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THE IMPACT OF SECTION 34 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 ON BANKING LAW

by

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Declaration

I hereby declare that this is the final corrected version of my minor dissertation and as such no unethical research practices were orchestrated or any manner of academic dishonesty. Furthermore, I declare that my minor dissertation is consistent with the University of Johannesburg plagiarism policy with which I have familiarized myself.



Lerato Rudolph Ngwenyama

13 June 2016

Full Names

Date

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“Now unto him that is able to do exceedingly abundantly above all that we ask or think, according to the power that worketh in us” (Ephesians 3:20).

Summary

The dissertation explores the impact of section 34 of the constitution of the Republic of South Africa, 1996 on certain aspects of banking law. During parliamentary sovereignty, the parliament and the executive could enact legislation ousting the jurisdiction of courts to adjudicate public-administration matters. However, the constitution in section 34 has brought changes to our banking law by compelling the alteration of established statutory or common law legal principles. The impact brought by section 34 of the constitution on banking law is explored by paying special focus to the law in potential conflict with section 34 of the constitution to see how the courts have addressed the issue of non-compliance with section 34 of the constitution. The law in potential conflict with section 34 of the constitution relates to mainly to manners in which courts could be by-passed by banks in the protection of their interests. Against this background this dissertation discusses and analyses case law in this regard which has contributed towards the development of both our common law and statutory law some of which was in conflict with section 34 of the constitution by limiting unfairly the right of access to court guaranteed by section 34 of the constitution. The following five topics are dealt with specifically: section 38(2) of the Northwest Agricultural Bank Act 14 of 1981; sections 34(3) (b) to (7), (9) and (10) and 55(2) (b) to (d) of the Land Bank Act 13 of 1944; Perfecting clauses in notarial bonds of movables without court intervention; Rule 8 of the Uniform Rules of the High Court; and section 2 of the Vexatious Proceedings Act 3 of 1956.

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THE IMPACT OF SECTION 34 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 ON BANKING LAW

1 Section 34 of the constitution: general analysis

1.1 Introduction

Section 34 of the constitution¹ provides that “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

During the previous regime where the parliament was sovereign, the parliament and the executive excluded the intervention of courts where a dispute concerned public administration.² This is because constitutional law at the time was subjected to parliamentary sovereignty, and parliament could enact any law; no one could challenge the enactments of parliament.³ The courts could only decide on the invalidity or unconstitutionality of legislation where it was passed into law inconsistent with the rules governing the passing of laws as stipulated in the constitution.⁴

Consequently, it was not important whether legislation enacted by parliament violated constitutional rights. The only relevant questions were whether the conduct fell within the ambit of the enactment, and whether the legislation was properly passed.⁵ The case of *Joyce & Mcgregor Ltd v Cape Provincial Administration*⁶ serves as authority in this regard. In this case the court held that the validity of provincial ordinances cannot be challenged if what the ordinance is stipulating falls within the express and implied powers granted by the enabling legislation. In similar vein, in the case of *Middleburg Municipality v Gertzen*⁷ the court held that if it is evident that the legislative provisions which are challenged fall within the powers conferred upon the provincial council, the court will not be justified in interfering with them merely because they may be considered unwise.

¹ Constitution of the Republic of South Africa, Act 108 of 1996 (henceforth ‘the constitution’).

² Phala “The impact of the constitution on tax law” 2000 *Juta’s Business Law* 22 24.

³ Currie and De Waal *The Bill of Rights Handbook* (2013) 2.

⁴ Currie and De Waal (n 3) 3.

⁵ Phala (n 2) 24 states that, it was immaterial that the legislation was unreasonable, impolitic or retrospective or that it impinged on existing rights. I support this view because during the apartheid era legislation was used by the government to satisfy political ideologies more than protecting human rights for the advantage of individual citizens.

⁶ 1946 AD 658 669.

⁷ 1914 AD 544 554.

It is clear from the above that the effective protection and promotion of constitutional rights by the courts was impossible.⁸ This is true because parliament and the executive did not deem fit that courts could play a fair and effective role in administration matters relating to protection and enforcement of individual rights when claimed against the state, and courts at the time were suited to be instruments of the parliament and the executive only in regulation of correct procedure in enacting statutes.

However, the position has since changed as a result of the new constitutional dispensation which has done away with parliamentary sovereignty.⁹ Section 2 of the constitution (the supremacy clause) states: “This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” As Cameron J put it in the case of *Holomisa v Argus Newspaper Ltd*¹⁰: “The constitution has changed the ‘context’ of all legal thought and decision-making in South Africa.”¹¹

As a result, the power of persons to challenge the constitutionality of legislative provisions is now recognised and is vested with the courts in terms of section 165(1) of the constitution (the judicial authority clause). It provides as follows: “The judicial authority of the Republic is vested in the courts.” Thus, this has been a salient development indeed.

Parliamentary sovereignty was a bizarre regime in that it led to gross unfairness in public-administration matters. The replacement of parliamentary supremacy with constitutional supremacy was commendable; it brought an end to the abuse of legislation as a vehicle to fulfil political ideologies beneficial to the government at that time. Hence, section 34 of the constitution must be considered against this background.

1.2 The purpose of section 34

The most important purpose of the right in section 34 of the constitution is to guarantee the protection of court process to persons who have disputes that can be resolved by the application of the law.¹² It therefore means that where an individual is in a dispute concerning the fulfilment of rights and/or obligations, such a dispute should be resolved by the

⁸ Currie and De Waal (n 3) 3.

⁹ Phala (n 2) 24; Calitz “Some thoughts on state regulation of South African insolvency law” 2011 *De Jure* 291 291 and Devenish *A Commentary on the South African Bill of Rights* (1999) 10.

¹⁰ 1996 (6) BLCR 836 (W) 836J.

¹¹ Calitz (n 9) 291.

¹² *Lesapo v Northwest Agricultural Bank* 1999 12 BLCR 1420 (CC), 2000 1 SA 409 (CC) par 11. See Currie and De Waal (n 3) 711-712 for a more detailed discussion of the purpose of the right.

application of legal rules under supervision and control of the judiciary fairly and courteously and that the judiciary should in all circumstances observe independence and impartiality towards the litigants.¹³ It follows that the purpose of the right is to prevent arbitrary self-help and ouster of court jurisdiction.

1.3 The conduct protected by section 34

According to Rautenbach¹⁴ section 34 of the constitution protects the conduct of individuals in disputes to which legal rules can be applied. This is because in disputes where legal rules apply no one is allowed to execute self-help or spoliation without the intervention of the courts. Thus, all conduct in disputes to which legal rules apply is fully protected by section 34 of the constitution.¹⁵ This is commendable since it prevents injustice in situations where disputes may be resolved by the application of the law.

1.4 The persons protected by section 34

In principle, all persons (whether natural or juristic) are protected by section 34 of the constitution. This is because in terms of section 8(2) of the constitution the bill of rights applies to or binds a natural or juristic person if, and to the extent that, it is applicable, taking into consideration the nature of the right and any duty imposed by the right.¹⁶ Moreover, as properly advocated by Kleyn and Viljoen¹⁷, the protection of section 34 of the constitution is not limited to persons in the country. This is clearly correct since section 7(1) of the constitution enshrines the rights of all persons in our country.¹⁸

1.5 The persons bound by section 34

Generally, the right of access to court may be claimed against all organs of the state. However, private organs are not excluded.¹⁹ This is because in terms of section 7(2) of the constitution state organs must respect, protect, promote and fulfil the rights in the bill of

¹³ Currie and De Waal (n 3) 732-735 and Joubert *et al Criminal Procedure Handbook* (2011) 229-230.

