried out on the premises at the time of the fire. Marce told Nativa that Keymax and Anvocon were responsible for the repair work, and hence for the fire. Nativa stated that it was only when Keymax filed its plea on 11 March 2016, averring that it was Marce's employee who had started the fire while removing fixtures and fittings from unit 10, that Nativa acquired knowledge that Marce was potentially liable for its damages.

Nativa then applied for the joinder of Marce in the action it had brought against Keymax. Marce opposed the application on the grounds that the claim against it had prescribed so that any joinder of it in the action would be futile.

Nativa's case was that, because of the effect of sections 12(2) and (3) of the Prescription Act (no 68 of 1969) the period of prescription only commenced running from 11 March 2016, when it acquired the requisite knowledge to institute a claim against Marce. On this calculation, the prescription period ended at midnight on 10 March 2019. Nativa instituted the joinder application in December 2018, which fell within the period of prescription. It contended that this had the effect of interrupting the period of prescription, and hence that its claim against Marce had not prescribed. On this basis, it said that it made no difference that joinder was not actually effected, and that no consequent procedural steps were taken against Marce prior to the end of the prescription period.

THE DECISION

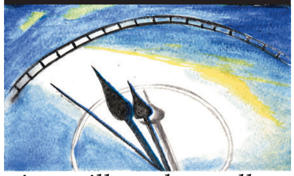
Sections 12(2) and (3) of the Prescription Act provide as follows:

'(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

Section 15(1) provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

The question was whether a



joinder application constituted such process and therefore interrupted the running of prescription.

As held in the judgment handed down in the case of Peter Taylor & Associates v Bell Estates (Pty) Ltd and Another 2014 (2) SA 312 (SCA) in order to constitute a 'process whereby the creditor claims payment of the debt' for purposes of judicial interruption of prescription under section 15(1), more is required than a mere procedural connection between the process in question (for example, as in this case, a joinder application) and the claim for payment of the debt. What is required is a substantive connection between the process served, and the claim for payment of the debt. There must be an overlapping cause of action between the two: the mere fact that it is procedurally necessary to issue out the process in question in order to ultimately claim payment of the debt is not sufficient.

The effect of the order under the process in question must dispose of a substantive element of the ultimate claim for payment of the debt. An application for, and granting of, joinder does not share this characteristic: it only has a procedural, and not a substantive, connection to the claim for the payment of the debt. It is for this reason that a joinder application does not constitute 'a process whereby the creditor claims payment of the debt'.

The question is not whether, if the respondent is joined, the same cause of action will apply to all defendants then before court. The application for joinder only informs the respondent as to what an intended cause of action in the action will be: the cause of action in the joinder application is based on the requirements for joinder; whereas the cause of action for the payment of debt is that set out in the particulars of claim, as amended, and subsequently served on the respondent, once they are joined as a defendant.

Service of the application for joinder on Marce did not constitute service of process whereby a creditor claimed payment of a debt as required by section 15(1). Consequently, service of the joinder application did not interrupt prescription.

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC *v* MOODLIAR

A JUDGMENT BY LE GRANGE J
WESTERN CAPE DIVISION, CAPE TOWN
26 JUNE 2019

2020 (1) SA 632 (WCC)

Insolvency

The fact that a liquidator may in law be entitled to reasonable remuneration as taxed by the Master, does not infer a right to such a party to also debit their fees from the companies' funds and to hold those funds as security.

THE FACTS

Recycling and Economic Development Initiative of South Africa NPC (Redisa) and Kusaga Taka Consulting (Pty) Ltd were solvent companies when they were placed under orders of winding-up. Redisa's cash reserves exceeded R170 million and KT's exceeded R9 million. The Master appointed Moodliar and two others as liquidators. Upon their appointment, the liquidators took control of the assets of the companies, including their funds, and were obliged to manage them in accordance with their duties as liquidators.

Redisa and KT appealed against the windings-up. A week before the hearings in the of the appeal, the liquidators transferred R20m from the current account which they operated in Redisa's name into the fourth respondent's trust account; and the KT liquidators transferred R2m from the current account operated in KT's name, also into the fourth respondent's trust account.

The appeals were successful. The final winding-up orders were set aside, and replaced with orders discharging the provisional winding-up orders.

A meeting was then held between directors of the companies and the liquidators. At the meeting the liquidators advised that they had taken the decision to retain an amount of R20m as cover for their fees in respect of Redisa, and R2m in respect of KT, and that such sums had been transferred to the trust account of the fourth respondent.

The liquidators instructed the fourth respondent to pay portions of the funds to the companies, which they did. Approximately R16.8m of the Companies' funds were retained in the fourth respondent's trust account.

The companies took the view that the transfer of the funds by the liquidators to the fourth respondent contravened section 394(1) of the Companies Act (no 61 of 1973) and they should be returned. The liquidators took the view that the companies and/or the Minister was liable to pay their reasonable remuneration as taxed or agreed, and that the fourth respondent should retain the funds, pending taxation and/or agreement, to pay the disputed funds to whomsoever would be entitled to it.

The companies applied for declaratory relief that the retained moneys be returned to them.

THE DECISION

In terms of the provisions of section 384(1) of the Companies Act, 'no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which he is entitled under this Act'. In terms of s 384(2) of the Act, the Master may reduce or increase such remuneration if in his or her opinion there is good cause for doing so, and may disallow such remuneration, either entirely or in part, on account of any failure or delay by the liquidator in the discharge of his or her duties.

It was evident on a reading of the regulations promulgated under the Act that on the discharge of a company from liquidation, the liquidators are obliged to account to the controllers of the company for their stewardship of the company's affairs and to include, in such, an account for their reasonable remuneration, which fee was to be taxed by the Master with due regard to the special circumstances of the case.

On a reading of s 384(3) of the

Act, it was evident that in a case of a provisional liquidator his remuneration was to be taxed by the Master in accordance with the prescribed tariff and with due regard to the special circumstances of the winding-up. In addition, in terms of subsection 2 the Master could reduce or increase such remuneration if in his or her opinion there is good cause for doing so, and may disallow such remuneration, either wholly or in part, on account of any failure or delay by the liquidator in the discharge of his or her duties.

It was also clear that under the Act and regulations, liquidators may not simply retain funds for themselves, out of the assets of the company, for what they propose as their fees. In terms of the laws which apply to these proceedings, liquidators' proposed fees must first be taxed by the Master and the quantum accordingly determined.

The liquidators could not in the circumstances of the case rely on the alleged misconduct, prior to liquidation of the companies to justify their withholding of the disputed funds from the companies. The fact that a party may in law be entitled to reasonable remuneration as taxed by the Master, does not infer a right to such a party to also debit their fees from the companies' funds and to hold those funds as security.

The application was granted.

It is evident on a reading of the regulations that on the discharge of a company from liquidation, the liquidators (be they provisional or final) are obliged to account to the controllers of the company (usually the directors) for their stewardship of the company's affairs and to include, in such, an account for their reasonable remuneration, which fee is to be taxed by the Master with due regard to the special circumstances of the case.

On a reading of s 384(3) of the Companies Act of 1973, it is evident that in a case of a provisional liquidator, as in this instance, his remuneration is to be taxed by the Master in accordance with the prescribed tariff and with due regard to the special circumstances of the winding-up. In addition, in terms of ss (2) the Master may reduce or increase such remuneration if in his or her opinion there is good cause for doing so, and may disallow such remuneration, either wholly or in part, on account of any failure or delay by the liquidator in the discharge of his or her duties.

WENTZEL v DISCOVERY LIFE LTD

A JUDGMENT BY TLHAPI J
GAUTENG LOCAL DIVISION, PRETORIA
6 MAY 2019

2019 (6) SA 559 (GP)

An asset to which an unrehabilitated insolvent becomes entitled after the winding up of his estate must be attributed to the trustee of the insolvent estate and dealt with by the trustee.

THE FACTS

Wentzel and his wife were married to each other in community of property. On 1 January 2012, Wentzel concluded an insurance contract with Discovery Life Ltd. He appointed himself as beneficiary of the proceeds of the policy in the event of his wife's death. The same policy also insured his life and appointed his wife as beneficiary in the event of his death. On 16April 2017, Wentzel's wife died.

The joint estate of Wentzel and his late wife was provisionally sequestrated by order of court on 20 February 2012, and the order was confirmed on 3 April 2012. The second to fourth respondents were appointed trustees ('trustees') of the insolvent estate on 20 September 2012. A first and final liquidation and distribution account dated 24 January 2014 in the joint insolvent estate was filed by them and confirmed by the Master on 11 July 2014. After realisation of the assets of the estate, the creditors were paid and there was a deficiency of R3 480 986,88.

On 9 May 2017 Wentzel as nominated beneficiary of the insurance policy claimed and accepted payment of the proceeds of the insurance policy amounting to R5 240 345,56. Discovery informed Wentzel that the proceeds would be paid over to the trustees of the insolvent estate. The trustees insisted upon payment being made to the insolvent estate because neither Wentzel nor his wife had been rehabilitated when such proceeds became payable by Discovery.

Wentzel averred that the proceeds were payable to him because the first and final liquidation and distribution account in the insolvent estate had been confirmed, so that to all intents and purposes, the administration of the insolvent estate had been finalised. Wentzel contended that the former joint estate was dissolved at the death of his wife, and the sequestrated and insolvent joint estate to which the trustees were appointed was dissolved ex lege on date of death.

The trustees' position was that the estate of the insolvent remained vested in them until such time that the insolvent was either revested therewith pursuant to a composition or the rehabilitation of the insolvent took place. This remained the position even though the marriage between the applicant and his late wife was ex lege dissolved by death.

THE DECISION

The question to be answered was, what effect the death of Wentzel's wife had on the joint estate which was sequestrated?

The filing of a first and final liquidation and distribution account did not necessarily mean that the trustees have completed their duties in the administration of the joint insolvent estate. The confirmation of the liquidation and distribution account only meant that after examination of the account by the Master, it had lain for inspection without objection, and the Master had confirmed that the trustees could pay to the creditors the dividend reflected in such account.

The trustees were therefore not barred from filing further accounts, with approval of the Master in respect of other assets which might later vest in them, or be acquired by the insolvent before the rehabilitation of the insolvent and their discharge from their duties as trustees.

It is only the appointed beneficiary who may demand and accept or refuse the benefit

offered by the insurer, and such call cannot be made by a trustee of his insolvent estate directly to such insurer. Such benefit when paid over to the insolvent by the insurer then beomes an asset in the hands of the insolvent which is not protected, in that it is not exempted or excluded by the laws of insolvency from reach by the creditors of his insolvent estate. The trustee remains in control.

Therefore, were the insurer to make payment to Wentzel, he would be obliged to hand over such payment to the trustee as administrator of his insolvent estate because he had acquired an asset. Alternatively, the trustee would have a right to claim from Wentzel because the proceeds would be an asset acquired by the insolvent before his rehabilitation and before revestment as envisaged in the Act.

Wentzel, who was not incapacitated from contracting as a result of his insolvent status, by claiming and accepting the benefit, was still obliged to have this acquisition administered by the trustees as an unrehabilitated insolvent and inasfar as it pertains to the creditors of his insolvent estate.

STANDARD BANK OF SOUTH AFRICA LTD v BLOEMFONTEIN CELTIC FOOTBALL CLUB (PTY) LTD

A JUDGMENT BY MUSI JP
FREE STATE DIVISION,
BLOEMFONTEIN
12 SEPTEMBER 2019

2020 (3) SA 298 (FB)

Contract

An agreement which provides that liquidation proceedings which have been brought by one of the parties against the other may be re-enrolled, on an unopposed basis, if the respondent defaults under the agreement is contrary to public policy and may not be enforced.

THE FACTS

Standard Bank of South Africa Ltd lent money, on the security of certain properties, to Bloemfontein Celtic Football Club (Pty) Ltd. Celtic defaulted in repaying the loans. Celtic owed the bank approximately R6 134 474,12. Celtic failed to reply to statutory notices and then failed to effect payment, or to secure or compound for it, to the reasonable satisfaction of the bank within three weeks of the service of the notices. The bank, a secured creditor by virtue of the mortgage bonds, was also the only creditor of Celtic

The bank instituted liquidation proceedings against Celtic on the basis that Celtic should be deemed unable to pay its debts. Celtic filed a notice of its intention to oppose the application.

The parties had settlement discussions which resulted in them entering into a memorandum of agreement. In terms of the agreement, they recorded that Celtic was in arrears with its monthly payments of the various loans in the amount of R481 632,84. They agreed that the last-mentioned amount should be paid by 31 August 2018 and that the full outstanding amounts due and owing in respect of all six home loan agreements would be settled by 28 February 2019.

Celtic also signed a power of attorney in terms of which it gave the bank the right to sell the properties on its behalf and to settle or reduce its indebtedness to the bank in the event of its default. The parties furthermore agreed that:

'2.1 If Celtic Football Club fails at any time during the six month period to make monthly payments in respect of one or more of the various home loan accounts then the full outstanding amount on all the accounts become due and payable.

2.2 In this event Celtic football agrees that Standard Bank may enrol the liquidation application, on an unopposed basis, to obtain a liquidation order, under case number 3894/2018.'

The parties also agreed that if Celtic did not settle the full outstanding amounts by 28 February 2019, the bank could sell the properties in terms of the power of attorney or proceed with the liquidation application on an unopposed basis as set out in clause 2.2 of their agreement.

Celtic paid the monthly instalments. However, it did not settle its full indebtedness. The bank served its supplementary founding affidavit and a notice of set down on Celtic, indicating that the matter had been set-down for hearing on 13 June 2019.

The bank applied to court, under the same case number, on the same papers duly supplemented, alleging that Celtic failed to make the monthly payments as agreed and that it failed to settle its indebtedness by 28 February 2019. It prayed for an order in terms of its original notice of motion.

At the hearing of the application, Celtic contended that clause 2.2 of the memorandum was contrary to public policy, therefore void, and that no effect could be given to it.

THE DECISION

Celtic did not comply with its obligations as stipulated in the memorandum. Under these circumstances, the question was whether or not the bank could fall back on the original notice of motion and apply for liquidation.

The answer to this question is to be found in *Van Zyl v Niemann*.1964 (4) SA 661 (A). In that case it was held that a

settlement agreement, such as the memorandum in this case, had the same effect as res judicata. This would exclude litigation on the same cause of action, unless the settlement agreement expressly or by express implication stipulated that, in the event of non-compliance with the terms of the settlement agreement, the plaintiff or applicant may revert to the original cause of action or ground.

Clause 2.2 of the memorandum was contrary to public policy and was thus illegal. That being the case, it was void and no effect could be given to it. The bank's attempt to revert to the notice of motion was predicated on clause 2.2, namely that it could do so in the event of Celtic defaulting. Clause 2.2 being illegal, and that part of the agreement thus a nullity, there was no other basis for the bank to rely on the notice of motion.

There was another reason why the bank's application should fail. Assuming that the agreement between the parties was legal and valid, it was clear that the court should not exercise its discretion in favour of the bank. This was because the bank was inept in granting Celtic credit and it had a less onerous, but more effective, way to recover its money, or a substantial part thereof. In terms of the memorandum, Celtic gave the bank a power of attorney granting it the power to sell any or all of the properties at its complete discretion at a purchase price and under conditions that the bank deemed appropriate.

The bank, a secured creditor by virtue of the mortgage bonds, was also the only creditor of Celtic. If Celtic was liquidated, other associated costs would have to be incurred. Liquidators would have to be appointed, at a fee. The properties would have to be sold by way of a public auction. Forced sales notoriously receive lower prices because the prospective buyer is aware that the properties are sold on liquidation.

There was no conceivable benefit for the bank if the properties were sold by liquidators rather than itself. The bank did not explain why it wanted to follow the route of liquidation instead of using its power of attorney to sell the properties. Applying the court's discretion, a winding-up order was refused.

It is common cause that the respondent did not comply with its obligations as stipulated in the memorandum. Under these circumstances, may the applicant fall back on the original notice of motion of 2 August 2018?
The answer to this question is to be found in Van Zyl v Niemann. In that case it was held that a settlement agreement, such as the memorandum in this case, has the same effect as res judicata. This would exclude litigation on the same cause of action, unless the settlement agreement expressly or by express implication stipulates that, in the event of non-compliance with the terms of the settlement agreement, the plaintiff or applicant may revert to the original cause of action or ground.

CHETTY *v* ERF 311, SOUTHCREST CC

A JUDGMENT BY KAIRINOS AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
27 JUNE 2019

2020 (3) SA 181 (GJ)

A sale agreement which does not substantially comply with the requirements of section 6(1) of the Alienation of Land Act (no 68 of 1981) may still be valid and enforceable if no appropriate proceedings to have it declared void ab initio due to non-compliance with the requirements of section 6 were instituted within two years the date of its conclusion.

THE FACTS

Erf 311, Southcrest CC sold to Chetty certain fixed property for a purchase consideration of R430 000. The purchase price was payable in instalments of R17 084 per month until the purchase price was paid in full. The instalments were payable to a Mr James Motswa, the respondent's attorney and the appointed conveyancer for the transaction.

Chetty contended that he had paid the full purchase price and was entitled to registration of transfer into his name. It was accepted that Chetty had paid at least R300 000 of the purchase price to Motswa. However, Southcrest disputed that the balance of the purchase price was paid and contended that due to non-payment of the balance of the purchase price and the outstanding rates and taxes, it had properly cancelled the agreement and Chetty was therefore not entitled to registration of transfer of the property into his name.

Mr Motswa misappropriated the funds in his trust account and ceased practising towards the end of January 2016, and new attorneys for Southcrest were appointed by the Law Society to administer the practice of Mr Motswa. Southcrest did not lodge claims for payment of the purchase considerations paid to and misappropriated by Mr Motswa.

Chetty, assisted by Southcrest's new attorneys lodged a claim with the Fidelity Fund. Chetty confirmed that he had paid R385 000 into the trust account of Mr Motswa and not the amount of R430 000, being the purchase price. The Fidelity Fund indicated that the supporting documents and proof of payments only evidenced payments in the amount of R300 000 being paid into the trust account of Mr Motswa. Chetty accepted the payment of R300 000 from the Fidelity Fund and the Fund paid such amount into Southcrest's attorneys' trust account.

Chetty relied on a statement from Mr Motswa indicating that a total amount of R377 500 had been received from him and that the outstanding balance on the purchase price was only R63 069. Chetty relied on a proof of payment of the amount of R63 069 into the trust account of Mr Motswa by a company known as India Steel (Pty) Ltd. India Steel's payment of the balance of the purchase price of R63 069 was said to be on behalf of Chetty since it owed him moneys for 'services rendered'. Chetty contended that he did in fact make payment of the full purchase price. India Steel also lodged a claim with the Fidelity Fund for repayment of the amount of R63 069.

In terms of s 20 of the Alienation of Land Act (no 68 of 1981), Southcrest was obliged to have recorded the sale agreement by the registrar of deeds concerned within 90 days from the date of the contract. There was not evidence that this was done.

Chetty applied for an order that the contract of sale was valid and enforceable.

THE DECISION

The agreement was an instalment sale agreement in respect of immovable property, and so the provisions of the Alienation of Land Act were applicable.

Section 26 of that Act provides that no person shall by virtue of a deed of alienation relating to an erf, receive any consideration until such erf is registrable and in the case where the deed of alienation is a contract required

to be recorded in terms of s 20 (as in casu), until such recordal has been effected.

Not having recorded or notified Chetty of any recordal of the contract in terms of section 20 of the Act, Southcrest was not entitled to have received any consideration pursuant to the agreement and was furthermore precluded from placing Chetty in mora and cancelling the agreement. It was clear that Southcrest was not entitled to have cancelled the agreement and that any cancellation was invalid and ineffectual. That being so, and since Chetty had paid at least 50% of the purchase price, it appeared that Chetty was entitled to claim registration of transfer in terms of the provisions of section 27(1) of the Act.

The question arose whether the agreement was required to comply with the provisions of section 6 of the Act and whether a failure to do so rendered the agreement void ab initio and whether the court was in such circumstances able to grant the relief sought by the applicant of registration of transfer into his name.

Section 6(1) of the ALA in turn provides that a contract shall contain, inter alia,
(i) the amount or amounts of any transfer duty payable in terms of the Transfer Duty Act, 1949 (Act 40 of 1949), in respect of the land, (ii) the dates on which and the conditions on which the purchaser shall be entitled to take possession and occupation of the land, (iii) the place where the payments shall be made, (iv) an indication of the party who shall be liable for the payment of the costs of the drafting of the contract, the recording thereof in terms of section 20 and the transfer of the land, (v) if the land is not the subject of a separate title deed at the time the contract is concluded, the latest date at which the land shall be registrable in the name of the purchaser, (vi) if the seller is the owner of the land, an undertaking by him that the land shall not be encumbered or further encumbered by a mortgage bond on or before the date on which the contract is recorded in terms of section 20, (vii) the period within which the purchaser is obliged or may be compelled to take transfer of the land against simultaneous payment of all amounts owed by him in terms of the contract, (viii) a reference to various rights and obligations of the parties.

The agreement did not comply with these provisions.

However, once the purpose of the Act is applied, and the need for protection of the purchaser is taken into account, it respect of non-compliance with the provisions of sections 5 and 6 of the Act, the legislature intended to afford only to the purchaser the remedy of escaping the contract by having it declared void ab initio, and then only if the purchaser institutes such appropriate proceedings within two years from the date of conclusion of the contract. If the purchaser does not do so, then the contract stands. A seller may not apply at any time to declare the contract void ab initio due to non-compliance with the requirements of section 6 of the ALA

A contract for the alienation of land in which the purchase price is payable in instalments, which does not comply with the requirements of section 6(1) of the Act, is voidable at the instance only of the purchaser and on condition that appropriate proceedings are instituted within two years from the date of conclusion of the agreement and then only if the contract does not substantially comply with the requirements of sections 5 or 6 of the Act.

In the present matter the agreement did not substantially comply with the requirements of section 6(1) of the Act. Nonetheless, no appropriate proceedings to have it declared void ab initio due to non-compliance with the requirements of section 6 were instituted within two years after the date of conclusion of the agreement. In the circumstances the contract had to stand and was enforceable.

Chetty was therefore entitled in terms of section 27(1) of the Act to registration of transfer of the property into his name.

TERMICO (PTY) LTD *v* SPX TECHNOLOGIES (PTY) LTD

Contract

A JUDGMENT BY PONNAN JA (LEACH JA, SWAIN JA, MOLEMELA JA and MBATHA JA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2019

2020 (2) SA 295 (SCA)

An arbitration award which does not include an order that a party pay an amount becoming due as a result of that award, because the amount is yet to be determined, is not an irregularity, and does not constitute an order lacking finality.

THE FACTS

Termico (Pty) Ltd subscribed for 25,1% of the shares in DBT Technologies (Pty) Ltd and financed the purchase through a loan granted by SPX Technologies (Pty) Ltd. SPXT held the remaining 74,9% shares.

Termico, SPXT and DBT entered into a shareholders' agreement. It provided that:
(i) Termico was not entitled, except in very limited circumstances, to dispose of its shares for seven years after 1 January 2007 (the lock-in period).
(ii) After 1 January 2014, if Termico wanted to sell the shares, it was entitled to exercise a put option in accordance with the provisions of clause 19 of the shareholders' agreement.
(iii) At any time SPXT could exercise a call option to acquire the shares from Termico, the effect of which would be that the latter would be obliged to sell its shares to the former at the value calculated in terms of clause 18.1 of the shareholders' agreement. Once exercised, there would be a binding agreement between the parties in terms of the call option.

On 3 June 2014, Termico exercised the put option by sending a written notice to SPXT. In the notice Termico asserted that the put price to be paid was the amount to be determined in accordance with the formula in clause 19.2.2 of the shareholders' agreement, and that the audited financial statements to be applied were the annual financial statements of DBT for the year ending 31 December 2012. On 12 June 2014 SPXT acknowledged receipt of the put option notice but contended that reliance had to be placed on the 2013, and not the 2012, annual financial statements, as the appropriate source of data for the formula. Later SPXT raised further disputes, including that (i) the 3 June 2014 notice did not constitute an effective put option notice; (ii) a valid put option had not been exercised by Termico; and (iii) it could enforce a call option, which it purported to exercise in September 2014, and defeat any enforcement of the put option.

The matter proceeded to arbitration. This resulted in an award that Termico validly exercised its put option in terms of clause 19.1 of the shareholders' agreement between the parties on 3 June 2014, and the put price, computed in terms of clause 19.2 of the shareholders' agreement, was an amount of R287 337 807. On their interpretation of clause 19.4, the arbitrators held that the amount to be paid required determination of the value of the loan, which had to be deducted from the put price. As the value of the loan was not an issue to be decided in the arbitration, they determined that the amount of the loan would need to be established and the put price applied to the loan before payment could be ordered. SPXT's counterclaim that it validly exercised the call option was dismissed with costs.

In response to requests from Termico for a meeting to be convened to determine the value of the loan, SPXT's attorney stated that they had instructions to 'bring an application to have the award set aside' and that '(i)n the circumstances, no purpose [would] be served in holding the requested meeting, at this time'.

SPXT applied court to set aside the award. Termico opposed the application. It also launched a counter-application to make the award an order of court and for judgment against SPXT in an amount exceeding R250m, being the put price less the balance owing to SPXT on the loan.

THE DECISION

No case had been made out to support a finding that the arbitrators misconceived the nature of the enquiry, with the result that SPXT was denied a fair hearing. There was no indication of any gross irregularity contemplated by section 33(1)(b) of the Arbitration Act (no 42 of 1965) that warranted the setting-aside of the arbitration award in its entirety. The contention that an irregularity arose because of a 'lack of finality' was devoid of substance. In any event, even if it could legitimately be concluded that the arbitrators committed a gross irregularity in failing to finally decide an issue, there was no warrant for setting aside the award made on the other issues. Those issues were properly and finally decided.

The arbitrators decided that, on their interpretation of clauses 19.3 and 19.4, they could not make an award compelling SPXT to make payment to Termico. On their interpretation, having held that there was a valid exercise of the put option, which brought about a binding sale at the put price determined in accordance with clause 19.2, the arbitrators recorded that a meeting was to be held as prescribed by clause 19.3 in order to implement the agreement of sale. Thus none of the issues referred for determination by the arbitrators were left undecided.

Neither SPXT nor the court a quo were able to identify an issue that had been referred to the arbitrators but not finally decided by them. What was still to be decided, before SPXT could be ordered to pay Termico, was the value of the loan, which had to be deducted from the put price, but it was common cause that this issue fell outside of the jurisdiction of the arbitrators. The additional issues that the court a quo recognised as being necessary to grant a money judgment in the counter-application, namely the application of the put price to the loan and the meeting to implement the sale, had not occurred at the time of the arbitration and were not issues before the arbitrators. They were accordingly not issues that the arbitrators could decide. The counterclaim relied on a cause of action that was only capable of prosecution when the facts relevant to the loan and the implementation meeting could be taken into account.

The order sought by Termico was accordingly not one in the nature of the 'hybrid order' referred to in *Britstown Municipality v Beunderman (Pty) Ltd* 1967 (3) SA 154 (C). It followed that not only should SPXT's review application have failed, but Termico's counter-application to make the arbitration award an order of court in terms of section 31 of the Act ought to have succeeded.

The arbitrators' refusal to grant a money judgment did not preclude Termico from claiming such a judgment from a court having jurisdiction to set off the value of the loan. Once the arbitrators had determined the put price, the meeting contemplated in clause 19.3 ought to have been convened. SPXT had stated that they had instructions to 'bring an application to have the award set aside' and that '(i)n the circumstances, no purpose [would] be served in holding the requested meeting, at this time'. However, it was unclear why the fact of an application to set aside the award meant that SPXT was free to simply ignore the request for a meeting. The purpose of the meeting was to determine the value of the loan. The loan was not one of the issues before the arbitrators. Not having been the subject of the arbitration, the challenge to the award did not relieve SPXT of its obligation to meet. SPXT's refusal to meet constituted a deliberate frustration of Termico's right, with the result that the meeting had to be deemed to have occurred.

