THE LAW REPORTS
January 2013 (1) The South African Law Reports (pp 1 – 322); [2012] 4 The All South African Law Reports December no 1 (pp 485 – 605) and no 2 (pp 607 – 689)

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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:
CC: Constitutional Court
ECP: Eastern Cape High Court, Port Elizabeth
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Attorneys

Attorney's conduct: *Plumb on Plumbers v Lauderdale and Another* 2013 (1) SA 60 (KZD) concerned a provisional sequestration application, which brought into question an attorney's conduct. On investigating several of the provisional sequestration applications from the same attorney's office, the court noted that the allegations of fact in the founding affidavits were identical or similar in form and content. The attorney involved then withdrew and was replaced by the recorded attorneys and counsel, who had nothing to do with the preparation of the applications.

The affidavit in each application contained the following statements: 'Despite many promises, the [debtor] has not paid the applicant. The [debtor] has been avoiding my phone calls and has said to me in many phone conversations that he was ''sorting the matter out''. The [debtor] has simply ''not sorted the matter out''.'

Not only was the identical nature of the allegations of fact significant, but in some cases the allegations were contained in affidavits deposed to in the first person, wherein the applicant refers to himself or herself in the third person as 'the applicant'. Further, in each affidavit the following allegation appears: 'I subsequently telephoned the [debtor] and I could gather from his (or her) voice, that he (or she) was under a great amount of stress and I have ascertained that the assets and liabilities of the [debtor] are as follows ... .'

Lopes J held that the affidavits could not have correctly represented, in each case, facts the deponent believed to be true. The preparation and finalisation of the affidavits were performed by the same person or persons, who should have, or must have had, knowledge of the falsity of the allegations contained in at least some, if not all, of the affidavits. Further, all of the applications were moved by the same counsel, who drafted at least some of the affidavits.

The *rule nisi* was not confirmed and the judgment and affidavits were referred to the KwaZulu-Natal Law Society and the Society of Advocates.

Banking law

Phishing scam: In *Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 (1) SA 12 (GNP) the plaintiff was an attorney and the defendant was a firm of attorneys. The plaintiff held a private bank account with Absa, while the defendant held trust accounts with Standard Bank and Nedbank.

On 20 November 2009 the defendant was contacted telephonically by one Slinger (a fraudster who traded as 'Sewmach') to collect R 1 million from one of Sewmach's debtors. At all relevant times the defendant was unaware of Slinger's fraudulent dealings. A few days later Slinger's business partner informed the defendant that Sewmach and its debtor had concluded an agreement in terms of which R 200 000 would be paid by the debtor to Sewmach. As Sewmach had by then already requested the defendant to collect the outstanding debt, or so it told the defendant, it (Sewmach) instructed the debtor to pay the money directly into the defendant's trust account, which was done on 14 January 2010.

Also on 14 January, the plaintiff received an e-mail purportedly from Absa. However, this was a phishing scam. The plaintiff clicked on the link provided in the fraudulent e-mail and typed in his password. Two hours later he was informed by Absa that money had been fraudulently transferred from his account to an account held with Standard Bank. The following day he was informed that an amount of R 200 000 had been transferred from his account.

On 15 January the defendant received confirmation by e-mail from Slinger's partner that the money had been transferred to its trust account and was informed Sewmach needed the money urgently.

On 18 January, after the defendant had verified with its accounts department that the money had been transferred to its trust account, it subtracted its professional fee (R 5 831,60) and paid the balance (R 194 168,40) to Sewmach's account.

The defendant only became aware of the fraud on 25 January.

On 3 February the defendant transferred an amount of R 194 168,40 from its Standard Bank account to its Nedbank account.

In June, the plaintiff, relying on the *rei vindicatio*, instituted action against the defendant, claiming the R 200 000 that was transferred by the fraudster to the latter's bank account.

Du Plessis J held that money paid into a bank account becomes the property of the bank. The account holder usually becomes the creditor of the bank for the amount so deposited into his account. Stolen money that is paid into the bank account of a *bona fide* third party and which has become mixed with the money of the third party cannot be claimed from the third party using the *rei vindicatio*.

Where the money is held in a dedicated fund and is still identifiable as the money that was deposited into the account, the original owner can obtain an interdict to prevent the account holder from using the money until it can be established who is entitled to it.

