Onlangse regspraak/Recent case law

Body Corporate Palm Lane v Masinge 2013 JDR 2332 (GNP)

Discretion and powers of the court in applications for sequestration

1 Introduction

In *Body Corporate Palm Lane v Masinge* (2013 JDR 2332 (GNP)) the court exercised its discretion in terms of section 12(1) of the Insolvency Act 24 of 1936 against the granting of a final order for sequestration even though all the requirements for the granting of such order in terms of section 12(1) were satisfied. The court thus came to the assistance of the respondent-debtor by allowing him the opportunity to pay off his debt rather than have his estate sequestrated and being obliged to surrender his assets and thus also being subjected to the stigma and restrictions of insolvency. In this respect, it is to be noted that it is currently a world-wide trend to accommodate insolvent or over-indebted debtors and to retreat from the principle of maximising returns for creditors as the only objective of consumer insolvency regimes. The following observation in a recent report of the World Bank is pertinent in this regard (see Working Group on the Treatment of the Insolvency of Natural Persons *Report on the treatment of the insolvency of natural persons* Insolvency and Creditor/Debtor Regimes Task Force, World Bank 2012 par 393 – available at http://bit.ly/Oft3hp – hereafter the World Bank Report):

> [A] regime for treating the insolvency of natural persons not only pursues the objectives of increasing payment to individual creditors and enhancing a fair distribution of payment among the collective of creditors, but, just as importantly, such a regime pursues the objectives of providing relief to debtors and their families and addressing wider social issues. In achieving those objectives, a regime for the insolvency of natural persons should strive for a balance among competing interests.

The court in *Masinge* did not elaborate much on its decision. References to relevant case law and provisions of the Insolvency Act are few and far between and the court's viewpoints and reasons for its decision have to be deduced from what is read between the lines. The aim of this case discussion is thus, first of all, to discuss and analyse the court's decision with specific reference to the applicable provisions of the Act and relevant case law that relate to the question as to what the discretion of the court pertaining to the granting or refusing of sequestration applications entails. *Masinge* concerned a compulsory sequestration application, but it should be noted that the Act also affords

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discretion to the court to grant or refuse a voluntary sequestration application even though the requirements in terms of the Act have been complied with. The provisions of the Act and relevant case law in this regard are therefore also investigated as it may shed some light on the issues under consideration. After discussing the issues relating to the court's discretion, the implications of the ruling in *Masinge* and the powers of the court when refusing a sequestration order are discussed. In light of this discussion, proposals are made for the amendment of the relevant provisions of the Act in order to allow the court to make certain orders when exercising its discretion to dismiss an application for sequestration. Paragraph 4 contains our proposals for amendment of the Act and concluding remarks.

2 Facts and Decision

Masinge concerned an application for the compulsory sequestration of the respondent's estate. A provisional order had already been obtained by the applicant and the matter was before Kubishi J for a final sequestration order (par 1). The court referred to the requirements for the granting of a final sequestration order in terms of section 12 of the Insolvency Act (par 3; see the discussion in par 3 1 below).

It was not in dispute that the respondent was indebted to the applicant in the amount of R32 003,16 for levies and costs payable to the applicant in terms of the Sectional Titles Act 95 of 1986. The levies and costs were payable in respect of immovable property situated in Pretoria and owned by the respondent. It was also common cause that the respondent had committed an act of insolvency in that he failed to satisfy a warrant of execution issued against him in respect of the debt. The act of insolvency (see s 8(b) of the Insolvency Act) entailed that the respondent was unable to point out any disposable goods, movable or immovable, to the sheriff and that the latter could not locate any goods for attachment (par 3).

The respondent opposed the application on the basis that the sequestration would not be to the benefit of the creditors (par 4). However, no details are provided in the judgment as to the grounds for such allegation.

Contrary to our courts' unsympathetic attitude generally as regards debtors' interests in sequestration applications (see Boraine & Roestoff 'Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform' 2014 *THRHR* 351 361 *et seq*), Kubishi J was of the view that he should exercise his discretion against the applicant's request for a final sequestration order. Referring to *Epstein v Epstein* (1987 4 SA 606 (C) 612G–J) the court pointed out that even if a court is satisfied that the creditor has established his or her claim, that the debtor has committed an act of insolvency or is in fact insolvent, and there is reason to believe that it would be to the advantage of creditors that the debtor's estate be sequestrated, the court nevertheless has a discretion, which

must be exercised judicially, to grant or refuse a final sequestration order (par 5).

The court stated that it was inclined to give the respondent the benefit of the doubt. The respondent's evidence was that he initially was not aware that he had to pay levies to the applicant. By the time he realised that he had to pay he was in arrears to such an extent that he was not able to pay the amount due in one lump sum. The fact that his wife lost her employment further contributed to his inability to repay the levies in one lump sum. The respondent then approached his attorney to negotiate a settlement to repay the debt in instalments, but the settlement proposals were not acceptable to the applicant who insisted upon payment in one lump sum (par 6).

Kubishi J stated that the applicant's reasons for requiring the debt to be paid at once were understandable, but indicated that he was of the view that the respondent should be afforded the opportunity to repay the debt in instalments whilst continuing to pay the monthly levy. The court pointed out that the applicant's evidence was that the respondent did not have any other asset apart from the house. Accordingly the application for sequestration was refused. No order was made as to costs and each party had to pay its own costs of suit (parr 6–8).

3 Analysis of Decision

3 1 Requirements for Sequestration Applications

It is trite law that a High Court hearing an application for the sequestration of a debtor's estate must firstly decide whether the applicant has met the prescribed requirements for either sequestration by means of voluntary surrender or compulsory sequestration (see ss 6, 10 & 12 of the Insolvency Act discussed below). Proof of the advantage to creditors requirement is of paramount importance and a sequestration order cannot be granted unless the advantage to creditors requirement has been satisfied. Moreover, when the court has to exercise its discretion as to whether to grant or refuse the order after all requirements have been met, our courts, in line with the present pro-creditor approach in South African consumer insolvency law, will generally be guided by considerations which are more favourable to the interests of the creditors than those of the debtor (see Boraine & Roestoff *supra* 361 *et seq*, and the discussion of relevant case law below).

It is interesting to note that proof of the advantage to creditors requirement was not required in applications for voluntary surrender in terms of the previous Insolvency Act 32 of 1916 (see *Ex parte Terblanche* 1923 (TPD) 168 170) and orders for voluntary surrender were generally only refused when the granting thereof would be to the detriment of creditors (*Ex parte Theron* 1923 (OPD) 46; Wille & Millin *Mercantile Law of South Africa* (1925) 348) or if there was a clear indication of fraud or a lack of *bona fides* on the part of the debtor (*In re Spiers Brothers* 1932

(NLR) 618 624). Contrary to the approach of our courts today, the courts then took into consideration the interests of both debtors and creditors when exercising their discretion in voluntary surrender applications. In *Ex parte Packer* 1933 GWL 34 37 the court explained as follows:

> [I]t would seem that the Court in exercising its discretion should bear in mind the interest of both the debtor and those of the general body of creditors. On the one hand it would not come to the assistance of a debtor whose conduct is shown to have been dishonest or reprehensible; on the other hand it would not accept a surrender if that course would be unjustly detrimental to creditors, for instance, when it is shown that although the debtor at the time is insolvent through misfortune he has prospects which may later on enable him to pay his creditors. It seems to me that in a case of a debtor whose financial position has become intolerable and hopeless as a result of misfortune the Court could in the exercise of its discretion come to the conclusion that his interests should outweigh those of his creditors who would not receive any dividend and could not benefit by an order resulting in their debtor being freed from his liabilities.

The other requirements (ito ss 6, 10 & 12) must of course also be met before a sequestration order can be granted, and of paramount importance is that the advantage principle should logically only become relevant once it is accepted that the debtor is indeed factually insolvent, or in the case of compulsory sequestration, where the applicant may also rely on an act of insolvency, once such an act is established on the facts. The fact of the matter is that once the advantage principle is considered by the court it should be accepted that the court is in fact dealing with an insolvent debtor.

Where application is made for compulsory sequestration in terms of the current Insolvency Act, the court will initially place the estate under provisional sequestration. The insolvent or any creditor is then entitled to oppose the granting of a final order by addressing the court on the return date of the rule *nisi* as to the reasons why the application for the final order should be refused (s 11(1); Bertelsmann, Evans, Harris, Kelly-Louw, Loubser, Roestoff, Smith, Stander & Steyn *Mars The law of insolvency in South Africa* (2008) 130).

As regards the requirements for the granting of the provisional order and the applicant's burden of proof in this regard, section 10 provides as follows:

> If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*; and
>
> (b) the debtor has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may make an order sequestrating the estate of the debtor provisionally.

Section 10 states that the court "*may* make an order sequestrating the estate of the debtor" and it would therefore appear that the court has a discretion in this regard (see eg *Epstein v Epstein supra* 612; *Nedbank Ltd v Potgieter* unreported case no 2012/5210 (GSJ) par 15; *Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 3 SA 218 (D) 219).

As regards the requirements for the granting of a final sequestration order, section 12(1) provides as follows:

> If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that –
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of subsection nine; and
>
> (b) the debtor has committed and act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may sequestrate the estate of the debtor.

In terms of section 12(2) the court, if it is not satisfied as regards the requirements set out in section 12(1),

> [S]hall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*.

It is thus clear from the word "shall" in section 12(2) that the court is obliged to dismiss an application for sequestration and set aside the order for provisional sequestration where the requirements are not satisfied (*Amod v Khan* 1947 2 SA 432 (N) 435; *Braithwaite v Gilbert (Volkskas Bpk intervening)* 1984 4 SA 717 (W) 723G; Meskin, Galgut, Magid, Kunst, Boraine and Burdette *Insolvency law and its operation in winding-up* (1990) par 2 1 13; Bertelsmann *et al* 134–135).

In terms of section 12(1) it would appear from the use of the words "*may* sequestrate" that the court is not bound to grant a sequestration order where the requirements are indeed satisfied as the court is once again afforded a discretion (see eg *Amod v Khan supra* par 435).

The requirements for the acceptance by the court of the surrender of the debtor's estate are found in section 6(1) which reads as follows:

> If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may accept the surrender of the debtor's estate and make an order sequestrating the estate.

It should be clear from the use of the words "*may* accept the surrender" that the court still has a discretion to reject the surrender of the estate even when it is satisfied as regards all the requirements in

section 6(1) (see eg *Ex parte Hayes* 1970 4 SA 94 (NC) 96; *Ex parte Bouwer and similar applications* 2009 6 SA 382 (GNP) 385). This is particularly the case where creditors appear to oppose the application (Bertelsmann *et al* 72).

It should be noted that the degree of proof with regard to the advantage to creditors requirement is more stringent in the case of voluntary surrender than in the case of compulsory sequestration (compare the wording of ss 6(1), 10(c) & 12(1)(c)). The reason for this difference is that a debtor knows about his own affairs and can adduce facts to show an advantage to creditors. A creditor, on the other hand, is seldom (except in the case of so-called "friendly sequestrations") in possession of sufficient facts relating to the debtor's assets to be able to provide details to the court. Consequently our courts have generally been inclined to accept, as proof, very little evidence that sequestration would be to the advantage of the creditors in compulsory sequestration applications (*Amod v Khan supra* par 438; *Hillhouse v Stott* 1990 4 SA 580 (W) 584; *Nedbank Ltd v Thorpe* 2009 JOL 24292 (KZP) par 51).

From the above discussion it should be evident that a court has to exercise its discretion at different stages of the sequestration proceedings. First of all it should exercise a discretion, after all relevant facts and circumstances have been taken into consideration, as to the question whether it is *prima facie* of the opinion (s 10) or satisfied (ss 6 & 12) that the relevant requirements have been met. Should the court be of such opinion, or if it is so satisfied, it must secondly decide, after consideration of all relevant facts and circumstances, whether it will in fact grant or refuse the order.

3 2 Discretion of Court

3 2 1 Advantage and Discretion

3 2 1 1 Case Law

Advantage to creditors upon sequestration is not the necessary concomitant with the commission of an act of insolvency (*London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (N) 592) and advantage still needs to be proved even where the applicant is armed with a *nulla bona* return (see *Mamacos v Davids* 1976 1 SA 19 (C) 22 & *cf* the facts of *Masinge* as regards the commission of an act of insolvency in terms of s 8(b)).

With regard to the meaning of advantage to creditors our courts have repeatedly cited the *dictum* in *Meskin & Co v Friedman* (1948 2 SA 555 (W) 559) that there must be "a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors". The court in *Meskin* referred to the so-called "indirect" advantages (see also *Stainer v Estate Bukes* 1933 (OPD) 86 90) which are not in themselves of a pecuniary character, such as the advantage of investigation of the insolvent's affairs under the powers of enquiry given by the Act. In this regard the court stated that the right of

investigation is not an advantage in itself (see also *London Estates (Pty) Ltd v Nair supra* par 559; *Mamacos v Davids supra* parr 21F–22C). The right of investigation is given as a possible means of securing ultimate material benefit for the creditors, for example in the form of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. According to the court in *Meskin* it is thus not necessary to prove that the insolvent has any assets. Even if there are none at all, it would be sufficient if it could be shown that there is a reasonable prospect that investigation in terms of the Insolvency Act may result in the discovery of assets to the benefit of the creditors (*Meskin supra* par 559; see also *Nedbank Ltd v Thorpe* parr 52 & 53; Smith 'The recurrent motif of the Insolvency Act – advantage of creditors' 1985 *Modern Business Law* 27 32).

