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Construction Industry Development Board

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ("CIDB")

CASE SUMMARIES AND ANALYSES

OCTOBER - NOVEMBER 2010

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2010

BMW FINANCIAL SERVICES (SA) (PTY) LTD v MUDALY

KwaZulu-Natal High Court, Durban

(16975/09) 2010 (5) SA 618 (decided: 20 August 2010)

FACTS: This case deals with the procedure to be followed by a credit provider before commencing legal proceedings to enforce a credit agreement, as contemplated in sections 129(1) and 130(1) of the National Credit Act 34 of 2005 ("the Act"), as well as an application for debt review in terms of section 86 of the Act.

On 31 August 2007 Mudaly purchased a second-hand BMW M3 SMG ("the motor vehicle") from BMW Financial Services (SA)(Pty)Ltd ("BMW") for a total price of R432 139,38. Mudaly agreed to repay this over five years by way of fifty-nine instalments of R6 272.87 and a final balloon payment of R62 040. During the first year Mudaly made eleven payments, but there were temporary defaults on two occasions. From September 2008 onwards he made no further payments, and as at December 2009 owed R300 621.50 under the agreement.

On 19 May 2009 BMW sent a notice to Mudaly in terms of section 129(1)(a) of the Act by registered post. On 8 June 2009, more than ten business days later, Mudaly made an application to Fidelity Debt Counselling Services (Pty) Ltd ("Fidelity") for debt review in terms of section 86 (1) of the Act. Fidelity formulated a proposal which was circulated to creditors, including BMW, but was rejected by them. On 7 October 2009, attorneys acting on Fidelity's instructions lodged an application with the clerk of the Chatsworth magistrates' court for an order for the re-arrangement of Mudaly's obligations in terms of section 87(1)(b)(ii) of the Act. That application was not served, although on 20 October 2009, Fidelity's attorneys wrote to BMW informing them that the application had been issued. Service was only effected on BMW on 4 December 2009.

In the meantime, on 30 October 2009, BMW gave notice in terms of section 86(10) of the Act to terminate the debt review. A letter cancelling the credit agreement was sent on 2 November 2009 and the proceedings for repossession of the motor vehicle and other relief were commenced on 11 December 2009.

BMW sought an order for the return of the motor vehicle. It claimed that as a result of Mudaly's breach, the agreement was cancelled and since it retained ownership of the vehicle, it wished to recover its property. Mudaly claimed that because he had commenced a process of debt review in terms of the Act, he did not have to restore the motor vehicle until the magistrate had dealt with the application in terms of section 86 (8) (b) of the Act. Alternatively, Mudaly argued that he was over-indebted and that in terms of section 85 of the Act the court should make an order to re-arrange his obligations, the effect of which would be that he might retain the motor vehicle.

ISSUES: Whether the credit agreement between Mudaly and BMW was subject to the process of debt review, and therefore whether BMW's cancellation of the agreement was lawful.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter the court first addressed the question of whether the agreement between Mudaly and BMW was subject to the process of debt review which Mudaly had initiated through Fidelity. The court stated that this depended upon a proper interpretation of section 86 (2) of the Act which provides that "an application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement." BMW had given Mudaly notice in terms of section 129 (1) (a) of the Act and the period of ten business days had elapsed after delivery of the notice without response before Mudaly commenced the debt review process. The court stated that it is important to distinguish the debt review process under section 86 of the Act from that which arises if a consumer in default under a credit agreement accepts the proposal of the credit provider in a section 129 (1) (a) notice to refer the credit agreement to a debt counsellor. The process under section 86 is one directed generally at the consumer's financial affairs and at securing a declaration that the consumer is over-indebted. In terms of section 79 (1) a consumer is over-indebted if it is clear from the information available at the time an assessment is made, that he or she is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party. A section 129 (1) (a) notice affords the consumer the opportunity to refer the particular agreement to a debt counsellor "with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date". By contrast, section 86 may lead to a court-imposed rearrangement of the consumer's obligations in terms of section 87 (1) (b) (ii) of the Act. The invitation extended to the consumer by a credit provider under a section 129 (1) (a) notice is not an invitation to engage in a general process of debt review. It is a limited process

directed at resolving the consumer's difficulties under a particular credit agreement. The court concluded that the acceptance by a consumer of a proposal by a credit provider under section 129 (1) (a) to refer a particular credit agreement to a debt counsellor may, but does not necessarily lead to a general debt restructuring under sections 86 and 87 of the Act.

Furthermore, section 86 (2) refers to "the steps contemplated in section 129 to enforce that agreement". In the court's view, this is a reference to section 129 (1) (b) of the Act, which prescribes the steps that must be taken prior to the commencement of legal proceedings. These steps are the giving of notice under section 129 (1) (a), or the termination of a pre-existing debt review under section 86 (10) (section 129 (b) (i)), and "meeting any further requirements set out in section 130" (Section 129 (b) (ii)). In terms of section 129 (1) (b), there are therefore various steps which the credit provider will have to take before action can be commenced and the debt enforced. These steps do not include the commencement of proceedings but are prior to it. Once these steps have been taken, the credit provider is entitled to commence legal proceedings. It is at that stage that section 86 (2) debars the consumer from applying for debt review.

The court further stated that a consumer who runs into financial difficulties may apply for debt review at various stages. A consumer may apply before any of its creditors start to complain of defaults and take steps to enforce their agreements. Alternatively, a consumer may be alerted to those problems by a notice under section 129 (1) (a). If a consumer's financial difficulties pertain to a specific credit agreement, then the sensible approach would be to respond positively to the credit provider's proposal that the particular credit agreement be referred to a debt counsellor or other agency, with a view to resolving disputes and developing and agreeing on a plan to bring the payments under the agreement up to date. If such difficulties involve more than one credit agreement, a consumer has the time provided for in section 130 (1) (a) to bring an application for debt review in order to obtain a declaration that he or she is over-indebted. If a consumer is already engaged in the consensual process with one credit provider, there is no reason why they should not agree that the process cease and an application for general debt review be brought. A consumer can also commence a debt review from which such an agreement is excluded.

The court concluded that the debt review by Fidelity did not apply to the credit agreement between Mudaly and BMW, and BMW's cancellation of the agreement was therefore lawful.

KWAZULU-NATAL HIGH COURT, DURBAN: The court ruled that BMW was entitled to the relief that it sought and accordingly made the following orders:

1. An order confirming the cancellation of the instalment sale agreement concluded between BMW and Mudaly.

2. An order for Mudaly to restore and re-deliver the motor vehicle to BMW.

3. An order for Mudaly to pay the costs of the action up to and including the hearings on 10 and 12 August 2010 on the attorney and client scale.

4. All other claims for relief by BMW were adjourned *sine die*.

Implication for CIDB prescripts: The *BMW* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

    1.1. The Preamble to the Act provides that "the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training". The drafters of the Act therefore acknowledged the challenges associated with accessing finance and credit, particularly for the emerging sector of the construction industry. In the face of such challenges it is therefore important that once finance or credit has been granted by a credit provider, a contractor is empowered to make prudent decisions concerning such finance or credit by being provided with appropriate and helpful information, particularly with regard to the consequences of defaulting on a credit agreement, and the correct debt enforcement procedure to be followed by a credit provider in the event that default does occur.

    1.2. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. If, for example, a client does not pay a contractor for work done in terms of a contract on time, this may result in a contractor being unable to meet some or all of his or her financial commitments, including the repayments on a credit agreement. This in turn may result in delays for

the completion of the same or another project that the contractor is involved in, and so on. If such circumstances exist on a large scale throughout the construction industry, the growth and development, as well as the stability, of the industry may be negatively impacted. Thus, as reasoned above, providing information to contractors concerning the consequences of defaulting on a credit agreement and the correct procedure for credit providers to follow to enforce a debt falls within the mandate of the CIDB.

1.3. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.4. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors". If a contractor is unable to service his or her debts, he or she runs the risk of a debt(s) being enforced by a credit provider(s), which may result in the attachment and removal of the goods or property concerned. This in turn may hinder his or her ability to perform in terms of a construction contract, and as a result, his or her performance record in the national register may be negatively affected.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ('the Code of Conduct")

2.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, the conduct of a client with respect to timely payment of a contractor for work done may have an impact on the ability of a contractor to complete that project or other projects on time, which in turn may also negatively impact the construction industry at large.

2.2. Principle 2.2 of the Code of Conduct provides that “in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private construction-related procurement should in their dealings with each other discharge duties and obligations timeously and with integrity”. Thus it is clear that the Code of Conduct regards performance in terms of a construction contract as essential to the health of the construction industry at large. It follows therefore that contractors who are unable to perform in terms of a contract for financial reasons, not only face the possibility of legal proceedings for debt enforcement but also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2010

CALIBRE CLINICAL CONSULTANTS (PTY) LTD AND ANOTHER v NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY AND ANOTHER

Supreme Court of Appeal

(410/09) 2010 (5) SA 457 (decided: 19 July 2010)

FACTS: This case deals with the decisions of a bargaining council relating to the procurement of services and whether such decisions are subject to judicial review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

In 2007, the first respondent, the National Bargaining Council for the Road Freight Industry ("the Council"), a bargaining council established under section 27 of the Labour Relations Act 66 of 1995 ("the LRA") decided to appoint a service provider to manage and administer its "Wellness Fund", and in July 2007 invited interested parties to submit proposals for its consideration. Proposals were submitted by, among others, a partnership comprising Thebe Ya Bophela Healthcare Administrators (Pty) Ltd and Calibre Clinical Consultants (Pty) Ltd, the first appellant ("the partnership") and a consortium, the second appellant, comprising Right to Care Ltd and the remaining appellants ("the consortium"). In September 2007, the various proposers were invited to present their proposals to an interview panel. On 5 October 2007, the Council wrote to the consortium, congratulating it on its presentation, and advising that the panel had decided in principle that the consortium should be appointed, but that a due diligence review was still required. Once that had been completed, the panel would "put together a recommendation to the Council for final adjudication".

The Council instructed a firm of auditors, SizweNtsaluba VSP ("SizweNtsaluba"), to perform a "limited financial due diligence review" of the various bidders. SizweNtsaluba performed the review and submitted a report, dated 6 December 2007. In its report, SizweNtsaluba raised certain concerns with respect to the partnership, as well as the consortium. After considering the report, the Council requested SizweNtsaluba to "engage with the bidders and report back" on the steps taken by the various bidders to address the concerns that had been expressed. SizweNtsaluba raised its concerns with the partnership and with the consortium, and reported their responses. After considering the matter at meetings held on 23 and 26 May 2008, the Council's Wellness Committee decided that neither the partnership nor the consortium had

adequately addressed the concerns raised by SizweNtsaluba, and decided to recommend to the Council that neither should be appointed. Instead, the auditing firm KPMG should be asked to identify alternative service providers. The Council adopted the Committee's recommendations on 28 May 2008. KPMG identified HIV Managed Care Solutions (Pty) Ltd trading under the name Careworks, the second respondent, and another organisation as potential service providers. A due diligence review revealed no difficulties with either and KPMG recommended that Careworks be appointed. The Committee, and ultimately the Council, adopted KPMG's recommendation, and a formal contract was concluded on 1 December 2008.

Aggrieved by the decisions of the Council, the appellants applied to the South Gauteng High Court ("the court of first instance") to review and set aside the Council's decision not to appoint any of the initial bidders, its decision to exclude the appellants when identifying alternative providers, and its decision to appoint Careworks. Their application was, however, dismissed by the court of first instance and they subsequently appealed against that court's decision in the Supreme Court of Appeal.

ISSUES: Whether the decisions by the Council constituted administrative action as defined in PAJA. Whether the Council's decision to reject the appellants' proposals was unlawful.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court stated that the decisions of the Council were subject to review only if such decisions constituted "administrative action" as contemplated in section 1 of PAJA. Section 1 provides that a decision (or the failure to make a decision) constitutes "administrative action" only if, among other things, it was made by "(a) an organ of State when (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision ..." The court therefore had to decide whether the Council, in taking the decisions at issue, was "exercising a public power or performing a public function". The court stated that in cases concerning the scope of public law judicial review in this and other countries, courts have consistently looked at the presence or absence of features of the conduct concerned that is "governmental" in nature. What is relevant is the extent to which the functions concerned are "woven into a system of governmental control", or "integrated into a system of statutory regulation", or that the government "regulates, supervises and inspects the performance of the function", or it is publicly funded, and so on. The extent to

which the power or function may be described as "governmental" in nature involves considering whether the exercise of the function or the performance of the function may involve public accountability.

The court then outlined the nature of a bargaining council. Section 27 (1) of the LRA allows for one or more registered trade unions and one or more registered employers' organisations to establish a bargaining council for a particular industry and area. A bargaining council exists primarily as a forum for collective bargaining between the parties. In addition, a bargaining council might also undertake other functions directed at maintaining industrial harmony and promoting the welfare of employees in the industry. The court stated that a bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement to perform functions in the interests and for the benefit of its members. When a bargaining council implements a project such as the Wellness Fund, it is not performing a function that is "woven into a system of governmental control" or "integrated into a system of statutory regulation". Government does not "regulate, supervise and inspect the performance of the function", and, most important, it involves no public money. The court added that while the Council's collective agreement, which records the terms upon which the Wellness Fund was established and is to be administered, has been extended to the industry in general by declaration in the Government Gazette, it is not a "public power" that it exercises when it establishes and administers such a fund. The collective agreement is not the source of the Council's powers. The Council's powers stem from its constitution or the equivalent powers conferred upon it by section 28 of the LRA. The collective agreement simply sets out the terms upon which the parties have agreed that the Council will exercise those powers.

In the court's view, the argument that the procurement of goods and services by the Council, for whatever purpose, is not a public function, found support in the Constitution. The court added that there was no reason why the Council should be publicly accountable for the contracts it concludes, since it is not expending public money, but money that derives from its members and, in some cases, others in the industry. It is to them, not the public, that it is accountable. In fact, the Council would have been entitled to seek out a service provider without first inviting tenders and proposals at all. In the court's view, when managing its Wellness Fund, and procuring services for that purpose, the Council was performing a domestic function in the exercise of its domestic powers, and therefore its decisions which were at issue were not in fact subject to review.

