DISPUTE RESOLUTION

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LITIGATION COSTS: FRONTING OF A DIFFERENT KIND

"There are people who enter into litigation with… a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear." **This was the view taken by the Supreme Court of Appeal (SCA) in *Boost Sports South Africa (Pty) Ltd v The South African Breweries Limited* where the court required the plaintiff to put up security for costs.**

Before this decision, the general rule was that a local company could not be compelled to put up security for costs. Section 13 of the previous Companies Act, No 68 of 1971 was an exception, providing that where there was evidence that a plaintiff company would not be unable to pay the costs of the defendant if the plaintiff were unsuccessful with its claims, then the court may order the plaintiff to provide security for costs. In terms of the Rules of Court if security was then not provided, the plaintiff company would not be able to proceed with its litigation. The clear purpose of this provision was to ensure that where a plaintiff company was unsuccessful with its claim that a defendant would be able to recover its costs. The new Companies Act, No 71 of 2008 does not contain such a provision.

Boost Sports South Africa (BSSA) alleged that South African Breweries (SAB) had breached a confidentiality agreement. BSSA claimed damages, which it alleged were caused by a disclosure of confidential information. SAB replied that it had not signed the confidentiality agreement and that in any event the information was already in the public domain. SAB believed that the action would almost certainly be dismissed, was concerned that BSSA would not be able to pay its costs and demanded that BSSA put up security. BSSA refused and the issue went to court. SAB was able to show the court that BSSA did not have any assets and had never traded. The shareholders of the company, although willing to fund the litigation against SAB, were not prepared to put up security on behalf of BSSA. In court, BSSA conceded that SAB's claims regarding its financial position were correct but contended that the demand would "effectively destroy [its] ability to prosecute its claim". The court found that the shareholders funding the litigation were not candid with the court and were on the probabilities in a position to put up security.

The court also looked at BSSA's prospects of success in its main claim and found that the claim was vexatious, in particular that the information in question was neither unique nor confidential. The court also looked at the reluctance of BSSA's shareholders to come to BSSA's aid by putting up security and held that they were effectively "shielding behind an empty shell in order to avoid liability for costs". The concern with this type of behaviour is that a plaintiff then has nothing to lose and everything to gain in the litigation and the absence of risk encourages speculative and vexatious litigation. On these facts the SCA ordered the plaintiff to put up security for costs notwithstanding the repeal of s13 of the old Companies Act.

This decision makes it clear that where the court's intervention in regard to security for costs is warranted by the facts of the case, the merit of the claim and the financial position of the plaintiff, the court will order the plaintiff to have some skin in the game.

Tim Fletcher and Wandile Sishi

DLA CLIFFE DEKKER HOFMEYR

TRACTOR TUSSLE ROUND TWO – PRESCRIPTION AND THE *REI VIDICATIO*

The Supreme Court of Appeal (SCA) has recently pronounced on a misconception regarding prescription and clarified that a claim for the return of a "thing" under the *actio rei vindication*, (the action of an owner for return of his property) does not prescribe after three years.

While this conclusion may seem logical, many people have and will continue to overlook the relevance of the word "debt" as used in the Prescription Act, No 68 of 1969 (Act).

In the matter of *Absa v Keet* (817/13) [2015] ZASCA 81 (28 May 2015), the bank took cession of the right, title and interest in an instalment sale agreement from Eastvaal Motors Limited, which Eastvaal had concluded with Keet for the sale and purchase of a tractor. In terms of the agreement ownership of the tractor was reserved and would not pass to Keet until fully paid off. The final instalment in the agreement was due on 1 November 2007. It was also an express provision of the agreement that should Keet fail to fulfil his obligations, Absa would repossess the tractor.

Keet failed to fulfil his obligations in terms of the agreement and on 14 December 2011, a summons was served on him, claiming return of the tractor. Keet defended the action and raised a special plea on the merits of the case. The special plea is at the centre of this decision. Keet argued that the "amount alleged to be outstanding [by Absa] became due and payable" on 1 November 2007 and thus Absa's claim for the return of the tractor had prescribed.

