DLA CLIFFE DEKKER HOFMEYR

September 2012

DISPUTE RESOLUTION MATTERS

SA CONFIDENTIAL: DISCOVERY AND PRIVILEGE IN SOUTH AFRICA

For any company to function properly, it must be able to keep certain communications and information out of the public domain. The right to privacy ensures that an individual's personal affairs are not unnecessarily made public. But privacy is not an absolute right and the consequence of pursuing court proceedings is that information or documents that might otherwise have been kept private, could be exposed to public scrutiny.

It can happen that documents will have to be disclosed in court proceedings, even if they are marked private or confidential.

Once proceedings have been initiated through South African courts, the words confidential or private carry little or no weight in determining whether or not a document is kept from scrutiny by third parties.

Unless the court directs otherwise, all proceedings conducted through our courts are conducted in an open and public manner. All pleadings and documents filed during the course of proceedings are deemed to be 'public documents' once that matter is called in open court. Because of this, parties often choose to arbitrate their disputes. In general, arbitration proceedings are conducted in private and all papers and documents filed during the course of the arbitration proceedings are kept from public scrutiny.

The South African legal system is structured to avoid 'surprises' at the hearing of any matter. For this reason, the legal process of providing 'all relevant documents' to a party's opponent (known as the discovery procedure), obliges both parties to discover all documents "relating to any matter in question in such action". This includes tapes and other electronic recordings.

There are some exceptions to this principle. For example, documents protected by legal privilege will remain private. Legal privilege is a specific term given to documents or information which our law recognises as worthy of protection against public disclosure. However, a court will not raise privilege on behalf of a litigant; it is up to a party seeking legal privilege protection to claim it.

Documents for which legal privilege may be claimed include those that might incriminate or expose someone to the risk of penalty or forfeiture, communications between spouses, and communication that is by its very nature, 'without prejudice' (whether marked as such or not). Communications between attorneys and their clients are generally protected from disclosure by legal privilege. But the list of documents for which legal privilege can be raised is not exhaustive. If a document satisfies the requirements for legal privilege, a litigant may invoke the protection that privilege affords. All communications between

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clients and their legal advisers are protected by legal privilege where they are made in confidence, for the purpose of obtaining legal advice or in the process of or in contemplation of litigation and are not obtained for the purpose of committing a crime or fraud. The legal privilege applies to communications between both in-house legal advisers and practicing attorneys.

If a party to a court proceeding knows of the existence of a document in its opponent's possession that has not been discovered, that party is entitled to request the court to compel its opponent to discover the document. Disclosure of that document, if relevant to the matters in issue, will be compelled unless the document is properly subject to legal privilege. If legal privilege does not apply, then the party will be obliged to discover the document in question and so, introduce it into the public domain.

Clearly, a proper understanding of the difference between privileged and confidential information is important and the position should be carefully evaluated before initiating court proceedings.

Jonathan Witts-Hewinson and Jonathan Ripley-Evans

THE RIGHT TO REQUEST CLAIMANT TO SUBMIT TO MEDICAL EXAMINATIONS

In the recent judgment of ***Fabian Brandon Thomas Potgieter v Road Accident Fund 2012 JDR 1210 (ECP),*** the court considered it necessary to restate the guidelines on the scope of Rule 36 of the Rules of the High Court in respect of medical examinations.

The last reported judgment addressing the application of this Rule was in 1967. Before these rules were promulgated, a wrongdoer did not have the right to request a claimant to submit to a medical examination.

Rule 36(2) allows any party to proceedings in which damages or compensation for bodily injury are claimed (the wrongdoer), to deliver a notice requiring the party claiming damages or compensation (the claimant) to submit to a medical examination.

Rule 36(5) provides that a second and final medical examination may be required if further examination is necessary or desirable for the purpose of giving full information on matters relevant to assessing damages.

In *Durban City Council v Mndovu 1966 (2) SA 319 (D),* the court held that Rule 36 is mainly designed to avoid a wrongdoer being taken by surprise by matters he or she would normally be unable, before the trial, effectively to prepare their case so as to meet that of the claimant. The court held further that in terms of Rule 36(3)(b), the claimant may object to the person nominated to conduct the examination, but is not required to nominate someone else.

In *Mgudlwa v AA Mutual Insurance Association Ltd 1967 (4) SA 721 (E),* the court stated that Rule 36 should be fairly applied so as to adjust between the two conflicting interests of the wrongdoer and the claimant. The Judge added that when applying Rule 36(2), in general the claimant should not be required to travel a long way for the examination if it could be reasonably avoided.

