development through partnership

Construction Industry Development Board

CASE SUMMARIES AND ANALYSES

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DORMELL PROPERTIES 282 CC v RENASA INSURANCE CO LTD AND OTHERS NNO

Supreme Court of Appeal

(491/2009) 2011 (1) SA 70 (decided: 1 October 2010)

FACTS: This case concerns the validity, the terms and the enforceability of a construction guarantee issued in terms of a building contract.

Dormell Properties 282 CC, or its predecessor ("Dormell" or the "appellant"), embarked upon a development project known as the Cobble Walk Retail Development Regional Shopping Centre in Durbanville("the project"). Synthesis Projects Cape (Pty) Ltd (in liquidation) ("Synthesis" or "the second respondent") was engaged as building contractor to construct and complete the project. The guarantee was issued by Renasa Insurance NNO ("Renasa" or "the first respondent") in favour of a company that was converted into the appellant close corporation, Dormell.

On 14 February 2007, a Joint Building Contracts Committee ("JBCC") 2000 Series Principal Building Agreement was concluded between Dormell Properties 282 (Pty) Ltd ("the company") and Synthesis. Synthesis' representative had signed the JBCC contract on 16 December 2006, while the company's representative did so on the latter date.

On 23 January 2007 Renasa received an application form for a JBCC 2000 guarantee to be issued in favour of the company. It issued a guarantee on 24 January 2007 since sufficient securities had been provided by Synthesis for that purpose. On 27 March 2007 this guarantee was replaced with a new guarantee because the first had incorrectly described the company and Synthesis as contractor and subcontractor respectively, rather than as employer and contractor. The guarantee issued on 27 March 2007 expired on 25 October 2007, and a new construction guarantee was issued at Dormell's request on 5 December 2007. Each of these guarantees indicated the company (i.e. Dormell Properties 282 (Pty) Ltd) as being the employer.

The planning of the shopping centre development had been undertaken by the company, which was still in existence when Synthesis' tender was accepted. The company was, however, converted to Dormell Properties 282 CC on 26 January 2007. Notice of this conversion was given by Dormell to interested parties on 13 February 2007. Dormell alleges that Renasa was included in the list of recipients, but Renasa denied any knowledge of this. Synthesis was informed of the change of identity of the employer.

Considerable delays occurred in the construction of the shopping centre. At the beginning of 2008 Synthesis informed Dormell that practical completion of the project would not be achieved before 13 March 2008. As a result, Dormell demanded, through its attorneys, an extension of the guarantee until 15 April 2008. Synthesis refused to provide further security.

On 11 February 2008, the principal agent sent a written demand to Synthesis, threatening on behalf of Dormell to cancel the agreement if Synthesis failed to provide an extended guarantee. Synthesis was formally placed on terms by another letter dated 13 February 2008, demanding an extended guarantee on or before 27 February 2008 to avoid cancellation of the contract and calling up of the guarantee. Synthesis' attorneys responded by letter, disputing the existence of any obligation to extend the guarantee.

On 28 February 2008 Dormell cancelled the agreement with Synthesis, and demanded payment of the guaranteed sum, an amount of R6 691 646.78 from Renasa, by delivering a letter to its offices, informing it of the cancellation of the building contract and of its consequent obligation to honour the guarantee. Renasa rejected the demand, and denied any obligation to pay, as, in their view, the guarantee had already expired when demand was made. Synthesis regarded the purported cancellation of the contract as repudiation thereof, which it accepted on 29 February 2008, and cancelled the contract in turn.

Dormell subsequently launched an application in the court of first instance for an order declaring that the guarantee was valid for the full day of 28 February 2008, that payment was demanded timeously and that Renasa was obliged to honour the guarantee.

Renasa raised two defences in this regard, namely that the guarantee had expired at midnight on 27 February 2008; and that Dormell was not entitled to claim payment under the guarantee, as it had been issued in favour of the company (i.e. Dormell Properties 282 (Pty) Ltd) and not Dormell Properties 282 CC. Synthesis denied that the close corporation was the beneficiary of the guarantee, and disputed any allegation that it had been in breach of the building contract.

Dormell then applied for the rectification of the guarantee, on the basis that all three parties always intended to procure and issue a guarantee in favour of the employer. The court of first instance, however, dismissed the application and leave to appeal was refused, but was subsequently granted by the SCA.

In the meantime, Dormell and Synthesis referred the dispute concerning the cancellation of the building contract to arbitration. The arbitrator held that Synthesis had not breached any term of the building contract and that Dormell had repudiated the contract by its purported cancellation, which repudiation was validly accepted by Synthesis, which thereafter cancelled the contract, as it was entitled to do. The arbitrator's award was not subject to appeal and had not been reviewed.

ISSUES: Whether the arbitrator's award could be introduced as new evidence on appeal; the expiry date of the construction guarantee; whether Dormell Properties 282 CC was entitled to rectification of the guarantee to reflect itself and not the company as the employer and therefore the beneficiary under the guarantee; whether Dormell was entitled to persist in claiming payment of the guarantee; whether, if Dormell were to succeed, the resultant judgment would have any practical effect or not.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first addressed the issue of the admission of new evidence on appeal.

In terms of section 22 (a) of the Supreme Court Act 59 of 1959 ("the Supreme Court Act"), a court of appeal may admit new evidence. Referring to *Colman v Dunbar* 1933 AD 141, the court stated that this power should be exercised sparingly and only if the further evidence is reliable, "weighty and material and presumably to be believed". There must also be an acceptable explanation for the fact that the evidence was not put forward in the court of first instance.

Renasa applied for leave to introduce the arbitrator's award as evidence on appeal. The court stated that it was clear from the circumstances of the case that evidence of the arbitration and its outcome did not exist at the time the court of first instance delivered its judgment. Furthermore, the award's authenticity and reliability were not in issue. The court therefore granted the application to present further evidence relating to the arbitration award on appeal.

The court thereafter addressed the question of whether the guarantee had expired at midnight on 27 February 2008. The court stated that the guarantee was a written agreement, and that the words used by the parties must be given their ordinary meaning. The court referred to *Joubert v Enslin* 1910 AD 6, where it was found that the terms of the contract are the decisive criterion by which any potential expiry of a deadline has to be determined, and that "it is only

when the contract is not decisive upon the point, that it is admissible to introduce the rules of law with regard to computation of time".

The expiry date was determined as being 28 February 2008, but it may have expired earlier at the happening of a specified event. The court of first instance concluded that the civil method of calculation had to be applied to determine the expiry date and found this to be at midnight on 27 February 2008.

In Roman Law, the expiry of a period of time could be calculated either by the natural or the civil method. The natural method calculates from the exact moment of the first day, upon which the period to be calculated commences, to the exactly corresponding moment of the last day. The civil method of computation includes the first day of the period to be calculated and excludes the last day.

The guarantee did not, however, contain a term calling for such a calculation. The printed form provided for a variable and for a fixed construction guarantee. Synthesis chose a fixed construction guarantee. Clause 2 of the guarantee provided that it should run "[f]rom and including the date of issue of this Construction Guarantee and up to and including the date of the only practical completion certificate or the last practical completion certificate where there are sections, upon which this Construction Guarantee shall expire". Furthermore, clause 11 stated that "The Construction Guarantee ... shall expire in terms of either 1.1.4 or 2.1, or payment in full of the Guaranteed Sum or on the Guarantee expiry date, whichever is the earlier, where after (sic) no claims will be considered by the Guarantor ..."

The expiry date was therefore not dependent upon the effluxion of a particular number of days or weeks, but upon the happening of a particular event. The court stated that the expiry date was 28 February 2008, as agreed upon by the parties, and thus the court of first instance erred in applying the civil method of computation to the contract.

The court then addressed the issue of whether Dormell was entitled to rectification of the guarantee to reflect it as the employer, and therefore the beneficiary under the guarantee. The court of first instance dismissed Dormell's application for rectification on the ground that Dormell was unable to show that there was either a common intention or a prior agreement between the parties that was not correctly reduced to writing as a result of a common error.

However, in *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253 De Wet CJ stated the following:

> "It is therefore open to the Court to consider the question whether, in the absence of proof of an antecedent agreement, it is competent to order the rectification of a written contract in those cases in which it is proved that both parties had a common intention which they intended to express in the written contract but which through a mistake they failed to express."

Furthermore, in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 it was held that the absence of a prior agreement does not in itself preclude rectification of a written agreement that does not correctly reflect the parties' intention.

The court stated that the facts of the matter clearly demonstrated that Renasa was more concerned with obtaining sufficient security from Synthesis, to back up the guarantee, than with the terms of the building contract, or the exact description of the employer. The court added that there was merit in Dormell's argument that all three parties, and in particular Renasa and Dormell, intended to secure the employer's position. The guarantee should therefore have been rectified to reflect that intention.

Finally, the court addressed the issue of whether Dormell was entitled to persist in claiming payment of the guarantee notwithstanding the fact that it was held on arbitration that it had repudiated the contract which was lawfully cancelled by Synthesis.

With reference to *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86, and *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812, the court stated that the guarantee must be honoured as soon as the employer makes a proper claim against it upon the happening of a specified event. Since there was no suggestion that Dormell had not properly demanded payment of the guaranteed sum, in the normal course of events payment should have been effected within seven days of demand. However, arbitration of the dispute between Dormell and Synthesis resulted in the finding that Dormell was not entitled to cancel the building contract. The arbitration award was final, and not subject to appeal and was therefore not taken on review. As a consequence, Dormell had lost the right to enforce the guarantee. If Renasa or Synthesis were to be ordered to honour the guarantee, they would be entitled to repayment of the full amount guaranteed.

As a result, the court requested the parties to present further written argument on the question whether, if Dormell were to succeed, the resultant judgment would have any practical effect or not, as any payment made by Renasa would have to be repaid by Dormell. The court stated that the guarantee was intended to enable the employer to complete the contract in case of

default by the contractor. Claims that arose after a breach by the employer were matters for arbitration. The guarantee was not intended to provide a source of funds for the payment of any outstanding amounts that might be due by the contractor to the employer.

The court concluded that it would amount to an academic exercise without practical effect if Dormell were to be granted the order it sought. It would immediately have to repay the full amount to Renasa or Synthesis. In terms of section 21A of the Supreme Court Act, the court had to exercise its discretion against Dormell.

Cachalia JA and Mhlantla JA concurred in the judgment of Bertelsmann AJA; Cloete JA and Mpati P dissented.

SOUTH GAUTENG HIGH COURT (COURT OF FIRST INSTANCE): The court held that no case for the rectification of the guarantee had been established and that it had in any event expired at midnight on 27 February 2008. The court accordingly dismissed the application. Leave to appeal was refused on 19 June 2008, but was granted on petition to the Supreme Court of Appeal on 27 August 2009.

SUPREME COURT OF APPEAL: The court held that Dormell was entitled to succeed with the appeal against the judgment of the court of first instance, in that the court's order must be set aside. In the particular circumstances of this case, it was, however, not entitled to an order that the guarantee should be enforced. The court made the following order:

1. The appeal is dismissed.

2. The respondents' application to place further evidence relating to the arbitration award before the court is granted.

3. The appellant is to pay the respondents' costs, including the costs of two counsel, incurred in respect of the appeal from 16 October 2009.

4. The respondents are to pay the appellant's costs, jointly and severally, the one paying the other to be absolved, of the appeal until 15 October 2010.

5. The order of the court of first instance is set aside and substituted with the following:

   "The respondents are to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, including the costs of two counsel."

***ANALYSIS*:**

This case is relevant to the CIDB and the construction industry at large, in so far as it involves the validity, the terms and the enforceability of a construction guarantee described as a "JBCC Construction Guarantee", issued in terms of a building contract.

The employers, contractors, and other participants in the construction industry take note of the *Dormell Properties* case and the court's findings therein, in particular the practical and legal implications of breaching a contract or not performing in terms of a contract, both in general and also in regard to one which contains a performance guarantee.

JOINT OWNERS, ERF 5216 HARTENBOS v MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE, AND ANOTHER

Western Cape High Court, Cape Town

(23635/2009) 2011 (1) SA 128 (decided: 2 September 2010)

FACTS: This case concerns the interpretation of certain provisions of the Environment Conservation Act 73 of 1989 ("the ECA") and the National Environmental Management Act 107 of 1998 ("NEMA"), and in particular whether the applicants could be said to have already commenced an activity listed or specified in terms of section 24 (2) (a) or (b) of NEMA, as envisaged in section 24 F (1) of that Act.

