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:

CC: Constitutional Court
GSJ: South Gauteng High Court
NWM: North West High Court, Mafikeng
SCA: Supreme Court of Appeal

Companies

Conduct that is oppressive, unfairly prejudicial or that unfairly disregards another's interest: Section 163(1)(*a*) of the Companies Act 71 of 2008 (the Act) provides that a shareholder or a director of a company may apply to court for relief if any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interest of the applicant. The remedies that may be granted are specified in subs (2).

In *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) the applicants, Peel and others, were shareholders and/or directors of the first respondent, Hamon J&C, a joint venture company formed by the applicants' group and the respondents' group, being Hamon and others. The company relied on government, public entities and large non-governmental companies for business and was awarded an Eskom Holdings contract because of its favourable black economic empowerment (BEE) status. That favourable BEE status was necessary for the continuation of the Eskom Holdings contract and possible future contracts. It was not long before the applicants established that the favourable BEE status of the company had been inappropriately

obtained, which was prejudicial to the company as it survived on contracts that were awarded on that basis. The respondents had represented that 26% of their company's shares in Hamon SA, which owned 60% of the J&C shares, were held by black people. Those shareholders were two black women, one a cleaner and the other a driver and messenger, who acquired that stake in the company at a price of R 1. The contract in terms of which they acquired the shares provided that the shares could be repurchased at any time on 'simple request'. Within two months after finalisation of the creation of the joint venture company that repurchase was done and the apparent BEE compliance disappeared. Because of the inappropriate conduct of the respondents relating to the company's BEE status, the applicants wanted to leave the joint venture company, seeking a number of remedies in terms of s 163(2) of the Act. It was alleged that what the respondents had done was oppressive, unfairly prejudicial or had unfairly disregarded the applicants' interests. As a result, they sought a number of remedies against the respondents, the main ones being that the Hamon group should transfer the shares it held in the joint venture company to them in return for payment for the value of those shares by them, subject to deduction of wasted expenditure; that is, the costs of implementation of the joint venture agreement and creation of the joint venture company.

The court, per Moshidi J, granted the orders sought, save that the issues of the price for the shares and wasted expenditure were referred to trial, as evidence was required to establish same.

The court held that the fact that the respondents engaged in an inappropriate BEE exercise, which the applicants viewed in a very serious light, and had not sought to take appropriate measures to remedy their conduct, was oppressive. The conclusion of that BEE transaction, which was never disclosed to the applicants, meant that the conduct of the respondents was unfairly prejudicial to the applicants and unfairly disregarded their interests. The transaction exposed the applicants to serious business risks, particularly if the Department of Trade and Industry, being in charge of Eskom Holdings, was to discover that the whole BEE exercise was a sham. Moreover, the possibility of criminal prosecution could not be ruled out. Therefore, it was more than plain that the applicants, as directors and shareholders, were being prejudiced. Their interests were being unfairly disregarded by the respondents. The fact that the BEE issue was not being resolved made the conduct oppressive towards the applicants.

Institution of legal proceedings for loss suffered by majority shareholders: Briefly, the rule in *Foss v Harbottle* (1843) 67 ER 189 provides that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is *prima facie* the company itself. No individual member of the company is allowed to maintain an action in respect of the claim, in that if the majority confirms the wrongdoing, the matter is laid to rest. An exception to the rule is allowed if what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In that case, the

rule is relaxed in favour of the aggrieved minority, which is allowed to bring a minority shareholders' action on behalf of it and all others.

In *Roestorf and Another NNO v Johns* 2013 (2) SA 459 (KZD) R and W, as trustees of two trusts, held a 75% majority shareholding in a company, Two Wheel Investments. They sued for damages suffered by them when their shares and loan accounts were destroyed as a result of the conduct of the manager, Johns, who ran the company in a manner alleged to have been *mala fide*, fraudulent or negligent. As a result of the alleged conduct of the manager, the company's contracts with suppliers were cancelled and the company was liquidated. Far from passing a resolution authorising the company to institute proceedings against the manager or communicating with the liquidator to do so, the plaintiffs instituted the claim against the manager. At the close of the plaintiffs' case, the defendant applied for absolution from the instance, which was granted with costs.

