The law reports

May 2013 (3) The South African Law Reports (pp 1 – 322); [2013] 2 The All South Africa Law Reports April no 1 (pp 1 – 124); and no 2 (pp 125 – 250)

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This column discusses judgments as and when they are published in the South African Law Reports, the All South African Law Reports and the South African Criminal Law Reports. Readers should note that some reported judgments may have been overruled or overturned on appeal or have an appeal pending against them: Readers should not rely on a judgment discussed here without checking on that possibility – *Editor*.

ABBREVIATIONS:
GSJ: South Gauteng High Court
NWM: North West High Court, Mafikeng
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Advocates

Appointment as SC: The facts in *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA) were as follows. Mansingh was a practising advocate in Johannesburg. She brought an application against, *inter alia*, the President of the Republic of South Africa, the General Council of the Bar (GCB) and the Johannesburg Society of Advocates (JSA) for the court to declare that the President did not have the power under s 84(2)(*k*) of the Constitution to confer the status of senior counsel (SC) on practising advocates.

The application was opposed by the President, the Justice Minister, the GCB, the JSA and the Independent Association of Advocates of South Africa. The Law Society of South Africa intervened, but, in essence, supported the application.

The court *a quo* held that the President had no power to confer SC status. The power to award the status of SC was a prerogative power of the king, queen or the President under previous constitutional dispensations. These powers had not been accorded to the President under the Constitution. It held that the power the Constitution accorded on the President to award 'honours' did not include the power to confer the status of SC on advocates. The court *a quo* thus granted Mansingh's application.

On appeal to the SCA by the GCB and the JSA, Brand JA held that the Constitution bestows the power on the President to confer certain 'honours' on individuals. There is nothing in the broader context that compels a meaning of 'honours' that deviates from the one clearly indicated by the historical background of the provision contained in s 84(2)(*k*) of the Constitution. The court thus concluded that the power to confer honours, bestowed on the President by s 84(2)(*k*), includes the authority to confer the status of SC on practising advocates.

The appeal was accordingly upheld. With regard to costs, the court pointed out that this was one of those rare occasions where none of the parties had asked for the costs of appeal in its favour. As to the costs in the court *a quo*, the appellants did not ask for any order against Mansingh. In consequence, the SCA made no order in their favour either. Since no appeal had been lodged against the costs order in the court *a quo*, the court held that it must stand, despite the fact that all the respondents should have succeeded in the court *a quo* 'in warding off the declarator sought'.

• See 2013 (May) *DR* 10.

Company law

Deregistration and reinstatement: In *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC) the WCC held that reinstatement of registration under the Companies Act 71 of 2008 (the 2008 Act) does not have retrospective effect.

The facts in the case were as follows. Bright Bay Property Services (Bright Bay) sued the Moravian Church for specific performance in terms of an agreement. Under the agreement, the Moravian Church undertook to assist Bright Bay in obtaining licences and permits to mine on a farm owned by the Moravian Church. After the conclusion of the agreement, but before performance had taken place, Bright Bay was deregistered in July 2010. Bright Bay applied, in terms of s 73(6)(*a*) of the Companies Act 61 of 1973 (the 1973 Act), for reinstatement in January 2011 and was reinstated in February 2012.

Section 73(6)(*a*) contained the provision that, on restoration, a 'company shall be deemed to have continued in existence as if it had not been deregistered'.

While Bright Bay's application for reinstatement was pending, the 2008 Act came into force and repealed the 1973 Act. The 2008 Act, too, provides for reinstatement of a company (in s 82(4)), but does not contain a deeming provision like s 73(6)(*a*) of the 1973 Act.

As a defence, the Moravian Church claimed that Bright Bay had been deregistered and this had triggered a resolutive condition in the agreement.

The crisp question was which Act governed the reinstatement of Bright Bay – the 1973 Act or the 2008 Act?

Henney J held that it was the legislature's intention to do away with the retrospective effect of reinstatement. The legislature must be taken to have been aware of the express regulation of the retrospective effect in s 73(6)(*a*) of the 1973 Act. As a result, so the court reasoned, the legislature must, therefore, have taken a conscious decision not to re-enact it.

