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Construction Industry Development Board

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ("CIDB")

CASE SUMMARIES AND ANALYSES

APRIL – JUNE 2011

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CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: APRIL 2011

PREFIX PROPERTIES (PTY) LTD AND OTHERS v GOLDEN EMPIRE TRADING 49 CC AND OTHERS

KwaZulu-Natal High Court, Pietermaritzburg (10035/2009) 2011 (2) SA 334 (decided: 6 December 2010)

FACTS: This case concerns the cancellation of a contract due to breach and the rule that, upon such cancellation, each party is obliged to restore to the other what he or she has received under the contract (*restitutio in integrum*).

Prefix Properties (Pty) Ltd, Michael David Uys and Jane Diane Dellar (the "first", "second" and "third applicants", respectively) and Golden Empire Trading 49 CC, Fullimput 1484 (Pty) Ltd and Mary Esther Spies (the "first", "second" and "third respondents", respectively) concluded two interrelated agreements on 10 April 2007, both of which were to take effect from 1 April 2007. The first agreement, concluded between the first applicant and the first respondent, involved the sale of a portion of the property on which the Old Halliwell Hotel was situated ("the property agreement"). The second agreement was concluded between the second and third applicants, on the one hand, and the third respondent, on the other, in which the former sold to the latter 100% of the members' interest and loan account in the second respondent, which was, at the time, a close corporation ("the CC agreement").

The first respondent took occupation of the property on or about 1 April 2007. Since 1 April, the second respondent, with the third respondent at its helm, conducted the business of the Old Halliwell Hotel.

In terms of the property agreement, a deposit was required to be paid to the first applicant in the sum of R2.5 million on or before 15 July 2007. This was not done. The first respondent undertook to pay occupational rental of R54 169.82 monthly in arrears from the date of occupation. The property agreement provided that, once the full deposit was lodged with the conveyancer, any occupational rental paid would thereafter reduce the amount owed. The first respondent made payments totalling R1.5 million to the first applicant. The first applicant contended that these payments, many of which were in the precise sum of the amount agreed upon as occupational rental, formed occupational rental. The first respondent

contended that it was the intention of the first applicant and the first respondent that these would be regarded as payments in reduction of the capital sum.

The applicants launched an application in the KwaZulu-Natal High Court, Pietermaritzburg in order to be placed back in possession of the property and the shareholding and loan account in the second respondent, respectively, on the basis that the property agreement was null and void *ab initio*, that the CC agreement had been cancelled, and that ownership in both was reserved.

The respondents set up the following defences, namely:

1. That other agreements were concluded between the parties relating to the same subject-matter, which gave the respondents rights of possession.

2. That, in relation to the property agreement, the first respondent had made improvements and accordingly had a lien entitling it to resist the application for eviction from the property.

3. That, in relation to the claim to be restored to possession of the subject-matter of both agreements, the applicants were obliged to tender repayment to the respondents of the amounts paid in relation to the agreements and, without such tender, the relief could not be sought.

ISSUES: Whether or not the respondents had rights of possession to the property; whether or not the first respondent was entitled to an improvement lien; and whether or not the applicants were obliged to tender repayment to the respondents of the amounts paid by them in relation to the agreements.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first addressed the question of whether or not other agreements were concluded between the parties relating to the same subject-matter, which gave the respondents rights of possession to the property.

The first two of the agreements set up by the respondents were concluded on 27 October 2006. In terms of the first agreement, the first applicant sold to the first respondent the entire property on which the Old Halliwell Hotel was situated. In terms of the second agreement, the second respondent sold to the first respondent the business of the Old Halliwell Hotel owned by it. The third agreement, dated 18 March 2008, provided that the first applicant sold to the third

respondent, acting on behalf of a company still to be formed, the portion of the property dealt with in the property agreement.

Since each of the first two agreements was subject to a suspensive condition and there had been no averment in the application papers that the respective suspensive conditions had been fulfilled, the court found that no case was made out on the papers, that the second respondent had given possession of the business owned by it to the first respondent. The court therefore accepted that the second respondent had possession of the business the entire time.

Regarding the third agreement, the court stated that no averment had been made that the company, on whose behalf the third respondent concluded the agreement, had been formed. Furthermore, the papers did not aver that the third respondent was in occupation of the property or that she was given occupation pursuant to the agreement. It was accepted, throughout, that the first respondent was given occupation as a result of the property agreement. Therefore the court found that the respondents did not set out a proper case for the contention that one of the respondents retained possession of the property.

Regarding the question of a lien, the assertion was made by the respondents that the first respondent had a lien "in respect of improvements effected on the Old Halliwell property", in that the first respondent had "upgraded rooms to attain a four star status" and "built a conference centre". The court stated that an improvement lien is founded where a possessor or occupier who meets certain criteria has incurred expenses which were necessary for the salvation or useful for the improvements of the thing. The amount secured by the lien is that sum by which the overall value of the property has been increased by the improvements. The court found that insufficient averments necessary to establish an improvement lien were contained in the affidavit deposed to on behalf of the first respondent. There was no averment that the expenses incurred were necessary or useful neither were there sufficient averments or evidence as to the amount for which the lien was to serve as security. In the court's view, the respondents failed to set out a basis for the existence or extent of the claimed lien on the papers before the court.

Regarding the defence, that the applicants had failed to tender restitution of the respondents' performance, the position relating to the property agreement and the CC agreement differed. In dealing with the property agreement, the court found that no case had been made out by the respondents that the payments made were in fact payments towards the capital sum due, and were not payments of occupational rental. Accordingly, on the papers, no tender for re-

payment was necessary, since, in the absence of any averments and evidence to the contrary, the agreement provided that these payments related to the first respondent's occupation of the property. There was therefore no basis made out on the papers which would require the first applicant to tender restitution of the performance of the first respondent under the property agreement.

In dealing with the CC agreement, the position was more complex. It was understood between the parties that, of the R1 million purchase price, the third respondent had paid to the second and third applicants the amount of R550 000.00. In their founding papers the applicants claimed that they were entitled to retain this amount, pending the outcome of a claim for damages to be instituted by them against the third respondent, arising from her breach of the contract, which, they claimed caused the severe devaluation of the shareholding whilst in her possession. It was also understood that, contrary to the position on 1 April 2007, the second respondent had substantial liabilities and that its business had been run down to the extent that it was unable to pay its debts. The applicants argued that, since the third respondent was unable to pay her debts, if they repaid the R550 000 that had been paid towards the purchase price, and later succeeded in the intended action for damages, she would be unable to satisfy their claim. Therefore it would be equitable for them to retain the amounts paid towards the purchase price, pending the outcome of an action for damages. The third respondent admitted having personal debts but stated that she intended to honour her obligations. The court found that it was likely that, if the third respondent had been in a position to pay the purchase price under the CC agreement, or discharge her other indebtedness, she would have done so but it seemed unlikely that, if restitution of the purchase price was made to the third respondent, she would be able in the future to satisfy any judgment against her for damages.

The respondents' counsel argued against giving possession of the shareholding in the second respondent to the second and third applicants and contended that it was impermissible to set off the part payment of the purchase price against their unliquidated claim for damages. The court stated that where a contract is cancelled as a result of breach and where the innocent party claims return of their performance under the agreement, the general position is that a tender to return the performance of the guilty party is necessary. The court also referred to *Fernstein v Niggli & Another* 1981 (2) SA 684 (A) at 700F – G where it was stated that "[t]he object of the rule is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations." The court in that case held that, since the rule is founded on equity, it can be departed from where considerations of equity and justice necessitate such a departure. Thus the court concluded that a tender of

restitution is, therefore, not invariably required of an innocent party which has cancelled as a result of a breach by another party.

This principle was stated as follows in *Mackay v Fey NO & Another* 2006 (3) SA 182 (SCA) para [10], p. 188D-F:

> "It has frequently been said that the action for *restitutio in integrum* is a separate and distinct remedy and that it is not an enrichment action. See e.g *Davidson v Bonafede* 1981 (2) SA 501 (C) at 510A-E, where Marais AJ cites with approval De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 2 ed at 144. However, under the influence of English law, which recognises *restitutio in integrum* as based on unjust enrichment, there has been over the years a general relaxation of the rule that a party seeking restitution must first be willing and able to restore what he or she received. See Daniel Visser "Unjustified Enrichment" in Zimmerman and Visser (eds) *Southern Cross: Civil law and Common law in SA* at 536-7. Whether the need to make restitution is excused, either wholly or partially, will now depend upon considerations of equity and justice and the circumstances of each case; the occasions on which it will do so are not limited to a specified and limited number of exceptions."

The court was of the view that there was sufficient evidence to show that it would be just and equitable, pending the outcome of an action for damages, to excuse the second and third applicants from tendering restitution of the third respondent's performance under the CC agreement prior to the restoration of the shareholding and loan account in the second respondent.

KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG: The court ordered as follows:

1. The first, second and third applicants are authorised to enter the premises of the Old Halliwell Hotel and to do all such things as may be necessary to preserve the said premises and property.

2. The second and third applicants are authorised to carry on the business of the second respondent on the premises of the Old Halliwell Hotel, and are directed to maintain all such accounting and other records as may be necessary to accurately reflect such trading activities, pending the outcome of the action mentioned in paragraph 8 below.

3. The first and second respondents are directed to vacate the Old Halliwell Hotel premises within 10 days of the grant of this order.

4. It is declared that the written agreement of sale concluded between the first applicant and the first respondent on 10 April 2007 for the purchase of the immovable property described as Portion A (of 57) of the Farm Halliwell No 924, Registration Division FT, Province of KwaZulu-Natal, in extent approximately 11.51 hectares, is null and void *ab initio* and of no force and effect.

5. It is declared that the agreement of sale concluded on 10 April 2007 between the second and third applicants, on the one hand, and the third respondent, on the other hand, in terms of which the second and third applicants sold their members' interest and loan accounts, in the predecessor in title to the second respondent, to the third respondent, is validly cancelled and of no further force and effect.

6. The first respondent is directed to restore possession of the Old Halliwell Hotel property to the first applicant within 10 days of the date of this order.

7. The third respondent is directed to sign all such documents as may be necessary to effect transfer of the entire shareholding in the second respondent to the second and third applicants and to further effect cession of the third respondent's loan account, if any, in the second respondent to the second and third applicants. Such documents the third respondent is directed to sign within 10 days of the date of this order. Failing compliance with the said order by the third respondent, the sheriff of this court or his deputy is hereby authorised to sign the necessary documents on behalf of the third respondent.

8. It is declared that the second and third applicants are entitled to retain all payments made to them by the third respondent in discharge of her obligations in respect of the agreement of sale, pending the final determination of an action to be instituted by the second and third applicants against the third respondent for such damages that they may have suffered by virtue of the third respondent's breach of the said agreement of sale.

9. In the event of the second and third applicants failing to institute the action referred to in paragraph 8 above within 20 days from the date of this order, the second and third applicants are directed to repay to the third respondent the amounts paid by her. In

that event, and in the further event that they fail to make such repayment within 30 days from the date of this order, they are directed to retransfer to the third respondent the entire shareholding and loan account in the second respondent.

10. The first and third respondents are hereby directed to pay the costs of this application jointly and severally, the one paying the other to be absolved.

