THE LAW REPORTS

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Abbreviations:

CC: Constitutional Court

GJ: Gauteng Local Division, Johannesburg

GP: Gauteng Division, Pretoria

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

Arbitration

Review application: The facts in *Eskom Holdings Soc Ltd v Khum MK Investments & Bie Joint Venture (Pty) Ltd and Others* [2015] 3 All SA 439 (GJ) were as follows. In terms of s 33(1) of the Arbitration Act 42 of 1965, the applicant, Eskom, sought to review and set aside a partial award made by the third respondent, the arbitrator. The dispute referred to arbitration was of a contractual nature.

Moshidi J referred to earlier case law and held that South African law governing the review of arbitration awards has been underpinned and applied so as to provide only narrow grounds for review and these have been restrictively interpreted. Although the courts have demonstrated a willingness to assist parties deprived of a fair hearing by procedural wrongs, they have limited their reviews to those alone. Our courts have refused jurisdiction in cases that requested their reviews of the arbitrator's legitimate exercise of discretion. The courts have, therefore, maintained their lack of jurisdiction to enquire into the correctness of the conclusion arrived at by arbitrators on the evidence before them. Consequently, the integrity of the arbitration process

is preserved except where the arbitrator himself has discredited it through mala fides, gross irregularity or the exercise of powers not conferred on him.

The court concluded that Eskom's allegations of gross irregularity, misconduct, bias and incompetence against the arbitrator were exceedingly exaggerated without any basis. The somewhat robust exchanges between the arbitrator and one of Eskom's witnesses, and on the odd occasion with Eskom's counsel, did not constitute sufficient grounds for intervention.

The arbitrator's finding against Eskom on the issue of estoppel was found to be in keeping with the legal principles on that issue. Eskom, as employer, was estopped from denying a tender contract involving the first respondent. The arbitrator was found to have correctly rejected the defences raised by the applicant.

The review application was thus dismissed with costs.

Company law

The material under review features no less than six cases that deal with company law. Four of these cases deal with business rescue proceedings: See the three cases which are discussed immediately below, as well as the decision in *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA). The decisions in *Absa Bank v Hammerle Group* 2015 (5) SA 215 (SCA) and *Chater Developments (Pty) Ltd (in Liquidation) v Waterkloof Marina Estates (Pty) Ltd and Another* 2015 (5) SA 138 (SCA) deal with the winding-up of companies.

Business rescue: The facts in *Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA) were that one month after a final liquidation order had been granted against a close corporation, Bloempro, Richter, who was employed as general manager by Bloempro, applied for an order placing Bloempro in business rescue. Absa obtained a default judgment granting it leave to intervene and dismissing the business rescue application because Richter appeared to have withdrawn his opposition to the application. Richter then applied for the rescission of the order on the grounds that he had only withdrawn his opposition to the application for leave to intervene.

The court a quo dismissed the application for rescission on the grounds that at the time of the application for business rescue, a final liquidation order had already been issued against Bloempro.

On appeal Dambuza AJA pointed out that s 131(1) of the Companies Act 71 of 2008 (the Act) provides that an affected person may apply to court for an order commencing business rescue proceedings 'at any time' and the use of these words is significant. The same words are used in s 131(7) allowing a court to make such an order during liquidation proceedings or proceedings to enforce any security against the company (or corporation).

The court further held that the term 'liquidation proceedings' does not refer only to a pending application for a liquidation order but includes the process of winding-up of a company after a final liquidation order has been granted. Liquidation refers to the entire process by which a company's existence is brought to an end by its deregistration after its assets have been redistributed. The court a quo erred in its reasoning that a company's existence is terminated by a final liquidation order because the correct position is that the company continues to exist, but control of its affairs are transferred to the liquidator.

There is no sensible justification for drawing the proverbial 'line in the sand' between pre- and post-final liquidation in circumstances where prospects of success of business rescue exist. A company's circumstances could change radically after a final liquidation order had been issued resulting in the company being able to become profitable again if allowed to trade.

