DLA CLIFFE DEKKER HOFMEYR

DISPUTE RESOLUTION

MATTERS

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IN THIS ISSUE

THE INCORPORATION OF TACIT TERMS WHEN A CONTRACT IS SILENT ON DURATION

The general principles in construing a contract silent as to its duration is to look at the express provisions of the contract and the intention of the parties. However there is no presumption either way and the concern is that parties can be bound in perpetuity especially when there are no express terms dealing with the duration of the contract and where the parties dispute when the contract can be terminable.

These principles were recently applied of the case of *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd [2014] SCA 73*. This case involved the determination of whether a contract between two parties contained a tacit term to the effect that the contract was terminable by either party on reasonable notice. The written agreement between the parties regulated the importation of agricultural chemical products.

It was common cause between the parties that the contract was silent as to the duration of the contract and the issue to be decided in the High Court was whether the agreement had a tacit, alternatively implied term that the agreement was terminable by either party on reasonable notice or that properly construed, the agreement was terminable on reasonable notice. The High Court found that the contract was not terminable on reasonable notice and the concern was therefore that the appellant could be bound in perpetuity.

In assessing whether the contract contained a tacit term the Supreme Court of Appeal (SCA) noted that the first assessment is one of construction and involves looking at the language used by the parties in the agreement. The SCA found that the contract contained no express term dealing with the contract's duration but that there was also no indication that the parties intended to be bound in perpetuity. The next assessment involves considering the intention of the parties, having regard to the nature of the relationship between the parties and the surrounding circumstances. The SCA found that the contract required the parties to form and maintain a close working relationship with regular conduct and interaction. The SCA also found that the contract covered a wide range of products and that it was therefore reasonable to assume that the nature of the relationship would change over time. The contract involved the local distribution authority importing chemical products and the SCA found that a number of factors would impact the profitability and financial viability of the contract. The SCA was of the opinion that given the unpredictable and variable nature of factors such as production and transportation costs it would be unlikely that the parties could have

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intended to be bound to the contract in perpetuity. It was the commercial reality of the relationship which the SCA found to suggest an intention of the parties not to remain bound in perpetuity.

As a result the SCA found that taking into account the surrounding circumstances and in view of the fact that the contract was silent as to its duration it was necessary that a tacit term be imported into the agreement. Taking into account the practical considerations, the SCA found that it was necessary and commercially efficacious that the tacit term should have the effect that the contract would be terminable on reasonable notice. The SCA also stated that when formulating a tacit term one must ensure that it is capable of clear formulation. The SCA therefore declared that the agreement between the parties contained a tacit term that the contract may be terminated by either party on reasonable written notice.

It is therefore clear that where a contract involves a close working relationship with mutual trust and confidence it is reasonable to infer that the parties do not intend to bind themselves indefinitely but rather that the contract will by either party terminate on reasonable notice. Moreover, while a court should be cautious in deciding whether to import a tacit term into a contract, regard must be had to the circumstances surrounding the contract such as the business sensitivities and the practical effect that a perpetual contract would have on the parties.

Byron O'Connor and Verusha Moodley

CREDITORS AND AFFECTED PERSONS HAVE A SAY TOO!

Though seemingly straightforward, section145 and impliedly, s131 of the Companies Act, No 71 of 2008 remain points of litigation on a regular basis in the courts. The sections set out, in detail, the rights and obligations of creditors when participating in the business rescue procedure as a whole. In terms of s145, creditors are entitled to:

- formally participate in a business rescue process to the extent permissible in terms of chapter 6 of the Act; and
- informally participate in those proceedings by making proposals for a business rescue plan to the business rescue practitioner.

Participation by any means may be hindered where a creditor has not been properly notified or informed of a court proceeding, decision, meeting or other relevant event concerning business rescue proceedings of the company. The legislature, for this reason, conferred a general right of notification on creditors in s145(1)(a).

