The law reports

December 2013 (6) The South African Law Reports (pp 319 – 634); [2013] 4 The All South African Law Reports November no 1 (pp 253 – 383) and no 2 (pp 385 – 508)

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: Gauteng North High Court, Pretoria
GSJ: South Gauteng High Court, Johannesburg
SCA: Supreme Court of Appeal
WCC: Western Cape High Court
LCC: Land Claims Court

Actio ad exhibendum

Requirements: In *Rossouw NO and Another v Land and Agricultural Development Bank of South Africa* [2013] 4 All SA 318 (SCA) the respondent, Land Bank, bought certain irrigation equipment from a supplier (Andrag), which included pivots. The purpose of buying the equipment was to sell it to SJP Trust (the trust). Before it could pay the purchase price to the supplier the respondent required written declarations, one provided by the trust and the other by the supplier, confirming that the equipment had ten pivots that had actually been delivered, installed and were functional.

The declarations were duly provided. However, it subsequently transpired that the declarations were false as only six instead of ten pivots had been delivered and that the price had been inflated in terms of collusive conduct between the trust and the supplier. After completing financing of the equipment, the respondent entered into an instalment sale agreement with the trust in terms of which it reserved ownership of the pivots until the trust had paid the price in full.

The trust failed to pay the instalments as required and the respondent approached the GNP for an interdict restraining the trust, represented by the appellant trustee Rossouw, from disposing of the pivots, a *mandamus* for a return of the pivots and alternatively, and only if the pivots had already been disposed of, payment of their value (*actio ad exhibendum*). As it became common cause that the pivots had been disposed of, the application proceeded on the *actio ad exhibendum* and succeeded. Hiemstra AJ granted the respondent judgment for payment of the value of ten pivots, even though only six had been delivered to the trust and had subsequently been disposed of.

An appeal against the decision of the High Court succeeded on the amount of the value of the pivots, the SCA holding that such amount had to be limited to the six pivots delivered to the trust and disposed of by it. The value of each pivot disposed of was the market value at the date of alienation to a third party. The appellant's costs were limited to the employment of one and not two counsel.

Majiedt JA (Brand, Leach JJA and Meyer, Van der Merwe AJJA concurring), noting that the appeal concerned a vindicatory claim and, in the alternative, a claim in terms of the *actio ad exhibendum*, held that in order to succeed with the *actio ad exhibendum* the respondent had to prove the following requirements, namely that –
• it was the owner of the pivots at the time of their disposal by the trust;
• the trust had been in possession of the pivots when it disposed of them;
• the trust acted intentionally in that it had knowledge of the respondent's ownership or its claim to ownership when it parted with possession of the pivots; and
• the respondent would be entitled to delictual damages as well as the extent thereof (taking into account, among others, the value of the pivots when the trust sold them to a third party).

Appeals

Appeal against a costs order: Rule 16A(1) of the uniform rules of court provides that any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading and that such notice shall contain a clear and succinct description of the constitutional issue concerned. The rule continues to provide that the registrar shall, on receipt of such notice, forthwith place it on a notice board designated for that purpose, which notice shall be stamped by the registrar to indicate the date on which it was placed on the notice board and shall remain there for a period of 20 days.

The main issue in *Phillips v SA Reserve Bank and Others* 2013 (6) SA 450 (SCA) was whether there had been compliance with the rule and what was to be done if that was not the case. The appellant, Phillips, sought a High Court order setting aside the decision of the first respondent, the South African Reserve Bank, not to return foreign currency seized from him at the airport. He also sought an order declaring some regulations of the Exchange Control Regulations, promulgated in Government Notice R1111 of 1 December 1961, unconstitutional. However, he did not specify the grounds on which they were alleged to be unconstitutional.

