THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 686/2009

MERIDIAN BAY RESTAURANT (PTY) LTD	First Appellant
BOE BANK LIMITED	Second Appellant
NEDBANK LIMITED	Third Appellant

and

D R MITCHELL SC N O (in his capacity as the duly appointed *curator ad litem* of HARBOUR'S EDGE BODY CORPORATE)	Respondent

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Neutral citation: ***Meridian Bay Restaurant v Mitchell*** **(686/09) [2011] ZASCA 30 (23 March 2011)**

BENCH: **NAVSA, PONNAN and SHONGWE JJA**

HEARD: **22 FEBRUARY 2011**

DELIVERED: **23 MARCH 2011**

SUMMARY: **Sectional title scheme – developer – fraudulently creating additional units out of common property- insolvency intervening – double sales – doctrine of notice – first purchaser allowed to claim directly from second purchaser who acquired with knowledge of first sale.**

ORDER

On appeal from: Western Cape High Court (Cape Town) (Uijs AJ sitting as court of first instance).

The appeal is dismissed with costs to be paid jointly and severally by the appellants, the one paying the others to be absolved.

JUDGMENT

PONNAN JA (NAVSA and SHONGWE concurring):

[1] On 19 July 2000 Wimbledon Lodge (Pty) Ltd, the registered owner of Unit 91 in the sectional title scheme known as Harbour's Edge (the sectional title scheme), launched an application in the Cape High Court in terms of s 41(3) of the Sectional Titles Act 95 of 1986 (the Act) for an order that a curator ad litem be appointed to the Harbour's Edge Body Corporate (the body corporate), which controls the sectional title scheme. The case advanced in the application was that a fraud had been perpetrated on Wimbledon Lodge and the other registered owners of units in the sectional title scheme by one Casper Scharrighuisen, who so the accusation went, had secretly appropriated a large part of the common property of the scheme for the benefit of two corporate entities which he controlled. They are, the developer of the scheme, Casisles Coastal Property Investements CC (Casisles) and Harbour's Edge Commercial Property Holdings (Pty) Ltd (Holdings). Scharrighuisen's estate has been sequestrated and those two corporate entities wound up. Casisles was since 19 August 1994 the registered owner of Erf 4600, Gordons Bay, upon which the sectional title scheme was developed.

[2] The sectional plan was first registered on 19 September 1997. The body corporate was constituted on 18 November 1997 when transfer of the first unit in the scheme was registered. The scheme is a mixed use scheme comprising several residential and commercial units but consisting mainly of units that are equipped as

hotel suites to be operated as such through a rental pool agreement. Fifty five units were sold prior to the coming into existence of the body corporate and 46 of those sales occurred prior to the registration of the first sectional title plan. To each of those deeds of sale was annexed a participation quota and drawings. All 55 deeds of sale concluded between Casisles and the purchasers (the purchasers) were in all material respects in identical terms. Simultaneously with those deeds of sale, each purchaser concluded a rental pool agreement with Casisles. In terms of that agreement each purchaser undertook to make his unit available for the purposes of conducting a hotel business. Each of the rental pool agreements were also in identical terms. The deeds of sale and the rental pool agreements envisaged that a management company would lease the units from the purchasers and include them in the hotel apartment business to be conducted by it. The purchasers would derive rental income after the deduction of operating levies imposed by the management company to cover the costs of operating the hotel business. The management company would in turn contract with a suitable expert hotel operator, who would effectively run the hotel business.

[3] The application by Wimbledon Lodge for the appointment of the *curator ad litem* failed before Van Reenen J in the Cape High Court, but succeeded on appeal to this court. Both judgments are reported sub nom *Wimbledon Lodge (Pty) Ltd v Gore NO & others*.[1] The facts and the history of the matter are somewhat complicated. To understand the gist of the complaint though it suffices for present purposes to borrow from Schutz JA, who in writing for the majority of this court, summarised (at para 3) the position as follows:

'The building was not intended to be occupied by the unit-holders. It was to be used as a hotel. The rentals earned were to be placed in a pool which, after expenses had been met, was to be distributed according to individual participation quotas. According to the plan which was annexed to the deeds of sale, the common property was to include restaurants, kitchens, a parking basement, a squash court, necessary service areas and much more. That plan showed that there would be 86 sections with a total area of 5 886 square metres. It is not Wimbledon's case that a fraudulent misrepresentation was made when the sales took place, in the sense that Scharrighuisen then already intended to cheat buyers. Wimbledon's case is that the sectional title plan which Scharrighuisen had registered in the deeds registry

[1] The High Court judgment at 2002 (2) SA 88 (C). And the judgment of the SCA at 2003 (5) SA 315 (SCA).