The court referred to the earlier decision in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* 2013 (1) SA 570 (GSJ), in which Van Oosten J held that a High Court could exercise its inherent jurisdiction to validate an act of a company that it had performed in the period between its deregistration and reinstatement.

The court in the present matter rejected the decision in the *Fintech* case because, so it reasoned, there was no basis in law for the court to grant such relief. The legislature had not included the 1973 Act's retrospectivity provisions in the 2008 Act and, if a court were to validate acts performed between deregistration and reinstatement, it would in effect negate the legislature's intention. The 1973 Act had given courts and registrars the power to reinstate companies and, on reinstatement, they were regarded as never having been deregistered. However, courts and registrars never had the power to validate acts performed between deregistration and reinstatement.

The mining permit issued in the period that Bright Bay was deregistered was thus issued to a non-existent entity and was void.

Thus, Bright Bay could not compel the Moravian Church to perform under the contract. The court refused the relief requested in terms of the notice of motion for specific performance, with costs.

Personal liability of directors: In *Bellini v Paulsen and Another* [2013] 2 All SA 26 (WCC) the court was asked to pronounce on the meaning of the phrase 'conducting the business of a company recklessly and fraudulently', as enunciated in s 424 of the Companies Act 61 of 1973 (the Act).

The plaintiff, Bellini, was a creditor of a company in liquidation. The first and second defendants were directors of the company. The two directors (on behalf of the company) bought certain technology from Bellini. At all relevant times the directors were aware that the company was unable, and would never become able, to pay its debts to Bellini. Under cross-examination, the first defendant, who testified on behalf of the defendants, admitted to this.

Bellini sought to hold the directors liable for the debts and other liabilities of the company by virtue of s 424 of the Act.

Mansingh AJ held that, on the evidence presented, the first director had concluded an agreement through the company at a time when it had no assets, no bank account and no means of paying any debt incurred on its behalf.

After the court examined the evidence, it held that the first director was untruthful in the relevant transactions. This conduct, in turn, constituted not only reckless conduct but the court also held that there was a 'wilful perversion of the truth with intent to defraud'.

The court further held that 'recklessness' must be given its ordinary meaning. It requires gross negligence in the form of *culpa lata* (not necessarily *dolus eventualis*), not only in relation to foreseen circumstances, but also to culpably unforeseen consequences, whatever they may be.

The two directors failed to act as reasonable business people. Their conduct, measured against the provisions of s 424(1) of the Act, constituted fraudulent and reckless management of the company's affairs.

The two directors were thus held liable to the plaintiff, in terms of s 424(1) of the Act, for the debts incurred by the company.

Contract law

Place of payment: In *Bush and Others v BJ Kruger Incorporated and Another* [2013] 2 All SA 148 (GSJ) the court held that payment by means of an electronic funds transfer (EFT) occurs when the party entitled to the payment actually receives the money in his or her bank account. The mere instruction by the transferor to his or her bank to transfer the money does not constitute payment.

The dispute between the parties arose from money advanced by the plaintiffs to the first defendant, a firm of attorneys, of which the second defendant was the sole member. When the plaintiffs sought repayment of the money, the defendants failed to oblige. There was no real dispute that the plaintiffs had advanced the money. However, the defendants alleged that the money was paid as an investment in property and the plaintiffs alleged that the money was paid to the defendants as part of a bridging finance transaction.

The agreement between the parties provided that the first defendant had to repay the capital investment plus interest to the plaintiffs. The second defendant's bank account was situated in Pretoria. The plaintiffs' bank accounts were held in Johannesburg. The money had to be repaid by way of an EFT from the first defendant's bank account in Pretoria to the plaintiffs' accounts in Johannesburg.

One of the issues at stake was whether the GSJ, situated in Johannesburg, had jurisdiction to hear the matter. The aspect of jurisdiction, in turn, hinged on whether payment took place in Pretoria or Johannesburg.

