[zRPz]OILWELL (PTY) LTD v PROTEC INTERNATIONAL LTD AND OTHERS 2011 (4) SA 394 (SCA)

Citation 2011 (4) SA 394 (SCA)

Case No

 295/10

Court

 Supreme Court Of Appeal

Judge

 Harms DP, Lewis JA, Ponnan JA, Malan JA and Theron JA

Heard

 March 8, 2011

Judgment

 March 18, 2011

Counsel *EW Dunn SC* (with *I Joubert*) for the appellant.

*P Ellis SC* (with *AP Ellis*) for the first and second respondents.

Annotations

E

F

[zFNz]Flynote : Sleutelwoorde

 G **Exchange control** — Exchange Control Regulations — ‘Capital’ — Meaning — Trademark not ‘capital’ — Currency and Exchanges Act 9 of 1933, s 9 and reg 10(1)*(c)*.

**Exchange control** — Exchange Control Regulations — Transaction to export capital — Treasury permission to enter into transaction — Failure to obtain permission not rendering agreement void — Currency and Exchanges Act 9 of 1933, s 9 and reg 10(1)*(c)*.

[zHNz]Headnote : Kopnota

Regulation 10 of the Exchange Control Regulations provides that:

‘(1) No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose –

 I . . .

*(c)* enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.’

A trademark is not ‘capital’ within the meaning of the term used in the regulation (paragraphs [5], [7] and [15] at 397B–C, 398B–C and J 400G–H).

Failure to obtain prior Treasury consent for an agreement falling under A reg 10(1)*(c)* does not render the agreement void (paragraphs [15], [23], [24] and [25] at 400G–H, 403G, 404A–D and 404E–405B).

[zCAz]Cases Considered

**Annotations:**

Reported cases

 B

Southern Africa

*Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA): referred to

*A-Team Drankwinkel BK en ’n Ander v Botha en ’n Ander NNO* 1994 (1) SA 1 (A): referred to C

*Barclays National Bank Ltd v Brownlee* 1981 (3) SA 579 (D): approved

*Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A): referred to

*Berzack v Nedcor Bank Ltd* [2001] 1 All SA 410 (SCA): referred to

*Botha v Fick* 1995 (2) SA 750 (A): referred to

*Couve and Another v Reddot International (Pty) Ltd and Others* 2004 (6) SA 425 (W): overruled D

*Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA): applied

*Goss v EC Goss & Co (Pty) Ltd and Others* 1970 (1) SA 602 (D): criticised

*Henry v Branfield* 1996 (1) SA 244 (D): criticised

*Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA): referred to

*Nestel v National and Grindlays Bank Ltd* 1962 (2) SA 390 (A): referred to E

*Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA): referred to

*Pottie v Kotze* 1954 (3) SA 719 (A): referred to

*Pratt v First Rand Bank* 2009 (2) SA 119 (SCA) ([2009] 1 All SA 158): referred to F

*Pratt v Firstrand Bank Ltd and Another* [2004] 4 All SA 306 (T): referred to

*R v Shoolman* 1937 CPD 183: referred to

*S v De Blom* 1977 (3) SA 513 (A): referred to

*S v Katsikaris* 1980 (3) SA 580 (A): referred to

*South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) ([2004] 4 All SA 168): referred to G

*South African Reserve Bank v Khumalo and Another* 2010 (5) SA 449 (SCA) ([2011] 1 All SA 26): referred to

*South African Reserve Bank v Torwood Properties (Pty) Ltd* 1997 (2) SA 169 (A): referred to

*Standard Bank v Estate van Rhyn* 1925 AD 266: applied

*Swart v Smuts* 1971 (1) SA 819 (A): referred to.

 H

Australia

*Incorporated Interests Pty Ltd v The Federal Commissioner of Taxation* (1943) 67 CLR 508: referred to.

England

 I

*Lubbock v British Bank of South America* [1892] 2 Ch 198 ([1891–4] All ER Rep Ext 1753): referred to.

[zSTz]Statutes Considered

Statutes

The Currency and Exchanges Act 9 of 1933, s 9 and reg 10(1)*(c)*: see *Juta’s Statutes of South Africa 2009/10* vol 2 at 1-6. J

[zCIz]Case Information

 A An appeal from the North Gauteng High Court, Pretoria (Prinsloo J).