subsequently, without informing buyers, provided for 120 sections with a total area of 14 420 square metres. The extra area was achieved, not by enlarging the building, but by the appropriation of a large part of the common property. Of the 34 extra sections, 10 are registered in the name of Casisles and 12 in the name of Harbour's Edge. How the 12 sections reached Harbour's Edge (these are the valuable ones) we are not told, as, despite a challenge to disclose, there came only the statement that the sections "were purchased" from Casisles. As the entries in the deeds registry stand those 22 sections are owned by the one or the other of the two corporations, now in liquidation, and their area has been subtracted from the common property of the other unit-holders. It is these doings that Cuninghame [on behalf of Wimbledon lodge] describes variously as a fraud or theft. The exact legal categorisation hardly matters. These allegations stand essentially unchallenged.'

[4] D R Mitchell, the present respondent, a practising advocate at the Cape Bar was accordingly appointed to act as *curator ad litem* to the body corporate in terms of s 41(3) of the Act with inter alia the power to:

> 1. Conduct an investigation into the grounds and desirability of the institution of proceedings on behalf of the third respondent in order to:
>
> 1.1 take such steps as are necessary to obtain registration of the immovable property listed in the schedule annexed to this order as common property of the Harbour's Edge Sectional Title Scheme; and/or
>
> 1.2 claim such damages as may be legally recoverable as a result of the alleged misconduct of the developer and any of its successors in title as set out in the affidavits filed of record on behalf of the applicant.
>
> 2. Report the results of his investigation and his recommendations to the Cape High Court on the return day.

[5] Pursuant to his appointment, the *curator ad litem* caused summons to be issued against various defendants including the liquidators of Casisles and Holdings. The curator sought, inter alia, an order that certain disputed sections in the sectional title scheme revert to the body corporate as common property and consequently that the sectional title plan and deeds be rectified accordingly. The claim succeeded before Uijs AJ in the Cape High Court. With the leave of the learned judge three of the 11 defendants appeal to this Court. They are Meridian Bay Restaurant (Pty) Ltd (Meridian Bay), the first appellant, BOE Bank Limited, the second appellant and Nedbank Limited, the third appellant.

[6] Meridian Bay is the registered owner of sections 1 (basement parking), 7 and 120 (conference rooms) and 21 (a hotel suite (formerly hotel kitchen)), which was transferred to it during December 2000. The pleaded case against Meridian Bay is that after the proceedings had been instituted by Wimbledon Lodge for the appointment of the *curator ad litem*, Holdings represented by its liquidators, disposed of sections 7, 21 and 120 in the sectional title scheme to Meridian Bay and section 1 to Berties Mooring Investments (Pty) Ltd (Berties Moorings) (the disputed sections). Berties Moorings, in turn, disposed of and transferred that section to Meridian Bay.

[7] Whilst the pleaded case against the banks (the second and third appellants) is that the one or the other is the registered holder of two mortgage bonds registered in its favour by Meridian Bay. The first in an amount of R 4.5m was registered over sections 7, 21 and 120 on 13 December 2000 and the second in the amount of R 7.1m over sections 7, 21 and 120 on 5 December 2002. In his heads of argument, counsel for the banks makes plain:

'As far as the question of who the relevant bondholder may be is concerned, it is submitted that nothing turns on this. Neither the second nor the third appellants intend taking the point that the judgment of the court a quo was granted against the incorrect banking entity.'

Moreover counsel for the banks accepts that 'the success or failure of the banks in this appeal depends on the success or failure of [Meridian Bay]'.

[8] The particulars of claim further allege that:

'23 At the time that each disposal aforementioned took place the entity acquiring the section had knowledge of the pending proceedings and took transfer of the sections knowing that proceedings to recover the sections as common property might be instituted on behalf of the body corporate by a *curator ad litem*.

24 In the premises the transferees acquired, and can assert, no greater right to the sections than Holdings had at the time of its disposal of the sections and to assert such greater right would constitute a species of fraud upon the plaintiff.

25 The mortgage bonds registered in favour of the Bank referred to in paragraph 3(b) above were registered on 13 December 2000 and 5 December 2002 at which date both the mortgager and the Bank

had knowledge of the pending proceedings referred to in paragraph 22 above and registered the mortgage bonds in the knowledge that:

(a) proceedings to recover sections 1, 7, 21 and 120 as common property might be instituted on behalf of the body corporate by a *curator ad litem*;

(b) if such proceedings were successful, the said sections would not constitute security for the debts of the mortgager referred to in the said mortgage bonds.'

