DLA CLIFFE DEKKER HOFMEYR

DISPUTE
RESOLUTION

MATTERS

19 MARCH 2014

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SELLER BEWARE!

If you are selling moveable property, make sure your sale agreement clearly states that ownership of the property will only pass to the buyer when you are paid. The default position of our law is that ownership of moveable property passes on delivery to the buyer. Where the buyer does not pay the seller against delivery the seller cannot reclaim the property itself, only the purchase price.

This issue recently came before the Supreme Court of Appeal in the case of *Van der Molen v Fagan* [2013] ZASCA 203. Fagan sold a vehicle to Amod and the agreement of sale provided that payment must be made by Amod to Fagan a month after delivery of the vehicle. Fagan gave Amod the registration papers for the vehicle to enable him to secure finance but then Amod did not pay Fagan in terms of the contract. Fagan then discovered that the address given by Amod was a vacant stand and that she had been the victim of a fraud. In fact Amod's associate had registered the vehicle in his own name and thereafter had sold the vehicle to a car dealership. That dealership registered the vehicle in its name and sold it to Van der Molen who in turn registered the vehicle in his name. Fagan asked the court to order the return of the vehicle from Van der Molen claiming that she was still the owner.

continued

The court found that it could never have been the parties' intention for ownership to pass to Amod before Fagan was paid. Since Fagan was never paid for the vehicle, Amod's associate was never the owner of the vehicle. Consequently he could not have transferred ownership to the dealership and the dealership could not have transferred ownership to Van der Molen. The court then held that as Fagan was the owner of the vehicle, Van der Molen only had a claim against the dealership and the dealership in turn had a claim against Amod's associate.

Even though the court came to Fagan's assistance in this matter a seller of moveable property should take heed. Sellers should be proactive and insist on a "reservation of ownership" clause that makes it clear that ownership will not pass until payment has been made. The inclusion of a simple clause in an agreement of sale would probably have saved Fagan the not insubstantial cost of going all the way to the Supreme Court of Appeals.

Tim Fletcher assisted by Llewellyn Angus

SHADY DEALS AND SWINDLING – DULY AUTHORISED?

In the case of *ABSA Bank Ltd v Mahomed* (876/12) [2012] ZASCA 1, two retail businessmen from Pretoria (respondents) entered into interest bearing deposit investment agreements (investment agreements) with one Mistry, who was an agent of ABSA at their Marabastad agency. Mistry was later found to have perpetrated massive frauds at two ABSA agencies and a forensic investigation and audit revealed that he had stolen millions of ABSA clients' investments.

The respondents, armed with purported ABSA investment (deposit) certificates (receipts) claimed a total amount of approximately R8 million together with interest from ABSA on the basis that ABSA breached the investment agreements, and 'misappropriated, divested, lost or stole' the amounts invested. However, none of the alleged investment accounts showed on ABSA's banking systems and records and it emerged that the respondents and Mistry, unbeknownst to ABSA, used fictitious names in concluding the investments agreements to conceal the substantial taxable funds from the South African Revenue Services (SARS) to evade tax.

The respondents relied on their deposit receipts bearing the names of the fictitious account holders and apparently falsified bank stamps issued to them by Mistry. ABSA admitted only Mistry's authority to operate its Marabastad agency as its agent but denied liability. It disputed *inter alia* the genuineness of the deposit receipts, the conclusion of the alleged investment agreements alternatively, if they were so concluded, Mistry's authority to act as its authorised agent or representative when contracting with the respondents. It also pleaded that the respondents, acting independently or in concert with Mistry, intentionally and unlawfully concealed the investments, their entitlement thereto and the source of the investment funds from SARS to evade tax.

ABSA proclaimed its innocence and alleged that the respondents assumed all risks associated with such conduct from which it did not benefit. ABSA finally pleaded that granting the respondents' claims would offend public policy, fairness and equity as it would constitute the enforcement of illegal, dishonest and immoral conduct.