It has been held that an advantage to creditors is proved generally in applications for compulsory sequestration when the petitioning creditor establishes that the debtor has a substantial estate to sequestrate and that the creditors cannot obtain payment except through sequestration (*Hill & Co v Ganie* 1925 (CPD) 242 245; *Trust Wholesalers & Woolens (Pty) Ltd v Mackan* 1954 2 SA 109 (N) 111; *Realizations Ltd v Ager* 1961 4 SA 10 (N) 11; *Mamacos v Davids supra* par 20C). However, in *Realizations* (*supra* parr 11–12), Williamson JP stated that a court, when considering the advantage to creditors requirement, should not consider the question whether alternative methods of obtaining payment might bring better results than sequestration. This is an issue to be considered at the stage of the proceedings when the court has to decide whether it should refuse an order despite the fact that all requirements entitling the applicant to an order have been established (see also *Trust Wholesalers supra* parr 112–113). However, in other cases our courts when considering the advantage to creditors requirement have indeed considered alternative procedures and debt repayment options in order to come to a decision as to whether sequestration is the best option to deal with the debt situation of the debtor (see eg *Ex parte Van den Berg* 1949 (WLD) 816 817; *Gardee v Dhanmanta Holdings* 1978 1 SA 1066 (N) 1070; *Madari v Cassim* 1950 2 SA 35 (N) 39; *Levine v Viljoen* 1952 1 SA 456 (W) 461H; *Behrman v Sideris* 1950 2 SA 366 (T) 370–372; *Sacks Morris (Pty) Ltd v Smith* 1951 3 SA 167 (O) 173).

Case law indicates that the machinery of sequestration should only be implemented in cases where it would be cost-effective to do so, namely, when the proceeds of the assets would be sufficient to cover at least the cost of sequestration. In *Van den Berg* (*supra* par 817), Ramsbottom J observed that to use the machinery of sequestration to distribute amongst the creditors the small amount which may be available from the realisation of the assets after paying the costs of administration is really "to use a sledge hammer to break a nut". The court was of the view that the administration procedure rather than the "expensive machinery" of sequestration was the best procedure to deal with the estate in this instance. In *Gardee* (*supra* par 1070), Didcott J held that where there is a single creditor who has a judgment against the debtor upon which he can

execute, compulsory sequestration is a more expensive course which is not to the advantage of creditors. This situation should, however, be distinguished from cases where there is no judgment against the debtor. In these cases it would probably not be more advantageous to the creditor to issue summons and to proceed to judgment and execution, especially where the creditor knows that the debtor is hopelessly insolvent and will not be able to meet the judgment. In such a case the machinery of sequestration would probably be more advantageous than trial procedure (*Absa Bank Ltd v De Klerk* 1999 SA 835 (E) 839; *Maxwell v Holderness* 2009 JOL 23740 (KZP) par 9).

In several other cases the court preferred the machinery of sequestration as a measure to deal with the debtor's financial situation. In *Julie Whyte Dresses* (*supra* 220), for example, the respondent-debtor requested the court to implement garnishee proceedings and to refuse the granting of a provisional sequestration order. However, Muller J refused to exercise its discretion in favour of the respondent-debtor as he found that there was nothing to show that garnishee proceedings would be less expensive or more advantageous to the general body of creditors than the administrative procedure provided for by section 23(5) and (11) of the Insolvency Act.

In *Levine v Viljoen* (*supra* 459–460), Roper J stated that the machinery of administration provides an inexpensive and convenient means of dealing with the estates of small debtors of the salaried or wage-earning class or those whose business affairs have been simple. However, the court was of the view that it is unsuitable for use in the case of more elaborate estates where transactions have been more complex, especially because of the limited facilities for investigation available to the trustee of the sequestrated estate.

As regards applications for voluntary surrender, our courts have also considered alternative measures such as debt review in terms of the National Credit Act 34 of 2005 (NCA) (*Ex parte Ford and two similar cases* 2009 3 SA 376 (WCC) 384; *Ex parte Arntzen (Nedbank Ltd as intervening creditor)* 2013 1 SA 49 (KZP) 56–57; *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) par 33). In *Ford* (*supra* par 18), the court refused to exercise its discretion in favour of the applicants for an order for the voluntary surrender of their respective estates, as it found that the machinery of the NCA was the more appropriate mechanism to be used and thus more advantageous than sequestration (Boraine & Van Heerden 'To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments' 2010 *PER* 84 113). The court ultimately refused to grant the sequestration order, despite the fact that creditors did not intervene to oppose the matter and despite the fact that the applicants testified that debt review in terms of the NCA would not be a workable solution to their debt problems (see Roestoff & Coetzee 2012 'Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward' *SA Merc LJ* 53 62; *Ford supra* par 15).

A factor which according to the court in *Arntzen* (*supra* 57) plays an important role with regard to the advantage to creditors requirement in voluntary surrender applications is whether, despite the applicant-debtor being insolvent, his or her income exceeds his or her expenses as this would enable the applicant to liquidate his indebtedness over time (see also *Ex parte Bouwer supra* 385C–D). It should be noted that such a situation may convince the court to refuse a sequestration order as sequestration would see the debtor obtain a discharge of all his pre-sequestration debts. However, in order to ascertain whether the acceptance of the surrender of an estate would be to the advantage of creditors it is not only the income of the applicant that needs to be disclosed, but also all other relevant information regarding the applicant's estate as the surrender of an estate involves, amongst others, a financial enquiry (*Ex parte Bouwer supra* par 7).

3 2 1 2 Analysis

The advantage to creditors requirement clearly plays a central role in the exercise of the court's discretion and our courts' emphasis on the creditors' position when considering this requirement should obviously be attributed to the fact that the Act currently sets such a requirement for sequestration applications. It is thus noticeable that the court in *Masinge*, contrary to the current pro-creditor approach of our courts, has in fact taken the debtor's best interest and convenience into consideration when exercising its discretion.

From the case law discussed above and the facts and decision in *Masinge* in this regard, it would appear that our courts are generally willing to refuse a compulsory sequestration order when they are of the opinion that the repayment of a debt in instalments might be a better or more cost-effective option to deal with the debt situation of the debtor and thus be more advantageous to creditors. However, it should be noted that the court in *Masinge* apparently did not decline the order because it was of the view that the repayment option would be a better or less expensive solution and that the advantage requirement was thus not complied with. The court noted that the application was opposed by the respondent on the basis that sequestration was not to the benefit of the creditors, but it did not pronounce upon this issue. It merely stated that its view was that it should exercise its discretion against the granting of a final order despite the fact that the requirements of section 12 were complied with. The court held that the respondent should be afforded an opportunity to pay off his debt in instalments, and in this instance it appears that the court took into consideration the debtor's position and convenience when exercising its discretion rather than the interests of the creditor. The court mentioned that the applicant's evidence was that the respondent's house was his only asset and the fact that the debtor could lose his home when his estate was to be sequestrated was probably a factor which convinced the court to exercise his discretion in favour of the respondent-debtor, by allowing him the opportunity to repay his debt in instalments. The fact that the applicant's house was his only asset may

also have had a bearing on the advantage to creditors requirement as such a situation may imply that there is insufficient assets in the estate to establish an advantage to creditors. However, as indicated, the court apparently did not refuse the application on the basis that there was no advantage proven.

3 2 2 Discretion when all Requirements are Met

3 2 2 1 Case Law

Apart from exercising its discretion in relation to the various requirements of a sequestration application, be it voluntary or compulsory, the court still has a discretion to grant or deny the order (see eg *Firstrand Bank Ltd v Evans* 2011 4 SA 597 (KZD) par 27; *Nedbank Ltd v Potgieter supra* par 15; *Ex parte Ford supra* par 19; *Ex parte Bouwer supra* 385).

As regards the question as to how the court should exercise this discretion, it has been held that the court has an overriding discretion which must be exercised judicially and upon consideration of all the facts and circumstances (see eg *Julie Whyte Dresses (Pty) Ltd v Whitehead supra* 219; *Nedbank Ltd v Potgieter supra* par 15). The court has a wide discretion and may refuse to sequestrate an estate even where there has been an act of insolvency. However, it is a discretion to be exercised not capriciously, but in accordance with the correct principles (*Pelunsky & Co v Beiles* 1908 (TS) 370 372). No exhaustive or general rule can be laid down and each case thus depends on its own facts (*Consolidated Estates and Collection Agency v Choonara* 1929 (WLD) 92 93; see also Bertelsmann *et al* 141). So, for example, the court refused a final sequestration order where it was of the opinion that an administration order in terms of the Magistrates' Courts Act 32 of 1944 (MCA) was in existence and working satisfactorily (*Barlow's (Eastern Province) Ltd v Bouwer* 1950 4 SA 385 (E) 397; *Madari v Cassim supra* 39). In *Chenille Industries v Vorster* (1953 2 SA 691 (O) 701) the court refused to grant the order despite the fact that an act of insolvency was committed and proved where there was a substantial surplus of assets over liabilities and the court was of the view that the likelihood of injury or hardship to creditors was more remote than in the case where the excess was small or problematical. In *Amod v Khan* (*supra* 439), Hathhorn JP exercised his discretion in favour of the respondent-debtor where it appeared that the object of the applicant-creditor was not to obtain payment of his debt, but to prevent the debtor from obtaining payment against the creditor's son. Hathhorn JP made the following observation regarding the nature of the court's discretion:

> [T]he section enacts that if the Court is satisfied 'it may sequestrate the estate of the debtor', and in my judgment 'may' in that phrase does not mean 'must'. The word 'may' is frequently used by the legislature when it gives the power of decision to the Court, and it is natural that ordinarily the legislature should not intend to bind the Court to a particular course when it decides a

> case. If it does so intend, it uses appropriate words as it has done in sub-sec. (2) in the phrase 'it shall dismiss.

However, the general approach of our courts appears to be that the court is indeed bound to grant a sequestration order when all requirements are met and the court may not exercise its discretion in favour of the debtor-respondent unless special circumstances are present (*Millward v Glaser* 1950 3 SA 547 (W) 554; *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* 1940 (NPD) 163 165; *Chenille Industries v Vorster supra* par 700; *Firstrand Bank v Evans supra* par 27). Furthermore, the exercising of the discretion should in all instances bear a close relation to considerations relating to the rights and best interests of the creditors (*Cyril Smiedt (Pty) Ltd v Lourens* 1966 1 SA 150 (O) 155). In *Firstrand Bank v Evans* (*supra* par 27) Wallis J explained as follows:

> There is little authority on how this discretion should be exercised, which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking, it seems to me that the discretion falls within the class of cases generally described as involving a power combined with a duty. In other words, where the conditions prescribed for the grant of a provisional order of sequestration are satisfied, then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.

The view of Wallis J in *Evans* that the discretion provided for in sections 10 and 12 involves a "power combined with a duty", supports the view that the court is generally bound to grant an order for compulsory sequestration and will normally not have a residual power to dismiss an application for compulsory sequestration when it is satisfied as to the relevant requirements. Wallis J referred to *Schwartz v Schwartz* (1984 4 SA 467 (A) 473–474) where Corbett JA, referring to section 4(1) of the Divorce Act 70 of 1979, explained as follows:

> A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised ... this does not involve reading the word 'may' as meaning 'must'. As long as the English language retains its meaning 'may' can never be equivalent to 'must'. It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power.
>
> Section 4(1) empowers the Court to grant a decree of divorce on the ground of the irretrievable breakdown of the marriage 'if it is satisfied that'; and then follows a specified state of affairs which is in effect the statutory definition of irretrievable breakdown. Clearly satisfaction that the estate of affairs exists is a necessary prerequisite to the exercise by the court of its power to grant a decree of divorce on this ground. But once the Court is so satisfied, can it, in its discretion, withhold or grant a decree of divorce? It is difficult to visualize

> on what grounds a Court, so satisfied, could withhold a decree of divorce. Moreover, had it been intended by the Legislature that the Court, in such circumstances, would have a residual power to withhold a decree of divorce, one would have expected to find in the enactment some more specific indication of this intent and of the grounds upon which this Court might exercise its powers adversely to the plaintiff.

Applying the above explanation as regards the nature of the court's discretion to grant a decree of divorce to the discretion of the court in sequestration applications, it could be argued that the courts are generally bound to grant compulsory sequestration orders when all requirements are met. It could further be argued that, in light of the context in which the discretion is afforded to the court, namely, that the main purpose of the Insolvency Act is to ensure an orderly and fair distribution of the debtor's assets for the benefit of the creditors as a group (see Bertelsmann *et al* 2–3), as well as the fact that the interests of debtors are not specifically indicated as a possible ground for exercising its discretion against the applicant-creditor, a court is bound to grant an order unless other special circumstances exist which do not relate to the position and convenience of the debtor.

As regards the issue of the court being empowered to exercise its discretion in favour of the debtor when special circumstances are present, it should further be noted that the debt review provisions of the NCA do not preclude a credit provider from bringing an application for the sequestration of the debtor's estate (*Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (GSJ) par 35; confirmed on appeal in *Naidoo v Absa Bank Ltd* 2010 4 SA 587 (SCA) par 4). In this regard it has been held that sequestration proceedings do not amount to proceedings to enforce a credit provider's rights in terms of a credit agreement (see s 88(3) which precludes a credit provider from enforcing a credit agreement debt once a debtor is under debt review). The purpose of sequestration proceedings is to set the machinery of the law in motion to have the debtor declared insolvent (*Mutemeri supra* parr 27–35; *Naidoo supra* par 4; *Firstrand Bank v Evans supra* par 25). Consequently, a creditor may proceed with sequestration proceedings and the mere fact that the debtor preferred debt review as the solution to his or her financial problems appears to be irrelevant when the court has to decide whether a sequestration order should be granted or not (see Roestoff & Coetzee *supra* 63). In *Firstrand Bank v Evans* (par 35) Wallis J held that the fact that a debt rearrangement order has been granted in terms of section 87 of the NCA will not affect the situation and will therefore also not preclude sequestration proceedings However, according to Wallis J the existence of a debt rearrangement order that provides for the payment of the debtor's debt within a realistic and reasonable time and in an orderly fashion, in conjunction with proof that the debtor is complying with the order, could constitute the special circumstances mentioned above and could thus be a powerful incentive for the court to exercise its discretion in favour of the debtor. However, the court emphasised that it is not necessarily

decisive, especially where, as was the position in this instance, the existence and validity of the order were debatable (par 36).