[9] To complete the narrative. Prior to the institution of the proceedings the subject of the present appeal, the liquidators of Casisles and Holdings tendered, without admission of liability, to transfer to the body corporate sections 15, 20, 27, 42, 50, 55, 61, 83, 87, 92, 116, 117 and 118, which tender the curator accepted. Those sections indubitably belonged to the body corporate.

[10] Uijs AJ found for the *curator ad litem*. He accordingly made the following order:

'(a) The acquisition by the Body Corporate of the Harbour's Edge Sectional Title Scheme of sections 15, 20, 27, 42, 50, 55, 61, 83, 87, 92, 116, 117 and 119 is ratified.

(b) Such acquisition of the sections aforesaid are declared to be acquisitions of land extending the common property of the Harbour's Edge Sectional Title Scheme as envisaged in section 26(1) of the Sectional Title Act, No 97 of 1986.

(c) It is directed that Sections 1, 7, 21 and 120 of the Harbour's Edge Sectional Title Scheme are to revert to the Body Corporate of that Scheme as common property, for the benefit of the owners of the remaining sections in the scheme.

(d) The said sections are to be deleted from the Sectional Title Deeds ST 21129/2002 and ST 16518/2000 in the name of the First Defendant and from Sectional Title Mortgage Bonds SB 9612/2000 and SB 11767/2002 held by the Second Defendant and/or the Eleventh Defendant.

(e) The Body Corporate is directed to prepare and submit to the Ninth and Tenth Defendants an amended Sectional Plan, reflecting all of the abovementioned sections as common property, together with a revised schedule of participation quotas for the remaining sections in the scheme.

(f) The Ninth and Tenth Defendants are directed to register such amended Sectional Plan and schedule of participation quotas and to make such consequential entries in their records as may be necessary to give full effect to this order.

(g) The parties are directed to ensure that there is due compliance with all of the requirements of both the Ninth and Tenth Defendants in giving effect to this order.

(h) The lease agreement between the First Defendant and the Eighth Defendant in respect of section 120 of the said Sectional Title Scheme is declared not to be binding on the Body Corporate of the said scheme.

(h) First and Eighth Defendants and Second or Eleventh Defendants are (save as provided for herein) to pay jointly and severally Plaintiff's costs of suit, the one paying, the other to be absolved. In this regard, Plaintiff's expert witnesses, Mellon and Harding are declared necessary witnesses, the costs occasioned by employing them to be calculated on the appropriate tariffs and scale, and all other witnesses called by Plaintiff are declared to have been necessary witnesses.

(j) Second and/or Eleventh Defendants shall not be obliged to pay any costs occasioned by the Application brought by First and Eighth Defendants to separate the issues, or any wasted costs incurred as a result of the bringing of that application, which, it is recorded, they opposed.

(k) Second and/or eleventh Defendants shall not be obliged to pay the costs occasioned by any amendment to First Defendant's Plea, or any costs occasioned by the opposition of First and Eighth Defendants to Plaintiff's application for an order directing the order of evidence, which, it is recorded, they did not oppose.

(l) The matter shall stand down, with leave granted to the parties to approach the Court to re-open same.'

[11] The thrust of the curator's case is that the developer altered the sectional plans that had been annexed to each deed of sale in relation to the common property thereby converting portions into units that could be misappropriated. All of this had been done without the knowledge of the purchasers. The developer in giving transfer of the units to the purchasers pretended to deliver what they had contracted for and obtained payment of the purchase price on that basis. In that way he caused certain portions of the common property to cease to exist. He further purported to put those illegally obtained sections beyond the reach of the body corporate by causing them as registered sections to be transferred to an associated entity, Holdings. The cause of the conversion of the common property and thus its disappearance from the sectional plan was the unilateral act of the developer who caused a sectional plan at variance with the purchase and sale agreement with the purchasers to be registered. It is thus the fraudulent act of registering a revised plan, one at odds with the prior purchase and sale agreements, which founds the respondent's action. As the common property had ceased to exist in consequence of the fraud, the body corporate, so the submission goes, can recover it by rectifying the records of the Deeds Office so that they conform to the prior purchase and sale agreements concluded with the purchasers. In effect, the body corporate seeks, as the entity charged with the administration and control of the common property

of the scheme, to recover that which was fraudulently removed from the unit holders in the scheme, namely, an undivided share of the common property that ought in terms of the contracts of sale to have been in existence when the body corporate was first established.

