The law reports

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

ABBREVIATIONS:

GNP: North Gauteng High Court

GSJ: South Gauteng High Court

SCA: Supreme Court of Appeal

Company law

Register of members of company: In *Gaffoor NO and Another v Vangates Investments (Pty) Ltd and Others* [2012] 2 All SA 499 (SCA); 2012 (4) SA 281 (SCA) the first respondent was a private company formed by a number of the co-respondents (the shareholders), as well as the second appellant's father (the deceased). The appellants (the applicants) were the heirs of the deceased. The company was formed for the purpose of bidding for the development of certain land owned by the City of Cape Town. The bid being successful, the company was required to purchase the land from the City of Cape Town for a purchase price of R 6,7 million. The company had to pay an initial deposit of R 670 000 to be financed by the members of the company. According to the respondents, a contribution of R 67 000 was required from each member towards the payment of the deposit, but, despite being called on to do so, the deceased did not make any contribution to this amount during his lifetime.

Initially the venture was not a success; however, during 2004 the project was resuscitated through the involvement of a financier (the developer). The developer insisted that the deceased estate not be a transacting party and, on the basis of a shareholders' agreement, and without notice to the deceased estate, the company's share register was altered so as to transfer the deceased's shares to the other shareholders. Shareholders' and directors' resolutions were later passed to effect the transfer.

The heirs became aware of the transfer and applied to the High Court for rectification of the share register. Their application was dismissed.

On appeal, the shareholders argued that the right to recover the shares had prescribed. The court, per Van Heerden JA, dismissed their argument. It held that the estate did not cease to own the shares because the transfer documents were not signed in the manner prescribed by the company's articles and there was also no cession of the shares by the executors to the other shareholders.

Further, so the court reasoned, the right to apply for rectification in terms of s 115 of the Companies Act 61 of 1973 was not a debt within the meaning of the Prescription Act 68 of 1969 and therefore could not prescribe.

The court re-examined the available evidence and concluded that equity required rectification of the register. In coming to its conclusion, the court considered the following. Weighing against rectification was the delay in bringing the application. In addition, the shareholders contended that they had borne the risk of the project, while neither the deceased nor his estate had contributed to the deposit or balance of the price of the land, nor had they stood surety.

However, the court found there was no evidence that the estate was asked to contribute to the deposit or to stand as surety. Further, the other shareholders had not contributed to the price (the bank had financed the purchase).

Against the foregoing, and weighing in favour of rectification, was the fact that the shareholders took the deceased's shares without compensation. Further, there was no prior notice of transfer of the deceased's shares; and, finally, the other shareholders were aware that the estate wished to retain the shares.

The court accordingly ordered the company to rectify its register to reflect the deceased estate as a shareholder.

Credit agreements

Applicable legislation: The applicant in *National Credit Regulator v Standard Bank of SA Ltd* 2012 (4) SA 47 (GSJ) sought an interdict, alternatively a declaratory order, restraining the respondent bank from charging an administration fee in relation to a housing loan agreement that was in excess of the maximum amount stipulated in s 5(1)(*k*) of the Usury Act 73 of 1968, read with para 3(b)(i) of the schedule thereto. The National Credit Regulator (the regulator) contended that these provisions remained operative, notwithstanding the repeal of the Usury Act by the National Credit Act 34 of 2005 (NCA), by virtue of item 7(2) of sch 3 to the NCA and of s 12(2)(*c*) of the Interpretation Act 33 of 1957. The latter section provides that, where one law repeals another, then, unless the contrary intention appears, the repeal shall not 'affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed'.

The regulator also contended that, if it was held that para 3(b) was not applicable to such pre-existing housing loan agreements, it would mean that determination of the applicable administration fees would be in the unilateral discretion of a financial institution. This, in turn, so the regulator argued, could result in exorbitant administration fees being charged.

