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South African Restructuring and Insolvency Practitioners Association NPC

SARIPA Insolvency Law Update 3 of 2017 dated 20 September.

The views expressed in this update are those of the writer, Martinus (Tienie) Cronje.

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Obligations of a company arising from the cession of book debts are not capable of being suspended, certainly not as regards the right of the cessionary to enforce the debts, even if they arise from sales during business rescue. The book debts belong to the cessionary. They may not be 'disposed of' without the consent of the cessionary, as provided in section 134(3)*(a).*

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BUSINESS RESCUE

BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others

2017 (4) SA 592 (GJ)

Suspension of contracts and cession of debts as security.

Suspension of all the obligations of a company by a business rescue practitioner in terms of section 136(2) of the Companies Act 71 of 2008 entitles the other party to a contract to withhold compliance with reciprocal obligations or cancel the contract, provided the appropriate notices are given. However, the other party may not simply ignore the suspension and insist on performance contrary to it.

Obligations of a company arising from the cession of book debts are not capable of being suspended, certainly not as regards the right of the cessionary to enforce the debts, even if they arise from sales during business rescue. The book debts belong to the cessionary. They may not be 'disposed of' without the consent of the cessionary, as provided in section 134(3)*(a).*

The company under business rescue and the business rescue practitioner argue that the court has no jurisdiction because both the registered address and the main place of business of the company fall within the area of jurisdiction of the Gauteng Provincial Division of the High Court, namely, respectively, Pretoria and Olifantsfontein, Tembisa. However, the areas of civil jurisdiction of the Gauteng Provincial Division and the Gauteng Local Division are now co-extensive, and Tembisa falls within the area of Ekurhuleni North. [Government Notice 30 of 13 January 2016, published in *Government Gazette* No 39601 of 15 January 2016.] Both the local division and the provincial division therefore have jurisdiction, and the objection to jurisdiction fails. (Par [23] and [24])

A point raised is that winding-up cannot be granted without first having business rescue set aside. But it is implicit in the prayer for winding-up that the setting-aside of the business rescue is being sought. (Par [25])

The applicant asks, in a separate prayer, for leave to institute these proceedings. The prospects of such an application would generally be heavily reliant on the prospects of success in the main relief to be sought. Where the main relief to be sought goes to the very status which invokes the moratorium protection, it seems overly technical to insist on two distinct applications as opposed to one application with two sets of prayers: one for permission, and one for the substantive relief. (Par [27]) As regards the matter of form, ie whether a court should insist on a discrete prior application it would appear that a full court of the Gauteng Provincial Division has decided the issue against the first and second respondents' argument. (Par [28]) The first respondent's proposition has been foreclosed by the full court of the Gauteng Provincial Division. [**LA Sport 4x4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Ltd and Others** GP 513/2013 ([2015] ZAGPPHC 78, 26 February 2015), effectively overruling **Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another** GP 12406/2013 ([2013] ZAGPJHC 109, 10 May 2013).] (Par [81])

The competing contentions are that the second respondent says that he has suspended all of the first respondent's obligations to applicant in terms of the contract. The applicant disputes the entitlement of the second respondent to do so while at the same time insisting on performance by the applicant of its reciprocal obligations in terms of that agreement. [Par [34])

Since the entitlement to suspend is founded in express terms in section 136(2)*(a)* of the Companies Act 71 of 2008 the real question is whether those provisions are to be read as excluding the power to suspend obligations when at the same time the company insists on performance by the creditor of the latter's reciprocal obligations in terms of the same contract; or whether instead the position is simply that the creditor's reciprocal obligations are automatically and equally suspended as a matter of law; or whether the

creditor's reciprocal obligations are not suspended without more but the creditor acquires the right to elect either to rely on the *exceptio non adimpleti contractus* [a remedy that allows a party to a reciprocal contract to withhold his own performance, accompanied by a right to ward off a claim for such performance until the other party has duly performed his or her obligations under the contract] — and so in effect procures a suspension of its counter-prestation, protected against mora — or instead to cancel the agreement for breach. (Par [35])

Interpretation starts with a textual treatment of the words in their context. [***Cool Ideas 1186 CC v Hubbard and Another*** 2014 (4) SA 474 (CC) (2014 (8) BCLR 869; [2014] ZACC 16) para 28.] The language of section 136 conferring the power of suspension is pretty clear, at least on the face of it; 'any' is notoriously a word of wide if not unlimited import, and so it would, at least prima facie and unless any absurdity is thrown up, include obligations that are contractually tied with a reciprocal obligation of the creditor. (Par [37])

Since the section is silent about the effect that the suspension has on such an reciprocal obligation, and since the legislature knew and knows the residual law of contract, it must be accepted that the creditor has available, subject to the normal rules, the *exceptio non adimpleti contractus* and, again, if the normal rules of materiality and contractual notices apply, the creditor also has available the normal rights of cancellation. [See **Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank** 2015 (3) SA 438 (SCA) ([2015] ZASCA 39).] (Par [38])

Applied to the agreement under discussion, the applicant's obligation to avail product is obviously reciprocal with the obligation to pay for it, and also with the first obligation of the company to purchase exclusively from the applicant. So too would the applicant's obligation to avail the premises be reciprocal with the obligation of the company to pay the rental. The applicant's obligation to avail the equipment is also reciprocal with the obligation of the company exclusively to purchase product from the applicant. [Par [39]) It follows that the suspension of all the obligations of the company entitles the applicant to withhold product, access to the premises and access to the equipment. The

applicant may also cancel the branded distribution agreement, provided the appropriate notices will have been given. However, the applicant may not simply ignore the suspension and insist on performance contrary to it. (Par [39]

The competing contentions are whether or not the cession of book debts continues to operate in respect of debts that arise from sales concluded during business rescue. (Par [42])

It might at first blush be supposed that section 134 and section 136 are in conflict — how can the security be preserved if the debtor's obligations to the creditor are suspended? But section 136(2A)*(c)* expressly carves out a suspended provision of an agreement relating to security, and proclaims that it 'continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company'. (Par [44]) This provision too must be read in the context of the applicable law, at least to the extent that it has not expressly or by necessary implication been swept aside. A security cession of future book debts is, by our law, complete and effective by mere initial agreement. When at the future date the book debts come into existence then, without more and without any further obligation they become the property of the cessionary. [**Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others** 2001 (4) SA 360 (W) at 366; see also **Western Breeze Trading 43 (Pty) Ltd v Engen Petroleum Ltd** [2016] ZAWCHC 42 (17 March 2016) para 50.] (Par [45])

No further obligation on the part of the cedent exists or is required to be performed for the debt to become subjected to the rights of the cessionary, including, for instance, to recover the debt from the debtor. [See **Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd** 2009 (1) SA 493 (SCA) ([2008] ZASCA 128) para 50.] Even the reversionary right was ceded to the creditor in this agreement. [Page 153 clause 4.] That being so, there was no obligation of the company arising from the cession of book debts that was capable of being suspended, certainly not as regards the right of the cessionary to enforce the debts, albeit that they arose only in business rescue, and to allocate the proceeds towards the cedent's indebtedness to the cessionary. (Par [46])

In consequence, whenever the first respondent's book debts arise, now or in the future, they belong to the cessionary [See **Kritzinger and Another v Standard Bank of South Africa** 2013 ZAFSHC 215 (19 September 2013), especially paras 49 – 55], at least to the extent of the indebtedness of the company to the cessionary. They may not be 'disposed of' without the consent of the cessionary, as provided in section 134(3)*(a).* (Par [47])

The applicant has made it clear that it will not surrender its security. That means that unless the business rescue practitioner can propose recourse to short-term capital of the order of R80 million, it will not be able to trade at all. Such a prospect has not been illustrated. (Par [60])

The company and business rescue practitioner argue in their latest heads of argument that no case has been made out to establish that there is no reasonable prospect for rescuing the company, on the following bases: First, they submit that the company does not need the applicant's product, premises or branding. The company is able, they say, to conduct its business by collecting fuel in the first respondent's trucks and tankers from the alternative suppliers and then delivering it direct to the customers of the company. [First and second respondents' heads of argument paras 5.5.4 – 5.5.8.] (Par [66])

The difficulty with this proposition is that it involves a change in the way in which the first respondent has functioned up to now. It smacks of devising a simplistic makeshift solution to an insurmountable problem, and selling it as the panacea that was there all the time. If it were that simple, why was it not implemented all along? (Par [67])

What is the yardstick to be applied? Section 130(1)*(a)*(ii), read with section 130(5)*(a)*(i), provides that a business rescue resolution may be set aside if there is no 'reasonable prospect' for rescuing the company. A court hearing such an application may also, under section 130(5)*(a)*(ii), set aside the resolution if, having regard to all of the evidence, the court considers that it is otherwise 'just and equitable' to do so. It has been said that a 'reasonable prospect' means something less than a reasonable probability; something more than a prima facie case; something more than an arguable possibility; a

prospect based on reasonable grounds; and mere speculative suggestion is not enough. [**Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others** 2013 (4) SA 539 (SCA) ([2013] ZASCA 68) para 29ff. Brand JA also concluded that the discretion under section 134(4) is a so-called 'discretion in the loose sense', thus a value judgment, and thus appealable without any misdirection first required, as is the case with a 'discretion in the strict sense'. It is suggested that the same applies in regard to the powers under section 130(5)*(a)*(ii).]

In this case the best-case scenario advanced by the first and second respondents, ultimately fails for the following reasons:

> First, according to the business rescue practitioner, the company will not be conducting the same business as before. It will not need a forecourt at all; it will instead, gypsy-like, fetch and deliver fuel. But whether such a business has any legs at all, is not proven.
>
> Second, the company has no working capital to speak of. The second respondent's latest preliminary executive report acknowledges this fact. It clearly is wholly dependent on the lawfulness of its business concept, which is to sweep aside the applicant's cession of book debts and to use that money, without the applicant's consent, to keep the business ticking over. It has become a wholly hand-to-mouth operation.
>
> Third, the first company blithely ignores its obligation to pay its R80 million debt to the applicant immediately, an obligation which was due before business rescue incepted, and was thus not capable of suspension by the second respondent. The moratorium under s 133 prevents its direct enforcement, but for so long as it remains owing, the security cession remains effective. (Par [72], [73[and [74])

The propositions of the company are not realistic at all. The first proposition is, unproven. The substrates of the second and third propositions have been analysed in the judgment and both have been found to be unmeritorious. The scenario put up by the business rescue practitioner is thus speculative and

unrealistic. It naïvely supposes that it can ignore two mountains in its way: the R80 million debt, coupled with the cession of book debts; and the lack of working capital. Any business plan that ignores these is bound to fail. (Par [75])

It follows that the resistance against liquidation must fail. (Par [76])

On behalf of the employers it was submitted that the court should prefer business rescue proceedings to the death knell of liquidation. In particular it was submitted that the cases have preferred business rescue proceedings to liquidation, one of the reasons being that job losses often occur in liquidation. It was accordingly submitted that in this case, where there was a 'tussle' as to whether business rescue proceedings or liquidation was the preferred route, the court should opt for business rescue. (Par [77])

The difficulty is that, as is often the case, one is not simply dealing with a case where the choice between the one or the other is evenly balanced. When business rescue will probably not rescue the company, it would be manifestly wrong to perpetuate that state. (Par [79])

Where a company is distressed, it is not always the solution to deny principal creditors — without whose preparedness, to have extended working capital in the first place, the business would not have existed at all — the entitlement to realise the very security that persuaded them to extend the working capital in the first place. If courts are not prepared to enforce commercial securities, investment, the essential precursor to employment opportunities, will seek other pastures. (Par [80])

Extracts

[7] The applicant now applies, in its amended notice of motion, for liquidation of the first respondent — arguing that there is no prospect that the first respondent will recover. In the alternative, it assumes the first respondent remains in business rescue and applies for relief aimed principally at, if not expelling the second respondent altogether, then at least constraining him by requiring that he put up security and appoint a joint business rescue practitioner with him. Other ancillary relief is also sought in that event.

[12] The applicant contested these propositions. It argued, first, that the doctrine of unanimous assent destroyed any reliance on the absence of a special resolution,

and that the cession was thus fully enforceable. Second, it disputed that the suspension of obligations impaired the cession of debts that only arose in business rescue. Here it submitted that the suspension of obligations under s 136(2)*(a)* was, by virtue of s 136(2A)*(c)*, expressly subject to the protection of property over which it had security in terms of s 134(3) of the Act. On its argument all the debts, past, present and future, were covered by the cession and were its property, incapable of being disposed of without its consent.

[13] Third, whereas before, the first respondent's debt to the applicant for product sold and delivered was never disputed, the second respondent now for the first time disputed that the first respondent owed the applicant any amount at all, not because the fuel had not actually been sold and delivered, but because he contended, on oath, for the first time that the applicant was in fact indebted to the first respondent to the tune of some R288 million for not having afforded the first respondent its due entitlement in respect of rebates. The applicant disputed this.

[14] Against the background of this commercial disharmony, the applicant attacks the conduct of the second respondent on a number of fronts, but centrally for his failure to have published a business rescue plan within 25 days of his appointment, as required by s 150(5) of the Act. It is, despite these weighty issues, necessary first to say something about the litigation history.

