FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO : 005/2004

PARTIES: Douglas Klerck N.O

AND

SA Metal & 8 others
Macsteel International Far East
Stephen Anthony Hefferman

REFERENCE NUMBERS -

- Registrar: CA 7/2003
- Magistrate:
- Supreme Court of Appeal/Constitutional Court:

DATE DELIVERED: 23 April 2004

JUDGE(S): Erasmus , Chetty and Plasket JJ

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s):
  1st Appellant: M Lowe SC & SH Cole
  2nd & 3rd Appellant: JT Whitehead SC & EAS Ford

- for the Accused/Defendant(s)/Respondent(s): OL Rogers SC & E Fagan

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s): Wheeldon, Rushmere & Cole
- Defendant(s)/Respondent(s): Netteltons

CASE INFORMATION -

- *Nature of proceedings* : Full Bench Appeal

- *Topic*: Escrow agreement

- Keywords: Agency – undisclosed principal – final and unappealable judgment

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: CA 7/2003

DATE DELIVERED:

In the matter between:

DOUGLAS KLERCK N.O.	**Appellant**
and	
SA METAL & MACHINERY (PTY) LIMITED	**First Respondent**
MACSTEEL INTERNATIONAL FAR EAST LIMITED	**Second Respondent**
GENESIS POWER MOZAMBIQUE LIMITADA	**Third Respondent**
EDWARD NORMAN ROBINSON	**Fourth Respondent**
ALFREDO MUCHANGA	**Fifth Respondent**
ACET SCRAP AND MACHINERY (PTY) LTD	**Sixth Respondent**
JOHANNES HERMANUS BOSCH	**Seventh Respondent**
STEPHEN ANTHONY HEFFERMANN	**Eighth Respondent**
SHEPSTONE & WYLIE (UNITED KINGDOM)	**Ninth Respondent**

and in the matter between:

MACSTEEL INTERNATIONAL FAR EAST LTD	**First Appellant**
STEPHEN ANTHONY HEFFERMANN	**Second Appellant**

and

SA METAL & MACHINERY (PTY) LTD	**First Respondent**
DOUGLAS KLERCK N.O.	**Second Respondent**
GENESIS POWER MOZAMBIQUE LIMITADA	**Third Respondent**
EDWARD NORMAN ROBINSON	**Fourth Respondent**
ALFREDO MUCHANGA	**Fifth Respondent**
ACET SCRAP AND MACHINERY (PTY) LTD	**Sixth Respondent**
JOHANNES HERMANUS BOSCH	**Seventh Respondent**
SHEPSTONE & WYLIE (UNITED KINGDOM)	**Eighth Respondent**

Subject: Escrow agreement – agency – undisclosed principal – final and unappealable judgment

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JUDGMENT

ERASMUS J, CHETTY J and PLASKET J:

[A] THE PARTIES

[1] There are two appeals before court arising from the same trial. In both

appeals the respective appellants were granted leave to appeal by the court *a quo*. In the first appeal, the appellant was the first defendant in the court *a quo*; the first respondent, the plaintiff; the second respondent, the second defendant. In the second appeal the first appellant was the second defendant; the second appellant, the eighth defendant; the first respondent, the plaintiff; the second respondent, the first defendant. The other respondents, in both appeals, have not appeared before us. For the sake of clarity and consistency, we will refer to the parties by name as appears from our judgment.

[B] BACKGROUND

[2] An escrow, a term derived from English law, is a deed or agreement delivered to a disinterested third party in trust pending the fulfillment of a condition specified therein in favour of one or other of the parties to the agreement. If the condition is performed it becomes a binding obligation. Otherwise it fails.[1] In *Butterworths Words and Phrases Legally Defined* (3ed) (Vol 2),[2] the learned authors refer to the Canadian case of *Toonton v Atkinson* [3] in which the following was stated:

> 'In early times escrow may have been used exclusively when delivering deeds. Today however, "escrow", like many other words has acquired a much wider application. It may apply to money, company stock, securities and other items of property. The modern day application of the word is provided in *Black's Law Dictionary*, 5th ed, p 489: "Escrow. A writing, deed, money, stock, or other property delivered by the grantor or obligator into the hands of a third party, to be held by the latter until the happening of a contingency or

1 See for example Onions (ed) *The Shorter Oxford English Dictionary on Historical Principles* (Vol 1).
2 At 172-173.
3 (1985) 52 Nfld 8 PEIR 167, 174, Nfld District Ct.

> performance of a condition, and then by him delivered to the grantee, promisee or obligee. A system of document transfer in which a deed, bond, or funds is delivered to a third person to hold until all the conditions in a contract are fulfilled; e.g., delivery of deed to escrow agent under instalment land sale contract until full payment of land is made." The *Concise Oxford Dictionary* states as follows: "Escrow. Written legal engagement to do something, kept in third person's custody until some condition has been fulfilled; money or goods so kept."'

[3] Such an agreement was entered into, in September 1998, by the De Klerk brothers (Allan and Christo), Genesis Power Mozambique Limitada (Genesis), Edward Rowan Robinson (Robinson), Alfredo Muchanga (Muchanga), Acet (Pty) Ltd (Acet) and the second appellant, Macsteel International Far East Ltd (Macsteel). (For ease of reference, the escrow agreement is attached to this judgment as Annexure 'A'.)

[4] The agreement was concluded to enable a ship, the MV Handy Lily (the Handy Lily), laden with a quantity of scrap metal, to set sail from the port of Nacala, Mozambique, and for Macsteel to deal with it unhindered. As a quid *pro quo* for the scrap metal, Macsteel deposited the sum of $596,000 with the escrow agent, the London office of attorneys Shepstone and Wylie (the ninth defendant in the court *a quo*). The escrow funds were to be paid to the successful party once a final and unappealable judgment of the Mozambique court was delivered in pending proceedings instituted by the De Klerks against Robinson.

[5] In that action the De Klerks sought, *inter alia*, the cancellation of their partnership agreement with Robinson and an order compelling him to export the remaining scrap metal to certain designated parties. Whilst the action was

pending, Macsteel International SA (Pty) Ltd filed an application to intervene. Owing to an administrative glitch, the other parties were not apprised of the application to intervene.