The court a *quo* found that it was not disputed that Mistry held himself out as, and was in fact, ABSA's duly authorised agent with actual and ostensible authority to transact on ABSA's behalf as he did when the investment transactions were effected. In the court's view, 'the contract to make a fixed deposit investment . . . was separate and distinguishable from the financial advice on how to evade . . . tax . . . [and] was irrelevant to the issue that the branch manager of the bank, with the requisite actual or ostensible authority, solicited and took deposits from the [respondents] and issued fixed deposit receipts in respect thereto''. The court found that the respondents had established the requirements to hold ABSA liable for its agent's acts on the basis of estoppel and proved their pleaded case on a balance of probabilities.

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On appeal, the Supreme Court of Appeal (SCA) had to decide whether Mistry was duly authorised to represent ABSA in concluding the alleged investment agreements. The respondents consequently were required to show either that Mistry was expressly authorised by ABSA to conclude the investments or impliedly authorised, a fact that had to be inferred from the conduct of the parties and the circumstances of the case. The SCA concluded that express authority was ruled out since Mistry did not provide the respondents with official acknowledgements of their deposits as required by his agency agreement with ABSA. Moreover, the SCA pointed out that the respondents intentionally and knowingly colluded with Mistry to open investments accounts with ABSA in fictitious names to facilitate their tax evasion, unlawful conduct which ABSA was not shown to have authorised Mistry, expressly (or otherwise), to undertake on its behalf. The SCA accordingly disagreed with the court a *quo* that the underlying unlawful intent to circumvent tax laws had no bearing on the validity of their claims and was a matter to be dealt with by SARS.

Regarding implied authority, the court relied on dicta from the case of *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) and held that the type of agreements which Mistry purportedly concluded with the respondents on ABSA's behalf did not fall within the category of business or transactions that a branch of a bank and its agent would ordinarily conduct. Furthermore, the respondents could most certainly not reasonably have believed that engaging in fraudulent conduct fell within Mistry's functions and that ABSA had authorised him to represent it in unlawful activity. The respondents, therefore, failed to prove that Mistry had implied authority to conclude the alleged Investments on ABSA's behalf and ABSA's appeal was upheld.

Anja Hofmeyr and Neil Comte

SECURITY AND LIQUIDATION IN TERMS OF SECTION 141(2)(a) OF THE NEW COMPANIES ACT

On its introduction, through Chapter 6, into South Africa's Companies Act, No 71 of 2008 (new Act), the concept of business rescue presented exciting new alternatives to liquidations and the (failed) concept of judicial management. Unfortunately the excitement has been slightly curbed by practical challenges which have presented themselves when applying the provisions of Chapter 6. This article focuses on s141(2)(a) of the new Act, and the requirement that security be provided to the Master of the High Court (master) upon the filing of an application for liquidation.

Section 141(2)(a) prescribes that if at any time during business rescue proceedings the duly appointed business rescue practitioner (BRP) concludes that there is no reasonable prospect of the company being rescued, then the BRP must:

a) inform *inter alia* the court of the situation; and

b) apply to court for an order discontinuing the business rescue proceedings and placing the company into liquidation.

In the circumstances described in s141(2) it must be concluded that the company is, amongst other things, insolvent. That being the case, the new Act currently prescribes, in Schedule 5, part 9, that applications to liquidate insolvent companies are governed by the winding-up and liquidation provisions of the Companies Act, No 63 of 1971 (as amended) (old Act). It appears therefore that s141(2) of the new Act must be read with the winding-up and liquidation provisions of the old Act.

continued

Deviating a little, but with purpose it is highlighted that one of the applicable provisions of the old Act is s346. S346(3) requires that, save for an application by the Master to wind-up the company, every other winding-up application must be accompanied by a certificate from the Master. This certificate must confirm that sufficient security has been provided for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed. This is a statutory requirement and the court can therefore not condone its non-fulfilment – that is, in the absence of Master's certificate, described above, the court cannot grant the liquidation of a company.