In terms of section 24 (2) (a) of NEMA, the Minister had listed certain activities in Government Notice 386 of 21 April 2006, which took effect on 3 July 2006. Consequently, any person who intended to undertake a listed activity thereafter had to obtain environmental authorisation. However, where any party had already commenced any activity in furtherance of a listed activity, by 3 July 2006, that party was exempted from obtaining environmental authorisation.

The applicants were the joint owners of erf 5216, Hartenbos ("the property"), situated at Hartenbos in the Western Cape. The applicants intended to undertake various listed activities in a development on the property, which included the following:

(a) A palisade would be erected along the high-water mark on the beach. The land above the palisade fence, which formed part of the beach, would be enclosed;

(b) Lawns would be planted on the property. The lowest part of the lawns would be 11 metres above the high-water mark;

(c) Buildings would be erected on the property. The lowest point of the buildings would be 25 metres above the high-water mark; and

(d) The buildings and lawns would be erected on an existing dune and would be extended onto the existing beach.

When the applicants acquired the property, there was a large depression in its north-western corner that encroached upon the neighbouring erf 5217 (on which the Pansy Cove Sectional Title Scheme was subsequently developed) ("Pansy Cove"). The depression was situated directly in the path of a planned access road across the property. Given the size of the

property and the location of the proposed erven, it was not possible for the road to be deviated around the depression.

According to Jan Frederick Ellis ("Ellis"), one of the applicants in the proceedings, the access road to be constructed across the property required substantial earthworks to be carried out, to eliminate the depression and level the surface. The Pansy Cove developers also required these works to enable them to erect a palisade boundary fence. According to Ellis, the vast majority of infilling and earthworks, to remove the depression, had to be undertaken on the property. According to Ellis, the earthworks commenced on 26 April 2006 and were completed on 3 May 2006.

The court accepted that the work done constituted partial construction of the access road, which work could only be done with the applicants' permission. The court further accepted that the applicants granted permission because of the advantage of having the depression filled in, so that they would later be able to construct the access road over it.

The applicants continued with the detailed planning of the development. On 17 June 2006 they entered into a revised and comprehensive partition agreement and constitution for the Homeowners Association. At the same time, they accepted the proposed site development plan, erf layout and building designs relating to the development. The architects continued to prepare plans for submission to the municipality and made their final submission in May 2007. The applicants also put out to tender, and subsequently made an award for the construction of services on 14 June 2007. Furthermore, while the municipality had in principle accepted that the building plans were ready for approval, it had also indicated that the applicants should obtain environmental authorisation from the Department of Environmental Affairs and Development Planning ("the Department"). That requirement gave rise to the proceedings.

The applicants argued that they had commenced the first earthworks in April 2006. That work was an activity undertaken in furtherance of the development and consequently in furtherance of all the listed activities they intended undertaking on the property. They therefore argued that they were exempted from obtaining NEMA authorisation.

The applicants sought the following declaratory orders:

1. An order declaring that the applicants were not required, pursuant to section 24 F (1) of NEMA to apply for or be granted an environmental authorisation for the development of the property;

2. An order declaring that the earthworks conducted by the applicants on the property in April and May 2006 did not constitute the construction, erection or upgrading of a "road" as envisaged in Item 1(d) in Schedule 1 of the Regulations under section 21 of the ECA promulgated in Government Notice R1182 dated 5 September 1997, as amended; and

3. An order declaring that the applicants were not required to obtain a written authorisation in terms of section 22 (1) of the ECA before being entitled to perform such earthworks.

ISSUES: Whether the filling-in and compacting of the depression was an act in furtherance of all or any of the listed activities the applicants intended to undertake as part of the development; and consequently whether the applicants had to obtain NEMA authorisation in order to continue with their intended listed activities.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding whether the applicants had commenced all the activities by filling in the depression, the court had regard to the provisions of NEMA from which it was apparent that:

1. The legislature intended to provide measures to protect the environment for present and future generations.

2. Section 24 (2) (a) enables the national Minister to identify "activities which may not commence without environmental authorisation from the competent authority".

3. The relevant authority in these proceedings was the first respondent's predecessor.

4. Section 24 F (1) (a) prohibits any person from being allowed to "commence an activity listed in terms of section 24 (2) (a) or (b) unless the competent authority ... has granted an environmental authorisation for the activity".

5. The word "commence" is defined in NEMA as follows:

> ""Commence", when used in Chapter 5, means the start of any physical activity, including site preparation and any other activity on the site in furtherance of a listed activity or specified activity, but does not include any activity required for the purpose of an investigation or feasibility

study as long as such investigation or feasibility study does not constitute a listed activity or specified activity ..."

The court referred to *R v Hugo* 1926 AD 268 where Innes CJ interpreted the word "any" as being of wide and unqualified generality, and concluded that the filling-in of the depression qualified as "any activity". However, the court stated that "in each instance one has to relate the activity in question to the listed activity", since sections 24 F (1) (a) and (b) prohibit the commencement of "an activity ... unless ... the Minister ... has granted authorisation for the activity". Furthermore, section 24 E provides that -

"E. Every environmental authorisation must as a minimum ensure that -

(a) Adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity ..."

The court was clear that the objective of the legislation is to comprehensively manage the impact of an activity on the environment. The applicants, however, argued that the first respondent had a long-standing practice of granting environmental approvals not on an "activity-by-activity" basis, but with reference to the development as a whole. The court stated that the applicants had not attempted to show any link between the infill and compacting, and any of the listed activities they intended undertaking. Instead they had argued that, because the filling and compacting were essential for the development, it was carried out in furtherance of every listed activity that would be undertaken in the development.

Section 24 (1) requires that "the potential consequences for or impacts on the environment of listed activities ... must be considered, investigated, assessed and reported on". Since some activities may be authorised and others not, depending on the environmental impact, it follows that the relevant authority would have to assess each individual activity. The court agreed with the applicants that the statutory threshold of "any physical activity" is low, but stated that they nevertheless had to show a link between that activity and each listed activity they intended undertaking. The court added that not every activity the applicants intended to undertake in their development could be considered as even potentially harmful to the environment. Therefore, only those activities which are listed activities require NEMA authorisation.

For an activity to qualify as having been "in furtherance" of a listed activity, there must be evidence that it advanced the activity, i.e. some reasonably direct connection between the

physical activity and the listed activity. The applicants, however, failed to show a connection between the activity and the individual listed activities, and instead relied on a connection between the activity and the development. Since a development consists of many activities, the court stated that it could not determine whether there was a reasonably direct connection between the act of filling in the depression and any of the listed activities. The court concluded that the applicants were not entitled to a declaration that they were not required to apply for or be granted environmental authorisation under NEMA. The court added that the applicants required ECA authorisation.

Section 22 (1) of the ECA provides as follows:

> "(1) No person shall undertake an activity identified in terms of section 21(1) or cause such an activity to be undertaken except by virtue of a written authorisation issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, local authority or officer shall be designated by the Minister by notice in the Gazette."

Section 21 (1) of the ECA permitted the Minister by notice in the Gazette to identify those activities that, in his opinion, may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas. The Minister issued such a notice in the form of regulations on 5 September 1997, which was subsequently amended. On 3 May 2002, the ECA adopted the following definition for "road", namely:

> "(a) any road determined to be a national road in terms of section 40 of the South African National Roads Agency Ltd and National Roads Act 7 of 1998. Including any part of such road;
>
> (b) any road for which a fee is charged for the use thereof;
>
> (c) any provincial road administered by a provincial authority;
>
> (d) any arterial road or major collector street administered by a metropolitan or local authority;
>
> (e) any road or track in an area protected by legislation for the conservation of biological diversity or archaeological, architectural or cultural sites or an area that has been zoned open space or an equivalent zoning;

(f) any road or track in an area regarded by the relevant authority as a sensitive area."

It follows that, if the road or any part of it falls within the area regarded as sensitive, the applicants must obtain ECA authorisation.

The applicants argued that the relevant authority had not published its "regard" in any official notice, or by any other means. They did not, however, dispute the validity of the notice, and therefore its provisions were binding upon them. The court stated that it was satisfied, having regard to certain documents which, although they predated the acquisition of the property by the applicants, as well as materially predated the introduction of "road" in the EIA regulations of 3 May 2002, served as objective evidence that the relevant authority regarded the area as sensitive for purposes of development. The work constituted partial construction of an access road which intruded into an area regarded as a "sensitive area" by the relevant authority and accordingly ECA authorisation was required.

Furthermore, the applicants could also not rely on the filling-in and compacting as an activity in furtherance of a listed activity, because they had started the road in contravention of the ECA,

WESTERN CAPE HIGH COURT: The court dismissed the application with costs.

ANALYSIS:

This case is relevant to the CIDB and the construction industry at large, in so far as it involves environmental authorisation, in terms of the provisions of the Environment Conservation Act 73 of 1989 and the National Environmental Management Act 107 of 1998 ("NEMA"), of certain building activities already commenced with by property developers as part of a larger construction project.

The employers, contractors, and other participants in the construction industry take note of the *Hartenbos* case and the court's findings therein, in particular the practical and legal implications of not fulfilling applicable legislative requirements, both in general and specifically in regard to the activities listed in regulations published in terms of NEMA.

ZOKUFA v COMPUSCAN (CREDIT BUREAU)

Eastern Cape High Court, Mthatha

(1751/08) 2011 (1) SA 272 (decided: 1 July 2010)

FACTS: This case concerns an application for an interdict directing a credit provider to comply with its obligation under section 70 (2) (g), read with section 65 (1) and (2) of the National Credit Act 34 of 2005 ("the NCA"), to issue a consumer with a credit report upon request.

During May 2008, Nozuko Cecilia Zokufa ("Zokufa" or "the applicant") applied for certain credit facilities from the Capitec Bank in Stellenbosch. The application was refused. Zokufa, as she was entitled to do, requested reasons for the refusal. Capitec Bank advised her that the refusal was based on adverse credit reports obtained from, inter alia, Compuscan (Credit Bureau) ("Compuscan" or "the respondent") in Stellenbosch.

On 12 August 2008, Zokufa's attorneys in Mthatha addressed a letter to Compuscan requesting it to furnish them "... with a copy of the credit records, file and information and their originating sources concerning our client for inspection ...". Thereafter, protracted correspondence followed between Compuscan and Zokufa's attorneys. Compuscan required Zokufa to sign a document entitled "Application for your personal credit profile" which contained certain terms and conditions upon which the information would be released, such as the payment of a prescribed fee; the consent by Zokufa to the indemnification and limitation of liability of Compuscan in the event that incorrect information was supplied; and the acceptance by Zokufa of a "voetstoots" clause to the effect that no warranty would be given by Compuscan that the information supplied was correct. Negotiations followed between the parties regarding the terms of conditions for the release of the information, but eventually Zokufa refused to consent to any condition and insisted on the unconditional release of the report, which Compuscan refused.

Zokufa consequently instituted legal proceedings and requested that Compuscan be "directed to make available ... the credit record, file and information concerning applicant ... in terms of the National Credit Act 34 of 2005".

Compuscan raised the following relevant defence:

1. ...

2. Apart from the condition relating to the payment of a fee, which condition was waived by Compuscan prior to the institution of proceedings, the other conditions relating to indemnity and the like were necessary for the protection of the business rights of Compuscan and were not precluded by the NCA, and could therefore be lawfully insisted upon by a credit bureau before information was released.

3. ...

ISSUES: Whether or not Zokufa was entitled to a mandatory interdict directing Compuscan to provide her with the credit record, file and information pertaining to her under the NCA, and whether or not Compuscan was entitled to insist on a conditional release of the report.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court considered the three requirements for a final interdict, which are (1) a clear right; (2) a threat to breach such right (in the case of a prohibitory interdict) or a refusal to act in fulfilment of such right (in the case of a mandatory interdict or mandamus); and (3) no other remedy. The court then proceeded to consider the first requirement for a mandamus, in other words a clear right, which in this case relates to Zokufa's statutory claim to information.

The court stated that the right to access to information is a fundamental right under section 32 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), which provides that "anyone has the right of access to ... any information that is held by another person and that is required for the exercise or protection of any rights." The court added that there are numerous statutes giving effect to this constitutional right in South Africa, including the NCA.

In terms of section 60 of the NCA, every consumer has the right to apply for credit. In terms of section 62, if the application is declined, and on request from the consumer, the credit provider must advise the consumer in writing of the main reason for the refusal. In doing so, the bank which has based its decision on an adverse credit report received from a credit bureau must advise the consumer in writing of the name, address and other contact particulars of the credit bureau (section 62 (2)). These procedures were duly followed by Zokufa and Capitec Bank.