Cane AJ held that, as a precondition to their operation, both provisions required that the relevant right, entitlement or obligation had to have been acquired or incurred under or in terms of the repealed Act (here the Usury Act). The accrued rights and obligations of the parties had their origin in contract and no right or privilege was acquired by or accrued to any borrower by virtue of the provisions of para 3(b)(i) of the schedule to the Usury Act. The limitation imposed by para 3(b)(i) did not give rise to any right, privilege, obligation or liability, nor was any right, privilege, obligation or liability acquired, accrued or incurred under para 3(b)(i).

It was further apparent from the schedules to the NCA that, where the legislature thought it fit to preserve particular provisions of any statute after the coming into force of the NCA, it did so expressly. Thus, one would have expected that if the legislature intended for para
3(b)(i) to continue in force for any period subsequent to the repeal of that Act, it would have included it in schs 1 and 2 to the NCA.

Finally, the court held that, to the extent that the terms of the pre-existing agreements permitted the financial institution to vary the administration fees from time to time, it would be constrained to do so *arbitrio bono viri* (as a good person would). The right to fix administration fees conferred on mortgagees by the pre-existing housing loan agreement was subject to this limitation imposed by the common law.

The regulator's application was dismissed with costs.

Rearrangement of debt: In *FirstRand Bank Ltd v Adams and Another* 2012 (4) SA 14 (WCC) the defendants, Mr and Mrs Adams, applied to a debt counsellor to be declared over-indebted in terms of s 86 of the National Credit Act 34 of 2005 (NCA). They were in arrears and negotiations with the bank failed to result in an agreement. After the requisite 60 business days had elapsed, the bank terminated the debt review in terms of s 86(10) in respect of its debt and issued summons against the defendants. The defendants opposed the action and the bank applied for summary judgment.

At the first hearing, the defendants applied for a resumption of the debt rearrangement proceedings in terms of s 86(11) of the NCA. The court postponed the hearing to provide the defendants with an opportunity to make a reasonable proposal for a debt rearrangement.

However, the defendants and the debt counsellor simply recycled the previous proposal, which included a proposal to reduce the interest rate and which was considered unacceptable.

Davis J held that, during summary judgment proceedings initiated by a credit provider, a court, on application by the consumer in terms of s 86(11) of the Act, may order an adjournment to allow the consumer an opportunity to argue that the debt review process should be resumed in order to provide an opportunity for further negotiations between the parties. In order to decide whether there would be any benefit in postponing the summary judgment application, the court must strike a balance between the interests of the parties. In doing so, it must take into consideration the nature of the dispute, whether the parties acted in good faith during their negotiations, and the prospect of a rearrangement that, within the parameters of the NCA, will ensure the discharge of the consumer's obligations.

A court faced with a s 86(11) application for a resumption of the debt review proceedings must take into account a number of considerations, including the nature of the dispute, the good faith participation of both parties in the debt review negotiations and the prospect of a rearrangement that, within the parameters of the Act, will result in a discharge of the obligation.

In the present case, the new proposal put before the court after the postponement amounted to no more than a recycling of the original proposal. That proposal was unacceptable because it was based on a reduction of the interest rate that fell outside the parameters provided by the NCA.

Summary judgment was accordingly granted.

Right to information by consumer: In *Nkume v FirstRand Bank Ltd t/a First National Bank* 2012 (4) SA 121 (ECM) the applicant, Nkume, sought an order of specific performance in terms of s 62 of the National Credit Act 34 of 2005 (NCA).

Section 62 provides that a credit provider, when requested by a consumer to do so, must furnish reasons regarding its decision to transact with the consumer in a certain way. For example, it must furnish reasons why it refused to enter into a credit agreement with the consumer; why it offered the consumer a lower credit level than applied for by the consumer; or why it reduced the credit limit under an existing credit facility.