[6] During May 1999, Robinson consented to judgment being entered against him, which he accepted as being final and unappealable. Almost immediately thereafter Macsteel International SA (Pty) Ltd appealed unsuccessfully against the judgment to the Nacala Provincial Court. It then filed a further appeal to the President of the Mozambique Supreme Court. By the time the appeal in the present proceedings was argued before us no decision thereanent had been delivered. It was, and remains, common cause that according to Mozambican law the matter would only be considered closed once the President of the Supreme Court had rejected the appeal.

[7] The issues on appeal are narrow and confined. They are twofold: (i) whether the De Klerks concluded the escrow agreement as agents of SA Metal and Machinery (Pty) Ltd (SA Metal), their undisclosed principal and (ii) whether a final and unappealable judgment in favour of the De Klerks was handed down in the Mozambican court. The court *a quo* found for SA Metal on both issues, hence the appeal. Douglas Klerck N.O. (Klerck N.O.) is the liquidator of De Klerk and Weber CC (DKW), the entity through which the De Klerks conducted their business, and the executor of their insolvent estates. If the De Klerks are entitled to the escrow funds as principals, those funds will be payable to Klerck N.O. If they acted as undisclosed agents, the funds will be due to their principal, SA Metal, if the Mozambique proceedings have been finalized and the nominees mentioned in the escrow agreement direct payment to them.

[C] AGENCY AND THE UNDISCLOSED PRINCIPAL

[8] The judgment of the court *a quo* on the first issue is assailed on the grounds that, on the evidence adduced, there was no suggestion that an authority was afforded the De Klerks either to act for SA Metal as their undisclosed agent or to contract for and to represent SA Metal. We proceed first to consider this issue.

[9] The legal position is clear. The authority to represent another may be granted expressly or it may be implied from the conduct of the parties and the circumstances of the case.[4] This matter concerns, not the precise ambit of the legal rules relating to agency, but whether, as a fact, the De Klerks were authorized to contract on behalf of SA Metal. The contentions advanced on behalf of Klerck N.O. necessitate an analysis and appraisal of the evidence adduced. It is exhaustively traversed in the judgment of the court *a quo* but the repetition of certain salient features is, in the circumstances, unavoidable.

[10] SA Metal owned the largest scrap yard in South Africa, located in Cape Town. It purchased scrap metal from diverse sources and during 1997 and 1998 had a ready market for its scrap. The De Klerks owned DKW, a small scrap metal business in East London. It commenced supplying the respondent with scrap metal in 1995, transporting it to Cape Town by road. As the volume increased, practical exigencies dictated a change in the mode of supply. Consequently, an agreement was concluded in terms of which the scrap metal was stockpiled at the East London harbour and, when expedient, loaded onto ships specially chartered by export customers of SA Metal.

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4 Bowstead and Reynolds *On Agency* (17ed) paras 2-030 to 2-034; *LAWSA* (2ed) Vol I, para 192; Kerr *The Law of Agency in South Africa* (3ed), 113; *Majola Investments (Pty) Ltd v Uitzig Properties (Pty) Ltd* 1961 (4) SA 705 (T), 714A-B; *Coetzer v Mosenthals Ltd* 1963 (4) SA 22 (A), 23E-H; *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1973 (1) SA 837 (O), 839C-H.

[11] In terms of their prevailing business practice, DKW reported the tonnage of the stockpiled scrap metal to the respondent and then requested and received advanced payments for it. Thereupon SA Metal became the owner of the scrap metal.

[12] During 1996 Robinson, a resident of East London, approached the De Klerks. He informed them that he had access to vast quantities of scrap metal in Mozambique. Although initially sceptical of Robinson's puffery, the subsequent production of photographs that ostensibly verified his claims persuaded Christo to visit Mozambique during the latter half of 1997. His reservations proved groundless. Substantial quantities of scrap metal were literally there for the taking.

[13] The potential financial rewards to be reaped persuaded him to conclude a partnership agreement with Robinson in terms of which they set up an offshore company (Acet) to conduct the scrap metal business in Mozambique. Pursuant to the partnership agreement, Robinson was tasked with locating scrap metal and stockpiling it at the port of Nacala. The De Klerks were, in turn, to effect payment to the actual suppliers and transact the onward sale to prospective buyers. The De Klerks had a ready buyer in the form of SA Metal because of their prior dealings. Accordingly they concluded an agreement with SA Metal in terms of which the latter undertook to purchase 15 000 tons of scrap metal from Nacala at $120 per ton, which it sold to its Australian buyer at $126 per ton (even though, in reality, the scrap had, as yet, not been stockpiled at Nacala). These were advance deals common within the scrap metal business.

[14] In August 1997, the De Klerks notified SA Metal on an Acet letterhead that 5 500 tons of scrap metal had already been stockpiled at Nacala and the remainder (of the agreed 15 000 tons) would be ready for collection at the end of

September. In terms of the existing payment arrangement the De Klerks requested payment of the sum of $660 000, being the monetary value of the estimated tonnage then stockpiled. An amount of $ 500 000 was paid to them by SA Metal in view of the possibility that the estimated quantity stockpiled could conceivably be less. Subsequent thereto, the De Klerks advised SA Metal that a further 1 740 tons of scrap metal had been stockpiled and received a further advance of $200 000.

[15] The delay in stockpiling the 15 000 tons of scrap metal at Nacala had potentially serious consequences for SA Metal in terms of the contractual arrangement it had with its Australian buyer, Simsmetal. At the same time it had contracted to supply the second appellant, though not a regular customer, with scrap metal stockpiled at the East London harbour. In order to meet its contractual obligations to Simsmetal timeously the respondent arranged that Simsmetal would collect its 15 000 tons of scrap metal from East London and not Nacala, while Macsteel would in turn collect its scrap metal from Nacala by the end of October 1997.