*EW Dunn SC* (with *I Joubert*) for the appellant.

*P Ellis SC* (with *AP Ellis*) for the first and second respondents.

*Cur adv vult.*

 B *Postea* (March 18).

Order

The appeal is dismissed with costs, including the costs of two counsel.

[zJDz]Judgment

 C **Harms DP (Lewis JA, Ponnan JA, Malan JA and Theron JA concurring):**

[1] The trademark ‘Protec’ (sometimes with a device) is registered in many countries but this judgment is concerned only with the South African registration (1987/10291). This word mark is presently D registered in the name of the second respondent, Protec Auto Care Ltd (Auto Care), a company incorporated in the United Kingdom. The appellant, Oilwell (Pty) Ltd (Oilwell), is a local company and seeks an order for the rectification of the trademark register to reflect Oilwell instead of Auto Care as proprietor. Oilwell relies on s 24(1) of the Trade Marks Act 194 of 1993, E which, in brief, provides that, in the event of an entry wrongly made in the register, or of any error in any entry in the register, any interested person may apply to court for the desired relief, which would include rectification.

[2] Oilwell wishes in effect to reverse an assignment of the trademark, F which took place during 1998, when, in terms of a comprehensive agreement between many parties, this trademark, as well as the foreign Protec marks and pending trademark applications, were assigned to the first respondent, Protec International Ltd (International).

[3] During the intervening years relations between the parties (or some G of them) soured. Oilwell and some associates refused to respect the rights of International and a number of orders were made against them in the USA relating to trademark infringement and contempt of court. Locally there is a final order granted during 2002 against Oilwell, interdicting it from infringing the trademark. On the other hand, H International ran into financial difficulties and, as part of what appears to be a settlement, the South African trademark was assigned to Auto Care during 2007.

[4] Oilwell discovered a judgment of Jajbhay AJ in *Couve and Another v Reddot International (Pty) Ltd and Others* 2004 (6) SA 425 (W). The I judgment concerned, inter alia, the validity of an agreement to assign rights to patent applications by a South African entity to a foreign company, which was entered into without the prior consent of the SA Reserve Bank, the agent of the Treasury. *Couve* held that within the meaning of reg 10(1)*(c)* of the Exchange Control Regulations a patent application and, a fortiori, a patent are ‘capital’ and that such an J assignment amounts to the ‘export’ of capital. The regulation provides that ‘no person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury A may impose . . . enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic’.[[1]](#endnote-1)

[5] Relying on this judgment and the fact that International was B registered in Guernsey, Oilwell applied during September 2008 to the North Gauteng High Court for the relief mentioned. Prinsloo J, who heard the case, came to the conclusion that *Couve* was wrongly decided, principally because intellectual property rights are not ‘capital’ within the meaning of the term as used in the regulation, and he dismissed the application with costs. He subsequently granted the necessary leave to C appeal to this court.

[6] Two main issues crystallised as the case unfolded. The first is whether the transaction was covered by reg 10(1)*(c)* and the second concerns the effect of non-compliance with the provision. The third, D prescription, does not arise in the light of what follows. But before these issues are addressed in any detail, it is necessary to refer to the empowering Currency and Exchanges Act 9 of 1933, which was adopted during the Great Depression. Its title, referring to currency and exchanges, gives a general idea of the scope of the Act, as does the long E title: ‘To amend the law relating to legal tender, currency, exchanges and banking.’ The term ‘exchanges’ refers to what is better known as ‘exchange rates’. This appears from the Afrikaans text which speaks of ‘wisselkoerse’. Much of the Act has been repealed, but the important s 9 remains. It empowers the head of State to make regulations ‘in regard to any matter directly or indirectly relating to or affecting or having any bearing upon F

A currency, banking or exchanges’ (s 9(1)). This is the empowering provision under which the Regulations were promulgated.[[2]](#endnote-2)

[7] Turning then to the meaning of reg 10(1)*(c)*, Jajbhay AJ pointed out[[3]](#endnote-3) that the term ‘capital’ is not defined and he adopted the views of B Prof AN Oelofse[[4]](#endnote-4) that, considering the wide wording of the provision and the general objects of the Regulations, ‘capital’ is anything (or everything) with monetary value. The court below, while disagreeing with this view because the interpretation did not take account of the general scheme of the Regulations in the light of the terms of the Act, did not reach any firm conclusion as to its meaning. I, too, do not intend to C define ‘capital’ in this context comprehensively, but will confine myself to the question whether trademarks are within this framework ‘capital’. My conclusion will by parity of reasoning obviously apply to patents, designs and copyright.