There appeared to be no dispute as to the amount outstanding on the loan. Accordingly, there was no dispute to go to arbitration. SPXT has consistently refused to set out what it contended was the balance of the loan. There was undisputed evidence of the balance of the loan in the court papers.

SPXT's application to review and set aside the arbitration award was dismissed. Termico's counter-application for payment succeeded.

UMGENI WATER v SEMBCORP SIZA WATER (PTY) LTD

Contract

A JUDGMENT BY WALLIS JA and WEINER JA
(PONNAN JA, DAMBUZA JA and MOKGOHLOA JA concurring)
SUPREME COURT OF APPEAL
30 SEPTEMBER 2019

2020 (2) SA 450 (SCA)

A private company appointed by a water services authority to supply water in the region for which that authority is responsible may not be subject to tariffs different from those applicable to public bodies to which that authority also supplies water.

THE FACTS

In terms of s 19(1)(b)(i) of the Water Services Act (no108 of 1997), the Ilembe District Municipality, concluded a Water and Sanitation Concession agreement with Sembcorp Siza Water (Pty) Ltd (Siza). The Ilembe District Municipality, as a water services authority, appointed Siza, a private entity, as a water services provider with the obligation to supply potable water and sanitation services to a portion of the Ilembe's region for a period of 30 years.

On 7 August 2000, a Bulk Water Supply Agreement (BWSA) was concluded between Umgeni Water, Siza and Ilembe. It provided for the supply of bulk water by Umgeni Water to Siza to enable it to discharge its obligations under the concession agreement. Clause 10.1 of the BWSA provided that 'Siza shall pay Umgeni Water for bulk water supplied in terms of this agreement, in accordance with the tariff determined by the board of Umgeni Water in terms of the Act as amended from time to time'. It also provided that Umgeni would consult with Siza annually in regard to any adjustments to the tariff.

Section 34 of the Act provides that, in exercising its powers and duties a water board must, in a fair and transparent manner, achieve a balance between, inter alia, striving to provide efficient, reliable and sustainable water services, financial viability, and the needs of water services institutions, consumers and users.

In a policy document. Umgeni Water stated that it would strive to be 'financially viable which means it will seek as far as is practical to recover its costs from tariffs and fees. Umgeni Water will be financially sustainable by ensuring that its costs are fully recovered through tariffs and fees with defined fiscal support where services cannot be provided on a cost recovery basis.'

Umgeni Water conducted an Annual Bulk Water Review for the years 2015/2016 in order to determine the bulk water supply tariffs for this period. In the 'Document for Discussion' presented in the annual review it was recommended that its municipal customers would be subject to an increase across the board of 8,2%, while the increase proposed for Siza was 41,4%. Umgeni Water recommended the same increase for the same reasons, in the final annual review submitted to the Minister of Water and Sanitation for her approval. She reduced the increase for Siza to 37,9% and the increase for the other customers to 7,8%.

The annual review document stated that:

'Siza Water draws its sales volumes from the North Coast Pipeline only. However based on a 8,3% tariff increase for 2016, the cross subsidy to Siza Water (who is not a municipal customer to UW), will be R1,534/kl. To reduce the cross subsidy to nil, the required tariff to Siza Water will be R6,552/kl. Therefore, the tariff increase will have to be 41,4% in 2016. Alternatively, the increase can be smoothed in (over the next five years).'

In its letter to the Minister seeking approval for the increases, Umgeni Water said that, in order to break even, 'Umgeni Water cannot continuously cross subsidize losses incurred in the water supply to Siza Water which is a private entity that continuously makes a profit on its water supply operation'. and that 'as far as supply of water to Siza is

concerned UW has to at least break even, since Siza Water [is a] private entity [and] all the profits it makes from supplying water [do] not necessarily get ploughed back into service delivery in a similar manner as other municipal entities'.

In the 2015/16 financial year, after obtaining approval from the Minister, Umgeni Water, imposed a tariff increase on bulk water supply of 37,9% for Siza, and an increase of 7,8% for its other customers, all of which were municipalities.

The decision led to a review application in the High Court. That court upheld the review and set aside the tariff increase applicable to Siza. Umgeni Water appealed.

THE DECISION

Two reasons for the differential tariff increases appeared: firstly, that it was aimed at reducing to nil what was described as 'the cross-subsidy to Siza'; secondly, that Siza was not a municipal customer.

Umgeni Water accepted that because the tariffs had to be determined in accordance with the Act, the process was essentially statutory and subject to review as administrative action. Siza's review was based on the Promotion of Administrative Justice Act (no 3 of 2000).

The policy document put up by Umgeni Water did not support Umgeni Water's contentions. It did not deal with cross-subsidisation. It provided a model indicating that from tariffs charged on all its supplies of bulk water, Umgeni Water would recover its costs, a statutory requirement. This was to be done with 'defined fiscal support', that is, financial subsidies from outside sources, where services cannot be provided on a cost recovery basis.

Umgeni Water's contention that its differential treatment of Siza was in accordance with and justified by the pricing policy was not borne out by reference to the policy. The contrary appeared, ie that a uniform bulk tariff would be formulated applicable to all bulk water customers similarly situated. This would allow for cross-subsidisation of social schemes and maintain Umgeni Water's financial viability. The elimination of a uniform tariff for the principal purchasers of bulk water was not mentioned.

No provision in the empowering legislation justified this discrimination between municipal and non-municipal water services providers, more particularly when they are both performing a municipal function. Penalising Siza for its ability to generate a profit through its efficiency would be irrational. Siza paid the revenue it collects into Ilembe's coffers. These fees and the tariff Siza charges were controlled by Ilembe. The rationale behind entering into a contract with a private water services provider is that it will undertake the function of supplying water services more efficiently than the water services authority is able to do. There was no question of excessive profits being earned because the Minister was entitled to impose conditions concerning the overall profitability of the private water services provider.

A change of tariff of the nature proposed by Umgeni Water could not be seen as being fair to all parties, in particular Siza and the consumers. Siza did not have a free hand to increase its tariffs based upon the tariff approved by the Minister. It charged in accordance with the tariff laid down by Ilembe.

Umgeni Water's first reason that the differential tariff was necessary to eliminate cross-subsidisation did not stand up to scrutiny. It was neither reasonable nor rational and proceeded on an incorrect factual premise. There was nothing to suggest that Umgeni Water was endeavouring to eliminate cross-subsidisation in relation to the beneficiaries other than Siza. This cast doubt on the veracity of this reason and leads to a consideration of the other reason proffered by Umgeni Water.

As far as the second reason for the differential tariff increases was concerned - that Siza was not a municipal customer - the conclusion was inevitable that Umgeni Water drew a distinction between Siza and its other customers on the basis that Siza was a private sector company with a profit motive, while the municipalities were public entities that ploughed any surplus from the provision of water to consumers back into service delivery. This was not a valid distinction valid.

Ilembe was treated in the same way as the other municipalities in respect of its own purchases of bulk water. Siza was discharging Ilembe's functions, constitutional and statutory, in the concession area, yet Umgeni Water was requiring it to do so on the basis that it should pay considerably more than Ilembe for its bulk water. If the concession agreement was terminated Umgeni Water would be obliged to supply bulk water to Ilembe in accordance with the tariff applicable to the municipal customers, at the tariff applied to Siza.

The appeal was upheld.

W & A LE ROUX SLAGHUIS (PTY) LTD v VAN NIEKERK

Contract

A JUDGMENT BY MABUSE J (KUBUSHI J and JANSE VAN NIEUWENHUIZEN J concurring)
GAUTENG DIVISION, PRETORIA
4 DECEMBER 2019

2020 (2) SA 624 (GP)

The phrase 'the offer is open for acceptance by the Seller at any time during the period' where it appears in an irrevocability clause means that the offer remains open for as long as the seller acts in accordance with the agreement. It is no carte blanche for the seller to act in a manner that might be regarded as anticipatory breach or a breach justifying cancellation, but at the same time entitling the seller to accept the offer, despite his conduct.

THE FACTS

On 14 May 2015 Van Niekerk signed an agreement after buying certain property on public auction. The property was described as 'Lot 1' consisting of 'a double storey building with offices, butchery with cold room and freezer rooms, storage rooms, bakery, cell phone tower with rental income, staff changing/ restrooms, parking for customers and more. He signed the agreement personally. The auctioneer also signed the agreement.

Clause 2.1 of the agreement stated that the property would be sold without reserve, to the highest bidder but subject to confirmation by the seller. The document signed was an Offer to Purchase by the Purchaser, and the Purchaser was unconditionally and irrevocably bound to the offer for a period of 14 calendar days and Offer was open for Acceptance by the Seller at any time during this period.

Clause 3.3 of the agreement stated that the person signing the contract would be held personally liable for the fulfilment of all the terms hereof, even though he acts on behalf of the principal or spouse.

On the same day, as required by the provisions of clause 9.2 of the Agreement, Van Niekerk paid to the auctioneer a sum of R612 150,00 made up of 10% of the purchase price, R330 000, 7,5% of the purchase price as commission, R247 500, and 14% VAT on commission, R34 650.

On 18 May 2015 it came to the attention of Van Niekerk that the two cool rooms and freezer room, forming part of Lot 1, were almost fully demolished and that a certain Rupert was busy removing parts of the cool rooms and freezer room, as well as the rails and hooks by which animal carcases were hooked and transported. On the same day, he informed the auctioneer that he had auctioned the cool rooms and the freezer room, parts of Lot 1 again, after Lot 2 and Lot 3 had been auctioned.

Van Niekerk's attorneys wrote to the seller, W & A Le Roux Slaghuis (Pty) Ltd, informing it that the removal of the cool rooms and freezer room were contrary to Lot 1 in respect of which Van Niekerk put a bid of R3,3m, that damages were done to the property, the cool rooms and freezer room in the process of removing parts and equipment, that in view of the fact that what remained of Lot 1 was no longer the Lot 1 he had purchased, the deposit of R612 150,00 was to be paid back into the trust account of his attorneys of record.

W&A's attorneys replied that the offer of R3,3m was accepted, the fixed property was restored to the position in which it was when the bid was made, W&A was not prepared to pay back the deposit but that would retain the deposit as damages.

In response, Van Niekerk alleged that W&A repudiated the agreement by the removal/ demolishing of the cool rooms and freezer room, and that the deposit in the amount of R612 150,00 was to be repaid. On 19 May 2015, he elected to terminate the agreement signed by him. His termination of the agreement document signed by him was communicated in writing toW&A on 29 May 2015.

Van Niekerk sued for the return of the deposit.

THE DECISION

Van Niekerk paid the sum of R612 150 to the auctioneer. Seeing that the offer was withdrawn before it could be accepted by W&A, the only person that Van

Niekerk could claim refund of the money from was the auctioneer. Furthermore, Van Niekerk was never informed that said money had already been paid over to W&A. The assumption was therefore that the money was still in the possession of the auctioneer. Since the offer was withdrawn before it could be accepted by the seller, and no evidence existed to prove that any money paid by the offeror had been paid over to the offeree, the auctioneer could be sued jointly with the seller.

The auctioneer was a person who had, in terms of clause 3.3 of the Agreement, signed the Agreement, and waived any right not to be held personally responsible for any conduct performed on behalf of the principal.

In view of this clause, the auctioneer was personally liable to Van Niekerk under the contract.

The next question was whether a party who makes an irrevocable offer, as Van Niekerk did, may withdraw such an offer whilst it is still open for acceptance by, in this case, W&A. Relevant to this question were the provisions of clause 2.1 of the agreement and the fact that as stated again in his letter dated 19 May 2015, the respondent gave notice to the appellants that he was withdrawing his offer.

The attitude of W&A to Van Niekerk's withdrawal of his offer was that such a withdrawal was ineffective by reason of the fact that clause 2.1 of the Agreement provided that the offer was irrevocable. They stated that by the time the alleged repudiation took place, Van Niekerk's offer had not been accepted and therefore no binding agreement that was capable of being repudiated had come into being. In this, they were wrong.

The fact that an offer is said to be irrevocable does not make it irrevocable simply because it is said to be irrevocable. Whether or not an offer is irrevocable will depend on the conduct of the parties. An innocent party is entitled to withdraw the offer on any of the recognised grounds on which an agreement may be repudiated even if it is said to be irrevocable.

The reliance on clause 2.1 rendering the agreement irrevocable could not disqualify Van Niekerk from relying on the repudiation of the seller. To give the wording of paragraph 2.1 any other meaning would enable the seller to act in a manner that would constitute a repudiation but nevertheless . . . enable them to profit from their own wrongdoing to the detriment of the innocent party, the purchaser. The phrase 'the offer is open for acceptance by the Seller at any time during the period' where it appears in the irrevocability clause could only mean that the offer remains open for as long as the seller acts in accordance with the agreement. It is no carte blanche for the seller to act in a manner that might be regarded as anticipatory breach or a breach justifying cancellation, but at the same time entitling the seller to accept the offer, despite his conduct.

Accordingly, what was created in this provision was an option. An option is a contract on its own and it can be repudiated. When Van Niekerk complained that W&A had repudiated an agreement, he meant the option and not the agreement of sale, for that had not been concluded.

Van Niekerk was entitled to return of the desposit.

JEANY INDUSTRIAL HOLDINGS (PTY) LTD *v* ZUNGU-ELGIN ENGINEERING (PTY) LTD

A JUDGMENT BY CHETTY J
KWAZULU NATAL LOCAL DIVISION, DURBAN
30 JULY 2019

2020 (2) SA 504 (KZD)

Suretyship

A co-surety has a right of recourse against another surety whether or not the other surety has been placed in business rescue. Its claim arises at the time its liability arises and not at the time when the business rescue application is granted.

THE DECISION

The defendant operates its business in the engineering sector, in which it manufactures heavy-duty parts and equipment for the sugar and petrochemical industries. The second and third plaintiffs are the erstwhile directors of the defendant, which was formerly called Elgin Engineering (Pty) Ltd. The second plaintiff resigned from the defendant on 30 November 2016, with the third plaintiff resigning on 19 April 2015. This appears from a company search report. According to the defendant, at the time when both the second and third plaintiffs were directors of Elgin

In September 2013, Elgin Engineering (Pty) Ltd concluded an agreement with Elgin Engineering (Pty) Ltd (later renamed Zungu-Elgin Engineering (Pty) Ltd), pursuant to Elgin having been awarded a large contract to carry out the manufacture of a tank at Saldhanha in the Western Cape. Sunrise Energy (Pty) Ltd undertook to carry out the fabrication and delivery of certain tanks for the storage of liquid petroleum gas.

The agreement between Elgin and Hollard Insurance contained the provision of a performance guarantee bond by Hollard to Sunrise Energy (Pty) Ltd. Hollard forwarded the performance guarantee to Sunrise in October 2013. A material term of the agreement was that Hollard would, in the event of a breach of Elgin's obligation to Sunrise, upon written demand by Sunrise, pay to Sunrise an amount not exceeding R33 951 466, representing 25% of the contract price. In February 2015 Sunrise furnished a written demand to Hollard pursuant to the terms of the agreement for a performance guarantee for this sum. Hollard honoured the guarantee and paid the amount to Sunrise.

In terms of a written reciprocal indemnity and suretyship agreement concluded on 20 September 2013 between Hollard as the insurer and seven 'principal' companies, including Elgin, the signatories undertook to indemnify Hollard from any claims which Hollard might sustain by reason of executing any guarantees on behalf of one of the signatories to the agreement. As a consequence of Hollard's payment of R33 951 466 to Sunrise, Elgin became indebted to Hollard in this amount.

A further term of the agreement was that each of the signatories, including Jeany Industrial Holdings (Pty) Ltd and Elgin, undertook to indemnify Hollard against all claims of whatever nature which Hollard sustained as a consequence of having executed any guarantees on behalf of any of the signatories. Each of the signatories agreed to bind itself as surety and co-principal debtor jointly and severally with each other for any guarantee executed by Hollard in respect of any debt owed by any of the signatories. If Hollard paid Sunrise, as it actually did, as a result of a breach committed by any of the signatories, each of the other signatories became liable to Hollard as a surety for the other principals' breach. In consequence, Jeany bound itself as surety and co-principal debtor with Elgin for all debts owed by Elgin to Hollard.

Following the discharge of its obligations in terms of the performance guarantee and its payment of R33 951 466 by Hollard to Sunrise, Hollard instituted proceedings against Jeany and the other signatories for payment of the said amount

based on the indemnity and suretyship agreements which had been entered into. Judgment was taken on 24 June 2016 by Hollard for this amount together with interest. On 7 December 2016 a settlement agreement was concluded between the plaintiffs and Hollard in terms of which the parties entered into a compromise agreement to make payment of the amount of R33 951 466 to Hollard, payable in terms of a schedule agreed to, together with an additional amount relating to the recovery of third-party claims. In the discharge of their obligations under the compromise agreement and as surety for the defendant's indebtedness to Hollard, the plaintiffs made payment in three instalments to Hollard between October 2017 and April 2018, totalling R250 000.

Jeany claimed payment of R250 000 from Elgin. On 11 March 2015, Elgin was placed under business rescue. Jeany did not participate in the business rescue. While other creditors, including Hollard — which was classified as a 'contingent creditor' — lodged claims to the value of R124m, they would have received approximately R13,8m on the basis that the amount available for payment of claims was approximately 15 cents to the rand.

Jeany's claim was based on a surety's right of recourse against the principal debtor where the surety has made payment to a creditor to whom the debtor was indebted. Jeany applied for summary judgment against Elgin.

THE DECISION

Elgin contended that Jeany avoided participating in the business rescue so as to hold out for a better deal once the plan had been discharged. It contended that what the plaintiffs were seeking was to obtain a 100% satisfaction of its claim.

Elgin depended on section 154(2) of the Companies Act (no 71 of 2008) which provides:

'Discharge of debts and claims

(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.'

Elgin contended that irrespective of whether the plaintiffs were given notice of the business rescue proceedings and alerted to their right to lodge a claim with the business rescue practitioner, the moratorium imposed by section 154 applies to all creditors and prevents them from enforcing pre-business rescue debts. It further contended that the plaintiffs' claim arose in February 2015, the date when Sunrise delivered its demand to Hollard, which provided a performance guarantee for Elgin. As the summons was only issued in May 2018, the claim, it contended, had prescribed.

The crux of the matter is, when the plaintiffs' claim arose and whether the institution of the action in May 2018 was precluded by virtue of Elgin having been placed under business rescue on 11 March 2015. The additional consideration which arose was whether the plaintiffs' claim had prescribed.

Elgin's case was that the plaintiffs should have lodged their claims with the business rescue practitioner as at 11 March 2015. However, at this particular time the plaintiffs were not possessed of any claim that they could have lodged, or one that was capable of enforcement. Hollard made payment to Sunrise during March 2015. It was even doubtful how Hollard could have participated in the rescue plan as it only started making payments to Sunrise on 17 March 2015 — after the commencement of business rescue. When Hollard made payment to Sunrise, this gave rise to a claim by Hollard against the plaintiffs, which it duly pursued, on the basis of them having signed a suretyship agreement. In contrast, the plaintiffs' claim against the defendant could only have arisen when they made payment to Hollard. Their claim is based strictly on a surety's right of recourse, which accrued only once they commenced to pay Hollard.

What Elgin essentially contended was that the claim of both Hollard and the plaintiffs arose at the time when Hollard paid Sunrise, the one claim arising from the indemnity agreement and the other based on a right of recourse as sureties for the debt owed to Hollard. This could not be correct. At the time when the business rescue plan was being drawn, the plaintiffs would have had no idea as to the extent of their claim against the defendant. Other than knowledge of the fullest extent of their liability as set out in the agreements, or the amount to be paid by Hollard to Sunrise.

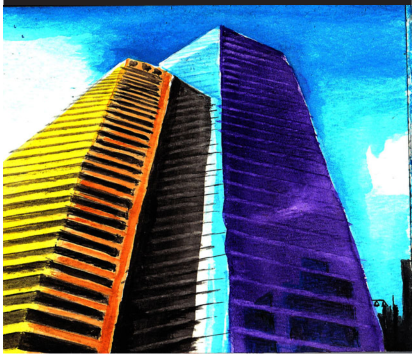
Summary judgment was granted.

MANUEL v SAHARA COMPUTERS (PTY) LTD

A JUDGMENT BY WEINER J
GAUTENG DIVISION, PRETORIA
12 DECEMBER 2018

2020 (2) SA 269 (GP)

Corporations



In establishing that information is required of a private body for the exercise or protection of a right protected by the Promotion of Access to Information Act, a person must identify the right sought to be exercised or protected, and show that prima facie, he had established that he had such a right. Secondly, he must demonstrate how the information would assist in exercising or protecting the right in question.

THE FACTS

Manuel applied for access to information in terms of section 78(2) of the Promotion of Access to Information Act (PAIA). He alleged that his personal information had been unlawfully obtained and disclosed, and that he had been subjected to unlawful surveillance. This arose from an article published in an article entitled 'GuptaLeaks: Guptas spied on Manuel, Malema and Bank Bosses'.

Manuel stated that it was not clear who was responsible for this unlawful conduct. In terms of section 50 of PAIA, he requested access to certain records to identify the appropriate defendants in order to protect and exercise his constitutional right to privacy.

In response to the respondents' averment that the information did not exist, Manuel claimed that the court should order that the application be referred to oral evidence on the question of whether the records were, or ever had been, in the possession of the respondents.

On 27 July 2017 Manuel's attorneys addressed letters to both Sahara Computers (Pty) Ltd and and an official of the Department of Home Affairs, a Mr Chawla. These letters set out Manuel's concerns regarding his personal safety and security, due to unlawful surveillance and unauthorised possession of his personal information. Attached to the letter to Sahara was a formal PAIA request. A separate formal PAIA request was also addressed to Chawla, subsequent to the letter addressed to him.

Sahara was a private company with no formal connection with an organ of the State.

Manuel contended that the PAIA requests set out that the records were required in order to protect and exercise his 'right to privacy as guaranteed in the Constitution'.

Sahara's attorneys delivered a letter refusing access to the records on various grounds.

Manuel applied for an order an order directing that the Chief Executive Officer of Sahara, its IT administrator, and Chawla be required to give oral evidence, and be subjected to cross-examination, on the question of whether the records are — or had ever been — in the respondents' possession..

Sahara and the other respondent contended that Manuel had failed to meet the requirement of establishing that the records were required for the exercise or protection of a right. They stated that he sought the records for the purpose of prelitigation discovery, which was impermissible.

THE DECISION

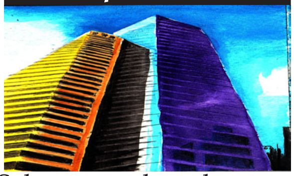
Section 50 of PAIA governs requests for access to information held by private bodies. It provides, in ss (1):

'(1) A requester must be given access to any record of a private body if —

(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and . . . .'

Other than the grounds set out in this section, the only other basis upon which a private body may legally refuse access to records is if those records are not in its possession or do not exist. This is the defence upon which the respondents based their opposition. However, Manuel contended that this ground could not be invoked merely on the private body's say-so.



In establishing that information is required for the exercise or protection of a right, Manuel had to satisfy two distinct requirements. Firstly, he had to identify the right that he sought to exercise or protect, and show that prima facie, he had established that he had such a right. Secondly, he had to demonstrate how the information would assist in exercising or protecting the right in question. He therefore had to establish a connection between the information requested and the right sought to be exercised or protected.

Manuel had established that he had met these requirements.

Section 55 requires a private body that claims that records do not exist or cannot be found to go under oath to say that it is not possible to provide access to the record, and provide a full account of all steps taken to find the record or determine whether it exists and provide such an affidavit or affirmation in response to the initial PAIA request, in which case it is deemed to be a refusal. A mere statement that a record cannot be found or does not exist does not suffice. Courts are required to scrutinise the private body's version on affidavit to determine whether its account is satisfactory.

Neither Sahara nor the other respondent deposed to an affidavit or affirmation in response to Manuel's PAIA request. It was only after Manuel's application was brought that both respondents, for the first time, sought to rely on section 55 in their answering affidavits. The respondents' contentions set out in their answering and supplementary affidavits did not comply with the requirements of section 55.

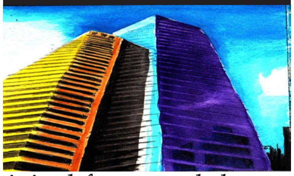
Accordingly, the matter was referred to a hearing of oral evidence on the issue as to whether the respondents currently had, or have ever had, the records in their possession.

In establishing that information is required for the exercise or protection of a right, Manuel is required to satisfy two distinct requirements. His counsel referred to various authorities in this regard. In summary, and based upon such authorities, the requisites are the following:

(a) Firstly, he must identify the right that he seeks to exercise or protect, and show that prima facie, he has established that he has such a right. In respect of s 50(1)(a) of PAIA the word 'any' before the word 'right' has been held to mean that the broadest possible interpretation must be given to what qualifies as a right for purposes of the section.

(b) Secondly, he must demonstrate how the information will assist in exercising or protecting the right in question. He must thus establish a connection between the information requested and the right sought to be exercised or protected and must '"lay a proper foundation for why that document is reasonably 'required' for the exercise or protection of his or her rights" …'.

MEYER v TRUSTEES, AURUM MYKEL TRUST



A JUDGMENT BY FRANCIS AJ (BOZALKE J concurring)
WESTERN CAPE DIVISION, CAPE TOWN
29 APRIL 2019

2020 (2) SA 557 (WCC)

To establish a right of way over adjoining property, in favour of any subdivisional property that remains without access to a public road, over any subdivisions with access., a property owner must prove its property was originally in common ownership with that of the adjoining property.

THE FACTS

Meyer owned Portion 11 of Farm 293, Plettenberg Bay, Western Cape. The subdivisional diagram for Portion 11 was approved during 1951 and this property was first registered through sub-division during 1953. Prior to being subdivided, the parent property of Portion 11 was Lot 57, later renumbered 'Farm 293' when the subdivision of Lot 57 was approved by the Surveyor-General.

The Aurum Mykel Trust was the owner of Portion 15 of Farm 290, The Crags, Plettenberg Bay, Western Cape. The subdivisional diagram for Portion 15 was approved during 1952. Prior to the subdivision, the parent property of Portion 15 was Lot 58 which was later renumbered 'the Farm 290, The Crags' when the subdivision of Lot 58 was approved by the Surveyor-General.

Prior to being subdivided, Lot 57 and Lot 58 were adjacent to each other. Access to Lot 57 was obtained via a farm road which traversed Lot 58. Both properties were in separate ownership at the time the subdivisional diagrams were approved and at the time when Portion 11 and Portion 15, respectively, were registered as separate subdivisions.

Meyer contended that Portion 11 was landlocked on sub-division and, accordingly, a tacit or implied servitude of right of way was created over the trust's property in favour of his property in order to access the public road. Without this implied servitude, Meyer would not have been able to access the public road from Portion 11. Meyer contended that the original owner of Lot 57, the parent property of Portion 11, had even prior to subdivision used the disputed road, which was the original farm road that traversed the trust's property, in order to gain access to Lot 57, and is depicted on the sub-divisional diagram for Portion 11.

Meyer's predecessor in title, a Mr Cronje, affirmed that the disputed road had been pointed out to him by the person who sold the property to him. Mr Cronje testified that he and his partner, Mr Mostert, were present when the previous owner of Portion 15 told them 'that is the road to use'. Cronje was the owner of Portion 11 for approximately 22 to 23 years and he used the disputed road without interference.

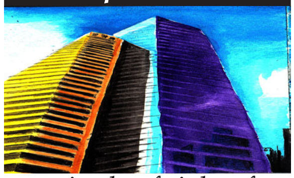
Meyer applied for a final interdict prohibiting the trust, from interfering with his right of way allegedly acquired by implied consent and alternatively claiming the registration of a right of way servitude acquired by acquisitive prescription.