The GNP held, per Makgoba J, that the appellant had not complied with r 16A(1) and therefore had to proceed without pursuing the unconstitutionality of the regulations concerned or seek postponement in order to comply with the rule, in which case he would have to pay wasted costs occasioned by the postponement. In the event, postponement was granted and the appellant was ordered to pay the costs occasioned by it. The appellant appealed against the costs order. The issue before the SCA was whether such an order was appealable. The appeal was upheld with costs.

Farlam JA (Mthiyane DP concurring and Majiedt JA, in whose judgment Petse and Ndita AJJA concurred, reading a separate concurring judgment) held that the costs order made by the High Court would stand, unless it was upset on appeal, until at the earliest the main case was dealt with on appeal. As the High Court order was wrongly made, it gave rise to considerable inconvenience and prejudice and also impeded the attainment of justice in cases involving constitutional issues where argument arose as to whether r 16A(1) had been complied with. That in itself afforded sufficient reason to allow an appeal at that stage.

Furthermore, in this case there were exceptional circumstances within the meaning of s 21A(3) of the Supreme Court Act 59 of 1959 so as to permit an appeal to be brought solely against a costs order. Obtaining a decision by the SCA on the interpretation of r 16A(1), as well as the other issues relating to the question as to whether the rule was complied with, satisfied the requirement of exceptional circumstances. The court held further that there had been compliance with r 16A(1) in that the appellant's notice had identified the issue at stake as the constitutional invalidity of the Exchange Control Regulations. It was not necessary to elaborate by specifying the grounds of the constitutional challenge as the High Court held.

Constitutional law

Unconstitutionality of s 50(2)(*a*)(i) of Criminal Law (Sexual Offences and Related Matters) Amendment Act: Section 50(2)(*a*)(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) provides that a court that has, in terms of the Act or any law, convicted a person of a sexual offence against a child or person who is mentally disabled and after sentence has been imposed by that court for such offence, in the presence of the convicted person, 'must' make an order that the particulars of the person be included in the National Register for Sexual Offences (the register). The purpose of the register is to keep track of offenders and deny them jobs and positions that would give them access to minors and persons with mental disability.

The section was declared to be inconsistent with the Constitution and therefore invalid in *Johannes v S* [2013] 4 All SA 483 (WCC) where the order of invalidity, which was not retrospective, was suspended for 18 months to give parliament the opportunity to remedy the defect. The matter was referred to the Constitutional Court for confirmation of the High Court order.

The case came to the WCC by way of automatic review in terms of s 85(1)(*a*) of the Child Justice Act 75 of 2008 (the CJA). That was after the accused, Johannes, who was legally represented, pleaded guilty to three charges for the rape of very young boys, two of whom were aged six years and the other seven years of age. He also pleaded guilty to a charge of grievous bodily harm to a girl aged 12 years after having stabbed her with a knife. The accused, at the time of the commission of the offences, was a 14-year old minor.

In respect of the rape convictions the accused was sentenced to compulsory residence in a child and youth care centre for five years, after completion of which he would serve three years' imprisonment and, significantly for present purposes, the regional magistrate ordered that his name be entered in the register in terms of the section.

The review issue before the High Court was whether it was 'competent' for the presiding officer to order entry of the name of the offender in the register without giving him the opportunity to make representation, more so since he was a minor at the time of the commission of the offences.

It will be noted that the better word would be 'appropriate' rather than 'competent', since the Act gave the court authority and in fact required it to order that such entry be made.

Henney J (Fourie and Steyn JJ concurring) held that failure to afford an offender the right to be heard before an order was made in terms of s 50(2)(*a*)(i) could not be said to be a reasonable and justifiable limitation of the right of a sexual offender in order to enforce and protect the dignity, freedom and physical integrity of children, and mentally disabled persons, against sexual abuse and exploitation. The section offended against a person's right to a fair hearing as it did not allow a court a discretion to consider whether or not an entry in the register should be made. The section should have made provision for giving the offender, as well as the prosecution, the opportunity to address the court as to whether it would be in the interest of justice that an order be made directing that the particulars of the offender be entered in the register.