Contiguous with the right of notification in s145(1)(a) is the right contained in s145(1)(b) which provides that each creditor is entitled to participate in any court proceedings taking place during the business rescue proceedings. While the methods for notification must comply with those prescribed in the Companies Regulations of 2011, the question which arises is how, as a matter of procedure, a creditor is required to go about participating in the court proceedings.

In the well-known case of *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Limited and another (Advantage Project Managers (Pty) Ltd intervening) [2011] (5) SA 600 (WCC)*, a creditor applied for leave to intervene in compulsory business rescue proceedings to oppose the relief sought by the applicant, Cape Point Vineyards. The intervening creditor applied for leave to intervene against the granting of an order placing the Pinnacle Point Group under supervision and business rescue proceedings. The court somewhat frankly remarked that it could not have been the contemplation of the legislature that an affected party would have to apply for leave to intervene in the proceedings. If a person is an 'affected person', such person has a right to participate in the hearing. Further filing of affidavits by the intervening party would be regulated by the court.

The approach of Boruchowitz J in *Engen Petroleum Ltd v Multi Waste (Pty) Ltd [2011] JOL 28082 (GSJ)* accorded with that of the Western Cape High Court. The applicant in this case was an intervening creditor seeking to oppose the grant of an order for the placement of two companies under supervision and to commence business rescue proceedings in terms of s131 of the Act. Boruchowitz J recorded however that, although it would not require leave of the court for an affected person to participate in a hearing, such leave may be necessary as a procedural requirement.

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More recently, in *AG Petzetakis International Holdings Ltd v Petzetakis Africa Ltd & Others [2012] JOL 28598 (GSJ)*, one of the intervening applicants was a creditor of Petzetakis Africa. The creditor had a concurrent claim amounting to R45 million. They were not cited as a respondent in the business rescue application and thus, sought to intervene in that application. The court again referred to the Cape Point Vineyards and Engen Petroleum cases and followed the approach taken by the judges in those matters by allowing the intervention. Further, a registered trade union was the second intervening applicant. The court held that the registered trade union, as a representative of the employees of the company, has an automatic right to participate in the proceedings, without an order authorising them to do so, in terms of s130(4) of the Act.

From this, it is apparent that there are two crucial points which may affect a creditor during the business rescue proceedings, namely, notification and participation. The burden of notification rests with the distressed company and while participation is a conferred right, an application to formally intervene and be placed on record as a party to the court proceedings may be procedurally advantageous. Although the Supreme Court of Appeal is yet to pronounce on this issue, the dicta of various high courts have so far been in agreement regarding notification and participation, even by means of intervention, of creditors in a business rescue process.

Danielle Koen and Thabile Fuhrmann

BUSINESS RISKS IN AFRICA AND POTENTIAL PENALTIES

Multinational companies in South Africa – with business links in the United States of America (USA) and the United Kingdom (UK) – are committed to abiding to the Foreign, Corrupt Practices Act (FCPA) of the USA or the UK Bribery Act. However, employees – whose bonuses may be linked with successfully selling products abroad or concluding an international deal – may conduct themselves in such a way as to enhance their own performance but which may trigger the FCPA or the UK Bribery Act. Such employees may be unfamiliar with the net of the FCPA/UK Bribery Act and be operating under the impression that if their conduct has no connection to the USA or UK, they will not contravene the Acts. Similarly in Competition Law related matters, companies often become aware of the unlawful conduct of an employee long after the damage has been done.

Since its passing in 2010, the UK Bribery Act has introduced laws which have far reaching effects for any South African company with ties to the UK and it's vital for South African CEO's to be aware ot the far reaching effects of the act. The mere fact that a bribe is channelled through certain banks – and only one of those banks has a connection with the USA or UK – may trigger the FCPA or the UK Bribery Act. In addition, the FCPA may be triggered if USA currency is used to pay the bribe. That means that even with no connection with the business conducted in the UK, the business in question will be prosecuted by the UK authorities. The same applies for the USA and will be regarded as a contravention of the FCPA.

As CEO, what must you do?