During October 2011 Nkume applied for a credit facility with FirstRand. After processing the application on the computer, a consultant from FirstRand advised Nkume that the information obtained from the credit bureau showed that she had an adverse credit record and, for that reason, Nkume had to first sort out her financial difficulties before relodging her application for an assessment for a credit facility with FirstRand. Aggrieved by such information, Nkume requested reasons for the refusal of her application, including the name, address and contact details of the credit bureau. Nkume stated on affidavit that at the time of making the application she had neither received summons from any of her creditors nor was there any judgment or writ of execution issued by a court against her for failure to pay. In addition, she had not applied for an administration order and had not been sequestrated due to being indebted to any creditor.

FirstRand refused to provide written reasons and/or disclose the particulars of the credit bureau as sought by Nkume.

In an application before Nhlangulela J to have the information disclosed, the court held that s 62 creates a statutory obligation that is enforceable by an order of court. This remedy is independent of any remedy the consumer might have under the Promotion of Administrative Justice Act 3 of 2000. While s 62 does not specify a time period in which the credit provider must furnish the requested information, it must do so within a reasonable time. If the reasons for the refusal of credit are readily available to the credit provider when credit is refused, there is no reason why they should not be provided to the consumer immediately. If the credit provider elects to remain supine in the face of a s 62 request and to respond only when the consumer launches an application for judicial relief, this would constitute an unreasonable delay and lead to costs being awarded to the consumer.

The application was accordingly allowed and FirstRand was ordered to furnish Nkume with the information requested by her.

Donations – tacit term

Requirements: The decision in *Scholtz v Scholtz* 2012 (1) SA 382 (WCC), discussed in 2012 (Apr) *DR* 47, was taken on appeal to the SCA. The SCA's decision has been reported with the citation *Scholtz v Scholtz* [2012] 2 All SA 553 (SCA).

The facts in this matter were as follows. During the course of their marriage, the parties entered into a written agreement of donation in terms of which the respondent (the husband) donated to the appellant (the wife) his undivided half share in certain immovable property. The agreement stipulated that the husband would sign all documents and take all other steps necessary to facilitate the transfer of the donated property to the wife as soon as possible. Alleging that the husband refused to comply with these obligations, the wife approached the court *a quo* for an order compelling compliance, alternatively authorising the sheriff to sign the relevant documents to give effect to the agreement.

The husband argued that the contract of donation was invalid for failure to comply with s 5 of the General Law Amendment Act 50 of 1956 (the Act). Underlying the defence was the fact that, at the time of the donation, the donated property was encumbered by a mortgage bond in favour of a bank. In essence, the husband argued that the parties should have expressly agreed on what would happen to the liability for the bond debt. As this was not made a material term of the agreement, he argued that the deed failed to comply with the requirements of s 5, which rendered the donation void. The court *a quo* upheld the husband's defence.

On appeal, Brand JA held that s 5 of the Act provides that no executory contract of donation entered into after the commencement of the Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority in the presence of two witnesses.

Both the husband and the court *a quo* relied on the decision in *Savvides v Savvides and Others* (1986) 2 SA 325 (T), in which the facts were similar to those in the present matter. The court disagreed with the conclusion in *Savvides* that the donation was void for non-compliance with the requirements of s 5 of the Act.

Brand JA held that the conclusion in *Savvides* failed to recognise the possibility that the missing term relating to liability for the bond could be found in a proper interpretation of the express terms of the agreement or that it might be incorporated by way of a tacit term. In the event of ambiguity, interpretation is not restricted to the wording of the document and reference may be made to the context or the factual matrix of the contract, which includes the background and surrounding circumstances. Tacit terms are by definition not to be found through interpretation of the express terms, they emanate from the common intention of the parties as inferred by the court from the express terms of the contract and the surrounding circumstances.

As a result, so the court reasoned, a dispute about the terms of a contract in itself cannot render the agreement void *ab initio*. In this instance the defendant failed to establish the defence raised. The appeal was therefore upheld and the husband's defence was dismissed.

