20 JULY 2016

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

COMMERCIAL:
IN FULL AND FINAL SETTLEMENT? MAYBE NOT...

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:
THE ELEPHANT IN THE ROOM – POST-COMMENCEMENT FINANCING AND WHETHER PRE-BUSINESS RESCUE CREDITORS' RIGHTS TO THEIR SECURITY ARE COMPROMISED

INTERNATIONAL ARBITRATION:
InKOMPETENZ IN THE *FIERY PACIFIC*

CDH
CLIFFE DEKKER HOFMEYR

COMMERCIAL:
IN FULL AND FINAL SETTLEMENT? MAYBE NOT...

An application to make a settlement agreement an order of court cannot be rejected solely on the basis that the agreement is not immediately enforceable.

It is not necessary that all of the terms of the settlement agreement relate directly to the original underlying dispute.

The lawyer's dream: settle the matter before the trial starts and spend the rest of the day at lunch.

In the matter of *Eke v Parsons* 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC), Parsons applied for summary judgment for payment of money owing in terms of a sale agreement. On the morning of the hearing, the parties agreed to settle with the summary judgment application postponed and Eke paying the money in instalments. If Eke missed a payment Parsons could re-enrol the summary judgment application and Eke would not be allowed to oppose the application. We don't know why the parties did not agree that Eke's default would entitle Parsons to judgment for the balance but that notwithstanding the agreement was clear, simple and final. But was it?

Eke missed a payment and Parsons re-enrolled the application for summary judgment. The High Court unsurprisingly found in favour of Parsons, on the basis that the settlement agreement, having been made an order of court, was final. Eke appealed all the way to the Constitutional Court where Madlanga J, supported by the majority of the court, agreed with the High Court, finding that the settlement order is "final in its terms" and that Parsons was entitled to approach the court for enforcement of that order.

The Constitutional Court rejected the formalistic approach to settlement orders argued by Eke and effectively allowed for a broader range of settlement orders to be considered.

Eke argued that contrary to the essence of an agreement made an order of court is that the order becomes immediately enforceable upon non-compliance, and includes only those terms which require performance of a specific act such as payment of money. The settlement order in *Eke v Parsons* was not immediately capable of execution as the terms of the agreement required a set down of the summary judgment application rather than simply an accelerated payment of the money. There are lessons to be learned in the strange and cumbersome terms of this agreement, but the Constitutional Court found that an application to make a settlement agreement an order of court cannot be rejected solely on the basis that the agreement is not immediately enforceable.

In addition, it is not necessary that all of the terms of the settlement agreement relate directly to the original underlying dispute. An agreement may

CLICK HERE to find out more about our Dispute Resolution practice.

CDH
CLIFFE DEKKER HOFMEYR

COMMERCIAL:
IN FULL AND FINAL SETTLEMENT? MAYBE NOT...

CONTINUED

As with any agreement the purpose and effect should be carefully considered before the agreement is crafted to secure the interests of the parties.

be comprehensive in that it deals with the issues in dispute but also with peripheral issues which are not directly in dispute, but are perhaps of importance to the litigants and require resolution. The court found that to be competent and proper the agreement must relate directly or indirectly to the dispute between the parties but it serves no purpose to excise these additional issues from a settlement order because as Madlanga J stated the "entire agreement may crumble".

He said that the agreement must not be objectionable either from a legal or practical point of view in the sense that it accords with both the Constitution and the law, is not at odds with public policy and holds some practical and legitimate advantage. The agreement must also be clear and unambiguous. He also said that settlement agreements are consistent with the efficient use of judicial resources in that the original dispute is settled, subsequent litigation will relate to non-compliance with the settlement order, not the original underlying dispute and litigation in regard to enforcement is not the norm.

Although settlements are entered into every day, they are often prepared in haste at court, scribbled down on a pad, signed and presented to a judge, anxious to clear the court roll. As with any agreement the purpose and effect should be carefully considered before the agreement is crafted to secure the interests of the parties. All of this before the agreement is set in a court order. After all, having sued for payment of money and having settled the matter, you can be sure that the very last thing that Parsons wanted was to be making law in the Constitutional Court.