¹⁴ *Rautenbach-Malherbe Constitutional Law* (2010) 451.

¹⁵ Rautenbach (n 14) 451.

¹⁶ Rautenbach (n 14) 452.

¹⁷ *Beginners Guide for Law Students* (2010) 236.

¹⁸ S 7(1) of the constitution provides: "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

¹⁹ Rautenbach (n 14) 452.

rights, including (specifically in the context of this dissertation) those arising from section 34 of the constitution.²⁰

Section 34 of the constitution accordingly obliges the state, within its available resources, to establish courts so that all disputes requiring the application of the law may be resolved properly. This is further to be implemented through legislative frameworks and court procedures to facilitate the execution of court orders.²¹ Phala²² puts it thus: “The state has the duty to establish independent tribunals for the resolution of civil disputes and the prosecution of persons who have committed crimes.”

1.6 The contents of section 34

Section 34 of the constitution is two-limbed. Firstly, it warrants the right to a fair and public hearing, and secondly, the right to an impartial court. I shall now briefly discuss these limbs.

The right to a fair and public hearing

Although the law of civil procedure may prescribe procedures to be followed in civil proceedings, the presiding officer is in charge and gives orders which must be adhered to. The phrase in section 34 of the constitution “in a fair public hearing” requires that all parties involved in civil proceedings as guaranteed by section 34 of the constitution to be treated fairly and courteously by assisting them to bring a matter before the court (most commonly in cases of poor people when they are brought before the court by another party) and to have the matter heard by an impartial judge; hence, treatment with dignity, respect and in a polite manner.²³

Moreover, the right to a fair and public hearing basically includes the recognition of constitutional rights relating to civil proceedings, *inter alia*; the right to the furnishing of reasons for decisions.²⁴ The case of *Mphahlele v First National Bank of South Africa*²⁵ serves as authority in this regard. In this case the court held that the right to a fair and a public hearing requires the court to give reasons for a decision made because it is a safe-guard

²⁰ S 7(2) of the constitution provides: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

²¹ Rautenbach (n 14) 452-453.

²² (n 2) 23.

²³ Budlender “Access to courts” 2004 *SALJ* 339 341.

²⁴ Rautenbach (n 14) 454.

²⁵ 1999 3 BCLR 253 (CC), 1999 2 SA 667 (CC) par 12.

against arbitrary court decisions. This is clearly correct since good administrative action and the constitution require such to be embraced in terms of section 33(2) of the constitution.²⁶

The right to an independent and impartial court, tribunal or forum

Another limb which is found in section 34 of the constitution is the right to an impartial court. This right requires that the court must be independent and impartial and must treat all parties involved in civil proceedings fairly and courteously at all times. Section 165(2) of the constitution reinforces this limb by making provision that the courts must apply the law impartially and without fear, favour or prejudice.²⁷

This right to an independent and impartial tribunal brings to picture the common law principles of natural justice *audi alteram partem*²⁸ and *nemo iudex in sua causa*²⁹. For a court to be independent and impartial it must hear all interested parties before any final decision is made and must avoid by all means being biased. The case of *Bernert v Absa Bank Ltd*³⁰ serves as authority in this respect. In this case the court held that where the presiding officer may appear to have a personal interest which may affect the outcome of the case or prejudice another he or she must apply for recusal or disclose such personal interest. This is commendable as it reflects both the old common-law principles underscored by the new constitutional dispensation that parties to court proceedings must be treated impartially, courteously and without any form of bias.

1.7 Conclusion

The impact of section 34 of the constitution on banking law is that all disputes which can be resolved by the application of law within this branch of the law are subject to the regulated dispute resolution mechanism imposed by section 34 of the constitution, and are to be

²⁶ S 33(2) of the constitution provides: “Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

²⁷ S 165(2) of the constitution provides: “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

²⁸ It simply means that the court should always hear both litigants in a case before attempting to make any finding or ruling.

²⁹ It simply means that no one should be a judge in his or her own cause.

³⁰ 2011 4 BCLR 329 (CC) par 45, 54, 56, 57, 75 and 78. See Schulze “Procedural law: Application for recusal” 2011 *De Rebus* 1 43 where he gives an update on the outcome of the *Bernert* case. He points out that in South African law the controlling principle to establish bias on the part of a judge was the interest of justice and where the litigant had knowledge on which recusal could be sought and kept quiet until an adverse ruling; it was incorrect to allow such litigant to apply for recusal based on bias. This is correct because if the litigant is allowed to apply for recusal at that stage, it will be undesirable towards other litigants to have the matter adjudicated again and it will undermine the administration of justice. For a comprehensive commentary on the *Bernert* case, see further, Rautenbach “Overview of constitutional court judgment on the Bill of Rights – 2010” 2011 *TSAR* 342 357-358.

judicially controlled and supervised by the courts of the land in an impartial and independent way.

2 Law in potential conflict with section 34 of the constitution

2.1 Introduction

The coming into effect of the constitution, in particular; section 34, has led the constitutional court, and even the high courts, to consider law in potential conflict with the right of access to court. I shall now discuss and comment on the law in potential conflict with section 34 of the constitution where the courts have had the opportunity to address the issue of non-compliance with the section.

2.2 Section 38(2) of the Northwest Agricultural Bank Act 14 of 1981

Section 38(2) of the Northwest Agricultural Bank Act (henceforth ‘NABA’) provides that “The board may, in the circumstances contemplated in subsection (1) where the loan or advance has already been paid over to the debtor, by written notice addressed to the debtor, recall the said loan or advance in whole, and require the debtor to repay such loan or advance together with interest thereon up to the date of such notice within the time specified therefor in such notice, and in the event of default of payment on such specified date, the Board may in writing and under the official seal of the Bank, require the messenger of the court or any other person designated by the Board to seize –

- (a) in the case where such loan or advance has been secured by mortgage, the immovable property encumbered thereby; or
- (b) in the case where such loan or advance has been secured by a deed of hypothecation of movable property or where any other form of security has been given, the property encumbered by such deed or constituting such other form of security,

without recourse to a court of law, and, irrespective of whether or not such messenger of the court or such other person is a licensed auctioneer, to sell such property by public auction on such date, and at such time and place and on such conditions which the Board may determine, of which at least fourteen days’ notice has been given in the Provincial *Gazette* and in a newspaper circulating in the district where the said property is situated or, as the case may be, where the said property was kept or used before such seizure, or the Board may itself sell the property so seized by public tender on such conditions as it may determine: Provided that the provisions of this section shall not be construed so as to derogate from the provisions of subsection (4).”