Lopes J held that there was no reason why the plaintiffs, as holders of 75% of the shares, could not pass a resolution authorising the action on behalf of the company to recover the losses sustained by it as a result of the actions of the defendant. It was incumbent on the plaintiffs to demonstrate that they were the proper plaintiffs in the action. Their bringing of the action was in breach of the rule in the *Foss* case. The fact that their shareholding was affected by the conduct of the defendant did not give them a right of action *per se* against the defendant. The plaintiffs did not demonstrate that their action fell within the rule or was within any of the exceptions envisaged in the *Foss* case. Moreover, the company was in liquidation and there was no evidence as to progress made in this regard. Therefore, as the action lay in the first instance in the hands of the company, if all the creditors had not been paid, any amount recovered by the company would have gone to the creditors who suffered a shortfall. To allow the plaintiffs' present action would circumvent the liquidation process in its entirety and award a dividend to shareholders – a course that was not warranted.

Security for costs: Section 13 of the repealed Companies Act 61 of 1973 provided, among others, that a plaintiff company could be required to provide security for the defendant's costs. The present Companies Act 71 of 2008 does not have a similar provision. However, r 47(3) of the Uniform Rules of Court provides that if the party from whom security is demanded contests liability to give security, or if he or she fails or refuses to furnish security in the amount demanded or fixed by the registrar of the court within ten days of the demand or the registrar's decision, the other party may apply to court for an order that such security be given and that proceedings be stayed until compliance with such order.

In *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd* 2013 (2) SA 477 (FB) the respondent instituted proceedings against the applicant, claiming damages for breach of contract. In response, the applicant demanded that security be furnished for its costs in case it successfully

contested the main claim. When such security was not forthcoming, the applicant launched the pre-sent application in terms of r 47 of the Uniform Rules of Court. The application was dismissed with costs.

Thamage AJ held that the main emphasis in the instant application was on the inability of the respondent to pay costs; there being no substantial indication that the respondent's litigation was vexatious, reckless or amounted to an abuse of the process of the court. There was therefore nothing more than the respondent's solvency. Although the court had an inherent duty to guard against abuse of its process, it should nevertheless not close the door to a genuine *incola* plaintiff who has a sustainable case but is impecunious. Each case had to be decided on its own merits and circumstances, with an emphasis on legitimate litigation and the interests of justice. Access to courts should thus not be technically denied simply because a litigant with a meritorious claim could not provide security. As stated by Van der Merwe AJ in *Ngwenda Gold (Pty) Ltd and Another v Precious Prospect Trading 80 (Pty) Ltd and Another* (GSJ) (unreported case no 2011/31664, 14-12-2011) (LJ van der Merwe AJ), the absence of an equivalent to s 13 of the 1973 Act suggested that the legislature placed greater emphasis on the entitlement of even impecunious or insolvent corporate entities to recover what was due to them in courts without the obstacle of having to provide security in advance for the costs of the litigation.

Note: A similar decision was reached in *Maigret (Pty) Ltd (In Liquidation) v Command Holdings Ltd and Others* 2013 (2) SA 481 (WCC), in which the court emphasised that the power to order security had to be exercised with caution and that 'something more', such as vexatious or reckless litigation or abuse of the process of the court, was required to be established by a defendant than just the prospect of the plaintiff not being able to meet an adverse costs order. Therefore, the 'woeful insolvency' of the plaintiff alone would not justify an insistence on furnishing security.