Tim Fletcher and Natasha Leaf

CDH
CLIFFE DEKKER HOFMEYR

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY: THE ELEPHANT IN THE ROOM – POST-COMMENCEMENT FINANCING AND WHETHER PRE-BUSINESS RESCUE CREDITORS' RIGHTS TO THEIR SECURITY ARE COMPROMISED

The common phrase "once bitten, twice shy" is often the sentiment of pre-business rescue creditors when PCF is sought.

There is little doubt that even the most thought-out, meticulous and well-structured business rescue plan cannot succeed unless there is some degree of financial support in the form of post-commencement finance (PCF) available, to allow the business to sail through the choppy waters of financial distress.

The South African PCF market is still in its developmental stages and with the fluctuating strength of our economy, financial institutions and other investors are slow to throw money at a "business rescue idea", regardless of how plausible it is. The common phrase "once bitten, twice shy" is often the sentiment of pre-business rescue creditors when PCF is sought.

The reluctance to provide PCF is further aggravated by the uncertainty in our law regarding how PCF should be dealt with and, once granted, how it affects the ranking of pre-business rescue creditors who hold security for the indebtedness.

To add fuel to the fire, the reluctance to provide PCF is further aggravated by the uncertainty in our law regarding how PCF should be dealt with and, once granted, how it affects the ranking of pre-business rescue creditors who hold security for the indebtedness due to it by the company in business rescue. Given that the success of business rescue is intricately linked to the ability to raise PCF, it is surprising that the Companies Act, No 71 of 2008 (Act) does not deal with this in great detail.

The ranking of claims in a business rescue was decided in the cases of *Merchant West Capital Solutions (Pty) Ltd v Advance Technologies & Engineering Company (Pty) Ltd & Another* [2013] ZAGPJHC 109 (10 May 2014) and *Redpath Mining South Africa (Pty) Ltd v Marsden N.O. & Others* [2013] ZAGPJHC 148 where the court held that the effect of s135 of the Act is that claims rank as follows:

- the business rescue practitioner (BRP) and other professionals, for remuneration and expenses;
- employees for any remuneration which became due and payable after business rescue proceedings began ie PCF;
- secured lenders or other creditors for any loan or supply made after business rescue proceedings began, ie PCF;
- unsecured lenders or other creditors for any loan or supply made after business rescue proceedings began, ie PCF;
- secured lenders or other creditors for any loan or supply made before business rescue proceedings began;
- employees for any remuneration which became due and payable before business rescue proceedings began; and
- unsecured lenders or other creditors for any loan or supply made before business rescue proceedings began.

Unfortunately no analysis is contained in the judgments as to how Kgomo J (who decided both cases) arrived at the decision. If one were to apply such ranking as is, it would mean that pre-business rescue creditors who hold security would rank below post-commencement financiers regardless of whether the post-commencement financiers hold security or not. This would lead to an absurd result that post-commencement financiers who hold no security would be paid out first from the proceeds of the security held by pre-business rescue creditors.

CDH
CLIFFE DEKKER HOFMEYR

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY: THE ELEPHANT IN THE ROOM – POST-COMMENCEMENT FINANCING AND WHETHER PRE-BUSINESS RESCUE CREDITORS' RIGHTS TO THEIR SECURITY ARE COMPROMISED

CONTINUED

Kgomo J's ranking cannot be justified on the wording employed in s135 and is irreconcilable with the provisions of s134(3) which provides pre-business rescue creditors (who hold security) with the necessary certainty in respect of their security during the business rescue proceedings.

Kgomo J's ranking cannot be justified on the wording employed in s135 and is irreconcilable with the provisions of s134(3) which provides pre-business rescue creditors (who hold security) with the necessary certainty in respect of their security during the business rescue proceedings. While Kgomo J referred to the provisions of s134(4) in the *Redpath Mining* case, he overlooked the prescriptions as to the treatment of secured creditors therein.

The correct position is that secured creditors are entitled to the treatment set out in s134(3) of the Act, which is to the effect that:

- Unless the proceeds of the assets that form the subject matter of the secured creditors' security are sufficient to discharge the company's indebtedness to that creditor in full, the company must obtain the consent of that creditor before disposing of (ie realising) the asset in question; and
- The company must promptly pay the proceeds from the disposal of the assets in question to the creditor up to the amount of the company's indebtedness to the creditor or provide security for the amount of those proceeds to the reasonable satisfaction of that creditor.