THE DECISION

Right of way by implied consent

The creation of a right of way servitude by implied consent can be traced to Van Leeuwen's Commentaries. In essence, the Van Leeuwen principle is to the effect that when a landlocked tenement is created by the sub-division of land, a servitude of right of way is established by implied consent, in favour of any subdivision that remains without access to the public road, over any subdivisions with access.

The Van Leeuwen principle is a method of establishing a right of way to gain access to the public road in subdivision cases and must be distinguished from the right of way of necessity. The Van Leeuwen principle rests on implied consent whereas the normal right of way of necessity derives from the operation of law and has to be confirmed by court



order, if necessary.

The key features underpinning the Van Leeuwen principle are that the subdivided portions of the property must be in common ownership and that the sub-division of land cannot impose a servitudal burden upon neighbouring properties. In the matter at hand, Meyer did not plead, or demonstrate, that the requirements for the acquisition of a right of way by implied consent were met. There was no averment that the properties were in common ownership at subdivision. On the contrary, it appeared to be common cause that the properties were in separate ownership and were subdivided at different times from different parent properties. In addition, the disputed road undoubtedly imposed a burden on Portion 15. Accordingly, the claim for a right of way by implied consent, and the consequential relief sought for a final interdict to protect this alleged right, had to fail. If Meyer was of the view that the disputed road was the only viable access to the public road, he ought to have pursued an action for the determination of a right of way.

Acquisitive prescription

Meyer offered no evidence to support his assertion that he and his predecessors collectively used the disputed road uninterruptedly for a period of 30 years. The fact that the disputed road may have existed for 30 years is not proof of actual use. Even if the disputed road was depicted on the subdivisional diagram for Portion 11, this does not automatically convert this road into a servitude of right of way. What was clearly absent from Meyer's evidence were details of all his predecessors in title, whether they had actual or constructive knowledge of the rights alleged and, if so, how such knowledge was acquired. In other words, it was essential for Meyer to show the historical devolution of the ownership of Portion 11 and that each of the persons who acquired it did so with full knowledge of Meyer's rights.

In any event, according to Meyer, the disputed road was always used on the basis of implied consent. However, the claimed use of a servitude route by way of implied consent is inimical to the requirements of acquisitive prescription, which include the requirement that use is without consent and adverse to the owner.

It appears to me that the parties may have misconceived the true nature of the remedy sought to be relied on by the appellant; they appear to have misconstrued a right of way of necessity with the right of way by implied consent as postulated by Van Leeuwen. The key features underpinning the Van Leeuwen principle are that the subdivided portions of the property must be in common ownership and that the sub-division of land cannot impose a servitudal burden upon neighbouring properties. In the matter at hand, the appellant certainly did not plead, or by way of evidence demonstrate, that the requirements for the acquisition of a right of way by implied consent were met. For instance, there is no averment whatsoever that the appellant's property and the respondent's property were in common ownership at subdivision. On the contrary, it appears to be common cause that the properties were in fact in separate ownership and were subdivided at different times from different parent properties. In addition, the disputed road undoubtedly imposes a burden on Portion. Accordingly, the claim for a right of way by implied consent, and the consequential relief sought for a final interdict to protect this alleged right, must fail. If the appellant was of the view that the disputed road was the only viable access to the public road, he ought to have pursued an action for the determination of a right of way.

MURRAY N.O. v AFRICAN GLOBAL HOLDINGS (PTY) LTD

A JUDGMENT BY WALLIS JA (MOKGOHLOA JA, PLASKET JA, NICHOLLS JA and GORVEN AJA concurring)
SUPREME COURT OF APPEAL
22 NOVEMBER 2019

2020 (2) SA 93 (SCA)

Insolvency

Although the effect of an event which will cause commercial insolvency has not yet taken place when a resolution for the winding up of a company is made, an inability to pay debts precipitated by that event is a sufficient reason for the taking of such a resolution and a company may then be properly placed in liquidation.

THE FACTS

At a meeting on 12 February 2019 of all the directors of Global Africa Holdings (Pty) Ltd (Holdings) and its subsidiary, African Global Operations (Pty) Ltd (Operations), resolutions were signed placing Operations and other subsidiaries in a creditors' voluntary winding-up. On 14 February the resolutions were filed with the Companies and Intellectual Property Commission. On the same day the Deputy Master of the High Court in Pretoria appointed Murray and Lutchman as the provisional liquidators of all eleven of the companies.

These events had been precipitated by the fact that the banking facilities of Operations had been withdrawn by its bank, and no other bank could be found which would offer it such facilities.

On 26 February Holdings was advised that the process of voluntary winding-up was defective. It then commenced proceedings seeking orders directed at having the resolutions for voluntary winding-up declared null and void and of no force and effect from inception. Consequent upon that they sought an order that the appointment of the liquidators was likewise null and void and of no force and effect and compelling the liquidators to restore control of the companies to their directors.

Holdings alleged that the Group and its individual members were all solvent with no significant debt, apart from a liability on the part of Operations to the South African Revenue Services, and held a number of current contracts for the provision of services and providing for a healthy cash flow. No financial statements or any financial information was put up to support this. A director of Holdings, a Mr Gumede, stated that the principal assets of Holdings appeared to be loans of over R416m owed to it by the various subsidiary companies. Mr Gumede said that if these loans could not be recovered the damage to Holdings would be considerable

Murray stated that the claim of solvency was not borne out by the CM100 forms setting out the financial position of the companies, but did not attach these forms to his affidavit. Given the time constraints imposed by Holdings, that required the answering affidavit to be delivered two days after service of the application papers, it was not possible to provide a detailed analysis of the financial position of the Group. Accordingly he said that the affidavit would need to be amplified. In particular he raised the fact that Mr Gumede merely asserted the solvency of the companies without providing a factual basis for his assertion.

The directors' report stated that:
'The directors draw attention to the statement of equity in the annual financial statements which indicates that the company incurred a net loss of R40 864 615 during the year ended 28 February 2017, and as of that date, the company's total liabilities exceeded its total assets by R173 026 543. These conditions indicate the existence of uncertainty which may cast doubt about the company's ability to continue as a going concern.'

Holdings' primary case was that Operations, and all the subsidiaries, were solvent companies and thus could not be voluntarily wound up in terms of section 351 of the Companies Act (no 71 of 1973). It contended that

the resolutions were null and void from inception and that none of the companies had been validly wound up. It followed that the appointment of the liquidators was null and void from inception and should be set aside and the companies restored to their directors.

Holdings also contended that the meetings at which the various resolutions leading to the voluntary winding-up of the companies were passed were not properly convened in terms of section 62 of the Companies Act (no 71 of 2008) and that this provided a further reason for holding that the resolutions were null and void from inception. Holdings' contentions were advanced on the basis that the applicable legislation for the purpose of winding up these companies was the 2008 Act, and not the 1973 Act.

Holdings also attacked the locus standi of the liquidators on the grounds that their appointment was invalid because it had been effected by the Deputy Master in Pretoria, while the registered offices of all the companies were within the area of jurisdiction of the Master in Johannesburg. They claimed that this was contrary to the relevant provisions of the Administration of Estates Act 66 of 1965 (the Estates Act).

Judgment was delivered granting Holdings the relief it had sought and ordering the liquidators to pay the costs of the proceedings in their personal capacity. The liquidators appealed.

THE DECISION

As far as the attack on the locus standi of the liqidators was concerned, this could not be upheld. Section 2(1)(a)(ii) of the Administration of Estates Act does not give the Minister the power to appoint a Master for a portion of the area of jurisdiction of a High Court. Nor is the Minister empowered to limit a Master's jurisdiction in any way or to prescribe which matters will be dealt with in which Master's office where there is concurrent jurisdiction. The assumption underlying Holdings' argument was that the areas of jurisdiction of the Master in Johannesburg and that of the Master in Pretoria do not overlap. That was incorrect because the area of jurisdiction of the Master in Pretoria includes the entire area of jurisdiction of the Master in Johannesburg, in the same way that the former Transvaal Provincial Division exercised concurrent jurisdiction over the entire area of jurisdiction of the former Witwatersrand Local Division. The objection to the appointment of the liquidators by the Deputy Master, Pretoria, was therefore without merit.

As far as the commercial solvency of the Group was concerned, the statement by the Group appeared to have been formulated with a view to conveying that the Group's assets exceeded its liabilities and the Group companies were all going concerns. Its conclusion that all the companies were solvent was an assertion not supported by the facts. Taking into account Gumede's assertions, in the absence of evidence that the subsidiaries would be able to repay the loans the financial situation of the Group appeared to be precarious. There was a considerable body of material in Mr Gumede's evidence and in the surrounding circumstances to demonstrate that the companies were commercially insolvent. Once the banking facilities were withdrawn, something that was imminent, they could neither pay their bills nor receive payment of amounts due to them.

Holdings contended that the moment of inability of the Group to pay its debts had not yet arrived when the resolutions placing the companies in voluntary winding-up were passed. The bank accounts had not yet been closed and at that time they could pay their debts, However, aan inability to pay was imminent once the Group's access to banking facilities was terminated. Although Mr Gumede did not say when the banking facilities would be terminated, he did say that when that occurred the Group would be unable to pay its employees and suppliers.

Holdings' argument about timing misconceived the nature of commercial insolvency. This is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company is able to meet its current liabilities, including contingent and prospective liabilities as they come due.

The correct conclusion to be drawn was that Operations and the other companies in the Group were commercially insolvent at the time that the resolutions for their voluntary winding-up were taken. The application should have been dismissed.

BODY CORPORATE, PADDOCK SECTIONAL TITLE SCHEME v NICHOLL

JUDGMENT BY MATSEMELA AJ
GAUTENG DIVISION,
JOHANNESBURG
2 OCTOBER 2019

2020 (2) SA 472 (GJ)

Property

When considering whether a Sectional Title rule is reasonable, one has to weigh up the individual owners' interest against that of the body corporate as a whole. The conduct rules, the Sectional Title Schemes Management Act (no 8 of 2011) and the regulations thereto are for the benefit of all of the occupants and residents of a sectional title scheme

THE FACTS

The Body Corporate, Paddock Sectional Title Scheme was a body corporate governed by both the Sectional Titles Act (no 95 of 1986) and the new Sectional Title Schemes Management Act (no 8 of 2011) (the STSMA). Nicholl was an owner of a unit within the sectional title scheme.

Nicholl used her unit as an Airbnb. During November 2016 the body corporate received complaints from certain owners objecting to the short-term renting of units in the sectional title scheme because Nicholl was utilising her unit as an Airbnb.

The body corporate alleged that the security concerns raised by the owners of their units were very serious and very real because:

1. It was not aware at any given time who was in Nicholl's unit.
2. It could not validate the identity of all of the tenants entering and exiting the complex.
3. By having access to the complex, Nicholl's tenants also had full access to the common property, including the gardens and the swimming pool.
4. The importance of validating Nicholl's tenants/guests was amplified insofar as complete strangers to the body corporate and the residents of the complex were allowed to enter and exit the complex at any given time. This is a concern to both the residents of the complex and the applicant insofar as unauthorised persons entering the complex masquerading as short-term tenants could cause injury to persons or damage to property within the complex. This was not an unreasonable threat to have to guard against, given the prevalence of crime in South Africa.
5. Nicholl's guests had not entered into lease agreements with a copy of the conduct rules and the body corporate was thus not provided with a copy of these lease agreements. Without being aware of the rules, the guests/ tenants were more likely to contravene same.
6. The high number of people coming and going not only posed a security risk but also jeopardised the reputation of the scheme, as these short-term tenants did not always adhere to the conduct rules.

Conduct rule 3 stated that the registered owner of a section shall be responsible for the conduct of all occupants of the section, their family, employees, guests and service providers. The registered owner shall provide occupants with the rules of the scheme and were to ensure compliance with the rules at all times.

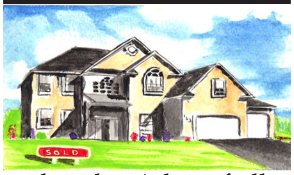
Conduct rule 14(e) stated that ownersweare not permitted to utilise their units and/or lease their units for commercial use without the written consent of the trustees of the applicant.

Conduct rule 14(f) stated that owners were prohibited from leasing out their units or permitting their units to be leased shorter than six months due to the security risk to the residents of the applicant.

Conduct rule 20(a) stated that owners who let their units to tenants had to ensure that their tenants were introduced to an appointed trustee and that they sign a copy of the rules.

Conduct rule 20(b) stated that owners who let their units to tenants had to ensure that their tenants were introduced to an appointed trustee and that they sign a copy of the rules.

The body corporate sought an interdict directing Nicholl to immediately cease from leasing her section for a period shorter



than six months, and that she be directed to immediately cease from utilising the unit and/or leasing the unit for commercial use and/or as a resort facility and/ or a bed and breakfast.

THE DECISION

Nicholl purchased her unit only for investment purposes and renting same out with the objective of paying it off. Logically, the only conclusion that could be arrived at was that the very nature of the Airbnb is commercial and was in contravention of the conduct rules.

Nicholl alleged that the rules of the scheme were unlawfully adopted, were unfair and unreasonable in failing to comply with the STSMA, and that he was not bound by the amended rules. She also argued that the new rule negatively impacted on her rights as a property owner to maximise her investment. She was also of the view that units were still used for residential purposes and that short-term letting was not the equivalent of running a business.

When considering whether a rule is reasonable, one has to weigh up the individual owners' interest against that of the body corporate as a whole, and consider the rule against the backdrop of South Africa's laws as well as the intention of the legislature in drafting the STSMA.

The conduct rules, the STSMA and the regulations thereto were for the benefit of all of the occupants and residents of a sectional title scheme, who reside within close proximity to one another. It is therefore essential that the rules be complied with so as to ensure that the rights of all occupants and residents are respected and so that they can live in harmony with one another. Nicholl should not be allowed to break these rules. The limitation of his use, enjoyment and exploitation of the property was purely to determine the length of the lease that could be entered into, and nothing more. The body corporate did not seek to dictate any other terms of the lease at all and, importantly, did not intend to intrude on the relationship between Nicholl and tenants, as long as the conduct rules of the applicant were adhered to by both such persons.

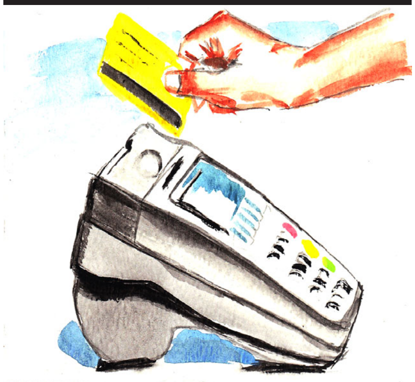
Nothing in the conduct rules deprived Nicholl of her right to property, and there had been no substantial interference therewith.

NSOVO HOLDINGS (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY LAMONT J
GAUTENG LOCAL DIVISION, JOHANNESBURG
1 AUGUST 2019

2020 (2) SA 619 (GJ)

Credit Transactions



If a credit card holder's card is lost and is fraudulently used by a third party, the cause of the loss is not the result of conduct on the part of the bank which issued the card, but conduct on the part of the cardholder, which lost control of the card and PIN number to the third party.

THE FACTS

Nsovo Holdings (Pty) Ltd and Standard Bank of South Africa Ltd concluded a suite of contracts pursuant to which Nsovo conducted a banking account with the bank and made use of a credit card. As part of the contract relating to the credit card the Nsovo received from the bank both the credit card and a personal identification number (PIN). It was a term of the contract that the card and PIN be kept separate and that the PIN not be disclosed to anyone.

The terms of the contracts also provided that only the authorised cardholder was entitled to use the card; that when the card was used the cardholder would be required to enter the PIN; that the Nsovo was responsible for the safekeeping and proper use of the card; that the Nsovo was obliged to notify the bank immediately it realised the card had been lost or stolen or if any other person was aware of the PIN; that the Nsovo would be responsible for all card transactions until it notified the bank that the card had been lost or stolen.

The authorised cardholder to whom the Nsovo specified the PIN number should be disclosed to, was Mrs Mabunda. The only authorised signatory for the card was Mrs Mabunda.

The terms of the contract provided that the Nsovo was responsible for the safekeeping and proper use of its card; Nsovo was to memorise the PIN number or keep it in a safe place separate from the card; Nsovo was to notify the bank immediately it realised the card had been lost or stolen or if any other person was aware of the PIN number; Nsovo was liable for all card transactions; only Nsovo could use the card; and Nsovo and the cardholder were to take all reasonable steps to prevent unauthorised use of the card, card number and PIN number.

Nsovo received the card on 8 July 2014. It kept the card in a storage safe at a guesthouse owned and operated by Nsovo. The only person authorised and having access to the card was Mabunda and an employee of Nsovo. The card was used the card to purchase utilities for the guesthouse

On 11 August 2017 the card and the PIN were used to complete a number of transactions. The evidence of Nsovo was that Nsovo had not performed the transactions which accordingly must have been performed by a thief. The bank had a computer programme which was able to detect transactions which might not have been authorised by the card user. That programme drew the attention of the bank to the fact that the transactions on the Nsovo's account constituted an unusual activity.

On 11 August 2017 the bank telephoned Mabunda. The bank was unable to contact her as the call was unanswered. On the same day the bank sent an email requesting its employee to take further steps in the matter. On the same day, the bank phoned Mabunda on her cellphone. The call was not answered. Later the same day, the bank sent an email to Mabunda asking her to confirm whether the transactions processed on the business card were valid. From the bank's perspective, as such transactions involved the use of the card and the PIN, each transaction on the face of it appeared authorised.

The bank's attempts to contact Nsovo were unsuccessful as there was no response from Nsovo. On 15 August 2017 the bank's fraud investigator commenced inspecting a transaction

concluded at POC Majestic Autos. On 18 August 2017 the bank again contacted Mabunda on her cellphone and managed to speak to her. She said that she had no knowledge of the transaction concerned. She sent an SMS to cancel the transactions conducted on the account on 11 August 2017 and stated that she did not think she had ever received the card in question. The card was cancelled on 18 August 2017.

All the transactions were conducted on 11 August 2017 and all the amounts due to the merchants were due on that date. The card was only cancelled after that date, on 18 August 2017, pursuant to Nsovo's notice concerning the transactions and receipt of the card. Nsovo's bank account with the bank was debited with the value of the transactions over the period 11 August 2017 – 22 August 2017.

Nsovo brought an application against the bank claiming an order directing the bank to reverse certain 'fraudulent transactions' as well as an order requiring the bank to reimburse the Nsovo the amount of R612 815,84, the total value of the transactions.

THE DECISION

The bank was contractually obliged to perform the acts which it did by way of seeking to contact the cardholder on the dates and at the times that it did. Far from there being any negligence, it appeared that the bank had the rights of Nsovo in full view when it took steps to diminish any possible loss to Nsovo by way of making contact with Nsovo. The fact that it failed to reach Nsovo until later was not due to negligent conduct by the bank.

The cause of the loss was not the result of conduct on the part of the bank, but conduct on the part of Nsovo, which in some unexplained way lost control of the card and PIN number to a person who concluded a number of transactions for which Nsovo was liable. Nsovo breached the obligations of the contract to keep the card under its control and to keep the PIN number secret and separate from the card. It was those breaches which enabled the conduct which resulted in the loss to occur.

Nsovo submitted that there was a duty on the bank to make greater effort to protect it. There was no indication of what greater steps should have been taken other than to attempt to contact the cardholder, which the bank did. The bank was entitled to assume that an authorised cardholder had used the card and the PIN number lawfully and in accordance with the contract. There was no indication from the bank that there was any difficulty with the transactions.

The question arose whether, assuming there was an obligation which the bank breached by failing to contact Nsovo, there would have been any effect in the loss which had been incurred. The loss was incurred on 11 August 2017 when the card was used. Steps were taken and could only be taken by the bank after the loss had been incurred, and its computer programme drew the fact of the existence of the transactions to its notice. By that time, as the loss had been incurred, any steps to prevent loss could only be in respect of future loss. There were no future losses. As to the debt due to the merchants, there was no loss suffered by Nsovo since on any basis Nsovo owed the merchants the sum it sought to recover from the bank.

The application failed.

AIRPORTS COMPANY SOUTH AFRICA SOC LTD v IMPERIAL GROUP LTD

A JUDGMENT BY PONNAN JA (CACHALIA JA and WALLIS JA concurring, MOLEMELA JA and TSHIQI JA concurring on other grounds)
31 JANUARY 2020

2020 (4) SA 17 (SCA)

Contract

A preferential procurement policy may only operate within a framework prescribed by national legislation. In terms of the framework provided for in the Preferential Procurement Policy Framework Act (no 5 of 2000), a preferential procurement policy may only allocate 10 or 20 preference points out of a total of 100 to transformation goals. It may not afford any greater weight to transformation objectives. Any goal for which a point may be awarded must be clearly specified in the invitation to tender.

THE FACTS

On 5 September 2017 Airports Company South Africa Soc Ltd published a Request for Bids (RFB) in terms of which members of the public were invited to submit bids for the hiring of 71 car-rental kiosks and parking bays at nine airports operated by ACSA. The RFB indicated that each successful applicant would be granted car-rental concessions for ten years. Imperial Group Ltd (Imperial), a car-rental company, submitted a bid in response to the RFB.

In terms of clause 5 of the RFB, bids were to be evaluated in a four-stage process.

Clause 4.2.4 of the RFB set out certain criteria as pre-qualification requirements. A failure to comply with these pre-qualification criteria meant that the bidder in question would fall at the first hurdle and would thus not be eligible to proceed to the second stage of the evaluation process. Clause 4.2.4.1 required large-entity enterprises such as Imperial to meet certain minimum-qualification criteria. Under the heading of 'criteria', the RFB prescribed the minimum percentages of designated persons that each large entity was expected to have at the level of ownership, enterprise, supplier development, as well as the management control of that entity. In its clarification statement relating to clause 4.2.4.1, ACSA advised prospective bidders that each large entity was expected to satisfy all the specified minimum percentages applicable to the designated persons listed in clause 4.2.4.1. The assessment of the pre-qualification criteria set out in clause 4.2.4.1 was to be done at stage I of the bid evaluation process.

Imperial contended that the inclusion of pre-qualification criteria imposing discriminatory minimum ownership, enterprise and supplier development, as well as management control, requirements based on race and gender were unlawful as they contravened s 217 of the Constitution, the Preferential Procurement Policy Framework Act (no 5 of 2000) (the PP Act) and the regulations promulgated under that Act, as well as the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act), read with the Tourism Code.

Under the heading of 'B-BBEE Provisions', clause 4 of the RFB dealt with price and preference (B-BBEE compliance). It provided, inter alia, that a maximum of 100 points would be allocated to a bid on the basis that: 20 points would be allocated for price in respect of rental offered for a kiosk; 30 points for price in respect of rental offered for the parking bays required; and 50 points for the bidder's B-BBEE scorecard. This essentially meant that at stage III bids would be scored a maximum of 50 points for price and 50 points for B-BBEE compliance. Imperial contended that the provisions of this clause contravened the PP Act.

Clause 1.7 of the RFB provided that at stage IV a bid might be awarded to a bidder other than the highest-scoring bidder 'where transformation imperatives allow'. This clause was read with clause 5.6, which stated that ACSA's transformation imperatives for all the car-rental opportunities mentioned in the RFB were in line with ACSA's transformation policy which could be downloaded from ACSA's website. Imperial contended that clauses 1.7 read with clause 5.6 contravened the provisions of the PP Act.

Imperial contended that the decision to issue and publish the RFB amounted to the exercise of a public power reviewable either in terms of Promotion of Administrative Justice Act (no 3 of 2000) or the principle of legality; that it was invalid because it had no lawful basis; was irrational; and contravened the provisions of section 217 of the Constitution and the statutes envisaged in that section.

Although ACSA acknowledged that PAJA applied to any tender award, it maintained that PAJA was not applicable to the RFB. Imperial's core attack was that the RFB was subject to and in breach of section 217 of the Constitution. ACSA contended that section 217 of the Constitution did not apply to the RFB, inasmuch as ACSA was granting concessions to bidders who were paying for such concessions. Accordingly, ACSA was not engaging in 'procurement' or 'contracting for goods and services'. In any event, even if section 217 did apply to the RFB, then the procurement laws were patently inapplicable. They could have no application to a situation such as obtained in the present case.

Imperial applied for the High Court for relief in two parts. Under part A, Imperial successfully obtained an order compelling ACSA to disclose the identities of all the bidders, who were joined as the second to twelfth respondents. Under part B, Imperial successfully reviewed and set aside the RFB.

ACSA appealed.

THE DECISION

The general rule under section 217 of the Constitution was that all public procurement had to be effected in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. The only exception to that general rule was that envisaged by section 217(2) and (3). Section 217(2) allows organs of state to implement preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination. Express provision to permit this needed to be included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in section 9 of the Constitution. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by section 217(3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation. It follows that the only escape for ACSA from the reach of section 217(1) was if it was able to bring itself within subsections (2) and (3).

The PP Act is the national legislation envisaged by section 217(3). In terms of section 2(1) of that Act, an organ of state must determine and implement its preferential procurement policy within the framework prescribed by the section.

This provision gives effect to the restriction imposed by section 217(3) of the Constitution that permits a preferential procurement policy but only within a framework prescribed by national legislation. In terms of the framework, a preferential procurement policy may only allocate 10 or 20 preference points out of a total of 100 to transformation goals. It may not afford any greater weight to transformation objectives. Any goal for which a point may be awarded must be clearly specified in the invitation to tender. Section 2 clearly contemplates a conventional transaction by which an organ of state purchases goods or services at the lowest possible price. It accordingly allocates higher scores to lower prices. A transaction of the kind contemplated by the RFB, on the other hand, sought to elicit bids for leases at the highest possible rental.

This does not mean, as ACSA argued, that such a transaction is not subject to section 2. Section 2 must be read and understood to be mutatis mutandis applicable to such a transaction. It accordingly allows a scoring system which allocates more points for higher rentals. The principle remains the same.

As a general rule the words of a statute must be given their ordinary, grammatical meaning

in the context in which they appear, unless to do so ‘would lead to absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the court is justified in taking into account’. In that event the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature.

The High Court’s core conclusion that the RFB breached section 217 of the Constitution and the PP Act could not be faulted. Given ACSA’s approach that section 217 of the Constitution and the PP Act were simply inapplicable to the RFB, that conclusion is dispositive of the appeal against it.

The appeal was dismissed.

The general rule under s 217 of the Constitution is that all public procurement must be effected in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The only exception to that general rule is that envisaged by s 217(2) and (3). Section 217(2) allows organs of state to implement preferential procurement policies, that is, policies that provide for categories of preference in the allocation of contracts and the protection and advancement of people disadvantaged by unfair discrimination. Express provision to permit this needed to be included in the Constitution in order for public procurement to be an instrument of transformation and to prevent that from being stultified by appeals to the guarantee of equality and non-discrimination in s 9 of the Constitution. The freedom conferred on organs of state to implement preferential procurement policies is however circumscribed by s 217(3), which states that national legislation must prescribe a framework within which those preferential procurement policies must be implemented. The clear implication therefore is that preferential procurement policies may only be implemented within a framework prescribed by national legislation. It follows that the only escape for ACSA from the reach of s 217(1) is if it is able to bring itself within ss (2) and (3).

COPPERMOON TRADING 13 (PTY) LTD v GOVERNMENT, EASTERN CAPE PROVINCE

A JUDGMENT BY VAN ZYL DJP
EASTERN CAPE DIVISION, BHISHO
18 JUNE 2019

2020 (3) SA 391 (ECB)

There cannot be an election in the sense of making a choice, without there being two valid inconsistent rights. Consequently, if a party chooses to pursue its rights on one basis, because the other basis does not support its rights, no election has been made to abandon its rights.

