Current Commercial Cases

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AIRPORTS CO SA LTD v SPAIN N.O.

A JUDGMENT BY CHETTY J
KWAZULU NATAL DIVISION, DURBAN
1 SEPTEMBER 2020

2021 (1) SA 97 (KZD)

Insolvency

In determining whether a business rescue plan has been substantially implemented, a court should adopt a sensible interpretation of the documents placed before it, without attempting to analyse the plan in such detail that the scrutiny under which it is placed results in the plan having no practical effect.

THE FACTS

The Airports Co SA Ltd and Masiphuze Trading (Pty) Ltd entered into a lease agreement in August 2009 in respect of the premises at the King Shaka Airport, where Masiphuze carried on the business of a Wimpy restaurant. During the course of the lease, Masiphuze fell into arrears with its rental. Airports brought an action against it.

At the end of April 2015 when the lease agreement would have terminated, Masiphuze continued to remain in occupation of the premises. Airports brought an application for its eviction.

In September 2017 the directors of Masiphuze took a resolution placing the company under voluntary business rescue. Spain was appointed as the business rescue practitioner. In light of its claims based on arrear rental and eviction, Airports contended that it was an 'affected person' for the purposes of s 128 of the Act.

Spain called meetings of all affected parties, including creditors. A meeting was held on 23 July 2018 at the offices of Airports' attorney for the purpose of adopting a plan. The plan reflected that, of the total owed to concurrent creditors at the time of the plan's adoption, being the amount of R5 749 538, an overwhelming portion comprised Airports' claim, the sum of R5 603 563, which had been rejected. The minutes of the meeting reflected that there was no unanimity as to the computation of Airports' claim. The plan also catered for the payment of the salaries of 61 employees, with the meeting on 15 May 2018 recording that certain retrenchments had taken place and a director removed, thereby resulting in a reduction of the salary bill. The plan set out by the practitioner proposed that rent be promptly paid, and made provision for payment of arrear rentals on a monthly basis, with the aim to restore the company to a financially viable position.

Airports alleged that based on the projections of Spain, by the end of February 2019, Masiphuze projected a cash surplus of R1 603 113. Airports brought an application for an order compelling the practitioner to comply with his obligations pursuant to sections 141(2)(b)(ii) and 152(8) of the Companies Act. It effectively sought to compel the practitioner to file a notice of the termination of the business rescue proceedings, alternatively a notice that there had been substantial implementation of the business rescue plan. Airports contended that Masiphuze had been able to generate a sufficient cash income to settle those debts which have been admitted, and that it was now trading profitably.

THE DECISION

Since Airports was a state-owned entity, it had a duty in terms of section 217 of the Constitution to follow a fair process in concluding a lease extension . However, the apparent position of the unlawful extension of the lease agreement could not simply be ignored, but had to be set aside by a court after a review. Even if the decision is not labelled an 'administrative action' the principle of legality still applies if Airports was performing a statutory or public function in leasing out the premises.

The issue to be determined was whether Airports had made out a case that the company was no longer in financial distress. If so, the practitioner was obliged to issue the notice referred to in

Airports' application. An applicant must make out a case for relief in its founding papers. Airports dealt with this by alleging that having regard to the projected cash flow surplus reflected in the business plan, it should be concluded that the company must have, by then, generated sufficient cash income to settle admitted debts due by it as recorded in the business rescue plan'.

This was hardly a sufficient basis for the court to conclude that the company was no longer in financial distress.

As to whether there had been substantial compliance with the plan in terms of section 132(8) of the Act, this was an enquiry which had to be answered having regard to whether the business was able to achieve a commercially viable outcome. The practitioner should have 'taken all necessary steps to satisfy the conditions on which the business rescue plan is contingent'.

In determining whether the plan had been substantially implemented, the court should adopt a sensible interpretation of the documents placed before it, without attempting to analyse the plan in such detail that the scrutiny under which it is placed results in the plan having no practical effect.

Airports submitted that inasmuch as the plan provided for the restaurant to operate from its premises, until a tender process was finalised, there could therefore be no substantial implementation of the plan until there was a finalisation of the tender process. But, there was nothing to indicate how far this process had gone. There was also nothing to show details of the negotiations towards the conclusion of a lease between the parties.

Airports had not discharged the onus of establishing that Spain had achieved substantial implementation of the business rescue plan. Airports' complaint against the practitioner seemed to be less about there being 'substantial implementation' with the plan and more about the fact that it was unfair for the company to essentially 'hijack' Airports' property until the tender process was concluded, despite it no longer being in financial distress. If this was the case, Airports should have brought an application to set aside the plan.

The application was dismissed.

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

A JUDGMENT WEINER AJA (NAVSA JA, MBHA JA, PLASKET JA and UNTERHALTER AJA concurring)
WESTERN CAPE DIVISION, CAPE TOWN
15 SEPTEMBER 2020

2020 (6) SA 386 (SCA)

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 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. Section 384(3) of the Act provides that the liquidator is entitled to be paid the remuneration, to which he is entitled under the Act 'out of the assets of the company'.

The liquidators relied solely upon a statutory right as a necessary incident of the liquidators' entitlement to remuneration in terms of section 384(3).

The liquidators may reflect their fees in their account, but upon discharge of the order, all assets, including funds which would

cover their fees, must be returned to the companies. The provisions of the Act and the regulations do not permit the liquidators to retain the disputed funds. These are assets of the companies. The liquidators are not permitted to draw their remuneration until the estate account has been taxed and confirmed. A liquidator is entitled to deduct his expenses and remuneration. But he is not entitled to sell assets solely for the purpose of paying himself. He has no lien on any assets or books or papers for his remuneration.

It followed that the liquidators were not entitled to 'sell' or 'retain' or 'transfer' the disputed funds to cover their remuneration. The liquidators' distinction between their remuneration, on the one hand, and other assets of the companies, on the other, was wrong. There was no lawful basis upon which the liquidators were entitled to retain fees, for their reasonable remuneration.