***ANALYSIS*:**

This case is relevant to the construction industry at large, in so far as it concerns the cancellation of a contract due to breach and the rule that, upon such cancellation, each party is obliged to restore to the other what he or she has received under the contract, *restitutio in integrum* ("*restitutio* rule"). It is particularly important for participants in the construction industry such as employers and contractors, who may enter into contracts with a number of different parties for various building works related matters.

It is clear from the court's judgment that not only is the *restitutio* rule based on equity, but it may also be departed from in the interests of equity. Thus, in the present case the seller was excused from tendering restitution of the purchase price, pending the institution by him of a claim for damages against the purchaser, because it seemed unlikely that the purchaser would in fact be able to satisfy such a claim.

Since there may be instances where a contractor is in breach of a contract or is unable to perform in terms of a contract, whether for financial or other reasons, the implications of the *restitutio* rule, as well as the fact that it may be departed from, would consequently be of direct relevance.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: APRIL 2011

WESBANK, A DIVISION OF FIRSTRAND LIMITED v PAPIER (NATIONAL CREDIT REGULATOR AS AMICUS CURIAE)

Western Cape High Court, Cape Town (14256/10) 2011 (2) SA 395 (decided: 1 February 2011)

FACTS: This case concerns the question of whether a credit provider is able to terminate a debt review process in terms of section 86 (10) of the National Credit Act 34 of 2005 ("the NCA") after an application has been lodged with a Magistrates' Court for an order restructuring a consumer's debts as envisaged in section 86 (7) (c) of the NCA, but before an order has been made in terms of section 87 (1).

Mr Deon Winston Papier ("Papier" or "the consumer") and Wesbank, a division of FirstRand Ltd ("Wesbank" or "the credit provider") entered into a credit agreement on 27 March 2007 for the lease of a 2003 Mazda 6 motor vehicle. In terms of the credit agreement, Papier was obliged to pay to Wesbank an "initial rental" of R13 157.89, followed by 53 consecutive rentals of R2 772.90 each, payable on the first day of each month, with the final instalment payable on 26 September 2011.

By September 2009, however, Papier encountered financial difficulties, and on 29 September 2009 he applied to a debt counsellor in Vredenburg for debt review in terms of section 86 (1) of the NCA. On 2 October 2009 the debt counsellor sent notices in terms of section 86 (4) (b) (i) of the NCA to all Papier's creditors, informing them of his application for debt review. On 30 October 2009 the debt counsellor forwarded another notice to all Papier's creditors informing them that his application for debt review was successful; that he was over-indebted as contemplated by section 79 (1) of the NCA; and that "the debt obligations were in the process of being restructured". The latter notice was accompanied by an "installation offer" proposing a re-arrangement of Papier's debts. The proposal entailed that an amount of R5 300.00 per month would be distributed on a *pro rata* basis among Papier's creditors. This meant that Wesbank would receive monthly instalments of R1 762.44 instead of R2 772.90 per month, as originally agreed.

Wesbank did not make a counter-proposal to the debt counsellor, nor did it respond at all to the debt counsellor's notices. Papier then proceeded to make monthly payments to the debt counsellor, which payments were distributed among his creditors, including Wesbank, in accordance with the earlier proposal.

On 12 March 2010 the debt counsellor launched an application in the Magistrates' Court of Vredenburg, citing Papier and his wife, together with the various creditors (including Wesbank) as respondents. This application was for the re-arrangement of Papier's debts in terms of section 86 (7) (c) (ii) of the NCA. The respondents were informed that the application would be made to the court on 11 June 2010 for, amongst others, an order that Papier and his wife were over-indebted, as set out in section 79 of the NCA; an order that Papier's debt obligations be restructured in accordance with the proposal; and an order directing credit providers who had given notice to terminate the debt review process to resume the debt review in terms of section 86 (11) of the NCA.

On 4 June 2010, Wesbank's attorneys notified Papier by registered post that it had terminated "the pending debt review with regard to the above agreement as contemplated in s 86 (10) of the Act". They also pointed out that Papier was at that time in arrears in the amount of R40 982.78 in respect of the credit agreement, for more than 20 business days. They accordingly demanded immediate payment of the arrears.

On 29 June 2010 Wesbank issued summons to enforce the credit agreement. It alleged that the debt review process had been terminated by the delivery of its section 86 (10) notice, more than 60 business days after Papier's application for debt review and that Papier had been in default of the credit agreement on the date the notice was delivered.

Papier gave notice of his intention to oppose the claim, which prompted Wesbank to apply for summary judgment. In his opposing affidavit, Papier pointed out that his application for debt re-arrangement had been issued on 12 March 2010 and set down for hearing in the Magistrates' Court on 11 June 2010, which was prior to the issue of summons by Wesbank.

ISSUE: Whether Wesbank was able to terminate the debt review process in terms of section 86 (10) of the NCA after the application had been lodged with the Magistrates' Court for an order restructuring Papier's debts as envisaged in section 86 (7) (c) of the NCA, but before such order had been made in terms of section 87 (1).

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court considered the provisions of section 86 of the NCA.

Section 86 (10) provides as follows:

> "If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement 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."

This section contains no limitation on a creditor's right to give notice of termination, apart from two jurisdictional requirements, namely (a) the consumer must be in default under the credit agreement; and (b) at least 60 business days must have elapsed after the date on which the consumer applied for debt review. In this case, both these requirements had been met: Papier was already in default when he applied for debt review on 29 September 2009. On 4 June 2010, more than 60 business days later, Wesbank gave the required notice in terms of section 86 (10). Furthermore, more than 10 days had elapsed after Wesbank's notice, before summons was issued, as required by section 130 (1). Relying on a literal interpretation of section 86 (10), Wesbank submitted that it was entitled to enforce the credit agreement by claiming summary judgment and referred *inter alia* to the judgment in *FirstRand Bank Ltd v Evans* [2010] ZAECPEHC 55 where the following was stated in paragraph 20:

> "the credit provider's rights to give notice in terms of s 86(10) and to legitimately terminate the debt review process continue until the magistrate's court has made an order as envisaged in s 87."

The court, however, agreed with the approach followed in another line of cases regarding the interpretation of section 86 (10), where it was held that it was not competent for a credit provider to give notice in terms of section 86 (10) of the NCA, where the debt counsellor had already referred the debt review to the Magistrates' Court.

The court stated that the provisions of section 86 (10) appear, on the face of it, to be clear and unambiguous. Having regard to the context in which they appeared, it was clear that a literal interpretation of the provisions, read in isolation, could easily lead to the wrong answer. Those provisions deal with one aspect of a process described in the NCA as "Application for debt review". The process commences with an application by the consumer "in the prescribed manner and form" to a debt counsellor to have the consumer declared over-indebted. The debt counsellor is then required to notify all credit providers listed in the application, as well as every registered credit bureau of the consumer's application for debt review. The consumer and each credit provider must thereafter "participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement". The debt counsellor must determine within 30 days whether the consumer appears to be over-indebted. If the debt counsellor finds that the consumer is not over-indebted, then the counsellor must provide the consumer with a "letter of rejection" containing the prescribed information. Among other things, the consumer must be advised of his/her right "to approach the court ... within 20 business days" for an order that he or she be declared over-indebted.

However, if the debt counsellor concludes that the consumer is indeed over-indebted, the procedure in section 86 (7) (c) must be followed. This means that the debt counsellor "may issue a proposal" recommending that the Magistrates' Court make an order that one or more of the consumer's debts be "re-arranged" in one or more of a number of specified ways. Thus, section 86 (7) (c) sets in motion a "debt re-arrangement by the court", as opposed to a "voluntary re-arrangement" in terms of section 86 (8) (a).

The court concluded that the period of 60 business days referred to in section 86 (10) of the NCA was introduced with the abovementioned timeframe in mind so as to allow the consumer and/or debt counsellor sufficient time to "approach the court" for the necessary relief in terms of section 87. Given the fact that a consumer has a period of 50 business days, calculated from the date of his application to the debt counsellor, within which to approach the Magistrates' Court for an order in terms of section 87, it could never have been contemplated that the rest of the process – including a hearing before the Magistrate and a re-arrangement order in terms of section 87 – should all be finalised within the remaining 10 business days.

The National Credit Regulator ("the NCR") placed evidence before the court, which indicated how some credit providers circumvented and undermined the statutory process of debt review by following a literal interpretation of the provisions of the NCA. On this interpretation, some credit providers may, and do, put an end to the debt review process even where the consumer

and the debt counsellor have taken all necessary steps to invoke and implement the relevant provisions of the NCA.

The court agreed with the NCR that such conduct on the part of credit providers was inconsistent with the NCA and was a strong indicator that a literal interpretation of section 86 (10) of the NCA should not be followed. The court stated that it would be counter-productive and contrary to the purpose of the NCA to allow a credit provider unilaterally to terminate the consumer's protection at the exact moment when he/she may need it the most.

The court was satisfied that by applying a purposive approach to the relevant provisions, and having due regard to the context in which they appear, on a proper interpretation of section 86 (10) of the NCA, the consumer is protected against enforcement proceedings by the credit provider, not only once a re-arrangement order has been made by a Magistrate in terms of section 87, but also while proceedings for such an order are pending.

Wesbank intended to terminate the process of debt review a week before the application for an order in terms of section 87 was due to be heard in the Vredenburg Magistrates' Court, and such termination was therefore invalid.

WESTERN CAPE HIGH COURT, CAPE TOWN: The court ordered as follows:

1. The application for summary judgment is stayed, pending a final determination of the proceedings referred to in paragraph (2) below.

2. It is ordered that the debt review that was pending in the Magistrates' Court of Vredenburg is to resume.

3. The Clerk of the Court is directed to set the above application down for hearing at the earliest available date, after due notice to the parties.

4. The costs of the application for summary judgment shall stand over for later determination.

ANALYSIS:

This case is relevant to the construction industry at large, in so far as it considers the question of whether a credit provider is able to terminate a debt review process in terms of section 86 (10) of the National Credit Act 34 of 2005 ("the NCA") after an application has been lodged with a

magistrates' court for an order restructuring a consumer's debts, but before such an order has been made.

This is particularly important for participants in the construction industry such as contractors, who may conclude credit agreements to finance the purchase of, for example, raw materials and resources, and even property, and who may be at risk of failing to pay any of the monthly instalments on the due date, in which case he or she risks the attachment and removal of the goods or property concerned or other property, which may result in a cascade of consequences for all parties concerned. Defaulting contractors also risk their ability to access finance or credit at a future date.

It is clear from the court's judgment that although a credit provider would, on a literal interpretation of section 86 of the NCA, be entitled to terminate debt-review proceedings and enforce the credit agreement when an application for the rearrangement of the consumer's obligations has been lodged with a magistrates' court (provided the specified 60 days have elapsed since the application for debt review), this would undermine the entire debt review process as envisaged by the NCA. Thus a more appropriate approach would be to adopt a purposive interpretation so as to protect the consumer against enforcement while proceedings for the rearrangement of his or her obligations are pending, so that credit providers are barred from giving notice of termination of the debt review process during this period.

Since there may be instances where a contractor defaults under a credit agreement, and subsequently applies for debt review, the circumstances under which a credit provider may terminate the debt review process and enforce the debt against him or her would be of direct relevance.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: APRIL 2011

MSC DEPOTS (PTY) LTD v WK CONSTRUCTION (PTY) LTD AND OTHERS

Eastern Cape High Court, Port Elizabeth (734/07) 2011 (2) SA 417 (decided: 4 February 2010)

FACTS: This case concerns an application for absolution from the instance by a contractor whom, it was alleged, had breached a standard building agreement ("JBCC 2000" or "the agreement").