The Compulsory Motor Vehicle Insurance Amendment Act, No 69 of 1978 amended the Compulsory Motor Vehicle Insurance Act, No 56 of 1972 (as it was known then) to include a provision excluding liability on the part of the wrongdoer to compensate a claimant who unreasonably refuses or fails to be subjected to any examination by medical practitioners the wrongdoer designates. This statutory power to compel a claimant to submit to a medical examination is now provided for in section 19(e)(i) of the Road Accident Fund Act, No 56 of 1996 (Act).

The Constitution of the Republic of South Africa, 1996 took effect on 4 February 1997. The Constitution is the supreme law of the land and entrenches the fundamental rights of every citizen, including the right to privacy (section 14).

Having regard to section 14 of the Constitution, subjecting a claimant to medical examination may be regarded as an infringement of their Constitutional right to privacy. In this regard, Ackerman J in *Bernstein and Others v Bester NO and Others 1996 (4) BCLR 449 (CC),* concluded that the protection of a person's right to privacy can be limited by the manner in which that person interacts with people with whom they communicate about private life matters. A claimant subjects his right to privacy to infringement

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when claiming for bodily injury from a wrongdoer and can expect that medical examinations may be called for to allow the court to calculate the damages suffered.

Tshiki J, in *Potgieter,* held that a wrongdoer requesting a claimant to attend a medical examination can ask the claimant to attend up to two medical examinations for each head of damages claimed. More specifically, on a proper interpretation of Rule 36(5), the claimants cannot object to the examination on the ground that they have already been examined by their own medical practitioner as this is excluded from the two medical examinations provided for in Rule 36(5).

In his judgment, Tshiki J restated the principles of Rule 36 outlined in the *Durban City Council* and the *Mgudlwa* cases, and confirmed the right of a wrongdoer to request a final and second medical examination, as provided for in Rule 36(5).

In conclusion, a wrongdoer can compel a claimant to submit to a medical examination by either invoking the provisions of Rule 36 or Section 19(e)(i) of the Act in respect of claims against the Road Accident Fund. However, it should be noted that every case is decided on its own facts and the claimant may object to these medical examinations on the grounds provided for in Rule 36(3).

Willie Van Wyk and Carien van der Linde

CASE MANAGEMENT ON THE INCREASE

Dispute resolution can be a lengthy and costly process. The wheels of justice are known to turn slowly and delays in the judicial process result in increased costs and frustration on the part of litigants.

Following international best practice, South African courts are adopting case management as a valuable tool to achieve speedier dispute resolution. Case management involves court intervention in a process that up to now has been directed almost exclusively by attorneys. There are basically two models, one of which results in case management through a committee of judges and the other, the more popular South African model, a case manager being appointed to a particular matter.

Case management has proven to be very successful in Hong Kong and Canada. The Hong Kong system incorporates a committee of judges and mandatory mediation as part of their system in dealing with the extremely high volume of cases in that jurisdiction.

The Canadian system on the other hand, involves a master in control of their case management system who calls for case conferences on short notice and exerts pressure on the attorneys to avoid delays and tactical abuse of the legal process. His main objective is to work with the parties, using his powers to narrow and resolve issues through facilitated consensus. He has the power, among other things, to extend or abridge deadlines, to confine parties to genuine disputes, to issue interlocutory directives, and, most importantly, to strike pleadings, dismiss actions and award punitive costs, especially *de bonis propriis* costs (payable out of the attorneys own pocket).

Our courts seem to be leaning towards the Canadian practice, except that judges, rather than a master, manage cases.

A matter in which our firm is involved has spanned more than a decade and is currently under case management. We have seen the Deputy Judges President in Pretoria and Johannesburg incorporating case management in many cases. In these cases, the court calls pre-trial conferences and notifies attorneys in advance that one of the points on the agenda will be possible punitive costs linked to clear abuse of the court process, especially in regard to tactical pleading.

Chapter 6.3 of the Practice Directive of the South Gauteng High Court's Practice Manual provides that any party who is of the opinion that a trial requires case management, may write to the registrar (for the attention of the Deputy Judge President) setting out the litigant's reasons for requiring case management. The letter must be given to the other parties involved; they are entitled to make written representations in this regard. Should the Deputy Judge President agree to case management, a judge will be allocated and all interlocutory applications will be heard by that judge. Although the case-managing judge will not ultimately hear and adjudicate the matter, he or she is entitled to intervene at a party's request and issue directions for the conduct of the trial. The judge may also direct that pre-trial and additional case conferences be held.

