DISPUTE RESOLUTION

IN THIS ISSUE

EMAIL SIGNATURES - THE MODERN AUTOGRAPH

The Electronic Communications and Transactions Act 25 of 2002 ('ECTA') was enacted to *inter alia* clarify and promote legal certainty relating to electronic communications and transactions which have, due to their practical and expeditious nature, become extremely prevalent in today's commercial environment.

The ECTA gives legal recognition to transactions which are concluded electronically, by way of email. In this regard, s12(a) of the ECTA states that a legal requirement for an agreement to be in writing will be satisfied if it is concluded electronically or by way of a 'data message' (as defined in the ECTA). Section 13(3) of the ECTA states that, where an electronic signature is required by the parties to an electronic transaction (and the parties have not agreed on the type of electronic signature), that requirement is met if:

(1) a method is used to identify the person and to indicate the person's approval of the information communicated; and

(2) having regard to all the relevant circumstances at the time the method was used, the method was as reliable and appropriate for the purposes for which the information was communicated.

The Supreme Court of Appeal ('SCA') recently handed down a judgment in the case of *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and another* 2015 (2) SA 118 (SCA) which deals with the question of whether or not a person's email signature, which appears at the foot of an email, is sufficient to satisfy the requirements of an electronic signature in terms of s13(3) of the ECTA.

The salient facts were that an agreement had been entered into between the appellant and respondent, which required cancellation thereof to be 'in writing' and to be 'signed by both parties'. The parties subsequently cancelled the agreement by way of email exchanges. The respondent later contended that the agreement had not been validly cancelled due to the fact that the (electronic) agreement of cancellation had not been signed by both parties. The main contention related to whether or not the email signatures constituted valid electronic signatures, as contemplated in s13(3). *continued*

DLA CLIFFE DEKKER HOFMEYR

On appeal, the SCA analyzed how the courts had generally approached signature requirements in the past, and held that a signature is:

"...a person's name written in a distinctive way as a form of identification... In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of attesting a document or identifying it as his act, to be a valid signature."

Most importantly, the courts have always adopted a pragmatic, as opposed to a formalistic, approach towards signatures, and the primary consideration has always been whether or not the method of signature fulfils the function of authenticating the identity of the signatory. In terms of the ECTA, an electronic signature is defined as:

"data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature".

The SCA concluded that the names of the parties at the foot of their respective emails were:

(1) intended to serve as signatures;

(2) constituted 'data' which was logically associated with the data in the body of the emails; and

(3) identified the parties.

Accordingly, this detail satisfied the requirement of an electronic signature in terms of s13(3) of the ECTA and had the effect of authenticating the information contained in the emails.

The approach adopted by the SCA conforms with the aim and purpose of the ECTA, as well as the practical and non-formalistic way in which the courts have treated signature requirements in the past, and is accordingly to be welcomed.

Jonathan Witts-Hewinson & Fiorella Noriega

INTERPRETATION OF WRITTEN AGREEMENTS

***Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC* (44/2014) [2015] ZASCA 62 (17 April 2015) is a recent judgment by the Supreme Court of Appeal concerning the interpretation of a written agreement.**

The court (per Mpati P) said that what the parties and their witnesses *ex post facto* think or believe regarding the meaning to be attached to the clauses of the agreement, and thus what their intention was, is of no assistance in the exercise.

The court referred to its earlier judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593; [2012] ZASCA 13 (SCA) where Wallis JA said the following with regard to the construction of a document:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."
(Para 18)

And further:

"Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, 'the intention of the contracting parties', because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself." (Para 20)

In *Shakawa Hunting*. Mpati P concluded that, what was stated in *Endumeni Municipality* regarding the expression 'the intention of the parties', was in line with what was expressed by Greenberg JA more than six decades ago in *Worman v Hughes & others* 1948 (3) SA 495 (A) at 505, namely:

"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means...."

According to the judge, it followed that the testimony of the parties to a written agreement as to what either of them may have had in mind at the time of the conclusion of the agreement is irrelevant for purposes of ascertaining the meaning of the words used in a particular clause.