Contract

Breach of contract – repudiation and specific performance: In *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ) the plaintiff, Sandown Travel, had a contract with the defendant, Cricket South Africa, in terms of which it rendered travel services to the latter. The contract was to run for two years but contained a provision to the effect that it would be automatically renewed for one more year unless either party gave notice of termination more than six months before the automatic renewal provision was activated. No such notice of termination was given by either party and, as a result, the contract was automatically renewed for one year. However, although it was too late to do so, the defendant nevertheless repudiated the contract by giving notice of termination inside the last six months. The plaintiff rejected the late notice of termination and advised the defendant that it

regarded the contract as still running. The defendant persisted with its repudiation and proceeded to obtain the services of another supplier. Eventually the plaintiff conceded that the defendant was no longer interested in the contract, accepted repudiation of the contract and sued for damages. The defendant resisted the claim for damages on the basis that the plaintiff could not both approbate and reprobate at the same time, meaning that the plaintiff was not allowed to both reject and accept repudiation of the contract at the same time. The parties agreed on the amount of damages to be awarded if the plaintiff succeeded; the only issue remaining for determination being the existence of liability.

Wepener J held that the defendant was liable to the plaintiff in the amount of damages as agreed; the claim being upheld with costs. It was held that, based on the assumption that the plaintiff was bound by its initial election to keep the contract alive, and shorn of its ineffective belated change of mind, the plaintiff's particulars of claim nevertheless disclosed a cause of action for damages as a surrogate for specific performance due to the defendant's repudiation of the contract. The principle that the innocent party (such as the plaintiff in the present case), when the defaulting party committed an anticipatory breach, could change his or her mind if the defaulting party persisted with its repudiation when the date for performance arrived, had been applied since 1910 but was limited to cases of anticipatory breach of an agreement; that is, breach of the agreement before the date on which performance was due. The principle of repentance – that is, the principle that an innocent party should be afforded the opportunity to reconsider his or her position – was well established and had become part of South African law. In the instant case, the plaintiff relied on the doctrine of repentance in order to exercise its rights and was entitled to succeed with its claim against the defendant. Although a claim for damages based on keeping the contract in existence had to be coupled with the plaintiff's tender to perform its obligations, in the present case the plaintiff was excused from tendering performance in its particulars of claim as the defendant had made it clear that it was terminating the contract.

Conveyancers

Liability of conveyancer for delay in transferring property: In *Margalit v Standard Bank of South Africa and Another* 2013 (2) SA 466 (SCA) the appellant, Margalit, was the owner of immovable property over which the first respondent, Standard Bank, held two mortgage bonds. After selling the property in 2007, the appellant had to pass transfer of ownership to the purchaser. However, before transfer could take place the two bonds had to be cancelled and, as the purchaser had also obtained financing from his bank, a new mortgage bond had to be registered. A delay took place from the end of May 2008 to the middle of July 2008 when the two mortgage bonds were cancelled, the property was transferred to the purchaser and a new mortgage bond was registered to secure the purchaser's loan. The delay was caused by the second respondent, a firm of attorneys acting for the first respondent, after its

conveyancer failed to lodge the cancellation of bond and transfer documents properly, as a result of which they were rejected by the deeds office three times. Eventually, the documents were properly lodged and the registrations effected on 16 July 2008, whereas that could have been done by 29 May 2008 had the correct documentation been properly submitted. As a result of the late cancellation of the bonds and transfer of the property to the purchaser, it being the stage at which the appellant received the proceeds of the sale, the appellant sued the respondents for damages in the form of interest lost due to the delay. The magistrate's court held the respondents liable, which decision was overturned by the GSJ, per Mbha J and Levenberg AJ.

A further appeal to the SCA was upheld with costs but counsel's fees were limited to one instead of two counsel, as the court was of the view that the employment of two counsel was not warranted in view of the small amount involved (some R 42 700); the law being settled and the facts being straightforward.