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Case management will be enforced regularly in dispute resolution in future as Judges President are intent on limiting frivolous disputes, and avoiding wasted costs and time. The system works on the basis that the parties are required to identify exactly what the legal issues are, so avoiding vague, formulaic and precedent-based pleadings. This practice will curb expensive and ineffectual interlocutory disputes.

In August 2012, at a planning meeting attended by the country's senior judges, a key decision taken was to immediately implement judicial case management so as to involve judges at an early stage to dictate the pace of litigation and prevent postponements and backlogs.

A potential concern is the absence of policies to ensure that qualifying matters are in fact referred for case management. As previously mentioned, case management is not imposed by the court *mero motu*, but initiated on the request of a litigant.

Matters that genuinely need case management may continue to waste the courts' time, as both litigants may prefer to follow an obstructive or 'trial by ambush' approach rather than taking advantage of a means to get to the essence of the dispute.

Another concern is overburdening our judges with a case and administrative load that is already very difficult to manage. The system is only as good as the human resources available to implement it. Also, our judges are accustomed to the adversarial system, so becoming actively involved in driving a case will be unfamiliar territory for them.

Willem Janse van Rensburg and Shanna Gammie

SECURITY FOR COSTS: AN OVERSIGHT OR OVERKILL?

Rule 47 of the Uniform Rules makes provision for a defendant to demand security for costs. This section is usually applied against plaintiffs such as foreigners, insolvents, foreign companies or close corporations. The rule does not set out the grounds on which one party is entitled to demand security, so recourse must be had to the common law and statutory provisions.

Section 13 of the Companies Act, No 61 of 1973 (old Act), provided that a court could order a limited company plaintiff to furnish costs if there was reason to believe that the company or its liquidator would be unable to pay the costs in cases where the defendant is successful. As s13 has now been repealed by the new Companies Act, No 71 of 2008 (new Act), can a demand for security for costs be filed by relying solely on rule 47 of the Uniform Rules?

The Court in *Haitas and Others v Port Wild Props 12 (Pty) Ltd 2011 (5) SA 562 (GSJ)* had to decide whether an insolvent private company must provide security for costs. The respondent (an insolvent private company) had been liquidated and had no realisable assets or cash. There was no prospect of the company being able to meet its obligations should an adverse costs order be made against it. The respondent refused to file security for costs, shielding behind the new Act, which does not require an insolvent *incola* plaintiff to file security for costs.

The court held that although the new Act lacks a provision equivalent to s13 of the old Act, the common law will prevail in this situation in that an impecunious or insolvent company, or other corporate entity that is an *incola* of the Republic, cannot be called on to give security for costs for proceedings it institutes.

The court referred to s173 of the Constitution, which deals with a court's inherent power to protect and regulate its own process and develop the common law, taking into account the interests of justice. In coming to its decision and taking into consideration that s13 of the old Act had been repealed, the court held that the interest of justice would be served in requiring the plaintiff to furnish security for costs in terms of rule 47.

Relying on its inherent power, the court was of the view that court's should order security to be furnished in the interests of justice, since insolvent or impecunious plaintiff companies could encourage unnecessary or vexatious law suits.

But it stressed that each case should be decided on its own facts and courts should not hesitate to order security for costs to be filed when peculiar facts scream for that judgment.

Tayob Kamdar and Natasha Foster

LET'S AGREE TO DISAGREE

Two recent judgments by our superior courts give rise to uncertainty about the requirements for an 'agreement to agree' to be valid and enforceable. Both the Western Cape High Court's ruling in ***Indwe Aviation v Petroleum Oil and Gas Corporation of South Africa 2012 JDR 0824 (WCC)*** and the judgment of the Constitutional Court in ***Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012(1) SA 256 (CC),*** indicate the ongoing impact of South Africa's constitutional dispensation on the common law of contract.

Before *Indwe and Everfresh,* the common law position was authoritatively set out by the Supreme Court of Appeal in *Southernport Developments (Pty) Ltd v Transnet Limited 2005 (2) SA 202 (SCA).* In this case it was held that "an agreement that parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree".

Ponnan AJA went on to hold that an agreement to engage in further negotiations may, nevertheless, be legally enforceable in circumstances where:

- The parties have clearly agreed to engage in negotiations.
- The parties have already reached agreement on all of the "essential terms" of the ultimate agreement, and the relevant further negotiations are needed only to "settle subsidiary terms [that are] still within the contemplation of the parties".
- There is a dispute resolution mechanism that brings sufficient certainty to the "agreement to negotiate" by creating an objective mechanism for determining the negotiations in the event of the parties being unable to reach agreement on the remaining "subsidiary terms".

