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
GNP: North Gauteng High Court
GSJ: South Gauteng High Court
SCA: Supreme Court of Appeal
WCC: Western Cape High Court

Banking law

Contravention of s 11: In *Dulce Vita v Van Coller and Others* [2013] 2 All SA 646 (SCA) the court held that a contract underlying a scheme that contravenes s 11 of the Banks Act 94 of 1990 (the Act) is not necessarily void and therefore unenforceable.

The facts were as follows: Bluezone Property Investments (Bluezone) was a company that conceived and promoted the Spitskop Property Development Scheme (the Spitskop scheme). Bluezone was incorporated to carry on business by means of various property syndication schemes. A public property syndication scheme in terms of which the promoters withhold certain prescribed information from investors is unlawful (see N459/*GG* 28690/30-3-2006 (notice 459)).

It was trite that Bluezone and their representatives did not disclose certain prescribed information regarding the Spitskop scheme to investors and potential investors. The Spitskop scheme was later liquidated.

The court *a quo* held that because the Spitskop scheme was taking money (deposits) from the general public, while not registered as a bank, the agreements in terms of which the investors invested in the Spitskop scheme were unlawful and void *ab initio* and thus not enforceable against the liquidators of the Spitskop scheme (the respondents).

On appeal the court was asked to pronounce on two questions: Whether the Spits-kop scheme contravened s 11 of the Act, which prohibits any person from conducting the business of a bank unless it is a public company and is registered as a bank in terms of

the Act. If the answer to the first question is yes, the second question is whether the contravention of s 11 and notice 459 resulted in the agreements in terms of which the investors invested in the Spitskop scheme being unlawful and void *ab initio*.

As far as the first question, regarding the contravention of s 11 of the Act, is concerned Southwood AJA pointed out that the primary business of a bank is defined in the Act as 'the acceptance of deposits from the general public as a regular feature of the business in question'.

The court held that the word 'deposit' is broadly defined. By receiving payment for the debentures, the Spits-kop scheme accepted deposits unlawfully and in contravention of s 11 from the general public as a regular feature of its business.

As to the second question regarding the status of agreements concluded in terms of the Spitskop scheme, the court held that there is no provision in the Act that a public property syndication scheme is unlawful if the promoter raises funds by accepting loans against the issue of debentures in contravention of the Act.

In this regard the court referred with approval to the earlier decision in *Gazit Properties v Botha and Others NNO* 2012 (2) SA 306 (SCA) in which the court held that a contravention of the Act does not result in the illegality of the agreements in terms of which deposits are made.

The court reasoned that the fact that the legislature visits non-compliance with s 11 and notice 459 with a hefty fine and/or imprisonment, serves as proof that it does not want to burden non-compliance with the additional sanction of being unlawful.

It further pointed out that there is no provision in the Act that a public property syndication scheme is unlawful if the promoter raises funds by accepting loans against the issue of debentures in contravention of the Act.

It found that the court *a quo* erred in finding that the Spitskop scheme was unlawful and that the agreements entered into were null and void *ab initio*.

The appeal was accordingly allowed with costs.

Cession

Cession of real right: The facts in *Page Automation (Pty) Ltd v Profusa Properties CC t/a Homenet OR Tambo and Others* 2013 (4) SA 37 (GSJ) were as follows. The plaintiff (Page Automation) is a supplier of office equipment. OEP Financial Services (OEP) are financiers. In October 2008 the first defendant (Profusa Properties) entered into a five-year rental agreement with OEP for the hire of certain office equipment. The second and third defendants (the sureties) acted as sureties and co-principal debtors with Profusa Properties in terms of the rental agreement. In January 2010, as a result of Profusa Properties defaulting on its rental obligations, OEP ceded its right, title and

interest to the rental agreement to Page Automation.

Page Automation argued that, in its capacity as cessionary, it could step into the shoes of OEP and exercise the rights in terms of the rental agreement as if it were OEP. Page Automation subsequently instated action against Profusa Properties (as well as the sureties) for various claims, including arrear rentals.

