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A SURVEY OF THE CURRENT CASE LAW

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SUPREME COURT OF APPEAL
19 SEPTEMBER 2005

2005 (6) SA 592 (A)

Contract

An intention to avoid the payment of levies is not objectionable. However, if the real nature of the agreements and their implementation was inconsistent with their ostensible form, then they will be considered a simulation, and the real agreement between the parties will be substituted for the simulated one.

THE FACTS

Rainbow Chicken Farms (Pty) Ltd concluded two agreements with Jackson, a farmer in the Bergville area of Kwazulu-Natal. In terms of the first, Jackson let a portion of his farm to Rainbow. In terms of the second, Rainbow employed Jackson as the manager of its maize farming operations on the leased land.

Pursuant to these agreements, Jackson produced and delivered to Rainbow quantities of maize over the following three seasons.

The Maize Board claimed that it was entitled to levies on the maize which were payable on maize sold by farmers. The levies were provided for in the Marketing Act (no 59 of 1958) and did not apply to maize produced for the purpose of feeding the producer's own animals. Rainbow, a breeder and producer of broiler chickens, fed the maize to its chickens.

The Maize Board contended that the agreements entered into between Jackson and Rainbow were simulated and concluded with the intention of disguising that Jackson in fact sold the maize to Rainbow. It claimed payment of levies in the sum of R576 439,63.

THE DECISION

An intention to avoid the payment of levies would not be objectionable. However, if the real nature of the agreements and their implementation was inconsistent with their ostensible form, then they will be considered a simulation, and the real agreement between the parties will be substituted for the simulated one.

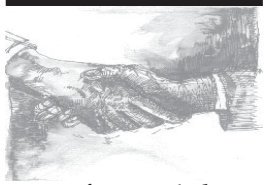
Viewing the agreements as they stood, the inference was that they were not intended to be implemented as they stood. Despite the fact that in one year, Jackson failed to reach the minimum quota provided for, he nevertheless received a production bonus. Furthermore, his own statements in a loan application indicated that he farmed on his own properties, and the parties effected settlements between themselves without regard to the formula provided for in the agreements.

The inevitable conclusion was that the undisclosed agreement was in fact the sale of maize to Rainbow. The underlying and disguised transaction was one for such a sale and levies were payable thereon.

The claim succeeded.

As a general rule parties to a contract intend it to be exactly what it purports to be. Not infrequently however, they may endeavour to conceal its true character. In such a case, when called upon, a court must give effect to what the transaction really is and not what in form it purports to be.

ERF 1026 TYGERBERG CC v PICK 'N PAY RETAILERS (PTY) LTD



A JUDGMENT BY HJ ERASMUS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
31 AUGUST 2005

2005 (6) SA 527 (A)

It is permissible to formulate a claim for damages arising from breach of contract on the grounds that the claimant faces a potential claim for damages from a third party as a result of the breach of contract.

THE FACTS

Erf 1026 Tygerberg CC brought an action against Pick 'n Pay Retailers (Pty) Ltd in which it claimed damages for breach of contract. The contract was alleged to have been concluded between the two parties and involved the supply to Pick 'n Pay of a quantity of bandanas. Erf 1026 alleged that Pick 'n Pay had repudiated the contract. Damages were alleged to have arisen firstly from loss of profit on the contract, and secondly from liability for loss of profits suffered by Andrew Spann.

In support of the claim for the second head of damages, Erf 1026 alleged that it had contracted with Andrew Spann to manufacture the bandanas, that as a result of Pick 'n Pay's breach of contract, it had been compelled to breach its contract with Spann, and that Spann was holding Erf 1026 liable for its loss of profits in the sum of R429 000. It alleged that at the time the agreement with Pick 'n Pay was concluded, both parties were aware that Erf 1026 would contract with a manufacturer for the production of the bandanas, and in the event of Pick 'n Pay breaching the agreement, Erf 1026 would be liable for the manufacturer's loss of profit.

Pick 'n Pay excepted to the claim for the second head of damages on the grounds that there was no indication that Erf 1026 had as yet suffered any damages arising from Spann's alleged loss of profit and on the grounds that this constituted a different claim requiring separate proof.

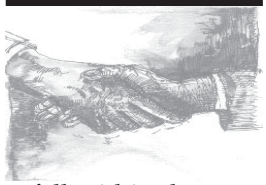
THE DECISION

Erf 1026's claim under the second head of damages could be sen as falling within the broad basis for any damages claim, ie the interest held by the claimant, and could be categorised as its indemnity interest.

The objections to the claim raised by Pick 'n Pay all related principally to issues of causation, quantum and proof. Whether or not Spann had instituted any action against Erf 1026 or made a claim against it were issues for determination in the trial of the action. They were not matters which were to be dealt with at this stage and no exception could be taken against the claim based on doubts about the basis of proof of them.

The exception was dismissed.

GRÜNDLINGH v PHUMELELA GAMING AND LEISURE LTD



A JUDGMENT BY FARLAM JA and CONRADIE JA (LEWIS JA and HOWIE P concurring, COMRIE AJA dissenting)
SUPREME COURT OF APPEAL
1 JUNE 2005

2005 (6) SA 502 (A)

A bookmaker is entitled to offer and accept exotic bets which depend on the agreement that the payout will be determined according to a formula which applies the results announced by a totalisator betting system. Such practice is not unlawful competition.

THE FACTS

Gründlingh and the other appellants were licensed bookmakers in terms of the Gauteng Gambling Act (no 4 of 1995). As such, they were authorised to accept 'fixed odds bets' on sporting events. A 'fixed odds bet' was defined in the Act as a bet taken by a licensed bookmaker on one or more event where odds were agreed upon when such bet was laid, but excluding a totalisator bet.

A totalisator bet was not defined, but a 'totalisator' was defined as a system of betting on a sporting event in which the aggregate amount staked on such event was divided amongst those making winning bets on that event is divided amongst those persons who have made winning bets in proportion to the amounts staked.

Gründlingh began offering and accepting 'exotic bets'. These were bets in which the dividend per rand paid on a bet would be the same as the dividend per rand paid on Phumelela Gaming and Leisure Ltd's tote. Phumulela held a license to operate a totalisator. It objected to the bookmakers' offering and accepting exotic bets, contending that they were prevented from doing so by the defining limitations of 'fixed odds bet' which excluded the bookmakers from offering and accepting totalisator bets.

Phumelela sought an interdict preventing Gründlingh from offering and accepting exotic bets.

THE DECISION

The exotic bets were not totalisator bets as referred to in the Act. Gründlingh and the other bookmakers did not maintain a pool of bets in the same way as the totalisator did and they were at risk as far as the potential payout was concerned. The question was however, whether the exotic bets fell within the definition of a 'fixed odds bet', this being the only bets the bookmakers were entitled to take.

Fixed odds bets involved an agreement on the odds when the bet was laid. In the case of exotic bets however, the odds were not known when the bet was laid. The odds are however determined later, after it is known what money was wagered on the particular event. They are determined according to a known formula and it may therefore be said that the agreement is that the payout will be made according to this formula. The definition of 'fixed odds bets' is ambiguous to the extent that it does not specify whether such an agreement would be considered the kind of agreement envisaged. However, it was permissible to interpret the definition as including such an agreement.

Gründlingh was not in breach of the Act.

Phumelela also argued that the use of exotic bets amounted to unlawful competition in that it used the dividend results announced by it to determine the payout and depended on the operation of its totalisator and its acknowledged reliability. However, changes in the legislation governing betting showed that such use of dividend results was not always considered unacceptable practice. Legislation had at one stage prohibited such use, but for a short period only, and historically, the practice had been condoned and acted upon by bookmakers. No legislative prohibition on the practice existed at the time Phumelela brought interdict proceedings and there was no reason to consider it contrary to public policy.

Phumulela's application was dismissed.

JICAMA 17 (PTY) LTD v WEST COAST DISTRICT MUNICIPALITY

A JUDGMENT BY CLEAVER J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
30 MAY 2006

2006 (1) SA 116 (C)

Acceptance of a tender results in a binding contract in circumstances clearly indicating that the tender is made on the basis that such a contract is concluded upon acceptance of the tender.

THE FACTS

Jicama 17 (Pty) Ltd tendered for a contract to collect arrear municipal service council levies and attend to the registration of levy payers on behalf of the West Coast District Municipality. It received a letter from the municipality informing it that its tender had been successful. Three months later, the municipality informed it that it had cancelled the award of the tender which was to be readvertised. The municipality cancelled the award on the grounds that it had been given based upon an error of law, the tender process having omitted to include a requirement of 'functionality'.

Jicama applied for an order reviewing and setting aside the municipality's decision to set aside the award. The municipality opposed the application on the grounds, inter alia, that no agreement resulted from its acceptance of the tender.

THE DECISION

Jiacma contended that the award of the tender was a preliminary first step to the signing of a formal contract between the parties. However, this disregarded the provisions governing the tender process. Regulation 1(e) of the regulations promulgated in terms of section 5 of the Preferential Procurement Policy Framework Act (no 5 of 2000) defines a contract to mean the agreement that results from the acceptance of a tender by an organ of State.

More importantly however, was the fact that the tender documents themselves provided that if the tender was accepted, and the tenderer was notified of acceptance, it agreed to be bound by the terms of the agreement constituted by the said tender on acceptance thereof by the municipality until a formal contract was executed. The same document provided that upon acceptance of the tender, the tenderer agreed to enter into a formal contract if required. This was a clear indication that the municipality foresaw that the tender, once accepted, would be binding if no other contract was concluded.

A binding agreement had therefore come into being upon acceptance of the tender. The application was granted.

In my view, the terms of the agreement, as also the legislative provisions in the regulations to the Act, make it quite clear that a binding agreement, whereby the applicant would collect regional services levies from persons within the jurisdiction of the first respondent liable to pay such levies came into force upon the acceptance of the first applicant's tender.

GREY'S MARINE HOUT BAY (PTY) LTD v MINISTER OF PUBLIC WORKS

A JUDGMENT BY NUGENT JA (SCOTT JA, NAVSA JA, MTHIYANE JA and MAYA AJA concurring)
SUPREME COURT OF APPEAL
13 MAY 2005

2005 (6) SA 313 (A)

A party seeking to set aside a contract concluded by the State with a competitor must show that the exercise of the State power in question materially and adversely affected its rights, if it is to obtain an order setting aside the decision to exercise State power in that manner.

THE FACTS

In October 2001, the Minister of Public Works agreed to let a portion of undeveloped land to Bluefin, a company established by inhabitants of Hout Bay who wished to enter the fishing industry operating in that area. Their intention was to use the land as a base for their fishing boats and as a place where they would establish a fish-processing plant and associated restaurant.

The property was at the waterfront of the Hout Bay harbour, and adjacent to land used by others operating in the fishing and associated industries, as well as a yacht club. The yacht club had been unable to maintain its commitments in terms of its lease and had secured a release from those obligations and a new lease.

In June 2003, the lease between Bluefin and the Minister of Public Works was formally concluded. This took place after inviting and considering objections to the lease from neighbouring occupiers.

Grey's Marine Hout Bay (Pty) Ltd held a lease over property adjacent to that leased to Bluefin where it operated a fish-processing plant. It objected to the lease concluded with Bluefin on the grounds that it would cause traffic congestion at the quayside, deprive tenants and visitors of necessary parking and manoeuvring space and impede access to their premises and to the waterside.

Grey's Inn alleged that it had not been consulted or invited to comment on Bluefin's lease before it was approved. It applied for an order that the Minister's decision to conclude the lease should be set aside.

THE DECISION

It was true that in entering into the lease, the State was exercising its rights of ownership in the same way as any private individual would be entitled to. However, such rights were to be asserted within the framework of the Constitution, and subject to the provisions of the Promotion of Administrative Justice Act (no 3 of 2000). The question was whether the manner in which the State had exercised its rights were consistent with the Constitution and that Act.

Section 3(1) of the Act confers the right to procedural fairness in respect of administrative action that materially and adversely affects the rights or legitimate expectations of any person. In the present case, it was difficult to see how Grey's right's had been affected by the State's decision to lease its property to Bluefin. It did not have the right to use the property in question and it was not clear that its rights of occupation were unlawfully compromised by the entering into of the lease. It also did not have any right which, while falling short of any prospective right, transcended the rights enjoyed by the public at large.

Grey's also did not have any legitimate expectation that the lease would not be concluded. It had not shown that it was under the impression that the existing state of affairs would not be disturbed.

The application was dismissed.

TEBE TRADING (PTY) LTD v MEDITERRANEAN SHIPPING COMPANY (PTY) LTD

A JUDGMENT BY LEVINSOHN J
(SWAIN J and HURT J concurring)
NATAL PROVINCIAL DIVISION
10 NOVEMBER 2005

2005 CLR 489 (N)

A sale of goods may be validly concluded without the determination of a price if a price may be determined in the future upon the happening of certain events. An agent may be liable to a third party for failing to inform that party of facts which the agent knows would have changed that party's conduct in avoidance of the ensuing damages. A Himalaya clause does not assist an agent when the neglect alleged against it is not done in performance of its obligations as agent.

THE FACTS

In November 2001, Tebe Trading (Pty) Ltd's forwarding agent concluded an agreement with the Mediterranean Shipping Company (Pty) Ltd (MSC) in terms of which MSC undertook to arrange the carriage of a consignment of litchis to Jebel Ali, United Arab Emirates. The consignment of litchis was to be transported on the MSC Spain in two refrigerated containers. The ship was to leave Durban on 6 December 2001 and reach Jebel Ali within fourteen days. MSC concluded the agreement as agent of the shipping line Mediterranean Shipping Line SA of Geneva for which it acted exclusively, and was remunerated by way of a commission. Bills of lading were prepared by Tebe and submitted to MSC.

The bills of lading contained a 'Himalaya' clause exempting from liability any servant or agent of the carrier for any loss, damage or delay arising from neglect of default on his part while acting in the scope of his employment.

Tebe had acquired the litchis from the growers, known as 'Laughing Waters' who had indicated a preferred selling price of R35,00 per carton. The understanding between Laughing Waters and Tebe was that the actual price they would be paid would ultimately depend on market conditions of the sale of the litchis in Jebel Ali.

The consignment was loaded on the MSC Spain on 11 December and 13 December, the latter being a portion which Tebe had later indicated should be delivered in Dammam, Saudi Arabia. The ship sailed to outer anchorage, returned to Durban harbour where it discharged 171 containers, then on 15 December, sailed for Maputo where it took on board other containers. It then proceeded up the African coast, stopping at various ports along the way, and arrived at Jebel Ali on 10 January 2002.

Tebe alleged that the delay in delivering the litchis had caused it to suffer damages arising from breach of contract. It claimed US$27 164,16 and US$29 705,40. At trial, certain issues for decision were separated and determined.

THE DECISION

1. Tebe was not the purchaser of the goods and therefore had no locus standi to sue MSC

MSC contended that no sale agreement had been concluded because no definite price for the sale of the litchis had been agreed, the price being what market conditions in Jebel Ali would determine. While it was true to say however, that a valid sale agreement requires a definite price, the price of the litchis was to become definite in the future ie when market conditions determined it. The uncertainty as the actual price until that time did not render the sale agreement void as at the time it was concluded. Accordingly, Tebe could be considered the purchaser under a valid sale agreement, and therefore a party with the right to sue MSC.

2. MSC contracted as agent of Mediterranean Shipping Line SA of Geneva and not as principal.

The evidence showed that MSC indeed contracted as agent and that the other party to the agreement with Tebe, as evidenced in the bill of lading, was not MSC but the Mediterranean Shipping Line SA of Geneva or the charterers of the vessel.

3. Whether or not MSC owed Tebe a duty of care to inform it of the delay of departure of the ship and

the change of route entailing a longer voyage.

Even though MSC acted as agent, it would have been aware of the longer period for the voyage to Jebel Ali. This was information which it would have known was of vital importance to Tebe. Given the nature of the relationship between agent and customer, this would entail that MSC should have informed Tebe of the ensuing delay.

4. Assuming that MSC was liable to Tebe, was it not excused from liability by virtue of the Himalaya clause contained in the bills of lading?

The conduct complained of was the failure by MSC to inform Tebe of the delay. Such conduct was not the subject of the Himalaya clause as it was not conduct assisting the carrier with the performance of its obligations or conduct in connection with MSC's employment to perform acts which the carrier was obliged to perform in terms of the contract of carriage. MSC's neglect for which the carrier stipulated protection in the Himalaya clause.

The appeal succeeded.

The facts in the present case show a final determination of price is made according to the market conditions at the place of sale. This is not dissimilar to Pothier's example. In these circumstances I find that the price is capable of determination and that the delivery of the fruit was made in accordance with an enforceable contract. Accordingly I differ with respect from the conclusion reached by the learned judge in the court a quo.

...

Wide wording in a clause containing such stipulations must needs be construed narrowly to achieve this object within the context of the contract of carriage and not beyond it. Thus, in the clause in question, where the expression 'while acting in the course of ….. his employment' is used, it must be understood to confine the particular 'course of employment' to the acts which are required to assist in the performance of the contract of carriage. It could, in my view, hardly be contended by the defendant that if, in the course of marketing the services of MSC SA Geneva, the defendant somehow negligently caused the plaintiff to suffer loss, the defendant could invoke the Himalaya stipulation in the bill of lading as a defence. This is because the bill of lading covers a specific contract of carriage and stipulations in it which limit liability are necessarily confined to stipulations concerning that specific contract. In my view the words 'in connection with', although objectively capable of a wide construction, must, for the purpose of ascertaining their meaning in the Himalaya Clause, be restrictively construed to limit their application to the contract of carriage.

KLOKOW v SULLIVAN

JUDGMENT BY CACHALIA AJA (MPATI DP, CAMERON JA, BRAND JA and NKABINDE AJA concurring)
SUPREME COURT OF APPEAL
29 SEPTEMBER 2005

2005 CLR 524 (A)

An agreement entered into in contravention of a statute being voidable, both parties are entitled to restitution of their performance. The par delictum rule should not be applied against either party where the facts clearly show that one of the parties has inequitably gained by the incompletely performed agreement.

THE FACTS

Klokow bought a business from Sullivan. The business assets included a liquor licence. In terms of the Liquor Act (no 27 of 1989) the permission of the chairperson of the Liquor Board is required when a controlling interest in a business incorporating a liquor licence is acquired. Such permission was not obtained.

Klokow paid half of the purchase price of R500 000. He took possession of the business, but within three weeks he returned the business to Sullivan and claimed repayment of the R250 000 paid by him. Klokow alleged that the agreement was illegal and therefore void, and that following his cancellation of the agreement, restitution should take place.

Sullivan resisted the claim on the grounds that because the sale agreement was illegal in that it involved the contravention of a statute, and both parties were equally guilty (in pari delicto), restitution could not be ordered.

THE DECISION

The facts relating to an agreement concluded against the provisions of a statute will often be important in indicating whether or not restitution should be applied in favour of the plaintiff. Generally, where public policy considerations do not favour either party, the par delictum rule will operate against the plaintiff. However, where the bare facts show that the defendant has been enriched by the incomplete performance of the agreement, and there are no further facts relevant to the matter, a plaintiff need not plead for a relaxation of the par delictum rule in order to show that restitution should be ordered.

In the present case, there were no further facts that Klokow could adduce to show that the par delictum rule should be relaxed. The bare facts showed that Sullivan had both retained the business and the R250 000 paid to him by Klokow. This showed that Klokow had a clear cause of action against Sullivan and was entitled to restitution.

The appeal was upheld.

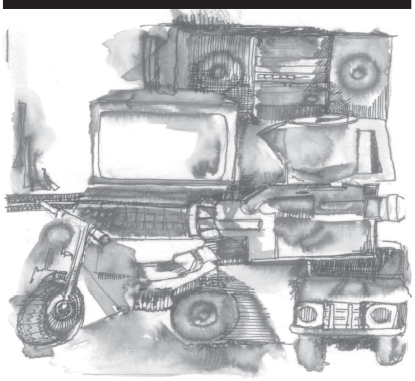
Faced with these facts it is difficult to understand what 'further facts' the plaintiff was required to plead to persuade the full court that the par delictum rule should be relaxed. The defendant was left with both the business and R250 000. The equities clearly supported a return to the status quo. There was no need, in these circumstances, for the plaintiff specifically to plead the relaxation of the par delictum rule on grounds of public policy, or that the defendant had been unjustly enriched. Once it had been alleged that the defendant was in possession of the business as well as the money (which at exception stage must be accepted as true), it was he, not the plaintiff, who needed to show that he had not been enriched

WOLMARANS v ABSA BANK LTD

A JUDGMENT BY BOZALEK J
(HJ ERASMUS J and
VELDHUIZEN J concurring)
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
8 SEPTEMBER 2005

2005 (6) SA 551 (A)

Credit Transactions



In the absence of an agreement expressly entitling a creditor to do so, a person has a right not to be listed with a credit information agency if the debt has not been proven and the effect of the listing is detrimental to his ability to earn a living.

THE FACTS

Wolmarans concluded an instalment sale agreement with Absa Bank Ltd for the purchase of a truck. Clause 17.1.2 of the agreement provided that the seller could disclose information about the purchaser's accounts and the conduct by the purchaser of its accounts to other banks and credit bureaux when asked for such information. A year later, he sold the truck to a certain Maseko. Maseko paid the outstanding balance due under the instalment sale agreement by depositing a cheque to the instalment sale account. An official of Absa assured Wolmarans that the account had been fully paid, whereupon Wolmarans released the truck to Maseko. The cheque was dishonoured and Absa bank reversed the credit passed to the account.

Wolmarans refused to make any further payment under the instalment sale agreement and was then sued by Absa for the balance owing. He defended the action on the grounds that he had relied on the official's advice that the account had been paid.

While the action was still pending, Absa notified a credit information agency that Wolmarans had not paid its claim and Wolmarans was listed as a debt defaulter. The listing was subsequently amended to noting Wolmarans as subject to a claim still the subject of legal process.

Wolmarans applied for an order that pending the outcome of the action brought by Absa, it be barred from listing him as a person in default of his payments in respect of the account in question.

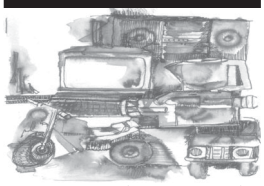
THE DECISION

Given the adverse consequences of a listing by the credit information agency, and the fact that clause 17.1.2 was drafted by Absa, the proper interpretation of the clause was that it required Absa to be specifically and individually requested for information before it could disclose information regarding its customer. The evidence was that Absa had given the information to the credit information agency without being asked for it. Absa could therefore not rely on clause 17.1.2 in having done so.

Wolmarans had shown that he had a prima facie right not to be listed with the credit information agency. He had an estoppel defence to the claim brought by Absa and the listing of his name was unreasonable and unlawful. Furthermore, the consequences of a listing for him and his creditworthiness were potentially detrimental to his ability to conduct his business and earn a living.

The order sought by Wolmarans was granted.

ABSA BANK LTD v FRASER



A JUDGMENT BY MLAMBO JA (MPATI DP, CAMERON JA, NUGENT JA and NKABINDE AJA concurring)
SUPREME COURT OF APPEAL
24 NOVEMBER 2005

2005 CLR 511 (A)

A creditor of a person against whom action has been taken under the Prevention of Organised Crime Act (no 121 of 1998) has an interest in applications brought under that Act and is entitled to protection of that interest by the retention of funds necessary to satisfy its claim.

THE FACTS

Fraser was arrested on 16 November 2003 on charges relating to racketeering and money laundering. His arrest was effected under the Prevention of Organised Crime Act (no 121 of 1998).

In terms of the Act, the membership interest in Portion 3 Lavianto CC and the immovable property it owned, were placed under restraint by order of the Durban High Court obtained ex parte on 26 November 2004. The membership interest in the close corporation was held on behalf of Fraser by his fiancée, having been transferred to her by Fraser in order to avoid attachment of the property by Absa Bank Ltd. Absa held a default judgment against Fraser for payment of the sum of R673 281.

Fraser then applied for an order directing that the curator bonis appointed in terms of the restraint order sell the immovable property and/or the membership interest in the close corporation, and pay the proceeds to his attorneys to meet his reasonable legal expenses in his criminal trial.

Absa applied to intervene in the application. The National Director of Public Prosecutions (the NDPP) which had obtained the restraint order, opposed Fraser's application and applied for confirmation of the restraint order. Fraser opposed Absa's application to intervene.

THE DECISION

Section 26(6) of the Act provides that a restraint order may make provision for the reasonable legal expenses of a person against whom the restraint order is made in connection with any proceedings instituted against him in terms of the Act. Section 33(1) of the Act provides that the powers conferred on the court by the Act shall be exercised with a view to making available the current value of realisable property for satisfying any confiscation order which might be made against the defendant.

The provisions in regard to the restraint on a party's assets are largely silent in regard to the rights of concurrent creditors. However, it is clear from section 31(1) that the purpose of a restraint order is to ensure that the current value of realisable property satisfies any ensuing confiscation order. Section 30(5) authorises the court to delay the realisation of property so as to enable a victim of the defendant's crimes to obtain a judgment and satisfy that judgment before the property is realised. This means that the court retains the power to entertain applications by creditors of the defendant. The State's interest in a confiscation order is subordinate to the defendant's concurrent obligations.

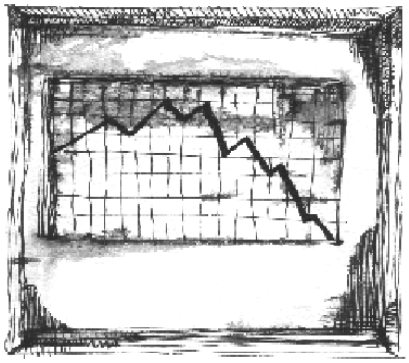
Since Absa's claim was not left out of account, there was no reason why it should not be a party in the application brought by Fraser. Absa should therefore have been allowed to intervene in the application and given the opportunity to oppose Fraser's application. Fraser was not entitled to payment of any amount for reasonable legal expenses which would reduce the value of assets held under the restraining order to less than Absa's claim against him.

GRIFFIN v THE MASTER

A JUDGMENT BY ZULMAN JA (STREICHER JA, NAVSA JA, PONNAN JA and COMBRINCK AJA concurring)
SUPREME COURT OF APPEAL
19 SEPTEMBER 2005

2006 (1) SA 187 (A)

Insolvency



A liquidator must have the authority of members and creditors in order to properly compromise or admit a claim against a close corporation or company in liquidation.

THE FACTS

In 1998, Cape Trails CC was placed under liquidation by Griffin and others. At the time of its liquidation, Griffin and some of the respondents were members of the close corporation. The liquidator convened a meeting of members and creditors before the Master. Only Griffin attended.

At the meeting, a resolution was passed authorising the liquidator to compromise or admit any claim. This resolution was evidence by a form headed 'First Meeting of Members and Creditors' and signed by Griffin, citing himself as 'member'.

Later, Griffin and the other appellants submitted claims for proof against the close corporation but they were rejected. Subsequently, the claims were admitted to proof by the liquidator and reflected in the liquidation and distribution account. Following objection by the respondents, the liquidation and distribution account was redrawn without these claims.

Griffin and the other appellants objected to the omission of their claims. They applied for an order that they be admitted.

THE DECISION

Section 386(3)(a) and 386(4)(a) of the Companies Act (no 61 of 1973) provides that the liquidator of a company, with the authority granted by meetings of creditors and members, shall have the power to compromise or admit any claim against the company.

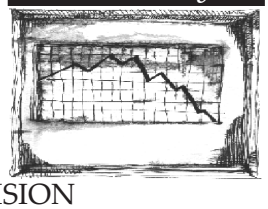
These sections make it clear that the liquidator is authorised to act only on condition that the requisite authority has been obtained. This requires the authority of creditors as well as members and it will be insufficient if only the authority of a member has been obtained.

As far as the resolution passed at the first meeting of creditors was concerned, it was clear that it was taken only by one member and not by creditors as well. There were no creditors who could give the liquidator the authority required to admit the claims.

The application was dismissed.

It is clear that s 386(3) specifies in terms that a liquidator may only exercise the powers given (with certain exceptions which are not here relevant) if granted authority to do so. Furthermore s 386(3)(a) specifies from whom this authority must be obtained; namely in the case of a winding-up by the court, meetings of creditors and members or contributories or on the directions of the Master. It is not suggested that in this case there was any authority given by contributories or that there were directions from the Master.

FOURIE N.O. v LE ROUX



A JUDGMENT BY BOSIELO J
TRANSVAAL PROVINCIAL DIVISION
8 SEPTEMBER 2004

2006 (1) SA 279 (T)

A provisional liquidator is entitled to take steps to locate and preserve assets of a company in provisional liquidation.

THE FACTS

Fourie was the provisional liquidator of Herlan Edmunds Engineering (Pty) Ltd and Herlan Edmunds Investment Holdings Ltd. In his capacity as provisional liquidator, he brought an application for an order authorising him to obtain recognition as a liquidator in the United Kingdom, and there to institute such proceedings as might be necessary for the recovery of all property and funds in bank accounts situated in England belonging to the companies, and ancillary relief.

Fourie then applied for confirmation of an interim order given in favour of Fourie. Le Roux opposed the application on the grounds that Fourie had no locus standi to bring the application, his powers as provisional liquidator being circumscribed only by section 386(1) and section 4(f) of the Companies Act (no 61 of 1973).

THE DECISION

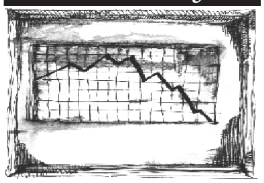
Generally speaking, the primary duties of a provisional liquidator are to look after the property of the company in liquidation and to preserve the status quo pending the appointment of the liquidator.

In the present case, the provisional liquidator had a duty to investigate allegations made regarding asset stripping of the companies in question and try to preserve those assets that could be found and identified. The legislature has not denied a provisional liquidator the right to approach the court for leave to institute proceedings or for other directions intended to protect and preserve the assets of the company. To interpret the Companies Act in such a way that the legislature had intended to deny a provisional liquidator such a right would be in conflict with the underlying spirit of section 386 and 387 of the Act read with section 69(2) of the Insolvency Act (no 24 of 1937).

The application was granted.

Speaking for myself, I find it startling, if not incongruous that the Legislature could deny a provisional liquidator, who has an interest in the protection and preservation of the assets of a company in liquidation, of the right to approach the court for leave to institute proceedings or whatever directions specifically intended to protect and preserve the assets of such a company.

LYNN & MAIN INC v NAIDOO



JUDGMENT BY TSHABALALA JP
NATAL PROVINCIAL DIVISION
12 AUGUST 2005

2006 (1) SA 59 (N)

A debtor who makes a 'without prejudice' offer of compromise while conceding that the debt is due cannot claim privilege in respect of the offer and such an offer will be admissible in proceedings brought against him.

THE FACTS

Naidoo and his wife signed deeds of suretyship in favour of Citibank as security for a loan on overdraft given by the bank to Big City Trading CC. Citibank called for repayment of the loan, and interest thereon, and claimed payment from Naidoo and his wife under their suretyship obligations.

Naidoo raised certain disputes concerning the loan including the liability for interest. His attorneys sent a letter to Citibank in which they stated that their clients did concede that the amount of their indebtedness exceeded the amount of the bank's securities. In a later letter marked 'strictly without prejudice', the attorneys stated that they 'categorically record that the contents of this letter are strictly without prejudice and are advanced in an endeavour to settle the above matter'. The letter further stated that its contents were to be handled with the strictest confidentiality and could not be used to prove an act of compromise as envisaged by the provisions of the Insolvency Act (no 24 of 1936).

Citibank ceded its claim against Naidoo to Lynn & Main Inc. Lynn & Main brought an application for the sequestration of Naidoo and his wife, basing the application on the allegation that the letter sent by their attorneys constituted an act of compromise as referred to in the Insolvency Act.

Naidoo opposed the application on the grounds that the letter was inadmissible evidence as it had been marked 'without prejudice' and that there was no reason to believe that their sequestration would be to the advantage of creditors.

THE DECISION

The effect of making a statement 'without prejudice' is to render it inadmissible in subsequent litigation. However, this will only follow if the party making the statement does not concede that the claim against him is undisputed.

In the present case, Naidoo had conceded that the amount claimed by Citibank was payable. No defence to the claim had been put forward by his attorneys, other than that the overdraft facility was prematurely terminated. The bank however, had the right to terminate the facility without prior notice and was entitled to repayment on demand.

The letter contained the admission that the amount claimed by Citibank was due and the compromise put in it was, in effect, a choice put to the bank that it accept the compromise or face receiving nothing.

The letter was therefore admissible in evidence in the application for sequestration.

The advantage to creditors offered by the sequestration of the Naidoos was to place the trustee in a position to make inquiries and investigate the whereabouts of their assets.

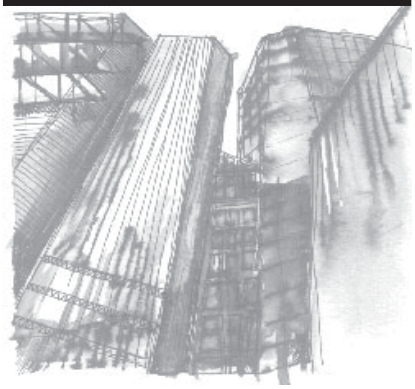
The application was granted.

VICTORIA AND ALFRED WATERFRONT (PTY) LTD v CITY OF CAPE TOWN

A JUDGMENT BY DESAI J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
16 SEPTEMBER 2005

2005 (6) SA 404 (C)

Property



Section 13 of the Legal Succession to the South African Transport Services Act (no 9 of 1989) requires a local authority to consider for consent and approval development plans submitted by a property owner whose property falls within a development zone as provided for in that section. The agreement contemplated in that section need not provide for a development zone to which all the provisions of a local authority's zoning scheme applies.

THE FACTS

In 1988, the South African Transport Services concluded a long lease over 123 hectares of harbour area around the Victoria and Alfred basins in Cape Town. The lease was concluded with Victoria and Alfred Waterfront (Pty) Ltd (V & A).

Use of the land was then regulated by the South African Transport Services Act (no 65 of 1981). The land was not zoned under the City of Cape Town's town planning scheme prepared under Township Ordinance no 33 of 1934.

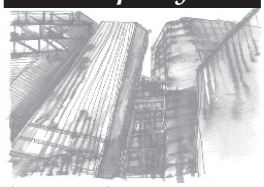
In 1989, the Legal Succession to the South African Transport Services Act (no 9 of 1989) came into operation. In terms of section 2(1) of this Act, Transnet Ltd was formed and became the successor to SA Transport Services. In terms of section 13(1), Transnet was entitled to develop and let its immovable property for any purpose, whether or not the property was zoned for other purposes in terms of a township scheme. Section 13(2) provided that immovable property could only be developed after an agreement had been reached with the local authority concerned, or the Administrator of the province. Section 13(3) provided that the City would then be obliged to record the suitable zoning of the property.

Transnet and V & A then entered into negotiations for the redevelopment of the property which concluded with the signing of heads of agreement in 1991 in which the parties adopted the goals objectives and policies contained in a development framework earlier drawn up

In 1993, both parties as well as the City of Cape Town concluded an agreement pursuant to the provisions of section 13. Clause 2 of that agreement provided that the zoning applicable to that portion of the property falling within the City's area of jurisdiction was that of development zone in terms of which Transnet could use the property so zoned as of right for the exercise of any of its statutory rights, and, for any other purpose, with the consent of the City. Clause 3 provided that the City had consented to the development and use of that property for a compatible mix of industrial, recreational, cultural, educational, residential, retail and office purposes, and for street purposes.

V & A and others who had obtained ownership rights in the land to which this agreement applied submitted to the City applications for approval of development plans. These were dealt with in accordance with the agreement. However, the City then determined that there was no basis for the owners of Waterfront properties being released from the constraints of the planning development framework governing all other property owners within the City boundaries, including the provisions of the Land Use Planning Ordinance (no 15 of 1985).

V & A and the other owners contended that their development rights were defined and provided for in the agreement concluded under section 13, and that they were not subject to the City's planning development framework or the Land Use Planning Ordinance which were only applicable when the agreement was silent. They applied for an order that the agreement concluded under section 13 was valid and binding, and that in respect of those properties falling within the development zone, their



applications for consent or approval were to be dealt with in terms of that agreement.

THE DECISION

Transnet's rights were derived from section 13. This section entitles Transnet to develop land in the absence of appropriate zoning. It is entitled to do so once the agreement provided for in sub-section 2 has been concluded. Such an agreement was concluded between the City and Transnet. The question therefore was whether the City had recorded a suitable zoning for the property as provided for in section 13(3).