To summarise, the liquidators may reflect their fees in their account, but upon discharge of the order, all assets, including funds which would cover their fees, must be returned to the companies. The provisions of the Act and the regulations do not permit the liquidators to retain the disputed funds. These are assets of the companies. The liquidators are not permitted to draw their remuneration until the estate account has been taxed and confirmed. Their interpretation of the commentary in Blackman on this point is also flawed. If one has regard to the full passage in Blackman, it accords with the general principles referred to in Howat; AMS Marketing; and Strydom, ie 'a liquidator is entitled to deduct his expenses and remuneration. But he is not entitled to sell assets solely for the purpose of paying himself. He has no lien on any assets or books or papers for his remuneration.' The implication is that the liquidators are not entitled to 'sell' or 'retain' or 'transfer' the disputed funds to cover their remuneration. The liquidators' distinction between their remuneration, on the one hand, and other assets of the companies, on the other, is ill-conceived. There is thus no lawful basis upon which the liquidators are entitled to retain fees and/or transfer such funds to Bowmans, in trust, for their reasonable remuneration.

FOURIE *v* GEYER

A JUDGMENT BY PETERSEN J
NORTH WEST DIVISION, MAHIKENG
22 AUGUST 2019

2020 (6) SA 569 (NWM)

Credit Transactions

A credit agreement concluded between parties between whom a personal relationship exist may be subject to the National Credit Act (no 34 of 2005) when the agreement exhibits a business arrangement with all the usual protections business people include in such contracts.

THE FACTS

Fourie and Geyer had been friends for the 18 years. Fourie came to the financial rescue of Geyer and his family on a number of occasions. They engaged in formal business dealings underpinned by rental agreements in respect of property owned by Fourie.

In August 2015, Geyer signed and acknowledgment of debt (AoD), concluded in favour of Fourie in respect of three amounts:

1. R461 000 for outstanding rentals;
2. R270 000 in respect of the respondent's indebtedness to Absa Bank for loans which were settled on his behalf; and
3. R100 000 in respect of commission due to the applicant arising from the sale of an immovable property.

The AoD also made provision for payment of interest and legal costs in the event of default.

In due course, Fourie brought an application for the payment of an amount of R1 303 120,05, the underlying cause of the claim is an acknowledgment of debt (AoD).

Geyer contended that the AoD was tantamount to a credit agreement which rendered it subject to the National Credit Act (no 34 of 2005). Fourie contended that section 4(2)(b)(iii) and (iv) of the Act applied , in that the parties' agreement constituted an arrangement where the parties were not dealing at arm's length . This is defined in the section as an arrangement when —

'(iii) a credit agreement between natural persons who are in a familial relationship and —

(aa) are co-dependent on each other; or

(bb) one is dependent on the other; and

(iv) any other arrangement —

(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or

(bb) that is a type of transaction that has been held in law to be between parties who are not dealing at arm's length'.

THE DECISION

The AoD as drafted had the salient features of a credit agreement at arm's length. The agreement identified a capital amount which attracted interest. In a familial relationship in the ordinary sense, it would ordinarily be extraordinary that loans would be advanced to family members with the expectation of interest and the lurking notion of litigation with punitive costs orders.

The relationship between the parties overwhelmingly demonstrated anything but a familial relationship. Save for the fact that the parties were friends, the agreements which gave rise to the AoD were clear business transactions which were greatly to the benefit of or advantageous to Fourie. They were clearly concluded at arm's length.

On an interpretation of section 4(2)(b)(iii) and (iv), and section 8(4)(f) of the Act, it could be concluded that the nature of the business relationship between the parties was of one conducted at arm's length, similar to a financial institution and consumer seeking to engage in a credit agreement. The nature of the relationship did not fall within the ambit of any of the exclusions envisaged by section 4(2)(b)(iii) and (iv) of the Act.

As Fourie was not registered as a credit provider, the AoD was unlawful due to non-compliance with section 40(1) of the Act.

FIRSTRAND BANK LTD v MOONSAMMY

A JUDGMENT BY DE VILLIERS AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
27 FEBRUARY 2020

2021 (1) SA 225 (GJ)

If an agreement requires notice of default by one party to the other, then the party alleging default must allege that such notice has been given in order to complete its cause of action.

THE FACTS

Firstrand Bank Ltd granted a loan under a written 'overdraft facility agreement' to Moonsammy. The agreement did not record an obligation to make regular and sufficient deposits and credits into the facility account to repay interest, costs, fees and charges debited. Clause 5.1.2 of the terms provided that an event of default would occur if Moonsammy failedto comply with any term or condition of the agreement and failed to remedy that breach within five days after having been called upon to do so.

The bank also alleged that it had complied with sections 129 and 130 of the National Credit Act (no 34 of 2005).

In an action brought by the bank against Moonsammy, it alleged that he had breached their agreement, entitling it to call up the loan, by failing to make 'regular and sufficient deposits and credits into the facility account to repay interest, costs, fees and charges debited'. It did not allege that it had complied with the provisions of clause 5.1.2.

Moonsammy opposed an application for summary judgment.

THE DECISION

Notice to Moonsammy in terms of clause 5.1.2 was required before it could be alleged that he was in breach of the repayment obligation and that thus an event of default had occurred, entitling the bank to call up the loan. No notice in terms of clause 5.1.2 had been pleaded. In *Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd* it was held that although the defendant may be indebted to the plaintiff, it does not follow that that indebtedness is due and payable. It held that for there to be a verification of a cause of action within the meaning of Rule 32(2) there must be made to appear a complete cause of action.

Accordingly, the bank did not plead a completed cause of action, such a cause of action was not verified, and the particulars of claim were excipiable. Furthermore, it was not alleged that Moonsammy was in default when the section 129 default notice was attached to the summons.

In the circumstances summary judgment should be refused.