Wepener J held that payment had to be effected in the plaintiffs' Johannesburg bank accounts and, therefore, in the GSJ's jurisdiction. Payment by an EFT occurs only when the party entitled to such payment receives it in his or her bank account. Payment would therefore only have been made and completed when the money became available in the plaintiffs' Johannesburg bank accounts.

The court rejected the defendants' reliance on earlier case law (*Salmon v Moni's Wineries Ltd* 1932 CPD 127; *Blumberg v Sauer* 1944 CPD 74; and *Buys v Roodt (now Otto)* 2000 (1) SA 535 (O)) in which it was held that payment takes place when the instruction for payment is given. This earlier case law dealt with cheques and the place of payment where the cheque was payable. The place of payment of a cheque and the place where a debtor instructs its bank to effect a payment in terms of an EFT is not the same. An act of effecting an electronic transfer in Pretoria does not, in itself, constitute payment. It is the receipt of money in the bank account of the recipient that constitutes payment.

Because the instruction to transfer the money had been given from a Pretoria bank account, while the accounts to which the money was to be transferred were in Johannesburg, the court had little difficulty in correctly identifying Johannesburg as the place where actual payment had to take place.

The court accordingly held that the GSJ had jurisdiction to hear the matter.

It granted judgment in favour of the plaintiffs and held the defendants jointly and severally liable for the amount borrowed.

Rei vindicatio: In *Rhoode v De Kock and Another* 2013 (3) SA 123 (SCA) the respondent sellers sold certain immovable property in George to the appellant buyer. The deed of sale was signed by both sellers, who were married in community of property and in whose names the property was registered. It contained a suspensive condition that a loan for the full purchase price, to be secured by a mortgage bond, would be obtained by the buyer before a certain date.

The buyer paid part of the price (R 400 000), but failed to obtain the loan in time.

The buyer and one of the sellers then attempted to extend the deed of sale. However, these amendments were not signed by the second seller. The agreement failed and the sellers sued the buyer to recover the property, relying on *rei vindicatio*.

The buyer argued that the sellers had to tender repayment of the R 400 000 he had paid them in order to complete their cause of action.

Cloete JA held that the sellers did not need to tender repayment of the money, as their cause of action (ie, the *rei vindicatio*) was complete without it.

The court pointed out that the buyer had a claim in unjustified enrichment for the money he had paid to the sellers.

The mere fact that the buyer would be entitled to repayment of the R 400 000 (absent a defence), in order to prevent the sellers being unjustly enriched, did not mean that the buyer was entitled to resist ejectment until the amount was repaid or tendered.

The court explained that, in those cases where the *rei vindicatio* was not available and there had been part performance under a void contract, a party would have no option but to sue for restitution. He or she then had to tender restitution of what had been received under the void contract.

Further, there was no mention of a lien in the present case.

The appeal was dismissed with costs.

Delict

Defamation – social media: In *H v W* [2013] 2 All SA 218 (GSJ) the court was asked to adjudicate on alleged defamation of the complainant by the respondent through the posting of personal information about him on social networking website Facebook.

The respondent, W, had posted an open letter to the applicant, H, on Facebook.

The following extract constitutes the gist of the letter: 'I wonder too what happened to the person who I counted as a best friend for 15 years, and how this behaviour is justified. … Should we blame the alcohol, the drugs, the church … ? But mostly I wonder whether, when you look in the mirror in your drunken testosterone haze, do you still see a man?'

H was separated from his wife and W had been H's close friend. H's estranged wife was residing with W. W claimed that she made the posting on Facebook not to defame H, but in order for him 'to reflect on his life and on the road he had chosen'.

H applied for an interdict to prevent W from posting any similar letters on Facebook or any other similar social network. H also applied for an order directing W to remove the postings already made.

Willis J pointed out that at stake were the common law rights to privacy and freedom of expression, both of which are constitutionally protected.

It was noted that it is the duty of the courts 'harmoniously to develop the common law' in accordance with the principles enshrined in the Constitution.