MSC Depots (Pty) Ltd, a shipping company ("MSC"), concluded an agreement with Volkswagen South Africa for the delivery of motor vehicle parts to its factory in Uitenhage, and required a container depot in order to fulfil its contractual obligations. The nearby Nelson Mandela Logistics Park in Despatch was the ideal site for the construction of a container depot where the full and empty containers could be stored.

P.D. Naidoo & Associates, a firm of consulting engineers ("the second defendant") and a joint venture comprising the second defendant and a firm of quantity surveyors, Bham Tayob Khan Matunda ("BTKM") ("the third defendant"), were engaged by MSC to oversee the project. Plans and a bill of quantities were prepared, and the contract was awarded to W K Construction (Pty) Ltd ("the first defendant").

Upon completion of the container depot, and prior to its full operational capacity being reached, premature surface deformation of the surface paving occurred. Investigations were conducted and reports detailing the probable cause of the pavement failure were prepared by the second defendant. In addition, the first defendant, of its own accord and expense, commissioned a firm of engineers, Ninham Shand, to investigate and report. The first defendant was thereafter instructed by the second defendant to effect certain remedial work, which was commenced with, but shortly thereafter was instructed by them to stop. MSC subsequently dispensed with the services of the second defendant and engaged another firm of consulting engineers, Vawda Thornton, to examine the cause of the pavement failure and to render the container depot functional.

MSC instituted a claim for damages against the first, second and third defendants. During the trial, however, the matter between MSC and the second defendant, as well as MSC and the

third defendant, was settled, and therefore the case proceeded against the first defendant only.

In its amended particulars of claim, MSC alleged that it had concluded a JBCC 2000 with the first defendant. MSC further alleged that the first defendant, in its capacity as the contractor, was to carry out certain works comprising the bulk earthworks, paving, storm water, water and sewerage reticulation and mast lighting at the container depot. The first defendant was to perform its contractual obligations in conformity with the bill of quantities and contract drawings, with "due skill, diligence, regularity and expedition to bring the works to, *inter alia*, final completion" in terms of clause 15.3 of the JBCC 2000. MSC alleged that the first defendant had breached the agreement in the following respects:

> "...
>
> (b) The first defendant laid the paving blocks unevenly over the entire site with varying joint widths;
>
> (c) The paving blocks are creeping and opening and the jointing sand between the blocks is being washed out by storm water;
>
> (d) As a result of the aforegoing:
>
> (i) the storm water will reach the bedding sand on which the paving blocks are laid;
>
> (ii) once saturated the bedding sand will allow further creep of the paving blocks which will ultimately lead to the failure of the underlying works;
>
> (e) There is a joint in the paving where the herring bone patterns meet. This joint is failing due to lack of interlock which will ultimately lead to the failure of the underlying layers;
>
> (f) There are two service manholes in the paved surface each of which is surrounded by a concrete apron. In each case this apron, together with the surrounding block paving, has failed as a result of a lack of compaction around the manholes;

(g) Large settlements and deflections have occurred along the construction stake lines due to incorrect construction processes and compaction;

(h) The in-situ material is poorly compacted thus impacting on the bearing capacity of the paving."

At the close of MSC's case, the first defendant applied to the court for absolution from the instance.

ISSUES: Whether MSC had adduced sufficient evidence in support of its allegation that the defects in the building works were caused by the first defendant; and whether or not the defects in fact, and in law, constituted a breach of clause 15.3 of the JBCC 2000.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first set out the terms of clause 15.3 of the agreement, which provided as follows:

"15.3 On being given possession of the site the contractor shall commence works within the period stated in the schedule and proceed with due skill, diligence, regularity and expedition and bring the works to ...

15.3.1 Practical completion in terms of 24.0

15.3.2 Works completion in terms of 25.0

15.3.3 Final completion in terms of 26.0"

The court thereafter addressed the question of whether or not MSC had adduced sufficient evidence in support of its allegation that the defects in the building works were caused by the first defendant. MSC admitted in its particulars of claim that "the first defendant constructed the project according to the second defendant's design". The first defendant argued that the allegations relied upon in the particulars of claim, that the first defendant did not perform the work entrusted to it properly, were not based on any evidence that the first defendant did not execute the work strictly in accordance with the engineer's design or instructions issued to it from time to time. The first defendant further argued that the evidence relied upon, to the effect that the work was not executed properly, was based upon inferences drawn from various reports and on-site observations, and that there was insufficient evidence to show that the first defendant did not perform the work properly. In the court's view, the first defendant's argument could not be refuted. There was furthermore no evidence that, when the first defendant sought a certificate of practical completion of the works, in terms of clause 24 of the

JBCC 2000, the works had not been performed with due skill, diligence, regularity and expedition.

The court then proceeded to address the question of whether or not the alleged defects constituted a breach of clause 15.3 of the JBCC 2000. MSC argued that clause 15.3 should be read on its own and not in conjunction with its subparagraphs and clause 17, and in doing so relied on clause 36.1 which provided as follows:

> "36.1 The employer may cancel this agreement where the contractor:
>
> 36.1.1 Fails to comply in terms of 15.1 or 15.3
>
> 36.1.2 Refuses to comply with a contract instruction subject to 17.2"

In the court's view clause 36.1 could not be read in isolation, but must be considered in conjunction with clause 36.2 which provides:

> "36.2 Where the employer considers cancelling this agreement, the principal agent shall be instructed to notify the contractor of such default in terms of 36.1. The issuing of such a notice shall be without prejudice to any rights that the employer may have."

The court stated that the interpretative method suggested by MSC, that clause 15.3 must be read in isolation, could not be correct. On that interpretation the contractor could be precluded from remedying defects, as instructed by the principal agent, and still find itself in breach of clause 15.3, and in addition be confronted with cancellation of the agreement by the employer.

According to the court, MSC had failed to adduce sufficient evidence that the first defendant performed the work entrusted to it defectively, and furthermore failed to show that the first defendant had breached clause 15.3 of the JBCC 2000.

The court then dealt with the repudiation of the agreement by the first defendant. In this regard MSC alleged that:

(a) The letter of demand in which cancellation of the agreement was communicated was incorrectly addressed;

(b) The alleged breaches, which the first defendant relied upon for cancellation, were either conceded within ten days or were without substance; and

(c) The first defendant was precluded from terminating the agreement, as it was itself in breach of a material term of the agreement.

The court held that these grounds were without substance. Clause 38.2 of the JBCC 2000 provided that "where the contractor considers cancelling the agreement notice shall be given to the employer and the principal agent of the defendant in terms of 38.1 ..." The clause merely required that notice of the intended cancellation be given to the employer. The fact that the letter was addressed to the second defendant and copied to MSC was not a genuine complaint.

The breaches relied upon by the first defendant, for cancellation of the agreement, are set out in a letter dated 14 August 2006, and stated as follows –

> "1. The Principal Agent has failed to issue a Payment Certificate in terms of Clauses 31.0 and/or 34.0 and/or
>
> 2. The Principal Agent has failed to issue a Statement to the Contractor in terms of Clauses 31.13.1 and/or
>
> 3. The Employer has failed to pay the amount certified in terms of Clauses 31.9 and/or 34.1
>
> 4. The Employer is preventing the Principal Agent from exercising his independent judgment regarding the performance of his duty and the Contractor is being prejudiced by such action."

In terms of clause 38.1 a contractor may cancel the agreement where the principal agent fails to issue any payment certificates in terms of clauses 31.0 or 34.0, or fails to issue a statement to the contractor in terms of clause 31.13.1; the employer fails to pay the amount certified in terms of clauses 31.9 or 34.10, or prevents the principal agent from exercising his independent judgment regarding the performance of his duty, and the contractor being prejudiced by such action. Any one breach would entitle the contractor to cancel the agreement, and absolution would have to be granted if MSC failed to establish that each of the four grounds was not sound.

The first defendant's cancellation was based on the second defendant's failure to issue interim payment certificates. MSC alleged that had the second defendant in fact issued such interim payment certificates, the amount reflected as being due for payment, would not have been paid, as the first defendant was not entitled to any further payment. The court, however, pointed out that clause 31.1 expressly provided that "the payment certificate may be for a nil or negative amount ...". The failure by the second defendant to issue the interim payment certificates amounted to a breach of clause 31 of the agreement, which entitled the first defendant to cancel the agreement.

EASTERN CAPE HIGH COURT, PORT ELIZABETH: The court held that the first defendant was entitled to an order of absolution from the instance, together with costs, such costs to include the costs of two counsel, as well as the qualifying fees of the first defendant's expert witnesses in respect of whom expert summaries were filed.

***ANALYSIS*:**

This case is relevant to the construction industry at large, in so far as it deals with a claim for damages by an employer against a contractor for defective construction works and an alleged breach of clause 15.3 of a standard building agreement prepared by the Joint Building Contracts Committee Incorporated, otherwise known as the JBCC series 2000 ("the JBCC 2000" or "the agreement").

In this instance, the court considered the evidence and came to the conclusion that the first defendant was not responsible for the decisions which led to the defects. The decision of the court affirms that risk is distributed between the parties in a construction scenario and that all parties to a contract must abide by the provisions of the contract in order to rely on it. This is significant for the construction industry, which is by nature a specialised and risk-associated industry.

It is important that all participants in the industry such as employers, contractors, and subcontractors behave responsibly and perform efficiently in completing a project. This enhances productivity, and quality workmanship contributes to higher health and safety standards, which impact directly on individuals, communities and society at large. Moreover, a contractor's work performance has direct bearing on his or her individual performance record, and specifically the National Register of Contractors, which affects his or her ability to access opportunity, finance and credit, and which in turn has implications for the construction industry as a whole.

Contractors who render a poor or defective service risk responsibility for the loss or damage suffered by the client as a result of this negligent conduct, but contractors do not bear responsibility for defects that result from bad planning on the part of engineers or architects.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: APRIL 2011

ALLPASS v MOOIKLOOF ESTATES (PTY) LTD t/a MOOIKLOOF EQUESTRIAN CENTRE

Labour Court of South Africa, Johannesburg (JS178/09) 2011 (2) SA 638 (decided: 16 February 2011)

FACTS: This case concerns an automatically unfair dismissal under section 187 (1) (f) of the Labour Relations Act 66 of 1995 ("the LRA"), on the grounds of an employee's HIV status.

On 28 October 2008, Gary Shane Allpass ("Allpass" or "the applicant") was appointed by Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre ("Mooikloof" or "the respondent") as Stable Yard Manager and horse riding instructor. Allpass' letter of appointment confirmed his appointment, commencing on 1 November 2008, "on a temporary basis for a period of three months, where after the position will (sic) reviewed". The terms of his employment included remuneration at R12 000.00 per month, as well as accommodation on Mooikloof's premises. A detailed job description defined his duties as, *inter alia*:

- managing and overseeing the Mooikloof Equestrian Centre, in close cooperation with Aletta Herbst ("Herbst");
- horse grooming, care and supervision (24 hours);
- crisis management of horses and clients;
- assisting the veterinarian; and
- reporting to Dawie Malan ("Malan") on all aspects.