[18] This matter was therefore doubled in complexity by the admission of a wholly new, complete set of affidavits in the part B section. How does one deal with conflicts between the part A affidavits and the part B affidavits? If one then adds to the mix a 67% increase in paper volume, excluding the employees' affidavits, it becomes virtually impossible to do justice to the issues that arise in this matter. Were it not for the presence of the employees and their plight, I would have disallowed the last two sets of affidavits. I intend however to focus on the complete set of affidavits exchanged in respect of part B.

[23] The first and second respondents argue that this court has no jurisdiction because both the registered address and the main place of business of the first respondent fall within the area of jurisdiction of the Gauteng Provincial Division of the High Court, namely, respectively, Pretoria and Olifantsfontein, Tembisa.

[24] However, the areas of civil jurisdiction of the Gauteng Provincial Division and the Gauteng Local Division are now co-extensive, and Tembisa falls within the area of Ekurhuleni North. [Government Notice 30 of 13 January 2016, published in *Government Gazette* No 39601 of 15 January 2016.] Both the local division and the provincial division therefore have jurisdiction, and the objection to jurisdiction fails.

[25] The second point is that winding-up cannot be granted without first having business rescue set aside. But it seems to me implicit in the prayer for winding-up that the setting-aside of the business rescue is being sought.

[27] The applicant asks, in a separate prayer, for leave to institute these proceedings. The prospects of such an application would generally be heavily reliant on the prospects of success in the main relief to be sought. Where the main relief to be sought goes to the very status which invokes the moratorium protection, it seems overly technical to insist on two distinct applications as opposed to one application with two (sets of) prayers: one for permission, and one for the substantive relief.

[28] In other words, if the application is bad on the merits, the order should be to refuse leave to institute the proceedings. In short, this point goes with the substantive issue, and the latter is discussed below. As regards the matter of form, ie whether a court should insist on a discrete prior application, as is further discussed at the end of

this judgment, it would appear that a full court of the Gauteng Provincial Division has decided the issue against the first and second respondents argument.

[34] The competing contentions here are that the second respondent says that he has suspended all of the first respondent's obligations to applicant in terms of this contract. The applicant disputes the entitlement of the second respondent to do so while at the same time insisting on performance by the applicant of its reciprocal obligations in terms of that agreement.

[35] Since the entitlement to suspend is founded in express terms in s 136(2)*(a)* of the Act, the real question is whether those provisions are to be read as excluding the power to suspend obligations when at the same time the company insists on performance by the creditor of the latter's reciprocal obligations in terms of the same contract; or whether instead the position is simply that the creditor's reciprocal obligations are automatically and equally suspended as a matter of law; or whether the creditor's reciprocal obligations are not suspended without more but the creditor acquires the right to elect either to rely on the *exceptio non adimpleti contractus* — and so in effect procures a suspension of its counter-prestation, protected against mora — or instead to cancel the agreement for breach.

[36]The section reads in relevant part as follows:

'**136 Effect of business rescue on employees and contracts**

(1) Despite any provision of an agreement to the contrary —

. . .

(2) *Subject to subsection (2A),* and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may —

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that —

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) *would otherwise become due during those proceedings*; or

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph *(a)*.

(2A) *When acting in terms of subsection (2) —*

. . .

(c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company.

(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages. . . .' [Emphasis added.]

[37] Interpretation starts with a textual treatment of the words in their context. [***Cool Ideas 1186 CC v Hubbard and Another*** 2014 (4) SA 474 (CC) (2014 (8) BCLR 869; [2014] ZACC 16) para 28.] The language conferring the power of suspension is pretty clear, at least on the face of it; 'any' is notoriously a word of wide if not unlimited import, and so it would, at least prima facie and unless any absurdity is thrown up, include obligations that are contractually tied with a reciprocal obligation of the creditor.

[38] Also, since the section is silent about the effect that the suspension has on such an obligation, and since the legislature knew and knows the residual law of contract, it must be accepted that the creditor has available, subject to the normal rules, the *exceptio non adimpleti contractus*and, again, if the normal rules of materiality and contractual notices apply, the creditor also has available the normal rights of cancellation. [See **Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank** 2015 (3) SA 438 (SCA) ([2015] ZASCA 39).]

[39] Applied to the agreement under discussion, the applicant's obligation to avail product is obviously reciprocal with the first respondent's obligation to pay for it, and also with the first respondent's obligation to purchase exclusively from the applicant. So too would the applicant's obligation to avail the premises be reciprocal with the first respondent's obligation to pay the rental. In my view the applicant's obligation to avail the equipment is also reciprocal with the first respondent's obligation exclusively to purchase product from the applicant. There may also be other sets of reciprocal obligations but it is not necessary further to explore this point.

[40] It follows that the suspension of all the first respondent's obligations entitles the applicant to withhold product, access to the premises and access to the equipment. The applicant may also cancel the branded distribution agreement, provided the appropriate notices will have been given. However, the applicant may not simply ignore the suspension and insist on performance contrary to it.

[42] Here the competing contentions are whether or not the cession of book debts continues to operate in respect of debts that arise from sales concluded during business rescue.

[43] The relevant provisions of s 134 are as follows:

'134 Protection of property interests

(1) Subject to subsections (2) and (3), during a company's business rescue proceedings —

(a) the company may dispose, or agree to dispose, of property only —

(i) in the ordinary course of its business;

(ii) in a *bona fide* transaction at arm's length for fair value approved in advance and in writing by the practitioner; or

(iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;

(b) any person who, as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136; and

(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.

(2) The practitioner may not unreasonably withhold consent in terms of subsection (1)*(c)*, having regard to —

(a) the purposes of this chapter;

(b) the circumstances of the company; and

(c) the nature of the property, and the rights claimed in respect of it.

(3) *If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must —*

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

(b) promptly —

(i) *pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or*

(ii) *provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.*' [Emphasis added.]

[44] It might at first blush be supposed that this section and s 136 are in conflict — how can the security be preserved if the debtor's obligations to the creditor are suspended? But s 136(2A)*(c)* expressly carves out a suspended provision of an agreement relating to security, and proclaims that it 'continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company'.

[45] Again, this provision too must be read in the context of the applicable law, at least to the extent that it has not expressly or by necessary implication been swept aside. A security cession of future book debts is, by our law, complete and effective by mere initial agreement. When at the future date the book debts come into existence then, without more and without any further obligation of the cedent, they become the property of the cessionary. [**Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others** 2001 (4) SA 360 (W) at 366; see also **Western Breeze Trading 43 (Pty) Ltd v Engen Petroleum Ltd** [2016] ZAWCHC 42 (17 March 2016) para 50.]

[46] No further obligation on the part of the cedent exists or is required to be performed for the debt to become subjected to the rights of the cessionary, including, for instance, to recover the debt from the debtor. [See **Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd** 2009 (1) SA 493 (SCA) ([2008] ZASCA 128) para 50.] Even the reversionary right was ceded to the creditor in this agreement. [Page 153 clause 4.]

That being so, there was no obligation of the first respondent arising from the cession of book debts that was capable of being suspended, certainly not as regards the right of the cessionary to enforce the debts, albeit that they arose only in business rescue, and to allocate the proceeds towards the cedent's indebtedness to the cessionary.

[47] In consequence, whenever the first respondent's book debts arise, now or in the future, they belong to the applicant [See **Kritzinger and Another v Standard Bank of South Africa** 2013 ZAFSHC 215 (19 September 2013), especially paras 49 – 55], at least to the extent of the first respondent's indebtedness to the applicant. They may not be 'disposed of' without the applicant's consent, as provided in s 134(3)*(a).*

[53] However, the next day, when the matter was argued on 4 November 2016, during oral argument counsel for the first and second respondents conceded that in fact there was no regulatory framework that entitled the first respondent to the rebates for which the second respondent had repeatedly contended on oath. [It is disconcerting that the second respondent appears oblivious to the gravity of making serious allegations on oath, and then executing an about-turn without an affidavit that explains the new position.] It was, he correctly conceded, a matter for agreement between the parties, although he persisted in arguing that the agreement was unfair.

[60] The applicant has made it clear that it will not surrender its security. That means that unless the business rescue practitioner can propose recourse to short-term capital of the order of R80 million, it will not be able to trade at all. Such a prospect has not been illustrated.

[66] The first and second respondents argue in their latest heads of argument that no case has been made out to establish that there is no reasonable prospect for rescuing the first respondent, on the following bases: First, they submit that the first respondent does not need the applicant's product, premises or branding. The first respondent is able, they say, to conduct its business by collecting fuel in the first respondent's trucks and tankers from the alternative suppliers and then delivering it direct to the first respondent's customers. [First and second respondents' heads of argument paras 5.5.4 – 5.5.8.]

[67] The difficulty with this proposition is that it involves a change in the way in which the first respondent has functioned up to now. It smacks of devising a simplistic makeshift solution to an insurmountable problem, and selling it as the panacea that was there all the time. If it were that simple, why was it not implemented all along?

[71] Against these considerations, what is the yardstick to be applied? Section 130(1)*(a)*(ii), read with s 130(5)*(a)*(i), provides that a business rescue resolution may be set aside if there is no 'reasonable prospect' for rescuing the company. A court hearing such an application may also, under s 130(5)*(a)*(ii), set aside the resolution if, having regard to all of the evidence, the court considers that it is otherwise 'just and equitable' to do so. It has been said that a 'reasonable prospect' means something less than a reasonable probability; something more than a prima facie case; something more than an arguable possibility; a prospect based on reasonable grounds; and mere speculative suggestion is not enough. [**Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others** 2013 (4) SA 539 (SCA) ([2013] ZASCA 68) para 29ff. Brand JA also concluded that the discretion under s 134(4) is a so-called 'discretion in the loose sense', thus a value judgment, and thus appealable without any misdirection first required, as is the case with a 'discretion in the strict sense'. It is suggested that the same applies in regard to the powers under s 130(5)*(a)*(ii).]

[72] In this case the best-case scenario advanced by the first and second respondents, as set out above, ultimately fails for the following reasons: First, according to the second respondent, the first respondent will not be conducting the same business as before. It will not need a forecourt at all; it will instead, gypsy-like, fetch and deliver fuel. But whether such a business has any legs at all, is not proven.

[73] Second, the first respondent has no working capital to speak of The second respondent's latest preliminary executive report acknowledges this fact. [SAM 21 paras 1.6, 1.8, 1.9 and 2.4.] It clearly is wholly dependent on the lawfulness of its business concept, which is to sweep aside the applicant's cession of book debts and to use that money, without the applicant's consent, to keep the business ticking over. It has become a wholly hand-to-mouth operation.

[74] Third, the first respondent blithely ignores its obligation to pay its R80 million debt to the applicant immediately, an obligation which was due before business rescue incepted, and was thus not capable of suspension by the second respondent. The moratorium under s 133 prevents its direct enforcement, but for so long as it remains owing, the security cession remains effective.

[75] The first respondent's propositions are, in my view, not realistic at all. The first proposition is, as I have remarked, unproven. The substrates of the second and third propositions have been analysed in this judgment and both have been found to be unmeritorious. The scenario put up by the second respondent is thus speculative and

unrealistic. It naïvely supposes that it can ignore two mountains in its way: the R80 million debt, coupled with the cession of book debts; and the lack of working capital. Any business plan that ignores these is, in my view, bound to fail.

[76] It follows that in my view the resistance against liquidation must fail.

[77] On behalf of the employers it was submitted that the court should prefer business rescue proceedings to the death knell of liquidation. In particular it was submitted that the cases have preferred business rescue proceedings to liquidation, one of the reasons being that job losses often occur in liquidation. It was accordingly submitted that in this case, where there was a 'tussle' as to whether business rescue proceedings or liquidation was the preferred route, the court should opt for business rescue.

[78] The most recently released national statistics of official unemployment of greater than 27% are, of themselves, hugely disquieting and generally supportive of the employees' argument. Further job losses will not help our challenged economic circumstances.

[79] The difficulty is that, as is often the case, one is not simply dealing with a case where the choice between the one or the other is evenly balanced. When business rescue will probably not rescue the company, it would be manifestly wrong to perpetuate that state. It is thus unavoidable to engage on the merits of the 'tussle', and to decide which standpoint is likely correct.

[80] Where a company is distressed, it is not always the solution to deny principal creditors — without whose preparedness, to have extended working capital in the first place, the business would not have existed at all — the entitlement to realise the very security that persuaded them to extend the working capital in the first place. If courts are not prepared to enforce commercial securities, investment, the essential precursor to employment opportunities, will seek other pastures.

[81] As will have been inferred from the aforegoing, in my view, the liquidation of the first respondent is inevitable. As indicated, there was an argument by the first and second respondents that this application is fatally flawed for not having been preceded by a discrete application for relief under s 133(1)*(b)* of the Act. From a substantive perspective, in my view, a case for liquidation has been made out. From a formal perspective, it seems that the first respondent's proposition has been foreclosed by the full court of the Gauteng Provincial Division. [**LA Sport 4x4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Ltd and Others** GP 513/2013 ([2015] ZAGPPHC 78, 26 February 2015), effectively overruling **Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another** GP 12406/2013 ([2013] ZAGPJHC 109, 10 May 2013).]]