The court then addressed the two grounds upon which the appellants argued that the decision to reject their proposals was unlawful. In the first place, it was argued that the Council's decision was procedurally unfair since, in terms of section 3 (2) (b) of PAJA, it was obliged to have allowed the appellants an opportunity to be heard before the decision was made. The appellants argued that when they responded to the invitation to submit proposals, a contract came into being with the Council. The court stated that whether this is so in a particular case will depend upon the facts, as with all cases of contract. In this case, there was no factual basis upon which to conclude that a contract was concluded by the parties when the appellants submitted their proposals. Furthermore, while a person is generally entitled to be heard before a decision is taken that adversely affects his or her rights, as provided for in section 3 (2) (b) of PAJA, that does not hold true where the decision is adverse to an "interest", which is neither a right nor a legitimate expectation. The appellants were not induced by the Council to believe that they would be heard before it took its final decision, and it was not suggested that it is the regular practice of public bodies to afford a hearing before it rejects tenders or proposals that they have invited. In the court's view there was even less reason to find that the appellants had a legitimate expectation that they would be afforded a hearing before their proposals were rejected. Since they were made aware of what the Council considered to be their shortcomings and were invited to make representations, they should have been aware that their proposals could be rejected if the Council's concerns were not addressed. In the court's view the Council did not act unfairly by not inviting yet further representations before making its decision.

Secondly, it was argued that the decision was irrational and unreasonable. PAJA provides that administrative action is reviewable if it is "not rationally connected to ... the purpose for which it was taken, [or] the information before the administrator, or the reasons given for it by the administrator" or if the functionary concerned exercised his or her power or performed his or her function in a manner that is "so unreasonable that no reasonable person could have so exercised the power or performed the function". The court stated that the appointment of either of the appellants would have exposed the Council to an element of risk in one form or another and neither of the appellants was able to eliminate that risk. In the court's view, the decision was neither irrational according to PAJA, nor was it one to which a reasonable decision-maker could not come. The court added that since it is the Council and not a court which must bear the consequences for the contracts that it concludes, a measure of deference to the view of the decision-maker was appropriate.

In the court's view, the Council's decision not to appoint the appellants did not offend the provisions of PAJA, and therefore should not be set aside.

COURT OF FIRST INSTANCE (SOUTH GAUTENG HIGH COURT, JOHANNESBURG): The court dismissed the application.

SUPREME COURT OF APPEAL: The Supreme Court of Appeal dismissed the appeal and ordered the appellants, jointly and severally, to pay the costs of the appeal.

Implication for CIDB prescripts: The *Calibre* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

    1.1. Section 4 (b) of the Act provides that "the objects of the CIDB are to provide strategic leadership to construction industry stakeholders to stimulate sustainable growth, reform and improvement of the construction sector". Since a bargaining council comprises one or more registered trade unions and one or more registered employers' organisations, both of which have an interest in a particular industry, it may be argued that a bargaining council is a "stakeholder" as referred to in section 4 (b), and therefore that the CIDB has a mandate to provide strategic leadership to bargaining councils established for the construction industry, as well.

    1.2. Section 4 (c) of the Act provides that "the objects of the CIDB are to determine and establish best practice that promotes (i) improved industry stability; ... (v) national social and economic objectives including ... (cc) improved labour relations (See also section 5 (1) (a) (iii)); and (vi) human resource development (See also section 5 (1) (a) (iv)) in the construction industry". As discussed above, bargaining councils are established in terms of the LRA, and while they serve primarily as a forum for collective bargaining between parties, they also undertake other functions which maintain industrial harmony and promote the welfare of employees. It is therefore clear that there are areas of concern common to both the CIDB and construction industry bargaining councils, and thus also opportunities to co-operate for the benefit of the construction industry at large.

    1.3. Section 5 (1) (d) of the Act provides that "to provide strategic leadership, the CIDB must establish a construction industry stakeholders' forum as contemplated in section 13". In terms of section 13 (1) the purpose of the stakeholders' forum is to

inform the CIDB "on matters that affect the development of the construction industry". Furthermore, section 13 (3) provides that "in constituting the stakeholders' forum the CIDB must, once every two years, invite nominations from organised labour, organised business and construction industry related bodies, clients, societies and associations in a manner the CIDB considers fit." We have already argued in paragraph 1.1 above that a bargaining council is a "stakeholder" as described in the Act. We argue further that a bargaining council established for the construction industry is a "construction industry related body" as referred to in section 13 (3), and consequently that such a bargaining council may be invited to nominate an individual to the construction industry stakeholders' forum.

1.4. Section 5 (1) (c) stipulates that "to provide strategic leadership, the CIDB must facilitate communication between construction industry stakeholders, all spheres of Government and statutory bodies". Thus, a relationship of co-operation, based on communication and information sharing, between the CIDB and construction industry bargaining councils has been provided for in terms of the Act, whether such bargaining councils are considered to be "stakeholders" or "statutory bodies" as referred to in section 5 (1) (c).

1.5. Section 5 (1) (e) of the Act states that "to provide strategic leadership, the CIDB must provide information to stakeholders on best practice, industry performance and improvement and generally on matters affecting the construction industry". When read together with section 13 (1) of the Act, it is clear that there is to be an exchange of information between the CIDB and stakeholders, which we have argued above includes construction industry bargaining councils, for the benefit of participants and the development of the construction industry in all respects.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ("the Code of Conduct")

1.1. The Code of Conduct provides that it "applies to the various parties involved in public and private procurement" and further defines the parties that may be directly or indirectly involved in the procurement process, namely agents, contractors, employers, employees, representatives, subcontractors and tenderers (See paragraph 1 "Parties Involved In Construction Procurement"). The Code of Conduct furthermore provides in its Preamble that:

"... the development of the construction industry will be promoted by participant and stakeholder organisations that

...

2.1.2 Ensure that they perform efficiently, responsibly, accountably, transparently, and with probity;

2.1.3 Recognise the legitimacy of interest of defined stakeholders;

...

2.1.15 Engage with and share best practice".

Thus, the Code of Conduct differentiates between "participant" and "stakeholder" organisations. Strictly speaking therefore, since a bargaining council is not a participant in the procurement process, it is also not subject to the Code of Conduct as set out in paragraph 1 "Parties Involved In Construction Procurement" and paragraph 2 "Principles Governing The Conduct Of Parties". In terms of the Preamble to the Code of Conduct, however, there is an expectation that such bargaining councils, together with other stakeholder organisations, perform efficiently, responsibly, accountably, and transparently; that they have regard to the interests of stakeholders; and that they operate according to best practice. While it is not certain whether the CIDB has jurisdiction to enforce such conduct among stakeholder organisations, it may be argued that as a "watchdog" for the construction industry and "guardian" of the Code of Conduct, it has considerable leverage with regard to the actions of such organisations, which may be used if necessary for the reform and development of the construction industry.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2010

NEDBANK LIMITED v MOKHONOANA

North Gauteng High Court, Pretoria

(22942/2010) 2010 (5) SA 551 (decided: 12 August 2010)

FACTS: This case deals with the enforcement of a credit agreement by legal action, as provided for in sections 129 (1) (b) and 130 (1) (a) of the National Credit Act 34 of 2005 ("the Act").

Nedbank Limited ("Nedbank") sued Namashishi Dorian Mokhonoana ("Mokhonoana") for payment of R541 924.24, interest and costs, and also requested an order declaring specific immovable property executable. The immovable property was described as Portion 130 of Erf 3257, Dawn Park, Extension 37 Township, Registration Division IR Province of Gauteng, in extent 292 m^2, held under deed of transfer T5982/2008 ("the immovable property").

The sequential facts of the case are as follows:

1. On 13 April 2010 Nedbank sent a notice in terms of section 129 (1) of the Act to Mokhonoana by registered post;

2. On 21 April 2010 the summons was issued against Mokhonoana;

3. On 28 April 2010 the summons was served on Mokhonoana;

4. On 11 May 2010 Mokhonoana entered appearance to defend the matter;

5. On 31 May 2010 Nedbank applied for summary judgment; and

6. On 4 June 2010 Mokhonoana applied for debt review.

ISSUE: Whether Nedbank had complied with the requirements for an order to enforce a credit agreement, as set out in section 130 (1)(a) of the Act.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court considered the process of enforcing a credit agreement by legal action, as contemplated in sections 129 (1) and 130 (1) of the Act. Such a process begins with the delivery of a notice to the consumer

in terms of section 129 (1) (a). The notice draws the consumer's attention to the fact that he or she is in default, and proposes that the consumer refer the credit agreement to a debt counsellor, alternative dispute-resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date. In terms of section 130 (1) (a), a credit provider "may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under the credit agreement for at least 20 business days and at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in ... section 129 (1)..."

Nedbank argued that, since ten days had elapsed between posting and service of the summons on Mokhonoana, it was entitled to an order enforcing the credit agreement; while Mokhonoana argued that legal proceedings are commenced for purposes of section 129 (1) (b) by the issue of the summons and not the service thereof. The court was therefore called upon to decide when legal proceedings for purposes of section 129 (1) (b) of the Act are commenced, that is whether by the issue of a summons or the service of a summons. In so doing, the court had to decide what meaning should be given to the words "commence any legal proceedings to enforce the agreement" in section 129 (1) (b) and the words "approach the court for an order enforcing ..." in section 130 (2) of the Act. The court assumed that the proceedings envisaged in both provisions are the same and therefore the same meaning should be given to both.

The court stated that the commencement of legal proceedings has a distinct and far-reaching effect on the rights of a consumer. In terms of section 86 (2) of the Act, a consumer is prohibited from applying to a debt counsellor to have him or herself declared over indebted after the commencement of legal proceedings. The court stated further that legal uncertainty would result if the consumer's ability to apply for debt review is determined by the date of issue of the summons, of which he or she may not be aware, rather than the date of service thereof. The court therefore found that legal proceedings for the purposes of section 129 (1) (b) of the Act are commenced not by the issue of a summons, but by the service thereof.

The court concluded that in terms of section 130 (1) (a) of the Act, once it has been established that ten business days have elapsed between delivery of the section 129 (1) letter and service of the summons, the process of enforcement of a credit agreement cannot be faulted, and a creditor is entitled to its judgment.

NORTH GAUTENG HIGH COURT, PRETORIA: The court granted summary judgment against Mokhonoana, in favour of Nebank, for:

1. Payment of R541 924.24;

2. Interest on the aforementioned amount at the rate of 8.90% per annum from 2 April 2010 to date of payment; and

3. An order declaring the property executable.

Implication for CIDB prescripts: The *Nedbank* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

    1.1. The Preamble to the Act provides that "the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training". The drafters of the Act therefore acknowledged the challenges associated with accessing finance and credit, particularly for the emerging sector of the construction industry. In the face of such challenges it is therefore important that once finance or credit has been granted by a credit provider, a contractor is empowered to make prudent decisions concerning such finance or credit by being provided with appropriate and helpful information, particularly with regard to the consequences of defaulting on a credit agreement, and the correct debt enforcement procedure to be followed by a credit provider in the event that default does occur.

    1.2. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. If, for example, a client does not pay a contractor for work done in terms of a contract on time, this may result in a contractor being unable to meet some or all of his or her financial commitments, including the repayments on a credit agreement. This in turn may result in delays for the completion of the same or another project that the contractor is involved in, and so on. If such circumstances exist on a large scale throughout the construction industry, the growth and development, as well as the stability, of the industry may be negatively impacted.

Thus, as reasoned above, providing information to contractors concerning the consequences of defaulting on a credit agreement and the correct procedure for credit providers to follow to enforce a debt falls within the mandate of the CIDB.

1.3. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.4. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors". If a contractor is unable to service his or her debts, he or she runs the risk of a debt(s) being enforced by a credit provider(s), which may result in the attachment and removal of the goods or property concerned. This in turn may hinder his or her ability to perform in terms of a construction contract, and as a result, his or her performance record in the national register may be negatively affected.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ('the Code of Conduct")

2.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, the conduct of a client with respect to timely payment of a contractor for work done may have an impact on the ability of a contractor to complete that project or other projects on time, which in turn may also negatively impact the construction industry at large.

2.2. Principle 2.2 of the Code of Conduct provides that "in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private construction-related procurement should in their dealings with each other discharge duties and obligations timeously and with integrity". Thus it is clear that the Code of Conduct regards performance in terms of a construction contract as essential to the

health of the construction industry at large. It follows therefore that contractors who are unable to perform in terms of a contract for financial reasons, not only face the possibility of legal proceedings for debt enforcement but also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2010

SOKHELA AND OTHERS v MEC FOR AGRICULTURE AND ENVIRONMENTAL AFFAIRS (KWAZULU-NATAL) AND OTHERS

KwaZulu-Natal High Court, Pietermaritzburg

(12266/08) 2010 (5) SA 574 (decided: 19 June 2009)

FACTS: This case deals with the question of whether the decision to suspend members of a board established in terms of a statute constitutes "administrative action" as defined in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), and therefore also whether the actions of the MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) ("the MEC") in suspending the members of the KwaZulu-Natal Conservation Board ("the Board") were procedurally fair.

The day-to-day responsibility for conservation matters in the Province of KwaZulu-Natal lies with the KwaZulu-Natal Nature Conservation Service established in terms of the KwaZulu-Natal Nature Conservation Management Act 9 of 1997 ("the Act"). The Conservation Service is now called Ezemvelo KwaZulu-Natal Wildlife ("Ezemvelo"). Ezemvelo is accountable to the Board, established in terms of section 4 of the Act, for the execution of its functions, powers and duties. The members of the Board (or "the applicants") were all appointed by the MEC (or "the first respondent") as members of the Board, with Dr Sokhela (or "the first applicant") being appointed as its Chair. The relevant primary functions of the Board are to direct the management of nature conservation in KwaZulu-Natal and to ensure the proper, efficient and effective management of Ezemvelo.

The Auditor-General conducted an audit of the Board for 2006-2007, resulting in a qualified report, which in turn led the MEC to appoint Deloitte and Touche to provide a report on the situation and thereafter to appoint a firm of auditors to conduct a forensic investigation into the affairs of Ezemvelo. This investigation resulted in a report in May 2008, which made a number of recommendations. Of these recommendations, the only ones that had any direct bearing on the members of the Board were those under the general heading of "Supply Chain Management". It was said that Dr Sokhela had failed to declare his interests in other organisations. A similar complaint was made in regard to the fifth applicant. In regard to the second, third and fourth applicants, it was alleged, in addition to a failure to declare other

interests, that they or entities in which they had an interest had done work for the Board or Ezemvelo without following proper procurement procedures.