Husband and wife

Right to maintenance: The appellant (the husband) in *EH v SH* 2012 (4) SA 164 (SCA) appealed against an order obliging him to pay R 2 000 per month to the respondent, his wife of almost 29 years, on dissolution of their marriage. His principal objection to the order was that the wife had been cohabiting with another man for some eight years prior to the divorce. This, the husband contended, disentitled her from receiving maintenance from him. In the alternative, he suggested that the sum of R 2 000 per month was, in any event, too high given his straitened finances.

In issue in this case was whether public policy barred a wife from claiming maintenance from her husband on divorce in instances where she was living with, and being maintained by, another man. Leach JA held that public policy no longer barred a claim solely on the ground of such cohabitation and each case must be determined on its own facts.

Under the common law, the reciprocal duty of support between spouses, of which the provision of maintenance is an integral part, terminates on divorce. This might well cause great hardship and inequity, particularly where one spouse has been unable to build up an estate during the subsistence of the marriage and has reached an age where he is unable to realistically earn an adequate income. The typical case cited by the court was that of a woman who has spent what would otherwise have been her active economic years caring for children and running the joint household.

It is trite that the person claiming maintenance must establish a need to be supported. In the present case, the wife had been living with her new partner for more than eight years and was being fully maintained by him. Further, she had no need for that maintenance to be supplemented in any way.

The appeal was therefore allowed with costs.

Minors

International abduction: At the centre of the decision in *KG v CB and Others* 2012 (4) 136 (SCA) was a five-year-old girl, T. On 14 February 2009 T was removed by her mother, KG, from the United Kingdom, where she had lived since birth, and taken to South Africa. This was done without the knowledge or consent of either the first respondent, T's father CB, or the second respondent, the Essex County Council (the council). Six months later, in August 2009, an application was brought in the GSJ for the return of T to the United Kingdom under the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the convention). The applicants were CB, the council and the third respondent, the Chief Family Advocate of South Africa, in her capacity as the Central Authority of South Africa (the Central Authority). The application succeeded in the High Court.

In issue on appeal at the SCA was the meaning of the phrase 'rights of custody' in arts 3 and 5 of the convention, as well as the approach to art 13(1)(b), which aims to prevent grave risk caused by returning the child to his country of habitual residence.

Regarding the meaning of 'rights of custody', Van Heerden JA pointed out that art 5 of the convention provides that '"rights of custody" shall include . . . the right to determine the child's place of residence'. For the purposes of the convention, a parent's (or other person's) right under domestic law to prevent the removal of a child from the relevant jurisdiction, or at least to withhold consent to such removal, is a right to determine where the child is to live and hence falls within the ambit of the concept of the 'rights of custody' in arts 3 and 5 of the convention. Thus, a custodian parent who removes the child from the state of the child's habitual residence or allows a third party to do so without the consent of the other parent (or without the leave of the court) commits a breach of the 'rights of custody' of the other parent within the meaning of the convention. This would constitute a 'wrongful removal' in terms of art 3.

Article 13(1)(b) provides that 'the judicial … authority of the requested state is not bound to order the return of the child if the person … [who] opposes [his/her] return establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"'.

The court endorsed the approach to this article in the English case of *Re E (Children) (Wrongful Removal: Exceptions to Return)* [2011] 4 All ER 517 (SC), in which the following guidelines were laid down –

• the article need not be 'narrowly construed';
• the burden of proof lies with the person opposing the return and the standard of proof is a balance of probabilities;
• the risk must have reached such seriousness as to be 'grave' (although 'grave' defines the risk rather than the harm, there is a link between the two. Thus a low risk of death or serious injury might be qualified as 'grave', while a higher level of risk might be required for less serious forms of harm); and
• 'intolerable', when applied to a child, means a situation that the particular child in the particular circumstances should not be expected to tolerate. This approach can be applied to physical or psychological harm.

The appeal was dismissed with no order as to costs. The order in the court *a quo* was replaced by one in terms of which the minor child be returned to the jurisdiction of the Central Authority for England and Wales, subject to a further set of terms ordered by the court.