For reasons unknown to the court, the plaintiff did not obtain such an interdict against the defendant.

At the time when the plaintiff instituted action (ie, in June 2010), R 194 168,40 had been transferred to the fraudsters for quite some time and the defendant's professional fee of R 5 831,60 had been transferred to its business account. It was therefore no longer an identifiable amount of money, nor was it kept in a dedicated fund.

The plaintiff's claim was therefore dismissed with costs.

Company law

Jurisdiction: In *Sibakhulu Co-nst-ru-ction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) the court was asked to pronounce on where a company 'resides' for purposes of instituting proceedings against or on behalf of a company. Sibakhulu Construction had applied in the WCC for the liquidation of a golf estate (the estate). The owners of an erf in the estate intervened, arguing that liquidation had been suspended pending the outcome of a business rescue application they had brought in the ECP. (It is not material for purposes of the present discussion to mention the grounds on which the owners of the erf argued that the ECP might have concurrent jurisdiction.)

Sibakhulu Construction, in turn, argued that the ECP did not have jurisdiction over the company as its registered office was in Cape Town. Therefore, there was no proper business rescue application that could, in terms of s 131(6) of the Companies Act 71 of 2008 (the 2008 Act), suspend the liquidation proceedings.

Binns-Ward J pointed out that the 2008 Act does not contain a provision equivalent to s 12 of the Companies Act 71 of 1973 (the 1973 Act), in terms of which more than one High Court could have jurisdiction over a company in matters arising under the Act.

According to the general principles of the common law, jurisdiction over a person depends on his residence. Under the 1973 Act, a company – unlike an individual – could have more than one residence.

The 2008 Act retains the institution of a registered office as the place where third parties may effectively transact with the company. The registered office has to be an office maintained by the company itself. If a company has more than one office, the address of its principal office must be registered. The principal office means the place where the administrative business of the company is principally centred.

A material distinction between a 'registered office' under the 2008 Act and its predecessors is that under the 2008 Act the registered office must be the company's only office; alternatively, if it has more than one office, its 'principal office'.

The only court with jurisdiction in the business rescue and winding-up of a company is the High Court where the company has its registered office. This is even in cases where a company, in breach of the requirements, registered an address different to that of its actual principal place of business. This is confirmed by the fact that s 128(1)(*e*) of the 2008 Act refers to 'the' High Court that has jurisdiction in business rescue proceedings.

The court postponed the matter to enable the business rescue application to be transferred from the ECP to the WCC. This could be done by obtaining an order from the ECP in terms of s 3(1) of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001. The court indicated that it would make a provisional winding-up order on the next court date, unless such a transfer order had been received.

Contract law

Cancellation: The decision in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2012] 4 All SA 555 (GSJ) dealt with the validity of a tender contract where there was no public tender.

The defendant, the Department of Infrastructure Development (the department), had contracted with a third party, Ilima, for the latter to complete the construction of a hospital. The plaintiff, Country Cloud, had, in a separate loan agreement, undertaken to lend Ilima money to enable it (Ilima) to furnish the requisite performance bond to the department as a guarantee against default in the construction of the hospital. A third agreement entered into between Country Cloud and the department had provided for repayment of the loan by the department.

The first agreement was, however, cancelled by the department on the grounds that Ilima fraudulently misrepresented that the tax certificate it had presented was valid. That gave rise to the plaintiff's claim against the defendant.

Satchwell J identified the following as the relevant issues –

• whether the contract was awarded to Ilima in compliance with the procurement regulations and policies of the department;

• whether the tax certificate presented by Ilima was valid;

• whether the defendant had a legal duty towards the plaintiff as alleged in the particulars of claim; and

• whether the sum of R 12 million was paid by the plaintiff.

The department's reasons for cancelling the contract were based on non-compliance with the relevant statutory provisions and regulations. Those provisions were not identified by the department, but the court found this to be irrelevant when the Constitution, the Public Finance Management Act 1 of 1999 and the Treasury Regulations were applicable. The court was satisfied that the issue was sufficiently defined.

If the department wished to contend that it was not feasible to comply with the requirements for a proper tender, it had to provide reasons for such contention, but had failed to do so.