Profusa Properties argued that, first, Page Automation has no right to claim for rentals after the date of cession as the agreement of cession does not provide for the cession of future rentals; and secondly, that because ownership cannot be ceded, ownership still vests in OEP rather than Page Automation who accordingly has no *locus standi* to claim delivery of the equipment.

Heaton-Nicholls J held that –
• although only personal rights – and not real rights (for example, ownership) – are in principle capable of being ceded, our courts have increasingly acknowledged that commercial realities demand a more streamlined mode of delivery free from the archaic requirements that accompany the traditional modes of transfer; and
• it is necessary that the law of cession be developed in accordance with the *obiter dictum* in the decision in *Caledon & Suid-Westelike Distrikte Eksekuteurs-kamers Bpk v Wentzel en Andere* 1972 (1) SA 270 (A).

Applied to the facts of the present case, the court held that the rights that OEP ceded to Page Automation included ownership of the equipment concerned and that delivery and transfer of ownership thereof took place on cession.

Page Automation's claim for delivery of the equipment therefore had to succeed with costs.

Company law

Reinstatement of deregistered close corporation: In *ABSA Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC) Absa Bank (Absa) lodged an unopposed application for the reinstatement of a deregistered close corporation, Voigro Investments 19 CC (the CC). It further applied for a declaratory order to vest the CC with its assets with retrospective effect.

The facts that led to the present application were as follows: The CC failed to lodge annual returns and was deregistered. Absa was a secured creditor of the CC. Absa obtained judgment against the CC as it was in arrears with the repayment of a mortgage loan. The property was attached in execution.

However, Absa then discovered that the property had already been sold in execution to satisfy a claim for arrear rates by the Knysna Municipality. The property was sold well below its market value of R 200 000. Although the sheriff executing the warrant had informed Absa of the attachment and impending sale in execution, the information

was not processed in time.

Absa argued that deregistration by the Companies and Intellectual Property Commission (CIPRO), which was intended to punish non-compliant entities, effectively deprived it of its security in terms of the mortgage bond. Absa further argued that a court application under s 83(4) of the Companies Act 71 of 2008 (the 2008 Act) was the only way to restore the company's status and its security. Section 82(4), which entails an application to CIPRO, was of no avail to Absa as it was unable to comply with the prescribed requirements for such an application.

The crisp issue was whether s 83(4) of the 2008 Act applies to a company or close corporation deregistered under s 82(3).

The court *a quo* held that it could not order the reinstatement of a company's registration under s 83(4) if the company's name was removed from the register under s 82(3) for failing to submit its annual returns. It pointed out that s 83(4) is intended for companies that have been dissolved following their liquidation. It accordingly dismissed the application for reinstatement and set aside the provisional winding-up order.

On appeal before a full Bench, Rogers J held that s 83(1) provides expressly that the removal of a company's name from the register results in the dissolution of that company. There is no basis in the 2008 Act to limit dissolution to companies or close corporations that have been liquidated.

Consequently, a court order under s 83(4) declaring the dissolution of a company to have been void, can also be made in respect of a company that was deregistered for failure to submit annual returns. The court's power under s 83(4) is not a power to review, which can be exercised only if the removal of the company's name from the register was irregular or unlawful. A common reason for orders under the similarly worded s 420 of the Companies Act 61 of 1973 was to discover assets.

The court ordered the dissolution to have been void, ordered the CIPRO to restore the CC's name to the register and declared that it was re-vested with its assets and liabilities as at the date of deregistration. The court declined the request that the order be made with retroactive effect as if the CC had not been deregistered.

The CC was ordered, on re-registration, to pay the costs of the applicant.
• See 2013 (Aug) *DR* 38.

Constitutional law

Mineral rights – expropriation: In *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) a company (Sebenza) was the holder of coal rights on different portions of the farm Goedehoop. On 1 May 2004, the commencement date of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), Sebenza lost its mineral rights; such rights then vesting in the people of South Africa under the

custodianship of the Minister of Minerals and Energy.

Sebenza ceded its right to compensation for the loss of the coal rights to Agri SA. Agri SA contended that the very enactment of the Act constituted an expropriation and, accordingly, that it was entitled to compensation from the minister for the expropriated rights.