The court concluded that an application for commencement of business rescue proceedings may also be brought after a final winding-up order has been issued against the company or corporation, up to the time it is deregistered at the end of the liquidation process. Such an application will then suspend the liquidation proceedings as provided in s 131(6) of the Act.

In passing the court alluded to the fact that its interpretation of s 131(6) of the Act created opportunities for abuse because any affected person can now halt liquidation proceedings at any time with a completely baseless and mala fide application.

The appeal was accordingly upheld with costs.

• See also case note 'Launching business rescue applications in liquidation proceedings – (successfully) flogging a dead horse' 2015 (Sept) DR 50.

Business rescue: In *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA); [2015] 3 All SA 274 (SCA) the sole shareholder of Panamo Properties (Panamo) was the Jan Nel Trust. The two trustees, Mr and Mrs Nel, were also the directors of

Panamo. Panamo owned a large commercial property in Roodepoort. The property was mortgaged to Firstrand Bank. Judgment was taken against Panamo for amounts totalling R 3,3 million when it fell into arrears on its mortgage payments. The property was declared executable.

In an effort to prevent the sale of the property in execution, the directors resolved to place the company in business rescue. A business rescue practitioner was appointed, a business rescue plan adopted and the property was sold as stipulated in the business rescue plan. The trust then obtained a declaratory order from the court a quo that in terms of s 129(5)(a) of the Companies Act 71 of 2008 (the Act), the business rescue resolution had lapsed and had become a nullity because of non-compliance with several procedural requirements prescribed by s 129(3) and (4) of the Act. As a result, the whole business rescue process was a nullity.

Wallis JA held that there is an apparent anomaly between s 129(5)(a) providing that the rescue resolution lapses and becomes a nullity on non-compliance with the procedural requirements, and s 130(5)(a)(i) providing that a court may set aside the resolution based on failure by the company to satisfy the procedural requirements. This anomaly can only be reconciled by reference to s 132(2) dealing with the termination of business rescue proceedings.

Section 132(2)(a)(i) requires the court to set aside the resolution that started the business rescue proceedings in order to terminate the proceedings. There is no provision for automatic termination of business rescue as a result of non-compliance with the procedural requirements.

The sensible interpretation of these provisions would be that the court may, at its discretion, set aside the resolution and terminate the process. In this regard, the word ‘or’ between s 130(5)(a)(i) and (ii) should be read as ‘and’. The court may therefore set aside a rescue resolution based on any of the three grounds stipulated in s 130(1)(a) if the court also considers it otherwise just and equitable. The ‘just and equitable’ requirement does not on its own constitute a further (fourth) ground for setting aside a business rescue resolution.

The court concluded that failure to comply with the prescribed procedural requirements for a board resolution to commence business rescue proceedings does not automatically result in the termination of the business rescue proceedings.

The appeal was accordingly upheld with costs.

Business rescue: In *Absa Bank Ltd v Golden Dividend 339 (Pty) Ltd and Others* 2015 (5) SA 272 (GP) the respondent, Golden Dividend, was placed in voluntary business rescue by a resolution of its board on 27 August 2013. On 21 November 2013, one day before the meeting of creditors, at which the rescue plan was approved by the majority creditor, Absa launched an application for an order that the business rescue plan was invalid. Absa argued that the business rescue plan had not been published within the prescribed period and/or did not substantially comply with the requirements of s 150(4) – (6) of the Companies Act 71 of 2008 (the Act) and/or was not validly adopted at the meeting of creditors.

Absa also applied for the board resolution placing the company in business rescue to be set aside on the grounds that there was no reasonable prospect for rescuing the company or, alternatively, having regard to all the evidence, it was otherwise just and equitable to do so.

Absa furthermore applied for an order that the agreement between the company and the business rescue practitioner providing for additional remuneration payable to the practitioner was invalid because it was not approved at meetings of the creditors and shareholders as prescribed.