THE NATIONAL CREDIT REGULATOR v LEWIS STORES (PTY) LTD

A JUDGMENT BY EKSTEEN AJA (WALLIS JA, NICHOLLS JA, DLODLO JA and HUGHES AJA concurring)
SUPREME COURT OF APPEAL
13 DECEMBER 2019

2020 SACLR 1 (SCA)

Consideration of extended warranties and club fees allegedly contravening the National Credit Act(no 34 of 2005)

THE FACTS

The National Credit Regulator alleged that a charge levied by Lewis Stores (Pty) Ltd for certain 'extended warranties' in respect of goods purchased from it constituted prohibited conduct as envisaged in sections 100, 101(1) and 102(1) of the National Credit Act(no 34 of 2005) and that the extended warranties also contravened sections 90 and 91 of the Act.

It also alleged that the charging of subscriptions for membership of the Lewis Family Club to customers who had entered into credit agreements with Lewis was prohibited conduct as envisaged in sections 100, 101 and 102(1) of the Act as these fees constituted a prohibited 'cost of credit'.

The regulator applied to the National Consumer Tribunal for a declarator that Lewis had repeatedly contravened these sections of the National Credit Act. The application failed. The regulator appealed.

THE DECISION

The warranties were consistently honoured for a period of two years after the lapse of the supplier's warranties and there was no evidence that the amount charged in respect thereof exceeded their fair market value. Had a dispute arisen between a customer and Lewis both parties would have been entitled to claim rectification of the extended warranty document. Even if that were not the case, section 90(4) of the Act provides for a court considering an agreement which is alleged to contain a clause which is unlawful in terms of section 90(2) to alter the offending provision so as to render it lawful, provided it is reasonable to do so.

The reliance placed by the regulator on the provisions of sections 90 and 91 flowed from its contentions in respect of sections 100, 101 and 102. Once it is accepted that errors in completing the document were resolved by the evidence of the actual warranty agreements concluded, the regulator's objections fell away.

As far as the club fees were concerned, the prohibited charge envisaged in section 100(1)(a)) contended for by the regulator was a charge made in conflict with section 101(1). The material portion of section 101(1) prohibits a credit provider from 'requiring payment' by a consumer under a credit agreement of any money or other consideration except the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102. It was common cause that club fees were not an item contemplated in section 102. On the undisputed facts set out on behalf of Lewis, however, the membership agreement between consumers and the club was an agreement unrelated to the credit facility. It dealt with a different subject matter. The club fees were payable in advance and did not constitute credit. No interest was raised on the arrears and in the event of them not being paid they were not recovered. In these circumstances it could not be said that a consumer is 'required' to pay the club fee, nor that it increased the cost of credit, nor could it be said that the club fee, if it is paid, is paid under the credit agreement.

The appeal failed.

UNIVERSITY OF STELLENBOSCH LAW CLINIC v THE NATIONAL CREDIT REGULATOR

JUDGMENT BY HACK AJ
WESTERN CAPE HIGH COURT, CAPE TOWN
13 DECEMBER 2019

2020 SACLR 25 (WC)

Collection costs as referred to in section 101(1)(g) of the National Credit Act (no 34 of 2005) includes all legal fees incurred by the credit provider in order to enforce the monetary obligations of the consumer under a credit agreement. Section 103(5) of the National Credit Act applies for as long as the consumer remains in default of his/ her credit obligations, from the date of default to the date of collection of the final payment owing in order to purge his default, irrespective of whether judgment in respect of the default has been granted or not during this period. Legal fees may not be claimed from a consumer or recovered by a credit provider pursuant to a judgment to enforce the consumer's monetary obligations under a credit agreement, unless they are agreed to by the consumer or they have been taxed.

THE FACTS

The University of Stellenbosch Law Clinic applied for three declaratory orders. These were an order declaring that the collections costs as defined in the National Credit Act (no 34 of 2005) must be read to include legal fees incurred to enforce the monetary obligation under the credit agreement, regardless of whether such fees are charged before, during or after litigation; an order that the limitation in terms of section 103(5) that all amounts except the capital, cannot exceed the balance of the debt, must apply at all times regardless of whether a judgment has been granted; and an order that legal fees may not be claimed until they are agreed upon or taxed. The applicants seek further and conditional upon the declaratory orders, a recalculation of the

The application was based on the contention that this interpretation of the Act will give true effect to the provisions of the Act whereas at present the exclusion of legal fees was undermining the protection which the Act was intended to afford consumers. The Clinic asserted that creditor providers, while having their recovery of costs curtailed in terms of the act, were nevertheless enjoying the protection of recovering legal fees resulting in a failure to prevent the exploitation of the consumer.

THE DECISION

Section 103(5) provides that the amounts contemplated in section 101(1)(b) to (g) that accrue during the time a consumer is in default under the credit agreement may not in aggregate exceed the unpaid balance of the principle debt under the credit agreement as at the time that the default occurs.

Section 101(1)(g) cites 'collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned and may be imposed only to the extent permitted by Part C of Chapter 6'.

It is contrived to distinguish legal fees which are part of collections costs and legal fees which are part of ligation costs. The interpretation contended for by the Clinic encourages and promotes responsible lending by ensuring that credit providers properly vet their clients. The interpretation underscores the importance of conducting a proper affordability assessment to ensure that a consumer can in fact repay the loan. If small loans are determined too costly to collect, then the credit provider will be forced to ensure that they are extended responsibly to start with. Credit should only be extended to consumers who can afford it and would not become over indebted as a result. This might contribute to stopping the conduct of lenders in seducing consumers to obtain credit. Consumers are constantly being cajoled and encouraged to apply for credit. The result is that the poor, in succumbing to the alluring of credit, simply get poorer.

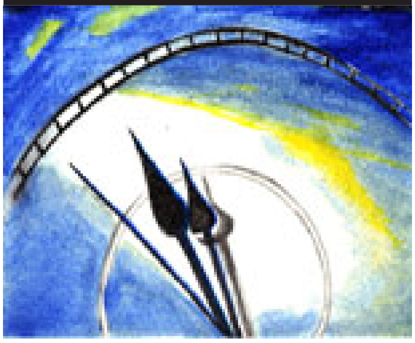
The legislature intervened in the National Credit Act to curb such exploitation. The Act must be interpreted to obtain this purpose, a purpose which the legislature intended. The Clinic had made out a case for the declaratory orders.