[16] Macsteel, for reasons not germane to this judgment, cancelled the contract that it had with SA Metal. Although there is some dispute concerning the legality of the cancellation, nothing turns on this. The scrap metal was eventually sold to another buyer at a reduced price of $95 per ton. Consequently, Mr. Graham Barnett, SA Metal's *de facto* managing director journeyed to Nacala together with Christo de Klerk to inspect the scrap metal and to arrange for its loading. Upon their arrival at Nacala they ascertained, contrary to what had been conveyed to them, that the quantity of scrap metal stockpiled was only in the region of 7 000 to 8 000 tons.

[17] Unbeknown to SA Metal, Macsteel, on 2 February 1988 -- the very day that

the respondent's representatives were in Nacala -- contracted with Robinson and Muchanga, representing Genesis, to purchase the same scrap metal which SA Metal had already paid for in full, for $88 per ton. These machinations on the part of Robinson could have deleteriously affected the business relationship between the De Klerks and SA Metal and gave rise to a meeting in East London between the De Klerks and representatives of SA Metal. The evidence of what transpired at this meeting was, and remains, crucial to establish whether the De Klerks assumed personal responsibility for the Nacala debacle and undertook to do whatever SA Metal told them to do to remedy the situation.

[18] As stated above, the court *a quo* dealt exhaustively with the evidence adduced. The trial judge concluded that 'the truth of the matter appears to be that although nominal steps were taken by the De Klerks, the litigation was driven by the plaintiff [SA Metal]. Ultimately Bosch [the De Klerks' attorney] conceded that the correspondence shows that he was in fact taking his instructions virtually solely from the plaintiff, to which he appeared to agree. That concession, which was correctly made, is in my view a telling one. This picture is wholly inconsistent with the De Klerks in fact acting on their own account. It is, however, wholly consistent with them acting as agents for the plaintiff who, in their eyes, was the owner of the scrap on the Nacala harbour'.

[19] That finding was arrived at upon a careful analysis of the evidence and the inferences to be drawn from it. We do not propose to regurgitate the evidence. Suffice it to say that upon an overall assessment, the trial court's finding is unimpeachable. We need do no more than refer to the evidence of Bosch and the correspondence between him and SA Metal which unequivocally establishes that he in fact not only took his instructions from Uys – SA Metal's adviser, tasked with concluding the Nacala debacle -- but, moreover, became his amanuensis.

[20] The letters written and signed by him were faithful and verbatim reproductions of letters written to him by Uys, in the form of instructions. These instances and the numerous examples in similar vein referred to in the judgment refute any suggestion that Bosch was in overall command. On the contrary, it compels the opposite conclusion. The evidence supports the court *a quo's* finding that SA Metal exercised effective control of the process that concluded with the signing of the escrow agreement. Subsequent events confirm this. The settlement negotiations with Robinson were engineered by SA Metal, the terms of the settlement reflected what was acceptable to SA Metal and SA Metal gave Bosch instructions concerning the account into which the escrow funds should be paid – an account which ensured direct payment to the respondent.

[21] These factors, which are expanded upon in the judgment of the court *a quo*, ineluctably show that although the term agency may not have been used by the De Klerks and SA Metal, the legal categorisation of their agreement reached on 4 February was that of the empowering of an agent for an undisclosed principal.

[22] At the trial and on appeal, counsel for the first appellant relied heavily on the evidence of Bosch to show that the De Klerks were acting in their personal capacity. Mr Lowe submitted that notwithstanding Bosch's close working relationship with SA Metal, he was effectively in control of the proceedings on behalf of the De Klerks, deferring to Uys only because of the latter's bombastic manner and experience. The submission is untenable and not supported by the evidence viewed holistically. The trial court correctly pointed out that Bosch admitted that his instructions, which he faithfully and meticulously performed, emanated from SA Metal. The admission was unavoidable. The trial court carefully examined the plethora of documentation. It conclusively showed that the De Klerks were in fact not acting of their own accord but as agents for SA Metal.

Bosch's inability or reluctance to recognize the true state of affairs can only be ascribed to his naivety.

[23] Mr Lowe made much of a cession signed by the De Klerks in favour of SA Metal. This, he argued, was not consistent with a relationship of agent and principal. In our view, however, the cession, if it can properly and in truth bear such appellation, does not offend against the conclusion reached by the court *a quo*. It was and remains a legal incongruity – a product of Uys' peculiar lack of legal acumen. Viewed thus, the court *a quo*'s finding that the cession was not incompatible with the agency agreement is, for the reasons stated therein, undoubtedly correct. Its existence does not, whether inferentially or otherwise, lend itself to the conclusion contended for on behalf of the first appellant. On the first issue therefore, the appeal must fail. We find, in other words, that in concluding the escrow agreement, the De Klerks acted as the agents for an undisclosed principal, the respondent.

[D] FINAL AND UNAPPEALABLE JUDGMENT

[24] The issue as to whether the judgment in Mozambique was final and unappealable requires analysis of the escrow agreement.

[25] The agreement follows a particular scheme. First, the parties are identified. Then a preamble outlines background events**:** essentially the dispute between the De Klerks and Macsteel, Robinson, Muchanga and/or Genesis as to the ownership of or title to the cargo on board the Handy Lily.[5] It is noted that the De Klerks have arrested the cargo, thus preventing the vessel from sailing. The purpose of the agreement is set out as being to facilitate the immediate release

5 This is referred to in the agreement as 'the Mozambique proceedings'. We shall use the term in this judgment in the same sense.

of the cargo and to allow the immediate sailing of the vessel. The obligations of the parties are stipulated in clauses B1 to B4: broadly speaking, the De Klerks are required to procure the release of the cargo, thus allowing the vessel to sail, against deposit by Macsteel of US$596 000 into an account at Midland Bank PLC, London.

[26] Clause B5 provides for the ultimate disposition of the funds out of the escrow account. Two attorneys are nominated to oversee and effect this payment process. They are Johannes Hermanus Bosch of the law firm Du Plessis, Bosch and Meyerowitz of Bethlehem, and Stephen Anthony Heffermann of the law firm Heffermann-Grove of Nelspruit. (When we do not refer to them by name, we shall refer to them as 'the nominees'). The clause is specific as to the procedure that the nominees must follow: payment shall be made upon (a) written confirmation from both Bosch and Heffermann that there has been a final, unappealable judgment in the Mozambique proceedings and (b) in accordance with the joint written directions of Bosch and Heffermann as to the party or parties who is or are to receive payment from the escrow account and in what proportions.