Golden Dividend argued that the application had to be dismissed because the failure by Absa to join the creditors constituted a material non-joinder, since the creditors would be prejudiced if the business rescue plan was set aside and it (Absa), therefore, had a direct and substantial interest in the application.

Lazarus AJ held that s 130(3) of the Act makes a clear distinction between the requirement that an application has to be served on the company and the Companies and Intellectual Property Commission and merely requiring that each affected person must be notified as prescribed. Creditors are given an express statutory right to participate in such an application and need not be formally joined to participate. Since Absa notified the creditors by e-mail of this application as allowed by the Act, no joinder was required.

Section 150(5) of the Act allows the majority creditor or creditors to grant permission for the business rescue plan to be published outside the prescribed time limit (25 business days after appointment of the practitioner) but does not require this resolution to be taken at a meeting. Even if the meeting was unlawful for any reason, it would not affect the validity of the extension. In this respect the court differed from the opposite view expressed in *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* 2014 (1) SA 103 (KZN) (see feature article, ‘Business

Rescue: The position of secured creditors' (2014 (Sept) DR 35) and law reports 'Company law' (2014 (March) DR 34)).

The court referred with approval to the interpretation of the words 'reasonable prospect' in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) (see law reports 'Companies' (2012 (June) DR 44)). The cause of the company's problems should be addressed and a remedy offered that had a reasonable prospect of being sustainable. In this case, the facts disclosed and the significant shortcomings of the plan did not meet that requirement. Accordingly, there was no reasonable prospect of rescuing the company and the resolution was set aside, thereby terminating the business rescue proceedings.

Proceedings by and against security for costs: In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] 3 All SA 255 (SCA); 2015 (5) 38 (SCA) the court was asked to consider the question whether it may, in terms of the new company law regime introduced by the Companies Act 71 of 2008 (the 2008 Act), during litigation still order an applicant or plaintiff company to provide security for payment of the costs of a potentially successful defendant.

Section 13 of the Companies Act 61 of 1973 (the 1973 Act) provided a statutory exception to the general rule under common law that an incola plaintiff cannot be compelled to furnish security for costs. It vested a court with a discretion to order a company, that had instituted action, to furnish security for costs if there were reason to believe that it would be unable to pay the costs of its opponent. The rationale behind s 13 was to serve as a disincentive to companies to institute actions they could not afford and have little chance of winning.

The crisp facts in Boost Sports Africa were as follows. The appellant, Boost Sports, instituted action against the respondent, South African Breweries (SAB) based on alleged breach of contract. Boost Sports had no assets or office and was not trading but refused to provide evidence that it would be able to pay should an adverse costs order be made against it.

SAB then served a formal notice in terms of r 47(1) of the Uniform Rules of Court on Boost Sports claiming security for its costs. On behalf of Boost Sports, it was stated that the litigation was funded by the four shareholders who did not have the means to provide security as claimed by SAB. The court a quo granted the application by SAB and ordered Boost Sports to furnish security for SAB's legal costs in the action.

The issue on appeal was whether, absent an equivalent provision to s 13 in the 2008 Act, an incola company could be ordered to furnish security for costs.

Ponnan and Mbha JJA pointed out r 47 merely prescribes the procedure for claiming security for costs in an action and not the substantive law on whether a defendant has the right to do so. The latter must be found in the common law or relevant statute. Section 13 of the 1973 Act contained such a provision but the 2008 Act does not and this has caused conflicting judgments by the courts.

Section 173 of the Constitution confirms the power of the courts to protect and regulate their own process and to develop the common law. Since the common law provides for exceptions to the general rule that a resident (incola) should not be required to provide security for costs, these principles must now apply to resident companies as well, in the absence of a statutory provision.

The court may, therefore, compel a resident company to furnish security for costs but, in terms of the common law, it cannot be done merely because the chances of recovering costs from the plaintiff appear remote. The court also had to be satisfied that the action or application by the plaintiff was vexatious or reckless or otherwise amounted to an abuse. However, this did not mean that the court had to undertake a detailed investigation of the merits or facts of the case.