So on the reading of s141(2) of the new Act with s346(3) of the old Act it appears that if the BRP sees no reasonable prospect of rescuing the company they are obliged to apply for that company's liquidation (s141(2)(a)(ii) of the new Act), and sufficient security therefor must be provided to the Master in terms of s346(3) of the Old Act before the Court can consider the application.

The question that therefore arises is who must furnish this security.

To put the problem in perspective, an example which arose in practice will be referred to.

The company in question had gone into voluntary business rescue, through a resolution issued by its board in terms of s129 of the new Act. Sometime later, despite his and the company's managements best efforts, the BRP was obliged to apply for a s141(2)(a)(ii) liquidation of a company. By that time the company had no liquidity, and it had insufficient unencumbered assets to satisfy any security requirements. The company therefore could not provide the security required by s346(3) of the old Act - the BRP would have been negligent in his duties had he represented to the Master that it could. There was no applicant creditor to supply such security. The BRP was under no obligation to supply this security in his personal capacity, which obligation would be ludicrous.

The conundrum: The BRP was obliged to apply for the company's liquidation, but security therefor could not be provided. The court was not permitted to grant the liquidation application, provisional or otherwise, until such time as presented with the certificate from the Master. The Master cannot issue the certificate until the security required in s346(3) is obtained.

Eventually a third party agreed to furnish sufficient security to the Master, and the court ordered the final liquidation of the company. The situation however was not ideal. There is rarely going to be a third party willing to take the risk of putting up the required security in circumstances such as these.

It is a very real and practical problem which requires a solution from the legislature, especially considering that BRPs are obliged to apply for the liquidation of a company in the circumstances described in s141(2) of the new Act.

Belinda Scriba

continued

NO ROOM FOR PAJA IN INDEPENDENT SCHOOLS

On 22 January 2014 the KwaZulu-Natal Division of the High Court handed down judgment in the matter of *Indrajith v Saint Charles College, Pietermaritzburg & One Other.*

Mr Indrajith went to court in his capacity as father and guardian of Pavishkar Indrajith, a matric pupil at St Charles College, an independent school. Mr Indrajith asked for an order reinstating Pavishkar as the captain of the St Charles first cricket team pending the outcome of an internal enquiry. He also asked the court to order such an enquiry. Mr Indrajith relied on the Constitution, the South African Schools Act, No 84 of 1996 and certain provisions of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA), the national legislation passed to give effect to s33 of the Constitution which guarantees the right to just administrative action. The judge found that all the references made by Mr Indrajith to the Constitution point to s33.

The principal defence raised by St Charles was that matters of internal governance within an independent school cannot constitute administrative action. St Charles noted that Mr Indrajith did not claim that Pavishkar's constitutional rights were violated and accordingly the court had no power to intrude. St Charles argued further that Mr Indrajith did not have a claim under PAJA because the definition of 'administrative action' does not include the decisions Mr Indrajith wanted reviewed. In making the decision to remove Pavishkar, St Charles did not exercise a public power or perform a public function.

The judge agreed with St Charles and found that courts will generally defer to the jurisdiction of a school over its internal affairs and will interfere only when a fundamental right has been violated. The judge found that St Charles did not exercise a public power or perform a public function and that generally the administrative decisions taken by an independent school are not the exercise of a public power or the performance of a public function. In reaching this conclusion the judge relied on *Khan v Ansur N.O & Ors 2009 (3) SA 258 (D)* in which Swain J held that there is a fundamental statutory distinction between a public school and an independent school, and the executive branch of government holds administrative control over an independent school by its power to register and deregister such a school. There is however no control over the administrative decisions taken by officials of an independent school in the exercise of their functions. These officials therefore do not exercise a public power or perform a public function. Ultimately Vahed J found that the court had no power to intrude upon the internal affairs of St Charles as Mr Indrajith had not claimed or proved a breach of any of Pravishkar's fundamental rights.

As the courts are reluctant to interfere in matters of internal governance at independent schools, these schools, and their pupils and parents, should make a concerted effort to resolve disputes through internal remedies before rushing to court. Only when the conduct complained of constitutes a breach of a fundamental right will the courts consider intervention. Parties that rush to court before trying to resolve a dispute amicably will inevitably incur legal fees that will be wasted when the court refuses to intervene.