The SCA, per Leach JA (Nugent, Pillay JJA, Southwood and Erasmus AJJA concurring), held that a conveyancer was an attorney who specialised in the preparation of deeds and documents that, by law or custom, were registrable in a deeds office and who was permitted to do so after practical examination and admission. Like any other professional, a conveyancer could make mistakes. In a claim against a conveyancer based on negligence, it had to be shown that the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position. The gravity and likelihood of potential harm would determine the steps, if any, that a reasonable person should take to prevent such harm occurring. Moreover, the more likely the harm, the greater the obligation to take such steps. In the case of a conveyancer, it was necessary to bear in mind that any mistakes made that could lead to a transaction in the deeds office being delayed would almost inevitably cause adverse financial consequences for one or other of the parties to the transaction. To avoid causing such harm, conveyancers should be fastidious in their work and take care in the preparation of their documents. In the instant case the conveyancer failed to check the documents to see if they would pass muster before lodging them, which omission was evidence of a 'slothful approach' to the important task of ensuring that the documents were in accordance with the deeds office's practices and requirements. The conveyancer's failure in that regard also fell short of the high standard of care expected of a prudent practitioner.

Fundamental rights

Right to housing – 'eviction' in-cludes 'attenuation' or 'obliteration' of the incidents of occupation: Section 26(3) of the Constitution provides, among others, that no one may be evicted from their home or have

their home demolished without an order of court made after considering all the relevant circumstances.

In *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 (2) SA 613 (CC) the appellants, Motswagae and others, were occupants of dilapidated buildings that the respondent, the Rustenburg Local Municipality, wanted to demolish to make way for new housing. Negotiations were held with the occupants of the buildings for their relocation and, as no agreement could be reached, the respondent, wi-thout obtaining a court order, commenced bulldozing and excavation work, which exposed the foundation of the buildings. As a result, the appellants approached the NWM for an interdict restraining the respondent from interfering with the peaceful and undisturbed possession of their homes. The application was dismissed and the respondents were granted a counter-application to proceed with the bulldozing and excavation work. The High Court and the SCA having denied the appellants leave to appeal, such leave was granted by the CC and the appeal was upheld with costs. The first and second respondents were interdicted and restrained from performing or causing to be performed any construction work on the properties on which the applicants' homes were situated, without the applicants' written consent or a court order.

Delivering a unanimous judgment of the CC, Yacoob J held that s 26(3) of the Constitution was sufficiently wide to ensure protection of the appellants in the occupation of their homes. Its provisions would be pointless and afford no protection if municipalities and other owners were permitted to disturb occupiers in peaceful and undisturbed occupation of their homes, unless a court order authorised interference. The idea that owners were able to do so without offending the provisions of s 26(3) had to be rejected. The underlying point was that an eviction did not have to consist solely in the expulsion of someone from their home. It could also consist of the attenuation or obliteration of the incidents of occupation. The work authorised by the respondent municipality interfered with the appellants' peaceful and undi--sturbed occupation of their homes. The course of action the municipality ought to have adopted was to secure the eviction of the appellants from their homes before carrying on with intrusive and objectionable construction work on the property on which the appellants' homes were situated.

Interest

Mora interest on unliquidated debt: Section 2A(5) of the Prescribed Rate of Interest Act 55 of 1975 (the Act) provides, among others, that a court may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.

In *Du Plooy v Venter Joubert Inc and Another* 2013 (2) SA 522 (NCK) the plaintiff, Du Plooy, sustained injuries in a shooting incident involving the police. As a result, she instructed the first defendant, Venter Joubert Inc, a firm of attorneys that acted through a professional assistant, the second defendant, to institute legal proceedings against the Minister of Safety and Security for the recovery of damages. The defendants duly served a letter of demand on the Minister on 3 August 2006 but did not institute legal proceedings before the claim prescribed. As a result, on 12 January 2010 the plaintiff instituted a claim against the defendants for professional negligence but failed to first serve a letter of demand. On 11 September 2011 the defendants delivered a tender to the plaintiff for settlement of the claim in a certain amount and party and party costs as taxed or agreed. The offer of settlement did not provide for payment of interest and the parties could not agree on costs. The trial proceeded on the issues of interest and costs, as the capital amount had been settled.