INVESTEC BANK LTD v ERF 436 ELANDSPOORT (PTY) LTD

A JUDGMENT BY PLASKET JA
(PETSE DP, SALDULKER JA,
DAMBUZA JA and POYO-
DLWATI AJA concurring)
SUPREME COURT OF APPEAL
16 SEPTEMBER 2020

2021 (1) SA 28 (SCA)

Prescription



In determining whether a party has acknowledged liability either expressly or tacitly, and thereby interrupted the running of prescription, it is necessary to consider not only what that party said but also what he did. A conspectus of such behaviour will determine whether or not interruption took place.

THE FACTS

Investec Bank Ltd advanced a loan to Erf 436 Elandspoort (Pty) Ltd. It was secured by a notarial mortgage bond. The loan agreement contained a tripartite agreement between Investec, Erf 436 and the South African Rail Commuter Corporation (the SARCC) in terms of which an option was granted to Investec to replace Erf 436 as lessee in the event of Erf 436 defaulting on its obligations to the SARCC.

Erf 436 defaulted. The lease was cancelled by an order of court rendering Investec's security worthless. On 10 September 2002 Investec demanded, as it was entitled to do following Erf 436's default, payment by Erf 436 within seven days of the full outstanding balance of the loan. Prescription in respect of this debt began to run on 17 September 2002, the date on which payment was due.

Investec then exercised its option and concluded a lease with the SARCC. In terms of an agreement between Investec and Erf 436, the latter continued to manage the property and collect rental from subtenants. These amounts were credited to Erf 436's loan account with Investec. This arrangement remained in place until about July 2003. The parties also agreed that they would make efforts to sell Investec's rights in terms of the lease with a view to the purchase price being used to settle Erf 436's loan obligation.

A second agreement between Investec and Erf 436 was concluded in about June 2003. In terms of this agreement Investec took over the function from Erf 436 of managing the property and collecting rental from subtenants. The income collected by Investec was similarly allocated to the repayment of Erf 436's loan. This arrangement remained in place from 1 July 2003 until 1 July 2009, when Investec sold its rights as lessee to an entity called Johnny Prop (Pty) Ltd (Johnny Prop). After the sale an amount of R2 999 459,51 was credited to Erf 436's loan account. After this amount had been credited, Erf 436's liability for the outstanding balance of the loan was R3 979 184,50. It claimed this amount from Erf 436 and the sureties in a summons served on 21 January 2011.

A director of Erf 436, Mr Joubert, was unhappy with Investec's decision to take over the management of the property, but he agreed to it nonetheless. During the period between Investec taking over the management of the property and the final payment of the purchase price for Investec's rights into Erf 436's account, Joubert, in a series of letters, consistently acknowledged Erf 436's liability to Investec. He agreed that the rental collected from the subtenants and the purchase price in respect of the sale of Investec's rights in the property would be allocated towards the repayment of Erf 436's loan.

On 29 March 2006, an amount of R1 350 000 was credited to Erf 436's account. That payment was made by Erf 225 Edenburg (Pty) Ltd, an entity of which Joubert was a director. In a letter to Investec dated 2 November 2005, he had informed Investec of a transaction involving Erf 225 and said that '[w]e have analysed and refined the transaction regarding the actual surplus available to be deposited into the bond account of Erf 436 and calculate that an amount of R1,35 million would be a more accurate amount'. Investec had agreed with Joubert that Erf 225 would pay the surplus of a sale of property towards Erf 436's

indebtedness to Investec.

The summons was met with a special plea of prescription. Investec pleaded that, on the basis of the payments made to reduce Erf 436's loan and various statements made in letters on behalf of Erf 436, it made a series of acknowledgments of liability. The result was that, insofar as prescription may have commenced during September 2002, it was interrupted by express or tacit acknowledgments of liability on the part of Erf 436 on the dates that each of the payments were effected and on the dates when each of the letters was addressed.

THE DECISION

Section 14 of the Prescription Act (no 68 of 1969) allows for the interruption of prescription. It provides:

'(1) The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.'

In determining whether Erf 436 acknowledged liability either expressly or tacitly, it was necessary to consider not only what Joubert said but also what he did. Viewed in isolation, his words in respect of the monthly payments of the rental of subtenants towards the loan and the payment of the purchase price for Investec's rights by Johnny Prop told one nothing, but viewed in their broader context, with particular reference to the two agreements between Investec and Erf 436, a picture emerged. When Erf 436 was responsible for the collection of the subtenants' rental, its payments of those amounts towards the repayment of its loan constituted a series of tacit acknowledgments of liability.

With regard to the transaction on 29 March 2006, when an amount of R1 350 000 was credited to Erf 436's account, as Joubert was a director of both entities, knowledge of, and agreement to, the payment had to be imputed to Erf 436. The inference that Erf 225 acted as Erf 436's agent was irresistible. That payment was a tacit acknowledgment of liability by Erf 436, with the effect that the running of prescription was extended to 29 March 2009.

From the outset, it was agreed that Investec's rights in the property would be sold and the proceeds allocated towards the payment of Erf 436's loan. From the evidence, it was evident that Joubert was particularly active in trying to find a purchaser.

The sum total of Joubert's behaviour constituted a tacit acknowledgment of liability on the part of Erf 436. The result of these tacit acknowledgments of liability was that prescription was interrupted on the dates of payment.

The special plea was dismissed.

MAGIC EYE TRADING 77 CC v SANTAM LIMITED

Prescription

JUDGMENT BY NICHOLLS JA (CACHALIA JA, ZONDI JA, GORVEN AJA AND HUGHES AJA concurring)
SUPREME COURT OF APPEAL
10 DECEMBER 2019

2020 SACLR 45 (SCA)

A claim to be indemnified against liability to a third party only arises once liability, in a fixed amount, has been established.