[12] It is a basic principle of our law that a real right generally prevails over a personal right (even if the personal right is prior in time) when they come into competition with each other.[2] Thus, according to Prof van der Walt, 'in South African law the distinction between real and personal rights has acquired something of a mystical nature, and is often presented as a problem without a solution'.[3] Accordingly, in the ordinary course, if A sells a thing – be it movable or immovable - to B and thereafter sells the same thing to C, ownership is acquired not by the first purchaser but by the purchaser who first obtains transfer of the thing sold. If the first purchaser, B, is also the first transferee, his right of ownership is unassailable by C. The legal situation is more intricate if the second purchaser, C, is first to obtain delivery. In this case, the first distinction to be made is whether or not C, when contracting with A, had notice of the previous sale to B. For, according to Professor Scholtens,[4] if C had such notice, he is not entitled to retain the thing as against B.

[13] As FDJ Brand in an as yet unpublished paper entitled '*Knowledge and Wrongfulness as Elements of the Doctrine of Notice*', observes the 'rather unyielding preference to real rights is tempered by the doctrine of notice'. Prof Lubbe suggests:

'From a dogmatic perspective the doctrine of notice seems to be anomalous in so far as it permits the holder of a personal, supposedly relative, right to a thing to prevail over the holder of a real right in respect thereof; even to the extent of requiring the transferee with notice to give effect to the contractual undertakings of the predecessor in respect of the thing.'[5]

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[2] *Hassam v Shaboodien* 1996 (2) SA 720 (C) at 724H-I; FDJ Brand *Knowledge and Wrongfulness as Elements of the Doctrine of Notice.*

[3] AJ van der Walt 'Personal rights and limited real rights an historical overview and analysis of contemporary problems related to the registrability of rights' 1992 (55) *THRHR* 170 at 179.

[4] CJE Scholtens 'Double Sales' (1953) 70 *SALJ* 22.

[5] G Lubbe 'A doctrine in search of a theory: reflections on the so-called doctrine of notice in South African law' 1997 *Acta Juridica* 246 at 249.

Ultimately, it is, as Prof McKerron observes, 'a purely equitable doctrine running counter to the rule of the strict law that a real right takes preference over a merely personal right'.[6]

[14] Under the doctrine of notice, someone who acquires an asset with notice of a personal right to it which his predecessor in title has granted to another, may be held bound to give effect thereto. Thus a purchaser who knows that the merx has been sold to another, may, in spite of having obtained transfer or delivery, be forced to hand it over to the prior purchaser. Reverting to my earlier example: if C had purchased with knowledge of the prior sale to B, B would be entitled to claim that the transfer to C be set aside and that transfer be effected from A to B, or B may perhaps even claim transfer directly from C.

[15] For many years our courts sought to invoke mala fides or 'a species of fraud' as the inherent justification for the doctrine. Thus it was said, for example, by Wessels JA in *De Jager v Sisana*:[7]

'[A] purchase of property made in derogation of the rights of a third party with knowledge of such rights is a species of fraud upon the third party and does not defeat his rights.'

and

'If A grants B a servitude, B has a right to that servitude as . . . against A, and has the right to have that servitude registered. If C knows of the grant, then if he endeavours to get the land free of the servitude he is conspiring with A to defraud B of a valid right which he already has against A and which he can by registration acquire against the whole world. C is therefore *particeps fraudis* with A.'

[16] Likewise, in *Grant & another v Stonestreet & others*,[8] Ogilvie Thompson JA stated:

'Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will — subject to a possible qualification, discussed below, relating to cases where there has been the intervention of a prior innocent purchaser — be bound by it notwithstanding the absence of

[6] RG McKerron 'Purchaser with notice' 1935 *SA Law Times* Vol 4 178 at 180.
[7] 1930 AD 71 at 80 and 84.
[8] 1968 (4) SA 1 (A) at 20A-E.

registration. The basis of this obligation is that in attempting, under such circumstances, to repudiate the servitude, the purchaser is *mala fide*, and that the law refuses to countenance any such attempted repudiation because, as it is put in some of the cases, it in reality amounts to a species of fraud (see *Richards v Nash*, 1 S.C. 312; *Jansen v Fincham*, 9 S.C. 289; *Ridler v Gartner*, 1920 T.P.D. 249 and cf. *De Jager v Sisana*, 1930 A.D. 71 at p 84). *Mala fides* is not readily presumed, and it was emphasised in *Jansen v Fincham* and *Ridler v Gartner*, *supra*, that clear proof of knowledge on his part is required before the Court will hold a purchaser bound by an unregistered servitude. As was observed by WESSELS J., *in Ridler v Gartner*, *supra* at pp. 259-260:

"There must be an element of deceit, an element of chicanery in the transaction, before the Court will set it aside on the ground of knowledge. It must be perfectly clear to the Court that the person who alleges that he bought a clean transfer knew perfectly well and did not expect that he would get a clean transfer except by his fraud. Any other view of the law would be extremely dangerous and would dig away the very foundations upon which our whole system of registration is based." '