Accordingly, the correct position is that PCF ranks only in priority to all unsecured creditors and that pre-business rescue creditors' rights to their security must be respected in terms of s134(3) of the Act and they can therefore not rank below any post-commencement financiers who hold no security. Although this position protects the rights of pre-business rescue creditors to their security, it increases the level of risk that post-commencement financiers have to endure as there is a higher probability of the PCF not being paid back, if secured creditors were to exercise their rights to their security.

Julian Jones and Roxanne Wellcome

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

CDH
CLIFFE DEKKER HOFMEYR

INTERNATIONAL ARBITRATION:
InKOMPETENZ IN THE *FIERY PACIFIC*

China's rejection of the award has received much public attention, especially in light of the lack of enforcement measures available to the PCA to give effect to the award.

On Tuesday 12 July 2016, the Permanent Court of Arbitration (PCA) in The Hague issued a landmark arbitral award in favour of the Philippines against China, striking a heavy blow to China's attempt to legitimise its efforts at dominance in the South China Sea.

In 2013, the Philippines initiated proceedings against China to resolve various disputes arising out of the hotly contested South China Sea (see our previous alert: Mischief in the fiery Pacific). China's position has always been that the arbitral tribunal did not have jurisdiction to entertain the claim. Initial hearings were held to determine the jurisdiction of the tribunal. Both China and the Philippines were invited to participate in these proceedings, but China refused to do so. Its refusal was based on a seemingly contradictory argument that the issues in dispute constitute matters of sovereignty and as such, the tribunal lacked jurisdiction to entertain the claim.

Instead, China lobbied for support for its stance both domestically and internationally. Notwithstanding its refusal to participate in the proceedings, certain "position papers" and communications issued by China, were duly considered by the tribunal during the hearings both on jurisdiction, and the main claim. Ultimately the tribunal found that it had jurisdiction to hear the claim which then led to the award being issued against China.

China's rejection of the award has received much public attention, especially in light of the lack of enforcement measures available to the PCA to give effect to the award. While this is a serious issue for the parties concerned (and the international community) there is a greater underlying problem with the manner in which China has refused to participate in the proceedings.

It is widely accepted that the foundational principle of international arbitration is the competence of the tribunal to determine its own jurisdiction, also known as the Kompetenz–kompetenz principle.

It is widely accepted that the foundational principle of international arbitration is the competence of the tribunal to determine its own jurisdiction, also known as the Kompetenz–kompetenz principle. Without this legal construct, a tribunal, for example, would not have the power to rule that it lacks jurisdiction to entertain a particular dispute.

And therein lies the real problem. China has reiterated its view that the tribunal lacked jurisdiction to entertain the dispute. It has regarded the final award as "null and void" as a result of this view. However, it refused to participate even in the hearings on jurisdiction.

CDH
CLIFFE DEKKER HOFMEYR

INTERNATIONAL ARBITRATION:
InKOMPETENZ IN THE *FIERY PACIFIC*

CONTINUED

Unless China concedes that an international arbitral tribunal possesses the inherent authority to determine the limits of its own jurisdiction, the institution of international arbitration, may very well cease to play a further role in Chinese jurisprudence.

In so doing, China has effectively voiced its rejection of the tribunal's authority and ability to rule on its own jurisdiction. Unless China concedes that an international arbitral tribunal possesses the inherent authority to determine the limits of its own jurisdiction, the institution of international arbitration, may very well cease to play a further role in Chinese jurisprudence.

China is now facing an almost impossible dilemma: Does it "stick to its guns" and continue with its expansion into, land reclamation from and militarisation of the South China Sea, or does it succumb to the pressure exerted by the international community, confirm its acceptance of the arbitral award and try its best to negotiate with the parties concerned in a manner which reduces the potential repercussions?

While the latter suggestion is undoubtedly the most beneficial for international law and the international community as a whole, it may be the hardest pill to swallow for China.

Insofar as China ultimately conducts itself in a manner which does not support and promote international arbitration, it is uncertain whether private individuals and entities registered in China will adopt a similar attitude to the resolution of disputes by arbitration. This is an important consideration in light of recent developments in the field, such as the establishment of the China Africa Joint Arbitration Centre (CAJAC) based in Johannesburg and Shanghai.

Jonathan Ripley-Evans

CLICK HERE to find out more about our International Arbitration team.

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Adine Abro
Director
T +27 (0)11 562 1009
E adine.abro@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Sonia de Vries
Director
T +27 (0)11 562 1892
E sonia.devries@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

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.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com