The purpose of section 38(2) of NABA was to provide a quick, effective and inexpensive procedure that enabled the Bank to protect whatever real rights it had in the secured property.³¹

2.2.1 *Lesapo v Northwest Agricultural Bank*³²

The facts and judgment

The facts of *Lesapo v Northwest Agricultural Bank*, which was concerned with the constitutionality of section 38(2) of NABA, may be stated as follows: As it appears from the section quoted above it permitted the Northwest Agricultural Bank without due court process, to ask the sheriff or messenger of the court to attach, seize and sell the secured personal property (either movable or immovable) of a debtor in default by public auction. On 20 May 1999, a high court judge granted the debtor (Chief Direko Lesapo) a court order declaring invalid section 38(2) of NABA because of its inconsistency with the constitution. As a result, the matter was referred to the constitutional court for confirmation.³³

The debtor had borrowed R60 000 from the bank to enable him to buy certain farming implements. The debtor was lent the monies in terms of a written agreement consistent with the provisions of NABA. Due to payment failure, the debtor fell into arrears. Subsequently, the bank resorted to self-help in terms of section 38(2) of NABA in asking the sheriff or messenger of the court to attach, seize and sell the secured personal property of the debtor by public auction. In trying to stop the sheriff, the debtor applied to court, *inter alia*, for urgent relief and a court order declaring section 38(2) of NABA to be invalid.³⁴

Against this factual background; Mokgoro J held that section 38(2) of NABA was inconsistent with section 34 of the constitution and ousted the jurisdiction of the court. The *ratio decidendi* was that everyone has the right of access to court and to have their disputes adjudicated by a court of law where legal rules may find application for the purposes of fairness and justice.³⁵ She put it thus: “This section [ie 34 of the constitution] embodies a

³¹ *Lesapo v Northwest Agricultural Bank* 1999 12 BCLR 1420 (CC), 2000 1 SA 409 (CC) par 23.

³² (n 31).

³³ par 1.

³⁴ par 3.

³⁵ par 5. See also the related cases of *First National Bank of South Africa v Land and Agricultural Bank of South Africa*; *Sheard v Land and Agricultural Bank of South Africa* par 1 and 20 which are authoritative in this regard. The case of *Armbruster v Minister of Finance* 2007 12 BCLR 1283 (CC) can be distinguished from the *Lesapo* case (n 31); it is submitted, that cases of seizure and forfeiture of unlawfully held foreign currency without due court process and attachment, seizure and sale in execution of secured personal property must be approached with caution. This is because in the former there is generally a right to review in instances of injustice, and no

fundamental rule of natural justice, according to which everyone has the right to have a dispute settled by a court of law or an unbiased, independent and impartial tribunal, where appropriate; and nobody should be allowed to take the law into his or her own hands or to usurp the functions of a court of law.”³⁶

2.2.2 Commentary

In light of the facts of the *Lesapo* case it is clear that challenged section 38(2) of NABA from the outset constituted a statutory ouster clause³⁷ which is prohibited in terms of section 34 of the constitution.³⁸ It also prevented the debtor from exercising his right of access to court. It follows that the section is inconsistent with section 34 of the constitution for the following reasons: (1) the procedure *in casu* of seizure and sale of the immovable property of the debtor was unregulated and this amounts to unlawful self-help; (2) the section did not allow judicial control and supervision in the execution and this ousted the jurisdiction of the court; and (3) the property was seized and sold against the debtor’s will or consent. Therefore, the section cannot rely on the protection of section 36 of the constitution because the interference with the right was unjust.

The section was clearly unconstitutional. It gave the bank the power to bypass and usurp the inherent functions and powers of the courts by taking the law into its own hands, and to be a judge in its own cause.³⁹ It further prevented the courts from exercising judicial authority and

violation of the right of access to court. In the latter case, however, there is none even where injustice to rights may occur. Therefore, it is incorrect to contend that the right of access to court is unjustifiably violated in seizure and forfeiture cases as opposed to seizure and sale in execution cases. This is because an aggrieved party in seizure and forfeiture cases has a remedy in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000.

³⁶ par 5.

³⁷ It means a clause or provision included in a piece of legislation by a legislative body to exclude judicial review of acts and decisions of the executive by stripping the courts of their supervisory judicial function: see Wikipedia at https://en.wikipedia.org/wiki/Ouster_clause (22/03/2016).

³⁸ See, for example, Loots “Access to the courts and justifiability” in Matthew Chaskalson *et al* (eds) *Constitutional law of South Africa* 8-1 and Budlender (n 23) 339.

³⁹ par 20. See Dicey *An Introduction to the Study of the Law of the Constitution* (1959) 188, where she argues the effect of the principles underlying section 34 of the constitution. She states that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land. This principle is correct since the power to apply and enforce the law is vested in the courts and not on individuals, in that the courts are specialized institutions to balance the measure of constraint which might be laid on another or his property. Thus, this principle upholds the rule of law which prevents arbitrary or prejudicial redress. See the case of *De Lange v Smuts NO* 1999 3 SA 785 (CC) par 31. In this case the court held that all citizens in South Africa are entitled to lean on the state for the protection and enforcement of rights and these include a duty on the state to assist citizens to enforce their rights and civil claims against debtors. This is correct since our constitution affords equal protection and benefit of the law to all citizens despite who may be in the wrong. See also the case of *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC). In this case the court held that any constraint upon a person or property shall be exercised only after recourse to court recognised in the law.

to apply the law independently, impartially and without fear, favour or prejudice.⁴⁰ Van der Walt and Pienaar⁴¹ correctly submit that it is a complete violation of a defaulting bank debtor's right of access to court if recourse is excluded by legislation. I agree, since the debtor cannot enjoy due court process as he is entitled to in the circumstances. The section offended public policy by excluding the debtor's right of access to court where prejudice could result.⁴² It created a self-initiated, self-driven and self-supervised mechanism for banks to deal with defaulting bank debtors which is inconsistent with the principles embedded in section 34 of the constitution.⁴³ This mechanism therefore offends section 34 of the constitution.

The section contravened two fundamental principles of our common law. Firstly, it infringed the common law principle of natural justice *nemo iudex in sua causa* by giving the bank the power to be a judge in its own cause. Kelly⁴⁴ opines that by empowering a bank as creditor to seize and sell the secured property of a debtor without due court process amounts to self-adjudication against the defaulter. This is correct as the power conferred on the agricultural bank created a dual functioning on the bank to act as a complainant and a judicial officer in its own cause.⁴⁵ Secondly, the section violated the common law principles underlying the *mandament van spolie*⁴⁶ by giving the bank the power to help itself to the property of the debtor.⁴⁷ This is because the bank took possession of the debtor's property against his will on default; thus it follows that the unauthorized act of taking possession offends the common law principles against arbitrary spoliation or self-help.⁴⁸

Furthermore, the rule of law⁴⁹ as one of the most important constitutional principles was also affected by section 38(2) of NABA. This rule provides that South Africa is a constitutional

⁴⁰ See, s 165(2) of the constitution.

⁴¹ *Introduction to the Law of Property* (2009) 270.

⁴² See *SA Bank of Athens Ltd v Van Zyl* (431/2003) 2005 ZASCA 2; 2006 1 All SA 118 (SCA) par 9. In this case the court held that executions without recourse to court in which the debtor may suffer injustice on his rights are contrary to public policy and unenforceable *ipso jure*.

⁴³ Kelly "Investigating the statutory preferential rights the land bank requires to fulfil its developmental role (Part 2)" 2004 *SA Merc LJ* 378 389.