The burden of proving the special or unusual circumstances on a balance of probabilities rests upon the respondent and entails proof of facts showing that the dismissal of the provisional order will be more or at least as advantageous to the applicant and the other creditors as regards obtaining payment, than the administration of the estate in insolvency (Meskin *et al* par 2 1 13 and see *Cyril Smiedt (Pty) Ltd v Lourens supra* 155–156; *Realizations Ltd v Ager supra* 13; *Benade v Boedel Alexander* 1967 1 SA 648 (O) 655–656; *Firstrand Bank v Evans* par 27). In *Realizations* Williamson JP observed as follows (12):

> [B]efore I in effect grant a moratorium by refusing a sequestration order, I would have to be satisfied quite clearly that the creditors do, in fact, stand to lose nothing, that they will be paid fully or certainly paid not less than they would have if they obtained a sequestration order at this stage, and that any such payment would be made substantially at the time when a dividend would have been expected in insolvency.

Where a debtor cannot pay immediately, but is not insolvent and if given time would be able to repay his debt, it has been held that the court will be justified in exercising its discretion against sequestration (*Millward v Glaser supra* 553; *Barlow's (Eastern Province) Ltd v Bouwer supra* 396–397). In *De Waard v Andrew and Thienhaus, Ltd* 1907 (TS) 727 736 Solomon J observed as follows:

> [W]here it is clearly proved that a man has committed an act of insolvency it is a matter of discretion for the judge to decide whether or not he shall sequestrate the estate, and he is not debarred from doing so merely because the debtor produces evidence to show that his assets are in excess of his liabilities. In such cases he may either sequestrate the estate, or he may in the exercise of his discretion give the insolvent time to pay. If the insolvent comes to court and says, 'It is true I have committed an act of insolvency, but I am in a position to pay the debt, and if reasonable time is given me I undertake to pay my creditor,' then I for one should be disposed to give him that reasonable time within which to liquidate his debts.

However, the considerations that the respondent-debtor is solvent, despite the fact that an act of insolvency has been committed and that he or she will be able to pay all his debt in full, are not decisive in his favour (Meskin *et al* par 2 1 13; see also *Metje & Ziegler Ltd v Carstens* 1959 4 SA 434 (SWA) 435; *Realizations Ltd v Ager supra* 12–13; *Benade v Boedel Alexander supra* 655; *Brakpan Municipality v Chalmers* 1922 (WLD) 98 101). In the recent judgment of *Nedbank Ltd v Potgieter* (*supra* par 19), Mudau AJ held that a debtor who wishes to persuade a court to exercise its discretion in his or her favour should place evidence before the court that clearly establishes that the debts will be paid if a sequestration order is not granted. Should such contention furthermore be based on a claim that the debtor is in fact solvent then that should, according to the court, be shown by acceptable evidence (see also *Matthiesen v Glas* 1940 (TPD) 147 150; *Firstrand Bank v Evans supra* par 33).The creditor-orientated

approach and the emphasis on the best interests of the creditors is evident from Mudau AJ's reference to Holmes J's observation in *R v Meer* 1957 3 SA 641 (N) 619A "that the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors". According to Mudau AJ this statement remains as apposite today as it was then (par 20).

The fact that an act of insolvency has been proved thus clearly plays an important role in the exercise of the court's discretion against the respondent-debtor (*Millward v Glaser supra* 553–554; *Metje & Ziegler Ltd v Carstens supra* 435; *Pelunsky & Co v Beiles supra* 374; *Julie Whyte Dresses supra* 219; *Port Shepstone Fresh Meat and Fish supra* 164; *Firstrand Bank v Evans supra* par 33) In *De Waard* (*supra* 733), Innes CJ explained as follows:

> Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him; first a judgment is obtained against him, then a writ is taken out and he must expect, if he does not satisfy the claim, that his estate will be sequestrated. Of course, the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.' To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.

In *Realizations Ltd* (*supra* 12), Williamson JP stated that the court, when exercising its discretion whether to grant an order after all requirements have been met, may consider whether there are alternative methods of meeting creditor's claims. The main difficulty raised at this stage of the enquiry is often whether in fact the respondent is insolvent or whether it is merely a case of a temporary embarrassment which will be overcome in the near future if an order is not granted. However, the court indicated that it is not entitled to grant a debtor a moratorium, or a "breathing space to recover" by refusing a sequestration order if the result would be to deprive the creditors of the possibility of an early dividend. The court concluded as follows (par 15):

> A creditor in the applicant's position is entitled to enforce payment in the way he seeks to do – he has established a legal position to entitle him to it – and cannot be deprived of that right merely because one may have sympathy for a person who is perhaps – but not for certain – only financially embarrassed.

As regards the discretion of the court which is to be exercised in voluntary surrender applications, it also appears that the mere proof of the requirements will not necessarily lead to the granting of the order. In *Ex parte Ford supra* the major portion of each of the applicants' debts arose from credit agreements in terms of the NCA. In each case there were strong grounds for suspecting some degree of reckless credit

extension. Binns-Ward AJ observed (parr 19–20) as regards an argument advanced on the applicants' behalf that:

> it is for them to choose the form of relief that suits their convenience simply by mechanically and superficially satisfying the relevant statutory requirements under the Insolvency Act, is a misdirected approach, especially where the grant of the selected remedy is discretionary ... To the contrary, it is the duty of the court, in the exercise of its discretion in cases like the current, to have proper regard to giving due effect to the public policy reflected in the NCA. That public policy gives preference to rights of responsible credit grantors over reckless credit grantors and enjoins full satisfaction, as far as it might be possible, by the consumer of all 'responsible financial obligations'.

The court in *Arntzen* (*supra* 60 n 22) stated that it could not find any authority as regards the nature of the discretion in voluntary surrender applications. With reference to *Ex parte Ford* (*supra* parr 18–21) and *Ex parte Van den Berg* (*supra* 817–818), Gorven J pointed out that the courts have applied a more general approach without any discussion of the nature of the discretion. With reference to the statement of Wallis J in *Firstrand Bank v Evans* (*supra* par 27), that proof of the relevant requirements will ordinarily lead to the granting of a provisional order, Gorven J stated (60 n 22):

> It seems to me that, in voluntary surrender applications, a different approach may need to be considered, not least because the debtor is the applicant rather than the party opposing the application. In addition, a creditor brings sequestration applications and this indicates the attitude of at least that creditor.

The disregard for the debtors' interests when exercising its discretion appears from the court's response in *Ford* (*supra* par 21) to the further argument on behalf of the applicants that they had a "constitutional right" to the acceptance by the court of the surrender of their estate and that "the primary object of the machinery of voluntary surrender is not the relief of harassed debtors" (Binns-Ward AJ here referred to the observation by Holmes J in *Ex parte Pillay* 1955 2 SA 309 (N) 311E).

With reference to the above-mentioned observation of Holmes J, Marais AJ in *Ex parte Dube* (2009 JOL 24731 (KZD) parr 6–7) stated that where an application for surrender is motivated largely by the debtors' concerns with their own difficulties and less concerned with the interests of the creditors, this will indicate an ulterior motive which, in itself, will constitute a circumstance weighing against the exercise of the court's discretion in favour of the applicants (see also *Ex parte Gumede* 2010 JOL 24744 (KZD) parr 4–5). In *Ex parte Gumede* (*supra* par 4) Marais AJ further stated that the court must in actual fact be satisfied that an application was indeed brought for the benefit of creditors and not to assist the applicants as harassed debtors.

3 2 2 2 Analysis

From the above discussion it should be clear that the interests of creditors have been a consideration of utmost importance when our

courts exercised their discretion in sequestration applications. In summary, decisions in compulsory sequestration applications, where the courts were willing to refuse an order and thus be more lenient towards the debtor, appear to be based on the fact that the debtor, despite the fact that an act of insolvency was proved, could prove his or her solvency and that sequestration would not be to the detriment of the creditors in that they would not be paid less than they would have been paid if a sequestration order was granted. Furthermore the courts were in general also willing to refuse a sequestration order where they were of the opinion that there was an alternative procedure or repayment option that would provide a better solution to the debtor's financial problems and would thus be more advantageous to creditors. However, the court in *Masinge* did not indicate explicitly whether its decision to refuse the sequestration order was indeed based on the solvency of the respondent-debtor and his ability to repay his debt in instalments. Details regarding the respondent's financial situation were also not provided in the judgment. It also does not appear that Kubishi J was of the opinion that the repayment of the respondent's debt in instalments would bring better results than sequestration.

The judgment merely conveys the respondent's evidence that he was not able to pay the amount due in one lump sum and that his settlement proposals were not acceptable to the applicant. The court stated that in its view the respondent should be afforded the opportunity to pay off the debt in instalments while also mentioning the fact that the respondent does not have any other asset except the house. The court finally held that the application for sequestration must be refused and it is suggested that the court's decision in this regard may have been based on its viewpoint that the facts and circumstances of the case required the court to come to the respondent's assistance. As mentioned above, the fact that the respondent's house was his only asset may have convinced the court to refuse the application as sequestration would have caused the debtor to lose his house.

It is submitted that our courts' present creditor-orientated approach to sequestration applications is to be understood in light of the advantage to creditors requirement and the often-stated objective of the Insolvency Act, namely, to be for the benefit of creditors and not to bring relief to harassed debtors. However, in light of the world-wide trend that consumer insolvency regimes should strive to accommodate insolvent and over-indebted debtors as an additional objective of consumer insolvency law, the decision in *Masinge* is to be commended insofar as the court has apparently realised the importance of following a more balanced approach by also taking into consideration the interests of the respondent-debtor as to what would be the best solution to his debt problems.

At this point it would be apt to also refer to the World Bank's reservations as regards creditor-initiated proceedings. According to the World Bank Report (parr 186–187) the standards for access to consumer

insolvency systems should *inter alia* ensure against improper use by creditors. The Report points out that both creditors and debtors can initiate individual insolvency proceedings in several countries. However, almost all the countries that have introduced distinct consumer insolvency systems in recent decades only accept debtor petitions. Moreover, creditor petitions are uncommon even in most of the countries where such petitions are allowed. The World Bank's stance is that if creditor petitions are permitted controls should be implemented to prevent its abuse as a collection tool. This may be accomplished through a requirement that more than one creditor should initiate a petition, or by establishing a high financial threshold for an individual debt as a prerequisite for a petition.

4 Implications of Court's Ruling and Powers of Court

In *Masinge* the court dismissed the creditor's application and the question thus arises as to what the implications of the dismissal would be as regards to the creditor's and debtor's respective rights and obligations after refusal of the order. At this juncture of the sequestration proceedings the dire financial position of the respondent-debtor would have been further inflated by the costs involved. The further question arises as to what extent the court hearing the matter can actually provide a practical and cost effective solution to the debt situation, rather than just refusing the sequestration order and sending the debtor, and for that matter the creditor, back into the realm of individual debt collection procedures – given the history of the matter up to that point (namely, that the debtor failed to satisfy a warrant of execution and that his settlement proposals were not acceptable to the creditor) and the time and cost involved.

Outside the realm of the sequestration process, a debtor and his creditor or creditors may negotiate new terms that may give rise to a rearrangement of the debt, which may entail a repayment in instalments over a longer time period and/or a full or partial discharge of the debts or any part thereof. Since such an arrangement is contractual in nature, consensus is required and this may prove difficult to achieve in many instances – a situation that will be aggravated when the debtor has a number of different creditors to deal with. Of course, and in so far as some or all of the debts are credit agreements regulated by the NCA, the debtor may consider to apply for debt review in terms of section 86 of the NCA. The problem with debt review is of course that in many instances it may not provide a lasting solution, especially where only some of the debts are subject to the process (the NCA only applies to "credit agreements" as defined in s 8). As indicated, the court may also, in the exercise of its discretion, find that administration is the better procedure to be utilised. On the one hand this scenario should be rare in practice due to the monetary limitation of R50 000 (see s 74(1)(b) of the MCA and GN R3441 in *GG* 14498 of 1992-12-31) but at the same time the implication is further that the court will send the debtor off to initiate another procedure in a different court. The fact of the matter is that

neither the court hearing the sequestration proceedings, nor the debtor can force the creditor or creditors to accept the negotiation option, and the two statutory procedures mentioned are subject to further legal procedures that will entail further time and cost for an already insolvent debtor.

If a sequestration order is refused and the debtor is unwilling to negotiate an arrangement or to follow one of the statutory procedures, the creditor will have to consider debt enforcement by individual debt enforcement means. Usually, and following a court order in favour of the creditor, execution will follow if the debtor fails to meet the court order. This may entail executing against the property of the debtor with some additional procedural hurdles if the property consists of the family home of the debtor, or forced repayment procedures such as emoluments attachment orders. It is to be noted that the creditor may also call for a so-called section 65 procedure in terms of the MCA. However, it should be borne in mind that this process is only available in the Magistrates' Courts.