The test for determining whether words have a defamatory meaning is whether a reasonable person of ordinary intelligence might reasonably understand the wo-rds concerned to convey a meaning defamatory of the litigant concerned.

The court held that the words in the posting were indeed defamatory.

Further, it held that it was not a valid defence to, or a ground of justification for, defamation that the published words may be true.

A distinction must always be made between 'what is interesting to the public', on the one hand, and 'what is in the public interest to make known', on the other. It was neither to the public benefit nor in the public interest that the words in question be published, even if it was accepted that they were true.

The court ordered W to remove all postings she had posted on Facebook or any other social media site on which she referred to H. She was also ordered to pay H's costs.

• See 2013 (May) *DR* 14.

Enrichment

Requirements for *condictio indebiti*: The facts in *MN v AJ* 2013 (3) SA 26 (WCC) were as follows. The parties were married in 1989. In June 1990 their union bore a daughter, N.

In 1995 the parties divorced and the respondent, AJ, was directed in terms of an order of court to maintain N by effecting payment of R 350 per month and to retain her on his medical fund. Between 1995 and June 2006 AJ paid the applicant, MN, a sum of R 50 050 in respect of the maintenance of N.

In June 2006 AJ underwent a paternity test, which conclusively showed that he was not N's biological father.

In July 2007 AJ obtained a court order to the effect that he was not the natural father of N. The order further deleted AJ's maintenance obligations towards N.

At the same time, AJ instituted action in the magistrate's court for recovery of the sum of R 50 050.

His claim was upheld and MN appealed against the order of the magistrate.

On appeal, Gamble J reasoned that AJ's particulars of claim lacked certain material allegations. In this regard, the court held that the particulars of claim failed to mention any enrichment of MN at his expense. They further contained no allegation that the payments were made without cause (*sine causa*) and were therefore unjustified.

There was little doubt that there was an error of fact on AJ's part, which rendered payment of the maintenance money *indebite*. However, he had to prove something additional in order to succeed with the *condictio indebiti*. He bore the onus of establishing the existence of all the elements of the enrichment action on which he relied.

This included setting up sufficient facts to justify an excusable error on his part in effecting payment of the amounts of maintenance to MN; further, that she had been enriched thereby and that his estate had been impoverished in the process.

The fact that AJ took several years to initiate the paternity tests indicated that he was indifferent as to whether or not the maintenance was due, and it could be inferred that he intended to pay the monthly maintenance whether or not he owed it.

The court concluded that, in the light of all the circumstances, AJ did not establish that his mistake was justified to the extent that it entitled him to 'judicial exculpation'.

He further failed to show that MN's estate had been enriched by the monthly maintenance payments.

Finally, the court reasoned that because AJ had approached the court *a quo* for relief under an equitable remedy, and given the fact that the money was paid for the maintenance of a child, it would not be fair to MN to order her to restore either the entire or a part of the amount to AJ.

MN's appeal was therefore upheld with costs.

Insolvency

Winding-up of company: In *FirstRand Bank Ltd v Lodhi 5 Properties Investment CC* 2013 (3) SA 212 (GNP) the facts were as follows. The applicant, FirstRand Bank, applied for the winding-up of the respondent close corporation.

The close corporation raised a point *in limine*, namely that, bearing in mind that the application relating to the close corporation was issued after the commencement of the Companies Act 71 of 2008 (the 2008 Act), the expression 'solvent company' – or insofar as this applied equally to close corporations, 'solvent close corporation' – in item 9(2) of sch 5 to the 2008 Act, means a company that is 'actually (or factually) insolvent'.

As a result, so the close corporation argued, the onus rests on the applicant to prove that the close corporation is 'actually (or factually) insolvent', in the sense that its liabilities exceed its assets.

The close corporation further argued that the ordinary meaning of 'insolvent' was factual insolvency in the sense of an excess of liabilities over assets, as opposed to commercial insolvency or an inability to pay debt in the course of business.

The relevant part of s 344 of the Companies Act 61 of 1973 (the 1973 Act) provides that a company may be wound-up by the court if it is unable to pay its debts and it appears to the court that it is just and equitable that the company should be wound-up.