It has been held by the courts that contracts concluded without complying with prescribed competitive processes are invalid. The contract between the department and Ilima in this case was confirmed as having been invalid, and the fact that the department did not *mero motu* apply to court for a declarator did not mean that it had to be held to the contract.

The plaintiff's claim was dismissed.

Credit agreements

NCA – right to knowledge of terms of agreement: In *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD) Dlamini was a functionally illiterate Zulu speaker who did not understand English. He bought a motor vehicle from a second-hand car dealer. The dealer acted as the bank's agent to facilitate the bank's financing of the purchase of the vehicle. Four days later Dlamini returned the seriously defective vehicle and demanded a refund of his deposit, which the dealer refused. The bank issued summons against Dlamini.

The bank contended that because Dlamini did not notify the bank of the termination in the manner prescribed by a certain clause in the agreement, the termination was a voluntary surrender, in which case the bank could sell the vehicle and claim any shortfall due by him under the agreement. The clause provided that Dlamini could, within five business days, terminate the agreement on notice to the bank at a certain fax number and return or tender the return of the vehicle. What the agreement had not recorded was that he was entitled to a refund in terms of s 121(3)(*a*) of the National Credit Act 34 of 2005 (NCA).

The only disputed fact was whether the consumer knew and understood the terms of the agreement.

D Pillay J held that Dlamini had terminated the agreement by returning the vehicle because it was so defective that it could not be driven. The bank failed to establish a factual basis for any finding that the termination was a voluntary surrender, which is usually triggered by a consumer's inability to comply with the credit agreement. Dlamini's mere non-compliance with the procedural formality of faxing a notice of termination did not lead to the inference that he had terminated the agreement by voluntarily surrendering the vehicle.

The court further held that the bank and its agents caused Dlamini to enter into a credit agreement without reading, interpreting and explaining the material terms to him, which he did not know or understand. A consumer is entitled to be informed of his rights in his own language where practicable (s 63 of the NCA) and to receive the document in plain and understandable language (s 64 of the NCA). Strictly interpreted, neither s 63 nor s 64 assists an illiterate consumer. Purposively interpreted, the credit provider bears the onus to prove it took reasonable steps to inform the consumer of the agreement's material terms.

When a credit agreement is terminated in terms of s 121 of the NCA, the consumer has the right to a refund from the credit provider, which the clause in the bank's agreement excluded. Rescission of the agreement under s 121 aims to restore the parties to the *status quo ante*.

The remedy Dlamini was entitled to when he discovered that the vehicle could not be driven was a refund in terms of s 121(3)(*a*). Non-disclosure of s 121(3)(*a*) violates the right of consumers to education and information in terms of s 3 of the NCA. The bank's selection of what parts of s 121 of the NCA it recorded in the agreement, and what it excluded, was deliberate and deceptive. Such deception conflicted with the letter and spirit of the NCA.

Finally, the court reasoned, the agreement had been skewed in favour of the bank by such selective disclosure, as well as the failure to inform Dlamini of the contents of the agreement and the breach of his rights to information in an official language that he understood and to information in plain and understandable language. The court held that Dlamini had rescinded the agreement with the bank.

The entire agreement was thus set aside.

Damages

Riot damage: In *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) the court was asked to pronounce on the constitutionality of s 11(1) and (2) of the Regulation of Gatherings Act 205 of 1993 (the Act). The subsections provide, *inter alia*, that organisations that organise gatherings or demonstrations will be held liable for riot damage caused by those who participated in the riot as a joint wrongdoer, as provided for by the Apportionment of Damages Act 34 of 1956. It is a defence to a claim against the organisation if it can prove that it did not permit or connive at the act or omission that caused the damage in question; and that the act or omission in question did not fall in the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and that it took all reasonable steps to prevent the act or omission in question.

The facts were that the South African Transport and Allied Workers Union (SATAWU) had organised a gathering that resulted in a riot and damage to the property of the first to eighth respondents (the plaintiffs in the court *a quo*). The respondents proceeded against SATAWU in the High Court for their damages, relying on s 11(1) of the Act. SATAWU denied liability and raised a claim in reconvention that s 11(2)(*b*) constituted an unjustifiable limitation of the right to freedom of assembly. By agreement between the parties, this point of law was determined separately and initially, with the High Court finding against SATAWU, which finding was upheld by the SCA. SATAWU then appealed to the CC.