Furthermore, the NCA provides for the manner in which the right to access to information is not only to be exercised, but also to be complied with, by both the credit provider and the credit bureau. Section 70 (2) of the NCA provides as follows:

"(2) A registered credit bureau must:

...

(g) issue a report to any person who requires it for a prescribed purpose or a purpose contemplated in this Act, upon payment of the credit bureau's fee except where the Act explicitly provides that no fee be charged..."

In this case, no fee could be charged under section 65 (3). Furthermore, Zokufa required the information for the purposes as prescribed.

In addition, section 65 of the NCA provides for the consumer's right to receive documents:

"65. Right to receive documents

(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must -

(a) make the document available to the consumer through one or more of the following mechanisms -

(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;

(ii) by fax;

(iii) by e-mail; or

(iv) by printable web-page; and

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)..."

The NCA therefore provides for four steps, namely:

1. On request from a consumer, the credit provider must advise the consumer in writing of the reasons for refusing credit, and if such refusal is based on an adverse credit report, then the credit provider must advise the consumer of the name, address and contact details of that credit bureau (section 62).

2. The credit bureau is obliged to "issue" a report to the consumer who requires it for purposes contemplated in the NCA (section 70 (2) (g))

3. The consumer has the right to "receive" such report, and the credit bureau has the obligation to "make (it) available" to the consumer in one of the prescribed methods, and then to "deliver" it to the consumer in the manner chosen by the consumer (section 65(1) and (2)).

4. The consumer then has the right to "inspect" the credit bureau, national credit register, file or information concerning him/her (section 72).

Compuscan's obligation to issue the report in terms of section 70 (2) (g) of the NCA was dependent upon on the requirement that Zokufa required it for a prescribed purpose or a purpose contemplated in the NCA. Zokufa challenged the accuracy of the information, and she required the report to exercise her rights under the NCA, and to correct the information in order to qualify for credit from Capitec Bank. The court therefore had no doubt that she "required" the report for a purpose contemplated in terms of section 70 (2) (g). The fulfilment of this requirement automatically triggered Compuscan's obligation under section 70 (2) (g) to "issue" the report to her. The court thereafter addressed the question of whether or not Compuscan was legally entitled to insist on a conditional release of the report, and to dictate the conditions of release. The court stated that while the NCA did not, either expressly or by implication, prohibit a credit bureau from attaching conditions to the release, the wording of section 70 (2) (g) and its mandatory tone, commanded unconditional compliance. The court added that section 32 of the Constitution, which deals with the right to access to information, limits the application of section 32 to information "that is required for the exercise or protection of any rights". In the court's view, this requirement had been fulfilled since Zokufa had argued that she required the information to enable her to exercise her rights under the NCA and to challenge the accuracy of the information. She also had the right to protect her financial credibility against false or incorrect credit reports. Furthermore, the conditions which Compuscan sought to attach to the release of the report could not be said to be a "law of

general application" within the meaning of section 36 of the Constitution, which deals with the limitation of constitutional rights. The court therefore held that neither section 32 nor section 36 was available to Compuscan in attaching any conditions to its obligation under section 70 (2) (g) of the NCA, to issue the report to the applicant

In the court's view, the intention of the legislature with respect to section 70 (2) (g) of the NCA was to obligate Compuscan to unconditionally issue the report. The court concluded that Compuscan's failure to issue the report unconditionally was unlawful and in breach of its statutory obligations under the NCA.

EASTERN CAPE HIGH COURT, MTHATHA: The court made the following order:

1. Compuscan is hereby ordered to deliver to Zokufa, in terms of the provisions of the NCA, without charge, all files, reports or information concerning Zokufa which constitute the adverse credit report to Capitec Bank Ltd, Stellenbosch and delivered by Compuscan to the said bank.

2. Compuscan is ordered to pay the costs of this application.

ANALYSIS:

This case is relevant to the CIDB and the construction industry at large, in so far as it considers the right of a consumer to access to information pertaining to him or her, namely his or her credit record, file and relevant documentation. Furthermore, it outlines the correct procedure to be followed by a consumer, as well as the credit provider and credit bureau involved, in the event that the consumer's application for credit is declined and he or she wishes to exercise such a right to access to such information, as provided for in the National Credit Act 34 of 2005 ("the NCA").

All contractors, and other participants in the construction industry who may enter into a credit agreement, take note of the *Zokufa* case and the court's findings therein, in particular the correct procedure to be followed by a consumer, the credit provider and the credit bureau where a consumer wishes to exercise his or her right to access to information held by such credit provider and/or credit bureau as provided for in terms of sections 62, 65 (1) and (2), 70 (2) (g) and 72 of the NCA.

SA TAXI SECURITISATION (PTY) LTD v MBATHA AND TWO SIMILAR CASES

South Gauteng High Court, Johannesburg

(51330/09; 52948/09; 53080/09) 2011 (1) SA 310 (decided: 30 March 2010)

FACTS: This case deals with the enforcement of a consumer credit agreement by a credit provider, and in particular the defences which may be relied upon by a consumer, based upon sections of the National Credit Act 34 of 2005 ("the NCA").

Three separate applications for summary judgment were brought before the court. In each case, SA Taxi Securitisation (Pty) Ltd ("the plaintiff") had financed the acquisition of a taxi by the defendant through an agreement and as a result, the plaintiff leased a vehicle to each defendant. Each defendant was required to pay rental, which included capital plus finance charges. Each of the lease agreements was a credit transaction as defined in section 1 of the NCA.

Each defendant allegedly defaulted in its obligation to pay the rental. The plaintiff alleged that it had validly cancelled each of the lease agreements and sought to repossess each of the leased vehicles. The plaintiff therefore applied for summary judgment for the return of each of the vehicles. In each action the defendant raised various defences under the NCA, including the defences of "reckless credit" and over-indebtedness.

ISSUES: Whether or not the lease agreements constituted reckless credit agreements; whether or not the defendants were over-indebted; and whether or not the plaintiff was entitled to an order for repossession of the leased vehicles.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court considered the standard that the defendant would have to meet in order to defeat a plaintiff's claim for summary judgment. In this regard, the court referred to the principles set out in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T), which are inter alia that the allegations made by a defendant opposing summary judgment should not be "inherently and seriously unconvincing", should contain a reasonable amount of confirming detail, and should not be "needlessly bald, vague or sketchy". The court added that a bald allegation that there was "reckless credit" or there was "over-indebtedness" would not be sufficient.

The court then considered the purpose of the NCA, and stated that the NCA was structured in such a way as to prevent "over-indebtedness" and to provide for more efficient discharge of consumer debts. The court pointed out that a major purpose of the NCA was to assist over-indebted consumers to pay off their indebtedness. In certain limited circumstances, the NCA granted them a moratorium on the repayment of the indebtedness in order to enable them to get back on their feet. The NCA might also allow consumers to be relieved of indebtedness that was incurred as a result of reckless credit. The court emphasised that these objectives were directed at the consumer's indebtedness, and were not intended to unfairly deprive lenders of their security.

The court thereafter addressed the defence of "reckless credit".

Section 80 of the NCA provides:

> "(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased ... -
>
> (a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
>
> (b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that -
>
> (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or
>
> (ii) entering into that credit agreement would make the consumer over-indebted."

Section 80 (2) provides that a determination of recklessness must be based upon the circumstances that prevailed at the time that the obligation was entered into, and not at the

time when the determination is made. Furthermore, section 80 (3) sets out some of the factors that must be considered in determining whether there has been reckless credit. These include a determination of the value of any credit facility available to the borrower at the time that the credit was granted, and the amount of any pre-existing credit guarantees.

Section 83 of the NCA provides:

> "(1) Despite any provision of law or agreement to the contrary, in any court proceeding in which a credit agreement is being considered, the court may declare that the credit agreement is reckless, as determined in accordance with this Part.
>
> (2) If a court declares that a credit agreement is reckless in terms of section 80 (1) (a) or 80 (1) (b) (i), the court may make an order -
>
> (a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or
>
> (b) suspending the force and effect of that credit agreement in accordance with subsection (3) (b) (i)."

Section 84 (1) provides:

> "(1) During the period that the force and effect of the credit agreement is suspended in terms of this Act -
>
> (a) the consumer is not required to make any payment required under the agreement;
>
> (b) no interest, fee or other charge under the agreement may be charged to the consumer; and
>
> (c) the credit provider's rights under the agreement, or under any law in respect of that agreement, are unenforceable, despite any law to the contrary."

Therefore, if a court declares a credit agreement to be reckless, it can either "set aside" the consumer's "rights and obligations" in whole or in part, or suspend the force and effect of the credit agreement.

The court furthermore agreed with the following statements of the court in *Standard Bank of South Africa Limited v Panayiotts* 2009 (3) SA 363 (W) 370:

> "[77] In any event, my view is that the NCA does not envisage that a consumer may claim to be over-indebted whilst at the same time retaining possession of the goods which form the subject-matter of the agreement. Such goods should be sold to reduce the defendant's indebtedness.
>
> ...
>
> [81] The purpose of the NCA is, inter alia, to provide for the debt re-organisation of a consumer who is over-indebted, thereby affording such consumer the opportunity to survive the immediate consequences of his financial distress and to achieve a manageable financial position ..."

Section 130 (1) of the NCA further provides that the failure of a consumer to surrender its security is a factor that strongly favours immediate enforcement of the credit agreement by the credit provider.

The court concluded that the defendants had not set out their defence of reckless credit in any of the actions in sufficient detail to comply with the requirements of *Breitenbach v Fiat*. The defendants should have provided the following information:

1. Details of the negotiations leading up to the conclusion of the agreement. This includes the identity of the parties involved in the negotiations, as well as details concerning any credit application that the defendant signed and the circumstances in which the defendant signed such a credit application.

2. Where a defendant wished to rely on section 80 (1) (b) (i), the defendant should provide information demonstrating his/her level of education and experience at the

time relating to the risk of incurring credit, including details of prior credit transactions that the defendant had entered into.

3. Where a defendant wished to rely on section 80 (1) (b) (ii), the defendant should provide details of all its indebtedness at the time that the agreement was concluded, as well as details of the defendant's potential income and expenditure.

4. Information concerning the defendant's current levels of indebtedness, and income and expenditure, in order to enable the court to decide whether the court might either set aside the credit agreement or suspend it.

The court then addressed the defence of "over-indebtedness".

In terms of section 86 of the NCA, a consumer may apply to a debt counsellor for a declaration that she/he is over-indebted. On receipt of such an application, the debt counsellor is required to notify all of the consumer's credit providers and every registered credit bureau.

Section 86 (5) provides:

> "(5) A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4) (b), must –
>
> (a) comply with any reasonable request by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and
>
> (b) participate in good faith in the review and in any negotiations designed to result in responsible debt rearrangement."

Section 86 (10) and (11) of the NCA provide as follows:

> "(10) 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.

(11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate's Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."

The court concluded that the defendants' defence of over-indebtedness fell short of what was required by *Breitenbach v Fiat*. Each defendant should have provided some of the following information in his defence:

(1) An outline of the defendant's assets and liabilities, income and expenditure. This would have enabled the court to ascertain whether the allegation of over-indebtedness was bona fide.

(2) The date when the defendant approached the debt counsellor, as well as the identity of the debt counsellor.

(3) Copies of documents that the defendant submitted to the debt counsellor, or an explanation for their absence.

(4) Copies of documents received from the debt counsellor indicating that the debt counsellor had assessed the defendant and found him to be over-indebted, or an explanation for the absence of such documents.

(5) Details of when the debt counsellor allegedly approached the plaintiff for information concerning the defendant's indebtedness, as well as the proposal that the debt counsellor allegedly submitted to the plaintiff.

(6) Copies of all documents generated by the debt counsellor, or an explanation for the absence of such documents.

SOUTH GAUTENG HIGH COURT, JOHANNESBURG: The court held that the defendants failed to set out a bona fide defence to the claims for repossession of the leased vehicles and accordingly, the plaintiff was entitled to judgment for restoration of each of the vehicles. The court made the following orders:

1. In the first action (case No: 51330/09), the defendant, Bhekithemba Mishack Mbatha:

   (a) return the 2007 Toyota Siyaya to the plaintiff forthwith;

   (b) return the 2008 Quantum Sesfikile to the plaintiff forthwith; and

   (c) pay the costs of the action incurred by the plaintiff so far, on the attorney and client scale.

2. In the second action (case No: 52948/09), the defendant, Christopher Qenehelo Molete:

   (a) return the 2008 Toyota Quantum Sesfikile to the plaintiff forthwith; and

   (b) pay the costs of the action incurred by the plaintiff so far on the attorney and client scale.