Customs and excise

Lapsing of anti-dumping duties: In the *Association of Meat Importers and Exporters and Others v International Trade Administration Commission and Others* [2013] 4 All SA 253 (SCA) the appellant, the Association of Meat Importers and Exporters, together with other interested parties, appealed against a High Court order declaring sched 2 to the Customs and Excise Act 91 of 1964 (the Act) invalid and of no force and effect, which order gave the Minister of Finance a period of three years within which to rectify the defect.

In the schedule the Minister had given a list of imported goods that were suspect to anti-dumping duties. The list included, among others, chicken meat portions, garlic, acrylic blankets, glass, etcetera. The duties in question were imposed for a period of five years after which they were to lapse unless their operation was extended in terms of sunset review provisions.

The authorities – being the first respondent the International Trade Administration Commission (ITAC) established in terms of International Trade Administration Act 71 of 2002, the South African Revenue Service, the Minister of Finance as well as the Minister of Trade and Industry – took the view that the schedule was invalid, unaware that as it had already lapsed the issue of its invalidity was no longer live. In other words,

the authorities took a matter to court regarding duties that had since ceased to exist, there being a dispute about that fact.

The GNP held, per Raulinga J, that the schedule was invalid and suspended its invalidity for a period of three years so that the Minister of Finance could attend to its defects. An appeal to the SCA against the order was upheld with costs.

Nugent JA (Lewis, Theron and Saldulker JJA concurring and Wallis JA concurring in part and dissenting in part) held that the principle underlying the World Trade Organisation Agreement 1994 (WTO agreement) was that anti-dumping duties were exceptional measures that were imposed only in an amount and for so long as they would be required to counter injury to the domestic industry. Dumping occurred when goods were exported from one country to another at an export price that was lower than the price of goods when sold for consumption in the exporting country. The practice gave imported goods an unfair advantage over those produced domestically and it was common internationally for anti-dumping duties to be levied by the importing country so as to neutralise that advantage.

When a court made a declaration, it was declaring the existence of a state of affairs. The state of affairs that existed before a law was declared invalid was that it purported to have force of law but that in truth it did not. For so long as it purported to have the force of law it commanded obedience but, on being declared invalid, it no longer purported to have the force of law and could be ignored with impunity. When a declaration of invalidity was made, and then suspended, the state of affairs remained as it was before the declaration, that law purporting to have the force of law and commanding obedience. When there was nothing purporting to have the force of law in the first place, a court could declare that state of affairs, but such declaration did not bring about any change. Before the declaration there was nothing purporting to have the force of law and after the declaration there was also nothing purporting to have the force of law. Suspending the declaration had no effect on the position because no change in the state of affairs was brought about by the declaration.

In the instant case whether the anti-dumping duties came to an end by operation of art 11.3 of the WTO agreement or reg 53.1 of sched 2, the fact remained that, by the time of the granting of the High Court order, they had ceased to exist with the result that there was nothing that purported to command obedience. That being the state of affairs, a declaration of invalidity was not competent. Therefore, the High Court ought not to have declared the anti-dumping duties to be invalid because that was not the state of affairs that existed. The orders of the High Court were not competent and had to be set aside.

Divorce

Separation of issues: Rule 33(4) of the uniform rules of court provides, among others, that if in any pending action it appears to the court that there is a question of law or fact that may conveniently be decided either before any evidence is led or separately

from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of and the court shall, on application by any party, make such order unless it appears that the question cannot conveniently be decided separately.

An application for separation of issues in terms of the rule was made by the applicant, the husband, in *CC v MVC* [2013] 4 All SA 327 (GSJ) but was opposed by the respondent wife, MVC. The parties were married out of community of property, profit and loss without accrual sharing. As the parties were married before the enactment of the Matrimonial Property Act 88 of 1984 (the Act), maintenance and patrimonial issues arising from the marriage were governed by s 7(2) and (3) of the Act.