⁴⁴ "Constitutionality of executions by agricultural bank without debtors having recourse to a court" 2000 *Juta's Business Law* 167 169 and 171.

⁴⁵ Kelly (n 44) 169

⁴⁶ This is a summary remedy, usually issued upon urgent application, aimed at restoring control of property to the applicant from whom it was taken by unlawful self-help, without investigating the merits of the parties' rights to control: see Van der Walt and Pienaar (n 41) 202.

⁴⁷ Kelly (n 44) 169.

⁴⁸ Kelly (n 44) 169.

⁴⁹ S 1(c) of the constitution provides: "The Republic of South Africa is one, sovereign, democratic state founded on the following values ... supremacy of the constitution and the rule of law."

democracy rather than a dictatorship; as such all state institutions or the government must act in accordance with the law. This entails two things: the state and everyone must obey the law, and the state or state institutions can only exercise any power upon individuals if it is permissible in terms of the law.⁵⁰ Therefore, the legislation promulgated by parliament gave the Northwest Agricultural Bank the power to make decisions on a debtor's constitutional fundamental rights which under the rule of law should be made by the judicial branch of the government, and was not in line with the rule of law and thus inconsistent with section 34 of the constitution in that it restricted access to justice.⁵¹

The constitutional court's order in invalidating section 38(2) of NABA is commendable. It is also supported by both Kelly⁵² and Van der Walt. Van der Walt⁵³ further correctly submits that the resultant effect of the invalidation of section 38(2) of NABA brings clarity that no one may attach and sell the property of another without due court process.

2.3 Sections 34(3) (b) to (7), (9) and (10) and 55(2)(b) to (d) of the Land Bank Act

These provisions had a similar purpose and effect to the one contained in section 38(2) of NABA which was declared unconstitutional by the constitutional court in the *Lesapo* case. Somewhat simplified, these provisions of the Land Bank Act expressly provided that the Land and Agricultural Bank of South Africa as creditor may without recourse to a court of law, ask the sheriff to attach, seize and sell the secured personal property of a defaulting debtor by public auction. I shall now consider how the court dealt with these provisions below.

2.3.1 *First National Bank of South Africa v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South Africa*⁵⁴

The facts and judgment

The facts of *First National Bank of South Africa v Land and Agricultural Bank of South Africa; Sheards v Land and Agricultural Bank of South Africa* are as follows: These cases concerned two applications for confirmation orders of invalidity made by the Orange Free State and Eastern Cape Divisions of the high court. The Orange Free State high court struck

⁵⁰ Currie *et al* *The Promotion of Administrative Justice Act Administrator's Guide* (2002) 5 and Currie and De Waal (n 3) 10-11.

⁵¹ Budlender (n 23) 339.

⁵² (n 44) 171.

⁵³ *Property and Constitution* (2012) 64 and 65.

⁵⁴ 2000 8 BCLR 876 (CC), 2000 3 SA 626 (CC)

down sections 34 (3) (b) to (7), (9) and (10) and 55 (2) (b) to (d) of the Land Bank Act 13 of 1944 (henceforth 'LBA') and the Eastern Cape high court section 55(2).⁵⁵ These provisions expressly provided that the Land and Agricultural Bank of South Africa as creditor may without due court process, ask the sheriff to attach, seize and sell the secured personal property of a defaulting debtor by public auction. The high court held that the process of execution sanctioned by these provisions has a similar effect as the one which was contained in section 38(2) of NABA which the constitutional court declared unconstitutional. This was because the section violated the right of access to court.⁵⁶ The Land and Agricultural Bank of South Africa admitted that these provisions were unconstitutional. However, it asked the constitutional court for an order to suspend these provisions so that they may be remedied. The constitutional court confirmed the unconstitutionality of these provisions and allowed for them to be suspended for two years.⁵⁷

2.3.2 Commentary

In light of the facts of the *Sheard* case, it is clear that sections 34(3)(b) to (7), (9) and (10) and 55(2)(b) to (d) of LBA constituted a statutory ouster clause for the following two reasons: (a) The matter was not resolved by the application of legal rules applied by the ordinary courts of the land; and (b) the matter was not decided in a fair public hearing before a court or independent and impartial tribunal or forum, but by the bank as creditor. Thus, the constitutional court ruling or finding declaring these provisions unconstitutional is commendable. This is because these provisions ousted the jurisdiction of the court and permitted unlawful self-help.

The violation of the right of access to court was not justifiable by the speedy recovery of loan monies without delay and an inexpensive protection of the banks' securities purpose in terms of section 36 of the constitution. This is because the method used to recover the monies back was drastic and called for serious due court process and it was unjustifiable in an open and democratic society based on human dignity, equality and freedom⁵⁸

The suspension of these provisions is commendable since the Lank Bank Act contained numerous grants on debt recovery process without due court process. Moreover, the bank

⁵⁵ par 1.

⁵⁶ par 1. See n 35.

⁵⁷ par 20.

⁵⁸ par 6.

became aware of these violating provisions upon the outcome of the *Lesapo* case and by then it had asked parliament to remedy the offending provisions.

2.4 Perfecting clauses in general notarial bonds of movables without court intervention

Banks lend money to customers against security. One such form of security is a general notarial bond over movables. A general notarial bond is a bond registered against particular movables of a debtor as security for the payment of a debt. Despite registration of such a bond, no real right of security is conferred on the creditor unless the bond has been perfected.⁵⁹ For the bond to be perfected the creditor must take possession of the bonded movables through attachment. It is worthy to note that a general notarial bond does not automatically confer the right to take possession of the movables by the creditor. The operation of such a right is dependent upon the debtor and the creditor having included a perfection clause in the bond.⁶⁰

Therefore, a perfection clause entitles the creditor to take possession of the bonded movables on default of the debtor, and such a clause constitutes a pledge agreement.⁶¹ However, the perfection clause in a general notarial bond of movables does not guarantee the creditor possession of the movables.⁶² The clause merely entitles the creditor to take possession of the movables with the consent of the debtor, or to take possession of the movables with the permission of the court on refusal of perfection by the debtor. The movables taken into possession by the creditor in this manner then serves as security for the repayment of the debt.⁶³ Without perfection, the creditor has only a preferential right over the free residue of the debtor's movables against unsecured creditors when the debtor becomes insolvent.⁶⁴

⁵⁹ Van der Walt and Pienaar (n 41) 266; Mostert *et al* *The Principles of the Law of Property in South Africa* (2010) 322; Du Bois *Wille's Principles of South African Law* (2007) 651 and Jansen "More legal security regarding security by means of general notarial bonds" 2003 *SA Merc LJ* 486 488.

⁶⁰ Jansen (n 59) 488 and Mostert *et al* (n 59) 322.

⁶¹ Mostert *et al* (n 59) 332 and Jansen (n 59) 489.

⁶² Jansen (n 59) 489 and Roos "The perfecting of securities held under a general notarial bond" *SALJ* 169 169. See also the case of *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd* 1982 4 SA 650 (D) 654.

⁶³ Van der Walt and Pienaar (n 41) 270 and Roos (n 62) 169. On how perfection is executed, see the case of *Barclays National Bank Ltd* (n 62) 657.

⁶⁴ Jansen (n 59) 489 and Du Bois (n 59) 652.