Section 345(1) of the 1973 Act provides that a company will be deemed unable to pay its debts in a number of circumstances, including if a creditor to whom the company is indebted in a sum over R 100 has served on the company a demand to pay the sum so due; or where a company on which a demand to pay a debt has been served has failed to pay the debt within three weeks; or where a sheriff has issued a *nulla bona* return; or if it is proved to the satisfaction of the court that the company is unable to pay its debts.

In determining, for the purpose of s 345 (1), whether a company is unable to pay its debts, the court must also take into account the contingent and prospective liabilities of the company.

Van der Byl AJ held that the 2008 Act distinguishes between the grounds for winding-up solvent companies, as set out in s 81; and the grounds for winding-up insolvent companies, as set out in ss 344 and 345 of the 1973 Act.

In determining the meaning of 'solvent' and 'insolvent', it must be borne in mind that commercial insolvency has always been relevant to the winding-up of companies.

The words 'solvent company' in item 9(2) of sch 5 to the 2008 Act refer to companies that are not actually insolvent or commercially insolvent. Such solvent companies are envisaged by part G of ch 2 to the Act. In contrast, an insolvent company, to which the grounds in s 344 of the 1973 Act apply, is one that is either commercially or factually insolvent.

Accordingly, so the court concluded, in the absence of an express provision, there is no indication in the 2008 Act that the legislature intended, particularly insofar as it left s 345 of the 1973 intact, to do away with the principle that a company (or close corporation) may be liquidated on the grounds of its 'commercial insolvency'.

The court accordingly dismissed the point *in limine*.

Land

Meaning of 'portion' of agricultural land: The appeal in *Adlem and Another v Arlow* 2013 (3) SA 1 (SCA) concerned the correct interpretation of s 3(*d*) of the Subdivision of Agricultural Land Act 70 of 1970 (the Act).

The commencement of the Sub--division of Agricultural Land Repeal Act 64 of 1998, which repeals the whole of the Act, has not yet been promulgated.

On 14 August 2008 the parties entered into a written agreement of lease of certain immovable properties, including two portions of the same piece of agricultural land.

Arlow, as the plaintiff, instituted an action against Adlem and another, as defendants, in the NWM, in which he claimed ejectment of Adlem, *inter alia*, on the basis that the lease was void as it contravened s 3(*d*) of the Act.

Adlem brought nine counter-claims, some of which were later abandoned.

The question for decision was whether the lease, in terms of which two portions of the same agricultural property was leased to Adlem, was valid as the consent of the Minister of Agriculture was not obtained prior to the conclusion of the lease.

Arlow argued that because the Minister's consent was not obtained, the lease was in contravention of s 3(*d*) of the Act and therefore void in as much as the property was agricultural land. The lease was for an initial period of nine years and 11 months and it conferred a right on Adlem to renew the lease for a further two successive periods of nine years and 11 months each.

Cloete JA held that the clear impression from reading the Act as a whole was that its object and purpose were to prevent subdivision of agricultural land into uneconomic units and, further, to prevent the use of uneconomic portions of agricultural land for any length of time.

The phrase 'portion of agricultural land', as referred to in ss 3(*d*) and 3(*e*) of the Act, must be interpreted as meaning a piece of land that forms part of a property (as opposed to the whole property) registered in the deeds registry.

Further, the prohibition is aimed at preventing physical fragmentation of the property, and the use of part of the property under a long lease – as well as the granting of a right for an extended period in respect of the property.

In other words, the word 'portion' in, *inter alia*, s 3(*d*) must be interpreted as meaning a part of a property (as opposed to the whole property) registered in the deeds registry, and not as having the meaning used in the deeds registry to describe the whole property.

Section 3(*d*) of the Act thus did not apply to the present lease since the whole of the property owned by Arlow was leased to Adlem.

The order of the court *a quo* was set aside and costs were awarded to Adlem. The matter was referred back to the High Court to continue with the trial.