- Firstly, your board must be made acutely aware of the Acts and their consequences. The CEO should send out a message of 'zero tolerance' to all employees; who must also be trained on the workings of the FCPA and the UK Bribery Act. Training should include practical examples of the kind of conduct that may put the CEO, the company and the employee at risk.
- Secondly, ensure that you have policies and procedures in place to prevent a contravention of the FCPA and the UK Bribery Act.

When management becomes aware of a possible contravention of the FCPA or the UK Bribery Act, they must immediately report such knowledge via the correct channels. Self-reporting will not indemnify a company from prosecution. However, directors could avoid heavy fines and imprisonment if they are able to demonstrate that the company put in place adequate procedures to prevent offences of bribery.

As a CEO, why should you care?

To prevent you from being arrested when you enter the USA or the UK for a crime that you did not commit, but – as CEO – you must now take responsibility for, and account to foreign authorities.

Pieter Conradie

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ARBITRATION AWARDS – FALLIBLE OR INFALLIBLE: COOL IDEAS 1186 CC V HUBBARD AND ANOTHER

Several commercial contracts provide for disputes to be resolved by way of arbitration. The arbitration procedure is robust and designed to bring about finality much quicker than ordinary civil trials. While there are many benefits to opt for arbitration as a mechanism for resolving disputes (such as the parties' right to choose arbitrators based on their experience, which is particularly useful when it comes to specialised disputes) there are also disadvantages. One of the disadvantages being that, because arbitration is designed to resolve disputes rapidly, parties often do not provide for a right of appeal, which may result in undesired consequences.

Ideally arbitrators would never be wrong and always arrive at correct conclusions. Successful parties would deserve victory and losing parties would accept defeat graciously. However, in the real world, arbitrators are fallible human beings. If parties do not agree on a right of appeal in their arbitration clauses under commercial agreements, arbitration awards will be final and binding, even if such awards are wrong – unless one can prove a gross irregularity.

Parties aggrieved by arbitration awards have very limited options available to challenge such awards. Where an arbitrator committed a gross irregularity in the proceedings or exceeded his powers, the aggrieved party may apply to court to have the arbitration award set aside under s33(1) of the Arbitration Act, No 42 of 1965 (Arbitration Act). To succeed with such application is not an easy task. In the past, parties have consistently failed to persuade our courts to set arbitration awards aside on the basis of alleged gross irregularities or transgressions of power.

In *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others [2001]* (2) SA 1097 (C), the court found that where an arbitrator has given fair consideration to a matter it would be impossible to find that he had been guilty of misconduct merely because he had made a bona fide mistake of either law or fact. As such, an aggrieved party has to go further and prove moral turpitude or *mala fides* on the part of the arbitrator before a court would be prepared to upset his award. In *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another [2002] (4) SA 661 (SCA)*, Smalberger ADP found that misconduct in the required sense would not be easily inferred on the part of a professional arbitrator. Similarly, Harms J made it clear in *Telcordia Technologies Inc v Telkom SA Ltd [2007] (3) SA 266 (SCA)* that an arbitrator had the right to be wrong on the merits of a case. Gamble J in *Marble Classic Exclusive Warehouse for Natural Stones Cape (Pty) Ltd v A.R. Sholto-Douglas SC & Another (Western Cape High Court, Case number: 3521/14)* reaffirmed that alleged mistakes of law do not disclose a basis for a review under the Arbitration Act.

The principle seems to be clear: once an arbitration award is made, it is extremely difficult to avoid its enforcement, driven (it seems) by the need for finality even where an incorrect award may give rise to an unjust result.

Although our courts have consistently refused to set potentially wrong arbitration awards aside under s33(1) of the Arbitration Act, courts must still decide whether or not to allow its enforcement, by making it an order of court under s31 of the Arbitration Act. In *Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16*, which was handed down on 5 June 2014, the Constitutional Court was divided on the question of whether or not an arbitration award should be enforced. The facts of the matter are briefly as follows: Cool Ideas 1186 CC (Cool Ideas) carried on business as a property developer. It entered into a building contract with Hubbard, agreeing to construct a residential dwelling for Hubbard. Cool Ideas in turn enlisted the services of a sub-contractor, Velvori Construction CC (Velvori), to execute the building work. A dispute arose between Hubbard and Cool Ideas regarding the quality of the work and the payment of the balance of the contract price. Hubbard invoked the provisions of the arbitration clause and instituted a damages claim against Cool Ideas. Cool Ideas, in turn, instituted a counterclaim for payment of the balance of the contract price. The arbitrator found against Hubbard and ordered that the balance of the contract price be paid to Cool Ideas.