3. In the third action (case No: 53080/09), the defendant, Aaron Velaphi Makhoba:

   (a) return the 2008 Cam Inyathi XGD 2.2i High Roof to the plaintiff forthwith; and

   (b) pay the costs of the action incurred by the plaintiff so far on the attorney and client scale.

ANALYSIS:

This case is relevant to the CIDB and the construction industry at large, in so far as it considers the enforcement of a credit agreement by means of summary judgment and in particular the defences which may be relied upon by a consumer, namely that of “reckless credit” and over-indebtedness, as provided for in the National Credit Act 34 of 2005 (“the Act”).

All contractors, and other participants in the construction industry who may enter into a credit agreement, take note of the *SA Taxi* case and the court's findings therein, and in particular the type of information which a defendant should provide if he or she wishes to successfully raise a defence of "reckless credit" or "over-indebtedness" against a plaintiff's claim for summary judgment.

VIKING PONY AFRICA PUMPS (PTY) LTD t/a TRICOM AFRICA v HIDRO-TECH SYSTEMS (PTY) LTD AND ANOTHER

Constitutional Court of South Africa

(CCT 34/10) 2011 (1) SA 327 (decided: 23 November 2010)

FACTS: This case concerns the application of the preferential procurement policy, and specifically the nature and extent of the duty of an organ of state when presented with allegations presumed to be true, that an enterprise, to which a tender was awarded, fraudulently manipulated a preferential procurement scheme for the purpose of securing a preference.

The applicant, Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa ("Viking") was a company that supplied and installed mechanical and electrical equipment for water and sewerage treatment works. The first respondent, Hidro-Tech Systems (Pty) Ltd ("Hidro-Tech") was a company which, to a large extent, carried on the same business as Viking. The second respondent was the City of Cape Town ("the City").

Over the years, Viking and Hidro-Tech received much work from the City and other municipalities in the Western Cape, Northern Cape and Eastern Cape provinces. However, Hidro-Tech contended that Viking had been awarded approximately 80% more tenders than Hidro-Tech, and further that on at least three occasions Hidro-Tech had submitted a lower tender than Viking, but still lost. Hidro-Tech believed that the reason behind Viking's competitive advantage was because of its higher historically disadvantaged individual (HDI) profile. HDIs held 70% of Viking's shares, whereas the converse was true in Hidro-Tech. Consequently, Viking was always given higher preference points, which resulted in tenders often being awarded to it.

Hidro-Tech obtained knowledge that HDIs in Viking were neither remunerated nor allowed to participate in the management of Viking to the degree commensurate with their shareholding and their positions as directors. Hidro-Tech also believed that the benefits Viking received from tenders awarded were being routed to its sister company, Bunker Hills Pumps (Pty) Ltd t/a Tricom Systems ("Bunker Hills"), which was a wholly white-owned company. This information was conveyed to Hidro-Tech by Mr Zandberg (a white male and erstwhile employee of Viking, and a director and 10% shareholder in Bunker Hills) and Mr James (a HDI

who owned 35% of Viking's shares), who parted ways with Viking under unpleasant circumstances and joined Hidro-Tech. Hidro-Tech further believed that Viking was an instrument used by Bunker Hills to obtain tender benefits which it would otherwise not have enjoyed, given its all-white shareholding and executive structures.

Based on the aforesaid, Hidro-Tech lodged a complaint with the City. The complaint was that Viking had, over the years, made fraudulent misrepresentations in its tender documents to the City, about its profile of historically disadvantaged individuals, for the purpose of securing a preference. The City then requested external database managers, Quadrem t/a Tradeworld ("Tradeworld") to investigate Hidro-Tech's allegations. Tradeworld conducted a verification exercise which confirmed that Viking's shareholding as reflected in tender documents was correct. Unsatisfied with this, Hidro-Tech's attorneys wrote a follow-up letter to the City wherein they expressed the view that the investigation conducted by Tradeworld was inadequate due to Tradeworld's incapacity to investigate allegations of fronting. Subsequently, Hidro-Tech's attorneys held talks with a senior City official who stated that the City was unable to take action against Viking at that stage. Hidro-Tech thereafter wrote a letter to the City requesting an urgent investigation by the City, and demanding the suspension of the work which Viking was doing for the City, as well as a halt to the award of any further tenders to Viking. Hidro-Tech furthermore threatened legal action against the City, if its demands were not met. Since the City did not respond favourably, Hidro-Tech approached the Western Cape High Court for relief.

ISSUE: What are the obligations of an organ of state in circumstances where an enterprise which has been awarded a tender is reasonably accused of having been successful only because of fraudulent misrepresentations it made.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first addressed the question pertaining to the source of the City's obligation to investigate Hidro-Tech's complaints against Viking satisfactorily, in terms of the regulatory framework. Section 217 of the Constitution of the Republic of South Africa provides the basis on which organs of state may enter into contracts for the procurement of goods and services. It also allows for the preferential allocation of contracts for the advancement of persons previously disadvantaged by unfair discrimination and provides for the enactment of national

legislation to lay a framework within which a procurement policy, designed to favour HDIs, is to be implemented.

The Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA") was therefore enacted, and some of its specific goals are to: (i) have an organ of state contract with HDIs; and (ii) give the organ of state the discretion to cancel any contract awarded as a result of the false information supplied by the tenderer for the purpose of securing preference, without prejudice to any other remedies the organ of state may have. Regulations made in terms of the PPPFA: (i) describe a HDI; (ii) set out the principles which regulate the preferential point system; (iii) underline the importance of truthful and correct information in submitting tender documents; and (iv) provide for the obligations and powers of an organ of state to "act against" any person who was awarded a tender, as a consequence of a fraudulent misrepresentation of the facts, when the fraud is detected. The court stated that when any service provider who did not secure a tender registers its complaint with the relevant organ of state, an appropriate response is required. The type of response called for depends on the particular circumstances of each case, and on the obligations imposed on the organ of state. There are different statutory sources for the obligation of an organ of state to investigate allegations of impropriety in municipal tendering processes, including the Local Government: Municipal Finance Management Act 56 of 2003 and Regulation 15 of the Regulations.

The court then stated that the question of whether the City had discharged its obligations to investigate the complaint satisfactorily in terms of the regulatory framework could only be resolved by determining the nature of the obligation, which in turn depended on the meaning of "detect" and "act against" in Regulation 15 (1), which provides that "an organ of state must, upon detecting that a preference in terms of the Act and these regulations have been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract". The court pointed out that the Supreme Court of Appeal had correctly held that Regulation 15 (1) "ensures that no organ of state will remain passive in the face of evidence of fraudulent preferment, but is obliged to take appropriate steps to correct the situation".

The court then considered the meaning of "detect" and stated that the word should be interpreted broadly when read within the context of Regulation 15 (1). The court found that

the general meaning of "detect" was no more than discovering, getting to know, coming to the realisation, being informed, having reason to believe, entertaining a reasonable suspicion, that allegations, of a fraudulent misrepresentation by the successful tenderer, so as to profit from preference points, are plausible. It is therefore not the existence of conclusive evidence of a fraudulent misrepresentation that should trigger responsive action from an organ of state, but the awareness of information which, if verified through proper investigation, could potentially expose a fraudulent scheme. Thus, obtaining any information that gives rise to a reasonable suspicion that preference points might have been fraudulently awarded does amount to detection.

The court then gave attention to the meaning of "act against". In terms of Regulation 14, and in the event that an enterprise is reasonably accused of having made fraudulent misrepresentations in its tender documents, the organ of state responsible for the tender is, upon becoming aware of the alleged misrepresentation, obliged to investigate the matter. The court stated that "act against" in a situation where the allegations of fraud are superficial, may require an in-depth investigation into the matter. Furthermore, "act against" also extends to the determination of culpability and an appropriate penalty to impose on the party found to have acted fraudulently.

The court thereafter addressed the question of whether or not PAJA was applicable to "detect" or "act against", or both. "Administrative action" is defined in PAJA as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes "action that has the capacity to affect legal rights". The court stated that detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute administrative action. It is what the organ of state decides to do and actually does with the information it has became aware of which could trigger the applicability of PAJA. If the City were about to pronounce on the culpability or otherwise of Viking, Hidro-Tech and Viking would have had to be afforded the opportunity, in terms of PAJA, to make representations, if they so wished. This case did not, however, reach that stage and PAJA was therefore not applicable.

Finally, the court addressed the question of whether the steps taken by the City in addressing Hidro-Tech's complaints, were adequate, and tracked the steps taken by the City from the lodging of the complaint, through to just before Hidro-Tech launched the application for a

mandatory order. The court stated that the nature and seriousness of the complaint, and the details provided in support thereof, imposed an obligation on the City to investigate allegations of non-compliance with the provisions of the Regulations. In this regard, Regulation 13 provides:

> "(1) Preference points stipulated in respect of a tender must include preference points for equity ownership by [historically disadvantaged individuals];
>
> ...
>
> (4) Preference points may not be claimed in respect of individuals who are not actively involved in the management of an enterprise or business and who do not exercise control over an enterprise or business commensurate with their degree of ownership."

It follows therefore that it is not sufficient to have the HDIs holding the majority shares in a tendering enterprise. The exercise of control and the managerial power actually held by them, in proportion to their shareholding, are pertinent.

The court stated that the steps taken by the City to investigate, namely the referral of the complaint to its indifferent lawyers, Tradeworld and the Department of Trade and Industry, amounted to a failure by the City to respond appropriately to the demands of the complaint by Hidro-Tech. The City was obliged to "act against" Viking by investigating the matter properly. It could have investigated the matter itself or referred the matter to a person or entity capable of investigating the complaint, for example the Commercial Crimes Unit of the South African Police Service, the Directorate for Priority Crime Investigations, the National Prosecuting Authority or a firm of forensic accountants).

WESTERN CAPE HIGH COURT, CAPE TOWN: The court found that:

(i) the investigation conducted by Tradeworld was inadequate as the investigation did not address the real issues, which were the inner workings of Viking and the actual status of its HDI directors;

(ii) Hidro-Tech was justified in forming the opinion that the City's response to its complaint was inadequate to safeguard its constitutional rights and legitimate commercial interest;

(iii) the City was obliged to "act against" Viking;

(iv) the content of the letter written at the instance of Hidro-Tech was true and it was in the public's, as well as Hidro-Tech's, interest;

(v) the City's persistent opposition to the relief sought, on the face of the totality of the evidence before the court, justified a mandatory order against it;

(vi) on the probabilities neither Mr James nor Mr Mosea were actually involved in the management of, or exercised control over, Viking to the extent commensurate with their respective shareholding at the time of Viking's submission of the tenders awarded in 2006 and 2007; and

(vii) Viking is guilty of a fraudulent misrepresentation.

The court ordered the City therefore to "act against" Viking in terms of Regulation 15 and an order as to costs was made against the City, Viking and Bunker Hills.

Viking subsequently sought and obtained leave from the Western Cape High Court to appeal to the Supreme Court of Appeal.

SUPREME COURT OF APPEAL: The Supreme Court of Appeal only addressed the question of whether or not the City conducted an appropriate investigation into the serious allegations made by Hidro-Tech against Viking. The Supreme Court of Appeal found that the City was in breach of its duty to investigate and concluded that the Western Cape High Court did not err in granting the relief, and dismissed the appeal with costs.

Viking then approached the Constitutional Court for leave to appeal against the decision of the Supreme Court of Appeal.

CONSTITUTIONAL COURT OF SOUTH AFRICA: The court made the following order:

1. Leave to appeal is granted.

2. The appeal is dismissed, save for the orders set out below.

3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

"(a) The City of Cape Town is directed to investigate the allegations made by Hidro-Tech against Viking Pony, including whether or not the HDIs who held the majority of the shares in Viking Pony, were at the time referred to in the complaint actively involved in the management of the company and exercised control over the company, commensurate with the degree of their ownership.

(b) The order for costs made by the Western Cape High Court, Cape Town is confirmed.

(c) The appeal is otherwise dismissed with costs."

4. The City of Cape Town is ordered to pay the costs of Hidro-Tech and Viking in this court, including the costs of two counsel.

5. The order in para 4 is provisional.

6. The parties and the City of Cape Town are invited to make representations within 10 days of the date of delivery of this judgment, on whether the provisional order should be made final.

***ANALYSIS*:**

This case is relevant to the CIDB and the construction industry at large, in so far as it considers the duty of an organ of state to investigate a complaint that an enterprise, to which a tender was awarded, fraudulently manipulated a preferential procurement scheme for the purpose of securing a preference, in violation of the provisions of the Regulations published in terms of the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA").

All participants, including public sector clients take note of the Viking Pony case and the court's finding therein.