The MEC thereafter wrote to the Board on 4 July 2008, enclosing a copy of the executive summary of the Report. The members of the Board were also informed of the MEC's intention to request the entire board to tender their resignations. On 6 July 2008, the MEC met with the Board's Chair, Dr Sokhela, and presented the report to him. Two further letters were sent by the MEC to the Board on 18 July 2008 and 25 July 2008, respectively. On 28 July 2008, Dr Sokhela responded to the MEC in writing, explaining the scope of the duty of disclosure on the Board. His letter was accompanied by detailed letters from each member of the Board, dealing with their interests in other entities and, where applicable, their commercial dealings with the Board and Ezemvelo. At no stage did the MEC or his staff respond to them in any way, whether by seeking further information or explanation, or by disputing any of their contents, including the legal arguments made by the Board members as to the scope of the duty of disclosure resting on them. On 11 August 2008 Dr Sokhela sent another letter to the MEC referring to the Board's response on 28 July 2008 and requesting permission to release the report to the members of the audit committee and members of the executive of Ezemvelo. Dr Sokhela also required the MEC's input on certain matters and invited him to attend the Board meeting on 29 August 2008, and a meeting of the audit committee on 8 September 2008. In a further letter from Dr Sokhela to the MEC on 25 August 2008, the Board responded to certain issues raised by the MEC in a letter dated 19 August 2008, by requesting the MEC to attend an urgent meeting with the Board on 25 August 2008. The members of the Board were, however, urgently summoned to a meeting of the Joint Finance and Economic Development Portfolio Committee of the Provincial Legislature ("the Joint Committee"), which took place on 9 September 2008. The Board members were present during some of the discussions regarding Ezemvelo but when the discussion turned to that portion of the forensic report dealing with their position, they were requested to leave the room. After some time had passed, they were informed that it was unnecessary for them to wait any longer and that they could go. That afternoon the MEC sent a letter to Dr Sokhela in which the members of the Board were informed of the recommendations made by the Joint Committee, which included that the members of the Board be suspended pending further investigations. The MEC made it clear, however, that he had not reached a decision on the question of suspending the members of the Board. Consequently, Dr Sokhela convened an urgent meeting with the members of the Board on 10 September 2008. At the meeting a letter was drafted to the MEC, which *inter alia* requested an urgent meeting with him. A meeting was consequently held on 11 September 2008, at which

the members of the Board specifically asked the MEC if he had decided to suspend them, to which he replied he had not, but that he was applying his mind to the recommendation made by the Joint Committee. During the course of the meeting the members of the Board handed the letter they had drafted the previous evening to the MEC, but the MEC did not read the letter, or take it into consideration, at the meeting.

The MEC suspended all the members of the Board from their duties on 18 September 2008. Subsequently, proceedings to set aside the suspension of the Board members were instituted five days later on 23 September 2008. The Board members argued that the MEC did not exercise his power to suspend them in terms of section 12 of the Act lawfully, in two respects: Firstly, section 12 imposes certain restraints on the MEC's powers of suspension, by defining the circumstances in which a suspension can occur, and the purposes of such suspension. They argued that those circumstances were not present and the purpose of the suspension was not a permissible purpose. Secondly they argued that before they could be lawfully suspended the MEC was obliged to inform them of the charges against them and give them an opportunity to make representations to him as to why they should not be suspended, and he failed to do so. They therefore claimed that their suspension was invalid.

ISSUES: Whether the MEC exercised his powers of suspension in terms of section 12 of the Act lawfully, and whether the members of the Board were afforded an opportunity to make representations to the MEC in this regard.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first addressed the question of whether the MEC had lawfully exercised his powers to suspend a Board member in terms of section 12 of the Act. The court stated that in terms of section 12 (which should be read together with section 11 of the Act), the power granted to the MEC is a power to suspend a member while the MEC is investigating and considering allegations against that member. Suspension is permissible whilst the MEC is investigating allegations made against a Board member and also when he is considering those allegations in the light of any investigations that he has undertaken or caused to be undertaken. In the court's view, suspension is permissible not only in cases where there is a need for investigation and consideration, but also in a case where simply just time to consider an issue is appropriate. The court added that an investigation may be under way, but it could be conducted irrespective of whether the Board member remained in office or had been suspended. There may, however, be circumstances in which the MEC regarded suspension of the member concerned as being in the interests of the operations of the Board and Ezemvelo, and in the public interest.

If allegations of financial impropriety against a Board member are the subject of an investigation it is important for the MEC to consider whether that member should be suspended from his or her duties while the investigation is under way. A suspension in those circumstances is commonplace, both in the public arena and in private and commercial organisations, both in South Africa and overseas.

The court thereafter addressed the question of whether the members of the Board had been properly informed of the charges against them and whether they had been given an opportunity to make representations to the MEC as to why he should not suspend them. The MEC's response was that the Board members' right to make representations was fully satisfied by way of the meeting held on 11 September 2008, and a letter handed to him at that meeting. In the court's view, however, while there was some discussion at the meeting on 11 September 2008 of some issues relevant to the decision to suspend the Board members, it was not a hearing on that issue or a reasonable opportunity for the Board members to make representations as contemplated in section 3 (2) (b) (ii) of PAJA. In terms of section 3(2)(a), what will constitute a fair administrative procedure depends upon the circumstances of each case. In general, in order to give effect to the right to procedurally fair administrative action, the person affected must be given adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; and a clear statement of the administrative action. The right to make representations will involve a right to present and dispute information, so as to ensure that the person making the decision is properly and correctly informed before doing so. The court added that where a person has a right to be heard before a decision is taken it is important that, whatever the form of the hearing, the subject matter of the hearing or opportunity to make representations is made clear to the affected parties, in order that the right to make representations may be effective. If the occasion identified as the opportunity to make representations is a meeting, but the participants are unaware that it is intended to serve the purpose of enabling representations to be made, and the ultimate decision-maker does not disclose the concerns that might lead him or her to take an adverse decision, then no opportunity to make representations has been given. In the court's view, the meeting of 11 September 2008 did not constitute a sufficient opportunity for the Board members to make representations to the MEC concerning their possible suspension and the reasons therefore, so as to satisfy any requirement that they be given a hearing before their suspension was effected. There was no notice that this was the purpose of the meeting, and such notice is necessary in order for the persons affected to appreciate the significance of the meeting. The fact that some things were said at that

meeting that had a bearing on the question of suspension, did not convert it into a proper opportunity to make representations on that issue.

The court then addressed the question of whether the members of the Board were entitled to have a hearing and an opportunity to make representations to the MEC prior to their suspension. They argued that they were entitled to make such representations on the basis that the suspension constituted administrative action as defined in section 1 of PAJA, and therefore involved the constitutionally guaranteed right to procedural fairness, which includes a reasonable opportunity to make representations to the decision-maker prior to the decision being made and implemented. The respondents argued that neither the appointment of members to a statutory board, nor the suspension or termination of those appointments, constitutes administrative action in terms of PAJA. The court stated that the MEC's action must be considered in light of the requirements of the definition of "administrative action" in PAJA. There are seven requirements, namely that there must be (i) a decision, (ii) by an organ of State, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone's rights, (vi) which has a direct, external legal effect, and (vii) that does not fall under any of the exclusions listed in section 1 of PAJA. The decision must, in terms of the definition of "decision" in PAJA, be one of an administrative nature. In deciding whether a decision is one of an administrative nature the appropriate starting point is to determine whether it would constitute administrative action within the meaning of section 33 of the Constitution. The boundaries between administrative action and other forms of conduct by organs of State will often be difficult to draw, and this must be done carefully on a case-by-case basis, taking into consideration the provisions of the Constitution and the need for an efficient, equitable and ethical public administration.

It was not disputed that in suspending the members of the Board, the MEC was acting in terms of legislation and it was not suggested that the suspension falls within any of the exceptions listed in the definition of administrative action. The court was therefore left with four matters to decide, namely (a) whether the decision to suspend constituted administrative action; (b) whether it involved the exercise of a public power or the performance of a public function; (c) whether it adversely affected the rights of the Board members; and (d) whether it had a direct, external legal effect. With respect to (a): In the court's view, the establishment of statutory bodies and the function of ensuring that they can perform their statutory obligations does not fall within the realm of administrative action as contemplated by PAJA. The same does not necessarily hold true for suspension and dismissal. It has been held under our common law, that even prior to the Constitution, proceedings of a disciplinary nature were required to be procedurally fair, whether or not they amounted to administrative action, and whether or not

an organ of State was involved. In the court's view, therefore, the exercise of the power to terminate the appointment of a board member under section 11 of the Act would constitute administrative action. It is no different in regard to the suspension of a board member under section 12 of the Act. With respect to (b): In the court's view, the MEC was clearly exercising a public power in terms of an empowering provision when he suspended the members of the Board. The purpose for which such a suspension is permissible under section 12 of the Act is to enable the MEC to investigate or consider conduct that may lead to the termination of the Board member's appointment in terms of section 11 of the Act. There is nothing private or personal about the exercise of these powers. Both powers are given to the MEC in the interests of the proper conduct of the affairs of the Board and Ezemvelo. Their exercise is plainly the exercise of a public power, and in exercising those powers the MEC is an organ of State as defined in section 239 of the Constitution. With respect to (c): In terms of the Constitution, the right to human dignity is inherent in each person, and each person has the right to have their dignity respected and protected. The suspension of the members of the Board adversely affected their standing, reputation and dignity as the public perception would inevitably be that the members of the Board had been or perhaps had been guilty of some or other form of misconduct that rendered them no longer fit to serve in that capacity. There was also an adverse effect in the loss of benefits which accrued to a Board member, which consisted not only of the *honoraria* for attending meetings, but also the enjoyment of other benefits, such as the use of Ezemvelo's facilities. In the court's view, the suspension directly affected the Board members. With respect to (d): The suspension directly affects the Board members. It is external to the MEC, who is the decision-maker, and its legal effect is to impact upon the rights of the Board members, as well as preventing them from performing their lawful functions as Board members in the future. In the court's view, the effect of the decision on the Board members is therefore direct, external and legal in nature.

KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG: In the court's view, the suspension of the Board members by the MEC did constitute administrative action in terms of PAJA, and therefore incurred the obligations of procedural fairness laid down in PAJA. Since the MEC did not comply with those obligations before suspending them, their suspension was invalid and they were entitled to the relief they claimed. The court made the following order:

1. The decision of the MEC to suspend the members of the Board is reviewed and set aside.

2. The MEC is to pay the applicants' costs of the application.

Implication for CIDB prescripts: The *Sokhela* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

1.1. Section 2 of the Act provides for the establishment of the CIDB as a juristic person.

1.2. Furthermore, section 6 (1) of the Act provides that CIDB board members are "appointed by the Minister". Thus, the CIDB and the board in the *Sokhela* case are both creatures of statute, and their respective board members are appointed by the minister responsible for the particular portfolio. We may therefore conclude that the findings of the court in *Sokhela* are applicable to the CIDB as well.

1.3. Section 7 (4) provides that

"7. (4)A member must immediately vacate office if he or she -

(a) is convicted, whether in the Republic or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury or any offence involving dishonesty or of any offence in terms of the Corruption Act 94 of 1992, the Companies Act 61 of 1973, or of contravening this Act;

(b) becomes a political office bearer;

(c) becomes an insolvent as contemplated in section 6 (8) (c);

(d) has been removed from an office of trust on account of misconduct;

(e) is relieved of his or her duties under subsection (5); or

(f) without authorisation discloses or improperly acts on information gained as a result of his or her membership of the CIDB."

1.4. Section 7 (5) of the Act provides that -

"7. (5)The Minister must, in writing, immediately relieve any member of his or her duties if that member has -

(a) failed to vacate his or her office in terms of subsection (3) or (4);

(b) failed to comply with section 6 (8);

(c) failed to attend two consecutive meetings of the CIDB without leave of the CIDB as noted in the minutes of those meetings, which leave may be granted retrospectively; or

(d)

(e) failed to uphold and advance the objects of the CIDB."

Thus, the Act does not provide for the suspension of CIDB board members. In terms of the Act, if the specified circumstances in section 7 (4) exist, a board member must immediately vacate his or her office, or if the specified circumstances in section 7 (5) exist, a board member must immediately be relieved of his or her duties by the Minister. In other words, in terms of subsection (4) a board member must immediately resign or, in terms of subsection (5) the Minister must immediately terminate the board member's duties. There is also a degree of overlap between subsections (4) and (5): If a board member fails to vacate his or her office as provided for in subsection (4), in terms of subsection 5 (a), the Minister must immediately relieve the member of his or her duties. See also subsection (4) (e) in this regard.

Furthermore, the Act does not provide for a hearing or an opportunity for board members to make representations to the Minister prior to the decision to "vacate" or "relieve" being made and implemented. This is emphasised by the use of the word "immediately" in both subsections. Since, according to Sokhela, the exercise of the power to terminate the appointment of a board member will constitute administrative action as defined in section 1 of PAJA, the obligations of section 3 of PAJA are incurred, and thus the procedure whereby a board member vacates his or her office or is relieved of his or her duties, must be fair. In terms of section 3 (2) (a) of PAJA, what will constitute a fair administrative procedure depends upon the circumstances of each case. In general, in order to give effect to the right to procedurally fair administrative action, the person affected must be given adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; and a clear statement of the administrative action. The right to make representations will involve a right to present and dispute information so as

to ensure that the person making the decision is properly and correctly informed before doing so.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: OCTOBER 2010

STANDARD BANK OF SOUTH AFRICA LTD v MAHARAJ t/a SANROW TRANSPORT

KwaZulu-Natal High Court, Pietermaritzburg

(2216/10) 2010 (5) SA 518 (decided: 6 August 2010)

FACTS: This case deals with the enforcement of a credit agreement by legal action as contemplated in sections 129 (1) (a) and 130 (1) (b) of the National Credit Act 34 of 2005 ("the Act").

Standard Bank of South Africa Ltd ("Standard Bank") and Deepchun Siamnath Maharaj t/a Sanrow Transport ("Maharaj") concluded a credit transaction instalment agreement on 15 February 2008. In terms of this agreement Standard Bank financed the purchase by Maharaj of a MAN truck tractor ("the vehicle"), which would be owned by Standard Bank until Maharaj had paid the amount owed by him to Standard Bank in full. The credit agreement provided that Maharaj would be in default if he failed to pay any of the monthly instalments payable in the amount of R10 702.59 on the due date. As at 20 October 2008, the balance due under the credit agreement was the sum of R598 785.90, and Maharaj was in breach of the credit agreement, in that he was in arrears with his instalments in the amount of R21 877.34. As a result, Standard Bank applied for an order directing Maharaj to return the vehicle, to be held by Standard Bank pending the final decision of the Stanger Magistrates' Court in the action instituted by Standard Bank against Maharaj for the return of the vehicle.

When Maharaj defaulted under the credit agreement, Standard Bank sent a notice to Maharaj in terms of section 129 (1) of the Act by pre-paid registered post to the *domicilium* address chosen by Maharaj, in terms of the credit agreement.