Kerry Plots

continued

CREDIT PROVIDERS' OBLIGATIONS IN TERMS OF THE NATIONAL CREDIT ACT'S DEFAULT NOTICE

The National Credit Act, No 34 of 2005 (Act) was introduced into South African law with the aim of regulating the relationship between consumers and providers of credit. It is important to remember that the Act applies to all credit agreements entered into after 1 June 2007 between natural and/or juristic persons with an asset value/annual turnover of less that R1 million. It does not apply however where it is a large agreement entered into by a juristic person where such agreement is a mortgage agreement or a credit transaction that falls at or above R250 000.

The discussion below concerns the recent judgement made by the Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd*[1] 2014 ZACC 1 which refined the credit provider's obligations and the application of s129 in terms of the Act.

S129 provides that before heading to court to enforce the debt owed to you by a consumer who has defaulted on their debt, a notice must be sent to the consumer informing them that they are in default and propose that the consumer refer the dispute to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the purpose of resolving the dispute and determining a plan to have all the outstanding payments met.

In the event that the credit provider does not send this notice before going to court, s130 of the Act states that the court must adjourn the matter and make an order setting out the steps the credit provider must follow before the matter can resume.

Due to the regular occurrence of secured assets 'growing legs' and disappearing into the night, it is imperative that proper dispatch of a s129 notice is ensured for a credit provider to be successful against a defaulting consumer in the court room.

In the above judgement, Standard Bank issued summons against Mr Kubyana for the cancellation of the instalment sale agreement, return of the motor vehicle and damages. Amongst other averments, Mr Kubyana alleged that the High Court did not have jurisdiction to hear the matter as Standard Bank had not complied with its s129 obligation. He alleged that due to the notice having been sent back to Standard Bank by the Post Office being unclaimed, there had not been proper delivery as the Act requires.

Standard Bank provided evidence that Mr Kubyana's account was in arrears, the s129 notice had been sent via registered post to the address nominated by Mr Kubyana in the instalment sale agreement, the notice had reached the correct branch of the Post Office and the notification from the Post Office had been sent to Mr Kubyana's address. Though present, Mr Kubyana provided no explanation for his failure to collect the notice.

The Constitutional Court highlighted the following three aspects regarding a credit provider's obligations in terms of the Act:

[1](CCT 65/13) [2014] ZACC 1 (20 February 2014).

continued

- S129 requires the credit provider to 'draw the default to the notice of the consumer in writing'. This obligation is discharged by 'making the document available to the consumer'. Thus, it is the use of an acceptable mode of delivery which the statute requires of the credit provider, not the bringing of the contents of the s129 notice to the consumer's subjective attention.

- When a consumer has elected to receive notice by way of post, the credit provider must respect the consumer's election, undertake the additional expense of sending notices by way of registered rather than ordinary mail and ensure that any notice is sent to the correct branch of the Post Office for the consumer's collection.

- For there to have been delivery under the Act it must be the case that it may reasonably be assumed that notification of the arrival of the default notice reached the consumer and that a reasonable consumer would have ensured retrieval of the item.

One qualification to the above obligations was that proper delivery will not take place if the notice would nevertheless not have come to the attention of a reasonable consumer. Judge Jafta, in his minority judgement, gave the example of an unconscious consumer lying in hospital.

Therefore in order to avoid your assets slipping out of your grasp and having to leave court empty handed, always keep in mind the above three obligations and ensure proper delivery of the s129 notice.

Thabile Fuhrmann and Nicole Meyer.

2013
1st by M&A Deal Flow, 1st by M&A Deal Value

2012
1st by M&A Deal Flow
1st by General Corporate Finance Deal Flow
1st by General Corporate Finance Deal Value
1st by Unlisted Deals-Deal Flow

2011
1st by M&A Deal Flow
1st by M&A Deal Value
1st by General Corporate Finance
1st by Legal Advisor (Deal of the Year)

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