The court held that there were inconsistencies in Boost Sports' pleadings and also found it telling that the shareholders were prepared to fund the action from which they could benefit if successful, but not to put up security for SAB's costs. They were therefore shielding behind the company (which clearly was 'an empty shell') to avoid liability for costs should the claim not succeed. This meant that they had everything to gain but nothing to lose through this action and this was one of the mischiefs which s 13 of the 1973 Act was intended to curb.

The court also took into consideration that Boost Sports failed to show that it would be forced to terminate its claim if compelled to furnish security.

The appeal was dismissed with costs.

• See law reports 'Companies' (2014 (Oct) DR 44).

Constitutional law

Exchange control: The decision in *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) 146 SA (CC); 2015 (8) BCLR 959 (CC) brought to an end a lengthy and protracted legal battle between the South African Reserve Bank (SARB) and the multi-billionaire, Mark Shuttleworth, regarding the validity of the so-called 'exit levy', which is levied when one exports capital from South Africa.

During 2009 the SARB imposed a 10% exit levy (the levy) on Shuttleworth when he took his assets out of South Africa. Shuttleworth paid the levy under protest. The levy amounted to more than

R 250 million. The levy was imposed in terms of s 9 of the Currency and Exchanges Act 9 of 1933 (the Act); read with various Exchange Control Regulations, specifically reg 10(1)(c); and Exchange Control Circulars.

In the GP Shuttleworth argued that these legislative measures were unconstitutional and, therefore, invalid. By introducing reg 10(1)(c) the SARB and the Minister of Finance did not comply with the enabling legislation, in particular s 9(5)(a) of the Act, which empowered a person to make orders and rules by regulation. The court dismissed Shuttleworth's application.

The SCA upheld Shuttleworth's appeal and decided that the imposition of the levy was inconsistent with ss 75 and 77 of the Constitution and thus invalid.

On appeal to the CC the question was whether the levy, as Shuttleworth contended, was a tax imposed for the purpose of raising revenue for the state or, as the SARB argued, a regulatory charge, the main object of which was to disincentivise the export of capital. If the levy was a tax, that is, a revenue-raising mechanism, then the regulation that authorised the levy would be invalid because it had not been enacted in accordance with prescribed constitutional and statutory strictures.

Moseneke DCJ, in a majority judgment, held that a 'law', other than a 'money Bill', may authorise the executive arm of government to impose regulatory charges in order to pursue a legitimate government purpose. Section 77 of the Constitution provides that a so-called money Bill appropriates money, or imposes taxes, levies, duties and surcharges.

The question is how does one distinguish a regulatory charge from a tax that may be procured only through a money Bill? The test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct. If regulation is the primary purpose of the revenue

raised under the statute, it would be considered a fee or a charge, rather than a tax. But if the dominant purpose is to raise revenue, then the charge would ordinarily be a tax.

The court held that the purpose of the legislation in question was to curb or regulate the export of capital from the country. The levy was, therefore, not directed at raising revenue. The levy was charged as part of the regulation easing in the dismantling of exchange controls that were in place before 2003. The dominant purpose of the levy was to slow down the extent and the frequency of capital externalisation.

The court concluded that the levy was, therefore, not one which attracted the definition of 'money Bill', and as a result, did not need to comply with s 73(2) of the Constitution, which provides that only the Minister of Finance may introduce a money Bill in Parliament. The controversial reg 10(1)(c) that provided for an exit levy of 10% in the past on the export of capital from South Africa was thus constitutional and valid.

The appeal was accordingly allowed with costs.

• See law reports 'Exchange control' (2013 (Dec) DR 36).