Mandament van spolie

Spoliation order to reconnect water supply: In *City of Cape Town v Strümpher* 2012 (4) SA 207 (SCA) Strümpher, a landowner, used water supplied by the City of Cape Town (the city). In some months Strümpher's water account from the city detailed unusually high usage, which was eventually found to have been caused by a defective meter and leakage.

In May 2007 the city notified Strümpher that it would disconnect his water if he failed to pay arrears of R 182 000 within two days. Strümpher's attorneys wrote to the city and declared a dispute. In August, and without responding to this letter, the city disconnected Strümpher's water supply. Strümpher then applied to a magistrate's court for a spoliation order directing the city to reconnect the water, which was granted. The city appealed this order in the High Court, which upheld the appeal. The city then appealed to the SCA.

The crisp issue before the SCA concerned the competence of the order. The city argued that earlier authority barred the granting of a spoliation order to enforce a contractual right and Strümpher's rights to water were purely contractual.

Mthiyane DP held that, although a water consumer had to enter into a water-supply contract with a body such as the city, this did not make his rights to water merely personal rights arising from the agreement. The rights claimed were also statutory rights under the Water Services Act 108 of 1997 (the Act) and, accordingly, the granting of a spoliation order was not barred. In this regard, the court referred to the fact that the right to water is a basic right – everyone has the right to have access to sufficient water in terms of the Constitution. This constitutional provision is given effect to in s 3(1) of the Act, which provides that everyone has a right of access to basic water supply. The city's duty to provide water supply services is provided for in s 27(2) of the Constitution, which declares that: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.' The right to have access to sufficient water is specifically mentioned in s 27(1) of the Constitution.

The appeal was therefore dismissed with costs.

Spoliation order to grant access to housing complex: In *Fisher v Body Corporate Misty Bay* 2012 (4) SA 215 (GNP) the applicant, Fisher, owned a house in a village complex managed by the respondent body corporate. Access to the complex, and thus to the respective house, was controlled at the main gate that leads into and out of the village complex. All owners of houses in the complex were required to enter into a contract with the body corporate in terms of which they

undertook to pay a certain amount of money for rates and levies to the body corporate. Fisher fell in arrears in the payment of these levies and the body corporate deactivated his access disk. As a result, he was unable to gain access to the complex through the motor gate. It was only his motor vehicle that was barred from entering the complex and not him personally. Fisher applied to the GNP to have his access via the motor gate restored.

Legodi J held that the body corporate's decision to bar Fisher's motor vehicle from the complex resulted in him no longer having peaceful and undisturbed possession and/or use of his vehicle. This constituted spoliation and the application was accordingly granted.

Readers should also take note of negative comments made by the court regarding conduct by counsel for the body corporate. Immediately after the court granted the initial spoliation order, but before it had provided reasons for doing so, counsel for the body corporate stood up and declared that his instructions were to appeal or to apply for leave to appeal the order. The court remarked that this conduct was 'uncalled for'. It pointed out that the least counsel could have done was to wait for the reasons for the order, as one would not expect a party to appeal or ask for leave to appeal before reasons are furnished.

Trusts

Variation of trust instrument: In *In re Heydenrych Testamentary Trust and Others* 2012 (4) SA 103 (WCC) the applicant, in its capacity as administrator of three charitable testamentary trust instruments, brought an *ex parte* application for the deletion of discriminatory provisions regarding the potential beneficiaries of such trust funds. The provisions in question discriminated directly on the grounds of race and gender insofar as they restricted the allocation of scholarships to boys from the white population group and by requiring that at least 50% of the recipients of the scholarships were boys of British descent.

Goliath J held that s 13 of the Trust Property Control Act 57 of 1988 empowers a court to delete or vary provisions in a trust instrument that bring about consequences that the founder of the trust did not contemplate or foresee and which either –

• hamper the achievements of the objects of the founder;
• prejudice the interests of the beneficiaries; or
• are in conflict with the public interest.