[27] It is common cause that Bosch and Heffermann accepted their nomination, and that the De Klerks and Macsteel performed their respective obligations. The question remaining is whether the contingency set for payment of the funds in the escrow account has come about. The facts relevant to that question, and the position in Mozambican law based on those facts, are conveniently summarised in chronological order in a document with the heading: 'Admissions re: Caldeira Summary'.[6] It reads as follows:

> '1. Allan and Christo de Klerk applied to the Nampula Court on 27/02/1998 under case number 15/1998 for an Order interdicting Robinson from

6 The title of the document relates to its author, Dr Jose Manuel Caldeira, a legal practitioner of long standing in Mozambique and the vice president of the Bar Council of Mozambique, who compiled a report on relevant aspects of Mozambican law and practice.

disposing of the scrap at Nacala. The interdict was granted on 16/03/98 pending the outcome of an action to be instituted.

2. The action was instituted by Allan and Christo de Klerk against Robinson on or about 15/04/1998 under case number 33/1998.

3. In the action, the De Klerks claimed:

3.1 cancellation of their partnership agreement with Robinson;

3.2 an Order that Robinson be compelled to export the remaining scrap to the parties indicated by the De Klerks;

3.3 the return of machinery and equipment;

3.4 certain ancillary relief.

4. On or about 13/08/1998, and under case nubmer 66/1998, the De Klerks obtained an Order from the Nampula Court for the arrest of the scrap on board the *Handy Lily* as also on the quayside at Nacala plus certain ancillary relief. The Respondent in these proceedings were Robinson, Muchanga and Genesis Power.

5. On 02/09/1998, Macsteel International SA (Pty) Ltd ('Macsteel SA') filed an application in case number 66/1998 for the upliftment of the arrest of the cargo.

6. On 17/09/1998, the escrow agreement was concluded in the form annexed to the Particulars of Claim and an addendum was concluded on 18/09/1998, as annexed to the Particulars of Claim.

7. Pursuant to the escrow agreement and its addendum, the interdict under case number 66/1998 was uplifted and the *Handy Lily* departed from Nacala with the cargo.

8. On 26/11/1998 and under case number 116/1998, Macsteel SA, alleging itself to be an interested party, filed an application to intervene in case number 33/1998. This application was not notified to the other parties as required by the Code of Civil Procedure ("CCP"), in terms of which the judge is required to issue an order directing the Clerk of the

Court to notify the other parties to the action of the intervention.

9. On 14/05/1999, judgment in case 33/1998 was granted against Robinson based on a confession to judgment signed by Robinson in which he accepted that the judgment would be a final and unappealable judgment against him. At that time, no decision had been made in respect of case number 116/1998.

10. On 27/05/1999, under entry 764/1999, Macsteel SA appealed to Nampula Provincial Court against the judgment in case number 33/1998. That appeal was rejected.

11. On 01/03/2001, Macsteel SA filed an application to the President of the Supreme Court appealing against the rejection of the appeal referred to in paragraph 10 above.

12. This further application was made under Article 688 of the CCP and is called a "reclamacao". This appeal was sent to the Supreme Court on 15/05/2001, the Supreme Court case number being 8/2001.

13. In terms of Article 689 of the CCP, the President of the Supreme Court can decide whether the appeal should be accepted or rejected.

14. The case will only be considered closed in Mozambican law if the President rejects the appeal.'

[28] Bosch was willing to confirm that there had been a final judgment and to issue written directions to the effect that the escrow funds be paid into an account nominated by the De Klerks. Heffermann refused to follow suit. SA Metal thereupon instituted their action. In essence it claimed that Bosch and Heffermann be ordered to effect payment of the escrow funds in favour of the De Klerks in accordance with clause B5 of the escrow agreement. Bosch did not defend the action. The only defendants to join issue with SA Metal on this aspect of the action were Macsteel and Heffermann. They filed a common plea in which they 'deny that any final judgment (as contemplated in clause 5 of the Escrow

agreement) has been given and plead that the proceedings are in any event premature'.

[29] The court *a quo* directed Bosch and Heffermann to issue written instructions to the holder of the escrow funds to the effect that payment be made to the De Klerks of all funds, including accumulated interest. Macsteel and Heffermann appeal against the judgment on the basis that there was no finality in respect of the Mozambique proceedings as required by the escrow agreement.

[30] The material facts are, for the most part, common cause or not in dispute. As a result, the judgment of the court *a quo* relied on inferences drawn from those facts for the interpretation of the agreement in the light thereof. This means that we can approach our decision in this appeal on the basis of the comments of Davis AJA in *R v Dhlumayo*[7] that '[s]ometimes … the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.' However '[w]here there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong'.

[31] The order of the trial court is based on the express finding that, on a proper interpretation of the escrow agreement, there was a final, unappealable judgment in the Mozambique proceedings. Implicit in that order is the further finding that by virtue of that judgment, Bosch and Heffermann were obliged to issue joint written directions to the effect that the escrow funds be paid to the De Klerks (for the account of SA Metal).

[32] In order properly to consider the correctness of the court's findings, it is

7 1948 (2) SA 677 (A), 705.

necessary first to establish clarity as to the nature of the proceedings in the matter. It is to be noted that the plaintiff did not seek an order for specific performance against Bosch and Heffermann, nor a mandamus that they perform their duties under the agreement. The court was asked to compel the nominees to perform their duties under the agreement in a specific manner. In this sense, the proceedings were analogous in nature to a judicial review. The focus of the trial was on (a) whether the decision of Heffermann that there had not been a final judgment in the Mozambique proceedings was correct and (b) whether his refusal to issue the directions for payment of the escrow funds to the De Klerks was justified.

[33] The first issue – whether there is in existence a final, unappealable judgment, as contemplated by the escrow agreement -- is in the nature of a jurisdictional fact (to continue the public law analogy). As for the second, however, it is clear that the decision as to who should be paid and how much, is not a mere mechanical function but is dependant on an interpretation of the judgment and the agreement: it involves discretion. A court will not readily instruct a person in Heffermann's position how he or she is to perform his or her discretionary duties. To do so, without compelling, perhaps even exceptional, circumstances being present would amount to an unjustifiable usurpation of the functions of that functionary.[8] In the light of the conclusion that we reach on the first issue, it is not necessary to say much more about the second issue.