Credit agreements sequestration

Debt re-arrangement: In *FirstRand Bank Ltd v Kona and Another* 2015 (5) SA 237 (SCA) the appellant, FirstRand, had a liquidated claim against the respondents, Mr and Mrs Kona (the Konas), for an amount of R 953 903 plus interest based on an overdraft facility subject to the National Credit Act 34 of 2005 (the Act) and secured by a mortgage bond.

During 2008 the Konas applied for debt review and eventually a debt rearrangement order was granted by the magistrate's court. However, the Konas again defaulted on the reduced amount they had to pay in terms of the order. FirstRand then issued summons against the Konas claiming payment of the debt and an order declaring the immovable properties executable. The Konas defended the action and successfully resisted summary judgment.

FirstRand then launched an application for the sequestration of the Konas and a provisional sequestration order was issued but that order was later set aside. The court a quo held that an application for sequestration included 'other judicial process' in terms of s 88(3) of the Act by which the credit provider exercises or enforces a right under the credit agreement between itself and the consumer. It also held that a debt re-arrangement order contemplated in s 86(7)(c)(ii) of

the Act, unless and until set aside by a competent court, constitutes a bar to the compulsory sequestration of a consumer's estate.

On appeal, Meyer AJA held, that a credit provider's motive is irrelevant in deciding whether sequestration proceedings are proceedings to 'exercise or enforce by litigation or other judicial process any right or security' as provided in s 88(3) of the Act.

In *Naidoo v ABSA Bank Ltd* 2010 (4) SA 597 (SCA) the court held that 'sequestration proceedings are not in and of themselves "legal proceedings to enforce the agreement" within the meaning of s 129(1)(b)'. The existence or validity of a debt rearrangement order did not constitute a bar to the lodging of sequestration proceedings.

Circumstances that would have justified the High Court to have exercised the discretion vested in it in terms of s 12(1) of the Insolvency Act 24 of 1936 in favour of the respondents are absent.

The appeal was accordingly granted and the estate of the Konas placed under final sequestration.

Delict

Adultery: In *DE v RH* 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) the CC was asked to pronounce on the justification for the continued existence of the delictual action for adultery (ie, contumelia and loss of consortium).

Mr DE, successfully sued the respondent, Mr RH, in the GP for damages after Mr RH had an adulterous affair with the former's wife. In the court a quo (*RH v DE* 2014 (6) SA 436 (SCA) see law reports 'Delict' (2015 (Jan/Feb) DR 53)) the SCA held that the time had come to rid our legal system of the delictual action for adultery.

On appeal to the CC, Madlanaga J held that the innocent spouse's delictual action for adultery (contumelia and loss of consortium) against the third party is obsolete and unconstitutional.

After referring to developments in foreign jurisdictions, the court held that internationally the general trend is towards the abrogation of a civil claim for adultery.

It further held that the Constitution does not support such a claim either. In the light of changing public policy the element of wrongfulness too, is lacking. It concluded: 'That is, what public policy dictates. In this day and age it just seems mistaken to assess marital fidelity in terms of money'.

The appeal was accordingly dismissed. No order as to costs was given because at the time when Mr DE instituted action the law still acknowledged the delictual claim for adultery.

Wrongfulness: The facts in *Za v Smith and Another* [2015] 3 All SA 288 (SCA) were as follows: In operating a private nature reserve on his farm, the first respondent, Mr André Smith, invited and allowed members of the public, for a fee, to make use of the recreational facilities available in the reserve.

The present appeal originated from an incident in June 2009 when the late Pier Alberto Za (the deceased) slipped on a snow covered mountain slope and fell over a 150m sheer precipice to his death. The incident occurred at Conical Peak, one of the highest mountain peaks in the Western Cape. It is situated on Mr Smith's farm.

The appellant (Za) is the widow of the deceased, and mother of the deceased's three minor children. In her personal capacity and in her capacity as mother and natural guardian of her three children, Za sued Mr Smith for damages representing the loss of support they had suffered through the death of her husband. Her claim was based on delictual liability arising from the wrongful and negligent failure by Mr Smith to take reasonable steps to avoid the incident that led to the death of the deceased.

