SOUTH AFRICAN LAW COMMISSION

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(for comment before 24 April 1987)

PROJECT 62

PROTECTION OF A PURCHASER OF SECURITIES

March 1987

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)
The Honourable Mr Justice H J O van Heerden (Vice-Chairman)
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PREFACE

This working paper has been prepared by Mr Peter S G Leon on behalf of the Johannesburg Stock Exchange. Mr Leon and the Johannesburg Stock Exchange have kindly given their permission for it to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to furnish persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests could reach the Commission not later than 24 April 1987. Please refer to the previous page for the address to which correspondence should be directed.

The researcher responsible for the project who may be contacted for further information is Mr M Schutte.

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SUBMISSION BY THE JOHANNESBURG STOCK EXCHANGE ON THE NEED TO CHANGE THE LAW TO PROTECT PURCHASERS OF SECURITIES ACQUIRED THROUGH THE JOHANNESBURG STOCK EXCHANGE

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Section 1

Introduction and summary

1.1 The Johannesburg Stock Exchange (JSE) today is a very different creature from that which it was a decade ago or, indeed, in 1947 when the first Stock Exchanges Control Act was passed. Internationally, the development of ever more sophisticated data systems, new financial instruments and the globalisation of financial markets has turned the financial services industry into a veritable global village. South Africa has not been left behind in this process of change; indeed the evolution of a gilts market, the introduction of clearing houses for equities and gilts, together with developing technology in the electronic data processing field are all testimony to this. In one significant respect, however, the JSE lags far behind its fellow bourses in London and New York; principally through a watershed Appellate Division judgment in 1975, South Africa retains a uniquely classical fidelity towards an owner's right to recover his property by "vindication" wherever he may find it and against whomever may hold it, notwithstanding the fact that the ultimate purchaser acquired the securities in good faith and for value.

1.2 The purpose of this report is to illustrate that in the context of shares and gilts traded on the JSE, this approach is not only internationally discordant, but is, more importantly, potentially explosive. When one considers that the JSE is currently transacting some R6 billion in equities and some R51 billion in gilts annually, and when regard is had to the fact that the law presently allows any owner of shares or gilts an unlimited right of vindication against wholly innocent third parties, the nature of this

problem will be appreciated. The combination of an enormous volume of transactions on the JSE and the practice (especially in the gilts market) of consolidating securities on larger block certificates (followed by subsequent "splits") means that not only will the original owner of securities in practice find it difficult to trace his securities successfully, but as the vindicatory action requires such owner to identify his securities, institution of any action would require unravelling a complex network of transactions. This may not be possible because securities are simply not identifiable and have not been identifiable since the Securities' Transfer Act, 1965 removed the need for distinctive numbering. If followed to its logical concusion chaos could ensue on the market, especially in relation to gilts, in the aftermath of attempting, but not succeeding, to undo all previous transactions.

1.3 It is thus the JSE's belief that the law is presently antiquated, dangerous and inequitable. For while the vindicatory action allows the owner of securities (in theory) to vindicate his property wherever he may find it, it does not take account of the fact that the very nature of the JSE market will invariably and inevitably result in a third party acquiring such person's securities without notice of any defect. It is, in the JSE's view, wholly inequitable that such third party be exposed to the owner's vindicatory action when he has acquired securities in good faith and for value. It is our submission that in these circumstances, the purchaser must acquire an indefeasible title (as is the case in the New York and London stockmarkets).

1.4 We are mindful of the fact that the unfortunate person who is unlawfully deprived of ownership of his securities should not be left entirely without a remedy. However, even if the law were to be changed as we propose, this would not

be the case. For such erstwhile owner would still be entitled to apply for rectification of the company register and seek damages against the company if it has acted negligently. Moreover, where the owner's broker had himself acted culpably, such owner would have a substantial claim against the JSE Guarantee Fund set up, inter alia, for this purpose.

1.5 This report accordingly postulates that the Stock Exchanges Control Act, 1985 be amended to accord an indefeasible title to the bona fide purchaser of securities who acquires such in good faith, for value and who accordingly is not party himself to any illegality nor has notice of any claim affecting the securities. With this in mind, the report has been divided into the following sections :

1.5.1 Section 2 provides some background to the volume and nature of transactions on the JSE at the present time;

1.5.2 Section 3 deals in some detail with general principles of common law, from which it will be noted that the legal principle that no one can acquire more than he receives means, in the context of the ownership of securities, that an innocent purchaser cannot acquire an indefeasible title to securities even if value has been given and such person takes them without notice of any pre-existing defect. Although the owner's vindicatory action is subject to the legal "defences" of the exceptio doli and estoppel, in practice, these defences are nugatory. In the U.S.A. and the U.K, an innocent bona fide purchaser who acquires securities for value, would acquire indefeasible title. While this is clearly not the case in South Africa, certain statutory exceptions have already been made in relation to the law of insolvency, so the proposal now made by the JSE is not by any means unprecedented;

1.5.3 Section 4 deals with the common law position in relation to stock exchange transactions and accordingly illustrates how the "defence" of estoppel would be of no value to an innocent purchaser of securities in the circumstances outlined above and shows the requirement that the owner must identify his lost property makes the vindicatory action illusory in the context of the spider's web of multiplications and divisions surrounding most JSE transactions. Illustrative examples are cited;

1.5.4 Section 5 describes the owner's alternative remedy (which would not be affected by the proposed legislative change) in terms of Section 115 of the Companies Act, 1973, for rectification of the company register;

1.5.5 Section 6 provides an outline of how the proposed legislative change would affect the JSE Guarantee Fund, while Annex "A" to the report sets out the liabilities of the Fund as they are detailed in section 15 of its Rules;

1.5.6 Section 7 of the report introduces the proposed legislative change to the Stock Exchanges Control Act, 1985, and Annex "B" sets out a draft of the proposed section 29(A) to the Stock Exchanges Control Act, 1985.

1.6 It goes without saying that the JSE and the State have a common interest in maintaining a sound securities industry through a healthy secondary market; the law as it presently stands is inimical to the smooth development of such market by placing innocent purchasers at risk and the whole market in jeopardy under the threat of the owner's vindicatory action; with the added danger that such action may not, in practice, be capable of implementation.

Section 2

The JSE in 1986

2.1 The JSE is the only licensed stock exchange in South Africa. It is a market for dealings in the securities of 570 listed companies or other issuers by 43 broking firms around the country.

2.2 During 1985 the equities market showed an annual turnover of R6 372 000 000 in dealings in listed equities and R51 220 000 000 (at nominal values) in dealings in gilts.

2.3 The annual number of transactions in listed equities is over 500 000 mainly concentrated in some 200 share counters and some 75 000 in gilts centred on less than a dozen active gilt stocks.