[17] But with *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd,*[9] came the demise of the fraud construction. The court held that references to a species of fraud or *mala fides* on the part of the acquirer with knowledge in the earlier cases was nothing but a fiction to provide the doctrine of notice with theoretical support. According to Van Heerden AJA, any reference to fraud or *mala fides* in the context of the doctrine of notice should be avoided because it only gives rise to confusion. The only requirement for the operation of the doctrine, so he stated, is actual knowledge (or perhaps *dolus eventualis*) with regard to the prior personal right on the part of the acquirer. Once this requirement is satisfied, the holder of the personal right is afforded what is in effect a limited real right against the acquirer.

[18] Thus C, the acquirer of the real right, does not need to have actual knowledge of B's prior right. It suffices that C subjectively foresaw the possibility of the existence of B's personal right but proceeded with the acquisition of his real right regardless of the consequences to B's prior personal right. The reference to *dolus eventualis* in Van Heerden AJA's judgment echoes what was said by Ogilvie Thompson JA in *Grant v Stonestreet*:

[9] 1982 (3) SA 893 (A).

'Although, unlike the English Law, the doctrine of constructive knowledge has, in our law, little or no application in enquiries of this kind (*Erasmus v du Toit* 1910 TPD 1037*, Snyman v Mugglestone* 1935 CPD 565), the statement made by Bristowe, J in *Erasmus'*s case, *supra* at p 1049, that, if a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice, appears to me to be sound in principle and to merit the approval of this Court.'[10]

[19] Perhaps on account of its anomalous aspects and uncertain pedigree, the doctrine of notice has attracted more academic discussion than its practical importance seems to merit.[11] According to Lubbe:

'Attempts to locate the doctrine of notice within the general conceptual framework of our system of private law, seek to reduce it either to the law of obligations or the domain of property. In an echo of attempts elsewhere, a resort to delictual liability has been predominant in attempts to forge an explanation of the doctrine in terms of the law of obligations.'[12]

It may well be, as Brand posits, that we simply have to accept that the doctrine of notice is a doctrinal anomaly which does not fit neatly into the principles of either the law of delict or property law.[13] Brand poses the question: 'If the answers do not lie in a search for the doctrinal basis of the doctrine where should one start?' He proffers the following illuminating response that no doubt will not only appreciably assist in shaping and determining the future debate on the subject, but also in resolving the various problematic anomalies and dogmatic classification puzzles:

'The key to the solution, I believe, is to be found in the following statement by Badenhorst Pienaar & Mostert:

"Infringement of a personal right by an acquirer of the real right is perceived as unlawful conduct. The criteria for the determination of wrongfulness in the law of delict should be applied."

As I see it, this means two things. Firstly, that although the doctrine of notice is not founded in delict, it shares a common element with delictual liability, namely, the element of wrongfulness (sometimes also referred to as unlawfulness). Secondly, that in determining wrongfulness for the purposes of the doctrine, we should be guided by the principles that have become crystallised in delictual parlance. In this regard the principles of the law of delict proceed from the premise that conduct which manifests itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. By contrast, causation of pure economic loss is not regarded as prima facie wrongful. Its wrongfulness

[10] At 20F.
[11] Lubbe op cit p258.
[12] Lubbe op cit p258.
[13] Brand para 22.

depends on the existence of a legal duty. In applying these principles, the doctrine of notice seems to fit naturally into the category of pure economic loss. In consequence, it invokes the concept of a "legal duty". The imposition of a legal duty, so it has been explained, is a matter for judicial determination, involving criteria of public and legal policy. When we therefore say, in the law of delict, that conduct causing pure economic loss is "wrongful" we mean that public or legal policy considerations require that such conduct attracts legal liability for its consequences. Conversely, when we say that conduct causing pure economic loss is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant enjoys immunity against such conduct. As I see it this would mean, in the context of the doctrine of notice, that an infringement of a prior personal right through the acquisition of a real right will only be recognised as "wrongful", if for reasons of public and legal policy, the courts determine that such infringement should attract the consequences of the doctrine.'[14]