Mooikloof announced Allpass' appointment, in a notice dated 3 November 2008, to all stablers, pupils and riders, and listed his 27 years' experience in horse riding, instructing, stable-yard management and judging of dressage competitions. The notice also referred to his impressive curriculum vitae and achievements.

In his pre-employment interviews Allpass was questioned about, *inter alia*, his health, whether he had any significant debt, and his marital status. Allpass stated that he was in good health,

that he had a bond over an immovable property, and that he was married. As regards his religious affiliation, he stated that he was agnostic. In reply to a question concerning his sexual orientation, he stated that he was homosexual and was in a same-sex civil union. Malan indicated that Mooikloof had no problem with this, and already employed a same-sex couple, Aletta and Magda Herbst.

Allpass had been living with HIV for 18 years and he had commenced a regime of medication and treatment since his diagnosis. The evidence led on his behalf was that he had consistently adhered to a proper treatment regime, and had at all material times been, and remained, in good health. According to his medical expert his CD4 count at the material time was exceptionally low, and his viral load was at such a low level as to be undetectable. Allpass was regarded as being in excellent health, and able to perform the duties required of him.

On 10 November 2008 Allpass, Herbst and her spouse were requested to complete a Personal Particulars Form ("the PPF") which required information, *inter alia*, concerning allergies, as well as medication taken for these allergies, as well as chronic medication taken by the employee. Allpass struck out the words "medikasie wat daarvoor geneem word" and wrote in the word "illnesses", which he listed as asthma, deep vein thrombosis and HIV. He listed six allergies, including penicillin, and also listed his chronic medication, which included antiretroviral drugs.

On or about 12 November 2008 Malan collected Allpass' PPF. The following day a confrontation ensued between Malan and Allpass, during which Allpass was dismissed and instructed to vacate the premises. Allpass did not leave immediately, as he had not received formal notice of dismissal, nor his salary, and his personal belongings (including medication) were on the premises. He also had no alternative accommodation.

In a dismissal notice dated 14 November 2008 Allpass was advised, *inter alia,* that he had been dishonest in the job interview, that he was in fact severely ill and therefore would not be able to complete his duties as required. Allpass was further advised that his salary would be paid up to the end of the day, after he had vacated the house and the premises.

On 18 November 2008 Allpass was forcibly removed from the premises, and verbally abused by a security manager at the estate. Following the intervention of his attorneys, Allpass was given until 12h00 the following day to vacate the premises.

Allpass' dismissal was confirmed in a final notice dated 19 November 2008, which accompanied his salary payment. The notice declared the reason for his dismissal as

"fraudulent misrepresentations". It recorded that he did not qualify for one week's notice because of the reason for his dismissal, but offered him the equivalent amount as a "gesture of humanity". Allpass referred a dispute arising from his dismissal to the Commission for Conciliation, Mediation and Arbitration ("CCMA") on 17 November 2008. The dispute was conciliated on 17 December 2008 and a certificate of outcome was issued, referring the matter to the Labour Court.

Allpass sought relief arising from his alleged automatically unfair dismissal, on the grounds of his HIV status, in terms of section 187 (1) (f) of the LRA. Alternatively, that his dismissal was substantively and procedurally unfair, in terms of section 188 of the LRA (Claim A). Allpass further sought relief, arising from unfair discrimination on the grounds of his HIV status, as prescribed by section 6 (1) read with section 50 (2) (b) of the Employment Equity Act 55 of 1998 ("the EEA") (Claim B).

ISSUES: Whether the dismissal of Allpass was automatically unfair, or alternatively, procedurally and/or substantively unfair, and, if so, the appropriate measure of compensation to be awarded. Whether Allpass was unfairly discriminated against on the basis of his HIV status, and, if so, what relief would be appropriate..

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first considered the evidence led by both parties, and thereafter the applicable law.

The court stated that the legal prohibition against unfair discrimination in the workplace derived from section 9 of the Constitution of the Republic of South Africa, which provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken ..."

The LRA renders a dismissal for a discriminatory reason automatically unfair, unless it can be justified on the grounds of inherent job requirements. Section 187(1) of the LRA defines an automatically unfair dismissal as occurring when the reason is -

"(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

Where a ground is not specifically stated, such as HIV status, in the context of dismissal it would have to be proven to be an arbitrary ground. While discrimination based on HIV status is expressly prohibited by the EEA, it is not so in the LRA. In *Bootes v Eagle Ink Systems KwaZulu-Natal (Pty) Ltd* (2008) 29 ILJ 139 (LC), Pillay J held that HIV status was an arbitrary ground, as envisaged in section 187 (1) (f) of the LRA. Pillay J also noted that dismissal of employees because of their HIV status was widely acknowledged as discrimination, unless the employer could show that being free of HIV was an inherent requirement of the job.

Section 6(1) of the EEA specifically prohibits discrimination in the workplace and provides as follows:

"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth".

Section 6(2) of the EEA makes it clear that it is not unfair discrimination to -

"(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

The court thereafter proceeded to evaluate the evidence. With respect to Claim A, the court referred to the test described in *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC):

"(S)ection 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary, that is, to produce evidence to show that the reason for the dismissal

did not fall within the circumstances envisaged n section 187 for constituting an automatically unfair dismissal."

The court stated that where the reason for an employee's dismissal was in dispute, it was necessary to determine, where there were a number of reasons put forward for the dismissal, what the main reason was, as well as to distinguish between the apparent reason advanced by the employer, and the real reason that emerged from the evidence. The facts were that the evidence of Allpass and his medical expert was that Allpass had no medical or physical impediment preventing him from performing his duties. Furthermore, Malan had been unable to dispute that Allpass had acquitted himself well in a strenuous and demanding job. It was clear from the evidence that Mooikloof's primary concern was Allpass' HIV status, even though concerns had been expressed about the other "illnesses". In the court's view, the real reason for the dismissal, or at least the dominant reason, was Allpass' failure to disclose his HIV status. This would explain Malan's outrage, and the manner in which he proceeded to summarily dismiss Allpass. This constituted discrimination on an arbitrary ground prohibited by section 187 (1) (f), and was therefore an automatically unfair dismissal. Once it had been found that Allpass' HIV status was the real reason for his dismissal, Mooikloof then had to prove that the discrimination was justified.

Thus, the court thereafter considered the defence that Allpass' termination was justified, based on an inherent job requirement. In *Workplace Law*, Tenth edition (Juta 2010) at page 107, John Grogan defines an inherent job requirement as relating to the possession of a "particular personal physical characteristic (for example, being male or female, speaking a particular language, or being free of a disability) which must be necessary for effectively carrying out the duties attached to a particular position."

Mooikloof alleged that it was an inherent requirement of the job that an employee should be non-allergic to penicillin and relied exclusively on the expert testimony of Herbst, whose evidence, according to the court, was nullified by her lack of medical, veterinary or para-veterinary experience, in proving its defence. Allpass, however, argued that a non-allergy to penicillin could not constitute an inherent job requirement in that:

(a) the administration of depocillin by a stable manager in the absence of a medical prescription would be unlawful;

(b) the evidence of Allpass and his medical expert dispensed, medically and factually, with the idea that a penicillin allergy is a contra-indication for administering penicillin to a horse; and

(c) Malan conceded that Allpass had performed all the strenuous requirements of the job, and there had never been a crisis involving horses during his short period of employment.

The court stated that the penicillin defence confused inherent and essential job requirements, and was of the view that it was "a thin veil" designed to disguise the real reason for the dismissal. If it was a legitimate and genuine requirement of the job, it should have been specifically mentioned in the detailed job description provided to Allpass or conveyed to him during the pre-employment interview, or, at the very least, raised by Malan in the confrontation with him. It was, furthermore, not mentioned in the dismissal notices. The court also noted that the penicillin defence emerged for the first time, more than two years after the cause of action arose.

The court was therefore of the view that Mooikloof had failed to prove that the penicillin defence constituted an inherent job requirement, and that it was objectively justifiable. Furthermore, it had been established that, even had Mooikloof succeeded in proving that it was an inherent job requirement, on its own admission it had not affected Allpass' ability to perform his duties.

With respect to Claim B, the court stated that it was accepted as law that Allpass was under no legal obligation to disclose his HIV status to his prospective employer, and that the expectation that he should have done so violated his right to dignity and privacy. The court pointed out that the relief sought in Claim B was in essence a *solatium* for the *injuria* or damages for the applicant's humiliating treatment based on his sexual orientation, and his homeless status following his dismissal, as well as the unfair discrimination and loss of dignity, arising from the expectation that he should have disclosed his HIV status at the interview. The Labour Court, however, lacked jurisdiction in respect of a claim for harassment and loss of dignity which occurred after Allpass' dismissal, and in circumstances where Allpass did not wish to rely on the vicarious liability of the employer under the EEA. Thus, the only appropriate cause of action would be a civil claim in delict.

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG: The court made the following order:

1. Claim A:

   (a) The applicant's dismissal is declared to be automatically unfair under section 187 (1) (f) of the LRA. The respondent is ordered to pay the applicant compensation in the sum of 12 months' remuneration, reflecting both restitution as well as a punitive element for unfair discrimination on the grounds of HIV status.

   (b) The applicant is entitled to the costs consequent upon the employment of two counsel, and this court is indebted to the Aids Law Project for its assistance.

2. Claim B:

   (a) The claim is dismissed, although, in the interests of fairness, there is no order as to costs.

***ANALYSIS*:**

This case is relevant to the construction industry at large, in so far as it considers an automatically unfair dismissal under section 187 (1) (f) of the Labour Relations Act 66 of 1995 ("the LRA"), on the grounds of an employee's HIV status. This is particularly important for contractors and sub-contractors in the construction industry, who employ others to perform certain tasks or to provide certain skills, whether on a temporary or more permanent basis.

It is clear from the court's judgment that section 9 of the Constitution of the Republic of South Africa Act 108 of 1996 prohibits unfair discrimination in the workplace. In addition, the LRA renders a dismissal for a discriminatory reason automatically unfair, unless it can be justified on the grounds of inherent job requirements. While the Employment Equity Act 55 of 1998 ("the EEA") expressly prohibits discrimination based on HIV status, the LRA does not. However, the court made reference to *Bootes v Eagle Ink Systems KwaZulu-Natal (Pty) Ltd* (2008) 29 ILJ 139 (LC) where it was pointed out that the dismissal of employees because of their HIV status is widely acknowledged as discrimination, unless the employer can show that being free of HIV is an inherent job requirement. Furthermore, such employees may, depending upon the circumstances of the individual case, be awarded compensation, reflecting both restitution as well as a punitive element, for unfair discrimination on the grounds of HIV status.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: MAY 2011

SEA FRONT FOR ALL AND ANOTHER v MEC, ENVIRONMENTAL AND DEVELOPMENT PLANNING, WESTERN CAPE AND OTHERS

Western Cape High Court, Cape Town (15974/07) 2011 (3) SA 55 (decided: 26 March 2010)

FACTS: This case concerns environmental authorisation in terms of section 22 of the Environmental Conservation Act 73 of 1989 ("the ECA").