THE FACTS

Imperial Cargo Pty Ltd claimed damages against Magic Eye Trading 77 CC arising from an incident in which its truck was allegedly forced off the road on 21 March 2009 by another truck. Imperial alleged that the driver of the other truck was acting within the course and scope of his employment with Magic Eye and was solely responsible for the incident. In March or April 2011 Imperial issued summons for R449 461.71 against Magic Eye as first defendant and the driver as second defendant.

The two defendants denied liability. After close of pleadings they applied to join Santam Limited as a third party. The third party notice was premised on an insurance policy issued by Santam in favour of Magic Eye and which included indemnity insurance against loss suffered by Magic Eye by way of liability to third parties as a benefit under the policy. On 11 October 2016, the court made an order joining Santam and separating the issues between the two defendants and Santam from the main action, in terms of Rule 33(4) of the Uniform Rules of Court.

In the third party notice, the defendants claimed that, by virtue of certain clauses in the policy, Magic Eye had a contractual right to claim indemnity from Santam against any liability to the injured party attributed to them. They sought a declaratory order to the effect that in the event of Imperial succeeding against them, Santam would be liable to indemnify them in such amount as they may be ordered to pay Imperial, together with legal costs and expenses on an attorney and own client scale.

Santam entered a special plea of prescription. It alleged that upon the occurrence of the defined event, alternatively when the appellants became aware of the event, their right to a claim for indemnification against any liability to Imperial became vested in the defendants. Because the defendants failed to serve the notice of joinder on Santam within three years of that date, any third party claim they may have had against Santam had prescribed.

THE DECISION

A claim to be indemnified against liability to a third party only arises once liability, in a fixed amount, has been established.

In the present case, the claim was for a declaration of rights in respect of a contingent claim. Liability was dependent on the outcome of an uncertain future event, namely a finding by a court holding the defendants liable to Imperial in a specified amount. There is a fundamental distinction between a claim and a contingent claim.

The granting of a declarator is discretionary. This means that there is always a possibility that a court may, in its discretion, refuse to grant a declaration of rights. This was particularly so in light of the uncertainty regarding the incident itself, as in the present matter. If the court refuses to grant a declarator in respect of a contingent right, namely the claim for indemnification, the logical consequence of Santam's argument was that the claim would have prescribed following the effluxion of the prescription period. That argument was unacceptableprecisely because the claim for indemnity can only arise once there has been a fixed and quantifiable loss.

A claim for indemnification

insurance under an insurance contract can only arise when liability to the third party in a certain amount has been established. The debt, for purposes of prescription, therefore, becomes due when the insured is under a legal liability to pay a fixed and determinate sum of money. Until then a 'claim' for indemnification under the policy does not exist, it is only a contingent claim. Magic Eye's right to approach the court for a declaration concerning the obligation of Santam to indemnify it in the event of Imperial establishing liability had thus not prescribed. In fact prescription had not even begun to run. Santam's special plea ought to have been dismissed. The appeal accordingly succeeded.

In addition the granting of a declarator is discretionary. This means that there is always a possibility that a court may, in its discretion, refuse to grant a declaration of rights. This is particularly so in light of the uncertainty regarding the incident itself, as in the present matter. If the court refuses to grant a declarator in respect of a contingent right, namely the claim for indemnification, the logical consequence of Santam's argument is that the claim would have prescribed following the effluxion of the prescription period. That is absurd. This is precisely because the claim for indemnity can only arise once there has been a fixed and quantifiable loss.

To conclude, a claim for indemnification insurance under an insurance contract can only arise when liability to the third party in a certain amount has been established. The debt, for purposes of prescription, therefore, becomes due when the insured is under a legal liability to pay a fixed and determinate sum of money. Until then a 'claim' for indemnification under the policy does not exist, it is only a contingent claim. Magic Eye's right to approach the court for a declaration concerning the obligation of Santam to indemnify it in the event of Imperial establishing liability has thus not prescribed, in fact prescription has not even begun to run. Santam's special plea ought to have been dismissed.

MFWETHU INVESTMENTS CC *v* CITIQ METER SOLUTIONS (PTY) LTD

A JUDGMENT BY ROGERS J
WESTERN CAPE DIVISION, CAPE TOWN
11 MAY 2020

2020 (6) SA 578 (WCC)

Companies

In the absence of evidence about the activities carried on at the offices of a company doing business within the territorial jurisdiction of a court, the prima facie position of its location as established by its registration as recorded in terms of the Companies Act (no 71 of 2008) is not displaced.

THE FACTS

Mfwethu Investments CC, which traded under the name 'Recharger', and Citiq Meter Solutions (Pty) Ltd were among various firms competing in the wholesale and retail supply of prepaid electricity submeters. The meters, each with its own 11-digit number, were linked to that supplier's identity by means of a supplier group code (SGC).

Recharger was a South African close corporation with its principal place of business in Durban. Citiq was a South African company with its place of business in Cape Town and another in Midrand, Gauteng. The Midrand office was its registered office in terms the Companies Act (no 71 of 2008).

Recharger alleged that Citiq had activated Recharger meters on Citiq's platform, and in so doing had linked such meters to Citiq's SGC, and had supplied particulars of such meters to electricity vendors. Although a consumer could buy electricity by means of a token in respect of such a meter, the token number could not be successfully punched into the meter, because there was a mismatch between the meter's number and the SGC. This, Recharger alleged, caused harm to the consumers, and was damaging to Recharger's business, because the consumers complained that Recharger's meters were defective. In some instances Recharger, in order to appease customers, had to buy fresh tokens for them or even arrange for the customers to be transferred to the Citiq platform by providing a key-change code.

It was unclear how many of Recharger's meters had been incorrectly activated in this way. The number of affected meters was small in relation to the total number of meters supplied by their respective clients.

Citiq raised a preliminary objection to the court's jurisdiction.

THE DECISION

Recharger did not assert that Citiq's allegedly wrongful conduct was perpetrated, wholly or partly, in the area of the court's jurisdiction. The court would thus only have jurisdiction if Citiq's presence within the court's territory conferred such jurisdiction. The court would only have jurisdiction —that is, the cause at issue only arising within this court's territory — if Citiq resided in the court's territory.