Hubbard refused to satisfy the arbitration award where after Cool Ideas applied to have the award made an order of court, in terms of s31 of the Arbitration Act. Hubbard contended that Cool Ideas was not entitled to receive remuneration under the building contract as it was not registered as a homebuilder under s10 of the Housing Consumers Protection Measures Act, No 95 of 1998 (Housing Protection Act). Accordingly, Hubbard opposed

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the application on the basis that the court would be sanctioning a contravention of the Housing Protection Act if the arbitration award was made an order of court. Hubbard did not seek to have the arbitration award set aside in terms of s33(1) of the Arbitration Act, nor did she seek the remittal of the arbitration award to the arbitrator in terms of s32(2) of the Arbitration Act. Under s32(2) of the Arbitration Act, the court has the power to remit the arbitration award to the arbitrator for reconsideration on grounds of good cause shown. This is intended to give an arbitrator an opportunity to reconsider and change the arbitration award in certain circumstances.

The High Court was of the view that Hubbard's defence was effectively an appeal and accordingly was not permitted to raise same at such a belated stage. For that reason, the High Court made the arbitration award an order of court and allowed Cool Ideas to enforce it. However, the Supreme Court of Appeal (SCA) found that it was an offence to contravene s10 of the Housing Protection Act and that the enforcement of the arbitration award would provide legal sanction to an offence which the Housing Protection Act sought to prevent. The issue under consideration was not whether the arbitration award should be set aside, but rather whether it would be legally tenable to make the arbitration award an order of court (where doing so would sanction the breach of a clear statutory prohibition). The SCA found that it would be untenable to do so, and upheld Hubbard's appeal. Wallis J dissented and held that a refusal to enforce the arbitration award would give rise to an unjust result.

Dissatisfied with the judgment, Cool Ideas appealed to the Constitutional Court and *inter alia* argued that the SCA's refusal to make the arbitration award an order of court infringed upon Cool Ideas' constitutional right of access to court (s34 of the Constitution). In addition, Cool Ideas contended that the refusal to enforce the arbitration award amounted to an unlawful deprivation of its property, in the sense that it would be deprived it of its right to payment for work that was properly and fairly done.

In the majority judgment (written by Majiedt AJ (with Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J concurring)) the Constitutional Court found that Cool Ideas was afforded a full and proper opportunity to have all the issues ventilated in the High Court and the SCA, and that its right of access to courts was accordingly not infringed. The Constitutional Court further held that the enforcement of the arbitration award would be inimical to public policy, since it would undermine the principle of legality and sanction a criminal offence. It was held that the refusal to enforce the arbitration award did not amount to an arbitrary deprivation of Cool Ideas' property as it was done for a rational purpose. Accordingly, the Constitutional Court dismissed the appeal and refused to make the arbitration award an order of court, effectively rendering it unenforceable.

However, Froneman J, Cameron J, Dambuza AJ and Van der Westhuizen J disagreed with the majority judgment and held that the appeal should have succeeded. In the minority's view, Cool Ideas was deprived of its right to payment for work fairly and properly done. The minority held that this constituted an unjustifiable deprivation of property within the meaning of s25 of the Constitution and that, based on considerations of fairness and prejudice, Cool Ideas should have been allowed to enforce the arbitration award.

Although our courts will generally enforce arbitration awards, even where they may be wrong, the SCA and Constitutional Court have created a precedent in terms whereof arbitration awards that sanction a breach of a statutory prohibition will not be enforced. However, where arbitration awards will not have the effect of sanctioning an illegality, our courts will be loath to interfere with an arbitration award, even when it might have been decided incorrectly.