The City of Cape Town ("the fourth respondent") was the owner of an immovable property known as the Sea Point Pavilion site ("the immovable property"). On Track Developments (Pty) Ltd ("the third respondent") sought to erect an up-market hotel with 52 bedrooms and a retail centre on the immovable property, which would extend below the high-water mark and onto the beach. The proposed development entailed activities which were prohibited and for which written authorisation had to be obtained in terms of section 22 (1) of the ECA. Authorisation was required for the change of land use from zoned public open space to any other land use, and for construction which was to take place below the high-water mark and impacted upon public resorts and associated infrastructure.

On 8 August 2007, the Member of the Executive Council for Environmental Affairs and Development Planning in the Western Provincial Government ("the first respondent") issued a Record of Decision ("the 2007 ROD") on appeal in terms of section 35 (4) of the ECA, which granted the third respondent the necessary environmental authorisation for the proposed redevelopment of the site.

Sea Front for All ("the first applicant") was a voluntary association and juristic person which was established to, amongst others, protect and maintain for the benefit of present and future generations the public open space which existed on the coastline on the seaside of Beach Road, Sea Point, stretching from Mouille Point to Saunders Rocks.

Shirley Joan Rabinowitz ("the second applicant") was an interested party and owner of a residential property across the road from the proposed development.

The applicants approached the court for an order reviewing and setting aside the 2007 ROD and based their application on the following grounds:

(a) The first respondent failed to consider alternatives to the proposed development, as was required by the ECA;

(b) The first respondent relied on an expert report co-authored by Commlife Properties ("Commlife") which had an undisclosed financial interest in the matter;

(c) The first respondent's decision was based on information that was in material respects out of date;

(d) The first respondent took her decision on the basis of materially incorrect information, concerning the extent of loss of open space and the consequences of the proposed development for traffic and parking; and

(e) The first respondent failed to undertake the balancing exercise required of her in terms of the ECA.

The first respondent and the Director: Integrated Environmental Management of the Department of Environmental Affairs and Development Planning in the Western Cape Provincial Government ("the second respondent") initially opposed the application but later filed a notice of withdrawal of opposition and intention to abide the decision of the Court. The fourth respondent also did not oppose the application, but the third respondent did.

ISSUES: Whether or not the first respondent failed to consider alternatives to the proposed development. Whether or not Commlife complied with regulation 3 (1) (c) of the General EIA Regulations, published in Government Notice 1183 of 5 September 1997 ("ECA Regulations"). Whether or not the first respondent had regard to the changed circumstances. Whether or not the first respondent correctly undertook the balancing exercise required of her in terms of the ECA.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first set out the relevant legislative framework. Section 24 of the Constitution of the Republic of South Africa provides that:

> "Everyone has the right –
>
> (a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

In terms of section 21 of the ECA, the National Minister of Environmental Affairs and Tourism identified activities which may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas, which included:

(a) the construction, erection or upgrading of marinas, harbours and all structures below the high-watermark of the sea and marinas, harbours and associated structures on inland waters;

(b) the construction or upgrading of public and private resorts and associated infrastructure; and

(c) the change of land use from use for nature conservation or zoned open space to any other land use.

In terms of section 22 of the ECA:

(a) No person is entitled to undertake an activity identified in terms of section 21 (1) of the ECA, or cause such an activity to be undertaken, except by virtue of a written environmental authorisation by the Minister or competent authority;

(b) Such authorisation shall only be issued after reports concerning the impact of the proposed activity and of alternative proposed activities on the environment have been considered; and

(c) The Minister or competent authority may, at his/her/its discretion, refuse or grant the environmental authorisation for the proposed activity or an alternative proposed activity on such conditions, if any, as he/she/it may deem necessary.

The process to be followed to obtain environmental authorisation, is as follows:

(a) An application must be made in the prescribed form and submitted to the competent provincial authority for consideration;

(b) After considering the application, the relevant authority may request the applicant to: (a) submit a plan of study for scoping for the purposes of a scoping report; or (b) in a suitable case submit such scoping report without a prior plan of study;

(c) On being informed by the relevant authority that the plan of study has been accepted or on receiving a request to submit a scoping report without a prior plan of study, the applicant must submit a scoping report to the relevant authority;

(d) After a scoping report has been accepted the relevant authority may decide: (a) that the information contained in the scoping report is sufficient for the consideration of the application without further investigation; or (b) that the information contained in the scoping report should be supplemented by an environmental impact assessment which focuses on the identified alternatives and environmental issues identified in the scoping report; and

(e) Thereafter, the relevant authority must consider the application and may decide to: (a) issue an authorisation with or without conditions; or (b) refuse the application.

It is noteworthy that sections 21 and 22 of the ECA have been repealed by the National Environment Management Act 107 of 1998, but such repeal has not yet come into operation.

Section 35 (3) of the ECA provides that an aggrieved person may appeal against a decision to the Minister or competent authority concerned in the prescribed manner, within the prescribed period and upon payment of the prescribed fee. The first respondent is the designated competent authority for determining appeals in terms of section 35 (3) and (4) of the ECA.

The court then dealt with the nature of an appeal in terms of section 35 of the ECA.

In Baxter, *Administrative Law* (1984) at 255, the following was stated:

> "If an appeal does lie to a Minister the power of decision is thereby kept fully within the departmental hierarchy and the appellate body (the Minister) is usually in a position to exercise the widest appellate jurisdiction. Such appeals therefore normally take the form of 'wide' appeals, or re-hearings *de novo*."

It was clear from the contents of the 2007 ROD as well as the reasons furnished by the first respondent, that she did not merely confine herself to the appeals lodged against the original ROD, but considered the application afresh.

The court was of the view that the first respondent, in dealing with an appeal in terms of section 35 (3) and (4) of the ECA, exercised wider appeal powers and conducted a re-hearing of the matter afresh.

The court then proceeded to consider the grounds of review raised by the applicants.

The court stated that a judicial review is basically concerned with the decision-making process and has as its purpose to scrutinise the legality of administrative action.

The court then addressed the question of whether or not the first respondent failed to consider alternative proposed activities. The relevant functionary was obliged to consider reports "concerning the impact of the proposed activity and of alternative proposed activities on the environment". "Alternative" is defined in regulation 1 of the 1183 ECA Regulations as "in relation to an activity … any other possible course of action, including the option not to act".

The applicants submitted that the first respondent did not properly consider alternative proposed activities, in particular the option not to act and as a result of this, the 2007 ROD was unlawful and should be set aside.

The third respondent however argued that the Minister's decision was given on appeal in terms of section 35 (4) of the ECA and not in terms of section 22 and that she was therefore not required to consider reports in terms of section 22 (2). It was further argued that, as was clear from the first respondent's principal reasons, she considered the option not to act as an alternative.

The court stated that because the MEC conducted a re-hearing afresh, the granting of the authorisation was an original decision in terms of section 22 of the ECA. The first respondent was therefore required to consider the reports prescribed by section 22 (2) of the ECA.

The first respondent relied heavily on the scoping reports submitted by the independent consultant appointed by the third respondent in complying with the ECA and its regulations. However, the independent consultant did not investigate the question of alternative proposed activities for the site. The first respondent was also repeatedly advised by the fourth respondent and a senior official in its department, that it was necessary to investigate and consider the

alternatives. It was clear from the 2007 ROD that the only alternatives the first respondent considered were the three design options submitted by the third respondent. The 2007 ROD furthermore contained no reference that the first respondent considered the option not to act.

The court held that the failure by the first respondent to properly consider reports of alternative proposed activities and in particular, the option not to act, as was required by section 22 of the ECA, was fatal. The court was also of the view that an expert report on the important question of whether the land should not be retained as public open space, was an indispensable prerequisite.

The court consequently held that the 2007 ROD should be reviewed and set aside.

The court thereafter dealt with the ground of review that the first respondent relied on an expert report co-authored by Commlife, which had an undisclosed financial interest in the approval sought.

In terms of regulation 3 (1) (c) of the 1183 ECA Regulations, a person who applies for environmental authorisation in terms of section 22 of the ECA, is required to appoint an independent consultant to comply with certain prescribed responsibilities. The independent consultant is required to prepare reports as prescribed, collate information and conduct the required public participation process. The independent consultant may not have a financial or other interest in the undertaking of the proposed activity, except in connection with complying with the said regulations.

The reports submitted by the independent consultant appointed by the third respondent, were co-authored by Commlife..

The court was of the view that a specialist, such as Commlife, should also meet the requirements of regulation 3 (1) (c) of the 1183 ECA Regulations. In Glazewski, *Environmental Law in South Africa*, 2nd Edition, on page 240 the following is stated:

> "In stipulating that an independent consultant is appointed, the view may be held that the requirement of independence does not apply to specialists who may be appointed by the consultant to carry out specific duties. In the writer's view, the requirements of independence applies to both the consultant and the specialists who may contributed (sic) to the study."

The court found that "Commlife would or could have had an expectation or contemplation that it might derive a financial benefit from the proposed development, seems, in the prevailing circumstances, to be reasonably justifiable. Given Commlife's financial interest in the development, they failed to meet the requirement of independence.

The court lastly addressed the question of whether the first respondent failed to consider the changed circumstances.

The first respondent's decision to grant the authorisation was made on 8 August 2007, approximately three years after the second respondent issued the original ROD. The first respondent's decision was mainly based on information contained in the final scoping report which was dated April 2003. The court held that it was clear from the first respondent's reasons that she did not consider any changed circumstances before September 2004.

The court was of the view that the first respondent precluded herself from properly performing the required balancing exercise when she relied on outdated and erroneous information. In the absence of information regarding the current socio-economic environment in Sea Point, she could not decide whether the proposed development of the site would, in fact, serve a socio-economic need. She was accordingly unable to balance the socio-economic consequences of the development against the (negative) environmental consequences.

WESTERN CAPE HIGH COURT, CAPE TOWN: The court made the following orders:

1. The first respondent's decision taken in terms of section 35 (4) of the ECA as contained in the 2007 ROD, granting written authorisation to the third respondent to undertake certain activities identified in section 21 (1) of the ECA on the immovable property, is reviewed and set aside.

2. The matter is remitted for reconsideration by the first respondent, taking account of the principles outlined in the judgment.

3. The issue of costs is to stand over for later determination.

***ANALYSIS*:**

This case is relevant to the construction industry at large, in so far as it concerns the development of land involving activities which are prohibited, except with a written environmental authorisation issued under section 22 (1) of the Environment Conservation Act 73 of 1989 ("the ECA") and specifically, the change of land use from zoned public open space to

any other land use, and for construction which was to take place below the high-water mark and which impacted upon public resorts and associated infrastructure.

This is particularly important for participants in the construction industry such as employers and contractors who, in the course of a construction project may wish to undertake certain activities which have been identified in terms of section 21(1) of the ECA as having a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

Contractors, who avoid complying with legislation in order to save time or money, not only place the particular construction project in jeopardy, but also risk earning a bad name in the industry, and may even face penalty or prosecution by the state. In addition, a contractor's work performance impacts his individual performance record, and specifically the National Register of Contractors, which has direct bearing on his or her ability to access opportunity, finance and credit, which in turn has implications for the construction industry as a whole. Furthermore, since the CIDB is the entity which is tasked with not only providing strategic leadership to the construction industry but also the active promotion of best practice and the improved performance of all participants in the construction delivery process, such knowledge is of importance to the CIDB as well.