The minister argued that the mineral rights were not expropriated, but merely regulated on behalf of the people of South Africa by the minister as custodian. It did not vest in the state, which is a requirement for expropriation. The minister further argued that this should be classified as a deprivation in terms of s 25(1) of the Constitution. Accordingly, so the minister argued, no compensation was payable to Agri SA. The North Gauteng High Court held that the deprivation amounted to expropriation and that Agri SA was entitled to compensation. On appeal to the Supreme Court of Appeal it was held that neither deprivation nor expropriation took place, and the decision of the High Court was set aside.

On appeal to the Constitutional Court the crisp question was whether Sebenza's mineral rights, which it possessed during the subsistence of the Minerals Act 50 of 1991, were expropriated when the MPRDA took effect.

Mogoeng CJ held that, before the commencement of the MPRDA, a holder of mineral rights like Sebenza could prospect, mine, sterilise or freely sell or lease such rights. When the MPRDA came into force it terminated the ability to sterilise or freely sell the rights, but otherwise left them intact. It thus concluded that a law of general application, which was not arbitrary, had deprived Sebenza of its rights.

Next, the court considered the question whether the deprivation allowed by the MPRDA constituted expropriation. The court defined expropriation as an acquisition by the state of the substance of what was deprived, for a public purpose or in the public interest. Expropriation is subject to compensation. However, in the present case, the state had not acquired Sebenza's entitlements to freely sell or lease or sterilise the rights on the coming into force of the MPRDA. Accordingly, so the court reasoned, there had been no expropriation.

The court was at pains to emphasise that its decision should not be interpreted to mean that expropriation in terms of the MPRDA is never capable of being established. Provided that a case of expropriation is properly pleaded and argued, it will be possible for expropriation to take place in terms of the MPRDA.
• See 2013 (July) *DR* 44 and 2013 (Aug) *DR* 42.

Motion of no confidence in the president:

In *Mazibuko NO v Sisulu and Others NNO* 2013 (4) SA 243 (WCC) the court was asked to interpret s 102(2) of the Constitution. Section 102(2) provides for the resignation of the president if the majority of the national assembly passes a motion of no confidence

in the president.

In the present case the applicant (who is the leader of the official opposition in parliament) brought an urgent application that the first respondent (the speaker) be directed to ensure that a tabled motion of no confidence in the president be scheduled for debate and a vote before the national assembly on or before the last day of its annual sitting. The applicant alleged that 'procedural machinations' frustrated the scheduling of the debate and argued that, notwithstanding the national assembly rules not providing for breaking the resulting deadlock, the speaker had a residual power to order scheduling of the debate.

Davis J held that there was a constitutional right to move a motion of no confidence in the president. This motion could be brought not only by a majority party, but also by a minority party that sought to garner support for the motion from members across the floor of the house. The right of an elected representative to bring a motion, whether in the form of a Bill or in the form of a motion of no confidence in the president, as envisaged in s 102 of the Constitution, captured the animating spirit of South Africa's democracy, which was not to be reduced to the view of a transient majority.

The court further held that a motion of no confidence in the president has to have an inherent urgency because, for example, it raises matters of profound national interest and importance. The debate had to take place, and the majority could not subvert this right by delaying its initiation for an unreasonable time.

However, while the judiciary was entitled to direct parliament to operate within constitutional boundaries and to refrain from subverting the expressly formulated idea of a motion of no confidence, it could not trespass into legislative terrain by dictating to parliament when and how it should arrange its order of business. How the right envisaged in s 102 of the Constitution would be enforced was a matter for parliament to decide, not the courts.

The court pointed out that, as the national assembly rules presently stood, unless the motion of no confidence in the president was supported by the majority party, it could not be debated. This position was incompatible with the Constitution in that the majority could subvert the right of the minority to have a debate as envisaged in terms of s 102 of the Constitution. The rules did not provide for the enforcement of this right enjoyed by the party proposing the motion; it did not provide for the necessary deadlock-breaking mechanism.