Keet based this assertion on s11(d) of the Act which provides for a prescription period of three years for a 'debt', meaning that, if indeed the claim for repossession of the tractor was a 'debt' in terms of the Act, the 'debt' prescribed on 31 October 2010.

The court of first instance found that the claim in question had indeed prescribed. The court ruled that the case of *Staegemann v Langehoven* 2011 (5) SA 648 (WCC), (which held that "a vindicatory claim being a claim to ownership in a thing and not a claim for payment of a debt, does not prescribe after three years"), was wrongly decided.

The matter was, however, taken on appeal to the SCA with success. The SCA held that the genesis of the misconception of the word 'debt' arose in *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) where it was said that, "the word 'debt' in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for vindication of property". The SCA, however, regarded this as a mere "comment in passing" and therefore not binding on it.

Ultimately, the SCA reviewed the case law on the matter and found that *Staegemann* was "on all fours" with the present case. The SCA held that there has always been a clear distinction between real rights (the rights of legal persons to things or property), and personal rights (arising from the relationship between two legal persons). As a result, conflating acquisitive prescription in regard to things (subject to a thirty year prescription period), with extinctive prescription of ordinary debts (subject to a three year period if they fall into s11(d) of the Act) is not in keeping with the intention of the Legislature.

Thankfully it is now clear that a claim by an owner for the return of their asset (under the *actio rei vindicatio*), is not a 'debt' (as used in Chapter III of the Act) to which extinctive prescription is applicable.

Jonathan Ripley-Evans and Neil Comte

TAKE CAUTION BEFORE POSTING: SOCIAL MEDIA AND DEFAMATION

Facebook, Twitter, LinkedIn and Google+ have become the most effective and immediate way of conveying information. There are, however, some pitfalls that come with being able to communicate instantly with the social media world; chief among these perils is defamation.

The issue of defamation via social media platforms has been an internationally debated topic. South African is no different: our judges and arbitrators have been tasked with applying their minds to issues of defamation via social media.

Defamatory posts in an employment context

Defamation via social media has been the subject of several hearings before the Commission for Conciliation, Mediation and Arbitration (CCMA), particularly where employees post information regarding their employers that is scandalous or damaging to their employers' reputation.

In the case of *Sedick & another v Krisray (Pty) Ltd* [2011] 8 BALR 879 (CCMA), two employees were dismissed for posting derogatory comments on Facebook about their employer following the CCMA's finding that the employees did not restrict access to their Facebook pages and, because the posting of the information was in the public realm, its admissibility could not be contested.

Moreover, in the case of *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business, Worcester, a Division of Pioneer Foods (Pty) Ltd* [2014] 7 BALR 716 (CCMA), an employee was dismissed following the posting of derogatory comments regarding his employer in contravention of his employer's IT policy which specified permissible usage. The CCMA again held that the employee's dismissal was fair since the employee had not restricted access to his Facebook page and therefore he could not rely on his right to privacy in circumstances where his posts brought the employer's name into disrepute.

Facebook defamation in our courts

The first South African case involving defamation via social media was *Heroldt v Wills* 2013 (2) SA 530 (GSJ), where an interdict was sought against the defendant for a Facebook post suggesting that the plaintiff was not a "proper" man for allegedly failing to care for his daughters because of "the alcohol, the drugs, the church". The court found that the post defamed the plaintiff and ordered the defendant to remove all posts involving the plaintiff and also to pay the plaintiff's legal costs.

In a later case of *Isparta v Richter and Another* 2013 (6) SA 529 (GNP), the first defendant made various posts on her Facebook wall concerning the plaintiff (his ex-wife). The second defendant (the first defendant's wife at the time) was tagged in the first defendant's posts but did not post any comments to these posts. Two of the first defendant's posts suggested that the plaintiff was a bad mother and permitted an inappropriate relationship between her step-son and daughter. The court found these posts defamatory, and awarded damages of R40,000 to the plaintiff, payable by both defendants jointly and severally. This was despite the fact that only some of the parties' Facebook friends would have read the defamatory posts.