Coetzee AJ held that before the introduction of s 2A of the Act in 1997 no common law principle or statutory enactment provided for the award of pre-judgment interest on unliquidated damages. The purpose of the section was not to compensate a creditor for his patrimonial loss but to compensate his patrimonial loss in real monetary value and not in depreciated
currency. There was no indication that the legislator intended to limit the court's discretion to the provisions or ambit of s 2A(2)(*a*) to service on the debtor a demand or summons that was otherwise overridden by the discretion given to the court. The date from which interest was to run had to be a date that was, in the exercise of the court's discretion, just. In exercising its discretion, the court could order interest to run from a date prior to the date of demand or service of summons, or from a date subsequent to either date, and to such date or dates as could be considered just, having regard to the circumstances of each case. In the instant case it would not be just to pay the plaintiff in depreciated currency and thus deprive her of being paid in real monetary value. Accordingly, it was found to be just to order payment of interest to run from 3 September 2006 (being 30 days after the letter of demand was served on the Minister in the prescribed claim) at the rate of 15,5% to date of payment and costs.

Motor vehicle accidents

Determination of 'serious injuries' by the Road Accident Fund, not the court: As a result of the amendment introduced by the Road Accident Fund Amendment Act 19 of 2005, which came into effect on 1 August 2008, s 17(1) of the Road Accident Fund Act 56 of 1996 (the Act) limits the liability of the Road Accident Fund (the fund) to compensate the victim of a road accident, a third party, for non-pecuniary loss – that is, general damages – to instances where such person has suffered 'serious injuries' as contemplated in

s 17(1A) of the Act.

Section 17(1A) provides that the assessment of whether or not an injury is ‘serious’ shall be carried out by a person registered as a medical practitioner under the Health Professions Act 56 of 1974 and on the basis of a ‘prescribed method’. The prescribed me-thod is found in reg 3 of the Road Accident Fund Regulations of 2008, which requires the third party to submit to an assessment by a medical practitioner.

In *Road Accident Fund v Duma and Three Other Related Cases (Health Professions Council of South Africa as amicus curiae*) [2013] 1 All SA 543 (SCA) the respondents, Duma and three others, suffered injuries in motor vehicle collisions in circumstances in which the fund would be liable. As a result, the fund accepted liability, except in respect of general damages – it contended that the respondents did not suffer ‘serious injuries’ as required by s 17(1).

In all four matters the fund, through its legal representatives, rejected the respondents’ ‘serious injury assessment reports’, being the RAF 4 forms, very late – it being more than a year since they were submitted – contending that the injuries had not been correctly assessed as serious. The main problem with the RAF 4 forms was that they had been completed by a ‘health practitioner’, namely an occupational therapist, and signed by a psychiatrist instead of a ‘medical practitioner’, who had also fa-iled to physically examine the respondents. The psychiatrist only signed the forms after looking at hospital records. In view of the rejection of the RAF 4 forms by the fund, the respondents were supposed to have referred the dispute to the Health Professions Council within 90 days, whereafter an appeal tribunal would be set up to take a final and binding decision. Instead, the respondents proceeded to trial. The GSJ held that the respondents had suffered ‘serious injury’ and their claim was successful, hence the present appeal to the SCA, which was upheld with no order as to costs; the court being of the view that reg 3, dealing with assessment of serious injury, raised a challengeable constitutional issue. The issue of general damages was postponed *sine die* and the respondents were given 90 days to refer the dispute to the Health Professions Council for determination as to whether the injuries suffered by the respondents were serious.

Brand JA (Mhlantla, Leach JJA, Plasket and Saldulker AJJA concurring) held that, in accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party was serious enough to meet the threshold requirement for an award of general damages was conferred on the fund and not the court. That much appeared from the stipulation in reg 3(3)(c) that the fund would only be obliged to pay general damages if it – and not the court – was satisfied that the injury had correctly been assessed as serious in accordance with the RAF 4 form. Unless the fund was so satisfied, the court had no jurisdiction to entertain the claim for general damages.

