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EDITORIAL POLICY
Current Commercial Cases is a reporter of judgments of importance to commerce and commercial practice. The underlying assumption of this publication is that judgments are important because they are indicators of the rules under which commerce is obliged to operate. Whether such judgments are consistent with each other or not, and whether rational or irrational, publication of them is necessarily beneficial to the operation of commercial practice.

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BAYPORT SECURITISATION LTD v UNIVERSITY OF STELLENBOSCH LAW CLINIC

A JUDGMENT BY PHATSHOANE AJA (PONNAN JA, MAKGOKA JA, GORVEN JA and MOLEFE AJA concurring)
SUPREME COURT OF APPEAL
4 NOVEMBER 2021

2022 (2) SA 343 (SCA)

Credit Transactions

Collection costs as defined in the National Credit Act (no 34 of 2005) are not intended to include litigation costs.

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 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.

Bayport opposed the application. Having failed in its opposition, it appealed.

THE DECISION

Section 1 of the Act defines 'collection costs as 'an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge'.

Costs are awarded to successful litigants in order to indemnify them for the expense which they have been put through, having been compelled either to initiate or defend litigation. The ensuing legal costs, which courts have a discretion to both award and determine the applicable scale thereof, flow directly from, and are limited to, the litigation. Legal costs are regarded as commencing with a summons and do not as a general rule allow for pre-litigation costs to be recovered from the losing litigant.

To hold that collection costs include legal costs would be to oust or severely fetter the discretion of a court to make appropriate costs orders, including where necessary punitive costs orders. The language used in the Act demonstrates that collection costs were not intended to include litigation costs.

As far as the second order was concerned - to the effect that section 103(5) of the Act applies for as long as the consumer remains in default of his credit obligations, from the date of default to the date of collection of the final payment, irrespective of whether judgment has been granted - Bayport argued that a judgment alters the character of the debt. By the grant of judgment, the litigation steps taken to obtain satisfaction of a judgment cannot be equated with the collection of the debt in its original form. It must follow, it contended, that section 103(5) ceases to be of any force or effect post-judgment because it can only apply while the creditor is in default under the credit agreement.

After a judgment has been granted against a consumer, usually, save for necessary

disbursements and charges allowed in terms of the relevant tariff, only interest accrues on the judgment debt. The remaining charges contemplated in section 101(1)(b) – (g) are thus not post-judgment charges. The judgment entered is for the capital sum fixed at a particular date together with interest. It followed that section 103(5) does not apply post-judgment.

The appeal was upheld.

The respondents' submission that the NCA puts a maximum limit on the amount of legal costs that can be recovered from a consumer would lead to some glaring absurdities. What militates against such a construction is that the award of costs generally involves the exercise of a judicial discretion. To hold that collection costs include legal costs would be to oust or severely fetter the discretion of a court to make appropriate costs orders, including where necessary punitive costs orders. The following example, which was put to counsel and to which he had no answer, may well illustrate the point: Assume that credit provider A is forced to institute proceedings in a magistrates' court against consumer B. Judgment is entered for A. B then prosecutes an appeal to the High Court, which fails. Are the costs of the appeal also to be limited by the application of s 103(5)? What if a further appeal is prosecuted by B to this court? Imagine if any of the courts form the view that B's conduct in the litigation is deserving of censure, would thet be precluded by virtue of s 103(5) from ordering costs on a punitive scale? Where, for example, the principal debt is comparatively small (as most microloans are), it is not hard to imagine that the litigation costs will quickly exceed that amount.

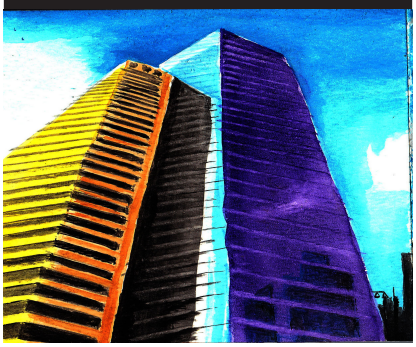
Had the legislature intended collection costs to include legal costs, it could easily have said as much. The language used by the legislature demonstrates that collection costs were not intended to include litigation costs. 'If the language used by the lawgiver is ignored in favour of a general resort to values the result is not interpretation but divination.'

DU TOIT v AZARI WIND (PTY) LTD

A JUDGMENT BY FRANCIS J
WESTERN CAPE DIVISION, CAPE TOWN
4 AUGUST 2021

2022 (2) SA 510 (WCC)

Companies



An application for cancellation of a contract made in terms of section 136(2)(b) of the Companies Act (no 71 of 2008) must indicate obligations which are discrete and identified in order to provide the court with some certainty on what is to be cancelled.

THE FACTS

Azari Wind (Pty) Ltd was employed as a contractor by Nordex (Pty) Ltd on a windfarm project known as Copperton project and by Vestas (Pty) Ltd on a similar project known as the Oyster Bay project. The projects included both the mechanical and electrical assembly of wind turbine generators. These generators were supplied by Nordex and Vestas in terms of an engineering and procurement contract or a turbine supply contract with the project companies controlling the projects. Nordex and Vestas contracted Azari to erect and install the wind turbine generators.

Azari subcontracted Tsoma Trading CC as a specialist subcontractor to provide crane services on both the Oyster Bay and Copperton projects. The services rendered by Tsoma were limited to the erection of cranes operated by its employees which were used to hoist various portions of the towers and the turbine propellers. After the services were rendered, the cranes were dismantled and Tsoma left the site. Azari remained responsible for the overall installation and erection of the wind turbine generators.

The contractual relationship between Azari and Tsoma commenced during 2020 and continued until the Copperton main agreement was cancelled between Nordex and Azari, and the subcontract between Azari and Tsoma was subsequently cancelled on 14 May 2021. The Oyster Bay project was completed on 31 March 2021 and, as a consequence, the Oyster Bay subcontract also came to an end.

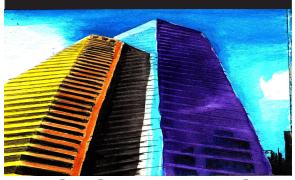
Tsoma performed the services it was contracted to perform and no further services needed to be rendered by Tsoma in terms of either of the subcontracts. Tsoma issued invoices to Azari. However, Azari has not paid certain of these invoices, despite Azari having been paid by Nordex and Vestas.