2.4 A clearing house was set up for transactions in equities in 1967 and a separate gilt clearing house was established in 1984. "No offset" transactions (ie transactions specially designated for settlement outside the clearing house settlement system) have become a rarity, although such a transaction was the subject of the decision in Gelria.[1]

2.5 Institutional "users" have been permitted access to the gilt clearing house for clearing of their transactions in

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(1) Oakland Nominees (Pty) Limited v Gelria Mining & Investment Co (Pty) Limited 1976(1) SA 441 AD.

gilts. The JSE guarantees good delivery of scrip (and payment) to users who agree to receive scrip through the gilts clearing house.

2.6 The JSE Guarantee Fund was set up in 1947 to afford some measure of protection for clients of brokers who suffered loss if their broker defaulted. The Fund has grown to approximately R26 000 000 at current market values. Claims against the Fund arising out of compliance by clients with the provisions of sections 22 to 27 of the Act are unlimited;(2) other claims are limited to R1 million per defaulting broking firm for transactions in gilts and a further R1m per defaulting broking firm for transactions in securities other than gilts or such lower amount as will, together with any dividends received out of the estate of the defaulting broker, be sufficient to discharge all claims against that broker.(3)

2.7 The JSE is investigating the establishment of a market for "futures" and "traded options" to accord with world trends. Such a market would, as everywhere else in the world, be heavily dependent on the reliability to be placed on scrip lodged as security or "cover".

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(2) Rule 15.2.1 of the JSE Guarantee Fund Rules.

(3) Rule 15.2.3.

Section 3

The common law position in general

3.1 South African law jealously guards the rights of ownership. Nemo dat quod non habet is the legal maxim which applies to prevent a purchaser receiving ownership of goods purchased from a seller who does not own the goods sold :

> "Therefore, neither a thief nor any other person who is not the owner (e.g. a hirer or a borrower) can transfer the right of ownership to another person, irrespective of whether the person who acquires the thing from a thief or a hirer acts in good or in bad faith and gives value for it or whether the transferor himself was a bona fide possessor (that is a person who genuinely believed himself to be the owner of the thing) or genuinely but mistakingly believed that he was authorised by the owner to dispose of it. Such extensive protection of the right of ownership is based on the assumption that an owner in fact exercises and retains control over his property and it is justified if the owner loses control over it without his fault and against his will."(1)

3.1.1 This general principle also applies in English law(2) where it has, in fact, been afforded statutory recognition.(3)

3.2 In view of the growth over the centuries, in the quantity, value and complexity of commercial transactions, the realisation arose in many overseas legal jurisdictions of the need to protect the rights of an innocent purchaser:

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(1) H. Silberberg and J. Schoeman, The Law of Property, (2nd ed., 1983) at 286.

(2) Whistler v Forster (1863) 14 CB(NS) 248; Banque Belge v Hambrouck, [1921] 1 KB 321 (CA).

(3) Section 21 of the Sale of Goods Act, 1979.

> "Most sales of goods are made either by their owner or by his duly authorised agent; but sometimes the seller is neither the owner nor authorised by the owner to sell. He may be an agent who has exceeded his authority, e.g. by selling without securing his principal's prior approval to the terms; or a buyer who, having received possession from his seller, has wrongfully re-sold the goods before himself acquiring title; or a thief who has stolen and disposed of them before they have been traced. In all these cases the question arises whether the owner can recover his property and, if so, on what terms, or whether, on the other hand, the person into whose possession the goods have come is entitled to retain them."(4)

Protection of innocent purchasers has also been recognised by some academic commentators in South Africa, where the view has been expressed that the common law casts too heavy a burden on bona fide third parties acquiring property ex causa onerosa from persons whom the owner has entrusted with his property and the suggestion has been made that their protection should, in the interests of fairness, be extended.(5)

3.3 Where property is stolen and re-sold, someone will be exposed to the risk of loss. There is also the question of who should bear the risk: the owner or the innocent purchaser? South African common law has always provided a balance as between the remedies of an owner, on the one hand and the defences available to an innocent purchaser, on the other hand. In South Africa an owner's right to "vindicate" (that is recover his property by legal action) is balanced by the innocent purchaser's defence of estoppel, where the owner's attempt to vindicate will be defeated if the owner in some way induced the innocent

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(4) R.M. Goode, Commercial Law, (1st ed., 1982) at 391.

(5) See Silberberg and Schoeman, op cit, 286/287.

purchaser to believe that the purchaser would get ownership. However, in the United Kingdom, the law has tended to develop more towards protecting the innocent purchaser:

> "In principle, the protection of the innocent buyer is a more sensible and more realistic approach. If the owner of goods voluntarily parts with possession of them he takes upon himself certain risks. He can make his own judgment as to the creditworthiness of the party to whom he gives possession, and if his trust turns out to be ill-founded he ought not to put the consequences of his own mistaken judgment onto the shoulders of a blameless third party."(6)

3.4 The South African remedy of vindication enables an owner who can identify his property to recover possession of that property from an innocent purchaser or from any person in possession of the property through an innocent purchaser,(7) eg a lender holding that property as security for a loan to the innocent purchaser. The owner's right of vindication is dependent upon the ability of the owner to identify his property and prove his ownership of it. If the owner cannot do that, his vindicatory action would fail.(8)

3.5 South African common law does not permit a "blameworthy" owner from vindicating against an innocent purchaser. The purchaser would have defences under the legal rules of estoppel and also under the exceptio doli - a defence derived from the inherent equitable jurisdiction of the Roman praetor. This latter remedy is, unfortunately, so

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(6) R.M. Goode, op cit, 393.

(7) Chetty v Naidoo 1974 (3) SA 13 (AD).

(8) R.W. Lee and A.M. Honoré Family, Things and Succession, (2nd ed., 1983), para. 348.

undeveloped in our law that it can be practically disregarded as there is no judicial consensus as to the exact scope of the defence.

3.5.1 For the exceptio doli to succeed it must be shown that its enforcement would cause some great inequity and would amount to unconscionable conduct on the plaintiff's part.(9) The decided cases do not, unfortunately, expand on this principle.(10)

3.5.2 For a purchaser to succeed on the defence of estoppel he must show that the owner made a representation, negligently in the circumstances, upon which the innocent purchaser relied and which was the cause of the purchaser acting to his detriment.(11) Thus if the owner confirms his agent's authority to sell on

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(9) See Zuurbekom Limited v Union Corporation Limited 1947 (1) SA 514 (AD) at 537.