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Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd and Others

2017 (3) SA 539 (GJ)

Sale by business rescue practitioner of assets subject to reservation of ownership in terms of a lease.

Section 134(3)(b) of the Companies Act 71 of 2008 requires the business rescue practitioner to promptly pay the debt due to a secured creditor or owner or provide security therefore to the reasonable satisfaction of the owner.

The Lessor leased equipment to a company which was later placed under business rescue by way of a written lease. The lease contained a reservation-of-ownership clause in favour of the lessor. (Par [4])

The Business Rescue Practitioner sold assets subject to the lease to a purchaser. (Par [5])

The purchaser disputes that the lessor acquired ownership of the equipment. That defence would not have been available to the business rescue practitioner. [Van der Westhuizen J in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum* Ltd 2016 (1) SA 621 (CC) para 28.] The practitioner could not transfer more rights than it had. Consequently this defence is also not available to the purchaser who acquired its rights from the business rescue practitioner. The common law does not allow the practitioner to transfer ownership of the property of another (the lessor) because a transferor of rights cannot transfer more rights than it has. (Par [7] and [8])

The purchaser also relies on a statutory right in terms of section 134(3) of the Companies Act 71 of 2008. That subsection provides:

> (3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must —
>
> *(a)* obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
>
> *(b)* promptly —
>
> (i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
>
> (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.' (Par [9])

The purchaser argues that the business rescue practitioner had the right to sell the equipment without the consent of the lessor because the proceeds of the disposal were sufficient to fully discharge the indebtedness of the company to the lessor. It follows that the court must determine whether the equipment constitutes 'security or title interest' in terms of section 134(3). This is a matter of interpretation. A number of recent judgments dealt with the correct approach to interpretation. They include the summary by Wallis JA in para 18 of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). (Par [10])

The court commences with a consideration of the words used in the Companies Act. The Act does not define the word 'security' as used in section 134. Other statutes assist: The Insolvency Act 24 of 1936 defines the word 'security' in relation to the claim of a creditor of an insolvent estate, as property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention; The Security by Means of Movable Property Act 57 of 1993 does not define the word 'security' but its focus on the legal consequences of special notarial bonds over movable property indicate that special notarial bonds constitute 'security'; Section 50(2) of the Deeds Registries Act 47 of 1937 provides that a mortgage bond or notarial bond may be registered to secure payment of specified debts. The court concludes that, in general terms, the phrase 'property over which another person has any security' in section 134(3) of the Companies Act refers to property of the company under business rescue which secures an indebtedness of the company, for an example property subject to a notarial bond. The lessor’s case is not that the equipment was the property of the company over which the applicant held 'security'. It follows that the reference to 'security' in s 134(3) does not assist the lessor. (Par [11])

The reference to 'title interest' in section 134(3) is more difficult to deal with. Counsel have not been able to refer to authority that explains the meaning of this phrase in South African law, neither has the court been able to find such authority. The comment of *Henochsberg* [Delport et al *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2011) is that —

> '(t)he term title interest is not one which is used in the South African context, but is a term that tends to be used in countries where security rights have been codified'.

The court accepts this to be correct, but it is not helpful. The difficulty in defining 'title interest' does not provide a valid reason to disregard the use of this term by the legislature as an alternative to 'security'. (Par [12] and [13])

Separately from each other, the words 'title' and 'interest' can be defined without too much difficulty. In short, the relevant meaning of the word, 'title' is the right or claim to ownership of property, [The Concise Oxford Dictionary] the basis of such right or the document substantiating such right, such as a title deed. [The Concise Oxford Dictionary.] The word 'interest' in property refers to a legal concern, title or right in such property. [The Concise Oxford Dictionary.] (Par [14])

The meaning of the combination of these two words, 'title interest' is novel in South African law. The legislature chose to refer to 'title interest' as an alternative to security. It follows that it must have been intended to mean something other than 'security'. The last portion of subsection *(a)* indicates that, like 'security', 'title interest' is something which safeguards the payment of the indebtedness due to the creditor of the company under business rescue. (Par [15])

In South Africa it is not unusual for creditors to safeguard their rights by way of reservation of ownership clauses in contracts such as contracts for the sale of goods where the purchase price is paid over time. The use of the word title as a synonym or alternative for ownership is also not unusual; for example, ownership of immovable property is based on a title deed. The term 'title interest' would include a reservation of ownership clause such as the one in the lease between the lessor and the company. (Par [16])

The purpose and context of business rescue are not aimed at the destruction of the rights of a secured creditor. The court concludes that section 134(3) of the Companies Act allows a company under business rescue to dispose of property which is subject to 'security' or a reservation of ownership clause

without the consent of the creditor concerned only if the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by the security. If that is so, section 134(3)*(a)* authorises a business rescue practitioner to dispose of the property of the company under business rescue by selling and delivering such property. In such event section 134(3)*(b)* requires the practitioner to promptly pay the debt due to secured creditor or owner or provide security therefore to the reasonable satisfaction of the applicant. (Par [19])

The court does not regard the obligation to pay or secure the debt as a mere personal right against the practitioner. The effect of such an interpretation would be to destroy the agreed security or ownership and replace it with a personal right against the practitioner. The court interprets the obligation to promptly pay or secure the debt and the consideration as a requirement for the valid transfer of ownership by the practitioner by way of a sale and delivery in terms of section 134 without consent of the creditor. The rights of the creditor will only be terminated on payment or the provision of other security. (Par [20])

The purchaser was ordered to deliver to the lessor the movable property identified in the court order.

Extracts

[Applicant leased equipment to the 2nd respondent (company under business rescue). The business rescue practitioner (4th respondent) sold moveable assets on the premises to the 1st respondent.]

[4] The applicant leased a power-saving variable-speed drive system (the equipment) to the second respondent by way of a written lease. The applicant says that the equipment consisted of the goods listed in its founding papers. The lease contained a reservation-of-ownership clause in favour of the applicant. The value of the equipment is approximately R800 000. The equipment was installed in the plant of the second respondent on the latter's premises.

[5] The second respondent went into business rescue. The fourth respondent is the business-rescue practitioner of the second respondent. In that capacity the fourth respondent concluded the written sale agreement with the first respondent. The selling price was more than R35 million. The sale agreement described the goods sold (referred to as 'the assets') as 'the items set out in annexures A to O hereto, being the subject matter of the sale and all movable items situated in the premises' of

the second respondent. Elsewhere in the sale agreement the assets are referred to with reference to annexures A to O, without reference to 'and all movable items situated in the premises'. It does not follow that I can disregard this phrase in the definition section of the sale agreement. The 'movable items situated in the premises' includes the equipment.

[7] The first respondent disputes that the applicant acquired ownership of the equipment. That defence would not have been available to the second respondent. [Van der Westhuizen J in *Mighty Solutions CC t/a Orlando Service Station v Engen* Petroleum Ltd 2016 (1) SA 621 (CC) para 28.] The second respondent could not transfer more rights than it had.

[8] Consequently this defence is also not available to the first respondent who acquired its rights from the second respondent. The common law does not allow the second respondent to transfer ownership of the property of another (the applicant) because a transferor of rights cannot transfer more rights than it has.

[9] The first respondent, however, also relies on a statutory right in terms of s 134(3) of the Companies Act 71 of 2008. That subsection provides:

> (3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must —
>
> *(a)* obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
>
> *(b)* promptly —
>
> (i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
>
> (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.'

[10] The argument on behalf of the first respondent is that the fourth respondent had the right to sell the equipment without the consent of the applicant because the proceeds of the disposal were sufficient to fully discharge the indebtedness of the second respondent to the applicant. It follows that I must determine whether the equipment constitutes 'security or title interest' in terms of s 134(3). This is a matter of interpretation. A number of recent judgments dealt with the correct approach to interpretation. They include the following summary by Wallis JA in para 18 of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ...

[11] I commence with a consideration of the words used in the Companies Act. The Act does not define the word 'security' as used in s 134. Other statutes assist: The Insolvency Act [24 of 1936] defines the word 'security' in relation to the claim of a creditor of an insolvent estate, as property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention. The Security by Means of Movable Property Act [57 of 1993] does not define the word 'security' but its focus on the legal consequences of special notarial bonds over movable property indicate that special notarial bonds constitute

'security'. Section 50(2) of the Deeds Registries Act [47 of 1937] provides that a mortgage bond or notarial bond may be registered to secure payment of specified debts. I conclude that, in general terms, the phrase 'property over which another person has any security' in s 134(3) of the Companies Act refers to property of the company under business rescue which secures an indebtedness of the company, for an example property subject to a notarial bond. The applicant's case is not that the equipment was the property of the second respondent over which the applicant held 'security'. It follows that the reference to 'security' in s 134(3) does not assist the applicant.

[12] The reference to 'title interest' in s 134(3) is more difficult to deal with. Counsel have not been able to refer to authority that explains the meaning of this phrase in South African law, neither have I been able to find such authority. The comment of *Henochsberg* [Delport et al *Henochsberg on the Companies Act 71 of 2008* (LexisNexis 2011) is that —

> (t)he term title interest is not one which is used in the South African context, but is a term that tends to be used in countries where security rights have been codified'.

[13] I accept this to be correct, but it is not helpful. The difficulty in defining 'title interest' does not provide a valid reason to disregard the use of this term by the legislature as an alternative to 'security'.

[14] Separately from each other, the words 'title' and 'interest' can be defined without too much difficulty. In short, the relevant meaning of the word, 'title' is the right or claim to ownership of property, [The Concise Oxford Dictionary] the basis of such right or the document substantiating such right, such as a title deed. [Id.] The word 'interest' in property refers to a legal concern, title or right in such property.[Id]

[15] The meaning of the combination of these two words, 'title interest' is novel in South African law. The legislature chose to refer to 'title interest' as an alternative to security. It follows that it must have been intended to mean something other than 'security'. The last portion of ss *(a)* indicates that, like 'security', 'title interest' is something which safeguards the payment of the indebtedness due to the creditor of the company under business rescue.

[16] In South Africa it is not unusual for creditors to safeguard their rights by way of reservation of ownership clauses in contracts such as contracts for the sale of goods where the purchase price is paid over time. The use of the word title as a synonym or alternative for ownership is also not unusual; for example, ownership of immovable property is based on a title deed. In my view the term 'title interest' would include a reservation of ownership clause such as the one in the lease between the applicant and the second respondent.

[18] The purpose and context [of business rescue] are not aimed at the destruction of the rights of a secured creditor.

[19] I conclude that s 134(3) of the Companies Act allows a company under business rescue to dispose of property which is subject to 'security' or a reservation of ownership clause without the consent of the creditor concerned only if the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by the security. If that is so, s 134(3)*(a)* authorises a business rescue practitioner to dispose of the property of the company under business rescue by selling and

delivering such property. In such event s 134(3)*(b)* requires the practitioner to promptly pay the debt due to secured creditor or owner or provide security therefore to the reasonable satisfaction of the applicant.

[20] I do not regard the obligation to pay or secure the debt as a mere personal right against the practitioner. The effect of such an interpretation would be to destroy the agreed security or ownership and replace it with a personal right against the practitioner. I interpret the obligation to promptly pay or secure the debt and the consideration as a requirement for the valid transfer of ownership by the practitioner by way of a sale and delivery in terms of s 134 without consent of the creditor. The rights of the creditor will only be terminated on payment or the provision of other security.

[21] In the present matter the fourth respondent did not pay or secure the debt due to the applicant. On my interpretation of s 134(3) it follows that the practitioner did not validly destroy the right of ownership of the applicant. The applicant is still owner of the equipment.

[22] The rule of law requires that a court order must be couched in clear terms and its purpose must be readily ascertainable from the language of the order. [*Eke v Parsons* 2016 (3) SA 37 (CC) (2015 (11) BCLR 1319; [2015] ZACC 30) para 64.] Applied to the present matter, this means that my order must be formulated such that the sheriff can with reference to the order identify the equipment to be returned to the applicant. The notice of motion does not describe all of the equipment sufficiently for this purpose. The equipment includes, for example, a reference to 100 metres' cable. The applicant is not owner of any 100 metres of unidentified cable on the erstwhile premises of the second respondent. The applicant's papers do not identify the specific 100 metres cable that is part of the equipment. Other items are clearly defined, for example by reference to serial numbers. My order is aimed at allowing the delivery of the identifiable items.

[23] I grant the following order:

(1) The first respondent is hereby directed to deliver to the applicant the movable property identified as [XXX]

(2) The first respondent is ordered to pay the applicant's costs.

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INSOLVENCY AND LIQUIDATION

Jordaan and Others v City of Tshwane Metropolitan Municipality and Others

[2017] ZACC 31

No liability for historical municipal debts –debts of a previous owner

Upon transfer of a property, a new owner is not liable for debts arising before transfer from the charge upon the property under section 118(3) of the Local Government: Municipal Systems Act 32 of 2000.