[34] Leach J was correct in his approach: giving effect to the terms of the escrow agreement is ultimately a matter of contractual interpretation.[9] This means that Bosch and Heffermann had to ascertain the true intention of the parties from the

8 For the principle in its public law setting, which would be similar in this setting, see Baxter *Administrative Law*, 681-685.
9 S*assoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A), 649 E-G.

contents of the written document, viewed against the backdrop of the facts and circumstances giving rise to the agreement.

[35] In interpreting the agreement, the nominees had to bear in mind that the document was drafted in a crisis involving a number of parties, some of whom were at arm's length while others were with daggers drawn, and that these parties were operating through intermediaries communicating by telephone, post and e-mail. It is only to be expected that the document is less than perfectly clear. In the circumstances, an overly critical or legalistic analysis could miss the true intention of the parties. What is required is a common sense approach which has due regard to the overall purpose of the agreement. As Heffermann suggested to Bosch in a letter dated 11 September 1998, the purpose of their negotiations was to enable their clients 'to come to a sensible commercial settlement … for the mutual benefit of the parties'. It can be presumed that the parties entered into the escrow agreement in that spirit.

[36] The central feature of the agreement is the fact that the escrow funds became the surrogate for the cargo. This is clear from the general scheme of the agreement. Importantly, the preamble specifically identifies the dispute concerning the title to the scrap metal as the cause for the agreement. Significantly, the amount of money deposited in the account is based on the value that the parties placed on the cargo, namely 6780,650 metric tons at US$88 per ton, which provided a total of US$596 000.[10] The dispute regarding the payment of the escrow funds is inextricably tied up with the dispute as to the rights to the cargo on the vessel, which dispute in its turn apparently arose from the double sale of the scrap metal at Nacala harbour by Robinson to the De Klerks and to Macsteel respectively. Presumably, these actions of Robinson are in some way related to the claim of the De Klerks in case 33/1998 that Robinson

10 See clauses B4 and B8 of the agreement.

be compelled to export the remaining scrap metal to the parties indicated by the De Klerks.[11]

[37] The parties to the agreement obviously expected that the outcome of the Mozambique proceedings would establish some clarity as to the 'ownership of and/or title to the cargo', or at least would give some indication in this regard. A judgment on a technical aspect such as, for example, a point relating to standing or jurisdiction would not determine, or throw light on, the conflicting claims of Macsteel and the De Klerks to the cargo on the vessel; nor would a judgment obtained by fraud or some other untoward means. It is doubtful, to say the least, that these businessmen would have made payment of the escrow funds contingent upon the outcome of a court case on a basis quite unrelated to the rightful title to those monies and irrespective of considerations of justice as between the parties; they might just as well have flipped a coin for the US$596 000. The nominees must therefore have regard to the real purpose of the escrow agreement and not just the narrow issue as to who -- the De Klerks or Robinson -- are or is successful in action 33/1998. Their decision as to whether there has been a final judgment is not purely technical; their joint direction as to payment, not purely perfunctory.

[38] In regard to the question whether technically there has been a final, unappealable judgment, counsel for the respondent identify the following grounds for the judgment delivered by the court *a quo*: (a) that the phrase 'the Mozambique proceedings' did not include proceedings to which Macsteel SA (Pty) Ltd was an intervening party; (b) that it could not have been envisaged that a person who was not a party to the agreement might seek leave to intervene in the proceedings; (c) that, in effect, although the Mozambique judgment was not

11 Admissions re: Caldeira Document, para 3(ii).

final, and notwithstanding the intervention of Macsteel International SA (Pty) Ltd, it should, as between the parties, be deemed to be so; (d) that it must have been within the contemplation of the parties to the escrow agreement that the litigation to which reference is made in the agreement could be settled, and that it must therefore have been within their contemplation that the De Klerks, on the one hand, and Robinson, Muchanga and Genesis, on the other, might settle their differences and obtain a judgment by consent.

[39] Ground (a) *supra* was raised in the opening address of counsel. It would be the plaintiff's case – so Mr Rogers intimated -- that the party to the escrow agreement was the Hong Kong company which was the second defendant, Macsteel International Far East Ltd; that the intervention in the Mozambique proceedings in November 1998 was not by any of the parties to the escrow agreement, but by a company called Macsteel International SA (Pty) Ltd; and that it was therefore the plaintiff's case that the intervention proceedings by that third party was not envisaged in the agreement. The contention is repeated in argument in the appeal before us. We find that the argument does not carry. We find that on the pleadings and the evidence, the inference is unavoidable that Macsteel International SA (Pty) Ltd, in intervening in the action, was acting as representative of Macsteel International Far East Ltd.

[40] We do so on the following grounds. In its particulars of claim SA Metal averred that Macsteel International Far East Ltd conducted business in South Africa through the agency of Macsteel International SA (Pty) Ltd. In their plea, Macsteel and Heffermann admit the correctness of this averment. The representative role of Macsteel International SA (Pty) Ltd for Macsteel International Far East Ltd is therefore unequivocally established. In their opening address counsel declared that Macsteel International Far East Ltd was part of a group that was formed and originated in South Africa, 'the Macsteel group'. Mr.

Rogers added that this Hong Kong company apparently operated through the agency of a South African company, Macsteel International SA (Pty) Ltd. The Letter of Credit in respect of the transaction between Macsteel and Genesis reflects the applicant as being Macsteel International SA (Pty) Ltd acting 'for and on behalf of Macsteel International Far East Ltd'. This transaction is part of the background to the escrow agreement. On 2 February 1998, in an agreement with Genesis for the purchase of 15 000 tons of scrap metal at Nacala, the contracting party was 'Macsteel International SA (Pty) Ltd for and on behalf of Macsteel International Far East Limited'. On 2 September 1998, Macsteel International SA (Pty) Ltd filed an application in case no. 66/1998 for the upliftment of the arrest of the cargo. This was part of 'the Mozambique proceedings'.