The court a quo held that Za had failed to discharge the onus of proving a causal connection between the alleged wrongful and negligent omission of Mr Smith, on the one hand, and the death of the deceased, on the other hand. It dismissed Za's claims.

On appeal, Mr Smith denied wrongfulness. He argued that owners and others in control of property are under a duty to warn and protect those who visit the property against hidden dangers of which the latter are unaware, but not against dangers which are clear and apparent.

Brand JA held that the concept of a clear and apparent danger, on which Mr Smith relied for his line of defence, had nothing to do with wrongfulness. The court pointed to the often-confused concepts of wrongfulness and negligence in delictual liability. It also confirmed that the correct test for negligence is that of the diligens paterfamilias (ie, the 'reasonable man'), and involves whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable.

The court was satisfied that the element of wrongfulness had been established by Za. In determining wrongfulness, the other elements of delictual liability are usually assumed. Hence the enquiry was whether, on the assumption that Mr Smith in this case could have prevented the deceased from slipping and falling to his death and that he had died because of Mr Smith's negligent failure to do so, it would be reasonable to impose delictual liability on Mr Smith.

Mr Smith was in control of a property, which held a risk of danger for visitors. Mr Smith allowed members of the public, for a fee, to make use of the property. He should have warned and protected the unwary visitor against the danger of slipping and sliding over the precipice. The failure in that regard was negligent.

In its application of the test for causation, the court held but for Mr Smith's wrongful and negligent failure to take reasonable steps, the harm that befell the deceased would not have occurred.

The appeal was thus upheld with costs.

Execution

Attachment of salary: The decision in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC) is an important milestone in the protection of low income money borrowers.

The first applicant, a public interest organisation, assisted 15 of its low-income clients (the debtors) in bringing an application to set aside salary attachment orders issued in terms of s 65J(2)(a) of the Magistrates' Courts Act 32 of 1944 (the MCA) in favour of various micro-lenders (respondents four to 11 and 13 to 16). Although the debtors had consented to the orders, there had been no enquiry as to affordability or whether the orders were 'just and equitable' as provided for in s 65A of the MCA. Most of the orders had also been obtained on written consent

(s 45 of the MCA) in jurisdictions located far from where they lived and worked. The applicants challenged the constitutionality of s 65J(2)(a) and ss 65J(2)(b)(i) and (ii) on grounds that it made no provision for judicial oversight.

Desai J held that for debtors such as the applicants, who worked in low paid and vulnerable occupations, their salaries were invariably their only asset and means of survival. Any court order or legislation, which deprived them of their means of support or ability to access their socio-economic rights accordingly constituted a limitation of their right to dignity. Since the

micro-lenders obtained judgments and attachment orders against the applicants in courts far away from their homes and places of work, and in places which they could not hope to reach, the right of the debtors to approach the courts was seriously jeopardised, if not effectively denied. The use of s 45 to bypass the courts in areas in which the debtors or their employers resided amounted to forum shopping.

The state had to protect its citizens against human rights abuses by business enterprises by providing victims with a remedy. The attachment order system established by the MCA failed to do this by allowing orders to be issued without the involvement of a judicial officer or the opportunity for representations. Where debtors were vulnerable and over indebted, and at real risk of abuse by unscrupulous creditors, there was a strong argument for judicial oversight in the issue of the orders. This was also in accordance with general principles that there should be judicial oversight where an applicant sought an order to execute or seize the property of another. Accordingly when attachment orders were issued, judicial oversight was to be mandatory and occur when the execution order was issued.