It was argued by the City that the zoning agreement contained insufficient particularity to be classified as an agreement contemplated in section 13, and that the recordal of the agreement similarly contained insufficient particularity to count as a recordal thereof. However, it was not necessary for the agreement to contain the same particulars as would be required under the zoning scheme applicable in other areas of the City. The City did not have to ensure that the zoning of the property fell within the categories of that zoning scheme, since the zoning of the property was specially and differently provided for in the section.

The Land Use Planning Ordinance remained applicable to the property in question, notwithstanding the agreement concluded between the parties. The recordal of the agreement would bring the property in question within the application of that ordinance.

The City was therefore obliged to observe the terms of the valid and binding agreement concluded between the parties and consider the property as zoned as a development zone in accordance with the provisions of clauses 2 and 3 of the agreement. All applications for consent or approval as contemplated in those clauses were to be considered and dealt with by the City in terms of that agreement.

In arguing that the agreement must afford sufficient particulars about the intended development to enable the local authority to record a suitable zoning, counsel for the city, it seems, conflates s 13(2), the agreement and s 13(3), the recordal of the zoning. This approach is inconsistent with the wording of the section. The agreement contemplated in s 13(2) is not made dependent on teh zoming in s 13(3). It works the other way around. The agreement precedes the recordal of a zoming. Furthemore, s 13(2) refers simply to an agreement. It does not say that the agreement must contain all the detail that a local authority might require in order to recrod a suitable zoning in due course. Following the ordinary meaning of the words in s 13(1) or (2), it is apparent that the first applicant, the city and Transnet concluded a valid and binding written agreement as contemplated in the said sections.

LAUGH IT OFF PROMOTIONS CC v SOUTH AFRICAN BREWERIES INTERNATIONAL (FINANCE) BV

A JUDGMENT BY MOSENEKE J (LANGA DCJ, MADLALA J, MOKGORO J, NGCOBO J, O'REGAN J, SACHS J, SKWEYIYA J, VAN DER WESTHUIZEN J and YACOOB J concurring)
CONSTITUTIONAL COURT
27 MAY 2005

2006 (1) SA 144 (CC)

Competition

In a claim based on section 34(1)(c) of the Trade Marks Act (no 194 of 1993), a party that seeks to oust expressive conduct protected under the Constitution must establish a likelihood of substantial economic detriment to the claimant's mark.

THE FACTS

South African Breweries International (Finance) BV owned a trademark in a label attached to a beer bottle. The label bore the words 'Carling Black Label' and incorporated a specific design as well as other descriptive words such as 'America's lusty, lively beer' and 'Carling Black Label Beer'.

Laugh It Off Promotions CC marketed clothing which bore the trademarks of various parties including that of SA Breweries and including the Carling Black Label mark. An exact replica of the mark was however, not used. Laugh it Off amended the mark to read 'Carling Black Labour' and 'America's lusty, lively beer' was substituted with 'Africa's lusty lively exploitation since 1652'. It retained the general layout and colours of the registered mark.

SA Breweries brought an application for an interdict against Laugh it Off, basing its claim on section 34(1)(c) of the Trade Marks Act (no 194 of 1993). The section provides that a trademark is infringed by the unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a registered trademark, if such trademark is well known in the Republic and the use of the mark would be likely to take unfair advantage of or be detrimental to the distinctive character or repute of the registered trademark notwithstanding the absence of confusion or deception.

THE DECISION

Section 34(1)(c) must be understood in the light of the Constitution, specifically the guarantees of free expression contained within it. In doing so, the proper approach in applying the section is to determine whether the action alleged to be in violation of the section is constitutionally protected.

The section itself requires proof of unfair advantage or detriment to the distinctive character of the trade mark. The meaning attached to the labels was not necessarily of detriment to SA Breweries, but even assuming that it was, there was little indication that this would lead to substantial economic harm to its marks. The fact that the labels might inspire discomfort was not in itself sufficient to indicate a breach of section 34(1)(c).

SA Breweries had not shown that the labels would cause trade or commercial harm. The likelihood of harm was not self-evident. There was no indication that any unfavourable associations might have been created by them.

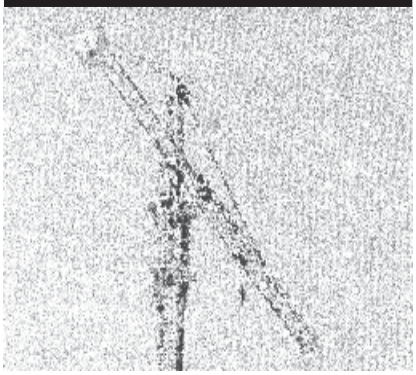
The application was dismissed.

PELLOW N.O. v CLUB REFRIGERATION CC

A JUDGMENT BY CLOETE J
(SCOTT JA, MTHIYANE JA,
ERASMUS AJA and JAFTA AJA
concurring)
SUPREME COURT OF APPEAL
29 SEPTEMBER 2004

2006 (1) SA 230 (A)

Construction



A construction contract containing references to the terms of the tender under which the construction contract was concluded may be understood to include the terms of tender within its provisions. A reservation of ownership clause contained in such terms of tender will be entitle the contractor to claim as owner in respect of goods supplied in terms of the construction contract.

THE FACTS

Fisher Foods SA (Pty) Ltd called for tenders for the construction of a factory in Kempton Park. Club Refrigeration CC submitted a tender for the construction of the factory and the supply of certain movable items. The tender provided that all items of equipment remain the property of Club Refrigeration until paid for in full. Fisher Foods accepted the tender and Club Refrigeration submitted a signed standard principal building agreement recording the terms of the construction contract.

The Industrial Development Corporation financed the construction works and registered a general notarial bond over the movables of Fisher Foods. Club Refrigeration completed the work and supplied the movables. Before it was paid the balance of the amount due to it, Fisher Foods was placed in liquidation. Shortly before its liquidation, the IDC perfected its security.

Club Refrigeration and the IDC made competing claims against the movables. They and the liquidators then entered into a tripartite agreement in terms of which the movables were sold to Afgri Operations Ltd and the determination as to which of the two competing parties was entitled to the whole of or portion of the purchase price was to be made by a court of competent jurisdiction. The equipment was then sold to Afgri for R1,28m.

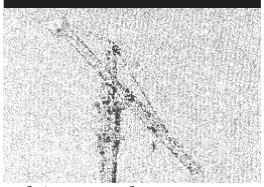
Club Refrigeration then applied for an order that it was the owner of the equipment and entitled to the proceeds of the sale to Afgri. The liquidators contended that Club Refrigeration was not the owner of the equipment as no reservation of ownership clause existed, alternatively that section 84 of the Insolvency Act (no 24 of 1936) applied, conferring on Club Refrigeration a hypothec in respect of the equipment.

THE DECISION

The liquidators contended that the agreement in terms of which the equipment was supplied was not contained in the terms of tender submitted by Club Refrigeration but in the standard principal building agreement, which did not provide for the reservation of ownership in the equipment. It was however, clear from the standard principal building agreement that its terms included those of other related contract documents. In the circumstances, this would include the tender document which included the reservation of ownership clause.

The liquidators also contended that since the construction contract was a lump sum contract, it was impossible to determine whether payment for individual items, such as the equipment, had been made. However, the provisions of the building contract provided for payments in terms of interim certificates which were to separately specify reasonable estimates of amounts due for work done and for goods supplied. Goods paid for would become the property of Fisher Foods. The liquidators did not contend that Club Refrigeration had been paid. Accordingly, Club Refrigeration could properly depend on the reservation of ownership clause and assert its ownership in equipment for which it had not been paid.

The liquidators also contended that since the value of the equipment was not specified in any of the payment certificates, it was impossible to determine the amount due to Club Refrigeration. However, Club



Refrigeration did not make its claim in terms of the construction agreement under which such certificates were produced, but in terms of its rights as owner, as stated in the tripartite agreement.

Having proved it was the owner of the equipment, Club Refrigeration was entitled to payment in terms of the tripartite agreement.

The appeal failed.

The order placed by Fisher Foods made specific provision for payment in terms of the JBCC agreement. Clause 31 of the JBCC agreement provides for interim payments to be made to the contractor. Clause 31.4 provides that the value certified in an interim payment certificate shall separately include:
'31.4.1A reasonable estimate of the value of the work executed …
31.4.2 A reasonable estimate of the value of materials and goods in terms of 31.6…'
(It is not necessary for present purposes to have regard to clause 31.6 or to consider the submission by counsel representing the liquidators that the court a quo *was incorrect in considering that the movable goods at issue in these proceedings would fall to be certified under clause 31.4.2.) Clause 31.9 provides that the employer shall pay to the contractor the amount certified within seven calendar days of the date of issue of the payment certificate. Clause 31.7 provides that materials and goods paid for in terms of clause 31.9 shall become the property of the employer. This is the mechanism by which it can be determined which part of the price has been allocated for specific goods and whether particular goods have been paid for. Clause 31.7 dovetails easily with the reservation of ownership provisions in Club Refrigeration's tender: The latter provides that until goods are paid for, ownership remains vested in Club Refrigeration; and the former provides that once payment has been made for goods (whether they have been incorporated in the works or not and therefore irrespective of whether* accessio *applies), ownership in them will pass to the employer i.e. Fisher Foods.*

[13] The liquidators have at no stage suggested that Club Refrigeration has been paid for the goods. They bear the onus of proof on this point. The specific allegation in the founding affidavit that Club Refrigeration has not been paid, has not been contradicted. Furthermore, the tripartite agreement can only have been entered into on the basis that Club Refrigeration had not been paid for the goods in question; for otherwise the provisions of Clause 31.7 of the JBCC agreement would have provided a complete answer to Club Refrigeration's claim that it was the owner of the goods.

FREEFALL TRADING 211(PTY) LTD v PROPLINK PUBLISHING (PTY) LTD

A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
29 NOVEMBER 2005

JOC 881 (C)

A marked similarity between two works may in itself indicate copying but will not be sufficient to indicate copying if other factors may be attributable to the similarity. Copyright in a work commissioned by a third party and executed by an employee acting in the course of his employment vests in the third party and not the employer.

THE FACTS

Freefall Trading 211 (Pty) Ltd published the Property Trader, a weekly magazine, in the Western Cape. Proplink Publishing (Pty) Ltd published SA Proplink.co.za, a similar magazine, in four other provinces. Both magazines were produced in the same format and both advertised properties for sale on behalf of estate agents, for a fee. Advertisements placed in the magazines by estate agents followed the house style of the particular estate agent.

In August 2005, Proplink expanded its publication area to include the Western Cape. Three of Freefall's senior employees, including its senior designer, resigned and took up employment with Proplink.

Freefall then brought an application for interdicts to restrain Proplink from employing its former employees, to enforce compliance with restraint and confidentiality agreements, and to prevent infringement of its copyright in the designs, layouts and templates of the advertisements appearing in the Property Trader.

THE DECISION

It was not clear that designs, layouts and templates fell within the category of literary or artistic works, as defined in the Copyright Act (no 98 of 1978). However, assuming that they were works to which copyright could apply, the question was in any event, whether the copyright in them vested in Freefall Trading.

There was indeed a marked similarity between the advertisements appearing in the two magazines, but to some extent, this could be attributed to factors other than a direct copying of them. Chief among these was the fact that the advertisements were produced on instructions received from clients who were common to both Freefall Trading and Proplink. The details of such clients would therefore be the same in both magazines, and where the same properties were advertised, their details would be the same.

The evidence showed that the advertisements were placed upon the instruction and authorisation of the estate agents who paid for the advertisements. This meant that the copyright in them in fact vested in the estate agent, and not the magazine publisher. In effect, section 21(1)(e) applied, varying the rule that the copyright in a work made by an author in the course of his employment vests in his employer.

Even if copyright was considered to vest in Freefall Trading, it was clear that production of the advertisements required considerable skill, time, labour and effort. This being so, the same effort would have been required to produce the advertisements appearing in Proplink's magazine, thus establishing a separate and independent copyright in that publication.

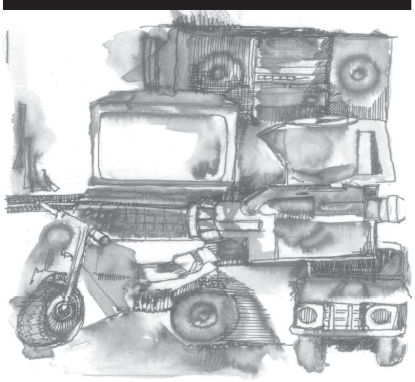
The application was dismissed.

STANDARD BANK OF SA LTD v SAUNDERSON

A JUDGMENT BY CAMERON JA and NUGENT JA
(HOWIE P, JAFTA JA and MLAMBO JA concurring)
SUPREME COURT OF APPEAL
15 DECEMBER 2006

2006 CLR 58 (A)

Credit Transactions



An action claiming the right to execute against the immovable property of a defendant must notify the defendant of his rights under section 26(1) of the Constitution. A plaintiff claiming an order that the defendant's property be declared executable is entitled to such an order unless the defendant places sufficient facts before court to show that such rights are infringed.

THE FACTS

Standard Bank of SA Ltd brought actions against Saunderson and others foreclosing on mortgage bonds passed by the defendants in its favour. The bank alleged a failure to pay sums due on money lent and advanced and claimed the right to execute against the debtors' fixed property. In each case, it sought orders that the bonded property be declared executable.

The bank's claim did not refer to section 26(1) or section 26(3) of the Constitution. Section 26(1) provides that everyone has the right to have access to adequate housing. Section 26(3) provides that no-one may be evicted from their home without an order of court made after considering all the relevant circumstances.

The Registrar refused to grant an order declaring the defendants' properties executable in the light of the decision given in the case of *Jaftha v Schoeman* 2005 (2) SA 140 (CC). This judgment held that section 66(1)(a) of the Magistrates' Courts Act (no 32 of 1944) must be read subject to the addition that a court may give an order executing against the immovable property of a defendant after considering all relevant circumstances. The effect of the judgment is to require such an order before execution against property may be given.

The actions were referred to the court for decision. The Cape High Court decided that an action claiming the right to execute against the immovable property of a defendant must allege that the claim complies with section 26(3) of the Constitution. Since the bank's summonses did not contain such an allegation, it could not obtain an order declaring its debtors's properties executable.

The bank appealed.

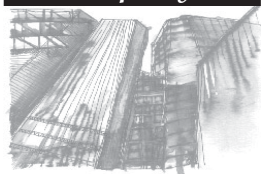
THE DECISION

Jaftha v Schoeman was concerned with a very different situation than that relevant to the present matter. In the *Jaftha* case, the debtor was sued by a claimant whose claim did not arise from a mortgage bond, but from an ordinary debt. The right of access to adequate housing was a pertinent issue, in the face of a creditor's threat to sell Jaftha's house in order to obtain satisfaction of the debt. A mortgage debt differs from this situation because the debtor under a mortgage bond has expressly contracted to burden his property with the claims of the mortgagee, and has agreed that those claims may be satisfied by the sale of the debtor's property.

The section of the Constitution relevant to the claims of a mortgagee in these circumstances is not section 26(3) but section 26(1). However, there are few situations in which a mortgagee exercising its rights under a mortgage bond will be in conflict with this section. It is incumbent on a debtor sued by a mortgagee to demonstrate that such a conflict has arisen, and present facts to the court to show that this is the case. Summonses issued claiming an order that the defendant's property be declare executable should therefore include a notification of the rights provided for in section 26(1).

In the present case, the bank was entitled to judgment on all its claims including that the defendant's property be declared executable.

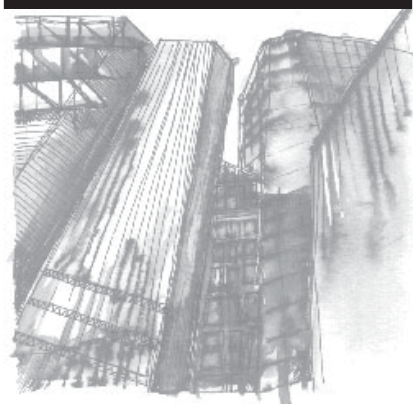
ANGLO OPERATIONS LTD v SANDHURST ESTATES (PTY) LTD



A JUDGMENT BY DE VILLIERS J
TRANSVAAL PROVINCIAL DIVISION
23 SEPTEMBER 2004

2006 (1) SA 350 (T)

Property



An owner of land is entitled to lateral support of the land and such right persists against the holder of mineral rights in the land, unless the right has been clearly abandoned by agreement between the parties.

THE FACTS

Anglo Operations Ltd held all the rights to coal in, on and under property owned by Sandhurst Estates (Pty) Ltd. Its rights derived from a notarial cession of coal rights given by previous owner of the property and the coal rights pertaining thereto. The cession had been given in favour of African and European Investment Co Ltd which had later ceded its rights to Anglo.

In terms of the cession, Anglo was entitled to rights of access and temporary residence on the property for prospecting purposes and held the right to exercise an option to purchase up to 50 morgen of the property for the erection of buildings, machinery, dams and other installations which it might require for the proper exercise of its rights. The cession also conferred on Anglo associated and ancillary rights to enable it to exploit the coal reserves on the property. A similar notarial cession of coal rights was given by a party who held a one-sixth share in the coal rights pertaining to the property.

Anglo wished to use a portion of the property for open-cast mining purposes, and construct a stream diversion on the property. It contended that it was entitled to do so by virtue of its rights under the cessions, alternatively under common law, alternatively in terms of section 5(1) of the Minerals Act (no 50 of 1991). It applied for an order that it was entitled to exercise these rights.

THE DECISION

The judgment handed down in the case of *London SA Exploration Co v Rouliot* (1891) 8 SC 74 was of direct relevance to this case. An essential part of the defence in this case was whether or not the defendant was entitled to remove lateral support, the effect of which would be to cause damage to the plaintiff's land. The effect of the decision is that the surface owner of land has the right of enjoyment of the surface protectable against outsiders. This principle was accepted as a principle of law and confirmed in later cases.

As a result of the adoption of this principle of law, the holder of mineral rights does not hold preferential rights over the owner of land subject only to the limitation that they are to be exercised in a reasonable way. The effect of later cases, such as that of *Regal v African Superslate* 1963 (1) SA 102 (A) has not been to qualify the rights of owners against mineral rights holders but to underline the necessity of demonstrating all of the elements required in interdict proceedings. The rule established in Rouliot should continue to be applied because it is long established, and its reason for adoption was that it was considered to be just and equitable and enjoyed universal recognition.

The holder of mineral rights is generally entitled to exercise all ancillary rights incidental to the grant of those rights, being those that are directly necessary to the enjoyment of the rights granted. The precise ambit of those rights may be determined by the terms of agreement between owner and mineral rights holder, including those implied and tacitly agreed between them. These are to be determined as at the time of the agreement, not at any subsequent time. The Rouliot case showed that a term to the effect that the surface owner abandons his right of support is not readily implied. Furthermore, the right to let down support is never implied by law, but must be agreed consensually. The right to conduct open-cast mining is not a matter of ancillary rights.

The right to conduct open-cast mining was not given in the cession agreements. The only basis upon which the right could then be established would be to show that it follows by necessary implication, ie is a true tacit term. An examination of the terms of the cessions showed that the intention was that mining would take placed underground and the cedent specifically reserved the right to live and farm on the surface. It was most unlikely that the parties contemplated open-cast mining but failed to provide expressly for it in the cession agreement.

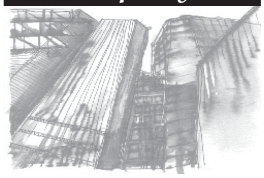
Anglo's case was taken no further by the Minerals Act, and failed to make out its case in regard to the diversion of the stream.

The application was dismissed.

The above outline clearly shows what is generally accepted by modern writers, namely that the concept of a 'right' of 'duty' of support was inspired by the English law. (See CD van der Merwe Sakereg 2nd ed at 198). What is, however, of more importance in the present context is that experienced growth and development in South African law by the South African courts. (See CG van der Merwe (loc cit). The aforesaid analysis also shows that the so-called right of support was not imported because it was English law, or Roman law, or Roman-Dutch law. The exact pedigree did not matter to the Judges.

... it is evident that the applicant has modelled its case on a view of the law which coincides with that set out in textbooks such as LAWSA and Franklin & Kaplan. The 'common-law rights' on which the applicant relies are terms implied by law according to the textbooks. But this view of the law, on which prayer 1.2 of the notice of motion is based, is inaccurate in at least two essential respects: it does not clearly differentiate between those ancillary terms that are expressly or tacitly (ie consensually) agreed upon (incidentalia) and those which are implied by law (naturalia); secondly, it does not clearly recognise that the waiver of the so-called 'right of support' by the owner is never implied by law, but has to be agreed consensually.

BAREKI N.O. v GENCOR LTD



A JUDGMENT BY DE VILLIERS J
TRANSVAAL PROVINCIAL DIVISION
19 OCTOBER 2005

2006 (1) SA 432 (T)

Economic activities which cause environmental degradation as referred to in the National Environmental Management Act (no 107 of 1998) and which were not being continued as at date of promulgation of the Act are not affected retrospectively by the provisions of the Act.

THE FACTS

Gencor Ltd conducted asbestos mining at the Bute Asbestos Mine in the North West Province in an area occupied by the Bareki tribe. By 1985, mining activities had stopped. The remains of the mining activity were left behind when mining stopped. They comprised asbestos dumps, a beneficiation plant, a mill and a haul road between the mine and beneficiation plant.

In his capacity as leader of the tribe, Bareki brought an action against Gencor, alleging that it had caused significant pollution in the mining area and surrounding areas by the distribution of asbestos fibres, thereby contaminating those areas. The claim pleaded that Gencor failed to take those measures required of it in terms of the National Environmental Management Act (no 107 of 1998).

Section 28(1) of the Act provides that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation.

The Act commenced operation on 29 January 1999.

Gencor excepted to the claim on the grounds that the Act did not have retrospective effect and since the alleged pollution had occurred in 1985, no claim based on the provisions of the Act could be brought against it.

THE DECISION

The presumption that a statute is not retrospective is based on elementary considerations of fairness which dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. The question therefore was whether there would be unfairness to Gencor, or an encroachment on the rule of law, if the statute was interpreted as possessing retrospective force.

The duty or obligation created in section 28(1) flows merely from the fact that a person causes, has caused or may cause significant pollution or degradation of the environment. Because, in the case of a land owner, both fault and unlawfulness are not required to establish the duty, the section creates at least a strict liability. In some cases, an absolute liability is created. No monetary limit to such liability is provided for, and nor are any statutory defences.

The duty to enforce compliance rests with the Director-General or a provincial head of department, not with an individual in the first instance.

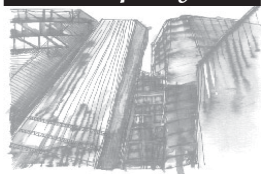
If the Legislature had intended to attach new legal consequences to past conduct by creating severe strict liability retrospectively, it would be expected that such an intention would have been made clear. The unfairness or retrospective effect being given to the section is so great that it is unlikely that the Legislature could have intended it.

The fact that other environment-protecting legislation was in place at the time the pollution took place did not provide any reason to apply the Act retrospectively.

The use of the past tense 'has caused' was not a reference to events taking place prior to the promulgation of the Act but to events which may take place following promulgation but thereafter ceasing.

The exception was upheld.

BUSINESS AVIATION CORPORATION (PTY) LTD v RAND AIRPORT HOLDINGS (PTY) LTD



A JUDGMENT BY GOLDSTEIN J
(KHAMPEPE J concurring)
WITWATERSRAND LOCAL DIVISION
11 MARCH 2005

2006 (2) SA 95 (W)

A tenant which effects improvements to the leased property is not entitled to exercise a right of retention to prolong its rights of occupation.

THE FACTS

Rand Airport Holdings (Pty) Ltd owned property occupied by the Business Aviation Corporation (Pty) Ltd originally under a lease agreement concluded with the previous owner.

Business Aviation alleged that when Rand Airport became the owner of the property, the parties concluded a verbal long-term lease. In support of the allegation, it indicated that it had effected extensive improvements to the property, that the sale agreement between Rand Airport, that the seller had not warranted that any improvements belonged to the seller, and that tenants would be compensated for any improvements in the event of Rand Airport selling the property.

Business Aviation paid rental to Rand Airport on an escalating basis. Rand Airport however, wished Business Aviation to vacate the property. It brought an action to eject Business Aviation.

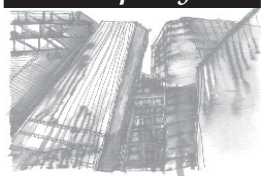
THE DECISION

The reasons given by Business Aviation for the continuation of its tenancy resulting in the alleged long lease indicated the convenience to it of a continued tenancy, but there was no indication that there was any convenience to Rand Airport in its continuation. The terms and conditions of the sale agreement under which Rand Airport acquired ownership of the property gave no indication that the parties intended to continue the lease, or any other lease in the future. Furthermore, the increased rental paid by Business Aviation did not appear to be in accordance with the escalation alleged to apply to the new rental.

No right of retention resulted from the improvements having been effected at the property. Such a right on the part of a tenant who effects improvements to the leased premises no longer subsists in our law which merely entitles the tenant to remove materials added during the currency of the lease.

The action was allowed.

SECTION THREE DOLPHIN COAST MEDICAL CENTRE CC v COWAR INVESTMENTS (PTY) LTD



A JUDGMENT BY OLSEN AJ
DURBAN AND COAST LOCAL DIVISION
26 APRIL 2005

2006 (2) SA 15 (D)

A purchaser is entitled to enforce an agreement which fails to comply with section 29A of the Alienation of Land Act (no 68 of 1981) since the intention of the Act is not to render such an agreement null and void.

THE FACTS

The applicant* signed an offer to purchase a proposed sectional title unit in a double-storey commercial development for R148 000. Cowar Investments (Pty) Ltd accepted the offer. The agreement made no reference to section 29A of the Alienation of Land Act (no 68 of 1981).

Section 29A provides that a purchaser of land may within five days after signature of an offer to purchase or a deed of alienation, revoke the offer or terminate the deed by written notice delivered to the seller.

The applicant applied for an order compelling Cowar to complete the opening of the sectional title register and transfer the unit. Cowar opposed the application on the grounds that the agreement was null and void because it failed to comply with section 29A. It contended that nullity followed because section 2(2A) of the Act provides that a deed of alienation shall contain the right of a purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A.

THE DECISION

The provisions of section 29A operate wholly for the benefit of purchasers. It is significant that section 2 refrains from using language that conveys the idea that non-compliance would result in unenforceability of the agreement. The intention of the legislature was to bring the attention of the purchaser to the purchaser's rights as provided for in section 29A. There was however, no reason to impute any additional intention, on the part of the legislature, to cause manifest injustice to more decisive purchasers who would not be affected by the failure to receive notification of their rights.

The relevant provisions of the Act make a distinction between an offer to purchase and a deed of alienation. This distinction indicates an element of arbitrariness in the operation of section 2. This is inconsistent with the notion that non-compliance with the section renders the agreement void ab initio.

The intention of the legislature was therefore not that an offer or deed not complying with the section is automatically invalid. Given that the applicant sought to enforce the agreement, rather than declare it void, the agreement should be considered enforceable and not inconsistent with the provisions of section 2.

The application was granted.

* Section 3 Dolphin Coast Medical Centre CC settled the litigation. The second applicant continued with the application. Reference to the applicant is accordingly reference to the second applicant.

DU TOIT v MINISTER OF TRANSPORT

JUDGMENTS BY MOKGORO J and LANGA ACJ (MADALA J, MOSENEKE J, SACHS J, SKWEYIYA J, YACOOB J, NGCOBO J, O'REGAN J and VAN DER WESTHUIZEN J concurring)
CONSTITUTIONAL COURT
8 SEPTEMBER 2005

2006 (1) SA 297 (CC)

The expropriation of a temporary use of land and the extraction of items of value from it entitle the owner to compensation as determined by what is just and equitable under section 25(3) of the Constitution.

THE FACTS

Du Toit was the owner of a farm 614 hectares in extent. The South African Roads Board expropriated 3.03 hectares of the farm for the purposes of maintaining and upgrading two roads which ran to its north and its south. The expropriation was effected under section 8(1)(c) of the National Roads Act (no 54 of 1971) read with section 12(1)(b) of the Expropriation Act (no 63 of 1975). The purpose of the expropriation was described as the temporary right to use the land for 18 months as a borrowpit and access road.

In terms of section 12(1)(a), the amount of compensation to be paid to an owner for expropriated property other than a right, shall not exceed the aggregate of the market price of the property and the amount required to make good any financial loss caused by the expropriation. In terms of section 12(1)(b), the amount of compensation to be paid to an owner for expropriated property in the case of a right to property, shall not exceed the amount needed to make good any actual financial loss caused by the expropriation.

While exercising its temporary right to use the land, the Board removed gravel from the land and used it. Du Toit claimed that he was entitled to compensation under section 12(1)(a) and that this should be calculated by reference to the market value of the gravel removed from the land. Du Toit had earlier obtained a licence to mine and sell gravel. Sales of gravel prior to the construction of the roads were minimal and had increased only because of the maintenance and upgrading then taking place.

Du Toit's calculation of the compensation he was entitled to took into account the market value of the gravel, and amounted to R801 980. The Minister of Transport contended that this calculation was incorrectly based on section 12(1)(a) and not section 12(1)(b) and that applying the latter sub-section, the amount payable was R6 060 being the market value of the land expropriated.

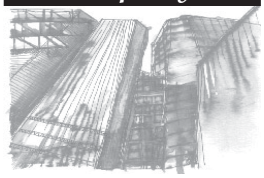
In the High Court, Du Toit was awarded R240 594. The Minister of Transport however, persisted in his contentions which were upheld in the Supreme Court of Appeal which allowed compensation only in the sum of R6 060. Du Toit appealed to the Constitutional Court.

THE DECISION

Mokgoro J:

Section 25(3) of the Constitution provides that the amount of compensation payable upon expropriation of property must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to the current use of the property, the history of the acquisition and use of the property, the market value of the property, the extent of direct State investment and subsidy in the acquisition and its beneficial capital improvement, and the purpose of the expropriation.

The proper approach to the present case was to determine what compensation was payable under the National Roads Act, and then determine if that amount was just and equitable under section 25(3). The method of determination followed by the Supreme Court of Appeal, when applying the National Roads Act, could not be faulted. This was to determine the amount of actual financial loss, which in this case had been shown to be R6 060. The gravel taken by the Roads Board was not sufficient to affect any



future exploitation of the material that Du Toit might wish to undertake as there was sufficient gravel to meet exploitation requirements for 45 years. It was clear that the property to which the expropriation notice applied was bought and used for agricultural purposes and was used for the excavation of gravel only on an ad hoc basis.

What was expropriated was a right to use land temporarily to create a quarry pit to excavate gravel for the purposes of construction of a public road. Applying the provisions of section 25(3), the compensation paid to Du Toit was just and equitable and reflected an equitable balance between the private and public interests.

Langa ACJ:

The correct application of the National Roads Act would have been for the board to have issued a notice under both sub-sections of section 8. This would have been necessary because the Board would have had to take occupation of the property in order to extract the gravel.

As far as the application of the Expropriation Act was concerned, this was subject to the overriding provisions of section 25(3) of the Constitution. Accordingly, the proper method of determining the amount of compensation payable was not to follow the two-stage approach proposed by Mokgoro J but to determine what amount was just and equitable in terms of the Constitution. The determination made in the Supreme Court of Appeal was just and equitable, and was accordingly the sum in which Du Toit should have been compensated.

Section 12(1)(a) bases the determination of the amount of compensation paid for the expropriation of property on the aggregate of the market value and actual financial loss, and section 12(1)(b), where what has been expropriated is a right, bases the compensation only on actual loss suffered. In section 25(3) of the Constitution, however, provision is made for a range of relevant circumstances to be taken into account to ensure that the compensation agreed to between the parties or approved by a court of law in terms of section 25(2) is just and equitable and reflects an equitable balance between the public interest and the interests of those affected by the expropriation. The Act does not explicitly insist that the compensation meet those standards. While section 12(1) of the Act bases compensation on market value or financial loss, none of the relevant circumstances listed in section 25(3) of the Constitution, which include market value and possibly actual financial loss, are given any particular prominence. The Constitution therefore does not foreshadow which of the circumstances provided in the open-ended list will be relevant, will actually apply or will be more significant.

RATES ACTION GROUP v CITY OF CAPE TOWN

A JUDGMENT BY LEWIS JA (HOWIE P, STREICHER JA, JAFTA JA and NKABINDE JA concurring)
SUPREME COURT OF APPEAL
25 NOVEMBER 2005

2006 (1) SA 496 (A)

A municipal council is entitled to impose tariffs in respect of the provision of services but is not obliged to ensure that the collection of revenue from the provision of such services is related only to such tariffs to the exclusion of the rateable value of the property in respect of which such services are rendered.

THE FACTS

The City of Cape Town introduced a system of rates on properties which related to the rates payable to the value of the property in question. It also applied this relationship to the provision of sewerage and refuse-removal services.

Sewerage service charges consisted of a charge based on estimated consumption, subject to a maximum, and a basic charge, subject to a rebate based on the value of the property. The rebate ranged from a full one for properties worth less than R50 000 to R8,00 for properties worth up to R1,5m. Refuse removal charges were subject to rebates based on property values and a percentage of the rateable value of the property if it was in excess of R50 000.

For the 2003/4 year, the charging system was changed so that the sewerage charges were increased in respect of all properties with a rateable value of R128 509,80 or higher. Refuse removal charges were increased because of the removal of a maximum charge.

The Rates Action Group objected to the increases. It applied for an order that the City of Cape Town was not entitled to charge for the services on the basis it had. It contended that while section 10G of the Local Government Transition Act (no 209 of 1993) allows for a rate to be levied for a service, section 74 of the Local Government: Municipal Systems Act (no 32 of 2000) requires a tariff to be charged.

THE DECISION

The Rates Action Group conceded that the City was entitled to use revenue accumulated through the collection of rates for general services. Such services cannot be measured so that charges can be made to individuals. It was also accepted that the City could use rates to subsidise households.

The insistence on the application of a tariff when charges are made for electricity, sewerage and refuse removal was however, not warranted. Section 74 provides that a municipal council must adopt and implement a tariff policy on the levying of fees for municipal services. It provides that the amount individual users pay for services should generally be in proportion to their use of that service, and that tariffs must reflect the costs reasonably associated with rendering the service. These provisions however, do not require that a tariff be imposed or that rates collected by a municipal council be put to specific uses. They only require that a tariff policy be adopted and by-laws promulgated.

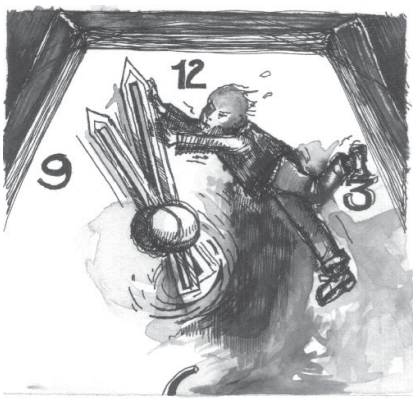
The City of Cape Town was therefore entitled to charge for services in the way it had. The application was dismissed.

DITEDU v TAYOB

A JUDGMENT BY GOLDSTEIN J
WITWATERSRAND LOCAL DIVISION
24 AUGUST 2005

2006 (2) SA 176 (W)

Prescription



A person who depends on another for the provision of expert services and is unaware of the fact that such services have been negligently provided does not have knowledge of the facts from which that person's claim arises.

THE FACTS

Ditedu gave Tayob a written mandate to lodge a claim for damages against the Road Accident Fund (no 56 of 1996) following a collision in a motor car on 3 March 2000.

On 7 September 2000, the Fund offered R5 013 in settlement of the claim, and a contribution of R1 500 to costs. Tayob accepted the offer and on 20 November 2000, the Fund paid the claim.

At the time, Ditedu was satisfied with the amount paid to her, but later alleged that Tayob had failed to properly investigate the nature and extent of her injuries and failed to claim the full extent of the damages she had sustained. She alleged that he was negligent in the performance of his mandate and, as a result, she had suffered damages to the extent of R472 172.

Tayob specially pleaded that the claim had prescribed.

THE DECISION

It could be accepted that Ditedu's failure to appreciate that she had been wronged resulted only from her ignorance of the law. The incorrect opinion given to her was however, a fact, as referred to in section 12(3) of the Prescription Act (no 68 of 1969) which would have resulted in the commencement of the running of prescription in respect of her claim against Tayob.

But what Ditedu also did not know was that Tayob acted negligently in accepting the Fund's settlement offer. Ditedu was an unsophisticated person, with no knowledge of the law which might have indicated that the settlement figure was too low. A layperson contracting with an attorney for the furnishing of expertise in the knowledge of the law is entitled to a remedy in respect of errors made by the attorney and discovered more than three years after the rendering of the service concerned.