Tsoma became financially distressed and commenced the business rescue process by virtue of a members' resolution on 24 February 2021. Du Toit and the second applicant were appointed as Business Rescue Practitioners (BRPs). They brought an application in terms of section 136(2)(b) of the Companies Act (no 71 of 2008) for the cancellation of Tsoma's obligations in terms of the subcontracts concluded between Tsoma and Azari in relation to the Oyster Bay project and the Copperton project. They also sought payment from Azari of the amount of R13 857 836 in respect of the Oyster Bay subcontract and the amount of R2 392 862,50 in respect of the Copperton subcontract.

THE DECISION

The principal difficulty with the applicants' case was that it failed to demonstrate that the obligations sought to be cancelled would fall due during the business rescue proceedings. Claims for stoppages, delays, disruptions, and the cost of additional main build teams would all have arisen during the course of the contract period when Tsoma was still providing services to Azari. Azari submitted that these obligations did not fall within section 136(2)(b) of the Companies Act because those claims arose prior to the business rescue process, even though all the claims had not necessarily been quantified.

The failure by the applicants to demonstrate that the obligations in respect of the stoppages claims



became otherwise due during the business rescue proceedings applied also in respect of the other obligations sought to be cancelled, namely the indemnification obligations, warranty obligations, performance bond obligations, warranty bond obligations, and insurance obligations. No indication was provided that any of these obligations would become due during the business rescue process. The nature of the events that might give rise to the performance of these obligations was such that they may have already occurred, and might or might not occur at all. This, together with the limited time frame which the BRPs had to work with, meant that the obligations that would fall due during the business rescue proceedings were reasonably ascertainable.

The obligations to be cancelled must be discrete and identified in order to provide the court with some certainty on what is to be cancelled. However, apart from identifying in general terms the obligations to be cancelled, the applicants had failed to discharge the onus of demonstrating that the obligations sought to be cancelled would otherwise become due during the business rescue proceedings.

The application was therefore dismissed.

The failure by the applicants to demonstrate that the obligations in respect of the stoppages claims become otherwise due during the business rescue proceedings applies equally in respect of the other obligations sought to be cancelled, namely the indemnification obligations, warranty obligations, performance bond obligations, warranty bond obligations, and insurance obligations. No indication was provided whatsoever by the applicants that any of the aforementioned obligations would become due during the business rescue process. The nature of the events that might give rise to the performance of these obligations is such that they may have already occurred, may not occur at all, or may occur at some future date. This, together with the limited time frame which the BRPs had to work with, meant that the obligations that would fall due during the business rescue proceedings were reasonably ascertainable.

In summary, the obligations to be cancelled must be discrete and identified in order to provide the court with some certainty on what is to be cancelled. However, apart from identifying in general terms the obligations to be cancelled, the applicants have failed to discharge the onus of demonstrating that the obligations sought to be cancelled would otherwise become due during the business rescue proceedings.

INTONGO PROPERTY INVESTMENT (PTY) LTD v GROENEWALD

A JUDGMENT BY MEER J
WESTERN CAPE DIVISION, CAPE TOWN
2 SEPTEMBER 2021

2022 (2) SA 543 (WCC)

If it is clear from company documents that a person is not reflected as a director, then a resolution purportedly made by that person authorising a party to institute proceedings is insufficient to give it locus standi.

THE FACTS

Groenewald took occupation of certain property on 1 January 2014. In lieu of rental he paid Intongo Property Investment (Pty) Ltd's bond on the property and all rates. In May 2015, the parties entered into a sale of shares agreement in terms of which Moller, Intongo's shareholder, sold his shares to Groenewald for US$850 000. Groenewald paid USD 377 000, approximately 45% of the total purchase price.

In October 2015, Groenewald became the shareholder and director of Intongo. Intongo alleged that this occurred fraudulently, Groenewald having made use of unsigned documents sent to him by an attorney to have himself appointed as the director of Intongo.

In 2017 the property was offered to UVT Company (Pty) Ltd for sale. UVT paid a deposit of R400 000 for the property into the bond account held with Standard Bank, to prevent the bank from foreclosing on the property. Shortly before payment of the R400 000 Intongo's attorney, wrote to De Bruin, Moller's s agent in the share sale agreement, and provided him with the closing documents for the transfer of the shares, which, according to Kotze, were unused and were prepared at a time when he understood that payment in full was expected from Groenewald.

On 4 August 2017, Intongo made a demand on Groenewald for the purchase consideration in respect of the share sale agreement. On the same day, Groenewald signed the property sale agreement with UVT. At the end of 2017 Groenewald paid a further US$66 000 in respect of the share sale agreement. In January 2018, the property was transferred into UVT's name.

After the further payment by Groenewald at the end of 2017, Moller explored a settlement of the outstanding purchase price owed on the share sale agreement with Groenewald. In August 2018, Moller threatened to remove Groenewald as a director but did not in fact do so. In October 2018, Moller learnt of the sale of the property. Moller continued to negotiate with Groenewald to obtain payment up to June 2019. He did not during this period try to set aside the sale he had learned of in October 2018.

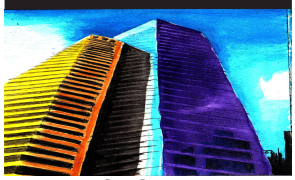
Some two years after Moller learnt of the sale of the property and some three years after Moller became aware that Groenewald had been registered as the director of Intongo, Intongo brought an application to set aside the property sale on the basis that the sale of the property was unlawful and fraudulent and is accordingly a transaction tainted by fraud.

THE DECISION

Since Moller was aware of UVT's ownership of the property for at least two years, since at least October 2018, for more than three years he had not wished to set aside the property sale agreement. His interest was only to enforce the share sale agreement between himself and Groenewald. It was only when these attempts failed that he directed his attention towards reclaiming the property in the name of Intongo.

A central issue was the question of locus standi: who in law was entitled to institute proceedings on behalf of the company, and the purview and position of a shareholder in relation to the company and its assets.

It was clear from the company documents annexed to the



answering affidavit that Groenewald was reflected as the only active director. Neither Moller nor the second applicant were recorded as directors. Groenewald had not authorised the proceedings nor had he authorised the institution thereof by the second applicant or any other person. As Moller was not recorded as a director, his resolution authorising the second applicant to institute proceedings was insufficient to give Intongo the requisite standing.

The unsubstantiated allegations of fraud in the founding affidavit shored up by mainly hearsay allegations of fraudulent signatures in the replying affidavit did not assist Intongo which sought to impugn Groenewald's position as director. This was so because, apart from the fact that a party cannot make out a case in reply, the alleged fraudulent representation to UVT in the contract of sale on which Intongo relied, did not cause Intongo to act to its detriment, which is an essential element of fraud

Intongo, was not entitled to institute the present application. Its alleged interest in the application did not detract from this and certainly could not give it locus standi.. Even had they been shareholders, Moller and the Second Applicant would not have had the requisite locus standi to set aside the sale of the property. As shareholders, they would not have owned the property of Intongo but the shares therein.