McLUCKIE v SULLIVAN

South Gauteng High Court, Johannesburg

(2008/14301) 2011 (1) SA 365 (decided: 7 September 2010)

FACTS: This case concerns the liability of directors and officers for the debts incurred by a company in terms of section 424 of the Companies Act 61 of 1973 ("the Companies Act").

Sullivan, the sole director of Dansk Design (Pty) Ltd ("Dansk"), concluded a written settlement agreement with McLuckie in June 2004. Dansk had previously been mandated by McLuckie to carry out construction work on property owned by McLuckie.

During the erection of McLuckie's home a number of disputes arose between him and Dansk. These disputes culminated in Dansk demanding payment of approximately R900 000.00 from McLuckie, which it claimed was due and payable by him and McLuckie refusing to pay any further moneys, since he claimed that his home was incomplete and/or defective.

In an attempt to resolve these disputes, McLuckie and his attorney, and Sullivan and his attorney, met at McLuckie's incomplete home on 21 November 2005. McLuckie wanted his home completed, whilst Sullivan wanted to ensure that Dansk was paid what was due to it. After some discussion, the parties reached a settlement agreement the essential terms of which were:

1. McLuckie would pay to Dansk the amount of R530 675.07 in full and final settlement of any and all claims Dansk may have had against McLuckie pertaining to the sale of land and construction of the buildings at McLuckie's property; and

2. Payment of the amount of R530 675.07 would be made to Dansk within 24 hours of McLuckie receiving Dansk's written undertaking that it would comply fully with all of its obligations in terms of the various agreements concluded between the parties, which included, but was not limited to; the proper repair of all problems as discussed with the architect, the completion of all outstanding works at the premises and to the common property and the honouring of all guarantees applicable to the agreements.

These terms were confirmed by Dansk's attorney in a fax dated the following day.

On 28 November 2005 McLuckie's attorney sent a further fax to Dansk's attorneys in which it was confirmed that an amount of R8 396.95 would be deducted from the R530 675.07 which had originally been agreed to, as McLuckie had paid this amount directly to a supplier. This was confirmed by Dansk's attorneys in a telefax dated 30 November 2005. The total balance due in terms of the agreement was therefore R522 278.12.

On 28 November 2005 McLuckie transferred the amount of R522 278.12 into Dansk's bank account. However, that same day the parties met at McLuckie's incomplete house. Sullivan had just been informed by the Bristows that they were not prepared to pay Dansk R500 000.00 which was due to it in terms of an architect's certificate. McLuckie was upset as no further work had been done to his house since their previous meeting, despite their agreement of 21 November. Words were exchanged between McLuckie and Sullivan, and a heated confrontation followed. At the end of the discussion Sullivan informed McLuckie that Dansk would not complete the building works. Sullivan argued that at the time he made the statement on behalf of Dansk, he was unaware of the fact that McLuckie had made the payment that morning.

Dansk did no further work on McLuckie's house. In the next few days, Sullivan retrenched Dansk's workforce, paid all outstanding trade creditors on its behalf and effectively closed Dansk down.

In June 2005 Sullivan approached the court to wind up Dansk, which application was granted on 21 February 2006.

In a statement of affairs prepared in terms of the Companies Act, the liquidators of Dansk demonstrated that Dansk was insolvent, despite having received McLuckie's payment of R522 278.12. Dansk had utilised this money to pay its trade creditors and workers, and to pay R300 000.00 to Sullivan himself.

McLuckie subsequently claimed payment of R522 278.12 from Sullivan.

ISSUE: Whether or not McLuckie was entitled to claim payment from Sullivan in terms of section 424 of the Companies Act.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court considered the provisions of section 424 (1) of the Companies Act which provides:

> "(1) When it appears, whether it be in winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."

The court also referred to *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA), and in particular paragraph 15 where the following is stated by Cameron JA:

> "[15] It need hardly be added that the function of the statutory provision also shapes its application. Although juristic persons are recognised by the Bill of Rights - they may be bound by its provisions, and may even receive its benefits - it is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted. The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a *quid pro quo*: <u>for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable."</u> (Emphasis added)

The use of the term "reckless" as used above was explained in paragraph 14 of the *Ebrahim* case:

> "[14] Acting "recklessly" consists in "an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences". In applying the recklessness test to the running of a close corporation, the court should have regard to amongst other things the corporation's scope of operations, the members' roles, functions and powers, the amount of the debts, the extent of the financial difficulties and the prospects of recovery, plus the particular circumstances of the claim "and the extent to which the [member] has departed from the standards of a reasonable man in regard thereto"".

The court pointed out that the fact that Dansk was a company, as opposed to a close corporation, did not alter the principles referred to in the *Ebrahim* case.

The court concluded that the terms of the agreement between the parties were that McLuckie would pay the amount agreed to as a quid pro quo for Dansk providing a written undertaking that it would complete all the outstanding works at his premises. Dansk could only perform its obligations to McLuckie with the financial support of Sullivan. Sullivan's statement that Dansk would not complete the building works constituted repudiation by Dansk of its agreed obligations to McLuckie. By allowing Dansk to keep the moneys paid to it by McLuckie in terms of the agreement, well knowing that there was no possibility that Dansk could repay it, unless he paid it, Sullivan caused it to act recklessly, as envisaged in section 424 of the Companies Act. Sullivan was therefore liable to compensate McLuckie for the moneys paid by him in terms of the settlement agreement,

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

1. It is declared that Sullivan is liable to McLuckie in terms of section 424 (1) of the Companies Act for the debts incurred by Dansk to McLuckie.

2. Sullivan is ordered to pay to McLuckie the sum of R522 278.12, together with interest thereon at the rate of 15.5% per annum calculated from 21 May 2008 (the date upon which appearance to defend was filed) to date of payment.

3. Costs of suit.

ANALYSIS:

This case is relevant to the CIDB and the construction industry at large, in so far as it considers the liability of directors and officers for the debts incurred by a company in terms of section 424 of the Companies Act 61 of 1973 ("the Companies Act").

All employers and contractors, and other participants in the construction industry who are directors of their own company, take note of the *McLuckie* case and the court's findings therein, in particular the fact that section 424 (1) of the Companies Act prevents company directors from hiding behind the formal identity of their companies in order to avoid paying debts which they caused the company to incur at a time when they knew that the company would be unable to pay without their financial assistance.

COMPANY UNIQUE FINANCE (PTY) LTD AND ANOTHER v JOHANNESBURG NORTHERN METROPOLITAN LOCAL COUNCIL AND ANOTHER

South Gauteng High Court, Johannesburg

(14581/99) 2011 (1) SA 440 (decided: 13 August 2010)

FACTS: This case deals with ostensible and actual authority.

Between October 1998 and January 1999 three Master rental agreements were concluded by Company Unique Finance (Pty) Ltd (the first plaintiff) then trading as Compufin Finance ("Compufin") and the Johannesburg Northern Metropolitan Local Council ("the Council"). Each of these agreements ("A", "B" and "C" respectively) constituted a contract for the rental of certain equipment by the Council from Compufin over a period of 60 (sixty) months.

Contract "A" was dated 2 December 1998 and was concluded for the lease of a copier for a total rental of R971 703.96.

Contract "B" was dated 21 January 1999 and was concluded for the lease of certain radiophones for a total rental of R6 272 032.80.

Contract "C" was dated 21 January 1999 and was concluded for the lease of certain radiophones for a total rental of R6 272 032.80.

Johannes Jacobus Du Plessis (the second defendant) ("Du Plessis") signed the contracts on behalf of the Council and was at all relevant times employed as an Acting Senior Superintendent: Support Services. However, his designation in the contracts was referred to as "Executive Officer (acting) Security".

First National Bank of Southern Africa Ltd ("FNB") (the second plaintiff) was the cessionary of Compufin's rights in terms of contract "C".

The plaintiffs (Compufin and FNB) averred that the Council unlawfully repudiated its obligations as contained in the contracts by letter dated 19 March 1999. In this letter the Council averred that Du Plessis was never authorised to sign the contracts, that the Council did not authorise the transactions and that the contracts were therefore null and void.

Compufin and FNB accepted the repudiation and thus cancelled each of the contracts, which the Council disputed as it was of the view that it was not bound by any of these contracts at any stage.

The plaintiffs instituted a claim against the Council and Du Plessis and contended that in the event of the claim not being proved in contract, Du Plessis warranted that he was duly authorised by the Council when he signed the contracts. This warranty constituted a misrepresentation by Du Plessis and was made within the course and scope of his employment with the Council, thus making it vicariously liable for any claim for damages based on the wrongful conduct of Du Plessis.

Du Plessis denied that he lacked authority as averred by the Council and therefore denied any liability to the plaintiffs.

The plaintiffs further replicated to the Council's plea and pleaded in the alternative that the Council represented that Du Plessis was duly authorised to sign the contracts and that it was therefore estopped from denying Du Plessis' authority. The plaintiffs based their contentions on the fact that Willem Van Wyk ("Van Wyk") in his capacity as Head of Security of the Council, signed an extract of a meeting recording that a resolution was taken by the Council authorising Du Plessis to enter into contracts and to sign contracts and give effect to the resolution.

However, only Van Wyk's and Du Plessis' ostensible authority was in issue as it was agreed that the plaintiffs had no case based on actual authority as it turned out that the representation made in the resolution was untrue.

ISSUE: Whether or not Du Plessis had authority to act on behalf of the Council.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court addressed the issue of whether or not Du Plessis had authority to act on behalf of the Council.

In order to act on behalf of another so as to affect that other's relationships, the necessary authority to do so must be present. Authority to act can either be actual or ostensible.

In *South African Broadcasting Co-operation v Coop and Others* 2006 (2) SA 217 (SCA) the following was said:

> "Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out". Thus, if he orders goods worth £1 000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other party who does not know of the £500 limitation. ..."

It was further stated in *NBS Bank Ltd v Cape Produce Company (Pty) Ltd and Others* 2002 (1) SA 396 (SCA):

> "... ostensible authority flows from the appearances of authority created by the principal. Actual authority may be important, as it is in this case, in sketching the framework of the image presented, but the overall impression received by the viewer from the principal may be much more detailed. Our law has borrowed an expression, estoppels, to describe a situation where a representor may be held accountable when he has created an impression in another's mind, even though he may not have intended to do so and even though the representation, must have been created by the principal himself. The fact that another holds himself out as his agent cannot, of itself, impose liability on him. Thus, to take this case, the fact that Assante held himself out as authorised to act created the impression that he was entitled to do so on its behalf. This was much stressed in argument, and rightly so. And it is not enough that an impression was in fact created as a result of the

representation. It is also necessary that the representee should have acted reasonably in forming that impression ..."

The requirements for estoppel are:

(a) There must be a representation by words or conduct;

(b) Made by the "principal" and not merely by the "agent" that he had the authority to act as he did;

(c) The representation must be in a form such that the principal would have reasonably have expected that outsiders would act on the strength of it;

(d) The "third party" must have reasonably relied on the representation; and

(e) The "third party" must have been prejudiced.

All three contracts were dependent upon a resolution from the Council, which was signed by Van Wyk and was on the Council's letterhead. The court therefore concluded that there was a representation by both words and conduct made by the Council and that Du Plessis had the authority to sign contracts "A", "B" and "C". Van Wyk also had the authority to record that an authorising resolution had been passed, which resolution was in such a form that the Council should reasonably have expected that outsiders, such as the plaintiffs, would act on the strength of it. The plaintiffs acted reasonably in relying upon the representations made by the Council as to the authority of Du Plessis to sign the contracts. The court held that the Council was estopped from denying Du Plessis' authority to act on its behalf in concluding the contracts. The plaintiffs were therefore entitled to judgment with interest and costs.

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

1. Against the Council:

   (a) Payment of the sum of R7 070 607.34 to Compufin in respect of contracts "A" and "B", together with interest thereon at the rate of 6% per annum above the prime overdraft rate charged by FNB from time to time, from 19 March 1999 to date of final payment;

(b) Payment of the sum of R6 208 952.80 to FNB in respect of contract "C", together with interest thereon at the rate of 6% per annum above the prime overdraft rate charged by FNB from time to time, from 19 March 1999 to date of final payment;

(c) Costs of suit on the scale of attorney and client, such costs to include the costs consequent upon the employment of two counsel.

2. As against Du Plessis:

(a) The court dismissed Compufin's claim with costs.

ANALYSIS:

This case is relevant to the CIDB and the construction industry at large, in so far as it considers the authority of government officials to enter into agreements and the enforceability of agreements entered into without authority, where the private party had no knowledge of the lack of authority and had taken care to determine whether the official concerned had the requisite authority.