Although the court may consider alternative procedures or debt repayment options when considering the advantage to creditors requirement or when exercising its discretion either to grant or refuse a sequestration order (see the discussion of case law in parr 3 2 1 1 & 3 2 2 1 above), it should be clear that the High Court does not have the power at present to make any orders as regards the implementation of alternative procedures or alternative debt repayment options other than granting or denying a sequestration order. The only exception appears to be the discretionary power granted in terms of section 85 of the NCA to a court when considering a credit agreement to refer a matter to a debt counsellor for debt review or to declare that the consumer is over-indebted and simultaneously to grant an order for debt rearrangement in terms of section 87 (see *Ex parte Ford supra* par 12, where the court held that it may exercise the discretion provided for in s 85 when hearing an application for voluntary surrender; see also Boraine & Van Heerden *supra* 118 who submit that the provision may also be applied by a court hearing a matter for compulsory sequestration). Section 85 provides as follows:

> Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may–
>
> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or
>
> (b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

It is submitted that the lack of a procedure to deal with the alternatives to sequestration at this point in time is cost and time consuming and that

the Act should be amended to specifically grant the court the power to make certain orders when refusing a sequestration order. In this context it should be noted that section 65 of the MCA, for instance, allows for various ways to recover a debt after judgment has been granted against a debtor (see in general Van Loggerenberg *Jones and Buckle Civil practice of the magistrates' courts in South Africa* (2015) 406 ff). A court has various powers and options to deal with the execution or repayment of the debt. This type of debt-collection procedure is available only in the Magistrates' Courts, but in terms of a section 65M procedure, a High Court judgment for any amount of money may also be enforced by a judgment creditor in the Magistrates' Courts.

In addition to the section 65 debt-collection procedure, emoluments attachment orders (see s 65J) and administration orders, the MCA also makes provision for the recovery of debts in terms of section 57 when the defendant admits liability for a debt and offers to pay in instalments, or in terms of section 58 when the defendant unconditionally consents to judgment and offers to pay in instalments.

The sections 65 and 65M procedures apply where an original judgment has been granted for payment of an amount of money or where the court has ordered payment in specified instalments of such amount and the judgment or order has not been complied with within ten days of the date on which the judgment was granted, became payable, or, where the court has suspended payment for a certain period in terms of section 48(e), and ten days have elapsed after expiry of such a suspension period (s 65A(1)(a)). Section 65C also allows for the joinder of more than one notice against the same debtor in order to be heard concurrently.

Where the debtor fails to meet the judgment debt, he or she may be called for a so-called section 65 hearing in terms of the MCA. On the day stated in the section 65A(1) notice, the judgment debtor appears *in camera* before the court. The judgment debtor takes the oath and presents oral evidence relevant to his or her financial situation (s 65D(1)). The judgment creditor's attorney is afforded the opportunity to cross-examine the judgment debtor on all issues regarding the judgment debtor's financial situation, the judgment debtor's ability to pay the judgment debt and costs, and the reasons for his or her failure to do so. In terms of section 65D(4)(a)–(b) the factors to be considered in judging an ability to pay a debt are:

(a) the nature of debtor's income;

(b) the amounts needed for necessary expenses; and

(c) the amounts needed to make periodical payments in terms of other court orders or other commitments.

The court may also call witnesses and receive further evidence in this regard by means of affidavit or in any other manner deemed appropriate

by the court. In reaching its decision the court may at its discretion (see ss 65D(5); 65E(1)(a)(i); 65E(1)(a)(ii); 65E(1)(b); and 65E(1)(c)):

(a) refuse to take into account periodical payments made by a judgment debtor in terms of a hire purchase agreement;

(b) authorise the issuing of a warrant of execution against movable or immovable property and issue a warrant together with an order for the payment of a judgment debt in periodical instalments in terms of section 73;

(c) authorise the attachment of a debt due to the judgment debtor in terms of section 72; and

(d) where the judgment debtor has made a written offer to pay in instalments and the debtor is able to pay, the court may order the debtor to pay in specific instalments and even order the issuing of an emoluments attachment order.

The court may in terms of sections 65D(2), 65K(1) and 65E(5) also:

(a) postpone the hearing at any time and to any future date;

(b) order the judgment debtor to pay the costs of the hearing except where the judgment creditor has refused a reasonable offer of settlement made by the judgment debtor; or

(c) suspend, amend or rescind its order.

5 Proposals for Amendment of the Act and Concluding Remarks

As mentioned, our courts' present creditor-orientated approach when hearing sequestration applications should be understood in light of the context in which the discretion to either grant or refuse a sequestration order is afforded to them. As indicated, it is generally accepted that the current South African consumer insolvency system has been designed for the benefit of creditors and not to provide debt relief to debtors. Moreover, advantage to creditors is a requirement which must be met in both compulsory and voluntary sequestration applications. It is submitted that the advantage to creditors requirement serves an additional goal insofar as it ensures that sequestration will only be resorted to if it would be cost effective to do so, that is, if the proceeds of the residue would be sufficient to cover the costs of sequestration and to provide a pecuniary benefit to creditors. We therefore believe that the requirement should be retained for that purpose (see also Roestoff & Coetzee *supra* 59).

Nonetheless, it is of concern that the South African system does not follow a balanced approach and that it has remained creditor orientated despite international developments to the contrary (see Boraine & Roestoff in Cisse *et al The World Bank Legal Review* (2013) 91). Insolvency law reform to address the Insolvency Act's failure to pursue the additional objective of providing relief to debtors as well as its failure to strive for a balance amongst the competing interests of creditors and

debtors is thus of paramount importance. In *Masinge*, the court apparently refused the sequestration order as it was of the opinion that the facts and circumstances of the case required the court to come to the assistance of the debtor. However, as is apparent from the case law discussed above, our courts have rarely been willing to be led by the best interests of the debtor when exercising their discretion. As indicated, case law confirming the nature of the discretion to be a "power combined with a duty" may furthermore be interpreted to actually oblige the court to grant a sequestration order when all requirements of the Act are met unless special circumstances exist, which circumstances may not relate to the position and convenience of the debtor. In order to ensure that our courts follow a balanced approach when exercising their discretion to grant or refuse a sequestration order, it is thus suggested that insolvency legislation be amended to explicitly require an advantage for the *debtor* as a prerequisite for compulsory sequestration applications. In voluntary surrender applications the legislator should expressly provide that the court, when exercising its discretion, should take into consideration the debtor's interests regarding what the best solution to his or her financial problems should be (see also Roestoff & Coetzee *supra* 63). In light of the World Bank's reservations regarding creditor-initiated insolvency petitions it is furthermore suggested that law makers should take notice of the controls suggested in the Report in order to prevent the abuse of compulsory sequestration as a collection tool (see the discussion in par 3 2 2 2 above).

As indicated, the lack of a procedure to allow the court to deal with the alternatives to sequestration after a sequestration order has been refused, is cost and time consuming. As regards the current consumer insolvency legislative framework it is thus submitted that a court hearing an application for sequestration should, in addition to the powers afforded to it in terms of section 85 of the NCA, be explicitly empowered to impose a suitable alternative measure or procedure in order to conclude the matter. Thus, instead of only being able to dismiss the matter and suggest a suitable alternative procedure, the court should for instance also be empowered to refer the matter to a Magistrate's Court to deal with it in terms of a section 65 type of procedure.

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Farm Frites v International Trade Administration Commission Case 33264/14 GN

Urgency and prejudice in anti-dumping investigations – nullification of Anti-Dumping Regulations – removing only interim legal remedy available to interested parties

On 20 May 2014, in the High Court, Bam J passed judgement that may have far-reaching implications for the administration of the law of unfair international trade, specifically anti-dumping law, in South Africa. It is submitted that the decision could lead to abuse of administrative powers by the International Trade Administration Commission (ITAC), the authority responsible for conducting anti-dumping investigations. This is the second judgement that severely curtails the rights of interested parties, following on *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* Case CCT 59/09 2010 (CC) 6.

Before considering the merits of the case or the verdict, it is important to provide a brief background to the applicable law. The Anti-Dumping (AD) Regulations specifically provide for the judicial review of any interim decisions or procedures in an anti-dumping investigation. Regulation 64.1 provides as follows (own emphasis):

> Without limiting a court of law's jurisdiction to review final decisions of the Commission, *interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation* in cases where it can be demonstrated that –
>
> (a) [T]he Commission has acted contrary to the provisions of the *Main Act* or these regulations;
>
> (b) [T]he Commission's action or omission has resulted in serious prejudice to the complaining party; and
>
> (c) [S]uch prejudice cannot be made undone by the Commission's future final decision.

South Africa has also incurred international obligations in terms of the World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (the AD Agreement) (see *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) par 6). The Constitutional Court has also held in the *ITAC v SCAW* Case (*supra* par 25) that (own emphasis):

> [T]he Anti-Dumping Agreement is *binding on the Republic in international law*, even though it has not been specifically enacted into municipal law. In order to give effect to the Anti-Dumping Agreement, Parliament has enacted legislation and, in turn, the Minister has prescribed Anti-Dumping Regulations.

Article 17.4 of the AD Agreement provides that:

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> [w]hen a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the [Dispute Settlement Body].

This confirms that preliminary anti-dumping determinations should be subject to review. However, a clear differentiation needs to be drawn between the wording of Article 17.4 of the AD Agreement and AD Regulation 64.1. Article 17.4 provides for the review of "a provisional measure". This review considers not only a review of the procedures applied in an investigation, but also the substance thereof (see Art 17.6(i) of the Anti-Dumping Agreement, which provides that "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective", and Art 11 of the WTO Understanding on Dispute Settlement, which provides that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements").

AD Regulation 64.1, on the other hand, refers to "preliminary decisions or the Commission's procedures prior to the finalisation of an investigation". Thus, whereas Article 17.4 of the AD Agreement only refers to "a" provisional measure that can be reviewed (as happened recently when Brazil challenged a preliminary measure imposed by ITAC – see WTO *South Africa – Anti-dumping duties on frozen meat of fowls from Brazil* WT/DS439/1), the AD Regulation makes reference to "preliminary decisions" and to "procedures" in the plural. It is, therefore, clear that this does not only relate to the preliminary determination that may result in the imposition of provisional measures, but to any interim decision. This could thus relate, for instance, to the decision to initiate an investigation, to accept or reject a party's claim for confidentiality, to accept or reject a party's information, or any other relevant decision or procedure. The qualification is that the decision or procedure must have "resulted in serious prejudice", that is, the prejudice must not be something in the future, and that such prejudice cannot be undone by ITAC's future decision. It is not clear how any interim decision cannot be undone by a future final determination, which means that care should be taken in applying this provision so as not to nullify it. However, Bam J in *Farm Frites v ITAC* disregarded this, as will be clear from the analysis below.

In the present case, the applicant, Farm Frites, was accused of dumping frozen potato chips on the South Africa market. The applicant had operations in both Belgium and the Netherlands, but functioned as a single economic entity with a single set of financial accounts. It, therefore, made a single submission to ITAC, which rejected this and required that it make separate submissions for each plant. ITAC also required the applicant to submit individual cost build-ups for each of the more than 350 types of chips that it produced and not only for the nine types that it sold to South Africa, as well as its worldwide sales, on a

transaction-by-transaction basis, for each of the more than 350 types. The applicant could not complete all this information in time and its information was disregarded for purposes of ITAC's preliminary determination (AD Regulation 31.3). The applicant submitted a complete update of its information before the deadline for comments on the preliminary determination, which is also the deadline for addressing any deficiencies to its submissions (AD Regulation 35.5). However, in the process of splitting the costs and sales between the plants in Belgium and the Netherlands and preparing an additional more than 340 cost build-ups, the applicant neglected updating two columns in the overall cost build-up for the Netherlands, being those relating to "other products", that is, products not subject to the investigation, and "total company", being the total information for the specific plant. On 17 January 2014, ITAC indicated that it would verify the applicant's information, but five days later, without any further information submitted in the investigation by any party, it rejected the applicant's information *in toto*. The applicant liaised with ITAC in an attempt to convince it to take its information into consideration and was granted an oral hearing in March 2014. At the oral hearing, a commissioner asked why the outstanding information could not simply be submitted, which was then done on the same day.

On 14 April 2014, ITAC issued an essential facts letter. The purpose of this letter is to inform interested parties of all the essential facts that ITAC will take into consideration during its final deliberations (see WTO *EC – Salmon (Norway)* par 7.807 where the panel held that essential facts are the "body of facts essential to the determinations that must be made by the IA before it can decide whether to apply definitive measures. That is, they are the facts necessary to the process of analysis and decision-making by the IA, not only those that support the decision ultimately reached"). Whereas for all other exporters, this letter indicated their individual domestic sales volumes and values, their export sales volumes and values and margins of dumping, for the applicant, it was merely indicated that it was regarded as a non-cooperating party and that its information was rejected for a number of reasons, as indicated in the letter.

On 2 May 2014, the applicant lodged an urgent review application against ITAC in which it requested that ITAC be interdicted from taking a final determination pending a full review of ITAC's decision. The application was brought on an urgent basis as ITAC's final determination was to be made on 13 May 2014.

ITAC argued that there was no administrative procedure that could be reviewed as only the final determination would be reviewable, that there was no urgency, and that the applicant had experienced no detriment. However, both the High Court and the Supreme Court of Appeal have previously held that a procedure or determination, such as ITAC's essential facts letter, is a decision or step that affects the rights of others and that it must be regarded as an administrative action (see *Oosthuizen's Transport v MEC, Road Traffic Matters Mpumalanga* 2008 (2) SA570 (T);

Grey's Marine Hout Bay v Minister of Public Works 2005 (6) SA 313 (SCA)) and that a fatal flaw in this process affects the whole process (see *Minister of Finance v Paper Manufacturers of South Africa* Case 567/07 (SCA), not reported; *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA)). This issue was therefore moot.

As regards the other two issues, Bam J contradicted himself. First, he held that "I find it difficult to understand why the applicant brought the application *only at this stage*" (par 8, own emphasis). However, he then indicates that the application was "premature" and that ITAC would only have considered the relevant issues the day after the application was heard in court, that ITAC's recommendation could still have been favourable to the applicant and that the Minister "was enjoined to, independently, consider the recommendations of ITAC" (par 11). It is not clear how the application could have been brought too late, yet was still premature. Bam J did not deal with the issue of prejudice.