The central issue is whether the provision of section 118(3) of the Local Government: Municipal Systems Act 30 of 2000 permits a municipality to reclaim, from a new owner of property, debts a predecessor in title incurred. (Par [2])

It is evident that municipalities invoke section 118(3) to refuse new owners municipal services if historical debts are unpaid. The High Court rejected the municipalities' contention that their by-laws and rates collection policies permitted this conduct. The Court's conclusion that, properly interpreted, these by-laws and policies do not, on their own, allow that, is unassailable. Besides, the municipalities' protestation that their by-laws and policies, rather than section 118(3), justify their stance is tumble-down logic, since a municipality's credit control and debt collection policy must in any event comply with the provisions of the Act. (Par [11])

Section 118(3) took effect on 1 March 2001. Against the background of its predecessors, its enactment appeared to signal a radical departure. This is because the provision, though in the same section of the statute, evinces no express link with the embargo in the earlier subsection (1). The Supreme Court of Appeal rebuffed attempts to create a link between subsections (1) and (2) by importing a two-year limit into section 118(3) in both **BOE Bank v City of Tshwane Metropolitan Municipality** [2005] ZASCA 21; 2005 (4) SA 336 (SCA at par [37] and **City of Johannesburg v Kaplan N.O.** [2006] ZASCA 39; 2006 (5) SA 10 (SCA) para 26. This has the consequence, first, as the Supreme Court of Appeal held in **BOE Bank** at para 7, that the charge in subsection (3) operates independently of the embargo in subsection (1). This means the charge upon the property has no express retrospective time limit on the debts it covers. The two-year time limit is absent. The charge takes effect in respect of all debts owed to the municipality that have not prescribed. This is thirty years for "any debt in respect of any taxation imposed or levied by or under any law" (section 11(a)(iii) of the Prescription Act 68 of 1969), which appears to include municipal rates and, possibly,

sewer and refuse charges (see **Alberts v Roodepoort Maraisburg Municipality** 1921 TPD 133; **City of Johannesburg v Renzon and Sons (Pty) Ltd** 2010 (1) SA 216 (W)) and three years in respect of electricity and water charges (section 11(d) of that Act). This may embrace the total of accumulated municipal debts, including municipal taxes going back 30 years, and other charges for three years. (Par [25])

Delinking the two provisions created the basis for the suggestion, which the municipalities and the Minister have embraced, that the charge survives transfer and, thus, can be enforced against the new owner. This approach must be assessed in the light of the fact that there is no evidence at all that before 1 March 2001 any enactment ever sought to impose on a new owner responsibility for a previous owner's debts. The sole effect of the preceding enactments was to embargo transfer until a municipal debt-payment certificate was provided, and, later, to give municipalities preference, coupled with a charge, over other creditors before transfer. This means that, if the subsection has the meaning the municipalities and the Minister give it, it would have constituted a radical innovation on the South African legal landscape. (Par [26])

The case law indicates that, without an express enactment conferring preference above other holders of real rights in the property, the embargo over property transfers until arrear rates are paid gives the municipality no preference above registered rights holders in the property. The cases also show that, enacted on its own, a legislatively created "charge upon the property" means no more than that a debt may be recovered by execution upon the property. There is thus no magic in the word "charge" and no abstruse technical meaning associated with it. The Supreme Court of Appeal has explained, illuminatingly, that the word "charge" in section 118(3) means no more than that any amount due for municipal debts that have not prescribed is secured by the property and that, after an order of court has been obtained, the property may be sold in execution and the proceeds applied to pay those debts. [***Kaplan*** above at para 26.] (Par [29])

This points to the conclusion that a mere enactment, without more, that a claim for a specified debt is a “charge” upon immovable property does not make the charge transmissible. So it does not endure beyond transfer. And the creditor’s claim is not enforceable against successors in title. This does not mean the charge is ineffective or illusory. There is reason enough for its enactment even without transmissibility. It is this: the “charge” helps municipalities elude the constrictions of the Rules of Court that would otherwise need to be complied with in order to render the property executable. In other words, the charge allows municipalities to by-pass at least some debt collection enforcement procedures. It renders the property immediately and expeditiously executable, subject to an order of court. In this way, it gives the preference teeth. (Par [30])

Long-standing doctrine in our law is that a real right of security over immovable property can arise only by giving notice of its creation to the world in general: “The law insists that mortgages shall be effected in so open and public a manner that no one can afterwards complain that he had no notice of them.” [Maasdorp “The law of mortgage” (1901) 18 SALJ 233 at 240.] (Par [Par [36])

And there is good reason for this. Real security in property is a limited real right with the purpose of ensuring satisfaction of a debt or obligation to another, usually ahead of other, unsecured creditors. This is important for it illustrates the difference between real security rights specifically of security (which are designed to shore up debt, and are a sub-category of limited real rights) and limited real rights in the broader sense. It moves us away from asking whether a real security right is in principle enforceable against a third party – which, as a sub-species of limited real rights, it must in principle be – and towards focusing on the purpose for which the limited right was created. The point of the right of security in property is to ensure payment of a debt. Then the question becomes the one at issue here: if that debt could be satisfied by execution upon the property before the debtor disposes of the property – or even later – why should it be enforceable against innocent third

parties who are unconnected with the debt and may not even know of its existence? (Par [38])

Against this background, what is notable about section 118(3) is that the legislature did not require that the charge be either registered or noted on the register of deeds. Textually, there is no indication that the right given to municipalities has third-party effect: no provision is made to fulfil the publicity requirement central to the functioning of limited real rights. It stands alone, isolated and unsupported, without foundation or undergirding and with no express words carrying any suggestion that it is transmissible. (Par [39])

The notion that owning property comes with burdens for the public good is not outlandish. The Constitutional Court has increasingly emphasised the constitutional limitations on private property as well as the constitutional vision that property utilisation must conduce to the public good. So the notion that a new owner may be burdened by historical debt relating to the property should not be treated as landing from planet Pluto. (Par [51])

All outstanding debt can be recovered, as a charge against the property, *before* transfer. This power does not improve with age. It is no jot or tittle better *after* transfer than before. So why wait? If transfer nowise strengthens a municipality's position, why not act pre-transfer? The municipalities and the Minister had no answer. Indeed, during oral argument, Tshwane conceded perforce and rightly that, should the Court find municipalities have ample power to recover outstanding debt from current owners, there would be little justification for making the charge survive. (Par [56])

Despite these far-reaching effects, not only the municipalities but also the Minister contended that there was no deprivation. This, they urged, was because the charge took effect at the time when the debts were incurred – under the previous owner. This meant that the new owner, when taking transfer of the property, acquired dominium that had already diminished in the hands of the previous owner. This argument is fallacious. Enforcement of the charge against the owner during whose title the debts accumulate does not amount to a deprivation of property. The previous owner was as property

owner responsible for the debts incurred on the property. The charge served to enforce the debts for which the previous owner was responsible. It is fanciful to construe payment of a debt that is lawfully owing as imposing a deprivation of property on the debtor. The debtor's patrimony is diminished – but this is in consequence of lawful subtraction, through payment of a debt for which the debtor itself is responsible. There is no constitutionally cognisable deprivation. (Par [62] and [63])

The position is different when a debt is enforced against the property of an owner who had no connection at all with it. It is then that a constitutionally cognisable deprivation occurs. This is precisely what would happen if the charge in section 118(3) were to take effect on new owners. (Par [64])

Mkontwana [**Mkontwana v Nelson Mandela Metropolitan Municipality** [2004] ZACC 9; 2005 (1) SA 530 (CC) at para 40] recognised that the value of a property was enhanced if municipal services were accessible from it. That is clear. A plot in the bundu, without electricity or piped water, is in most circumstances much less valuable than one in town. But the applicants astutely pointed out that any value reflected in this way has already been factored into the purchase price. The new owner paid more precisely because of the urban location of the property, and its accessibility to municipal services. To make the new owner pay for this value again by making historical debts enforceable against the transferee is a form of double debit that makes it a constitutional deprivation. (Par [67])

The court therefore concluded that, if the charge in section 118(3) survived transfer, there could be a significant deprivation of property. (Par [68])

The new owner's deprivation is arbitrary in cases where the debt is much smaller than the value of the property, and even where it is relatively trivial. This is because it is intrinsically arbitrary to impose responsibility for payment of a debt on a property owner who has no connection with it and who had no control at all over the property or those occupying the property when the debt was incurred. Control in this sense was integral to the reasoning in ***Mkontwana***.

It follows that, because the provision can properly and reasonably be interpreted without constitutional objection, it is not necessary to confirm the High Court's declaration of invalidity. The reasons that led the High Court to conclude that the provision was invalid are substantially vindicated in this judgement. To make this clear, the court grants a declaration that the charge does not survive transfer. (Par [78])

Extracts

[1] At issue is the meaning and constitutional validity of section 118(3) of the Local Government: Municipal Systems Act (Act) [30 of 2000]. This provides that "an amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property".[Footnote with full provision omitted.] The High Court of South Africa, Gauteng Division, Pretoria (High Court) (Fourie J) declared section 118(3) constitutionally invalid. [**Jordaan v City of Tshwane Metropolitan Municipality; New Ventures Consulting & Services (Pty) Ltd v City of Tshwane Metropolitan Municipality; Livanos v Ekurhuleni Metropolitan Municipality; Oak Plant Rentals (Pty) Ltd v Ekurhuleni Metropolitan Municipality** 2017 (2) SA 295 (GP) (High Court judgment). It did so "to the extent only that the security provision 'a charge upon the property' survives transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to municipal debts incurred prior to such transfer". [The relevant part of the High Court order reads: "The provisions of section 118(3) of the [Act] are declared to be constitutionally invalid to the extent only that the security provision 'a charge upon the property' survives transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to municipal debts incurred prior to such transfer." Pursuant to this, the High Court also granted declaratory relief against the City of Tshwane Metropolitan Municipality (Tshwane) and Ekurhuleni Metropolitan Municipality (Ekurhuleni) at the instance of individual and corporate ratepayers. All were new property owners who complained that they were being denied services because the municipalities invoked section 118(3).

[2] The central issue is whether the provision permits a municipality to reclaim, from a new owner of property, debts a predecessor in title incurred. If it does, its constitutional validity must be determined. If it does not, then the declaration of invalidity was unnecessary. But to determine the provision's true meaning, its language and history, as well as its setting in the common law and under the Constitution, must be scrutinised.

[9] The constitutional dispute was large and pressing. The High Court's decision to decide it despite the factual and other considerations the municipalities sought to strew in its path was clearly right. The matter was ripe for decision there, and it is ripe for decision here.

[11] The municipalities argued that they relied on their by-laws and debt collection policies to justify their refusal to open consumer agreements until historical debt was settled. Despite these disclaimers of Tshwane and Ekurhuleni, it is evident that municipalities do invoke section 118(3) to refuse new owners municipal services if

historical debts are unpaid. Furthermore, the High Court rejected the municipalities' contention that their by-laws and rates collection policies permitted this conduct. The Court's conclusion that, properly interpreted, these by-laws and policies do not, on their own, allow that, is unassailable. Besides, the municipalities' protestation that their by-laws and policies, rather than section 118(3), justify their stance is tumble-down logic, since a municipality's credit control and debt collection policy must in any event comply with the provisions of the Act. [Section 96 of the Act is headed "Debt collection responsibility of municipalities". It provides: "A municipality— (a) must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and (b) for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of this Act." Tshwane's Credit and Debit Control Policy of 30 August 2012 provides that clearance certificates in terms of section 118(1) of the Act may be issued only upon security being provided for full payment of outstanding amounts – including historical debts.] Disjunction would be artificial.

[25] Section 118(3) took effect on 1 March 2001. [The history of the provision is set out in du Plessis above below at 509-12.] Against the background of its predecessors, [the statutory predecessors of section 118 are set out in ***Kaplan*** below at paras 14-22] its enactment appeared to signal a radical departure. This is because the provision, though in the same section of the statute, evinces no express link with the embargo in the earlier subsection. [The Supreme Court of Appeal rebuffed attempts to create a link between subsections (1) and (2) by importing a two-year limit into section 118(3) in both [**BOE Bank v City of Tshwane Metropolitan Municipality** [2005] ZASCA 21; 2005 (4) SA 336 (SCA) BOE Bank at par [37] and **City of Johannesburg v Kaplan N.O.** [2006] ZASCA 39; 2006 (5) SA 10 (SCA) para 26.] This has the consequence, first, as the Supreme Court of Appeal held [**BOE Bank** above at para 7], that the charge in subsection (3) operates independently of the embargo in subsection (1). This means the charge upon the property has no express retrospective time limit on the debts it covers. The two-year time limit is absent. [Instancing the omission of the two-year time limit in section 118(3), du Plessis "Observations on the (un-)constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000" (2006) 17 *Stell LR* 505 at 528 considers section 118, though "substantially similar to most of its predecessors in apartheid era provincial ordinances", to be "actually . . . more of an encroachment on property rights than most of its predecessors".] The charge takes effect in respect of all debts owed to the municipality that have not prescribed. [This is thirty years for "any debt in respect of any taxation imposed or levied by or under any law" (section 11(a)(iii) of the Prescription Act 68 of 1969), which appears to include municipal rates and, possibly, sewer and refuse charges (see **Alberts v Roodepoort Maraisburg Municipality** 1921 TPD 133; **City of Johannesburg v Renzon and Sons (Pty) Ltd** 2010 (1) SA 216 (W)) and three years in respect of electricity and water charges (section 11(d) of that Act).] This may embrace the total of accumulated municipal debts, including municipal taxes going back 30 years, and other charges for three years.