[8] As a glance at any number of dictionaries will show, and as D Latham CJ once said, ‘it is impossible to say that capital has a single technical meaning which prima facie should be attributed to the word in any statutory provision’, and that ‘the significance of the word [capital] in a particular case depends on the context in which it is used’.[[5]](#endnote-5)

 E [9] Oilwell’s counsel submitted that the term ‘capital’ includes ‘anything with a monetary value’. But, when asked whether the term in the present context has been used as an economic, financial or accounting concept, counsel readily accepted that it was used in a financial sense. This must be so because the Regulations are supposed to deal with matters relating to currency (banking and exchange rates, the other two matters referred F to in s 9, do not feature). The *Encarta World English Dictionary* (sv ‘capital’) distinguishes between these meanings and states that the meaning of ‘capital’ in a financial context is ‘cash for investment[,] money that can be used to produce further wealth’. As Chitty J explained in another context, capital is not the thing that for the time being represents capital ‘in the sense of being things in which the capital has G been laid out’.[[6]](#endnote-6)

[10] But how does that particular dictionary definition fit in with the Regulations? Perfectly, I would suggest. It appears, for instance, from the definition of ‘affected person’ in reg 1 that the Regulations do not H regard ‘capital’ and ‘assets’ as synonymous concepts, which is what Oilwell’s argument boils down to.[[7]](#endnote-7) ‘Capital’ in this definition in any A event refers to share capital. It also defines the term ‘goods’, which includes ‘any immovable goods or security’ and consequently movables also. There are also other textual indications in reg 10(1) where paras *(a)* and *(b)* deal with the export of ‘goods’, while para *(c)* speaks of the export of ‘capital’. This means, according to ordinary rules of interpretation, B that there must be a difference between ‘capital’ and ‘goods’ and that the terms do not overlap. Further support for this interpretation is to be found in reg 11, which deals with ‘capital issues’ — all about raising money.

[11] Serious anomalies would arise if ‘capital’ in context were to mean C everything with monetary value. Immovable property would then be capital and, although it cannot be ‘exported’, the purchase of such property by a foreign company would amount to the export of the right to capital, something covered by para *(c)*. This would be all the more so when the property is an income-producing property. But it is common D cause that the sale of immovable property to a foreign company is not covered by the provision. The example can be extended to movables with monetary value. A ‘foreigner’ who purchases a movable in South Africa, on Oilwell’s argument, buys a capital item and exports the right to that capital item from the Republic on leaving. This would surprise E many, not only those who hawked vuvuzelas during the Soccer World Cup event but also the Treasury. These examples show that a restrictive interpretation is called for, particularly in view of the fact that any legislation that creates criminal and administrative penalties, as the Regulations do, requires restrictive interpretation.

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[12] It is also useful to refer to the Afrikaans text. Since the Regulations were promulgated in English and Afrikaans at a time when these languages were on a par, the two texts have equal authority.[[8]](#endnote-8) Regulation 10(1)*(c)* uses the term ‘kapitaal’ and ‘uitvoer’ for ‘capital’ and ‘export’. According to the authoritative Afrikaans dictionary, G *Woordeboek van die Afrikaanse Taal*, the term ‘kapitaaluitvoer’ means ‘verplasing van geldkapitaal na die buiteland’ and ‘beskikbaarstelling op die lang termyn van geldmiddele aan die buiteland’, which accords with the financial meaning of ‘capital’ referred to above.

