LAW LETTER

Linking Attorney & Client

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Your strategic partner at law

This first edition of Law Letter 2013 deals with a variety of recent decisions of our courts which we are confident will enable our readers to keep abreast of legal developments in an entertaining and informative way. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney. We welcome your comments and suggestions.

FROM THE COURTS

Company Law

▪ *Rescue Remedy*

"New road: new ruts."
– GK Chesterton (1874 - 1936)

WHEN A bank brought an action against a surety he raised the defence that because the principal debtor was subject to business rescue proceedings in terms of the **Companies Act** of 2008, any claim against him as surety for the liabilities of that company would also be suspended.

Acting Judge Owen Rogers in the Cape Town High Court disagreed. He pointed out that the plain meaning of Section 133(2) of the Companies Act is that during business rescue, any claims against the company subject to business rescue where it had stood surety would be suspended. However, that section cannot be construed as providing that during business rescue proceedings a suretyship given by another person in favour of a creditor for the indebtedness of the company may not be enforced by the creditor against that third party without the leave of the court.


Western Cape High Court

Acting Judge Rogers pointed out that the statutory moratorium against legal proceedings for the enforcement of debts in terms of Section 133(1) in favour of a company that is undergoing business rescue proceedings is a defence only in respect of that company. It is a personal privilege or benefit in favour of the company. The defence attaches to the company and not to the claim itself. The obligations of the company as principal debtor are not extinguished nor discharged by business rescue proceedings and their validity is in no way impaired. Indeed, with the consent of the business rescue practitioner or the court, the obligations may be enforced. As a result, such a moratorium does not avail a surety liable for the debts of the company which is now subject to business rescue.

Investec Bank Ltd v. Bruyns 2012 (5) SA 430 (WCC).

▪ *Intensive Care*

"Remember that time is money."
– Benjamin Franklin (1706 - 1790)

ACTING JUDGE JP Coetzee in the South Gauteng High Court in Johannesburg, hearing an application in terms of Section 131 of the **Companies Act** of 2008 for a business rescue order pointed out that Chapter 6 of the Act demonstrates a legislative intention that business rescue proceedings must be conducted reasonably speedily. The reason is obvious. Pending rescue proceedings temporarily protects the company concerned from legal proceedings by its creditors for the recovery of legitimate claims without any input from the creditors, and removes the unfettered management of the company from the directors. Delays will extend the duration of these temporary statutory arrangements, which duration is restricted by way of the procedure prescribed by the Act. If the time periods provided in the Act for the convening of meetings, publication of the business plan and other requirements are added up, it appears that the protection of the company without the co-operation of the creditors from the time of the rescue order should not be more than two to three months even if there are many intervening non-business days.

A court will accordingly not easily grant any postponements in the process. Acting Judge Coetzee quoted with approval an earlier judgment of Judge Ashley Binns-Ward in the Western Cape High Court who stated that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue. The Legislature recognised this, if one looks at the tight timelines given in terms of the Companies Act for the implementation of business rescue procedures. There is also the consideration that the mere institution of business rescue proceedings materially affects the rights of third parties to enforce their rights against the subject company.

As a result the judge refused the application for postponement.

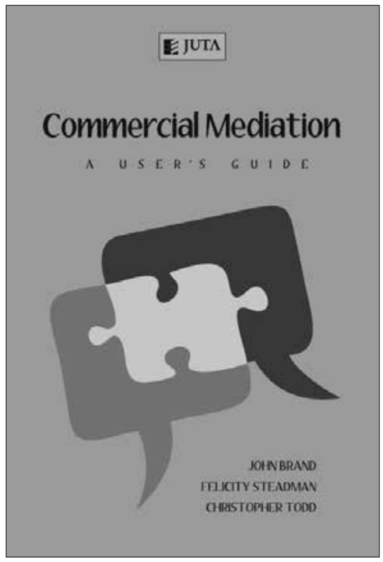
AG Petzetakis International Holdings v. Petzetakis Africa 2012 (5) SA 515 (GSJ).

BOOK REVIEW

COMMERCIAL MEDIATION – A User's Guide

By John Brand, Felicity Steadman & Christopher Todd
(Juta & Co Ltd) www.jutalaw.co.za

Mediation is rapidly emerging in South Africa as a desirable option for resolving commercial disputes. This follows a global trend where mediation is well-established as a speedier, less costly and more effective alternative to traditional litigation.



This practical and well-organised publication explains the entire mediation process. The authors expertly set out the principles of mediation and analyse the different types of consensus-seeking approaches. The place of mediation in the dispute resolution spectrum which includes arbitration, litigation and negotiations, is clarified by the use of visual diagrams. Each chapter is concisely summarised.

Both voluntary and court referred mediation are covered. Specimen mediation agreements are provided and statutes that make provision for mediation are listed.

The co-authors and publishers Juta & Co. have produced a compact but comprehensive guide which has been widely welcomed.