Where a company has more than one place of business in South Africa, the 'principal place of business', in the jurisdictional sense, means the place where the company's 'general administration is centred', the 'seat of its central management and control, from where the general superintendence of its affairs takes place'. If a company is to be regarded as resident within a particular court's territory on the basis of the location of its principal place of its business, it does not suffice that the company has a place of business within that court's territory, even a significant one. The question is whether that place of business is the company's principal place of business in South Africa. If the company's general administration is centred elsewhere, the company does not reside in the court's territory.

In the absence of evidence about the activities carried on at the offices of Centriq, the prima facie position established by its registration as recorded in terms of the Companies Act had not been displaced.

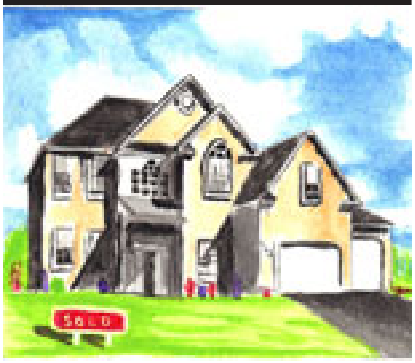
The preliminary objection was upheld.

SIGNATURE REAL ESTATE (PTY) LTD v CHARLES EDWARDS PROPERTIES

A JUDGMENT BY MAKGOKA JA (NAVSA JA, CACHALIA JA, DAMBUZA JA and SCHIPPERS JA concurring)
SUPREME COURT OF APPEAL
10 JUNE 2020

2020 (6) SA 397 (SCA)

Property



Section 34A of the Estate Agency Affairs Act (no 112 of 1976) is complied with when a fidelity fund certificate is issued in favour of the party applying for it, even though there is a mistake on the certificate of the name of that party.

THE FACTS

During April 2018, Signature Estate (Pty) Ltd and Atlantic Seaboard Realty (Pty) Ltd jointly brokered a lease agreement in terms of which they were each to receive 50% of the commission due in terms of that agreement. After the full amount of the commission was paid to Atlantic, it refused to pay Signature its share of the commission. Signature brought an application seeking payment of the commission.

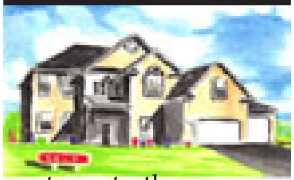
Atlantic opposed the application, and challenged Signature's locus standi, alleging that at the time the lease agreement was brokered, Signature was not in possession of a fidelity fund certificate. Section 34A of the Estate Agency Affairs Act (no 112 of 1976) precludes an estate agent from claiming commission when, at the time the commission was earned, the estate agent had not been issued with a valid fidelity fund certificate by the regulatory statutory body, the Estate Agency Affairs Board

Signature denied Atlantic's allegations and explained that on 9 January 2017 Hidicol CC, which had traded as Signature Real Estate CC, had been converted into a company being itself. On 10 May 2017 the Board was informed of the conversion, which was duly recorded in its records and Signature complied with all the Board's requirements in relation to changes in entities that hold fidelity fund certificates. An application was made to the Board in the name of Signature for fidelity fund certificates to be issued to it, its directors and its agents. On 1 January 2018 the Board erroneously issued certificates in the name of Hidicol CC instead of Signature, and similarly, to its directors and agents, but in their former capacities as members and agents of Hidicol CC. After being made aware of these errors, on 8 May 2018, the Board issued new certificates to Signature, its directors and agents. The certificates were later withdrawn and replaced with ones backdated to 1 January 2018.

Atlantic averred that given how the online applications for renewal of fidelity fund certificates worked, and the fact that the certificates were issued in the names of Hidicol CC and its former directors and agents, the 2018 applications were probably erroneously submitted in the name of Hidicol CC instead of Signature. Thus the certificates were invalid, having been issued to a non-existent company, its directors and agents. Atlantic accordingly contended that Signature was precluded by section 34A of the Act from payment of commission.

THE DECISION

The general object of the Act is to control certain activities of estate agents in the public interest through the establishment of the Board and the Estate Agents Fidelity Fund. The fidelity fund is established in terms of s 12(1) of the Act. Its purpose is to reimburse persons who, in certain circumstances, have suffered financial loss due to missappropriation of trust moneys by estate agents. The moneys in this fund are in the main contributed by all registered estate agents who, in return, are issued with valid fund certificates. In other words a fidelity fund certificate is issued in exchange for compliance by an estate agent with the relevant requirements set out in the Act, which include payment of a stipulated amount into the fund.



In this way, members of the public are assured of reimbursement in the event of misappropriation of their moneys by an estate agent.

The Act provides a regulatory framework for estate agents. One of the key components of that framework is an estate agent's trust account. In terms of section 32 of the Act, every estate agent is required to open and keep one or more separate trust accounts with a bank into which money held or received by or on behalf of such estate agent shall be deposited. The estate agent is required to notify the Board of the details of such a bank account or accounts.

In the present case the purpose of the Act was served. The public would have been protected. If, for example, a member of the public had suffered loss due to misappropriation by an estate agent involved in the agreement in question, the Board would have been hard-pressed to argue that a claim against the fidelity fund should not succeed because a certificate had not physically been issued to the wrongdoer at the time of the conclusion of the agreement. Such an outcome would be contrary to the purpose of the legislation.

Care should be taken to observe the peremptory provisions of section 34A of the Act. As in the case of Crous International (Pty) Ltd v Printing Industries Federation of South Africa [2017] 1 All SA 146 (GJ), the provisions of the Act in relation to a fidelity fund certificate being issued were met and in both the estate agents were rightly considered to have been in possession of a certificate, thus meeting the requirements of the section.

Signature's application succeeded.