 A [13] Reverting to trademark rights: like all other intellectual property rights they are territorial and akin to immovables.[[9]](#endnote-9) They can therefore not be ‘exported’. But *Couve* held that the rights in patent applications include the concomitant right to receive royalties as capital.[[10]](#endnote-10) This statement contains many misconceptions. A patent application creates B no monopoly. It creates only a priority right and an expectation that a patent may issue. Once the patent issues — and only from the date of grant — patent rights arise.[[11]](#endnote-11) The Patents Act does not mention any right to receive royalties and the ‘right’ to them would be incidental, flowing from a subsequent contract. In other words, a patent does not create a C right to royalties; it is the royalty agreement that does. The flow overseas of royalties and licence fees is in any event controlled by reg 3(1)*(c)* — it may not take place without the Treasury approval. And last, royalties represent earnings or income and not ‘capital’ in any sense of the word. This is confirmed by another aspect of the definition of ‘affected person’: D it also distinguishes between capital and earnings.

[14] Jajbhay AJ also relied for his conclusion, that royalties are ‘capital’, on a provision of the Income Tax Act 58 of 1962, in terms of which the acquisition of a patent or patent application is regarded as a capital E expenditure, and allowed as a reduction in the determination of taxable income (s 11*(g*A*)*). This, too, gives rise to conceptual problems. How something that is capital for purposes of income tax can determine the meaning of the word in unrelated legislation dealing with currency, is not understood. In any event, the fact that the Income Tax Act regards a patent as a capital asset does not mean that royalties are capital. As a F matter of fact, that Act regards royalties and licence fees as ‘gross income’ (s 1 sv ‘gross income’ *(g)*(iii)).

[15] I therefore conclude that the court below was correct in its interpretation of reg 10(1)*(c)* and that the appeal must be dismissed on G this ground. There is, however, another and independent reason why the appeal cannot succeed, and this relates to another mainstay of the *Couve* judgment, namely the finding that the failure to obtain prior Treasury consent for an agreement falling under reg 10(1)*(c)* is fatal to the agreement because it is void. Prinsloo J, in the court below, disagreed. It H will be recalled in this regard that the paragraph states that no person ‘shall’, except with the requisite permission, ‘enter into’ any transaction covered by the provision. As mentioned, failure to comply may amount to a criminal offence punishable by a heavy fine of not exceeding R250 000 and/or five years’ imprisonment (reg 22).

[16] It is necessary to place reg 22 in perspective. The parties to the A assignment did not intend to contravene or circumvent the Regulations.[[12]](#endnote-12) On the contrary, they were concerned that the envisaged transfer of the trademark registration might be conditional on requisite approvals being obtained from relevant national revenue and other authorities, and they all agreed to apply promptly for such approvals and use their best B efforts thereto. It is clear that they all were under the impression that no Treasury consents were required. As a matter of fact, the Exchange Control Manual issued by the Treasury, and which details all the requirements and rulings relevant to the Regulations at the time, made no reference to the assignment of intellectual property rights. It was only two years after the judgment in *Couve* that the manual (which has no C legal standing) was amended to reflect that reg 10(1)*(c)* applied to such agreements. It is therefore unlikely that any of the relevant parties had *mens rea* and, consequently, committed any crime, because the criminalisation of contraventions of, or failures to comply with, any provision of the Regulations in reg 22 requires *mens rea*, as was held by D Rumpff CJ in *S v De Blom* 1977 (3) SA 513 (A). This is especially so where the public was not informed of the requirement.[[13]](#endnote-13) However, this does not mean that a contravention of the Regulations requires *mens rea*: it means only that in its absence the relevant parties may not be punished criminally.

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[17] Reliance on the Regulations in order to escape contractual obligations is not something new. However, as Steyn CJ said nearly 50 years ago, the Regulations are there in the public interest and not to provide ‘an unwilling debtor with a ready instrument for evading liability’, or ‘to grant a selective moratorium to a particular class of defaulting debtors’.[[14]](#endnote-14) F Their purpose, said Trollip JA, is to enable the Treasury to exercise proper control over transactions affecting foreign currency, in order to protect the Republic’s foreign reserves.[[15]](#endnote-15)

[18] Debtors remained undaunted and relied especially on reg 3(1)*(c)* to evade judgment.[[16]](#endnote-16) After a number of conflicting judgments this court G held, in spite of the peremptory language of the provision (‘no person A shall’), that the prior consent of the Treasury was not required in order to obtain a court order for payment. Hoexter JA concluded with these words:[[17]](#endnote-17)

 ‘Embodied in the regulations is a criminal sanction which is designed to B enforce compliance therewith. The penalty prescribed for non-compliance is a stiff one. In my view the Legislature was here content with the said criminal sanction as being sufficient to ensure compliance with reg 3(1)*(c)*.’