[41] To suggest that Macsteel International SA (Pty) Ltd, in intervening in case no. 33/1998, was acting on its own in a matter where it had no business, and not on behalf of its principal, Macsteel International Far East Ltd which had an interest in the case, is pure conjecture that flies in the face of the strong probabilities arising from the facts set out above. We find therefore that the court *a quo* misdirected itself in holding that it was not proven that the party which intervened in case no. 33/1998 was Macsteel International Far East Ltd as represented by Macsteel International SA (Pty) Ltd. (In this judgment henceforth, we continue to use the term 'Macsteel' as inclusive of Macsteel International Far East Ltd as represented by Macsteel International SA (Pty) Ltd.)

[42] The other grounds upon which the judgment of the court *a quo* rests[12] relate to the intention of the contracting parties. Such agreement must be gleaned from the agreement viewed against the factual backdrop thereto. Clause B5 of the agreement contemplates 'a final, unappealable judgment of the court of first

12 Grounds (b) to (d) set out in para [38].

instance (but then only after the period for any appeal has lapsed) or of the final court of appeal ("the final judgment") in the Mozambique proceedings'. The provision raises certain difficulties of interpretation**;** but, adopting a common sense non-legalistic approach, we find that the agreement envisages one of two contingencies: either a judgment of the court of first instance where the period for noting an appeal has lapsed**,** or a judgment of a final court of appeal that has the effect of establishing *res judicata* on the question or questions in issue.

[43] In case no. 33/1998, the judgment of the court of first instance was appealable despite the formal acceptance by Robinson that the judgment was final and unappealable. This is conclusively established by the very fact of the appeal to the Nampula Provincial Court.[13] The dismissal of that appeal also did not constitute the final judgment in the matter in that the application for a further appeal is possible in Mozambican law and is, in fact, pending.[14] Procedural finality will be achieved only if and when the *reclamacao* to the President of the Supreme Court fails.[15]

[44] In a rule 37 minute, SA Metal recorded that it 'accepted that there had not been a final judgment in Mozambique'. It added, however, that it contended that there had not been a final judgment within the meaning of the escrow agreement, but did not explain what it meant by this. In his opening address at the trial, Mr. Rogers stated that this 'somewhat cryptically' conveyed the plaintiff's case on the point. He explained his client's position more fully. The escrow agreement, he said, referred to the Mozambique proceedings which, as defined at that stage, were between the De Klerks and Robinson; it was the plaintiff's contention that the litigation contemplated in the agreement was litigation between those parties and that as between them there had been a final judgment against which

13 Admissions re: Caldeira Document, para 10.
14 Admissions re: Caldeira Document, paras 11-13.
15 Admissions re: Caldeira Document, para 14.

Robinson had not and could not appeal. This contention is reflected in the finding of the court *a quo* that notwithstanding the unfinalised appeal of Macsteel in regard to its application to intervene, a final judgment as envisaged in the escrow agreement has in fact been given.

[45] It was never in dispute at the trial, nor is it in the appeal, that in terms of Mozambican law there is no final judgment. Counsel's contentions ascribe a special meaning to the concept 'the final judgment'. That meaning is not based on any express definition, or any particular term or words, in the agreement, but on the fact that at the time the escrow agreement was entered into, the only parties to the action in case no 33/1998 were the De Klerks and Robinson.

[46] Counsel's submission loses sight of the opinion of Dr Caldeira to the effect that, in Mocambican law, the 'existing cause of action between the plaintiffs and the defendant does not preclude the court from hearing the claim of the third party, despite the fact that such claim may be entirely divorced from the existing cause of action which exists prior to the intervention'**;** that 'as long as the third party is entertained as an interested party in the proceedings, the court can decide all the issues between the parties, including the original parties, in such a way as their different interests relate to each other'**;** and that '[a]t this moment no decision has been taken on appeal and the Mozambican litigation remains unfinished without a final and/or unappealable judgement'.

[47] It emerges from this opinion that a number of orders, in varying permutations, can follow upon the intervention by the third party in the proceedings that were pending in the Nampula **c**ourt. Importantly here, the court of first instance could decide afresh the issues between the original parties. It follows that in Mozambican law there is no final judgment between those parties

in existence at present. (Caldeira concludes his opinion with a categoric statement to that effect.) The position is that the operation of the judgment in the lower court is suspended pending the decision of the President of the Supreme Court on the petition which, if successful, will have the effect of setting aside the judgment obtained by the original parties in the court of first instance.

[48] On the findings of the court *a quo*, the parties to the escrow agreement intended that the earlier judgment could remain 'the final judgment' for purposes of the agreement even in the event of that judgment being reversed upon referral flowing from a successful petition. The proposition is patently untenable. The procedural possibility of its reversal totally negates the finality of the original judgment. Finality is an absolute concept: a judgment cannot be final and appealable at the same time; it cannot be final one day and not so the next. At this stage the merits of the petition are irrelevant. So too is the fact that the judgment was obtained by consent. The important point is this: the judgment as between the De Klerks and Robinson is impugnable at this stage of the proceedings.

[49] It is not clear – with respect – on what basis the court *a quo* found that the intervention by Macsteel in case 33/1998 was not contemplated by the parties to the agreement. The course and outcome of legal proceedings are notoriously uncertain and unpredictable. It must therefore be expected that any development that can happen, might happen. Such a development is therefore foreseeable and consequently foreseen as a general possibility, unless it is fanciful or unimaginable. Prior to the intervention, Macsteel was at risk to case 33/1998 being conducted in the manner prejudicial to its interest, as in fact occurred. The intervention by Macsteel in the proceedings which directly affected its rights to US$596 000.00 was a basic and obvious precaution. Any lawyer worth his or her

salt would have advised such a step. It squarely placed before the Nampula court the question of Macsteel's and the De Klerks' conflicting claims to the title to the scrap metal, which was the real issue in the Mozambican proceedings. The intervention was therefore consonant with the expectation of the parties to the escrow agreement that the outcome of the Mozambique proceedings would enable Bosch and Heffermann to determine who was to receive the escrow funds. In short: the intervention by Macsteel was a development of a kind that could be expected in the particular litigation; as such it was within the general contemplation of the contracting parties.