Maharaj subsequently raised two defences to Standard Bank's claim:

1. The notice was defective, in that it did not contain a "proposal" as required by section 129 of the Act; and

2. Maharaj did not receive the notice.

ISSUES: Whether the notice in terms of section 129 of the Act was defective; whether Maharaj did in fact receive such notice; and whether Standard Bank was precluded from seeking return of the vehicle and obliged to participate in the debt review procedure.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first addressed the question of whether the notice in terms of section 129 of the Act was defective. Section 129 (1) (a) of the Act provides that "if the consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date ...". In terms of section 130 (1) (b) of the Act, a credit provider "may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least twenty business days and in the case of a notice contemplated in section 129 (1), the consumer has (i) not responded to such notice; or (ii) responded to the notice by rejecting the credit provider's proposals ...". In the court's view, the first objective of section 129 (1) (a) is to bring the default complained of to the consumer's attention. The second objective is to propose to the consumer that he or she seeks assistance from one of the entities mentioned in the section, in order to obtain the third objective which is the resolution of the dispute under the agreement, or the development of an agreement to a plan to bring the payments under the agreement up to date. The court stated that the purpose of the "proposal" as contemplated in section 129 (1) (a) of the Act is to engage the services of one of the named entities "with the intent" to achieve a resolution of the dispute. The fact that section 130 (1) (b) (ii) provides for a rejection of "the credit provider's proposals" does not imply that the proposal must be something more than is expressly provided for in section 129 (1) (a) of the Act. The court concluded that the notice sent to Maharaj set out the requirements of section 129 (1) (a) clearly and was therefore not defective.

The court thereafter addressed the question of whether Maharaj did in fact receive the notice sent by Standard Bank. The court agreed with the view of Wallis J in *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) that the credit provider discharged its obligations of delivering notice by sending it to the postal address selected by the consumer. If the credit provider delivered the notice in the manner chosen by the consumer, and such manner was one specified in section 65 (2) (a) of the Act, it was irrelevant whether the notice in fact came to the attention of the consumer. The court stated that although section 65 (2) (a) (i)

of the Act only makes provision for delivery by way of "ordinary mail", delivery by pre-paid registered post is not a material departure from the provisions of the section. Furthermore, the fact that a letter is registered, makes it more, not less, likely to reach its destination. Standard Bank argued that the section 129 notice was sent by prepaid registered post to the *domicilium* address chosen by Maharaj. Maharaj argued that Standard Bank was, in addition, obliged to put up an affidavit by the person who actually effected the registered posting of the notice, as proof of this fact. In the court's view, proof of receipt of the notice sent by Standard Bank to Maharaj was established by Standard Bank's statement that the notice was sent by pre-paid registered post, together with the registered posting slip which served as evidence.

The court also addressed a further defence raised by Maharaj, namely that Maharaj was placed under debt review by Your Debt Helpline on 15 January 2009, and therefore Standard Bank was precluded from seeking the return of the vehicle and was obliged to participate in the debt review procedure. Standard Bank gave notice to Maharaj of intended proceedings in terms of the section 129 notice, prior to this date on 24 October 2008. Furthermore, section 86 (2) of the Act provides that an application for debt review may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of application, the credit provider has taken the steps contemplated in section 129 to enforce the agreement. The court therefore concluded that there was no basis for Maharaj's defence.

KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG: The court ordered that the sheriff of the court be authorised to attach and remove, and thereafter handover the vehicle to Standard Bank for storage, which should continue to be held by Standard bank pending the final decision of the Stanger Magistrate's Court action. The court also ordered Maharaj to pay the costs of the application.

Implication for CIDB prescripts: The *Standard Bank* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

    1.1. The Preamble to the Act provides that "the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training". The drafters of the Act therefore acknowledged the challenges associated with accessing finance and credit, particularly for the emerging sector of the construction industry. In the face of such challenges it is therefore important that once finance or credit has been granted

by a credit provider, a contractor is empowered to make prudent decisions concerning such finance or credit by being provided with appropriate and helpful information, particularly with regard to the consequences of defaulting on a credit agreement, and the correct debt enforcement procedure to be followed by a credit provider in the event that default does occur.

1.2. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. If, for example, a client does not pay a contractor for work done in terms of a contract on time, this may result in a contractor being unable to meet some or all of his or her financial commitments, including the repayments on a credit agreement. This in turn may result in delays for the completion of the same or another project that the contractor is involved in, and so on. If such circumstances exist on a large scale throughout the construction industry, the growth and development, as well as the stability, of the industry may be negatively impacted. Thus, as reasoned above, providing information to contractors concerning the consequences of defaulting on a credit agreement and the correct procedure for credit providers to follow to enforce a debt falls within the mandate of the CIDB.

1.3. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.4. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors". If a contractor is unable to service his or her debts, he or she runs the risk of a debt(s) being enforced by a credit provider(s), which may result in the attachment and removal of the goods or property concerned. This in turn may hinder his or her ability to perform in

terms of a construction contract, and as a result, his or her performance record in the national register may be negatively affected.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ('the Code of Conduct")

2.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, the conduct of a client with respect to timely payment of a contractor for work done may have an impact on the ability of a contractor to complete that project or other projects on time, which in turn may also negatively impact the construction industry at large.

2.2. Principle 2.2 of the Code of Conduct provides that "in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private construction-related procurement should in their dealings with each other discharge duties and obligations timeously and with integrity". Thus it is clear that the Code of Conduct regards performance in terms of a construction contract as essential to the health of the construction industry at large. It follows therefore that contractors who are unable to perform in terms of a contract for financial reasons, not only face the possibility of legal proceedings for debt enforcement but also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: NOVEMBER 2010

AFRICAN BANK LIMITED v ADDITIONAL MAGISTRATE MYAMBO NO AND OTHERS

North Gauteng High Court, Pretoria

(34793/2008) 2010 (6) SA 298 (decided: 9 July 2010)

FACTS: This case concerns the interaction between certain provisions of the National Credit Act 34 of 2005 ("the Act") and section 58 of the Magistrates' Courts Act 32 of 1944 ("Magistrates' Court Act"), and in particular what effect the Act has on the procedure prescribed by section 58 ("section 58 procedure") and on the adjudication of a request for judgment by consent.

In May 2006, African Bank Limited ("the applicant") granted Khumiso Abednego Seketema ("the second respondent or consumer") an unsecured cash loan, which was repayable in monthly instalments, with interest. When the loan was granted, the Act had not yet come into operation. The loan was granted under the Usury Act 73 of 1968 ('the Usury Act").

The consumer made the first monthly repayment of the loan in June 2006, but thereafter defaulted on his monthly payments from July 2006 onwards, except for one irregular payment that he made in November 2006. On 15 September 2006, the applicant sent a letter of demand in terms of section 129 (1) of the Act to the consumer's chosen domicile. The consumer did not respond. During December 2007, a tracing agent commissioned by the applicant delivered a second letter of demand to the consumer. The second letter of demand complied with the provisions of section 58 and with the relevant Magistrates' Courts Rules, thus commencing the section 58 procedure. On receipt of the second letter of demand, the consumer signed a consent to judgment and undertook to pay the outstanding amount, interest and costs in monthly instalments. Consequently, on 4 March 2008, the applicant applied to the clerk of the Pretoria Magistrates' Court for judgment by consent. The clerk of the court referred the matter to Additional Magistrate Myambo ("the first respondent or magistrate"), who refused to grant judgment.

Consequently, the applicant requested an order reviewing and setting aside the magistrate's decision to refuse judgment. The National Credit Regulator ("the third respondent or Regulator") later joined the proceedings, and also made application for a number of

declaratory orders which address the practical difficulties that are encountered with the interaction between the Act and the section 58 procedure.

ISSUES: Whether the consumer, who owes a debt under a credit agreement governed by the Act, can validly consent to judgment in terms of section 58 of the Magistrates' Courts Act. If so, the question then raised is what effect does the Act have on the section 58 procedure and on the adjudication of a request for judgment by consent.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first dealt with the review application. Section 58 of the Magistrates' Courts Act provides for a procedure whereby a creditor can, on obtaining the written consent of a debtor, obtain judgment by consent.

Section 58 (1) provides:

"(1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him of a summons demanding payment of any debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the debt and the costs claimed in the letter of demand or summons, or for any other amount, the clerk of the court shall, on the written request of the plaintiff or his attorney accompanied by -

(a) if no summons has been issued, a copy of the letter of demand; and

(b) the defendant's written consent to judgment -

(i) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and

(ii) if it appears from the defendant's written consent to judgment that he has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with this consent, and such order shall be deemed to be an order of the court mentioned in section 65A (1).

(2) The provisions of section 57 (3) and (4) shall apply in respect of the judgment and court order referred to in subsection (1) of this section."

The effect of section 58 (2) is that when the clerk of the court grants judgment by consent, the judgment is deemed to be a default judgment granted by the court.

Section 172 (1) read with Schedule 1 of the Act specifically provides for the situation where there is conflict between section 58 and the Act, which implies that the Act did not repeal section 58 or render it pointless in respect of debts to which the Act applied. The court stated that fair and effective collection procedures promoted the purpose of the Act. The section 58 procedure is a particularly cost-effective and speedy one. Provided that the provisions of section 58 and those of the Act are applied properly and with due regard to the parties' rights, it is in the interests of credit providers, of consumers, and of justice that the procedure be utilised. The court therefore disagreed with the magistrate's finding that the procedure as such is contrary to the purposes of the Act and cannot be applied in cases originating from credit agreements.

The court then discussed each of the declaratory orders requested by the Regulator in turn, and ruled as follows:

1. The obligatory nature of the words "shall ... enter judgment" in section 58 did not prevent clerks of the court from exercising their discretion to refer section 58 applications to court. If the Act was applicable, the clerk had to refer the request for judgment to the court - (a) if they were uncertain as to whether the consumer had been given the full benefit of the protective measures provided for in the Act; (b) allegations of over-indebtedness had been made; (c) the credit provider failed to disclose that a credit agreement was at issue; and (d) the letter of demand or summons did not contain an allegation that the credit provider was registered as such.

2. Where the cause of action in a consent to judgment procedure was a credit transaction as intended in the Act, the summons or letter of demand had to contain allegations that – (a) section 129 or section 86 (10) of the Act had been complied with; (b) that the consumer was in default and had been in default for at least 20 business days and; (c) a 10-day period had expired since delivery of the section 86 (10) or section 129 (1) notice. The request for judgment had to have attached to it a true copy of the section 129 notice.

3. Section 58 proceedings were also "proceedings commenced in a court" for the purposes of section 130 (3) of the Act, and therefore the clerk of the court had to be satisfied that each of the facts mentioned in section 130 (3) had been dealt with before he or she could determine the matter. A general allegation in the letter of demand or summons that section 129 and 130 of the Act had been complied with was not sufficient: the credit provider had

to deal with each one of the requirements of section 130 (3), alleging that each one had been met.

4. Where a plaintiff applied for judgment by consent under section 58, and the cause of action was a credit agreement under the Act, magistrates were entitled to interrogate the application for judgment and were thus also entitled to require proof by a plaintiff of any fact or document that enabled the court to determine – (a) whether a credit agreement under the Act was in issue; (b) whether credit was recklessly granted; (c) whether the plaintiff was registered as a credit provider with the Regulator; (d) the extent of the admitted debt; (e) whether the debtor failed to respond to the plaintiff's letter of demand issued in terms of section 129 of the Act or whether the debtor rejected a proposal made; and (f) whether it was required to act in terms of section 85 where allegations of over-indebtedness had been made.

5. For the consumer's consent to have been informed, he or she must have understood the available alternatives to legal proceedings and must have been given an opportunity to pursue such alternatives. The wording of the section 129 notice therefore had to be in plain language, understandable, and had to contain a meaningful proposal.

PRETORIA MAGISTRATES' COURT: The magistrate refused to grant judgment and ruled that a judgment by consent is contrary to the purposes of the Act.

NORTH GAUTENG HIGH COURT, PRETORIA: The court made the following orders:

2. The decision of the magistrate given on 9 April 2008, refusing to grant judgment against the consumer, is reviewed and set aside.

3. The matter is remitted to the magistrate for reconsideration.

The court also declared that:

1. The Act did not repeal section 58 of the Magistrates' Courts Act or render it pointless in respect of debts to which the Act applies.

2. In order to obtain judgment in terms of section 58 of the Magistrates' Courts Act, where the original cause of action was a credit agreement under the Act, a credit provider must comply with the provisions of section 58 and attach to the request for judgment a true copy of the notice in terms of section 129 of the Act. The credit provider must deal with each of the relevant provisions of sections 129 and 130 of the Act in the summons or letter of demand and allege that each provision has been complied with.

3. In cases to which the Act applies, clerks of the court may refer the request for judgment by a credit provider in terms of section 58 to the court in terms of rule 12 (7) of the Magistrates' Courts Rules. Where clerks of the court are uncertain as to whether the consumer has been given the full benefit of protective measures provided for in the Act, such requests for judgment must be referred to the court.

4. Where a credit provider seeks judgment by consent in terms of section 58 of the Magistrates' Courts Act, magistrates are entitled to interrogate the application for judgment, and in so doing they may require proof by a credit provider of any fact or document pertaining to the underlying cause of action so as to determine whether a credit agreement under the Act is at issue.

5. Where a credit provider seeks judgment by consent in terms of section 58 of the Magistrates' Courts Act based on a cause of action arising from a credit agreement under the Act, magistrates are entitled to interrogate the application for judgment and they may require proof by a credit provider of any fact or document so as to enable the court to determine whether the granting of the credit in question was an instance of the granting of reckless credit or not.

6. Where a credit provider seeks judgment by consent in terms of section 58 of the Magistrates' Courts Act, based on a cause of action arising from a credit agreement under the Act and where it is alleged that the defendant is over-indebted, clerks of the court must refer the application to the court. In such a case, magistrates are entitled to interrogate the application for judgment and in so doing they may require proof by a credit provider of any fact or document so as to enable the court to determine whether it should act in terms of section 85 of the Act.

7. Where a credit provider seeks judgment by consent in terms of section 58 of the Magistrates' Courts Act based on a cause of action arising from a credit agreement under the Act, magistrates are entitled to interrogate the application for judgment, and in so doing they may require proof by a credit provider of any fact or document:

    7.1 so as to enable the court to establish whether the credit provider is registered as a credit provider with the Regulator;

    7.2 pertaining to the computation of the admitted debt;

7.3 so as to establish that the debtor failed to respond to the credit provider's letter of demand issued in terms of section 129 of the Act or that the debtor rejected a proposal made therein.

Implication for CIDB prescripts: The *African Bank* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

1.1. The Preamble to the Act provides that "the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training". The drafters of the Act therefore acknowledged the challenges associated with accessing finance and credit, particularly for the emerging sector of the construction industry. In the face of such challenges it is therefore important that once finance or credit has been granted by a credit provider, a contractor is empowered to make prudent decisions concerning such finance or credit by being provided with appropriate and helpful information, particularly with regard to the consequences of defaulting on a credit agreement, and the correct debt enforcement procedure to be followed by a credit provider in the event that default does occur.