[19] The background to this statement is to be found in J Voet C *Commentarius ad Pandectas* 1.3.16 (Gane’s translation) who said this:

 ‘Things done contrary to the laws are not *ipso jure* null if the law is content with enacting a penalty against transgressors.

 . . .

 Nay indeed there is no lack of laws which forbid, and yet do not invalidate things to the contrary, nor impose any penalty upon them. D Hence came into vogue the famous maxim Many things are forbidden in law to be done which yet when done hold good.’

This approach has been adopted in many judgments, more particularly in the leading case of *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274, where Solomon JA also referred to a further statement by E Voet (not as translated by Gane), that an important consideration is whether ‘greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law’. Voet concluded this section with a reference to H De Groot (Grotius to some) *Inleidinge* 1.2.2, where the author, dealing F with the same subject, said that things done contrary to law are only void if the law so expresses itself (‘de wet sulcks uytdruckt’), or if someone’s ability to perform the act has been curtailed, or if the deed ‘heeft een gestadigde onbehoorlickheid’ (translated by Gane via Voet, as ‘if the act performed suffers from some obvious and ingrained disgrace’, but more G correctly from some ‘unremitting impropriety’).

[20] Next to consider is the judgment of Kriek J in *Brownlee* (supra). The case concerned reg 3(1)*(e)*, which deals with the grant of financial assistance to any person in the Republic where security for the financial assistance is furnished by any person resident outside the Republic. H Once again such assistance may not take place without the permission of the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury may impose. Kriek J held that the fact that such financial assistance was given without the consent of the Treasury did not nullify the agreement. He recognised, in quoting I extensively from *Swart v Smuts* 1971 (1) SA 819 (A); and *Pottie v Kotze* 1954 (3) SA 719 (A), that it is really a matter of interpretation, and he A came to this conclusion, in spite of the fact that reg 3 is couched in imperative terms, and in spite of the severity of the penalties in reg 22.[[18]](#endnote-18) Important considerations, to his mind, were that the Treasury consent was in a sense a formality (although not ‘merely’ one), and the fact that the prohibition was not absolute because the Treasury could always have B consented to the conclusion of the transaction.[[19]](#endnote-19) In addition, he said, avoiding the agreement was not necessary to attain the objects of the regulations,[[20]](#endnote-20) and nullity would have resulted in greater inconvenience and impropriety than keeping the agreement alive.[[21]](#endnote-21)

[21] Then came *Henry v Branfield* 1996 (1) SA 244 (D). The case C concerned the purchase of foreign currency without the permission of the Treasury, in conflict with reg 2. Levinsohn J, relying on the reasoning of Kriek J in *Brownlee*, struck the agreement down*.* He did not explain why he in effect overruled a judgment which was binding on him, nor did he justify the use of Kriek J’s reasoning to reach the opposite result. He D simply said that, having regard to the peremptory nature of the prohibition, the legislature not only intended to visit a contravention with criminal sanctions, but also with nullity,[[22]](#endnote-22) something that does not quite accord with the quoted dictum by Hoexter JA in *Barclays National Bank Ltd v Thompson* (supra).

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[22] It would be fair to say that *Couve* refused to follow *Brownlee* for these reasons: the Regulations aimed to protect our reserves and are couched in imperative terms.[[23]](#endnote-23) Bertelsmann J, in the context of another type of transaction, came more or less to the same conclusion, but he left open the important question whether the Treasury could give its consent F after the event.[[24]](#endnote-24)

[23] Although these considerations are important, and although it is arguable that, in spite of Voet’s generalised view, the heftier the penalty, the more likely it is that invalidity is intended, I am unable to agree with G the conclusion reached in *Couve*.