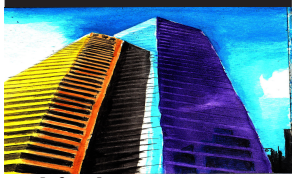
The second respondent took issue with Moller's failure to file a confirmatory affidavit authorising the second applicant to act for him. Even had such an affidavit been filed, it would not have cured the defects pertaining to the standing of the second applicant alluded to above.

In the light of the aforegoing, I find that the applicants have not shown the requisite locus standi, and for this reason alone the application cannot succeed.

It would seem to me that the applicants have in any event not established the elements of fraud apropos the property – sale transaction. Apart from the unsubstantiated allegations of fraud, the representation made by Groenewald to the second respondent, which is relied upon for the fraud, has not resulted in the second respondent acting to its detriment or wanting to set aside the sale. No representation concerning the sale of the property was made to any other person.

It is to be noted that the only representations that were made to Moller pertained to the sale of shares agreement which, as appears from the factual background, was breached. The applicants' remedy in those circumstances would have been for damages arising from the breach of the sale of shares agreement. It is unfortunate that they resorted instead to this application.

MILLER v NATMED DEFENCE (PTY) LTD



A JUDGMENT BY MATOJANE J
GAUTENG DIVISION,
JOHANNESBURG
24 AUGUST 2021

2022 (2) SA 554 (GJ)

When shareholders seek the removal of a director, section 71(1) of the Companies Act (no 71 of 2008) does not require them to provide the director concerned with a statement setting out the reasons for the proposed resolution

THE FACTS

On 25 May 2017 Miller, acting in his personal capacity, and Kellerman, acting in his capacity as a duly authorised shareholder representative of both Natmed Defence (Pty) Ltd and the second respondent (Chalcid (Pty) Ltd), concluded three separate oral agreements. The first agreement was a directorship agreement between Miller and Natmed. The second directorship agreement was between Miller and Chalcid. The third agreement was between Miller on the one hand and Chalcid and Natmed on the other (the bonus agreement).

In October 2018, by agreement, Miller resigned from Chalcid, and the amount that Chalcid was paying the applicant in director's fees was taken over by Natmed. Miller's Natmed directorship continued until 30 April 2019, when he was removed as the director thereof.

The trustees of the shareholder of the two companies took a decision to remove Miller as director of the companies.

Miller contended that his removal was in breach of section 71(2)(b) of the Companies Act (no 71 of 2008) because (a) no reasons were given to the applicant regarding why his removal as a director was proposed in order to enable him to make representations, (b) the notice to remove him was given short of the statutorily required 10-day period, (c) the shareholder's meeting that took the decision to remove him was held telephonically, in breach of section 63(2) of the Act, (d) the notice of the meeting was given less than 10 days before the meeting, in breach of section 62(1)(b)

Miller applied for an order for the payment of outstanding amounts for remuneration (director's fees, and certain bonuses) and for his reinstatement.

THE DECISION

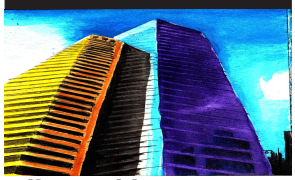
The question was whether the requirement that a director be afforded 'reasonable opportunity to make a presentation' be read to require that reasons for the proposed removal be given to the director prior to the decision being taken. There would appear to be no such requirement.

When shareholders seek the removal of a director, section 71(1) does not require them to provide the director concerned with a statement setting out the reasons for the proposed resolution, as is the case where the removal is by directors. The legislature has deliberately preserved the right of the majority shareholders to remove a director whom they no longer support. Directors serve at the behest of shareholders who elected them. The shareholders can remove them at will, without having to provide reasons.

Section 71(1) does not require shareholders to have a reason for wanting to remove a director. Shareholders cannot, therefore, be obliged to give reasons in advance as this was not the legislature's intention.

Though short of what was statutorily required, the notice period did not prejudice Miller to warrant the setting aside the shareholders' decision in exercising a statutory right that they possessed. Nothing in section 71 deprived Miller of the right he might have to claim damages for loss of office as a director, for non-compliance with the required notice period.

Section 71(2)(b) affords the applicant a reasonable opportunity to make a representation, in person or through a representative, 'to the meeting' before the resolution is



put to the vote. Miller did not explain why he did not do so. This also could not be said to have prejudiced the applicant, rendering his removal unlawful.

Even if it was not competent for the shareholder to remove Miller as a director, without having to give reasons in advance for its decision, Miller could not insist on remaining a director in circumstances where the shareholder no longer had trust that he was able to conduct the affairs of the company to its liking. The relationship of trust had broken down irretrievably.

The application was dimsissed.

The requirement that shareholders must furnish the director concerned with the reasons for the proposed resolution in advance is expressly provided for in s 71(3) of the Act. The section provides for instances where the removal of a director is sought by the board of directors. The director concerned must be given notice of the meeting and a copy of the relevant resolution, accompanied by a statement of reasons for the resolution, which is detailed enough to enable him to formulate a response. Secondly, the decision by the board of directors to remove a director is subject to review by a court to ensure that the removal is procedurally and substantively fair.

Where shareholders seek the removal of a director, s 71(1) does not require shareholders to provide the director concerned with a statement setting out the reasons for the proposed resolution, as is the case where the removal is by directors. The legislature has deliberately preserved the right of the majority shareholders to remove a director whom they no longer support. Directors serve at the behest of shareholders who elected them. The shareholders can remove them at will, without having to provide reasons.

FRAMATOME v ESKOM HOLDINGS SOC LTD

A JUDGMENT BY MATHOPO JA (MOLEMELA JA, MAKGOKA JA, MBATHA JA and MOTHLE JA concurring)
SUPREME COURT OF APPEAL
1 OCTOBER 2021

2022 (2) SA 395 (SCA)

Contract

In determining whether an adjudicator's determination is binding on the parties, it must be determined whether or not the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error.

THE FACTS

Eskom Holdings Ltd concluded an Engineering and Construction Contract with Framatome's predecessor for the replacement of the steam generators at the Koeberg Nuclear Power Station located in Cape Town. Under the contract, Framatome was the contractor and Eskomthe employer, represented by the project manager.

The contract made provision for 'compensation events'. This allowed the contractor, Framatome, to claim additional payment and extra time to do the work from the employer. Compensation events were events which, should they occur, and provided they did not arise from the contractor's fault, entitled the contractor to be compensated for any effect the event had on the prices and the contractual sectional completion date(s) or key date(s).