As to s 45 of the MCA, properly interpreted, the broader approach to jurisdiction of s 45 could not be reconciled with the more restrictive approach in ss 65J, 90 and 91 of the National Credit Act 34 of 2005 (the NCA), especially in the light of the consumer protection rationale underlying the NCA. The court accordingly declared that the attachment orders were invalid and unlawful; that s 65J(2)(a) and s 65J(2)(b) were unconstitutional and invalid to the extent that they failed to provide for judicial oversight. The court also directed that a copy of the proceedings be forwarded to the relevant law society to determine whether the micro-lenders' attorneys were in beach of their ethical duties, particularly with regard to forum shopping, to secure salary attachment orders.

• See Editorial 'Debt collection system to be changed' (2015 (Aug) DR 3) and Opinion 'The use of emolument attachment orders, jurisdiction and forum shopping under the spotlight (2015 (Oct) DR 59).

International law

International Criminal Court: The decision in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] 3 All SA 505 (GP) enjoyed a lot of media attention.

At stake were the duties and obligations of South Africa in the context of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Rome Statute). The question was whether a Cabinet Resolution coupled with a Ministerial Notice were capable of suspending South Africa's duty to arrest a head of state against whom the International Criminal Court (ICC) had issued arrest warrants for war crimes, crimes against humanity and genocide.

The court had issued an order declaring the respondents' (the Minister's) failure to take steps to arrest and/or detain the President of the Republic of Sudan, Omar Hassan Ahmad Al-Bashir (Al-Bashir) to be unconstitutional and invalid. The court directed the Minister to take all reasonable steps to prepare to arrest Al-Bashir without a warrant in terms of s 40(1)(k) of the Criminal Procedure Act 51 of 1977. Al-Bashir was to be detained, pending a formal request for his surrender from the ICC.

The court per Mlambo JP, Ledwaba DJP and Fabricius J, held that as a ratifying State of the Rome Statute, South Africa was enjoined to co-operate with the ICC, for example, to effect the arrest and provisional arrest of persons suspected of war crimes, genocide and crimes against humanity. The Minister' assertion that Al-Bashir would be protected by diplomatic immunity was shown to be without merit.

The court further confirmed that despite its order for the arrest and detention of Al-Bashir, he was allowed to leave South Africa. His departure, in full awareness of the order demonstrated non-compliance with the order. For that reason, the court invited the National Director of Public Prosecutions to consider whether criminal proceedings were appropriate.

• See News 'Court criticised over Al-Bashir judgment' (2015 (Aug) DR 6) and LSSA News 'Profession stands behind Chief Justice and judiciary in raising concern on the attacks on judiciary and the rule of law' (2015 (Aug) DR 14).

Trusts

Description of parties: In *Standard Bank of South Africa Ltd v Swanepoel NO* 2015 (5) SA 77 (SCA) Swanepoel (the trustee) was the sole trustee of a trust. He borrowed money on behalf of the trust from Standard Bank (the bank). The crisp question was whether a duly registered trust could be named as a party to a contract, concluded by the sole trustee on its behalf. If not, the trustee claimed that he was not bound by two transactions: A contract of loan (for agricultural production) and a business banking overdraft facility.

The agreement between the bank and the trustee provided that the ‘borrower’ was the Harne Trust, and set out its registration number. It was signed by the trustee ‘on behalf of the [trust]’.

When the trust defaulted, the bank instituted action against Swanepoel as trustee. He excepted and contended that the loan agreement was invalid. He argued that the loan had been concluded between the bank and the trust (as opposed to its trustee). He further argued that trusts were not legal persons and had no contractual capacity. As a result, a valid agreement had not been concluded. The High Court upheld the exception.

On appeal Lewis JA held that the naming of the trust as the party to the agreement was sufficient. Where the trustee signed the agreement on behalf of the trust he clearly did so in the capacity of trustee.

A trust is a ‘legal institution sui generis’. It is a legal entity, though it does not have legal personality.

The appeal was upheld, and the order of the court a quo set aside and replaced with an order dismissing the trustee’s exception.

Other cases

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with administrative law, appeals, broadcasting, civil procedure, constitutional law, construction guarantees, contracts, education, immigration, intellectual property, land rights, media freedom, mines and minerals, ownership and tax.

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