2.4.1 *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd*⁶⁵

The facts and judgment

The facts of *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* were as follows: the applicant was granted an order to take possession of the respondent's movables so that the hypothecated security under the general notarial bond would be perfected.⁶⁶ On the return day of the rule *nisi*, the court raised the issue whether the order seeking to sell the respondent's movables should be considered constitutional.⁶⁷ The court found the order seeking to sell such movables to be unconstitutional on the basis of the *Lesapo* and *Sheard* cases dealt with above dealing with statutory seizure of property and sale without recourse to a court.⁶⁸ The court further said that if legislation which empowered seizure and sale was declared unconstitutional, the common law principles relating to attachment for perfecting clauses in notarial bonds with permission of a court must also be declared unconstitutional.⁶⁹

2.4.2 Divergence from the case of *Findevco: Bock v Duburoro Investments (Pty) Ltd*⁷⁰

The facts and judgment

In the case of *Bock v Duburoro Investments (Pty) Ltd* the question arose as to whether a bank which held shares pledged to it in security could either take them over or sell them without intervention of the courts. The relevant clause permitted the bank "immediately or at any time thereafter irrevocably or *in rem suam* or at its discretion... to realise the securities or take over the securities at the bank's election at a fair value".⁷¹ The clause accordingly provided for *parate executie*, but, alternatively, also for the bank to take over the shares at a fair price. The appellants had argued the case on the basis of *parate executie*. Harms JA, however, took the view that in fact the bank had elected to take over the shares at a fair price, and that this was not *parate executie*. It was similar to a conditional sale and was valid. He nevertheless dealt with the law regarding *parate executie* as follows:

"The principles concerning *parate executie* (immediate execution) are trite. A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgagor or the court by taking possession of the

⁶⁵ 2001 1 SA 251 (E).

⁶⁶ par 16E.

⁶⁷ par 16G.

⁶⁸ par 17D-E.

⁶⁹ par 19E.

⁷⁰ 2004 2 SA 242 (SCA)

⁷¹ par 5.

property and selling it is void. Nevertheless, after default the mortgagor may grant the bondholder necessary authority to realise the bonded property. It does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the court's imprimatur is required. It is different with movables held in pledge: a term in an agreement of pledge, which provides for the private sale of the pledged article and in the possession of the creditor, is valid...⁷²

It seems that the appellants assumed that the bank had exercised a right of *parate executie*. This assumption, as they submitted, stems from the fact that the bank's exercising of its right of *parate executie* was unconstitutional since clauses permitting summary execution are in conflict with section 34 of the constitution on the basis of the *Lesapo* and *Sheard* cases discussed above. This is incorrect because in cases where unconstitutionality involves questions of fact as *in casu*, especially where questions of reasonableness and justifiability have to be considered, the method relating to commercial matters should not be countenanced.⁷³

Although the court found it difficult to extend the proscription of the statutory provisions by the constitutional court in the *Lesapo* and *Sheard* case to *parate executie* clauses of movables which were lawfully in possession of the creditor, its line of reasoning is commendable. This is because the procedure to execute the right of *parate executie* does not authorise the creditor to bypass the courts, and seize and sell the debtor's secured property of which the debtor was in lawful and undisturbed possession.⁷⁴ It is noteworthy to point out that though our common law curbs arbitrary or unlawful self-help, the doctrine of *mandament van spolie* has since been developed to be in step with the rules relating to *parate executie*. As a result of such a development, there has been a notable clear distinction of cases where the security is in the hands of the debtor and where it is in the hands of the creditor, and hence in the *Lesapo* and *Sheard* cases the constitutional court was concerned with the deviation from this norm.⁷⁵ It follows that the decision of the court in the *Findevco* case was wrong in finding that the law relating to *parate executie* of movables is unconstitutional.⁷⁶

2.4.3 Commentary

With regard to the facts and the decision of the court in the *Findevco* case, the court was wrong in holding that perfection clauses in notarial bonds of movables are invalid and

⁷² par 7.

⁷³ par 11-12.

⁷⁴ par 13.

⁷⁵ par 14.

⁷⁶ par 15.

unenforceable⁷⁷ due to the fact that they contravened section 34 of the constitution on the basis of the *Lesapo* and *Sheard* cases. This is because the cases heavily relied upon were concerned with statutory seizure of immovable property and sale of execution without permission of a court. In those cases the banks as state organs and creditors were empowered to use unlawful self-help or spoliation to take possession, and sell the secured personal property of debtors against their will and without involvement of a court. In the *Findevco* case the matter was concerned with perfection clauses in notarial bonds. In such cases the creditor does not empower himself to take possession and sell the personal property of a defaulting debtor in exclusion of recourse to court or consent of the debtor as in the *Lesapo* and *Sheard* cases. Thus these cases concerned different situations requiring a different approach all together.

However, against the factual background of the *Bock* case, the court was correct in holding that perfection clauses in notarial bond of movables are constitutionally valid and enforceable except if the clauses offend the principles of public policy.⁷⁸ This is because the court made a clear distinction of cases where the security was in the hands of the debtor and where it was in the hands of the creditor and thus did not deviate from such a norm. Cook and Quixley⁷⁹ submit that it is premature at this stage to conclude that these clauses are constitutional, unless and until the constitutional court has taken the opportunity to decide on such clauses. In their opinion these clauses involve a much greater constitutional issue and can only be settled by the constitutional court. Whether Cook and Quixley's submission is correct is to be doubted. This is because the parties to the agreement voluntarily agree to the stipulations in these contracts. Thus, the parties willingly give consent that on default of payment the

⁷⁷ In this regard, the court in the *Findevco* case (n 65) disregarded the previous authoritative decision in the *Osry v Hirsch, Louber and Co Ltd* 1922 CPD 531 in which the court confirmed the validity of such clauses.

⁷⁸ par 7. Van der Walt and Pienaar (n 41) 270 support the ruling in the *Bock* case (n 70). They point out that the unenforceability of these clauses may result where they completely exclude the debtor's constitutional right to protection of the court in relation to prejudicial private sale of movable and immovable property, and the complete exclusion of consent of the debtor to the private sale of the immovable property. This is correct since clauses of private redress to property in cases of undue prejudice results to unfair deprivation or expropriation of property under section 25 of the constitution.