[26] Second, and pertinent here, delinking the two provisions created the basis for the suggestion, [Discussed but rejected by Brits, "The statutory security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 – does it survive transfer of the land?" (2014) 25 Stell LR 536 at 542-3.] which the municipalities and the Minister have embraced, that the charge survives transfer and, thus, can be enforced against the new owner. This approach must be assessed in the light of the fact that there is no evidence at all that before 1 March 2001 any

enactment ever sought to impose on a new owner responsibility for a previous owner's debts. The sole effect of the preceding enactments was to embargo transfer until a municipal debt-payment certificate was provided, and, later, to give municipalities preference, coupled with a charge, over other creditors before transfer. This means that, if the subsection has the meaning the municipalities and the Minister give it, it would have constituted a radical innovation on the South African legal landscape.

[27] The question is, thus, whether the separation of subsection (3) from subsection (1) in section 118 means that the charge "upon the property" survives transfer so as to burden succeeding owners with the previous owner's historical debts.

[29] The case law indicates that, without an express enactment conferring preference above other holders of real rights in the property, the embargo over property transfers until arrear rates are paid gives the municipality no preference above registered rights holders in the property. The cases also show that, enacted on its own, a legislatively created "charge upon the property" means no more than that a debt may be recovered by execution upon the property. There is thus no magic in the word "charge" [Nor is there any magic in calling the charge a "hypothec". Both words convey a right of security realisable against property, as opposed to a personal claim only against the debtor. Sohm in *Sohm's Institutes of Roman Law* 3 ed (OUP, Cape Town, 1907) at 354 claims that the hypothec or real right of security "was borrowed, both in name and in substance, from Greek law", but Thomas in *Textbook of Roman Law* (North-Holland Publishing Company, Amsterdam/New York/Oxford, 1976) at 332 bluntly asserts the opposite: the institution, "despite its Greek name, was of Roman origin".] and no abstruse technical meaning associated with it. [See *Irwin v Davies* 1937 CPD 442 at 447. There, Davis J held that a "first charge" meant that assets were so bound that the debt owed "is to come out of them in priority to any other debts", and quoted *Sweet's Law Dictionary* to the effect that a charge on property signifies that the property is security for the payment of a debt or the performance of an obligation.] The Supreme Court of Appeal has explained, illuminatingly, that the word "charge" in section 118(3) means no more than that any amount due for municipal debts that have not prescribed is secured by the property and that, after an order of court has been obtained, the property may be sold in execution and the proceeds applied to pay those debts. [*Kaplan* above at para 26.]

[30] This points to the conclusion that a mere enactment, without more, that a claim for a specified debt is a "charge" upon immovable property does not make the charge transmissible. So it does not endure beyond transfer. And the creditor's claim is not enforceable against successors in title. This does not mean the charge is ineffective or illusory. There is reason enough for its enactment even without transmissibility. It is this: the "charge" helps municipalities elude the constrictions of the Rules of Court that would otherwise need to be complied with in order to render the property executable. In other words, the charge allows municipalities to by-pass at least some debt collection enforcement procedures. It renders the property immediately and expeditiously executable, subject to an order of court. In this way, it gives the preference teeth.

[36] In short, long-standing doctrine in our law is that a real right of security over immovable property can arise only by giving notice of its creation to the world in general: "The law insists that mortgages shall be effected in so open and public a manner that no one can afterwards complain that he had no notice of them." [Maasdorp "The law of mortgage" (1901) 18 SALJ 233 at 240.]

[37] This was the case before registration of title in central deeds registries became common practice. [Jones *Conveyancing in South Africa*, 4 ed (Juta & Company Limited, Cape Town 1991) at 3-13; Carey Miller and Pope Land Title in South Africa (Juta & Co Ltd, Kenwyn 2000) at 45-8. Jones explains (at page 3) that: "The history of colonization and expansion northwards determined the underlying principles of our system of registration", which originated with the Placaet of 1529.] Since then, [Seemingly from 1882, when formal land registers began to be maintained in the Cape: Jones above n 71 at 3-4.] the act of formality required for the constitution of a transmissible real right of security in immovable property is registration in the deeds office.

[38] And there is good reason for this. Real security in property is a limited real right with the purpose of ensuring satisfaction of a debt or obligation to another, usually ahead of other, unsecured creditors. This is important for it illustrates the difference between real security rights specifically of security (which are designed to shore up debt, and are a sub-category of limited real rights) and limited real rights in the broader sense. It moves us away from asking whether a real security right is in principle enforceable against a third party – which, as a sub-species of limited real rights, it must in principle be – and towards focusing on the purpose for which the limited right was created. The point of the right of security in property is to ensure payment of a debt. Then the question becomes the one at issue here: if that debt could be satisfied by execution upon the property before the debtor disposes of the property – or even later – why should it be enforceable against innocent third parties who are unconnected with the debt and may not even know of its existence?

[39] Against this background, what is notable about section 118(3) is that the legislature did not require that the charge be either registered or noted on the register of deeds. [Under the Deeds Registries Act 47 of 1937, which, for the first time, formalised and systematised the national system of registration of title: see Carey Miller above n 77 at 47 and Jones above n 71 at 6 and 14-31.] Textually, there is no indication that the right given to municipalities has third-party effect: no provision is made to fulfil the publicity requirement central to the functioning of limited real rights. It stands alone, isolated and unsupported, without foundation or undergirding and with no express words carrying any suggestion that it is transmissible.

[41] This is the bullseye target [a charge upon the property until the amount of the advance together with interest and costs has been repaid] section 118(3) does not even attempt to hit. The two provisions use the same language ("charge upon the property") – but the Land and Agricultural Development Bank Act contains the logical corollary that secures transmissibility, namely registration by public act in the register of deeds. It thus shows that, when legislation creates a transmissible charge upon immovable property, registration in the Deeds Registry (or some other act of publicity or formality) is specified. Its absence from section 118(3) provides a telling indication that the charge takes effect only against the current owner and not successors.

[51] These arguments are not without force. The notion that owning property comes with burdens for the public good is not outlandish. This Court has increasingly emphasised the constitutional limitations on private property as well as the constitutional vision that property utilisation must conduce to the public good. [**City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd** [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC); **City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd** [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) and *Daniels Scribante* [2017] ZACC 13, 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).] So the notion that a new owner

may be burdened by historical debt relating to the property should not be treated as landing from planet Pluto.

[56] In this way, all outstanding debt can be recovered, as a charge against the property, *before* transfer. Neat. This power does not improve with age. It is no jot or tittle better *after* transfer than before. So why wait? If transfer nowise strengthens a municipality's position, why not act pre-transfer? The municipalities and the Minister had no answer. Indeed, during oral argument, Tshwane conceded perforce and rightly that, should the Court find municipalities have ample power to recover outstanding debt from current owners, there would be little justification for making the charge survive.

[62] Despite these far-reaching effects, not only the municipalities but also the Minister contended that there was no deprivation. This, they urged, was because the charge took effect at the time when the debts were incurred – under the previous owner. [The parties at times spoke of "subtraction" and at times of "deprivation". These are not equivalent. See **South African Diamond Producers Organisation v Minister of Minerals and Energy and others** [2017] ZACC 26 at para 49.] This meant that the new owner, when taking transfer of the property, acquired dominium that had already diminished in the hands of the previous owner.

[63] This argument is fallacious. Enforcement of the charge against the owner during whose title the debts accumulate does not amount to a deprivation of property. The previous owner was as property owner responsible for the debts incurred on the property. [**Mkontwana v Nelson Mandela Metropolitan Municipality** [2004] ZACC 9; 2005 (1) SA 530 (CC) at para 67 restricted responsibility for debts incurred by others on the property to the two years preceding application for transfer. The present point is that the debts lawfully due from the previous owner did not constitute a subtraction of ownership.] The charge served to enforce the debts for which the previous owner was responsible. It is fanciful to construe payment of a debt that is lawfully owing as imposing a deprivation of property on the debtor. [It is in any event unjust to construe the deprivation or subtraction or attenuation of dominium as occurring before the sale transaction because the purchaser buys what is visible on either the land itself or its title as registered in the deeds office and is ignorant of, with no means of knowing about, historical debt. So, to say that debts subtracted from that title are known to the transferee is plainly unjust.] The debtor's patrimony is diminished – but this is in consequence of lawful subtraction, through payment of a debt for which the debtor itself is responsible. There is no constitutionally cognisable deprivation. [In any event, to argue that the new owner does not receive the property free of any encumbrances, as the municipalities and the Minister did, begs the question whether the debt survives transfer. It is to this question that the consideration whether deprivation is just is directed.]

[64] The position is different when a debt is enforced against the property of an owner who had no connection at all with it. It is then that a constitutionally cognisable deprivation occurs. This is precisely what would happen if the charge in section 118(3) were to take effect on new owners.

[66] First, it is difficult to see how past consumption of municipal services, in contradistinction to their continuing supply, enhances a property's value. Mkontwana was concerned with the current enhancement of a property's value, in the hands of the present owner, by the continuing supply to it and consumption on it of municipal services. [Yacoob J in **Mkontwana** at para 40, said: "It cannot be accepted that electricity and water are merely consumed at the property. These amenities are

supplied to the property, accessed and consumed by the occupier on the property and are enjoyed by the occupier as part and parcel of the enjoyment of the occupation of the property."]

[67] **Mkontwana** also recognised that the value of a property was enhanced if municipal services were accessible from it. [Yacoob J in **Mkontwana** above n 92 at para 40, continued: "What is more, the supply of electricity and water to a property ordinarily increases its value; the consumption of electricity and water enhances its use and enjoyment. Indeed, the consumption of electricity and water by the occupier is integral to the use and enjoyment of the affected property and to its inherent worth."] That is clear. A plot in the bundu, without electricity or piped water, is in most circumstances much less valuable than one in town. But the applicants astutely pointed out that any value reflected in this way has already been factored into the purchase price. The new owner paid more precisely because of the urban location of the property, and its accessibility to municipal services. To make the new owner pay for this value again by making historical debts enforceable against the transferee is a form of double debit that makes it a constitutional deprivation.

[68] We must therefore conclude that, if the charge in section 118(3) survives transfer, there could be a significant deprivation of property.

[73] The new owner's deprivation is arbitrary in cases where the debt is much smaller than the value of the property, and even where it is relatively trivial. This is because it is intrinsically arbitrary to impose responsibility for payment of a debt on a property owner who has no connection with it and who had no control at all over the property or those occupying the property when the debt was incurred. Control in this sense was integral to the reasoning in *Mkontwana*.

[75] It may be useful to add that none of the parties suggested that anything turns on how the transferee acquired title, whether at a sale in execution or by regular deed of sale or by other means. [Compare **Tshwane City v Mitchell** [2016] ZASCA 1; 2016 (3) SA 231 (SCA), where a sale in execution was in issue; the dissenting judgment of Zondi JA found that in those circumstances the charge did not survive transfer.]

[78] It follows that, because the provision can properly and reasonably be interpreted without constitutional objection, it is not necessary to confirm the High Court's declaration of invalidity. This means that, purely as a matter of form, the appeal must succeed, though not for the reasons the appellants advanced. In fact, the reasons that led the High Court to conclude that the provision was invalid are substantially vindicated in this judgement. To make this clear, I would grant a declaration that the charge does not survive transfer.

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Sass NO v Nenus Investments Corporation and Others

(A488/2016) [2017] ZAWCHC 81 (15 August 2017)

Void dispositions after winding up void in terms of section 341(2) of the Companies Act 61 of 1973

If a court finds that a disposition was void and the court has not, in the exercise of its discretion in terms of section 341 (2) ordered otherwise, the order for repayment of the void disposition, must be made.