THE FACTS

The Govenment of the Eastern Cape Province sold an immovable property to the Coppermoon Trading 13 (Pty) Ltd. The government repudiated the sale agreement, and Coppermoon instituted an action claiming specific performance, alternatively damages.

After the close of the pleadings and before the trial, the parties concluded a 'deed of settlement' in terms of which the parties agreed to enter into a lease agreement. Upon signature of the finalised settlement agreement, Coppermoon would withdraw its action and each party would pay its own legal costs.

After negotiations had taken place for the lease agreement, the government informed Coppermoon that it was 'not in a position to proceed with the existing terms of the settlement agreement and the draft lease agreement'. Coppermoon brought an application in which it sought to have the terms of the deed of settlement made an order of court, as the parties envisaged in the preamble thereto, and that the terms of the court order be embodied in a written lease agreement to be concluded by the parties within 14 days of the date of the order. The application was dismissed on the grounds that the settlement agreement was not a final agreement, and that it consequently could not be made an order of court.

After appeals had been dismissed, the government averred that Coppermoon had made an election to waive or to abandon the action. This election or waiver was evident from (a) Coppermoon's election to pursue a remedy inconsistent with an action for an order for specific performance based on the agreement of sale, when it applied for relief based on the deed of settlement, (b) to thereafter seek leave to appeal the decision to dismiss the settlement application, (c) Coppermoon's statements in the settlement application that from the signing of the deed of settlement, it had not taken any further steps to prosecute the action, (d) by raising as a ground of appeal the failure of the judge to find that by staying the action, and agreeing to bear the costs thereof, the plaintiff had withdrawn and abandoned the action, and (e) by failing to take any further steps in the action subsequent to the refusal of the applications for leave to appeal.

The government applied for an order that Coppermoon be held to have surrendered and abandoned its right to continue with the action, declaring that Coppermoon lost its right to proceed with the action against the government, and that it was barred from doing so.

THE DECISION

The issue raised in the application was stated to be whether Coppermoon was barred from proceeding with the action by reason of it having made an election to abandon or to waive its right to do so. In action proceedings a special plea is raised in a defendant's plea filed in terms of rule 22. In the present matter the defence raised by the application arose after the defendants had already filed their plea and the pleadings were closed. That in itself did not prevent the defendants from raising it. The appropriate procedure was, however, to seek an amendment of their plea in terms of rule 28.

The essential question was whether the application should be entertained despite the failure

of the government to comply with the rules.

There was a fundamental reason why Coppermoon's decision to institute proceedings based on the deed of settlement did not constitute an election. Purely from a legal point of view, just as there cannot be a waiver without a valid right, there cannot be an election in the sense of making a choice, without there being two valid inconsistent rights. In the first application, it was found that the deed of settlement was unenforceable. It was, in other words, invalid ab initio. It could not, and did not, create any rights that were capable of enforcement, and in relation to which an election could be made.

As far as waiver was concerned, the conduct of Coppermoon by seeking to enforce the terms thereof, and to exercise its procedural right to appeal the judgment, did not by itself evince, on a reasonable view thereof, an unequivocal intention to waive the right to fall back on the action.

The nature of the onus that rests on the government, and the factual nature of the enquiry envisaged for determining Coppermoon's intention, was not conducive, in the circumstances of this case, to determine the issue raised in the manner the government propose to do. There was no crisp legal basis for its determination. Also, the conduct relied upon was either denied, or did not per se support an intention to waive, and the written or spoken statements of Coppermoon, on which reliance was placed, required a consideration of the broader context in order to determine whether they were capable of supporting the inference of waiver which is sought to be drawn therefrom. Furthermore, the issue of mistake or ignorance of the law only arose on the papers in answer, and, limited by the form of the present proceedings, the government was restricted to dealing therewith in their reply.

The application was dismissed.

There is, however, in my view a more fundamental reason why the plaintiff's decision to institute proceedings based on the deed of settlement did not constitute an election. Purely from a legal point of view, just as there cannot be a waiver without a valid right (Bradfield op cit at page 510), there cannot be an election in the sense of making a choice, without there being two valid inconsistent rights. Eksteen J found that the deed of settlement was unenforceable. It was, in other words, invalid ab initio. It could not, and did not, create any rights that were capable of enforcement, and in relation to which an election could be made.

FRAJENRON (PTY) LTD v METCASH TRADING LTD

A JUDGMENT BY VALLY J
GAUTENG LOCAL DIVISION, JOHANNESBURG
29 OCTOBER 2020

2020 (3) SA 210 (GJ)

To be absolved of a contractual obligation, no party may rely on an impossibility caused by its own act or omission — there should be no fault or neglect on its part in the creation of the impossibility. An obligation to perform is discharged by a subsequent change of circumstances that were neither foreseeable nor foreseen.

THE FACTS

On 16 November 1993 a head-lease agreement was concluded between Frajenron (Pty) Ltd and Metcash Trading Ltd, in terms of which Frajenron leased an immovable property from Metcash. The head-lease commencement date was 1 December 1993, the date Metcash took occupation of the property, and the termination date was 1 December 2013, the date when Metcash was to return possession of the property to Frajenron. Metro Cash & Carry Ltd stood surety for Metcash's indebtedness to Franjeron.

In a separate matter, Metcash and Metro Cash & Carry Ltd sued Incredible Happenings Trading CC (IH) for payment of arrear rental and other charges, as well as for reimbursement of any damages the court might award to Frajenron. Metcash's claim arose from a contract of lease concluded between itself and IH. That agreement of lease (sublease) was concluded on 1 March 2012. It terminated on 30 November 2013. It was allged that IH had breached the sublease in or about April 2013, and on 17 July 2013 Metcash cancelled the agreement with it. Despite the cancellation IH remained in possession of the property. It was still in possession on and after 1 December 2013, when Metcash was obliged to return possession to Frajenron. IH's refusal to vacate the property on or before 1 December 2013 resulted in Metcash being unable to perform its obligation to return possession of the property to Frajenron on that date. Frajenron's claim arose from this breach by Metcash.

Frajenron's claim of damages against Metcash was for all the rental due to it from 1 December 2013 to 1 April 2016, plus interest on the rental amount, all costs it incurred in the course and scope of securing possession, and all payments made to third parties such as, inter alia, the municipality for water and electricity consumed by IH during its illegal occupation of the property.

Metcash disputed some of the amounts claimed, and also raised the defence of impossibility of performance. Metcash contended that it did all that was legally possible to ensure that it complied with the head lease and return possession to Frajenron upon the termination of the lease. However, it was stymied in its efforts by the unlawful conduct of IH, over which it had no control.

THE DECISION

Two factors or circumstances that would excuse the non-performance are vis major and casus fortuitus. Not every vis major or casus fortuitus will excuse the non-performance. Facts specific to a case will determine whether the non-performance should be excused. These would include the nature, terms and context of the contract, the nature of the parties, their relationship and the nature of the impossibility relied upon. No party may rely on an impossibility caused by its own act or omission — there should be no fault or neglect on its part in the creation of the impossibility. The impossibility must be absolute and not relative and it must be applicable to everyone and not personal to the defendant, ie it must be objective.

An obligation to perform is discharged by a subsequent change of circumstances that were neither foreseeable nor foreseen. The reasoning underlying the doctrine is that the need or demand for justice requires that the law excuses

non-performance because not to do so would effectively be punishing a party that wants to, but cannot, perform its obligations through no fault or neglect of its own, and in conditions whereupon, by exercising reasonable and prudent care ab initio, it could never have foreseen that circumstances preventing it from performing would come to prevail.

The essential question was whether or not Metcash was discharged of its obligations by virtue of the conduct of IH?

Metcash had to bear the consequences of IH’s conduct. It was the risk-bearer, not Frajenron. It sought to protect itself from the hazard of not being able to extract economic value from the property while at the same time having to pay for it each month until 30 November 2013. To cover its liability, it sought out a tenant to sublet to. It did so to reduce its exposure to loss caused by its own inability to take economic advantage of the use of the property. Instead of leaving the property unoccupied and paying the amounts due for rental and other services, as prescribed in the head lease, or returning it immediately to Frajenron as it no longer could extract economic value from the property, it decided to sublet it to IH. Had it done the former, its liability would have been limited. At the same time it would have had the option to return the property and call upon Frajenron to do whatever it could to mitigate its loss. Should Frajenron have succeeded in mitigating all or part of its loss, Metcash would only have been liable for whatever loss, if any, that Frajenron suffered. On this analysis, both Metcash’s and Frajenron’s loss was limited to total rental amount due until 30 November 2013, as well as costs for services incurred up to and including that date. Instead of accepting this loss, Metcash on its own volition brought IH into the arena and thereby exposed Frajenron and itself to far greater loss than they both were otherwise exposed to.

Had Metcash not sought out a sublessee, or had it refused to sublet to IH, it would not have been in the position it found itself in on 1 December 2013 when it could not return the property to Frajenron. Thus, when it had to breach its obligations to Frajenron, it was because it led itself into that position.

The fact that Metcash took legal steps to evict IH, and was stymied by the legal process to secure the eviction on or before 30 November 2013, was irrelevant. The fact that the operation of the legal process sometimes fails to move with the speed that meets the interest of a party does not constitute impossibility of performance.

The impossibility of performance rule did not rescue Metcash from the consequences of its breach.

GOUWS N.N.O. v BBH PETROLEUM (PTY) LTD

A JUDGMENT BY TUCHTEN J
GAUTENG DIVISION, PRETORIA
19 MAY 2019

2020 (4) SA 203 (GP)

Where parties agree the essential terms of a contract and have the intention to contract on those terms, then it may be inferred that a valid agreement will come into existence between them even though they continue negotiating in regard to other terms. But if there is no intention to contract until all the terms of the proposed agreement have been settled and embodied in a document signed by the parties, there is no room for the application of the aforesaid principle.

THE FACTS

Gouws and the other trustees of a trust concluded a lease with BBH Petroleum (Pty) Ltd which provided that the period of the lease would commence on 4 July 2012, and would run for five years from that date unless extended pursuant to an option contained in clause 5. The option was not exercised, but the parties entered into negotiations for a new lease.

On 22 May 2017, Gouws notified BBH that it had to vacate the premises by midnight on 5 July 2017. On 31 May 2017, BBH informed Gouws that it had sold its business subject to the conclusion of a ‘further long-term lease agreement’ with Gouws. It made proposals for a lease and invited a reply.

On 5 July 2017, Gouws wrote that he was prepared to enter into a new lease and that the terms as contained in an earlier letter would incorporated in such a lease. He stated that until they signed the new lease, BBH would be understood to be renting the property on a month to month basis. He stated that he had one more demand ie that BBH was to sign a suppliers agreement with MBT Petroleum and afford MBT the opportunity to revamp the property, and that the new lease would only come into existence once signed by the parties.

On 24 July 2017, BBH asked Gouws to confirm whether the terms and conditions of the original lease agreement would apply during the negotiations pertaining to the rental charges that would be applicable for the further rental period. BBH stated that by enforcing the terms and conditions of the lease agreement, it could be induced that Gouws had accepted that BBH would be renting the premises for a further period of at least five years and that the rental for the further periods was currently being negotiated. It further stated that the lease agreement between the parties had not been cancelled and as such Gouws could not arbitrarily regard that the lease agreement was on a month to month basis, if he had invoked the provisions of the lease agreement entered into between the parties. It also stated that Gouws had already escalated rental in accordance with clause 6.2.1 of the lease agreement, and to which BBH had no objection. It stated that it would consider entering into a supplier agreement with MBT Petroleum, subject thereto that they would have the same favourable conditions and similar margins currently enjoyed from their current supplier.

Clause 6.2.1 of the earlier lease did deal with rental; in the suggested lease, clause 6.2.1 did not deal with rental at all.

On 14 September 2017, Gouws recorded the trust’s decision no longer to enter into negotiation with BBH and demanded that BBH vacate the premises by 31 October 2017. On 15 September 2017, BBH stated that it was of the opinion that by issuing invoices for the increased monthly rental amount and receipts for the payment thereof, Gouws had expressly, alternatively tacitly, accepted the renewal of the lease agreement for a further five years.

Gouws brought an application for an order that BBH vacate the premises.

THE DECISION

The essential question was whether the parties intended to enter into a binding agreement through their correspondence which was to operate until a formal written agreement was signed by the parties, or whether

the parties were merely negotiating towards a binding agreement.

In the letter dated 5 July 2017, Gouws made it plain that the new lease agreement would only come into existence when it had been signed by the parties. Until then, he said expressly, the trust would treat BBH as a monthly tenant.

In BBH's response dated 24 July 2017, BBH did not say that it understood that the new lease agreement had come into operation. On the contrary, BBH asked Gouws expressly to confirm that the provisions of the earlier lease would apply during their negotiations towards the new lease. And then BBH raised the fact that Gouws had unilaterally raised the rental, an indication, BBH said in effect, that Gouws had tacitly revived the earlier lease. This was important because it showed that BBH too did not understand Gouws' letter dated 5 July 2017 to be an offer to conclude a new lease which if simply accepted would, without the execution of a new written lease, bind the parties to a new landlord and tenant relationship for five years.

This conclusion was fortified by the reference to the escalated rental in BBH's letter dated 24 July 2017. The escalated rental was calculated under clause 6.2.1 of 'the lease agreement'. When clause 6.2.1 of the earlier lease is compared with clause 6.2.1 of the 'new' lease, it was clear that only in the earlier lease did clause 6.2.1 deal with rental; in the 'new' lease, clause 6.2.1 does not deal with rental at all. Therefore, BBH was not under the impression that it was paying rental under the 'new lease agreement'; its assertion was that it was paying rental under the earlier lease, as extended by conduct.

Nothing in the further correspondence demonstrated any intention on the part of Gouws to depart from the trust's stated position that no lease agreement would arise until a document signed by both parties had been executed. This was not a new approach by the trust to its contractual relationship with BBH.

BBH argued that it had asserted in the correspondence that the new lease agreement had come into existence. This however, was not the case. The letter dated 24 July 2017 did not assert that a new lease agreement had been concluded. It asserted that because Gouws had charged a rental after the date on which the earlier lease had expired and to cover the respondent's continued occupation of the premises, Gouws had expressly or tacitly revived and extended the earlier lease.

Furthermore, BBH repeated, expressly, and enlarged upon its earlier contention that Gouws had renewed the earlier lease for a further period of five years. This, BBH contended, had happened because Gouws had issued invoices for the increased monthly rental amount and receipts for the payment thereof. BBH submitted that because the essential terms of a lease had been agreed, the new lease had become binding on the parties by operation of law, even though it was manifest that Gouws had no intention of concluding such an agreement until the parties signed a document embodying the terms of their new lease agreement.

This submission was unsound. It confused two different situations. Where parties agree the essential terms of a contract and have the intention to contract on those terms, then it may well be that a valid agreement will come into existence between them even though they continue negotiating in regard to other terms. But where, as in this case, there was no intention to contract until all the terms of the proposed agreement have been settled and embodied in a document signed by the parties, there was no room for the application of the aforesaid principle.

THE FONARUN NAREE TRUSTEES, COPENSHIP BULKERS v AFRI GRAIN MARKETING (PTY) LTD

A JUDGMENT BY COWEN AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
7 AUGUST 2019

2020 (4) SA 188 (GJ)

Shipping

Interpleader proceedings may be brought in terms of rule 20 of the Admiralty Proceedings Rules read with section 5(2)(a) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) in the same way, and subject to the same conditions, as they may be brought in terms of the ordinary Rules of Court. A party asserting a claim for security in terms of section 5(3) of the Admiralty Jurisdiction and Regulation Act (no 105 of 1983) may be considered a party asserting a claim in respect of which interpleader proceedings may be brought.

THE FACTS

Copenship Bulkers obtained an order in terms of section 5(3) of the Admiralty Jurisdiction and Regulation Act (no 105 of 1983) for the arrest of the right, title and interest of Afgri Grain Marketing (Pty) Ltd in and to funds held in an Absa Bank account, as security for a claim that Copenship was prosecuting in arbitral proceedings in London.

Afgri Marketing sought the urgent reconsideration of the matter. It, and Afgri Operations (Pty) Ltd, the second respondent, contended that Afgri Marketing had ceded the right, title and interest in and to the money in the accounts to Afgri Operations and that the attachment had no effect on the rights of Afgri Operations to deal with the money. The application for urgent reconsideration was dismissed, and an appeal against this decision was lodged.

On 4 September 2018 the sheriff commenced interpleader proceedings in terms of rule 58 of the Uniform Rules of Court. Copenship Bulkers then sought an order setting aside the interpleader proceedings in terms of rule 20 of the Admiralty Proceedings Rules read with section 5(2)(a) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983). Both Afgri Marketing and Afgri Operations filed a notice of intention to oppose the application.

On 29 May 2019, the Supreme Court of Appeal upheld the appeal and ordered that the application for reconsideration succeeded.

In view of the success of the appeal, the court raised the question what the appropriate order should be in response to the application to set aside the interpleader proceedings.

THE DECISION

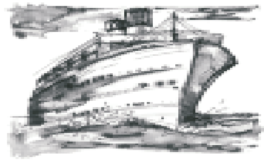
The first was whether it was competent for the applicants to raise the regularity of the interpleader proceedings in terms of rule 20(2) or whether, as Afgri Operations submitted, it was incumbent upon the applicants to deliver their particulars of claim and raise the issue in terms of rule 58(6)(d).

The second issue was whether it was competent for the sheriff to trigger interpleader proceedings when giving effect to an arrest order in terms of section 5(3) of the Act and faced with an adverse third-party claim to the property.

The third issue was whether the non-joinder of Afgri Marketing in the interpleader proceedings rendered them fatally defective.

With regard to the first issue, applying Rule 20(2) of the Admiralty Proceedings Rules, where there are no adverse claims, the jurisdictional requirements to trigger rule 58 are not present, and a party can request a court in the exercise of its ordinary civil jurisdiction to set it aside in terms of rule 30 of the Uniform Rules of Court. The same approach should be followed when the court exercises its admiralty jurisdiction.

With regard to the second issue, the applicants asserted a claim in respect of the property, being a claim to hold it as security in terms of section 5(3) of the Act. This was the reason why Afgri Operations could bring interpleader proceedings. There was no material difference in principle between the position of a sheriff who is directed by a court to attach property for purposes of a sale in execution, and is then faced by an adverse claim from a third party, and the present case. In both cases, control over the property, but not



ownership, passes from the owner to the sheriff being the officer entrusted with it.

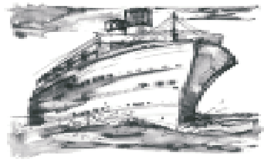
With regard to the third issue, the sheriff was not faced with any adverse claim from Afgri Marketing in respect of the arrested property. The adverse claim was from Afgri Operations and the sheriff was specifically informed that Afgri Marketing agreed with Afgri Operations' contentions regarding its right, title and interest in the moneys.

It was not irregular for the sheriff to trigger the interpleader proceedings.

The sheriff is giving effect to a court order that determines control of the property for stated purposes.

In arriving at my conclusion, I have had regard to the fact that the last sentence of rule 58(1) refers only to the case where the property is being sold in execution. In my view, this does not take the matter any further because the source of the sheriff's power does not seem to me to lie in that sentence. Rather, that sentence clarifies the status of the sheriff and an execution creditor in interpleader proceedings where the conflicting claims relate to property attached in execution. Logically, where the proceedings concern property arrested as security, the sheriff would similarly hold the position of an interpleader applicant and the party who obtained an arrest order would be a claimant under the rule.

WORLD NET LOGISTICS (PTY) LTD v DONSANTEL 133 CC



A JUDGMENT BY LOPES J (VAHED J concurring, OLSEN J dissenting)
KWAZULU NATAL DIVISION, PIETERMARITZBURG
29 NOVEMBER 2019

2020 (3) SA 542 (KZP)

The magistrates' courts do not have admiralty jurisdiction to determine the dispute arising from a maritime claim.

THE FACTS

World Net Logistics (Pty) Ltd and Donsantel 133 CC concluded a written agreement for the provision of freight-forwarding services by World Net to Donsantel. The agreement contained the consent by Donsantel to the jurisdiction of the magistrates' courts. A suretyship agreement signed by the second respondent also contained a consent to the jurisdiction of the magistrates' courts.

World Net sued Donsantel and the second respondent for payment of R213 837,05 in the magistrates court. In a special plea, Donsantel and the second respondent contended that the court did not have jurisdiction to entertain the suit on the basis that the claim was a maritime claim as defined in section 1 of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) and that only the High Court exercising its admiralty jurisdiction could determine the dispute.

It was accepted that the claim was a maritime claim as defined in the Act.

The magistrates' court upheld the special plea. Donsantel and the second respondent appealed.

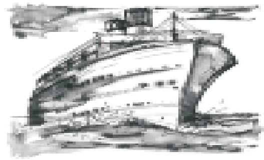
THE DECISION

The questions for decision were: (i) whether the magistrates' courts have jurisdiction to hear a maritime claim, in circumstances where the magistrates' courts would otherwise have jurisdiction to hear the action, and (ii) where an objection is raised to the magistrates' courts' jurisdiction, does a magistrate have the authority to ignore the objection, and proceed to hear the claim, if it is otherwise within the magistrates' courts' jurisdiction?

The arguments in favour of not allowing the magistrates' courts jurisdiction to hear maritime claims outweigh those against.

Section 7 of the Act is intended to deal only with matters in the High Court. It does not follow that because the Act does not preclude maritime claims being heard in the High Court, it does not preclude maritime claims being heard in the magistrates' courts. Once it is accepted that the magistrates' courts have no jurisdiction to apply the Act, the same referral as would occur from the High Court to the admiralty court cannot apply in the case of the magistrates' courts. This is because the magistrates' courts have no jurisdiction to apply the provisions of the Act, and there is no provision in the Magistrates' Courts Act (no 32 of 1944) to transfer the matter to the High Court exercising its admiralty jurisdiction. There are many instances where the High Court is able to exercise a jurisdiction which the magistrates' courts may not. The exclusion of a maritime matter only arises where a challenge is raised to a magistrate's jurisdiction. This does not raise objection to the exclusivity of the High Court exercising its admiralty jurisdiction, any more than a claim otherwise in excess of the jurisdiction of the magistrates' courts would raise such an objection.

In the magistrates' courts, if nothing at all is raised concerning the jurisdiction of the court on the basis that a plaintiff's claim is a maritime claim as defined by the Act, the magistrate may continue to hear the matter if it is otherwise within the court's jurisdiction. If there is an objection to the jurisdiction of the court on the basis that a



plaintiff's claim is a maritime claim, then the magistrate must determine whether the claim is based on a maritime claim, and, if so, the action must be dismissed for want of jurisdiction. If no objection is raised, on the basis that the plaintiff's claim is a maritime claim, that issue may not later be raised on appeal by either of the parties.

The appeal was dismissed.

The learned magistrate correctly found that the claim was a maritime claim. Had he been sitting in the High Court, he would have referred the matter to the admiralty court. Sitting in a magistrates' court, however, he could not do so, and was obliged to hear the action, or dismiss the action. If he had not dismissed the action, and had subsequently heard the matter to completion, he may not have had to apply the provisions of the Act. That, however, was not a discretion which he was empowered to exercise at that stage. Once his jurisdiction was challenged, he was compelled to decide whether the matter was a maritime claim. Having found that it was, it fell to be dealt with in terms of the Act, which he could not do.

GUPTA v KNOOP N.O.

A JUDGMENT BY LEDWABA DJP (JANSE VAN NIEUWENHUIZEN J and SENYATSI AJ concurring)
GAUTENG DIVISION, PRETORIA
13 DECEMBER 2019

2020 (4) SA 218 (GP)

Insolvency

Business rescue practitioners cannot unabatedly continue to sell off the assets of the respective companies and earn fees and commissions without having a plan regarding how the respective businesses are going to operate moving forward once the creditors have been paid. Business rescue proceedings are not intended to continue indefinitely.

THE FACTS

On 20 February 2018 the Companies and Intellectual Property Commission of the Republic of South Africa (CIPC) issued the notice of beginning business rescue proceedings in respect of lslandsite Investments One Hundred and Eighty (Pty) Ltd. A similar notice was issued in respect of Confident Concept (Pty) Ltd. A notice of appointment of the business rescue practitioners (BRPs) was issued bythe CIPC, appointing Knoop and the second respondent as the BRPs of the companies.

The primary reason cited for the financial distress of Islandsite was the 'un-banking' of the company, together with a group of indirectly related entities linked to companies controlled by Messrs Gupta. The four main banking institutions in South Africa decided to distance themselves from the entities and the company on account of reputational risk. This adversely affected the company's ability to continue running its business in the ordinary course beyond 31 March 2018. According to the directors, the solutions available to the BRPs, given the number of unsuccessful requests made to numerous financial institutions to allow banking facilities, was to either conclude a sale of the business as a going concern or enter into a management contract with an arm's-length party. The proposed solutions would be put in place in order to maintain the continued trading status of the business and thereby assist in preserving the employment of staff.

As far as Confident Concept was concerned, the directors adopted a resolution that, although the company was under financial distress, reasonable prospects that the company could be rescued and placed under supervision in terms of the provisions of section 129(1), read with s 129(2), of the Companies Act (no 71 of 2008) existed.

In the minutes of the first creditors / affected parties' meeting of Islandsite Investments held on 5 March 2017, it was recorded that Islandsite it was recorded that the company owned residential and commercial property. The financials of the company indicated that the company made a profit of approximately R4m and its book value was estimated at about R275m. The company's debtors wereestimated at R48m and its main source of income was recorded as being rental income. The primary reason for the company being under financial distress appeared to be the negative inferences attributed to the Gupta family, which in turn adversely impacted on the juristic entities which the family had links to, either directly or indirectly.

However, in terms of the minutes, the BRPs were of the opinion that the entity was rescuable against a careful cash-flow structure.

With regard to Confident Concept, according to the minutes of the first creditors / affected parties' meeting held on 5 March 2017, it was recorded that the reason for the entity's financial distress appeared to be the negative inferences attributed to the company's association with the Gupta family which in turn impacted negatively on the juristic entities which the family had links to. Furthermore, according to the minutes, the BRPs were of the opinion that the entity was rescuable again a careful cash-flow structure.

Tensions arose between the

companies' shareholders and the BRPs, and as a result of this that Gupta sought an order removing Knoop and the second respondent as BRPs of the companies. Gupta contended that the removal of the first and second respondents as BRPs was necessary for various reasons, inter alia that the conduct of the BRPs had not been in good faith, and their conduct amounted to a failure to perform the duties of a business rescue practitioner as contemplated in terms of section 139(2)(a) of the Act.

THE DECISION

It was vital is for the court to determine whether the BRPs executed their duties in accordance with the standard set not only by the Act but also by the courts as judicial officers.

The BRPs' conduct was at odds with the requirements as set out in the Act. As judicial officers, they failed to execute their duties with the highest level of good faith, objectivity and impartiality on several fronts. The respondents argued that in the execution of their duties they had overseen the sale of numerous properties belonging to the companies. However, they could not unabatedly continue to sell off the assets of the respective companies and earn fees and commissions without having a plan regarding how the respective businesses were going to operate moving forward once the creditors had been paid. Business rescue proceedings are not intended to continue indefinitely.

The respondents' continual earning of fees and commissions, despite their failure to timeously conclude the business rescue proceedings in respect of both companies, was wholly at odds with their mandate in terms of the Act.

Other than stating that the companies were rescuable, the respondents had failed to make out a cogent case to support their opinion that reasonable prospects of rescue existed. In terms of the business rescue plans for both companies, the respondents had failed to deal with how they would manage to secure a bank account with a licensed bank in order for the companies to continue with their business given the fact that both companies had been un-banked.