Stated differently, in order for the court to consider a claim for general damages, the third party had to satisfy the fund, not the court, that his or her injury was serious. Moreover, the fund's decision to reject the respondents' RAF 4 forms constituted an administrative action, which could be reviewed under the Promotion of Administrative Justice Act 3 of 2000, which meant that, until that decision was set aside by a court on review or overturned in an internal appeal, it remained valid and binding. The fact that the fund gave no reasons for the rejection or that the reasons given were found to be unpersuasive or were not based on proper medical or legal grounds could not detract from that principle. Whether the fund's decisions were right or wrong was of no consequence as they existed as a fact until set aside, reviewed or overturned in an internal appeal. It was therefore not open to the High Court to disregard the fund's rejection of the RAF 4 forms on the basis that the reasons given were insufficient or that they were given without any medical or legal basis or that that they were proved to be wrong by expert evidence at the trial. The appeals were thus upheld with no order as to costs.

Undertaking by the Road Accident Fund in respect of future medical costs: Briefly, s 17(4) of the Road Accident Fund Act 56 of 1996 (the Act) provides that the fund shall, in an appropriate case, provide the plaintiff with an undertaking for the costs of future accommodation in a hospital or nursing home or treatment of or rendering a service or supplying of goods to him or her arising out of injuries suffered in a motor vehicle collision. The section must be read together with s 36 of the Compensation for Occupational In-juries and Diseases Act 130 of 1993 (COIDA), which provides that an employee who suffers occupational injuries in the course of employment may claim compensation in terms of COIDA and may also institute action for damages against a third party (such as the fund). In awarding damages in a third party claim, the court is required to have regard to the compensation paid to the plaintiff in terms of COIDA.

In *Paterson NO v Road Accident Fund and Another* 2013 (2) SA 455 (ECP) N was injured in a motor vehicle collision in the course of his employment and, as a result, qualified for compensation under both the Act and COIDA. His claim against the first respondent, the Road Accident Fund (the fund), which was instituted by a *curator ad litem*, was settled by agreement 100% in his favour on the merits and an undertaking was furnished to him. The settlement was made a court order. However, the undertaking the fund provided in due course contained a condition to the effect that it was subject to the provisions of s 36 of COIDA. In other words, the undertaking certificate provided that the fund would pay future medical costs on condition that N proved that they had not been paid in terms of COIDA. This condition was not, however, provided for in the court order.

Malusi AJ granted an order, with costs on a punitive scale, directing the fund to furnish a proper undertaking in compliance with the court order that was not subject to s 36 of COIDA. It was held that, at best for the fund, s 36 of COIDA would be relevant where an employee had concurrent claims for compensation in terms of COIDA and damages against a third party. The trial court would then consider compensation already received by the employee from the compensation commissioner. It was therefore the trial court that was compelled to have regard to the compensation already paid, and not the employee. It was thus not necessary for an undertaking certificate that was for the benefit of the employee to include a reference to what the trial court had to consider. The proviso in the undertaking required the employee to do more than simply prove the costs he incurred as provided for in s 17(4) of the Act and therefore amounted to a qualification beyond the scope of the section. It was not for the employee to prove what compensation had been made by the commissioner when he proved costs incurred as provided in s 17(4). On the question of punitive costs, the court held that it was trite that a party that failed to comply with a court order was visited with a costs order on a punitive scale unless exceptional circumstances existed, that not being the position in the instant case.