In *Everfresh,* the Constitutional Court was faced with a request to develop the common law in relation to agreements to negotiate on the basis of the principles of good faith and *ubuntu.*

The case dealt with the possible renewal of a lease agreement and the negotiations between the parties in relation to that renewal. Although Moseneke DCJ, on behalf of the majority of the court, declined to develop the common law, he commented: "Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith".

In *Indwe,* adopting a somewhat liberal interpretation of *Southernport Developments,* it was held that the latter case had introduced a "more flexible approach" to the validity and enforceability of agreements to negotiate. The Western Cape High Court went on to rule that: "The absence of an agreed dispute resolution clause that is applicable between the parties is not fatal to the validity of an agreement to negotiate and that such an absence could be remedied inter alia by [the] standards of reasonableness and good faith [that] can readily be implied in a suitable case" (emphasis added).

Blignault J concluded that the communication to the applicant of the contents of a resolution by the respondent's board of directors, in which it had been resolved that the respondent would engage in negotiations with the applicant and the acceptance of the (implied) offer contained in that board resolution, was sufficient to conclude a valid and enforceable agreement to negotiate between the parties.

The court thus shed some light on the requirements for validity left in place after *Southernport Developments,* including the insistence on the existence of an objective dispute resolution mechanism.

Although *Everfresh* and *Indwe* make no reference to one another, both indicate that South African law is in the midst of radical changes over the enforceability of an obligation to engage in contractual negotiations. It is surely only a matter of time before a court sees fit to accept Moseneke DCJ's implicit offer and take the developments introduced by *Southernport Developments* one step further.

Lionel Egypt and Ashley Pillay

THE RECEIVER BECOMES A GIVER?

When the legislators of antiquity drafted the Insolvency Act, No 24 of 1936, in their wisdom they decided to give the Receiver of Revenue a preference on insolvency. The quaint view at the time – and it remains so – is that the fiscus needs money more than people who give business credit.

Anyone who has been involved in insolvency will know that there is a pecking order of creditors in liquidation. The gold medallists are secured creditors – people who have advanced credit against security - followed by statutory preferences, employees (up to a fixed amount), SARS, and only then, the rank and file of concurrent creditors.

What this has meant is that SARS has been able to sit back and relax. When businesses are liquidated, SARS is often a significant creditor and will, in terms of its preference, take whatever is left after secured creditors and employees have been paid. This often means that concurrent creditors are the big losers. Little, if anything, may be left once secured and preferent creditors have been paid.

Business rescue in the Companies Act, No 71 of 2008 introduces a new ranking. In fact, there is almost no ranking. Save for the protection of those creditors who advance post business rescue finance and the protection of employees carried over from labour law, no mention is made of the concept of preferent or concurrent creditors. Although the rights of secured creditors are protected for purposes of voting at meetings to approve a business rescue plan, all creditors are treated equally. The vote is based on aggregate claim value only and not the status of creditors.

This also means that, if any distribution is made, unsecured creditors will receive a pro rata share according to their claim value.

Unfortunately for SARS (and fortunately for everyone else), under business rescue SARS appear to enjoy no preference. This makes sense since the purpose of business rescue is to ensure the survival of the business or at least a better overall outcome for all affected parties, these being shareholders, employees and creditors. Were SARS to retain a preference, it is difficult to see how business rescue could work since, as with insolvency, SARS could use its preference to block business rescue or make it an unviable proposition for anyone else.

While SARS has commendably adopted a pragmatic view on tax compromises, this policy does no work in business rescue since compromises require funds to be available immediately to make the compromise. Companies in business rescue are self-evidently cash strapped and unable to make funds available.

One might think that, as an organ of state, SARS would throw its wholehearted support behind business rescue. After all, if it works, a business taxpayer will survive and some, if not all, of its taxpaying employees will retain their jobs.

Regrettably this is not so. In a substantial business rescue matter involving our firm, acting on our advice and that of senior counsel, the business rescue practitioners advised SARS that they will be treated as an ordinary creditor for both voting and distribution purposes. As this has previously not been the approach, SARS has issued a challenge in the Cape High Court, arguing that it should be treated the same way in business rescue as in insolvency, which is as preferent creditors.

The outcome of this case will be heard in October 2012. It will have a significant impact on business rescue in the future and on past matters where SARS has received preferential treatment.

Richard Marcus

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