The respondents' lack of good faith in conducting the affairs of the companies was demonstrated in their contention that there existed an element of criminal unlawfulness in the manner in which the board and shareholders had conducted the affairs of the companies. As judicial officers, the respondents bore the onus of reporting such suspicions to the relevant authorities. Not only did their failure to do so mean that the respondents' investigation into the affairs of the companies had been tainted as a result of their potential failure to be forthcoming regarding any dubious activities on the part of the board and shareholders, the respondents' failure to report their findings to the relevant authorities also tainted their impartiality as officers of the court. Given the nature of the office of a BRP and that the ability to execute one's duties as a BRP requires a high level of impartiality and independence, the conduct of the respondents in failing to report such findings was critical.

the respondents had filed papers vilifying the companies' board and shareholders, alleging that they have mismanaged the affairs of the companies, but they also wanted to rescue the companies for the ultimate benefit of the same board and shareholders. This related to the credibility of the respondents and raised the question whether the accusations levelled at the board and shareholders were truly being raised in good faith.

In terms of section 139(2) of the Act, a court is required to order the removal of a BRP based only on one of the listed grounds. A case had been made out for the removal of the respondents as BRPs on several grounds, namely a failure to perform the duties of a BRP in terms of section 139(2)(a), and the presence of a conflict of interest / lack of independence in terms of section 139(2)(e).

A sufficient case had been made out justifying the removal of the respondents as BRPs of both companies.

SHARMA v HIRSCHOWITZ

A JUDGMENT BY OPPERMAN J and MKHAWANE AJ
GAUTENG DIVISION, JOHANNESBURG
4 NOVEMBER 2019

2020 (3) SA 285 (GJ)

Property

A claim for holding over is founded on a breach of the contractual obligation to give vacant possession on termination, as required by the relevant clause in the lease agreement or as an incident of the common law. It is based on damages suffered by reason of the lessee's continued occupation despite lawful cancellation. A claim requires damages to be determined by reference to the amount which the landlord could obtain if he had been able to relet, but for this continued occupation of the property by the tenant.

THE FACTS

Sharma leased certain immovable property used for residential purposes from Hirschowitz. On expiry of the lease agreement, no further written lease agreement was concluded, but the parties orally agreed on a rental of R34 500 per month and Sharma paid this amount for the period 1 March 2014 to 31 October 2014.

Hirschowitz gave notice to Sharma to vacate the immovable property, effective 31 October 2014. Sharma did not vacate the property but continued to make rental payments for the months of November and December 2014 in the amount of R34 500 per month. Sharma did not make any payment for the months of January and February 2015 and only vacated the property on 26 February 2015.

Sharma paid a rental deposit in the amount of R40 000 at the commencement of the lease. In terms of clause 6 of the lease agreement, any amounts for which the lessee might be liable under the lease for damages, unpaid rental, cost of repair, and the like, could be deducted from the deposit.

Hirschowitz sued in the court a quo for the confirmation of the cancellation of the lease agreement and payment of holding over damages in the sum of R111 000.

Sharma defended the action on the grounds that holding over damages had not been proved, and also on the grounds that section 5(5) of the Rental Housing Act (no 50 of 1999) applied. This section provides:

'(5) 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.'

Sharma contended that this meant that the original lease applied and not the oral lease subsisting for the period 1 March 2014 to 31 October 2014.

THE DECISION

A claim for holding over is founded on a breach of the contractual obligation to give vacant possession on termination, as required by the relevant clause in the lease agreement or as an incident of the common law. It is based on damages suffered by reason of the lessee's continued occupation despite lawful cancellation. A claim requires damages to be determined by reference to the amount which the landlord could obtain if he had been able to relet, but for this continued occupation of the property by the tenant. The amount claimable is not rental but damages, which, according to settled law, is the market rental value of the premises. It is only in the absence of evidence to the contrary that the rental value of the premises is assumed to be the rental paid under the lease.

The rental provided for in the agreement, accordingly, is no more than evidential material available as to what the market-related rental for that period was.

Because it was common cause that the parties had reached agreement in early 2014 that Sharma would make payment of rental in the amount of R34 500 per month, which amount was paid for the period March 2014 to December 2014, this amount was the only admissible and accurate evidence before the court as to the market rental at the relevant time.

The total holding-over damages for the period January and February 2015 ought thus to have been R69 000 (R34 500 x 2).

As far as the defence based on section 5(5) was concerned, the interpretation contended for by Sharma, was that an oral lease bona fide and genuinely entered into between landlord and tenant, would nullify an oral agreement simply because it was oral, despite both parties having accepted that it was concluded and implemented. This interpretation would nullify section 5(1) of the Act, as the oral agreement concluded and expressly authorised by that section would be considered invalid by virtue of the application of section 5(5).

The proper construction to be given to the word 'deemed' in this subsection is that it provides prima facie proof in the absence of a written agreement. If the oral agreement had been concluded when the parties first contracted, section 5(5) would have held no bar to the oral agreement's enforcement. It would have been considered valid. Simply because it has come later in time, it is not to be considered invalid.

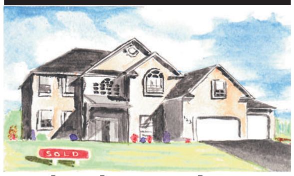
Hirschowitz's claim was upheld.

The proper construction to be given to the word 'deemed' in this subsection is that it provides prima facie proof in the absence of a written agreement. To bolster this conclusion: if the oral agreement had been concluded when the parties first contracted, s 5(5) would have held no bar to the oral agreement's enforcement. It would have been considered valid. Simply because it has come later in time, it is to be considered invalid? In our view, such a construction does not accord with the objects of the Act. Section 5(5) of the Act contemplates a situation where the parties' relationship is not being governed by a written agreement and is therefore 'clearly a provision to facilitate proof of matters which might otherwise be difficult to prove in a Court of Law' (see R v Haffejee and Another 1945 AD 345 at 353). It falls within the category contemplated by Watermeyer CJ where the word 'deemed' shall be regarded or accepted as being merely prima facie or rebuttable.

Section 5(5) only applies in the absence of a written lease agreement.

STAUFEN (PTY) LTD v MINISTER OF PUBLIC WORKS

Property



A JUDGMENT BY KOEN AJA (CACHALIA JA, SWAIN JA, NICHOLLS JA and LEDWABA AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2020

2020 (4) SA 78 (SCA)

An expropriation may take place despite the fact that there is a pre-existing unlawful use and occupation of the property in question. The sole consideration is whether the expropriation is for a public purpose or in the public interest. The expression 'public purposes' is a broad one, and may include matters where the whole population, or the local public are affected and not only matters pertaining to the state or the government.

THE FACTS

Mr A.F. Hitge owned the remainder of Portion 4 of the Farm 119 Nelson Mandela Bay Municipality, Division of Uitenhage, Eastern Cape Province. In 1997, he concluded a notarial deed of servitude with Eskom. This deed granted to Eskom and its successors in title and assigns, the perpetual right to a right of way (6 metres wide) over the remainder of portion 4; the perpetual right to a part of portion 4 not exceeding 1240 square metres for the purpose of erecting an electrical substation; and an exclusive perpetual right to lead electricity over portion 4. The notarial deed was subsequently registered in the deeds registry. An endorsement was appended simultaneously, in accordance with standard deeds registry practice, against title deed T77935/91, being the holding title in respect of the remainder of portion 4. The endorsement identified the notarial deed of servitude by its number, namely 'K884/98S', and recorded that it created a right of way 6 metres wide in favour of Eskom. It however made no mention of the right to erect an electrical substation, or the right to lead electricity over the land.

Eskom commenced the construction of an electrical substation on the remainder of portion 4. During 1999 the remainder of portion 4 was subdivided further by excising an area measuring 44,8915 hectares in extent, which was renamed 'Portion 7 (a portion of Portion 4) of the Farm 119'. Portion 7 was the subdivision, previously part of the remainder of portion 4, on which the substation had been erected, over which the right of way (6 metres wide) was exercised, and which was traversed by the incoming and outgoing overhead power lines.

In 1999 portion 7 was consolidated with Portion 4 of the farm Nooitgedacht No 118 adjoining it, to form Farm 664, in extent 249,3714 hectares, as reflected on the consolidation SG diagram 5561/1998. This property became known as 'Nooitgedacht'. The certificate of consolidated title which gave effect to that consolidation reflected as a condition of title, as far as the component thereof previously known as portion 7 was concerned, provided that:
'By Notarial Deed of Servitude No K884/98S the within mentioned property, 44,88915 hectares in extent, is subject to a servitude right of way 6 (six) metres wide, in favour of Eskom, as will more fully appear from the said Notarial Deed.'

As with the endorsement appended by the deeds office previously to the parent deed, that was the only servitude carried forward as a title condition. The other two servitudes created in the notarial deed were again not recorded in the title conditions. They were also not depicted on the SG diagram 5561/1998 depicting the consolidation.

In 2005, Nooitgedacht was sold to Mr W.B. Grundling. In the same year, he sold the property to Mr J.J.L. Lingenfelder, who sold it to Amber Bay Investments 34 (Pty) Ltd. In 2014, Amber Bay sold the property to Staufen 2014. In each title deed giving effect to these successive transfers, only the right of way servitude created in the notarial deed, described in the certidicate of consolidated title, was carried forward as a title condition. Neither of the other two servitudes in the notarial deed in favour of Eskom was recorded in any of the conditions of title.

. Staufen took the view that Eskom's entitlement to the substation was tenuous, if not non-existent. Whatever rights it had enjoyed in respect of the substation and power lines in terms of the notarial deed were personal in nature, arising from its relationship with Mr Hitge, which some subsequent owners may have acquiesced in, but not Amber Bay and Staufen. As the rights to erect the substation and to lead the overhead power lines over Nooitgedacht had never been registered against the title deeds, they did not constitute enforceable real rights. That these rights never became enforceable was due to the title deed of Mr Hitge not having been properly endorsed initially, and the subsequent deeds of transfer having perpetuated that omission.

Staufen brought an application to evict Eskom from Nooitgedacht. The Minister of Public Works responded with an application for expropriation. The rights to be expropriated were described as 'A servitude for a substation over 8,812 ha of land, and to convey electricity by means of 132 kV and 22 kV lines across land, and a right of way 6 metres wide across land being part of the Farm Nooitgedacht'. The application further specified that Eskom required 'the registration of an extended servitude area for the Nooitgedacht substation and the regularising of the existing servitudinal rights in respect of a portion of the sub-station, and other ancillary rights.

THE DECISION

Having regard to the terms of the notarial deed, Eskom bona fide but erroneously believed that it had initially acquired real rights. In fact, it had only acquired personal rights, or limited real rights, in respect of the right of way. Eskom had not deliberately occupied the property unlawfully. It conducted its operations on the property in the bona fide belief that it had a legal entitlement to do so. It was allowed to use the property, by the various predecessors in title to Amber Bay and Staufen, in the mistaken belief that it was entitled to do so. All the owners since Mr Hitge, Amber Bay and Staufen, were aware of the presence of the substation installation on Nooitgedacht. They acquired ownership of the land in each instance aware of the substation, the overhead lines leading to and from it, and the access route to the substation. They accepted transfer of ownership in each instance aware that the substation and power lines detracted from their rights of ownership.

The essential question for decision was whether or not the expropriation decision taken for an improper or unlawful purpose.

Applications for expropriation usually precede the occupation of the property sought to be expropriated. The Minister's decision to expropriate was however in respect of a portion of property already used unlawfully by Eskom. The expropriation therefore had as its purpose to regularise Eskom's unlawful use of part of Nooitgedacht, instead of permitting it to occupy the property. Staufen argued that the unlawful use by Eskom could not be regularised by another organ of state by expropriation, as to do so would not constitute a public purpose or be in the public interest, being the only objects which the Electricity Regulation Act (no 4 of 2006) sought to facilitate. Instead, it would seek to condone or legalise Eskom's unlawful occupation.

However, there is no authority for the proposition that an expropriation cannot occur if there is a pre-existing unlawful use and occupation. The sole consideration is whether the expropriation is for a public purpose or in the public interest. The expression 'public purposes' is a broad one. It has been held to include matters where the whole population, or the local public are affected and not only matters pertaining to the state or the government. It was not in dispute that the substation on Nooitgedacht served the local public by providing electricity, to amongst others, residential communities and townships, the town of Addo, the Sundays River Valley, several farms including citrus farms in the surrounding area, and the National Addo Elephant Park, an important tourist attraction.

The application to expropriate was clearly for a public purpose or in the public interest, namely the provision of electricity. This purpose was served by the substation continuously since its construction in 1997. It should continue serving that public purpose. The fact that there was an ancillary purpose, to regularise the pre-existing unlawful use and occupation, could not detract from its main purpose, which was to continue to supply electricity to the public through the substation for which a definite need was established.

The expropriation would result in Eskom acquiring servitude rights in respect of certain aspects of Staufen's ownership of Nooitgedacht, which as a matter of law vested in it, but as a matter of fact was used by Eskom. In that respect too, the expropriation would serve the public interest and purpose, as it would enhance the electricity infrastructure in the national interest.

ESKOM HOLDINGS SOC LTD v MASINDA

A JUDGMENT BY LEACH JA
(WALLIS JA MOCUMIE JA, MOKGOHLOA AJA AND WEINER AJA concurring)
SUPREME COURT OF APPEAL
18 JUNE 2019

2019 SACLR 358 (SCA)

The mere existence of a supply of services to a property is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession.

THE FACTS

Regarding itself obliged to take steps to avoid harm occurring due to dangerous and unauthorised connections to its grid, on 8 August 2017, Eskom Ltd sent a team made up of members from its various departments to hold an inspection of properties in Tsolo. On doing so, various illegal connections to the Eskom grid were identified and then disconnected. One of the properties identified as having an illegal connection was that of Ms Masinda.

Eskom averred that the electrical supply installation included equipment of incorrect sizes, did not meet prescribed standards, had been erected by an unauthorised contractor, and constituted an immediate danger to the public. For this reason, the supply to Ms Masinda's property was disconnected.

What had been installed on Masinda's property was a prepaid system using a meter box that someone had wired into Eskom's grid. This system was used in conjunction with a prepaid card in order to effect the supply. Electricity was purchased using the individual number of the meter reflected on the card. The receipt issued in respect of the transaction bore a coded number which, once typed into the meter, registered a credit in respect of the amount of electricity purchased. The supply of electricity to Masinda's property was therefore dependent upon it being paid for in advance.

Masinda brought urgent proceedings against Eskom seeking, inter alia, an order obliging it to forthwith restore the electricity supply to her home. In seeking this relief she relied upon the mandament van spolie (a spoliation application).

THE DECISION

Depending upon the circumstances, the supply of electricity or water may be recognised as being an incorporeal right, the possession of which is capable of protection under the mandament. In such cases, the right to the supply flows from the exercise of possession of the immovable property. Whoever is in lawful possession of the relevant portions of land is entitled to receive such services.

This however, is not authority for the proposition that the mere supply of water or electricity to a property, in itself and without more, constitutes an incident of the possession of that property, protectable by the mandament. The mere existence of such a supply is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession. Consequently, insofar as previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided.

Masinda said no more than that Eskom's officials had unlawfully

disconnected the supply of electricity to her house and the prepaid meter, and asked that it be reconnected to the national grid. There was no attempt to show that such supply was an incident of her possession of the property. She relied solely upon the existence of the electrical supply to justify a spoliation order. This was both misplaced and insufficient to establish her right to such an order.

In addition, Masinda purchased her electricity on credit through the prepaid system. In these circumstances, her right to receive what she had bought flowed not from the possession of her property, but was a personal right flowing from the sale. Her claim was essentially no more than one for specific performance. This personal, purely contractual right, could not be construed as an incident of possession of the property. As the mandament does not protect such a contractual right, for this reason too her claim had to be dismissed.

AQUARIUS PLATINUM (SOUTH AFRICA) (PTY) LTD v BONENE

A JUDGMENT BY MAYA JP, SALDULKER JA, VAN DER MERWE JA and MOCUMIE JA AND DOLAMO AJA
SUPREME COURT OF APPEAL
16 MARCH 2020

2020 (5) SA 28 (SCA)

Property

To obtain an eviction order in terms of section 9(2)(d)(i) of the Extension of Security of Tenure Act (no 62 of 1997), an employer must prove that the occupier's employment was first terminated entitling it to such an order.

THE FACTS

Following litigation, the employment of Bonene and the other respondents with Aquarius Platinum (South Africa) (Pty) Ltd was terminated. Aquarius then served notices of the intention to obtain an eviction order in terms of section 9(2)(d)(i) of the Extension of Security of Tenure Act (no 62 of 1997), Bonene and the other respondents having been residing in hostels on the property of Aquarius. Aquarius brought an application for the eviction of the occupiers.

The Land Claims Court decided the matter in favour of the respondents, and dismissed the application for the eviction of the occupiers. It held that there had been a failure to comply with the provisions of section 8 of the Act.

The court held that termination of employment does not necessarily and automatically lead to the termination of the occupier's right of residence. It held that the use of the phrase 'may be terminated' in section 8(2) postulates a situation where the owner or person in charge has a discretion; there will be cases where, despite the fact that employment has been terminated, the owner still in his or her discretion decides to permit the former employee to continue to reside on the premises. Therefore, termination of employment does not automatically lead to termination of the occupier's right of residence. A separate and specific notice of termination of right of residence is required.

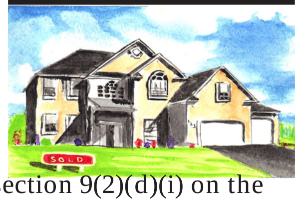
Section 8(2) provides that the right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act. Section 8(3) provides that any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), is to be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

THE DECISION

Both the clear meaning of the language of these sections and their context indicate a two-stage procedure. Section 8 provides for the termination of the right of residence of an occupier, which must be on lawful grounds and just and equitable, taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 at least requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, inter alia, the occupier's right of residence has been terminated in terms of section 8, and the occupier nevertheless did not vacate the land, and the owner or person in charge has, after the termination of the right of residence, given two months' written notice of the intention to obtain an eviction order.

Section 8(2) must be read with section 8(1) and provides for a specific instance of what may constitute a just and equitable ground for the termination of a right of residence.

Aquarius did not terminate the right of residence of any of the occupiers. It failed to appreciate the need to comply with this legal requirement. It erroneously equated the termination of employment with termination of



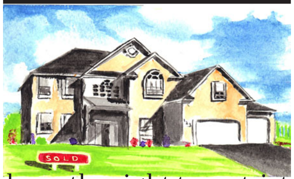
the right of residence. It was for Aquarius to allege and prove, in addition to the termination of the employment of the occupiers, that their rights of residence had been terminated. This it had not done. Aquarius only served notices in terms of section 9(2)(d)(i) on the occupiers.

Aquarius' case for eviction of the occupiers suffered from a fatal defect and therefore its appeal had to fail.

Both the clear meaning of the language of these sections and their context — the need to protect the rights of residence of vulnerable persons — indicate a two-stage procedure. Section 8 provides for the termination of the right of residence of an occupier, which must be on lawful grounds and just and equitable, taking into account, inter alia, the fairness of the procedure followed before the decision was made to terminate the right of residence. Section 8 at least requires that a decision to terminate the right of residence must be communicated to the occupier. Section 9(2) then provides for the power to order eviction if, inter alia, the occupier's right of residence has been terminated in terms of s 8, and the occupier nevertheless did not vacate the land, and the owner or person in charge has, after the termination of the right of residence, given two months' written notice of the intention to obtain an eviction order.

BAE ESTATES AND ESCAPES (PTY) LTD v TRUSTEES, THE LEGACY BODY CORPORATE

Property



A JUDGMENT BY BOZALEK J
WESTERN CAPE DIVISION,
CAPE TOWN
4 FEBRUARY 2020

2020 (4) SA 514 (WCC)

Not only does a body corporate derive its power to formulate conduct rules and to apply them from a statutory source, namely, the Sectional Titles Act, the exercise of those powers could affect a substantial number of people in important matters concerning the conditions under which they occupied the property concerned. In the exercise of those powers a body corporate may therefore be seen as exercising a public power or performing a public function, namely regulating and administering the conditions under which persons who share common property in a sectional title scheme must live.

THE FACTS

In May 2018 the owner of unit 107 in the Legacy sectional title scheme instructed BAE Estates and Escapes (Pty) Ltd to find a tenant for his unit. BAE did so, and the owner entered into a year-long lease agreement with two co-tenants. In terms of the lease the owner agreed that the tenants would be permitted to sublet the unit through Airbnb. The tenants did so. From late September 2018 onwards, a steady stream of complaints reached the Trustees of the Legacy Body Corporate concerning the conduct of these Airbnb occupants.

In May 2019 the owner wrote to the second respondent, a private company and the managing agent of the scheme, advising that he had issued instructions for his tenants to vacate the unit by the following day and that no further Airbnb bookings would be allowed. In the same month, BAE\s director notified the second respondent confirming that the tenants' lease had been cancelled.

The owner was advised by the second respondent, acting on behalf of the Trustees, that he was no longer permitted to carry out short-term letting of his unit and further that the Trustees had resolved to restrict BAE from operating within the scheme.

The Trustees resolved to restrict BAE from operating within The Legacy with immediate effect. It based its decision on conduct rule 37.3 of the scheme which provided that 'in order to retain the nature of the Scheme, short term holiday letting shall be permitted provided that such short term holiday letting is managed through a letting agency which is considered to be reputable for such purpose in the sole discretion of the Trustees. The Trustees shall in their sole discretion have the right to restrict any short term letting.'

BAE demanded that this resolution be withdrawn. The Trustees refused to do so. BAE then applied for an order reviewing and setting aside the Trustees' resolution restricting it from conducting business in the scheme. It contended that the resolution was unlawful and passed in error in that conduct rule 37.3 had no application since the applicant was not engaged in any short-term holiday letting, was procedurally unfair in that it was passed without any prior investigation into the applicant's role and without any prior notice to the applicant, was taken arbitrarily and without the Trustees applying their minds, was taken with an ulterior motive, namely, to simply prevent it from carrying on business within the scheme.

BAE contended also that the resolution or decision amounted to administrative action in terms of PAJA, the Promotion of Administrative Justice Act (no 3 of 2000) but that in any event if PAJA was not applicable, it was entitled to review the resolution in terms of the common law read with section 3 of the Constitution.

THE DECISION

Two primary issues arose. The first was whether the resolution was reviewable either as being administrative action in terms of PAJA or a decision or action which was reviewable at common law. The second issue was whether the decision was to be reviewed and set aside on its merits or for procedural reasons.

As regards the first issue, in order for a decision by a person other than a state organ to qualify as administrative action for the purposes of PAJA it must constitute the exercise of a public

power or the performance of a public function in terms of an empowering provision.
The Trustees argued that the resolution only affected owners and occupiers in the scheme; however, its terms in effect proclaimed that BAE was not a reputable letting agency for the purposes of short-term holiday letting. The harmful effect on BAE of the resolution and its publication to owners in the scheme was obvious.

The impugned resolution was not limited in its effect to owners or occupiers of the scheme. It had a direct and significant impact upon BAE, a party external to any contractually based arrangements administered by the body corporate acting through the Trustees.

To constitute administrative action in terms of PAJA a decision taken must also adversely affect the rights of a person and have a direct external legal effect. In the present instance, whereas previously BAE could engage in short-term holiday letting on behalf of its client, the owner, and potentially also on behalf of all the owners in the scheme, such right was removed by the body corporate's resolution. Furthermore, BAE's reputation was harmed.

Not only did the body corporate derive its power to formulate conduct rules and to apply them from a statutory source, namely, the Sectional Titles Act, the exercise of those powers could affect a substantial number of people in important matters concerning the conditions under which they occupied the property concerned. In the exercise of those powers a body corporate can be seen as exercising a public power or performing a public function, namely regulating and administering the conditions under which persons who share common property in a sectional title scheme must live.

The Trustee's impugned decision impacted adversely upon a third party which had an existing commercial relationship with one of the unit owners. The impugned decision constituted administrative action as defined in PAJA and ws therefore reviewable at its instance.

As far as the merits of the matter were concerned, three features stood out. Firstly, the resolution appeared not to have been preceded by any basic investigation of the underlying facts; nor was BAE or the owner afforded any prior opportunity to make representations regarding the proposed decision. Secondly, the decision went well beyond the provisions of conduct rule 37.3. Thirdly, there appeared to have been no basis upon which the problems arising from the presence of Airbnb occupants in the unit could be ascribed to BAE.

As far as BAE's responsibility for the problems emanating from unit 107 was concerned, BAE did play a role in attempting to alleviate the problems which arose from the presence of short-term Airbnb occupants of the unit. However, the Trsutees and the management company wrongly assumed that BAE was instrumental in the selection, placement or management of Airbnb occupants in unit 107. Had the proposed resolution been put to BAE before it was taken, its directors would in all probability have set the record straight and the Trustees might very well have been dissuaded from issuing the restriction ultimately imposed upon BAE.

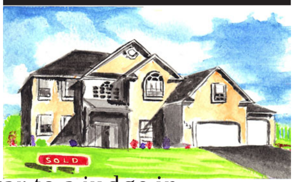
BAE's case on the merits was that it played no part in the short-term letting of unit 107 beyond attempting to assist, as an act of good faith, in resolving the issue of the many complaints arising from the occupation of the unit either by the then tenants or by Airbnb occupants. This being so, the Trustee's decision to restrict its activities in terms of conduct rule 37.3 was not rationally connected to the purpose for which it was taken or the information before the body corporate, was unreasonable, unlawful or was taken because irrelevant considerations were taken into account or vice versa. BAE's case that the decision taken was procedurally unfair in that it was not heard prior to the decision being taken was established.

As far as the scope of the restriction embodied in the resolution was concerned, there were clear indications that the Trustees acted arbitrarily or exceeded their powers by purporting to ban BAE from any dealings with the sale, leasing or management of property within the scheme. Conduct rule 37.3 limited the body corporate's powers to restricting a letting agency in the field of short-term holiday letting in circumstances where it considered such an agency was not 'reputable for such purpose.

The Trustees acted beyond their powers or arbitrarily in purporting to BAE entirely from all or any dealings with property or owners in the scheme. BAE had succeeded in establishing that the decision which it challenged amounted to administrative action and in establishing the review grounds upon which it relied, both substantive and procedural.

CHANGING TIDES 17 (PTY) LTD v MIEKLE

Property



A JUDGMENT BY VAN ZYL J
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
19 MAY 2019

2020 (5) SA 146 (KZP)

It is undesirable, impractical and not in the interests of justice to combine a judgment by confession with an application to declare an immovable residential property executable in compliance with the requirements of rule 46A.

THE FACTS

Changing Tides 17 (Pty) Ltd brought action against Miekle and the second defendant based upon their alleged failure to maintain payments in respect of a home loan, secured by a mortgage bond in favour of Changing Tides over their residential property. It claimed payment of the outstanding balance of the loan, interest thereon, costs and an order declaring the mortgaged property specially executable.

Following service of the summons, the parties entered into an agreement in terms of which the defendants agreed to a revised payment schedule, confessed to judgment in terms of rule 31(1), and agreed that the confession would not be used and the action would be stayed, subject to their compliance with the agreed arrangements

Changing Tides then sought judgment against the defendants in terms of their confessions to judgment on the grounds of their failure to adhere to the revised payment schedule, as agreed. It relied on the confession to judgment as executed by the defendants as part of the settlement agreement.

The court raised the question whether Changing Tides could properly obtain, in addition to a money judgment, an order declaring the residential property of the defendants specially executable.

THE DECISION

Changing Tides was seeking to combine the requirements of rule 46A, as applicable to matters where execution is to be levied against residential immovable property, with the procedure envisaged in rule 31(1)(c), where a defendant's confession to judgment is submitted through the registrar to a judge in chambers for judgment according to such confession.

Rule 46A is aimed at facilitating the access to court of a litigant, whose home is under threat, as well as enabling the court in arriving at a just decision regarding the issue. For instance, rule 46A(3) deals with notice of the intended court proceeding to the 'judgment debtor' and all other parties who may be affected, and requires as a rule that such application be served upon the judgment debtor personally.