The testators had executed the relevant wills before the advent of democracy and the introduction of the Constitution and, therefore, the court reasoned, they would not have foreseen that the allocation of scholarships by the trusts on a discriminatory basis would be rendered unconstitutional and unlawful, or that the charitable purpose of the trusts would be hampered by the discriminatory conditions imposed.

The court referred with approval to a long line of earlier decisions in which similar discriminatory provisions in testamentary trusts were declared invalid. One of these decisions was *Ex Parte President of the Conference of The Methodist Church of Southern Africa NO: In re William Marsh Will Trust* 1993 (2) SA 697 (C), in which the court held that a clause in a trust deed that restricted the benefits of a home for destitute children to white children was contrary to the public interest. Another such decision was *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C), in which the court considered the limitation of bursaries to candidates of European descent and found that this constituted indirect discrimination based on race and colour.

Accordingly, so Goliath J concluded, the terms of the testamentary trusts had to be varied to remove the discriminatory provisions.

The application was thus allowed.

Universal partnership (cohabitation)

Characteristics of a universal partnership: In *Butters v Mncora* [2012] 2 All SA 485 (SCA); 2012 (4) SA 1 (SCA) the SCA considered the characteristics of a universal partnership, also known as a *universorum bonorum* (of all property). The facts were that the appellant, Butters (the defendant in the court *a quo*), and the respondent, Mncora (the plaintiff in the court *a quo*), lived together as husband and wife for nearly 20 years. The couple were not married and even though they were engaged to be wed for almost ten years, this never happened. The relationship came to an end in 2008. While Butters was a wealthy man, Mncora owned no assets worthy of mention.

Butters conducted a security business from Grahamstown, while Mncora and their two children, plus a third child Mncora had from a previous relationship, lived in Port Elizabeth. Mncora admitted that she had 'never set foot' in the business premises in Grahamstown and knew 'next to nothing' about the business. Mncora instituted action against Butters in the court *a quo*, claiming half of his assets.

She founded her claim on the basis that a tacit universal partnership existed between the parties in which they held equal shares. The court *a quo* held that a tacit universal partnership did in fact exist between the parties. It then determined Mncora's share in the partnership at 30% and awarded her an amount equal to that percentage of the defendant's net asset value at the date the partnership came to an end.

On appeal, Brand JA, in a majority judgment, held that universal partnerships of all property that extend beyond commercial undertakings were part of Roman-Dutch law and still formed part of South African law. Where the partnership enterprise extends beyond commercial undertakings, the contribution of both parties need not be confined to a profit-making entity.

A universal partnership of all property does not require an express agreement; like any other contract, it can also come into existence by tacit agreement; that is, by an agreement derived from the conduct of the parties.

The requirements for a universal partnership of all property, including universal partnerships between cohabitees such as Butters and Mncora, are the same as those formulated by Pothier for partnerships in general.

Where the conduct of the parties is capable of more than one inference, the test for the existence of a tacit universal partnership is whether it is more probable than not that a tacit agreement had been reached.

The court concluded that it was clear that the 'all-embracing venture' pursued by the parties, which included both their home life and the business conducted by Butters, was aimed at a profit – a profit that they tacitly agreed to share.

The appeal was dismissed with costs, including the cost of two counsel.

In a minority judgment, Heher JA held that, on the available evidence, there was no evidence of a tacit agreement to create a universal partnership. He would have allowed the appeal with costs.

Note: The court in this matter referred, without commenting on the correctness or otherwise, to the decision in *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA), which dealt with the same topic and which was discussed in 2012 (Mar) *DR* 41.

Other cases

Apart from the cases and topics referred to above, the material under review also contained cases dealing with actions by the state, administrative law, attorneys, appeals, companies, contracts, constitutional law, criminal procedure, damages, discoveries and inspections, evidence, fishing rights, insolvency, intellectual property, land reform, local authorities, magistrates' courts, mining rights, motor vehicle accidents, practice and prescription.