 A [24] In search of the elusive intention or meaning expressed in the Regulations, it is necessary to reiterate that the object of the Regulations in general is to regulate and control foreign currency, and the object of reg 10(1)*(c)* in particular is ‘to control foreign exchange in the public interest and to prevent the loss of foreign currency resources through the B transfer abroad of capital assets held in South Africa’.[[25]](#endnote-25) The Regulations are, accordingly, for the public interest and not to protect any private interests. They were adopted for the sake of the Treasury and not for the sake of disgruntled or disaffected parties to a contract. This is apparent from the penalty provision. But, more importantly, it appears from C regs 22A, 22B and 22C.[[26]](#endnote-26) They provide that any money or goods, in respect of which a contravention has been committed, may be attached by the Treasury; these may be forfeited to the State; and any shortfall may be recovered by the Treasury from not only persons involved in the commission of the offence, but also from anyone enriched or who has D benefited as a result thereof. To add irremediable invalidity to the transaction would amount to overkill and, as Kriek J said, it would lead to ‘greater inconveniences and impropriety’, which is illustrated not only by the facts in *Brownlee*,[[27]](#endnote-27) but also the facts of this case, and even those of *Henry v Branfield*.[[28]](#endnote-28) In addition, transactions falling foul of the E Regulations do not pass De Groot’s test for invalidity.

[25] This does not mean that in the absence of Treasury consent the transaction is enforceable without more. Parties who enter into a contract that may conceivably be hit by the Regulations are, unless the F contract provides otherwise (in this case it did not provide otherwise), both obliged to take the necessary steps to obtain the Treasury’s consent (something expressly agreed to by the parties). This must be so because of the supposition that the parties negotiated in good faith and intended to enter into an effective contract.[[29]](#endnote-29) There is nothing preventing the Treasury from consenting to a transaction ex post facto, a necessary G corollary of the judgment in *Barclays National Bank Ltd v Thompson* (supra). This means that the transaction, absent consent, is not void at the behest or election of one of the parties to it. A party faced with a claim based on a transaction which that party believes is covered by the Regulations can therefore not rely only on the lack of consent to avoid H the claim. The defendant may in appropriate circumstances file a dilatory plea pending the determination by the Treasury of its application A for the necessary consent.[[30]](#endnote-30) Once the Treasury refuses to grant consent, the defendant would be entitled to resist the claim on that ground. If performance took place without consent, neither party may claim restitution.[[31]](#endnote-31) It would then be for the Treasury to invoke regs 22A, 22B and 22C to undo the effect or proposed effect of the transaction.

 B

[26] In the result, the appeal is dismissed with costs, including the costs of two counsel.

Appellant’s Attorneys: *Adams & Adams*, Pretoria; *Honey Attorneys*, Bloemfontein.

First and Second Respondents’ Attorneys: *Mark W Nixon*, Pretoria; C *Hill McHardy & Herbst Inc*, Bloemfontein.

1. The whole of reg 10(1) reads as follows:

**'Restriction on export of capital**

(1) No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose:

*(a)* export from the Republic during any period of twelve months a total quantity of goods which exceeds in value twenty rand or such greater amount as the Treasury may determine, if:

(i) no payment for such goods has been or is to be received in the Republic from a person outside the Republic; or

(ii) such goods are exported at a price which is less than the value thereof; or

(iii) the period within which payment for such goods is to be made exceeds six months from the date of shipment from the Republic or such shorter period as an authorised dealer may determine in respect of such goods;

*(b)* take out of the Republic goods, including personal apparel, household effects, and jewellery which have a value in excess of six hundred rand or of such greater amount as the Treasury may determine;

*(c)* enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.' [↑](#endnote-ref-1)
2. It is debatable whether all of s 9 would survive constitutional scrutiny — and I refer specifically to s 9(3) which empowers the head of State to suspend any Act of Parliament by means of regulation — but that is by way of an aside. [↑](#endnote-ref-2)
3. At 430E–H. [↑](#endnote-ref-3)
4. *Suid-Afrikaanse Valutabeheerwetgewing* (1991) p 68–9. [↑](#endnote-ref-4)
5. *Incorporated Interests Pty Ltd v The Federal Commissioner of Taxation* (1943) 67 CLR 508 at 515. [↑](#endnote-ref-5)
6. *Lubbock v British Bank of South America* [1892] 2 Ch 198 ([1891–4] All ER Rep Ext 1753) at 202, quoted by John B Saunders *Words and Phrases Legally Defined* 3 ed (1988) sv 'capital'. [↑](#endnote-ref-6)
7. "'**Affected person**" means a body corporate, foundation, trust or partnership operating in the Republic, or an estate, in respect of which —