[20] After *ASA Bakeries* this court had occasion to consider the doctrine of notice in *Dream Supreme Properties 11CC v Nedcor Bank Ltd & others*[15] but in the context of an attachment and sale in execution. The facts were: During June 2000 Nedcor Bank obtained judgment against Mr Costas, who was the owner of a holiday house in Camps Bay. On 15 November 2001 he sold the house to Dream Supreme, a close corporation under the control of his mother-in-law. When Nedcor Bank became aware of the sale, it caused a writ of execution to be issued in respect of the house. Pursuant to the writ, the house was attached and sold at a sale in execution. Dream Supreme sought an order in the Cape High Court for the setting aside of the attachment and the sale in execution. The High Court refused the application essentially on the basis that the sale agreement between Dream Supreme and Costas was not a *bona fide* sale, but an attempt to shield the property from execution by the creditors. On appeal, this court held that the court of first instance had erred in holding that the agreement of sale was not *bona fide*. Streicher JA, writing for the majority, stated:

'However, it does not follow that because an inference of fraud on the part of a second purchaser is drawn from the mere fact of knowledge of a prior sale that an inference of fraud likewise has to be drawn from such knowledge on the part of an execution creditor who attaches property which his debtor has sold in execution of a judgment. In terms of the common law such an execution creditor could, with some exceptions, attach the assets of which his debtor was the owner in order to obtain satisfaction of his debt.

[14] Brand para 23 - 24.
[15] 2007 (4) SA 380 (SCA).

Effect is given to that right in s 36 of the Supreme Court Act 59 of 1959 read with Rule 45 of the Uniform Rules.'[16]

And

'It follows that, unlike the purchase of a property with knowledge of a prior sale, the first respondent did what, according to the Uniform Rules, he was entitled to do. There can be no question of regarding his actions as a species of fraud. To extend the doctrine of notice to situations such as the present would open the door to unscrupulous debtors to fabricate personal rights which would be difficult for a creditor to expose for what they are. It will discourage prospective purchasers from taking part in sales in execution where a claim to a prior personal right is made by a third party. Very few such prospective purchasers would be prepared to investigate the validity of such a claim by a third party and even less will be prepared to involve themselves in litigation against such a third party. In the result, to extend the doctrine of notice to situations such as the present will create, to the detriment of the creditor as well as the debtor, uncertainty as to the title obtained at a sale in execution and so reduce the effectiveness of such a sale, the purpose of which is to obtain satisfaction of a judgment debt.'[17]

[21] Whether or not mala fides or fraud on the part of the attaching creditor would render the attachment wrongful is an issue that Streicher JA did not decide. What he did decide is that once a creditor has established a real right known as a *pignus judiciale* through an attachment in execution of a judgment, the holder of a personal right cannot rely on mere knowledge on the part of the creditor at the time of the attachment, to set aside the real right acquired by the creditor.

Brand opines that:

'What Streicher JA decided . . . is that for reasons of public and legal policy, an attachment in execution is not wrongful, in the context of the doctrine of notice, merely because the creditor who caused the attachment to be made had knowledge of an earlier personal right. What is more, Streicher JA then proceeded to set out the considerations of legal and public policy which led him to the conclusion of wrongfulness. In sum, they relate to the specific nature and purpose of an execution sale and the particular consideration that the purchaser at an execution sale should as far as possible acquire secure title.'[18]

[22] *Dream Supreme*, it bears noting, considered the doctrine of notice in respect of attachments and sales in execution. Streicher JA, I daresay, decided that the

[16] Para 24.
[17] Para 26.
[18] Para 26.

considerations of public and legal policy that are applicable to attachments in execution are different to those applicable to double sales. To borrow from Brand it 'has no impact on the requirement of knowledge in the application of the doctrine of notice outside the ambit of attachments in execution. As far as these other applications are concerned, *ASA Bakeries* remains the beacon of authority.'[19] *Dream Supreme* is thus plainly distinguishable from the present case.

[23] Streicher JA had occasion once again in *Cussons & andere v Kroon*[20] to consider the doctrine. The facts were: A farm, which constituted an asset in a partnership between A and B, was registered in the name of A only because it would have been in conflict with legislation for it to have been registered in the names of both. As a partnership asset the property could not be alienated by A without the approval of B. A nonetheless sold and transferred the property to C without informing B. Relying on the doctrine of notice B then brought an application to set the sale and transfer to C aside. On appeal it was argued on behalf of A and C that the doctrine did not apply because the right relied upon by B was not a *ius ad rem acquirendam*. Streicher JA held that the personal right relied upon by B is so closely analogous to a right of pre-emption that if the one was deserving of protection so too was the other. The reason why a right of pre-emption is deserving of protection, according to Streicher JA, is because the conduct of the purchaser in acquiring the property with knowledge that it was in conflict with an existing right of pre-emption, is regarded as wrongful. He thus concluded that a sale in conflict with the duty not to sell without the consent of another is just as improper as a sale in conflict with the rights of a holder of a right of first refusal.