In **Sackstein v Proudfoot SA (Pty) Ltd** 2003 (4) SA 348 (SCA) the court referred to the **Herrigel NA v Bond Roads Construction Co (Pty) Ltd and another** 1980 (4) SA 669 (SWA)] and noted 'similar to the English provision, section 341 (2) of the Companies Act 61 of 1973 gives the Court a discretion not to declare a disposition made after the commencement of winding up proceedings void' (at 360). (Par [19])

If a court finds that the disposition was void and has not, in the exercise of its discretion in terms of section 341 (2) ordered otherwise, it follows as a necessary corollary that the order for the repayment of the void disposition must be made. **Herrigel NA v Bond Roads Construction Co (Pty) Ltd and another** 1980 (4) SA 669 (SWA) at 360. Absent a case for the validation of a transaction which has been declared void in breach of section 341(2) of the Act, a court should order repayment. **Excellent Petroleum (Pty) Ltd (in liquidation) v Brent Oil (Pty) Ltd** 2012 (5) SA 407 (GNP) at para s 79 and 82. (Par [20])

The obligations could not be discharged on their behalf by the CC. By causing the CC to discharge these obligations, it concluded transactions which were in breach of section 341 (2) of the Act. It is clear that the dispositions made by the CC were exclusively for the benefit of the former members and thus in palpable breach of section 341 (2) of the Act. No possible basis for validation was or could be offered by the respondents. (Par [23])

By entering into the settlement agreement, a compromise was effected, the agreement was enforceable and any indebtedness which the former member may have had against the CC was waived. Clause 10.1 of the settlement agreement provided that 'this agreement constitutes full and final settlement with any claims…'. (Par [25])

It is trite that a person in the position of the appellant should make out a case in the founding affidavit. That was hardly done with the respect to the claim against it. But, even if the court takes account of the passages referred to in the replying affidavit, there is hardly a basis, on the probabilities, to justify a conclusion that the settlement agreement did not cover the claims. (Par [26])

The Master authorised the holding of a commission of enquiry in terms of section 417 of the Act. The appellant in his founding affidavit, states that 'the facts herein disposed by me emerge from an on-going Commission of Enquiry being held in the Corporation pursuant to the provisions of s 418 as read with s 417 of the Companies Act…' It was surely incumbent upon the appellant to utilise this commission of enquiry to gain information as to the nature and scope of the settlement agreement and hence as to whether payment made pursuant to clause 4 of the settlement agreement covered his claim against the respondents. Without any additional information there is no justification for the court to disturb the finding of the court *a quo* in respect of appellant's claim against the respondents, for it cannot be said on the basis of these papers that, on the probabilities, appellant has shown that the agreement did not settle the claim. (Par [27])

Extracts

[19] In **Sackstein v Proudfoot SA (Pty) Ltd** 2003 (4) SA 348 (SCA) the court referred to the **Herrigel** decision, *supra* [**Herrigel NA v Bond Roads Construction Co (Pty) Ltd and another** 1980 (4) SA 669 (SWA)] and noted 'similar to the English provision, s 341 (2) of our Companies Act gives the Court a discretion not to declare a disposition made after the commencement of winding up proceedings void'. (at 360)

[20] However, there is a further finding in **Herrigel** which is at 681 B – D which is of particular relevance to the present dispute:

> 'In my judgment plaintiff is entitled to the repayment of the void disposition, this being the relief claimed by him in this action, and such repayment must be ordered against first defendant. Inasmuch as I have found that the disposition was and is void and have not, in the exercise of my discretion in terms of s 341 (2) of the Companies Act "ordered otherwise", it, in my view, follows as a necessary corollary that the order prayed for in the action for the repayment of the void disposition must be made.'

This finding finds favour in **Excellent Petroleum (Pty) Ltd (in liquidation) v Brent Oil (Pty) Ltd** 2012 (5) SA 407 (GNP) at para s 79 and 82, namely, absent a case for the validation of a transaction which has been declared void in breach of s 341(2) of the Act, a court should order repayment.

[23] Clearly the eleventh to thirteenth respondents owed R 250 000 and R 70 000 to first and third respondents respectively. These obligations could not be discharged on their behalf by the CC. By causing the CC to discharge these obligations, it concluded transactions which were in breach of s 341 (2) of the Act. There is no basis offered by the Court *a quo* to exercise a discretion which would have validated these transactions and accordingly have resulted in an order by which repayment did not have to be made by first and third respondents respectively, nor, on these papers, could such a discretion have been exercised in favour of validation. It is clear that the dispositions to first and third respondent made by the CC were exclusively for the benefit of the former members and thus in palpable breach of s 341 (2) of the Act. No possible basis for validation was or could be offered by first and third respondents.

[25] Central to this claim by the appellant is the nature of the settlement agreement. Respondent claim that appellant was empowered to compromise any claim in terms of s 386 (4) (b) of the Act. By entering into the settlement agreement, a compromise was affected, the agreement was enforceable and any indebtedness which the former member may have had against the CC was waived. As I have noted, clause 10.1 of the settlement agreement provided that 'this agreement constitutes full and final settlement with any claims…' Only in the replying affidavit does the applicant attempt to develop an answer to this problem. He states in respect of clause 10.1:

> 'This term as to full and final nature of the settlement was conditional, it providing further that that it was concluded by the Sellers "on condition that all information and representations that it has received from the members of Cema Roller Shutter Doors CC pertaining to the Corporation's affairs is accurate and up-to-date." The members of Cema Roller Shutter Doors CC are the respondents. On the basis of the facts of this matter, which included the plethora of post liquidation payments made under the control and auspices of the respondents, respondents failed to disclose material information concerning the identity and contact details for many of the recipients of these post-liquidation payments. In fact, much of the information received from the members (respondents) was neither accurate, nor complete and up-to-date. Consequently, the condition for the settlement being full and final was clearly not satisfied and accordingly there was no full and final settlement. More particularly, this inaccuracy and incompleteness arose from the respondents' failure to provide me and/or my Johannesburg attorney of record, the said hacker, with information relating to the identity and addresses of the recipients of a large number of payments reflected in Annexure "JS4" to the Founding Affidavit, for inclusion, either in letters of demand or in the Founding Affidavit.'

[26] This averment was clearly developed in response to twelfth respondent's answering affidavit in which he said 'I have been advised … that any liability the former members may have had as a result of the payments made from the corporations banking account has been repaid to the corporation as agreed with the liquidators including the applicant therein.' This was a reference to the amount of R 273 305.24 which was paid by the former members. It is trite that a person in a position of the appellant should make out a case in the founding affidavit. That was hardly done with the respect to this claim against eleventh to thirteenth respondents. But, even if I take account of the passages to which I have made reference in the replying affidavit, there is hardly a basis, on the probabilities, to justify a conclusion that the settlement agreement did not cover these claims.

[27] Furthermore, as noted above, on 27 March 2014 the Master authorised the holding of a commission of enquiry in terms of s 470 [should be 417?] of the Act. The appellant in his founding affidavit, states that 'the facts herein disposed by me

emerge from an on-going Commission of Enquiry being held in the Corporation pursuant to the provisions of s 418 as read with s 417 of the Companies Act…' It was surely incumbent upon the appellant to utilise this commission of enquiry to gain information as to the nature and scope of the settlement agreement and hence as to whether payment of R 273 305.24 made pursuant to clause 4 of the settlement agreement covered his claim against eleventh to thirteenth respondents. Without any additional information there is no justification for the court to disturb the finding of the court *a quo* in respect of appellant's claim against these respondents, for it cannot be said on the basis of these papers that, on the probabilities, appellant has shown that the agreement did not settle this claim.

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Sekgothe NO v Wesbank Limited

[2017] JOL 36754 (GJ)

Insolvency of purchaser in terms of instalments sale agreement

The purchaser in terms of an instalment sale agreement is not entitled to delivery of assets sold where the assets were returned to the seller more than a month before sequestration.

Section 84(2) of the Insolvency Act 24 of 1936 will not apply in this instance because the two motor vehicles were surrendered to the seller more than one month prior to the sequestration. This leaves only section 84(1). This section is very clear - it creates a hypothec in favour of the seller. The procedural aspects of subsection (1) envisage a position where at sequestration the property is in the possession of the debtor or the trustee which is not the case in the present matter. The property was at the stage of sequestration already in the possession of the seller and the question to be answered is, was the seller obliged under the circumstances to hand over the motor vehicles to the debtor and then follow the procedure as envisaged in section 83(3)? This section also finds no operation because as at the stage of instituting the application the two motor vehicles had already been sold and transferred to third parties. (Par [14])

When the insolvent surrendered the motor vehicles to the seller he was doing so on the basis of the contractual relationship he and the respondent created. That agreement read with section 1 of the National Credit Act 34 of 2005 did

not transfer ownership of the two vehicles to the insolvent. It granted the insolvent possession and the use of the two motor vehicles. In clause 4.2 of the agreement it was specifically agreed between the respondent and the insolvent that the respondent would remain the legal owner and title holder of the vehicles until the insolvent had paid all amounts due under the said instalment sale agreement. The seller raised this defence in paragraph 10.4 of its answering affidavit. The applicant in reply avoided this aspect despite a lengthy reply consisting of some seven pages in which he dealt mostly with the question whether the disposition took place in the ordinary course of business and other peripheral issues. At no stage did the applicant deny the veracity and existence as well as the meaning of clause 4.2. (Par [19] and [20])

Section 127 of the National Credit Act gives the consumer the right to unilaterally rid himself of the agreement by returning the goods purchased to the credit provider and when that happens the credit receiver not only loses possession of the goods but it brings to an end the right held over the property. In this instance when the insolvent surrendered the goods he did so guided by not only the National Credit Act but also by clause 4.2 of the instalment sale agreement. That act was a transaction within the ordinary course of business of the respondent and could not have been a “disposition”. (Par [24])

In the present matter the insolvent when he surrendered the two motor vehicles had the intention to stave off being sued by the seller and because a mechanism had been created not only by the National Credit Act but in the instalment sale agreement itself he disposed of the motor vehicles within the course of the ordinary business of the respondent. (Par [26])

The seller has successfully discharged the *onus* resting upon him of showing that the disposition was not made with the intent to prefer one creditor above another. It follows that the application must on that basis alone fail. It is unnecessary to discuss the factors which the applicant must establish under sections 30 and 31 of the Insolvency Act 24 of 1936. (Par [27])

Extracts

[14] As I understand it section 84(2) will not apply in this instance because the two motor vehicles were surrendered to the respondent more than one month prior to the sequestration. This therefore leaves only section 84(1). This section is very clear it creates a hypothec in favour of the respondent. The procedural aspects of subsection (1) envisage a position where at sequestration the property is in the possession of the debtor or the trustee which is not the case in the present matter. The property was at the stage of sequestration already in the possession of the respondent and the question to be answered is, was the respondent obliged under the circumstances to hand over the motor vehicles to the applicant and then follow the procedure as envisaged in section 83(3)? In my view, this section also finds no operation because as at the stage of instituting the application the two motor vehicles had already been sold and transferred to third parties.

[15] In the matter of **Williams Hunt (Vereeniging) Limited v Slomowitz and another** 1960 (1) SA 499 (T) at 501F Ludorf J said the following:

> "In my view, the terms of sec. 84(1) are clear and peremptory. Prior to the sequestration the applicant was the owner of the motor-car and the effect of the sequestration was that the applicant lost its ownership in the car and became a secured creditor and the means of perfecting the pledge is the machinery of sec. 84 whereby possession is to be restored to the applicant. There is no means whereby a trustee can resist such a claim and the section is clear that only after delivery do the provisions of sec. 83 become of application."

[18] The right that the insolvent held over the two motor vehicles is not that of ownership. He held a right in terms of the instalment sale agreement and accordingly that right stands to be defined subject to the provisions of the National Credit Act.

[19] When the insolvent surrendered the motor vehicles to the respondent he was doing so on the basis of the contractual relationship he and the respondent created. That agreement read with section 1 of the National Credit Act did not transfer ownership of the two vehicles to the insolvent it granted the insolvent possession and the use of the two motor vehicles.

[20] In clause 4.2 of the agreement it was specifically agreed between the respondent and the insolvent that the respondent would remain the legal owner and title holder of the vehicles until the insolvent had paid all amounts due under the said instalment sale agreement. The respondent raised this defence in paragraph 10.4 of its answering affidavit. The applicant in reply avoided this aspect despite a lengthy reply consisting of some seven pages in which he dealt mostly with the question whether the disposition took place in the ordinary course of business and other peripheral issues. At no stage did the applicant deny the veracity and existence as well as the meaning of clause 4.2.

[21] In my view, it is section 29 and the interpretation thereof in relation to the facts of this matter that is dispositive of the issues herein.

[23] In prayer 1 the applicant seeks an order declaring that the two motor vehicles form part of the insolvent estate of Phillipus CJ Loots. I have difficulty in understanding the basis on which such claim is made. The instalment sale agreement is clear. No ownership of the motor vehicles shall pass until the full purchase of the instalments shall have been paid in full. This portion of the

agreement mirrors the definition of instalment sale agreement in terms of the National Credit Act. Curlewis JA in the matter of **Estate Sham v Young** 1936 AD 231 said the following at 239 in a judgment in which he concurred with De Villiers JA:

> "I was at first inclined to the view that this appeal ought to succeed. But there can be no doubt that plaintiff by the various claims in his declaration seeks to recover the ownership of the assets which were the subject of the hire purchase agreement between Sham and Illings (Pty.) Ltd. and of the subsequent agreement between Sham, the company, and the defendant. It is clear, as is pointed out in the judgment of by brother DE VILLIERS, that the disposition which Sham made by this tripartite agreement was a disposition not of the assets, because they did not belong to him, but of his interests in those assets under the hire-purchase agreement, such interest consisting of the right of possession of the assets on payment of the monthly rent, together with the right to acquire the ownership of the assets on payment to the Illings Company of the balance due – £49 7s. 2d."

[24] Section 127 of the National Credit Act gives the consumer the right to unilaterally rid himself of the agreement by returning the goods purchased to the credit provider and when that happens the credit receiver not only loses possession of the goods but he/she brings to an end the right that he/she held over the property. In this instance when the insolvent surrendered the goods he did so guided by not only the National Credit Act but also by clause 4.2 of the instalment sale agreement. That act was a transaction within the ordinary course of business of the respondent and could not have been a disposition.

[26] In the present matter the insolvent when he surrendered the two motor vehicles had the intention to stave off being sued by the respondent and because a mechanism had been created not only by the National Credit Act but in the instalment sale agreement itself he disposed of the motor vehicles within the course of the ordinary business of the respondent.

[27] In my view, respondent has successfully discharged the *onus* resting upon him of showing that the disposition was not made with the intent to prefer one creditor above another. It follows that the application must on that basis alone fail. In the view that I take I find it unnecessary to discuss the factors which the applicant must establish under sections 30 and 31.