(10) In Aris Enterprises (Finance) (Pty) Limited vs Waterberg Koelkamers (Pty) Limited 1977(2) SA 436(T) Coetzee J could not attach a precise meaning to Tindall J A's phrase "some great inequity" in Zuurbekom. Jansen J A in Paddock Motors (Pty) Ltd v Igesund 1976(3) SA 16(AD) placed a restrictive interpretation on the defence, while the same judge in North Vaal Mineral Company Limited v Lovasz 1961(3) SA 604(T) held that the exceptio could not have its foundation merely in what a court "considers to be harsh, unfair, unjust or inequitable". Holmes J A in Oakland Nominees (Pty) Limited v Gelria Mining and Investment Company (Pty) Limited 1976(1) SA 441 (AD) did no more than recognise the existence of the defence by stating that the owner would be precluded from vindicating where there were "compelling considerations of fairness within the broad concept of the exceptio doli".

(11) Oakland Nominees (Pty) Limited v Gelria Mining and Investment Company (Pty) Limited 1976 (1) SA 441 (AD) at 452.

his behalf and the agent misappropriates the proceeds of the sale the owner is bound by his representation and may not deny the agent's authority to act on his behalf.

3.5.2.1 The Courts have recognized that there is a need to extend the narrow limits within which estoppel operates especially in regard to the requirement of negligence. Thus, Steyn CJ has stated :

> "Thereby I do not wish to say that estoppel in a rei vindicatio necessarily and in all circumstances can only be based on fault...the case would be sufficiently connected with the more extended application of the exceptio doli to justify estoppel without fault on convincing grounds of fairness".(12)

3.6 It is interesting to note that the United Kingdom has gone further by introducing, inter alia, the following statutory and common law exceptions affording protection to innocent purchasers -

3.6.1 where a bona fide private purchaser buys a motor vehicle, which is the subject of a hire purchase agreement, from a seller who is not the owner, the innocent purchaser will obtain good title and become the owner of the vehicle;(13)

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(12) See Johaadien v Stanley Porter Paarl (Pty) Ltd 1970(1) SA 394(AD) at 409.

(13) Schedule 4, para 22 of the Consumer Credit Act 1974.

3.6.2 where goods are sold in market overt (open market), according to the usage of the market, the purchaser acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.(14) The definition of "goods", however, in section 61 of the Sale of Goods Act excludes, inter alia, "things in action", which, according to Chalmers(15), includes scrip and shares;

3.6.3 It would seem that provided an unauthorised transfer of shares is in proper form it would pass title to such shares to the transferee, as the transferee would, on registration of transfer, become the legal owner of the shares and, as a bona fide purchaser of the legal title to the shares, without notice of any defect in title, be able to take free of any pre-existing equitable interest.(16)

3.6.3.1 Gower(17) elaborates on this conclusion by stating :

> "... this result is only reached by a combination of two principles, first that any interest in the shares other than that of absolute ownership is treated as equitable only, so that it cannot bind a bona fide purchaser of the legal interest and secondly estoppel. The former principle makes registration essential to protection, for absolute ownership cannot be obtained without it .... The second, the estoppel principle, carries

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(14) Section 22 of the Sale of Goods Act 1979.

(15) M. Chalmers, Sale of Goods, (18th ed., 1981) at 267.

(16) Snell, Principles of Equity, (27th ed., 1973) at 46.

(17) L.C.B. Gower, Principles of Modern Company Law, (4th ed., 1979), at 458/459.

still further the quasi-negotiability of a registered transfer by preventing, in some circumstances, the registered owner from setting up his legal title. But he can be estopped in this way only as a result of his own conduct - the delivery of an executed transfer. If a transfer is stolen from him, not even a bona fide purchaser who gets on the register can prevail against him and to this extent the full quality of negotiability is never attained".

3.7 In the United States, Article 8 of the Uniform Commercial Code, ("UCC") has managed to produce a set of provisions which "fairly balance the conflicting interests of the owner and the innocent purchaser".(18) The effect of sections 8-301/3 of the UCC is that a bona fide purchaser of a security(18a) acquires an indefeasible title to such security upon delivery; provided that he takes it for value, without notice of any "adverse claim" and is not party to any illegality himself. Consequently, unless a purchaser is deemed to have notice of an adverse claim in terms of section 8-304 (in circumstances which are not relevant in the present case), a bona fide purchaser for value may acquire an indefeasible title to the security, notwithstanding the fact that it is stolen and would thus have an absolute defence to any vindicatory action by the true owner.

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(18) R.M. Goode, op cit, 393.

(18)(a) Clause 8.301 of the UCC defines bona fide purchaser as :

> "... a purchaser for value in good faith and without notice of any adverse claim who takes delivery of a security in bearer form or of one in registered form issued to him or indorsed to him in blank."

3.8 The Netherlands, at the time of the reception of Roman Law in the sixteenth century, appreciated the vulnerable position of the purchaser in open market transactions. One instance where an owner of stolen movables was denied a rei vindicatio was where those goods had been sold on a public market. Voet thus remarked :

> "That is with the object of assisting commercial transactions, so that buyers may not approach a purchase rather nervously owing to their being bound after coming in good faith by another's property to undertake the risk of the price, though generally they are not mixed up in any negligence. It was thought to be burdensome to buyers and well nigh impossible for them to search inquisitively into the condition and uprightness of foreigners who attend by way of trade and display property for sale.(19)

In an old Transvaal case(20), this principle was applied to protect a purchaser who had bought stolen property on an ordinary municipal market and the Appellate Division appears to have left open the question of whether it is still applicable in our law today.(21)

3.9 In South Africa, too, statutory exceptions have been made to the nemo dat rule -

3.9.1.1 a sale of goods in execution by the messenger of the court cannot be impeached where the purchaser has bought in good faith and without notice of any defect;(22)

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(19) Voet, VI. 1. VIII. (Gane's translation).

(20) Retief v Hamerslach 1 SAR 171.

(21) See the comments of Steyn CJ in Johaadien v Stanley Porter Paarl (Pty) Limited 1970 (1) SA 394 (AD) at 408.

(22) Section 70 of the Magistrate's Courts Act 32 of 1944.

3.9.1.2 an owner cannot vindicate his goods from a purchaser who buys on a sale at a liquidation auction;[23]

3.9.1.3 on the insolvency of a purchaser under an instalment sale transaction the owner loses ownership of the goods which pass to the purchaser's insolvent estate, but acquires a hypothec over the goods in question; thus becoming a secured creditor for the outstanding balance.[24] In view of this, it is clear that such owner cannot bring any vindicatory action against the creditor, trustee, or any third party who obtains possession of the goods;[25]

3.9.1.4 a purchaser, who purchases land in terms of a contract which is subject to the provisions of the Alienation of Land Act, 68 of 1981, from another person who is not the owner of that land is entitled, subject to certain conditions, to claim transfer of the land.[26]

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(23) Section 36 of the Insolvency Act 24 of 1936.

(24) See C. Smith, The Law of Insolvency (2nd ed., 1982) 165 to 168 and s 84 of the Insolvency Act.