⁷⁹ Cook and Quixley "Parate executie clauses: Is the debate dead? 2004 *SA Merc LJ* 719 725-728. See the same authors for the proposed approach which might lead to the unconstitutionality of such clauses and the arguments put forward concerning the so-called "not dead debate on the constitutionality and validity of *parate executie* clauses". I prefer the construction of Scott in "Summary execution clauses in pledge and perfecting clauses in notarial bonds" 2002 *THRHR* 656 664. She state that the constitutionality and validity of the clauses should not be based on the value attributed to the movable or immovable, but rather the voluntary parting and authorisation of attachment and sale of the property. This construction is clearly correct since individual authorization should be differentiated from statute authorisation. In that in the latter there is possession and sale without consent and court intervention. While in the former there is consent and court intervention based on proved reasonable grounds of injustice by the seizure and sale.

creditor must attach and sell the property to get proceeds of which will discharge the debtor's indebtedness from the creditor.⁸⁰

Van der Walt and Pienaar⁸¹ are of the view that the decision of the court in the *Lesapo* and *Sheard* cases does not necessarily apply to perfection clauses in notarial bonds of movables. This is correct since these cases dealt with seizure and sale in execution without the prior consent or will of the debtors, and without prior involvement of a court. This is also supported by Scott⁸² and she further criticised the judgment of the *Findevco* case. She points out that the judgment was patently wrong and ill-considered, and should not be followed. This is because the judgment failed to make a distinction between perfection clauses, statutory measures empowering the state to seize property and summary execution clauses in pledge contracts. This is further supported by both Jansen⁸³ and Harms JA. Harms JA in the *Bock* case put it accurately as follows: "Froneman J thought it important that statutory provisions that dealt with by the CC related to both immovables or movables (at 254G-H), failing to realise that the movables, too, were in possession of the debtor in terms of a statutory hypothec which does not require the creditor to have possession. He also thought that that the common law permits attachment of movables without a court order (at 256E-F) which it does not."⁸⁴

It is therefore submitted, with respect, that the *Findevco* decision is incorrect and should not be followed because it was wrongly decided based on wrong principles not applicable to perfection clauses in notarial bonds of movables and opened a can full of uncertainty.⁸⁵ Cook

⁸⁰ Van der Walt and Pienaar (n 41) 270

⁸¹ Van der Walt and Pienaar (n 41) 270.

⁸² Scott (n 79) 657.

⁸³ (n 59) 496.

⁸⁴ *Bock* case (n 70) par 15 n 26.

⁸⁵ See Scott (n 79) 657-663, for a comprehensive evaluation of the confusion of different legal and factual situations. For similar uncertainty, see the case of *Tem Fresh meat Wholesalers v D.Z's Meat Centre CC* (Unreported case) WLD case 2001/5487. In this case Jordaan AJ looked at the same decisions in the *Lesapo* (n 31) and *Sheard* (n 54) cases followed heavily in the *Findevco* case (n 65) and proposed not to follow the approach of Froneman J. See also the case of *Senwes Ltd v Muller* 2002 4 SA 134 (T). In this case the court found that *parate executie* clauses to be invalid and unconstitutional. Against the uncertainty cast upon by these cases I remark that the courts felt so much bound by the decision of the constitutional court in the *Lesapo* (n 31) and *Sheard* (n 54) cases and turned on a blind eye that the outcome of the cases came as a consequence of something totally different from *parate executie* clauses. In the case of *De Beer v Keyser* 2002 1 SA 827 (SCA), the supreme court of appeal in *obiter dicta* considered the validity of *parate executie* clauses, but the court was reluctant to engage itself further and rule on the constitutionality of these clauses. However, the court in the *Bock* case (n 70) par 7 has cleared this uncertainty. In that case Harms JA said that the concept of *parate executie* in an agreement of pledge of movables, which makes provision for the private redress of the pledged movables in possession of the creditor of the principal debt, is constitutionally valid and enforceable, and does not violate section 34 of the constitution. This is subject to the condition that the rights of the debtor are not

and Quixley⁸⁶ state that the case brought a stir among lawyers and creditors since their tried and tested security mechanisms were called into question, and brought considerable uncertainty especially in the area of *parate executie* clauses as used in many commercial contexts.

The limitation of the right of access to court by the perfection clause is justifiable in an open and democratic society based on human dignity, equality and freedom as opposed to the finding of the court in *Findevco* case. This is because it does not violate section 34 of the constitution, since the creditor in the circumstances takes possession of the movables with the co-operation and approval of the debtor, or with court intervention. Moreover, the debtor can still approach the court where, on reasonable grounds, he or she believes that the private execution of the movable was prejudicial on his or her rights.⁸⁷

2.5 Rule 8 of the Uniform Rules of the High Court

Rule 8 of the Uniform Rules of the High Court (hence forth ‘rule 8’) provides: “(1) Where by law any person may be summoned to answer a claim made for provisional sentence, proceedings shall be instituted by way of a summons as near as may be in accordance with Form 3 of the First Schedule calling upon such person to pay the amount of claimed or, failing such payment, to appear personally or by counsel ... upon a day named in such summons ... to admit or deny his or her liability.

(3) Copies of all documents upon which the claim is found shall be annexed to the summons and served with it.

(5) Upon the day named in the summons the defendant may appear personally or by an advocate ... to admit or deny his liability and may, not later than noon of the court day but one preceding the day upon which he or she is called upon to appear in court, deliver an affidavit setting forth the grounds upon which he or she disputes liability in which event the plaintiff shall be afforded a reasonable opportunity of replying thereto.

(6) If at the hearing the defendant admits his liability or if he has previously filed with the registrar an admission of liability signed by himself and witnessed by an attorney acting for him ... if not so witnessed, verified by affidavit, the court may give final judgment against him.

(7) The court may hear oral evidence as to the authenticity of the defendant’s signature, or that of his agent, to the document upon which provisional sentence is founded or as to the authority of the defendant’s agent.

unduly prejudiced. The *ratio decidendi* was that where prejudice or injustice took effect on the debtor, he or she may seek the protection of the court.

⁸⁶ (n 79) 721.

⁸⁷ Van der Walt and Pienaar (n 41) 270 and Scott (n 79) 658 and 664. See also the case of *Osry* case (n 77) 547. In this case the court held that debtor may seek protection of the court upon any unjust ground. However, the debtor must show that the creditor acted in a manner that prejudiced his or her rights in carrying out the execution of the contract and sale. See, similarly, the case of *Sasfin (Pty) Ltd Beukes* 1989 1 SA 1 (A) par 14D-E.

(8) Should the court refuse provisional sentence it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just ...

(9) The plaintiff shall on demand furnish the defendant with security *de restituendo* to the satisfaction ... against the payment of the amount due under the judgment.

(10) Any person against whom provisional sentence has been granted may enter into the principal case only if he shall have satisfied the amount of the judgment of provisional sentence ... or if the plaintiff on demand fails to furnish due security in terms of subrule (9).”

(11) A defendant entitled and wishing to enter into the principal case shall ... of the grant of provisional sentence, deliver notice of his intention to do so ... Failing such notice or such plea the provisional sentence shall ipso facto become a final judgment

The purpose of rule 8 was to enable a plaintiff/creditor (while precluding a defendant with no valid defence from delaying the proceedings) armed with a liquid document to obtain an extraordinary, swift relief for the recovery of money due without having to resort to the more expensive, cumbersome and often dilatory machinery of an illiquid action.⁸⁸

*2.4.1 Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a the Land Bank*⁸⁹

The facts and judgment

The facts of the *Twee Jonge Gezellen* case (an appeal against the judgment and order of the Western Cape high court)⁹⁰ were as follows: Twee Jonge Gezellen (Pty) Ltd was the first applicant and Mr Nicolas Krone was the second applicant and director of the first applicant which conducted wine-farming operations. The Land and Agricultural Development Bank of South Africa trading as Land Bank were the first respondent and the Minister of Justice and Constitutional Development was the second respondent.⁹¹

The second applicant signed an acknowledgement of debt on behalf of the first applicant and in his personal capacity in favour of the bank. In terms of the debt acknowledgement, the applicants admitted their liability to the bank jointly and severally for a certain sum of

⁸⁸ *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a the Land Bank* 2011 5 BCLR 505 (CC), 2011 3 SA 1 (CC) par 57 and 58, and *Levy v Fairclough et Uxor* 1950 2 SA 240 (W) 245-246. See, further, Cilliers *et al Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (2009) 1313, and Van Loggerenberg *Erasmus Superior Court Practice* (2015) D1-98.