1.2. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. If, for example, a client does not pay a contractor for work done in terms of a contract on time, this may result in a contractor being unable to meet some or all of his or her financial commitments, including the repayments on a credit agreement. This in turn may result in delays for the completion of the same or another project that the contractor is involved in, and so on. If such circumstances exist on a large scale throughout the construction industry, the growth and development, as well as the stability, of the industry may be negatively impacted. Thus, as reasoned above, providing information to contractors concerning the consequences of defaulting on a credit agreement and the correct procedure for credit providers to follow to enforce a debt falls within the mandate of the CIDB.

1.3. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.4. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors". If a contractor is unable to service his or her debts, he or she runs the risk of a debt(s) being enforced by a credit provider(s), which may result in the attachment and removal of the goods or property concerned. This in turn may hinder his or her ability to perform in terms of a construction contract, and as a result, his or her performance record in the national register may be negatively affected.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ('the Code of Conduct")

2.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, the conduct of a client with respect to timely payment of a contractor for work done may have an impact on the ability of a contractor to complete that project or other projects on time, which in turn may also negatively impact the construction industry at large.

2.2. Principle 2.2 of the Code of Conduct provides that "in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private construction-related procurement should in their dealings with each other discharge duties and obligations timeously and with integrity". Thus it is clear that the Code of Conduct regards performance in terms of a construction contract as essential to the health of the construction industry at large. It follows therefore that contractors who are unable to perform in terms of a contract for financial reasons, not only face the possibility of legal proceedings for debt enforcement but also face sanction by the

CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: NOVEMBER 2010

JMV TEXTILES (PTY) LTD v DE CHALAIN SPAREINVEST 14 CC AND OTHERS

KwaZulu-Natal High Court, Durban

(15136/09) 2010 (6) SA 173 (decided: 20 August 2010)

FACTS: This case deals with the obligation of a credit provider to register as such in terms of section 40 (1) of the National Credit Act 34 of 2005 ("the Act") and the implications thereof for a credit agreement entered into between that credit provider and a consumer.

On 18 February 2009, JMV Textiles (Pty) Ltd ("the plaintiff") and De Chalain Spareinvest 14 CC, a close corporation trading as Cuts ("the first defendant"), concluded an agreement in terms of which the plaintiff would sell fabric to the first defendant on credit. The credit limit was described as "R50 000/R100 000", presumably a monthly limit, and the agreement provided that payment should be made "sixty days nett". Anwar Ismail Lockhat ("the second defendant") and Mohomed Ismail Lockhat ("the third defendant") bound themselves as sureties and co-principal debtors with the first defendant for its obligations in terms of the agreement. The plaintiff instituted action against the defendants to recover the price of goods that it claimed to have supplied under the agreement. Since the first defendant had gone into liquidation, the action proceeded only against the second and third defendants as sureties.

The defendants raised various defences in terms of the Act, but in particular that the plaintiff was obliged to be registered as a credit provider in terms of section 40 of the Act, and as it was not registered, the credit agreement was unlawful and void, and the plaintiff was prevented from recovering the purchase price of the goods.

ISSUE: Whether the plaintiff was obliged to register as a credit provider in terms of section 40 (1) of the Act, and therefore also whether the credit agreement was lawful.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first addressed the issue of whether the plaintiff was obliged to be registered as a credit provider in terms of section 40 (1) of the Act. If the plaintiff was obliged to register and did not do so, then any credit agreement concluded by it would be an unlawful agreement and void as provided for in section 89 of the Act. In terms of section 89(5), a credit agreement that is unlawful and void must be declared to be void from the date upon which it was entered into, and all the

rights of the credit provider in terms of the credit agreement to recover goods delivered to the consumer are cancelled. That is, unless the court decides that such cancellation would unjustly enrich the consumer. As the agreement is void, the credit provider is also prevented from recovering the price of the goods supplied. In terms of section 40(1) of the Act a person is obliged to register as a credit provider if "(a) that person ... is the credit provider under at least one hundred credit agreements, other than incidental credit agreements; or (b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1)". The threshold referred to is R500 000.

The court stated that the key to whether the plaintiff was obliged to register as a credit provider was whether its agreements with the first defendant were incidental credit agreements. In terms of section 40, if the agreements concluded by a credit provider are incidental credit agreements, there is no obligation on the credit provider to register. The parties agreed that the plaintiff was party to more than 100 agreements, similar in form and content to the agreements concluded with the first defendant, and that the total amount owed to it in terms of those agreements exceeded R500 000. Section 1 of the Act defines an incidental credit agreement as "an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply: (a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or (b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date."

The plaintiff argued that the agreements concluded with the first defendant were incidental credit agreements. However, the defendants argued that the arrangement between the parties constituted a credit facility as defined in section 8 (3) of the Act and not an incidental credit agreement. In terms of section 8(3) an agreement constitutes a credit facility if, in terms of the agreement:

"(a) a credit provider undertakes

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to –

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of -

(i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or

(ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement."

Section 8 (3) (a) therefore provides for two types of transactions. The first is the supply of goods or services at the consumer's request, and either the deferment of the obligation to pay the price, or periodic billing of part of the amount. The second is the payment by the credit provider of amounts to either the consumer or third parties at the consumer's request, where the obligation to pay is deferred, or is the subject of periodic billing in respect of part of the amount. The first describes the position with store charge-cards or accounts, and the second the position with credit cards. The court stated that the agreement between the plaintiff and the first defendant was fundamentally different from this. The agreement was that the plaintiff would sell goods on credit to the first defendant. The expectation was that the price of the goods would be paid each month as it fell due. There was no fee paid for this and there was no entitlement to pay less than the full amount due each month. The obligation to pay interest flowed from default in making payments on time, not from a legitimate decision not to pay the full amount that is due each month. In the court's view, section 8 (3) is directed at providing consumers with charge cards and credit cards and similar arrangements, and not at conventional sales on credit. The court stated that the agreement between the plaintiff and the first defendant was therefore not a credit facility.

The court added that although the expression "incidental credit agreement" conveys the idea that one is dealing with ancillary or occasional transactions, a party is free to enter into as many transactions as it likes, which fall within the definition of such an agreement, without being obliged to register in terms of section 40 (1) of the Act. The court concluded that the

transaction between the plaintiff and the first defendant was an incidental credit agreement, and as such did not give rise to an obligation to register as a credit provider in terms of section 40 (1) of the Act. As a result, neither the agreement to permit goods to be purchased on credit nor the individual sales were unlawful agreements.

KWAZULU-NATAL HIGH COURT, DURBAN: The court ruled that all of the special defences under the Act raised by the defendants were to be dismissed, and made the following order:

1. The defences of the second and third defendants were dismissed.

2. The second and third defendants were ordered to pay the plaintiff's costs of the preparation for and argument at the separated hearing on 16 August 2010, such costs to be paid on the scale as between attorney and client.

3. The action was adjourned *sine die*.

Implication for CIDB prescripts: The *JMV Textiles* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

    1.1. The Preamble to the Act provides that "the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training". The drafters of the Act therefore acknowledged the challenges associated with accessing finance and credit, particularly for the emerging sector of the construction industry. In the face of such challenges it is therefore important that once finance or credit has been granted by a credit provider, a contractor is empowered to make prudent decisions concerning such finance or credit by being provided with appropriate and helpful information, particularly with regard to the type of credit agreement he or she has entered into, and the payment terms attached thereto.

    1.2. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. If, for example, a client does not pay a contractor for work done in terms of a contract on time, this may result in a

contractor being unable to meet some or all of his or her financial commitments, including the repayments on a credit agreement. This in turn may result in delays for the completion of the same or another project that the contractor is involved in, and so on. If such circumstances exist on a large scale throughout the construction industry, the growth and development, as well as the stability, of the industry may be negatively impacted. Thus, as reasoned above, providing information to a contractor concerning the type of credit agreement he or she has entered into and the payment terms attached thereto, will assist him or her in making prudent decisions concerning the agreement in the context of his or her particular financial situation, thereby avoiding enforcement of the debt by legal action.

1.3. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.4. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors". If a contractor is unable to service his or her debts, he or she runs the risk of a debt(s) being enforced by a credit provider(s), which may result in the attachment and removal of the goods or property concerned. This in turn may hinder his or her ability to perform in terms of a construction contract, and as a result, his or her performance record in the national register may be negatively affected.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ('the Code of Conduct")

2.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, the conduct of a client with respect to timely payment of a contractor for work done may have an impact on the ability of a contractor to complete that

project or other projects on time, which in turn may also negatively impact the construction industry at large.

2.2. Principle 2.2 of the Code of Conduct provides that “in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private construction-related procurement should in their dealings with each other discharge duties and obligations timeously and with integrity”. Thus it is clear that the Code of Conduct regards performance in terms of a construction contract as essential to the health of the construction industry at large. It follows therefore that contractors who are unable to perform in terms of a contract for financial reasons, not only face the possibility of legal proceedings for debt enforcement but also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: DECEMBER 2010

DIRECTOR-GENERAL, DEPARTMENT OF PUBLIC WORKS v KOVACS INVESTMENTS 289 (PTY) LTD IN RE: KOVACS INVESTMENTS 289 (PTY) LTD v DIRECTOR-GENERAL, DEPARTMENT OF PUBLIC WORKS

North Gauteng High Court, Pretoria

(3823/2009) 2010 (6) SA 646 (decided: 11 August 2010)

FACTS: This case deals with the obligation of a party to notify an organ of state of its intention to institute a claim against the organ of state, and whether such claim constitutes a "debt" as defined in section 1 of the Institution of Legal Proceedings Against Certain Organs of State Act No 40 of 2002 ("the Institution of Legal Proceedings Act").

On 13 April 2006 the Director-General of the Department of Public Works ("the DG" or "the defendant") entered into a written lease agreement with African Alliance (Pty) Ltd/Kovacs Investments 289 (Pty) Ltd ("Kovacs" or "the plaintiff"). The defendant took occupation of the leased premises on or about 26 September 2006. The plaintiff alleged that the defendant breached the lease agreement by failing to pay rental and other charges for the period 1 October 2006 to 4 May 2007. The plaintiff claimed payment of R1 112 173.46.

The defendant raised an exception to the plaintiff's claim, namely that in the absence of the defendant having consented to the plaintiff instituting the claim, and without it being notified by the plaintiff in terms of section 3(1)(a) of the Institution of Legal Proceedings Act, of its intention to do so, the court did not have jurisdiction over the claim.

ISSUE: Whether Kovacs' claim constituted a "debt" as defined in section 1 of the Institution of Legal Proceedings Act, and therefore whether Kovacs was obliged to notify the DG of its intention to institute the claim.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first addressed the question of whether the plaintiff's claim constituted a "debt" as defined in the Institution of Legal Proceedings Act.

"Debt" is defined in section 1 of the Institution of Legal Proceedings Act as:

"any debt arising from any cause of action -

(a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any -

(i) act performed under or in terms of any law; or

(ii) omission to do anything which should have been done under or in terms of any law; and

(b) for which an organ of state is liable for the payment of damages".

The court stated that the plaintiff's claim against the defendant for arrear rental, for damages for breach of contract or any other claim for damages, would for purposes of the Prescription Act 68 of 1969 ("the Prescription Act") constitute a "debt". However, for a "debt" to constitute a debt in terms of the Illegal Proceedings Act, there is a further requirement, which is the requirement set out in paragraph (b) of the definition of "debt" in that Act. The court stated that paragraphs (a) and (b) of the definition of "debt" cannot be read independently of each other. The plaintiff's claim would therefore have to satisfy the requirements set out in paragraphs (a) and (b) of the definition. Paragraph (a) establishes that all contractual and delictual claims give rise to a debt. Paragraph (b) provides that, in addition, the contractual, delictual or other claim must be a claim for which an organ of state is liable for the payment of damages. Furthermore, for purposes of paragraph (b), the nature of the claim must be ascertained. If a claim is for specific performance, then the claim, while it would amount to a debt in terms of the Prescription Act, would not qualify as a debt for purposes of the Institution of Legal Proceedings Act.

While the plaintiff argued that its claim was one for contractual damages, the court disagreed. The court stated that, since the plaintiff sought an order that the defendant pay to it that which it undertook to pay in terms of the contract, the plaintiff's claim was a claim for specific performance, and not for damages. Thus, the court found that the plaintiff's claim was not a "debt" as defined in the Institution of Legal Proceedings Act, and therefore the provisions of section 3 of that Act did not apply to the plaintiff's claim.

NORTH GAUTENG HIGH COURT, PRETORIA: The court dismissed the exception raised by the defendant and ordered the defendant to pay the costs of the exception.

Implication for CIDB prescripts: The *Kovacs Investments* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

1.1. The Preamble to the Act provides that "the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training". The drafters of the Act therefore acknowledged the challenges associated with accessing opportunities, particularly for the emerging sector of the construction industry. In the face of such challenges it is therefore important that once a contractor has obtained a contract to perform construction work, he or she is empowered to make prudent decisions concerning the contract by being provided with appropriate and helpful information, particularly with regard to the correct procedure to be followed when an organ of state fails to satisfy the debt outstanding in terms thereof.

1.2. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. If, for example, a client does not pay a contractor for work done in terms of a contract on time, this may result in a contractor being unable to meet some or all of his or her financial commitments, including the repayments on a credit agreement. This in turn may result in delays for the completion of the same or another project that the contractor is involved in, and so on. If such circumstances exist on a large scale throughout the construction industry, the growth and development, as well as the stability, of the industry may be negatively impacted. Thus, as reasoned above, providing information to contractors concerning the correct procedure to be followed when an organ of state fails to satisfy a debt falls within the mandate of the CIDB.

1.3. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.4. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which

provides for categories of contractors in a manner which facilitates public sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors". If a contractor is unable to service his or her debts, he or she runs the risk of a debt(s) being enforced by a credit provider(s), which may result in the attachment and removal of the goods or property concerned. This in turn may hinder his or her ability to perform in terms of a construction contract, and as a result, his or her performance record in the national register may be negatively affected. It is therefore critically important for clients to satisfy their debts so as to avoid negative impact on other parties throughout the supply chain.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ('the Code of Conduct")

2.1. The Preamble to the Code of Conduct provides that the development of the construction industry is promoted when participant and stakeholder organisations "ensure that they perform efficiently, responsibly, accountably, transparently, and with probity". Thus, the growth and development of the construction industry is dependent upon a certain acceptable level of performance by all participants and stakeholders, as well as their continued commitment to improved performance.