(25) P. Aronstam, Consumer Protection, Freedom of Contract and the Law, (1st ed., 1979), at 251.

(26) It is submitted that s 18 of the Alienation of Land Act, 1981, read with the definition of "remote purchaser" in s 1 supports this conclusion.

3.10 The question to be considered is whether the absolute preservation of proprietary rights should be at the expense of commercial transactions. It is submitted that the increasing dynamic evidenced by commercial markets abroad has required those markets to adapt their legal systems in an attempt to strike a pragmatic balance between the outright protection of ownership and commercial reality. As will appear from section 4, however, the same cannot be said of South Africa.

Section 4

The common law position in relation to stock exchange transactions

4.1 It is arguable that it is unfair to the innocent purchaser (and restricts the proper development of commercial transactions) that South African common law should favour the rights of the owner, as against the rights of the purchaser, even where the property sold has been stolen. As will be apparent from section 3, the relevance of this to stock exchange transactions in South Africa is that a bona fide purchaser of securities cannot acquire an indefeasible title to those securities notwithstanding the fact that he gave value for such securities. Perhaps the argument in favour of the right to vindicate is influenced by the knowledge that the defences of estoppel and the exceptio doli will prevent the abuse of that right. However, as illustrated below, these defences operate within narrow confines and it surely becomes untenable for the owner's right of vindication to exist where the innocent purchaser has, in reality, no such defence.

4.2 The following paragraphs illustrate that the innocent purchaser's "defence" of estoppel is entirely illusory in normal straightforward stock exchange transactions. This was indeed found to be the case in Gelria[1] where the essential elements for the defence of estoppel were set out in some detail. Holmes JA held that -

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(1) Oakland Nominees (Pty) Limited v Gelria Mining & Investment Co (Pty) Limited 1976(1) SA 441(AD) at 462.

"1. There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it.

2. The representation must have been made negligently in the circumstances.

3. The representation must have been relied upon by the person raising the estoppel.

4. Such person's reliance upon the representation must be the cause of his detriment."(2)

It must be remembered that, in regard to stock exchange transactions, an innocent purchaser would find it extremely difficult to prove negligence on the part of the true owner of the securities and accordingly succeed on the defence of estoppel in the normal case where securities are entrusted by the owner to a broker for the purposes of sale.

4.3 The Gelria case can be regarded as a watershed in the development of the law relating to ownership as applied to stock exchange transactions. It became obvious, as a result of Gelria, that the owner's right to vindicate was a harsh remedy indeed where the disposal of shares took the form of a transaction on the open market : ie the JSE. Galgut J, in the court a quo, appreciated this point, stating :

> "In these circumstances the effect of granting to the owner of shares the right to vindicate his shares, where the broker or one of his employees has caused a nominee company to dispose of his shares without authority may well cause great difficulties, if not near chaos, in trading on the J.S.E."(3)

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(2) Ibid, 452.

(3) Oakland Nominees (Pty) Limited v Gelria Mining & Investment Co (Pty) Ltd (Unreported WLD decision) at 36.

The Appellate Division, however, acknowledged that although the concept of "ownership" may, juristically, not be accurate in relation to the rights of the person in whom shares vest[4] yet "for convenience the descriptive labels of 'owner' and 'ownership' will be retained in this judgment."[5] The truth of the matter is, however, that the Court went on to apply the law of ownership as if shares were used cars!

4.4 In Gelria the transaction was marked "no offset" so that the actual shares sold in the transaction were delivered to the broker who bought them. Normally, however, (as illustrated in 4.10 and 4.11), the purchaser will not receive the exact shares sold by the seller. In such a case the owner is faced with the difficulty of identifying his shares to exercise his right to vindicate successfully; once again emphasising the inappropriateness of applying the ordinary principles of ownership to stock exchange transactions.

4.5 It has been held that a purchaser of shares in a stock exchange transaction is not entitled to receive the actual shares sold by the seller. He can only expect to receive "equivalent" shares.[6] It frankly does not matter that a purchaser should receive shares notionally numbered

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(4) Oakland Nominees (Pty) Limited v Gelria Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (AD) at 451 A-B.

(5) Ibid, 447.

(6) Oakland Nominees (Pty) Limited v Gelria Mining & Investment Co (Pty) Ltd (WLD) at 36-37; see also, West v Pollak and Freemantle 1937 TPD 64.

501 to 600 in a particular company when the seller sold shares notionally numbered 201 to 300. As long as the seller sells 100 shares and the buyer receives 100 shares, both parties have succeeded in their expectations. In practice, because of the intervention of modern developments such as cleaning systems, it is most unlikely that the identical shares sold will be delivered to the purchaser.

4.6 The true legal nature of a straightforward stock exchange transaction can be illustrated diagramatically as follows :

where a client, C1, instructs his broker, B1, to sell a given quantity of shares for a given price for delivery on a given date, B1 sells to another broker, B2, on the trading floor of the JSE and B2 buys the shares for his client, C2, who has instructed B2 to purchase that quantity of shares at that price.

4.7 In the above example no privity of contract exists as between C1 and C2. B1 may have orders to sell identical parcels of shares at the same price for any number of sellers on the same day. Similarly B1 may enter into sale transactions with any number of different brokers for identical parcels of shares at the same price on the same day. Again B2 may have purchase orders for identical parcels of shares at the same price for any number of purchasers on the same day. When B1 concludes a deal with B2, a sale agreement comes into effect between the two brokers. Each broker will "book" the transaction to his respective client, who will then be notified that his

broker has "bought for you" or "sold for you" the specified shares at the specified price.

4.8 The issue of brokers' notes by B1 to C1 and by B2 to C2 has the effect of binding C1 and C2, notwithstanding the absence of privity of contract between them, to support the actions taken by their broker agents, respectively. Within 7 business days C1 has in terms of the Stock Exchanges Control Act, 1985 to deliver the shares in negotiable order to B1 and C2 has to pay the price to B2. The brokers' notes inform the clients that brokers have executed their mandates to sell or buy, as the case may be. The clients are thereafter not permitted to withdraw without penalty and they must deliver the scrip or pay, as the case may be, failing which their broker may sell out against his purchasing client or buy in against his selling client, as the case may be.(7)

4.9 If the JSE clearing house system did not exist, delivery would have to be made, in the above example, by CI to B1 and by B1 to B2, in whom ownership of the shares would then vest. The shares would come into B2's "pool". It is only when B2 "pins up" or allocates the shares out of his pool to C2 that C2 becomes the owner of the required number of shares.(8) B2 would then lodge the scrip with the transfer secretaries of the issuer company for the shares to be transferred into the name of C2. On receipt of the new share certificate, B2 would then deliver it to C2. B2 may have to "split" a certificate where, for example, he allocates a share certificate for 500 shares to 5 different clients, each purchasing 100 shares in the same company.

