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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

INSURANCE:
THE GROWING NEED FOR CYBERCRIME INSURANCE IN SOUTH AFRICA

In 2014 the Centre for Strategic and International Studies estimated that South Africa loses 0.14% of its GDP to cybercrime activities, amounting to around R5.7 billion annually.

Organisations are increasingly dependent on technology to run their businesses. With this reliance however comes a potential threat serious enough to cause an organisation severe reputational and financial harm. Known as cybercrime, this threat involves illegal activities using computer systems, networks and the internet.

When an organisation falls victim to cybercrime it's exposed to a multitude of risks which Santam identified as including loss of revenue, loss of data, loss of competitive advantage, industry and regulatory fines and penalties and fraud.

The global surge of cybercrime and the risks involved

In 2014 Sony Pictures Entertainment was hacked causing the release of confidential data into the public sphere. As a result of the leak, Sony had to cancel the release of its film "The Interview". Sony also set aside USD$15 million to deal with ongoing damages from the breach. While such an occurrence may seem far removed from us, South Africa is in fact one of the foremost countries targeted for cybercrimes. According to PWC's Global Economic Crime Survey of 2016 cybercrime was ranked as the second most reported crime internationally and ranked in fourth place in South Africa. In 2014 the Centre for Strategic and International Studies estimated that South Africa loses 0.14% of its GDP to cybercrime activities, amounting to around R5.7 billion annually.

When an organisation falls victim to cybercrime it's exposed to a multitude of risks which Santam Limited identified as including loss of revenue, loss of data, loss of competitive advantage, industry and regulatory fines and penalties and fraud. A standard property policy may not provide cover for these risks and in order to protect an organisation from cybercrime a comprehensive cybercrime insurance policy is required.

Inadequate cover by standard insurance policies

Aon South Africa (Pty) Ltd has identified the following gaps in standard insurance policies that could prevent organisations from claiming under their insurance policies:

- General liability and property policies cover risks that damage physical assets. Since cybercrime is a relatively new risk, the loss covered under conventional property policies do not extend to incorporeal assets nor losses caused by non-physical perils such as viruses or hackers.
- Professional indemnity policies cover damage resulting from a failure of the defined professional services and may not extend to losses resulting from data and privacy breaches.

CLICK HERE to find out more about our Insurance team.

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CONTINUED

Most organisations in South Africa are still not adequately prepared or understand the risks inherent in cybercrime, with only 35% of organisations having a cybercrime incident response plan.

- Crime policies generally cover money, securities and tangible property with no coverage for third party property such as customer data.

The challenges of providing cybercrime insurance

Taking out cybercrime insurance is an increasing trend in South Africa. In 2014, Santam reported an increase of over 3000% in quote requests. Specialised cybercrime insurance typically provides for first party insurance and third party insurance. First party insurance provides cover for the insurance holder and third party insurance provides cover for losses suffered by another organisation or individual due to a security breach.

Relative to other established risks, providing cover for cybercrime can be challenging for the insurer and Jain and Kalyaman of the management consulting company Capgemini identified the following challenges in providing cybercrime insurance:

- When conducting risk assessments an insurer will be required to predict the probability of cybercrime occurring in an organisation to be insured and determine its business impact. Cyber-attacks can lead to an array of business consequences and it may be difficult to quantify the financial impact.
- Since cybercrime is a relatively new concept in the insurance industry insurance firms still have to develop standard methodologies and financial models to determine the appropriate price to cover cybercrime risks.
- The lack of historical data poses a problem to insurance firms when deciding the rate of an insurance policy and whether to underwrite the risk in the first place.
- The lack of standard legal definitions of cyber liability across the world also impacts the insurance of cyber risks. A country's laws are restricted by its geographical limits. This limit can create difficulties when determining which country's laws are applicable when a cross-border cyber-attack occurs.

Electronic data and information is one of the most important assets in an organisation. Despite its importance PWC notes that most organisations in South Africa are still not adequately prepared or understand the risks inherent in cybercrime, with only 35% of organisations having a cybercrime incident response plan. It is therefore imperative that organisations obtain specialised and comprehensive cybercrime insurance to protect them in the event of a cyber-attack. In this regard, as cybercrime is a relatively new concept in the insurance industry, insurers will need to combine their knowledge of insurance and technology to ensure that they provide adequate cover.