The judgment in *Shakawa Hunting* should be read with an earlier judgment by the Supreme Court of Appeal in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) (Bpk)* 2014 (2) SA 494 (SCA) where Wallis

continued

JA emphasised, that while the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, was never very clear and has since fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

Marius Potgieter

TAKING A BITE OUT OF THE PIE ACT

Applying Ndlovu v Ngcobo; Bekker and Another v Jika [2002] 4 All SA 384 (SCA)

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 (PIE Act) regulates the eviction of unlawful occupiers. The PIE Act thus protects an unlawful occupier's rights under s26(3) of the Constitution.

The requirements set out in the PIE Act have to be complied with before an unlawful occupier can be evicted from a property. Some respite is given to property owners by the fact that the PIE Act only relates to the eviction of unlawful residential occupants and not to evictions concerning unlawful commercial occupants. The distinction between the two was rehashed and clearly set out in the recent Constitutional Court decision of *MC Denneboom Service Station CC and Another v Phayane* 2015 (1) SA 54 (CC).

MC Denneboom Service Station CC (Denneboom) and Nola Elison Chiloane (Chiloane) operated a service station and a convenience store on a property owned by Molefe Ian Phayane (Phayane). Chiloane was, however, also residing on part of the property. The property had previously been owned by Chiloane and his wife. During 1992, Chiloane was sequestrated and the duly appointed trustee of Chiloane caused the property to be sold on public auction to Phayane who took transfer of the property during May 2010. Despite the sale and transfer of the property to Phayane, Chiloane refused to vacate the property which resulted in Phayane instituting eviction proceedings in the North Gauteng High Court against Denneboom and Chiloane.

Denneboom and Chiloane challenged the application, pointing out that there were a number of other occupants residing on the property and that Phayane had failed to comply with the provisions of the PIE Act. Phayane subsequently amended his pleadings to exclude the eviction of 'residential occupants'. The court consequently granted an order evicting both Denneboom and Chiloane and all those who were working through or under them, excluding any residential occupants from the property.

Denneboom and Chiloane applied for leave to appeal to a full court of the High Court and the SCA, arguing that the order was ambiguous as it provided for the eviction of Chiloane who was a resident of the property, despite Phayane not having complied with the provisions of the PIE Act. Both applications were dismissed. Denneboom and Chiloane then appealed to the Constitutional Court.

The Constitutional Court dismissed the appeal, except insofar as it related to the amendment of the High Court's order which the Constitutional Court held was ambiguous. Hence, the unqualified reference allowing for the eviction of Chiloane was an error on the part of the court *a quo* as it allowed for his unequivocal eviction. The Constitutional Court therefore amended the order to exclude the eviction of Chiloane as a resident of the property.

The Constitutional Court also held that the PIE Act was enacted as a means of regulating the eviction of unlawful occupiers even if they reside on commercial premises. Importantly, however, and in applying the dictum set out at paragraph 20 of *Ndlovu v Ngcobo; Bekker and Another v Jika* [2002] 4 All SA 384 (SCA), the Constitutional Court held that where one aims to evict a commercial occupant or a juristic person, then such eviction will not fall within the scope of the PIE Act as the PIE Act does not apply to evictions of juristic persons and to persons that do not make use of a building or structure as a means of shelter or a dwelling.

Nicolette du Sart & Batool Hayath

ONE FOR THE GOOD GUYS!

There has been an unfortunate tendency, over the past several years, for clients to sue their professional advisers, in an effort to recover damages brought about, more often than not, by the client's own inadequacies. Claims against audit firms have become all the more prevalent, and it was one such claim which recently enjoyed the scrutiny of the Supreme Court of Appeal ('SCA') in the matter of *Pricewaterhouse Coopers Inc & Others vs National Potato Co-operative Limited & Another*, in a judgment delivered on 4 March 2015.

The judgment in this matter is of interest for various reasons, most of which have little to do with the auditing profession itself.

In this matter, a claim was pursued against PwC on the basis of losses allegedly suffered by the plaintiff co-op ('NPC') in consequence of a failure on the part of PwC to have identified, in its audit process, material irregularities in the management, control and administration of credit.