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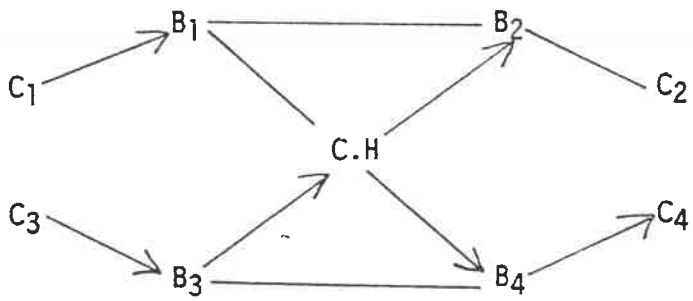
(7) ss. 22 and 25 of the Stock Exchange Control Act, 1985.

(8) JSE Rule 5.70.8.1

4.10 The existence of the clearing house settlement systems for equities and gilts complicates the issues. The purpose of a clearing house is to record all transactions (which is done by computer) and, at the end of each trading week, to work out a "net delivery" of securities of any given issuer which must be made by any one broking firm to other broking firms. The effect of this settlement system is that B2, who purchased securities in the above example from B1, may in fact receive delivery of the scrip from B3 or from a combination of other brokers, eg. one-third from B3 and two-thirds from B4.

4.11 The following example depicts diagramatically the effect of delivery through a clearing house :



where C1 and C3 are sellers and C2 and C4 are buyers. B1 sells to B2 and B3 sells to B4 during a given settlement period. The clearing house instructs B1 to deliver to B4 and instructs B3 to deliver to B2. Even if privity of contract did exist as between C1 and C2 and as between C3 and C4, the above example illustrates how C4 could receive delivery of securities put into the market as a result of the sale transaction entered into on C1's instructions. The securities received by B4 for C4 may or may not be the actual securities delivered by C1 to B1.

4.12 What is then the position if a thief, T, steals C1's share certificate, forges a transfer deed and delivers them to B1 and gets paid out? When C1 discovers the theft (which might take several months, during which time the same shares could have been resold many times!) he may identify those shares (by tracing the registrations of transfer away from his stolen share certificate) in the hands of C4 (or subsequent purchasers). He may then vindicate those shares by instituting action against C4. What chance does C4 have of establishing a defence of estoppel? For that matter what chance would C2 have had if delivery had been made to B2 for C2? C4 may have lodged the shares with his bank as security for a loan, in which case what does the vindication of shares do to the bank's security?

4.13 After surrendering his shares, C4 must have a common law remedy - but against whom? Against T (for what that is worth)? Certainly B4 has not fulfilled his mandate to deliver shares purchased, so C4 would be entitled to delivery of new shares from B4. B4 in turn has a right of recourse against B1, who put the defective scrip into the market. B1 in turn would have recourse against T (for what it is worth) for fraud and might even have a right of action, in certain circumstances, against C1.

4.14 The illusory nature of the true owner's <u>rei vindicatio</u> is vividly illustrated if the example cited in 4.11 is adapted from an equity to a gilt transaction. Assuming that the initial factors in 4.11 and 4.12 are present, but that C1 in fact is the seller of a RSA stock certificate carrying a nominal value of R1 000 000. The certificate is stolen by T, who forges a transfer deed and delivers it and the stock certificate to B1. Unfortunately for C1 the theft and loss of his certificate is only discovered when he fails to

receive an interest payment some six months later. By this stage the certificate has been consolidated on to a block certificate with a R100 000 000 nominal value and later split into 100 different denominations. In the complete absence of any 'traces' (ie uniquely identifiable characteristics) on treasury stock certificates (or any other stock or share certificate for that matter) how can C1 vindicate? The answer is, quite simply, that he cannot. He has no means of identifying his stock certificate in the hands of any of the 100 innocent parties in whose possession (albeit in truncated form) it could possibly be. For the truth of the matter is that by a process of consolidation and splitting, the identity of the original certificate has been entirely lost. This example is not, by any means, unusual. Indeed, it is quite standard in relation to equity and gilt transactions.

4.15 What would the position be if the law were changed as envisaged? The change envisaged is that by statutory provision a specific and clearly identified exception to a common law principle will be created which will take into account commercial reality in stock exchange transactions. In terms of this change not only an innocent purchaser of securities in the Gelria type of situation but even a purchaser through a clearing house settlement system would obtain indefeasible title to the securities purchased. This protection would also be extended to a bank to whom the shares had been ceded in securitatem debiti. Therefore, C4 would obtain an indefeasible title to the shares and his bank's security would remain assured. [It goes without saying that it is vital for a healthy, efficient and liquid securities industry - and indeed for the whole economy - that banks and other lenders of money have adequate and sound security lodged with them.] C1, who clearly must act

with due care in ensuring that his securities do not, by his negligence, fall into the wrong hands, would be unable to vindicate his shares and would be left with a common law remedy against T. C1 may have a common law remedy against B1. However, C1 would still be left with an alternative remedy which he in fact enjoys at present (in addition to his right to vindicate!) as described in Section 5.

Section 5

The owner's alternative remedy

5.1 With the gradual increase in volume and complexity of commercial transactions has come a gradual series of statutes and rules which, taken together, are intended to provide innocent parties with remedies they otherwise would not have. In the case of stock exchange transactions these protective measures are to be found in the provisions of the Companies Act, 1973 ("the Act") and the Rules of the JSE. In so far as transactions in gilts are concerned, similar measures, in practice, apply.(1) [Attention is drawn, however, to the fact that an apparent lacuna exists in the Act in that inasmuch as those sections dealing with the transfer and registration of scrip apply equally to gilts and equities, the procedure for obtaining rectification of the register would only appear to apply to companies.] Circumstances can often arise which would prevent an owner from vindicating his stolen shares. It will be recalled that one of the vital elements of vindication is the identification of the stolen property. But it may become impossible to "trace" shares where a certificate for a given number of stolen shares is

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(1) The effect of the definition of "security" in s 134 of the Act is to make ss 135-185 and s 140 of the Companies Act applicable to gilts. However, these sections are only concerned with the method of effecting transfer of securities and the issue of certificates. They do not directly affect the owner's alternative remedy under s 115 for rectification of the register of members, which, interpreted literally, would only appear to apply to companies. It is arguable that in view of ss 135-140 of the Companies Act, this remedy is also available to the unlawfully dispossessed holder of a stock certificate; it is understood that, as a matter of practice, the Treasury applies s 115 to RSA Treasury stock.

consolidated in a new certificate for a larger number of shares, or where shares are cancelled as a result of a scheme of arrangement and replaced by a new issue of some other shares.