In the present case one must bear in mind the general object of the Act, as set out in its long title, which is to control certain activities of estate agents in the public interest through the establishment of the Board and the Estate Agents Fidelity Fund (the fidelity fund). The fidelity fund is established in terms of s 12(1) of the Act. Its purpose is to reimburse persons who, in certain circumstances, have suffered financial loss due to missappropriation of trust moneys by estate agents. The moneys in this fund are in the main contributed by all registered estate agents who, in return, are issued with valid fund certificates. In other words a fidelity fund certificate is issued in exchange for compliance by an estate agent with the relevant requirements set out in the Act, which include payment of a stipulated amount into the fund. In this way, members of the public are assured of reimbursement in the event of misappropriation of their moneys by an estate agent.

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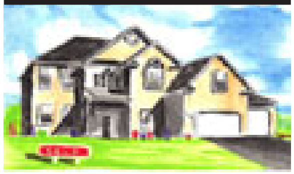
TELKOM SA SOC LTD v CAPE TOWN (CITY)

Property



A JUDGMENT BY JAFTA J (KHAMPEPE J, MADLANGA J, MAJIEDT J, MATHOPO AJ, MHLANTLA J, THERON J and VICTOR AJ concurring)
CONSTITUTIONAL COURT
25 JUNE 2020

2021 (1) SA 1 (CC)

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

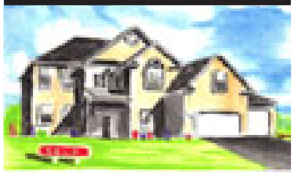
(c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

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 section 22(1) was in conflict with section 156(3) of the Constitution and therefore invalid. In terms of s 156(3), a bylaw that is in conflict with national legislation is 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.

Telkom's approach to the interpretation of municipal planning was also flawed for disregarding the importance of the language chosen by the framers of the Constitution. There is nothing in the text of the relevant schedule which suggests that provincial planning and national planning carry a meaning that includes zoning and subdivision of land. On Telkom's approach, each sphere is competent to zone and subdivide land for the use of that land to achieve purposes which form part of the sphere's competence. This would not only be unworkable but it would also not be consonant with the Constitution and its scheme of establishing wall-to-wall municipalities with powers to control and regulate land use within their areas of jurisdiction. Therefore, the interpretation advanced by Telkom lacked merit.

As far as section 22(1) was concerned, for s 156(3) to be activated, there must be real conflict between the challenged bylaw and national legislation. And for a conflict to arise, the two pieces of legislation must be incapable of operating alongside each other. In other words, they must be mutually exclusive. If they are reasonably capable of co-existing, conflict as envisaged in s 156(3) would not have arisen.

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.

The impugned bylaw regulates the control and use of land, whereas the Act governs telecommunications matters. The fact that telecommunications infrastructure is established on land creates an overlap between the functional areas of municipal planning and telecommunications which are located in different spheres of government. In accordance with our jurisprudence, the fact that Telkom is licensed to offer telecommunications services does not, without more, entitle it to exercise the rights in section 22(1) of the Act to the total disregard for municipal planning and zoning powers. The Act itself stipulates that the exercise of those rights is subject to compliance with applicable law which includes the impugned bylaw.

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

VALOR IT v PREMIER, NORTH WEST PROVINCE

A JUDGMENT BY PLASKET JA (WALLIS JA, MOLEMELA JA, MOKGOHLOA JA and KOEN AJA concurring)
SUPREME COURT OF APPEAL
9 JUNE 2020

2021 (1) SA 42 (SCA)

Contract

An agreement which fails to comply with section 217 of the Constitution is unlawful and may be set aside. A settlement agreement arising from a dispute which arises from an unlawful agreement is itself unlawful.

THE FACTS

On 4 October 2011, Valor IT (VIT) and the Department of Sports, Arts and Culture in the government of the North West Province signed an agreement termed a 'service delivery agreement' in respect of an 'enterprise content management solution' for the Department. Clause 1.1.27 defined the scope of work envisaged by the SDA to mean 'the description of the Deliverables, timeframes and Delivery Dates of the Services, scope, plan and payment schedule/s as set out in Schedule 1'.

Schedule 1 referred to 'Scope of Work Phase 0'. It was stated that the schedule and its annexures was based on the agreement reached between the parties'. Phase 0 was described as involving an information audit and scoping in which the 'deliverables' were inter alia, the collection of information; the collation, evaluation and interpretation of the information; the compilation of a 'comprehensive report' containing findings and recommendations. The fee that VIT would be entitled to for this work was R498 000.00 excluding VAT.

On 26 October 2011, the Department paid VIT the amount of R567 720, made up of R498 000 plus VAT. On 2 December 2011, the parties signed a document titled 'Schedule 2: Scope of Work – Phase 1'. In terms of Schedule 2, VIT was engaged, over a period of four months and for a fee of R9 800 000, excluding VAT, to develop 'provincial governance instruments', which included, inter alia, appointing records managers and creating and implementing 'records life-cycle processes'; putting in place 'governance instruments'; and rolling out a change management plan.

As a result of concerns being expressed by supply chain management officials about irregular expenditure, the relationship between the Department and VIT attracted the attention of, inter alia, the Auditor-General. On 1 October 2013, the Department cancelled the agreement with VIT. It did so on a number of bases including that the award of the contract did not comply with section 217 of the Constitution and the other procurement related prescripts that gave effect to it. In response to the cancellation, VIT instituted proceedings against the Department in which it claimed damages of R152 073 768.

The matter was settled by agreement, and in terms of the settlement agreement which was made an order of court, VIT was paid R22.8m. Thereafter, VIT was paid further amounts: R213 750 in respect of Phase 1B, R2 100 021.51 in respect of Phase 0 for all of the provincial government's remaining departments, and R1 750 000, also for Phase 0.The provincial government paid VIT a total of R41 729 647.

Advice was then received that the award of the 'contract' to VIT was irregular and contrary to section 217 of the Constitution. On 9 January 2015, the provincial government cancelled the contract. In response, VIT sought a declaratory order that the provincial government's 'unilateral termination' of the contract was unlawful and an order directing the provincial government to pay it R146 473 747.49 as damages. The provincial government opposed that application and brought a counter-application for the setting aside of the service delivery agreement and all

subsequent agreements entered into between the Department and VIT, and for the setting aside or rescission of the settlement agreement.