It is entirely inconsistent with both the constitutional imperatives and the rules of court to telescope into a single procedure a confession to judgment which, by way of exception, may be dealt with in chambers in the absence of the parties, with a proceeding which by its very nature requires to be dealt with in open court after due notice to the affected persons, who may then appear and place facts or make representations to the court regarding the fate of the residential property concerned.

By service of the application for judgment by confession upon the defendants there was nothing to indicate to them, as lay persons, how they are to set about adequately placing before the judge in chambers any facts or make representations regarding the fate of the residential property concerned. Such service, in the circumstances, is therefore ineffective in satisfying the requirements of rule 46A.

It is undesirable, impractical and not in the interests of justice to combine a judgment by confession in terms of rule 31(3) with an application to declare an immovable residential property executable in compliance with the requirements of rule 46A.

NIEHAUS v HIGH MEADOW GROVE BODY CORPORATE

Property

A JUDGMENT BY VAN DER LINDE J
GAUTENG DIVISION, JOHANNESBURG
13 NOVEMBER 2018

2020 (5) SA 197 (GJ)

Spoliation relief does not avail an applicant whose electricity supply has been discontinued for failing to honour contractual obligations. But an exception to this general principle applies in the case where the supply of electricity is an incident of the possession of immovable property.

THE FACTS

Niehaus was the owner of an apartment and High Meadow Grove Body Corporate was the body corporate in respect of that property. In terms of the rules of the body corporate Niehaus had to pay levies in respect of general expenditure and electricity and other services. Niehaus fell into arrears with her levies and was unable to settle the arrear amount.

The body corporate decided to reduce her supply of electricity and it implemented that decision. As a result of the reduced electricity supply Niehaus was unable to use the stove and the oven to cook and prepare food, to boil water, to use the microwave, to use her geyser, to bath or shower unless she used cold water, to bath her children, and her children were unable to do their homework or study for their upcoming exams.

Niehaus brought an urgent application, after the electricity was reduced for an order directing the body corporate to restore the electricity supply to her property.

The body corporate contended that it was entitled by virtue of section 10 of the Sectional Title Schemes Management Act (no 8 of 2011), and the rules of the Sectional Title Scheme, to reduce the electricity supply. It stated that it was an express, alternatively tacit, alternatively implied term of an agreement between the Niehaus and the body corporate that Niehaus pay for the electrical supply which had been metered.

THE DECISION

One who asserts that a specific term of an agreement is ‘express, alternatively tacit, alternatively implied’ needs to give evidence of the agreement and its terms. It is insufficient merely to make the assertion.

In the present case, the evidence consisted only of the legal submission and there was no evidential material of the term of the agreement upon which the body corporate relied, and from which the inferences of either a tacit or an implied term could be drawn. Niehaus asserted that she was a possessor of electricity supply and had been deprived of that supply.

There is a general rule that spoliation relief does not avail an applicant whose electricity supply has been discontinued for failing to pay rental due in terms of a lease with the landlord. But there is an exception to the general principle. It applies in the case where the supply of electricity is an incident of the possession of immovable property. Then the discontinuance of electricity is a partial deprivation of possession of the immovable property itself.

Accordingly, where the incorporeal right, such as a right to the supply of electricity, is an incident of the possession of immovable property, then the mandament van spolie will protect interference with such possession, as if it were interference with possession of the immovable property itself.

In the present case, Niehaus’ possession clearly included possession of the incorporeal right of use of electricity. She could not live in her apartment without access to electricity, given the needs of her and the minor children. In these circumstances, Niehaus was entitled to the relief that she sought.

PETROPULOS v DIAS

A JUDGMENT BY MAKGOKA JA (PONNAN JA, SALDULKER JA, VAN DER MERWE JA AND MOKGOHLOA JA concurring)
SUPREME COURT OF APPEAL
31 MAY 2020

2020 (5) SA 63 (SCA)

A landowner has a right to lateral support and where subsidence or other destabilisation occurs, as a result of excavations on an adjacent property, the owner of the adjacent property will be liable in an action for damages, irrespective of whether she was negligent or not.

THE FACTS

In 1993, Dias built a house on his property. A certain amount of fill from excavations was used to level out the garden facing the sea, above property owned by his neighbour, Petropulos . Following complaints that the material from his property was falling onto Petropulos' property, Dias commissioned an engineer to design a retaining wall to solve this problem.

In 2007 / 2008 Petropulos commenced with plans to build a residential dwelling on her property. The plan involved excavating the property to produce three tiers, each to be retained by a retaining wall. The top level was to be positioned just below Dias' retaining wall. Excavations on Petropulos' property took place, and then construction of the concrete retaining walls was commenced and eventually completed some months later. During the course of the construction of the top retaining wall Dias' retaining wall largely collapsed.

At about the same time as these excavations took place and the commencement of his building operations, the second defendant, Venter, proceeded with an excavation on his property preparatory to the erection of a new garage. His excavation and newly constructed garage were completed but during June / July 2008 subsidence and cracking problems began to present themselves on his property. By 23 July 2008 these had reached such proportions that Venter had to evacuate his property, never to return. Similar problems had begun to manifest on Dias' property. Furrows appeared in the garden between his dwelling and Petropulos' property and a pool rail pulled away from the house structure.

Petropulos implemented measures to stabilise the slope of the mountainside. However, as the months and years passed more and more cracks and structural damage appeared in Dias' dwelling. Venter's dwelling was eventually demolished and a new dwelling built thereon.

Commencing in October 2009, Dias brought a damages action against Petropulos for damage caused to his property. His case was that the damage to his property was caused by the mobilisation in June 2008 of the scree mountain slope on which it was located. That slope mobilisation, Dias alleged, was caused through breaches by Petropulos of the duty of lateral support owed to his property.

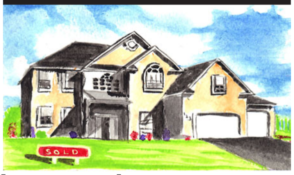
THE DECISION

The first question was whether or not the duty of lateral support was owed only in respect of land in its natural state.

The court a quo correctly held that the duty of lateral support was not limited to land in its natural state, but extended to buildings on the land. That court articulated an exception to that general principle. The court said that a duty of lateral support extends not only to land but also to buildings, save where such land has been 'unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land'. This exception is incorrect. There are sufficient safeguards in our law to meet the concerns sought to be addressed by this exception

The second question was whether or not the excavations on the Petropolus' property breach the duty of lateral support owed to Dias.

It was not in dispute that Petropolus' property was damaged by the slope failure in



July and August 2008. Petropolus' property was damaged when it moved laterally and downwards towards the excavation on Dias' property. This happened because lateral support, previously provided by Petropolus' property to Dias' property, had been removed. Given these considerations, the exact mechanism which caused the removal of lateral support is unimportant.

Petropolus argued that as Dias' property was contiguously situated on a slope with other properties, the weight of her and Venter's properties was meant to support the entire slope, and not only Dias' property. Accordingly, following the slope mobilisation and damage to his property, Dias did not, as a matter of law, have a cause of action for breach of lateral support. The court a quo correctly rejected this submission on the grounds that it is illogical to propose that if an excavation is of such large proportions that it causes not simply a localised subsidence or failure but also one which undermines an entire slope comprising multiple properties, then the owner of a contiguous property cannot sustain an action based on a breach of the duty of lateral support. To accept this reasoning would mean that a landowner whose excavation or breach causes far-reaching damage affecting a number of properties escapes liability whilst land owners, the consequences of whose breach are much more modest, are saddled with strict liability.

A third question was the issue of causation:it had to be asked whether, but for the excavation, the slope would have mobilised.

In this regard, the excavation was extensive, involving the removal of 5413 cubic metres of earth, 57 blasting shots as well as the removal of many large boulders. The excavation extended up to about 6 metres from Dias' property and was done without any bracing or support. It involved blasting at least one large boulder and many others which needed to be broken and removed. In these circumstances, it is hard not to accept that there was a clear nexus between the excavation and the slope failure.

The excavation on Petrolous' property had to be regarded as a 'substantial factor' or a proximate cause of the slope mobilisation. In the circumstances, it was safe to conclude that but for the excavation on Petrolous' property, the slip circle failure would most probably not have occurred. There was adirect and probable chain of causation between the excavation and the slope mobilisation which caused damage to Dias' property.

Broadly stated, every landowner has a right to lateral support and where subsidence or other destabilisation occurs, as a result of excavations on an adjacent property, the owner of the adjacent property will be liable in an action for damages, irrespective of whether she was negligent or not. That does not mean that an adjacent property owner is not entitled to excavate. His or her entitlement to do so is limited by the duty not to withdraw the lateral support which is afforded to the adjacent property. The right is reciprocal. Neither culpa nor dolus is a requirement for liability for damage caused by the withdrawal of lateral support. If an aggrieved property owner can prove that he or she suffered pecuniary loss through dolus or culpa, she can likewise sue in delict by virtue of the lex Aquilia.

The duty of lateral support is a natural right incidental to the ownership of the property and not servitudal in nature. It is a principle of neighbour law which rests on justice and fairness. It is a duty owed to land not only in its natural state, but also extends to buildings upon it.

The appeal failed.

TRUSTEES, OREGON UNIT TRUST v BEADICA 231 CC

A JUDGMENT BY THERON J (KHAMPEPE ADCJ, JAFTA J, MAJIEDT J, MATHOPO AJ, MHLANTLA J and TSHIQI J concurring, FRONEMAN J, MADLANGA J and VICTOR AJ dissenting)
CONSTITUTIONAL COURT
17 JUNE 2020

2020 (5) SA 247 (CC)

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. Contracts, freely and voluntarily entered into, should be honoured. The power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases.

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 successfully appealed an order which was given to this effect. Beadica brought a further appeal in the Constitutional Court.

THE DECISION

In our new constitutional era, a careful balancing exercise is required to determine whether enforcement of contractual terms would be contrary to public policy in the circumstances. A court must also exercise ‘perceptive restraint’ when approaching the task of invalidating, or refusing to enforce, contractual terms. A court will use the power to invalidate a

contract or not to enforce it, sparingly, and only in the clearest of cases.

This follows from the notion that contracts, freely and voluntarily entered into, should be honoured. The power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases. However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution.

In the present case, the inescapable inference to be drawn from the facts was that there were no circumstances that prevented Beadica from complying with the terms of the renewal clauses in the leases. The clauses were favourable to it. The only inference to be drawn was that Beadica simply neglected to comply with the clauses in circumstances where it could have complied with them. It followed that Beadica failed to discharge the onus resting on it to demonstrate that in the circumstances of this case, the enforcement of the clauses would be contrary to public policy.

The conduct of the Trust did not amount to snatching at a bargain or exploiting a mere technical slip on the part of Beadica. Its failure to exercise the right of renewal within the requisite notice period resulted in the termination of the lease agreements by effluxion of time. There was no cancellation of the lease agreements on the part of the Trust. Instead, the termination occurred automatically by operation of the clear terms of the lease agreements regarding the termination date, in the absence of a valid renewal.

In any event, the termination of the' franchise agreements did not follow automatically upon the termination of their lease agreements.

Beadica failed to adequately explain how the enforcement of the strict terms of the renewal clauses would be contrary to public policy. It contended that enforcement would be inimical to the constitutional value of equality as enunciated in section 9(2) of the Constitution. Section 9(2) provides that '(e)quality includes the full and equal enjoyment of all rights and freedoms'. This provision recognises that the constitutional promise of equality cannot be sustained merely by the achievement of formal equality: it authorises the taking of 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.

Beadica failed to discharge the onus of demonstrating that the enforcement of the impugned contractual terms would be contrary to public policy. It was fatal to its case that it did not adequately explain why it did not comply with the terms that they sought to avoid. In any event, the public policy considerations advanced by Beadica was insufficient to demonstrate that it would be contrary to public policy to enforce the terms it sought to avoid.

The appeal failed.

MARAIS N.O. v MAPOSA

A JUDGMENT BY PLASKET JA (PETSE DP, MBHA JA, VAN DER MERWE JA and NICHOLLS JA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2020

2020 (5) SA 111 (SCA)

Section 15 of the Matrimonial Property Act (no 88 of 1984) seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other. A third party to a transaction contemplated by subsections 15(2) or (3) that is entered into without the consent of the non-contracting spouse is required, in order for consent to be deemed and for the transaction to be enforceable, to establish that he or she did not know that consent was lacking, and that he or she could not reasonably have known that consent had not been given. The burden of bringing section 15(9)(a) into play rests on the party seeking to rely on the validity of the transaction.

THE FACTS

Broodie was the widow of Mr S Broodie, and the executrix in his deceased estate. The deceased died in 2016. Some two years prior to the death of the deceased he had transferred a 25% member's interest in Seepunt Eiendomme CC to Maposa and the second and third respondents

The third respondent was a woman with whom the deceased had had a long-standing extramarital relationship. The deceased went through the rites of a customary marriage with the third respondent in 1988. The putative customary marriage between the deceased and the third respondent was legally invalid by virtue of his pre-existing civil marriage with Broodie. The two children born of the relationship between the deceased and the third respondent were the first and second respondents.

The respondents did not know that Broodie and the deceased were married in community of property. They did not make any enquiries into the matrimonial property regime of the deceased and the applicant. The third respondent's evidence was that the deceased's conduct gave her no reason to suspect that he was not ordering his life in accordance with North Ndebele tradition and custom.

Broodie sought an order that the registered transfer by the deceased of the 25% member's interest in Seepunt Eiendomme CC to Maposa and the second and third respondents be declared unlawful and void. Broodie contended that the transfer was invalid because it occurred without her consent, and thus in breach of sub-sections 15(2) and (3) of the Matrimonial Property Act (no 88 of 1984).

THE DECISION

The effect of section 15 is that firstly, as a general rule, a spouse married in community of property 'may perform any juristic act in connection with the joint estate without the consent of the other spouse'; secondly, there are exceptions to the general rule. In terms of subsections 15(2) and (3), a spouse 'shall not' enter into any of the transactions listed in these subsections without the consent of the other spouse. Subject to what is said about the effect of section 15(9)(a), if a spouse does so, the transaction is unlawful, and is void and unenforceable. Section 15(9)(a) deems the transaction concerned to have been entered into with the required consent if the person to whom the disposition was made did not know and reasonably could not have known that it was effected contrary to section 15(2) or (3).

Section 15 thus seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other. A third party to a transaction contemplated by subsections 15(2) or (3) that is entered into without the consent of the non-contracting spouse is required, in order for consent to be deemed and for the transaction to be enforceable, to establish two things: first, that he or she did not know that consent was lacking; and secondly, that he or she could not reasonably have known that consent had not been given. The burden of bringing section 15(9)(a) into play rests on the party seeking to rely on the validity of the transaction.

The reference to reasonableness in the phrase 'cannot reasonably know' imports an objective standard into the proof of this element: it must be established with reference to the standard of the reasonable person, in terms of

what the reasonable person would do in the circumstances and the conclusion that the reasonable person would draw. In other words, a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries.

A duty is cast on a party seeking to rely on the deemed-consent provision of section 15(9)(a) to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married, if so, in terms of which marriage regime, whether the consent of the non-contracting spouse is required and, if so, whether it has been given. Anything less than this duty of enquiry, carried out to the standard of the reasonable person, would render s 15(9)(a) ineffective. It would not protect innocent spouses from the maladministration of the joint estate and would undermine the Matrimonial Property Act's purpose of promoting equality in marriages in community of property.

Section 15(3)(c) only requires the non-contracting spouse's consent if the donation concerned 'does not and probably will not unreasonably prejudice' his or her interests. Section 15(8) provides the means to determine this issue. The donation of 75 percent of the members' interest in Seepunt constituted the lion's share of the joint estate. In effect, the respondents claimed an asset valued at R20m for themselves, leaving a residue of perhaps two or three million rand for Mr Broodie's 'first family'. The reason given by Ms Ledwaba for Mr Broodie's donation was to make provision equally for both of his families. This donation certainly did not do that but rather benefited Ms Ledwaba and her children in a disproportional manner as compared to Mr Broodie's children by Ms Broodie. These factors, on their own, lead to the conclusion that the donation certainly prejudiced the interests of Ms Broodie, and therefore required her consent.

Ledwaba admitted that she knew that Mr and Ms Broodie were married but she made no enquiries as to how they were married and whether Mr Broodie required Ms Broodie's consent to the donation. She did not even ask Mr Broodie if he had discussed the transfer with Ms Broodie. As she made no enquiries despite her knowledge that Mr Broodie was married, she did not, on her own version, establish that she, as a reasonable person, could not have known that the transaction was entered into without Ms Broodie's consent.

The transaction had to be set aside, with the consequence that the members' interest in Seepunt reverted to the joint estate of Mr and Ms Broodie.

Section 15(3)(c) only requires the non-contracting spouse's consent if the donation concerned 'does not and probably will not unreasonably prejudice' his or her interests. Section 15(8) provides the means to determine this issue.

The donation of 75 percent of the members' interest in Seepunt constitutes the lion's share of the joint estate. In effect, the respondents claim an asset valued at R20 million for themselves, leaving a residue of perhaps two or three million rand for Mr Broodie's 'first family'. I bear in mind that the reason given by Ms Ledwaba for Mr Broodie's donation was to make provision, equally it would appear, for both of his families. This donation certainly does not do that but rather benefits Ms Ledwaba and her children in a disproportional manner as compared to Mr Broodie's children by Ms Broodie. These factors, on their own, lead me to the conclusion that the donation certainly prejudiced the interests of Ms Broodie, and therefore required her consent.

SA SIGHT MANAGEMENT INITIATIVE NPO v BENADE

A JUDGMENT BY OPPERMAN J
FREE STATE DIVISION,
BLOEMFONTEIN
19 JULY 2019

2020 (5) SA 211 (FB)

A non-profit company which engages in charity work may prevent a party with which it has concluded a restraint of trade agreement from violating the restraint by doing business under the guise of charity when that person gains personally from the profits in contravention of the prescriptions regulating non-profit organisations, and to the detriment of the beneficiaries.

THE FACTS

SA Sight Management Initiative NPO (Sight) and Benade entered into an agreement, the purpose of which was to improve access to basic eyecare services in underserviced areas in South Africa by mobile units or on fixed premises. Sight's objective was to provide such services as a charity to the community.

The agreement combined characteristics of agreements of supply, lease, profit-share, subcontract and the supply of services. The intention of the parties was that Benade would be an independent contractor. Benade's duty was to provide a free, practical eye-screening, after which he was to assist the member of the public to choose a frame and make an arrangement for the lay-by payment of the glasses, upon which the pre-fixed tariff for the glasses would be collected by Benade. On payment of 75% of the price for the glasses, the laboratory automatically received the script, manufactured the glasses and delivered them directly to Benade.

The agreement, inter alia, provided that Benade would not at any time during the course of the agreement or during any renewal or extension thereof or during the duration of a restraint period, enter into negotiations or conclude any agreement with any third party which would in any other way conflict with or detract from the objective set out in the agreement, or offer products or services similar or related to the products or services rendered by Sight. For the duration of the agreement Benade was to place exclusively with Sight all orders for products relating to the services rendered in execution thereof. Benade undertook that he would not from the date of termination of the agreement for a period of two years within an allotted area, be associated and / or concerned with, interested and / or engaged in and / or interest itself in any firm, business, company, close corporation or any other form of business that carried on business similar to the business of Sight.

Benade fell into arrears with his payments to Sight, and Sight remained liable towards the laboratory for payment of all those applicable frames and glasses manufactured by the laboratory. Benade's arrears reached the amount of R201 619,94. The business relationship between the parties deteriorated to such an extent that it was finally terminated

Benade then engaged in his private capacity and not in terms of the agreement in business with the public. They became clients for his own gain.

Sight claimed payment of the amount due to it, and brought an application for a final interdict to enforce the covenant of restraint of trade.

THE DECISION

Sight did not want to prevent Benade from doing charity work. Its charity work was for the community and nobody could have a monopoly in any form on this. Its intent was, in terms of the contract, to prevent Benade from doing business under the guise of charity and to gain personally from the profits in contravention of the prescriptions regulating non-profit organisations, and to the detriment of the beneficiaries.

Benade was contracted as a subcontractor to do charity work. He was bound by the contract to ensure income to the charity by way of service and profit. He sourced his clients under the auspices of Sight's identity.

The plea that the business, in contravention of the covenant, was his only means of making a living, did not show that it was against public interest and unfair if measured against the evidence as a whole. The length of time for which the restraint operated was not unduly long; the geographical area to which the restraint applied was limited to the areas specified in the contract; and Benade still had the capacity to earn a living in other areas.

Sight was entitled to protection of its business which generated an income by way of profit and which was ploughed back into the non-profit organisation to render welfare services to the indigent, not charity. Charity is not a protectable right to be regulated horizontally between entities and for them to claim monopoly on via contract. The covenant of restraint trade was not automatically illegal and unenforceable because Sight was a non-profit organisation.

The application succeeded.

STANDARD BANK NOMINEES RF (PTY) LTD v HOSPITALITY PROPERTY FUND LTD

A JUDGMENT BY KEIGHTLEY J
GAUTENG DIVISION, JOHANNESBURG
12 JUNE 2019

2020 (5) SA 224 (GJ)

The right of a dissenting shareholder to approach the court under section 164(14) of the Companies Act (no 71 of 2008) must be exercised before the expiry of the 30-day period prescribed under sub-section (12)(b). If it does not do so, the offer will have lapsed and under sub-section (14)(b) and the shareholder is precluded from applying to court.

THE FACTS

Standard Bank Nominees RF (Pty) Ltd (Nominees) was the registered shareholder of the shares in Hospitality Property Fund Ltd (HPF), a real-estate-investment trust company. Its securities were traded publicly and listed on the Johannesburg Stock Exchange. Nominees was entitled to exercise the right of appraisal provided for in section 164 of the Companies Act (no 71 of 2008).

On 1 July 2015 HPF issued a circular to holders of its units giving notice of a meeting at which a special resolution would be proposed. If adopted, the resolution would result in the implementation of a scheme of arrangement in terms of which the units' linked capital structure would be altered to a simple all share structure. This involved a substitution of all units for no par value B shares. All unit holders would become holders of no par value B shares.

The proposed scheme of arrangement was such that it triggered the rights of appraisal under section 164 of all affected shareholders, including Nominees. HPF duly notified shareholders to this by way of a notice under section 164(2)(b). Nedgroup Investment Advisors (Pty) Ltd (Advisors) had been appointed as a discretionary financial service provider to manage, among others, an investment fund which included in its portfolio the shares, the beneficial owner of which was the Standard Bank of South Africa Ltd, the second applicant.

Advisors engaged with HPF by giving the required notice and demand to signal an intention to exercise the appraisal right provided for in terms of section 164. Following a demand, Advisors instituted an application for appraisal of the shares in the High Court under section 164(14)(b). In terms of this sub-section, a shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has made an offer that the shareholder considers to be inadequate, and

that offer has not lapsed.

HPF noted that Nominees was the shareholder as defined in the Act, and that the objection notice sent by Advisors were invalid as they ought to have been sent by Nominees.

On the basis of these errors, Nominees averred that Advisors' attempts at exercising the appraisal rights under section 164 were invalid from the outset. As such, the steps taken had no legal effect on Nominees' rights in the shares, as Nominees had not taken any of the compulsory steps to perfect its appraisal rights. Therefore, none of the consequences flowing from a valid enforcement of the appraisal right under section 164 could follow and, as such, Nominees' rights to the shares substituted under the scheme of arrangement remained valid, enforceable and actionable.

Nominees applied for an order declaring that it was the holder of the shares in question, was entitled to exercise all rights in and to and arising out of the shares and was entitled to be paid certain sums, arising from distribution declarations made by HPF in the period February 2016 to date.

The principal claim relied on Nominees' contention that Advisors' purported attempt to exercise the appraisal rights in respect of the shares was invalid, irregular, and had no legal effect on Nominees' shareholding. Nominees was the registered shareholder of the Units, and, when the substitution was effected under the scheme of arrangement it became the registered shareholder of the no par value B shares with full rights as shareholder, unaffected by whatever legal consequences would have flowed from a valid pursuit of the appraisal right under section 164. In these circumstances, Nominees was legally entitled, as shareholder, to its share of the dividends declared and distributed by HPF between the time that the substitution of shares under the scheme of arrangement took effect until the present. Six dividends had been declared and distributed by HPF in this period, and Nominees was excluded from the distribution.

THE DECISION

The issue was whether, even assuming that the preceding notice and demand were duly authorised by Nominees and were valid, the withdrawal of the fatally flawed appraisal application had the effect under sub-section 10, read with sub-sections (9)(a), (12)(b) and (14)(b), of reinstating Nominees' full rights in its shares without interruption.

Sub-section 10 provides that if any of the events contemplated in subsection (9) occur, all of the shareholder's rights in respect of the shares are reinstated without interruption.

Sub-section 9(a) provides that a shareholder who has sent a demand in terms of subsections (5) to (8) has no further rights in respect of those shares, other than to be paid their fair value, unless the shareholder withdraws that demand before the company makes an offer under subsection (11), or allows an offer made by the company to lapse, as contemplated in subsection (12)(b).

Sub-section (12)(b) provides that every offer made under subsection (11) lapses if it has not been accepted within 30 business days after it was made.

Central to HPF's interpretation of the provisions in question was the meaning to be ascribed to sub-section (12)(b) when it provides that an offer of fair value made by a company 'lapses if it has not been accepted within 30 business days after it was made'. HPF contended that this means 'rejected'. This proposed interpretation was contrary to the ordinary, grammatical meaning. On the plain words used in sub-section (12)(b), an offer is open for acceptance for 30 business days after it has been made. At the end of those 30 days, in the absence of an acceptance by the dissenting shareholder, the offer lapses. This is regardless of whether the shareholder has actually dismissed or refused the offer or not.

Taking into account the context and purpose of the provision, there was a clear structural and contextual link between the associated sub-sections. All of them referred to, and assigned a consequence to the lapsing of an offer. For example, under sub-section (9)(a), unless a dissenting shareholder allows an offer to lapse, its full rights in respect of its shares are limited to the right to obtain fair value. The clear contextual link between these sections meant that sub-section (14) was not a stand-alone provision to be interpreted and applied separately from sub-sections (9), (10) and (12)(b). Furthermore, it meant that the reference to 'an offer that has not lapsed' in ss (14)(b) must have the same meaning as similar references to a lapsed offer in the other subsections.

It followed that the right of a dissenting shareholder to approach the court under sub-section (14) must be exercised before the expiry of the 30-day period prescribed under sub-section (12)(b). If it does not do so, the offer will have lapsed and under sub-section (14)(b) and the shareholder is precluded from applying to court. Nominees was required to exercise that right within the 30-day period). That period had passed, and the remedy was no longer available to it.

... continued at page 115

CARATCO (PTY) LTD v INDEPENDENT ADVISORY SERVICES (PTY) LTD

A JUDGMENT BY CACHALIA JA (WALLIS, JA NICHOLLS JA, DLODLO JA AND KOEN AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2020

2020 (5) SA 35 (SCA)

Insolvency

Section 143 of the Companies Act (no 71 of 2008) regulates the remuneration of business rescue practitioners by the company under business rescue. It does not apply to any other fee arrangements that may be concluded between a practitioner and a third party.

THE FACTS

IndependentAdvisory Services (Pty) Ltd was a company specialising in business rescue. On 9 October 2015, two of its directors, Klopper and Peters, were appointed as joint business rescue practitioners by Galaxy Jewellers (Pty) Ltd. Klopper discussed the payment of a success fee with Olivier, Galaxy's managing director, who agreed a fee of R2m with Mr Tom Watson. Watson was the managing director of Caratco (Pty) Ltd, a company which controlled Galaxy. On 20 February 2016 he confirmed this agreement in an email to Klopper. On 24 March 2016 Caratco's attorney informed Klopper that he would advise him in due course which entity in the Galaxy group would be chosen to be responsible for payment of the fee so as to maximize any income tax advantage to the group.