Freddie Terblanche

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EMPLOYER'S POWERS TO TERMINATE? KEY PROVISIONS OF FIDIC 'YELLOW BOOK' REVIEWED

Since disputes under the International Federation of Consulting Engineers (FIDIC) form of contract are usually resolved through adjudication, reportable FIDIC cases are rare and often have precedential value.

The decision of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* concerned a dispute arising out of a £30 million contract for the design and construction work to the Gibraltar Airport which incorporated the commonly known FIDIC Yellow Book.

After over two and a half years of work on the two year project, the employer terminated the contract, after which the contractor commenced proceedings against it. The contractor argued, *inter alia*, that it had encountered more rock and contaminated material in the excavated site than would have reasonably been foreseeable by an experienced contractor at the time of tender. As a result of a report it had commissioned, it had to suspend tunnel excavation works and re-designed the tunnel.

The main issue revolved around contract termination. In determining responsibility for termination, Mr Justice Akenhead considered the following:

Was the engineer entitled to issue notices to correct on 16 May 2011 and/or 15 July 2011 under Clause 15.1?

Mr Justice Akenhead found that the engineer was entitled to issue the Clause 15.1 notices to correct on 16 May 2011 and/or 5 July 2011 in relation to various Clause 8 breaches, including the suspension of tunnel excavation works.

He noted that Clause 15.1 related only to more than insignificant contractual failures by the contractor. That the construction industry would not benefit from trivial contractual failures giving rise to notices to correct, which if not complied with, would lead to termination. He noted that the time for compliance must be reasonable in all circumstances prevailing at the time of notice, and that given the potentially serious consequences of non-compliance, Clause 15.1 notices need to be construed strictly but also against the surrounding facts.

Was the employer entitled to terminate the contract under Clause 15.2?

Mr Justice Akenhead found that the employer was entitled to serve a notice of termination pursuant to Clause 15.2(a), on the basis that the contractor had failed to comply with the Clause 15.1 notice to correct, and made it clear that the contractor's right to re-design the tunnel did not outweigh its obligation to get on with the works.

Furthermore, that the employer was entitled to serve a notice of termination pursuant to Clause 15.2(b) because the contractor had demonstrated an intention not to continue with the performance of its obligations under the contract.

Lastly, that the employer was entitled to serve a notice of termination pursuant to Clause 15.2(c)(i) of the contract because the contractor had failed to proceed with the works with due expedition and without delay and the contractor had no 'reasonable excuse' for such failure.

Must the breach of contract relied upon to terminate the contract be analogous to a repudiatory breach?

Mr Justice Akenhead noted that each contract must be considered on its own terms. If the termination clause allows for termination 'for a, or any, breach of contract', the meaning is clear and does not require repudiatory breach. In *casu*, there was a warning mechanism whereby termination could be avoided by the contractor's compliance with the Clause 15.1 notice. The remedy is therefore in the contractor's hands.

Will termination occur if the contractor has been prevented from remedying the failure for which the notice to correct is given?

Mr Justice Akenhead stated that Clauses 15.1 and 15.2(c) must, as a matter of common sense, pre-suppose that the contractor is given the opportunity by the employer to remedy the failure of which it is given notice, since the employer should not be entitled to rely on its own breach to benefit by terminating.

The court disagreed with the contractor's arguments and found, *inter alia*, that the contractor had failed to proceed with the design and execution of the works with due expedition and without delay, was responsible both in law and fact for the termination, and the employer had lawfully terminated the contract.

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This case highlights the powers available to employers under the FIDIC Yellow Book to terminate the contracts of contractors who fail to comply with notices to correct pursuant to Clauses 15.1 and 15.2(a), abandon the works or otherwise plainly demonstrate the intention not to continue performance of their obligations under the Contract pursuant to Clause 15.2(b), or (without reasonable excuse) fail to proceed with the works with due expedition and without delay pursuant to Clause 15.2(c)(i).

Yasmeen Raffie

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