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Strutfast (Pty) Limited v Uys and Another

(5675/2016) [2017] ZAGPJHC 183 (5 July 2017)

Joinder of respondents in an application for sequestration.

The joinder of two respondents in one application for sequestration is only justified if there is a complete identity of interests between the respondents or at least a similarity of interests such as to justify a joinder.

One underlying reason for limiting a sequestration application to the estate of one respondent only is that sequestration brings with it the status of diminished legal capacity *(capitis diminutio).* The relief sought in a sequestration application is directed at diminishing the legal status and capacity of a particular individual debtor. Because of this, similar to an application for the appointment of a curator *bonis* for a patient, it should pertain to that debtor's circumstances only. (Par [3])

It is important to note that while it is convenient to treat **Breetveldt and Others v Van Zyl and Others** 1972 (1) SA 304 (T) and **Ferela (Pty) Ltd v Craigie** 1980 (3) SA 167 [W] as alike judgments, there was a further important consideration, which informed the decision in **Ferela**. As Coetzee J's judgment indicates, where one is dealing with the requirement of advantage to creditors, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances, which have to be investigated separately in order to decide whether in a particular case there is the likelihood of an advantage to creditors in respect of that particular debtor. This reasoning is with respect sound. Intertwining allegations about assets belonging to a plurality of respondents have the potential to generate confusion about which assets (as between several respondents) are to form the basis of the advantage (in the form of a dividend) to the particular creditors of one respondent. (Par [10])

The only reported judgment in which any misgivings were expressed about the practice established in **Ferela** is to be found in **Business Partners Ltd v Vecto Trading 87 (Pty) ltd and Others** 2004 (5) SA 296 (SE). Prior to making any qualification as to the correctness of the **Breetveldt** and **Ferela** judgments, Kroon J expressly endorsed the approach in those cases. To the extent that Kroon J then suggested a different approach, such difference was one expressed as to kind, namely that the strictness of the rule be reduced from a complete identity of interest to a somewhat more flexible substantial coincidence of interest. Even then the suggested qualification was stated in the tentative form of a "perhaps". In **Business Partners** the application was for a winding up under the Companies Act, not for the sequestration of

individuals under sections 9 and 10 of the Insolvency Act. The above qualification as it pertained to sequestration proceedings was thus clearly *obiter.* (Par [13], [14] and [15])

The continued application of the practice established in **Ferela** was recently rendered uncertain. Such uncertainty arises out of a decision of Gauteng Local Division, Johannesburg, namely **Maree and Another v Bobroff and Another** [2017] ZAGPJHC 116 (7 March 2017). (Par [16])

Applying the principles of the *stare decisis* doctrine to the present case, the court is in respectful disagreement with the conclusion reached in **Bobroff** to the effect that **Ferela** was clearly wrong. An analysis of **Bobroff** indicates that the conclusion reached therein was based solely on the qualification expressed in **Business Partners**. Even if the suggested qualification in **Business Partners** is in principle to be preferred over the stricter test enunciated in **Ferela**, the rationale advanced for the qualification, namely that it is almost impossible to conceive of a situation where there would be a complete identity of interest, does not indicate a palpable error in **Ferela**. The court was accordingly in respectful disagreement with the conclusion of Theron AJ that the judgment of **Ferela** was clearly wrong. (Par [31])

There was no rationale for having launched sequestration proceedings against both respondents in one application. Whilst the same judgment debt based on a settlement agreement, that was made an order of Court, was obtained against each of the respondents, there was no identity of interests as between them, particularly so when consideration is given to the requirement of advantage to creditors. The applicant did not identify nor distinguish between the creditors of each respondent. The applicant's founding affidavit contained no averments from which it could be discerned that there is an identical group of joint creditors for each of the respondents. The failure to distinguish or even attempt to delineate between the creditors and assets of each of the respondents for the purposes of identifying a potential dividend to the creditors in each separate estate, rendered the application fatally defective. (Par [33] and [34])

In these circumstances even were the test to be the less stringent formulation of a similarity or coincidence of interests such as to justify joinder, the court would be unable to conclude that the joinder in this matter was justified. The applicant's blurring of the distinction between the affairs of the first and second respondents demonstrates why the joinder of respondents in an application for their sequestrations is an ill-advised practice. (Par [35])

Extracts

[3]. Apart from the weight of the authorities discussed further below, one underlying reason for limiting a sequestration application to the estate of one respondent only is that sequestration brings with it the status of diminished legal capacity *(capitis diminutio).* The relief sought in a sequestration application is directed at diminishing the legal status and capacity of a particular individual debtor. Because of this, similar to an application for the appointment of a curator *bonis* for a patient, it should pertain to that debtor's circumstances only.

[4]. The authority for the practice against joining multiple respondents in a joint application for their individual sequestration is **Ferela (Pty) Ltd v Craigie** 1980 (3) SA 167 (W)), a decision of a judge (Coetzee J) of this division. Coetzee J's judgment in turn drew upon case law in which a similar rule against joining multiple respondents had been developed and applied in the context of winding-up applications. **Ferela** has however recently been departed from in another judgment of this division on the basis that it was wrongly decided.

[7]. By reference to the specific statutory requirements, Coetzee J determined that it could rarely be the case that the sequestration of more than one respondent would pertain to the determination of substantially the same questions of fact. The following extract from the **Ferela j**udgment is apposite:

> "When one comes to the acts of insolvency, however, it is apparent from the facts that I have given that these are based on completely different facts not related in any sense whatsoever. There were two different warrants of execution. One had nothing to do with the other, save that possibly the headings or the case numbers were the same. But in the case of one some fixed property was attached; in the case of the other no attachment could be made. The facts, which have to be investigated to decide whether each of these persons committed an act of insolvency or not, do not overlap in any sense whatsoever. But even more important is the fact that, as far as the third requirement is concerned, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances which will each have to be investigated In order to decide whether in that particular case there is the likelihood of an advantage to creditors In respect of that particular debtor. It could therefore quite easily be that two completely different cases, both as regard the act of insolvency or actual insolvency and the advantage to creditors are concerned, may have to be heard and determined by the Court.
>
> This is not simply a case where either money or property is claimed from a respondent and where the provisions of Rule 10 would very easily be applicable mutatis mutandis. This is a procedure which really achieves a concursus creditorum. That is the purpose of sequestration proceedings. It is to my mind inadvisable that two separate estates should be dealt with in this way, each leading to its own and utterly separate concursus creditorum." (At 171F-H, emphasis added)

[8]. Coetzee J found support for his reasoning in **Breetveldt and Others v Van Zyl and Others** 1972 (1) SA 304 (T), a cognate case concerning an application for the winding-up of several corporate debtors. There, Margo J had reasoned that barring a complete identity of interest or the consent of each of the respondents, several companies should not be joined in one application for their liquidation. Margo J stated as follows:

> "In the present case, each company has its own separate share capital, separate shareholders and separate creditors and the fusing of the interests of all four companies in one proceeding is confusing and prejudicial to persons interested in only one such company. In the compulsory winding-up of a company, the petition is an important document. Its purpose, inter alia, is to place before the Court, for the information of the company, the creditors and shareholders, a statement of the material facts upon which a winding-up order is claimed, and it also serves to provide information to the Master, the Sheriff, the liquidator and other interested parties. If, for example, creditors in one or other of the companies in this case, should wish to intervene on the return day, or to suggest a compromise under sec. 103 of the Companies Act, there is no valid reason why they should have to become involved in the affairs of three other companies." (At 314)

[9]. Some four decades later Boruchowitz J remarked that **Breetveldt** has *"stood the test of time".* (See **Brick and Another v Front Runner Racks 2000 (Pty) Ltd** (2011] ZAGPJHC 34 (4 May 2011) at para 7.)

[10]. It is important to note that while it is convenient to treat **Breetveldt** and **Ferela** as alike judgments, there was a further important consideration , which informed the decision in **Ferela**. As the above emphasised portion of Coetzee J's judgment indicates, where one is dealing with the requirement of advantage to creditors, one has to do with two sets of creditors, two different sets of assets, two different sets of circumstances, which have to be investigated separately in order to decide whether in a particular case there is the likelihood of an advantage to creditors in respect of that particular debtor. This reasoning is with respect sound. Intertwining allegations about assets belonging to a plurality of respondents have the potential to generate confusion about which assets (as between several respondents) are to form the basis of the advantage (in the form of a dividend) to the particular creditors of one respondent.

[11]. Accordingly and in my view, the judgment in **Ferela** has likewise and for good reason withstood the passage of the years. If anything, noting up the judgment indicates that its authoritative force has grown, not diminished, over the years.

[12]. The only reported judgment in which any misgivings were expressed about the practice established in **Ferela** is to be found in **Business Partners Ltd v Vecto Trading 87 (Pty) ltd and Others** 2004 (5) SA 296 (SE). In that case Kroon J, after a comprehensive analysis of *inter alia* **Breetveldt** and **Ferela** stated as follows {at para 34):

> *"I am persuaded, because of the different requirements that require to be satisfied, there is in principle serious objection to a single application for the liquidation of a company and a sequestration of an individual.*
>
> *Accordingly, subject to what follows, I align myself with the approach followed in Breetveldt, Ferela and Caltex Oil* [Caltex Oil SA (pty) Ltd v Govender's Field Distributors (Pty) Ltd 1990 (6) SA 552 (M)]. *I, however, have some difficulty with the stance that a complete identity of interests is a sine qua non for the valid joinder of more than one debtor in liquidator and/or sequestration proceedings.*

One cannot readily conceive of a situation where there would in fact be a complete identity of interests between debtors. Perhaps a preferable test would be that mooted by counsel for the applicant, viz a sufficiently substantial coincidence of interests such as would practically or at least substantially place the case outside the objections to joinder that were stated in the three cases referred to above and properly bring the case within the ambit of rule 10."

[13]. As appears from the above passage, prior to making any qualification as to the correctness of the **Breetveldt** and **Ferela** judgments, Kroon J expressly endorsed the approach in those cases.

[14]. To the extent that Kroon J then suggested a different approach, such difference was one expressed as to kind, namely that the strictness of the rule be reduced from a complete identity of interest to a somewhat more flexible substantial coincidence of interest. Even then the suggested qualification was stated in the tentative form of a "perhaps".

[15]. In **Business Partners** the application was for a winding up under the Companies Act, not for the sequestration of individuals under sections 9 and 10 of the Insolvency Act. The above qualification as it pertained to sequestration proceedings was thus clearly *obiter.* In any event, the judgment in **Business Partners** does not address a central aspect of the reasoning in **Ferela**, namely that the rule of practice applies a *fortiori* to sequestration proceedings because of the statutory imperative to prove a likely advantage to the creditors of a particular debtor. The practice firmly established in **Ferela** thus remained undisturbed by the judgment in **Business Practice**.

[16]. However as foreshadowed above, the continued application of the practice established in **Ferela** was recently rendered uncertain. Such uncertainty arises out of a decision of this division, namely **Maree and Another v Bobroff and Another** [2017] ZAGPJHC 116 (7 March 2017). Thus, the question now arises whether the practice established through **Ferela** *et al* remain good law.

[17]. **Bobroff** concerned the application for the sequestration of two attorneys, a father and son who were partners in the same law firm. From the judgment it does not appear that the practice itself had been sequestrated or liquidated. Indeed, the practice (or the business of the practice) appears to have been sold to a third party. The facts in **Bobroff_**fell squarely within the ambit of the **Ferela** precedent. Unsurprisingly the respondents in that case contended that their joinder was improper and that a single application for the sequestration of each of them was ill conceived. As appears from judgment, the respondents' reliance on judicial precedent proved to be of no assistance to them. Theron AJ dismissed the objection of a fatal misjoinder on the basis that **Ferela** was (in his view) clearly wrong. For the reasons set out below, it is respectfully not clear to me on what basis Theron AJ could have reached so definitive a conclusion.

[18]. In **Bobroff** the only basis for why **Ferela** was found to be wrongly decided appears to be a reliance on the qualification to the general rule as suggested by Kroon J in **Business Partners**. [Cf Bobroff at para 11where the following terse statement appears "I find the qualification of Kroon J persuasive and that the judgment of **Ferela** is clearly wrong. The qualification of **Business Partners** is to be preferred." However, Kroon J's remarks on the general rule (which he specif1eally endorsed) do not in *my* view properly serve to ground a conclusion that the judgment

in **Ferela** constituted a clear judicial error.

[19]. In considering under what circumstances a Court may overrule its own previous decisions (**Ferela** and **Bobroff** are decisions of this Court), guidance is to be found from the Constitutional Court and its judgment in **Gcaba v Minister for Safety and Security and Others** 2010 (1) SA 238 (CC).