⁸⁹ (n 88).

⁹⁰ par 1.

⁹¹ par 5.

money. The debt acknowledgement contained the following provisions: (i) the applicants will undertake to pay the debt by way of instalments; and (ii) a record of the applicants' consent to the effect that on default of payment of the instalments will result in the balance of the debt becoming due and payable.⁹²

The first respondent issued provisional sentence summons on the basis of the acknowledgement of debt as the applicants did not pay the amount that they were supposed to pay in respect of their undertaking when it fell due and payable.⁹³ In the high court, the applicants unsuccessfully sought an order to declare the common law provisional sentence and rule 8 procedures invalid, *inter alia*, for violating their right to a fair hearing under section 34 of the constitution. The matter was taken to the supreme court of appeal without success. The applicants then sought relief from the constitutional court relating to the constitutional validity of the provisional sentence procedure.⁹⁴

In delivering the judgment of the constitutional court, Brand J considered whether rule 8 violated the right to a fair hearing to the extent that the rule did not afford the court discretion to refuse provisional sentence where the outcome may be unfair to the defendant.⁹⁵ As opposed to the finding of the high court and supreme court of appeal, Brand J found in favour of the applicants. The *ratio decidendi* was that the provisional sentence procedure limited the defendant's right to a fair hearing where, *inter alia*, the court did not have discretion to refuse provisional sentence outside "special circumstances".⁹⁶ Consequently, the limitation imposed by the provisional sentence is out of step with its purpose. Moreover, the court held that the limitation imposed on the court's exercise of discretion to "special circumstances" only is out of step with the protection of the plaintiff's interest.⁹⁷ The court then indicated that the common law needed to be developed in order to enable the courts in the future to have discretion to refuse provisional sentence.⁹⁸

⁹² par 6.

⁹³ par 7.

⁹⁴ par 2.

⁹⁵ par 64.

⁹⁶ par 34-52.

⁹⁷ par 64.

⁹⁸ par 78. Van Loggerenberg (n 89) D1-117 – D1-118 having discussed the court's indication that the common law needed to be developed in the *Twee Jonge Gezellen* case (n 88), he makes the following conclusion: in provisional sentence proceedings the court has, as in all other cases, a discretion to grant an adjournment of the proceedings on good cause shown. Thus, no hard and fast rules in regard to the circumstances in which a postponement will be granted can be laid down. Hence, each case must necessarily depend upon its own facts.

2.4.2. Commentary

With regard to the facts of *Twee Jonge Gezellen* case, the constitutional court's finding that rule 8 was unconstitutional in not affording courts the discretion to refuse provisional sentence where injustice or prejudice may result on the part of the defendant is commendable.⁹⁹ This is because the rule was out of step in promoting and protecting the right to a fair hearing and thus unconstitutional. The protection the rule gave to the plaintiff was too wide and only the plaintiff benefited from the protection of the law as opposed to the constitutional rule "equal protection and benefit of the law to all" despite the calamity.¹⁰⁰ The unconstitutionality of the rule is also supported by Cilliers.¹⁰¹

In contrast, Nkubungu¹⁰² submits that rule 8 is constitutional for the following reasons: it does not necessarily result in an unfair hearing for the defendant as it recognizes that the plaintiff is required to have resort to court before he can attach and sell the property of the defendant; the entire procedure does not exclude proper access to court; the court's jurisdiction is not ousted since it can refuse to grant provisional sentence in certain circumstances; and the methods of attachment executed by the plaintiff on the property of the defendant do not promote unlawful self-help since it is possible for the defendant to have recourse to a court.

Whether Nkubungu's arguments are correct is to be doubted. For example, in terms of rule 8(10) "any person against whom provisional sentence has been granted may enter into the principal case only if he shall have satisfied the amount of the judgment of provisional sentence ... or if the plaintiff on demand fails to furnish due security in terms of subrule (9)". In light of subrule (10), it is submitted that the rule is unconstitutional since it does not afford the courts the power to exercise discretion except in the case of "special circumstances".¹⁰³ Section 34 of the constitution guarantees the right to a fair hearing in an independent or

⁹⁹ This is also supported by Rautenbach in "Overview of constitutional court judgment on the Bill of Rights – 2011" 2012 *TSAR* 301 313. He states that the judgment contains an excellent example of a systematic and thorough application of section 36 of the constitution.

¹⁰⁰ par 64 and s 9(1) of the constitution which provides: "Everyone is equal before the law and has the right to equal protection and benefit of the law."

¹⁰¹ Cilliers *et al* (n 88) 1411 with proposed authorities therein.

¹⁰² "Are provisional sentence proceedings constitutional?" 2012 *De Rebus* 1 30-31.

¹⁰³ For a detailed discussion of the "special circumstances", see Cilliers *et al* (n 88) 1397-1399. The "special circumstances" exception originated in the case of *Fichardt's Estates v Mitchell* 1921 OPD 152. This exception was thus followed in a number of cases. See, for example, *Ottico Meccanica Italiana v Photogrammetric Engineering (Pty) Ltd* 1965 2 SA 276 (D) 282C-287B and *Mao-Cheia v Neto* 1981 3 SA 829 (C) 833B-834G. For a commendable example of the court's discretion, see for instance, the *Levy* case (n 88) 245-246.

impartial court and the provisions of subrule (10) seems to be peremptory.¹⁰⁴ Therefore, such a peremptory provision seems to be unconstitutional since it limits the discretion of the court and this may result in an unfair hearing for the defendant without sufficient means to satisfy the amount of the judgment of provisional sentence even though there's recourse to court.¹⁰⁵ However, such a limitation seems to affect only a defendant who is unable to pay or satisfy the provisional sentence judgment.

The ruling of the court by ordering the common law principles relating to provisional sentences to be developed to fit into the current legal position required by the constitution is correct. This is because rule 8 did not give full effect to the right to a fair hearing under section 34 of the constitution; hence it was necessary for the court to develop the common law principles of provisional sentence so as to give full effect to the right. This is reinforced by section 8(3) of the constitution which states that: "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to the right."

With regard to section 34 of the constitution, the limitation of the right could not be justified by the speedy-remedy purpose of the provisional sentence procedure which is designed to protect an aggrieved plaintiff. This is because the protection afforded to the plaintiff by the rule fettered the discretion of the court, which may lead to injustice befalling the defendant where he or she is unable to satisfy the judgment debt.¹⁰⁶

2.6 Section 2 of the Vexatious Proceedings Act 3 of 1956

Banks are often the target of persistent and vexatious proceedings. Section 2 of the Vexatious Proceedings Act (henceforth 'the VPA') provides that "(1) (a) if, on the application made by the State Attorney or any person acting under his written authority, the court is satisfied that any person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing the person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or inferior court, as the case may be, and such leave shall not be granted unless the court or judge or inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.

¹⁰⁴ Van Loggerenberg (n 88) D1-119.

¹⁰⁵ Cilliers *et al* (n 88) 1411.