Among other things, the *Isparta* judgment indicates that:

- South African law does not require a person to be the originator of the defamatory content to be held liable – merely repeating or "sharing" a defamatory post is sufficient to constitute defamation;
- a person may be equally liable for another person's posts where that person knows that they have been tagged in the other person's post and allows their name to be used, and fails to take steps to disassociate themselves from the defamatory post;
- a series of comments or posts published via social media may have a defamatory meaning when read together, despite each comment or post appearing individually harmless; and
- an apology on the same social media where a defamatory statement has been made may assist in mitigating the damage to a person's dignity and reputation.

continued

Balancing the right to dignity against the right to freedom of expression

In the recent case of *RM v RB* 2015 (1) SA 270 (KZP), Chetty J established a limit to which our courts should go to protect social media users. The *RM* case involved a mother, father and a daughter. After the daughter spent a weekend at her father's place, the mother took to Facebook to criticise the father's care of their daughter and referred to his use of alcohol and drugs in her posts.

Chetty J held that although courts may order a person to remove defamatory messages from social media, they should not order such a person to refrain from posting future defamatory statements via social media, or in any other way, because not every defamatory statement would necessarily be actionable in court and relief in the form of an interdict or damages is always available to the defamed person. This reasoning appears to be an appropriate balancing of the Constitutionally-enshrined right to freedom of expression and the right to dignity.

The effect of the *RM v RB* case is two-fold:

- not all defamatory statements are actionable in court and granting a blanket interdict preventing such posts in future will place a severe limitation on freedom of expression; and
- a final interdict is unlikely to be granted by a court in circumstances where alternative options for relief are available.

It would be wise to think twice before sharing or posting scandalous content on social media. Social media users should be proactive in controlling their privacy settings and are advised to study their employers' IT policies carefully.

Anja Hofmeyr and Gareth Howard

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BUSINESS RESCUE – WHERE WILL IT END?

The commercial landscape in South Africa was forever changed when business rescue was introduced by Chapter 6 of the Companies Act, No 71 of 2008 (Act).

The proverbial "blind leading the blind" comes to mind when one recalls the great uncertainty which existed, and to an extent still exists, in the minds of business owners, creditors, employees and even business rescue practitioners as to the meaning of certain of the provisions of Chapter 6 of the Act.

With each new judgment delivered, our courts are providing clarity on Chapter 6, making it easier for business owners, creditors and business rescue practitioners to navigate their way through this ever-changing landscape.The Supreme Court of Appeal (SCA) was recently tasked with determining whether it is competent for an affected person to apply for a company to be placed in business rescue after a final liquidation order has been granted against a company. The SCA delivered the judgment in *Richter v Absa Bank Limited* (20181/2014) [2015] ZASCA 100 on 1 June 2015.

In 2013, Mr Dawid Richter (Richter), an employee of Bloempro CC (Bloempro), brought an application to place Bloempro under business rescue after it was placed under final liquidation. A shareholder, creditor, employee and registered trade union representing employees are all defined as "affected persons" in the Act. The application was dismissed, but taken on appeal at the SCA.

Sections 131(1) and (6) provide:

> "(1) Unless a company has adopted a resolution contemplated in s129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.
>
> (6) …if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until:
>
> (a) the court has adjudicated upon the application; or
>
> (b) the business rescue proceedings end, if the court makes the order applied for."

The crux of the issue before the SCA was the interpretation of the phrase "liquidation proceedings" within the context of s131(6) of the Act. The SCA had to decide whether the phrase refers only to a pending liquidation application or whether it includes the process of winding up a company after being place under final liquidation.

The SCA overturned the court a quo's decision and confirmed that upon the final liquidation order being granted, a company continues to exist, but control of its affairs is transferred from the directors to the liquidator. Only once the affairs of the company have been finally wound up by the liquidator and a Master's certificate to that effect is published in the Government Gazette, is the company dissolved.

This judgment has far reaching implications for businesses and creditors as it allows any affected person to apply for a company to be placed under business rescue even after a final order of liquidation has been granted, and conceivably after a liquidator has liquidated certain of the company's assets.