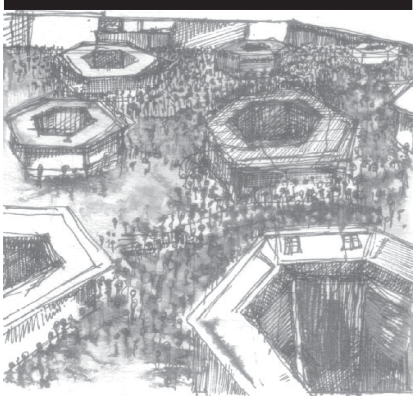
The claim against Tayob had therefore not prescribed. The special plea was dismissed.

HANEKOM v BUILDERS MARKET KLERKSDORP (PTY) LTD

A JUDGMENT BY DE VOS J
TRANSVAAL PROVINCIAL DIVISION
12 DECEMBER 2004

2006 (1) SA 423 (T)

Corporations



If the sole member of a close corporation signs a deed of suretyship on behalf of the close corporation, the express previously obtained consent in writing to the execution of the deed is thereby given, as required by section 52 of the Close Corporation Act (no 69 of 1984).

THE FACTS

RTMC Marketing CC executed a deed of suretyship in favour of Builders Market Klerksdorp (Pty) Ltd in respect of the debts of LSL Konstruksie (Pty) Ltd. Hanekom was the sole shareholder and director of LSL and the sole member of RTMC.

LSL incurred debts toward Builders Market to the extent of R865 931,87 for goods sold and delivered. It began liquidation proceedings against LSL and RTMC and both were placed in liquidation.

Hanekom then applied for an order declaring that the deed of suretyship was invalid and unenforceable due to non-compliance with section 52 of the Close Corporation Act (no 69 of 1984). Section 52 provides that a corporation shall not make a loan or provide security to a corporation in which one or more of its members holds more than a 50% interest, unless the express previously obtained consent in writing of all the members of the corporation has been obtained.

THE DECISION

It has been held that the similar provision to section 52 contained in the Companies Act (no 61 of 1973) renders a loan or security given invalid. That invalidity results from the giving of such a loan or security in the case of a close corporation is evident from the use of the word 'invalidity' in section 52(3). It must therefore be accepted that the suretyship would be invalid, provided that the further conditions of the section are met.

In the present case, the sole member signed the suretyship agreement on behalf RTMC. The 'express previously obtained consent in writing of all the members' was required for the suretyship to fall within the exemption provided for in section 52. Such consent was in fact given when the sole member signed the deed of suretyship.

The suretyship was therefore valid. The application was dismissed.

KOTH PROPERTY CONSULTANTS CC v LEPELLE-NKUMPI LOCAL MUNICIPALITY LTD

A JUDGMENT BY PATEL J
TRANSVAAL PROVINCIAL DIVISION
4 FEBRUARY 2005

2006 (2) SA 25 (T)

Contract

A party alleging that a contract is illegal because the process leading to its conclusion failed to comply with section 217 of the Constitution must allege and prove facts that substantiate the allegation. It may not rely on the failure of the other party to allege compliance to show that the contract was concluded in violation of that section.

THE FACTS

Koth Property Consultants CC brought an action against Lepelle-Nkumpi Local Municipality Ltd based on a written contract in terms of which Lepelle appointed Koth as a service provider for the revaluation of properties, and for updating and compiling a municipal valuation roll for Lepelle.

Koth alleged that it performed its obligations in terms of the contract but received only R550 000 of the agreed remuneration. It claimed the balance of R2 221 200.

Lepelle excepted to the claim on the grounds that Koth failed to allege that it tendered for the contract in accordance with a procurement system that is fair, equitable, transparent, competitive and cost effective, as required by section 217 of the Constitution. Lepelle alleged that as an organ of state, contracts concluded with it had to be preceded by such a tendering process, including the submission of tender documents and the successful award of a tender by it. Lepelle's exception concluded that without such allegations, Koth's claim was based on an invalid, irregular, unlawful and abstract agreement.

Lepelle asked for an order that its exception be upheld and Koth's claim struck out.

THE DECISION

The issue was whether Koth was required to aver that the process followed in concluding the agreement of service was that provided for by section 217 of the Constitution read with the provisions of the Preferential Procurement Policy Framework Act (no 5 of 2000) (the 'Act').

Section 217 provides that when an organ of State contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 10G(5)(a) of the Act provides that a municipality shall award contracts for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

The assertion that the contract alleged by Koth was invalid because it was illegal could not be assessed or determined merely because Koth did not allege those facts and circumstances giving rise to the contract. The failure to allege that the process leading to the conclusion of the contract complied with the Act and the Constitution did not give a prima facie indication that the contract was illegal.

Lepelle had to plead that the contract was illegal, for the reasons it had given, and the matter had to be dealt with in evidence in any forthcoming trial. The exception was accordingly dismissed.

LENCH v COHEN

A JUDGMENT BY
BORUCHOWITZ J
(SATCHWELL J and MBHA J concurring)
WITWATERSRAND LOCAL DIVISION
10 NOVEMBER 2005

2006 (2) SA 99 (W)

Notice of breach of contract may be given prior to the breach taking place when a party envisages that mora will take place. Such notice will be validly given when it is stated that cancellation will take place upon the expiry of any notice period commencing upon the other party being in mora.

THE FACTS

Lench sold fixed property to Cohen for R1 675 000. Clause 1 of the sale agreement provided that the price was payable by means of a deposit of R30 000 immediately and the balance upon transfer. The balance was to be secured by guarantees acceptable to the conveyancer and were to be delivered by no later than 5 January 2004.

Clause 8 of the agreement provided that if Cohen was in breach of any term, and failed to remedy such breach within ten days of posting or hand-delivering a written notice to his domicilium address calling upon him to remedy such breach, then Lench would be entitled to cancel the agreement and retain the deposit, or enforcement the agreement and claim damages.

On 5 January 2004, Lench addressed a letter to Cohen informing him that the guarantees had still not been received and if they were not received on that day, he would be in breach of clause 1. In that event, he gave notice of the breach in terms of clause 8, and failing receipt of the guarantees, this would result in cancellation of the sale on 15 January 2004.

Lench hand-delivered to Cohen's domicilium address where he taped it to the main gate of the complex in which Cohen resided, there being no post box or response to an intercom inquiry.

Cohen failed to make secure payment of the balance of the purchase price by 15 January 2004, but did so by 19 January 2004. On that date, Lench confirmed his cancellation of the sale.

Cohen applied for an order that the sale had not been lawfully cancelled, and an order compelling Lench to pass transfer of the property sold.

THE DECISION

The issue between the parties was whether or not the letter of 5 January 2004 validly placed Cohen in mora.

On a proper interpretation of the letter, the notice was only intended to have effect if and when Cohen fell into breach. This is what was meant when Cohen was informed that should the guarantees not be received by 5 January 2004, he would be 'regarded as being in breach'. Although the letter was prematurely delivered, once Cohen fell into breach, Lench had the right to invoke the notice provision and the notice given would have become effectual.

The fact that the period stated within which Cohen had to comply with his obligations was incorrect was of little consequence. No date for compliance in fact had to be fixed. Only notice of the breach had to be given. Cohen had still been validly placed in mora.

As far as the method of delivery of the letter was concerned, it was clear that no better method could have been used in the circumstances. The only obvious and reasonable method of delivery was to have taped the letter to the gate as this ensured that the letter would come to the attention of Cohen.

The application was dismissed.

NDLOVU v SANTAM LTD

JUDGMENT BY MTHIYANE JA (ZULMAN JA, CAMERON JA, LEWIS JA and COMRIE AJA concurring)
SUPREME COURT OF APPEAL
13 MAY 2005

2006 (2) SA 239 (A)

A cause of action arising from breach of contract may arise in the area where the contract should have been performed and need not be located only in the area where the breach occurs.

THE FACTS

Ndlovu lodged a claim with his insurer, Santam Ltd, following a burglary at his house in Roodepoort. Santam repudiated the claim. Ndlovu brought an action against Santam for payment, claiming R100 000. He sued in the magistrates' court in Roodepoort.

Santam specially pleaded to the claim that the court did not have jurisdiction to adjudicate the claim, Santam having no registered office or principal place of business in the Roodepoort area. Santam alleged that its letter of repudiation was sent from its offices in Krugersdorp and delivered to Ndlovu's broker in Krugersdorp. Since the claim related to its repudiation, it contended that the court having jurisdiction was the court where this event occurred, ie the Krugersdorp magistrates' court and not the Roodepoort magistrates' court.

Ndlovu contended that he had sued in a court having jurisdiction.

THE DECISION

The allegation against Santam was that it was in breach of contract because it had failed to perform in terms of the parties' contract. The question therefore was: where should Santam have performed?

The totality of facts that had to be proved to prove Ndlovu's claim included not only Santam's breach of contract, but the proper performance of it. Ndlovu's claim amounted to a claim that Santam in fact perform in terms of the contract, which was something that had to take place in Roodepoort. The totality of facts therefore brought the cause of action within the jurisdiction of the Roodepoort magistrate's court.

Ndlovu had sued in a court having jurisdiction.

*[14] In my view the starting point of the enquiry, when dealing with a challenge to jurisdiction under s 28(1)(d) of the Act, is to determine the presence or absence of facts which have to be proved by a plaintiff to succeed in his or her cause of action (*facta probanda*) as opposed to facts tending to prove such* facta probanda *(*facta probantia*). Thereafter one has to establish whether the* facta probanda *arose wholly within the particular magesterial district. In the present matter the appellant did not accept the respondent's repudiation and sued the respondent for specific performance on the agreement. It follows therefore that the repudiation was not a material fact which the appellant had to prove to establish his cause of action. The fact that the repudiation might may have taken place outside the district of Roodepoort is accordingly irrelevant. The repudiation was therefore merely 'a thing writ in water'.*

SEBENZA FORWARDING & SHIPPING CONSULTANCY (PTY) LTD v PETROLEUM OIL AND GAS CORPORATION OF SA (PTY) LTD

A JUDGMENT BY BOZALEK J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
7 OCTOBER 2005

2006 (2) SA 52 (C)

A contracting party dealing with a party which is controlled by a Minister of government acting under statutory powers may consider the action taken by the Minister to be administrative action which is subject to review under administrative law.

THE FACTS

In June 2003, Sebenza Forwarding & Shipping Consultancy (Pty) Ltd was awarded a tender to supply clearing and forwarding services to Petroleum Oil and Gas Corporation of SA (Pty) Ltd. Although the tender provided for a written contract to be concluded in terms of which Sebenza would supply services to Petro SA for three years, no such contract was concluded, owing to disagreements which arose between the parties in their negotiations. Despite the absence of a concluded written contract, Sebenza supplied services to Petro SA, and the services were accepted by Petro SA, pending the decision of the Minister of Minerals and Energy Affairs regarding the matter. Petro SA confirmed that the contract period was extended to enable the Minister to conclude a final ruling on the matter.

In May 2005, Petro SA purported to terminate the contract on one month's notice. Sebaneza brought interdict proceedings against Petro SA to compel it to honour the undertaking to continue performance of the contract pending the decision of the Minister. Before these proceedings were complete, the Minister informed Petro SA that she was satisfied with the manner in which it was dealing with the matter, that she considered it to be an operational matter to be handled and resolved by Petro SA management and would accordingly not be conducting an enquiry into the matter.

Sebenza then applied for an amendment to its interdict application to include further relief reviewing and setting aside the Minister's decision to approve the manner in which Petro SA was dealing with the matter and to refrain for conducting an enquiry into the matter.

The Minister opposed the amendment.

THE DECISION

Petro SA was a subsidiary of a state-owned company, all of whose directors were appointed by the Minister. Petro SA's board of directors would therefore be ultimately responsible to the Minister. It was quite conceivable that the Minister's response was an exercise of her statutory powers and an inquiry into alleged irregularities would amount to the implementation, thus constitute administrative action, rather than the formulation of policy. It was therefore not clear that her actions were political rather than administrative.

The Minister's decision had an effect on Sebenza's rights in the broad sense of the word. Assuming that her action was administrative action, Sebenza would be entitled to invoke its right to administratively fair action in challenging that action.

Sebenza was entitled to procedurally fair action, and possible review of the Minister's decision. The amendment sought would raise a triable issue both on the basis that the Minister's actions did fall within this category and on the basis that the Minister's decision amounted to executive action subject to judicial scrutiny for procedural fairness.

The amendment was granted.

P TRIMBORN AGENCY CC v GRACE TRUCKING CC

Contract

A JUDGMENT BY SWAIN J
NATAL PROVINCIAL DIVISION
17 MAY 2005

2006 (1) SA 427 (N)

A defence to a claim which depends on invalidity of the agreement upon which the claim is based must set out sufficient particularity to indicate how such invalidity has arisen. If the invalidity is a result of a failure to comply with statutory provisions, the defendant must indicate the facts showing that such failure has taken place.

THE FACTS

P Trimborn Agency CC supplied diesel fuel to Grace Trucking CC, the parties having concluded an agreement under which such supplies were to be sold on credit. Trimborn alleged that Grace Trucking had failed to pay for supplies, so that it was indebted to it in the sum of R360 118,63. It brought an action for payment of this sum.

Grace Trucking defended the action inter alia on the grounds that the supply of the diesel was prohibited in terms of regulation 4(1) of the Regulations in Respect of the Saving of Petroleum Products published in terms of the Petroleum Products Act (no 120 of 1977). The regulation prohibits the sale of diesel fuel on credit in respect of passenger vehicles with a passenger-carrying capacity of 12 persons and under, and light commercial vehicles with a gross mass of 3 500 kilograms and less.

Trimborn applied for summary judgment against Grace Trucking.

THE DECISION

In order to successfully oppose an application for summary judgment, a defendant must set out facts which show that it has a bona fide defence to the plaintiff's action. In the present case, this meant that Grace Trucking was obliged to indicate how the provisions of regulation 4(1) had been contravened. This would involve at least alleging that the diesel fuel supplied was for vehicles referred to in the regulation. However, Grace Trucking had made no such allegations.

Grace Trucking would have known which kind of vehicles the diesel fuel was supplied for. There was no reason why it could not have stated this in its opposing affidavit.

There was insufficient evidentiary material to raise doubts that Trimborn's case was unanswerable and to indicate a reasonable possibility that Grace Trucking had a good defence.

Judgment in favour of Trimborn was granted.

The particular nature of the vehicles belonging to the defendant to which diesel fuel was supplied on credit, and consequently whether such sales are visited with illegality in terms of the legislation, is information which must be known to the defendant. There can be no reason, in the absence of any explanation from the defendant, why this information could not have been set out int he defendant's affidavit, if not in its plea, to clearly establish a bona fide defence which is good in law.

RECTRON (PTY) LTD v GOVENDER

A JUDGMENT BY McLAREN J
DURBAN AND COAST LOCAL DIVISION
30 DECEMBER 2005

2006 CLR 1 (D)

The onus of proof in showing why a restraint provision should not be enforced rests on the party contending itself to be free of the restraint. A company's right to protection of its confidential information cannot prejudice an employee's right to be economically active.

THE FACTS

In June 2002, Govender began employment with Rectron (Pty) Ltd at its Durban branch. The employment agreement was made orally, but she later signed four agreements with Rectron. The agreements incorporated confidentiality provisions intended to protect Rectron's interests, and restraint provisions, and one of the agreements introduced a polygraph testing provision and a penalty of R75 000 payable by Govender should she not serve her notice period with Rectron. The confidentiality provision contained an undertaking to pay pre-estimated damages of R5m in the event of Govender breaching its terms.

Shortly after signing the last of these agreements, Govender resigned from Rectron's employment, and left the company on 31 August 2005. On 1 September 2005, Govender began employment with Axiz (Pty) Ltd, a competitor of Rectron.

Rectron alleged that Govender had had access to its confidential information while she was employed by it. This included contact details of people in the companies which were its customers, details of those customers considered bad credit risks, the structure of discounts allowed to customers, customers' needs and buying patterns.

Rectron brought an application for an order enforcing the agreement in restraint of trade and preventing Axiz from employing her. The mater was referred to trial and decided as a matter of urgency.

THE DECISION

It was held, in the judgment handed down in *Canon Kwazulu-Natal (Pty) Ltd v Booth* 2005 (3) SA 205 (N) that a party seeking to enforce a restraint of trade agreement must do more than invoke the provisions of the contract and prove the breach, but must also show that the restraint is reasonable and justifiable, as provided for in section 36 of the Constitution. The effect of this judgment was to hold that the onus of proof in demonstrating the breach rests on the party seeking to enforce it. In view of the weight of authority following this judgment, however, it was, properly considered, plainly wrong and could not be followed. The onus of proof in the present case accordingly rested on Govender and it was necessary for her to show why the restraint should not be enforced.

The information alleged by Rectron to be confidential had not been shown to be useful information, or such as to be properly classified as 'confidential' or capable of giving a competitor an advantage. Govender had established a good and cordial relationship with customers of Rectron, but there was no evidence to show that Rectron lost customers to Axiz following Govender's change of employment. Customers that she had dealt with after taking up employment with Axiz were common to both companies.

Rectron had a right to protection of its confidential information. However, the evidence showed that this right had not been violated by Govender's move to Axiz as she had shown there was no reasonable possibility that she would divulge or use for the benefit of Axiz Rectron's confidential information.

Even if such a possibility existed, Govender still had the right to be economically active, a right which would be defeated were the restraint provision to be enforced. In any event, the restraint went further than was necessary to protect Rectron's interest. Its provisions were wider than necessary to protect its interests and contrary to public policy.

The application was dismissed.

TECHNICAL FLEET MANAGEMENT (PTY) LTD v ROUSSEAU

A JUDGMENT BY VAN ZYL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
1 DECEMBER 2005

2006 CLR 39 (C)

An agreement in restraint of trade preventing competitive activity by an employee which is 'detrimental to the interests' of the employer should not prevent the employee from participating in limited competitive activity, where such limited competition is eclipsed by the prejudice that might be suffered with enforcement of the restraint.

THE FACTS

In November 1998, Technical Fleet Management (Pty) Ltd employed Rousseau as its executive and regional director in the Western Cape. Clause 9 of the employment contract provided for restrictions against disclosure or use of confidential information, pirating of fellow employees and influencing licensors, suppliers and customers. Clause 9.4 provided that Rousseau was to be restrained from competing with the company for a period of three years from date of resignation and he undertook not to be interested or engaged in any business carrying on any business in competition with Technical Fleet Management.

In April 2005, Rousseau resigned from his employment with Technical Fleet Management's successor. The company alleged that from that date, Rousseau became interested and engaged in a close corporation which was competing with it, Fleet & Time Control (George) CC.

Rousseau admitted that the close corporation had supplied certain equipment to one of Technical Fleet Management's customers, but stated that the consideration involved was a negligent amount when compared with that company's annual turnover. He also stated that the avenue of business opportunity being exploited by his close corporation related to new areas of wireless documented tracking systems which were not a part of Technical Fleet Management's business.

Technical Fleet Management brought an application for an interdict to enforce the restraint of trade agreement.

THE DECISION

The primary issue was whether or not Rousseau was in breach of the restraint provided for in the employment agreement. To determine this, it was necessary to establish whether or not his close corporation was conducting a business in competition with Technical Fleet Management. A secondary issue was whether or not the three-year period of the restraint was unreasonable and should be reduced.

Agreements in restraint of trade are enforceable, unless their effect is to curtail or restrict fair competition. Applying this, and all legal principles to the facts of the case, it appeared that Rousseau was involved with a close corporation that had sold items to Technical Fleet Management's customers. These sales however, represented a very small percentage of the company's total turnover. This had to be seen in the light of the proviso included in clause 9.4 that the competing activity was to be 'detrimental to the interests' of the company.

The extremely limited competition which the close corporation had engaged in, in relation to Technical Fleet Management, was eclipsed by the prejudice that would be suffered were Rousseau to be prevented from continuing his efforts at participating in the open market in a field in which he had built up a considerable knowledge and expertise. This competition could not be regarded as detrimental to the business of Technical Fleet Management.

The application was dismissed.

PARSONS TRANSPORT (PTY) LTD v GLOBAL INSURANCE COMPANY LTD

A JUDGMENT BY MPATI DP (MTHIYANE JA, NKABINDE JA, MAYA AJ AND CACHALIA AJ concurring)
SUPREME COURT OF APPEAL
29 SEPTEMBER 2005

2006 (1) SA 488 (A)

Insurance

A provision in an insurance policy that cover is conditional on the payment of the premium is not a suspensive condition, non-fulfilment of which renders the policy void.

THE FACTS

Global Insurance Company Ltd agreed to insure Parsons Transport (Pty) Ltd against damage or loss caused to its fleet of vehicles from 1 December 2002 to 30 November 2003. An annual premium of R4 513 998,83 was payable in full by 15 January 2003.

The insurance policy provided: 'Subject to the terms, exceptions and conditions (precedent or otherwise) and in consideration of, and conditional upon, the prior payment of the premium by or on behalf of the insured and receipt thereof by the company, the company agrees to indemnify or compensate the insured by payment ...' The policy also provided that it was subject to certain warranties, one of which was that the premium was payable by 15 January 2003.

Parsons failed to pay the premium. Global brought an action for payment. The parties approached the court for a determination of whether or not payment of the annual premium by 15 January 2003 constituted a condition precedent or a suspensive condition so that non-compliance thereof would render the contract inoperative and unenforceable by Global.

THE DECISION

Parsons argued that payment of the premium was a condition precedent to the operation of the insurance policy and, not being an obligation resting on it, could not be enforced. However, the provision that the premium was to be paid by 15 January 2003 was stated in the form of a warranty. The effect of this was merely to render the policy voidable by the insurer were it not honoured. The validity of the whole contract of insurance was not rendered subject to the fulfilment of the condition.

Even if the provision was considered to be a 'promissory warranty', the contract of insurance was in existence, and cover did subsist, as from 1 December 2002. Parsons enjoyed cover from that date and any failure on its part to pay the premium in January did not expunge that benefit.

Payment of the annual premium was therefore not a suspensive condition and Global was not prevented from suing for payment based on the obligations created in the contract of insurance.

MINISTER OF HEALTH v NEW CLICKS SA (PTY) LTD

A JUDGMENT OF THE CONSTITUTIONAL COURT
30 SEPTEMBER 2005

2006 (2) SA 311 (CC)

The Constitution

An analysis of regulatory and statutory provisions governing the price determination of medicines and scheduled substances.

Introduction

The Minister of Health promulgated regulations in terms of section 22G of the Medicines and Related Substances Act (no 101 of 1965). The purpose of the regulations was to provide for a transparent pricing system for the sale and dispensing of medicines and scheduled substances in South African pharmacies. New Clicks SA (Pty) Ltd and the Pharmaceutical Society of South Africa (the PSSA) challenged the regulations, contending that they were invalid and of no force and effect. The Minister of Health appealed a decision of the Supreme Court of Appeal holding that the regulations were invalid.

Evidence in the case revolved almost exclusively on the activities of a Pricing Committee. This committee was established by the Minister of Health to hear representations regarding the existing practices of the pharmaceutical industry and the best methods of implementing the transparent pricing system referred to in the Act.

The Constitutional Court decided the case upon an assessment of:

- this evidence;
- the Constitution;
- the Medicines and Related Substances Act (no 101 of 1965);
- the Promotion of Access to Justice Act (no 3 of 2000);
- the regulations

The Constitutional Court upheld the appeal in part. The court held that parts of the regulations were invalid and ordered that the invalid parts were to be appropriately amended and new regulations published within sixty days. The Constitutional Court's analysis of the regulations was extensive and detailed, each provision being examined and assessed in the light of the applicable law. This summary refers to the court's analysis of one such regulation, that applicable to the determination of the single exit price.

The Evidence

The Pricing Committee was chaired by one Professor McIntyre. The committee first conducted research into the existing pricing structure of the pharmaceutical industry, and the findings of a working group established to obtain information of the industry were used to update the views of the committee on a continuous basis. A notice in the Government Gazette invited comments and representations from interested parties.

The Pricing Committee also invited oral representations based on written comments made by interested parties. When the oral representations were made, not all members of the Pricing Committee were present.

Draft regulations were published, after which New Clicks and PSSA made representations to the Pricing Committee. They contended that the proposed dispensing of 24% for medicine under R100 and R24 for medicine over R100 would cause pharmacists to trade at a loss.

The Medicines and Related Substances Act (no 101 of 1965)

Section 22G of the Act provides that the Minister may, on the recommendation of the pricing committee, make regulations on (i) the introduction of a transparent pricing system for all medicines and scheduled substances sold in South Africa, (ii) an appropriate dispensing fee to be charged by pharmacists or licensed person, (iii) an appropriate fee to be charged by wholesalers or distributors or any other person selling Schedule 0 medicines.

Sub-section 3 provides that the transparent pricing system shall include a single exit price which shall be published as prescribed, and such price shall be the only price at which manufacturers shall sell medicines and scheduled substances to any person other than the State. No pharmacist or licensed person shall sell a medicine at a price higher than this price, but a dispensing fee may be charged.

The Constitution

Section 24 of the Constitutions entitles every person to (i) lawful administrative action where any of his or her rights or interests is affected or threatened, (ii) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened, (iii) be given reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public, and (iv) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

Section 33(1) of the Constitution provides that such rights may be limited by law of general application, provided that such limitation shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society, and shall not negate the essential content of the right.

The Promotion of Access to Justice Act (no 3 of 2000)

This Act governs the exercise of administrative action. This is defined as any decision taken, or failure to take a decision, by an organ of State exercising a power in terms of the Constitution or provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or by any other person exercising a public power in terms of any empowering provision.

Excluded from this definition is the exercise of certain powers. One such power is the exercise of executive powers of the National Executive including certain of the powers listed in section 85. These powers do not include the power of implementing national legislation, ie that provided for in section 85(2)(a).

It follows from this omission that the exercise of such power is not administrative action to which the Act does not apply. Accordingly, the exercise by the Minister of her powers in the present case was administrative action and subject to the Act.

It was also true that the making of the regulations constituted a 'decision' within the meaning of the Act.

Applying the provisions of the Act to the procedure adopted by the Minister, there was no evidence that anything about it was unfair. The process of making regulations was a single process involving both the Minister and the Pricing Committee, each of whom had taken measures to bring about the new pricing system.

The Regulations

Regulation 5(2)(c) provided that the price of each medicine or scheduled substance to be set upon the date of commencement of the regulations by the manufacturer or importer must not be higher than the weighted average net selling price of the medicine or scheduled substance during the calendar year 2003.

This regulation was vague and ambiguous in that it was not clear whether the reference to 'the

price' and the 'weighted average net selling price' was to the manufacturer's 2003 price or the price at which the medicine was sold to the retail trade in that year. Some of the ambiguity had been reduced by the settlement of prices by manufacturers, wholesalers and distributors in the period following promulgation of the regulations, having regard to the guidelines for doing so set out in the annexure to the regulations. However, the formula for setting the maximum single exit price could not be applied to medicines that were not sold in South Africa during 2003. Regulation 5(2)(c)(ii) therefore provided for medicines sold on or after 1 January 2004.

This regulation provided that the price of such medicine was to be calculated using the average of the total rand value of sales less the total rand value of the discounts for the period for which the medicine was sold and with reference to the price of that medicine in other countries in which prices of medicines and scheduled substances are regulated and published.

It was not possible however, to determine from these provisions how the maximum single exit price was to be calculated. Assuming that it could be established what countries were referred to and what the prices were, there was no indication of how the formula was to be applied in the prices differed.

Regulation 5(2)(c) was therefore too uncertain for it to be enforced.

Does the fact that the Medicines Act imposes these various controls in specific terms and provides that the fees of pharmacists, wholesalers and distributors are to be prescribed in the regulations, but says no more about the SEP than that it is the only price at which the manufacturer may sell medicine, mean that the regulations may not deal with how the SEP is to be set or controlled in the future?

A statutorily mandated pricing system, which is to be fleshed out by regulations, inevitably contemplates a system with inbuilt controls. Reverting to section 22G, which is the section under which the regulations were made, a thread that runs through it is that the pricing system must contain measures that will enable control to be exercised over the price of medicines. Section 22G prescribes certain essential measures to be included in the system but does not say that they are the only measures that are competent. There seems to be no reason why the "pricing system" referred to in section 22G, which contemplates price controls throughout the distribution chain, should be construed as excluding controls over how the SEP should be set and increased.

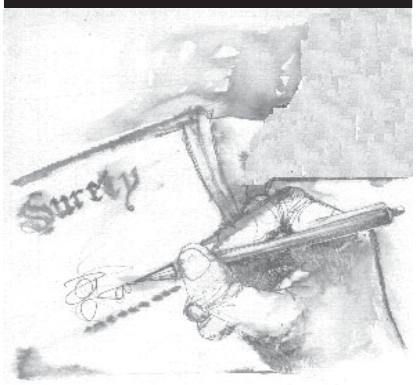
I am accordingly unable to agree with the SCA, or with the submissions made to us in this regard by counsel for the Pharmacies. In my view the regulations are not invalid simply because they include price control measures affecting the SEP.

BILSBURY v STANDARD BANK OF SA LTD

A JUDGMENT BY JONES J
EASTERN CAPE DIVISION
8 SEPTEMBER 2005

2006 (3) SA 60 (E)

Suretyship



Action taken by a creditor which it is authorised to take cannot constitute prejudice to a surety. The creditor which does not accept an offer made by a surety the effect of which would have been to confer a benefit on the surety does not thereby cause prejudice to the surety.

THE FACTS

Standard Bank of SA Ltd lent money to a partnership to purchase a motor vehicle. The loan was repayable in instalments and Bilsbury stood surety for the loan.

The motor vehicle was used for the delivery of dairy products and farm produce, but the business failed and it fell into arrears with its repayment instalments. In January 2000, the bank took steps to enforce repayment of the loan by sending its agent to the partnership to secure repossession of the vehicle. When the agent arrived at the partnership premises, Bilsbury telephoned the bank's head office in Cape Town. He offered to purchase the vehicle and pay the full outstanding balance of the loan, on condition that the bank did not repossess the vehicle. The head office representative said he would respond to the offer in due course. Bilsbury confirmed his offer in writing.

When the bank reverted to Bilsbury, it rejected the offer. The partnership signed a consent to surrender the vehicle to the bank which repossessed the vehicle.

Bilsbury then stated that in view of the bank's rejection of his offer, he would refuse to pay any shortfall, should the vehicle be sold and the proceeds be insufficient to extinguish the outstanding debt. The vehicle was sold, resulting in a shortfall of R17 083,96. The bank looked to Bilsbury for payment.

Bilsbury defended the bank's action on the grounds that the refusal of his offer had caused prejudice to him in that he had been denied the opportunity to pay the principal debt.

THE DECISION

Where alleged prejudice is caused by the exercise of a right or the performance of an obligation for which the contract or suretyship, or governing statute, makes provision, the action cannot constitute a breach by the creditor. The creditor is authorised to take such action by law or the contract. Accordingly, no prejudice is caused entitling the surety to discharge of his obligations.

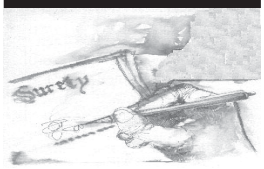
In the present case, the principal debtor was in default of its obligations. This entitled the bank to institute repossession proceedings, the consequences of which could not be characterised as prejudice to Bilsbury. Any prejudice was therefore not a result of a breach of some or other legal obligation on the part of the creditor. The bank had done nothing which was not in accordance with its ordinary rights and duties under the contract and the governing statute. Its refusal to enter into a contract which would confer an advantage on the surety was not an act prejudicial to the surety entitling him to discharge of his obligations.

The offer of payment made by Bilsbury was in any event, subject to a condition which would have denied the bank the right to repossess the vehicle. The refusal did not cause prejudice to Bilsbury who could, at all times, have paid the outstanding debt.

The action succeeded.

INVENTIVE LABOUR STRUCTURING (PTY) LTD v CORFE

Suretyship



A JUDGMENT BY JAFTA JA (SCOTT JA and CACHALIA JA concurring)
SUPREME COURT OF APPEAL
18 NOVEMBER 2005

2006 (3) SA 107 (A)

A deed of suretyship which cites the principal debtor as the surety complies with section 6 of the General Law Amendment Act (no 50 of 1956) because the deed may be interpreted as referring to two separate parties with identical names.

THE FACTS

Corfe signed a deed of suretyship, intending to guarantee the debts of D&R Distributors CC, which owed Inventive Labour Structuring (Pty) Ltd R240 119,93. By error common to both parties, Corfe's name was inserted as the principal debtor, instead of D&R's name.

Inventive wished to obtain default judgment against Corfe, in an action brought against him for payment of D&R's debt. It claimed rectification of the deed of suretyship and judgment in the amount of the debt.

THE DECISION

A deed of suretyship which fails to comply with section 6 of the General Law Amendment Act (no 50 of 1956) is invalid. The section provides that no contract of suretyship is valid unless the terms thereof are embodied in the written document signed by the surety. The first step to rectification is therefore to determine whether or not this section has been complied with.

As the deed of suretyship stood, two possible interpretations of it could be made: firstly, that the surety and principal debtor were the same person, secondly that they were two parties with identical names. The first interpretation would lead to invalidity, the second would not. The second was therefore to be preferred. Accordingly, section 6 of the Act had been complied with.

A proper case for rectification had been made out because it was clear that the parties had intended the D&R would be the principal debtor.

Rectification was therefore applied to the deed of suretyship and judgment against Corfe granted.

KLEIN v DAINFERN COLLEGE

JUDGMENT BY CJ CLAASSEN J
TRANSVAAL PROVINCIAL DIVISION
3 OCTOBER 2005

2006 (3) SA 73 (T)

Contract

A decision of a private tribunal established by contract is reviewable in the same way as administrative action is reviewable if the principles of natural justice are not observed in reaching such a decision.

THE FACTS

Klein was employed as a teacher at Dainfern College. In terms of the employment contract, misconduct or behaviour which was in breach of the college requirements and its code of conduct would result in the application of appropriate disciplinary action as per the college's disciplinary procedures. The college's disciplinary procedure and code formed part of the contract of employment, which also included a code of conduct for staff and educators.

While she was so employed, Klein levelled certain complaints against one of Dainfern's representatives. Dainfern took the view that the mode and conduct of her complaint amounted to a breach of the code of conduct. It served on her a notice requiring her attendance at a disciplinary hearing at which the charge of gross insolence would be made against her and investigated.

On the date of the hearing, at the request of Klein, the matter was postponed in order to give her more time to prepare for the hearing. At the resumed hearing, one week later, Klein's representative alleged that insufficient information had been furnished, and insufficient time had been given, for the proper preparation of Klein's case. He requested a further postponement. When this was refused, Klein and her representative withdrew from the hearing. The hearing proceeded with the evidence. Klein was found guilty of the charge brought against her.

Klein then brought an application to review and set aside the decision finding her guilty of gross insolence.

THE DECISION

Dainfern argued that a decision taken by a domestic tribunal which has been created by contract cannot be subject to judicial review in the same way as administrative action is so subject. As a private school, disciplinary hearings did not constitute the exercise of any public function entitling Klein to judicial review.

However, this argument did not take into account the fact that the elementary principles of natural justice may still be applicable. A court may interfere in the decision of a domestic tribunal which has disregarded its own rules or the fundamental principles of fairness. The advent of constitutionalism in all aspects of law did not have the effect of abrogating this principle. The Bill of Rights affects the right of review in respect of public bodies only, but this does not limit the right of review in respect of private bodies which may be similarly accountable to those affected by their decisions. The principles of natural justice continue to apply in respect of such bodies.

The employment contract concluded between the parties did not exclude the application of the principles of natural justice. The disciplinary code in fact expressly included them in that it provided for procedural fairness and substantive fairness, and held that the accused was to have the right to state her case fully and after the leading of all relevant evidence so as to enable a just and balanced verdict.

Deficiencies in the procedures associated with the disciplinary hearing in question indicated that the decision finding Klein guilty of the charge brought against her should be set aside.

MACKAY v FEY N.O.

A JUDGMENT BY SCOTT JA (HARMS JA, ZULMAN JA, CAMERON JA and JAFTA JA concurring)
SUPREME COURT OF APPEAL
22 SEPTEMBER 2005

2006 (3) SA 182 (A)

A court will not find that a contract is a simulated transaction if it is clear that one of the parties intended the contract to be precisely as recorded in its written terms.