[24] In arriving at that conclusion Streicher JA said (para 9):

'In die geval van dubbelverkope word 'n beginsel bekend as die kennisleer toegepas. Waar A sy goed aan B verkoop en daarna dieselfde goed verkoop en oordra aan C, wat bewus was van die regte van B, is B geregtig op kansellasie van die verkoping en van die oordrag van die goed, op grond daarvan dat die verkoper en C geag word op 'n bedrieglike wyse teenoor hom op te getree het (*Tiger-Eye Investments (Pty) Ltd & another v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (K) op 358F-H). Werklike

[19] Para 27.
[20] 2001 (4) SA 833 (SCA).

bedrog word nie vereis nie. Blote kennis aan die kant van C van die bestaan van B se vorderingsreg is voldoende (*Kazazis v Georghiades & andere* 1979 (3) SA 886 (T) op 893). Die verwysings na bedrog in sake van hierdie aard dien slegs as aanknopingspunt in die regsisteem ter onderskraging van die kennisleer (*Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd & andere* 1982 (3) SA 893 SA 893 (A) (*ASA Bakeries*) op 910E).'

[25] Here the facts are more nuanced than those ordinarily encountered in what may be described as the classic double sale scenario. In this case Scharrighuisen knowingly and deliberately registered a sectional title plan at odds with the prior purchase and sale agreements concluded with the purchasers. The sectional title scheme so registered established new sections. Those valuable new sections he appropriated to himself. He then sought to place them beyond the reach of the prior purchasers by transferring those from Casisles to Holdings. All of this occurred without the knowledge of the prior purchasers and but for the vigilance of one of the purchasers may have gone undetected. The court below found that Scharrighuisen as the controlling mind of both Casisles and Holdings acted fraudulently in misappropriating the disputed sections. That finding was not attacked on appeal. Nor, in my view, could it be.

[26] The first question therefore is whether the doctrine of notice avails the prior purchasers, as here, where: first, the dispositive act has the effect of creating new objects of ownership out of the property that is already the subject of a prior personal right; and, second, insolvency intervenes. I accept, as one must, that extensions of the operation of the doctrine of notice with reference to considerations of public and legal policy must occur incrementally. To facilitate the fraud Scharrighuisen (through Casisles) unilaterally reconfigured the common property into units in the scheme before disposing of it to Holdings (which, like Casisles, he controlled) in disregard of the rights of the prior purchasers. Had he simply disposed of the common property without first having reconfigured it (assuming that to have been possible) then surely in those circumstances the doctrine would have availed the prior purchasers. I cannot conceive of any reason why the reconfiguring of the common property into units to fraudulently place it beyond the reach of the prior purchasers would operate as a bar to the invocation of the doctrine by them.

For, first, as Schutz JA stated in *Wimbledon Lodge v Gore* (para 10):

‘ “No one is allowed to improve his own condition by his own wrongdoing.” This fundamental principle has been applied expressly at least twice in this Court, in *Principal Immigration Officer v Bhula* 1931 AD 323 at 330 and *Parity Insurance Co Ltd v Marescia and Others* 1965 (3) SA 430 (A) at 433 and 435. It finds exact application to this case. Scharrighuisen, through his corporations, by means of his fraud, obtained at least apparent ownership of the contested sections.’

And, second, the liquidators could not acquire rights greater than the insolvent entity ever had (*Afrisure CC v Watson* NO).[21] Nor could the liquidators transfer more rights than they themselves had. This rule, which has been described as the ‘golden rule of the law of property’, is based on the old Roman law maxim *nemo plus iuris ad alium transferre potest, quam ipse haberet*.[22]

[27] What then of Meridian Bay? On the authority of *ASA Bakeries* the only requirement for the operation of the doctrine is actual knowledge (or perhaps *dolus eventualis*) of the prior personal right of the first purchaser on the part of the second purchaser (the acquirer). Once this requirement is satisfied the holder of the real right is afforded what in effect is a limited real right against the acquirer.[23] The requirement of notice poses no difficulty in this case, it being common cause that Meridian Bay had knowledge of the prior personal right of the purchasers. Indeed each of the written agreements of purchase and sale concluded by the liquidators with Meridian Bay and Berties Mooring, respectively, in respect of the disputed sections contained a provision to the following effect:

’DISPUTE AS TO THE SELLER’S TITLE TO THE PROPERTY

1 It is recorded that it has been disclosed to the Purchaser who fully understands that:

1.1 the Seller’s title to certain sections forming part of the immovable property sold has been challenged by the Harbours Edge Body Corporate and certain individual members thereof. Furthermore individual members of the Body Corporate have in their personal capacities applied and/or indicated their intention to apply to the appropriate court for an order interdicting this sale

[21] 2009 (2) SA 127 (SCA) para 41.
[22] Digest 14. 17. 54; PJ Badenhorst, Juanita M Pienaar and Hanri Mostert *Silberberg and Schoeman’s The Law of Property* 5 ed 2006 p 73.
[23] *ASA Bakeries* 910G-H. Lubbe asserts that the statement by Van Heerden AJA that the doctrine of notice results in personal rights being accorded a limited real effect exacerbates, rather than resolves, the dogmatic puzzle.

and for certain relief the effect of which will be to vest ownership of the immovable property sold in terms hereof in the Harbours Edge Body Corporate; and . . .'