The speaker of the national assembly did not have a residual power to schedule such a debate. It was also not for the court to dictate when exactly a debate should be held; courts had to leave it to parliament to determine how to allow the right to be vindicated. Again, such a position was incompatible with the national assembly's constitutional obligation to ensure that such motion be debated. Rules should be provided to ensure that the national assembly made the determination as to when this occurs. The *lacuna* created by the absence of a rule allowing a minority party to vindicate the right to debate

a motion of no confidence was a matter for the Constitutional Court to address.

The application was accordingly dismissed. The court decided not to make a costs order because it held that the applicant was correct to bring the present application.

Right to information: The facts which led to the litigation in *BHP Billiton PLC Inc and Another v De Lange and Others* [2013] 2 All SA 523 (SCA) enjoyed a high level of media attention and public interest. The facts of the case were as follows: The third respondent (Eskom) is the sole provider of electricity in South Africa. Eskom concluded long-term contracts with the appellant (BHP) for the supply of electricity to two aluminium smelters that belong to BHP. In terms of the contracts the smelters are entitled to receive electricity for a fixed period at a lower rate than the standard tariff.

The first respondent (De Lange) is a financial journalist with Media 24, a newspaper and media group. De Lange (as representative of Media 24) requested certain information from Eskom under the Promotion of Access to Information Act 2 of 2000 (PAIA) regarding Eskom's contracts with BHP. Media 24 first requested information from Eskom on 30 June 2009. Eskom communicated its refusal of the request on 29 July 2009. On 18 September 2009 Media 24 lodged a refined, follow-up request. Eskom then provided some of the information, but refused to disclose everything.

On 18 March 2010 Media 24 successfully applied in the court *a quo* for the information that Eskom refused to supply. Although Eskom abided by the court's decision, it persisted in its refusal to disclose the information. BHP decided to appeal the decision.

The appeal raised a number of issues, three of which merit discussion here:
• First, the point *in limine* taken by BHP that Media 24's second request for information was out of time and consequently it was precluded from asserting its right of access to information under PAIA.
• Secondly, the grounds for refusing the request insofar as they relate to the disclosure of the signatories to, and the dates of commencement and termination of the two contracts.
• Thirdly, the court was also asked to pronounce on the question whether the information that BHP sought to protect was already in the public domain.

In a majority decision the SCA dismissed BHP's appeal. Mthiyane DP held that the question whether a request is out of time is one of fact. Because Media 24's two requests were not the same, Media 24's application to the court *a quo* does not fall foul of the 180-days limit. The 180 days started running only on the date when the second request for information was refused.

The court pointed out that BHP refused access to information based on ss 36(1)(*b*), 36(1)(*c*) and 37(1)(*a*) of PAIA. The first two sections provide for the mandatory protection of commercial information of a third party (here: BHP). The third refers to the mandatory protection of certain confidential information and the protection of the confidential information of a third party.

It further pointed out that a party who relies on the above provisions to refuse access has to establish that it will suffer harm as contemplated in ss 36(1)(*b*) and (*c*). That party (BHP) must adduce evidence that harm 'will and might' happen if Eskom parts with or provides access to information in its possession relating to the contracts. The burden lies with the holder of the information, not the requester.

BHP failed to adduce evidence of the likelihood of harm should the information be disclosed. The information that BHP sought to protect (that is, its pricing formula) was available in a report compiled by a third party and was therefore already in the public domain. The appeal was dismissed and Media 24 was granted access to the information.

(Note: In a well-reasoned minority judgment Leach JA pointed out that the information that Media 24 requested in its second request was also requested in terms of its first request. Because Eskom's refusal to provide the information was communicated to Media 24 on 29 July 2009, the Media 24 application to the court *a quo* on 18 March 2010 was, in fact, out of time. The minority held that BHP's point *in limine* should have succeeded and the appeal should have been allowed.)

Consumer Protection Act

Municipalities: Validity of ministerial deferral of implementation: The facts in *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP) concerned a ministerial deferral of the implementation of certain provisions of the Consumer Protection Act 86 of 2008 (the CPA).