> *"The book should be accessible to business people, government officials, community leaders and lawyers who are involved in mediation. I hope that people in all of these areas will embrace the opportunities that mediation has to offer. When they do, they will find in this book an invaluable guide in that process."*

– Cyril Ramaphosa

Credit Law

■ *Interesting Interpretation*

IT IS often assumed that where goods are sold "on credit" that the provisions of the **National Credit Act** (NCA) of 2005 apply. That is not correct. The NCA only applies if the transaction in question falls within the definitions of a credit facility, a credit transaction or a credit guarantee as provided in Section 8(1) of the NCA.

Acting Judge Bhikha in the South Gauteng High Court in Johannesburg recently considered an application for judgment where the plaintiff had sold and delivered goods to the defendant where payment was due and payable within 30 days of date of delivery. It was further provided that if payment was late, it would attract interest. The issue was whether the agreement of sale constituted a "credit agreement" in terms of the NCA, and in particular, whether it fell within the definition of "incidental credit agreement."

The judge concluded that the interest claimed was not charged "in terms" of the agreement or as part of the cost of the goods, as required by the NCA. Instead, it became payable as damages in consequence of a breach of the agreement, when payment was not made timeously within the credit period granted, namely 30 days.

Similarly, the legal costs which a plaintiff claims where there has been breach of the agreement are not costs of the transaction, but are costs for which the debtor becomes liable as a consequence of breach of contract.

Voltex (Pty) Ltd v. SWP Projects CC & Another 2012 (6) SA 60 (GSJ).

Insolvency

■ *Starting Over*

"They tried to make me go to rehab but I said 'no, no, no.'"
– Amy Winehouse (1983 - 2011)

DANIEL OOSTHUIZEN was sequestrated in the North West High Court in Mafikeng on 17 September 2009. He now applied in terms of Section 124 of the **Insolvency Act** of 1936 for his rehabilitation. Judge Landman pointed out that for the court to exercise its discretion in favour of Oosthuizen, he had to demonstrate that the Master of the High Court had approved a plan of distribution which provided for full payment of all claims proved against his insolvent estate, as well as payment of interest and costs of the sequestration. It also had to be shown that the application for rehabilitation was made after the above steps were complied with, and that not less than three weeks before making the application, notice had been given to the Master and to the trustees of his insolvent estate.

> *"Public policy, with its principles of fairness, justice and reasonableness, precludes the enforcement of contractual terms if their enforcement would be unjust and unfair."*

Although the judge found that Oosthuizen had not complied with all these requirements, he was prepared to postpone the application so as to enable Oosthuizen to supplement his papers, obtain reports from both his trustees and the Master and to provide the necessary notice. In addition, those unproven creditors, whose names and addresses were known, had to be given notice of the application.

Because the court has a judicial discretion where it hears an application for the rehabilitation of an insolvent, it is essential that any applicant for rehabilitation strictly complies in full with the requirements of the Insolvency Act.

Ex Parte Oosthuizen [2012] 4 All SA 408 (NWM).

■ *Going, going, gone*

WHEN A sheriff sells movable property which has been attached at a sale in execution, ownership passes to the purchaser at the sale in execution on delivery by the sheriff. In the case of immovable property, namely land, however, ownership in the attached property does not pass during the sale in execution. It only passes subsequently upon formal registration of transfer of the property in the Deeds Registry by the sheriff to the purchaser.

Judge Moshidi in the South Gauteng High Court in Johannesburg had to consider whether the purchaser of immovable property at a public sale in execution conducted by the sheriff of the court was entitled to take transfer where the registered owner of the property subsequent to the sale in execution, but before formal transfer had been registered, published a notice of intention to surrender his estate in terms of Section 4(1) of the **Insolvency Act** of 1936.

The judge decided that the prohibition in Section 5(1) of the Insolvency Act against a sale in execution of property falling into an insolvent estate in respect of which notice of surrender has been published, does not prevent transfer of immovable property sold in execution prior to the publication of such notice.

At the stage of publication of the notice to surrender his estate, the insolvent no longer had any authority over the immovable property which had already been sold in execution. At the time of their appointment, the trustees of the insolvent therefore had no right to prevent transfer of the property. The trustees effectively stepped into the shoes of the insolvent. As a result Section 20(1)(a) of the **Insolvency Act** does not have the effect of vesting the trustees of an insolvent estate with ownership of immovable properties sold in execution, but not yet transferred at the time of publication of the notice of surrender of the estate concerned. The purchaser of the immovable property who had purchased it at the public auction was entitled to take transfer, notwithstanding the publication of surrender of the execution debtor's estate prior to transfer.

Edkins v. Registrar of Deeds, Johannesburg & Others 2012 (6) SA 278 (GSJ).

Law of Contract

■ *No Exit Clause*

"You can check-out any time you like, but you can never leave."
– *Hotel California*, by the Eagles

RUBANATHAN NAIDOO, a fleet manager and coach driver, checked into the Birchwood Hotel, near the OR Tambo International Airport. He signed a registration card containing a clause that provided that: "the Hotel shall not be responsible for any injury…on the premises…caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel."

The following morning a steel gate to one of the entrances of the hotel fell on top of Mr Naidoo, causing him serious bodily injury. He then sued the hotel for the damages he suffered as a result thereof.