There was a compensation event for which Framatome provided a quotation. The project manager notified Eskom of a compensation event which had arisen as a consequence of the agreed need for the redefinition of certain key dates. Following the project manager's notification and assessment of the compensation event, a dispute arose between the parties. This was in relation to the project manager's decision regarding the consequences of the changed key dates and, whether the project manager's notification amounted to a compensation event.

Framatome referred the dispute to adjudication as 'Adjudication No 7'. Included in Framatome's referral notice was a quotation setting out Framatome's assessment of the impact of the revised key dates on the remaining key dates, sectional completion dates, the completion date and the prices.

Clause W1 of the contract provided that the adjudicator could only decide disputes which had been notified and referred to him in accordance with the provisions of the contract. The provisions of the contract also place specific time periods within which such disputes had to be notified and referred. The effect of this was that an adjudicator would have no jurisdiction to decide a dispute which: (a) had not been notified; (b) if notified, had not been notified within the prescribed time period; and (c) had not been referred to the adjudicator within the prescribed period.

The adjudicator issued his decision as 'decision No 7', which recorded that the project manager's instruction of 29 May 2017 was indeed a compensation event and summarised the dispute as being about 'the manner in which [the] compensation event was implemented which needs to be evaluated'.

On 23 April 2019 Framatome notified the project manager and Eskom of a dispute regarding the project manager's assessment. The dispute, referred to as 'dispute 11', was referred to the adjudicator. Framatome requested the adjudicator to determine whether the project manager had made a full assessment of the compensation event in due time, as directed by decision 7 and whether the project manager had properly assessed the impact of the change to key dates on the sectional completion dates, the completion date, the prices, and whether Framatome's quotation was deemed accepted by Eskom in terms of subclause 16.4.

In his findings, referred to as 'decision 11', the adjudicator

determined that Eskom had failed, within the project manager's assessment, to make a full assessment of the compensation event in due time as directed by decision 7 and also as required by clauses 63 and 64 of the contract. The adjudicator concluded that Framatome's quotation was deemed to have been accepted by Eskom. The effect of this decision was that the adjusted key dates, sectional completion dates, completion dates, activity schedule and payments of the quotation became contractually binding upon the parties.

Eskom notified the adjudicator of its dissatisfaction. Additionally, it raised various grounds for refusing to give full effect to decision 11. Framatome brought enforcement proceedings in the High Court. The High Court dismissed Eskom's challenge to decision 7 on the basis that the dispute fell within the jurisdiction of the adjudicator and that Eskom neither objected to that decision nor gave notice of its intention to refer the decision to arbitration. It upheld Eskom's argument on decision 11 on the ground that the adjudicator did not decide the dispute that was referred to him under the contract by the parties. It held that there was no mention in the referral about whether the project manager timeously issued the assessment. It concluded that the adjudicator answered the wrong question, and held that the impugned decision was not binding on the parties and was thus unenforceable. It also held that Eskom had good prospects of successfully establishing at the arbitration that the adjudicator acted outside his jurisdiction.

Framatome appealed.

THE DECISION

The purpose of adjudication is to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration. As far as the procedure is concerned, adjudicators are given a fairly free hand. They are required to act impartially and permitted to take the initiative in ascertaining the facts and the law. Adjudication is merely an intervening, provisional stage in the dispute resolution process. Parties still have a right of recourse to litigation and arbitration. Only a tribunal may revise an adjudicator's decision. As that decision had not been revised, it remained binding and enforceable. Eskom could not partially comply with the award and decline to give full effect to the payment portion of the award. What Eskom was asking the court to do was to determine the merits, an aspect which fell within the purview of the arbitrator.

In the final analysis, the question to be asked was whether the adjudicator's determination was binding on the parties. The answer to that question depended on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties were bound by his determination, notwithstanding that he may have fallen into error. The finding of the High Court that the adjudicator answered the wrong question was not borne out by the facts. The adjudicator formulated the dispute as it was referred to him. At no stage did he depart from the real dispute between the parties. He decided the dispute in accordance with what the parties had contemplated and appreciated.

The adjudicator rendered a sound decision based on the facts. Before the High Court was an enforcement of a provisional or interim payment due to Framatome in terms of the contract. The provision that payment must be made even before arbitration is a strong indication of the ousting of a court's jurisdiction to review the award. The parties knew when they contracted with each other that disputes may arise and a temporary solution in the form of interim payments is provided to ensure the completion of the Contract within the agreed specified period. The High Court erred in its conclusion that the wrong question was answered.

The appeal was upheld.

PRIDE MILLING CO (PTY) LTD v BEKKER N.O.

Contract

A JUDGMENT BY PETSE AP (PONNAN JA, WALLIS JA, MOKGOHLOA JA and CARELSE JA concurring)
SUPREME COURT OF APPEAL
30 SEPTEMBER 2021

2022 (2) SA 410 (SCA)

In depending on the qualification provided for in section 341(2) of the Companies Act (no 61 of 1973), it does not assist a party wishing to depend on this to contend that dispositions sought to be recouped from it by liquidators were made in good faith in the ordinary course of business at a time when it was not aware that the company in question was being wound up.

THE FACTS

On 29 June 2017, Irfan Sohail Trading (Pty) Ltd (Irfan), a private company carrying on business as a general trading store at Ga-Masha Village in Limpopo, was placed under provisional winding-up at the instance of Eendag Meule Bothaville (Pty) Ltd (Eendag Meule). The application for the liquidation of Irfan was founded on the contention that Irfan was indebted to Eendag Meule in the sum of R144 165 in respect of goods sold and delivered for which Irfan had failed to pay because it was unable to pay its debts as contemplated in section 345(1) of the Companies Act (no 61 of 1973).

Irfan was placed under final liquidation on 14 September 2017. During the period 7 June 2017 to 8 August 2017 Irfan made four payments to Pride Milling Company (Pty) Ltd in settlement of amounts owing in respect of goods sold and delivered by Pride Milling to Irfan: (i) R70 000 on 7 June 2017; (ii) R75 000 on 7 July 2017; (iii) R130 000 on 7 August 2017; and (iv) R20 000 on 8 August 2017, a total of R295 000.

A dispute arose between Pride Milling and the joint liquidators, Bekker and the second respondent. The joint liquidators contended that the payments constituted void dispositions and were prohibited by section 341(2) of the Companies Act. Consequently, the joint liquidators asserted that these payments were liable to be set aside because they were made after the effective date of the winding-up application.

Section 341(2) of the Act provides that every disposition of its property by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders.

The joint liquidators sought an order directing Pride Milling to repay the amount of R295 000.