THE FACTS

MacKay concluded a lease as lessor with Mrs Jeannette Harksen as lessee. The duration of the lease was a period of ten months. In that period, a total of R271 290,63 in rent was paid to MacKay through a letting agency which deducted a commission. The premises were a cottage situated close to Harksen's house and they were used on weekends only.

A year after the expiry of the lease, the trustees of the insolvent estate of Harksen's husband, Fey and others, brought an action against MacKay for repayment of the total rental paid to MacKay. They alleged that the lease was in fact concluded with Mr Harksen as an oral lease at a time when his estate was subject to a sequestration order, and that it had been concealed from the trustees and was concluded without their knowledge or consent. They contended that the lease was voidable in terms of section 23(2) of the Insolvency Act (no 24 of 1936). Section 23(2) provides that the fact that a person concluding a contract is an insolvent does not affect the validity of the contract, provided that the insolvent does not thereby purport to dispose of any property of the insolvent estate and provided that the insolvent shall not enter into any contract whereby his estate, or any contribution to his estate, is likely to be adversely affected.

MacKay denied that he had concluded a lease with Mr Harksen and alleged that his lease was with Mrs Harksen. The trustees contended that any such lease found to have been concluded was a simulation, and the true lessee was Mr Harksen.

THE DECISION

Given the size of the rental which had to be paid in terms of the lease, and the limited usage made of the premises, it seemed that the proviso of section 23(2) would apply, ie the contract concluded was one whereby Harksen's estate would be adversely affected by it.

To apply this section, it had to be shown that the lease was concluded by Mr Harksen, as alleged by the trustees, and not by Mrs Harksen, as alleged by MacKay. The trustees did not prove that any oral lease was concluded; accordingly, the question was whether the lease actually concluded was a simulation in which Mr Harksen was the real lessee.

Where parties to a transaction attempt to conceal its true nature by giving it some form different from what they really intended, effect will be given to the transaction in accordance with its substance and not its form. A court will only hold a transaction to be simulated if it is satisfied that there is some unexpressed or tacit understanding between the parties to the agreement which has been deliberately concealed.

In the present case, the intention of at least one of the parties to the lease, MacKay, was to contract with Mrs Harksen, not Mr Harksen. In these circumstances, whatever Mr or Mrs Harksen intended, it would not be possible to show that the parties intended the lessee to be Mr Harksen as opposed to the party actually shown as the lessee, ie Mrs Harksen. MacKay's true intention was of crucial importance in determining whether or not the lease was a simulated transaction, and in this regard, there was no

evidence that he wished to connive with Mr Harksen in disguising the true identity of his lessee. It was clear that MacKay had regarded Mrs Harksen as the lessee. The lease was therefore not a simulated transaction and had been concluded with her, not the insolvent Mr Harksen.

The action was dismissed.

Ultimately the inquiry is whether the appellant regarded Harksen or his wife as his debtor under the lease or, to put it differently, the inquiry is to which of the two would he have regarded himself as obliged to look in the event of a breach. It is clear from the correspondence that when informed of the unusual circumstances of the previous lease, the appellant's principal concern was, as he put it, who was to be the principal. He wanted to know who and where he would have to sue in the event of a breach. Although earlier in the negotiations he had contemplated contracting with Studer as agent for Harksen, in which event he required a power of attorney, by 14 February 2001, as is apparent from his letter of that date, he was prepared to contract with either Studer or Harksen as principal. The appellant testified that when Mrs Harksen was proposed as the lessee he accepted her as the party with whom he would contract as principal. There is nothing improbable about this. Indeed, the subsequent correspondence during the subsistence of the lease demonstrates quite clearly that he regarded Mrs Harksen as the lessee and the person to whom he looked for fulfilment of the lessee's obligations.

ENGELBRECHT v MERRY HILL (PTY) LTD

A JUDGMENT BY PLASKET J
EASTERN CAPE PROVINCIAL DIVISION
11 JANUARY 2006

2006 (3) SA 238 (E)

A notice of breach given in terms of section 19(2) of the Alienation of Land Act (no 68 of 1981) must state what steps the seller intends taking as a result of the purchaser's breach of contract.

THE FACTS

Merry Hill (Pty) Ltd sold two properties to Engelbrecht under an instalment sale agreement. The agreement was subject to the Alienation of Land Act (no 68 of 1981).

Clause 9 of the agreement provided that in the event of the purchaser failing to fulfil on due date any of his obligations under the contract, and the seller having demanded rectification of the breach by written demand, as set out in section 19 of the Act, the seller would be entitled either to claim immediate payment of the balance of the purchase price and other charges, or to cancel the agreement and claim payment of all arrear instalments and retain payments already made.

Engelbrecht paid some of the instalments but then fell into arrears. In August 2005, Merry Hill's attorney addressed a letter to him. It demanded payment of R22 534 within 32 days. It stated that should payment not be made within that period, Merry Hill would be entitled to claim immediate payment of the full balance of the purchase price and other charges, or would be entitled to cancel the contract. Subsequently, Merry Hill's attorney addressed a letter to Engelbrecht in which notice of cancellation of the contract was given.

Engelbrecht contended that the first letter sent to him did not properly comply with section 19 of the Act because it failed to state the steps Merry Hill intended taking if the breach of contract was not rectified, and did not indicate which of the two alternative remedies provided for in clause 9 it intended to exercise.

Section 19(2) of the Act provides that a notice of breach of contract must contain, inter alia, an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.

THE DECISION

Section 19(2) is peremptory in its terms. It is also intended to protect the purchaser. Substantial compliance with the section is therefore not sufficient: there must be strict compliance in order to achieve the protection the section seeks to provide. There should be no difficulty in requiring unequivocal conduct on the part of the seller when notice is given in terms of the section.

The protection afforded a purchaser is achieved by requiring that the seller make an election at an early stage as to which alternative it has chosen to follow. This does not prevent the seller from changing its choice at a later stage, provided that it does so by giving further notice to that effect when this takes place.

The letter sent by Merry Hill's attorney merely stated the alternatives open to it. It did not indicate what steps it intended to take, but merely reminded Engelbrecht of what the sale agreement provided for in the event of breach. This could not be considered compliance with section 19(2). The letter had also not indicated which of the two alternative remedies it intended to exercise, with the result that Engelbrecht could not realistically appraise the consequences of the various courses open to him.

The notice given therefore did not comply with the section and it was invalid.

SEALED AFRICA (PTY) LTD v KELLY

A JUDGMENT BY EPSTEIN AJ
WITWATERSRAND LOCAL DIVISION
6 JULY 2005

2006 (3) SA 65 (W)

A prior oral agreement varying the terms of a recorded agreement is not admissible in evidence where such agreement would contradict the terms of the recorded agreement.

THE FACTS

Sealed Africa (Pty) Ltd concluded a loan agreement with Airshield Holdings (Pty) Ltd in terms of which Sealed Africa was to lend Airshield R5m. The loan was repayable on or before 28 February 2005, provided that if the 'Kohler Transaction' was not consummated prior to 31 August 2001, it would become immediately due and payable. Kelly and the other respondent signed suretyship agreements to guarantee repayment of the loan. They also signed the loan agreement.

The Kohler Transaction was an agreement to purchase the airothene business of Kohler Versapak and the purpose of the loan was to facilitate that purchase.

Clause 7 of the loan agreement provided that it and the other credit documents set forth the entire understanding of the parties with respect to its subject matter.

The loan was advanced to Airshield. It failed to repay the loan on due date. Sealed Africa brought an application for an order enforcing payment.

THE DECISION

Kelly contended that the loan agreement was part of a much larger transaction in which Sealed Africa intended to obtain an equity interest in Airshield South Africa, the loan being given in order to fund the initial acquisition of the Kohler business. It contended that the parties intended to form a joint venture which, when implemented, would result in the conversion of the loan to an equity interest in Airshield South Africa. The joint venture having been formed, the loan was extinguished.

Kelly's contentions depended on allegations of facts which were at variance with the recorded terms of the loan agreement. This violated the parol evidence rule which excludes evidence of an agreement outside of the recorded terms of that agreement, where such evidence contradicts or conflicts with the terms of agreement. The evidence sought to be introduced by Kelly did contradict the terms of the loan and was therefore inadmissible.

It was clear from clause 7, that the parties intended the loan agreement to be the sole memorial of the agreement they had concluded. There was therefore no basis for applying the exception to the parol evidence rule and allow evidence of a prior oral agreement between the parties. There was also no basis for interpreting the intention to form a joint venture as the introduction of a resolutive condition.

Kelly had shown no reason why the loan was not enforceable. The application was granted.

THE SOCIETY OF LLOYD'S v ILSE

JUDGMENT BY VAN ZYL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
3 MARCH 2006

2006 CLR 101 (C)

An ambiguity created by the application of rules of the Conflict of Laws may necessitate the application of a middle way, taking into account both the lex fori and the lex causae in order to determine whether or not a claim has become time-barred. A contractual provision which denies a party the right to sue another until that party has discharged all its obligations to the other is not an indication of fraud and is enforceable at the instance of the other party. A challenge to a 'conclusive proof' provision requires more than a vague dispute regarding the computation of an amount claimed by a party in whose favour the provision subsists.

THE FACTS

Ilse and the other defendants* were underwriting members of the Society of Lloyd's, an insurance institution regulated by the Lloyds Act, 1982. During the 1980s, Lloyds experienced an unexpected increase in claims arising from injury related to the production and use of asbestos. It then recruited a considerable number of new underwriting members which ultimately had to meet the claims arising from the asbestos claims.

Faced with these claim, members, both individually and as syndicates, brought actions for damages against members and their managing agents. To avert an increase in such litigation, Lloyds developed a reconstruction and renewal scheme directed at settling claims by means of a virtual waiver of claims arising before 1992. To this end, it passed bye-law 22 of 1995 which provided for the reinsurance of claims by Equitas Reinsurance Ltd to which members were required to pay premiums. Further measures were provided for to deal with the asbestos claims under the reconstruction and renewal scheme. All such measures were taken under the powers provided for in section 6(2)(a) of the Lloyds Act, 1982. Clause 5.5 provided that a member was obliged to pay premiums free of any set off, counterclaim or deduction, and waived any claim to stay execution, and would not be entitled to bring any action in connection with the obligation to pay unless the liability had been discharged in full.

A number of members, known as 'Names' refused to pay the reinsurance premiums to Equitas. The defendants were among these members. Litigation ensued in the English courts, which held that Lloyds was entitled to enforce the payment of such premiums, although the Names could, should they so choose, dispute the obligation to pay them on the grounds of fraud. Counterclaims based on the allegation of fraudulent misrepresentation were ultimately dismissed.

Judgments for payment of the reinsurance premiums were obtained by Lloyds against Ilse and the other defendants in December 1999, March 1998 and May 2004.

Lloyds brought actions for provisional sentence against the defendants, based on the judgments it had obtained against them in the English courts. It did so more than three years, but less than six years, after it had obtained the judgments. The defendants defended the actions on the grounds that the claims against them had prescribed in terms of South African law, that the judgments had resulted from fraud by Lloyds, and that a 'conclusive proof' provision in the bye-law passed by Lloyds was against public policy and contra bonos mores under South African law.

THE DECISION

It was common cause that the period of prescription applicable to the judgments, in terms of English law, was six years. This is provided for in section 24 of the Limitation Act, 1980. If the period of prescription applicable was to be determined under South African law, the Prescription Act (no 68 of 1969) would be three years for an ordinary debt, or thirty years if the debt was properly considered to be a 'judgment debt' as contemplated in that Act. The first issue was therefore whether the law applicable was English law or South African law.

* The other three defendants were cited in three separate actions.

Under South African law, prescription extinguishes an action and does not simply bar it. Under English law however, there is a procedural bar on the bringing of an action which exceeds the limitation period provided for in the Limitation Act.

Under the rules of private international law, also known as the Conflict of Laws, matters of procedure are governed by the lex fori, ie the domestic law of the country where proceedings have been instituted. Matters of substance are governed by the lex causae, ie the law applicable to the underlying cause of action. The difficulty with the application of these rules in the present case was that under the lex causae, the issue was considered a procedural matter whereas under the lex fori, it was not. The effect of applying the lex fori would be to render the issue one of substantive law, which would be the very converse of the reason for applying the lex fori in the first place.

Given the ambiguity created by the application of these rules of the Conflict of Laws, it was appropriate that the court should follow a middle way, taking into account both the lex fori and the lex causae when determining whether or not the claim had expired. This could be done by qualifying the rules to the extent that if a matter of procedure in the lex causae should be a substantive matter in the lex fori, it would revert to the lex causae for the purposes of applying it to the facts of the case. Justice, fairness, reasonableness and policy considerations dictate that this should be done. Accordingly, the English law was to be applied and in terms thereof, the action brought by Lloyds was not time-barred.

As far as the allegations of fraud were concerned, these were based on an interpretation of the provisions of clause 5.5 which was incorrect. Names were entitled to challenge the obligation to pay the premiums by bringing separately instituted counterclaims. The defendants had in fact availed themselves of this opportunity and, having failed, wished to have a second opportunity to contest the obligation. The clause did not entitled Lloyds to contract out of its own alleged fraud.

As far as the conclusive proof issue was concerned, it was clear that the essence of the defendants' objection concerned a vague query to the computation of the quantum of Lloyd's claim. The conclusive proof clause was not in itself contrary to public policy.

SPRINGFIELD OMNIBUS SERVICE DURBAN CC v PETER MASKELL AUCTION CC

Contract

A JUDGMENT BY PC COMBRINCK J
(PILLAY J AND ABOOBAKER AJ concurring)
NATAL PROVINCIAL DIVISION
23 FEBRUARY 2006

2006 CLR 185 (N)

An agent acting for an undisclosed or unnamed principal incurs no obligations toward the party with whom he contracts merely because he acts for an undisclosed or unnamed principal. An auctioneer normally acts on behalf of the seller of goods sold at the auction and accordingly, in respect of the buyer, incurs only those obligations agreed between the buyer and himself.

THE FACTS

Springfield Omnibus Service Durban CC bought a bus at an auction sale for R255 000. The auctioneer was Peter Maskell Auction CC. Springfield's representative paid a deposit of R5 000, and upon payment of the balance, was permitted to remove the bus from the premises of Peter Maskell.

When Springfield took delivery of the bus, it was given a copy of the registration certificate of the bus. This showed the second respondent to be the owner.

Thereafter, Springfield experienced difficulty in obtaining the original registration certificate in order to effect transfer of the bus into its name. It also discovered that the chassis number and engine number on the bus were not the same as the numbers on the copy of the registration certificate in its possession.

Springfield then called on Peter Maskell to rectify the discrepancies and furnish a valid registration certificate. The parties entered into settlement negotiations but without success. Springfield then cancelled the agreement of sale and claimed repayment of the purchase price, tendering return of the bus.

Springfield applied for an order declaring that the agreement was validly cancelled and that the purchase price be repaid. The application was brought against Peter Maskell. The second respondent being joined as an interested party but no relief was sought against it.

THE DECISION

The question was whether Springfield was entitled to cancel the sale agreement as against Peter Maskell and claim from it return of the purchase price.

An auction sale normally involves three contracts, that between seller and auctioneer, that between seller and purchaser, and that between the purchaser and the auctioneer. The terms of the latter two are normally contained in the Conditions of Sale issued to purchasers at the sale.

It has been said that an auctioneer incurs personal liability where he acts for an undisclosed principal or even when he is known to act for a principal but does not disclose his name. However, this is an unsound principle of law. An auctioneer is by virtue of his occupation, known to be an agent and the agent of the seller. The purchaser at an auction is therefore unlikely to be under the illusion that he is buying the auctioneer's property. Whether the auctioneer acts for an undisclosed principal or an unnamed principal does not affect the fact that the concluded contract is with the auctioneer's principal and not with the auctioneer himself.

In the present case, it was common cause that Peter Maskell acted as agent at the auction sale. No obligation to effect delivery of the bus rested on Peter Maskell, either by contract or by virtue of the undisclosed principal doctrine.

The application was dismissed.

NATIONAL SORGHUM BREWERIES LTD v CORPCAPITAL BANK LTD

A JUDGMENT BY JAFTA JA (MPATI DP, NUGENT JA, COMBRINCK AJA AND MAYA AJA concurring)
SUPREME COURT OF APPEAL
23 FEBRUARY 2006

2006 CLR 197 (A)

A non-variation clause does not prevent the parties thereto concluding a subsequent agreement relating to similar subject matter of the first agreement. Agreements concluded in terms of an existing master agreement containing such a clause do not purport to vary the terms of that agreement merely because they are concluded on terms not contained in the master agreement.

THE FACTS

Afinta Financial Services (Pty) Ltd ceded its rights in certain vehicle leasing agreements to Afinta Finance Ltd. The cession was incorrectly stated to be a cession in securitatem debiti, the parties having actually intended that it would be an out-and-out cession. Afinta Finance then ceded the lease agreements to Corpcapital Bank Ltd. This was correctly stated to be a cession in securitatem debiti, Corpcapital having agreed to lend money to Afinta Finance taking the cession as security.

Both cession agreements contained a non-variation clause, to the effect that no variation of the agreements would be valid unless concluded in writing, and signed.

Later, in substitution of the first cession agreement, Afinta Financial Services 'sold' eighteen lease agreements to Afinta Finance. Included in the eighty lease agreements were eleven lease agreements concluded with National Sorghum Breweries Ltd. The sale agreement also contained a non-variation clause.

Schedules of the ceded lease agreements were subsequently drawn up identifying those ceded to Corpcapital in terms of the second cession agreement. These were signed by Afinta Finance only.

Corpcapital alleged that Sorghum had breached the terms of its lease agreements. It brought an action to enforce its rights under them. Sorghum contended that no lease agreements not recorded in the 'sale' agreement, and no lease agreements identified in the subsequent schedule, were ceded, since the non-variation clause prevented the validity of any such cession.

THE DECISION

The later agreements did not purport to vary the terms of the existing sale agreement. They were no more than later transactions in similar terms. They were therefore not affected by the non-variation clause and could form the basis of Corpcapital's action against Sorghum.

As far as the lease agreements governed by the second cession was concerned, there could be no objection to the cession of these to Corpcapital since the second cession was a master cession agreement and as such, contemplated future cessions. To effect such future cessions, the relevant lease agreements needed to be merely listed in a schedule compiled and signed by Afinta Finance. This is what it did, and no variation of the master cession agreement was contemplated or intended.

Corpcapital was entitled to enforce compliance with the cessions.

MASTERSPICE (PTY) LTD v BROSZEIT INVESTMENTS CC

Contract

A JUDGMENT BY FARLAM JA (HOWIE P, BRAND JA, JAFTA JA and MAYA AJA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2006

2006 CLR 204 (A)

The description of a term of a contract as a 'warranty' does not necessarily mean that breach of the term entitles the other party to cancel the contract. Breach of a term resulting in a claim for reduction of the purchase price or payment of the value of what was not delivered ordinarily confines the innocent party to those remedies, rather than cancellation of the agreement.

THE FACTS

In August 2000, Broszeit Investments CC sold to Masterspice (Pty) Ltd a spice blending business as a going concern for R2 198 574 plus the value of stock. The agreement contained certain 'seller's warranties'. Two of them were provided for in clauses 9.3 and 9.10.1.

Clause 9.3 provided that Broszeit warranted that all assets sold were its property, would be fully paid for, and were not subject to any lien or right of retention. Clause 9.10.1 provided that Broszeit was not aware of any factors that could negatively impact on the smooth and profitable operation of the business after the date of possession.

Clause 13 provided for the right of either party to either enforce the agreement or cancel it and claim damages, in the event of the other party committing a breach of the agreement and failing to remedy the breach within 14 days of written notice of the breach. Cancellation was only possible if the breach was a material breach and was incapable of being remedied by the payment of money.

Shortly after the conclusion of the sale, Masterspice lost the custom of the largest customer of the business, Today Frozen Foods, which had accounted for approximately 46% of turnover. The total turnover of the business declined significantly, the majority of its clients being lost.

Masterspice alleged that Broszeit had breached clause 9.3 in that some of the recipes and product formulations sold were not Broszeit's property, and had breached clause 9.10.1 in that it had disseminated some of those formulations resulting in a negative impact on the smooth and profitable operation of the business.

Masterspice applied the provisions of the breach clause and claimed cancellation of the sale and repayment of the purchase price and return of the business. Broszeit refused to comply with the demand. Masterspice applied for the liquidation of Broszeit.

Broszeit denied that it had breached the agreement as alleged and contended that in any event, the alleged breach was not a material breach.

THE DECISION

Following the hearing of oral evidence in the matter, the court a quo held that a breach of the warranty in clause 9.3 had been established and that this was a material breach, but that it had not been shown that the breach was incapable of being remedied by the payment of money.

The fact that the obligation provided for in clause 9.3 was described as a 'warranty' did not indicate that the breach thereof entitled Masterspice to cancel the agreement. The question was in what sense did the parties use the term?

The parties had included provision for other obligations under 'seller's warranties' which were clearly terms whose breach could be remedied by monetary payment. It was clear that they had not attached any special significance to the description 'warranty' and had therefore not clearly intended that it referred to an obligation breach of which would give rise to the right to cancel the agreement.

The reality was that some of the formulations forming part of the business assets were not the property of Broszeit, but this default gave rise to a right to claim payment of the value of what was not delivered and possibly a reduction in the

purchase price. However, it did not give rise to a right to cancellation of the sale, merely because the business was no longer commercially viable in relation to the purchaser's initial outlay.

Masterspice failed to prove that it was entitled to cancel the agreement. Accordingly, it was not entitled to an order for the liquidation of Broszeit.

In view of the fact that the word 'warranty' can mean a term whose breach only gives rise to a claim for damages but can also mean a term whose material breach gives rise to a right to cancel, it is necessary in every case where the expression is used to examine the terms of the contract in question closely in order to endeavour to ascertain in what sense the parties have used it. I do not think that the parties in the present case attached any special significance to the word or that there is any basis for holding that they intended it to mean a term whose breach gives rise to a claim for cancellation even if notionally a monetary payment could remedy the problem. That this is so appears from clause 9.1, the first of the 'Seller's Warranties' in the agreement which reads as follows: 'The Seller shall be liable for all the debts and liabilities of the Business until the Date of Possession including, but not limited to, sums due to staff for Leave pay, P.A.Y.E deductions, Workmen's Compensation Insurance, and the like. The Seller accordingly indemnifies the Purchaser against any claim or liability incurred by the Business, or in respect thereof, prior to the Date of Possession.' It is clear that this is a term whose breach can be remedied by a monetary payment.

In truth what happened was that some (but by no means all) of the formulations were not the property of the respondent and could not be transferred to the appellant. Clearly to the extent to which portions of the merx were not delivered the appellant had a claim for payment of an amount equal to the value of what was not delivered and presumably to a further claim if the business was worth less because these formulations were not delivered. There is no reason to believe that this claim was incapable of quantification in money.

TWO OCEANS AQUARIUM TRUST v KANTEY & Ttempler (PTY) LTD

Contract

A JUDGMENT BY BRAND JA (HOWIE P, NUGENT JA, JAFTA JA and MAYA AJA concurring) SUPREME COURT OF APPEAL 25 NOVEMBER 2005

2006 (3) SA 138 (A)

There is very little scope for establishing liability in delict for pure economic loss alleged to have been caused by a party with whom the plaintiff has concluded a contract where it is clear that remedies for such loss could have been provided for in that contract.

THE FACTS

The Two Oceans Aquarium Trust was formed for the purpose of developing and operating an aquarium. Kantey & Templer (Pty) Ltd was appointed as the structural engineering consultant, responsible for advising on the construction of the aquarium's exhibit tanks.

After the aquarium had been constructed, lining material used in the construction turned out to be porous, allowing the penetration of sea water from tanks into surrounding concrete thereby causing corrosion in the steel reinforcement. Remedial work had to be done, including the replacement of the waterproof lining with a more suitable one.

The Trust claimed that as a result, it had suffered damages and that Kantey & Templer was responsible in that it advised on the wrong option in the construction of the aquarium, this option being the waterproofing by means of a lining, as opposed to the design of water-retaining concrete structures. The Trust alleged that the wrong option was chosen in the course of Kantey & Templer rendering professional services after its appointment as engineering consultant, and prior to the conclusion of the contract so appointing it.

Kantey & Templer excepted to the claim on various grounds, one of which was upheld. This was that the Trust's pleaded case failed to establish the existence of any delictual liability, ie liability arising out of any legal duty subsisting prior to the conclusion of the contract. The Trust appealed.

THE DECISION

Assuming that the decision to take the waterproofing was wrong, and was negligently taken, the question remaining was whether or not it was wrongful. In cases where an action constitutes a positive act causing physical damage, such action is prima facie wrongful, but in cases such as the present, where the alleged damage is economic, a plaintiff must establish the existence of some legal duty not to act negligently. This means that it must be shown that public or legal policy considerations require that such conduct is actionable and that legal liability should follow.

In the present case, there was no reason to extend legal liability to actions taken by Kantey & Templer prior to the conclusion of the contract. It was clear that it was intended by all parties that if the aquarium project was to proceed, it would be governed by a contractual relationship to be created when the Trust was formed. It was not contemplated that the Trust would suffer any damages unless and until a contractual nexus was brought into existence through the formal appointment of Kantey & Templer. There was no reason why the Trust could not have made provision for liability arising out of pre-contractual decisions and actions taken by any of the parties involved in pre-contractual discussions. Remedies based in delict need not be extended to a party which fails to anticipate its need for such remedies by providing for them in contracts.

The appeal was dismissed.

STEENKAMP N.O. v THE PROVINCIAL TENDER BOARD OF THE EASTERN CAPE

A JUDGMENT BY HARMS JA (CAMERON JA, JAFTA JA, PONNAN JA AND MLAMBO JA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2005

2006 (3) SA 151 (A)

A claim for delictual damages arising from pure economic loss caused by the negligent performance of an administrative body's duties must show that policy considerations indicate the administrative body acted in a wrongful manner.

THE FACTS

Balraz Technologies (Pty) Ltd submitted to the Provincial Tender Board of the Eastern Cape a tender for the provision of an automated cash provision system for social pensions. The tender was accepted, and in due course the Eastern Cape Province placed an order with Balraz.

Thereafter, the award of the tender was set aside by the Ciskei High Court, upon application by an unsuccessful tenderer.

Balraz alleged that following the award, in order to provide the services, it had incurred expenses amounting to R4,35m, most of this being consultants' and directors' salaries.

After Balraz had been placed in liquidation, its liquidator, Steenkamp, claimed damages being the expenses so incurred. The claim alleged that the award of tender was made negligently, the Board having failed to take reasonable care in the evaluation and investigation of tenders by disregarding the recommendations of two technical evaluation committees.

Balraz brought an action against the Board for the payment of damages, being the expenses incurred in initiating the provision of services.

THE DECISION

The action was brought on the grounds that the Board had negligently caused pure economic loss. Loss caused in these circumstances is not prima facie wrongful and does not give rise to a claim for damages, unless policy considerations require that the plaintiff should be compensated for the loss suffered by the defendant. The breach of a legal duty, especially one imposed by administrative law, does not necessarily establish the breach of a delictual duty, ie a duty to compensate by payment of damages.

The legal duty of the Board to perform its task, was provided for in the statute under which it operated, and in common law. The question was whether, in the circumstances, the negligent breach of that duty would give rise to a claim for damages. The Board itself was composed of lay persons, not experts, and their assessment of a tender was based on the exercise of their discretion. Policy considerations do not favour the award of damages following on the exercise of discretion negligently made. Other policy considerations point against the imposition of delictual liability when administrative powers are exercised, especially where this might result in the attraction of doubled expenses, those payable to a successful tenderer and those payable to a disappointed tenderer.

Weighing the policy considerations applicable, the statute applicable did not warrant the award of delictual damages arising from pure economic loss. Likewise, the common law provided no basis for such a claim.

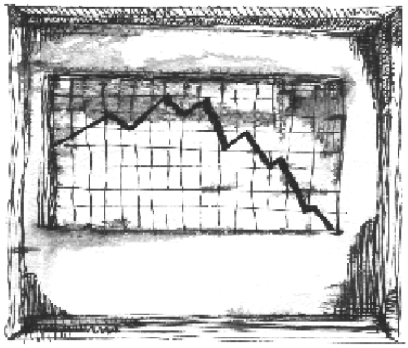
The action was dismissed.

GORE N.O. v McCARTHY LTD

A JUDGMENT BY DAVIS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
5 DECEMBER 2005

2006 (3) SA 229 (C)

Insolvency



A 'trader' as referred to in section 34(1) of the Insolvency Act (no 24 of 1936) is a party whose normal business includes the transactions involving the transfer of goods referred to in that section.

THE FACTS

Ramsauer Transport (Pty) Ltd conducted business as a transport contractor, conveying goods long-haul. In 1998, the company was seriously under-capitalised and required a substantial cash injection. The shareholder in the company sold his shares to Roadcorp Ltd. Roadcorp lent the company R3,5m and this was used to restore it to solvency.

During 1999, the South African Revenue Service investigated Ramsauer for unpaid value-added tax and other unpaid tax, amounting to R3 369 585. It served a garnishee order on a company, Cutfin (Pty) Ltd, which had provided Ramsauer with an invoice-discounting facility. Cutfin was thereafter no longer willing to provide this facility and was no longer prepared to advance funds to the company.

To alleviate the ensuing cash-flow crisis, Ramsauer sold to McCarthy Ltd certain of its vehicles, for a purchase consideration of R2 052 000. Later in the same month, the price was paid and the vehicles transferred to McCarthy. The vehicles remained in the possession of Ramsauer however, and continued to be operated by it. The financing of the purchase was arranged through Roadfin (Pty) Ltd, a company within the Roadcorp group which received payment of the purchase price after it raised an invoice against McCarthy. A few days after this, Ramsauer was placed in liquidation.

The liquidator of Ramsauer contended that the sale of the vehicles should be declared void as it fell within the terms of section 34(1) of the Insolvency Act (no 24 of 1936). He sought an order declaring the sale void and ordering repayment of the R2 052 000 paid to McCarthy.

THE DECISION

Section 34(1) of the Insolvency Act provides that if a trader transfers any goods forming part of its business, other than in the ordinary course of business, and the trader has not published a notice of the intended transfer between thirty and sixty days prior to the transfer, such transfer will be void as against its creditors and void against the trustee of his estate for a period of six months thereafter.

Although Ramsauer was in the haulage business, it was clear that from time to time it had sold vehicles. This had taken place with a significant number of them being sold above their depreciated values. Furthermore, as an integral and regular feature of its business, the company had sold its book debts to Cutfin. Accordingly, when the company entered into the transaction whereby it sold its vehicles to McCarthy, it concluded a transaction which it had performed regularly in the past. To restrict the meaning of the word 'trader' to one which carries on the business of a haulage contractor would be to ignore the very nature of the business conducted by the company over a lengthy period.

The transaction in question was not concluded in the ordinary course of Ramsauer's business: it was concluded to raise funds for Roadfin, and the company derived no economic benefit from it.

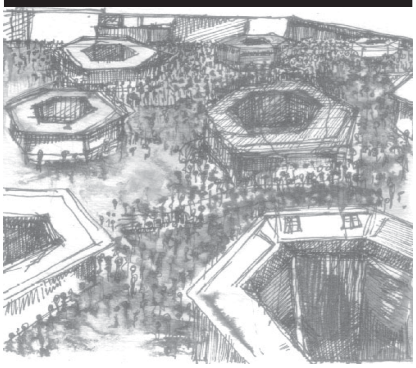
The sale of the vehicles fell within the terms of section 34(1) and was therefore void. McCarthy was ordered to pay R2 052 000 to the liquidator.

HABIB OVERSEAS BANK LTD v SOUTH AFRICAN EAGLE INSURANCE CO LTD

A JUDGMENT BY LEVINSOHN J
DURBAN AND COAST LOCAL DIVISION
24 APRIL 2006

2006 CLR 218 (D)

Corporations



The corporate veil should not be removed merely because it is shown that the alleged alter ego of the corporation has concluded contracts on lenient terms with the corporation.

THE FACTS

In 1997, De Novo Import & Export CC's insurance broker negotiated new insurance cover for that corporation with South African Eagle Insurance Co Ltd. The insurance cover included a group accident policy insuring one Osman Aboo, a member of management, for R1m. It also included cover for fire damage which might occur at the premises of De Novo.

At the time this insurance cover was arranged, Aboo was facing fraud charges in the Durban Regional Court. This fact was known to Mrs R Kajee, the member of De Novo and its manager and executive who made the insurance proposal on behalf of the corporation. Mrs Kajee was Aboo's wife. She had been assisted by Aboo in certain aspects of the running of De Novo's business, principally in the initial provision of stock, and also in the provision of a his suretyship when a loan was arranged. She, and not Aboo, had taken part in the day-to-day running of the business of Aboo. Mrs Kajee did not disclose the fact of the fraud charges faced by Aboo at the time the insurance proposal was made.

In 1998, a fire took place at the premises of De Novo. Damages of some R4m were incurred. SA Eagle denied liability under the insurance contract and refused to indemnify De Novo. SA Eagle alleged that when the insurance cover was concluded Aboo was a manager and/or one of the key personnel of De Novo, and De Novo, through its personnel, had known of the fraud charges faced by Aboo.

The parties approached the court for a determination of these allegations. De Novo ceded its claim for payment under the insurance policy to Habib Overseas Bank Ltd which, as cessionary, brought the action against SA Eagle.

THE DECISION

The first factual issue was whether or not Aboo was a manager and/or one of the key personnel of De Novo. SA Eagle argued that the 'corporate veil' of De Novo should be removed, and Aboo seen to be the person with which it contracted on granting the insurance cover.

The evidence did not show that De Novo had been used for any purpose other than normal trading. The fact that De Novo received lenient credit facilities from Aboo and his own company was no indication that Aboo controlled De Novo. Mrs Kajee controlled De Novo and conducted its day-to-day management.

It not having been shown that Aboo controlled or managed De Novo, De Novo was under no obligation to disclose Aboo's criminal prosecution.

The matter was decided in favour of De Novo.

DISNEY ENTERPRISES INC v GRIESEL N.O.

A JUDGMENT BY DANIELS J
TRANSVAAL PROVINCIAL DIVISION
7 SEPTEMBER 2004

JOC 895 (T)

Copyright

An attachment order ad fundandam jurisdictionem made upon allegations that the respondent has infringed the copyright of the applicant may depend on evidence that the respondent has instigated or instructed the infringement, without giving evidence of any subjective knowledge of infringement on the part of the respondent.

THE FACTS

The executor of the estate of the late S Ntsele obtained an ex parte order attaching the assets of Disney Enterprises Inc. The attachment was effected ad fundandam jurisdictionem, its intention being to bring an action against Disney for copyright infringement. Griesel alleged that Disney caused certain cinematograph films to be made in the United States of America, and distributed in South Africa copies thereof.

In an application to set aside the attachment, Disney alleged that it was the owner and licensor of the copyright in the film, and the production, manufacture, copying and distribution of the film was undertaken by various licensees of Disney, all of whom were its subsidiaries. Griesel did not dispute these allegations.

Griesel alleged that it had made out a prima facie case against Disney entitling it to a continuation of the attachment order it had obtained.

THE DECISION

Copyright can be infringed by a person who causes another to do a restricted act without the authority of the copyright owner. It is therefore possible for an infringement to take place not only by the person who copies the protected work but also by the person who instigates or instructs the copying of that work.

Disney contended that, for it to be held liable for copyright infringement, it had to be shown that it had subjective knowledge of the copying, and that no evidence that it had such knowledge had been presented. However, at this stage, it was sufficient for Griesel to depend on the various licensing agreements and the obligations imposed by Disney on its subsidiary licensor, in order to establish a prima facie case against Disney.

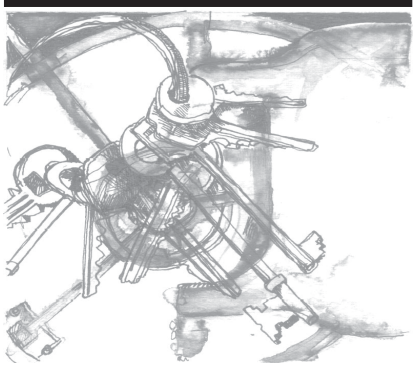
Having established a prima facie case, Griesel had been entitled to the attachment ad fundandam jurisdictionem. The attachment order was confirmed.

FLIONIS v BARTLETT

A JUDGMENT BY HOWIE P (ZULMAN JA, NAVSA JA, BRAND JA and VAN HEERDEN JA concurring)
SUPREME COURT OF APPEAL
22 MARCH 2006

2006 (3) SA 575 (A)

Trusts



A practising attorney proclaims to the public that his firm possesses the expertise and trustworthiness to deal with trust money reasonably and responsibly and accordingly has a legal duty not to deal with such money negligently.