2.2. The Preamble to the Code of Conduct provides that "the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, the conduct of a client with respect to timely payment of a contractor for work done may have an impact on the ability of a contractor to complete that project or other projects on time, which in turn may also negatively impact the construction industry at large.

2.3. The Code of Conduct defines an employer as "a natural or juristic person, partnership, or organ of state entering into the contract with the contractor for the provision of supplies, services, or engineering and construction works". The Code of Conduct further provides that "an institution (a public body i.e. a department, trading entity, constitutional institution, municipality, public entity or municipal entity) which contracts with a contractor, is an employer ... An employer is often referred to

as a 'client'". As an employer or client, an organ of state is therefore a party involved in construction procurement and thus also subject to the Code of Conduct.

Principle 2.2 of the Code of Conduct provides that "in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private construction-related procurement should in their dealings with each other discharge duties and obligations timeously and with integrity". Thus it is clear that the Code of Conduct regards performance in terms of a construction contract as essential to the health of the construction industry at large. It follows therefore that clients who are unable to perform in terms of a contract, not only face the possibility of legal proceedings for satisfaction of a debt but should also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: DECEMBER 2010

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK v SEYFFERT AND ANOTHER AND THREE SIMILAR CASES

South Gauteng High Court, Johannesburg

(21862/2010) 2010 (6) SA 429 (decided: 11 October 2010)

FACTS: These cases deal with a notice to terminate a debt review in terms of section 86 (10) of the National Credit Act 34 of 2005 ("the NCA").

All four cases involved similar applications for summary judgment, and in each instance:

(a) The applicant was a registered credit provider in terms of the NCA;

(b) The applicant sought recovery of a debt secured by a mortgage bond registered over immovable property;

(c) The respondents were spouses;

(d) The respondents were in occupation of the property;

(e) The property was situated in a comfortably affluent or "middle-class" area;

(f) The respondents raised no defence other than to invoke the requirements of the NCA;

(g) The respondents claimed that the matter was subject to debt review in terms of Chapter 4 of the NCA;

(h) The applicant claimed to have given notice of termination of that review in terms of section 86 (10) of the NCA;

(i) The agreement upon which the applicant relied was a credit agreement in terms of the NCA;

(j) There was no indication that the applicant provided credit recklessly; and

(k) There was no indication that the applicant imposed exploitative burdens on the respondents.

The parties were invited by Willis J to argue these matters before him on 21 September 2010.

***ISSUE*:** Whether a debtor who has made an application for debt review in terms of section 86 (1) of the NCA, may, simply by making such an application, indefinitely frustrate the enforcement of a debt to which he or she has no real defence and where no serious effort is being made to enter into an arrangement for the rescheduling or re-arrangement of his or her debt, as provided for in the NCA.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court considered the relevant provisions of the NCA, and in particular section 86 (10).

Section 130 (3) of the NCA prevents a court from determining a matter in respect of a credit agreement to which the NCA applies if it is "pending before" the National Consumer Tribunal or "during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction". The court pointed out that this was a common defence for respondents attempting to resist summary judgment.

Section 86 (10) of the Act provides that a credit provider -

> "may give notice to terminate the review in the prescribed manner to -
>
> (a) the consumer;
>
> (b) the debt counsellor; and
>
> (c) the National Credit Regulator,
>
> at any time at least 60 business days after the date on which the consumer applied for the debt review."

Section 88 (3) of the NCA prevents a credit provider from enforcing "by litigation or other judicial process any right or security" under the credit agreement in question until debt review has been completed. This subsection is, however, subject to the provisions of section 86 (10) of the NCA.

The court stated that it was clear from reading section 3, which sets out the purpose of the NCA, that it pursues varied objectives which must be held in balance. Although the NCA was designed to protect consumers, it was not intended to make of South Africa a "debtors' paradise". The Act was also drafted for the "development of a credit market that is accessible

to all South Africans". The court added that section 86 (5) (b) of the NCA requires that, with respect to debt review, consumers and credit providers are to act in good faith towards one another.

Section 86 (10) read together with section 86 (11), makes it clear that the giving of notice by a credit provider to a consumer to terminate a process of debt review does not necessarily terminate that process of debt review, but may have this consequence. In other words, a "notice" refers to an intention or a preliminary step towards a consequence, rather than the consequence itself. Much depends on the extent to which the parties show good faith to one another, have sensible, fair and reasonable proposals and actively engage with one another to find realistic solutions to a particular consumer's problems. The court referred to the important principle set out in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T), which is that the defence must not be set out so badly, vaguely or using so few words that a court hearing an application for summary judgment is left with the impression that the respondent is being merely opportunistic, or lacking in conviction. In other words, the defence must not be flimsy. Where a debtor wishes to avoid summary judgment after proper notice has been given in terms of section 86 (10), the court would want to see active, serious, sensible and reasonable proposals being put forward by the consumer, and not an opportunistic attitude. On the other hand, a credit provider who appears to disregard the process may expect to be deprived of the expeditious and inexpensive remedy of summary judgment.

The court thereafter addressed the question of whether and when a matter is "pending" before the National Consumer Tribunal, or is "before" a debt counsellor, alternative dispute resolution agent, consumer court, or ombud with jurisdiction. In *Noah v Union National South British Insurance Co Ltd* 1979 (1) SA 330 (T) it was stated that the meaning of the word "pending" depends much upon its context. In the court's view, in context the words "pending" in s 130(3)(b) and "before" in s 130(3)(c) denote a certain immediacy to the events rather than merely a formal referral having been made. "Pending" in the Oxford English Dictionary is defined, *inter alia*, as "about to happen; to be imminent". In other words, it is not good enough for a consumer who is being pursued for a debt for which he or she has no real defence, to adopt a "catch-me-if-you-can" attitude.

The court stated that a prospective debt review is not a bar to obtaining summary judgment. Where a credit provider has given a consumer proper notice in terms of section 86 (10) of the NCA, a court hearing an application for summary judgment upon a credit agreement, may, depending on the facts and circumstances of the particular case:

(a) grant the application; or

(b) dismiss the application; or

(c) adjourn the application on appropriate terms and conditions.

In this regard, active endeavours to exchange serious, sensible and reasonable proposals to resolve a consumer's debt problems will be among the factors taken into consideration by a court in deciding which order to make.

The court concluded that the respondents were all "clutching at straws" and that in each case, summary judgment was appropriate.

SOUTH GAUTENG HIGH COURT, JOHANNESBURG: The court made the following orders:

A. In Case No 21862/2010 (*First National Bank v Seyffert*) summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:

(1) Payment of the sum of R219 715.69;

(2) Interest on the aforesaid sum calculated at the rate of 9% per annum from 12 May 2010 to date of payment.

B. In Case No 23132/2010 (*First National Bank v Buitendach*) summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:

(1) Payment of the sum of R731 217.72;

(2) Interest on the aforesaid sum calculated at the rate of 8.75% per annum from 29 May 2010 to date of payment.

C. In Case No 23380/2010 (*First National Bank v Saunders*) summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:

(1) Payment of the sum of R927 350.14;

(2) Interest on the aforesaid sum calculated at the rate of 7.5% per annum from 5 June 2010 to date of payment.

D. In Case No 09987/2010 (*Nedbank v Petersen*) summary judgment is granted in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved, for:

(1) Payment of the sum of R777 011.18;

(2) Interest on the aforesaid sum calculated at the rate of 9.4% per annum from 1 February 2010 to date of payment.

Since these were "test" cases, the court did not make an order as to costs.

Implication for CIDB prescripts: The *FirstRand Bank* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

1.1. The Preamble to the Act provides that "the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training". The drafters of the Act therefore acknowledged the challenges associated with accessing finance and credit, particularly for the emerging sector of the construction industry. In the face of such challenges it is therefore important that once finance or credit has been granted by a credit provider, a contractor is empowered to make prudent decisions concerning such finance or credit by being provided with appropriate and helpful information, particularly with regard to the consequences of defaulting on a credit agreement, and the possibility of making an application for debt review, in the event that default does occur.

1.2. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. If, for example, a client does not pay a contractor for work done in terms of a contract on time, this may result in a contractor being unable to meet some or all of his or her financial commitments, including the repayments on a credit agreement. This in turn may result in delays for the completion of the same or another project that the contractor is involved in, and so on. If such circumstances exist on a large scale throughout the construction

industry, the growth and development, as well as the stability, of the industry may be negatively impacted. Thus, as reasoned above, providing information to contractors concerning the consequences of defaulting on a credit agreement and the possibility of making an application for debt review, falls within the mandate of the CIDB.

1.3. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.4. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors; [and] regulate the behaviour and promote minimum standards and best practice of contractors". If a contractor is unable to service his or her debts, he or she runs the risk of a debt(s) being enforced by a credit provider(s), which may result in the attachment and removal of the goods or property concerned. This in turn may hinder his or her ability to perform in terms of a construction contract, and as a result, his or her performance record in the national register may be negatively affected.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ('the Code of Conduct")

2.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, the conduct of a client with respect to timely payment of a contractor for work done may have an impact on the ability of a contractor to complete that project or other projects on time, which in turn may also negatively impact the construction industry at large.

2.2. Principle 2.2 of the Code of Conduct provides that "in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private

construction-related procurement should in their dealings with each other discharge duties and obligations timeously and with integrity". Thus it is clear that the Code of Conduct regards performance in terms of a construction contract as essential to the health of the construction industry at large. It follows therefore that contractors who are unable to perform in terms of a contract for financial reasons, not only face the possibility of legal proceedings for debt enforcement but also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: DECEMBER 2010

KWIKSPACE MODULAR BUILDINGS LTD v SABODALA MINING COMPANY SARL AND ANOTHER

Supreme Court of Appeal

(173/09) 2010 (6) SA 477 (decided: 18 March 2010)

FACTS: This case involves the interpretation of a building contract which contained a provision that the law applicable to the contract would be that of the state of Western Australia, and concerns the right of a building contractor to interdict the other contracting party from presenting a performance guarantee, unconditional in its terms and furnished by a financial institution, to the other party.

On or about 30 December 2006 Kwikspace Modular Buildings Ltd ("Kwikspace" or "the contractor"), a South African company, entered into a written contract with Sabodala Mining Company SARL ("Sabodala" or "the principal"), a company incorporated in terms of the laws of Senegal. The contract was for the supply and installation of an accommodation village at the Sabodala Gold Project Site in Senegal. The building contract comprised a formal instrument of agreement; the special conditions of contract (SCs) and appendix A (the site-specific conditions); the general conditions of contract (GCs), being the Australian Standard General Conditions of Contract AS 2124 – 1992, together with annexures; the contract schedules; the contract specification (Scope of Work); and appendices and drawings, which were to take precedence in that order. GC 23 provided that the principal was obliged to ensure that there was at all times a superintendent. Annexure A to the GCs provided that the law applicable to the contract would be that of the state of Western Australia.

The appeal concerns the interrelationship of GC 5 and the guarantees provided in terms of it. G5 dealt with security, retention moneys and performance undertakings. Two performance guarantees with identical terms, one dated 28 March 2007 and the other 2 April 2007, and each for a maximum amount of R2 651 254, were issued by Nedbank Ltd ('Nedbank"). The undertaking attached to the GCs was not used. In terms of the guarantees issued Nedbank bound itself to the principal for the due performance by the contractor of all the contractor's obligations in terms of the contract.

Various disputes arose between the parties during the performance of the contract. On 24 October 2008, the principal sent notice to the contractor of its intention to convert into money the performance guarantees lodged by the contractor under the contract. A request addressed on behalf of the contractor to the principal's attorney, for an undertaking that the guarantees would not be presented to Nedbank prior to an urgent application for an interdict to prevent such presentation, was refused. The contractor then approached the South Gauteng High Court, Johannesburg for an urgent interim interdict pending an application for a final interdict. An interim interdict was granted by consent by Victor J on 27 October 2008 that interdicted the principal "from presenting a first written demand for payment for any amounts in terms of the performance guarantees ... and from claiming or receiving payment from" Nedbank "in terms of the guarantees or pursuant to the presentation thereof" and interdicted Nedbank from making any payments to the principal pursuant to the guarantees – all pending the outcome of the contractor's application for a final interdict. Victor J subsequently refused a final interdict on 18 December 2008, but granted leave to appeal. Makhanya J thereafter issued an interdict in the same terms as the interim interdict except that the relief was granted pending the finalisation of all appeals. This appeal was against the order of Victor J refusing a final interdict.

ISSUE: Whether Kwikspace could rely on a term of the building contract to interdict Sabodala from presenting unconditional performance guarantees to Nedbank.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, in spite of the presumption that the law of a foreign state is, in the absence of evidence to the contrary, presumed to be the same as the law of South Africa, the court proposed applying Australian law to the interpretation of the building contract and in particular GC 5, as the law in Australia on the points in issue could be ascertained readily and with sufficient certainty, as contemplated in section 1 (1) of the Law of Evidence Amendment Act 45 of 1988.

The argument on behalf of the contractor involved three propositions: (1) that the underlying building contract between the contractor and the principal could, as a matter of law, qualify the right of the principal to present the guarantees for payment to Nedbank, despite the unconditional wording of the guarantees; (2) that the building contract did in fact contain such a qualification in GC 5.5 (a); and (3) that GC 5.5 contained an implied term so that GC 5.5(b) should be read as follows: "The party has given the other party notice in writing for the period stated in the annexure [two days] of the party's intention to have recourse to the retention

moneys and/or cash security and/or to convert the security, *setting out the grounds on which the demand will be made"* (emphasis added).

With respect to the first proposition: The court stated that the contractor's first proposition seemed to be well established in Australian law, and referred to *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd & Others* [2008] FCAFC 136 ((2008) 249 ALR 458) ("Clough Engineering"); *Bachmann (Pty) Ltd v BHP Power New Zealand Ltd* [1998] VSCA 40 ([1999] 1 VR 420) (11 September 1998)("Bachmann"); and *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812 ("Fletcher Construction"). In the court's view therefore it could be said with sufficient certainty that Australian law is to the following effect: a building contractor may, without alleging fraud, restrain the person with whom he had covenanted for the performance of the work, from presenting to the issuer a performance guarantee unconditional in its terms and issued pursuant to the building contract, if the contractor can show that the other party to the building contract would breach a term of the building contract by doing so; but the terms of the building contract should not readily be interpreted as conferring such a right.

The court thereafter addressed the question of whether GC 5.5 qualified the principal's right to present the guarantees. GC 5.5 of the contract provided as follows:

> *"5.5* Recourse to Retention of Moneys and Conversion of Security
>
> A party may have recourse to retention moneys and/or cash security and/or may convert into money security that does not consist of money where -
>
> (a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security; and
>
> (b) the party has given the other party notice in writing for the period stated in the annexure [which was two days] of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and
>
> (c) the period stated in the annexure [two days] has or have elapsed since the notice was given."