FIRSTRAND BANK LTD v MVELASE

KwaZulu-Natal High Court, Pietermaritzburg

(4096/10) 2011 (1) SA 470 (decided: 26 October 2010)

FACTS: This case concerns a summary judgment application and whether or not a credit provider may enforce a credit agreement after terminating debt review proceedings in the Magistrate's Court in terms of section 86 (10) of the National Credit Act 34 of 2005 ("the NCA"). It also deals with the question of whether a notice in terms of section 86 (10) can lawfully terminate the debt review pending before a Magistrate's Court.

Firstrand Bank Ltd ("Firstrand Bank") was a registered credit provider in terms of the NCA. Vusi Emmanuel Mvelase ("Mvelase") was indebted in terms of a mortgage bond registered for R1 280 000.00 plus R256 000.00. At 2 June 2010, the outstanding balance on the mortgage bond was R1 368 972.84 plus interest at the rate of 8.2% per annum from 1 June 2010 to date of payment. Mvelase was also in arrears in terms of the mortgage bond in the amount of R209 214.88, with a monthly instalment of R12 416.16.

On 13 November 2009 the debt counsellor referred the matter to the Magistrate's Court for debt review in terms of section 86 (8) (b) of the NCA for an order in terms of sections 86 and 87 of the NCA.

On 30 April 2010 Firstrand Bank notified Mvelase that he was in arrears in terms of the mortgage bond, 60 (sixty) business days elapsed since he applied for debt review, and as a result Firstrand Bank terminated the review with immediate effect in terms of section 86 (10) of the NCA.

Mvelase remained in default of the mortgage bond for more than 20 (twenty) business days after receipt of the section 86 (10) notice.

On 14 May 2010 Firstrand Bank delivered a section 129 (1) notice to Mvelase wherein he was informed that he was in arrears in terms of the mortgage bond in the amount of R196 798.72 for at least 20 (twenty) business days, and if he did not exercise certain options within 10 (ten) business days to repay the debt, Firstrand Bank would have the right to institute legal

proceedings against Mvelase for the recovery of the entire balance due, owing and payable to it.

Mvelase's options included approaching a debt counsellor for advice, but he already applied for debt review which was terminated by the section 86 (10) notice whilst the review was pending before the Magistrate's Court.

Mvelase failed to respond to the section 129 (1) notice within the time frame provided and on 3 June 2010, Firstrand Bank's attorneys certified that it complied with section 129 (1) (a) of the NCA.

On 8 June 2010, more than 6 (six) months after Mvelase applied for debt review, Firstrand Bank issued summons against Mvelase wherein it claimed payment of the full balance due.

ISSUES: Whether or not Firstrand Bank may enforce the credit agreement after it terminated the debt review proceedings in the Magistrate's Court in terms of section 86 (10) of the NCA. Whether or not a notice in terms of section 86 (10) can lawfully terminate a debt review pending before a Magistrate's Court. Whether or not Firstrand Bank was entitled to an order for summary judgment and whether or not Mvelase set out a bona fide defence to the application.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court analysed the NCA, which aims to "provid(e) for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

To enforce a credit agreement by way of litigation, the following is relevant: section 130 sets certain pre-requisites for litigation; the consumer has prescribed time limits to react to notices from the credit provider; the credit provider is delayed from approaching the court in certain circumstances; and the powers of the court hearing the matter are limited.

Section 130 (1) of the NCA sets the following prerequisites for litigation:

(a) The consumer must be in default under the credit agreement;

(b) Such default must persist for at least 20 (twenty) business days;

(c) The credit provider must deliver a notice to the consumer as contemplated in section 86 (10) or section 129 (1) of the NCA;

(d) 10 (ten) days must have elapsed after delivery of the notice (in terms of either section 86 (10) or section 129 (1));

(e) The consumer either does not respond to the section 129 (1) notice or rejects the credit provider's proposals.

A section 86 (10) notice serves to terminate a debt review and sets the following additional prerequisites for litigation when a credit agreement is being reviewed:

(a) The credit provider must give notice to terminate the review in the prescribed manner to-

(i) the consumer;

(ii) the debt counsellor; and

(iii) the National Credit Regulator.

(b) At least 60 (sixty) business days must have elapsed after the consumer applied for debt review before the credit provider gives a section 86 (10) notice.

Section 129 (1) (a) of the NCA provides that if the consumer is in default of a particular credit agreement, the credit provider must notify the consumer and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, to resolve any dispute under the agreement or agree on a payment plan. Section 129 (2) provides that subsection (1) is not applicable to a credit agreement which is the subject of a debt restructuring order, or to proceedings in a court that could result in such an order. It does not prohibit a section 86 (10) notice, but simply exempts a credit provider from notifying a consumer of his rights in terms of section 129 (1) (a).

The section 86 (10) notice and section 129 (1) notice therefore inform consumers of different processes. Giving both notices does no harm and in fact strengthens a credit provider's case for enforcement of a credit agreement. However, serving a section 129 (1) notice instead of

a section 86 (10) notice when a debt review is pending is fatal. A section 86 (10) notice is indispensable when a debt review is underway, even if the credit provider delivers a section 129 (1) notice.

Section 88 (3) of the NCA provides that a credit provider may not litigate under a certain credit agreement if it has received notice that the consumer applied to court for the suspension of a reckless credit agreement, to be declared over-indebted or for debt review. A credit provider may only do so if the consumer defaults under the credit agreement or any repayment agreement.

Firstrand Bank was entitled to enforce the credit agreement and to terminate the debt review pending before the Magistrate's Court as Mvelase defaulted under the credit agreement and no debt restructuring order had been made.

The court thereafter addressed the question of whether or not the requirements for summary judgment had been met.

Rule 32 (2) requires a "person who can swear positively to the facts verifying the cause of action and the amount ... claimed" to depose to the affidavit in the application for summary judgment. The deponent to the affidavit on behalf of Firstrand Bank was the Senior Manager – Foreclosures. The deponent therefore had access to Mvelase's loan account, which enabled the deponent to have personal knowledge of the status of the loan account and to verify the cause of action and amount claimed.

Firstrand Bank also gave proper notice in terms of section 86 (10) to the debt counsellor and the National Credit Regulator by emailing it to them at their correct addresses, as is required by section 65 of the NCA.

A defendant who opposes an application for summary judgment must show on the facts of the case that he has a bona fide defence. He must also show that the debt review process itself is bona fide and not just a tactic to delay final judgment for payment of the debt. Undue and unexplained delay in finalising a debt review indicates bad faith. Failure by a defendant to disclose sufficient information to persuade the court that a proposed scheme for repayment of his debts is reasonable, capable of meeting the purpose of the NCA and

that the defendant will be able to meet his obligations also falls short of the requirement of setting out a bona fide defence.

The court concluded that Mvelase did not set out a bona fide defence for the following reasons:

(a) The debt review had been pending since 13 November 2009 with no prospect of reaching finality;

(b) The outstanding balance on the credit agreement exceeded the initial amount of the loan;

(c) Mvelase was indebted to various other credit providers;

(d) He failed to disclose the total amount of his indebtedness to various creditors as well as his income;

(e) Mvelase never approached the Magistrate's Court hearing the matter for an order to resume the debt review in terms of section 86 (11) of the NCA when the section 86 (10) notice, which terminated the debt review, was served on him; and

(f) He entered appearance to defend the application for summary judgment simply to delay final judgment.

KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG: The court granted summary judgment against Mvelase for:

(a) Payment of the sum of R1 368 972.84;

(b) Interest on the aforesaid sum at the rate of 8.2% per annum calculated daily on the amount outstanding at the commencement of each day and compounded at the end of each month, as from 1 June 2010 to date of payment, both dates inclusive; and

(c) An order declaring Portion 13 of Erf 3050 Westville, Registration Division FT, Province of KwaZulu-Natal, in extent 1506 square metres, held by Deed of Transfer T56448/04, executable.

The court directed Mvelase to pay Firstrand Bank's costs on the scale as between attorney and client.

ANALYSIS:

This case is relevant to the CIDB and the construction industry at large, in so far as it considers the enforcement of a credit agreement after terminating debt review proceedings in the Magistrate's Court in terms of section 86 (10) of the National Credit Act 34 of 2005 ("the NCA"). It also deals with the question of whether a notice in terms of section 86 (10) can lawfully terminate the debt review pending before a Magistrate's Court.

All contractors, and other participants in the construction industry who may enter into a credit agreement, take note of this and the *SA Taxi* case and the court's findings therein.

AB VENTURES LTD v SIEMENS LTD

North Gauteng High Court, Pretoria

(26310/09) 2011 (1) SA 586 (decided: 29 January 2010)

FACTS: This case deals with a claim for pure economic loss for losses incurred by a plaintiff construction contractor under a contract with a mining company against a defendant supplying mining equipment under a separate contract with a joint venture, due to the defendant's alleged negligence in the supply of such equipment.

AB Ventures Ltd ("AB") was the construction contractor employed by Lumwana Mining Company Ltd ("Lumwana"), on a project ("the construction project") for the construction of Lumwana Copper Mine ("the Mine"), in terms of a contract ("the construction contract").

Siemens Ltd ("Siemens") contracted with a joint venture ("the Joint Venture") in terms of which the Joint Venture procured from Siemens the engineering, design, manufacture, supply and commissioning of four specialised inverter units ("the drives").

AB alleged that Siemens:

1. had produced defective equipment;

2. had thereby caused loss to AB in the form of

    (a) contractual penalties AB had to pay to Lumwana; and

    (b) additional site-related expenses incurred by AB in performing its obligations in terms of its contract with Lumwana; and

3. knew that the drives would be utilised by AB as an integral part of the construction project in terms of the construction contract.

AB consequently issued summons against Siemens to recover the loss it allegedly suffered as a result of the negligence of Siemens. The cause of action was based in delict and not in contract, and this distinction is essential to the outcome of the matter. Siemens took exception to AB's particulars of claim, on the grounds that:

1. the loss claimed, to the extent that it was suffered at all, was pure economic loss;

2. the negligent causation of such loss, was not prima facie wrongful; and

3. the particulars of claim did not contain allegations that would justify the extension of liability to cover a claim for pure economic loss in the circumstances argued by AB.

AB argued that Siemens had a legal duty to ensure that the drives would not be defective in order to prevent loss or damage to Lumwana or to AB. Siemens argued that an independent duty to perform contractual obligations based on the law of delict would generally not be recognised in cases of pure economic loss. Siemens further argued that obligations were assumed within a multi-party contractual context, and it was inferred that the parties intended their rights and obligations with respect to each other to be regulated by contract, and not delict. Furthermore, there was no policy reason why the contractual splitting of construction and services responsibilities to Lumwana between AB and the Joint Venture should place Siemens in the position where its liability for economic loss in the performance of its contractual duties, would be governed by delict, as well as contract.

AB argued that our law recognises that, even where there is no contractual link between a purchaser of certain goods and the manufacturer of the goods, the injured purchaser would have a remedy against the manufacturer in delict. Siemens argued that the principles applicable to product liability did not extend that liability to claims for pure economic loss. The various parties had contracted among themselves, and had been able to assume, limit or exclude liability in these contracts. Public-policy considerations would not allow the liability assumed by AB in its contract with Lumwana to be imported into the contract between Siemens and the Joint Venture.

ISSUE: Whether the exception made by Siemens to AB's claim, on the basis that it lacked assertions which were necessary to sustain an action, was well founded or not.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court first considered the nature and role of an exception in law, and stated that the principal use of an exception is to raise and obtain a speedy and economical decision on questions of law that are apparent on the face of the pleadings, or, as in this case, on the face of the particulars of claim. Furthermore, a party raising an exception must make out a very clear case in order to succeed, and must satisfy the court that there is a real point of law that would end the proceedings.

The court explained that certain categories of liability exist, but in a case where a claim for pure economic loss fell outside the ambit of any of the recognised categories of liability, as in this case, the first step would be to identify the considerations of policy that would be of relevance. Assistance could also be gained from previous decisions of the courts, and analysis of academic authors.

The court then considered several decided cases. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA), "pure economic loss" was described as loss that does not arise directly from damage to the plaintiff's person or property, but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses, or the diminution in the value of property. In the same case it was stated that in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent, and have caused the loss. However, the fact that an act was negligent did not make it wrongful, although foreseeability of damage might be a factor in establishing whether or not a particular act was wrongful.

It was reiterated in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) that the negligent causation of pure economic loss was prima facie not wrongful in the delictual sense, and did not give rise to liability for damages, unless policy considerations required that the plaintiff should be compensated by the defendant for the loss suffered. Furthermore, with regard to foreseeability of damage, it was stated that it may, depending on the circumstances, be a factor that could be taken into account, but it was not a requirement of wrongfulness, and could never be decisive of the issue.