This notwithstanding, it is submitted that this is an incorrect interpretation of Regulation 64, which does not require a party to await the final decision by the Minister. On the contrary, it provides specifically that any preliminary determinations or procedures may be reviewed before a final determination is made, subject to certain criteria. These criteria include that ITAC has acted contrary to the provisions of the International Trade Administration Act or the AD Regulations, which Bam J essentially found to have been the case (see parr 10 & 12), that the action has resulted in serious prejudice and that such prejudice cannot be made undone by a final determination. The most important question that needs to be answered is what possible prejudice can be experienced as a result of preliminary determinations that cannot be made undone by a future final determination. If, as Bam J indicated, the application was premature as ITAC's final determination "could have been favourable to the applicant" despite all indications to the contrary, and that the Minister could still have reached a favourable determination, this would mean that a final determination could *always* overturn a negative preliminary determination. This would render the provision null and void. Accordingly, a different meaning has to be considered.

A decision to initiate an investigation without proper basis has an immediate and direct effect on importers and exporters. Even if it is subsequently found that no injurious dumping took place and no definitive anti-dumping duties are imposed, the interested party's trade is significantly affected by the uncertainty caused by the investigation and it may have to pay substantial fees to defend its interests in the matter. This prejudice cannot be made undone by future action. Likewise, a decision to impose a provisional duty against an exporter has an immediate and chilling effect on that exporter's exports to South Africa. Importers are seldom willing to pay provisional duties in the hope that the final decision will allow the exporter back into the market. This means that the exporter is often effectively prevented from competing in the South African market for the duration of the provisional duties, even

if no definitive duties are imposed. Again, this cannot be made undone by the future decision. Likewise, the decision to reject a party's information from being taken into consideration in the final determination has direct prejudicial effect as ITAC may consider *only* the essential facts made known to interested parties in its final determination. Thus, where the essential facts indicate that the party's information has been rejected, there are no other facts pertaining to that party before ITAC. ITAC cannot therefore make any determination other than treating that party as not cooperative and assigning it the highest possible margin of dumping, resulting in anti-dumping duties significantly higher than that for any cooperating party. It appears that the Court did not fully understand the significance of the essential facts letter (see Brink 'Anti-dumping and judicial review in South Africa: An urgent need for reform' 2012 *Global Trade and Customs Journal* 274-281 & Brink 'South Africa: A complicated, unpredictable, long and costly judicial review system' in Yilmaz *Domestic Judicial Review of Trade Remedies* 2013 247-268 regarding the problems with judicial review of anti-dumping measures in South African courts).

If the verdict in *Farm Frites v ITAC* is to remain unchallenged, this would effectively nullify the provisions of the AD Regulations. It is clear, however, that the Regulations were specifically drafted to counter such a situation. Accordingly, it is submitted that the decision is wrong and based on an error of law. It follows that that the relief requested should have been granted and that ITAC should have been instructed either to take the exporter's information into consideration or should have been interdicted from proceeding in the matter until a full review had been concluded, especially in light of the fact that Bam J twice indicated that there were proper grounds for review.

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The President of RSA v Reinecke 2014 3 SA 205 (SCA)

Constructive dismissal, common law remedies and the changing identity of the employer: A Critique of some of the findings made by the Supreme Court of Appeal[1]

1 Introduction

The recent appeal case of *The President of RSA v Reinecke* (the *Reinecke* judgment) dealt with many issues about the employment of magistrates under the Magistrates Court Act (90 of 1993) but the most important issue for purposes of this note is how the judgment grappled with, on the one hand, the relationship between the common law rights and those rights conferred by statute in the labour sphere and; on the other hand, the notion of constructive dismissal in a complex working environment. The case calls for comment purely on the possible precedent it sets for the relationship between the common law and statutory rights in matters concerning employment as well as the impact it makes into the doctrine of constructive dismissal. The findings made by the court could potentially escalate and begin to constitute new defences to common law remedies where these intersect with other statutes that regulate employment and to claims of constructive dismissals.

It should however be said at the outset that Reinecke's case, properly considered was for contractual damages arising from a repudiation of his contract of employment which repudiation he had accepted by resigning. But, because the remedy he invoked is so closely related to constructive dismissal under the Labour Relations Act (66 of 1995) (the LRA) the court discussed his remedy in relation to constructive dismissal as generally understood under the LRA. This is evidenced by the fact that the court actually did make reference to constructive dismissal and the LRA. It therefore follows that the pronouncements the court made are equally applicable to constructive dismissals and it is in that light that this note approaches the discussion. As would be seen elsewhere in this note Reinecke would in any event have been entitled to invoke the remedies afforded by constructive dismissal under the LRA had he not been excluded from the ambit of the LRA by virtue of his judicial office as a magistrate.

Constructive dismissal as a form of dismissal serves a very important purpose in our labour relations. It allows an employee who has been a victim of intolerable conduct in the workplace to resign and still have recourse against an employer. Absent the remedy afforded by constructive dismissal this employee will have no recourse against the

1 I wish to thank my colleague Prof Peter Jordi, for the useful exchange of views we had during the writing of this note

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employer as the employment relationship would have been terminated at his instance and not at the instance of the employer. Constructive dismissal affords this employee a remedy he otherwise would not have. It does this by recognizing that although the employee resigned the cause of the resignation is the employer's intolerable conduct. In this way it can be said that constructive dismissal serves a purpose of protecting employees against an employer who makes their working conditions so intolerable that they resign and in the process forfeit their rights of recourse against such an employer (Dekker 'Did He Jump or was he Pushed? Revisiting Constructive Dismissal' 2012 *SA Merc LJ* 346). It was for this reason that in *Murray v Minister of Defence* (2009 3 SA 130 (SCA) par 8), it was said that constructive dismissal "represents a victory for substance over form."

In the *Reinecke* judgment, the Supreme Court of Appeal seems to have made a few worrying findings. One, the court seems to have declared that if the process of dismissal is statutory in nature and in origin, then constructive dismissal or any reliance on common law contractual remedies is not available. In those circumstances the court suggested that a victim of intolerable conduct should instead approach the High Court to remedy the intolerable situation through an interdict. On this point Wallis JA, after finding that the process for the discharge of a magistrate from service was statutory and after going through the applicable provisions of the statute, held (par 21):

> It follows that the process for dismissing a magistrate was at the time (and remains) a statutory process. Non-compliance with any part of that process would have been remediable (and still would be remediable) at the instance of the magistrate by resort to the high court. It would, for example, have been open to Mr Reinecke to apply for an interdict…

Two, the court appeared to be saying that before claiming constructive dismissal or contractual damages based on repudiation of the contract of employment, the employee has to be certain that the intolerable conduct complained against was committed by someone who had the power to dismiss in the first place. In this regard the court held (par 22):

> In practical terms Mr Booi had no power to dismiss Mr Reinecke. How then can his conduct be invoked as constituting a repudiation of the latter's contract of employment as a magistrate? It would be entirely anomalous to hold that the conduct by someone, who had no power to appoint or to discharge the magistrate, could nonetheless provide contractual grounds upon which a magistrate subjected to such conduct could terminate their appointment as a magistrate and claim damages.

Three, the court seemed to suggest that for constructive dismissal or contractual damages arising from a repudiation of an employment contract to succeed the claimant should not have had another remedy available to him but to resign. In particular the court held (par 23):

I do not think that Mr Reinecke can contend that there was no remedy other than resignation available to him in response to Mr Booi's conduct.

He had available, and used in relation to his financial claims, the grievance procedures laid down in the regulations to address this type of situation.

It is not suggested that Mr. Reinecke's case was without difficulties. For starters, there were difficulties relating to whether Mr. Reinecke had cited the correct parties. But the judgment falls to be criticized for the narrow stance it took on the application of the common law rights to contractual damages in the employment sphere as well as its application of the constructive dismissal doctrine which now forms part of "the constitutionally developed common law" (*Murray v Minister of Defence supra* par 9).

In criticizing the judgment, this note will argue that the judgment gives an incorrect impression that a statute like the Magistrates Court Act extinguishes existing common law rights of an employee to claim contractual damages resulting from a repudiation of the contract of employment; or somehow prevents an employee from claiming constructive dismissal. It should be noted that although constructive dismissal is a statutory invention under the LRA, its function closely resembles the contractual action for damages an employee would have against an employer who through unacceptable conduct repudiates a contract of employment. This, Corbett JA explained in *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A), occurs:

> Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to 'repudiate' the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract [to claim damages] (22D-F).

In those circumstances once an employee accepts the employer's repudiation as was done by Reinecke who accepted the repudiation by resigning, that employee becomes entitled to claim contractual damages. The note will submit that it cannot be said that just because a litigant potentially has another cause of action emanating from a particular statute or another source therefore he is barred from instituting a constructive dismissal claim under the LRA or an action for contractual damages at common law.

The note will further submit that a conclusion that says a litigant is barred from instituting a claim of constructive dismissal merely because he has another cause of action arising from a particular statute goes against the dictum of *Fedlife Assurance Ltd v Wolfaardt* (2002 2 All SA 295 (A)). In this case a differently constituted Supreme Court of Appeal considered the impact of the LRA on the common law contract of employment and held that the effect of the unfair dismissal regime introduced by the LRA has not been to extinguish existing common law rights but, so reasoned the court, the LRA operates to supplement the common law rights of an employee whose employment could at common law be lawfully terminated at the will of the employer (par 13).

This finding in *Fedlife Assurance Ltd v Wolfaardt supra* was fitting because it accords with the wholesome rule of our law that for a statute to alter the common law, that statute must either expressly say so or the inference must be such that no any other conclusion could be reached (*Casserly v Stubbs* 1916 (TPD) 310 312). In the absence of express provisions to that effect there is no presumption that a statute extinguishes existing common law rights. To the extent that a suggestion was made in the *Reinecke* judgment that the Magistrates Court Act somehow extinguishes existing common law rights of magistrates, the court was clearly wrong as the Magistrates Court Act has no express provision stating that it in any way interferes with existing common law rights of magistrates and the court did not say it was reading such an interference with the common law rights into the Act by necessary implication.

Moreover, this note will further argue that the judgment, in requiring that the conduct causing resignation must emanate from someone who has the power to dismiss, is out of touch with reality and must be rejected on that basis. Although it is clear that constructive dismissal is said to arise where an "employer" has made continued employment intolerable, the construction of the term "employer" need not be too narrow or restrictive as the nature of employment itself has meant that the term "employer" is a broad construction.

Furthermore, in light of the Constitutional Court's judgment in *Strategic Liquor Services v Mvumbi* (2010 2 SA (CC) par 4) where it was held that the test for constructive dismissal is not whether the employee has no choice but to resign, but only that the employer made continued employment intolerable, this note will submit that Wallis JA's judgment cannot stand in so far as it purports to hold that an employee can only claim constructive dismissal where there are no other remedies. If the correct test for constructive dismissal is not whether an employee resigned as a last resort, then by parity of reasoning it should not matter if that employee had other remedies available to him.

2 The Facts

The case concerned Reinecke, a magistrate who was appointed for the district of Germiston but performed the duties of a relief magistrate throughout South Africa. As a relief magistrate, Reinecke relieved magistrates who were indisposed, or absent and at times assisted with the clearing of backlog of cases. He lived in Pretoria whilst his wife and children lived outside Rustenburg. He intended joining them but initially could not do so as he spent most of his time in Gauteng and on the East Rand performing his duties as a relief magistrate (par 1).

In October 2000, the Magistrates' Commission advertised a number of posts for magistrates throughout the country, including at Randburg which was for a relief magistrate. Reinecke applied for this post as the Randburg Court provided relief magistrates for the North West province

and he expected to perform relief duties in Rustenburg, nearer to his family. He made it clear in his interview for the position that he did not want the post if it meant he would continue performing relief duties primarily in Gauteng and not in the North West province. In 2001, Reinecke got the post in the Randburg Court but it did not work out the way he had envisioned (par 2).

Months into the job he clashed with Booi, the chief magistrate at the Randburg Court. The clash began immediately after Reinecke's appointment at the Randburg Court when he lodged a claim for payment of a relocation allowance due to him in terms of the applicable regulations. Booi objected to Reinecke's claim, taking a view that since his family was already in Rustenburg before he came to the Randburg Court, Reinecke's claim for a relocation allowance could not stand (par 18). This caused Reinecke to make a few complaints about Booi's conduct, in response to the complaints Booi unilaterally and without consultation decided that Reinecke would no longer perform relief duties and that from that point onwards Reinecke would only perform the duties of a magistrate in the Randburg Court. Booi also advised the regional office of the department to terminate Reinecke's standing advances and to recover past payments from his salary (par 19).

Booi also ensured that at the Randburg Court, Reinecke was not allocated any judicial work except for a few postponements and that he was allocated work of an administrative nature (par 19). Such conduct, the court accepted would amount to a repudiation of the contract of employment in a conventional employment relationship (par 20). As a result of all the frustrations emanating from Booi's conduct and the complaints against him that went unanswered; Reinecke resigned and claimed constructive dismissal, unfair labour practice as well as damages for loss of earnings against the defendants, namely the President of South Africa, the Minister of Justice as well as the Magistrates' Commission. There was also a claim for *injuria* which was dismissed by the court *a quo*.

3 Judgment

Wallis JA began his judgment by embarking on a lengthy enquiry into whether or not magistrates were employees of the state and part of the public service, a question that was later abandoned without making any final decision on the basis that the decision "would not on its own serve to resolve the dispute in favour of Mr Reinecke" (par 16). The Supreme Court of Appeal noted that Reinecke's claim had both contractual and statutory elements to it and that he incorrectly, so the judge reasoned, sought to rely solely upon the contractual elements thereby divorcing the relationship from its statutory background. The court then upheld the appeal and in the process made a few findings this note will take issue with.