It is clear from the court's judgment that, in terms of section 22 (1) of the ECA, no person shall undertake an identified activity, except in terms of a written authorisation. Furthermore, section 22 (2) provides that the authorisation shall only be issued after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities on the environment. The (then applicable) regulations defined "alternative" as "any other possible course of action, including the option not to act". Thus, the functionary is required to consider reports which should not only concern the impact of the proposed activity, but also alternative courses of action, including the option not to act. It is important to note, however, that while sections 21 and 22 of the ECA have been repealed by the National Environment Management Act 107 of 1998, such repeal has not yet come into operation.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: MAY 2011

SMITH v VAN DEN HEEVER AND OTHERS

Supreme Court of Appeal (136/2010) 2011 (3) SA 140 (decided: 4 March 2011)

FACTS: This case concerns a breach of a contract and a plea of *exceptio non adimpleti contractus*.

T. W. Van Den Heever, E. M. Motala and J. D. Pema ("the plaintiffs") were the joint liquidators of Agrichicks (Pty) Ltd (in liquidation) ("the company").

The plaintiffs claimed payment of the amount of R469 604.96 from F. J. Smith ("Smith") who was a farmer in the Zeerust district. The plaintiffs claimed that this amount was due in terms of a written innominate agreement between Smith and the company. Smith admitted the agreement but denied liability and alleged that the company breached the agreement. Smith also lodged a counterclaim for damages.

The trial court (North West High Court, Mafikeng) upheld the plaintiffs' claim in part and ordered Smith to pay the amount of R242 628.00. The counterclaim was upheld and an award of damages in the sum of R317 366.50 was made. Both parties appealed to the full court of the North West High Court, Mafikeng. The full court upheld the plaintiffs' claim and dismissed Smith's cross-appeal. Smith applied for and was thereafter granted special leave to appeal to the Supreme Court of Appeal.

ISSUES: Whether or not Smith could have raised the plea of an *exceptio non adimpleti contractus* and whether or not he was entitled to damages as per the counterclaim instituted.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court firstly set out the general terms of the agreement between the parties.

The company was obliged to supply Smith with day-old chickens, with the requisite poultry feed, medication and vaccination as and when required. Smith was obliged to rear them until they reached the marketable age at about 37 days. The company, within 45 days after supply of the day-old chickens, had to collect the live broilers, weigh and slaughter them and market them as processed broilers.

The chickens, poultry feed, medication and vaccination at all material times remained the property of the company. Smith was therefore only responsible for rearing of the chickens and was not entitled to purchase feed from other sources or to dispose of chickens to third parties.

The agreement also operated in cycles. A cycle commenced with the first day of delivery of a consignment of day-old chickens and ended with the delivery of the next batch – an agreed average period of 56 days. Each cycle had to be accounted for individually. The company had to credit Smith's account with the agreed 'price' per live kilogram of broilers collected for slaughter and had to debit his account with the agreed 'price' of the day-old chickens, feed, medication and vaccination. The accounting date was to be 30 days following the date of completion of any particular cycle, and any credit balance of that particular cycle had to be paid to Smith on that date. Any debit balance had to be carried over as the opening balance of the next cycle. Should the debit balance of any specific cycle be carried over more than twice as the opening balance of the following cycle, the amount of the debit balance was then due and payable by Smith.

The claim and counterclaim relate to the last two cycles, the first of which commenced on 15 May 2002. The broilers were slaughtered on 26 June 2002. On the accounting date a month later it emerged that Smith suffered a loss and his account was debited. Accordingly, the second cycle commenced on 12 July 2002, but the company was unable to deliver the required feed and medication. It therefore informed Smith that it was abandoning the chickens and he was free to destroy or dispose of them. The company was thereafter liquidated on 14 August 2002.

In an attempt to limit his losses, Smith purchased broken maize and other feed. No one on behalf of the company in liquidation took any steps to collect the broilers for slaughter and on 25 and 30 August 2002 Smith disposed of the chickens to third parties.

The plaintiff's case was based on the provision of the chicks, medication and feed to Smith. The plaintiffs averred that the company performed all its contractual obligations and the amount claimed was the debit balance on Smith's account which was carried over for more than two cycles.

Smith, in his defence, raised a plea of *exceptio non adimpleti contractus*. In A D J Van Rensburg et alia: '*Contract*', 5(1) Lawsa 2 ed para 210, it is stated that in the case of reciprocal contracts, one party undertakes to perform specifically in exchange for a particular counter

performance by the other. In other words, the first party is not entitled to demand counter performance from the other party unless the first party has performed or is prepared to perform.

In *Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPC (Electronics) Ltd* [1996] 4 All SA 601 (A), the following principles were emphasised: firstly, the *exceptio* presupposes the existence of mutual obligations which are intended to be performed reciprocally, and that the parties' intention is to be sought primarily in the terms of the agreement; secondly, interdependent promises are *prima facie* mutual; thirdly, the *exceptio* is often a temporary defence raised in an attempt to compel the other party to perform its unfulfilled obligation(s) but only in the event that defective performance of an obligation can still be remedied; and fourthly, the applicability of the *exceptio* is (subject to the *de minimis* principle) not dependent on the degree of non-performance.

Although the company supplied chickens, feed and medication for the second cycle, it failed to comply with its obligation of supplying the necessary feed and medication for the full cycle whereafter it abandoned the chickens and Smith and the debit balance on Smith's account was not carried over for more than two cycles.

The court stated that a plaintiff who fails to prove full and proper performance is not necessarily remediless. If a proper case is made out for such relief, such plaintiff may be entitled to claim a lesser amount than that provided for in the agreement. However, if the lesser amount is not claimed, it is not for the court to speculate what the amount should be. In claiming a lesser amount, a plaintiff should allege and prove:

(a) That the employer utilised his/her work to its own advantage even though it fell short of the required contractual standards;

(b) The cost of remedying defects and supplementing shortfalls;

(c) That it would be reasonable to award the contractor some remuneration even though he/she breached the agreement; and

(d) That the overall circumstances are such that the court ought to exercise its discretion in awarding the contractor a reduced contract price.

As a result of the aforesaid, the court held that the plaintiffs' claim, at the outset, should have been dismissed.

The court then dealt with the two breaches on which the counterclaim was based.

In terms of the agreement, the company was obliged to provide F1 high quality day-old chickens to Smith. Smith alleged that the company breached this term of the agreement by supplying poor quality day-old chickens instead. Smith was able to show the court that F1 chickens were used industry-wide, the company initially provided F1 chickens to him and as the company's financial difficulties increased it supplied cheaper F2 chickens instead. Smith also alleged that the company delivered sub-standard poultry feed to him.

The court assumed that the terms of the agreement and the breaches were established and that Smith was in principle entitled to claim any losses suffered as a result thereof. The court was however not satisfied that Smith suffered any recoverable loss and limited its judgment to that aspect.

In assessing Smith's loss, it was necessary for the court to take into account any benefits he received from the company and his income from the sale of the abandoned broilers to third parties. The court also took into account the expenses incurred relating to the purchase of feed by Smith after the company abandoned the chickens and breached the agreement.

The court concluded that the high court should have dismissed both the claim and the counterclaim and since both were upheld, the parties were justified in appealing and the full court should have upheld both appeal and cross-appeal. The appeal in the Supreme Court of Appeal should therefore succeed.

NORTH WEST HIGH COURT, MAFIKENG (COURT OF FIRST INSTANCE): The trial court upheld the plaintiffs' claim in part and ordered Smith to pay the amount of R242 628.00. The counterclaim was upheld and an award of damages in the sum of R317 366.50 was made.

On appeal, the Full Court of the North West High Court, Mafikeng upheld the plaintiffs' claim and dismissed Smith's cross-appeal.

SUPREME COURT OF APPEAL: The court upheld the appeal with costs and set aside the order of the Full Court and replaced it with the following orders:

(a) The appeal of the liquidators is upheld with costs.

(b) The cross-appeal of the defendant is upheld with costs.

(c) The order of the trial court is amended to read: 'Claim and counterclaim are both dismissed with costs.'

***ANALYSIS*:**

This case is relevant to the construction industry at large, in so far as it concerns reciprocal contracts, and in particular the defence of non-performance or the *exceptio non adimpleti contractus* ("the *exceptio*"). It is of particular importance to participants in the construction industry such as employers and contractors, who enter into contracts with different parties for various building works related matters, and who may be required to perform in exchange for a specific counter-performance by the other contracting party.

It is clear from the court's judgment that the principle of reciprocity dictates that a party is not entitled to demand performance unless it has itself performed, or is prepared to perform, so that any such demand may be met by the defence of non-performance or the *exceptio*. A plaintiff who fails to prove full and proper performance on its part is not necessarily without a remedy. If a proper case is made out for such relief, he may be entitled to claim a lesser amount than that provided for in the contract by alleging and proving (a) that the other party has utilised its work to its own advantage, even though it fell short of the required contractual standards; (b) the cost of remedying defects and supplementing shortfalls; (c) that it would be equitable to award the plaintiff some remuneration, even though it had breached the agreement; and (d) that the circumstances are on the whole such that the court ought to exercise its discretion in awarding the plaintiff a reduced contract price.

Since there may be instances where an employer or contractor is in breach of a contract or is unable to perform in terms of a contract, whether for financial or other reasons, the law concerning reciprocal contracts, including the *exceptio* defence, would consequently be of direct relevance.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: JUNE 2011

NEDBANK LTD AND OTHERS v NATIONAL CREDIT REGULATOR AND ANOTHER

Supreme Court of Appeal (662/2009 and 500/2010) 2011 (3) SA 581 (decided: 28 March 2011)

FACTS: This case concerns the interpretation of sections 86(2), 86(7) and (8), 87, 129 and 103(5) of the National Credit Act 34 of 2005 ("the NCA").

This was an appeal by the National Credit Regulator ("NCR") on the construction of sections 86(2) and 129 of the NCA as well as appeals by the other parties relating to further sections of the NCA.

COURT'S APPLICATION OF THE LAW TO THE FACTS: The Appeal court was required to provide a declarator on the interpretation on certain provisions of the NCA in order to eliminate confusion arising out of different approaches to the interpretation of these sections in case law. The Appeal considered whether orders 1, 2, 4, 7 and 8 of the court a quo, as set out below, were correct:

> "1 On a proper interpretation of s 86(8)(b), it applies in the circumstances contemplated in s 86(7) (c).
>
> 2 In circumstances where s 86(8)(b) of the Act applies, a debt counsellor is obliged to refer his or her recommendation to a magistrates' court and the magistrate to whom the matter is allocated is in terms of s 87 obliged to conduct a hearing and make an order contemplated in either s 87(1)(a) or s 87(1)(b) of the National Credit Act, 2005.
>
> 4 A referral by a debt counsellor to a magistrates' court under s 86(8)(b) (and s 86(7)(c)) of the National Credit Act, 2005 is an application within the meaning of the Magistrates' Courts Act, 1944 and the rules of the magistrates' courts and falls to be treated as such in terms of rule 55 of the rules.

7 Rule 9 of the magistrates' courts' rules pertaining to service is applicable to the service of process, any recommendation and other documents for the purpose of the referral and hearing contemplated in ss 86(7)(c), 86(8)(b) and 87 of the National Credit Act, 2005, but service of any such documents may, with the agreement of the affected parties, be by way of fax or email.