THE FACTS

Bartlett was approached by a Mrs Hardaker with the proposal that he assist with the forthcoming sale of ten tonnes of gold from an unnamed seller to a European company which was to on-sell the gold to the Swiss government. Hardaker claimed to be an intermediary between the buyer's agent and the seller's agent and would receive a commission on the eventual sale price. She told Bartlett that if he assisted by putting up a deposit of US$500 000, he would be able to participate in the commission of US$5m-US$8m which would become payable on the sale.

Bartlett, who was a commercial attorney, indicated his willingness to assist, and received a faxed agreement from Helsinki setting out various terms of the commission agreement. Bartlett framed his own agreement which was signed by all the parties.

Bartlett borrowed the US$500 000 from a client, then transferred the rand equivalent of this sum, R3,1m, into the trust account of Flionis, another attorney. He did so at the direction of Mrs Hardaker. He did not inform Flionis of the purpose of the deposit and did not communicate with him regarding the transaction.

As soon as Hardaker received confirmation of this deposit, Flionis received a fax from a certain Mr Gambino in Zurich. The fax instructed Flionis to pay Hardaker 10% of the deposited money, subtract his own fee of R5 000, and convert the balance into KrugerRands. Flionis did so.

Some three weeks later, Hardaker informed Bartlett that there was to be no gold bullion transaction. Bartlett notified Flionis of the purpose of the deposit and requested repayment. Flionis stated that the money had been paid out.

Bartlett brought an action against Flionis for repayment of the R3,1m deposited to his trust account.

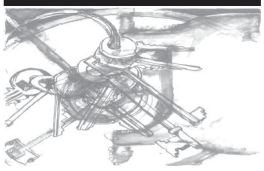
THE DECISION

Bartlett contended that he was entitled to repayment because he had entrusted money to Flionis and there was a legal duty on Flionis to deal with the money without negligence.

There was much to be said for the conclusion that the money had been entrusted to Flionis—the fact that the origin and purpose of the deposit was not communicated to Flionis till it was too late would appear to be irrelevant, given that Flionis could have ascertained these things on his own, before disbursing the deposited funds. Furthermore, it appeared that Bartlett had intended to entrust Flionis with the money.

However, even without showing that the money had been entrusted to Flionis, there remained a legal duty on him to deal with the money without negligence. Flionis had dealt with the money negligently. The legal duty to be imposed on him for having done so arose from the fact that he was a practising attorney, as such proclaiming to the public that his firm possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. Furthermore, Bartlett had relied on this and on the fact that the money would be in the trust account until he instructed otherwise. An attorney who discovers an anonymous and unexplained deposit can easily ensure that it is transferred to a suspense account and then trace the depositor with the aid of his own bank. It could also be foreseen that unreasonable conduct that might put the money at risk might cause loss to the depositor or beneficiary.

There was therefore a legal duty



on Flionis to deal with the money without negligence, and he had breached that duty.

That Bartlett was also negligent was clear from the evidence of his behaviour. The two parties were contributorily negligent in bringing about the loss.

... there are a number of considerations which, in my opinion, compel the conclusion that Flionis was indeed subject to the legal duty under discussion. First and foremost, the appellant, as recipient, was a firm of practising attorneys. As such it proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. Second, Bartlett relied on that and particularly on the fact that the money would be in the appellant's trust account until he instructed otherwise. Faris's exposition of an attorney's obligations in properly managing a trust account demonstrate that Bartlett's reliance on the money being safe in a trust account was reasonable even if, as I shall point out, his failure to communicate with Flionis was not. Third, even where an attorney discovers an anonymous and unexplained deposit it requires minimal management to transfer the money to a trust suspense account. It is then a task of no difficulty to trace the depositor with the aid of the firm's own bank. After that one need merely leave the money where it is until receipt of instructions by or on behalf of the depositor or the person for whose benefit the deposit was made. Fourth, unreasonable conduct that might put the money at risk would, as a reasonable foreseeablility, cause loss to the depositor or beneficiary. The legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances.

CITY OF CAPE TOWN v BOURBON-LEFTLEY N.O.

A JUDGMENT BY BRAND JA (HOWIE P, NAVSA JA, VAN HEERDEN JA and CACHALIA JA concurring)
SUPREME COURT OF APPEAL
15 SEPTEMBER 2005

2006 (3) SA 488 (A)

Contract

A tacit term can only be imported into a contract if the parties would necessarily have agreed upon such a term if it had been suggested to them at the time. If it can only be inferred that one of the parties would have stated its interest in discussing and considering the suggested term, the importation of the term cannot be justified.

THE FACTS

The Bourbon-Leftley Trust was the owner of farm named Môrelig. A servitude of aqueduct was registered against the title deeds of the property. The servitude entitled the owner of the farm to some 90 000 kilolitres of water to be drawn from the City of Cape Town's pipeline which passed over the property. The servitude provided for the supply of a further 60 000 kilolitres of water at stipulated rates.

During the period 1994-1998, the City of Cape Town's meter readers checked the two water meters measuring the consumption of water at the property. The reported figures always indicated a water consumption of far less than the free allocation allowed by the servitude.

In July 1999, it was discovered that the meter readers had failed to multiply the water consumption reading by a factor of ten. The actual water consumption far exceeded the maximum allocation of some 150 000 kilolitres provided for in the servitude. The City claimed payment of R1,7m in respect of the excess consumption.

The City calculated the amount payable on water consumed in excess of 150 000 kilolitres at a rate equivalent to that charged to other parties entitled to similar rights to draw water from the pipeline. It contended that a tacit term could be added to the servitude to the effect that this would be the rate applicable to water consumed in excess of the maximum allocation.

The trust denied that any such tacit term existed and defended the City's action for payment of R1,7m.

THE DECISION

A tacit term can only be imported into a contract if the parties would necessarily have agreed upon such a term if it had been suggested to them at the time. If it can only be inferred that one of the parties would have stated its interest in discussing and considering the suggested term, the importation of the term cannot be justified.

The City contended that if the parties had given consideration to the rate applicable on water consumed in excess of the maximum, they would have agreed on consumption at the going rate.

It was true that the parties would not have agreed that the excess consumption would be free of charge. However, it was not the City's only other alternative remedy to cut of the water supply at the point where excess consumption began. When that point was reached, the City could have cancelled the agreement with or without a claim for damages, or claim specific performance. Its response could have been to whatever remedies it had available to it in law.

It appeared that at the time the servitude was agreed, neither party considered the possibility of consumption in excess of the maximum, and that the prime purpose of the pipeline was not supply farms but the inhabitants of Cape Town. The property owner would probably not have agreed to pay for water at the same rate as was applicable to them. The reason for the servitude was to allocate water to the farm to the exclusion of any further supply.

There was therefore no tacit term upon which the City could rely.

The City's alternative claim for damages foundered on its failure to prove that any damages were suffered, it being uncertain whether the excess supply to the farm denied it an alternative sale to another purchaser.

TRUSTEES, BUS INDUSTRY RESTRUCTURING FUND v BREAK THROUGH INVESTMENTS CC

A JUDGMENT BY KRUGER J
NATAL PROVINCIAL DIVISION
6 OCTOBER 2005

2006 (3) SA 434 (N)

The assignment of obligations owed to a third party which is provided for by agreement requires the consent of the other party to the agreement.

THE FACTS

The Bus Industry Restructuring Fund was established to provide eligible employers with financial assistance in paying retrenchment benefits to eligible employees under an agreement concluded between the Minister of Transport, the S.A. Bus Operators Association and various labour unions. Contributions to the Fund were required of participating employers. Included amongst the participating employers was KwaZulu Transport (Pty) Ltd, which had been awarded contracts for the provision of subsidised passenger bus services in certain areas of KwaZulu-Natal.

In August 2001, KwaZulu Transport was provisionally liquidated. Its entire bus transport business was sold to the fourth defendant. The terms of sale provided that the rights and obligations of KwaZulu Transport were to pass to the fourth defendant, including the obligation to pay the employer contributions. Clause 19.5 provided that the fourth defendant could not cede, delegate, assign or sub-contract any of its rights or obligations in terms of the agreement to any other person without the prior written consent of the liquidators.

The trustees of the Fund alleged that as at date of liquidation, KwaZulu Transport owed R237 215,14 in employer contributions. They alleged that the fourth defendant had ceded and assigned its rights and obligations to Break Through Investments CC, alternatively the second or third defendants, and that either of these parties was liable to it for payment of the employer contributions not paid by KwaZulu Transport.

The trustees contended that the defendants were liable to it by virtue of the cessions, alternatively because of the provisions of section 47(5) of the National Land Transport Transition Act (no 22 of 2000). The first three defendants excepted to the claim on the grounds that the allegations did not establish a valid assignment of obligations by the fourth defendant to Break Through or any other defendant.

THE DECISION

Clause 19.5 clearly and expressly restricted the fourth defendant's right to assign any obligation arising from the agreement it concluded with the liquidator. The prior written consent of the liquidator was required for any valid assignment.

The trustees had not alleged that the liquidator did consent to any assignment by the fourth defendant. They had therefore not alleged that the requirements of clause 19.5 had been complied with. In consequence, they had not alleged anything that could establish a cause of action against the first three defendants.

The exception was upheld.

D&H PIPING SYSTEMS (PTY) LTD v TRANS HEX GROUP LTD

A JUDGMENT BY CLOETE JA (HOWIE P, MTHIYANE JA, MAYA AJA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
24 MARCH 2006

2006 (3) SA 593 (A)

Manufacture of goods takes place upon the production of those goods even if the production takes place as a by-product in the production of other goods. A manufacturer's liability for consequential damages arising from latent defects in the goods arises whether or not their production requires the exercise of special expertise or skill.

THE FACTS

Over a period of some thirty years, Trans Hex Mining Ltd supplied D&H Piping Systems (Pty) Ltd with aggregate and sand. D&H used these materials for the manufacture of pipes and manholes.

On each occasion when the materials were supplied to D&H, clerical staff at D&H issued orders to Trans Hex based on prices agreed at a higher level within their respective companies and on bulk orders previously determined by an authorised representative of D&H. Standard terms and conditions of supply were also recorded on delivery notes and invoices.

The materials supplied by Trans Hex were obtained in the process of mining operations involving the extraction of lime products. These were rock and sand known as dolomitic aggregate and dolomitic sand which were in effect by-products which it stockpiled at its quarry where mining operations took place.

During July to December 1998, Trans Hex supplied aggregate and sand to D&H for use in the manufacture of concrete piping. D&H alleged that these materials contained latent defects and were not fit for the purpose for which they were intended. D&H alleged that in the course of installation of the piping, hard-burnt dolomitic limestone nodules in the aggregate and sand used to manufacture the sacrificial layer hydrated, causing a sacrificial layer to fracture and spall, and fail.

D&H contended that the terms of the contract between it and Trans Hex incorporated a warranty that the materials would be free from latent defects and would be fit for the purpose for which they were intended, and that Trans Hex had breached these terms. It contended in the alternative, that Trans Hex had publicly held itself out to be a manufacturer or expert seller of the materials for use in its concrete products.

D&H claimed consequential damages caused by the latent defects.

THE DECISION

The essential question was whether or not Trans Hex manufactured the aggregate and sand which was supplied to D&H, and whether in consequence, as manufacturing seller, Trans Hex was liable for consequential damages resulting from latent defects in the product.

The aggregate and sand supplied by Trans Hex was not simply dug out of the ground and delivered to D&H. It was obtained by separating out the material which could be used as aggregate and sand, put into stockpiles and then delivered to D&H. It was a by-product of the main manufacturing activity of Trans Hex, but it was nevertheless a product manufactured by Trans Hex.

The liability attaching to Trans Hex arising from its manufacture of the aggregate and sand was a result of the mere fact that it manufactured the product. The degree of skill or expertise required for its manufacture was irrelevant to this and there is no need for a manufacturer to exhibit any such degree or skill in order for such liability to arise. A seller of goods manufactured by himself is liable for consequential loss caused by latent defects in the goods irrespective of whether or not he is skilled in their manufacture and irrespective of whether he publicly professes skill or expertise in that regard.

D&H was entitled to claim damages on the basis it had.

ERASMUS v SENWES LTD

A JUDGMENT BY DU PLESSIS J
TRANSVAAL PROVINCIAL DIVISION
25 AUGUST 2005

2006 (3) SA 529 (T)

A term of an employment contract entitling an employer to unilaterally change the terms of the employment contract is valid and enforceable provided that the employer exercises that right reasonably.

THE FACTS

Erasmus and the other applicants had been employed by Senwes Ltd. One of the terms of the employment contract was that employees were required to be members of the company's medical scheme. Their membership would continue after their retirement. Senwes undertook to pay all or part of the premiums applicable to the medical scheme, the precise amount payable being related to which scheme option the employee selected.

Senwes was entitled to change the terms of the employment contract without notice to or consent of its employees.

After the applicants' retirement, Senwes management decided to change the subsidies it paid in respect of the medical scheme premiums. The medical scheme itself abolished some of the options which had till then been offered, and established new ones. Senwes decided no longer to base its subsidy on the premium payable in respect of a particular option, but to base the subsidy on an amount. It also no longer differentiated between different income categories. The subsidies took into account the rate of inflation, but not the actual increase in medical scheme premiums. The net effect of this was that pensioners in higher-income groups received a lower subsidy in monetary terms.

In November 2004, Senwes notified pensioners that they could choose from certain identified medical scheme options. In respect of the subsidies they would enjoy, three options were presented to them. These involved a reduced subsidy by some 66,6%.

The applicants contested this change and brought interdict proceedings against Senwes to prevent it from implementing its decision to change the subsidy scheme.

THE DECISION

Senwes contended that it only had a moral obligation to provide the subsidies and not a contractual obligation. However, while the language in which the obligation to pay the subsidy was stated was ambiguous, it was not merely a statement of intent but was indicative of a contractual obligation.

The fact that this was considered to be a contractual obligation by both parties was evident from the fact that on retirement, Senwes had issued a letter confirming its intention to continue paying the subsidy and had in fact done so. It had shown its recognition of the obligation to pay the subsidy by reflecting the present value of that obligation in its financial statements.

Whether or not that obligation was legally binding and enforceable depended on whether or not the right to change the terms of employment rendered the contract void in that respect. The power to amend the contract did not however, render the contract void and unenforceable in this case. Its power to vary the subsidies was not completely unfettered. It was required to do so reasonably.

Senwes had changed the subsidy scheme in order to increase its profitability. While there was nothing wrong with this in itself, it was unreasonable for it to have done so at the expense of Erasmus and the other applicants. What it did therefore amounted to a breach of contract.

The interdict was granted.

SUPER RENT (PTY) LTD v BAX GLOBAL (PTY) LTD

A JUDGMENT BY CACHALIA J
WITWATERSRAND LOCAL DIVISION
30 AUGUST 2004

2006 (3) SA 422 (W)

A provision in an agreement that one party is entitled to match the terms and conditions of a competitor confers on that party the right to conclude a contract with the other upon those terms and conditions.

THE FACTS

The parties entered into an agreement in terms of which Super Rent (Pty) Ltd undertook to provide transport services to Bax Global (Pty) Ltd. The agreement provided that it was to subsist for five years ending on 31 January 2001. The agreement was renewable for another five years at Bax's option.

Clause 2 of the agreement provided that if Bax exercised its option to renew the agreement, the parties would endeavour to mutually agree on the cost structure applicable in the renewal period. If they failed to reach agreement, the contract would be automatically terminated. Clause 1(d) provided that in the event of Bax not exercising its option to renew, and deciding to invite new tenders for transportation services, Super Rent would have the right to compete with or match the lowest or any other acceptable tender received in respect of a new transportation contract.

In the course of an action brought by Super Rent against Bax, the parties wished to determine whether, in the event of Super Rent matching the lowest or other acceptable tender, Bax would be obliged to award Super Rent a new transportation contract on terms not less favourable than those so matched.

THE DECISION

Clause 1(d) conferred two distinct contractual rights on Super Rent: the right to compete with the lowest or other acceptable tender, and the right to match any such tender. The question was whether, having exercised those rights, Super Rent would be entitled to be awarded the contract.

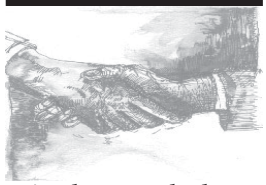
The right to match another tender was a right which clearly had to have some content. If Bax was not obliged to award a contract matching that of a competitor, the right would have no content. The right Super Rent held in terms of clause 1(d) was, in effect, a right of pre-emption or a right of first refusal. The fact that it held this right meant that Bax had to contract with it, once the conditions stipulated for it had been fulfilled.

The provision was also efficacious from a business point of view, conferring on Super Rent a preferential right to tender.

Bax was therefore obliged to award Super Rent a new contract upon fulfilment of the conditions provided for in the agreement.

KWAZULU CMS MONITORING SYSTEMS (PTY) LTD v KWAZULU-NATAL GAMBLING BOARD

Contract



JUDGMENT BY LEVINSOHN DJP
NATAL PROVINCIAL DIVISION
5 JUNE 2006

2006 CLR 241 (N)

A body created by statute must have the power to contract conferred upon it by statute if it is to be authorised to contract. Any contract concluded with a body not holding such power is a contract concluded by a party not authorised to contract and will be void ab initio.

THE FACTS

In June 2001, the Premier of the province of Kwazulu-Natal notified the chairperson of the Kwazulu-Natal Gambling Board that the province would implement its own central monitoring system for the electronic monitoring of gaming machines on premises operated by site operators. The Premier stated that the province should contract with a company which had experience in the field of central electronic monitoring systems, and this should be done following an open and transparent tender process. The responsibility was delegated by the Premier to the Board.

The electronic monitoring system was required in terms of the Kwazulu-Natal Gambling Act which regulates gambling matters generally, including the issue of licences for gambling in the province. Regulations were promulgated under the Act. Regulation 156(8) provided that the electronic monitoring system was to be a single one operated by the province or entity contracted by the province.

Due to a dispute between the national government and the provincial government, in which the latter asserted its entitlement to implement its own system, the tender process was delayed. However, in March 2004 a contract was finally concluded by Kwazulu-Natal CMS Monitoring Systems (Pty) Ltd ('CMS'), which had emerged as the preferred bidder, and the Board. The contract was for the setting up of the central electronic monitoring system.

CMS sued the Board for damages following an alleged repudiation of the contract. One of the Board's defences was that it was not authorised to conclude the contract, with the consequence that it was null and void ab initio. The court determined this issue.

THE DECISION

The objects of the Board, its powers and functions, were set out in the Act. Its principal power was to consider applications for licences and to license, regulate and control gambling activities in the province. In terms of section 7(1)(m)(iii), it had the power to monitor gaming machine premises, and persons associated with machine gaming operators and persons able to exercise control over gaming machine operators or persons associated with them. Section 7(1)(q) provided that the Board could perform any other function or exercise any other power which the Minister could, by regulation, empower the Board to do.

The powers conferred on the Board were powers relating to the determination of standards and criteria applicable to limited payout gambling machines. The power to contract however, vested in the province. Section 7(1)(q) provided no basis for concluding that any additional power had been conferred on the Board and the reference in regulation 156(8) to 'the province' had to be understood as a reference to the executive arm of the province. Section 7(1)(m)(iii) related to the monitoring powers of the Board and made no reference to a contracting power.

There was therefore no basis upon which it could be said that the Board had had the power to contract with CMS and it was not authorised to do so. The contract concluded between the parties was null and void ab initio.

STEINBERG v LAZARD

A JUDGMENT BY JAFTA JA (HOWIE P, BRAND JA, NUGENT JA AND VAN HEERDEN JA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2006

2006 CLR 284 (A)

A party claiming payment of a penalty does not bear the onus of proving that it has suffered prejudice. To successfully defend such a claim, the defendant must show that no prejudice was suffered by the claimant, or that the penalty claimed is out of proportion to the prejudice suffered by the claimant.

THE FACTS

Steinberg sold his interest in a close corporation to Lazard for R1 365 000. In terms of the agreement, Lazard undertook to build a house on property owned by the close corporation by 30 June 2002. Steinberg undertook to build a house on neighbouring property by the same date. If either party failed to comply with their respective undertakings, that party would pay to the other a penalty of R50 000 per month for the period of delay in completing the erection of the house.

Both parties were late in completing the erection of their houses, Lazard completing his building the latest, in June 2004. Steinberg brought an action for payment of R1 075 000 in terms of the penalty clause.

THE DECISION

Section 3 of the Conventional Penalties Act (no 15 of 1962) provides that a court may reduce a penalty claimed by one party against another, if it appears that such penalty is out of proportion to the prejudice suffered by the claimant.

The onus rests on the party sued for payment of a penalty to show that the claimant was not prejudiced by that party's default. The claimant need not allege that it has suffered any prejudice, and need not prove that any prejudice occurred, because the penalty clause it seeks to enforce is in its favour.

Lazard had however shown no evidence that Steinberg suffered no prejudice. Steinberg was therefore entitled to payment of the sum claimed.

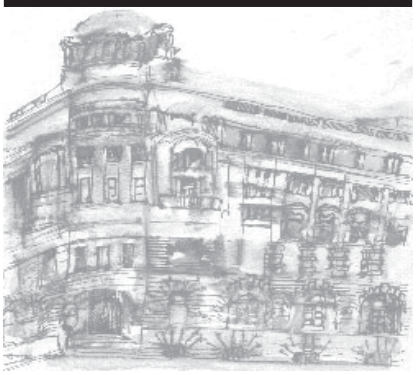
There is absolutely no need for the creditor to allege prejudice in claiming a penalty. The onus being on the debtor it is for the debtor to allege and prove its absence, albeit that that might call for only prima facie evidence initially. Counsel for the appellant also submitted that, in any event, since the property on which the respondent undertook to build the house belonged to a close corporation, it was only the close corporation, and not the respondent, that could possibly suffer prejudice as a result of the appellant's breach. This submission overlooks the fact that the parties acted in their personal capacities in concluding the agreement. Moreover, the inference sought to be drawn is not the most probable inference to be drawn from the relevant facts. The reciprocal undertaking and the substantial penalty for its breach lead ineluctably to the conclusion that the parties intended to protect themselves against some form of prejudice in the event of a breach. The appellant has adduced no evidence to establish, even prima facie, that the respondent suffered no prejudice.

THORPE v BOE BANK LTD

A JUDGMENT BY HEHER JA (ZULMAN JA, BRAND JA, NUGENT JA AND SOUTHWOOD AJA concurring) SUPREME COURT OF APPEAL 19 SEPTEMBER 2003

2006 (3) SA 427 (A)

Banking



The 'transaction' for the transfer of the assets and liabilities of a bank referred to in section 54 of the Banks Act (no 94 of 1990) is the implementation of the agreement in terms of which such a transfer is provided for.

THE FACTS

In 1995, NBS Bank Ltd lent money to the Wentworth Trust and Thorpe stood surety for the repayment of the loan. In 1997, NBS concluded an agreement with BOE Bank Ltd in terms of which NBS agreed to transfer its entire assets and liabilities to BOE. The agreement was made subject to the condition that the consent of the Minister of Finance was obtained in terms of section 54 of the Banks Act (no 94 of 1990) and the transfer was approved, ratified and adopted by general meetings of NBS and BOE.

In the month following the conclusion of the agreement, the Minister of Finance gave his approval to the transfer.

BOE brought an action against Thorpe and the trust for repayment of the loan. The action was defended on the grounds that the transfer of assets and liabilities had not been properly effected because the consent of the Minister of Finance had not been obtained prior to the transaction having taken place. Accordingly, BOE did not have locus standi to bring the action against Thorpe or the trust.

THE DECISION

Section 54(1) of the Banks Act provides that no arrangement for the transfer of all or any part of the assets and liabilities of a bank to another person, shall have legal force unless the consent of the Minister, conveyed in writing through the Registrar, to the transaction in question has been obtained beforehand.

The agreement was expressly made subject to a suspensive condition, that the consent of the Minister of Finance be obtained. The effect of this was to suspend the operation of the agreement until that event had taken place. This meant that the transaction in question would not take place until that consent was obtained, although the agreement had been entered into earlier. The question was therefore whether the 'transaction' referred to in section 54(1) was the implementation of the agreement or the agreement itself.

The dictionary definition of the word 'transact' refers to the implementation of a matter. Similarly, the language of the Banks Act itself indicates that the 'transaction' refers to the implementation of an agreement, the purpose of its provisions being to preservation of the asset base of a bank. The word therefore was to be understood in this sense, as the implementation of an agreement and not the conclusion thereof. This having been obtained, an effective transfer of assets and liabilities to BOE had taken place and it had the locus standi to bring the action against Thorpe and the trust.

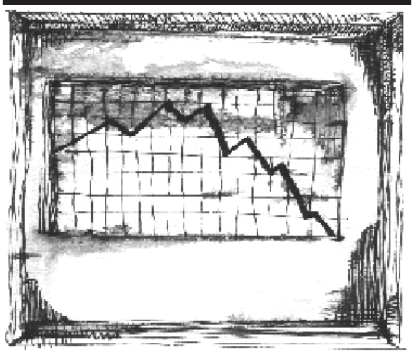
The action succeeded.

GUMEDE v SUBEL N.O.

A JUDGMENT BY LEWIS JA (MPATI DP, SCOTT JA, BRAND JA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
27 SEPTEMBER 2005

2006 (3) SA 498 (A)

Insolvency



Documents which are relevant to an enquiry into the affairs of a company in terms of section 417 of the Companies Act (no 61 of 1973) must generally be submitted by third parties unless they can be shown to be confidential, disclosure of which would violate the right to privacy.

THE FACTS

In August 2000, Sterenborg sold 26 percent of his shares in Acquired Card Technologies (Pty) Ltd to Gijima Afrika Smart Technologies (Pty) Ltd for R30m. The balance of his shares were sold to Gijima a year later, which then took complete control of its business, the manufacturing of smart cards for use in telephones.

In October 2001, a creditor applied for the winding up of Acquired. In February 2002, a final order winding up the company was given against it. Sterenborg applied to the Master for an order instituting an enquiry into the affairs of the company in terms of section 417 of the Companies Act (no 61 of 1973). The Master granted the order, appointing Subel as commissioner, whose powers included the power to issue such subpoenas as he might in his discretion regard as necessary for the proper investigation into the affairs of the company. A subpoenaed person could be ordered to produce all of the books, documents and records under his control relating to the company or relating to their dealings with the company.

Upon request by Sterenborg, Subel issued a summons which required the production of documents in the possession of Gijima. These documents had been obtained from a former employee of a Gijima comapny and consisted of communications with Telkom relating to a tender, a prequalification notice and award by Telkom of the tender for the manufacture and supply of phone cards, and all documents relating to the implementation of the award to the Gijima companies.

Gijima opposed the summons on the grounds that the documentation required was confidential.

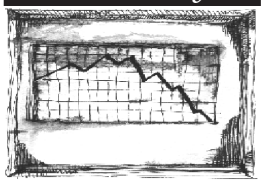
THE DECISION

There was reason to believe that Gijima had been awarded the Telkom tender after the work to secure the award had been done by Acquired. The suggestion that a corporate opportunity had been diverted from Acquired to Gijima entitled Subel to request any document that supported the inference that there had been such a diversion. There was no need for Sterenborg to prove to him that there had been a diversion. He had only to show that there were reasonable grounds for believing that the documents were relevant. Although they did belong to the Gijima group and not Acquired, they did relate to the affairs and dealings of Acquired.

As far as confidentiality was concerned, a bare assertion by Gijima that the documents were confidential did not entitle it to withhold them. Merely because a constitutional right was in issue, the right to privacy, the party seeking to infringe it is not obliged to show sufficient cause why that should be done. The proper approach is to determine whether there is reason to believe that the documents requested will throw light on the affairs of the company. In that case, the relevance of the documents will generally outweigh the right to privacy.

The decision to issue the summons was therefore not irregular. Gijima was obliged to submit the documents.

MARITZ v MARITZ & PIETERSE INC



A JUDGMENT BY HEHER JA (SCOTT JA, ZULMAN JA, NAVSA JA and NUGENT JA concurring)
SUPREME COURT OF APPEAL
30 MAY 2005

2006 (3) SA 481 (A)

The liquidator of a company whose directors are personally liable for the debts of the company has no right to sue the directors on the basis of such personal liability.

THE FACTS

Maritz & Pieterse Inc was a company which conducted the practice of an attorney in Pretoria. Following allegations that it had become a vehicle for the conduct of a pyramid scheme involving the channelling of some R12m through its trust account. The money was transferred to the architect of the scheme and insufficient security was taken for investors on whose behalf the money was so transferred.

The company faced claims for repayment by investors and it was placed in liquidation. Investors proved claims in the insolvent estate of the company.

The liquidator of the company then brought an application against the former directors of the company, Maritz and the second appellant, to recover the amounts proved as claims in the insolvent estate. They contended that the claims were contractual claims and that the claimants were entitled to payment from the directors because of the provisions of section 23(1) of the Attorneys Act (no 53 of 1979). The section provides that a company may conduct the practice of an attorney only if its Memorandum of Association provides that all of its directors shall be jointly and severally liable for the debts and liabilities of the company contracted during their periods of office. The company's Memorandum of Association contained such a provision.

Maritz and the second appellant opposed the application on the grounds, inter alia, that the liquidator did not hold the right, ie lacked the locus standi, to sue them.

THE DECISION

A liquidator is appointed to recover the assets of the company in liquidation for the benefit of creditors. The personal assets of the directors do not form part of the assets of the company. The question then was which asset of the company were the liquidators attempting to recover when claiming from them the amounts lost by investors in the pyramid scheme. The only basis for such a claim could be that section 23(1) read with the Memorandum of the company created an asset of the company in the form of a claim against the directors.

Such a claim however, does not arise on the basis of this provision as read with the Memorandum of the company. The protection provided by it is directed at the company's creditors and its effect is to render directors co-debtors with the company, conferring on the creditors and independent right of action against them. The section does not provide the basis of a right of action against the directors by the company itself.

To hold otherwise would be to prevent the creditors from claiming directly against the directors. This however, it is the very purpose of the section to enable the creditors to do so.

The liquidators obtained no rights from the section or from the Memorandum. The application was accordingly dismissed.

SASOL OIL (PTY) LTD v NATIONWIDE POLES CC

A JUDGMENT BY DAVIS JP
(SELIKOWITZ JA and
MHLANTLA JA concurring)
COMPETITION APPEAL COURT
13 DECEMBER 2005

2006 (3) SA 400 (CAC)

Competition

Price differentiation by allowing different discounts to different buyers based on quantities purchased is not in itself price discrimination as referred to in section 9 of the Competition Act (no 89 of 1998). A buyer subject to such price discrimination must show that there is a reasonable possibility that competition may be adversely affected by the practice.

THE FACTS

Sasol Oil (Pty) Ltd supplied creosote to various buyers. The product was used as a wood preservative for a variety of different purposes, including the treatment of wooden poles. Nationwide Poles CC was a buyer of the creosote. It produced pine building and fencing poles, and used the creosote to treat these products.

Sasol sold the creosote to different buyers and different prices. The prices would be higher if the buyer bought greater quantities, the precise price being determined upon a survey of the quantities purchased over a three-month period preceding that determination.

Nationwide Poles contended that Sasol's pricing policy constituted price discrimination within the meaning of section 9 of the Competition Act (no 89 of 1998). Section 9(1) provides that an action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if (a) it is likely to have the effect of substantially preventing or lessening competition, (b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and (c) it involves discriminating between those purchasers in terms of (i) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services, (ii) the provision of services in respect of the goods or services, or (iii) payment for services provided in respect of the goods or services.

Nationwide brought a complaint against Sasol in the Competition Tribunal. The complaint was upheld. Sasol appealed.

THE DECISION

There is nothing in section 9 which shows that its purpose is to protect small enterprises, as opposed to protecting the competitive process. Section 9(1)(a) however, does not require proof of actual harm to consumer welfare: the word 'likely' suggests that a mere probability is required. Once a supplier is shown to be dominant in the market and engages in discriminatory pricing practice, the test is whether there is a reasonable possibility that competition may be adversely affected by the practice of selling its goods at a cheaper price to some customers at the expense of others.

Nationwide attempted to show that that reasonable possibility existed by showing that the cost of creosote to it was higher by about 4% as a result of the price differential. However, this was not evidence directed at showing whether or not there was a reasonable possibility that competition might be adversely affected. In particular, there was no evidence that smaller firms had been forced to exit the market as a result of the price differential. Evidence that suggests only that one competitor may be prejudiced is insufficient to bring the practice of price differentiation within the scope of section 9(1)(a).

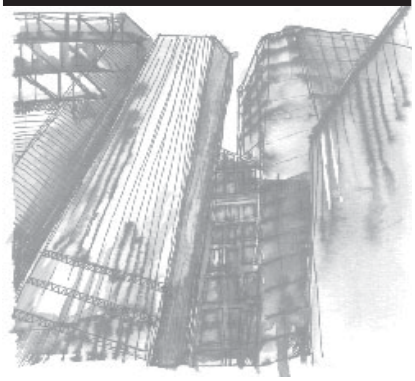
The appeal was upheld.

HARLEQUIN DUCK PROPERTIES 204 (PTY) LTD v FIELDGATE

A JUDGMENT BY DAVIS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
11 AUGUST 2005

2006 (3) SA 456 (C)

Property



A renovation of leased premises entitling the lessor to terminate the lease, as provided for in the lease agreement, constitutes grounds for termination, notwithstanding the presence of other provisions in the lease which govern the lessor's rights in respect of repair, alternation and improvement to the leased premises. An architect's determination which is final and binding on the parties is acceptable as a method of determining the lessor's right to terminate in these circumstances.

THE FACTS

Harlequin Duck Properties 204 (Pty) Ltd owned certain property known as Claremont Centre and Terraces. It leased premises in the property to Fieldgate and other tenants.

Clause 30.3 of the lease agreements provided that should Harlequin decide to demolish the building or substantially renovate the building for any reason whatsoever, then Harlequin would be entitled to terminate the lease on not less than three calendar months notice given in writing. The decision of Harlequin's architect as to what constituted substantial renovations to the building was to be final and binding on the parties.

Clause 22.1.1 provided that Harlequin was entitled to effect such repairs, alterations and improvements to the leased premises which it might decide to carry out. Clause 25.1 provided that should all or a majority of the leased premises be completely destroyed or become damaged as to render them substantially untenantable, Harlequin could declare the lease cancelled.

Harlequin decided to undertake major changes to the building. It prepared plans to renovate and upgrade the building and convert it to sectional title residential apartments. Its architect determined that the work constituted substantial renovations.

Harlequin contended that the architect's determination was final and binding on the parties in terms of clause 30.3 and that it was entitled to terminate the leases. On 31 March 2005, it gave notice to Fieldgate and the other tenants that the leases were terminated as from 30 June 2005.

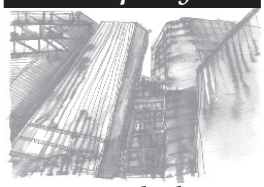
Fieldgate and the other tenants contested Harlequin's right to terminate the leases. They contended that clauses 22.1.1 and 25.1 were applicable and not clause 30.3, the work intended by Harlequin not being substantial renovations as referred to in clause 30.3.

THE DECISION

The nature of the work was more than a repair. It was more of a renewal of the building, as understood in the context of revenue law. The architect was therefore entitled to come to the conclusion that the proposed work was not a repair or simple alteration, nor a total destruction of the building, and was properly classified as a renovation. The architect's decision was capable of reasonable justification, particularly when it was remembered that the work involved a change of part of the building from parking garages to residential apartments.

The architect's determination which became final and binding on the parties, was not objectionable on the grounds that it ousted the jurisdiction of the court. A determination by a creditor, in the form of the issue of a certificate of balance of indebtedness, which purports to be final and binding, was not the same as the architect's determination. The architect's certificate was open to objection and was, in any event, not incontestable in a court of law.

The tenants also contested Harlequin's right to bring the application on the grounds that as security for a loan obtained from a bank, it had ceded its rights in the leases to its creditor. However, such a cession would not prevent Harlequin from asserting its rights in terms of clause 30.3. Harlequin sought a declaration of its rights in terms of the lease, not an order for relief, such as the liquidation



or sequestration of its tenants. Furthermore, the cession was in fact an undertaking to cede, the actual cession being conditional upon the delivery of documents evidencing Harlequin's rights, which in this case were the leases.

Harelquin was therefore entitled to terminate the leases and had given valid and effective notice of termination in terms of clause 30.3.

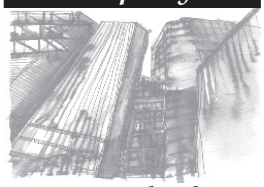
'Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is A reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion.'