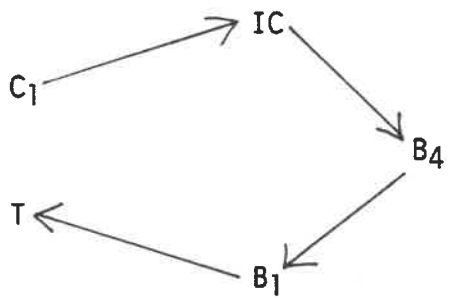
5.2 Thus, in relation to gilts, it was noted in section 4 that individual stock certificates were often consolidated into block certificates and later split into 'standard' denominations. In the absence of 'traces' on the original certificate, it is simply impossible for the owner of the original certificate to identify his certificate once this process has followed its usual course. If the owner were to attempt to identify his certificate, chaos would result in any attempt to unravel what is, in effect, a spider's web of transactions. The same applies to equities. Just as stock certificates may be consolidated and later divided, so may share certificates. A's 1000 shares in X company, if stolen by B, would easily be absorbed on to a block certificate for 50 000 shares and if later split into 50 equally denominated certificates, would generally never be identifiable by A.

5.3 When the owner discovers that his shares have been stolen, he finds that his name has been removed from the register of members of the issuer company ("the company"). This will undoubtedly have been done as a result either of a forged instrument of transfer or a valid transfer which has been stolen. In the latter case, the alternative remedy would not be available, since the company's transfer secretaries would execute the transfer based on a validly signed transfer deed. In the former case the transfer secretaries will have acted unlawfully in registering a transfer of shares pursuant to a forged transfer deed, contrary to section 133 of the Companies Act. The owner may then bring an action against the company in terms of section 115 of

the Companies Act for rectification of the register and have his name restored as a shareholder for the number of shares stolen, all at the company's expense.

5.4 In terms of section 137 of the Companies Act the company has no duty to satisfy itself as to the power of the transferor to transfer shares and may rely on the transfer deed. In terms of section 138 of the Companies Act the person who lodges the scrip with the company (or its transfer secretaries, acting as its agent) for transfer warrants the authenticity of the documents lodged and indemnifies the company against any claim, loss or damage the company may suffer arising out of a transfer registered on the strength of the document so lodged. In a Stock Exchange transaction it is customary for the buying broker to lodge scrip for transfer. In practice, therefore, the company would usually be entitled to be indemnified by the purchasing broker.

5.5 The alternative remedy can be illustrated diagramatically as follows (using the same designations as in previous examples) -



where C1 claims restitution from the company (IC) which seeks indemnity from B4 (the lodging broker). In terms of the Rules of the JSE, B4 is entitled to recourse against B1, being the delivering broker who put the defective scrip

into the market in the first place.[2] This leaves B1 with a right of recourse against T (for what it is worth) and possibly with an Aquilian-based right of action against C1. This chain would be broken if either of the brokers defaulted in the interim.

5.6 Where there is a valid transfer, the rights of the owner are referred to more fully in 6.4 below.

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(2) JSE Rule 5.70.8.1

Section 6

The JSE Guarantee Fund

6.1 The effect of the proposed change in the law on the JSE Guarantee Fund must also be considered. An extract of Rule 15 of the Rules of the JSE Guarantee Fund is attached as Annex "A". Rule 15 of the Fund rules sets out the circumstances in which the Fund may be liable to make payments to clients of defaulting brokers.

6.2 As the law stands at present, after an owner has vindicated his shares the innocent purchaser may call upon his buying broker to replace the shares for which he has paid (see 4.13 above). If the buying broker is unable to replace these shares, and defaults,[1] the Guarantee Fund may have an unlimited liability to replace those shares under Rule 15.2.1.2 of the Fund rules. If the innocent purchaser's claim were large enough, the entire Guarantee Fund could be wiped out. This contingency can ostensibly be met by obtaining fidelity insurance, but the present cost of such insurance and the unlikelihood of re-gaining cover after a claim may render this protection somewhat illusory.

6.3 However if the law is changed, the owner would not be able to recover his shares from the innocent purchaser. The Guarantee Fund would, therefore, not be exposed to a claim by the innocent purchaser. The owner would still have the

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(1) JSE rule 8.40.1

alternative remedy against the company[2] unless the owner entrusted the scrip in negotiable order to T. The position which arises in relation to a valid transfer deed is discussed in 6.4 below. Where the transfer deed is forged and the owner pursues the alternative remedy, the company is primarily liable and it is likely that the owner will be restored as a shareholder for the number of shares stolen. The indemnity claim by the company against the lodging broker is not a claim for which the Guarantee Fund would be liable. Similarly the lodging broker will have recourse_under the JSE rules to the broker who introduced tainted scrip into the market; such claim is also one for which the Fund would not be liable. Thus the alternative remedy, in circumstances where the transfer deed is forged, does not result in claims against the Guarantee Fund.

6.4 What is the position where the transfer deed is not forged? This could arise where the owner gives the scrip together with a valid signed transfer deed to T, who then steals the shares from the owner. The liability of the Guarantee Fund in such circumstances will depend on whether T was a broker (or a person employed by a broker) and whether the scrip was given to T in compliance with the provisions of sections 24, 25, 26 of the Act relative to the sale of securities (in which case the Guarantee Fund would have unlimited liability to replace that scrip)[3] or otherwise in connection with a transaction or transactions entered into by T as envisaged in Rule 15.2.3 of the Fund rules (in which case the Fund will be liable up to a maximum of R1m).

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2. As regards gilts, the considerations outlined in footnote 1 to Section 5 above would apply. As a matter of practice we understand that the Treasury would apply s 115 to stolen stock certificates.

3. JSE Guarantee Fund Rule 15.2.1

Section 7

The proposed legislative change

7.1 The purpose of legislation, which would, in effect, provide another exception to the nemo dat principle, is to ensure that a bona fide purchaser of securities, for value and without notice of defect in the seller's title to the securities sold, would, by virtue of a completed transaction on the J.S.E, receive an indefeasible title to those securities and would not be subject to a vindicatory claim by the true owner.

7.2 While the proposed legislative change will remove the owner's right to vindicate stolen securities, it will have no effect whatsoever on the owner's alternative remedy described in section 5.

7.3 Protection is required not only for the immediate purchaser of the securities but also for a 'remote' purchaser and for a financial institution which may have acquired the securities as security for a debt owed to it. On the other hand a purchaser, even if bona fide, should not be protected if, in the circumstances, he ought to suspect that the securities have been stolen or lost.

7.4 The position of a true owner, whose scrip is stolen or lost, and is then sold on the J.S.E. will have to be considered as he will no longer be able to recover such scrip.