8 A debt counsellor who refers a matter to the magistrates' court in terms of ss 87(7)(c) and 86(8)(b) of the National Credit Act, 2005, has a duty to assist the court and should be available and able to render such assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the court."

The objects of the NCA are set out in section 3 and are directed at providing protection for the consumer and addressing imbalances that exist between consumers and credit providers. The provisions of the NCA must be interpreted in a manner that gives effect to these objects and calls for a careful balancing of the competing interests of both the consumer and credit provider sought to be protected.

The court firstly dealt with sections 86(2) and 129 of the NCA. In this regard, The Credit Regulator's appeal asked for a declarator in the following terms: "The reference in section 86(2) to the taking of a step in terms of s 129 to enforce a credit agreement is a reference to the commencement of legal proceedings mentioned in section 129(1)(b) and does not include steps taken in terms of section 129(1)(a) ...".

Section 86(2) provides as follows:

> "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."

Section 129(1) provides as follows:

> "If the consumer is in default under a credit agreement, the credit provider –
>
> (a) 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; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130."

The court explained that, despite the use of the word 'may' in section 129(1)(a), the notice referred to therein is a mandatory requirement prior to litigation to enforce a credit agreement. The notice further refers to a specific credit agreement in respect of which the consumer is in default. It therefore deals with one credit agreement only and seeks to bring about a consensual resolution relating to that credit agreement.

As was stated in *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 (5) SA 618 (KZD) at para 10 "[t]he proposal is directed at achieving a situation where the consumer and the credit provider, through the agency of the debt counsellor, negotiate a resolution to the consumer's particular difficulties under a particular credit agreement. It is a consensual process, the success or failure of which will depend upon whether the parties can arrive at a workable basis upon which to resolve the issues caused by the consumer's default."

Section 86 on the other hand deals with an application by a consumer to be declared over-indebted (for debt review) and is concerned with the obligations under all the credit agreements to which the consumer is a party. Section 86(2) contemplates a debt review under which a specific credit agreement may be excluded. Even though a particular credit agreement falls outside the scope of debt review a court may nonetheless, in terms of section 85, in any court proceedings in which a particular credit agreement is being considered and when it is alleged that the consumer is over-indebted, refer that matter to a debt counsellor for evaluation and a recommendation in terms of section 86(7) or declare that the consumer is over-indebted and make any of the orders contemplated in section 87. In addition, a court may also declare a credit agreement to be reckless in terms of s 83(1) and make any of the orders provided for in sections 83(2) and (3).

The court emphasised the words "has proceeded to take the steps" in section 86(2) and stated that a 'step' includes "an action or movement which leads to a result; one of a series of proceedings or measures". To 'proceed' means "to go on with an action" and also "with stress on the progress or continuance of the action" to "go on or continue what one has begun; to advance from the point already reached". An ongoing process is indicated by the use of the words "has proceeded" and "steps" of which the section 129(1)(a) notice is the first step.

The court further stated that the purpose of a notice in terms of section 129(1)(a) is the resolution of a dispute and the bringing up to date of payments under a specific credit agreement. It is the first step the credit provider takes in enforcing the credit agreement and does not exclude a debt review, save insofar as it relates to the particular credit agreement in question.

Accordingly the Appeal Court found that the court a quo was correct in not granting the declarator prayed for in prayer 1.13 of the notice of motion.

The court secondly dealt with sections 86(7) and (8) as well as 87 of the NCA.

Section 86(6), (7), (8) and (9) provide:

> "(6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time –
>
> (a) whether the consumer appears to be over-indebted; and
>
> (b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.
>
> (7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that –
>
> (a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;
>
> (b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the

consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's' Court make either or both of the following orders –

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by -

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

(8) If a debt counsellor makes a recommendation in terms of subsection 7(b) and –

(a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and

each credit provider concerned, file it as a consent order in terms of section 138; or

(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.

(9) If a debt counsellor rejects an application as contemplated in subsection 7(a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection 7(c)."

Section 87(1) provides:

"Magistrate's Court may re-arrange consumer's obligations

(1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8)(b), or a consumer applies to the Magistrate's Court in terms of section 86(9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, may –

(a) reject the recommendation or application as the case may be; or

(b) make –

(i) an order declaring any credit agreement to be reckless, and an order contemplated in section 83(2) or (3), if the Magistrate's Court concludes that the agreement is reckless;

(ii) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or

(iii) both orders contemplated in subparagraph (i) and (ii)."

The court noted that a debt counsellor must meet certain requirements and be suitably qualified when so appointed and the court of first instance correctly noted that a debt counsellor fulfils a statutory function.

The court of first instance further stated that the essence of the dispute related to the procedure to be followed when a matter is referred to the Magistrate's Court under sections 86 and 87. Section 87(1) requires the Magistrate's Court to 'conduct a hearing' and make the relevant orders 'having regard to the proposal and information before it and the consumer's financial means, prospects and obligations'. However, neither section 86(8) nor section 87(1) refers to section 86(7)(c). Where a consumer (a) applies under section 86(1) for debt review it must do so in the form prescribed by regulation; and (b) applies directly to court in terms of section 86(9) it must do so in the prescribed manner. In cases falling under section 86(8)(b) the debt counsellor must refer his/her recommendation to the Magistrate's court but no procedure is prescribed. As a result, the court of first instance held, and this court agreed, that the Magistrate's Court Act and Rules will apply.

The court then stated that the reference to "Magistrate's Court" in sections 86(7)(c) and 87(1) were intended as references to a "court" which will adjudicate the matter and conduct a proper hearing. A court is also empowered to modify the wording of a statute where it is necessary to give effect to what was the true intention of the legislature and if there are other indications in the statute supporting such correction. In terms of section 86(7)(c) the debt counsellor may "issue a proposal" that the Magistrate's Court make certain orders. However, having regard to section 86(6) and the statutory function of the debt counsellor, he/she must issue such proposal to the Magistrate's Court. Thus, by reading in the words "and section 86(7)(c)" in order 4 of the court of first instance, proper effect will be given to the intention of the legislature.

The court lastly dealt with section 103(5) of the NCA, which provides as follows:

> "Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs."

Section 101 deals with the "cost of credit" and prohibits a credit agreement to require the payment of money or other consideration by the consumer except "(a) the principal debt, being the amount deferred in terms of the agreement, plus the value of any item contemplated in section 102"; (b) an initiation fee; (c) a service fee; (d) interest – which "(i) must be expressed in percentage terms as an annual rate calculated in the prescribed

manner; and (ii) must not exceed the applicable maximum prescribed rate determined in terms of section 105"; (e) the cost of any credit insurance; (f) default administration charges; and (g) collection costs.

The NCR found fault with the fact that banks have interpreted section 103(5) as if it were a codification of the *in duplum* rule enabling them to levy interest as soon as the consumer made a further payment.

The *in duplum* rule states that where the total amount of arrear and unpaid interest has accrued to an amount equal to the outstanding capital sum, interest ceases to run, but any payment made by the consumer thereafter will lead to the amount of interest decreasing after which interest starts accruing again to an amount equal to the outstanding capital amount. This means that the total sum of interest paid could well exceed the capital sum, and that the limitation only applies to the sum of interest payable at any one time. The question for the court to consider was whether the *in duplum* rule is applicable in the context of the NCA.

The court concluded that section 103(5) is not a codification of the *in duplum rule* and represents nothing more than a specific rule applicable to credit agreements subject to the NCA.

The court further pointed out that section 100(1) provides that a credit provider must not charge an amount to, or impose a monetary liability on, a consumer in respect of:

> "(a) a credit fee or charge prohibited by this Act;
>
> (b) an amount of a fee or charge exceeding the amount that may be charged consistent with this Act;
>
> (c) an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act; or
>
> (d) any fee, charge, commission, expense or other amount payable by the credit provider to any third party in respect of a credit agreement, except as contemplated in section 102 or elsewhere in this Act."

Thus, the interest that may be charged under a credit agreement must be consistent with the NCA. Section 103 therefore forms part of the credit agreement and defines the obligations of the consumer as well as the credit provider. This section also makes it clear that the amounts

contemplated in section 101(1)(b) to (g) may not accrue in total to more than the amount of the principal debt at the time of the consumer's default.

Consequently, the court agreed with the court of first instance's declaratory orders.

NORTH GAUTENG HIGH COURT, PRETORIA: The court, *inter alia*, made the following declaratory orders:

"1. On a proper interpretation of s 86(8)(b), it applies in the circumstances contemplated in s 86(7)(c).

2. In circumstances where s 86(8)(b) of the Act applies, a debt counsellor is obliged to refer his or her recommendation to a magistrates' court and the magistrate to whom the matter is allocated is in terms of s 87 obliged to conduct a hearing and make an order contemplated in either s 87(1)(a) or s 87(1)(b) of the National Credit Act, 2005.

...

4. A referral by a debt counsellor to a magistrates' court under s 86(8)(b) (and s 86(7)(c)) of the National Credit Act, 2005 is an application within the meaning of the Magistrates' Courts Act, 1944 and the rules of the magistrates' courts and falls to be treated as such in terms of rule 55 of the rules.

...

7. Rule 9 of the magistrates' courts' rules pertaining to service is applicable to the service of process, any recommendation and other documents for the purpose of the referral and hearing contemplated in ss 86(7)(c), 86(8)(b) and 87 of the National Credit Act, 2005, but service of any such documents may, with the agreement of the affected parties, be by way of fax or email.

8. A debt counsellor who refers a matter to the magistrates' court in terms of ss 87(7)(c) and 86(8)(b) of the National Credit Act, 2005, has a duty to assist the court and should be available and able to render such assistance by way of furnishing evidence or making submissions as to his or her proposal or to answer any queries raised by the court.

...

11. On a proper interpretation of s 103(5) read with ss 101(1)(b)-(g) of the National Credit Act, 2005:

(a) the amounts contemplated in sections 101(1)(b) to (g) which accrue while the consumer is in default may not exceed, in aggregate, the unpaid balance of the principal debt when the default occurred;

(b) once the total charges referred to in ss 101(1)(b)-(g) equal the amount of the unpaid balance, no further charges may be levied;

(c) once the total charges referred to in ss 101(1)(b)-(g) equal the amount of the unpaid balance, payments made by a consumer thereafter during a period of default do not have the effect of permitting the credit provider to charge further interest while such default persists."

SUPREME COURT OF APPEAL: The court dismissed all the appeals.

ANALYSIS *(Our analysis in this case is similar to that which we provided in the Wesbank case)*:

This case is relevant to the construction industry at large, in so far as it considers the enforcement of a credit agreement by legal action as contemplated in section 129 of the National Credit Act 34 of 2005 ("the NCA") in relation to an application for debt review in terms of section 86 of that act, as well as section 103 (5), which deals with charges levied during the period the consumer is in default.

This is particularly important for participants in the construction industry, such as contractors, who may conclude credit agreements to finance the purchase of, for example, materials, equipment and machinery, or even property, and who may be at risk of failing to meet his or her monthly financial commitments on the due date. If a contractor defaults on payments due to a credit provider, he or she risks the attachment and removal of the goods or property concerned or other property, which may as a result hinder his or her ability to meet his or her obligations in terms of a construction contract. Defaulting contractors also risk their ability to access finance or credit at a future date.