Item 2(3) of sch 2 of the CPA provides for the incremental implementation of the CPA. More specifically, it provides that the CPA's application to non-high-capacity municipalities may be deferred at the instance of the Minister of Trade and Industry. The effect of this would be to bar residents of such lower-capacity municipalities from seeking redress under the CPA for unsatisfactory municipal services.

The applicant (Afriforum) challenged two notices of the minister exempting medium- and low-capacity municipalities from parts of the CPA on the grounds, *inter alia*, that they were unauthorised and thus inconsistent with the doctrine of legality/rationality, and that the minister was in any event *functus officio* after the publication of the first notice. The notices, the first of which was subsequently revoked by the minister, were issued just over six months apart in 2011, and the second had the effect of extending the period of deferment.

Victor J emphasised that municipal services are at the centre of quality of life for all citizens, and their rights as consumers against municipalities cannot be deferred in perpetuity in absence of an express legislative provision allowing it.

Schedule 2 of the CPA specifically envisages the incremental effect of the Act, and in the

context Afriforum's submission that once the minister made a deferment, he could issue no further notice, had to fail. The minister was thus entitled to extend the period of deferment. However, the minister could not defer basic consumer rights without being precise. He would have been able to determine by examining the available records which services were lacking and which municipalities were incapable of complying with the CPA and, in the light of this, his failure to list individually each municipality requiring deferment instead of exempting an entire category was inexplicable.

The minister's decision to publish the notices was thus not rationally connected to the facts before him, he had transgressed the principle of legality and the second notice accordingly fell to be set aside on that ground. The minister was directed to publish a fresh notice listing every municipality requiring deferment. Because both parties have succeeded and failed on the various issues, the court held that each party is to pay its own costs.

Contract

Authority of agent to bind juristic person: In *Africast (Pty) Ltd v Pangbourne Properties Ltd* [2013] 2 All SA 574 (GSJ) the court considered a number of aspects relevant to the law of contract, only one of which will be mentioned here. The dispute between the parties concerned the proper interpretation of a written contract signed by representatives of the parties, and a determination of the existence of authority of the defendant's signatories to bind it (Pangbourne) at the time when the contract was signed.

Sutherland J held that there is no principle of law that compels a juristic person to confer authority on its agents in a specific way. There are thus no formal rules or legal principles according to which a juristic person has to go about in conferring authority on an agent. The existence of authority is a question of fact. In the present case Pangbourne's signatories did have authority to sign the contract.

The plaintiff's claim was dismissed on other grounds.

Execution

Sale in execution of immovable property: The applicant in *Knox NO v Mofokeng and Others* 2013 (4) SA 46 (GSJ) is the executor of the estate of his late mother. The applicant sought an order declaring the sale in execution of a property that belonged to his mother null and void and directing the Registrar of Deeds to reregister the property in the name of the estate of his mother. At the time of the deceased's death her property was bonded to the fourth respondent, First Rand Bank.

The bond fell in arrears while the applicant was in the process of finalising the estate. First Rand Bank was informed that its claim would be paid on the final conclusion of the estate. First Rand Bank nevertheless proceeded to serve summons for the arrears on the bond, and subsequently also the writ of execution at the deceased's address,

without the applicant being aware of these steps taken by First Rand Bank. The property was sold in execution to the second respondent, who, in turn, sold it to the first respondent. It was only after the property was registered in the name of the first respondent that the applicant became aware of the sale in execution. The applicant successfully launched an application for a rescission of the default judgment.

The crisp issue before the present court concerned the rights of *bona fide* purchasers of property at sales in execution (here the second and first respondents) where the judgment in terms whereof the sale in execution was effected has been subsequently rescinded. It also concerned the validity of the transfer of immovable property to a chain of successive purchasers under such circumstances.

Van der Merwe AJ referred with approval to the decision in *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) in which the court explained the abstract theory of the passing of ownership. The decision in *Legator McKenna* implies that the transferor of ownership must be legally competent to transfer the property. As a result, the court in *Knox* held that the present sale in execution constituted a nullity. The result of an invalid sale in execution is not only that the underlying sale agreement concluded at the sale is invalid, but also that the real agreement is defective, since the sheriff did not have authority to transfer the property to the second respondent pursuant to the purported sale in execution of the property. The transfer of the property to the second respondent was accordingly invalid, as was the subsequent sale and transfer of the property by him to the first respondent. The *nemo plus iuris* rule also applied to the real agreement in respect of the second sale.