This set of definitions would appear to indicate that a renovation is a form of renewal; at the very least, making new of the old; at the most, a reconstruction of the old. These would appear to be separate concepts of repair and renovation, the latter being linked to a greater part of the whole.

To return to clause 30, it places the decision in the hands of the architect. Assuming the legality of the provision, the question arises as to whether his determination that there was a renovation can be justified on the facts, read within the context of a plausible definition of the meaning of 'renovation'.

In my view, the nature of the work described in the founding and the replying affidavits is more than a repair. Stricto sensu , it is, in many ways, 'a renewal of the building', as the tax courts have sought to describe it. The architect was therefore entitled to come to the conclusion that the proposed work was not a repair or a simple alteration, read within the context of repair, nor a total destruction of the building. In the context of the contract, it fell to be classified as a renovation. In any event, given that it was the architect's decision, it is my view that his determination is capable of reasonable justification, particularly when the work that was envisaged included a change of part of the building from parking garages to residential apartments.

TORGOS (PTY) LTD v BODY CORPORATE OF ANCHORS AWEIGH



JUDGMENT BY SATCHWELL J
WITWATERSRAND LOCAL DIVISION
29 NOVEMBER 2005

2006 (3) SA 369 (W)

Compliance with section 25(6) of the Sectional Titles Act (no 95 of 1986) requires that the consent required of the body corporate must be obtained prior to the conclusion of the agreement to alienate the right to extend a scheme established under that Act.

THE FACTS

In September 2002, Torgos (Pty) Ltd addressed the body corporate of Anchors Aweigh with the proposal that it be given the opportunity to develop the undeveloped sections of the property over which the body corporate had control. Torgos was invited to make a presentation at the annual general meeting of the body corporate. Torgos did so, and at the meeting, a unanimous resolution was passed to sell development rights in the land and develop it. A committee was to be appointed by the trustees to negotiate the contract.

Negotiations took place between Torgos and the committee and in April 2003, final details of the development were discussed and agreed upon. An agreement was then signed by Torgos, the liquidator of the previous developer and the Master of the High Court.

Torgos alleged that subsequently, the body corporate failed to co-operate implement the agreement. It brought an application to enforce performance by the body corporate. The body corporate denied that a binding agreement had been properly concluded. It also contended that section 25(6) of the Sectional Titles Act (no 95 of 1986) applied.

THE DECISION

The resolutions passed at the annual general meeting did not amount to the conclusion of an agreement. While it had been stated that the decision was to accept the Torgos offer, the Torgos offer itself was a proposal only, and the body corporate had resolved to negotiate a contract with Torgos based on it. The body corporate decided to accept the Torgos offer in principle, and to reach agreement on terms later.

The question was whether or not the committee appointed by the trustees to negotiate the contract was authorised to enter into the agreement on terms and conditions unknown to the body corporate. The resolution had empowered this committee to negotiate the agreement but there was no indication that it had also been empowered to conclude the agreement. Lacking that power, it did not have the authority to do so. However, an application of the Turquand rule established that ostensible authority on the part of the trustees existed, so that a binding obligation for their part, could be established.

As far as section 25(6) was concerned, this section provides that a body corporate with the right to extend a scheme shall only exercise or alienate or transfer such right with the written consent of all the members of the body corporate. A distinction can be drawn between the words ‘alienate’ and ‘transfer’, alienation involving the dispossession of a right and transfer involving the formal act of dispossession.

The consent must be given prior to the conclusion of the agreement which is the act of alienation. This had not been done in this case. The result was that section 25(6) had not been complied with.

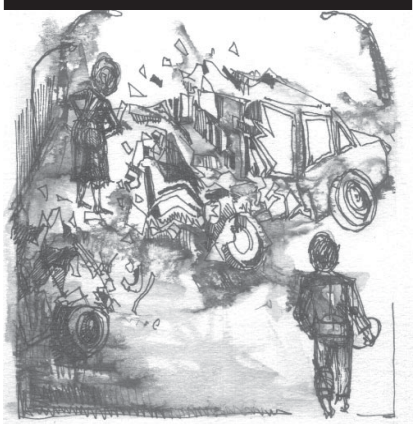
The application was dismissed.

VAN IMMERZEEL & POHL v SANTAM LTD

JUDGMENT BY STREICHER JA (ZULMAN JA, NAVSA JA, MTHIYANE JA and CACHALIA JA concurring)
SUPREME COURT OF APPEAL
5 DECEMBER 2005

2006 (3) SA 349 (A)

Insurance



A claim first made against an insured is a demand for payment in which it is alleged that the insured is liable to the claimant. It is not merely a notice of the possibility of a claim.

THE FACTS

Van Immerzeel & Pohl obtained insurance cover in respect of liability incurred resulting in a claim first made against it during the period of insurance. Santam Ltd assumed the rights and obligations of insurer.

The policy gave cover to a limit of R1m, and in addition undertook the payment of costs and expenses incurred in the conduct of any claim.

This policy was in force in 1993, at a time when Van Immerzeel was sued for damages in relation to its supervision of the construction of a water pipeline.

An earlier policy of insurance applying to the period 1991, gave cover to a limit of R1m without including the additional cover in respect of costs and expenses. Cover was offered to the extent of R1m inclusive of costs and expenses.

In May 1991, Van Immerzeel became aware of the potential claim for damages against them. In June 1991, it notified its brokers of this, as required of it in the policy.

Santam Ltd contended that the insurance policy applicable to the claim brought against Van Immerzeel was the 1991 policy and not the 1993 policy, since the claim was first made against it in 1991 when Van Immerzeel gave notice of the potential claim.

THE DECISION

No demand was made against Van Immerzeel in 1991 and no notice of a demand was given to its brokers. It was merely notified of a possibility that a demand might be made in the future, the claimant not having then asserted that Van Immerzeel was liable to it.

In any event, the notice given by Van Immerzeel was notice required under the 1991 policy and had not been given as required by the 1993 policy which was not yet in force.

The claim which resulted in Van Immerzeel being sued was first made during the insurance period of the 1993 policy. This policy covered claims first made during that period as the notification of a potential claim did not constitute the making of a claim. Van Immerzeel was therefore entitled to claim under the 1993 policy notwithstanding the fact that it could also claim a lesser amount under the 1991 policy.

Van Immerzeel was therefore entitled to payment under the 1993 policy. Its appeal was upheld.

HARIDASS v TJB FINANCIAL SERVICES (PTY) LTD

Insurance

A JUDGMENT BY PC COMBRINCK J
NATAL PROVINCIAL DIVISION
19 JUNE 2006

2006 CLR 289 (N)

An insurance broker is liable to an insured for damages flowing from actions taken on the insured's behalf which amount to breach of contract with the insured.

THE FACTS

Haridass requested the second defendant, Singh, an insurance broker, to arrange comprehensive insurance for his truck. Singh prepared a proposal form for cover commencing on 15 April 2002, with monthly deductions from a bank account to be effected in payment of the insurance premium. Singh forwarded the proposal to TJB Financial Services (Pty) Ltd, which arranged cover with S.A. Eagle Insurance Company.

In November 2002, TJB decided to transfer the insurer from SA Eagle to Mutual and Federal Insurance Company, the effective date of transfer to be 1 January 2003. Haridass was unaware of this decision. Due to administrative error, the bank account was thereafter not debited with the monthly premiums. Haridass discovered the error on 28 February 2003. The policy with S.A. Eagle had been cancelled, but no new policy with Mutual and Federal was concluded.

On 3 March 2003, the truck was involved in an accident and damaged beyond repair. When Haridass discovered that he was not covered for the loss, he brought an action against TJB and Singh claiming damages.

THE DECISION

While it was odd that TJB should consider itself entitled to transfer a policy from one insurer to another without the knowledge or consent of Haridass, in doing so, it had cancelled the SA Eagle policy, leaving Haridass uninsured. It had done this as agent for Singh, who was accordingly responsible for its actions. In cancelling the policy without obtaining his consent, Singh acted in breach of his contractual duties toward Haridass and was therefore liable to compensate him for damages.

Haridass was entitled to damages being that which he would have obtained if he had been insured as intended when he took out insurance cover in the first place.

JACQUESSON v MINISTER OF FINANCE

A JUDGMENT BY PONNAN JA (HARMS JA, STREICHER JA, MTHIYANE JA and LEWIS JA concurring)
SUPREME COURT OF APPEAL
16 NOVEMBER 2005

2006 (3) SA 334 (A)

Unjust enrichment

A claim for repayment of money paid without legal reason must show a connection between the initial payment and the impugned reason.

THE FACTS

In September 1987, the South African Reserve Bank instructed the Standard Bank to block the accounts of Jacques Film Distributors. The Standard Bank did so and in January 1988, funds standing to the credit of those accounts were attached in terms of Exchange Control Regulations and then transferred to the Corporation for Public Deposits.

In the same month, Jacquesson, the sole proprietor of Jacques Film Distributors, was arrested. In September 1992, he was convicted on 1058 counts of fraud and sentenced to imprisonment for seven years. The frauds took place in the period 1985-1987 and involved the transfer of some R103m from South Africa to the United Kingdom.

In 1994, the attached funds were declared forfeit to the State. In 1996, Jacquesson applied for amnesty in terms of the Promotion of National Unity and Reconciliation Act (no 34 of 1995) and in 2001 was granted amnesty for all offences resulting from the export of capital in contravention of the South African Exchange Control Laws committed during the period 1982 to 1987.

Jacquesson then applied for an order directing the Minister of Finance to pay him the funds which had been forfeited to the State. He contended that by virtue of section 20(7)(a) & (10) of the Act, we was entitled to repayment of the forfeited funds. These sections provide that no person who has been granted amnesty shall be criminally or civilly liable in respect of the offence of which he was convicted, and any record of conviction shall be deemed to be expunged from all official documents and the conviction shall be deemed not to have taken place.

THE DECISION

Jacquesson contended that he was entitled to repayment on the basis that payment had been made without legal reason (sine causa). The question was therefore whether the reason for the payment had in fact fallen away because of the operation of section 20 of the Act.

The order of forfeiture was made under the Exchange Control Regulations. The regulations authorise the forfeiture of money or goods in respect of which a contravention of the regulations has been committed or is reasonably suspected to have been committed. They do not contemplate a criminal conviction or a criminal prosecution.

Jacquesson was convicted of fraud, not with contravening the exchange control regulations. The money which was attached was not the subject of the fraud as the latter had been transferred out of the country. It was not clear why the funds of Jacques Film Distributors had been attached but it was clear that they were not connected to the charges of fraud brought against Jacquesson. The grant of amnesty and the setting aside of the conviction were therefore also unconnected to the attachment of the money and its forfeiture to the State.

In any event, the amnesty applied to events taking place in the period 1982 to 1987 which did not include the time when the money was attached and forfeited. It also applied to the export of capital which did not include the attached and forfeited money.

The application was dismissed.

LA PAMPA LOUIS DREYFUS ARMATEURS SNC v TOR SHIPPING

A JUDGMENT BY
TSHABALALA JP
DURBAN AND COAST LOCAL DIVISION
19 JANUARY 2006

2006 (3) SA 441 (D)

Shipping

A party which holds security for its claim against another is not entitled to further security against a third party against which its claim also lies on the basis of joint liability.

THE FACTS

Tor Shipping chartered the *Stefanie* from Sealight Marine Ltd, and sub-chartered the ship to Takamaka Marine Ltd. The latter charterparty provided for a performance guarantee by Louis Dreyfus Armateurs SNC.

During the subsistence of the charterparties, the *Stefanie* came adrift from her moorings in the River Seine. The ship was later reberthed after being grounded and refloated. Sealight then received a claim for salvage, which later resulted in an arbitration award against it. In consequence, Sealight began arbitration proceedings against Tor Shipping. Tor Shipping brought arbitration proceedings against Takamaka claiming an indemnity, and cited Louis Dreyfus as a respondent in those proceedings. Tor Shipping alleged that Louis Dreyfus was also liable to it under the performance guarantee, and as co-charterer.

Tor Shipping obtained security for its arbitration claim against Louis Dreyfus in the form of a bank guarantee. In order to obtain security for that claim against Takamaka, Tor Shipping arrested the *La Pampa* then in Durban harbour. Louis Dreyfus owned the *La Pampa*. It applied for an order setting aside the arrest.

THE DECISION

Tor Shipping had to show that it had a genuine and reasonable need for security. The critical question was whether there was already security for the claim, not whether the claim was secured by the security already obtained in the form of the bank guarantee.

The bank guarantee was given by Louis Dreyfus and not Takamaka, but the effect of it was to give Tor Shipping security for its claim which lay against Takamaka and had been brought against it in the arbitration proceedings. The undertaking obtained in the bank guarantee covered the arrest of another ship either owned by Louis Dreyfus or associated with one owned by it. What Tor Shipping now sought was the same undertaking but in respect of its claim against Takamaka. It was however, not entitled to confirmation of its already-obtained security in this manner. This did not constitute a genuine and reasonable need for security.

In any event, section 3(8) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) provides that property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant. This section does not refer merely to a second arrest of the same ship but also to a second arrest of another ship owned by the same party whose ship was initially arrested.

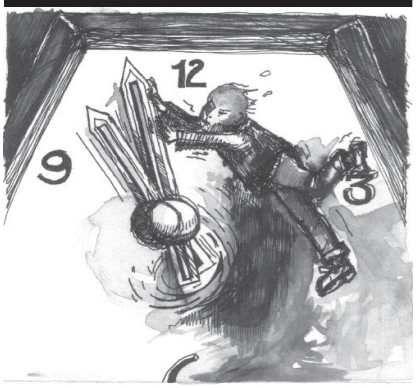
The arrest was accordingly set aside.

GROENKLOOF DRANKHANDELAARS (PTY) LTD v ARLINGTON VINTNERS INTERNATIONAL LTD

A JUDGMENT BY VAN ZYL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
8 JUNE 2006

2006 CLR 252 (C)

Prescription



A party does not have knowledge of the facts upon which it might claim against another party merely because there are indications of the possibility of a claim. It must have knowledge of facts serious enough to enable it to bring a claim based on them.

THE FACTS

During the period August to November 1998, Arlington Vintners International Ltd bought 29 400 cases of wine from Groenkloof Drankhandelaars (Pty) Ltd for £107 878,50. Arlington on-sold the wine to Threshers, a retail outlet in the United Kingdom.

In September 1998, Arlington was informed that examination of several batches of the wine revealed the presence of high levels of yeast. It informed Groenkloof of this and requested co-operation in further investigations. Subsequently, further evidence of defects in the wine were discovered. In January and February 1999, Arlington reported this to Groenkloof and requested it to address the problem.

On 7 April 1999, Arlington received a scientific report of an analysis of the wine. The report indicated that several batches of the wine contained yeast, although levels of residual sugars and carbon dioxide were not exceptionally high. Two of the batches contained high levels of yeast and the carbon dioxide level was higher than that found at the bottling stage, indicating secondary fermentation.

In June 1999, Threshers stated that the wine was not fit for human consumption and it would return the wine.

On 1 March 2002, Arlington issued summons claiming from Groenkloof repayment of the purchase price as well as associated costs.

Groenkloof contended that Arlington had become aware of the facts from which its claim arose by February 1999 when it had addressed it on the question of the wine. This being more than three years before the issue of summons, Arlington's claim had prescribed.

THE DECISION

Section 12(3) of the Prescription Act (no 68 of 1969) provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.

The information obtained by Arlington between September 1998 and February 1999 regarding the quality of the wine did not indicate a material or substantive defect in the wine. The defects discovered at that stage were also restricted to a single tank in a single lot. At that stage, all concerned were of the view that nothing conclusive could be stated regarding the wine. The information at the disposal of Arlington until February 1999 was not sufficient to alert it to the true nature and extent of the problem attaching to the wine. At most, it indicated there might be an isolated problem only. It was only on 7 April 1999 that Arlington knew of facts upon which it might base a claim against Groenkloof, but even then it was not clear whether the problem was serious enough to render the wine wholly or partially unfit for consumption.

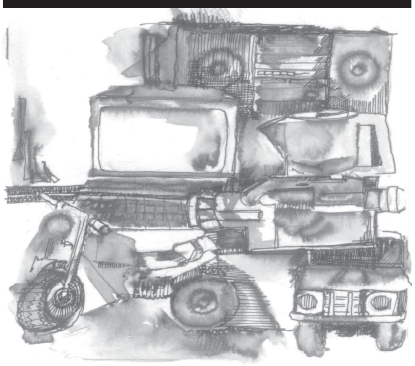
It followed that the claim made by Arlington had not prescribed.

BAFANA FINANCE MABOPANE v MAKWAKWA

JUDGMENT BY CACHALIA AJA (HARMS JA, CONRADIE JA, CLOETE JA and VAN HEERDEN JA concurring)
SUPREME COURT OF APPEAL
30 MARCH 2006

2006 (4) SA 581 (A)

Credit Transactions



A contractual provision excluding the operation of section 74 of the Magistrates Court Act (no 32 of 1944) in respect of a debtor is contrary to public policy and cannot be enforced.

THE FACTS

Bafana Finance Mabopane lent R1 700 to Makwakwa. The loan was to be repaid one month later, as well as interest of R510.

Clause 14 of the loan agreement provided that Makwakwa would not apply for an administration order as envisaged in section 74 of the Magistrates Court Act (no 32 of 1944) and the debt would not form part of an administration order which he might have applied for.

On the day when Makwakwa was obliged to repay the loan and interest, he applied for an administration order. The application showed that his monthly income was R4 819,33 and he had creditors with a total of R13 250,90 in claims against him. The application was granted, and Bafana's claim became subject to the administration order.

Bafana appealed the granting of the administration order.

THE DECISION

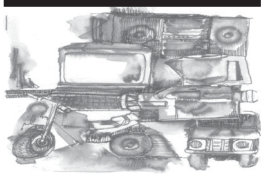
The general rule is that a person may renounce a right introduced for his own benefit. A person may therefore by contract waive rights conferred by statute. However, such waiver will be contra bonos mores if the rights were conferred in order to give protection to that party as a matter of policy.

Whether or not Makwakwa could waive the rights conferred by section 74 depended on the purpose of the section. An administration order has the advantage that it is less costly than sequestration proceedings, and does not require proof that it will be of advantage to creditors. It is therefore the only viable statutory protection available to debtors with small estates whose finances have fallen on difficult times. An administration order is a debt relief measure, but it is also designed to benefit creditors and serve the public interest. Creditors are restricted in proceeding with their claims against the debtor, but any conflict of interests between them is dealt with by the administrator for the benefit of the general body of creditors.

The two objectives of clause 14 were to prevent the debtor from applying for an administration order and to exclude Bafana's debt from an administration order. The second objective was plainly impermissible in the light of section 74. The tendency of the whole clause was to restrict Makwakwa's rights. This was inimical to public policy and the public interest. The insulation of Bafana's claim would confer on it an undue preference. This was prejudicial to Makwakwa and against the interests of other creditors. The clause could therefore not be enforced against Makwakwa.

The appeal was dismissed.

NEDBANK LTD v MASHIYA



A JUDGMENT BY
BERTELSMANN J
TRANSVAAL PROVINCIAL
DIVISION
5 APRIL 2006

2006 (4) SA 422 (T)

An application for default judgment based on default of debtor's obligations under a mortgage bond must be accompanied by an affidavit which clearly indicates that the deponent has knowledge of the facts upon which the application is based, involving identification of the sources of such facts, and disclosure of the identity and capacity of the deponent.

THE FACTS

Nedbank Ltd lent money to the Mashiya's on the security of a mortgage bond passed over their property. The bond provided that the property would be executable in the event of the debtors failing to repay the loan timeously. The extent of the indebtedness could be proved by means of a certificate of balance given by a manager or accountant of any branch or head office of Nedbank.

Nedbank brought foreclosure proceedings against the Mashiya's, alleging that they had fallen into arrears in repaying the loan. It filed an affidavit by a teamleader of Nedbank stating the amount then owed by the Mashiya's and that the property was then occupied by them. It was also stated that the property was then occupied by the Mashiya's. A certificate of balance was given and was signed by the manager: mortgage foreclosures.

Nedbank applied for default judgment against the Mashiya's.

THE DECISION

In applications for default judgment, where the effect is to deprive the defendant of his or her home, a court must be satisfied of certain minimum matters before granting an order to that effect. This is because such an order affects the debtor's right to housing as enshrined in the Constitution. A court must be furnished with an affidavit setting out the amount of the arrears outstanding as at the date of application for default judgment, whether or not the property was acquired with the assistance of a state subsidy, whether or not the property is occupied, whether the property is used for residential or commercial purposes, and whether the debt was incurred in order to acquire the property.

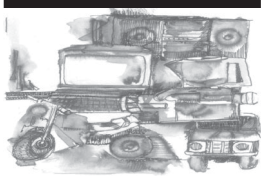
In the present case, the affidavit filed by the bank did not meet these requirements. The description of the bank's representative as 'teamleader' was vague and it was not clear that she had actual knowledge of the sum outstanding on the bond. Furthermore, the amount of the outstanding arrears had to be properly verified by indicating the source of the figures involved and their reliability.

The assertion that the property was occupied by the Mashiya's also fell short of the requirements because it failed to indicate the source of the information and the reliability of the source. This also applied to the other related assertions regarding the occupancy of the property.

As far as the certificate of balance was concerned, the signature to it gave no indication of the identity of the signatory. The failure to indicate identity constituted a deficiency in the certificate rendering the application defective.

The application was postponed pending the rectification of the matters raised.

GEYSER v NEDBANK LTD



A JUDGMENT BY GOLDSTEIN J
WITWATERSRAND LOCAL DIVISION
121 NOVEMBER 2005

2006 (4) SA 544 (W)

The mere fact that a mortgage bond is passed in the area of jurisdiction of a court is not sufficient to confer jurisdiction on that court in an action by a creditor for repayment of a loan.

THE FACTS

Nedbank Ltd lent money to Geyser. Geyser lived and worked in Pretoria and all the obligations of the parties were to be performed in that area. The money was advanced to Geyser in Pretoria and he made repayments to Nedbank in Pretoria.

As security for the loan, Nedbank required Geyser pass a mortgage bond over his fixed property. It was situated in the Johannesburg area. Geyser signed a power of attorney authorising the passing of the bond over his property in the Pretoria area, and the bond was subsequently passed securing Geyser's indebtedness arising from any cause whatsoever.

Nedbank brought an application for default judgment against Geyser and obtained such a judgment in the High Court of the Witwatersrand Local Division. Geyser then applied for an order that the judgment given against him was void because that High Court lacked jurisdiction in the matter.

THE DECISION

The registration of the bond over property within the area of jurisdiction of the court was not in issue. Nedbank might have advanced the loan without registering a bond at all. The only connection the action brought by Nedbank had with the court was the fact that the bonded property was within its area of jurisdiction.

Because so much of the loan transaction occurred outside the jurisdiction of the court, and so little within it, there were not enough factors to give the court jurisdiction. Nedbank was therefore to be prevented from proceeding with execution on the judgment and a rule nisi was issued for the declaration of the judgment as void.

There are no grounds of convenience, justice and good sense requiring this Court, rather than that in Pretoria, to have jurisdiction. That such a requirement, namely of convenience, justice and good sense, must be satisfied is implicit in the dicta of Cameron JA which I have quoted. The first respondent transacted with the applicant in F Pretoria, advanced money to him there and expected him to pay it there. The applicant signed the power of attorney to pass the bond there. That Court seems to me to be clearly the appropriate one, and none of the grounds for shifting jurisdiction to this Court is satisfied.
It is clear that in the absence of jurisdiction of this Court the judgment is a nullity and can have no legal effect.

SASFIN BANK LTD v SOHO UNIT 14 CC

A JUDGMENT BY VAN DEN HEEVER AJ
TRANSVAAL PROVINCIAL DIVISION
17 MARCH 2004

2006 (4) SA 513 (T)

Contract

The disclosure of an undisclosed principal on whose behalf a contract has been concluded does not amount to a variation of the terms of the contract.

THE FACTS

Sunlyn Investments (Pty) Ltd concluded a rental agreement with Soho Unit 14 CC. The agreement contained a non-variation clause which provided that it recorded the entire agreement between the parties and no variation, waiver, suspension or extension of time would be of any force or effect unless recorded in writing and signed by both parties.

At the same time, Sunlyn also concluded suretyship agreements with the other defendants, binding them as sureties in respect of Soho's obligations.

As a result of alleged default by Soho, an amount of R152 060,91 became payable and Sasfin Bank Ltd brought an action claiming payment of this sum.

Sasfin alleged that at the time the agreement was concluded, Sunlyn acted for it as undisclosed principal, with the result that it obtained all the rights in favour of Sunlyn recorded in the agreement.

Soho excepted to the claim on the grounds that Sasfin's reliance on the allegation that it was the undisclosed principal amounted to a variation of the terms of the agreement, in particular a variation of the parties to the agreement.

The sureties also excepted to the claim on the grounds that Sasfin's name was not mentioned in the deeds of suretyship, with the result that Sasfin could not rely on them.

THE DECISION

Whatever the proper basis or justification for the application of the principle of the doctrine of the undisclosed principal, it is not a variation or amendment of the agreement concluded between the agent and the third party. The contract is concluded between the agent and the third party and the original obligations, with the respective rights and duties flowing therefrom, remain unchanged and unaffected when the undisclosed principal becomes disclosed. The third party retains its rights against the agent and also obtains the rights against the principal. There is no variation of the original agreement.

The position of the undisclosed principal is therefore similar to that of a cessionary which seeks to enforce rights against the third party. It is also similar to that of a purchaser where the doctrine of 'huur gaat voor koop' applies: the purchaser obtains all the rights of the lessor which were held by the seller of the leased property.

The rental agreement could not be interpreted so as to involve the exclusion of the application of the doctrine of the undisclosed principal. The agreement expressly provided for the possibility of the transfer of rights from Sunlyn to another party, with the result that Soho and the sureties could not have been under the impression that no third party would ever become substituted for Sunlyn.

As far as the suretyships were concerned, the disclosure of Sasfin as the real creditor amounted to no more than the identification of the sureties' creditor and this did not render the suretyships deficient for want of compliance with section 6 of the General Law Amendment Act (no 50 of 1956).

The exception was dismissed.

HARLEY v UPWARD SPIRAL 1196 CC

A JUDGMENT BY LEVINSOHN J
DURBAN AND COAST LOCAL DIVISION
12 MAY 2006

2006 (4) SA 597 (D)

Where a second purchaser, prior to transfer, is apprised of the first purchaser's rights, and then nevertheless obtains transfer, the second purchaser must be held to have committed a wrongful act against the first purchaser.

THE FACTS

On 17 May 2004, Harley bought certain fixed property from the fourth respondent. He complied with his obligations under the agreement but the fourth respondent did not. Harley brought an application claiming specific performance of the agreement directed at obtaining transfer of the property into his name. When the application came before court, an order by consent was given postponing the application, directing the filing of further affidavits and recording the fourth respondent's undertaking not to transfer the property pending the outcome of the application.

While the application was still pending, Harley received notice that the property had been transferred into the name of Upward Spiral 1196 CC. The fourth respondent alleged that she had sold the property to Upward prior to the institution of the application by Harley, but had not been aware of the transfer which then took place to Upward. The transferring conveyancer also alleged that he had not been aware of the undertaking given not to transfer the property pending the outcome of the application.

Harley brought an urgent application to compel retransfer of the property to the fourth respondent.

THE DECISION

The fourth respondent's undertaking not to transfer the property pending the outcome of the application required that she act bona fide in relation to that undertaking. This would involve her revoking any authority previously given to pass transfer to another party, and would mean that when it came to her notice that such transfer had been given she would not simply have accepted that fact.

It was overwhelmingly probable that the transferring conveyancer would have known of the undertaking given by the fourth respondent. He had conducted an inquiry as to whether or not there was a caveat against the property in the Deeds Registry. The reason for the inquiry was not properly explained. There was therefore a strong prima facie case that the respondents had procured registration of transfer of the property, knowing of Harley's rights arising from his first purchase of the property.

The respondents argued that they did not know of the sale to Harley at the time the sale to Upward was concluded, and the fact that they did learn of it prior to registration of transfer to Upward did not affect Upward's right to take transfer. This contention however, could not be accepted. Where a second purchaser, prior to transfer, is apprised of the first purchaser's rights, and then nevertheless obtains transfer, the second purchaser must be held to have committed a wrongful act against the first purchaser.

The application was granted.

STANDARD BANK OF SOUTH AFRICA LTD v SUPA QUICK AUTO CENTRE

A JUDGMENT BY SWAIN J
NATAL PROVINCIAL DIVISION
16 FEBRUARY 2006

2006 (4) SA 65 (N)

The intention to defraud may be proved by showing that the party making the representation resulting in loss did so knowing that loss might result from its untrue representation.

THE FACTS

The third defendant completed a credit application form and submitted it to the Standard Bank of South Africa Ltd, the ostensible purpose thereof being to obtain credit for the purchase of goods from Supa Quick Auto Centre. The bank accepted the application and agreed to finance the purchase to the extent of R243 001, being the purchase price of the goods. It concluded an instalment sale agreement with the third respondent.

As part of its financing arrangement, the bank required Supa Quick to raise an invoice. Supa Quick did so and therein confirmed that it was the owner of the goods and that their value was R263 000. The third defendant certified that it had taken delivery of the goods and in consequence, the bank disbursed the loan.

The purchase of the goods was however, a simulated transaction. The defendants' real purpose was to secure financing for the benefit of another party, the fourth defendant.

The third defendant defaulted in repaying the loan. When the bank attempted to realise its security by attaching the goods, its claim was frustrated by the superior claim of the owner of the goods.

The bank alleged that it had been the victim of fraudulent misrepresentation by Supa Quick and the other defendants. It claimed from them repayment of its loan. Supa Quick defended the action on the grounds that an employee of the bank had been the architect of the scheme and that accordingly, the bank had at all times known of the true nature of the transaction.

THE DECISION

It was possible that Supa Quick did not intend to cause the bank harm, in the sense that this was its direct intention, but it did have such an intention in the broader sense of the term since it had raised the invoice knowing that nothing on the face of it would alert anybody to the fact that this was a simulated transaction. The second defendant must have foreseen that in the event of the third defendant not paying in terms of its obligations, the bank would suffer loss if the goods were owned by another party.

It was clear that Supa Quick intended the bank to act on the invoice and advance the loan. The decision to advance the loan was not made by the employee whose idea it was to structure a simulated transaction and accordingly, the part played by the bank's employee did not detract from the fact that a false representation was made in securing the loan.

The bank had shown that a false representation had been made, in the knowledge that it was false, and that the representation induced the bank to act and suffer damages as a result. It was therefore entitled to payment of damages in the sum claimed.

JOHANNESBURG WATER (PTY) LTD v MORAIS N.O.

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL DIVISION
9 JULY 2005

2006 CLR 306 (W)

A service provider appointed in terms of the Local Government: Municipal Systems Act (no 32 of 2000) is entitled to sue for payment of services rendered by virtue of the general assignment of responsibility provided for in that Act. Monthly notices of amounts due for such services constitute notice as provided for in section 49(2) of the Local Government Ordinance (no 17 of 1939).

THE FACTS

Johannesburg Water (Pty) Ltd brought an action against Morais for payment of an amount due in respect of water and sewerage charges. It alleged that its claim arose as a result of the provision of these services, they having been provided pursuant to an agreement concluded between it and the City of Johannesburg in 2001.

In terms of this agreement, Johannesburg Water undertook to provide water services to all customers of the City of Johannesburg. The company was given the right to collect all revenue arising from the supply of water services, and the right to enforce payment of all amounts owing to it for the provision of water services.

The agreement between Johannesburg Water and the City of Johannesburg was concluded in terms of sections 76(b) and 81(2) of the Local Government: Municipal Systems Act (no 32 of 2000). In terms of section 81(2) a municipality may assign to a service provider responsibility for developing and implementing service delivery, customer management, management of its own accounting, financial and related activities, and the collection of service fees for its own account from users of its services in accordance with the municipal tariff policy.

In 1997, Morais and the City of Johannesburg entered into an agreement in terms of which the City undertook to supply water to Morais at his property situated in Johannesburg. Johannesburg Water brought its action against Morais based on this agreement and the assignment provided for in the Act.

Morais raised two special please to the action. It contended that no written notice had been given of unpaid charges as was required in terms of section 49(2) of the Local Government Ordinance (no 17 of 1939). It also contended that because summons was issued in 2003, those claims relating to the period more than three years prior to that date had become prescribed.

THE DECISION

The assignment referred to in the Act was not an assignment in the strict sense of the word as understood in law, but a general assignment of responsibility, including the assignment of the power to enforce payment of service fees for Johannesburg Water's own account. A cession of rights by the municipality was therefore not necessary for the proper enforcement of the claim for payment.

As far as the allegation that no written notice had been given was concerned, the monthly statements of account sent in respect of water and sewerage services constituted such notice. They provided the information required by section 49(2) and were therefore the notice needed in order to allow the claim for payment.

As far as the defence based on prescription was concerned, the claim for sewerage charges had to be distinguished from the claim for water charges as the former could be considered a tax, and therefore subject to a thirty-year prescription period in terms of the Prescription Act (no 68 of 1969). The claim for water charges was therefore permissible only in respect of those charges arising in the three years prior to the issue of summons.

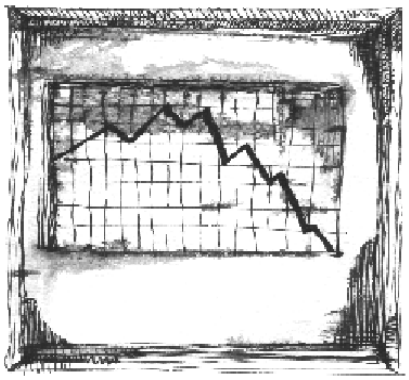
The claim, reduced accordingly, was allowed.

P G BISON LTD v JOHANNESBURG GLASSWORKS (PTY) LTD

A JUDGMENT BY JAJBHAY J
WITWATERSRAND LOCAL DIVISION
17 MAY 2006

2006 (4) SA 535 (W)

Insolvency



A party seeking to overturn the rejection of its claim against an insolvent estate by the Master must show that the Master acted ultra vires his powers in rejecting the claim. A court will only authorise the re-opening of a confirmed liquidation and distribution account if it is shown that there is some prospect of success that the account will be varied when it is re-opened.

THE FACTS

Investec Private Bank lent R4m to Kenbow (Pty) Ltd. PG Bison Ltd guaranteed the loan and signed a deed of suretyship in favour of Investec. Some R1m of the loan was paid directly to Bison in settlement of an existing indebtedness of Kenbow to Bison.

Simultaneously, Johannesburg Glassworks (Pty) Ltd signed a deed of suretship in favour of Bison and other companies for all amounts which might become owing by Kenbow, as well as a cession and pledge of claims in favour of Bison and the other companies.

Less than six months later, in June 2002, Glassworks and Kenbow were placed in liquidation. Both companies were hopelessly insolvent.

Bison lodged a claim against the insolvent estate of Glassworks. The liquidator rejected the claim on the grounds that it was a voidable disposition, having been made without value. In December 2003, the Master of the High Court notified Bison that its claim was rejected. In October 2004, the Master confirmed the liquidation and distribution account and Bison was advised of this in January 2005.

Bison commenced an action to challenge the Master's decision and enforce acceptance of its claim.

THE DECISION

In order to re-open a confirmed liquidation and distribution account, a court must authorise such re-opening. An application must show that this should be done by showing that its failure to object was induced by excusable error or fraud, and that there is some prospect of success of having the account varied or corrected when it is re-opened.

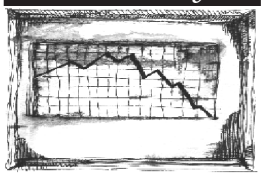
Bison contended that in rejecting its claim, the Master acted ultra vires as only a court is entitled to reject a claim. However, the Master was entitled to do so, as he was authorised to do so by section 45(3) of the Insolvency Act (no 24 of 1936). This did not mean that the Master thereby rejected the validity of the suretyship and Bison remained at liberty to establish its claim at law by instituting an action.

When the liquidator rejected Bison's claim, his reasons for rejecting them were given to it and explained to it both by the liquidator and the Master. The evidence therefore did not show that the decision to expunge the claim was made capriciously or arbitrarily. It was therefore not a decision that could be reviewed or set aside.

The action failed.

COMMISSIONER, S.A.R.S. v HAWKER AVIATION SERVICES PARTNERSHIP

Insolvency



A JUDGMENT BY CAMERON JA (HOWIE P, STREICHER JA, NUGENT JA and CONRADIE JA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2006

2006 (4) SA 292 (A)

A claim for unpaid VAT brought by the Commissioner of the South African Revenue Service based on assessments raised constitutes a claim for payment of a debt upon which an application for liquidation may be based. The fact that the real purpose of an application for liquidation is to secure control over an attachable asset is not a reason for the invalidity of the application.