[28] Moreover the evidence establishes that Meridian Bay knew, when it acquired the disputed sections, not just that complaints were being levelled by the prior purchasers but also of the exact nature of those complaints. It nonetheless chose to acquire the disputed sections with full knowledge that such acquisition was in conflict with the prior personal rights of the purchasers. It follows that in conducting itself thus, Meridian Bay's conduct was wrongful.

[29] In a situation such as this, Prof Scholtens submits that 'the only question to be determined should be whether the first contract of sale would have entitled the first purchaser to a decree of specific performance had the second not been concluded. If the answer is in the affirmative, the first purchaser has an indefeasible right and should be entitled to the assistance of the court without any further regard to the equities of the second sale.'[24]

In this case the prior purchasers would have had a claim for specific performance against the developer. Thus according to Prof Scholtens they have an indefeasible right that entitled them to the assistance of the court.

[30] Who then can that right be asserted against in this case in the light of the intervening sequestration of the developer? I earlier alluded to the fact that the holder of prior personal right, B, may claim directly from C, the acquirer of the right. Indeed Prof McKerron makes that plain when he states.

'It remains to consider the position where transfer has been passed to the second purchaser. If *C*, when he bought, had knowledge of the prior sale to *B*, there is no doubt as to the position. The authorities, both ancient and modern, are agreed that in such a case *C* is not entitled to retain the land as against *B*. The old authorities allow *B* to recover the *res vendita* direct from *C* by a personal action *in factum* [as opposed to the *rei vindicatio*, only available to the owner], and there is no reason why in a suitable case *B* should not be allowed to adopt this course in the modern law. But in South Africa the usual practice is for *B* to join *A* as co-defendant, and claim as against him an order cancelling the transfer, and as against *C* an order to pass transfer into his (*B's*) name.'[25]

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[24] Scholtens op cit 31.
[25] McKerron op cit 180.

(See also Voet 6.1.20 and *Bowring NO v Vrededorp Properties CC*[26]).

Bowring NO v Vrededorp Properties CC (para 17) put it thus:

'The essential quality of the right that the purchaser acquires from a contract of sale is therefore no different from the right of the beneficiary under a servitude agreement. Both rights are so-called *iura in personam ad rem acquirendam*, ie personal rights to acquire a real right (see eg Van der Merwe *op cit* 86; Badenhorst, Pienaar & Mostert *op cit* 70). In the case of a servitude, application of the doctrine of notice does not require that the transfer of the property to the purchaser be set aside so as to enable the beneficiary under the servitude agreement first to claim registration of the servitude against the seller before the property is retransferred to the purchaser subject to a registered servitude. The beneficiary's claim is allowed directly against the purchaser (see eg *Grant & another v Stonestreet & others* (*supra*) 7). That there is no privity of contract between the beneficiary and the purchaser is not seen as an insurmountable hurdle. Why then, it may in my view rightfully be asked, should the position be any different when the same doctrine is applied in the instance of double sales?'

[31] It thus follows that the absence of contractual privity between Meridian Bay and the prior purchasers is no bar to affording them the right to claim directly from Meridian Bay. The manner of application of the remedy must be determined largely by what is considered to be equitable to all concerned in the circumstances of the particular case (*Bowring* para 18). In this case if both Meridian Bay and the developer are restored to the positions that they occupied prior to the transfer of the disputed sections to the former, then, given the sequestration of the latter, the prior purchasers will have to stand in line with the other creditors in the insolvent estate. Further that may result in a windfall for the creditors of the insolvent to which they may not be entitled. It thus seems to me that this is one of those cases where the curator should be permitted to recover directly from Meridian Bay. I may add that in this case the bondholders were given notice of these proceedings. They advanced no additional argument (preferring instead to make common cause with Meridian Bay) as to why Meridian Bay should not be ordered to transfer the disputed sections directly to the curator.

[32] In the result the appeal must fail and it is accordingly dismissed with costs to be paid jointly and severally by the appellants, the one paying the others to be absolved.

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[26] 2007 (5) SA 391 (SCA) para 14 and 15.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

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