Restitutio in integrum

Party seeking *restitutio in integrum* must tender restoration of benefits received: In *Mkhwanazi v Quarterback Investment (Pty) Ltd and Another* 2013 (2) SA 549 (GSJ) the applicant, Mkhwanazi, needed funds to bring her motor vehicle and mortgage bond instalments up to date to avoid steps being taken against her by the relevant creditors. To this end, the first respondent, Quarterback Investment, represented by its agent, M, concluded a loan agreement with her. At the first consultation M explained how the system worked and told the applicant that the first respondent would provide the funds to bring the motor vehicle instalments up to date and could pay mortgage bond instalments directly to the bank. At the second consultation M brought papers for the applicant to sign and indicated that, as everything had already been explained, there was no need for the applicant to be taken through the papers or to read them. All that the applicant was required to do was to sign, which she did. A few days later the promised funds of some R 12 000 were deposited into the applicant's bank account, which she used to bring the motor vehicle instalments up to date. Thereafter the applicant started paying monthly instalments of R 3 000 to repay the loan (although sometimes more was paid and other times only R 2 500 was paid). However, some two years later the applicant established that the agreement signed was not a loan agreement. It was a contract for the sale of her house, as well as one in terms of which she leased it from the new owner, the first respondent. The monthly payment she was making was therefore not to repay the loan but rental for occupation of her house, which, by then, had been transferred to the first respondent after settlement of the balance and cancellation of the bond. Briefly, the first respondent was running a

fraudulent scam in terms of which needy homeowners sold their houses to it without knowing what they were doing. As a result, the applicant approached the GSJ by way of notice of motion for an order setting aside the transfer of her house to the first respondent and declaring the underlying agreement null and void. She also sought an order directing the Registrar of Deeds to transfer the property back into her name, as well as an interdict restraining the first respondent and M from selling or transferring the property to anyone other than herself. Finally, she also sought costs on an attorney and own client scale. The first respondent did not deny the facts but was content to raise the defence that, as the applicant had not tendered restoration of the benefits received from it, *restitutio in integrum* was not available to her. The court granted the orders sought by the applicant with costs on a punitive scale, as requested.

Spilg J held that the main elements of the *restitutio in integrum* remedy were the en-ti-tlement of the aggrieved party to set aside the legal consequences of an event (or a previously valid transaction) and the obligation to restore to the person from whom they were received any property or benefits given and received in consequence of the original legal relations. In the instant case the applicant was entitled to have the agreements set aside as null and void *ab initio* by reason of the material fraudulent misrepresentation and non-disclosure by the first respondent's representative. The effect was that the performance rendered by the parties no longer found legitimacy and the parties were entitled to be restored, *vis-à-vis* each other, to their respective positions immediately prior to the impugned agreements. Despite a finding that the applicant was entitled to have the agreements set aside by reason of fraud, the purpose of the remedy of *restitutio in integrum* would be seriously impeded, if not effectively frustrated, if the first respondent could insist on a prior determination of whether the applicant derived a net benefit from the transactions. Moreover, if such a finding were made, the applicant would have to find the money to be refunded before she could obtain transfer of the property. As the case was on motion, the main concern was to provide an effective remedy to undo the fraud.
Having regard to the provisions of ss 40(4), 89(1)(*d*) and 89(5)(*c*) of the National Credit Act 34 of 2005, equity and justice dictated that the applicant was excused from being obliged to restore any benefits before the property could be transferred back into her name. That did not, however, mean that the first respondent was not entitled to sue separately for repayment of any net benefits received, but only that transfer of the property would not be denied to the applicant because she had not tendered return of any benefits she might have received.

Other cases

Apart from the cases and material referred to above, the material under review also contained cases dealing with admission policy of a public school, amendment of particulars of claim, application for water licence, consumer credit agreement, contingency fee agreement, duty of

shareholder to prevent loss to company, enforceability of contractual undertaking, extinctive prescription, injurious posting on Facebook, liquidation of a close corporation for inability to pay debts, meaning of administrative action, removal of delinquent director from a company, requirements for class action, right of *amicus curiae* to adduce evidence, right of journalist not to reveal name of a source, right to legal representation at the Commission for Conciliation, Mediation and Arbitration, suretyship contract, unjust enrichment and vicarious liability of the Minister of Defence.