In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA), it was stated that, in dealing with a claim for pure economic loss, one had to remember that negligent causation of such loss was not regarded as prima facie wrongful. Its wrongfulness depended on the existence of a legal duty. Whether this legal duty was imposed was a matter to be decided by the court and would involve the consideration of criteria of public or legal policy which was consistent with constitutional norms. Conduct causing pure economic loss would only be regarded as wrongful if public- or legal-policy considerations required that such conduct, if negligent, should lead to legal liability for the resulting damages.

After considering both parties' arguments in the context of the relevant case law, as well as policy considerations, the court concluded that Siemens' conduct had not been wrongful in relation to AB, and even less so in relation to the world at large. AB had placed great reliance on what Siemens should have foreseen, which was a question relating to causation, and not necessarily one that must be considered in the context of wrongfulness.

The court added that one needs to look for wrongfulness to consider whether liability has been established. Wrongfulness functions to distinguish cases in which there is liability for negligence, from cases in which there is no liability for negligence. If such conduct is wrongful, the claim will succeed. If such conduct is not wrongful, the claim will fail. Consequently, the measure that a reasonable person would have foreseen the harm, or that a reasonable person would have prevented the harm, cannot be used to establish wrongfulness. Wrongfulness is about whether "public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant".

SOUTH GAUTENG HIGH COURT, PRETORIA: The court found that the exception raised by Siemens against AB's particulars of claim was well founded, and therefore upheld the exception with costs, including the costs of two counsel.

***ANALYSIS*:**

This case is relevant to the CIDB and the construction industry at large, in so far as it deals with a claim for pure economic loss for losses incurred by a plaintiff construction contractor under a contract with a mining company against a defendant supplying mining equipment under a separate contract with a joint venture, due to the defendant's alleged negligence in the supply of such equipment.

The employers, contractors, and other participants in the construction industry take note of the *AB Ventures* case and the court's findings therein, in particular the practical and legal implications of rendering a poor and/or defective service.

THE PRESIDENT OF RSA v M & G MEDIA

Supreme Court of Appeal

(570/2010) 2011 (2) SA 1 (decided: 14 December 2010)

FACTS: This case concerns access to a report made to the President in terms of the Promotion of Access to Information Act 2 of 2000 ("the Act").

On the request of former President Mbeki, two senior judges compiled a report after a visit to and shortly before an election in Zimbabwe in 2002. This report was never released to the public at large and was in possession of the President of the Republic of South Africa.

M & G Media Limited (the respondent), the publisher of a weekly newspaper the *Mail and Guardian* ("M & G") requested to see the aforementioned report, which disclosure was declined by Mr Trevor Fowler, the then Deputy Information Officer in the Presidency and was supported in this by Mr Kgalema Motlanthe (the first appellant) – who was the President of the Republic at the time the answering affidavits were filed - and Ms Tshabalala-Msimang, a Minister in the Presidency.

M & G accordingly applied to the North Gauteng High Court, Pretoria under the provisions of the Act for an order to compel the President to disclose the report. The court of first instance granted such order whereafter the President, the Deputy Information Officer of the Office of the Presidency and the Minister in the Presidency (the first, second and third appellants respectively) appealed to the Supreme Court of Appeal.

ISSUE: Whether or not the appellants established an evidential basis for refusing access by M & G to the report.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court had to examine the grounds upon which the appellants claimed secrecy of the report.

In terms of section 32 (1) (a) of the Bill of Rights "everyone has the right of access to any information that is held by the state …". However, the Act limits this constitutional right.

It was stated in Etienne Mureinik, *"A Bridge to Where? Introducing the Interim Bill of Rights"* 1994 (10) SALJ 31, that "The point of the Bill of Rights is consequently to spearhead the effort

to bring about a culture of justification. That idea offers both a standard against which to evaluate [the Bill of Rights] and a resource with which to resolve the interpretive questions that it raises". A mere request for information held by a public body obliges the information officer to produce it, unless the information officer can justify withholding the information requested. If such request to information is refused, then "adequate reasons for the refusal" must be stated as contemplated by section 25 (3) (a) of the Act.

The appellants put forward three grounds for secrecy in terms of the Act: Firstly, that the Act in section 12 (a) excludes from its ambit a record "of the Cabinet and its committees". It was argued that this section applies to records held by the President, as the head of the cabinet. However, the Court found that the President is not the cabinet and that the record was not served before the cabinet.

Secondly, section 41 (1) (b) of the Act permits the refusal of access to a record if its disclosure "would reveal information supplied in confidence by or on behalf of another state or an international organisation". Thirdly, section 44 allows access to a record to be refused "if the record contains an opinion, advice, report or recommendation obtained or prepared ... or an account of a consultation, discussion or deliberation that has occurred ... for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law".

The court found that these two sections entitled the information officer to exercise a discretion in refusing a request for information.

Mr Fowler was required by section 25 (3) (a) of the Act to "state adequate reasons for the refusal, including the provisions of the Act relied on". In this regard, he stated:

> "I have thoroughly examined the contents of the report and I am of the view that the disclosure of the contents thereof will reveal information supplied in confidence by or on behalf of another state or an international organisation.
>
> Further, the PAIA entitles me to refuse a request for access to a record of the body if the record contains an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or take

a decision in the exercise of a power or performance of a duty conferred or imposed by law.

Consequently, access to the record that you have requested is hereby refused in terms of sections 42(1)(b)(i) and 44(1)(a) of the PAIA."

Mr Fowler purportedly concluded that the report contained information provided by "another state" or "an international organisation". The court held that Information could be provided by one entity to the exclusion of the other, or be provided by both entities. However, information could not have been provided by the one or the other in the alternative. Furthermore, in terms of the Act an international organisation is defined as "an international organisation (a) of states or (b) established by the governments of states". The appellants did not suggest in their affidavits that the judges were tasked to have dealings with such an organisation or that they received information from such an organisation.

Ms Tshabalala-Msimang was of the view that the "disclosure of the contents of the said report would reveal information envisaged in Section 41(1)(b) of the [Act]" and that the Act "entitles the Deputy Information officer to refuse a request for access to a record of the Presidency, if the said record contains an opinion, advice, report or recommendation obtained or prepared; for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law".

The court found that the appellants relied on section 44 only because the section "entitles" an information officer to refuse access in certain circumstances and not because those circumstances were found to exist. Neither Mr Fowler nor Ms Tshabalala-Msimang were found to have actually exercised their discretion in this regard.

Mr Fowler also alleged that "Taking into account the contents of the report it would have been of assistance in formulating policy and taking decisions of the nature referred to in section 44 (1) (a), concerning, inter alia, the political situation in Zimbabwe, and the President's and South Africa's position and role in that regard. It is reasonably conceivable that the report was of assistance."

The court held that section 44 of the Act does not render a report subject to secrecy if it is "reasonably conceivable" that it has been of assistance in formulating policy, if it "would

have been of assistance" nor if the President "was able to utilise the report to assist him". The report was subject to secrecy only if it was obtained or prepared for the purpose contemplated in section 44 of the Act.

The appellants then abandoned any reliance on Mr Fowler and referred the court to the evidence of Mr Chikane. It was alleged that Mr Chikane had personal knowledge of the judges' appointment and that the report "was commissioned by the President and prepared for the purpose of assisting him with the formulation of policy and the taking of decisions pertaining to the situation in Zimbabwe, including the impact or possible impact of the Zimbabwean situation on South Africa".

The court found that knowledge of the occurrence of an event might come to a person in one of three ways, namely through directly experiencing the occurrence of the event; or it might have been reported to him or her by someone else in which event a proper basis should be laid to allow it as hearsay evidence; or he or she might deduce that the event has occurred by inference from other facts. If the knowledge was acquired only by inference then it does not constitute a sufficient evidential basis: it is for a court to draw the inference itself upon proof of primary facts. The court found that there was no indication that Mr Chikane had direct knowledge of the facts he attested to and no other basis for its admission had been laid.

The appellants' case to justify secrecy of the report was based on three grounds. First, the appellants alleged that the judges were diplomats (and were referred to as "envoys") who embarked upon a diplomatic mission. Second, they described the nature of diplomacy and pointed out that it is "generally accepted" in diplomacy that information is exchanged in confidence. And finally, it was stated that the judges were indeed received and dealt with in Zimbabwe as diplomats.

The court stated that diplomacy is an executive and not a judicial function and clear and substantiated evidence would need to be presented to persuade the court that judges would assume the role of diplomats. Although judges might from time to time perform functions that are not strictly judicial, Chaskalson P pointed out in *SA Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at paragraph 35 that "there are limits to what is permissible". He further stated that:

> "Certain functions are so far removed from the judicial function that to permit Judges to perform them would blur the separation that must be maintained between the Judiciary and other branches of government. For instance, under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not "appropriate to the central mission of the Judiciary". They are functions central to the mission of the Legislature and Executive and must be performed by members of those branches of government."

The court concluded that there was no evidential basis for the allegations made by the appellants. Neither Mr Fowler nor Ms Tshabalala-Msimang nor Mr Chikane accompanied the judges on their visit to Zimbabwe and therefore had no direct knowledge of how the judges went about their business or of the information they received.

COURT OF FIRST INSTANCE (NORTH GAUTENG HIGH COURT, PRETORIA): The court found that no evidential basis had been laid for refusing access to the report and granted an order compelling the President to disclose it.

SUPREME COURT OF APPEAL: The court found that the appellants did not establish an evidential basis for refusing access to the report. It was however established that the judges were commissioned to report on "constitutional and legal issues" pertaining to the election in Zimbabwe and it therefore did not bring the report within the terms of the Act. The court accordingly dismissed the appeal with costs, such to include the costs of two counsel.

ANALYSIS:

This case is relevant to the CIDB and the construction industry at large, in so far as it considers access to a report made to the President in terms of the Promotion of Access to Information Act 2 of 2000 ("the Act").

MANONG AND ASSOCIATES (PTY) LTD v CITY OF CAPE TOWN AND ANOTHER

Supreme Court of Appeal

(457/09) 2011 (2) SA 90 (decided: 1 December 2010)

FACTS: This case implicates the right to equality in the procurement of state related (municipal) contracts.

Mr Mongezi Stanley Manong ("Manong"), a professional engineer, started a close corporation in 1995. Manong and Associates (Pty) Ltd ("the company") (also the appellant) was a national company specialising in civil, structural and development engineering and which was formed in 2002. The company took over the business formerly run by the close corporation and Manong was its managing director.

Before its incorporation as part of the City of Cape Town ("CCT") (also the first respondent) in 2000, the City of Tygerberg ("COT") was responsible for awarding municipal contracts in Khayelitsha.

Manong formally introduced himself and the company to the COT in 1997 by way of a letter. Between 1998 and 2000 the company was awarded 2 municipal contracts to do work in Khayelitsha, namely the Mew Way Sports Project and the Lookout Hill project phase 1.

From 2000 to 2005 only 12 new projects were awarded to consultants in Khayelitsha by Mr Hendrik Barnard ("Barnard") acting with a colleague, Mr Tertius De Jager. Of the 12 new projects one was awarded to the company in 2000, namely the Lookout Hill project phase 1.

In 1999 the COT called for expressions of interest in the development of a Central Business District ("CBD") in Khayelitsha. What followed was a series of consultations and interactions with interested parties and community organisations which culminated in a framework agreement, to which attendees subscribed, being concluded. A provision in this framework agreement, whilst committing to fair and transparent procurement procedures, nevertheless purported to grant the signatories preference in the procurement process. The company was one such signatory.

After absorbing its predecessor in 2000, the CCT accepted the broad principles contained in the framework agreement but not all the details. The land owned by the CCT and

earmarked for the CBD was sold to a Trust which was established and controlled by the CCT. The Trust held 100% of the shares in KBD Management (Pty) Ltd which would have received the financing for the project. KBD Management (Pty) Ltd established KBD Retail (Pty) Ltd for the development and construction of the CBD. KBD Retail (Pty) Ltd appointed Futuregrowth Property Development Company (Pty) Ltd ("FG") as the project managers for the CBD project.

Only Rand Merchant Bank was prepared to finance the project and it insisted upon one of the big four building contractors in South Africa being commissioned to the CBD project and that same be completed on a turnkey basis. Consequently, WBHO (Pty) Ltd ("WBHO") was appointed as the contractor and it in turn insisted on having a free hand in appointing consultants, which included the engineers. This was subject to transformation targets being met. As a result of this, FG and the CCT effectively played no further part in the development of the CBD. WBHO therefore appointed Axis Consulting, a black-owned engineering entity, to the CBD project.