4 Analysis and Discussion of Judgment

4 1 Courts to Decide Cases on Pleaded Causes of Action

In *Khanyile v Commission for Conciliation, Mediation & Arbitration* (2004 25 *ILJ* 2348 (LC)) Murphy AJ considered the question of magistrates in the employment sphere and concluded that magistrates were not employees under the LRA. He held that: "In the premises I am persuaded that a magistrate is not an employee as defined within the Labour Relations Act, by virtue of the special constitutional position a magistrate holds as a judicial officer appointed in terms of Chapter 8 of the Constitution" (par 30).

A finding that magistrates are not employees within the definition of an employee under the LRA means that they are excluded from the ambit of the protection afforded by the LRA. This point is particularly important for it means that Reinecke would not have been entitled to the relief afforded by constructive dismissal under the LRA, but argues this note, Reinecke would have been entitled to claim contractual damages arising from the repudiation of his contract of employment because that is his existing common law right which has not been extinguished by either the Magistrates Court Act or the LRA.

Going further, excluding magistrates from the ambit of the protection afforded by the LRA did not leave them without rights or remedies in that together with "everyone" magistrates have a right to fair labour practices as guaranteed by section 23(1) of the Bill of Rights. When that right to fair labour practices is in anyway infringed, magistrates are entitled to choose a cause of action which they believe sufficiently advances their individual cases and vindicates their infringed rights. That cause of action could either be found at common law or on any statute including the Magistrates Court Act. Courts are only entitled to decide a case on a pleaded cause of action not on some other cause of action which may be applicable and was not utilized. The only time courts can decide on an issue that is not specifically pleaded it is when that issue was fully canvassed at trial (see *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) 714G).

It is not unusual for one act of dismissal to give rise to various causes of action especially in instances where the employer, like in Reinecke is an organ of state, or where the exercise of public power was involved (*Majake v Commission for Gender Equality* (2010 1 SA 87 (GSJ) par 3). In *Gcaba v Minister of Safety and Security* (2010 1 SA 238 (CC) par 53) a case that concerned the intersectionality of rights and remedies available to police officers in the public service the Constitutional Court correctly fortified this argument as follows: "[f]irst, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora".

There is another reason offered by Nugent JA in *Makhanya v University of Zululand* (2010 1 SA 62 (SCA)) as to why a single wrongful act may give rise to multiple remedies and causes of action. This is primarily so held Nugent JA (par 8) because:

> The law does not exist in discrete boxes, separate from one another. While its rules as they apply in various fields are often collected together under various headings, that is, for convenience of academic study and treatment that should not be allowed to disguise the fact that the law is a seamless web of rights and obligations that impact upon one another across those fields.

It is also not unusual for a litigant that potentially has various causes of action to choose that cause of action which in the mind of that litigant properly and sufficiently vindicates her infringed rights. When a litigant has chosen a particular cause of action amongst the many, it is then not open for courts to second guess the litigant's chosen cause of action. It was not open for Wallis JA to tell Reinecke that he should have applied for an interdict in the high court instead of resigning and claiming contractual damages emanating from the repudiation of his employment contract. The court should have decided the pleaded case and provided sound reasons as to why the pleaded case was bad in law. This would have been in line with Langa CJ's dictum in *Chirwa v Transnet Ltd and Others* (2008 4 SA 367 (CC) par 168) where the then chief justice correctly stated that a claim "must be approached as it is pleaded".

4 2 Contract Remains the Basis of Employment Relationship

The judgment can also be criticized for suggesting that those whose employment is regulated by statute should look at the statute for remedies and not rely on the contract. Implicit in this suggestion is that the statute somehow alters the nature of the employment relationship and that the contract, which is the basis of the relationship, yields or defers to the statute. This seems to go against what the Constitutional Court held in *Chirwa v Transnet supra* where after a careful examination of whether dismissals of public sector employees constitute administrative action for purposes of PAJA, Ngcobo J held (par 142):

> The subject-matter of the power involved here is the termination of employment for poor work performance. The source of the power is the employment contract ... The nature of the power involved is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising contractual power.

What the Constitutional Court did in this decision, was to put it beyond doubt that the existence of a statute does not change the nature and character of the employment relationship. This is the position even if the statute in question is the Magistrates Court Act. The basis of the employment relationship even if regulated by statute remains contractual and can attract both contractual and statutory remedies. To

this end, Basson J in *MEC for the Department of Health, Eastern Cape v Odendaal & Others* (2009 30 *ILJ* 2093 (LC) par 52) authoritatively held that "[t]he contract of employment (although influenced by labour legislation, collective bargaining and the constitutional imperative of fair labour practices) remains the basis of the employment relationship".

It is trite that both statute and contract constitute separate and independent sources of obligations in our law. However, it is doubtful if one can maintain a stringent separation between statute and contract in employment matters. This is so because the employment relationship itself has become highly legislated. So legislated is the employment relationship, that Cheadle in his chapter 'Employment (including Master and Servant)' (in Coaker & Zeffert (eds) *Wille and Millin's Mercantile Law of South Africa* (1984) 340)) correctly argued that:

> The employment relationship is so shot through by statute and collective bargaining agreement that it has become an inextricable complex of rights and obligations with its sources in contract, common law, trade custom and practice, legislation and collective bargaining.

It is generally accepted that legislating in employment matters is primarily aimed at correcting the power imbalance that exist between the employer and employee at common law, but by the same token it has not be said that the common law contract of employment has been completely eroded by legislation. If anything, the true import of legislating in the employment relationship has been that the contract of employment which remains the basis of the relationship is now reinforced and suffused by legislation. Of this Basson J in *MEC for the Department of Health, Eastern Cape* (*supra* par 50) correctly remarks:

> Labour legislation has therefore supplemented the common law principles regulating the *termination* of a contract of employment with the import of the requirement of *fairness* ... From the aforegoing it therefore does not appear that the LRA has overtaken the common law in respect of the termination of the contract of employment although, as already indicated, it is accepted that the fairness principles embodied in the LRA have soften the harsh effects a mere lawful termination of the contract may have.

Due to the fact that the contract remains the basis of the employment relationship, it follows that, in appropriate circumstances, litigants will rely on the contract to find causes of action even in circumstances where the employment relationship has statutory elements governing it. In the *Reinecke* judgment Reinecke did exactly that and was well within his rights to do so. In those circumstances, courts should not deny causes of action founded on contract, but should say why that cause of action is bad in a particular case.

4 3 Changed Nature and Identity of Employer

Going further, Wallis JA's judgment in so far as it suggests that Booi's could not have constructively dismissed Reinecke because he (Booi) in practical terms did not have the power to dismiss, is stuck in time from

an era where the employment relationship was simple and straight forward. The judgment is steeped in tradition where the employer-employee relationship consisted of an easily identifiable employer who at common law had, amongst others, a duty to receive his employee into service, supervise the work done, remunerate the employee and provide a safe working environment (*SAR & H v Cruywagen* 1938 (CPD) 219 229). This was a simple relationship, the regulation of which was in many ways straight forward and did not present many difficulties. An employee knew who the person of his employer was and was constantly under that person's supervision. But the economies of the world have changed and the employer-employee relationship has followed suit thereby necessitating a change in the laws that regulate and govern the employer-employee relationship. The reality of the situation is that Booi's conduct constituted the repudiation of Reinecke's employment contract necessary to entitle Reinecke to contractual damages similar to what he would have been entitled to under the LRA had he been an employee under that Act claiming constructive dismissal.

Wallis JA may find support for his view in section 186(1)(e) of the LRA, which defines constructive dismissal as a dismissal where "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee". The provisions of section 186(1)(e) are clear in providing that it must be an "employer" that made continued employment intolerable. It is axiomatic that in an employment relationship, it is the employer that has the power to dismiss. Perhaps Wallis JA had this in mind. If indeed Wallis JA had the provisions of section 186(1)(e) in mind, then it is submitted that he narrowly and too literally construed the word "employer" and this is out of touch with the way in which modern enterprises, the state included, are run and managed. Modern undertakings are run and managed in such a way that various people through their titles and positions within those undertakings qualify as "employer" and that is the reality courts need to be aware of.

Courts should be mindful of the fact that the nature and the identity of the employer in modern times have changed and continue to change. The end result has been that an employer is no longer an individual or a natural person. It is now often a juristic person or a corporate of one form or another. This juristic person or corporate is managed by a collective calling itself "the management" of the enterprise. In this context, the employment relationship exists not between any identifiable person or member of the corporate, but between the employee and the enterprise. This is so because there is a separate liability between members of the enterprise and the enterprise. The management of the enterprise possesses some managerial prerogative which enables it, amongst other things, to control and discipline the employees of the enterprise (see Strydom 'The Origin, Nature and Ambit of Employer Prerogative (Part 1)' 1999 *SA Merc LJ* 42). This in essence is a chain of command within the working environment which must be observed by all employees. These are the realities in management which all employees are subjected to.

The state in its capacity as employer is not immune to these realities in management. It too has a complex chain of command under which it subjects its employees. The employees of the state like their counterparts in the private sector are expected to observe and respect the chain of command. At the Randburg magistrate's court, Booi was part of that chain of command through his office and title, the office of the Chief Magistrate. That, it is submitted, brought Booi within the ambit and purview of "employer" and also by necessary implication clothed him with an implied power to dismiss. Booi was well apprised of the power his title and position gave him and he used that power to make Reinecke's working conditions intolerable. How the court missed this is inconceivable especially if one takes into account the common occurrence of delegation of powers and responsibilities in the public administration. It may well be the case that the Magistrates Court Act places the appointment of magistrates and issues incidental thereto on the ministry of justice, but the ministry may delegate some of its duties to people like Booi. When Booi acts under delegated authority as he did in Reinecke's case it is illogical to say that he did not have powers to dismiss. The reality is that in a complex working environment, there is no day to day interface between employer and employee but there is a chain of command that manages the undertaking. Any member in that chain of command has implied if not express powers of dismissal. This is the reality Wallis JA's judgment misses.

4 4 Availability of Other Remedies does not Affect Constructive Dismissal Claim

For a while there was a sense in our law that to succeed in a constructive dismissal claim a litigant had to prove that it had no other option but to resign or that resignation was a measure of last resort (*Old Mutual Group Schemes v Dreyer and Another* 2009 20 *ILJ* 2030 (LAC) par 18). The argument was that an employee ought to show that he exhausted all internal processes aimed at correcting the intolerable conditions to no avail. In *Albany Bakeries v Van Wyk and Others* (2005 26 *ILJ* 2142 (LAC) par 28), the court held that it would be opportunistic for an employee to resign and claim that the resignation was as a result of intolerable conditions when there was an avenue open to solve his problem which he did not utilize.

The only time an employee was permitted to resign without having gone through the internal processes, appear to have been in instances where the employee showed that following such internal procedures would have been futile or the outcome was pre-determined (*LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others* 2008 29 *ILJ* 356 (LC)). The requirement that an employee shows that he resigned as a last resort, or that he shows that he did not have a choice other than to resign and claim constructive dismissal, was expressly rejected by the Constitutional Court in *Strategic Liquor Services* (*supra* par 4). In this case, the Constitutional Court held that the test for constructive dismissal "does not require that the employee have no choice but to

resign, but only that the employer should have made continued employment intolerable" (par 4).

It follows therefore, that even if Reinecke had other options short of a resignation, his claim; be it for contractual damages or constructive dismissal cannot be dismissed only because he could have utilized those options and he did not. Simply put, to succeed in a constructive dismissal claim, it is no longer necessary that a litigant prove that the resignation was a last resort or that he had no choice; a requirement that he proves he did not have other options, seeks to reintroduce to the test a requirement which the Constitutional Court expressly rejected.

5 Conclusion

For constructive dismissal to remain relevant and effective, courts should not place unnecessary restrictions on the remedy, and associated concepts such as "employer" must be given their proper meaning within the context in which they operate and not be interpreted too restrictively as was done in this case. If anything, the concept of "employer" must be given a generous interpretation so as to afford protection to a greater number of employees who would otherwise be excluded. This will not be anything new seeing that section 200A of the LRA already casts a rebuttable presumption as to the existence of an employer-employee relationship in certain instances spelled out in the section. A literal interpretation of employer, that does not take into account the complex nature of employment, is tantamount to giving effect to form as opposed to substance. In modern economies employment comes about in many shapes and forms and labour laws must consistently keep up with the changes of modern economies so to be relevant. Any strict adherence to the person of the employer can potentially throw constructive dismissal as a form of dismissal into disuse as many employees will not be able to prove that the intolerable conduct causing their resignation was perpetuated by someone who had the power to dismiss in the first place.

Moreover, for reasons advanced in this note, it is apparent that magistrates, and all those whose employment contracts impact both statute and contract, lay a valid claim to the remedy of constructive dismissal where they are found to be employees under the LRA or contractual damages at common law if excluded from the ambit of the protection afforded by the LRA. For this not to be applicable, the statute impacting on their employment must expressly, or by necessary implication, exclude the application of and any reliance on the common law contractual rights (*Stadsraad van Pretoria v Van Wyk* 1973 2 SA 779 (A) 784D-H). Holding that a contractual claim for damages is not available, in the absence of any express exclusion by the relevant statute, is unjustifiable.

Furthermore, it is trite that courts do not make cases for litigants but that litigants must make their cases in the pleadings supported by evidence. Likewise, courts should only decide the pleaded case and not

any other case that potentially could have been brought but was not. There may very well be plausible reasons as to why a litigant brings the case that he does, and not any other case that potentially arises from the same facts. Having said all this, it can only be hoped that the findings made by the Supreme Court of Appeal do not escalate and become defences to constructive dismissal claims as well as claims for contractual damages where these intersect with other statutes that also regulate the employment relationship.