Pride Milling asserted that the disputed payments should be validated in accordance with the qualification in section 341(2). Pride Milling alleged that the payments: (a) were made in the ordinary course of business and in good faith; (b) were not to the 'detriment of the general body of Irfan's creditors'; (c) had 'the effect of increasing the asset value of Irfan to the benefit of the body of the creditors'; (d) were received at a time when Pride Milling was not aware that Irfan was in financial distress; and (e) were made when it had no knowledge of the fact that Irfan was being wound up.

THE DECISION

The provisions of section 341(2) clearly state that every disposition of its property by a company being wound up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law, ie the disposition is regarded as if it had never occurred. The mischief that this provision seeks to obviate is to prevent a company being wound up from dissipating its assets and thereby frustrating the claims of its creditors.

The manifest purpose of the qualification in section 341(2) is to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature. This discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order. In exercising this discretion, a

court will, amongst other relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding up a company unable to pay its debts, the interests of the creditors and those of the beneficiary of the disposition.

In the present case, Pride Milling asserted that the dispositions sought to be recouped from it by the joint liquidators were made in good faith in the ordinary course of business at a time when it was not aware that Irfan was being wound up. However, as stated in *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) it is no defence to assert that the dispositions were made by the company's staff in ignorance of the fact that the company had been placed under winding-up. Even where a disposition was alleged to constitute "a mere administrative rectification", the fact that the effect thereof was to remove a claim from the concursus and settle it in full in favour of the creditor concerned, to the prejudice of the general body of creditors, is impermissible.

Given the effect of section 341(2), a party approaching a court and seeking that the court order otherwise would logically need to establish its entitlement to the relief sought. Such a party bears the onus to persuade the court with clear evidence as to why a court should depart from the statutorily ordained default position and 'otherwise order'. This, Pride Milling failed to do.

A discretion in the true sense proceeds from the premise that a court exercising such a discretion may properly come to different decisions, having regard to a wide range of equally permissible options available to it. Thus, a court exercising a wide discretion should not fetter its own discretion, and, in the words of Hefer JA, 'particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security'. An appellate court may interfere with the exercise of a discretion in the true sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle, or has not brought an unbiased judgment to bear on the question under consideration, or has not acted for substantial reasons.

VUKEYA v NTSHANE

Contract

A JUDGMENT BY MOCUMIE JA (MAYA P, DAMBUZA JA, PLASKET JA and GOOSEN AJA concurring)
SUPREME COURT OF APPEAL
11 DECEMBER 2020

2022 (2) SA 452 (SCA)

A duty is cast on a party seeking to rely on the deemed consent provision of section 15(9)(a) of the Matrimonial Property Act (no 88 of 1984) 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.

THE FACTS

Ntshane and her husband were married in community of property on 13 May 1980. They lived together with their children in a residential property. On 8 September 2013, after her husband's death, Ntshane was appointed as the executrix of the deceased estate. Then she became aware of a sale of the property by the deceased to Vukeya on 5 April 2009 without her knowledge or consent as provided for in section 15(2)(a) of the Matrimonial Property Act (no 88 of 1984).

Ntshane instituted proceedings against Vukeya in the High Court, seeking an order that the deed of transfer dated 19 May 2009 and having registration number 015157/09 in respect of the property described be cancelled.

At the time Vukeya purchased the property from the deceased, he was staying alone in the said property and he also confirmed to me that he was not married. He signed the deed of sale and also the transfer documents alone as unmarried. The holding title deed described the deceased as unmarried and as the sole registered owner of the property. The power of attorney to effect the transfer, described the deceased as unmarried. Vukeya averred that he purchased the property bona fide as he had no knowledge that the deceased was married to Ntshane at the time of the sale and transfer of the property to him by the deceased.

Until her appointment as executrix of the deceased's estate Ntshane was not aware that the property had been sold to Vukeya, and did not give her consent to the sale. She asserted that Vukeya was duty-bound to have reasonably made enquiries as provided in section 15 of the Act to establish whether the deceased was married, and, if so, in terms of which marital regime, and if it was in community of property, whether she had consented to the sale and transfer of the property.

The High Court granted the order. Vukeya appealed.

The issue for determination was whether Vukeya had brought himself within the protection afforded to third-party purchasers by section 15(9)(a). If he had not, the sale was a nullity for want of Ntshane's consent. If he had, Ntshane would be deemed to have consented to the sale and it remained valid.

Section 15(2) of the Act provides that a spouse in a marriage in community of property may not without the written consent sell any immovable property forming part of the joint estate. Section 15(9)(a) provides that when a spouse enters into a transaction with a person contrary to the provisions of subsection (2) and that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection.

THE DECISION

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. This approach, and the test to apply in these circumstances was most recently endorsed in *Mulaudzi v Mudau* [2020] ZASCA 148..

Contract

It was only in September 2013, upon her appointment as executrix of the deceased estate, that Ntshane became aware that, without her knowledge or consent, the deceased had sold the property to Vukeya on 5 April 2009. Nevertheless, there were two official documents that supported Vuekeya's version that he was unaware that the deceased was married to Ntshane: the deed of transfer which referred to the deceased as unmarried, and the power of attorney to pass transfer describing the deceased as unmarried. This supported the assertion that Vukeya was not aware that the deceased was married and could not reasonably have known that he was. In these circumstances, he could not reasonably have been expected to make further enquiries as suggested by Ntshane.

Vukeya did not know that the deceased was married, and could not reasonably have known this. That being so, the standard of the 'deemed consent' provision applied, and the order sought by Ntshane should not have been granted.

The appeal was upheld.

A third party to a transaction contemplated by ss 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. In terms of the general principle that the party who asserts a particular state of affairs is generally required to prove it, the burden of bringing s 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.

THE MSC SUSANNA OWNERS AND UNDERWRITERS, MV MSC SUSANNA v TRANSNET SOC LTD

A JUDGMENT BY WALLIS JA (NAVSA JA, SCHIPPERS JA, MBATHA HA AND GORVEN JA concurring)
SUPREME COURT OF APPEAL
21 NOVEMBER 2021

2022 (2) SA 85 (SCA)

Shipping

Section 261(1)(b) of the Merchant Shipping Act (no 57 of 1951) limiting the liability of a potential defendant may be applied against a Defence Ministry controlling a naval vessel, and joinder of such a Ministry to a limitation action is possible.

THE FACTS

As a result of a storm in the port of Durban, the *Susanna* broke her moorings and collided with several ships. One of them was the *Floreal*, a French naval vessel under the control of the second respondent, the Ministère des Armées of the French Republic. The *Susanna* also collided with cranes and other infrastructure owned by Transnet SOC Ltd, the National Ports Authority of South Africa (the NPA).