THE DECISION

No public tendering process was ever held in respect of the service delivery agreement or any of the agreements that followed it. Thereafter, VIT and the Department purported to enter into new agreements on two further occasions before the first cancellation. These related to what VIT and the Department referred to as phase 1A, to the value of R9.8m, and phase 1B, to the value of R12 888 000. The award of these contracts was unlawful and invalid because their award had not been preceded by an open procurement process in accordance with the required constitutional and legal prescripts. This was the state of affairs that prevailed when the provincial government cancelled the service delivery agreement and the agreements that followed it for the first time.

As far as the settlement agreement was concerned, two issues arose for determination. The first was the effect of the attempt to 'repackage' the arrangement in order to comply with the Treasury Regulations. The second was the effect of having made the settlement agreement a court order and, more particularly, if the settlement agreement was unlawful, whether a court could have made it an order.

Calling the contractual arrangement between VIT and the Department a 'transversal term contract' did not alter the fact that it was unlawful and invalid because of non-compliance with procurement prescripts required by the law. *Gibson v Van der Walt* 1952 (1) SA 262 (A) is authority for the proposition that if the underlying contract suffers from a defect, such as unenforceability, dressing it in different garb will not alter that fact. The settlement agreement had no effect on the unlawfulness of the contractual arrangement between VIT and the Department: it remained an unlawful agreement whatever the parties chose to call it.

The contractual arrangement between VIT and the Department was unlawful. The settlement agreement sought to give effect to that unlawful arrangement and should, as a result, not have been made an order. It was correctly rescinded by the court below.

There can be no doubt that the delay in challenging the lawfulness of the award of the SDA to VIT was unreasonable. As I have shown, it took more than two years for the provincial government to cancel the contract for the first time, only to reverse its decision. It took a further 15 months before the provincial government cancelled the contract again and another nine months before it applied for the setting-aside of the contract and the rescission of the order of court embodying the settlement agreement.

In these circumstances, one would have expected a full and thorough explanation for the delay. That was not to be. Instead, the provincial government gave an explanation for its delay in filing its answering affidavit, and later, for its delay in filing its reply in the counter-application. That only accounts for the period between the service of the founding papers and the filing of the answering affidavit and reply in the counter-application, respectively. In order to understand why the provincial government delayed for more than four years before it challenged what was a patently unlawful contract, one has to trawl through the papers and draw inferences from the facts found there. That is far from satisfactory, but is necessary if the interests of justice are to prevail.

TELLYTRACK v MARSHALLS WORLD OF SPORT (PTY) LTD

JUDGMENT BY NAVSA JA (SALDULKER, VAN DER MERWE JA, DLODLO JA AND WEINER AJA concurring)
SUPREME COURT OF APPEAL
25 NOVEMBER 2019

2020 SACLR 57 (SCA)

Copyright

Images and interviews reduced to material form by way of recordings in cinematographic format constitute works in which copyright resides. The broadcast thereof without licence constitutes an infringement of such copyright.

THE FACTS

Tellytrack obtained raw television feeds from domestic horse races and received raw international horse race feeds via satellite. The raw race feeds consisted of visual images of events leading up to the race, images of the live race being run, accompanied by auditory commentary, as well as pre and post-race celebrity and guest interviews.

In respect of domestic races there was a production team consisting of its employees stationed at the race tracks owned by the constituent members of Tellytrack, operating mostly from outside broadcast vans. At each racetrack there were several cameras strategically positioned to film races at that track. The images captured during a race were converted to a format enabling them to be received via fibre-optic cable. The images were accompanied by the audio commentary of on-course presenters. Enhancements were added and the complete product was recorded in Tellytrack's control room on an output digital video recorder and sent to DSTV by Telemedia in compressed form via fibre-optic cable.

In respect of international races, the capture of the race by cameras involved production teams employed by rights owners in respective countries and the raw feed was then transmitted by Tellytrack's international supplier via satellite to the Tellytrack control room.

By agreements concluded between Tellytrack and licenced bookmakers, Marshalls World of Sport (Pty) Ltd and the other respondents, Tellytrack established and operated a television channel for the purpose of broadcasting the horseracing events. Totalisator operators subscribed to the television channel and had the right to display the television channel's contents at their outlets.

Tellytrack asserted that it held the copyright in the cinematograph films and sound recordings of the horse racing events that took place at the racetracks operated by them. It asserted that it held the copyright in the computer program used to produce the betting scrolls, added to the raw feed and that it held the copyright in the resultant betting scrolls which constituted computer generated literary works as contemplated in the Copyright Act.

When Tellytrack demanded a higher fee for Marshall's right to display its work at its outlets, Marshalls refused to do so. Tellytrack then contended that Marshalls was infringing its copyright in its works referred to above, in terms of ss 6, 8, 9, 11B and 23 of the Act. It sought an interdict restraining Tellytrack from infringing its copyright.

THE DECISION

What was displayed at the respondents' business locations was a sequence of images seen as a moving picture constituting in the main horse racing events. Those images and others, including those of studio interviews and the overlay of all the items imposed by way of the computer program, had been reduced to material form by way of the recordings on the aforesaid occasions.

At the time that a race event was seen it had already been recorded and stored. The stored images need not be stored in their original form, that is, as images. It was capable of being reproduced. These facts brought it squarely within the definition of section 1 of the Act and provided it with copyright protection in terms of sections 2, 8 and 23 of the Act.

This case was about Tellytrack claiming copyright in cinematograph films which encompassed sound recordings and the graphic enhancements. Onecannot broadcast ‘nothing’ and consequently, what the public was being allowed to view at the respondents’ business locations, was a cinematograph film. There was no dispute in relation to it being produced at source and later being added to by Tellytrack employees. In all of the circumstances, Tellytrack had discharged the onus of establishing copyright in cinematograph films.

Tellytrack was clearly entitled to the interdict it sought.