The contractor submitted that the clause required that an actual enforceable right be vested in the principal before it would be entitled to present the guarantees for payment, and that it was not sufficient for the principal to state that it in good faith believed that it did have such a

right; and accordingly, the right could only be enforced, if it were disputed, once the dispute had been settled by arbitration or a court. The court found this argument to be wrong in fact and in Australian law. As a matter of law, it was contrary to the decisions in *Clough Engineering, Fletcher Construction and Bachmann*. The court then proceeded to deal with the facts of the matter.

On 3 October 2008 the superintendent issued certificate 10, which was in part based on variations 17 to 20 ordered by him. The amount certified in this regard exceeded the total amount of the guarantees. No part of the amount certified was paid. Therefore, unless the contractor could provide a valid reason for not doing so, the principal would have "become entitled to exercise a right under the Contract in respect of the ... security" (GC 5.5), the right being to "have recourse to ... security (the guarantees) under the Contract" (GC 42.11) because the contractor "failed to pay ... an amount due and payable under the Contract" (GC 42.1), and the existence of a dispute is not a valid reason for non-payment (GC 47.1).

Three reasons were given in argument as to why the contractor was not obliged to make any payment under certificate 10. The first was that the person who issued it, Mr Patterson ("Patterson"), was not the superintendent's representative at the time he did so. The court stated that since the allegation by the principal in its affidavit that Patterson was indeed the superintendent's representative at all times, was not disputed by the contractor in its affidavit, this argument was not available to the contractor. The second argument was that it would be improper for the contractor to rely on certificate 10 because it did not contain a valuation of the works performed subsequent to the previous certificate. The court stated that after the previous certificate had been issued, the contractor made no claim for payment as required by GC 42.1 and the superintendent was consequently not obliged to value the work. The third argument was that reliance on the certificate would be fraudulent. The court explained that fraud – in the sense of lack of good faith - is a recognised exception in Australian law, as it is in other countries, to the rule that a court will not order the issuer of a performance guarantee from performing its unconditional obligation to make payment. The court stated that the principal was fully entitled to present the guarantees for payment based on the contractor's failure to pay certificate 10. The court therefore found that the contractor had no defence to its failure to pay at least that part of certificate 10 which depended upon variation orders 17 to 20, and that its failure to pay entitled the principal to present the guarantees to Nedbank for payment - unless the notice it gave the contractor in terms of GC 5.5 was invalid because there was an implied term such as the one for which the contractor argued. .

Finally, the court addressed the question of whether GC 5.5 contained an implied term so that GC 5.5 (b) should be read as follows: "The party has given the other party notice in writing for the period stated in the annexure [two days] of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security, *setting out the grounds on which the demand will be made"* (emphasis added). In the court's view there was no good reason for incorporating the implied term for which the contractor argued, and which would require the principal to present its grounds to the contractor for converting the guarantees into cash. The court stated that first, to do so would be contrary to the position adopted in *Fletcher Construction*; second, although the term would lead to efficiency in litigation, it is not essential and it is therefore not necessary to give the contract business efficacy; and third, the term is not so obvious that both the contractor and the principal would clearly have agreed to its inclusion in the contract had they applied their minds to do so at the time the contract was concluded.

COURT OF FIRST INSTANCE (SOUTH GAUTENG HIGH COURT): The court refused the contractor's application for a final interdict.

SUPREME COURT OF APPEAL: The court dismissed the appeal with costs.

Implication for CIDB prescripts: The *Kwikspace* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

    1.1. The Preamble to the Act provides that "the construction industry impacts directly on communities and the public at large and its improved efficiency and effectiveness will enhance quality, productivity, health, safety, environmental outcomes and value for money to South African society". The drafters of the Act therefore acknowledged the fact that the conduct and performance of participants in the construction industry has a direct impact on the lives of people. This places an onus on participants to behave honestly and to perform their duties and fulfil their obligations with integrity, and in so doing improve their efficiency and effectiveness. As is clear from the *Kwikspace* case, there are opportunities for South African contractors to deliver value for money to the people of other foreign states as well. It may therefore be argued that there is an even greater onus to perform on a contractor who has been awarded a foreign contract since he or she represents not only him or herself, but also the South African construction industry at large.

1.2. The Preamble to the Act further provides that the "Government has a vision of a construction industry development strategy that [*inter alia]* fosters ... international competitiveness". Thus, it is within the mandate of the CIDB to develop a strategy which develops participants, and in particular contractors, to the extent that both they and the South African construction industry at large are internationally competitive. A contractor who is internationally competitive, once he or she is awarded a contract to perform work for a foreign employer, whether in South Africa or in a foreign state, will also be able to fulfil his or her obligations in terms of the contract.

1.3. Section 4 (a) (iii) of the Act provides that "the objects of the CIDB are to promote the contribution of the construction industry in meeting national construction demand and in advancing improved value to clients". Thus, it may be argued that facilitating the rendering of a quality service by contractors in the South African construction industry, free from defects and completed on time, to all clients or employers, whether South African or foreign, falls within the mandate of the CIDB.

1.4. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. Since it is clear that the performance of individual participants impacts the construction industry as a whole, the development and implementation of programmes and measures aimed at improving their performance and informing them of the potential consequences of breaching a contract for the performance of construction works, or of being unable to perform in terms of such contract, particularly one which stipulates a performance guarantee, falls within the mandate of the CIDB.

1.5. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.6. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public

sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors; regulate the behaviour and promote minimum standards and best practice of contractors; [and] enable access by the private sector and thus also facilitate private sector procurement". If a contractor is unable to perform in terms of a contract entered into with a public or private sector client, his or her performance record in the national register may be negatively affected, which in turn may negatively affect his or her ability to procure work.

2. The Code of Conduct for All Parties Engaged in Construction Procurement, 2003

2.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, if a contractor is unable to perform in terms of a contract, where for example he or she has not received payment for another completed project, or his or her subcontractor has breached their particular contract, his or her performance record in the national register may be negatively affected, which in turn will negatively affect his or her ability to procure work. This in turn has implications not only for individuals and communities, but also for the construction industry at large.

2.2. The Preamble to the Code of Conduct further provides that the development of the construction industry is promoted when participant and stakeholder organisations "ensure that they perform efficiently, responsibly, accountably, transparently, and with probity", and " engage with and share best practice". The Code of Conduct therefore not only recognises the importance of efficient and responsible behaviour in general, but also highlights best practice.

2.3. The Code of Conduct provides that the parties in any public or private construction-related procurement should in their dealings with each other "discharge duties and obligations timeously and with integrity" and "comply with all applicable legislation and associated regulations". Thus, it is clear that the Code of Conduct regards such conduct as essential to the health of the construction industry at large. It follows therefore that contractors who do not perform their

duties or fulfil their obligations in terms of a contract and/or legislation, not only risk non-performance in terms of the contract and possibly even legal proceedings as a result, but also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: DECEMBER 2010

MARGO AND ANOTHER v GARDNER AND ANOTHER, GARDNER AND ANOTHER v MARGO AND ANOTHER

Supreme Court of Appeal

(564/09 & 511/09) 2010 (6) SA 385 (decided: 17 September 2010)

FACTS: This case deals with the application of the *in duplum* rule, which provides that a creditor is not entitled to claim unpaid interest in excess of the capital outstanding, while legal proceedings are pending.

This appeal is in fact two appeals, similar in almost all respects, which were argued as one. The one is Gardner (appellant) against Margo (respondent) (case No 511/09) and the other is Margo (appellant) against Gardner (respondent) (case No 564/09).

On 14 April 1999 Roger Hugh Margo ("Margo") served a summons against Tony Ricky Gardner ("Gardner" or "first defendant') and OTR Mining Ltd ("second defendant"). Mlambo J found in favour of Margo for the payment of the sum of approximately R15 000 000.00. Gardner successfully appealed to the Supreme Court of Appeal ("SCA") against this finding and the following order was made on 28 March 2006:

"1. Against the first defendant, for payment of the amount of R1 461 432 plus interest thereon at the rate of 15.5% per annum from 1 September 1998 *to date of payment.*

2. Against the second defendant, for payment of the amount of R1 461 432 plus interest at the rate of 15.5% per annum from 1 September 1998 to date of payment, the second defendant to be liable to make such payment only in the event that, and to the extent that, the first defendant fails to do so."

Subsequent to the SCA judgment Gardner made two payments, one of R1 222 864.00 on 24 April 2006 and another of R1 800 000.00, on 23 September 2006. The total paid at that stage amounted to R3 022 864.00. Gardner argued that after the second payment had been made, he understood that the two payments were made in full and final settlement of the capital amount. There was, however, no proof of this. He was of the view that the only issue

outstanding was the question of costs of the proceedings. This argument was disputed by Margo.

The relevant bills of costs were taxed and the respective attorneys exchanged a series of letters regarding what was still owing by Gardner. Margo's attorneys proposed that the payment of the outstanding amount must take place on or before 23 November 2007, failing which a writ of execution ("writ") would be issued. Gardner's attorneys made a counter proposal. As no settlement had been reached by 27 November 2007, the proposal for payment to be made by 23 November 2007 therefore lapsed. On 7 December 2007 a writ was sent to Gardner's attorneys as well as to the Sheriff for service, claiming the sum of R185 983.00, being the balance of the interest owing on the judgment debt and a sum for taxed costs. Gardner launched an urgent application for the suspension of the writ pending the outcome of an application for a declaratory order that the SCA judgment delivered on 28 March 2006 had been satisfied, and for the setting aside of the writ. On 28 February 2008 Horwitz AJ dismissed with costs the application for a declaratory order, and subsequently dismissed the application for leave to appeal.

On 3 October 2008 Margo caused a second writ to be issued, alleging that the first one reflected incorrect amounts and was therefore withdrawn. The second writ reflected the balance of the capital sum of R264 396.06, plus interest thereon at the rate of 15.5 % per annum, calculated from 24 September 2006 to 30 September 2008, in the sum of R82 749. 02, and a further interest on R264 397.06 at 15.5% per annum, calculated from 1 October 2008 to date of payment. Gardner launched another urgent application to suspend the second writ and later launched another application to have the second writ set aside and to declare that he was not indebted to Margo for any capital sum, interest or costs pursuant to the SCA judgment. Gyanda J found in favour of Gardner, and on 23 September 2009 the High Court granted leave to appeal to the SCA.

ISSUE: Whether the *in duplum* rule was applicable to the capital amount outstanding in terms of the SCA judgment delivered on 28 March 2006.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court addressed the argument raised by Gardner, namely that a judgment debt accumulates interest only until the amount thereof reaches the double of the capital amount outstanding in terms of the judgment. The court found Gardner's argument to be flawed and added that it is wrong to state that interest runs only until the amount of interest reaches the double of the capital

amount. The court referred to *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA), where it was held:

> "that interest on the amount ordered to be paid may accumulate to the extent of that amount *irrespective* of whether it contains an interest element. This would then mean that
>
> (i) the *in duplum* rule is suspended *pendente lite*, where the *lis* is said to begin upon service of *the* initiating process; and
>
> (ii) once *judgment* has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgment."

The court explained that interest does not run only until the amount thereof reaches the double of the capital amount outstanding in terms of the judgment, but it also runs *pendente lite* because, as a rule, the *in duplum* rule is suspended during the litigation. The court stated that Gardner failed to accommodate or recognise the suspension of the *in duplum* rule during the period when the matter was pending before the SCA. The court added that while the *in duplum* rule prevents unpaid interest from accruing further once it reaches the unpaid capital amount, a creditor is not prevented by the rule from collecting more than double the unpaid capital amount in interest, provided that he at no time allows the unpaid arrear interest to reach the unpaid capital amount. The purpose of the *in duplum* rule is to protect borrowers from exploitation by lenders who permit interest to accumulate, but also to encourage plaintiffs to issue summons and claim payment of the debt speedily.

The court concluded that the SCA judgment did not provide for any interest ceiling and therefore the amounts claimed in the second writ of execution were all due and owing by Gardner to Margo.

COURT OF FIRST INSTANCE (SOUTH GAUTENG HIGH COURT, JOHANNESBURG): Gyanda J concluded that the *in duplum* rule was applicable and found in favour of Gardner. Margo was ordered to pay the sum of R5 615.83 to Gardner, being the amount by which he found Gardner had overpaid. In addition he set aside the second writ and declared that Gardner was no longer indebted to Margo.

SUPREME COURT OF APPEAL: The Supreme Court of Appeal made the following orders:

1. In Case No 511/09:

   (a) The appeal is dismissed with costs; and

   (b) The appellants are ordered to pay such costs jointly and severally, the one paying the other to be absolved.

2. In Case No 564/09:

   (a) The appeal is upheld with costs; and

   (b) The order of the court of first instance is set aside and substituted with the following order:

   "The applications *are dismissed with costs, which costs are to include the costs reserved on 14 October 2008."*

Implication for CIDB prescripts: The Margo case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

   1.1. The Preamble to the Act provides that "the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training". The drafters of the Act therefore acknowledged the challenges associated with accessing finance and credit, particularly for the emerging sector of the construction industry. In the face of such challenges it is therefore important that once finance or credit has been granted by a credit provider, a contractor is empowered to make prudent decisions concerning such finance or credit by being provided with appropriate and helpful information, particularly with regard to the consequences of defaulting on a credit agreement, and specifically the procedure to be followed by a credit provider with respect to the charging and accruing of interest, in the event that default does occur.

   1.2. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all

participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. If, for example, a client does not pay a contractor for work done in terms of a contract on time, this may result in a contractor being unable to meet some or all of his or her financial commitments, including the repayments on a credit agreement. This in turn may result in delays for the completion of the same or another project that the contractor is involved in, and so on. If such circumstances exist on a large scale throughout the construction industry, the growth and development, as well as the stability, of the industry may be negatively impacted. Thus, as reasoned above, providing information to contractors concerning the consequences of defaulting on a credit agreement and the procedure for credit providers to follow with respect to the charging and accruing of interest, falls within the mandate of the CIDB.

1.3. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.4. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors". If a contractor is unable to service his or her debts, he or she runs the risk of a debt(s) being enforced by a credit provider(s), which may result in the attachment and removal of the goods or property concerned. This in turn may hinder his or her ability to perform in terms of a construction contract, and as a result, his or her performance record in the national register may be negatively affected.

2. Code of Conduct for All Parties Engaged in Construction Procurement, 2003 ('the Code of Conduct")

2.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed

above, the conduct of a client with respect to timely payment of a contractor for work done may have an impact on the ability of a contractor to complete that project or other projects on time, which in turn may also negatively impact the construction industry at large.