The court held that the applicant is in principle entitled to claim vindication of the property.

Local authority

Disconnection of electricity supply: The facts in *Rademan v Moqhaka Local Municipality* 2013 (4) SA 225 (CC) were as follows. The applicant (Ms Rademan) was a resident of the respondent municipality (the municipality), which includes the Free State town of Kroonstad. Ms Rademan became upset by the municipality's poor service delivery. She stopped paying her municipal rates, but continued to pay her electricity account. The municipality decided to disconnect her electricity supply because of her failure to pay part of her consolidated municipal account.

A magistrate's court ordered the re-connection of her electricity supply because the municipality did not first obtain a court order before disconnecting Ms Rademan's electricity supply. On appeal the High Court and later also the SCA held that no court order is necessary to disconnect a rate payer's electricity supply.

Zondo J held that the single account for municipal services rendered by the municipality represented a single consolidated debt, and consumers were liable for payment in full of the entire debt as reflected in their consolidated accounts. Any lesser payment would be

allocated to the reduction of the consolidated debt, and consumers were precluded by the applicable bylaws from electing how the account would be settled if it were not settled in full or if there were arrears.

If a consumer, like Ms Rademan, elected to pay for certain components of her consolidated account but not for others, she would be contravening the conditions of payment as set out in the bylaws, and would place herself in default. The municipality would then be entitled to cut off her electricity supply, or for that matter, the supply of any other service. Accordingly the municipality had lawfully cut off Ms Rademan's electricity supply because of her failure to pay her rates.

Sale

Warranty against latent defect: In *Banda and Another v Van der Spuy and Another* 2013 (4) SA 77 (SCA) the owners of a house with a leaking thatched roof sold the house without disclosing the fact that the repairs to the roof had not properly rectified the defect. The question was whether the sellers' fraudulent concealment of the latent defect nullified the effect of a *voetstoots* clause. In an alternative claim the buyers claimed damages for the sellers' alleged misrepresentation that they are in possession of a valid guarantee for the repair work to the roof.

Central to the inquiry as to the requisite knowledge of the defects on the part of the sellers was a consideration of the undertaking given by the sellers to the buyers in the addendum to the contract of sale, which was found to be misleading and fraudulent since the time period for which it had been furnished had expired. A further factor to establish the *bona fides* of the sellers' belief in the adequacy of the repairs to the roof was the fact that they continued to enjoy insurance cover over the roof, subsequent to the roof being repaired.

Swain AJA held that the sellers' 'willful abstention' from ascertaining certain facts from their insurer to satisfy their belief in the adequacy of the roof showed that they did not hold an honest belief in the adequacy of the repairs, and that this, together with the sellers' fraudulent conduct in not disclosing the absence of a valid guarantee for the repairs, indicated that they knew about the structural defects in the roof, which they were obliged to disclose to the buyers. It was clear, however, that they were not aware that the leaks were caused by the inadequate roof pitch.

The court further held that a leaking roof was a latent defect which rendered a house unfit for habitation. The fact that the sellers were aware of only one of the factors that caused the leakage, namely the inadequate roof design, and not also the inadequate pitch, did not affect the fact that their conduct was fraudulent. Their fraudulent conduct resulted in the forfeiture of the protection of the *voetstoots* clause in respect of the latent defect.

Finally, the court held that the buyers were entitled to the difference between the purchase price of the house and its value with the defective roof.

In regard to the alternative cause of action, namely the misrepresentation of a valid guarantee, the court held that its purported existence had induced the buyers to pay the agreed purchase price, and that their appropriate claim would thus be the reasonable cost of repairing such defect.

The appeal was accordingly upheld with costs.

Other cases

Apart from the cases and topics that were discussed above, the material under review also contained cases dealing with administrative law, attorneys, civil procedure, contract law, damages, delict, education, es-toppel, local authorities and revenue.