When the applicant sued for divorce, citing the irretrievable breakdown of the marriage relation as the parties had not lived together as husband and wife for some seven years, the respondent opposed the action, contending that there was no irretrievable breakdown of the marriage. In a counterclaim she alleged that if there was irretrievable breakdown of the marriage, it was due to the applicant's extra-marital affair with one K. She sought maintenance and redistribution of patrimonial assets in terms of s 7(2) and (3) of the Act.

The problem was, however, the determination of the size of the applicant's estate as, after making donations of cash and shares to his sons, D and P, he wanted to have those donations set aside by the court because of the trouble that D and P were causing him. Litigation to set aside the donations was expected to drag on for years with the further risk of appeal. As a result the applicant applied for separation of the issue of granting a decree of divorce from the maintenance and distribution of patrimonial assets. The respondent opposed the application, contending that the issues were inextricably linked and should therefore not be decided separately.

Mokgoatlheng J ordered separation of the issues as sought by the applicant, the costs being costs in the cause. The court held that, in applying the provisions of r 33(4), it would consider whether questions of law or fact could be decided separately before others or whether the issues sought to be separated could be conveniently separated. In considering the question of convenience, a court would have regard to its convenience, the convenience of the parties and possible prejudice that either party would suffer if separation was granted. The court was obliged to order separation unless it determined that the issues could not be conveniently separated, in other words, the court was obliged to order separation except where the balance of convenience did not justify such separation.

In the instant case the balance of convenience was in favour of granting separation as it was inappropriate for a party to an apparently irretrievably broken down marriage to oppose the separation of issues in a divorce action for the sole purpose of gaining a tactical advantage in order to secure a more favourable s 7(3) patrimonial distribution award, or to use the perpetuation of what seemingly appeared to be an irretrievably

broken down marriage as leverage for tactical reason to pre-empt the dissolution of such marriage for ulterior motives. If the marriage were dissolved, maintenance and patrimonial assets redistribution could be decided once litigation between the applicant and his sons, relating to the donations, was finalised.

Practice

Stay of proceedings on basis of *lis alibi pendens*: In *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA) the appellant, Caesarstone, had an agency agreement with the first respondent, World of Marble and Granite (WOMAG), and the Sachs family, in terms of which WOMAG and the Sachs family would act as its agents to sell its product, namely quartz panels, in South Africa. In return for services rendered, the respondents were to receive commission. The Sachs family consisted of Oren Sachs, his father and three brothers.

Thereafter, alleging that WOMAG and Oren Sachs had failed to meet their agency agreement obligations, the appellant cancelled the agreement and instituted legal proceedings in Israel for confirmation of cancellation of the contract and return of commission already paid. While proceedings in Israel were still underway, the respondents instituted proceedings against the appellant in the WCC in which they sought damages for breach of contract that allegedly occurred when the appellant repudiated the agency agreement, which repudiation they had since accepted.

The appellant raised a special plea of *lis alibi pendens* requesting a stay of High Court proceedings until litigation between the parties in Israel was finalised. Blignault J dismissed the special plea, hence the present appeal to the SCA. The appeal was upheld with costs and the High Court proceedings stayed, save for proceedings by the respondents other than WOMAG and members of the Sachs family, that is, those respondents who were not involved in the Israeli proceedings.

Wallis JA (Mthiyane AP, Maya, Theron JJA and Van der Merwe AJA concurring) held that a plea of *lis alibi pendens* was based on the proposition that the dispute (*lis*) between the parties was being litigated in the court in which the plea was raised. The policy underlying it was that there should be a limit to the extent to which the same issue was litigated between the same parties and it was desirable that there be finality in litigation. The courts were also concerned to avoid a situation where different courts would pronounce on the same issue with the risk that they could reach differing conclusions. There were three requirements for a successful reliance on a plea of *lis alibi pendens*, namely:

- The litigation was between the same parties.
- The cause of action was the same.
- The same relief was sought in those actions.