(i) 75 per cent or more of the capital, assets or earnings thereof may be utilised for payment to, or to the benefit in any manner of, any person who is not resident in the Republic; or

(ii) 75 per cent or more of the voting securities, voting power, power of control, capital, assets or earnings thereof, are directly or indirectly vested in, or controlled by or on behalf of, any person who is not resident in the Republic.' [↑](#endnote-ref-7)
8. LC Steyn *Die Uitleg van Wette* 5 ed p 143, with reference to *R v Shoolman* 1937 CPD 183 at 186–187. [↑](#endnote-ref-8)
9. *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA). [↑](#endnote-ref-9)
10. At 433B–C. [↑](#endnote-ref-10)
11. Patents Act 57 of 1978 ss 44 and 45. [↑](#endnote-ref-11)
12. *A-Team Drankwinkel BK en 'n Ander v Botha en 'n Ander NNO* 1994 (1) SA 1 (A) at 11B–E. [↑](#endnote-ref-12)
13. At 528D–E. [↑](#endnote-ref-13)
14. *Nestel v National and Grindlays Bank Ltd* 1962 (2) SA 390 (A) at 395H–396A. [↑](#endnote-ref-14)
15. *S v Katsikaris* 1980 (3) SA 580 (A) at 590A; also quoted by Kriek J in *Barclays National Bank Ltd v Brownlee* 1981 (3) SA 579 (D) at 584A. [↑](#endnote-ref-15)
16. It reads:

'(1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose —

 . . .

*(c)* make any payment to, or in favour, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person . . . .' [↑](#endnote-ref-16)
17. *Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A) at 795I–J. [↑](#endnote-ref-17)
18. At 583B–F. [↑](#endnote-ref-18)
19. At 583F–H. [↑](#endnote-ref-19)
20. At 584E–F. [↑](#endnote-ref-20)
21. At 584H. [↑](#endnote-ref-21)
22. At 250B–D. [↑](#endnote-ref-22)
23. At 438C–D. [↑](#endnote-ref-23)
24. *Pratt v Firstrand Bank Ltd and Another* [2004] 4 All SA 306 (T). The judgment dealt with an exception. During the subsequent trial it was found that the lack of consent had not been established. This finding was upheld on appeal: *Pratt v First Rand Bank* 2009 (2) SA 119 (SCA) ([2009] 1 All SA 158). [↑](#endnote-ref-24)
25. *Berzack v Nedcor Bank Ltd* [2001] 1 All SA 410 (SCA) para 3. [↑](#endnote-ref-25)
26. *South African Reserve Bank v Torwood Properties (Pty) Ltd* 1997 (2) SA 169 (A); *South African Reserve Bank v Khumalo and Another* 2010 (5) SA 449 (SCA) ([2011] 1 All SA 26). [↑](#endnote-ref-26)
27. *Brownlee* at 584H. But see for a different view: *Pratt v Firstrand Bank Ltd* [2004] 4 All SA 306 (T) para 48. [↑](#endnote-ref-27)
28. For a critical analysis of the facts: 1996 *Annual Survey of SA Law* 205–6. [↑](#endnote-ref-28)
29. *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) ([2004] 4 All SA 168) para 32. [↑](#endnote-ref-29)
30. A dilatory plea will not be possible, for instance, under reg 3(1)*(c)* as was held in *Barclays National Bank Ltd v Thompson* supra*.* [↑](#endnote-ref-30)
31. Compare *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) paras 45–47. Oilwell's argument that its claim was not one for restitution — relying on *Botha v Fick* 1995 (2) SA 750 (A) — is not acceptable. Its underlying cause of action, based on the alleged invalidity of the assignment, remained an enrichment action as was recognised in *Henry v Branfield.* This is so because ownership passed in the light of the abstract theory of transfer of ownership, which does not require a valid underlying transaction for passing of ownership: *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) paras 20–22; and compare *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA). Rectification of the register was but a formal way of accomplishing restitution. Once that is so, the *par delictum* rule may take effect, something not appreciated in *Goss v EC Goss & Co (Pty) Ltd and Others* 1970 (1) SA 602 (D). [↑](#endnote-ref-31)