One of the unusual features of this litigation is that the plaintiff's claim was in fact being pursued at the instance of an unrelated third party, IMF (Australia Limited) ('IMF'), an Australian entity which carries on business as a 'litigation funder'. IMF, in that capacity, provided NPC with funding to pursue the action against its erstwhile auditors (PwC) on the basis that, if the litigation succeeded, IMF would be fully reimbursed for its costs and paid a management fee for its services in regard to the conduct of the litigation. In addition, it would receive a proportion, exceeding 55%, of the gross proceeds of the litigation. Potentially, depending upon the gross amount recovered, IMF stood to be the sole beneficiary of any judgment procured in favour of the plaintiff.

PwC, wisely, joined IMF as a party to the action, with a view to obtaining a costs order against that entity, were its defence to the plaintiff's claim to succeed.

Although the trial court found in favour of the plaintiff, the SCA took a very different view of the matter, dismissing the claim and awarding costs in favour of PwC.

Although it made no finding on this issue, the SCA expressed reservations regarding the role played by IMF, in funding the litigation pursued by the plaintiff. Wallis J A had the following to say in this regard:

"It is one thing to enable an impecunious litigant to obtain legal relief to which that litigant is entitled. It is another matter altogether to have a situation where an outsider to a dispute, motivated solely by considerations of profit, may be the sole beneficiary of a judgment….Litigation exists for the proper settlement of disputes in society in the interests of the parties to those disputes. It comes at a social cost. It is undesirable that outsiders driven purely by commercial motives should be able to take over these disputes for their own benefit. When that occurs it is difficult to see how the constitutional guarantee of access to courts is engaged".

A separate but important feature of the judgment in this matter, is the criticism of the SCA relevant to the manner in which the proceedings were conducted, and the approach adopted by the plaintiff's legal team in presenting so called expert evidence in support of the plaintiff's claim. Expert opinions, not founded on fact or proper evidence, are of little value to court proceedings (and serve no proper purpose). In this regard the SCA approved of the approach adopted by the Canadian courts in the Widdrington case, stated as follows:

"Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish."

The SCA was highly critical of the manner in which the plaintiff had sought to present its expert testimony (which had resulted in the inordinate length of the litigation). The SCA pointed out that there was a complete failure, in the proceedings before the trial court, to have recognised that:

"The expert may be tendered for cross-examination upon his report alone, without additional oral examination, or after only limited questioning.

As a general rule the report of an expert witness can be read as his evidence in chief, subject only to supplementary questions necessary for explanation or amplification of the report."

The unsatisfactory manner in which the matter had been conducted, in the court of first instance, had led to a hearing on the merits, alone, which endured for some 264 days (the duration of which could, by and large, have been avoided had a different approach been adopted in relation to the proceedings, generally, and the relevance of expert evidence, in particular.

One can but hope that the criticisms of the SCA will serve to dissuade parties from approaching litigation in the manner which had been adopted in the court of first instance, in this matter!

Jonathan Witts-Hewinson

WHAT'S IN A NAME?

The incredible explosion of social media has resulted in most industry giants becoming more innovative in a world of expanding products and services. In a shrinking globally competitive market a trade mark can be the single most valuable asset of a company.

An extremely important feature of a trade mark is that it must have the ability to distinguish the relevant goods or services from other competitive goods or services of the same kind. In the event that a mark is devoid of a distinctive character and is merely a descriptive or generic term, it cannot be registered as a trade mark as competitors with the same marketing tendencies shouldn't be prevented from using descriptive terms for similar marks on related goods.

In the case of *Discovery Holdings Limited v Sanlam Limited & Others* 2015 (1) SA 365 (WCC), the importance of a distinctive feature in a trade mark was highlighted. The Sanlam Group and the Discovery Group are direct competitors in the financial services market. Discovery Holdings Limited (Discovery), the applicant in this matter, was the registered owner of the trade mark 'Escalator Funds'.

During May 2011, Discovery conducted a search of the register for trade marks and discovered an application for the registration of a trade mark namely 'Sanlam Escalating Fund'. After conducting numerous internet searches, Discovery established that Sanlam Limited and Sanlam Life Insurance (Sanlam), had been using 'Sanlam Escalating Fund' and 'Escalating Fund' in relation to several of its financial products.

Discovery believed Sanlam's actions were an infringement of its trade mark and approached the court to restrain Sanlam from using its trade mark. In a counter application, Sanlam argued that the term 'Escalator Funds' was generic in nature and therefore should be removed from the trade mark register.