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Minister of Safety and Security v Sekhoto 2011 1 SACR 315 (SCA)

A critique of reasonableness as the fifth jurisdictional fact for a lawful arrest

1 Introduction

The right to liberty of the person has always been accorded protection by our courts even before the advent of the Constitution. This right has been constitutionalised in the post-apartheid Constitutions. Section 12 of the Constitution of 1996 guarantees everyone's right to freedom and security of the person, which includes the right "not to be deprived of freedom arbitrarily or without just cause". Like all rights in the Bill of Rights, the right to freedom is not absolute and can, where it is reasonable and justifiable, be limited. Section 36 of the Constitution provides for the general limitation of the rights in the Bill of Rights. Arrest by police officials is one of the most common means of limiting an individual's right to freedom. Arrest may take one of two forms: arrest without a warrant and arrest with a warrant (in terms of ss 40 & 43 of the Criminal Procedure Act 51 of 1977 (CPA) respectively). This article will not concern itself with the latter form, ie arrest with a warrant. Suffice it to say unlike a warrantless arrest, arrest on a warrant is subject to judicial oversight. For an arrest without a warrant to be lawful, it has to satisfy the four jurisdictional facts set out in *Duncan v Minister of Law and Order* (1986 2 SA 805 (A) 818G-H). Where these factors are complied with, the arrest is deemed lawful regardless of its reasonableness. These factors are:

(a) the arrestor must be a peace officer;

(b) she must entertain a suspicion;

(c) the suspicion must be that the suspect has committed an offence listed in schedule 1 of the CPA;

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(d) such suspicion must be based on reasonable grounds.

The position postulated above accurately reflects the pre-constitutional era. Since the advent of the Constitution, several High Courts have held that this position falls short of affording the right to freedom the pride of place it deserves in our constitutional state. For instance, in *Louw v Minister of Safety and Security* (2006 2 SACR 178 (T) 185a-187g), Bertelsman J purported to widen the set of jurisdictional facts which a lawful arrest has to satisfy. According to the court, in addition to satisfying the traditional jurisdictional facts for a lawful arrest, time was ripe to evaluate the lawfulness of an arrest through the prism of the Bill of Rights. There is no need in a society founded on the values of equality, dignity and freedom to deprive individuals of their freedom where less invasive means could be used to achieve the objects of arrest – to bring a person suspected of having committed a crime to court. In essence, Bertelsman J demanded that the police action of arrest, in addition to satisfying the traditional jurisdictional facts, has to be objectively reasonable, taking into account whether milder methods of bringing a suspect before court could not be as effective as an arrest. This means that where methods short of arrest could ensure that the suspect appears in court to answer the charges against her, such milder methods should be preferred over arrest (see amongst others *Minister of Safety and Security v Sekhoto* 2010 1 SACR 388 (FB) par 24 (*Sekhoto a quo* case); *Mvu v Minister of Safety and Security* 2009 2 SACR 291 (GSJ); *Gellman v Minister of Safety and Security* 2008 1 SACR 446 (W)). However, this view has not been unanimously shared by the High Courts (see *Charles v Minister of Safety and Security* 2007 3 SACR 137 (W)). The Supreme Court of Appeal (SCA) had an opportunity to reconcile these contradictory views. In *Minister of Safety and Security v Sekhoto* (2011 1 SACR 315 (SCA) (*Sekhoto case*)) the SCA favoured the conservative view espoused in the *Charles* case in this regard.

2 Facts of the Case

The brief facts in this case were as follows: The first and second plaintiffs were arrested on allegations of being in possession of suspected stolen stock and stock theft respectively. After receiving a report of stolen stock from an informer, police paid a visit to the first plaintiff's home where they found bags containing seven sheepskins in an outbuilding. The first plaintiff's father informed the police that those skins belonged to the first plaintiff who was not around at the time. The first plaintiff arrived whilst the police were still there. The police asked him for an explanation about the sheep skins. The first plaintiff's explanation was to the effect that he had bought them but could not remember where. Mention should be made that those skins carried the same mark. The police found the first plaintiff's explanation implausible. The first plaintiff was arrested. The second plaintiff was arrested on the basis that the first plaintiff had later told the police that he had received the sheepskins from the second plaintiff. They were then prosecuted and discharged at the end of the state's case (*Sekhoto a quo* case par 29).

3 Judgment and Analysis

The court *a quo* found that the traditional jurisdictional facts for a lawful arrest were satisfied. However, the court found for the plaintiffs' on the basis that the respondent had failed to satisfy the fifth jurisdictional fact. (*Sekhoto a quo* par 28; see *Sekhoto case* par 10). The respondent appealed to the SCA. The SCA found the judgments of the High Courts' in this regard troubling. The SCA held that the present and other High Courts' formulation of the fifth jurisdictional fact is not borne out by the principles of interpretation. As the starting point, the SCA pointed out that it was not clear that when formulating the fifth jurisdictional fact the High Courts did so by directly applying the Bill of Rights, by developing the common law, in line with section 39 of the Constitution, or by way of interpreting section 40(1) of the CPA (*Sekhoto* case par 14).

The SCA found the High Courts' interpretation of section 40(1)(b) of the CPA problematic in that these courts had failed to deal with the constitutionality or otherwise of this provision. Secondly, relying on *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* (2001 1 SA 545 (CC) (*Hyundai* case)), the SCA held that with the interpretational aids at its disposal, it was unable to conclude that the fifth jurisdictional fact could be inferred from the proper reading of section 40(1) of the CPA without straining the language of the provision. Lastly, the SCA found that it was not clear whether the development of the fifth jurisdictional fact was through the development of common law (see parr 24 & 14).

The first and third concerns were disposed of easily. With regard the first ground, the SCA found that absent the finding of unconstitutionality of this provision, these courts were not entitled to read anything into a clear text. As to the third ground, the SCA held that the fifth jurisdictional fact could not be developed through the common law as the common law regarding this aspect has been superseded by legislation (parr 22-24). In relation to the second ground, the SCA held that although courts are under an obligation to read legislation through the prism of the values of the Bill of Rights in terms of section 39(2) of the Constitution, this was not possible in each and every case. This was one of those cases. According to the SCA, the text of section 40(1)(b) was not amenable to the interpretation ascribed to it by the High Courts. In this regard, the SCA drew a distinction between interpreting legislation in terms of section 39(2) of the Constitution (reading down) and the process of reading words into or severing them from a statutory provision that has been declared unconstitutional (par 15). With regard to the former, the court need not declare an otherwise unconstitutional provision invalid but read it in conformity with the values of the Bill of Rights to save it from invalidity. With regard to the latter, the court must declare a provision unconstitutional before saving it from invalidity by either reading-in or severing words from the provision (Currie & De Waal *The Bill of Rights Handbook* (2013) 67). When a court reads a provision in line with the values of the Bill of Rights that is usually the end of the matter.

For instance, if such a finding is made by a high court the matter would not be referred to the Constitutional Court for confirmation. In other words such a provision is not declared invalid. However, where a reading-in or severance is used the matter must be referred to the Constitutional Court to confirm the unconstitutionality of the provision (see s 172 of the Constitution).

In the current case, the High Courts purported to rely on the interpretational clause to reach their conclusions. The SCA held that the reliance on section 39(2) was flawed. In this regard the SCA held that the reason the High Courts' found a fifth jurisdictional requirement hidden somewhere in section 40(1)(b) was that the High Courts failed to draw a distinction between the objects of arrest and the motive for the arrest. It is the object, and not the motive, that is relevant in the determination of whether an arrest is lawful or not (par 31). According to the SCA, once the jurisdictional facts are satisfied and the object of the arrest is to bring the accused to justice, then the discretion whether to arrest or not arises. The arrestor is not obliged to affect an arrest (par 28). If the arrestor exercises her discretion within the bounds of rationality, such an arrest cannot be said to be unlawful. This is more so because section 40(1)(b) is silent on how the discretion must be exercised. In this regard, the SCA found that the manner in which the discretion to arrest is to be exercised must be discovered by inference in accordance with the ordinary rules of construction. In the present case, once the object of arrest (ie to bring the arrestee to justice) is the underlying reason for an arrest and the arrestor has rationally exercised her discretion, such an arrest could not be said to be unlawful. It is common cause that there are a number of avenues available to the arrestor to bring the arrestee to justice, however, that does not mean that the arrestor must be faulted for having chosen arrest over other methods. In other words, the question to be asked should not be whether the arrestee was brought to justice in the best possible manner, but whether the arrestor had the intention to bring the arrestee to justice and that she exercised her discretion properly. The arrestor exercises her discretion unlawfully when she invokes the power to arrest for a purpose not contemplated by the legislator (parr 30-31). It is common cause that the release of the arrestee after she has been arrested requires a judicial evaluation to determine whether it is in the interests of justice to do so. In other words, the arrestor's role in this regard is circumscribed by law. If a peace officer were to be required to arrest only in circumstances were she is satisfied that the suspect would not attend trial, the statutory structure relating to bail will be undermined (parr 30-44). The SCA has summarised this position (par 44):

> [I]t seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or a senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the legislature thought so – a peace officer could seldom be criticised for arresting a suspect

> for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest.

It is worth mentioning that the arrestor is not required to conduct a hearing before affecting an arrest. That question arises later, when the arrestee is at the police station (depending on what offence the arrestee had committed) or when he appears in court. Once the jurisdictional facts are satisfied then a discretion, which must be exercised rationally, arises (*National Commissioner of Police v Coetzee* 2013 1 SACR 358 (SCA) par 14). It is for this reason that the SCA found that if the fifth jurisdictional fact can indeed be read into section 40(1)(b) of the CPA, by parity of reasoning, it must also be read into section 43 of the CPA. Section 43 of the CPA provides for the arrest of a suspect on the strength of a warrant of arrest. The text of section 43 of the CPA is not susceptible to such a reading (par 23). However, it is noteworthy that even when a suspect is arrested on the strength of a warrant, the arrestor must still exercise the discretion whether to arrest or not (par 28).

4 Is the Formulation of The Fifth Jurisdictional Fact Justifiable?

It is difficult to comprehend why the SCA had difficulty establishing the route used by the High Courts to formulate the fifth jurisdictional fact. Firstly, the constitutionality or otherwise of section 40(1) of the CPA was not at issue in the High Courts that developed the fifth jurisdictional fact. With regard to the second concern that the High Courts failed to explain the basis for widening the traditional jurisdictional facts, the High Courts relied on section 39(2) of the Constitution. Despite the SCA claims that the interpretational aids at its disposal do not justify the development of the fifth jurisdictional fact (the second SCA concern), the High Courts' read section 40(1)(b) in a manner that embraced the values underlying our constitutional project as per section 39(2) of the Constitution injunction. It is not clear where the confusion of the SCA in this regard stems from. In the *Sekhoto a quo* case, the court specifically refers to the Constitution's dictate to interpret legislation in the manner that must promote "the spirit, purport and objects of the Bill of Rights" (*Sekhoto a quo* par 27). In this context, this principle means that legislation is to be presumed constitutional. In other words, wherever possible legislation must be read consistently with the Constitution. Devenish eloquently sums up this approach as follows (Devenish *A Commentary on the South African Bill of Rights* (1999) 600):

> [S]hould a statute be capable of being interpreted in more than one way, one resulting in validity and the other in invalidity, the court should presume that the legislature intended to act in a way that is compatible with the constitution.

Section 39(2) of the Constitution gives effect to this principle (Devenish *supra* 601). This provision provides that "when interpreting any legislation, and when developing the common law or customary law,

every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". It provides a leeway to courts to interpret a provision of a statute that otherwise would be unconstitutional liberally to save it from invalidity. The caveat is that the values and principles underlying the Constitution be upheld without straining the language of the provision. In the words of Devenish (*supra* 600-601):

> This [the interpretation of legislation in light of section 39(2)] does not necessitate that the constitution be interpreted restrictively in order to accommodate the impugned statute. The constitution should, as indicated above, be interpreted liberally, after which the statute should be analysed to determine whether it can be construed in a manner that is in accordance with the provisions, values and principles of the constitution.

De Ville takes this point further by stating that (De Ville *Constitutional and Statutory Interpretation* (2000) 266):

> A new consideration the courts would have to take account of in this regard is the principle that where two interpretations of a statutory provision are possible – the one leading to the validity thereof and the other to its invalidity (due to its conflict with the provisions of the Constitution) – the first-mentioned interpretation is to be followed. It may namely in certain instances occur that construing a provision as directory instead of peremptory leads to the invalidity of that provision or vice versa. One must follow the construction which leads to the validity of the provision.

Are the SCA's concerns regarding the formulation of the fifth jurisdictional fact justified? As already stated, the High Courts relied on section 39(2) of the Constitution to formulate the fifth jurisdictional fact. This method of interpretation (s 39(2)) was applied in *Govender v Minister of Safety and Security* (2001 4 SA 273 (SCA)) in relation to section 49(1) of the CPA. In that case, the SCA found that the threshold requirement for the exercise of power conferred by that provision was very low, as the arresting officer had only to be satisfied that the legislative requirements for the use of force (even fatal force) are present without having to adhere to the standard of reasonableness (par 21 *et seq*). The formulation of the fifth jurisdictional fact in the manner the High Courts did is therefore, nothing alien to our constitutional jurisprudence. The Constitutional Court has since confirmed the soundness of the interpretation adopted in the *Govender* case (see *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC) par 39 (*Walters* case)).

In the context of this discussion, given a number of choices open to the arrestor with regard to methods of bringing the suspect before court, it is therefore, implicit that the arrestor will have to apply her mind as to the appropriate method to use (see *Hyundai supra* par 37). Section 38 of the CPA specifically lists four "methods of securing the attendance of an accused in court for her trial", *ie* arrest; summons; written notice and indictment. Surely the CPA does not prescribe that a person, who is reasonably suspected of committing a schedule 1 offence, *must* be arrested. This is made clear by the usage of the modal verb "*may*" in section 40 of the CPA which denotes that the arrestor has a discretion.