On 30 March 2016, Holfeld requested Klopper by email to submit his company's invoice to Caratco. IAS invoiced Caratco for payment of the R2m, excluding VAT. Caratco ignored the invoice and IAS's subsequent demand for payment.

IAS brought motion proceedings against Caratco for payment of the debt on 4 August 2016. Watson admitted the agreement between IAS and Caratco but denied liability on several other grounds.

In an application for leave to appeal an adverse order given in the court a quo, Caratco contended that the issue as to whether a business rescue practitioner may earn a success fee outside the strictures of section 143 of the Companies Act (no 71 of 2008) involved important questions of public policy. Caratco contended that section 143 of the Act, which provides for the remuneration of business rescue practitioners, is the sole means by which they may be remunerated. Therefore any fees agreed upon outside of its terms are impliedly prohibited. It concluded that the agreement should be declared void in accordance with its powers under section 218 of the Act.

THE DECISION

Section 143 regulates the remuneration of business rescue practitioners by the company under business rescue. It says nothing about any other fee arrangements that may be concluded between a practitioner and a third party. The agreement in issue in the present case was such an arrangement. Therefore, whatever the scope of section 143 regarding such fee arrangements, it did not apply in the present case.

Even if it was accepted that section 143 was the sole basis by which business rescue practitioners could be paid, there were no indications in the section suggesting that an agreement that does not fall within its ambit is void. In the absence of any such clear expression, the question as to whether or not the agreement is void depends on whether this inference may be drawn from the language of the statute, or whether such intention may be imputed to the lawmaker.

Caratco attempted to bolster its case by relying generally on two other provisions, sections 75(3) and 76. It pleaded that because a business rescue practitioner has the powers to manage and control the company in terms of s 140(3)(b), and the responsibilities, duties and liabilities of a director as set out in sections 75(3) and 76, its failure to fulfil its

responsibilities and duties for which these sections provide rendered the agreement void.

Section 75 deals with a director's duty not to have personal financial interests in future or existing contracts with the company. Section 140(3)(b) imposes the same general obligations and fiduciary duties of a director under section 75 upon a business rescue practitioner when he or she assumes this responsibility, mutatis mutandis. The directors remain in office under section 137(2) acting under the practitioner's authority. The practitioner does not become a director. At common law, which applies to section 75, a director has a fiduciary duty to avoid any conflicts of interest with the company. In general, therefore, a director cannot have an interest in a contract with the company unless it approves the contract at a general meeting after disclosure of the interest by the director. Where no disclosure is made the contract is voidable (not void) at the company's instance.

However, the section applies only where there is a single director, who does not hold all the shares in the company. In addition, even assuming the section is broad enough to include agreements between the director and a third party, as opposed to with the company itself, the agreement must, at the very least, be one in which the company has a material interest. The agreement between IAS and Caratco is not one in which Galaxy had any interest. It therefore did not apply to Galaxy, which had a board of directors, not a single director.

It was clear from the evidence that Watson, who was the managing director of Caratco and the controlling mind of the Galaxy group, was a central figure in negotiating and concluding the agreement. So, neither Caratco nor anyone else in the Galaxy group could complain that they were unaware of the agreement or that it amounted to a conflict of interest having regard to the business rescue practitioner's fiduciary duty to Galaxy. On the contrary if anyone had cause to complain it may have been Galaxy (the entity under business rescue) and not Caratco.

The application was dismissed.

continued from page 113 ...

Subsection (10) read with sub-section (12)(b) does not have the effect of undermining the right to pursue a determination of fair value in court. It does not abolish a shareholder's right of appraisal in circumstances where a sub-section (14) application has been validly and timeously instituted. In those circumstances, the appraisal right remains vested in the dissenting shareholder while awaiting a determination by the court.

Nominees was the registered shareholder. Regardless of any intention it may have had to exit its shareholding against fair value for its shares, it was legally required to follow the prescribed process in order to enforce its right of appraisal under s 164. Critical to the enforcement of this right was the requirement that, if it did not want to accept HPF's offer of fair value, it had to apply to court for a determination of fair value before the end of the 30-day period. Advisors' application to court did not meet this requirement as it was not the registered shareholder. There was no application by Nominees within the prescribed period. Consequently, it lost its right to approach the court for a determination of fair value. This triggered the default position under sub-section 10.

The effect of this was that Nominees was reinstated to its full rights in respect of its shares. The further effect was that it was entitled to the six dividends declared during the interim period.

HLUMISA TECHNOLOGIES LTD v NEDBANK LTD

A JUDGMENT BY LOWE J
EASTERN CAPE DIVISION, GRAHAMSTOWN
10 DECEMBER 2019

2020 (4) SA 553 (ECG)

An application for rescission of judgment does not automatically suspend a judgment or an order of court.

THE FACTS

A final order of winding-up was issued against Hlumisa Technologies Ltd on 15 June 2018. The effect of the final order of winding-up was to place the control of all assets of the company in liquidation in the hands of the liquidator and to discharge the directors.

An application to rescind the final order of winding-up was issued on 14 May 2019. Hlumisa sought orders directed at placing the directors of the company in control of the bank account of the company in liquidation pending the finalisation of the application for the rescission of the final order of winding-up.

The application was based on the assertion that the effect of a pending application for the rescission of a final order of winding-up automatically suspends the operation and execution of the final order of winding-up and, in effect, releases the company and its assets from the consequences of the final order of winding-up.

THE DECISION

The nature of the dispute thus requires a finding to be made as to whether or not the filing of an application to rescind a final order of winding-up automatically suspend the operation and execution of the final winding-up order

In *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd* 2016 (6) SA 466 (GJ), it was held that an application for rescission of judgment does not automatically suspend a judgment or an order of court, and that a person against whom the decision which is the subject of an application for rescission was given can always approach a court under rule 45A to suspend its execution pending the finalisation of an application for rescission. The judgment was directly in point and applicable to the present case.

Fundamentally, it would be absurd if the operation and execution of an order of court, and particularly a final order of winding-up or sequestration, were to be automatically suspended by simply filing an application for the rescission of that order. Such a rule would enable respondent or defendant to frustrate the operation of an order of court by launching an application for the rescission of the order and, unlike in circumstances of an application for leave to appeal or the noting of an appeal, the successful party would not be able to invoke the provisions of s 18 of the Supreme Court Act and would potentially be without a remedy to meet the prejudice which may follow as a consequence.

The application was premised upon an incorrect proposition of our law as to suspension of an order of court upon a rescission application being lodged, without an application being sought for relief in terms of rule 45A. This was more so in respect of a final liquidation order.

The application was dismissed.

FARMERS TRUST v COMPETITION COMMISSION

A JUDGMENT BY TOLMAY J
GAUTENG DIVISION,
PRETORIA
11 MAY 2017

2020 (4) SA 541 (GP)

Competition

To obtain a search warrant ex parte, the Competition Commission needs to demonstrate that there are reasonable grounds to believe that (a) a prohibited practice has taken place, was taking place or was likely to take place on or in the premises; or (b) anything connected with an investigation in terms of the Competition Act (no 89 of 1998) was in the possession of, or under the control of, a person who was on or in those premises.

THE FACTS

The Competition Commission claimed that a search warrant to enter, search and seize information, documents, data and records from the premises belonging to the Farmers Trust and the other respondents was required. It was investigating alleged contraventions of section 4(1)(b) of the Competition Act (no 89 of 1998) as the respondents were alleged to have entered into agreements or engaged in practices to fix the price and trading conditions for the supply of fresh fruits and vegetables.

The Commission stated that it received a complaint from the Department of Agriculture, Forestry and Fisheries that intermediaries were involved in anti-competitive behaviour in their activities at fresh-produce markets in the country. It stated that cartel conduct was very secretive and once detected requires urgent intervention. It was also stated that the ease with which evidence could be destroyed made such investigations very sensitive.

The Commission set out in some detail the facts on which it based its application and said that the conduct of the respondents involved undercutting the prices charged by smaller intermediaries by charging way below the average market price for certain agreed periods of a trading day. It alleged that the respondents kept their prices unsustainably low during these periods and quickly increased prices significantly as soon as the small intermediaries ran out of stock. It alleged that the respondents were aware that their arrangements were unlawful in that they suppressed competition by driving their competitors out of the market and by agreement increased prices paid for freshly produced fruits and vegetables by consumers. This gave rise to a reasonable apprehension that the respondents had an incentive to hide or destroy evidence regarding their behaviour if they were to be afforded notice of the intended search and seizure. This would defeat the purpose of the investigation. The Commission indicated that search-and-seizure procedures would be the only effective way of investigation and less invasive methods would not yield the desired outcome.

After receiving the complaint, the Commission started investigating these allegations and these investigations led to the launching of the application for the search warrant. It set out in detail how the search and seizure would be conducted and also names the persons who would be involved in the procedure.

The order was granted. The respondents then applied for a reconsideration of the order.

THE DECISION

In granting an order of the kind in question, a court should take into account a number of factors including the nature of the order granted and the period during which it is to remain operative, whether an imbalance, oppression or injustice will result and, if so, the nature and extent thereof, and whether redress is open to attainment by virtue of the existence of other or alternative remedies. Each case will turn on its facts and the peculiarities inherent therein.

The reasons why the aggrieved party was not afforded the opportunity to be informed about the application are of great importance. The potential for injustice and possible prejudice are also factors of importance. On reconsideration all relevant circumstances will inform the decision ultimately taken by the court.

Certain principles evolved that should be kept in mind when investigative processes are considered:

(a) Although a respondent may be obliged to give evidence under oath, be subjected to a hearing and be required to submit its business affairs and documentation to public scrutiny, it was found that its rights are not affected in any real sense. The decision to investigate and the process of investigation do not adversely affect the rights of a respondent that have a direct and external legal affect.

(b) The nature of an investigation requires that the Commission be given an opportunity to gain access to documents, without the suspected firm being given prior warning, in order to prevent interference with the investigative process and possible destruction of evidence.

(c) A suspect firm will be able to exercise its rights, including its right to be heard in the event of the Commission issuing a notice of referral.

The Commission needed to demonstrate that from the information on oath there were reasonable grounds to believe that (a) a prohibited practice had taken place, was taking place or was likely to take place on or in those premises; or (b) anything connected with an investigation in terms of this Act was in the possession of, or under the control of, a person who was on or in those premises.

The Act aims to serve the greater good and it is self-evident that, in order to be able to do so, the Commission had to be able to investigate a complaint properly. It would be counterproductive if the Commission was required to inform a party about the possibility of a search and seizure, as it would defeat the purpose of an investigation. Under these circumstances it was justifiable that a suspected firm is not given notice of the application in terms of section 46. If, however, it would turn out that the investigation was vexatious or brought in ill faith a suspected firm may in due course be able to avail itself of any legal remedy available to it, to address any damages that it may have suffered.

The application for reconsideration was dismissed.

In the light of the aforesaid the reasons why the aggrieved party was not afforded the opportunity to be informed about the application are of great importance. The potential for injustice and possible prejudice are also factors of importance. On reconsideration all relevant circumstances will inform the decision ultimately taken by the court.

HOUTBOSPLAAS (PTY) LTD v NEDBANK LTD

A JUDGMENT BY MOTHLE J
GAUTENG DIVISION,
PRETORIA
19 DECEMBER 2019

2020 (4) SA 560 (GP)

Banking

In determining the applicability of regulation 7(f)(ii) of the Financial Intelligence Centre Act (no 38 of 2001) the voting rights of all shareholders in the company, as determined by the Memorandum of Incorporation, must be taken into account.

THE FACTS

Houtbosplaas (Pty) Ltd and the second applicant, TBS Alpha Beleggings, held accounts with Nedbank Ltd. When the provisions of section 21(2) of the Financial Intelligence Centre Act (no 38 of 2001) became applicable, Nedbank was obliged to verify the identity of the shareholders of the applicants. The shareholding in each of the two companies was held by four registered trusts. Each trust held ordinary shares conferring 25% of the voting rights in the companies and preferential shares conferring 20% of the voting rights in the companies. One preferential par-value share in each company, conferring 20% of the voting rights in each company was held by an individual, Van Dijkhorst.

The memorandum of incorporation of the two companies restricted the voting rights accorded to the preference shares as they concerned ‘a resolution that may have the result that a determination is made concerning the property of the company for their own benefit or for the benefit of the estate’.

Nedbank requested Van Dijkhorst to provide documents of the applicants’ shareholders to verify the identities thereof, in particular copies of the trust deeds and letters of authority of the trusts that held shares in the applicants. Van Dijkhorst was of the view that for purposes of verification of the identities of the shareholders of the applicants, he was not obligated to disclose the trust deeds as these were confidential. However, he stated that he was prepared to show trust deeds to the officials of Nedbank and to allow them to take photographs if necessary.

Nedbank officials saw the trust deed but did not take the photographs as invited because the trust deed was either not complete or not completely legible. Van Dijkhorst provided Nedbank with copies of letters of authority for all four trusts. The applicants’ auditors also provided copies of three of the four trust deeds to Nedbank.

After writing letters of demand to Judge Van Dijkhorst to submit a copy of the outstanding trust deed without success, Nedbank restricted access to both banking accounts and declined to honour any transactions on those accounts. The applicants then terminated the mandate of Nedbank and demanded that the investments held with Nedbank should be transferred to new accounts opened with another bank, Absa. Nedbank refused, maintaining that the very closure of an account is a business transaction referred to in section 21 of the Act. The applicants lodged a complaint with the ombudsman. The ombudsman’s report found that the request for the documents appeared to be normal administration by the bank.

As Van Dijkhorst could not afford the applicants’ funds to be tied up for an indefinite period, he provided the bank with a copy of the outstanding trust deed. A month thereafter Nedbank released the funds.

The applicants contended that Nedbank acted unlawfully in placing the restriction on access to the accounts and claimed the amounts of R66 814,68 and R114 288,63 plus interest, respectively, as compensation for the loss of the interest on their investments, incurred as a result of the restriction.

The parties approached the court for determination of whether the restriction / freezing of the applicants’ accounts by Nedbank was lawful.

THE DECISION

In terms of regulation 7(f)(ii) of the regulations published under the Act, a bank must obtain from a company the full names, date of birth, identity number . . . concerning the natural or legal person, partnership or trust holding 25% or more of the voting rights at the general meeting of the company concerned.

Nedbank contended that since the shareholding of each trust was 25%, the applicants fell within the provisions of regulation 7(f)(ii). The applicants contended that in determining the voting rights exercised by each trust shareholder in a general meeting, one has to include the preferential shares held by such trust and, in essence, each trust will in fact have 22% of the voting rights. Consequently, Nedbank erred in invoking the provisions of reg 7(f)(ii) to demand the trust deeds of the shareholders of the applicants.

The applicants' submission was correct. Nedbank's interpretation of regulation 7(f)(ii) in relation to the applicants was incorrect. Nedbank was therefore not lawfully entitled to demand the trust deeds of the trust's shareholders of the applicants. Nedbank ignored or misinterpreted the provisions of the Memorandum of Incorporation of the two companies and thus acted unlawfully in imposing the restrictions on access to the accounts. Nedbank was therefore liable for payment of the loss of mora interest.

Nedbank appeared to hold the view that its customers with which it had a business relationship were obliged by the Act to provide verification documents to it on demand. However, apart from demanding new customers to submit identification documents, the Act does not oblige a bank to demand from their existing account-holders, and enforce that demand for submission of identity documents for verification, by restricting access to their accounts. On the contrary, section 21B(4) enjoins a bank to establish the address of the Master of the High Court where a trust is registered, if applicable. By not specifically providing that the financial institutions should obtain identification only from the customers, the Act had left room for financial institutions to access other sources from which such documents could be obtained, such as the office of the Companies and Intellectual Property Commission, the office of the Master of the High Court in respect of trusts, and the personal identity documents of individuals and partners to a partnership from the Department of Home Affairs.

A business relationship between a financial institution and a customer does not entitle the former to restrict or freeze access to the account of the latter, even in instances where there is a suspicion that the transaction involves unlawful activity.

Nedbank acted incorrectly and was thus liable for the amounts claimed.

BILL v WATERFALL ESTATE HOMEOWNERS ASSOCIATION NPC

A JUDGMENT BY
SOUTHWOOD AJ
GAUTENG LOCAL DIVISION,
JOHANNESBURG
5 MARCH 2020

2020 (6) SA 145 (GJ)

Property

A right of access to a property is an incident of the possession or control of that property, although the mere fact that the rights may be contractual in nature does not necessarily exclude these rights from being possessory. The right of a body corporate to enforce compliance of its rules does not in itself confer the right to restrict access to property under the jurisdiction of that body corporate.

THE FACTS

Bill was the registered lessee of property in terms of a 99-year lease, and a member of the Waterfall Estate Homeowners Association, the manager of the estate of which the property formed a part. Bill was a signatory to the Memorandum of Incorporation (MOI) of Waterfall.

In terms of rule 16.3.1 of the MOT, Bill had to commence construction of a house on the property within 12 months from 7 April 2016 and complete construction within 24 months from 7 April 2016, failing which certain penalties would be imposed. During the period June 2016 to June 2018 Bill attempted to get his building plans drawn up and approved by Waterfall, and building lines relaxed and approved by the Johannesburg City Council. This process was only completed on 8 June 2018. Bill commenced construction on the property on or around 23 July 2018.

On 5 April 2017, Bill received an email from Waterfall's property manager, warning that a penalty would be imposed if he failed to commence construction of a unit on the property as provided for in rule 16.3.

On or about 23 July 2018, after the Municipality had approved the applicant's plans, Mr Singh, the aesthetics and building control manager of the second respondent, granted the applicant's contractor permission to commence with construction on the property, and construction on the property commenced.

Bill failed to pay the penalties imposed. Waterfall threatened to deactivate his biometric access to the estate and to refuse his contractors access to the estate.

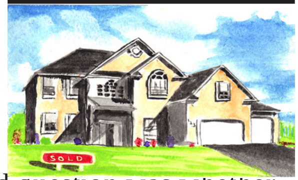
Bill applied for an order directing Waterfall to restore possession and unrestricted access to his property.

Bill contended that his rights of access were possessory rights which could be protected by a spoliation application (mandament van spolie). Waterfall contended that the rights of access were merely contractual rights which were not protected by the mandament van spolie. It also contended that there had been no dispossession of the right as Bill had alternative access in the form of his biometric access linked to his residence. This contention did not apply to the contractors' access. Lastly, Waterfall contended that the MOI authorised its conduct, rendering it lawful. In this, it depended on article 2.5 of the MOI which provided that Waterfall could take such steps aswere considered necessary to remedy a breach of any rules and debit the costs of so doing to the member concerned. In addition, Watefall could impose a system of fines or other penalties. The amounts of such fines would be determined by the Directors from time to time.' article 16.1 of the MOI provided that should any member fail to perform any obligation, Waterfall would be entitled to do such things necessary to procure compliance.

THE DECISION

The first question was whether Bill's right was a possessory right or merely a contractual right.

A right of access to a property is an incident of the possession or control of that property, although the mere fact that the rights may be contractual in nature does not necessarily exclude these rights from being possessory. Prima facie a right of access into the Estate was an incident of possession of the property. Waterfall contended however, that Bill's membership of the



association, and his occupation of the property, were founded in the lease agreement and the MOI, with the consequence that the relationship between him and Waterfall was contractual in nature.

The biometric access exercised by Bill was an incident of his possession of the property and, thus, constituted a possessory right which could be protected by the mandament van spolie. Insofar as the contractors were concerned, the rules did not create a right of access for contractors. Instead, contractors had to meet certain requirements and follow certain procedures to access the estate. The contractors were permitted and were exercising a right of access. Such access must have been a consequence of Bill's possession of the property. As such, the access by the contractors to the estate in order to develop the property was also an incident of Bill's possession of the property.

Both Bill's biometric access and the contractor's access could, therefore, be protected by means of a spoliation application.

The second question was whether or not Bill had been dispossessed.

Given that it is the particular method of access, ie biometric access linked to the property, which has been deactivated, Bill had been dispossessed of this right. In these circumstances, it did not matter that he had an alternative method of accessing the estate. Bill therefore had been dispossessed.

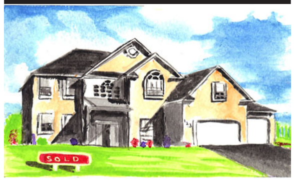
The third question was whether the dispossession was unlawful.

Articles 2.5 and 16.1 did not empower Waterfall to deactivate Bill's biometric access which was linked to the property or to refuse access to his contractors in these circumstances. The lockout was not directed at Waterfall itself remedying the member's alleged contravention of the rules but as a means of leverage to ensure compliance with the rules. The articles in the MOI relied upon were unenforceable insofar as they empowered it to deactivate biometric access and to refuse access to the contractors without recourse to a court.

The dispossession of Bill's right of access without an order of court was unlawful.

MAKESHIFT 1190 (PTY) LTD v CILLIERS

Property



A JUDGMENT BY ROGERS J
(CLOETE J concurring)
WESTERN CAPE DIVISION,
CAPE TOWN
25 MAY 2020

2020 (5) SA 538 (WCC)

A spoliation application for reconnection of an electricity supply must succeed when the alleged right to electricity is an incident of, or an adjunct to, the alleged right which the claimant has against the spoliator to be in occupation of the premises.

THE FACTS

Makeshift 1190 (Pty) Ltd was the owner of a farm occupied by Cilliers and her family. Eskom supplied electricity to the farm. The Eskom contract was in Makeshift's name but Cilliers' husband paid the bills On 20 or 21 December 2017 the Eskom electricity on the farm was disconnected. The electricity was disconnected because Makeshift had cancelled its contract with Eskom. As a result of this cancellation, Eskom sealed the electricity box on the farm.

There was a store on the farm, and Cilliers and her family had permission to build the store and occupy it. This store had also been supplied with electricity from Eskom.

Cilliers brought an urgent ex parte spoliation application against Makeshift. An ex parte order was issued calling on Makeshift to show cause why final orders should not be granted (a) ordering them to remove the locks on the electricity box or to provide Colleen with a key; (b) ordering them to switch on the supply of electricity to the store or to authorise Colleen to do so; (c) ordering them to restore the electricity supply to the property by not later than 16h00 on 21 December 2017; (d) prohibiting them from depriving Colleen of her possession and use of electricity and water without a court order. The rule nisi was to operate as an immediate interim order pending the final determination of the application.

Makeshift did not comply with the interim order, but opposed the application. However, the court granted final orders in terms of the rule nisi.

Makeshift appealed.

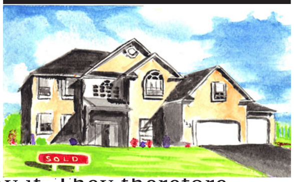
THE DECISION

The essential issue between the parties arose from the fact that Makeshift disputed that Cilliers had possession of an electricity supply in the sense required for spoliatory relief. In this, it depended on *Eskom Holdings Ltd v Masinda* 2019 (5) SA 386 (SCA). This judgment confirmed that certain rights, although incorporeal, may be the subject of quasi-possession for purposes of spoliatory relief, but in spoliation proceedings a court is not concerned with whether or not the right has been established - the facts must show that prior to the alleged spoliation the claimant enjoyed undisturbed quasi-possession of the alleged right, in the sense of performing acts demonstrating the exercise thereof.

The difficult question was to identify the precise basis on which an alleged right to electricity is to be characterised as being of one kind or the other. In general terms, one must enquire whether the alleged right to electricity was a 'gebruiksreg' (a right of use) or an 'incident of the possession or control of the property' served by the electricity. If so, the mandament is available to protect the alleged right.

A supply of electricity and water to a residential property is a practical necessity in order for an occupant to use the property as a dwelling. When such supply is terminated, the occupant experiences a significant disturbance in his occupation. It is apparent, however, from *Masinda* that this does not suffice to make the alleged right to electricity and water an 'incident of the possession or control of the property'.

The authorities discussed in *Masinda* can be divided into three



categories:

(a) Where the alleged right to a service, such as water, takes the form of a servitude or registered statutory right. These are uncontentious cases of quasi-possession enjoying protection under the mandament.

(b) Where the alleged right to electricity or other service is 'purely personal in nature'. These cases do not involve quasi-possession enjoying protection under the mandament.

(c) Where the alleged right to a supply of electricity was an alleged personal contractual right but where, nonetheless, the mandament's protection was held to be available.

The potentially difficult question is whether a case should be placed into category (b) or (c). A unifying feature of the cases falling into category (b) is that the person alleged to be under an obligation to supply the service was not the person who had conferred on the claimant the alleged right to occupy the property to which the service was supplied.

In both (b) and (c), the act of cutting off the electricity materially disturbs the claimant in his possession of the premises, and that the latter occupation is worthy of protection under the mandament. In order to discern why the one case is actionable under the mandament while the other is not, it is necessary to identify the distinguishing feature. The distinguishing feature is whether or not the alleged right to electricity is an incident of, or an adjunct to, the alleged right which the claimant has against the spoliator to be in occupation of the premises. If the alleged right to electricity is an incident of the claimant's occupation of the premises in this sense, one can then conclude (a) that the alleged right to electricity is the subject of quasi-possession for purposes of the mandament; and (b) that a spoliation of the said quasi-possession is simultaneously an act of spoliation in relation to the premises themselves.

On Cilliers' version, her family had permission to build the store and occupy it. They therefore occupied the store by virtue of a precarium, ie that Makeshift gave them a precarious right to build and occupy the store, terminable on reasonable notice. Their alleged right to electricity must have been of a similar kind. In terms of the precarium, Makeshift permitted Cilliers, as an incident of occupation of the store, to use the electricity supplied by Eskom to Makeshift, on the basis that Cilliers would pay the monthly bills. The supply of Eskom electricity was an adjunct to, or incident of, the precarium in terms of which Cilliers occupied the store.

This placed the case into category (c). Therefore, the alleged right to a supply of Eskom electricity was an incident of possession of the store and was not a 'mere' personal right. The alleged right was thus one enjoying the protection of the mandament.

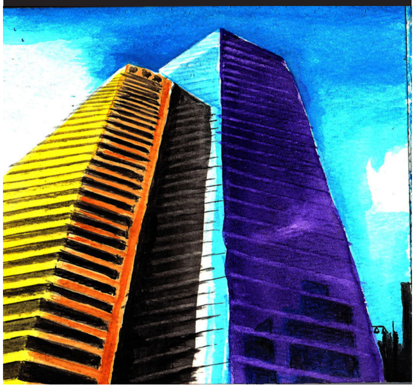
The appeal was dismissed.

HLUMISA INVESTMENT HOLDINGS RF LTD v KIRKINIS

A JUDGMENT BY NAVSA JA and SCHIPPERS JA (MAKGOKA JA, MOJAPELO AJA and KOEN AJA concurring)
GAUTENG LOCAL DIVISION, PRETORIA
3 JULY 2020

2020 (5) SA 419 (SCA)

Companies



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 (ABIL). 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.

The appellants' claims against the directors were that:

(a) The plaintiffs were shareholders of ABIL.
(b) The directors were at all material times directors of ABIL.
(c) African Bank was a wholly owned subsidiary of ABIL.
(d) African Bank carried out the business of a bank.
(e) The directors in their capacity as directors of ABIL conducted the business of ABIL and African Bank recklessly and in contravention of sections 22(1), 74 and 45 of the Companies Act and in breach of section 76(3) of that Act.
(f) The breach of the aforesaid provisions resulted in significant losses on the part of African Bank and consequently ABIL.
(g) As a result of the loss suffered by ABIL, the appellants suffered a diminution in the value of their ABIL shares.

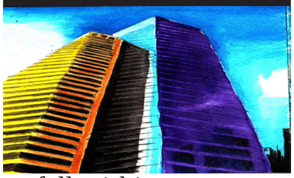
Section 218(2) provides that 'any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.'