It is clear from the court's judgment that by giving the notice referred to in section 129 (1) (a), the credit provider "has proceeded to take the steps contemplated in section 129 to enforce that agreement". The notice in section 129 (1) (a) deals with one credit agreement only and seeks to bring about a consensual resolution relating to that agreement. In other words, section

129 (1) (a) does not envisage general debt restructuring under sections 86 and 87 of the NCA. According to section 129 (1) (b), there are various steps which the credit provider may have to take before action can be commenced and the debt enforced. If all the requirements laid down in sections 129 and 130 for the commencement of legal proceedings to enforce the credit agreement have been satisfied, a debt review application under section 86 (1) will not apply to that credit agreement.

The scope of section 86, on the other hand, is general and deals with an application by a consumer to be declared over-indebted. It is concerned with the obligations under all the credit agreements to which he or she is party. Even if a particular agreement falls outside the scope of debt review a court may, nevertheless, as provided in section 85, in any court proceedings "in which a credit agreement is being considered' and in which it is alleged that the consumer is over-indebted, refer that matter to a debt counsellor for evaluation and a recommendation in terms of section 86 (7) or declare that the consumer is over-indebted and make any of the orders contemplated in section 87. A court may also, in terms of section 83(1), in proceedings where a credit agreement is being considered, declare it to be reckless and make any of the orders provided for in section 83 (2) and (3).

Furthermore, section 103 (5) deals with the same subject matter as the common law rule but this does not mean that it incorporates all or any of the aspects of the common law rule. It is a self-standing provision and must be construed as such. The NCA replaces the common law *in duplum* rule insofar as it concerns credit agreements within the ambit of the NCA. Once the amounts referred to in section 101 (b)-(g) that accrue during the period of default, whether or not they are paid, equal in aggregate the unpaid balance of the principal debt at the time the default occurs, no further charges may be levied.

Since there may be instances where a contractor defaults under a credit agreement, the correct procedure to be followed by a credit provider to enforce the debt would consequently be of direct relevance, as would the circumstances under which a consumer may apply for debt review.

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

CASE SUMMARY: JUNE 2011

AVENG (AFRICA) LTD (FORMERLY GRINAKER-LTA LTD) t/a GRINAKER-LTA BUILDING EAST v MIDROS INVESTMENTS (PTY) LTD

KwaZulu-Natal High Court, Durban (3187/05) 2011 (3) SA 631 (decided: 8 March 2011)

FACTS: This case concerns the application by a party for the stay of an action to pursue the matter by way of arbitration.

Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) ("Aveng") concluded a contract with Midros Investments (Pty) Ltd ("Midros") in terms of which Aveng built a shopping complex in Phoenix for Midros.

On 15 February 2005 Aveng instituted action against Midros wherein it claimed the balance of the price payable to it for the contract work based on three certificates which it alleged constituted payment certificates under the contract. Midros opposed the action and alleged that the certificates were not payment certificates as contemplated by the contract. It also contended that there were defects in the work and that the cost of remedying such defects exceeded the amount of Aveng's claim. Midros accordingly lodged a counterclaim and alleged that it suffered damages resulting from the defective works.

The action was set down for hearing for 10 days from 28 April to 8 May 2009. The parties however engaged in negotiations in an attempt to amicably resolve the matter. It was agreed between the parties that Aveng would undertake certain remedial work, against completion of which Midros would pay the full amount of its claim. Midros thereafter supplied Aveng with a post-dated cheque for the full amount payable on 31 July 2008. Aveng however did not complete or properly conduct all the work and Midros stopped payment on the cheque.

Further discussions were held between the parties during which it was agreed that Aveng would undertake further work and Midros would effect full payment. The action was therefore removed from the trial roll on 10 March 2009 as it was stated that the matter was settled.

Midros however alleged that the work Aveng undertook was not properly done and withheld payment to Aveng. Aveng further alleged that it was entitled to payment under the certificates

whereafter Midros contended that the action was settled and that the only claim available to Aveng was a claim under the settlement agreement.

Aveng applied to court to have the matter stayed to enable it to pursue the claim by way of arbitration for the following reasons:

(a) The action commenced six years ago and the building work undertaken in 2003/2004 had not reached finality;

(b) There would be a delay in obtaining trial dates for 10 days;

(c) It will be likely that the action will only be resolved after a further two to three years; and

(d) The issues in dispute expanded because of the negotiations undertaken and the counterclaim lodged by Midros.

ISSUES: Whether or not the claims by Aveng for payment of the balance of the contract price arose under separate agreements and whether they should all be resolved in a single set of proceedings and therefore by way of litigation. Whether or not it was open to Aveng to stay the action and pursue the matter by way of arbitration.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first set out the arguments of both parties.

Aveng placed reliance on clause 40 of the contract which dealt with the settlement of disagreements and disputes. Aveng submitted that it commenced the action and did not, at that time, understand there to be any dispute between it and Midros and therefore in the absence of a dispute it was not open to Aveng to have resorted to arbitration. It relied on *Parekh v Shah Jehan Cinemas (Pty) Limited and Others* 1980 (1) SA 301 (D) 304 E-G where the following was stated:

> "Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise."

Midros argued that this was irrelevant as it must have been apparent to Aveng once an affidavit opposing summary judgment was filed, that a dispute between the parties existed. It further argued that Aveng elected to pursue its claim by way of litigation and that it was no longer open to Aveng to resort to arbitration.

Midros further argued that any claim based on the settlement agreement that Aveng may have had was not a claim that was capable of being subjected to arbitration under the building contract. It submitted that those claims arose under separate agreements and issues of convenience dictated that they should all be resolved in a single set of proceedings and therefore by way of litigation.

The court disagreed with Midros' second contention and stated that whether the certificates on which Aveng relied were certificates issued in terms of the contract, was plainly an issue on which the contractor (Aveng) and the employer (Midros) disagreed. There were also disagreements on whether the work was properly completed, whether there were any defects, and whether Midros suffered damages as a result of the defective work. All of these disagreements arose out of the building contract and fell within clause 40.

Midros did not contend that the parties effected a consensual cancellation of the original building contract when they concluded the alleged settlement agreements. It simply stated that the parties agreed upon the work Aveng would conduct to complete the contract work against which Midros would pay the balance of the contract price. A disagreement between the parties over whether the work was done satisfactorily was a disagreement arising out of the building contract and therefore fell in terms of clause 40. The court explained that although it will require consideration of what the parties discussed and agreed upon and what was done thereafter, the basis for those discussions was the obligation of Aveng to construct the shopping complex in accordance with the building contract. The disagreement between the parties therefore remained whether the work conducted by Aveng was done satisfactorily and whether it was entitled to the balance of the contract price. The court concluded that the aforesaid disagreement arose out of the building contract.

The court stated that the modern approach to arbitration clauses contained in agreements/contracts was to respect the parties' decision in concluding the arbitration agreement and to minimise the extent of judicial interference in the process. In *Lufuno Mphaphuli and Associates v Andrews* 2009 (4) SA 529 (CC) at para [219] the following was stated:

> "The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters".

The court explained that, as was set out in *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 4 All ER 951 (HL), an arbitration clause is inserted in an agreement or a contract because the parties contemplate as a matter of convenience that it is advantageous to adopt this as a method of resolving any disputes that may arise during the course of their business relationship. Its construction should consequently be influenced by a consideration of the fundamental purpose for including such a clause in an agreement or a contract.

Accordingly, the court could not determine any reason why Aveng and Midros should have agreed to submit their disagreements which arose on completion of the building works to arbitration, but would exclude an arbitrator from considering the selfsame issues when they arose from discussions between the parties in an attempt to resolve the initial disagreements between them. The source of the disagreements was the rights and obligations of the parties under the building contract and the differences between them were disagreements arising out of the building contract which fell within the provisions of clause 40.

The court thereafter addressed the question of whether it was open to Aveng to stay the action and proceed to arbitration under clause 40 of the building contract. The court stated that where a party to an arbitration agreement commences legal proceedings against the other party to that agreement, the defendant is entitled either to apply for a stay of the proceedings pursuant to section 6 of the Arbitration Act 42 of 1965 or to deliver a special plea relying upon the arbitration clause. Either way, the responsibility rests on the plaintiff to persuade the court to exercise its discretion to refuse arbitration. If a stay of the proceedings is granted the only option the plaintiff then has to pursue the claim is to proceed by way of arbitration. However, the stay of the proceedings does not afford the defendant an absolute defense to the claim as its purpose is to have the claim determined by the forum to which the parties have agreed to submit themselves. If the question of arbitration is raised by way of a special plea rather than under section 6 of the Arbitration Act aforesaid, the legal proceedings will proceed on all issues until the stage when the special plea is determined as a separate issue under Rule 33(4) of the Uniform Rules of Court. If a stay is granted at that stage then the plaintiff is entitled to pursue its claim by way of arbitration.

The court was of the view that a party to an arbitration agreement who commences legal proceedings instead of arbitration does not, merely as a result of adopting that course, abandon its right to have resort to arbitration under the agreement. Consequently, it is not open to the other party to argue that it has 'accepted' the resort to litigation by not itself seeking a stay, and that this 'acceptance' debars subsequent resort to arbitration by the other party. The act of litigating instead of arbitrating is not an offer to put an end to an arbitration agreement that is available for acceptance. Nor is the act of the defendant in failing to raise arbitration as a dilatory plea or by way of an application for a stay a contractual acceptance. The commencement of legal proceedings therefore did not preclude Aveng from calling upon clause 40 in the building contract. Aveng wanted to keep the action in place but have it stayed whilst it pursued its claim by way of arbitration. Although Aveng was in breach of its obligations under the arbitration clause of the building contract, it claimed performance in terms of the contract from Midros and the court was not tolerant of this.

KWAZULU-NATAL HIGH COURT, DURBAN: The court dismissed the application with costs.

***ANALYSIS*:**

This case is relevant to the construction industry at large, in so far as it considers the conclusion of a contract for building works, the subsequent institution of legal proceedings by the contractor against its employer for the balance of the price payable to it in terms of payment certificates, and the consequent allegation by the employer that there were defects in the work. In particular, it considers the provisions of the building contract, which deal with the settlement of disagreements and disputes.

The construction industry is by nature a risk-associated industry. It is therefore important that participants in the industry such as employers, contractors, and subcontractors behave responsibly and perform efficiently in completing a project, whether in the public or private sector, to enhance not only productivity, but also quality workmanship as well as health and safety, since this impact directly on individuals, communities and society at large. Furthermore, a contractor's work performance has direct bearing on his or her individual performance record, and specifically the National Register of Contractors, which affects his or her ability to access opportunity, finance and credit. Contractors who render a poor service also risk defects in the project, and even being found guilty of negligent conduct in respect of damage caused as a result. (*Please note: We shall not analyse this aspect of the case here, as issues pertaining*

to defects in building work done have previously been discussed in the analyses of other cases, such as for example, the Pienaar case).

In terms of the court's judgment, a party to an arbitration agreement who commences litigation instead of proceeding to arbitration does not, simply by adopting that course of action, abandon its right to have to resort to arbitration under the agreement. Furthermore, the party who commenced with litigation is free to abandon the litigation and proceed to arbitration, but is not entitled to seek a stay of the litigation while it pursues its claim by way of arbitration

Since there may be instances where a dispute arises between an employer and contractor with respect to building works done, the circumstances under which the parties may proceed to arbitration in the context of litigation, would consequently be of direct relevance.