The SCA considered the concerns raised by Absa which included that a liberal interpretation of s131(1) may have negative results for the liquidation process. Absa argued these negative results would include repetitive disruptions and uncertainty that may result from various affected persons making applications for business rescue at different times during the winding up process and handing back business control to the same directors who may have been the cause of the company's financial distress.

It seems that, in reaching its decision, the SCA was guided and persuaded by the purpose of business rescue as stated in the Act being: "to provide for efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders."

This judgment is a significant victory for employees but not so much for creditors.

The SCA sent a definite message to creditors when stating that: "A necessary consequence thereof is limitation, to some extent, on the power of creditors to single-handedly curtail the life of a company".

The full impact of this judgment on the rights of creditors will soon become apparent.

Lucinde Rhoodie and Mongezi Mpahlwa

WHEN THE HEAD(ING) SAYS ONE THING AND THE BODY SAYS ANOTHER...

Contracts are concluded on the basis that the parties are *ad idem* (of one mind) regarding the type of contract and the wording contained in such contract. An issue may arise where the words used in the heading and those contained in the body of the contract are capable of being interpreted in different ways. Will the court merely give effect to the wording used in the heading or body of the contract, or consider both the heading and body in the context of other surrounding factors? This was the issue that the court grappled with in *Kilburn v Tuning Fork (Pty) Ltd 2015 ZASCA 53.*

The brief facts are as follows: Kilburn Auto (Pty) Ltd (Kilburn Auto) concluded a dealership agreement with McCarthy (Pty) Ltd (McCarthy) which gave Kilburn Auto the right to exclusively purchase products from McCarthy's Yamaha Distributors division. Kilburn Auto was also a customer of one of McCarthy's other divisions being the After Market Products (AMP) division. McCarthy subsequently concluded a sale agreement with Tuning Fork (Pty) Ltd (TF) whereby it sold six of its divisions (including Yamaha Distributors and AMP), each operating under a different name, to TF.

In May 2011, the AMP division requested Kilburn Auto to complete new credit application forms and furnish AMP with security in the form of a deed of suretyship (Deed). The Deed was concluded and when submitted, read as follows: Deed of suretyship – Tuning Fork (Pty) Ltd t/a After Market Products.

Kilburn Auto breached the dealership agreement with TF for products bought under the Yamaha Distributors division. As the new owner of the Yamaha Distributors division, TF launched an application for payment of the outstanding amount, ancillary relief, and costs jointly and severally from Kilburn Auto as the principal debtor and Ian Kilburn as the surety.

In the court *a quo*, Kilburn Auto contended that its indebtedness relating to the purchase of the products under the AMP division had been discharged. The court, however, found in favour of TF's interpretation that the deed of suretyship had been widely worded and thus covered the purchase of any product under any of the entities. TF was the creditor and therefore had a claim against Ian Kilburn in his capacity as surety.

The SCA was called upon to decide whether TF, on a proper construction of the Deed, had a contractual right to recover, against Ian Kilburn in his capacity as a surety, the indebtedness that arose from the credit purchases from TF's Yamaha Distributors division.

TF made the following contentions:

- Where a heading and body of an agreement are in conflict, the body has to prevail as the parties' intention could be derived therefrom. The SCA accepted this but further pointed out that where the heading and body can be read together, this should be done.
- The words used in the heading are meaningless, superfluous and administrative. The SCA disagreed with this view as it goes against the rule of interpretation that every word must be given a meaning.
- The context in which the Deed came into being is a neutral factor and that when the words are read in isolation and in the context of the body of the Deed, they may be unclear. The SCA rejected this by stating that clarity is achieved when language is considered in light of the factual background, including the purpose of the Deed and the circumstances in which it was prepared. The Deed only came into existence because security was required for Kilburn Auto to purchase the goods on credit from the AMP division.

The SCA held that when effect was given to words in the Deed and all other circumstances are taken into account, the liability of Ian Kilburn as surety was limited to the credit purchases from the AMP division and accordingly, had been discharged. There was thus no conflict found between the heading and body of the Deed.

This case should encourage contracting parties to carefully consider the wording used in the entire contract, from the heading to the body, in order to prevent the court from having to interpret the contract in a manner that neither party intended.