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

In deciding an exception a court must take the facts alleged in the pleading as being correct. The excipient must satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable. The court may uphold the exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts. The facts are what must be accepted as correct; not the conclusions of law.

In the present case it had to be accepted that there was a diminution in value of the shares held by the appellants, that losses were caused to both ABIL and African Bank; and that these losses were due to the alleged misconduct on the part of the directors. What was at issue was whether section 218(2) of the Companies Act provides a basis for a claim by the appellants, in their capacity as individual shareholders in ABIL, against the directors, based on contraventions by the directors of sections 22(1), 45 and 74 and breaches of s 76(3) of the Companies Act. In respect of the auditors the issue was whether they owed the appellants, as individual shareholders in ABIL, legal duties not to have made misrepresentations in African Bank's financial statements and to have qualified the audit.

When the Companies Act became operative on 1 May 2011, and thereafter, the law recognised the rule against claims for reflective loss, more particularly, in respect of claims by shareholders for compensation for a diminution in the value of their shares due to loss occasioned to the company by a wrongdoer. The appellants' claims against the directors were quintessentially reflective loss claims. The wrong done to ABIL was the basis of the appellants' claim and the diminution in share value was directly correlated to the losses suffered by ABIL. The attempt to establish that the diminution in value of the appellants' shares, although arising from a chain of events which includes the losses suffered by African Bank and ABIL, was a loss distinct from the losses suffered by African Bank and ABIL, was fallacious.

There was no independent cause of action as submitted on behalf of the appellants and no justification of any kind as to why the appellants' claim fell within any of the recognised exceptions, or why it would be unjust to deny the claim, or why allowing it would not do violence to the sound policy reasons for the retention of the rule, including a multiplicity of claims by aggrieved shareholders.

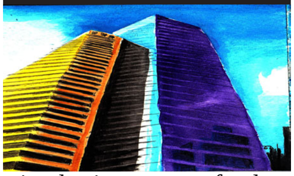
There was also no basis for the contention that the claim against the directors fell within any exceptions to the rule. These were firstly that where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it; and secondly, where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.

As far as section 218(2) was concerned, when a wrongdoer 'contravenes' the Act and causes loss to a person, the wrongdoer is liable to that person. The word 'contravenes' includes a breach or an infringement of any provision of the Act, 'which is by nature prescriptive or which in some way regulates conduct'. There was no need to give the words 'as a result of that contravention' an extended meaning so as to ignore the conventional meaning of a consequence flowing from the misconduct. All indications led to the ineluctable conclusion that it was meant to have the conventional meaning and that the person who can sue to recover loss is the one to whom harm was caused. There must be a link between the contravention and the loss allegedly suffered. In the present case, loss was occasioned to the company and the company was the entity with the right of action.

The exceptions were upheld.

ZIEGLER SOUTH AFRICA (PTY) LTD v SOUTH AFRICAN EXPRESS SOC LTD

Companies



A JUDGMENT BYDIPPENAAR J
GAUTENG
DIVISION,JOHANNESBURG
6 FEBRUARY 2020

2020 (4) SA 626 (GJ)

Section 131(4) of the Companies Act (no 71 of 2008) affords a court a discretion in a loose sense and requires of the court no more than a value judgment. The answer to the question whether or not the company should be placed in business rescue can only be 'Yes' or 'No'.

THE FACTS

Ziegler South Africa (Pty) Ltd, a provider of global logistics solutions, concluded an agreement with South African Express Soc Ltd in terms of which, Ziegler provided freight forwarding and custom clearing services. significant portion of the services rendered by Ziegler included disbursements to third parties.

As a result of default in payment, Ziegler delivered a letter of demand in terms of section 129(7) of the Companies Act (no 71 of 2008). The demand drew attention to the mandatory obligation on the board of directors, when there are reasonable grounds to believe that SA Express is financially distressed, to deliver a notice to each affected person, setting out the criteria for financial distress as set out in section 128(1)(f), and its reasons for not adopting a resolution for voluntary business rescue. In response, SA Express sought an indulgence for purposes of settlement discussions and promised to revert by 10 January 2020. It failed to do so. Ziegler brought an application for an order placing SA Express under supervision and commencing business rescue proceedings in terms of section 131(1) of the Act.

Ziegler's case was based on an indebtedness of R11 294 966,80 as at 23 December 2019 which was then due and payable by SA Express. It alleged that SA Express was financially distressed as envisaged by section 128(1)(b) of the Act and there was a reasonable prospect of rescuing the company as envisaged by the aforesaid provision. It also contended that it was otherwise just and equitable for financial reasons to place SA Express in business rescue rather than in liquidation in the interests of other affected persons, particularly the majority of its creditors as contemplated by section 131(4)(a)(iii) of the Act.

Ziegler's primary case was that business rescue was preferable to its alternative claim for liquidation as there was a prospect of saving the business.

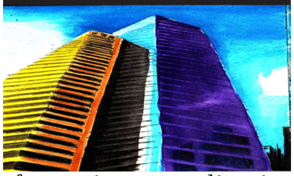
SA Express was financially distressed as envisaged by s 128(1)(f) of the Act. It was not disputed that SA Express is commercially insolvent and unable to pay its debts as and when they fall due. SA Express contends that 'it is a matter of public record that it, like all other state-owned entities, are facing serious financial challenges'.

SA Express's case stated that it had been able to secure an additional amount of R164m from government for the 2020/2021 financial year and that its strategy and business plan indicated that it was on a growth path. It is also averred that SA Express was in the process of engaging private equity partners, the details of which could not be disclosed due to confidentiality. It did not deny that it was financially distressed or had to rely on substantial cash injections from government since early 2017 to survive.

SA Express did not refer to its present financial position or the position of its employees and was unforthcoming in disclosing any relevant information. It disputed that Ziegler had illustrated a reasonable prospect that the company could be rescued, and in alleged that its version was based on speculation.

THE DECISION

The central issue to be determined was whether Ziegler had illustrated a reasonable prospect that SA Express could be rescued or whether it should be



placed in liquidation. The alternative goal of ensuring a better return for creditors envisaged by section 128(1)(b)(iii) as read with section 128(1)(h) of the Act, was relied on by Ziegler in the alternative.. Ziegler also relied on section 131(4)(a)(iii) and argued that the absence of opposition to the application by the government, employees and creditors of SA Express showed that it would be just and equitable to place it in business rescue.

Ziegler was obliged to place before court a cogent evidential foundation that supported the existence of a reasonable prospect of rescuing SA Express. The case made out by Ziegler was that while SA Express was currently reliant on taxes, government-guaranteed debt and resources from outside the aviation industry, it was inconceivable that SA Express would not be able to trade profitably if properly managed.

In its response on matters of importance to the application, notably its financial position and its business and strategy plan, SA Express failed to grapple with the central factual averments made by Ziegler. It could be reasonably expected of SA Express to provide cogent and comprehensive financial information regarding its position. It failed to do so. It did not meaningfully address this issue in its answering papers.

Section 131(4) of the Act affords a court a discretion in a loose sense and requires of the court no more than a value judgment. As to whether there is a reasonable prospect of rescuing a company, it cannot be said that it involves a range of choices which a court can legitimately make. The answer to the question can only be ‘Yes’ or ‘No’. Considering all the facts, the answer had to be ‘Yes’ and Ziegler had met the threshold of illustrating a reasonable prospect as required by section 131(4).

INVESTEC BANK LTD v FRASER N.O.

A JUDGMENT BY LAPAN AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
6 MAY 2020

2020 (6) SA 211 (GJ)

Credit Transactions

The protection of judgment debtors as provided for in rule 46(1) of the Rules of Court applies to individuals and natural persons only, and not to trusts.

THE FACTS

The Tricour Property Trust executed a suretyship in favour of Investec Bank Ltd in respect of debts owed by Bridgeland Development SA (Pty) Ltd to Investec, subject to a maximum amount of R17 400 000. Three other sureties also signed suretyships in favour of the bank.

On 31 March 2011, Investec concluded a loan agreement with Bridgeland in terms of which it lent R17 400 000 to Bridgeland. Several months later Bridgeland defaulted on its repayment obligations and, as a result, the outstanding balance became due and payable immediately.

On 21 January 2013, Investec concluded a second loan agreement with Bridgeland in terms of which it lent R15 400 000 to Bridgeland in order to, in effect, restructure the amount outstanding in terms of the first loan agreement.

On 29 July 2013 the Trust acquired certain immovable property. On 1 August 2016 Mr Fraser, his wife, the first respondent, and their two adult children moved onto the property.

Bridgeland defaulted on its repayment obligations in terms of the second loan agreement and, as a result, the full amount outstanding became due and payable immediately.

Investec instituted an action against all the sureties, claiming payment of Bridgeland's outstanding indebtedness. Default judgment was granted against the sureties in the amount of R13 242 075,26. A writ of execution was issued against the movable assets of the Trust, in execution of the judgment debt but a nulla bona return was made. Investec received R3 182 000, from the sale of immovable property owned by Bridgeland, Bridgeland was placed under voluntary liquidation and Investec proved a claim in the estate of Bridgeland in the amount of R10 106 741,02 plus interest thereon.

In July 2019 a second attempt was made at executing against the movable assets of the Trust but a nulla bona return was made. As at October 2019 the judgment debt of R13 242 075,26.

Investec sought an order declaring certain immovable property owned by the Trust to be specially executable as a precursor to satisfying a money judgment granted against the Trust, as surety, on 9 February 2015, in the amount of R13 242 075,26 plus interest and costs.

Fraser resided on the property with her two adult children. She alleged that this was her primary residence and, since Investec failed to comply with rule 46A of the Uniform Rules, this application was fatally defective.

Investec contended that rule 46A was not applicable as the provisions thereof applied to individual consumers and natural persons, not to trusts. (The rule provides that no writ of execution against the immovable property of any judgment debtor shall be issued unless —

(i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or

(ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5).)

THE DECISION

Constitutional considerations point to the fact that the protection of judgment debtors applies to individuals and natural persons only.

In every case involving execution against immovable property, the enquiry starts by establishing that the judgment debtor is indigent and that the judgment debtor is in danger of losing his / her home as a result of the sale in execution to satisfy the judgment debt. This enquiry will determine whether the protections afforded by way of judicial oversight are applicable.

It is beyond doubt that if the judgment debtor is not a natural person, the constitutional considerations and protections are not available to such a judgment debtor and the right to access adequate housing in section 26 of the Constitution is not implicated. Accordingly, in the present matter, the provisions of rule 46A were not applicable as the property sought to be executed against was registered in the name of the Trust and it was irrelevant that the trustee and her children resided on the property and considered it their home. Since the Trust, being the judgment debtor, was not a natural person, the constitutional safeguards were not available to it where execution was sought against its immovable property.

This position was set out in *FirstRand Bank Ltd v Folscher* 2011 (4) SA 314 (GNP). The provisions of rule 46A were not applicable. Investec was correct to proceed in terms of rule 46 to obtain execution against the immovable property of the Trust.

FIRSTRAND BANK LTD v MCLACHLAN

A JUDGMENT BY MBATHA JA (SALDULKER JA, SWAIN JA,SCHIPPERS JA AND EKSTEEN AJA concurring)
SUPREME COURT OF APPEAL
1 APRIL 2020

2020 (6) SA 46 (SCA)

A debt review order which does not result in the satisfaction of all responsible obligations assumed under the credit agreement during the repayment period does not meet the purposes of the Act.

THE FACTS

In 2010 the second and third respondents (the 'respondents') brought an application with McLachlan, a debt counsellor, for debt review in terms of section 86 of the National Credit Act (no 34 of 2005). One of their creditors was First National Bank which had advanced an amount of R2.1m to them to purchase an immovable property secured by a mortgage bond. The monthly instalment was fixed at R20 335,07, inclusive of 10,05 per cent interest per annum calculated daily and compounded monthly. The interest was variable at the instance of the bank.

McLachlan prepared a debt repayment proposal. The proposal was duly referred to a magistrate and a debt review order was subsequently granted. In granting the debt review order the debt review court did not, however, adopt the repayment proposal submitted by the debt counsellor.

In terms of the order, the respondents were declared to be over-indebted and their obligations were re-arranged. With regard to the loan agreement, the monthly instalments were reduced to R8 185,50 per month and the period was extended to 261 months. The interest payable immediately prior to the debt review order had been fixed in terms of the Loan Agreement at 12,55 per cent and there had accordingly been no change in the interest rate.

The effect of the debt review order was that the monthly instalment would not even cover the monthly interest accruing on the outstanding balance. A calculation of interest alone on the balance due on 25 November 2007, calculated at 12,55 per cent, would have required a repayment of almost R22 000 per month, substantially more than the R8 185,50 which was ordered by the court. In order to achieve a payment of R8 185, 50 per month as stipulated in the debt review order, the interest rate would have to be reduced to 4,5 per cent per annum. In the result, it was factually impossible for the respondent to service the interest on a monthly basis, let alone the capital amount owed. The consequence of this order was that the debt owing under the Loan Agreement grew to more than R3m since the granting of the debt review order. The result was that at the conclusion of the repayment term a substantial amount would remain due.

In October 2016 the Western Cape Division of the High Court delivered judgment in the matter of *Nedbank Limited v Jones* [2016] ZAWCHC 139; 2017 (2) SA 473 (WCC). It was held that a magistrate's court hearing a matter in terms of section 87(1) of the Act, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and any order containing such a provision was null and void. It was further held that a re-arrangement proposal in terms of section 86(7)(c) of the Act that contemplates a monthly instalment which is less than the monthly interest which accrues on the outstanding balance does not meet the purposes of the Act. A re-arrangement order incorporating such a proposal would be ultra vires the National Credit Act and the magistrate's court has no jurisdiction to grant such an order.

The judgment in Jones prompted an application for rescission of the magistrate's order.

THE DECISION

A debt review order which does not result in the satisfaction of all

responsible obligations assumed under the credit agreement during the repayment period does not meet the purposes of the Act. The conclusions reached in *Jones* had to be endorsed.

In the present case, the debt review court did not specify in terms of which sub-provision of section 86(7)(c)(ii) it purported to act. The respondents, however, acknowledged that the order purported to be in accordance with s 86(7)(c)(ii)(aa). The debt review court did not make an order in accordance with the proposal of the debt counsellor. Rather, it reduced the monthly instalments substantially from that proposed by the debt counsellor and extended the period for repayment beyond that which the debt counsellor had envisaged. The reduction of the monthly instalment was so substantial that it did not remotely cover the monthly interest due in terms of the order. Such an order does not serve to protect the interests of the consumer who would, at the end of the period, be left with a substantial debt which they would in all likelihood be unable to pay. The debt review order was therefore ultra vires the provisions of the Act and was accordingly void ab origine.

The high court, considered, however, that whereas the debt review order was issued prior to the judgment in *Jones*, the findings of the court in *Jones* were of no application at the time when the debt review order was made. In this respect the high court erred. *Jones* did not create new law. It merely pronounced on the meaning of the Act, as it was promulgated in 2005. The reasoning of the high court could therefore not be sustained. In the result the rescission order was correctly granted.

LIBERTY GROUP LTD v ILLMAN

A JUDGMENT BY MAKGOKA JA (SWAIN JA, MOKGOHLOA JA, NICHOLLS JA and KOEN AJA concurring)
SUPREME COURT OF APPEAL
6 APRIL 2020

2020 (5) SA 397 (SCA)

Suretyship

The sole consequence of a surety binding himself as a co-principal debtor is that, as regards the creditor, he renounces the benefits such as excussion and division available to him, and he becomes liable with the principal debtor jointly and severally. It does not make him a co-debtor.

THE FACTS

Illman and the other respondents signed separate but identical deeds of suretyship in terms of which they bound themselves as sureties and co-principal debtors in solidum with ECE Financial Holdings Ltd for the payment to Liberty Active Ltd of all moneys which ECE could in future owe to Liberty from whatsoever cause arising.

Before receiving any premiums in respect of contracts issued by Liberty Group Ltd on proposals submitted by ECE to it, Liberty advanced commissions to ECE. However, during the same period, up to August 2011, the contracts in respect of which commissions were advanced to ECE, either lapsed, were cancelled or terminated, because of non-payment of premiums to Liberty.

As a result, the commissions which Liberty had paid in advance, became repayable to it by ECE in terms of their broking agreement, and by the sureties in terms of the deeds of suretyship. The total amount of the commissions was R1 029 963,50. Liberty Group Ltd took cession of all its rights to claims arising from the commissions in respect of the broking agreement.

On 22 September 2011, Liberty issued summons against all the sureties and co-principal debtors for the repayment of the amount owing to it. On 29 September 2011 the summons was served on one of the sureties, Mr R.J. September, the seventh defendant. He failed to deliver a notice of intention to defend. Liberty obtained default judgment against him on 27 January 2012.

Summons was served on Ilman on 31 March 2016, approximately five years after it was issued. He raised a special plea of prescription to the claim. He asserted that to the extent that the claim against him was based on the alleged termination of the agreement on 14 March 2011, the claim became prescribed after three years of that date in terms of section 11 of the Prescription Act (no 68 of 1969).

Liberty responded with the assertion that as Ilman and Mr September had bound themselves as sureties and co-principal debtors in solidum with ECE, they became ‘co-debtors’. The claim against ECE and the sureties became due on 14 March 2011. Service of the summons on Mr September within the prescription period, interrupted the running of prescription in favour of ECE and all co-debtors, including Ilman. Accordingly, the claim against Ilman had not prescribed.

THE DECISION

The sole consequence of a surety binding himself as a co-principal debtor is that, as regards the creditor, he renounces the benefits such as excussion and division available to him, and he becomes liable with the principal debtor jointly and severally. It does not make him a co-debtor. This was established in *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A).

A surety and co-principal debtor do not undertake a separate independent liability as a principal debtor; the addition of the words ‘co-principal debtor’ does not transform his contract into any contract other than one of suretyship. The surety does not become a co-debtor with the principal debtor, nor does he become a co-debtor with any of the co-sureties and co-principal debtors, unless they have agreed to that effect.

Liberty’s response therefore, could not be accepted. The claim against Ilman had not been interrupted, but had prescribed.

M v MURRAY NO

A JUDGMENT BY MAKGOKA JA (PONNAN JA, DAMBUZA JA, VAN DER MERWE JA and MBATHA JA concurring)
SUPREME COURT OF APPEAL
9 JULY 2020

2020 (6) SA 55 (SCA)

Insolvency

If a pension benefit is received before a beneficiary's estate is sequestrated, section 37B of the Insolvency Act (no 24 of 1936) does not apply.

THE FACTS

M and her husband had been married to each other out of community of property since 1980. In 2009 a court ordered Mr M to pay Lowveld Cooperative Investments the sum of R726 638,35, interest and costs. On 31 May 2009 Mr M requested payment of his provident fund benefit from Mindkey Corporate Selection Retirement Fund. On 15 June 2009 he received R4 639 000 from the provident fund, which was paid into his banking account. On 23 June 2009 he transferred R3 500 000 of that amount into an attorney's trust account for the credit of Iprolog (Pty) Ltd. This money was used for the purchase of two farms by Iprolog. The balance of R1 023 867 was paid directly to Mrs M.

M and her husband had been experiencing marital problems for a number of years, and in April 2009 M requested a divorce. The pension payout was requested specifically to cater for the proprietary consequences of the marriage at divorce. M stated that the sum of R4 746 080,14 included a payment provided for in an antenuptial contract registered on 6 May 1980. A balance of R1 023 867 was a loan amount comprising unpaid wages when M worked as a bookkeeper in Mr M's business as a financial advisor. On 19 August 2009 they signed a settlement agreement in terms of which Mr M undertook to pay the sum of R1 023 867 and had liquidated his pension fund and agreed to pay over the balance of the proceeds thereof to M. The divorce action was finalised on 21 August 2009; an order was granted for a decree of divorce incorporating this settlement agreement.

Lowveld commenced proceedings for the sequestration of Mr M's estate. In August 2010, the farms purchased by Iprolog were sold, and R2 160 000 of the proceeds was used by Iprolog to purchase another immovable property. In March 2011 Mr M took occupation of this property.

The estate of M's husband was finally sequestrated on 1 August 2011. The respondents were appointed joint trustees of Mr M's estate. After the sequestration, Murray and the other respondents obtained a court order setting aside the dispositions, and interdicting the alienation of an immovable property indirectly purchased with the pension money.

The respondents alleged that there was collusion between M and her husband to strip Mr M of all his assets and income to avoid paying his debt to Lowveld.

M contended that the pension payout to Mr M was exempt from attachment in terms section 37B of the Insolvency Act (no 24 of 1936), and that, in any event, the payments to M could not be set aside as they were made in compliance with a court order.

Section 37B provided that if the estate of any person entitled to a benefit payable in terms of the rules of a registered fund is sequestrated or surrendered, such benefit or any part thereof which became payable shall . . . not be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors, notwithstanding anything to the contrary in any law relating to insolvency.

THE DECISION

All that s 37B entails is that, while in the hands of a pension fund, the insolvent's pension interest cannot be attached by his or her trustee on the basis that it forms part of the insolvent's

assets. It protects only the pension benefit of a person whose estate is sequestrated, which Mr M's estate was not when he received his pension payout.

The effect of a sequestration order is to divest an insolvent of his or her estate and to vest it in a trustee. When Mr M received the payment, his estate had not as yet been sequestrated. There was thus no insolvent estate or trustees to speak of. Section 37B therefore could not apply when the payment was effected. For that reason, Mr M could not bring himself within the exception, and payment could only have been made into his 'regular estate'. Having then disposed of those moneys in the manner in which he did, meant that they were susceptible to attack. This was fortified by section 23(7) of the Act which provides that, during the sequestration, 'the insolvent may for his own benefit recover any pension to which he may be entitled. . .'.

It followed that if the pension benefit is received before a beneficiary's estate is sequestrated, section 37B does not apply.

Section 3(1) of the Act provides that after the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.

The payments made by Mr M to M were 'dispositions' within the meaning of this section. It was clear that there was a carefully designed plan by Mr M to keep the pension money from his creditor, Lowveld. M and Iprolog were very much part of that plan, and the divorce between the parties was undoubtedly a sham.

The dispositions by Mr M were susceptible to being set aside pursuant to the provisions of s 31 of the Insolvency Act.

COMPETITION COMMISSION v WILMAR CONTINENTAL EDIBLE OILS & FATS (PTY) LTD

JUDGMENT BY MADONDO JP
KWAZULU NATAL DIVISION, PIETERMARITZBURG
15 JUNE 2018

2020 (4) SA 527 (KZP)

Competition

For the Competition Commission to succeed in an application for a search warrant, it must demonstrate that there are reasonable grounds to believe that a prohibited practice has taken place, was taking place or was likely to take place on the respondents' premises or that the 'material connected with the investigation' would be found on the premises of the respondents.

THE FACTS

Following a merger notification between Wilmar Continental Edible Oils and Fats (Pty) Ltd (Wilmar) and Sea Lake Investments (Sea Lake) which the Competition Commission received on 18 July 2016, the Commission initiated a complaint against the five respondents under section 4(1)(b) of the Competition Act (no 89 of 1998) alleging that the five respondents, being competitors in the market for edible oils, had entered into an agreement or engaged in a concerted practice to fix prices or trading conditions in the supply of edible oils.

The Commission made two urgent ex parte applications for the issuing of a warrant in order to conduct a search-and-seizure process at the premises of the five companies that were the subject of the complaint.

The Commission sought and obtained the search warrants based on the allegation that there was a 'reasonable belief grounded on information on oath' that prohibited practices, as specified in section 4(1)(b) of the Act were taking place at the premises of the respondents.

The Commission referred to Sea Lake as the source of the information upon which it relied for the warrant it sought and obtained in this matter. According to the Commission, Sea Lake was the genesis of the investigation into prohibited practice in the refined-oils industry, which led to the granting of an ex parte order, and ultimately the raids on the respondents' premises.

In a reconsideration application, Essack, a businessman and the managing director of Sea Lake, deposed to an affidavit on behalf of Sea Lake. In it, he denied that he said that there was a collusive arrangement between Sea Lake and its competitors. Such a suspicion had arisen from the fact that Sea Lake was allocated the business of Shoprite Checkers in KwaZulu-Natal. Sea Lake then discovered that its competitors were trying to entice Shoprite Checkers away from it and were doing so on the basis that Sea Lake would soon cease to exist. Sea Lake had then lodged a complaint to its attorneys.

According to Essack, Sea Lake communicated to its attorneys that incorrect information had been leaked out to the Commission, to its prejudice. Sea Lake's attorneys were in fact attempting to express Sea Lake's outrage at what its competitors were doing. Its attorneys ought to have complained about firms attempting to dominate the market rather than about horizontal relationships. Sea Lake's complaint was about its competitors taking some of its business and not about any collusion amongst its competitors. Essack said that the attorneys might have misunderstood what he was conveying.

Prior to the application, a Commission's investigator approached Essack and intimated to him that should he provide the Commission with the evidence concerning collusive practices within the edible-oil industry, the Commission would offer Sea Lake indemnity. Essack spurned such offer on the grounds that he could not provide any evidence in that regard since, as far as he was concerned and aware, there were no collusive practices within the industry.

The Commission stated that the information Sea Lake communicated to was corroborated, firstly in a letter dated 4 October 2016 that the attorneys addressed to the Commission, stating that Sea

Lake, as its client, was aware of the fact that there was collusion in the market which deserved investigation. According to the letter, Sea Lake was of the view that there was a concerted practice between firms in a horizontal relationship deliberately calculated to lessen competition by attempting to marginalise and eliminate Sea Lake as a relatively small supplier which has a long history of excellent, reliable supply in this market. Essack denied that was what Sea Lake conveyed to its attorneys. Prior to the bringing of the application, Essack s refused an offer of 'indemnity' for Sea Lake from the Commission in return for providing evidence of collusive practices in the refined-oils market, that it sought to investigate.

It was corroborated secondly in another letter from the attorneys which indicated that there was collusion in the market for the manufacture and distribution of refined oils and that there could be prospects of further collusion. The Commission relied on this as justifying the inference that 'there is collusion in the market for the manufacture and distribution of refined edible oils'.

Wilmar and the other respondents applied for a reconsideration and setting aside of the orders granted to the Commission.

THE DECISION

The first question for decision was whether there was sufficient information to justify the investigation, and the issue of a search warrant.

The Commission had a duty to disclose each and every fact and circumstance which might influence the court in deciding to grant or withhold the relief sought. However, the Commission was aware when it launched the application that Sea Lake had disputed that its interpretation of the attorneys' message was correct. The fact that Essack specifically refused an offer of 'indemnity' for Sea Lake showed that he could not provide any evidence of the alleged practices and that, as far as he was concerned and aware, there were no collusive practices or dealings in the refined-oils market. The Commission accepted that Sea Lake was not a participant at the 'manufacturing level' of the market. The Commission did not disclose any such material facts to the court hearing the ex parte application.

The application was therefore based on a series of material factual inaccuracies that were, or should have been, known to the Commission, which should have been drawn to the attention of the court. The search warrant was granted on incomplete facts or information.

For the Commission to succeed in its application it had to demonstrate that there were reasonable grounds to believe that a prohibited practice had taken place, was taking place or was likely to take place on the respondents' premises and / or that the 'material connected with the investigation' would be found on the premises of the respondents. However, it failed to make out a case for the issuing of a search warrant in terms of section 46 of the Act. The absence of a confirmatory affidavit by Essack impacted negatively on the existence, let alone the reasonableness, of the grounds upon which the Commission based its belief that the prohibited act was committed or likely to be committed, and that information connected to its investigation could be found on the premises of the respondents.

The Commission lacked bona fides in not disclosing in its founding affidavit the equivocation of Mr Essack of Sea Lake on the collusion in the market. Its allegations as to the alleged prohibited practice, were based on double hearsay, could never ground 'reasonable belief' that there were collusive dealings in the market.

The Commission had not given any evidence of any price-fixing between the respondents.

The application for reconsideration was granted.