THE FACTS

Hawker Aviation Services Partnership was formed for the purpose of conducting an air charter business. To conduct this business, in September 2000, the partnership purchased a Hawker aircraft. When it did so, it claimed input VAT on the purchase from the Commissioner of the South African Revenue Service. This was accepted and allowed in the sum of R10,2m. The partnership also purchased a Falcon aircraft from Ben Nevis Holdings Ltd, a company registered in the British Virgin Islands, for R171m. The partners of the partnership were Hawker Air Services (Pty) Ltd, Hawker Management (Pty) Ltd and Rand Merchant Bank, the latter having a 99,8% interest in the partnership.

Two years later, the partnership was dissolved and sold its partnership interests to Carmel Trading Ltd. It and Hawker Air Services formed a new partnership which used the aircraft of the dissolved partnership for the purposes of conveying passengers and goods for reward.

In March 2003, the Commissioner issued four VAT assessments and determined that the partnership was liable for VAT in the sum of approximately R73m. It did so on the basis that the aircraft were not being used for the purpose earlier stated but for the benefit of the sole director of Hawker Air Services.

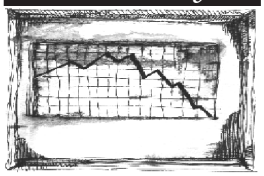
In December 2003, the Commissioner obtained judgment against both Hawker Air Services companies and the partnership. It did so by filing a certified statement of the amount due and payable in terms of section 40(2)(a) of the Value Added Tax Act (no 89 of 1991). This sum remained unpaid and the Commissioner then brought an urgent application for the sequestration of the partnership and the liquidation of the Hawker Air Services companies. The respondents opposed the application.

THE DECISION

Raising the assessments which included an additional tax, which included a penal element, against the partnership was not constitutionally impermissible on the grounds that it usurped the function of the courts. The taxpayer is always entitled to appeal such an assessment, thus bringing it before court. The fact that the Commissioner had not yet issued a revised assessment, having undertaken to do so, did not make the existing assessment invalid or unenforceable on the grounds that the existing debt was nullified.

The Commissioner's allegation that the purpose of the acquisition of the aircraft was to benefit the sole director of Hawker Air Services had not been contradicted in the court papers. The assessment which was based on the correctness of that allegation was therefore uncontradicted and rendered the Commissioner a creditor of the partnership, entitling him to bring an application for its liquidation. The partnership had not contested the claim that the Commissioner was its creditor and there was nothing to show that the debt was disputed on bona fide and reasonable grounds.

The fact that the Commissioner wished to secure the return of the aircraft in order to satisfy his claim for VAT was no reason to impute an ulterior purpose in bringing the liquidation application. In essence, the Commissioner wished to collect VAT and this was what the intention was in bringing the liquidation application.



Section 13(1) of the Insolvency Act (no 24 of 1936) provides that sequestration of a partnership must involve the simultaneous sequestration of all the partners of the partnership. The proper interpretation of this provision does not mean that no sequestration of a partnership is possible where one of the partners cannot be sequestrated. In such a case, the partnership may be sequestrated. The section is to be read as referring to all partners capable of sequestration.

The applications were granted.

King and a number of persons are alleged to have interests in the aircraft, including HAS. Previous efforts to recover the Falcon related to the interests of King and other parties associated with him. In the present case, the Commissioner seeks the appointment of a liquidator to pursue whatever interests HAS enjoys in the aircraft. That is not an ulterior purpose. The extent to which these interests may coincide with interests pursued in related applications is irrelevant and does not constitute an ulterior purpose. King claims that HAS's interest in the aircraft is limited to the extent of its share in the partnership, which is no more than 0.1%. The Commissioner contests this construction. A liquidator will be able to investigate the truth of these claims, and follow up any interest he may discover.

[24] The proceedings before Hartzenberg J, though also directed to the preservation and recovery of the Falcon, involved differing parties and different considerations. An application under Rule 49(11) for interim enforcement of a court order pending appeal is paras 34-48 considered and granted on quite different grounds from those at issue when a liquidation is sought. The applications for the liquidation of HAS and the sequestration of the partnership were thus not collateral challenges to the refusal by Hartzenberg J to grant the Commissioner interim enforcement of the order to return the Falcon, but a legitimate claim that entailed an alternative means to the same end. There was thus no impropriety, ulteriority or impermissibility in SARS seeking to pursue its purposes through liquidation and sequestration proceedings.

NAPIER v BARKHUIZEN

A JUDGMENT BY CAMERON JA (MPATI DP, VAN HEERDEN JA, MLAMBO JA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2005

2006 (4) SA 1 (A)

Insurance

A party alleging that its constitutional right of access to court has been denied by the provisions of a contract must show evidence that this is the effect of the contract. In demonstrating this, such a party must show that the contract had detrimentally affected pre-existing rights.

THE FACTS

Barkhuizen insured his 1999 BMW 328i motor vehicle for R181 000 with a syndicate of Lloyd's underwriters represented by Napier. Clause 5.2.5 of the policy provided that if the insurer rejected liability for any claim, it would be released from liability unless summons was served within ninety days of repudiation.

In November 1999, Barkhuizen's car was damaged. He notified the insurer but in January 2000, it rejected liability for any claim. Barkhuizen issued summons for payment under the policy in January 2002.

The insurer defended the action on the grounds that clause 5.2.5 released it from liability. Barkhuizen contended that the clause denied him his common law right to invoke the courts and was in breach of section 34 of the Bill of Rights in that it deprived him of his right to have a justiciable dispute decided in a court of law.

Section 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

THE DECISION

The first issue was the extent to which the Bill of Rights provisions applied between contracting parties.

It is true that contractual terms are subject to constitutional rights: courts are obliged to take into account the Constitution when developing the law of contract. This does not mean that courts have a general discretion to strike down contractual terms perceived to be unjust, but they retain the power to invalidate agreements which are offensive to public policy.

A court will however, make such a determination on the basis of evidence presented to it. It will not be in a position to make such a determination on the grounds that it is self-evident that a contractual time-bar is unfair.

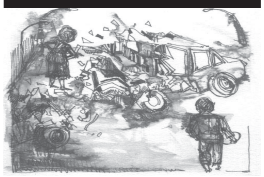
An insurer has an interest in knowing within a reasonable time whether it will face litigation following a repudiation of liability. Whether or not ninety days is a reasonable time is a question of evidence, depending on such facts as the number of claims an insurer has to deal with, how its claims procedures work, what resources it has to investigate a claim and the amount of premium it has charged for the insurance cover. Furthermore, there was insufficient evidence of the relative bargaining position of the two parties. Such evidence would include such matters as the market for short-term insurance products, the number of suppliers, whether time-bar clauses are included in all short-term insurance policies, and whether insurance cover is essential for a person in the position of Barhuizen.

The second issue was the extent of the right of access to court.

Of crucial importance was whether or not Barkhuizen had had a pre-existing right of redress which was curtailed by clause 5.2.5. A time-bar provision, whether enacted by statute or created in contract, is not in itself a denial of the right of access to court. Its effect must be determined in order to determine whether that result does follow. In the present case however, Barkhuizen did not have any rights against the insurer prior to the insurance contract having been concluded. Therefore, by agreeing to clause 5.2.5, his rights

REGENT INSURANCE COMPANY v D M J TRANSPORT CC

Insurance



A JUDGMENT BY VAN ZYL J (MOTALA J AND WAGLAY J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
28 JULY 2006

2006 CLR 318 (C)

An insurer relying on exclusionary clauses to repudiate a claim bears the onus of showing that the exclusions on which it depends apply to the facts giving rise to the claim.

THE FACTS

Regent Insurance Company insured DMJ Transport CC against damages which might occur to its bus. The insurance contract excluded Regent's liability in two cases.

The first exclusion was that Regent would not be liable to indemnify in the event of the number of passengers being carried by the bus exceeding the capacity for which the bus was constructed or licensed to carry. The second exclusion was that the company would not be liable to indemnify if the bus was not roadworthy.

During the subsistence of the insurance agreement, the bus was involved in an accident when its brakes failed on its way down a pass in the Eastern Cape. DMJ claimed against Regent in terms of the insurance policy, its claim amounting to R890 616,90.

Regent alleged that at the time of the accident, the number of passengers exceeded the permissible number of sixty four, and that the brake linings of the bus were inadequate, despite the bus having passed a roadworthy test a few weeks before the accident. It repudiated liability on the grounds that the exclusions provided for in the policy applied.

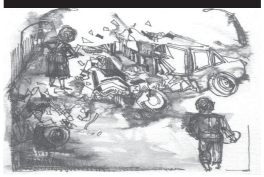
DMJ brought an action to enforce payment.

THE DECISION

Regent bore the onus of proving that the exclusions applied in the given factual situation and that it was consequently entitled to repudiate the claim. It would have to rely on expert evidence as to whether the brake linings were damaged prior to the accident or as a result thereof, and such evidence would have to be assessed in the light of factual findings based on the probabilities arising from the evidence as a whole. In this regard, it was significant that the experts did not examine the bus itself after the accident but relied on photographs and other documents.

The evidence given for the number of passengers on the bus was insufficient to discharge this onus. As far as the brake linings were concerned, it was common cause that the brake linings were worn down to the brake shoe, but there was doubt as to whether this occurred before or after the accident. The paucity of evidence presented by the expert witnesses on both sides made it impossible to determine with any certainty that the bus was in fact not roadworthy at the time of the accident.

Regent was therefore not entitled to rely on either of the two exclusionary clauses.



were not curtailed, and the insurer's defence based on this clause did not superimpose a time-bar on a pre-existing entitlement.

It cannot be assumed that Barkhuizen had a pre-existing right to insurance. He concluded the insurance contract freely and in the full exercise of his constitutional rights. The insurer was consequently entitled to depend on the terms of that contract.

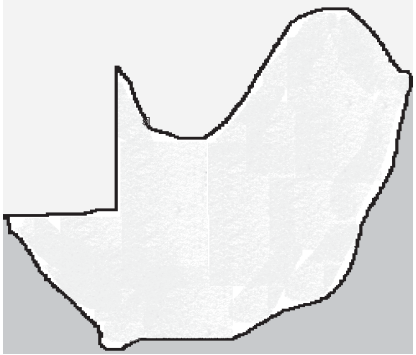
An insurer has an undeniable interest in knowing within a reasonable time after repudiating a claim whether it must face litigation about it. Whether 90 days is reasonable for this purpose the evidence is simply too meagre to allow us to assess. Although the period is much shorter than the statutory prescription period of three years, the clause certainly does not exclude the courts' jurisdiction entirely.5 And details of the claim and of the incident that caused it are usually uniquely within the claimant's knowledge (making a shorter time limit easier to justify). Whether the period is in fact reasonable, and thus whether the clause is 'fair', would depend, amongst other things, on the number of claims the insurer has to deal with, how its claims procedures work, what resources it has to investigate and process claims, and on the amount of the premium it exacts as a quid pro quo for the cover it offers. Of all this, we know nothing.

TSUNG v INDUSTRIAL DEVELOPMENT CORPORATION

A JUDGMENT BY HARMS JA (FARLAM JA, CAMERON JA, JAFTA JA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
23 MARCH 2006

2006 (4) SA 177 (A)

Jurisdiction



A peregrinus defendant may not obtain the lifting of an order attaching its property to establish the court's jurisdiction by consenting to the court's jurisdiction after the attachment has taken place.

THE FACTS

Tsung and the second appellant were peregrini of all of the High Courts of South Africa. The Industrial Development Corporation, an incola of the High Courts, alleged that it had a claim of R40m against them arising from fraudulent or reckless running of a local company. It brought an ex parte application for the attachment of the Tsungs' fixed property and shares belonging to them within the area of jurisdiction of the Cape High Court, in order to confirm and found the jurisdiction of the court in an action to be brought to prosecute the claim.

After the application had been granted, Tsung became aware of it, and on the return day, opposed finalisation of the order on the grounds that had he known of the application, he would have consented to the jurisdiction of the court, and did in fact so consent.

Tsung's opposition was dismissed on the grounds that the consent was too late and could not undo the attachment. Tsung appealed.

THE DECISION

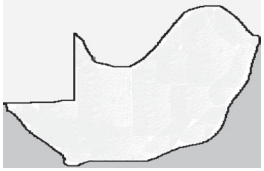
The line of authority in South African law is that a late consent cannot undo an attachment. Tsung's contention was that this rule should be replaced in order to make the law fairer and more consistent with the rule that a submission to jurisdiction is possible prior to attachment taking place.

There was however, no justification for a court varying the existing rule. The reasons justifying a departure from an existing rule did not arise in the present case. Once the attachment takes place there is a dramatic shift in the legal position of the parties in relation to each other. At that point, the plaintiff has established the court's jurisdiction and also security for its own claim. A plaintiff relying on a cause of action arising from a wrongful act, as opposed to a consensual arrangement, is entitled to both advantages. It would not be fair to deny such a plaintiff either.

The Corporation was therefore entitled to retain the attachment of the property. The appeal was dismissed.

SOUTH AFRICAN REVENUE SERVICES v DESMONDS CLEARING AND FORWARDING AGENTS CC

Jurisdiction



A JUDGMENT BY MPATI DP (STREICHER JA, NUGENT JA, CLOETE JA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
16 MARCH 2006

2006 (4) SA 284 (A)

A temporary deviation of goods from their destination out of the common customs area of South Africa does not amount to a diversion of the goods as referred to by section 18(13)(a) of the Customs and Excise Act (no 91 of 1964).

THE FACTS

Desmonds Clearing and Forwarding Agents CC attended to the importation of a truck and trailers for a client situated in Zimbabwe. The truck and trailers were landed at Durban harbour in April 2003 and Desmonds presented the Controller of customs and excise with a bill of entry in respect of the goods. The bill of entry described the goods as 'break bulk cargo' and 'right-hand drive unit to be removed on own wheels'. A code on the bill of entry indicated that the goods were intended for direct removal in bond to a destination outside the common customs area.

Section 18(13)(a) of the Customs and Excise Act (no 91 of 1964) prohibits the diversion, without the permission of the Commissioner, of 'any goods removed in bond to a destination other than the destination declared on entry for removal in bond' or the delivery of such goods in the Republic 'except into the control of the department at the place of destination'.

On 13 May 2003, an official of the SA Revenue Service examined the imported goods and a temporary permit issued by the traffic licensing authority, and issued a certificate allowing the export of the truck and trailers to Zimbabwe. Thereafter, the driver of the truck experienced mechanical difficulties necessitating the repair of the truck. At this time, the trailers were left in storage at a depot in Durban.

Officials of the SA Revenue Service received notice that the trailers were at the depot and issued a detention notice. They contended that a contravention of the Act had taken place and levied a penalty and forfeiture amount.

Desmonds applied for an order that the storage of the trailers was not a diversion of the goods as contemplated in the Act and directing the SA Revenue Service to release and hand over the trailers to it.

THE DECISION

The allegations made by Desmonds regarding the breakdown of the truck and the need to store the trailers stood undisputed. The SA Revenue Service therefore needed to show that this represented a diversion of the goods entitling it to take the action it had. It had been entitled to investigate the situation, as it had, and even detain the trailers, but having received the explanation given by Desmonds, the question was whether their continued detention was permissible.

The Act did not require Desmonds to store the trailers in a bonded warehouse in the circumstances of the case, ie in the event of the truck breaking down. Its removal of the trailers did not represent their diversion to a destination other than that declared on entry. A detour was permissible but not a diversion. The trailers had taken a detour and were being temporarily stored at the premises in Durban.

The continued detention of the trailers was therefore unlawful. The application for their release was granted.

HAUPT v BREWERS MARKETING INTELLIGENCE (PTY) LTD

JUDGMENT BY STREICHER JA (HARMS JA, MTHIYANE JA, CLOETE JA and LEWIS JA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2006

2006 (4) SA 458 (A)

Copyright

Copyright may vest in a computer programme even if the programme does not work properly. Copyright may subsist in a work which is a combination of a computer programme and a literary work. In the case of a computer programme the party exercising control over the person who creates the programme is the party in whom copyright vests. Copying of a substantial part of a work takes place if a significant portion is copied, such significance being measured qualitatively as well as quantitatively.

THE FACTS

In 1998, at the request of Brewers Marketing Intelligence (Pty) Ltd, Coetzee wrote a computer programme designed to enable the interrogation and manipulation of research data produced by a media research company. The data provided the source material concerning readers, listeners and viewers of various media such as newspapers, magazines and radio stations. The programme made use of a table which contained the questions upon which the research data was obtained. Haupt, the marketing director of Brewers, filled in the data required for this table.

Before completion of the programme, Haupt left Brewers and Coetzee continued the programming work for him. From that point, Coetzee was to receive 20% of the gross proceeds on sales of the programme. The programme was changed so that it accessed data from a separate file rather than from the table which Haupt had earlier completed. Further changes were made which ensured the more efficient access of data from an answers database and a weightings database. Coetzee continued work on the programme and develop it, and did so until October 2000 when he left the country for the United States. The programme was known as the 'Data Explorer' programme.

In July 2001, Coetzee and Brewers concluded an agreement in terms of which Coetzee undertook to provide compiled data to Brewers to enable it to develop a computer programme capable of importing data produced by the media research company into a database, and advise Brewers during the development stage. The agreement was implemented, and Coetzee assisted the Brewers progammer with portions of the source code used in the Data Explorer programme. The programme was named the 'Brewers AMPS' programme.

Most of the database structures used in the Data Explorer programme were identical with those used in the Brewers AMPS programme. The files used for accessing data were largely the same. The source code used for some of the programmes, and for search and graphing functions was largely the same.

Haupt discovered that the Brewers AMPS programme had been created. He brought interdict proceedings to prevent infringement of the Data Explorer programme as well as various files and folders and databases.

THE DECISION

The mere fact that the initial programme did not work properly did not mean that it was not a work in which copyright could not subsist. It was a computer programme as defined in the Copyright Act (no 98 of 1978) even though it sometimes produced incorrect results.

The definition of a computer programme, as given in the Act, requires that there is a set of instructions which when used on a computer directs its operation to bring about a result. The database structures created by Coetzee were therefore not a computer programme but a literary work, even though a computer might have been used as a tool in their creation. By contrast, the Data Explorer programme and those programmes associated with it were computer programmes as defined in the Act. Accordingly, the works in respect of which copyright could subsist in the present case were a combination of both computer programmes and literary works.

As far as their originality was concerned, there was no question that the converter programme and the tree preparer programme were the products of substantial skill, judgment and labour. It took about six months to create these programmes and it was clear that when the Brewers AMPS programme incorporated them, this resulted in a significant improvement in that programme. The works were therefore original.

As far as authorship was concerned, the evidence showed that at first the control over the creation of the computer programme was exercised by Brewers, but after July 1998, Haupt exercised control. Section 21 of the Act defines 'control' more broadly than the control of an employer over an employee. This was the control exercised by Haupt rendering him the author of the computer programme and literary works.

As far as infringement was concerned, although a limited amount of copying took place, what was copied was qualitatively, albeit not quantitatively, significant. Brewer's own programmer was having difficulty writing the programme. The copied portions therefore constituted substantial amounts of copying.

The interdict was granted.

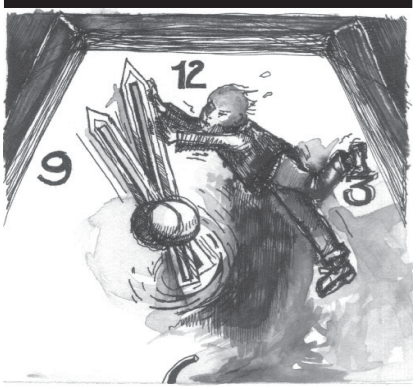
There is no definition of 'original' in the Act. That the work must originate from the author and not be copied from an existing source is clear but that is not to say that every work which is not copied would qualify for protection in terms of the Act. In this regard the High Court would seem to have accepted and the respondents submitted that a 'minimal degree of creativity' was required to satisfy the originality requirement. They relied on the judgment of the Supreme Court of the USA in Feist Publications Inc v Rural Telephone Service Co Inc *449 US 340 (1991) at 345 and 348. However, the originality requirement in the Act was also a requirement in the Copyright Act 63 of 1965, which was repealed by it, and there is no reason to believe that it was intended to have a meaning different from the meaning it had in the repealed Act. The repealed Act was based on the Copyright Act of 1956 of the United Kingdom which had a similar originality requirement. For this reason 'original' in the repealed Act was probably intended to have the meaning it had been held to have in the United Kingdom. There, creativity is not required to make a work original. Save where specifically provided otherwise, a work is considered to be original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour.7 In Canada 'original' has likewise been interpreted so as not to require creativity. In* CCH Canadian Ltd v Law Society of Upper Canada*8 it was held:*
'[A]n original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original".'

TRUTER v DEYSEL

A JUDGMENT BY VAN HEERDEN JA
(HARMS JA, ZULMAN JA, NAVSA JA and MTHIYANE JA concurring)
SUPREME COURT OF APPEAL
17 MARCH 2006

2006 (4) SA 168 (A)

Prescription



An opinion that a particular action is negligent is not a fact and is therefore not relevant to the determination of when a cause of action for the recovery of a debt arises.

THE FACTS

Between July and September 1993, Deysel had five operations on his eye by Truter and another doctor. The foreseeable and actual consequences of these operations was decompensation of the cornea which resulted in a corneal graft operation in December 1996. This resulted in complications which led to the loss of Deysel's eye in April 1997.

Shortly after the operations were performed, Deysel complained to the Medical and Dental Council concerning the treatment he had received. However, that council's judgment was that the complaint was ill-founded.

Deysel sought medical opinion on the conduct of the doctors who performed the initial operations in order to determine whether or not what they had done was negligent. None of the experts concluded that they had been negligent.

In late 1999, Deysel's attorney contacted a doctor referred to her by Deysel. This doctor was of the opinion that the six operations conducted on Deysel's eye had taken place too quickly one after another, and that this constituted negligence on their part. On the basis of this report, Deysel issued summons against Truter and the other doctor.

Truter defended the action and raised a special plea that Deysel's claim had prescribed three years after the operations took place.

THE DECISION

Section 12 of the Prescription Act provides that prescription begins to run from the time when the debt is due. A debt will not be deemed to be due until the creditor has knowledge of the facts from which the debt arises.

Deysel contended that in the context of his claim, knowledge of the facts entailed knowledge of facts showing that the treatment he had experienced was negligent. This meant that he had first to have received the opinion that such treatment was negligent.

This contention could not be upheld. A debt is due when the creditor acquires a complete cause of action for the recovery of his debt. This is when everything has happened which would entitle the creditor to institute action and pursue his claim. Fault does not constitute a factual ingredient of the claim since this is a legal conclusion drawn from the facts of the claim.

In the present case, Deysel had know of all the facts entitling him to institute action as soon as the operations had taken place. His own allegations following the operations were to the effect that the doctors had acted negligently. This meant that the debt became due from that point. The opinion received from the doctor to the effect that the doctors performing the operations had been negligent was not a fact but an opinion, and was therefore not relevant to the determination of when the debt became due.

Deysel's claim had prescribed. The special plea was upheld.

SOCIETY OF LLOYD'S v PRICE

A JUDGMENT BY VAN HEERDEN JA (HOWIE P, SCOTT JA, ZULMAN JA AND CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2006

2006 CLR 335 (A)

An action brought to enforce a claim arising from a contract to which foreign law applies will not be considered to have prescribed under South African legislation where the foreign law does not apply to matters of procedure and prescription of the debt is considered by that law to be a matter of procedure.

THE FACTS

In October 1997, an English court gave judgment by default in favour of the Society of Lloyds against Price for payment of £71 511,11. Price was a member of the Society and had agreed that the laws of England would apply to the rights and obligations arising from his membership and the courts of England would have exclusive jurisdiction to settle any dispute relating to his membership and/or underwriting of insurance business at Lloyds.

Lloyds' claim arose from a special settlement plan introduced by it to deal with unexpectedly large claims arising out of asbestos litigation in the United States. Lloyds depended on its statutory powers to make by-laws to impose an obligation on members to become parties to a contract concluded with Equitas Group. The contract obliged members to pay premiums to Equitas which reinsured the non-life liabilities of members.

In June 2003, Lloyds brought an action for provisional sentence against Price in a South African court. Price opposed the action, contending that the debt constituted by the foreign judgment against him had prescribed. Price depended on the provisions of the Prescription Act (no 68 of 1969) under which an ordinary debt expires after the lapse of three years. Lloyds contended that the English Limitation Act, 1980, applied. Under this Act, an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

THE DECISION

The contract on which Lloyds depended expressly provided that the law applicable to it was the law of England. However, this was the law applicable in matters of substance, not in matters of procedure. In English law, limitation of actions is regarded as a matter of procedure, whereas in South African law, it is regarded as a matter of substance. The question therefore was which law was to be applied in the limitation of the action.

There was clearly a conflict between the two alternative applicable laws. In these circumstances, a court should follow a via media approach in determining the applicability of the competing legal systems. Considerations of international uniformity of decisions indicate that claims which are enforceable in terms of the law of the country under which the claim arose should as a general rule also be enforceable in South Africa. The issue of prescription was properly dealt with in terms of the lex causae, ie English law. This meant that because the provisional sentence summonses were served on the defendants less than six years after the default judgments were obtained against them in the English court, the claims on the judgments had not become prescribed.

The defendants also contended that the English court lacked international jurisdiction in the matter. However, they had agreed that the courts of England would have exclusive jurisdiction to settle disputes with them. In terms of the law of England, which was applicable to the matter, such jurisdiction therefore existed.

As far as public policy considerations were concerned, the settlement plan was clearly formulated to deal with a practical situation which had arisen, ie the unexpected asbestos litigation. Having scrutinised the plan, the English courts had determined that it did not offend public

policy. It could not be said that recognition by a South African court of an English judgment obtained against a name on the basis of the scheme would be so repugnant to the values of our law that that law should be excluded.

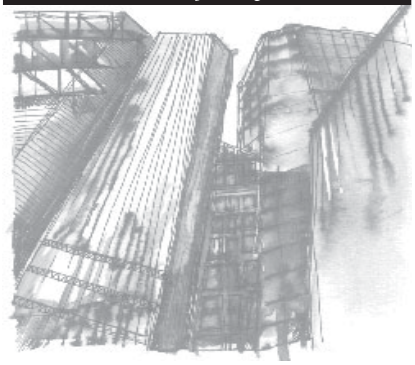
As was conceded by counsel for the defendant, the mere fact that the enforcement of a foreign judgment by a South African court would involve the recognition of a foreign institution or rule unknown to our legal system does not per se constitute a reason for refusing to enforce such judgment . The R & R scheme, however extraordinary it might appear from a South African perspective, was a solution devised to resolve an extraordinary insurance industry-related situation. It is clear from the judgments of the English courts that R & R was devised and implemented to deal with a market in a state of crisis and that one of the primary aims was to protect the names themselves from the risk of massive claims to which they would otherwise be totally exposed . All of the steps taken by Lloyd's to implement this scheme have been thoroughly scrutinised by the English courts and have been found to be legitimate. In my view, it certainly cannot be said that the recognition by a South African court of an English judgment obtained against a name on the basis of this scheme 'would be so repugnant to the values of our law that the lex causae will be excluded on grounds of public policy'

AVIS FORKLIFT CENTRE (PTY) LTD v STAND 56 KAYA PROPERTIES CC

A JUDGMENT BY MALAN J
(MAKHANYA J concurring)
WITWATERSRAND LOCAL DIVISION
11 AUGUST 2005

2006 CLR 295 (W)

Property



The landlord's hypothec over movables situated at the leased premises does not extend to those movables not given to the tenant under some binding arrangement between tenant and owner of the movables.

THE FACTS

Africa Enterprises was a tenant at the premises of Stand 56 Kaya Properties CC. It fell into arrears with its rent and judgments were granted against it. Stand 56 attached certain goods at the premises including a forklift vehicle belonging to Avis Forklift Centre (Pty) Ltd. Avis brought interpleader proceedings to secure the release of the forklift from attachment.

The forklift had been leased to an entity known as Golden Rib. Initially, Golden Rib occupied a separate section of the premises, but later entered into an informal sharing arrangement with Africa Enterprises for use of the premises. The forklift displayed a blue sticker bearing the name of Avis.

The interpleader proceedings brought by Avis failed in the magistrates' court. Avis appealed.

THE DECISION

Avis rented the forklift not having the intention that it would remain on the premises indefinitely. Golden Rib was not permitted to give up possession of the forklift to any other party. However, the important aspect was that between Avis and Africa Enterprises, there was no binding connection. For the landlord's hypothec to come into existence, the goods in question must have been given to the tenant for his or her use as intended by the owner. Avis did not intend to the forklift to be used by Africa Enterprises.

It could not be said that Avis tacitly consented to the forklift being subject to the hypothec. No estoppel arose as a result of any negligence or representation as to ownership. There was therefore no basis upon which Stand 56 was entitled to attach the forklift.

The appeal succeeded.

Golden Rib was not entitled to give up possession of the forklift to any other party (clause 24.3) and it could only be used by qualified personnel of Golden Rib (clause 9.5) and it could not cede, assign or delegate any of its rights or obligations part with possession of the forklift without the appellant's written consent (clause 9.14 and 9.15).
I need, however, not base my decision on this aspect since the appellant has conceded that the forklift was attached on the premises (see par 7 of the heads of argument). There was no vinculum iuris *between the appellant and Africa Enterprises: the forklift was rented to Golden Rib for its exclusive use (Record 90) and even if others may have used it there is no question of a blank consent having been given (Record 101 line 10). For the hypothec to come into existence the goods must have been given to the* tenant for his or her use *as intended by their owner (*Van den Bergh Melamed and Nathan v Polliack & Co *1940 TPD 237 at 239-40; 241-2). The appellant certainly did not intend the forklift to be used by anyone other than Golden Rib.*

BARLOWORLD CAPITAL (PTY) LTD v NAPIER N.O.

A JUDGMENT BY HOWIE P (ZULMAN JA, CAMERON JA, NAVSA JA and JAFTA JA concurring)
SUPREME COURT OF APPEAL
30 MARCH 2006

2006 (5) SA 384 (A)

Insurance

A seller's request to an insurer to note its interest in an item sold is insufficient to create an obligation by the insurer to pay the seller in the event of a claim, and not the insured.

THE FACTS

Barloworld Capital (Pty) Ltd sold a mechanical excavator, the price payable by instalments. A term of the sale was that the buyer would insure the excavator for as long as the price remained unpaid. The buyer insured the excavator and Barloworld asked the insurer's representative to note its interest in the policy.

While the insurance policy was in force, the excavator was damaged. At that time, Barloworld was still owed R839 925.

The insurer accepted liability for a claim then made under the insurance policy and entered into negotiations for settlement of the amount to be paid out to the insured. Barloworld asserted its interest in the settlement. The insured's attorney asserted that any payout had to be made to the insured and not Barloworld. Acting on its own advice, the insurer paid the insured directly.

Barloworld then brought an action against the insurer for payment of the amount it was owed. It contended that an agreement that the insurer would pay it in that manner was concluded when the insurer noted its interest in the excavator, alternatively that there was a trade usage that an insurer will pay a party whose interest is so noted.

THE DECISION

Barloworld had requested the insurer's representative to note its interest in the excavator, but there was insufficient evidence to show that it had in fact done so. Its agent had taken note of the request but it could not be inferred that noting had taken place on the policy itself. The request to note its interest was made after the insured's claim had arisen and after his attorney had made demands that the insured be paid directly and not Barloworld.

As far as the allegation of trade usage was concerned, while it could be accepted that the noting of a seller's interest in an insured item was sufficient to create an obligation by an insurer to first pay any claim to the seller, the question remained whether the insurer was equally obliged to pay such a claim when the interest had not been noted and in the face of express opposition by the insured.

Barloworld had not established that a trade usage existed to the effect that a seller was to be paid in the event of a claim, even if the insured objected to the payment. The most that had been established was that the insurer's obligation to pay was discharged upon payment to the seller so long as the tripartite agreement between the three relevant parties subsisted.

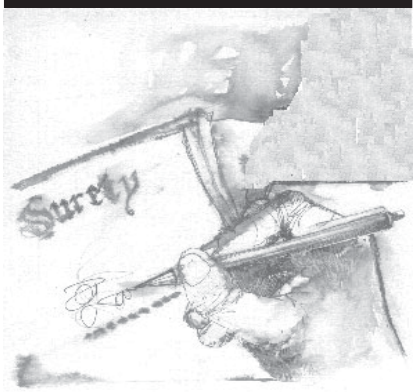
The action failed.

BOE BANK LTD v BASSAGE

A JUDGMENT BY ZULMAN JA (MPATI DP , SCOTT JA, NAVSA JA and CLOETE JA concurring) SUPREME COURT OF APPEAL 31 MARCH 2006

2006 (5) SA 33 (A)

Suretyship



A creditor which proves a claim in an insolvent estate according to the procedures provided for in section 89(2) of the Insolvency Act (no 24 of 1936) does not waive its right to proceed against a surety for payment of any shortfall in the amount received from the insolvent estate.

THE FACTS

Bassage signed an agreement of suretyship in respect of the debts of Zandills Shoe Manufacturers Ltd. The suretyship was in favour of the predecessor of BOE Bank Ltd. Shoe Manufacturers was placed in liquidation and wound up.

BOE Bank proved a claim in the insolvent estate of the company. In doing so, it filed an affidavit in which it affirmed that it relied solely on its security, a mortgage bond, in satisfaction of its claim. The mortgaged property was valued at R800 000.

The liquidators, empowered by a resolution passed at the second meeting of creditors, agreed with BOE Bank that the property would be abandoned to it for a consideration of R800 000 including VAT. Thereafter, the bank proved a claim in the insolvent estate in the sum of R1 972 721,06, submitting the affidavit affirming its reliance on its security in support of its claim.

The bank then brought an action against Bassage for the shortfall on its claim. Bassage defended the action on the grounds that by affirming in its affidavit it depended solely on its security, it had abandoned its claim for any amount higher than that realised from the mortgaged property, and had also rendered his right of recourse against Shoe Manufacturers ineffective.

THE DECISION

Section 89(2) of the Insolvency Act provides that if a secured creditor states in his affidavit submitted in support of his claim against the estate that he relies for the satisfaction of his claim solely on the proceeds of the property which constitutes his security, he shall not be liable for any costs of sequestration other than certain specified costs. It does not state that the effect of a creditor who elects to rely on its security in proof of its claim results in the claim being extinguished entirely. The section cannot be interpreted to mean that a creditor, by electing to rely solely on its security, abandons or waives the balance of the claim and is thereby precluded from proceeding against a surety for the balance.

The effect of proving a claim following the procedures provided for in section 89(2) is to limit the creditor's claim in respect of the free residue of the insolvent estate. This however, does not amount to abandonment of the balance of a creditor's claim for any other purpose. Furthermore, the bank exhibited no intention of waiving the debt.

As far as the denial of a right of recourse was concerned, the effect of proving its claim in the way the bank had did not prevent Bassage from proving a claim of his own against the insolvent estate, after meeting the claim brought against him by the bank.

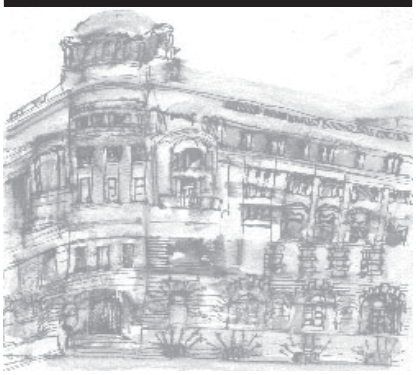
The action succeeded.

FIRST NATIONAL BANK OF SOUTHERN AFRICA LTD v DUVENHAGE

A JUDGMENT BY NUGENT JA (HARMS JA, CAMERON JA, NAVSA JA and BRAND JA concurring)
SUPREME COURT OF APPEAL
30 MARCH 2006

2006 (5) SA 319 (A)

Banking



A claim for damages needs to show that the alleged breach by the defendant caused the loss suffered by the plaintiff. A creditor alleged not to have given a promised loan must be shown to have failed to advance a loan already agreed to and not a loan stated by the creditor's representative to be obtainable in the future.

THE FACTS

Duvenhage and her husband hired a farm. Two permits had been issued in terms of section 7(2) of the Forest Act (no 122 of 1984) for the afforestation of 288 hectares of the farm. Duvenhage obtained some financial assistance from Sappi to establish plantations on the farm and began to prepare the land for planting of the seedlings for the intended plantations.