Joubert intimates that wherever a police official exercises a discretion in terms of the law, she has to be familiar with the possible alternatives open to her and must endeavour to avoid choosing the one infringing the rights of the individual (Joubert *Applied Law for Police Officials* (2001) 17). This, of necessity, requires that an arrestor weigh the appropriate method from the ones available to him, given the circumstances of each case. To argue otherwise would be to undermine the structure and objectives of the CPA pertaining to bringing suspects before court. That the arrestor has to choose an appropriate method of bringing the accused before court is obvious from the CPA and in particular section 38.

In addition to failing to apply the interpretational principles, the SCA found that the reasons offered by the High Courts for the formulation of the fifth jurisdictional fact cannot withstand scrutiny. The SCA held that if an arrest accords with the traditional jurisdictional facts, it could not be unlawful. Once the jurisdictional facts are present, the arresting officer is entitled to exercise her discretion as she sees fit (*Sekhoto* case parr 28-29). The SCA seems to have narrowed down the grounds for unlawful arrest to situations where the arresting officer "knowingly invokes the power to arrest for a purpose not contemplated by the legislator" (par 30). The SCA asserts that where the intention of the arrestor is to bring the arrestee to justice, no claim for unlawful arrest could lie despite the circumstances at the time of the arrest (par 30). Where an arrest is perpetrated for reasons other than bringing the arrestee to justice, such an arrest is in *fraudem legis* and amounts to the misuse of the power granted by the legislation and is therefore, unlawful. According to the SCA, the High Courts failed to draw a distinction between situations where the exercise of arrest power amounted to abuse and where the intention has always been to bring the arrestee before court; the High Courts conflated the motive and objects of arrest. In short, where the arrest was motivated by malice, a claim lies not because the arrestor failed to exercise her discretion reasonably, but in the fact that the arrest was not for the purpose for which it was meant (par 31).

The standard of rationality is not breached because the arrestor has opted for the less perfect (or even imperfect) method at the time: "The standard is not perfection, or even optimum, judged from the vantage of hindsight so long as the discretion is exercised in accordance with the jurisdictional facts the standard is not breached" (par 39). The standard is not breached for as long as it remains "within the bounds of rationality" (par 39). Once the legislative requirements for the exercise of discretion to arrest are satisfied, such an arrest cannot be said to be unlawful. In the context of section 40(1)(b) of the CPA, the legislature has failed to provide a matrix within which the arrestor has to exercise her discretion and therefore, such limits are to be discovered by inference (parr 40-41). The SCA intimates that if the arrestor has exercised her discretion rationally, that should be the end of the matter. The rationality to which the SCA seems to refer to is choosing one of the available options of bringing the suspect to justice without really applying one's mind to the effects that the chosen method would have on the subject.

Failure to use milder methods, without any justifiable reason, where the CPA grants the arrestor that discretion, should surely amount to a failure to exercise one's discretion reasonably, if not failure to act in accordance with the objects of the empowering legislation. This position is confirmed in the *Govender case* (see par 21). In that case, the plaintiff's seventeen year old son was involved in a motor car theft. After being cornered by the police, the plaintiff's son attempted to run away despite verbal warnings and a warning shot being fired. The police officer then shot the plaintiff's son in the back, fracturing his spine. The police official purportedly acted in terms of section 49(1) of the CPA (before its amendment) (*Govender supra* par 5). This provision authorised police officers to use force (even deadly force) when attempting to effect an arrest and the arrestee flees or attempts to flee and the use of force is reasonably necessary to overcome the arrestee from fleeing. The High Court found the shooting lawful in the following terms (*Govender supra* par 7):

> [I]n my view the force used was reasonable and necessary and proportionate to the offence of motor vehicle theft. The public interest involved in the use of deadly force as a last resort to arrest a fleeing car thief relates primarily to the serious nature of this crime, its increasing prevalence throughout this country, and the public's interest in the apprehension, prosecution and punishment of car thieves. In the result in my view the shooting was justified by section 49(1).

Mention should be made that in the *Govender* case, the constitutionality of section 49(1) was not at issue (par 9). Instead, the plaintiff urged the SCA that, in addition to taking into account the "proportionality between the degree of force used and the seriousness of the crime for which the victim is suspected" (*Govender supra* par 16), the reasonableness and justifiability of the police conduct must be taken into consideration (par 17). The court agreed with the plaintiff. The SCA found the approach of the High Court inappropriate. The SCA reaffirmed the standard of reasonableness as a yardstick for measuring the conduct expected of an arresting officer in terms of this provision as follows (par 21):

> [I]n licensing only such force, necessary to overcome resistance or prevent flight, as is 'reasonable', section 49(1) implies that in certain circumstances the use of force necessary for the objects stated will nevertheless be unreasonable. It is the requirement of reasonableness that now requires interpretation in the light of constitutional values. Conduct unreasonable in the light of the Constitution can never be 'reasonably necessary' to achieve the statutory purpose.

To underscore this sentiment, the SCA held that in relying on section 49(1) of the CPA, the arrestor must also take into consideration the rights of the fugitive (par 19). The court expanded factors that the arrestor has to take into consideration when relying on section 49(1) of the CPA to include whether, at the time and under the circumstances, the suspect posed immediate danger to the arrestor or to members of the society or that the suspect was involved in the commission of a crime involving the

infliction of serious bodily harm or attempt thereof (par 24). The SCA concluded that section 49(1) of the CPA could be reasonably developed to encompass the extended requirements for the lawful reliance on the provision.

The development of the fifth jurisdictional fact is sound for another reason. It is a fundamental principle in our law that "the interpretation of legislation involves more than analysing the particular provision in question" but the holistic reading of the statute (Botha *Statutory Interpretation: An Introduction for Students* (2012) 128) and other legislation that directly impacts on the provision at hand (see *DPP, Western Cape v Prins* 2012 2 SACR 183 (SCA)). Thus, it could not be said that the SCA in Sekhoto embarked on the holistic reading of the CPA for reasons advanced above. If the holistic reading of this legislation was undertaken, then this was done in isolation of other instruments that have the direct bearing on the issue at hand. Having regard to the fact that the legislature is presumed to be aware of its creations, it could not be said that the CPA is the only relevant instrument in the interpretation of section 40(1)(b). For instance, section 13(3)(a) of the South African Police Service Act 68 of 1995, provides that whenever a police official exercises powers granted to her, she must do so in a manner that is reasonable. It is therefore, beyond doubt that police actions in general and of arrest in particular, must comply with the standard of reasonableness. Furthermore, the Standing Order (G)341 issued by the National Commissioner of Police emphasises that arrest must be effected as a matter of last resort.

The afore discussion makes it clear that the legislature must be taken to have contemplated that the discretion afforded to the arrestor would be exercised reasonably, having regard to all relevant surrounding circumstances, including the use of the least severe method of bringing the suspect to court (see *Hyundai supra* par 43). The SCA's restrictive reading of section 40(1)(b) cannot be accepted in light of the fact that the Constitution, and not the legislature, is supreme. Therefore, the satisfaction of the traditional jurisdictional facts as intended by the legislature for a lawful arrest is not determinative of the matter. These factors have to be measured against the constitutional imperative of the protection of the right to freedom of the person. The legislature's intention cannot be the yardstick with which to measure whether a constitutional right has been breached or not. Botha (*supra* 145) counsels that:

> [I]f these values are not taken seriously and borne in mind constantly during (amongst others things) interpretation of legislation; and if we are not prepared to succumb to constitutionalism, we might as well get rid of the supreme Constitution, the justiciable Bill of Rights and rights rhetoric, and return to the former old bad days of sovereignty of Parliament and executive-minded interpretation of legislation. Otherwise we need to become serious about the rights and values in the Constitution – including a new 'constitutional' approach to statutory interpretation ...

The SCA misdirected itself by relying on the rationality test in that it failed to recognise that rationality is a lower standard than reasonableness. In *Ronald Bobroff & Partners Inc v La Guerre* (2014 3 SA 134 (CC)), the Constitutional Court held that rationality is not an appropriate test to use in cases in which the infringement of fundamental rights is at stake: "It is a less stringent test than reasonableness, a standard that comes into play when the fundamental rights under the Bill of Rights are limited by legislation" (par 7). The same holds true even where the fundamental rights are limited by the exercise of discretion by a functionary. This goes against what the SCA held in the *Sekhoto* case.

Interestingly, the *Govender* case is not referred to in the *Sekhoto* case. Despite this, striking features between the two cases can be observed: Both cases relied on the *Hyundai* case and are agreed on the interpretational principles laid down in that case. However, these cases part ways as to how these principles have to be applied in difficult cases. The provisions that the two courts grappled with, in *Sekhoto* and *Govender*, differed in some regards. For instance, section 49(1) of the CPA specifically provided for the use of "reasonable force" where the suspect flees or attempts to flee. The provision, however, did not specifically enlist the offences for which deadly force could be used. The court had to chart and define circumstances under which deadly force could be used. With regard to section 40(1)(b) of the CPA, the arrestor is granted the discretion to arrest upon a reasonable suspicion that the suspect has committed an offence listed in schedule 1. Given the usage of the modal verb "may" and a number of choices available to the arrestor to bring the suspect before court, it defies logic to argue that once the arrestor has decided to arrest no questions could be raised as to why she did not use milder methods, even *ex post facto*. Even in the case of unlawful arrest, the court can, as the High Courts did, chart and define circumstances under which a lawful arrest could take place. Therefore, it cannot be argued that these cases are distinguishable to the extent that the application of section 39(2) of the Constitution is acceptable in one and not the other.

As the *Sekhoto* case did not displace the *Govender* case, the latter was binding on the former. This clearly, shows that the High Courts were justified in their formulation of the fifth jurisdictional fact and the *Sekhoto* case failed to follow precedent. In addition to the above, it is common cause that, in a constitutional state, courts should be wary of limiting the rights of individuals unless it is shown that such limitation is reasonable and justifiable. The police arrest powers must be measured against the standard of reasonableness. Absent reasonableness, police would arrest suspects who should not be subjected to arrest. In *Khambule v Minister of Police* (2014 JOL 31721 (GSJ) parr 28-30) the court commented in this regard as follows:

> [T]he available methods of securing that attendance in court are arrest, summons, written notice and indictment in accordance with the relevant provisions of the Criminal Procedure Act. Read with section 40(1)(a) this

> implies that where a warrantless arrest is permissible, the *arresting peace officer* must consider all factors relevant to the appropriate method of bringing the alleged offender before a court and balance them, the one against the other, for what might be justifiable in one case could constitute gross abuse of power in another ... It is clear that ... [the arrestor] simply proceeded with an arrest on the basis of an erroneous assumption (or pursuant to an errant official directive) that it was not his job, but that of some other official tasked with making a decision on an early release at some stage after the arrest ... Even if the [arrestor] was unsure as to whether, for example, a written notice to appear would be an appropriate alternative to an arrest because of considerations such as the identity of the plaintiff, a fixed residential address, etc., he had available to him another option. That option was an arrest for the purpose of the verification of such matter and as a precursor to a written notice to appear in court (own emphasis).

Why impinge on the rights of the subjects when less intrusive, yet equally potent means could be used? That would not be in keeping with the requirement of the rule of law. "Arrest is not an objective in itself …" (*Walters supra* par 49).

5 The Requirements for a Successful Claim based on the Fifth Jurisdictional Fact

Although it does not explicitly say so, the SCA seems to realise that the only way to give effect to the right to freedom, where arrest without a warrant is concerned, is by recognising the fifth jurisdictional fact (*Sekhoto supra* par 45ff). This could be deduced from this passage (par 57):

> The case can be disposed of on a simple basis, namely, that the proper exercise of [arrestor's] discretion was never an issue between the parties. The plaintiffs, who had to raise it either in their summons or in replication, failed to do so. The issue was also not ventilated during hearing. This means that since the magistrate had found that the four jurisdictional facts required for a defence under s 40(1)(b) were established by the appellant (a finding upheld by the court below) their claims had to be dismissed.

In this regard, the court held that if the plaintiff alleges failure to exercise discretion properly, the plaintiff must bear the onus of proof (par 49). The SCA concludes that for a claim of unlawful arrest, based on the fifth jurisdictional fact, to succeed, the plaintiff has to allege and prove it. Rules of evidence require that the plaintiff must make up its case with all jurisdictional facts, the fifth jurisdictional fact in particular (par 50). As previously stated, the SCA concluded by holding that the issue of the fifth jurisdictional fact was raised neither during the pleadings nor during the hearing.

It is clear that the conclusion of the SCA (which seems at odds with the reasons it advanced) is that the fifth jurisdictional fact is part of our law. The plaintiff would just need to allege and prove it.

6 Conclusion

The formulation of the fifth jurisdictional fact sparked disagreements and dissents among different divisions of the High Court. The SCA was seized with the opportunity to reconcile the differing views among the High Courts. It is clear that the SCA leaned towards the rejection of the fifth jurisdictional fact. It has to be said, nonetheless, that the *Sekhoto* case was not ideal for the SCA to settle this question. This is due to the fact that the plaintiff's in this case failed to make their case with regard to the fifth jurisdictional fact. In other words, the plaintiffs' case was not based on the fifth jurisdictional fact on summons and same was not expressed during the trial. Therefore, some High Courts may find that the *Sekhoto* case is not binding on them. For instance, a High Court in which the issue of the fifth jurisdictional fact is pertinently raised in pleadings and in argument, may hold that it (a High Court) is justified in not following the *Sekhoto* case with regards to the question of the fifth jurisdictional fact, as this matter was not specifically raised in pleadings nor was it dealt with during trial. In other words, a High Court, in which the plaintiff has pleaded the fifth jurisdictional fact, may find that the *Sekhoto* case is distinguishable and therefore, not binding. At this moment, the last word on the question of the lawfulness of the fifth jurisdictional fact has not yet been spoken.

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