¹⁰⁶ par 64 and 78.

(b) If, on application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.

(c) An order under paragraph (a) or (b) may be issued for an indefinite period of time or for such period as the court may determine, and the court may at any time, on good cause shown, rescind or vary any order so issued.”

The purpose of the section is clearly to put a stop to persistent and ungrounded instigation of legal proceedings.¹⁰⁷ The question whether this provision violates section 34 of the constitution, a question considered in the case of *ABSA Bank Ltd v Dlamini*¹⁰⁸, is accordingly particularly relevant to banks also. The case is considered below.

2.5.1 *ABSA Bank Ltd v Dlamini*

The facts and judgment

The facts of *ABSA Bank Ltd v Dlamini* were as follows: the applicant (ABSA Bank Ltd) sought an order to stay all proceedings instigated by the respondent (Dlamini) pending an institution of an application for relief in terms of section 2 of the VPA.¹⁰⁹ In delivering the judgment of the court, Rabie J held that the purpose of the VPA was to put a stop to persistent and ungrounded instigation of legal proceedings.¹¹⁰ It was clear that the applicant sought to stay existing proceedings as well as prevent future proceedings instituted by the respondent. The court held that the VPA does not protect one against vexatious proceedings, or an abuse of process with regard to legal proceedings, which have already been initiated. The court held that the VPA does not allow vexatious proceedings which have already been instituted, to be stayed or struck out nor to prevent or terminate legal processes which emanated or might

¹⁰⁷ *ABSA Bank Ltd v Dlamini* 2008 2 ALL SA 405 (T) par 23.

¹⁰⁸ (n 107).

¹⁰⁹ par 1.

¹¹⁰ par 23. See, similarly, the case of *Beinash v Ernst and Young* 1999 2 SA 116 (CC) par 21. In this case the court held that the purpose of the provisions of the VPA was to protect good faith litigants, the process of the court and administration of justice. See also Rautenbach (n 14) 457 who in passing mentions the purpose of these provisions.

emanate from such proceedings.¹¹¹ The only manner to stay, strike out or else deal with annoying proceedings which have already been started is under recognized common law principles, depending on whether the court has the inherent power to apply such principles.¹¹² The court further held that the applicant had to prove separately from the other necessities for interim relief, that it had a *prima facie* right under section 2(1) (b) of the VPA as well as under the common law with regard to legal proceedings which had already been started by the respondent.¹¹³ Thus, taking into account the lengthy history of litigation on the part of the respondent, the court found that the above requirements were met.¹¹⁴ The application was granted.

2.5.2. Commentary

In respect of the decision in the *Dlamini* case, the provisions concerning vexatious proceedings are constitutional in terms of the VPA.¹¹⁵ This is because the VPA does not violate the right of access to court; however, it complements the common law which merely affords a court an intrinsic power to prevent frivolous and irritating proceedings since they lead to an abuse of a court process.¹¹⁶ This is achieved by the screening mechanism of the VPA in protecting the interest of victims of vexatious litigant who have continually been subject to costs, nuisance and humiliation of unmeritorious lawsuit and the interest of the public that the functioning of the courts and the administration of justice should not be impeded by the clogging caused by ungrounded proceedings.¹¹⁷ *In casu*, the power was exercised cautiously and thus it did not affect the elemental right of access to court. It is submitted that the right of access to court can be limited by summarily dismissing a case without the opportunity to hear any evidence, on the basis that it is annoying, unless the

¹¹¹ par 24.

¹¹² par 32. Cilliers *et al* (n 88) 1520, state that at common law a high court possesses the inherent jurisdiction to prevent the abuse of its own process in the form of vexatious litigation and when the court finds that an attempt is being made to use the machinery devised for the better administration of justice for an ulterior motive, it is the duty of the court to prevent such abuse. It is further stated that when vexatious litigation is instituted or threatened, the court may thus, depending on the circumstances, summarily dismiss the action, stay the proceedings, interdict threatened proceedings, and, it seems, strike out a plea if it appears from it that the process of the court is being abused or strike out an appearance to defend. See, the same authors for a more comprehensive discussion of the common law principles relating to vexatious proceedings with authorities at 1520-1522.

¹¹³ par 37.

¹¹⁴ par 120-121.

¹¹⁵ See Rautenbach (n 14) 457. See also the *Beinash* case (n 110) par 121E. In this case the court confirmed the provisions of the VPA to be constitutionally valid since it achieves its purpose.

¹¹⁶ par 19 and 23

¹¹⁷ par 23 and Cilliers *et al* (n 88) 1524.

action is unfounded and could not be sustained.¹¹⁸ It therefore follows that if the court did not give the provisions of the VPA full effect, a defendant could be subjected to long-continued ineffective attacks in respect of a similar dispute.¹¹⁹

Though the procedural barrier of the VPA seems to violate section 34, it is reasonable and justifiable, if one takes into account its purpose of protecting persons against vexatious litigation, in accordance with section 36 of the constitution. The VPA achieves its purpose of preventing insistent and ungrounded instigation of legal proceedings by permitting a court to screen a person who has tirelessly and short of any reasonable ground instituted legal proceedings in any court; it does not amount to absolute barring of the matter to be heard.¹²⁰ It is submitted, with respect, that the VPA is in step with section 34 of the constitution.

3 Conclusion

The legal principles that have emerged clearly in the discussion and analysis of case law relating to the impact of section 34 of the constitution on banking are: (i) the fundamental rule of natural justice that everyone has a right to have a dispute settled by a court of law or an unbiased, independent and impartial tribunal, where appropriate, and that nobody should be allowed to take the law into his or her own hands or to usurp the functions of a court of law¹²¹, is well entrenched and will be protected strongly by the courts; (ii) a court must exercise discretion in all circumstances where provisional sentence may be applied for to ensure a fair hearing for the defendant without sufficient means to satisfy the amount of the judgment of provisional sentence under subrule (10); (iii) perfecting clauses in notarial bonds of movables without court intervention should be regarded as constitutionally valid and enforceable; and (iv) the screening mechanism by a court of law in terms of the VPA is not an absolute barring of the right enshrined in section 34, but a measuring yardstick for the administration of justice.

It is further submitted in conclusion that: (i) no person is permitted to execute private redress or help him or herself to the personal property of another without obtaining first a court order or consent of the other person in the absence a court order (this is because the power to settle justiciable disputes, to order proper relief and the enforcement of an order of attachment and sale in execution of an individual's goods, vests in the courts where disputes may be resolved

¹¹⁸ See Cilliers *et al* (n 88) 1521 at n 14 with authorities.

¹¹⁹ See the case of *Corderoy v Union Government* 1918 AD 512 518.

¹²⁰ See the *Beinash* case (n 110) par 121E and Cilliers *et al* (n 88) 1524.

¹²¹ *Lesapo* case (n 31) par 5.

by application of the law and not with individual persons¹²²); (ii) in respect of the constitutionality and validity of perfection clauses in notarial bonds over movables, the *Bock* case should be followed instead of the *Findevco* case since the former case has brought certainty in this area of the law and the court's decision accords with legal logic; and (iii) all conduct between banks and their clients should cherish an open and democratic society based on the fundamental values of the constitution, namely human dignity, equality and freedom.



¹²² Phala (n 2) 26.

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