[22]. In a later decision, Brand AJ [Brand AJ was in that matter sitting as an Acting judge of the Constitutional Court and not as a permanent Judge of the Supreme Court of Appeal] for a unanimous Constitutional Court gave further constitutional imprimatur to the continued principled application of *stare decisis:*

> "The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in tum is a founding value of our Constitution. To deviate from this rule is to invite legal chaos." (See Camps Bay Ratepayers and Residents Association and Another v Harrison and Another 2011 (4) SA 42 (CC) para 28)

[27]. The *stare decisis* doctrine Is therefore encapsulated by the notion that a Court may only disregard its own established precedent in circumstances where the precedent was crystallised in a judgment that is not merely wrong, but "clearly" wrong. Various expressions have been used to describe the same precept. For example, similar phrases such as "quite satisfied", "settled conviction", “uconvinced", and "satisfied it was plainly wrong", "convinced that it was wrong" appear in the following cases: **R v Jansen** 1937 CPD 294 at 297, **Duminji v Prinsloo** 1960 OPD 83 at 84, **S v Tarajka Estates** 1963 (4) SA 467 (T) at 470, and **National Chemsearch (SA) CPtv) Ltd v Borrowman** 1979 (3) SA 1092 T at 11018.

[30]. Despite not having located a source for a clearly articulated or precise test (or perhaps because in the words of Botha J the test "is incapable of defintion") as to when a decision is not only wrong but clearly wrong, it nonetheless seems axiomatic and it is also clear that the stare decisis doctrine requires something more than a mere conclusion that a previous judgment was incorrectly decided. Whatever the precise test, a clearly or patently wrong judgment would pertain to a type of case where the error is so profound that it amounts to a judicial blunder or results in a manifest and unsustainable absurdity or injustice.

[31]. Applying the above principles to the present case, I am in respectful disagreement with the conclusion reached in **Bobroff** to the effect that **Ferela** was clearly wrong. An analysis of **Bobroff** indicates that the conclusion reached therein was based solely on the qualification expressed in **Business Partners**. Even if the suggested qualification in **Business Partners** is in principle to be preferred over the stricter test enunciated in **Ferela**, the rationale advanced for the qualification, namely that it is almost impossible to conceive of a situation where there would be a complete identity of interest, does not indicate a palpable error in **Ferela**. I am accordingly in respectful disagreement with the conclusion of Theron AJ that the judgment of **Ferela** is clearly wrong.

[33]. Turning to the present application, there was no rationale for having launched sequestration proceedings against both respondents in one application. Whilst the same judgment debt based on a settlement agreement, that was made an order of Court, was obtained against each of the respondents, there was no identity of

interests as between them, particularly so when consideration is given to the requirement of advantage to creditors.

[34]. The applicant did not identify nor distinguish between the creditors of each respondent and merely contented itself with an anodyne allegation that it has very little knowledge of the affairs of the respondents. Even if this is so the applicant was still required to distinguish between the affairs of each of the respondents. The applicant instead lumped the creditors of each respondent into one composite body of creditors and stated that their sequestration would be to the advantage of the *respondents'* (plural) general body of creditors. The applicant's founding affidavit contained no averments from which it could be discerned that there is an identical group of joint creditors for each of the respondents. While the founding affidavit did set out that the second respondent is vested with ownership of two bonded immovable properties, there was no allegation about whether the relevant mortgagees are creditors of the first respondent, the second respondent, or of both. The failure to distinguish or even attempt to delineate between the creditors and assets of each of the respondents for the purposes of identifying a potential dividend to the creditors in each separate estate, rendered the application fatally defective.

[35]. In these circumstances even were the test to be the less stringent formulation of a similarity or coincidence of interests such as to justify joinder, I would be unable to conclude that the joinder in this matter was justified. The applicant's blurring of the distinction between the affairs of the first and second respondents demonstrates why the joinder of respondents in an application for their sequestrations is an ill-advised practice.

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Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi

(98/2016, 210/2015) [2017] ZASCA 88; [2017] 3 All SA 520 (SCA) (6 June 2017)

Litigation on behalf of insolvent estate

The person to sue on behalf of an insolvent estate is the trustee, but where the trustee abides the decisions of the court the insolvent is entitled to intervene.

In terms of s 20(1) of the Insolvency Act 24 of 1936 the effect of the sequestration of the estate of an insolvent is to divest the insolvent of his or her estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee. One of the consequences of this is that '. . . the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the

trustee, and not the insolvent'. [**Mears v Rissik, MacKenzie NO and Mears' Trustee** 1905 TS 303 at 305.] For this reason alone, the trustees are necessary parties in both matters. The trustees remain trustees until such time as a court removes them from office. In such event, the Master retains control of the estate and may appoint new trustees. (Par [16])

Save for a narrow point sought to be advanced in the second appeal, the trustees formally stated that they would abide the decision of the court in both matters. In the result, the insolvents were entitled to take steps which, if successful, would enhance the value of the estate, whether by increasing the assets in the estate in the second appeal or reducing the liabilities in the estate in the first appeal. The insolvents were thus entitled to intervene in both matters. To the extent that the contrary view was expressed in **National Director of Public Prosecutions v Ishwarlall Ramlutchman** [206] ZASCA 20; 2017 (1) SACR 343 (SCA) paras 16-18, it is clearly wrong and should not be followed.] (Par [20]

Extracts

[16] In terms of s 20(1) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee. [**Aboo v Firstrand Bank Ltd** (319/2004) [2005] ZASCA 25 (29 March 2005) para 12.] One of the consequences of this is that '. . . the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent'. [**Mears v Rissik, MacKenzie NO and Mears' Trustee** 1905 TS 303 at 305.] For this reason alone, the trustees are therefore necessary parties in both matters. And, as the trustees correctly point out, their appointment remains valid until set aside by the Master or the Court hearing the review application. Until then, the trustees must continue to perform their duties in terms of the Insolvency Act. It follows that the review application has no bearing on these matters. The trustees remain trustees until such time as a court removes them from office. In such event, the Master retains control of the estate and may appoint new trustees.

[20] Save for a narrow point (to which I shall latterly turn) sought to be advanced in the second appeal, the trustees formally stated that they would abide the decision of this court in both matters. In the result, the Mulaudzis were entitled to take steps which, if successful, would enhance the value of the estate, whether by increasing the assets in the estate in the second appeal or reducing the liabilities in the estate in the first appeal. The Mulaudzis were thus entitled to intervene in both matters. [To the extent that the contrary view was expressed in **National Director of Public Prosecutions v Ishwarlall Ramlutchman** [206] ZASCA 20; 2017 (1) SACR 343 (SCA) paras 16-18, it is clearly wrong and should not be followed.] Go to top

AON South Africa (Pty) Ltd v Van den Heever NO

(2488/2017) [2017] ZAWCHC 58 (22 May 2017)

Res judicata – the legal doctrine to bar continued litigation of a case on the same issues between the same parties

Even though the plaintiffs in the two actions were liquidators of two different companies and the defendants were different entities, the special plea of res judicata was upheld where there was a complete identity of interests between the two sets of liquidators and a similar identity of interests between the defendants.

It is correct that there is a technical distinction between the plaintiffs in the present action and the plaintiffs in the previous action, but that is a matter of form not substance. The liquidators of Protector are the persons who sought and obtained the liquidation of Financial Services and they did so on the basis of the judgment they obtained in the previous action. As matters stand at present they are the only creditor of Financial Services. The sole purpose of the litigation is to recover the amount of R50 million, in order that it can be distributed to Protector on the winding up of Financial Services. To all intents and purposes the liquidators of Financial Services are merely surrogates for the liquidators of Protector. The fact that the liquidators of both companies are employees of the same firm of professional liquidators lends emphasis to this point. (Par [25])

As far as the defendants in the two actions are concerned, Glenrand (in whose shoes AON stands) was a defendant in the previous action. It was a party to the previous appeal, if only for the purpose of obtaining an order for costs, the judgment having been abandoned. The same attorneys and counsel represented it and Financial Services in that case. That emphasises the commercial reality that there was a complete identity of interests between it and Financial Services, both in the transactions that gave rise to that litigation and in the litigation itself. Financial Services was a special purpose vehicle that existed solely for the purpose of holding Glenrand's 65 per cent

interest in Protector. The individuals whose conduct was examined in the previous case were directors of both Glenrand and Financial Services. In those circumstances it seems to me that there was a complete identity of interests between them and it would be artificial to say that findings against or in favour of Financial Services in the previous case would not be binding upon Glenrand. (Par [26])

This line of thinking does not involve any significant development of the law in this regard. *Res judicata* has always been available as a defence against the privies of parties to earlier litigation. Voet's description of those who are the same parties for the purposes of *res judicata* goes well beyond those who are privies in the strict sense of deriving their rights from a party to the original litigation.

In *Goldex* [**Prinsloo NO and Others v Goldex 15 (Pty) Ltd** [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 15] Brand JA said:

> 'In this case Prinsloo not only represented the trust, he was the controlling mind of that entity. It would therefore surprise me if the controlling mind were not bound by an earlier decision that he committed fraud, while the mindless body of the trust was held bound by that finding.'

Likewise the sole member of a close corporation has been held to be the privy of the corporation itself. [**MAN Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC and Others** 2004 (1) SA 454 (W) paras 38-39.] In the present case Glenrand, through its directors Messrs Mansfield and Harpur, was the controlling mind of Financial Services. It would be extremely surprising then to learn that, after a trial where the evidence of those two men had been heard, Glenrand could, in subsequent litigation, dispute findings made against Financial Services.

In **Caesarstone [Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others** [2013] ZASCA 129; 2013 (6) SA 499 (SCA) para 43] the judge adverted to this type of situation and said:

> Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that

> the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.

The court concludes that the approach of the trial judge was incorrect. It focussed too much on the fact that the plaintiffs in the two actions were liquidators of two separate companies and insufficiently on the fact that there was a complete identity of interests between the two sets of liquidators and a similar identity of interests between the defendants in both actions. (Par [27])

Extracts

Res Judicata

[25] It is correct that there is a technical distinction between the plaintiffs in the present action and the plaintiffs in the previous action, but that is a matter of form not substance. The liquidators of Protector are the persons who sought and obtained the liquidation of Financial Services and they did so on the basis of the judgment they obtained in the previous action. As matters stand at present they are the only creditor of Financial Services. [There is a notional possibility, if this action succeeded, that AON might be able to prove a late claim for the historic debt that Financial Services owed to Glenrand but it was not suggested that this affected the position.] The sole purpose of the litigation is to recover the amount of R50 million, in order that it can be distributed to Protector on the winding up of Financial Services. To all intents and purposes the liquidators of Financial Services are merely surrogates for the liquidators of Protector. The fact that the liquidators of both companies are employees of the same firm of professional liquidators lends emphasis to this point.

[26] As far as the defendants in the two actions are concerned, Glenrand (in whose shoes AON stands) was a defendant in the previous action. It is true that at the end of the trial no relief was sought against it but that cannot matter, especially as the trial judge disregarded that and granted judgment against it. It was a party to the previous appeal, if only for the purpose of obtaining an order for costs, the judgment having been abandoned. The same attorneys and counsel represented it and Financial Services in that case. That emphasises the commercial reality that there was a complete identity of interests between it and Financial Services, both in the transactions that gave rise to that litigation and in the litigation itself. Financial Services was a special purpose vehicle that existed solely for the purpose of holding Glenrand's 65 per cent interest in Protector. The individuals whose conduct was examined in the previous case were directors of both Glenrand and Financial Services. In those circumstances it seems to me that there was a complete identity of interests between them and it would be artificial to say that findings against or in favour of Financial Services in the previous case would not be binding upon Glenrand.

[27] I do not think that this involves any significant development of the law in this regard. *Res judicata* has always been available as a defence against the privies of parties to earlier litigation. Voet's description of those who are the same parties for the purposes of *res judicata* goes well beyond those who are privies in the strict sense of deriving their rights from a party to the original litigation. [Johannes

Voet *The Selective Voet being the Commentary on the Pandects* (Gane's translation, 1957) 44.2.5, vol 6 at 558. He included a principal and agent; the pledgor and pledgee in relation to the right to possession of the thing pledged; two joint and several debtors or creditors in relation to a claim to a thing, and a surety and the principal debtor as falling within the concept of 'the same parties' for the purposes of *res judicata*.] In addition the joint stock company and similar entities, enjoying limited liability, were unknown to Voet, and the concepts he employed must be adapted to our modern commercial world. In *Goldex* [**Prinsloo NO and Others v Goldex 15 (Pty) Ltd** [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para 15] Brand JA said:

> 'In this case Prinsloo not only represented the trust, he was the controlling mind of that entity. It would therefore surprise me if the controlling mind were not bound by an earlier decision that he committed fraud, while the mindless body of the trust was held bound by that finding.'

Likewise the sole member of a close corporation has been held to be the privy of the corporation itself. [**MAN Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing CC and Others** 2004 (1) SA 454 (W) paras 38-39.] In the present case Glenrand, through its directors Messrs Mansfield and Harpur, was the controlling mind of Financial Services. It would be extremely surprising then to learn that, after a trial where the evidence of those two men had been heard, Glenrand could, in subsequent litigation, dispute findings made against Financial Services. In **Caesarstone [Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others** [2013] ZASCA 129; 2013 (6) SA 499 (SCA) para 43] I adverted to this type of situation and said:

> 'Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.'

I conclude that the approach of the trial judge was incorrect. It focussed too much on the fact that the plaintiffs in the two actions were liquidators of two separate companies and insufficiently on the fact that there was a complete identity of interests between the two sets of liquidators and a similar identity of interests between the defendants in both actions.