Having found the hotel negligent, the question remaining for Judge Heaton-Nicholls was whether the disclaimer seeking to absolve the hotel from any liability was contractually binding on Mr Naidoo.

The judge pointed out that Mr Naidoo was a guest at the hotel, and did not take his life in his hands when he exited through the hotel gate. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offended against notions of justice and fairness. Public policy, with its principles of fairness, justice and reasonableness, precludes the enforcement of contractual terms if their enforcement would be unjust and unfair. In the circumstances of this particular case, the court could not let blind reliance on the principle of freedom of contract override the need to ensure that contracting parties must have access to the courts. The Constitutional Court has given a clear indication that a term in a contract that seeks to deprive a party of judicial redress is on the face of it contrary to public policy, and is not in accordance with the values enshrined in our Constitution, even if freely and voluntarily entered into by consenting parties.

As a result the hotel was ordered to pay Mr Naidoo's damages and costs.

Naidoo v. Birchwood Hotel 2012 (6) SA 170 (GSJ).

Law of Property

■ *Cross Purposes*

"I started at the top and worked my way down."
– Orson Welles (1915 - 1985)

THE OWNER of a sectional title unit in a scheme known as Pinewood Park in Pinetown, KwaZulu-Natal was sued by the body corporate for arrear levies in the sum of R123 101. Apart from denying that he was obliged to pay the amount claimed, the owner contended that the jurisdiction of the High Court to determine the claim had been ousted by an arbitration clause in the sectional title scheme's management rules. The parties agreed to have this argued before the trial court as a preliminary point. Acting Judge Seegobin agreed with the owner and dismissed the claim of the body corporate with costs.

The body corporate then appealed to a full bench of the Pietermaritzburg High Court where Judges Kruger and Pillay and Acting Judge Nkosi dismissed their appeal.

Undeterred, the body corporate then applied to the Supreme Court of Appeal in Bloemfontein for special leave to appeal against that order.

President of the Supreme Court of Appeal Judge Lex Mpati and four other judges of appeal pointed out that the provisions of the **Sectional Titles Act** of 1986 intends the management rules of a sectional title scheme to be of a contractual nature. The arbitration procedure provided for in the management rules of the scheme in this case had not been prescribed by either the Act or the regulations. In those circumstances, the High Court should not have dismissed the claim of the body corporate. It had the discretion to stay the proceedings pending the finalisation of arbitration proceedings in terms of Section 6 of the **Arbitration Act** of 1965 or it could have continued with the action, hearing it without arbitration. That would depend on the existence or otherwise of a dispute between the parties and any other relevant factor that may have been present. Where the existence of an arbitration clause is contractual or consensual, the court has discretionary powers not to enforce that agreement.

The Appeal Court Judges were satisfied that the appeal raised a substantial point of law and that there were reasonable prospects of success on appeal. As a result, special leave to appeal was granted to the body corporate. The owner was ordered to pay the costs incurred by the body corporate in the High Court, before a single judge, before a full bench of the High Court on appeal, and before the Supreme Court of Appeal.

Body Corporate of the Pinewood Park Scheme No. 202 v. Dellis (Pty) Ltd [2012] 4 All SA 377 (SCA).

Family Law

■ *Suffer Not*

"A child of five would understand this."
– Groucho Marx (1890 - 1977)

A MOTHER GAVE birth to a baby boy soon after her husband was killed in a car crash. She later remarried but then relations between her and the parents of her deceased husband deteriorated to the extent that all contact between them and their grandson ended. The grandparents, desperate to re-establish contact with their grandson, approached the Eastern Cape High Court in Grahamstown for an order granting them access to their grandchild. The mother opposed this application on the basis that the initial contact with the grandparents had resulted in numerous problems which convinced her and her new husband that further contact with the grandparents would not be in her son's best interests.

The family advocate and a family councillor investigated and submitted reports. Section 7 of the **Childrens Act** of 2005 provides that a court must, when determining what is in the best interests of the child, have regard to the need for the child to remain in the care of his or her parents, family or extended family, and to maintain a connection with his or her family, extended family, culture or tradition.

Judge Smith carefully weighed up all the relevant considerations. He pointed out that contact between the child and his or her grandparents must be encouraged, unless there are compelling reasons to prohibit such contact. In this case the mother's attitude was motivated by her personal difficulties with the grandparents, rather than by a consideration of her son's best interests. Contact between the grandparents and their grandson, though desirable, had to be carefully circumscribed so as not to interfere with the mother and her husband's parental responsibility. The judge concluded that a reasonable transition period was required for the repair of the soured relationship between the mother and the grandparents, and allowing the grandparents to visit their grandchild once a week, for three hours at a time, at his parent's home or anywhere else the mother thought appropriate, would be in the child's best interest.

On the question of costs, the judge pointed out that the grandparents were successful in their application and would ordinarily have been entitled to their costs. However, it was inevitable that any attempt on their part to recover costs from the mother would put further strain on their relationship and impact negatively on their attempts to re-establish a close relationship with their grandchild. The judge took the view that such a costs order would not be in the best interests of the child, and in the circumstances it would be appropriate for each party to pay his or her own costs.

LH & Another v. LA 2012 (6) SA 41 (ECG).

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