[50] There can be no quarrel with the further finding of the trial court that settlement is always within the contemplation of the parties to litigation, and must have been in the minds of the contracting parties in regard to the Mozambique proceedings. As we have found, however, the judgment based on that settlement is not a final judgment in Mozambican law and was not intended to be such for purposes of the escrow agreement.

[51] For these reasons we find tat the court *a quo* was wrong on the finality question. However, before the nominees apply their minds to that issue, they might well ask themselves whether there has been a judgment as is envisaged in the escrow agreement. As we suggest above[16], the duty of the nominees to give effect to the object of the escrow agreement could take them beyond the technical issue of finality. This duty could require them to consider whether the agreement contemplated a judgment such as that obtained 'by consent' in case 33/1998. In this regard, in our view, it is disingenuous to refer to the doings of Uys and Robinson as 'a settlement'. Bosch and Heffermann might well be skeptical about the validity and regularity of the arrangement. It is common cause that at the time of the escrow agreement, any partnership between the De Klerks

16 See para [37]

and Robinson had ceased to exist. The real issue in those proceedings was the competing claims of Macsteel and the De Klerks to the scrap metal. Robinson was not entitled to any of the scrap metal or to a single cent of the escrow funds; yet, in terms of the arrangement with Uys, he would receive US$100 000.00 of the escrow monies when the funds were transferred to an account nominated by the De Klerks. The true purpose of this 'settlement' appears from the affidavit signed by Robinson immediately after the judgment, namely to ensure that the De Klerks (for and on behalf of SA Metal) would receive payment of the escrow funds. The evidence of Uys that the motivation for the agreement was to avoid the costs and delays in litigation in Mozambique might not wash so easily in another court – especially not a Mozambican court.

[52] Uys described the proceedings in Mozambique that led to the judgment by consent. He and Robinson first completed a consent to judgment 'acceptable in South African courts' and forwarded the document to their representative in Maputo, Mr. Motero. He informed Uys that it was not good enough. What was required in Mozambique was a notarial document, called a *confessio*. This had to be completed in Mozambique. This *confessio* – according to Uys -- is an unconditional surrender in which the declarant has to deal with the merits of the case. Uys and Robinson met Motero in Maputo. They completed a document in English, which was signed by Robinson. From there they went to an office which he describes as being like a Deeds Office, where they met a woman who was introduced to them as the most senior notary in Mozambique. She produced a book, which appeared to be a protocol, and proceeded to question Robinson about the details of the case including his defence. She prepared a minute, which she read back to him. He confirmed that it was correct. She and Robinson both signed it. The document contained an unequivocal admission by Robinson that his defence was false and that all the contentions of the De Klerks were correct. After the *confessio* was affirmed and sealed, the advocate took the document to

court, where judgment was granted on the strength of it.

[53] The notary was apparently not advised of the US$100 000.00 that Robinson would receive for his actions. It seems to us, in the light of the description of the procedure before the notary, that there is a real possibility that she might not have accepted the confession had she been informed of that fact. This raises the possibility of a deliberate non-disclosure that could be unlawful or irregular in Mozambican law, and therefore afford good cause for having the judgment set aside (as it could in our law). We make no finding on these aspects. It is not necessary to do so for purposes of our judgment. For present purposes it is sufficient to hold that the circumstances in which the judgment was obtained could call for closer scrutiny by the nominees before they issue their directive.

[54] On this aspect of the appeal, we find that SA Metal in the court *a quo* failed to establish that the Mozambique proceedings have been concluded with a final, unappealable judgment.

[E] COSTS AND THE ORDER

[55] There are, as appears from this judgment, two clearly demarcated issues in this appeal. The first, the issue of whether the De Klerks acted as the undisclosed agents of SA Metal was decided against Klerck N.O. Macsteel and Heffermann took the view that this issue did not concern them and they did not join issue with the respondent in this regard. The second issue, in which Klerck N.O. did not join issue with SA Metal, but in which Macsteel and Heffermann did, was the finality of the Mozambique proceedings. That issue was decided against SA Metal.

[56] In our view, it would be equitable to take into account, for purposes of costs, that practically speaking the issues were separate and distinct in the sense that Klerck's interest was restricted to the first issue, while the interests of Macsteel and Heffermann were restricted to the second issue. This was also the approach taken by counsel.

[57] The following order is made:

(a) The first appeal is dismissed and the second appeal succeeds.

(b) The order of the court *a quo* is set aside and is replaced with the following order. -

i) It is declared that in relation to the escrow agreement, the De Klerks acted as the agent of SA Metal and Machinery (Pty) Ltd.

(ii) It is declared that, for purposes of clause B5 of the escrow agreement, there has not been a final, unappealable judgment in the proceedings in Mozambique contemplated therein, and that the nominees are therefore not obliged at this stage to issue the written confirmation or the joint directions mentioned in that clause of the agreement.

(iii) Douglas Klerck NO is directed to pay the costs of SA Metal and Machinery (Pty) Ltd in relation to the issue set out in paragraph (i) above, such costs to include the costs of two counsel.

(iv) SA Metal and Machinery (Pty) Ltd is directed to pay the costs of Macsteel International Far East Ltd and Stephen Anthony Heffermann in relation to the issue set out in paragraph (ii) above, such costs to include the costs of two counsel.

(v) For the rest, each party shall bear its or his own costs.

(c) (i) Douglas Klerck NO is directed to pay the costs of SA Metal and Machinery (Pty) Ltd incurred in the first appeal, such costs to include the costs of two counsel.

(ii) SA Metal and Machinery (Pty) Ltd is directed to pay the costs of Macsteel International Far East Ltd and Stephen Anthony Heffermann incurred in the second appeal, such costs to include the costs of two counsel.

(iii) For the rest, each party shall bear its or his own costs.