7.4.1 Where the scrip is under the control of the owner's broker and the broker or his employee is responsible

for the theft or loss, the owner will have a right of action against such broker, and whoever else is responsible, on common law principles of delict or contract. The owner's rights against a dishonest or delinquent broker would be further protected, to varying degrees, by the JSE Guarantee Fund.

7.4.2 If the thief has no connection with the J.S.E, the owner must look to such thief for compensation and possibly to the thief's broker if the latter has acted negligently. There is no justification for holding the J.S.E. liable for the owner's loss in such a case. The owner thus suffers the greatest risk of loss where he deposits the scrip in negotiable order with a person who is not a stockbroker and it then transpires that the person is a man of straw.

7.5 In protecting the rights of an innocent purchaser, the rights of the owner must necessarily suffer. It is, however, within the power of the owner to conduct his affairs in such a manner so as to minimise the risk of loss, whereas the innocent purchaser is defenceless to an action for vindication of shares purchased through the stock exchange. A further implication of the protection presently afforded to the owner is that while the number of innocent third parties who may suffer the owner's vindicatory action is unlimited, removing such remedy against the bona fide purchaser for value limits any potential prejudice to only one innocent party, ie the owner.

7.6 It should not be overlooked that the owner of shares is not necessarily always the registered owner of those shares. It was acknowledged in Gelria that the use of nominee

companies was normal commercial practice.[1] In other words, the mere fact that the owner had his shares registered in the name of a nominee company, or even in the name of his broker's nominee company, did not in itself give rise to a representation to found an estoppel. In Gelria the Court evinced a tendency away from arguments which would "unduly denigrate the true role of the beneficial owner, and elevate the nominal role of the nominee".[2] It should, however, also be borne in mind that the prudent owner would not be expected to register his shares in the name of a nominee (or nominee company) without there being some agreement as to the respective rights and obligations as between the beneficial owner and the registered owner. Certainly the alternative remedy described in Section 5 above is available only to the registered owner but in practice the beneficial owner could be expected, if necessary, to take cession of the rights of the registered owner for the purpose of obtaining redress or to compel the registered owner to obtain such redress on his behalf.

7.7 It is proposed that the legislative change be achieved by the insertion, in the Stock Exchanges Control Act 1 of 1985, of a new section 29A, a draft of which appears as Annex "B" to this Report.

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(1) Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Company Ltd 1976(1) SA 441 (A) at 456H.

(2) Ibid, 462 D-E.

Annex "A"

Liabilities of the JSE Guarantee Fund

15.1 With the exception of payment of the liabilities referred to in 15.2.1 and 15.2.2, no payment shall be made from the Fund in respect of a claim -

15.1.1 against a natural person who was trading as a sole proprietor of his stockbroking business when he defaulted, until his estate has been sequestrated and excussed;

15.1.2 against natural persons who were trading in partnership when any of them defaulted, until the estates of all the partners have been sequestrated and excussed;

15.1.3 against a corporate member, until the corporate member has been wound up and excussed and the estates of all the persons who were directors of the corporate member when it defaulted have been sequestrated and excussed;

15.1.4 against the executor of a deceased broking member or of a deceased former broking member, until the executor of the estate of such deceased member elects to wind up the estate as an insolvent estate and the estate has been excussed;

and for the purposes of these Rules, "excussed" shall have the same meaning as contained in rule 9.30 of the JSE RULES.

15.2 The liability of broking members and former broking members referred to in 13.2.1 shall be limited to the amount which, together with the assets of the Fund, is required -

15.2.1 notwithstanding 15.1 and against receipt of the cessions referred to in 15.3, for the reimbursement in full, following the granting of a final sequestration order of the estate of a broking member or a former broking member or the final liquidation order of a corporate member or former corporate member, to the buyer or seller of securities, of monies paid by such buyer or due to such seller in compliance with the provisions of sections 22, 23, 24, 25, 26 and 27 of the Act in respect of -

15.2.1.1 securities that have not been allocated to such buyer by such member's broking firm as at the date of his default; and

15.2.1.2 securities of which such buyer is unable to obtain delivery and which he had not authorised such member's broking firm to retain for him in terms of rules 5.260.1, 5,260.2 and 5.260.3 of the JSE rules; and

15.2.1.3 cash received from a client with a written buying order and held by such member's broking firm for the purchase of securities prior to the purchase transaction being effected; and

15.2.1.4 any amount owing to a client in respect of securities sold by and delivery to such member's broking firm; and

15.2.1.5 cash and securities lodged with such member's broking firm in respect of minimum cover.

15.2.2 notwithstanding 15.1 and against receipt of the cessions referred to in 15.3, for the reimbursement in full, following the granting of a final sequestration order of the estate of a broking member or former broking member or the final liquidation order of a corporate member or former corporate member, to the buyer or seller of securities, of -

15.2.2.1 any cash retained by such member's broking firm on behalf of a client in terms of rules 5.90.7 and 5.90.8 of the JSE rules for the purchase of other securities and any cash balance remaining after such purchse has been effected and which has not been deposited in the name of the client with JSE Trustees (Pty) Limited; and

15.2.2.2 cash and securities lodged with such member's broking firm as cover in addition to minimum cover as defined by the Act, including cover in respect of option transactions; and

15.2.2.3 option moneys due to a client and held by such member's broking firm prior to the exercise of the option.

15.2.3 to reimburse losses other than those referred to in 15.2.1 and 15.2.2 sustained by clients of the insolvent, deceased member or former member and arising out of transactions in securities entered into by such member's broking firm with or on behalf of other persons which reimbursement shall not exceed -

15.2.3.1 in the case of a natural person referred to in 15.1.1, for transactions in all securities other than gilts, the sum of R1 million and for transactions in gilts, a further sum of R1 million;

15.2.3.2 in the case of a partnership referred to in 15.1.2, for transactions in all securities other than gilts the sum of R1 million in the aggregate in respect of all the persons who were trading in partnership on the date any of them ceased to be members and for transactions in gilts, a further sum of R1 million in the aggregate in respect of all the persons who were trading in partnership on the date any of them ceased to be members;

15.2.3.3 in the case of a corporate member or former corporate member, for transactions in all securities other than gilts, the sum of R1 million and for transactions in gilts, a further sum of R1 million;

or a lesser amount which together with -

15.2.3.4 any dividend which is paid or payable by the estate of the insolvent, deceased member or former member and by the estate of any previous partner of the insolvent, deceased member or former member and by the liquidator of any corporate member in liquidation and by the estate of any director or previous director of a corporate member in liquidation;

15.2.3.5 any amount paid by any surety or in terms of any security provided in terms of rule 4.10.9 of the JSE rules; and

15.2.3.6 any amount paid in terms of any insurance policy referred to in 16.4.

is sufficient to discharge the liabilities of the insolvent, deceased or corporate member in liquidation arising out of transactions in securities entered into by such member's broking firm with or on behalf of other persons.