In the SCA the issues were whether the words 'and was not reasonably foreseeable' rendered s 11(2) irrational and thus inconsistent with the principle of legality; whether s 11(2) limited the right to freedom of assembly; and, if it did, whether this was justifiable.

Mogoeng CJ held that the section could be interpreted in a way that preserved its validity. This interpretation was that an organiser had to continuously take reasonable steps to prevent damage-causing acts or omissions that became reasonably foreseeable in such a manner that, if it did so, any event that caused damage would be unforeseeable. The court noted that the steps had to be within the organiser's power and if they were outside its power, it had a duty to notify third parties with the duty to take steps in such circumstances to do so.

The reasonable steps the organisers had to take after the notification depended on the third parties' responses. With this interpretation, the section was rational. What remained to be determined was whether the section limited the right to assemble and, if it did, whether it did so justifiably.

The court held that s 11(1) and (2) made organisers of gatherings liable for riot damage on a wider basis than under the common law and compliance with s 11(2)'s requirements significantly increased the costs of organising gatherings. These factors amounted to a limitation of the right to assemble, which required justification.

After considering a number of aspects that impact on justification, the court held that there was a 'tight fit' between the limitation and its purpose – the protection of the rights of victims of riot damage – and that less restrictive means to achieve this were not available.

The limitation of the right to assemble was held to be reasonable and justifiable and the appeal was dismissed.

• See 2012 (March) *DR* 40, 2011 (Dec) *DR* 49 and 2011 (July) *DR* 40.

Insolvency

Voluntary surrender – advantage to creditors: *Ex Parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP) concerned an application for an order sequestrating the estate of the applicant by way of voluntary surrender in terms of the provisions of ss 3 to 6 of the Insolvency Act 24 of 1936 (the Act). The application was brought on an *ex parte* basis. It was not in issue that there was substantial compliance with s 4 of the Act.

Gorven J pointed out that the test for voluntary surrender applications is set out in s 6(1) of the Act, which, apart from requiring compliance with s 4, provides that if 'the court is satisfied … that the estate of the debtor … is insolvent, that he owns realisable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating that estate.'

There was no dispute that the estate of the applicant was insolvent. This left two issues for determination before the discretion granted by s 6(1) could be exercised by the court: The first was to determine whether the applicant owned realisable property sufficient to defray all costs of the sequestration and the second was to determine whether the sequestration of the applicant's estate would be to the advantage of creditors. Both of these aspects require the court to be satisfied. The applicant must discharge the onus satisfying the court on a balance of probabilities. In particular, the test relating to advantage to creditors is more strictly framed than that for the provisional sequestration of a debtor's estate, which only requires the court to be of the opinion that *prima facie* there is reason to believe that it will be to the advantage of creditors if the estate is sequestrated.

There is an even greater risk of abuse and a risk that the interests of creditors will be undermined in voluntary surrender applications than in 'friendly' sequestration applications. The need for full and frank disclosure and well-founded evidence concerning the debtor's estate is more pronounced. Voluntary surrender applications require an even higher level of disclosure than 'friendly' sequestrations if the court is to be placed in a position where it can arrive at the findings and exercise the discretion to accept surrender as set out in s 6(1) of the Act.

Because of a lack of proper evidence regarding the value of the applicant's assets, the court was not satisfied that the applicant owned realisable property of sufficient value to defray all costs of the sequestration. The court was also not satisfied that it would have been to the advantage of the applicant's creditors if his estate was sequestrated.

The application was thus dismissed with costs.

Sectional title

Management rules – arbitration of dispute: In *Body Corporate Pinewood Park v Dellis (Pty) Ltd* 2013 (1) SA 296 (SCA) the court considered the status and nature of the rules governing a body corporate.

The legislative framework relating to the management and control of sectional title schemes provides that a scheme shall be controlled and managed by means of rules comprising, *inter alia*, management rules prescribed by regulations. Rule 71 of the prescribed management rules provides that disputes must be determined in terms of the rules and if the dispute is not so resolved, either party may refer the dispute to arbitration.