The NPA sued the Owners and Underwriters of the *Susanna* and the demise charterer (the appellants), for damages in the sum of R23m arising out of this incident. The Ministry's response to the appellants' action for a declaration of non-liability in relation to the damages to the *Floreal* was to lodge a counterclaim for damages amounting to nearly 10 million.

The appellants issued a writ of summons in a limitation action against the NPA, contending that their total liability for damages should be limited in terms of the provisions of section 261(1)(b) of the Merchant Shipping Act (no 57 of 1951). They also brought an application for the joinder of the Ministry to the limitation action. The Ministry opposed the application on the grounds that, as the owner of a foreign naval vessel, the right to limit was excluded as against it by the provisions of section 3(6) of that Act.

THE DECISION

The issue for decision was correctly encapsulated by the parties as: whether the owners and demise charterers of a merchant ship may, in circumstances where a merchant ship causes damage to a ship belonging to a defence force as contemplated in section 3(6) of the Act seek a limitation of liability in terms of section 261 of the Act in respect of the claim of that defence force.

The basis for the Ministry's contention that the appellants could not invoke this provision was based on section 3(6) of the Act. Section 3(3) provides that the Act binds the state, subject to the entitlement of the Minister of Transport to exempt vessels owned by the Government of South Africa or Transnet from a range of provisions dealing with crew and the recovery of wages. Section 3(6) provides that the provisions of the Act shall not apply to ships belonging to the defence forces of the Republic or of any other country. The Ministry contended that, as the *Floreal* was part of the French navy and therefore part of the French defence force, the provisions of section 261 did not apply in relation to its claim against the appellants.

The appellants' contention was that s 261(1)(b) conferred an internationally recognised right upon them as the owners of the *Susanna* to limit their liability and that they were invoking limitation against the Ministry, as the party making a claim against them, and not against the *Floreal*.

The terms of section 261(1)(b) are clear and comprehensive. The right to limit is given to the owner of a vessel, an expression given an extended meaning in section 263(2), in respect of all loss or damage to any property or rights of any kind, whether movable or immovable. That language encompasses all types of property, without qualification. It is clearly wide enough to include the loss or damage embodied in the claim by the Ministry.

Section 3(6) excludes the bulk of the provisions of the Act from application to both South African

and foreign vessels forming part of their country's defence forces. Its wording states that the provisions of the Act shall not apply 'to ships'. It does not say that its provisions will not apply to the owners of ships. It does not say that the Act does not apply to defence forces, so as to preclude owners of merchant ships from invoking its provisions by, for example, seeking an order for the division of loss after a collision, or a contribution to the damages arising from jointly caused personal injury, or an order limiting their liability.

Therefore section 261(1)(b) could be applied against the Ministry, and joinder of it to the limitation action was possible.

No discernible reason of policy supports a different construction of s 261(1)(b). Limitation of liability exists as a matter of policy. None of the conventions on limitation exclude its invocation in respect of claims arising from damage done to or by naval vessels. We were not referred to any provisions in the laws of any other maritime state that would preclude a claim in respect of damage done to a naval vessel from being required to participate along with other creditors in the distribution of a limitation fund. France was an original signatory to the 1976 Limitation Convention, which contains no exemption from the invocation of limitation for naval vessels. 25 Sixty-three other states, including virtually all major maritime nations, with the exception of the United States of America, 26 were either signatories to, or have ratified, the Convention. An exemption from the right to invoke limitation in respect of claims by naval vessels would therefore be inconsistent with international practice.

TAHILRAM v TRUSTEES, LUKAMBER TRUST

A JUDGMENT BY MEYER AJA (ZONDI JA, DAMBUZA JA, PLASKET JA and HUGHES JA concurring)
SUPREME COURT OF APPEAL
9 DECEMBER 2021

2022 (2) SA 436 (SCA)

Contract

In the absence of a contractual provision to the contrary, whenever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his or her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once communicated to them.

THE FACTS

On 29 August 2014 the Lukamber Trust, Tahilram and A & A Dynamic Distributors (Pty) Ltd concluded a shareholders' agreement. It contained an arbitration provision for the settlement of disputes. It also provided for resolution of a dispute arising from a shareholder exercising its pre-emptive right to purchase the shares of a co-shareholder in respect of the fair market value of such shares. Clause 6.2.1 provided that the purchase price for the shares shall 'be a fair value therefor between a willing buyer and a willing seller determined on the basis provided in 5.1.8 and 5.1.9'.

In the absence of agreement between the shareholders on the market value of the company's shares, clause 5.1.8 provided that the fair market value of shares 'shall be determined . . . by the Auditors . . . and the valuation of the Auditors, communicated to the Shareholders in writing, shall be final and binding on the Shareholders'.

The employment of Tahilram with the company was terminated on 27 March 2018. This brought into operation clause 6.2.1 so that he was deemed on 26 March 2018 to have offered all his shares in the company to the trust. Tahilram and the trust did not reach agreement on a fair market value of his 30% shareholding of the company. The company's auditors, Odendaal & Co, were requested to determine the fair market value of the company's shares.

Mr Herman of Odendaal & Co (the valuer) determined the fair value of the company's business to be R4,8m 'plus any value unlocked on the obsolete stock as agreed on by a willing buyer/ willing seller'. He classified 'all stock that did not move for a 24-month period . . . as obsolete'. His written valuation report dated 4 July 2018 was communicated to the company's co-shareholders. The valuer thereafter confirmed 'that the stock value as per the detailed inventory list supplied by the company for the year ended 31 March 2018 was R14 971 701,51 but based on our obsolescence tests we believe the fair realisable value to be R4 795 249,18'. His written valuation report dated 13 July 2018 was communicated to the company's co-shareholders.

Tahilram disagreed with the valuation. In response, the valuer made it clear that he was not prepared to change his valuation. Tahilram ultimately accepted the valuer's determination of the fair market value of the company's shares. In a letter dated 15 February 2019 from the attorneys of the trust, represented by one of its trustees, Mr Kayser, addressed to Tahilram's attorneys, Tahilram was notified that the trust accepted the valuer's determination of the fair market value of the company's shares, and that the trust accepted Tahilram's offer to purchase his 30% shareholding. Sincd the auditors of the company confirmed that the company had a nett asset value of R4,877,427,00 as at 31 March 2018, the value for Tahilram's shares in terms thereof was R1,625,809,00. The letter also stated that in respect of the stock, R4,800,000,00 was not considered obsolete stock and was included in the Net Asset Value calculation by the auditors and would thus need to be deducted from the Stock Value Figure.