In the instant case, insofar as WOMAG was concerned, all the requirements for a valid plea of *lis alibi pendens* were satisfied, both in respect of its individual claim and in respect of the claim it was pursuing jointly with the Sachs family. The special plea could be rejected only if the court, in the exercise of its discretion, declined to grant a stay.

The position was the same regarding Oren Sachs. Neither WOMAG nor Oren Sachs had advanced adequate reasons for the High Court action not to be stayed as against them. However, that was not so with the other members of the Sachs family. The only sensible way in which to address the problem concerning other members of the Sachs family who were not involved in the Israeli legal proceedings, was for the court also to stay their High Court proceedings, not on the basis of *lis alibi pendens*, but in the exercise of its inherent powers to regulate its own procedures.

Restitution of land rights

When restitution is not feasible: In *Baphiring Community and Others v Tshwaranani Projects CC (formerly Matthys Johannes Uys) and Others* [2013] 4 All SA 292 (SCA) the facts were that in 1971 the appellant, Baphiring Community, was removed from their land that was situated in Koster, North West Province, in terms of racially discriminatory laws. In the instant case the community sought the land back, which land was owned by several commercial farmers and was to be restored to a communal property association created specifically for that purpose.

The Land Claims Court (LCC) held per Mia AJ (Gildenhuys J and Wiechers (assessor) concurring) that restoration was not feasible, with the result that the community was entitled only to equitable redress. In arriving at that conclusion the LCC took into account the fact that there was lack of financial assistance from the state, doing so after hearing extensive expert evidence on the failure of other resettlement projects where the state had not provided adequate institutional and financial support for restoration. The LCC also took into account the huge cost that would result from the state having to restore the land to the appellants. In other words, the LCC held that it would not be in the public interest, and therefore not feasible, to restore the land to the appellants, having regard to the prohibitive cost to the state.

An appeal against the decision of the LCC was upheld by the SCA with no order as to costs. The matter was remitted to the LCC to consider and determine anew the feasibility of restoring the land in question. In particular, the state was required to do a feasibility study and place evidence before the LCC to justify its assertion that it would not be able to fund the cost of the restoration.

Cachalia JA (Shongwe, Majiedt JJA, Van der Merwe and Mbha AJJA concurring) held that it was well established that a claimant for restitution of a land right was entitled to have the land lost through dispossession restored whenever feasible. A court should, therefore, restore the actual land to a claimant unless doing so was inimical to the public interest. Other forms of equitable redress in the form of a grant of alternative state land or payment of compensation could be considered only thereafter.

In the instant case the LCC was correct to consider the cost implications of the restoration because it lay at the heart of a proper assessment feasibility. Those costs would include the cost of expropriating the land from the current owners, resettling the claimants on that land and supporting a sustainable development plan for the resettled community.

The main problem, however, was that evidence presented by the state on those issues was at best inadequate, which meant that the court was hamstrung in making the assessment. After all, a claim for restoration of land was a claim against the state and not against current landowners. Therefore, the state could not adopt a supine stance, as it did in the instant case, when such claim was made. Before a court could make a non-restoration order it had to be satisfied that doing so was justified by the applicable legal principles and facts. It followed therefore that a non-restoration order granted in the absence of such evidence constituted a material irregularity and vitiated the order made by the LCC.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with adoption of business rescue plan, amendment of particulars of claim, asylum application, building contract dispute resolution, business rescue application, child trafficking, conduct of arbitration proceedings, contempt of court, defamatory Facebook posting, determination of capacity of public school, effect of voluntary surrender, indirect challenge of administrative action, interest on interest, jurisdiction of court over foreign defendant, liability for omission, meaning of administrative action, nature of verifying affidavit, private nature of arbitration proceedings, referral of complaint to Competition Tribunal, restoration of registration of close corporation, review of award of tender and transparency in tender process.