Anja Hofmeyr and Thato Thobakgale

DOES THE INVESTMENT BILL PROVIDE ANY REAL GUARANTEES FOR FOREIGN INVESTORS?

After almost a year and a half since the first draft of the Promotion and Protection of Investment Bill (Investment Bill) was released for public comment in November 2013, a revised Investment Bill will shortly be introduced into Parliament for deliberation. The question which needs to be addressed is whether the Department of Trade and Industry (DTI) has taken heed of the comments submitted by interested groups in response to the Investment Bill. This consideration is important because the adoption of the Investment Bill has the potential to limit the flow of foreign direct investment to South Africa pursuant to the termination of its Bilateral Investment Treaties (BITs) with a number of trading partners.

A high-level review of the revised Investment Bill reveals that although certain clauses have been clarified, the major concerns raised about the first draft are still present. These concerns include:

- the expropriation provisions in the revised Investment Bill are not similar to traditional BITs;
- there is concern regarding whether the regulation of national treatment as an investment protection principle for foreign investors goes far enough in the revised Investment Bill; and
- the dispute resolutions provisions determine that local remedies in local courts must first be exhausted before the government may consent to international arbitration.

The South African government has expressed its firm intention to proceed with the replacement of BITs that are deemed not to be in the interest of South Africa, and to regulate any future foreign investment on the same basis as any national investment. This strong stand-point makes it important for foreign investors (from countries with which South Africa would have previously had BITs) to understand what protections will exist for their investment in South Africa.

A plain reading of the revised Investment Bill reveals that the South African government has no intention of providing foreign investors with a higher degree of protection than a national investor. The contention being that South Africa's domestic legislation provides sufficient legal protection to any foreign investor aggrieved by any direct or indirect effect that a decision or action by the government may have on their investment.

This contention may well be viewed as correct from a South African investor's perspective however the position is different from a foreign investor's perspective in that they need to decide which country to invest in. Foreign investors are also likely to do a cost-benefit analysis, weighing the risk of investing in South Africa versus the risks associated with another jurisdiction. Although the existence of BITs are only one of the factors a potential foreign investor takes into account when making investment choices, the lack of a BIT could (depending on the investor's appetite for risk) be the deciding factor.

The implications of the Investment Bill in general for foreign investors are that an investor who invested prior to the termination of any BIT will still retain the protection of the BIT for the duration of the sunset period (between 10 to 15 years). Any investor who invests between the date of termination of the BIT and the eventual promulgation of the revised Investment Bill will be limited to recourse similar to that which a South African citizen would have in terms of domestic legislation. On the eventual promulgation of the revised Investment Bill, an aggrieved foreign investor will be limited to mediation, domestic courts or statutory institutions to resolve disputes. Foreign investors' access to international arbitration will be dependent on the state's consent thereto.

The Investment Bill does guarantee certain international investment law principles ie national treatment, security of investment, provisions regulating and preventing arbitrary expropriation, and the ability to transfer funds as a foreign investor (subject to taxation and other legislation). However, foreign investors' biggest concern may well be the regulation of dispute resolution since, in reality, the Investment Bill provides no recourse to international arbitration. Given how government bureaucracy works, foreign investors are unlikely to receive the necessary governmental consent to take the dispute to international arbitration.

In order to ease foreign investors' concerns, the government should consider explicitly consenting to international arbitration with certain caveats such as:

- the seat of arbitration shall be in South Africa; and
- the law governing the international arbitration shall be South African law.

This compromise should alleviate some concerns for foreign investors who may be more comfortable knowing that an independent arbitrator (not the courts) will settle their dispute. This proposal would need to be aligned with the promulgation of an International Arbitration Act based on the United Nations Commission in International Trade Law Model (1985 version or 2006 version) on International Commercial Arbitration which limits the interference of domestic courts in the adjudication of the disputes. While this solution may not provide absolute peace of mind to potential foreign investors, what it does do is meet foreign investors half-way by providing recourse to international arbitration. This concession will align with the Department of Justice's initiative to introduce an International Arbitration Bill during the latter part of this year.

Jackwell Feris

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