Bryon O'Connor and Verusha Moodley

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BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:
SAVED AT THE EXPENSE OF OTHERS?

Section 133(1) creates a temporary moratorium in that during business rescue proceedings no legal proceeding, including enforcement action, against a company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum subject to certain exceptions.

The case of *Kythera Court v Le Rendez-Vous Café CC trading as Newscafé Bedfordview* case number 2016/11853 GLDJ reiterated the Supreme Court of Appeal (SCA) decision in *Cloete Murray NO & another v Firstrand Bank Ltd T/A Wesbank* 2015 (3) SA 438 (SCA) that an agreement can be cancelled during business rescue as the unilateral act of cancellation does not constitute enforcement action in terms of s133(1) of the Companies Act, No 71 of 2008 (Act).

The court held with authority from the SCA's decision in Cloete Murray that the lease was validly cancelled and Newscafé was no longer in lawful possession of the property but actually in unlawful occupation.

Section 133(1) creates a temporary moratorium in that during business rescue proceedings no legal proceeding, including enforcement action, against a company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum subject to certain exceptions.

The dispute involved a lease agreement concluded in 2010 between Kythera Court, being the landlord, and Newscafé. Newscafé had failed to pay rental since October 2015 but remained in occupation of the premises. After receiving breach notices from the landlord the members of Newscafé voluntarily resolved to place the close corporation into business rescue in December 2015.

By the time the matter was argued in court in April 2016 the business rescue plan had still not been published and no rental payments had been made.

On 7 March 2016, after the effective date of business rescue, the landlord sent Newscafé a notice cancelling the lease agreement. The landlord then brought an application for the eviction of Newscafé which was argued before Boruchowitz J. Newscafé opposed the eviction application on the ground that the moratorium created by s133(1) of the Act precludes the landlord from cancelling the lease agreement and launching eviction proceedings.

The court held with authority from the SCA's decision in Cloete Murray that the lease was validly cancelled and Newscafé was no longer in lawful possession of the property but actually in unlawful occupation.

Boruchowitz J found that the phrases contained in s133 and s134 of the Act referring to lawful possession of property lead to an interpretation that excludes legal proceedings or enforcement actions dealing with property in unlawful possession of the entity under business rescue. Therefore the operation of s133(1)(b) and s134(1)(c) of the Act did not apply. Practically this meant that the landlord did not need to seek leave of the court to institute the eviction proceedings and was not required to obtain the consent of the business rescue practitioner to exercise its rights in terms of the property.

Boruchowitz J further remarked that in the event that the business rescue practitioner had invoked s136(2)(a) of the Act by partially or conditionally suspending the obligations of Newscafé that arose under the lease agreement, he could have prevented the landlord from cancelling the lease or instituting the eviction proceedings.

While one can understand the motivation behind such an interpretation, the effects of it could be disastrous. One should not

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BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:
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It is our view that a better interpretation of the section should be that it only applies to executory contracts, ie contracts where a performance is still outstanding by the business rescue practitioner and he is entitled to decide not to proceed with the contract as it would not be in the interest of the general body of creditors.

attempt to rescue a company at all costs, the reality is that not all companies should be or can be saved.

For example, in the event that the right to receive payment was suspended, the landlord would only be entitled to a damages claim. If the business rescue was terminated and the company liquidated, a damages claim would be a small consolation to a landlord who may have been without rental income for over a year.

It is important to note that during the period that the business rescue practitioner seeks to suspend the payment obligation, the business rescue practitioner is still in occupation of the premises and is still receiving a benefit to the detriment of the landlord.

It is our view that a better interpretation of the section should be that it only applies to executory contracts, ie contracts where a performance is still outstanding by the business rescue practitioner and he/she is entitled to elect whether to proceed with the contract or not, as it would not be in the interest of the general body of creditors. To extend this limited right which exists in a liquidation to a broader sphere of business rescue would, we believe, have disastrous effects upon creditors. While business rescue should always be preferred over liquidation, business rescue should never result in the liquidation of creditors where it can be helped.

Julian Jones and Janine Matthews

CLICK HERE to find out more about our Business Rescue, Restructuring and Insolvency team.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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