From 1996 until the beginning of 2005 the CCT awarded the company a total of 25 projects outside of Khayelitsha.

ISSUES: The company lodged a complaint with the Western Cape Equality Court (court of first instance) that it was discriminated against by the CCT and its predecessor, the COT by being generally excluded from municipal contracts in relation to Khayelitsha and specifically, in relation to the CBD project. It was alleged that the CCT and the COT implemented policies and practices that were designed to exclude and limit the company's access to municipal projects. Pertaining to the CBD project, it was alleged that FG discriminated against the company by excluding it from that project. The company also complained that FG had excluded it from the Setsing project in the Free State and had discriminated against it by doing so.

The court of first instance held that the CCT and FG had not discriminated against it on the basis of race.

The company appealed against the finding of the court of first instance in respect of its exclusion from the CBD project. It also appealed against the finding of misjoinder.

The CCT cross-appealed against the court of first instance's conclusion that it had discriminated against the company on the basis of race in the allocation of civil engineering contracts for the area of Khayelitsha in general. It also appealed against the finding that its practices and policies had been designed to maintain exclusive control by white professional consultants.

COURT OF FIRST INSTANCE (WESTERN CAPE EQUALITY COURT, CAPE TOWN): The court found that the CCT was "burdened with the onus of showing on a balance of probabilities that the discrimination did not take place or that the impugned conduct was not based on race or that the discrimination was fair". The court further stated that Barnard did not give a reason as to why the company was not appointed in the second phase of the Lookout Hill project. The court also took into account that the company did not receive any further work in Khayelitsha and concluded that the CCT discriminated against the company on the basis of race. The court also found that the practices and policies of the CCT had been designed to maintain exclusive control by white professional consultants. It was further stated by the court that FG had no connection to or involvement in the Setsing project and that there had been a misjoinder.

COURT'S APPLICATION OF THE LAW TO THE FACTS: In deciding the matter, the court analysed the evidence in the case.

Manong blamed the company's exclusion from opportunities in Khayelitsha on Barnard, employed by CCT as a civil engineering technologist. During his career with the COT and the CCT, Barnard was mostly involved with the allocation and administration of municipal contracts in Khayelitsha. Manong accused Barnard of being racist and of conspiring with others to ensure that only white-controlled institutions received municipal work. He also accused Barnard of conspiring with other CCT officials and employees of FG to exclude the company in the CBD project. It was alleged that the CCT, in order to exclude the company from the CBD project, decided to develop the CBD project on a turnkey basis which enabled WBHO to appoint the consulting engineers and others without having to comply with state procurement requirements and that this was done solely to exclude the company.

Manong also complained that the company was excluded from the second phase of the Lookout Hill project because of Barnard's racism. The court found that this allegation was ill-

conceived because the engineering consultant appointed to the second phase of the Lookout Hill project was black-controlled.

The court found that the court of first instance did not conduct a proper factual analysis of the evidence and adopted the wrong approach pertaining to the burden of proof. The burden of proof in cases of discrimination brought in the Equality Court is dealt with in section 13 of the Act. Section 13 (1) provides the following:

> "(1) If the complainant makes out a prima facie case of discrimination –
>
> (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; ..."

"Discrimination", as defined in section 1 of the Act, means:

> "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-
>
> (a) Imposes burdens, obligations or disadvantage on; or
>
> (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."

The company relied on the provisions of subsection 7 (c) and (e) of the Act, which reads as follows:

> "Prohibition of unfair discrimination on ground of race
>
> Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including –
>
> (a) ...
>
> (b) ...
>
> (c) the exclusion of persons of a particular race group under an rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;

(d) ...

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons."

The company should have at least showed that it was treated differently than other engineering consultants in relation to COT or CCT projects. It had to show that in totality of municipal projects, it received disproportionately fewer contracts if compared to other consultants. It furthermore had to establish a prima facie case that the differentiation was race-based.

The court found Barnard and Van Der Vent to be credible and reliable witnesses and Manong to be an unsatisfactory witness. The court stated that Manong made outrageous allegations that he could not justify. The company failed to establish a prima facie case. In respect of its complaint that it was discriminated against in general by the CCT in respect of projects in Khayelitsha, the company failed to take into account all the projects that it had been awarded across the metropole.

The court agreed with the court of first instance's finding pertaining to the company's exclusion from the CBD project. The main consultants appointed by WBHO in accordance with set Black Economic Empowerment targets were all black. It was ridiculous to suggest, as Manong did, that the final agreement which gave WBHO the right to appoint consultants was a ploy to exclude him and was racially motivated.

The court further agreed with the court of first instance's finding in upholding the plea of misjoinder of FG in relation to the Setsing project.

The court also considered the submission made by the CCT and FG that the Equality Court should have ordered the company to pay their costs. After considering the manner in which the company conducted the litigation and the unfounded allegations of racism, the court reversed the order of the Equality Court and ordered the company to pay the wasted costs occasioned by the CCT and FG. The court further ordered the company to pay the costs of

appeal and the costs of a postponement of the appeal occasioned by the CCT and FG, which costs included the costs of two counsel.

SUPREME COURT OF APPEAL: The court ordered as follows:

1. The company's appeals in respect of its exclusion from the CBD project and the upholding by the court of first instance of FG's plea of misjoinder in relation to the Setsing project were dismissed with costs, including the costs of two counsel.

2. The cross-appeal by the CCT in respect of the broader Khayelitsha enquiry was upheld with costs, including the costs of two counsel.

3. The cross-appeals by the CCT and FG, in relation to the costs order in both cases, were upheld with costs, including the costs of two counsel.

4. The finding of the court of first instance set out in paragraph 36 and the costs order contained in paragraph 64 of the judgment dated 12 November 2008 were set aside and substituted as follows:

   "1. The applicant's complaint that it was discriminated against in general by the first respondent and its predecessor in the allocation of contracts in Khayelitsha is dismissed with costs, including the costs of two counsel and such costs are to include the costs reserved on 18 August 2007.

   2. The applicant is ordered to pay the first and second respondents' costs in relation to the complaint concerning its exclusion from the CBD project, including the costs of two counsel and such costs are to include the costs reserved on 18 August 2007, which also encompass the second respondent's costs in relation to the Setsing project."

5. The company was ordered to pay the wasted costs of the CCT and FG occasioned by the postponement of the appeal on 20 August 2010.

ANALYSIS:

This case is relevant to the CIDB and the construction industry at large, in so far as it considers a complaint first heard before the Equality Court of purported discrimination against an engineering company that was alleged to have been generally excluded from municipal contracts. It was further alleged that the municipality involved implemented policies and practices that were designed to exclude and limit the company's access to municipal projects. The claim of discrimination was unsuccessful.

DRAHTSEILWERK SAAR GmbH v INTERNATIONAL TRADE ADMINISTRATION COMMISSION AND OTHERS

North Gauteng High Court, Pretoria

(53925/09) 2011 (2) SA 261 (decided: 26 November 2010)

FACTS: This case deals with an interlocutory application for an order regulating access to information held by a statutory body and deemed to be confidential in nature, and which was required in the main application to have certain decisions reviewed and set aside.

Drahtseilwerk SAAR GmbH ("Drahtseilwerk" or "the applicant") launched proceedings in terms of section 46 (1) of the International Trade Administration Act 71 of 2002 ("the ITAA"), the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and rule 53 of the Uniform Rules of Court ("rule 53"), in order to have certain decisions, made by the International Trade Administration Commission ("the Commission" or "the first respondent") and the Minister of Trade and Industry ("the Minister" or "the second respondent"), reviewed and set aside.

The Commission is a statutory body responsible for administering the country's international trade. One of its duties is to report to, and make recommendations to, the Minister, after conducting an investigation, with regard to the imposition or lifting of antidumping duties on specified goods introduced into the country.

Drahtseilwerk and the third and fourth respondents were trade competitors, involved in the manufacture of steel products. In 2002, the Commission had imposed antidumping duties on Drahtseilwerk, which were set to lapse in 2007. Prior to the lapsing of the antidumping duties on Drahtseilwerk, the third respondent requested the Commission to conduct a so-called sunset review. A sunset review is an investigation conducted by the Commission to determine whether it should extend the period of duties already imposed, and about to expire. The Commission accordingly conducted an investigation of Drahtseilwerk, as well as the third and fourth respondents. During the investigation, the Commission obtained information from the third and fourth respondents deemed to be confidential in nature.

When the investigation was concluded, the Commission recommended to the Minister that continued and increased duties be imposed on Drahtseilwerk, which recommendation the Minister accepted. It was this decision which Drahtseilwerk sought to be reviewed and set

aside in its main application.

In terms of rule 53 the Commission was obliged to provide Drahtseilwerk with the record of the proceedings which led to the decision taken, but the Commission refused to do so. As a result, the applicant instituted interlocutory proceedings, in which it sought an order that would regulate the use of confidential information contained in the record, in the main application.

The reason given by the Commission for not having provided Drahtseilwerk with a copy of the record of the proceedings leading to the decision was that the record contained confidential information which had been provided by other entities covered by the investigation, including the third and fourth respondents. The Commission argued that it could not provide Drahtseilwerk with the confidential information requested without the prior consent of the affected parties, alternatively, without a court order directing it to grant Drahtseilwerk access to the confidential information. The fourth respondent had refused to give such consent.

ISSUES: Whether or not the relief sought by Drahtseilwerk was provided for in the ITAA, whether the court was empowered to grant Drahtseilwerk an appropriate order with regard to accessing information, and whether Drahtseilwerk, as an aggrieved party, was entitled to apply to court for an order with regard to accessing information in terms of section 35 (2) of the ITAA and rule 53.

COURT'S APPLICATION OF THE LAW TO THE FACTS: Before the court heard the interlocutory application, the fourth respondent raised a point in limine. It was agreed as between the parties that the court should first address the point raised before proceeding with the application.

The fourth respondent argued that Drahtseilwerk's founding affidavit made no reference whatsoever to the provision in the ITAA that provided for the remedy sought. It was further argued that the remedy sought by Drahtseilwerk was not provided for in the ITAA. The fourth respondent also argued that the court did not have the power to grant the relief sought.

Drahtseilwerk argued that, even if there were no specific reference to section 35 (2) of the ITAA in its founding papers, it was clear from the papers filed in the application that it sought

relief in terms of section 35 (2). Furthermore, it was pointed out that, looking at the heads of argument of all the parties involved in the matter, it was clear that all the parties were aware that the relief sought by Drahtseilwerk was based on the provisions of section 35 (2) and (3) of the ITAA.

The court stated that in terms of rule 53 (1) (b), a party who applies for the review and setting-aside of a decision is entitled to be provided with the record of the proceedings, which includes "the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question". The purpose of providing the record is to facilitate applications for review, and to ensure their speedy and orderly presentation.

In the court's view, the point in limine raised by the fourth respondent had no basis. Drahtseilwerk had accepted that the information it was seeking access to was confidential. The relief it sought was therefore not a fresh determination of confidentiality but an appropriate order which would regulate access to what had already been determined by the Commission as being, by its nature, confidential information.

Furthermore, the court found that the fourth respondent's argument that the relief sought by Drahtseilwerk was not provided for in the ITAA, was misplaced. Section 35 (2) (b) (i) of the ITAA states that:

> "(2) A person who seeks access to information which the Commission has determined is, by nature, confidential, or should be recognised as otherwise confidential, may -
>
> (a) first, request that the Commission mediate between the owner of the information and that person; and
>
> (b) failing mediation in terms of paragraph (a), apply to a High Court for -
>
> (i) an order setting aside the determination of the Commission; or
>
> (ii) any appropriate order concerning access to

that information."

Although section 35 (2) of the ITAA was not expressly mentioned by Drahtseilwerk in its papers, this did not detract from the fact that the facts alleged related to that section.

The court concluded that the ITAA did not provide for an absolute prohibition on access to information that had been declared to be confidential in nature by the Commission. Section 35 (2) empowered the court to grant an appropriate order regarding access to such information. Furthermore, in terms of rule 53, if the record was not produced, Drahtseilwerk was entitled, as an aggrieved party, to apply to court to compel compliance with a request for the production of the record of the proceedings leading to the decision sought to be removed.

NORTH GAUTENG HIGH COURT, PRETORIA: The court dismissed the point in limine raised by the fourth respondent with costs, including costs of senior counsel.

ANALYSIS:

This case is relevant to the CIDB, and in particular its board, as well as all participants in the construction industry, in so far as it deals with the right to access to information held by a statutory body and deemed to be confidential in nature.