The permits issued in respect of the farm were due to expire in 1997. In November 1996, Duvenhage received an offer to sell the farm. She required a loan to pay for the farm, as well as finance the establishment of the plantation, and accordingly approached the manager of the Greytown branch of First National Bank of Southern Africa Ltd for a loan.

The manager stated that a loan application would be submitted as a matter of formality and that a loan would be advanced. Duvenhage continued with preparation of the land for planting the seedlings. By the time the end of the planting season came in February 1998, the loan from the bank had not materialised, despite ongoing enquiries from Duvenhage to the bank manager. The loan never did materialise.

The bank sued for repayment of money lent to Duvenhage on overdraft. Duvenhage counterclaimed for damages arising from the unpaid loan.

THE DECISION

When the plantation venture was abandoned in January 1998, Duvenhage lost the opportunity to make profits from the venture and to recover the expenditure she had incurred. However, this was not because the bank manager failed to submit the application for a loan, nor because he assured Duvenhage that a loan would be advanced. It was because a loan was not secured.

There was no evidence that Duvenhage would have secured a loan, had the application been submitted, nor that she would have secured a loan from an alternative party. Without a loan, the project would have failed, irrespective of the bank manager's conduct. The fact that Duvenhage had allegedly incurred expenditure in a project that would fail did not assist in showing that the failure of the loan was a cause of her loss.

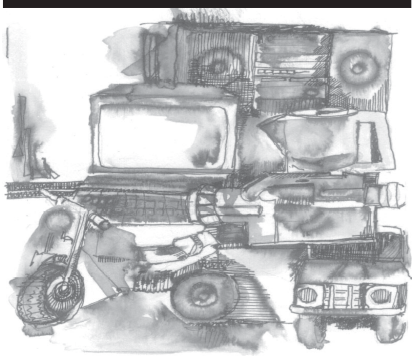
Duvenhage had failed to show that the cause of her loss was the fact that the loan had not been advanced by the bank. The bank was therefore not liable to her for damages.

GEYSER v NEDBANK LTD

JUDGMENT BY VAN OOSTEN J
WITWATERSRAND LOCAL DIVISION
22 MAY 2006

2006 (5) SA 355 (W)

Credit Transactions



A court has jurisdiction in an action for enforcement of a loan when the property taken as security for the loan is situated within the area of the court's jurisdiction.

THE FACTS

Nedbank Ltd lent money to Geyser. Geyser lived and worked in Pretoria and all the obligations of the parties were to be performed in that area. The money was advanced to Geyser in Pretoria and he made repayments to Nedbank in Pretoria.

As security for the loan, Nedbank required Geyser pass a mortgage bond over his fixed property. It was situated in the Johannesburg area. Geyser signed a power of attorney authorising the passing of the bond over his property in the Pretoria area, and the bond was subsequently passed securing Geyser's indebtedness arising from any cause whatsoever.

The bank brought an action for repayment of its loan. Geyser received notice of the action and instructed his attorney to enter an appearance to defend. The attorney did so by means of a fax transmission but notice of this did not reach the court file. Judgment by default was granted against Geyser, the bank's attorney also not having received notice of the intention to defend due to her having been out of the office at the time.

The parties entered into a settlement agreement in which the bank agreed to a rescission of the judgment and a stay of further action for so long as Geyser made payments. Geyser however, defaulted and the bank proceeded to execute against the property.

Geyser then applied for an order that the judgment given against him be rescinded and that transfer of the property to the purchaser under the sale in execution be suspended. A rule nisi was issued calling on the bank to show cause why the judgment should not be rescinded and the sale in execution set aside.

THE DECISION

The prima facie expression of opinion by the judge hearing the application for the issue of the rule nisi, to the effect that the court lacked jurisdiction in the matter, was incorrect. The facts establishing the court's jurisdiction all related to the mortgaged property. The bank had required the property to be mortgaged as security for its loan, and whether or not it would have advanced the loan without such security was irrelevant to the fact that it was in fact connected to the loan, and established the jurisdictional factor giving rise to the jurisdiction of the court.

Given the fact that the court did have jurisdiction, because of the situation of the property within its area of jurisdiction, there was no reason to prefer another court against it, even though another court also had jurisdiction. Considerations of convenience, justice and good sense were, as far as the two Divisions were concerned, almost evenly balanced.

As far as the application for rescission was concerned, the explanation given for the failure to respond to the notice of intention to defend was inadequate. The judgment having been taken on behalf of the bank on the basis of this unacceptable explanation, the judgment should have been rescinded.

The application was granted.

INGLEDEW v THEODOSIOU

A JUDGMENT BY WILLIS J
WITWATERSRAND LOCAL DIVISION
15 JUNE 2006

2006 (5) SA 462 (W)

Contract

Competing successive sales of the same property will not result in upholding the sale earlier concluded in preference to the sale later concluded where it is clear that the earlier sale was not concluded bona fide nor at arm's length.

THE FACTS

In January 1996, Ingledew as purchaser and Theodosiou as seller signed an agreement of sale of erf 432, Clifton Township, Cape Town, the purchase price being R750 000.

Ingledew brought an action for specific performance of the agreement, claiming transfer of the property into his name by Theodosiou, alternatively by the sheriff duly authorised to do so.

One of the defences raised to the claim was that an earlier agreement of sale had been concluded in which the second defendant, Wilson, had purchased the property from Theodosiou.. This had taken place the previous year. In that year, the property had been attached by Absa Bank Ltd in execution proceedings it had brought against one of Theodosiou's companies. Prior to its sale in execution, the bank and Theodosiou agreed that the property would be sold by private treaty rather than in execution and that should the bank find a buyer for the property, Theodosiou would be given a 48-hour opportunity to better the offer. The buyer found by the bank was Ingledew. In compliance with the right to better the offer, the sale agreement signed by Ingeldew was presented to Theodosiou. He was unable to better the offer.

The agreement of sale concluded between Theodosiou and Wilson was valid as between them, but it was not a bona fide, arm's-length agreement. Theodosiou however, contended that because the agreement was concluded prior to that concluded with Ingledew, the maxim 'qui prior est tempore potior est jure' applied. This meant that because these agreements were successive sales of the same property, the rights of the first purchaser superseded those of the second purchaser, and that Ingledew was therefore not entitled to transfer of the property in preference to Wilson.

THE DECISION

The reason for the qui prior rule was to uphold the sanctity of contracts and discourage sellers from engaging in activities that undermine this principle. The obverse of the principle was however, also applicable: in order to uphold the sanctity of contracts, the contract concluded between Ingledew and Theodosiou should be upheld. The 'contract' entered into between Wilson and Theodosiou should not be upheld. While it was not an invalid contract per se, it represented an attempt to undermine the sanctity of contracts.

The qui prior rule was also not an absolute rule of law, but a maxim established to provide a solution when two sales in respect of the same property have been concluded. It could not be elevated to a rule of law and it did not constitute an absolute bar to upholding a contract concluded later than that posited as the preferent one.

In the circumstances of the second contract not having been concluded bona fide nor at arm's length, the Ingledew contract should be upheld. The action succeeded.

MEC FOR ROADS AND PUBLIC WORKS, EASTERN CAPE, AND ANOTHER v INTERTRADE TWO (PTY) LTD

Contract

A JUDGMENT BY MAYA AJA (HOWIE P, FARLAM JA, VAN HEERDEN JA and HEHER JA concurring)
SUPREME COURT OF APPEAL
27 MARCH 2006

2006 (5) SA 1 (A)

A public body must disclose documentation relating to a public tender.

THE FACTS

In March 1997, the MEC for Roads and Public Works, Eastern Cape, awarded a tender to Intertrade Two (Pty) Ltd for a two-year contract for the maintenance and repair of plant and equipment at various provincial hospitals in the Eastern Cape. The contract was subsequently renewed.

In 2003, the department of Roads and Public Works invited tenders for further contracts. Intertrade submitted tenders, but one of them was not successful. Intertrade enquired with the department regarding its failure and requested that the tender documents and other documents relating to the successful tender be given to it.

The department gave Intertrade some of the information requested. Intertrade took the view that insufficient information had been given. It brought an application for review of the decision to award the tender to the other party. In doing so, it called for documents relating to the tender.

The department gave Intertrade documents which it contended were those it was obliged to give in terms of Rule 53 of the Rules of Court, but withheld certain other documentation which it said it was not obliged to give in terms of that Rule. These included minutes of certain departmental meetings at which tenders were considered and evaluated, correspondence, inter-office memoranda and extracts of the tender documents of the successful tenderers.

Intertrade contended that it was entitled to the omitted documentation.

THE DECISION

Section 32 of the Constitution gives a general and unqualified right of access to any information held by the state and its organs. The Promotion of Access to Information Act (no 2 of 2000) is the legislation which gives effect to that right.

Section 7(1) of that Act provides that its provisions do not apply to a record of a public body if that record is requested for the purpose of criminal or civil proceedings after the commencement of such proceedings. The MEC could however not depend on this section because the documents were requested before the commencement of proceedings.

The documentation requested should therefore have been given to Intertrade.

BE BOP A LULA MANUFACTURING & PRINTING CC v KINGTEX MARKETING (PTY) LTD

A JUDGMENT BY VAN ZYL J (NDITA J AND WAGLAY J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
25 AUGUST 2006

2006 CLR 365 (C)

A compromise does not take place unless the debtor clearly intends to propose the compromise and the creditor clearly intends to accept it. Such a compromise may take place when the debtor tenders a cheque in full and final settlement, provided the conditions of mutual intention in regard to a compromise are fulfilled.

THE FACTS

Kingtex Marketing (Pty) Ltd supplied certain T-shirts to Be Bop A Lula Manufacturing & Printing CC, the total price payable being R229 846,07. After delivery, Be Bop alleged that a large proportion of the T-shirts were defective and that it did not consider itself obliged to pay the total price. It despatched a cheque to Kingtex for R107 196,89.

The words 'Full and Final Settlement of Account' were added to the face of the cheque. The cheque was then despatched to Kingtex under cover of two letters. The first stated that it was a 'credit request' in the sum of R122 649,18 arising from the fact that the various defects in the T-shirts had meant they could only be on-sold at a lower price and had had to be examined and repaired. The second letter stated that it was a 'final reconciliation' and a calculation was done showing how the sum of R107 196,89 was arrived at.

Kingtex's attorneys then addressed Be Bop. They stated that Kingtex did not accept Be Bop's position and that if Be Bop did not accept Kingtex's claim that the full amount was due and payable, the cheque it had sent should be countermanded. Should Be Bop do so, Kingtex would then proceed with action for payment of the full amount outstanding. Should no countermand be issued, the cheque would be paid into the attorneys' trust account pending the outcome of the dispute regarding the balance owing.

The cheque was in fact deposited to Kingtex's account on due date. When Be Bop received the letter from Kingtex's attorneys, it was too late to countermand the cheque. If it had not been too late, Be Bop would have done so.

Kingtex brought an action for payment of the balance owing. Be Bop defended the action on the grounds that the full amount was not payable as the T-shirts were defective, alternatively that the parties had concluded a compromise. The latter defence was that upon which Be Bop ultimately depended.

THE DECISION

The concept of compromise is part of our law, having been received from Roman law as a form of novation. In determining whether a compromise has taken place, the ordinary principles relating to the determination of contractual consensus apply.

This position has been complicated by the fact that an inconsistency has developed whereby the situation where a debtor which delivers a cheque to its creditor 'in full settlement' and the cheque taken as payment, has been considered a compromise, notwithstanding the fact that the creditor may not accept that in cashing the cheque it is accepting a compromise.

In order to achieve consistency, a distinction should be drawn between a debtor's tender in the procedural sense and tender as a contractual compromise. Where the former situation does not apply, a contractual offer of compromise is usually intended. In determining whether or not an offer of compromise was intended, the true intention of the parties must be determined, and it must be shown that the parties achieved consensus and unequivocally intended to settle their disputes. If a tender is made with conditions, such as that the tender is made in full and final settlement, it must be determined whether or not the creditor accepted those conditions.

In applying these principles to the present situation, it was significant that no mention was

made of a compromise or settlement of dispute between the parties. From this it appeared that the intention of Be Bop was to inform Kingtex what it believed was the amount owing. The cheque was therefore tendered with a view to making payment of this amount and not with the purpose of making a contractual offer of compromise.

Even if the tender was considered to be an offer of compromise, it was not all clear that Kingtex accepted that offer. Much of the evidence showed a contrary intention.

There having been no compromise, Kingtex was entitled to payment in full.

Even if the tender of the cheque should be regarded as an offer of compromise, the appellant faces insurmountable difficulties on the issue as to whether or not the offer was accepted. It is true that the respondent deposited the cheque and later arranged for it to be transferred to its attorney's trust account. On the other hand, when it received the cheque and the accompanying letters, it responded, in the letter dated 1 March 2002 (par [10] above), by expressly and unequivocally rejecting the cheque as payment in full and final settlement of the appellant's indebtedness. It confirmed this rejection by inviting the appellant to arrange that payment on the cheque be stopped. This is simply not compatible with acceptance of any offer of compromise.

[46] That the appellant did not regard the payment of the cheque as an offer of compromise is supported by the fact that, when it was requested by the respondent to stop the cheque, it attempted to accede to this request. As appears from Mr Webster's testimony (par [14] above), had it succeeded in stopping the cheque, it would clearly not have placed any further reliance on the payment thereof as being in full and final settlement of its indebtedness to the respondent. It was only on being informed that the payment could not be stopped that it made the allegation, in its letter of 4 March 2002 (par [11] above), that the respondent had, by depositing the cheque, 'accepted the condition of it being in full and final settlement'.

CME AUTOMOTIVE (PTY) LTD v ARVIN MERITOR A&ET SA (PTY) LTD

A JUDGMENT BY VAN ZYL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
8 SEPTEMBER 2006

2006 CLR 386 (C)

A party alleging that it has a prima facie right to an interdict based on a tacit term of an agreement must demonstrate facts and circumstances indicating such a term existed.

THE FACTS

CME Automotive (Pty) Ltd supplied certain motor vehicle components to Arvin Meritor A&ET SA (Pty) Ltd. It had done so since December 1995 after Arvin accepted quotations given to it by CME from time to time. These quotations specified annual quantities and maximum daily volumes, but did not specify the future period during which CME would be required to continue to supply the components.

CME alleged that it was a tacit term of the supply agreement that the components would be supplied for the life of the model of the motor vehicle for which components were being supplied.

In March 2006, Arvin terminated the supply agreement and called upon CME to return certain equipment belonging to it. It alleged that CME had been unable to fulfil certain orders and that its prices were not competitive in the market.

CME brought an application for an interdict to compel Arvin to continue performing all of its obligations in terms of the agreements.

THE DECISION

Applying the rules for establishing the right to an interdict, and the proper basis for proving an tacit term, to the facts of the matter, it was clear that CME had failed to show that it had a prima facie case for the relief it sought. There was no indication of the existence of the tacit term relied on by CME.

Although CME might have been the sole supplier of components to Arvin at some point, and this demonstrated that the parties had a partnership-type relationship, this could justify no more than a hope or expectation that CME would continue to be Arvin's supplier and their relationship would continue into an indeterminate future. The facts and circumstances did not justify the existence of a right to continue to be the sole supplier for the life of a model of the motor vehicle in question.

The application was dismissed.

It may well be that, at a certain stage of their business relationship the applicant was in fact the sole supplier of components to the respondent. This might have given rise to what the applicant described as something akin to a partnership relationship. At most, however, this situation could justify only a hope or expectation that the applicant would continue to be the respondent's sole supplier and that their relationship would continue for an indeterminate period in the future. Neither the facts nor the surrounding circumstances could have justified the existence of a right to be, or to continue as, sole supplier for the duration of the "life" of the vehicles in which the components in question were used. I have no doubt whatever that, if this is what the parties had intended, they would certainly have stated it expressly and in no uncertain terms.

LIFEGUARDS AFRICA (PTY) LTD v RAUBENHEIMER

A JUDGMENT BY
TSHABALALA JP
DURBAN AND COAST LOCAL DIVISION
20 JANUARY 2006

2006 (5) SA 364 (D)

An oral agreement will be understood to constitute some of the terms of agreement between two parties when it appears that the performance given by one party suggests this is done as quid pro quo for an undertaking given by the other party.

THE FACTS

Raubenheimer was employed by Lifeguards Africa (Pty) Ltd as its national operations manager from December 1997 to December 2001. In 2001, there was a deterioration in the relationship between Raubenheimer and the chief executive officer of Lifeguards. This led to action in the Labour Court, and a request by Raubenheimer that Lifeguards look into his retrenchment from the company.

In discussions which followed, Raubenheimer indicated that following any termination of his employment he would be going into the clothing industry. Minutes of a meeting held in November 2001 recorded that Raubenheimer stated he would not enter into competition with Lifeguards and wanted to enter some other venture, indicated to be 'clothing retail manufacture'.

The parties agreed that Raubenheimer would be given a cash payment upon termination of his employment.

In February 2002, Raubenheimer re-entered the lifesaving industry through a close corporation which he helped to form. He became a consultant for the corporation. The corporation was later successful in securing two contracts for services which were offered by Lifeguards.

Lifeguards contended that the cash payment given to Raubenheimer was a payment in consideration of a restraint of trade undertaking, that Raubenheimer had breached the undertaking and that accordingly it was entitled to repayment of the money. It claimed repayment from Raubenheimer.

THE DECISION

The question was whether Raubenheimer's statement that he would not be going into competition with Lifeguards resulted in a term of a contract of restraint of trade.

The amount paid to Raubenheimer exceeded the severance amount which would have been required of Lifeguards under labour legislation. The probabilities were overwhelming that the parties contracted on the basis that Lifeguards would pay Raubenheimer this cash amount, in return for which Raubenheimer would not compete with it. The restraint of trade condition was of crucial importance to Lifeguards and must have been part of the intended term of the termination agreement.

Raubenheimer argued that because no indication of the extent of the restraint, either as to duration or geographical reach, had been specified, the restraint could not in any event be enforced. However, the amount of the cash payment indicated that the parties had in mind the reasonableness of the restraint and it was permissible to infer that contracts concluded within the immediate vicinity of Lifeguards were covered by it. In this regard, the onus of proof in showing that the restraint was not reasonable rested on Raubenheimer.

The oral agreement concluded between the parties therefore constituted a term of the termination agreement. It was reasonable that the restraint should be enforced to the extent of preventing Raubenheimer from carrying on the business of the supply of professional lifeguards to customers of Lifeguards.

YUNNAN ENGINEERING CC v CHATER

A JUDGMENT BY MAVUNDLA J
TRANSVAAL PROVINCIAL DIVISION
2 AUGUST 2006

2006 (5) SA 571 (T)

An appeal against an arbitration award which is not noted timeously lapses if such lapsing is provided for in the rules governing the arbitration proceedings, and the arbitration award is then final and binding between the parties.

THE FACTS

Yunnan Engineering CC and Chater were parties to arbitration proceedings which ended in an award being made in favour of Yunnan. The parties to the proceedings had agreed that the arbitration would be governed by the Arbitration Act and guided by the rules of the Arbitration Foundation of South Africa.

The award declared that certain shares had been transferred to Yunnan and Chater Developments (Pty) Ltd who had become the beneficial owners of the shares, and remained so until the liquidation of Chater Developments. Chater was a party to the arbitration but the second and third respondents, as also the second applicant, were not.

Chater and the other respondents noted an appeal against the arbitration award. The third respondent's notice of appeal was out of time, under the Rules of the Arbitration Foundation. The Rules provided that if an appeal was noted out of time, the award given would not be appealable.

Yunnan contended that the appeal had lapsed and the arbitration award was accordingly enforceable.

THE DECISION

There had been no strict adherence to the Rules, but the parties had agreed to be guided by them. This meant that while non-observance of any of the Rules was not necessarily fatal to that party's case, a party could not deviate too far from them. A party who had deviated from the guide must show that the deviation was not unreasonable and not deliberate, and that he has a good prospect of success. He must also show that the other party will suffer no prejudice were the indulgence to be granted.

In the present case, the respondents had given no reasons why they had not complied with the Rules. Although this was a matter which would be determined by the appeal tribunal, were it to adjudicate the matter, the absence of any reasons at this stage warranted the conclusion that the appeal tribunal would find against the respondents in that regard.

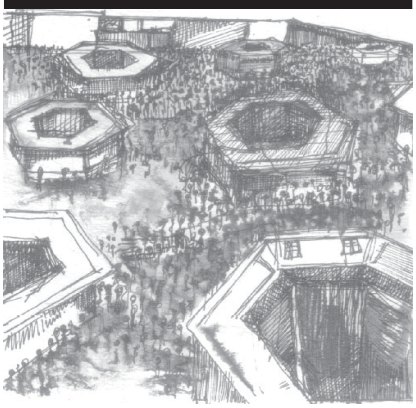
The appeal had therefore lapsed. The arbitration award was enforceable.

INSAMCOR (PTY) LTD v DORBYL LIGHT AND GENERAL ENGINEERING (PTY) LTD

A JUDGMENT BY BLIEDEN J
WITWATERSRAND LOCAL DIVISION
24 APRIL 2006

2006 (5) SA 306 (W)

Companies



An application for the restoration of a company to the register of companies after it has been deregistered, must be brought on notice to parties affected by the restoration. It must also fully disclose those facts which are relevant to the granting of such an order.

THE FACTS

In 1985, an agreement was concluded between Insamcor (Pty) Ltd, Saunders Valve Co Ltd and Dorbyl Light and General Engineering (Pty) Ltd's predecessor. In terms of this agreement, Dorbyl granted to Insamcor the right to use certain know-how to manufacture, assemble and sell certain products in South Africa. Dorbyl was obliged to provide technical know-how and assistance to Insamcor and Insamcor was obliged to pay royalties to Dorbyl and observe certain restraint of trade conditions. Clause 28.2 of the agreement provided that if either party became insolvent or was dissolved for any reason, then the other party would be entitled to terminate the agreement forthwith.

In 1989, Dorbyl became a division of its parent company, and from that time was no longer able to comply with its obligations under the agreement. Due to an oversight, the rights and obligations of the 1985 agreement were not transferred to the parent company but remained vested with Dorbyl. However, the parent company then carried on the business formerly carried on by Dorbyl as if it was the holder of the rights and obligations of the agreement.

In 1996, Dorbyl was deregistered as a company. In 2001, the parent company sold the business previously conducted by Dorbyl, including the agreement which was listed as an asset of the business, to Dynamic Fluid Control (Pty) Ltd.

In 2004, without the knowledge of Insamcor, Dorbyl was restored to the register of companies, following the bringing of an application for its restoration to the register. It then brought an action against Insamcor for payment of royalties for the period October 2001 to June 2004, and enforcement of the restraint of trade conditions.

Insamcor then applied for an order setting aside the restoration of Dorbyl to the register of companies.

THE DECISION

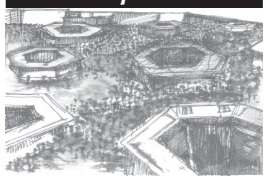
Insamcor should have been notified of the application to restore Dorbyl to the register of companies. Its rights were affected by the restoration, and obligations which had not existed before the restoration were deemed to have been recreated by the restoration order. These obligations were of a serious nature and imposition of them could have meant that Insamcor would be prevented from trading for the period of the restraint, and would be liable for royalties for a period during which Dorbyl had not been in existence. Insamcor also had the constitutional right to the protection of law and just administrative action.

When the application for restoration was made, insufficient facts were placed before the court to justify the granting of the order. Furthermore, facts which were relevant to the application were not placed before the court. These included the fact that the business had been sold to Dynamic Fluid Control, the fact that it had been conducting its business and performing its obligations thereunder. The 1985 agreement was not referred to. These deficiencies were grounds for the setting aside of the restoration order granted.

The restoration order also referred to an agreement not referred to in the founding papers. There was therefore no justification for the order and the order was erroneously made.

The application setting aside the

SINDLER N.O. v GEES



A JUDGMENT BY CLEAVER J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
13 MARCH 2006

2006 (5) SA 501 (C)

A provision in the Articles of Association of a company that shares are to be transferred subject to a restriction should be interpreted restrictively. An offer to sell a number of shares at a stated price should be interpreted as an offer to sell all of the shares at that price and not an offer to sell any of the shares at a price per share.

THE FACTS

Osler and Gees were the two directors of Mouille Point Investments (Pty) Ltd. The shares in the company were owned as to 50% by the Mako Trust and 50% by the Maria Trust, each trust being represented by one of the directors.

A deadlock arose between Osler and Gees in the management of the company. Osler found a buyer for all 150 of the shares held by Mako Trust. In terms of the Articles of Association of the company, if a shareholder wished to sell any or all of his shares he was to give notice of his intention to sell to the directors of the company, and state the price required for the shares. The directors were to notify other shareholders thereof and each such member was entitled to acquire the shares so offered within a month of receipt of the advice of sale. If none of the members wish to purchase the shares or part of them, the seller could sell the shares to any other person.

In terms of the Articles, Maria Trust was offered the shares for purchase. Maria Trust responded by indicating that it would purchase three of the shares.

Mako Trust contended that Maria Trust was not entitled to purchase only three of the shares. It applied for an order that the share sale agreement it had entered into was not subject to the suspensive condition that Mako was entitled to the pre-emptive right to purchase them and directing Gees and the other respondents to take the necessary steps to implement the provisions of the deed of sale.

THE DECISION

Shares in a company are freely transferable, subject to any conditions provided for in the Articles of Association. Any provisions in the Articles restricting transfer are to be restrictively interpreted.

In the present case, the offer to sell the shares represented an offer in respect of all 150 shares, and the priced stated for the shares was in respect of all of them, not some of them. The offer was not an offer to sell the shares separately at a price per share. The Articles could not be interpreted so as to change the meaning and intention of the offer. Considerations of principle and logic indicated that the offer was to be construed in this manner. Were it to be otherwise, Mako Trust's position would be weakened by the loss of equal control of the company, the majority shares following sale and transfer being held by the Maria Trust, and the remaining shares then being worth less because of the loss of control.

The reference to the shares 'so offered' was somewhat ambiguous in that no distinction was made between offer and counter-offer. The best interpretation of the Articles was therefore to understand the offer in terms of the most appropriate meaning attributable to the offer actually made.

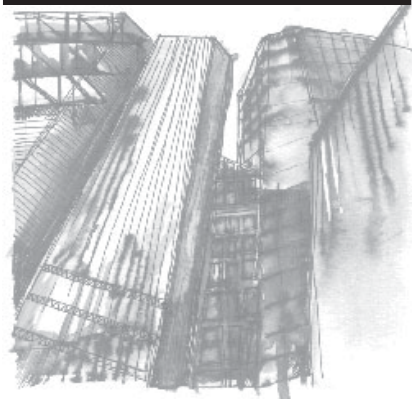
The application was granted.

PESIC v WETDAN W38 CC

A JUDGMENT BY LABE J
WITWATERSRAND LOCAL DIVISION
5 FEBRUARY 2005

2006 (5) SA 445 (W)

Property



The completion of subdivision of property does not require the issue of a certificate of registered title in respect of the subdivision, such a certificate merely constituting a statement of fact reflecting the position as recorded in the Deeds Registry.

THE FACTS

Wetdan W38 CC was the owner of erf 2328, Ext 12, Northcliff, Johannesburg. It sub-divided the property, built a house on the remainder and erected a perimeter wall around the remainder. It then sold the property to Eleanor Hamer.

The sale agreement incorrectly described the property sold to Hamer as the whole property and not the remainder. Consequently, the parties concluded an addendum agreement. As rectified, it recorded that Wetdan had applied for the subdivision of the property in accordance with a survey record examined an accepted by the Surveyor General, and that when this was finalised, Pesic and the second applicant would be entitled to transfer of portion 1 of the property to them and Hamer would retain the remainder of the property. It was provided that should the proposed subdivision not be successfully completed by 6 August 2003 Wetdan would retain portion 1.

The parties then agreed that Hamer would acquire the member's interest in Wetdan, and the transfer of portion 1 would then be given to Pesic and the second applicant, the two members of Wetdan, in their personal capacities.

By 6 August 2003, the consent of the local authority to the subdivision had been obtained and a diagramme reflecting the subdivision had been signed by the Surveyor General. However, the Registrar of Deeds had not yet issued a certificate of registered title in respect of the subdivided portion in terms of section 43 of the Deeds Registries Act (no 47 of 1937).

Pesic applied for an order compelling transfer of portion 1 of the property to himself and the second applicant. Wetdan resisted the application on the grounds that as the subdivision had not been successfully completed by 6 Augsut 2003, it was entitled to retain portion 1.

THE DECISION

In their agreement, the parties distinguished between obtaining subdivision of the property and effecting transfer of portion 1. Subdivision was to take place by 6 August 2003, but registration of transfer need not have taken place by that date.

The purpose of the subdivision was to put Wetdan in a position for it to give transfer. For this, it did not need a certificate of registered title in respect of the subdivided portion. The fact that Hamer had co-operated in attempts to obtain the certificate indicated that she considered it to be in her interest to acquire one, not that the acquisition of one was essential to transfer of the subdivided portion.

In terms of section 16 of the Deeds Registries Act, ownership of land is conveyed from one person to another only be means of a deed of transfer executed or attested by the Registrar. It follows that transfer of a subdivision would be practically effected by submitting the deed of transfer together with the new deed and diagramme to the Registrar of Deeds for registration. The general purpose of a certificate of registered title is not to assist in this process but to constitute merely a statement of fact extracted by the Registrar from existing titles.

Accordingly, subdivision had been completed by 6 August 2003 and transfer of portion 1 was to be given to Pesic and the second applicant.

THE CITY OF CAPE TOWN v HELDERBERG PARK DEVELOPMENT (PTY) LTD

A JUDGMENT BY HARMS JA (MTHIYANE JA. CONRADIE JA. NUGENT JA AND THERON AJA concurring)
SUPREME COURT OF APPEAL
31 AUGUST 2006

2006 CLR 393 (A)

The amount of compensation a property owner may receive following expropriation of its property is determined by an assessment of the market value of the expropriated property. A local authority's imposition of conditions which are unrelated to the expropriation should not be taken into account when determining the amount of compensation payable.

THE FACTS

The owner of erf 18835 applied for the consent of the municipality of Helderberg, Western Cape, to subdivide the property and rezone one of the three subdivisions from agricultural land to residential. The application was granted, subject to the condition that the owner was obliged to canalise a river running over the property and allow the conveyance of stormwater of any other erf across the property without compensation.

The new owner of that subdivision also purchased, in the name of a related company, Helderberg Park Development (Pty) Ltd, one of the other subdivisions and applied for its rezoning for mixed uses. In order to develop the first subdivision it had purchased, it undertook the canalisation required in the condition imposed by the local authority. This took place by way of the registration of a servitude on the second subdivision in favour of the local authority for the purposes of a stormwater canal and relief sewer line.

Following the registration of the servitude, the local authority expropriated the land to which the servitude related. The extent of the land expropriated was 6,5ha of the total 32,5ha purchased.

Helderberg contended that it was entitled to compensation as a result of the expropriation in terms of section 12(1)(a)(i) of the Expropriation Act (no 63 of 1975). This section provides that the amount of compensation to be paid in terms of the Act to the owner of property shall not exceed the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer.

Helderberg claimed R1 386 260,92. It contended that this represented the market value of the expropriated portion.

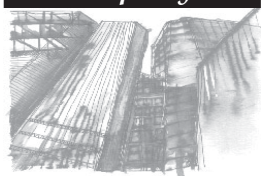
THE DECISION

Section 12(1) intends that what must be determined is the amount of compensation to be paid for expropriating the property. This entails determining the market value of the expropriated property.

One possible appropriate method of doing this is to measure the difference in value of the property before and after expropriation, another is to apply a rate per hectare. Either method would however, result in a negligible amount of compensation: because of the conditions imposed, the canal was a given and had little commercial worth to the owner.

Helderberg however, contended that it could avoid this conclusion by depending on section 12(5)(f). This section provides that in determining the amount of compensation to be paid, any enhancement or depreciation in value before or after the date of notice of expropriation which may be due to the purpose for which the property is expropriated shall not be taken into account.

The purpose of this section is to ensure that an expropriating authority does not employ planning restrictions to ensure that the property's potential prior to expropriation did not exist, so rendering the compensation payable lower than it might have been. This however, was not the case with Helderberg's property since there was no depreciation of the value of the land due to the purpose for which the property was expropriated. If the local authority's condition had not been accepted, the land would have remained agricultural.



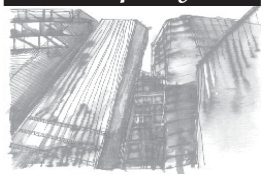
Accordingly, there was never a depreciation.

The compensation determined by the local authority was made on the basis of a rate per hectare. This also appeared to be just and equitable as required under section 25(3) of the Bill of Rights in the constitution.

Helderberg was accordingly entitled to compensation in the sum of R207 400.

Are there any relevant circumstances that justify an upward adjustment? Helderberg's counsel could not point to any when asked during the argument. In fact, if one simply limits oneself to the considerations listed in section 25(3) of the Bill of Rights, they point in the other direction. The strip's use current at the time of expropriation was to deal with stormwater and that will remain its use and this was the main purpose of the expropriation. As such the strip had little (if any) commercial value to the owner, so little that the owner was prepared to register a servitude in favour of the local authority free of charge. The strip has also little commercial value to the local authority. But, more importantly, when Helderberg purchased Phase 3 it bought a piece of land with a strip designated for canalisation and thereby sterilised. The sterilisation was a condition for the grant of very valuable rights to Phase 3 as a whole. Helderberg paid about R1,6m during 1995 for 32,5 ha and it wishes to recoup in the year 2000 some R1,4m for 1,037 ha of useless land. The price it paid for the whole had to be based on the fact that the strip had no commercial value. In other words, the history of the acquisition and use of the property does not justify any adjustment. In fact, a downward adjustment could be justified but since none was suggested and the local authority is acquiring ownership (instead of a servitude) of a piece of land which might affect the open public space requirements on the smaller Phase 3 and the building lines (matters which were mentioned but not investigated or quantified), I am prepared to accept that the amount proposed by the local authority would be fair and equitable in the circumstances of the case. I am not thereby suggesting that an owner should be entitled to compensation if the expropriated property has no value merely because there was an expropriation

ANDRIES VAN DER SCHYFF EN SEUNS (PTY) LTD v WEBSTRADE INV NO 45 (PTY) LTD



A JUDGMENT BY TSHIQI J
WITWATERSRAND LOCAL DIVISION
1 FEBRUARY 2006

2006 (5) SA 327 (W)

Parties who are not intended to be protected by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) may not depend on that Act to resist a spoliation application.

THE FACTS

Webstrade Inv No 45 (Pty) Ltd was the owner of certain property situated in Krugersdorp. It concluded an agreement with Andries Van der Schyff en Seuns (Pty) Ltd for the construction of a house on its property.

Andries proceeded to construct the house. Before completion of the construction and before Andries had handed over possession of the house to Webstrade, the director of Webstrade and his wife took possession of the house. They did so by obtaining a duplicate set of keys without the knowledge of Andries.

Andries applied for an order that it be restored to possession of the property, basing its application on the mandament van spolie. The director and his wife contended that they were entitled to the protections of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) and that Andries was obliged to abide by the procedures provided for in that Act when bringing proceedings for their eviction.

THE DECISION

The question was whether the grant of a spoliation order would undermine the Act by a simple device.

The Act was introduced not in order to protect affluent property owners who deliberately place themselves in unlawful occupation of property. The purpose of the Act is to prevent and control squatting on public or private land. Evictions of unlawful occupiers are intended to take place in accordance with its protections where the parties involved require this in the interests of justice and equity. The respondents in the present case did not require this. They were not in need of accommodation and they did not belong to the poor and vulnerable.

The application was granted.

As the Constitutional Court says, the 'manifest objective' of PIE is to overcome the abuse permitted by PISA and to A ensure that the eviction of unlawful occupiers takes place in a manner consistent with the Constitution. In essence, what the Constitutional Court has held is that PIE is directed at ensuring that justice and equity prevail in relation to all concerned in the eviction process. Justice and equity do not require that the respondents in this matter be protected from their unlawful conduct. In my view, the B respondents are not in dire need of accommodation and do not belong to the poor and vulnerable class of persons whose protection was foremost in the Legislature's mind when PIE was enacted. (See Wormald NO and Others v Kambule [2005] 4 All SA 629 (SCA).) C

Whilst it may be argued that the definition of unlawful occupier does not draw a distinction between different kinds of unlawful occupiers, nor classify different categories of unlawful occupiers, what should not be overlooked is the objective of PIE