Trusts

Sole trustee and beneficiary: The court in *Groeschke v Trustee, Groeschke Family Trust and Others* 2013 (3) SA 254 (GSJ) was asked to pronounce on a number of questions relating to a trust. The one to be discussed here was whether it is possible for a sole trustee of a trust to become the sole beneficiary at the same time.

The facts were that Heinrich Groeschke (the father) founded a trust, with himself as sole trustee and his son, R, as capital and income beneficiary. The father and son later fell out. The father subsequently drafted, signed and lodged with the Master a resolution in which he removed R as a beneficiary, replaced by himself, and appointed a third person, B, as an 'alternative' trustee.

When the father passed away, R applied to the High Court for an order declaring the father's changes to the trust invalid.

Bester AJ held that there was authority that a trustee may be a beneficiary at the same time.

In deciding on the question whether a sole trustee of a trust could become its sole beneficiary, the court held that this would conflict with the principle that control of the trust property must be kept separate from its enjoyment, with the controller exercising control on behalf of another. However, an eventuality where the sole trustee also becomes the sole beneficiary would not invalidate a trust.

Section 7 of the Trust Property Control Act 57 of 1988 gives the Master the power to appoint co-trustees to any serving trustee. This power is vested in the Master notwithstanding the terms of the trust deed.

A distinction is thus drawn between the situation where the trust is created *ab initio* with only one trustee, who is also the sole beneficiary, and the situation where the sole trustee later, after the trust has already been established, becomes the sole beneficiary. The first situation occurred in *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA), in which the court held that no trust had come into existence. The latter situation is what happened in the present case.

The court thus held that the father could be the sole trustee and the sole beneficiary at the same time.

R's application was dismissed with costs.

Wills

Freedom of testation: In *In Re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) the testatrix had bequethed money to a trust with the sole purpose of providing bursaries to assist white students who had completed an MSc degree at a South African university and who intended to study towards a doctorate at an overseas university. Four South African universities were nominated to participate in the selection process.

The will further provided that if the trustees were unable to carry out the terms of the trust, the trust income must be distributed to certain charities.

Although the testatrix was informed that the racially discriminatory nature of the trust might jeopardise its validity, she nevertheless decided to retain the word 'white' in her will.

All four of the universities declined to participate in the racially discriminatory nature of the bequest, but indicated that they would be prepared to participate if the word 'white' was removed from its conditions.

The trustees then approached the High Court for an order that the discriminatory word 'white' be deleted from the bequest, in order to make it acceptable to the universities and thereby allowing the purpose of the bursaries to be achieved.

The High Court held that the trust income must go to the charities stipulated in the will.

On appeal, Erasmus AJA co-nfirmed the constitutional protection contained in s 25 of the Constitution.

Section 25 provides that no one may be deprived of property, except where the deprivation is done in terms of a law of general application. This section entrenches the principle that no law may permit the arbitrary deprivation of property.

Freedom of testation is a basic principle of the law of testate succession.

The view that s 25 protects a person's right to dispose of his or her assets on death as he or she wishes was accepted by way of an *obiter dictum* in *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C); [2006] 3 All SA 373 (C).

However, freedom of testation is not absolute and the court is not obliged to give effect to the wishes of the testator if there is a rule of law preventing it from doing so.

The court held that the testatrix intended that, should it prove impossible to give effect to the provisions of the bursary bequest, the money had to go to the charitable organisations, thereby providing for foreseen eventualities.

The fact that the universities would not participate was an impossibility in respect of the bursary bequest, which meant that the bequest had to go to the named charitable organisations in accordance with the wishes of the testatrix.

The appeal was dismissed. The costs of the appeal were ordered to be taxed as between attorney and client and were to be paid out of the funds of the trust.

• See 2013 (Jan/Feb) *DR* 54.

Other cases

Apart from the cases and topics referred to above, the material under review also contained cases dealing with administrative law, civil procedure, constitutional law, execution, insolvency, interdicts, interpretation of contracts, justice and security, labour law, land reform, local authorities, mining, motor vehicle accidents, novation, practice, tax, pensions, and trade and industry.