Section 6 of the Arbitration Act 42 of 1965 provides that 'in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may … apply to that court for a stay of such proceedings' and that the court may thereupon 'make an order staying such proceedings subject to such terms and conditions as it may consider just'.

The court *a quo* upheld a point *in limine* that r 71 compelled resolution of a dispute between the applicant, a body corporate, and the respondent, the owner of a sectional title unit, by means of arbitration and, therefore, that the court's jurisdiction to hear the matter was ousted.

The SCA, per Mpati P, granted the body corporate special leave to appeal against that decision and upheld the appeal.

Dismissing the point *in limine*, the SCA held that the fact that the rules could be jettisoned and substituted by unanimous resolution of a body corporate clearly indicated that the legislature intended the rules to be of a contractual nature. In addition, the provisions of the Act and the regulations did not prescribe an arbitration procedure for inclusion in the rules; and the management rules were not an Act of parliament that could exclude the operation of the Arbitration Act.

Section 6 of the Arbitration Act was applicable to an arbitration process under management r 71. The court of first instance should not have dismissed the body corporate's claim and, instead, should have stayed the proceedings pending the finalisation of arbitration proceedings in terms of s 6 of the Arbitration Act, or it should have exercised its discretion and continued with the action.

Servitudes

Public right of way: In *Langebaan Ratepayers' and Residents' Association v Dormell Properties 391 (Pty) Ltd and Others* 2013 (1) SA 37 (WCC) the first respondent, Dormell, closed off a section of road forming part of a deproclaimed public road that traversed its land. The road in question was first proclaimed a provincial road in approximately 1968 by the then Malmesbury Divisional Council. In 1991 it was deproclaimed as a public road when a tar road was constructed. The applicant, the Langebaan Ratepayers' and Residents' Association, claimed the existence of a public servitutal right of way in favour of the public, constituted by ancient use, along the deproclaimed public road. It applied for a declaratory order to this effect as well as for an interdict *inter alia* preventing Dormell from interfering with such right by closing off its section of the road.

The court restated the principles applicable to establishing the existence of a public right of way based on immemorial use.

Saba AJ held that the evidence presented by the applicant, including maps from a book on the history of Saldanha and the evidence of two elderly residents from the area, established on a balance of probabilities that the public had access to the road long before it was proclaimed a provincial road in approximately 1968.

Dormell had failed to rebut the presumption that the origin of the use of the road was lawful. In the circumstances, a public servitutal right of way existed in favour of the public over the road. The deproclamation in terms of a provincial ordinance of a route as a public road did not affect the validity of a pre-existing public servitutal right of way created by immemorial use over a portion of such route.

Dormell was interdicted and restrained from closing the road and was ordered to re-open it for use by the public. Dormell was also ordered to pay the costs of the application on a scale as between attorney and client.

Spoliation

Spoliation order: In *Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd and Others* 2013 (1) SA 239 (KZD) a restaurant in Umhlanga Rocks had put out tables, chairs and umbrellas for the exclusive use of its clients in an area open to the public and to patrons of a nearby liquor store. No one else put out tables or attempted to serve customers in that space, nor did anyone impede the restaurant when it did so. The positioning of the tables was also not in any way limited. After 12 years of such use, access to the area was boarded up, preventing the restaurant from putting out tables and chairs. The applicant restaurant approached the court for a spoliation order. The defendant submitted that what was enjoyed by the restaurant was a right of access, and not possession, and that this was not protected by the *mandament van spolie*.

Gorven J held that, through its use of that area for placing tables, chairs and umbrellas for the enjoyment of its patrons, there was sufficient control for it to be said that the restaurant was in possession of the area. Deprivation of such possession entitled the applicant to a spoliation order.

The court held that neither the fact that the open area was also used by customers of a neighboring liquor store, nor the fact that the restaurant removed the tables, chairs and umbrellas each night, militated against a finding that the restaurant exercised the type of possession required to qualify for the remedy in question.

The application was thus allowed with costs.

Other cases

Apart from the cases and topics referred to above, the material under review also contained cases dealing with administrative law, appeals, civil procedure, company law, constitutional law, costs, criminal law, criminal procedure, customary law, evidence, immigration, labour law, land, motor vehicle accidents, practice, prescription and schools.