15.3 Payment of any amount payable in terms of 15.2.1 or 15.2.2 shall only be made against a valid cession to the Trustees of all claims that the client has against the insolvent, deceased member or former member.

15.4 For the purposes of 15.2.1 and 15.2.2 any cash held by a member's broking form on behalf of a client in terms of a managed account or any other arrangement of the kind referred to in rules 5.310 and 5.320 of the JSE rules at the time a purchase is made and any money which has been withdrawn from JSE Trustees (Pty) Limited to pay for a purchase made on behalf of a client shall constitute moneys paid by a buyer to a member's or a former member's broking firm in compliance with the provisions of sections 22, 23, 24, 25, 26 and 27 of the Act.

15.5 The liability of broking members, former broking members and the Fund -

15.5.1 shall, without prejudice to the expression "losses" referred to in 15.2.3, include the losses referred to in rule 9.70 of the JSE rules;

15.5.2 shall be limited as set out in rule 9.100.1 of the JSE rules;

15.5.3 shall not include consequential loss, as set out in rule 9.100.2 of the JSE rules.

Annex "B"

Proposed new section 29A
of the Stock Exchanges Control Act, 1 of 1985

(1) For the purposes of this section -

(a) "bona fide purchaser" means a purchaser, pledgee or cessionary who acquires securities in good faith and for value, who is neither himself party to any illegality nor has notice of any claim affecting the securities;

(b) "nominee company" means a company used by a stockbroker or a bank in whose name the securities are registered whether on his or its behalf or on behalf of his or its clients;

(c) "owner" shall, in relation to securities or a security certificate, include a beneficial owner of those securities or that certificate;

(d) "securities" means shares or stock including any share or stock certificate and any other document evidencing title;

(e) "stockbroker" shall mean a stockbroker defined in terms of s1 and any person who is a partner, officer or employee of such stockbroker or a nominee company of such stockbroker or an officer or employee of such nominee company.

(2) Where securities which are listed on a licensed stock exchange are stolen or lost and are subsequently -

(a) sold on a licensed stock exchange; or

(b) sold otherwise than on a licensed stock exchange and delivered through the mechanism of a clearing and/or settlement house owned or managed by a registered bank or banks or by a licensed stock exchange, the owner shall not be entitled to vindicate those securities from, or in any other way assert the rights of ownership in regard to those securities against a bona fide purchaser unless that person ought in the circumstances reasonably to have suspected that the securities concerned have been stolen or lost.

(3) The provisions of subsection (2) shall not -

(a) affect any action that the owner might have in law against a stockbroker of whom he is a client; or

(b) derogate from the provisions of any rule of a licensed stock exchange which provides for any liability or obligation of a stockbroker.

Addendum

Since this memorandum was first written, the Appellate Division has handed down an important decision preventing the true owner of SADF bonus bonds from vindicating his property from a bona fide onerous purchaser who acquired them from a thief. Kahn v Volschenk 1986 (3) SA 84(A) would appear to make our criticism of Gelria superfluous, as it would seem, ostensibly, to have been overruled. Closer examination, however, reveals that the decision has a somewhat attenuated impact on the JSE's submissions while paradoxically providing indirect support.

It was common cause in Kahn that the bonds (which were issued by the Treasury under the Exchequer and Audit Act, 1975) were sui generis bearer negotiable instruments and were thus freely transferable. However, as the bonds did not meet the definition of a 'bill of exchange' or a 'cheque' in terms of the Bills of Exchange Act, 1964, it was contended by the Applicant (and accepted by the Court) that they were common law negotiable instruments.

The Applicant thus alleged that as the bona fide holder for value of the bonds he was entitled to resist the true owner's vindicatory action. For, he argued, such a holder always acquired an indefeasible title to the instruments by reason simply of their negotiability.

After an extensive review of Roman-Dutch Law (in particular the views of Van Bynkershoek and the evolving jurisprudence of the Hooge Raad), the Appellate Division held unanimously (per Joubert JA), that, at common law, the bona fide holder for value of public bearer bonds could successfully resist the rei vindicatio of the true owner. The decision of the Cape Provincial Division to the contrary was accordingly reversed.

A number of points can be made about Kahn, but only the last of these is directly relevant to the present enquiry.

Firstly, while the Court's survey of Roman-Dutch Law in the seventeenth and eighteenth centuries is scholarly, indeed masterful, some may find it a little surprising to find no mention of modern South African authorities on the subject or reference to those cited by Counsel in argument (cf Randfontein Estate and Gold Mining Co Ltd v Custodian of Enemy Property 1923 AD 576; D.V. Cowen, The Law of Negotiable Instruments (5th ed) at 53, 156 and 250-253[1]).

Next, although the common law of negotiable instruments is undoubtedly Roman-Dutch (Estate Liebenberg v Standard Bank of SA Ltd 1927 AD 502), as our statute law is substantially based on the English Bills of Exchange Act, 1882, some may think it apposite if reference had been made to relevant English authorities (cf Wookey v Pole & Others [1820] All ER Rep 553).

However, Kahn's significance lies in the fact that it shows that Roman-Dutch Law, by the end of the eighteenth century, had recognised the need to protect bona fide purchasers for value, albeit in the narrow confines of government bonds.

But, as will be apparent from the above, Kahn was not concerned with securities in the sense that that term is used in this memorandum. The real significance of the decision is that the Court was able to assist the Applicant by reason only of the fact that he was the holder of a negotiable instrument. That explains why there was no discussion of Gelria or, indeed, of any of the numerous problems to which we have alluded in this memorandum.

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(1) Cowen argues (op cit, 250) that a bonus bond owes its negotiability not to custom but simply to subordinate legislation and refers to the regulations promulgated by the Minister of Finance in terms of the Exchequer and Audit Act, 1975, in which negotiability is clearly conferred on the instruments.

It should be remembered that securities as such are not and never can be treated as negotiable instruments for they cannot be transferred by mere delivery or delivery and endorsement. Shares can only transfer title once a securities transfer form is completed and the appropriate entry made in the company's books; likewise, stock may only be transferred once a document of transfer and registration of transfer is completed.

Unlike securities, negotiable instruments are the very converse of the common law principle of nemo dat quod non habet in allowing the holder of an instrument who acquires it in good faith and for value (even from a thief) to obtain good title, albeit against the dispossessed true owner.

It was said above that Kahn's importance to this memorandum was limited. In a narrow sense that is correct. In a holistic sense it is not for Kahn vividly highlights the inequity of a common law principle, which permits of exceptions where the (stolen) instrument falls within a narrow class, but does not where it comes within a broader ambit. It is submitted that this simply does not accord with modern commercial reality and accordingly urgent remedial legislative steps are required.