2.2. Principle 2.2 of the Code of Conduct provides that "in the interests of a healthy industry that delivers value to clients and society, the parties in any public or private construction-related procurement should in their dealings with each other discharge duties and obligations timeously and with integrity". Thus it is clear that the Code of Conduct regards performance in terms of a construction contract as essential to the health of the construction industry at large. It follows therefore that contractors who are unable to perform in terms of a contract for financial reasons, not only face an additional financial burden in the form of interest on the unpaid capital amount and the possibility of legal proceedings for debt enforcement, but also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: DECEMBER 2010

PIENAAR AND OTHERS v BROWN AND OTHERS

Supreme Court of Appeal

(48/2009) 2010 (6) SA 365 (decided: 1 December 2009)

FACTS: This case concerns a claim for damages against a property owner, the building contractor and his sub-contractor for damage caused by the collapse of part of the building work, and the respective liability of each of them.

On 25 April 2004 , the first and second respondents, Mr Russell James Brown ("Brown") and Mr Joseph Sloep ("Sloep") (the plaintiffs) were injured when a balcony on which they were standing at the house of the first appellant, Mr Pieter Andries Pienaar ("Pienaar"), collapsed. The plaintiffs were guests at Pienaar's house for a function to celebrate the birthday of Pienaar's life partner, Mr De Bruin ("De Bruin"). During the course of the afternoon a car alarm sounded and a number of guests, including Brown, Sloep and De Bruin, stepped out onto the balcony to see what was happening. As they did so, the balcony collapsed outwards and fell downwards, landing on the tiling below. The guests on the balcony fell forward and the plaintiffs sustained serious injuries as a result.

The plaintiffs instituted action for damages in the Cape High Court against Pienaar, as the owner of the property at which the balcony collapsed; the second appellant, Mr Melvin Douglas Classen, who had been employed as the main contractor; and the third appellant, a close corporation through which Classen conducted his business (collectively "Classen"); the third respondent Mr Don Noel Daniel Lamberts, the individual who physically performed the work; and his corporate entity, Ven Projects CC, the fourth respondent, who designed, manufactured and installed the balcony (collectively "Lamberts"). The claim was based on their alleged negligence in the design, construction and installation of the balcony.

On 23 November 2002 Pienaar, the owner of the property, approached Classen, the builder, to provide a quote for, amongst other things, the balcony in question. On 27 November 2002 Classen's corporate entity, Cape Home Improvements CC (as the third appellant was then

known), provided separate quotes to Pienaar in respect of various parts of the proposed building works, which included a quote for the construction and installation of a balcony. Classen informed Pienaar that he did not have any expertise or ability to design, construct and install a steel balcony as requested, and that an experienced individual should be requested to carry out part of the work. Classen's part of the work on the balcony was limited to the laying of the meranti floor on the steelwork after it had been manufactured and installed. Classen accordingly contacted Lamberts and requested him to provide a quote for the proposed work. Lamberts took the necessary measurements and provided a quote for the balcony to Classen, where after Classen provided a general quote to Pienaar which included that part of the work Classen was to perform, namely the laying of the meranti timber flooring after the balcony had been manufactured and installed.

Lamberts subsequently designed, constructed and installed the balcony off Pienaar's main lounge on the top floor. The balcony was a half-moon shaped steel-framed structure, which was attached to the wall of the house by means of coach screws. Apart from the screws, a brace, referred to as a knee brace, was attached underneath the balcony, near the apex of the half-moon, and ran at an acute angle to a point on the wall, below the level of the balcony. In the original design Lamberts had intended that the balcony would be supported on its outer edge by two steel posts or pillars, but when the time came for these to be installed Pienaar objected to them so they were not installed. Instead, they were adapted to form the knee brace. No plans or approvals were sought from or granted by the local authority, as required by sections 4 (1) and 7 of the National Building Regulations and Building Standards Act 103 of 1977 ("National Building Standards Act'). It was not disputed that the defendants were in breach of these statutory provisions and the case proceeded on the question of liability only. At the conclusion of the trial, the court found all the defendants to have been negligent. Pienaar and Classen were granted leave to appeal to the SCA; Lamberts and his corporate entity did not appeal the decision.

ISSUE: Whether negligence could be attributed to the actions of Pienaar, Classen and Lamberts, and their corporate entities.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court considered the question of Pienaar and Classen's possible negligence with respect to the plaintiffs, separately.

The court referred to the test for liability of the employer of an independent contractor set out in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991(1) SA 1 (A) ("the *Langley Fox* test"), which is as follows:

> *"[T]here are three broad questions which must be asked, viz:*
>
> 1. *would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,*
>
> 2. *would a reasonable man have taken steps to guard against the danger? If so,*
>
> 3. *were such steps duly taken in the case in question?"*

The *Langley Fox* test emphasises the point that the liability in cases where an independent contractor is employed to perform the work is personal, not vicarious, and that it is not a question of the liability of the employer being passed to the independent contractor and then to any sub-contractor, but a question of the respective individual liability of each of them. Only where the answer to the first two questions is in the affirmative, does a legal duty arise which, if not complied with, can form the basis of liability. The court added that in order to satisfy requirement (3), a party is required to take no more than reasonable steps to guard against harm to the public. Whether or not such threshold has been achieved depends upon a consideration of all the facts and circumstances of the case. The fact that the harm which was foreseeable did eventually occur would not mean that the steps taken were necessarily unreasonable.

The court of first instance found Pienaar to be negligent on two grounds:

1. *First*, he was said to be negligent in failing to comply with section 4 (1), read with section 7, of the National Building Standards Act in that he failed to submit plans in respect of the balcony, in circumstances where a reasonable person in his position would have made enquiries before commencing with the installation of the balcony; and

2. Secondly, it was found that he had caused the balcony to be constructed *without regard* to its structural integrity, by insisting that vertical supports not be used in its construction.

Any person who causes a two metre high balcony to be erected at his home would foresee the risk of harm to a person stepping onto it if it was not properly secured, and therefore would have been expected to take reasonable steps to avoid harm to such a person. The question before the court was what steps should have been taken and whether Pienaar took those steps to avoid the risk of harm to the plaintiffs in terms of requirement (3) of the *Langley Fox* test.

With respect to the first ground of negligence: Since Pienaar did not submit any plans for the balcony in question, and he did not make enquiries from his builder Classen as to whether plans were required for undertaking this type of work, the question that arose was whether this failure rendered Pienaar liable in damages arising from the collapse of the balcony. The court stated that on a proper reading of the Act there was nothing to suggest that a failure to comply with its requirement would necessarily lead to liability. On the facts of the case, and on the available expert evidence, it was not the failure to submit plans that caused the balcony to collapse, but the manner in which it was fixed to the wall.

With respect to the second ground of negligence: There was no evidence that the vertical posts would have prevented the balcony from collapsing when it pulled out of the wall from its fixings. Even if it was assumed that pillars would have helped, there was no evidence that Pienaar had reason to think that their exclusion could pose a danger. In the court's view, Pienaar took all reasonable steps to ensure that a proper balcony was designed, erected and installed. Since Pienaar did not have the expertise to do the work himself, he contracted Classen, a builder with 20 years' experience who came with the necessary credentials. Pienaar had no reason to think that Classen or his corporate entity would not perform the work in a professional manner or would fail to appoint a similarly qualified person as sub-contractor. The court found that Pienaar had complied with the third leg of the *Langley Fox* test and was therefore not liable to the plaintiffs for the damages claimed.

The court of first instance found Classen to have been negligent on several grounds, and held that:

1. He should have known that council approval was necessary before a structure such as a balcony could be installed;

2. He had a duty to investigate and advise Pienaar;

3. He should have foreseen the risk of danger in consequence of the work he employed the sub-contractor (Lamberts)to perform without council approval;

4. He was in a position to take steps to guard against the danger and he did not take the steps in question;

5. He ought to have appointed an engineer or a structural technician;

6. He agreed to change the design of the balcony and installation without vertical supports; and

7. He is liable [therefore] for the negligent conduct of his sub-contractor (Lamberts).

The court stated that when the evidence was considered as a whole, it was clear that the balcony had collapsed as a result of the negligent manner in which Lamberts had fixed it to the wall. At the last minute, he used coach screws instead of the intended rawl bolts, and positioned them incorrectly. The court asked two questions with respect to Classen's actions. The first question was whether Classen could be held vicariously liable for the negligence of Lamberts. The general rule of our law is that an employer is not responsible for the negligence or the wrongdoing of an independent contractor employed by him. In the court's view, on the facts of the case, Classen fell into this category of employer and was therefore not responsible for the negligence of Lamberts.

The second question was whether any personal fault could be attributed to Classen, since he could not escape liability if there were evidence implicating him in negligence. There was, however, no such evidence. Classen had no means of preventing the collapse of the balcony. He gave evidence that, when he arrived at the scene, the balcony had already been installed. In addition, there was evidence that the heads of the coach screws used to fix it in place were the same in appearance as those of rawl bolts, and thus he had no means of telling that inadequate fastenings were used. He also did not have any knowledge that they were wrongly positioned because they had been inserted into plaster, instead of brick. In the court's view therefore, no negligence was proved against Classen, and he should not have been found liable.

Nugent JA gave a separate judgment but concurred with the judgment of Mthiyane JA (Maya JA, Tshiqi AJA, and Wallis AJA concurring).

COURT OF FIRST INSTANCE (WESTERN CAPE HIGH COURT, CAPE TOWN previously known as CAPE OF GOOD HOPE PROVINCIAL DIVISION): The court found all the defendants to have been negligent and therefore liable to the plaintiffs, jointly and severally, the one paying the others to be absolved.

SUPREME COURT OF APPEAL: The Supreme Court of Appeal made the following order:

1. The appeals are allowed.

2. The first and second respondents (Brown and Sloep) are ordered to pay the appellants' (Pienaar and Classen) costs.

3. The order of the court of first instance is set aside and replaced with the following:

    3.1. The first and second plaintiffs' claims against the first, second and third defendants are dismissed.

    3.2. The first and second plaintiffs are ordered to pay the costs of the first, second and third defendants, jointly and severally, the one paying the other to be absolved.

    3.3. The fourth and fifth defendants are found to be liable jointly and severally, the one paying the other to be absolved for whatever damages the first and second plaintiffs might prove for injuries sustained by them as a result of the collapse of the balcony on 25 April 2004.

    3.4. The fourth and fifth defendants are ordered to pay the plaintiffs' costs of suit, jointly and severally, the one paying the other to be absolved, including the qualifying expenses of the plaintiffs' expert witness, Mr U Rivera, and the costs of the application for absolution from the instance.

Implication for CIDB prescripts: The *Pienaar* case relates to and has impact on the following CIDB prescripts:

1. Construction Industry Development Board Act 38 of 2000 ("the Act")

1.1. The Preamble to the Act provides that "the construction industry impacts directly on communities and the public at large and its improved efficiency and effectiveness will enhance quality, productivity, health, safety, environmental outcomes and value for money to South African society". The drafters of the Act therefore acknowledged the fact that the conduct and performance of participants in the construction industry has a direct impact on the lives of people. This places an onus on participants to behave honestly and to perform their duties and fulfil their obligations with integrity, and in so doing improve their efficiency and effectiveness.

1.2. Section 4 (a) (iii) of the Act provides that "the objects of the CIDB are to promote the contribution of the construction industry in meeting national construction demand and in advancing improved value to clients". Thus, facilitating the rendering of a quality service by contractors, free from defects and completed on time, falls within the mandate of the CIDB.

1.3. There are various references in section 4 of the Act to the objects of the CIDB as providing strategic leadership to the construction industry, and determining, establishing and promoting best practice for the improved performance of all participants in the construction delivery process, as well as the sustainable growth and stability of the construction industry. Since it is clear that the performance of individual participants impacts the construction industry as a whole, the development and implementation of programmes and measures aimed at improving their performance and informing them of the potential consequences of rendering a poor service falls within the mandate of the CIDB.

1.4. This is further substantiated by reference to section 5 of the Act regarding the CIDB's powers, functions and duties, particularly regarding the provision of strategic leadership (section 5 (1)), and the promotion of best practice (section 5 (2)).

1.5. Section 5 (2) (d) provides that "to promote best practice, the CIDB must establish and maintain a national register of contractors as contemplated in Chapter 3, which provides for categories of contractors in a manner which facilitates public

sector procurement". Chapter 3 establishes "a public sector register of contractors that will [*inter alia]* assess the performance of contractors in the execution of contracts and thus provide a performance record for contractors; [and] regulate the behaviour and promote minimum standards and best practice of contractors". If a contractor renders a poor service, he or she runs the risk of defects in the project causing damage to persons and/or property, and as a result, his or her performance record in the national register may be negatively affected.

1. The Code of Conduct for All Parties Engaged in Construction Procurement, 2003

1.1. The Preamble to the Code of Conduct provides that 'the conduct of parties throughout the supply chain impacts on the ability of the construction industry to deliver value and to perform efficiently and competitively... It impacts directly on project costs, timely completion and delivered quality." As we have discussed above, if a contractor renders a poor service, he or she runs the risk of defects in the project causing damage to persons and/or property. In addition, where an employer expects a project to be completed on an inadequate budget the contractor, in his or her need for work, may agree to perform such work knowing that shortcuts may be necessary in order to complete the project. This practice is unacceptable and can only lead to negative consequences, whether in terms of delivered quality, or health and safety, including damage to persons and/or property. This in turn has implications not only for individuals and communities, but also for the construction industry at large.

1.2. The Preamble to the Code of Conduct further provides that the development of the construction industry is promoted when participant and stakeholder organisations "ensure that they perform efficiently, responsibly, accountably, transparently, and with probity", "avoid the use of harmful products and processes", and "recognise the inherently dangerous nature of the industry and give priority to occupational health and the safety of all employees and the public". The Code of Conduct therefore not only recognises the importance of responsible behaviour and the adoption of safe working practices, but also deems as unacceptable, conduct which does not meet these standards.

1.3. The Code of Conduct provides that the parties in any public or private construction-related procurement should in their dealings with each other "behave equitably, honestly and transparently", "discharge duties and obligations timeously and with integrity" and "comply with all applicable legislation and associated regulations". Thus, it is clear that the Code of Conduct regards such conduct as essential to the health of the construction industry at large. It follows therefore that contractors who do not concern themselves with delivering a quality service or who take shortcuts for financial or other reasons, not only risk damage to persons and/or property, and possibly even legal proceedings as a result, but also face sanction by the CIDB for a breach of the Code of Conduct, as provided for in the Code of Conduct itself, the Act and the Construction Industry Development Regulations, 2004 issued in terms of the Act.