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AR ERASMUS

JUDGE OF THE HIGH COURT

_____

D CHETTY

JUDGE OF THE HIGH COURT

_____

C PLASKET

JUDGE OF THE HIGH COURT

ANNEXURE 'A'

ESCROW AGREEMENT

between

ALLAN GORDON DE KLERK and CHRISTO JOHAN DE KLERK

('the De Klerks')

GENESIS POWER MOCAMBIQUE LIMITADA

('Genesis')

EDWARD NORMAN ROBINSON

('Robinson')

ALFREDO MUCHANGA
('Muchanga')

A C E T (PTY) LTD
('ACET')

MACSTEEL INTERNATIONAL FAR EAST LIMITED
('Macsteel')

WHEREAS:

1. Macsteel purchased a cargo of steel scrap from Genesis under a Sales Contract number JSK3/6544 dated 2 February 1998, of which 6780.650 metric tons ('the cargo') are currently laden on board MV 'Handy Lily' ('the vessel') at Nacala;

2. The De Klerks have disputes with Macsteel, Robinson, Muchanga and/or Genesis and are inter alia claiming ownership of and/or title to the cargo in proceedings in the Mocambique courts ('the Mocambique proceedings');

3. In the course of the Mocambique proceedings, the De Klerks have arrested and/or interdicted the cargo; thus preventing Macsteel from dealing further with the cargo or sailing the vessel;

4. The parties wish to facilitate the immediate release of the cargo from arrest and/or interdict and to allow the immediate sailing of the vessel from Nacala.

B. IT IS NOW HEREBY AGREED THAT:

1. In consideration of the De Klerks procuring the release, by 24h00 on 17 September 1998, of the cargo from arrest, detention, interdict and/or any other restraint whatsoever that may currently be imposed on the cargo, thus allowing the vessel to sail;

2. And in further consideration of the De Klerks, Robinson, Muchanga, Genesis and ACET, and/or their assignees, subrogees or successors in title;

2.1 refraining from taking action in any jurisdiction resulting in the further attachment, arrest, interdict, detention and/or any other form whatsoever of interference with and/or restraint over the cargo (in the hands of Macsteel or any subsequent purchaser or successor in title), the vessel or the escrow funds (as defined in clause B4 *(sic)* hereof);

2.2 waiving all rights to or in relation to the cargo, including but not limited to any rights to ownership of and/or title to the cargo (other than those pursued against each other in the Mocambique proceedings, and for the purpose of those proceedings only);

3. And in further consideration of Genesis waiving all and any claims against Macsteel for payment in respect of the cargo other than in terms of this agreement;

4. Macsteel have paid into the following account ('the escrow account') the sum of US$596.000 (Five Hundred and Ninety Six

Thousand United States Dollars) ('the funds'):

Bank: Midland Bank FLC
Holborn Circus Branch
31 Holborn Circus
London EC1 2HR

Account no. 35548809

5. The funds, together with all interest credited to and accumulated in the escrow account (together referred to as 'the Escrow Funds') shall be paid to one or more of the parties to this agreement upon receipt by Shepstone & Wylie (UK) ('the Escrow Agent') of written confirmation from both Johannes Hermanus Bosch ('Bosch') of the law firm Du Plesses, Bosch & Meyerowitz of Bethlehem, South Africa and Stephen Anthony Hefferman ('Hefferman') of the law firm Hefferman-Grove of Nelspruit, South Africa that there has been a final, unappealable judgment of the court of first instance (but then only after the period for any appeal has lapsed) or of the final court of appeal ('the final judgment') in the Mocambique proceedings (or that there has been a final, unappealable judgment or award in any alternative forum which the parties may in the meantime have agreed in writing will assumed jurisdiction over the aforementioned disputes), and of joint written directions from Bosch and Hefferman as to the parties who are to receive payment from the Escrow Account and in what proportions.

6. Should the De Klerks fail to procure the release of the cargo referred to in clause B1 hereof by the time stipulated in that clause,

this agreement shall lapse and become void and of no further force or effect, the escrow account shall seize to be operated as an escrow account and the funds shall thereafter be held by the bank at the disposal and for the sole benefit of Macsteel, who may then in their sole discretion withdraw the full funds at any time.

7. Save that Macsteel shall be entitled to repayment of the sum of US$369,000.00 from the escrow funds in the event that the De Klerks are unsuccessful in the proceedings, Macsteel shall cease to have any further interest in the escrow fund once the cargo has been irrevocably released in accordance with clause B1 hereof.

8. Macsteel and the De Klerks agree each to appoint a surveyor at the vessel's next port of sail to conduct a joint draft survey prior to loading any further cargo or discharging any cargo. The parties agreed to be bound by the joint findings of the said surveyors as to the quantity of cargo currently on board the vessel. Should the quantity be found to be more than 6780.650 metric tons, Macsteel shall deposit into the escrow account an additional sum equivalent to US$88.00 per every metric ton found to be on board in excess of the said quantity. Likewise, Macsteel shall be entitled to reimbursement from the escrow account of an amount equivalent to US$88.00 per metric by which the cargo is found to be short of the said quantity.

9. MISCELLANEOUS MATTERS

9.1 This agreement contains all the express provisions agreed on by the parties with regard to the subject matter of the agreement and the parties waive the right to reply on any alleged express provision not

contained in the agreement.

9.2 Neither party may rely on any representation which allegedly induced that party to enter into this agreement, unless the representation is recorded in this agreement.

9.3 No contract varying, adding to, deleting from or cancelling this agreement, and no waiver of any right under this agreement, shall be effective unless reduced to writing and signed by or on behalf of the parties.

9.4 No indulgence granted by a party shall constitute a waiver or abandonment of any of that party's rights under this agreement; accordingly, that party shall not be precluded, as a consequence of having granted that indulgence, from exercising any rights against the other party which may have arisen in the past or which may arise in the future.

9.5 Neither party may cede that party's rights or delegate that party's obligations without the prior written consent of the other party.

9.6 This agreement shall be governed by and construed in accordance with South African Law and any dispute hereunder shall (without in any way derogating from the jurisdiction of the Mocambique courts, or substitute forum agreed between the parties, in relation specifically to the Mocambique proceedings) be subject to the exclusive jurisidiction of the High Court of South Africa, Durban and Coast Local Division, to which jurisdiction all parties hereby expressly consent for the purpose of any proceeding of whatever nature relative to his undertaking.