The trust maintained that various amounts which Tahilram allegedly owed to it should be

deducted from the purchase price it was to pay to Tahilram. Tahilram also accepted the valuer's determination of the fair market value of the company's shares and, to no avail, demanded payment from the trust of an amount equivalent to 30% of the fair market value of the company's shares as determined by the valuer. He brought an application claiming such amount plus interest and costs.

The valuer issued an amended written valuation in which he reduced his initial valuation of the net asset value of the company's shares by an amount of R1 260 775. Such deduction was for motor vehicles allocated to Kayser that were included in his original valuation.

On appeal, the issue for decision was whether the valuer was legally permitted to unilaterally withdraw his valuation in order to correct or modify it, once his valuation had been communicated to the parties concerned.

THE DECISION

It was remarkable that the reason for the valuer's reduction of an amount of R1 260 775 in respect of motor vehicles allocated to Kayser from the net asset value of the company's shares as initially determined by him, was not explained either by Kayser or by the valuer, nor did such deduction form part of Tahilram's initial objections to the valuer's initial valuation report or of the deductions which Kayser maintained should be made from the purchase price payable by the trust for 30% of Mr Tahilram's shares in the company.

Once the valuer's valuation had been communicated to the parties, the valuation validly issued could not be withdrawn or cancelled by the valuer to correct mistakes of fact or value in it. The shareholders agreement did not provide to the contrary; it expressly confirmed that there was to be finality as far as the valuer's valuation was concerned. Once therefore the valuer had issued his written valuation report, he was functus officio. That being so, the valuer was not legally entitled unilaterally to withdraw or cancel his valuation report and to issue one that altered and amended his definitive pronouncement of the fair market value of the company's shares. To hold otherwise would lead to uncertainty and a lack of finality.

In their shareholders agreement the parties identified a means of agreement on the fair market value of the company's shares by reference to the valuer identified by them, and they had to be held to their bargain. Their agreement did not offend public policy neither was it otherwise impeachable. Similar to judicial and quasi-judicial determinations, where it is permissible for a court or arbitrator to address and correct an obscurity, ambiguity, uncertainty, clerical, arithmetical or other error in a judgment or order or arbitral award, without thereby altering the sense and substance of the judgment, order or arbitral award, the same holds true for written valuation reports issued by an expert.

In the absence of a contractual provision to the contrary, or agreement or waiver by the parties, whenever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his or her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once communicated to them. The valuer is then functus officio insofar as the valuation and matters pertaining thereto are concerned. That being so, the valuer is then not permitted to unilaterally withdraw or cancel the valuation in order to alter or amend it. Only a court has the power to interfere with the valuer's decision in review proceedings. The judicial ambit of the court's power to interfere is severely circumscribed, and limited to the narrow grounds as enunciated in this court's jurisprudence to which I have referred.

The appeal was upheld.

NEDBANK LTD v YACOOB

A JUDGMENT BY FISHER J and MATTHYSEN AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
30 AUGUST 2021

2022 (2) SA 230 (GJ)

Failure to annex the contract upon which a plaintiff relies in bringing an action against a defendant does not invalidate the plaintiff's claim. The plaintiff is however, required to give an explanation as to why the contract has not been so annexed.

THE FACTS

Nedbank Ltd issued the summons against Yacoob for payment of R28 954,22 and ancillary relief. The claim was for moneys lent and advanced in terms of a credit agreement relating to the use of a credit card issued by the respondent. The action was defended and, after pleadings were closed, the matter was set down for trial on 12 August 2020.

Yacoob failed to appear at the trial hearing set down and, as a result, Yacoob brought an application for judgment by default at the trial. The magistrate found that Nedbank had failed at the hearing to prove the credit agreement relied on. Her finding was based on the fact that the bank did not attach to the particulars of claim a copy of the actual credit agreement between the parties but a standard pro forma document. The bank stated that the reason for this was that it could not locate the actual application form concluded. It thus relied on its pro forma standard terms and conditions. The salient terms relied on were also specifically pleaded in the particulars of claim.

The magistrate held that the only way in which the case could proceed would be if a condonation application dealing with the failure to attach the contract was successfully brought. The magistrate relied on the provisions of Magistrates' Courts Rule 12 in coming to this conclusion. Rule 12 deals with a plaintiff's rights to direct a written request to the court or the registrar to request default judgment in circumstances where either the defendant had not delivered a notice of intention to defend an action or the defendant is barred from delivering his plea.

The bank appealed.

THE DECISION

Rule 12 was not applicable as the pleadings were closed and the case allocated a trial date. Notwithstanding the erroneous reference to rule 12, the question of whether an application for condonation was appropriate at all still arose as an issue in the appeal. The questions for determination were: (i) whether a plaintiff in the predicament of the bank may still proceed to claim under the missing contract; and (ii) if so, what processes and principles apply to the making of such a claim.

The substantive law of evidence prescribes that the original signed contract is the best evidence that a valid contract was concluded and the general rule is thus that the original must be produced. But, if it is impossible for the plaintiff to produce the written contract or a copy thereof, substantive law allows him to plead and prove the conclusion of the contract and its terms by way of secondary evidence. A rule of procedure such as Magistrates' Courts Rule Court rule 18(6) cannot be construed to deprive the plaintiff of his cause of action or of his right to adduce secondary evidence of the contract.

Provided a plaintiff pleads the conclusion of the contract and the material terms, the particulars of claim will disclose a cause of action. The failure to attach a contract will, in the absence of a properly pleaded explanation for such failure, be in breach of the procedural rules pertaining to pleadings — but this does not deprive the pleader of a cause of action.

The bank therefore pleaded a cause of action.

The responsibility or otherwise for the loss of the document is only relevant to the extent that it impacts ultimately on the proof of the contract. Thus, an application for condonation is neither required nor would it be of any real assistance in these circumstances.

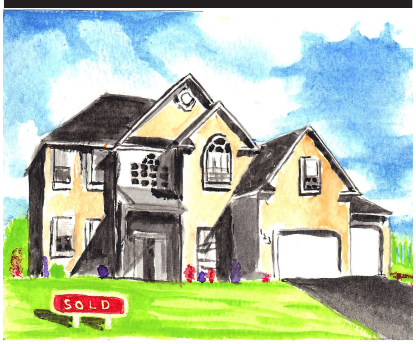
The appeal was upheld.

VAN DEN BOS N.O. v MOHLOKI

A JUDGMENT BY GILBERT AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
2 SEPTEMBER 2021

2022 (2) SA 616 (GJ)

Property



Although the High Court might have jurisdiction in a matter, an applicant in this court must establish a case why this court should through process-in-aid grant an order enforcing the judgment of a lower court, such as declaring immovable property specially executable.