In making its judgement, the court emphasised that coined or inventive names are trade marks which enjoy the highest level of legal protection. These marks consist of words which have some dictionary meaning but which are used in connection with services unrelated to the dictionary meaning such as Apple for computers and Omega for watches.

When determining if the mark was descriptive, Judge Goliath held that, "the term Escalator Funds is nothing more than a simple combination of two ordinary English words." In addition, the court found that Discovery had failed to show consumer awareness of the mark 'Escalator Fund' apart from the fame associated with the Discovery mark. Standing alone, the registered mark 'Escalator Fund' therefore lacked commercial strength or market recognition.

In terms of the s34(1)(a) of the Trade Marks Act, No 194 of 1993 (Act), trade mark infringement is defined as the unauthorised use of an identical or confusingly similar trade mark in the course of trade in relation to goods or services which are either identical, or, as stated in s34(1)(b) of the Act, so similar to those in respect of which the trade mark is registered that such use is likely to cause deception or confusion.

The question is not whether the people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source. Judge Goliath stated that the mark Sanlam, added to the descriptive portion 'Escalating Fund', is the dominant feature of Sanlam's mark, and would be viewed as such by the average consumer. Therefore there would be no consumer confusion.

Finally, in a very interesting turn, the court decided in favour of Sanlam's counter-claim to remove the trade mark 'Escalator Funds' from the trade mark register. Judge Goliath confirmed that, "the notion of escalation and the related verb 'escalate' is a concept common to the financial services industry... [Discovery] can therefore not claim a monopoly of these terms to the exclusion of other traders who are entitled to offer products with the same obvious features." The court therefore held that Discovery's application be dismissed and its trade mark expunged from the register.

When approaching the courts for protection of its trade mark, the last thing Discovery expected was the removal of its mark from the register. It is therefore paramount to ensure that the trade mark name selected – whether it be associated with an innovative product, service or company - is unique to your brand and cannot be usurped by your competitors on the basis that it is generic to your market.

Burton Meyer & Nicole Meyer

ABANDONMENT OF MINING RIGHTS: CHOOSE YOUR WORDS CAREFULLY?

In the recent case *Van den Heever v Minister of Minerals and Energy* (150/14) [2015] ZASCA 19, the Supreme Court of Appeal had to decide whether a letter, objectively viewed, evinced the writer's intention to abandon its mining rights.

In essence, a dispute arose whether Trans Hex Operations (Pty) Ltd ('Trans Hex') abandoned its old order mining right to mine for diamonds on two adjacent pieces of land, on the farm Richtersveld No 11 ('Property') situated in the Namaqualand district of the Northern Cape. Van den Heever applied for a mining permit for diamonds over the same Property in terms of s27 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). Van den Heever's mining permit application was refused by the Minister of Mineral Resources ('Minister') on the basis that Trans Hex already held a mining right for diamonds over the Property.

Van den Heever disputed the grant of a converted mining right by the Minister to Trans Hex's on the basis that Mynbou (Trans Hex's successor-in-title) abandoned the old order mining right for diamonds over the Property. In order to understand Van den Heever's contention, it is necessary to set out some of the facts that led to Trans Hex being granted with converted mining right for diamonds occurring in or under the Property by the Minister:

- In 1991, Mynbou became the holder of a notarial lease which gave it the right to mine for diamonds on the Property, as a result, the mineral right and mining licence were in favour of Mynbou. In 1998, the Richtersveld Community ('Community') lodged a land claim over the Property in terms of the Restitution of Land Rights Act, No 22 of 1994. In response to the land claim lodged, Mynbou entered into an agreement with the Community in terms of which it would fence-off a part of the Property to be used for agricultural purposes.
- In terms of Mynbou's mining lease, the Property could only be used for mining purposes. Mynbou could therefore not use or sublet the Property for purposes other than mining. Due to this restriction, Mynbou wrote a letter to the Department of Mineral Resources ('Department') to obtain its consent to implement the agreement with the Community. The agreement however, clearly stipulated that it would be without prejudice to the mining right held by Mynbou over the entire property. Mynbou subsequently ceded its mining rights to Trans Hex.
- According to Van der Heever, this cession to Trans Hex was invalid because, by sending the letter to the Department, Mynbou had abandoned its right to mine on the Property. Thus, Van der Heever reasoned, Mynbou had no mining right to cede at the time of the cession. In support of his argument of abandonment, Van der Heever cited the following paragraph from the letter:

  "U word dus versoek om die 13 stukke grond, waarvan die omvang in detail deur middel van koördinate op meegaande plan gedefinieer word, uit die bestaande mynhuurgebied uit te sluit, en die wysiging so by die Mynbriewekantoor in Pretoria te laat registreer."