THE FACTS

Van den Bos, in his capacity as a court appointed administrator of the Panarama Place body corporate for a sectional title scheme obtained orders by default against owners in the scheme, Mohloki and the other respondents, for arrear contributions and other charges owing to the body corporate.

Attempts to execute on warrants of execution issued out of the magistrates' court were unsuccessful as no attachable movable assets belonging to the respondents could be found at the units. The deputy sheriffs rendered nulla bona returns of service. Applications by the respondents in the magistrates' court for rescission of the default orders failed. The respondents have sought to appeal the refusal of the rescissions to the High Court. The applicant contends that the respondents are not pursuing those appeal proceedings with any vigour.

Relying upon the nulla bona returns of service rendered pursuant to the warrants of execution issued out of the magistrates' court, Van den Bos brought an application to declare the units as immovable properties specially executable, and to authorise that writs of execution be issued.

The court raised the question whether the High Court had jurisdiction to, and should, declare immovable properties specially executable in relation to judgments granted in the magistrates' court, where the execution process had been initiated in the magistrates' court.

THE DECISION

The Magistrates' Court Rules expressly provide for residential immovable property to be declared executable in a manner substantially the same to that provided for in the High Court. There is no statutory provision that regulates whether the High Court can declare property specially executable pursuant to orders granted in the magistrates' courts. A consideration of the case law recognises that a court can enforce a judgment of another court by way of what is known as process-in-aid. Therefore, the High Court does have jurisdiction to enforce another court's judgment.

The Magistrates' Court Rules expressly provide for property to be declared executable by the magistrates' court in exercising its role of judicial oversight over execution against residential immovable property. Therefore, the High Court cannot rely on an inherent jurisdiction as a basis to enforce magistrates' court orders, without the substantive requirements of issuing process-in-aid having been satisfied.

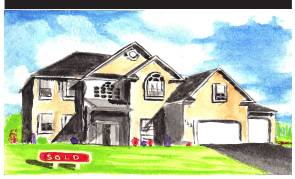
It is the right of an applicant or plaintiff as dominus litis to choose whichever forum may have jurisdiction and that he or she cannot be faulted for exercising that election because another court has concurrent jurisdiction, and should rather have instituted proceedings in that other court. In this instance, Van den Bos made the election to institute proceedings in the magistrates' court and having done so could not complain that he then proceed in his chosen forum.

Although the High Court does have jurisdiction, Van den Bos had failed to establish a case why this court should through process-in-aid grant an order declaring immovable property specially executable based upon the orders of another court.

The application was refused.

ZIKALALA v BODY CORPORATE, SELMA COURT

Property



A JUDGMENT BY CHETTY J
(OLSEN J concurring)
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG
23 SEPTEMBER 2021

2022 (2) SA 305 (KZP)

Without any express or implied power that is accorded to a body corporate in the Sectional Title Schemes Management Act (no 8 of 2011), the trustees of the body corporate may not conclude an agreement outside the ambit of the powers given in terms of the Act. To the extent that an act is outside the powers given in the Act, the body corporate, as a creature of statute, will be construed to have acted ultra vires.

THE FACTS

The Body Corporate, Selma Court raised levies against a unit owned by Zikalala in terms of section 3(1)(f) of the Sectional Title Schemes Management Act (no 8 of 2011). Zikalala failed to pay the levies and contributions raised, resulting in the body corporate instituting action and taking judgment by default in the amount of R24 099,09 as at 1 February 2018.

Zikalala wrote to the body corporate's attorneys acknowledging his indebtedness and his inability to pay the amount due. He offered to pay off the debt by way of instalments in the sum of R1000 per month, which amount would be inclusive of the existing monthly levies. The offer was rejected. In an attempt to satisfy this claim, the body corporate issued a warrant of execution which was unsuccessful, resulting in a nulla bona return by the sheriff.

Zikalala appeared in person at an enquiry, where the body corporate was represented by its attorney. He repeated his offer in full and final settlement of the claim, including costs. The body corporate's attorney undertook to take instructions regarding the offer. The matter was adjourned to 5 April 2019. On this date, the body corporate's attorney confirmed that Zikalala's offer was acceptable to the trustees of the body corporate. Shortly thereafter, the attorneys wrote to Zikalala advising that his offer of R30 000 in full and final settlement was being revoked as it was erroneously accepted. The letter further indicated that the body corporate was nonetheless prepared to accept R30 000 as a lump-sum payment towards the arrears.

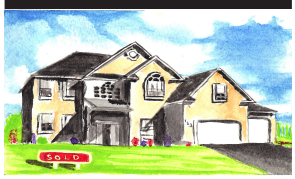
In response to the body corporate's application, Zikalala opposed the application to declare his property executable and filed a counter-application for an order declaring that the settlement agreement concluded with the body corporate be held to be valid and enforceable. In support of his application Zikalala contended that he had not breached the terms of the agreement and that the revocation by the body corporate was unilateral. He stated that he had communicated his offer of settlement not only to the body corporate's attorney, but also emailed two of the trustees of the body corporate. Both trustees responded that the offer of settlement was acceptable.

The body corporate raised the issue as to whether it was competent in law for it to have accepted an offer less than what had been claimed against Zikalala. It contended that it was not competent for the body corporate's trustees to compromise its claim for levies, costs and interest due and payable by Zikalala inasmuch as the actions of the trustees were ultra vires their powers in terms of the Act and its regulations.

THE DECISION

Section 7(1) of the Act provides that the functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules.

It follows that, without any express or implied power that is accorded to a body corporate in the Act, the trustees may not conclude an agreement outside the ambit of the powers given in terms of the Act. To the extent



that an act is outside the powers given in the Act, the body corporate, as a creature of statute, will be construed to have acted ultra vires. Likewise, it would not be competent for the body corporate to sanction an act which is ultra vires by way of a special resolution.

Whatever the motive of the two trustees in accepting the offer of Zikalala, in the absence of any express or implied provision in the Act, they were not empowered to accept a settlement offer of a lesser amount than what was owing to the body corporate. At a practical level, one could understand why the trustees accepted the offer, as the alternative would be to wait for several years before the debt would have been liquidated in terms of the offer made at the enquiry.

The contention that a valid and binding compromise was reached in respect of the body corporate's claims could not be sustained. Whatever the conduct of the attorney and the two trustees in conveying the impression that an agreement had been reached, in law neither had the authority to compromise the claim, as to do so would be ultra vires the provisions of the Act and its regulations.

The appeal failed.