In response to this contention, Trans Hex and Mynbou argued that on a proper interpretation of the letter and in light of the background facts, the letter did not constitute the abandonment of its mining right, but rather a request to obtain the Minister's consent to amend the mining lease, in order to give effect to the agreement between Mynbou and the Community.

The court held that Mynbou had not abandoned its old order mining right, which was supported by its conduct before and after sending the letter and it was accordingly validly converted by the Minister to a mining right contemplated by the MPRDA. The appeal was accordingly dismissed with costs.

The test in determining whether a mining right is abandoned is therefore objective. The intention of the person should be determined by the outward manifestation of their conduct and can never be presumed. The abandonment must be clearly demonstrated and prove that the person intended to abandon their right with full knowledge of the right in question.

Rishabaan Moodley

COMMERCIAL LAW UPDATE

***Cascadelle Distribution et Cie Ltée v. Nestlé Products (Mauritius) Ltd* 2015 SCJ 120 – 15 April 2015.**

A plaintiff who is party to an agreement can establish on a balance of probability that the termination of the agreement by the other party was abusive and made in bad faith having regards to all the circumstances of the case and claim for damages for '*abus de droit*' and '*faute*' and this would not be in breach of principle of 'non-cumul de la responsabilité contractuelle et délictuelle' (ie, a claim cannot be brought both in contract and in tort).

On behalf of the defendant company it was argued that in view of the contractual relationship which existed between the plaintiff and the defendant, the plaintiff was wrong to have based its claim on '*faute*' (tort) as opposed to 'breach of contract'.

In its claim, the plaintiff stated, after setting out the turn of events which led to the termination of the exclusive distribution agreement with the defendant company, that "the means adopted by the defendant to achieve its purpose were reprehensible, illicit, arbitrary and unfair and that the termination was done in utter bad faith and was calculated to harm the economic and commercial interests of the plaintiff, depriving the latter of the fruits of its investment in the common interest venture which had been set into place by the agreement." The plaintiff further stated that "the termination of the agreement made in the described circumstances constitutes an '*abus de droit*' (ie exercising a right abusively) and a '*faute*' (ie a tort)."

According to the principle of 'non-cumul de la responsabilité contractuelle et délictuelle' (ie a claim cannot be brought both in contract and in tort) which is applicable in Mauritius, a claimant must opt to base his action either on contract or in tort but cannot proceed by way of a hybrid action.

A plaintiff who is party to an agreement can, however, establish on a balance of probability that the termination of the agreement by the other party was abusive and made in bad faith having regards to all the circumstances of the case and claim for damages for '*abus de droit*' and '*faute*'. The plaintiff's action would not be a breach to the principles of '*non-cumul*'.

Commentary:

It would be for the plaintiff to establish those facts which would entitle it to claim damages for the tortious act ('*abus de droit*' and '*faute*') of the defendant distinct from the breach of contract. If the plaintiff does not establish that the termination of the contract was abusive and in bad faith, the claim will be dismissed. In the context of a commercial claim, it is advisable that accounting evidence is produced in court to establish the different heads of damages such as loss of profits, loss of opportunity and capital expenditure.

Although there was no exit clause in the two agreements binding the plaintiff and defendant, and the agreements would therefore be considered as '*contrats à durée indéterminée*', ie of unlimited duration, this, however, does not mean that such a contract cannot be terminated. As rightly observed by the Supreme Court, the parties cannot be tied up for life as that would infringe on the freedom of the individual. The parties may obviously mutually agree to put an end to the agreement or one of them may unilaterally put an end to it with all its legal consequences. However, there must be reasonable delay given before its termination to temper the damages the other party might endure and such termination must also be made in good faith. The Court held the view that a one year period is more than reasonable for the other party to mitigate its losses.

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