

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

WHOSE LOSS IS IT ANYWAY – THE SHAREHOLDER’S OR THE COMPANY’S?

In the matter of *Itzikowitz v Absa Bank Limited* (20729/2014) [2016] ZASCA 43 (31 March 2016), the Supreme Court of Appeal (SCA) provided clarity on the distinction between delicts committed against a company and those committed against a shareholder; and whether such a shareholder has a right of recourse against the party who committed such delicts.

THE LAZY BIRD CAN STILL CATCH THE WORM – PERFECTING NOTARIAL BONDS UNDER BUSINESS RESCUE

Section 133 of the Companies Act, No 71 of 2008 places a general moratorium on legal proceedings, while the company is under business rescue. This provides a company with time and resources to be rehabilitated through the implementation of a business rescue plan. As a result, there is some debate as to whether creditors are precluded from perfecting their security, such as a notarial bond, under business rescue.

WHOSE LOSS IS IT ANYWAY – THE SHAREHOLDER’S OR THE COMPANY’S?

The court emphasised the importance of determining whether the shareholder has a claim against the wrongdoer

In essence, if no wrong was committed against the shareholder, then they are not entitled to recover damages from the wrongdoer.

In the matter of *Itzikowitz v Absa Bank Limited* (20729/2014) [2016] ZASCA 43 (31 March 2016), the Supreme Court of Appeal (SCA) provided clarity on the distinction between delicts committed against a company and those committed against a shareholder; and whether such a shareholder has a right of recourse against the party who committed such delicts.

Gary Itzikowitz (Itzikowitz) sought to recover from Absa Bank (Absa) the amount of the reduction in the value of his shareholding in Compass Projects (Pty) Ltd (Compass) – a company that held shares in Quantum Properties Group that, in turn, wholly owned A Million Up (Pty) Ltd (AMU): the company against which the alleged delict was committed.

Itzikowitz alleged that AMU’s demise and, in turn, the reduction in the value of his shareholding in Compass resulted from the alleged intentional, reckless or negligent conduct of Absa. Itzikowitz maintained that Absa owed a legal duty to act as a ‘reasonable banker’ and ‘not to take any decisions or to engage in any business conduct which could adversely affect the value of shares in AMU, or the value of any loan account in AMU in material respect’. The claim was thus a delictual claim for pure economic loss.

The court confirmed the Constitutional Court’s view in a different matter that conduct which caused pure economic loss is not prima facie wrongful – the plaintiff must be able to demonstrate a right or legally recognised interest was infringed. If no wrong was committed against the plaintiff there can be no claim.

In approaching this enquiry, the court considered certain fundamental principles of company law, namely the nature of the company as a distinct legal personality, separate to that of its members. As such, the property of a company belongs to that company and not its shareholders. A shareholder’s right in relation to the company is simply a right to participate in such a company on the terms of the articles of association.

Due to these fundamental principles, the court emphasised the importance of determining whether the shareholder has a claim against the wrongdoer which is separate and distinct from any claim which the company may have against such wrongdoer. This determination turns on whether a wrong was committed against the shareholder, the company, or both the shareholder and the company. In essence, if no wrong was committed against the shareholder, then they are not entitled to recover damages from the wrongdoer. Thus the shareholder in the *Itzikowitz* matter could not go after Absa for the alleged wrongdoing.

WHOSE LOSS IS IT ANYWAY – THE SHAREHOLDER’S OR THE COMPANY’S?

CONTINUED

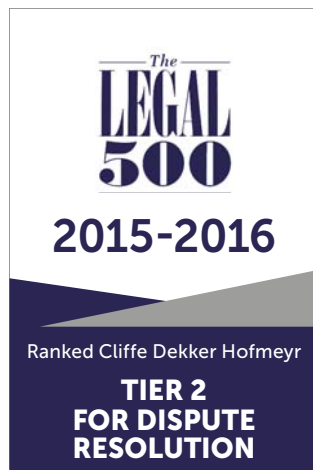
Thus when a party breaches a legal duty owed exclusively to a company, which results in a loss to that company, only that company may sue in respect of that loss; – as opposed to a shareholder who is merely invested in the company.

Moreover, whether or not the wrongdoer acted intentionally or negligently is irrelevant for the purposes of such an enquiry.

Thus when a party breaches a legal duty owed exclusively to a company, which results in a loss to that company, only that company may sue in respect of

that loss – as opposed to a shareholder who is merely invested in the company. Consequently, the shareholder cannot rely on a breach of a legal duty owed to the company in order to recover from a drop in the value of his shares.

.....
Hayley Laing and Maud Hill



THE LAZY BIRD CAN STILL CATCH THE WORM – PERFECTING NOTARIAL BONDS UNDER BUSINESS RESCUE

Section 133 of the Companies Act, No 71 of 2008 places a general moratorium on legal proceedings, while the company is under business rescue.

We encourage creditors to utilise the protection afforded by s134, which seeks to protect the property interests of both the company and third parties.



Section 133 of the Companies Act, No 71 of 2008 places a general moratorium on legal proceedings, while the company is under business rescue. This provides a company with time and resources to be rehabilitated through the implementation of a business rescue plan. As a result, there is some debate as to whether creditors are precluded from perfecting their security, such as a notarial bond, under business rescue.

While there has been no definition of 'legal proceedings' the legislature appears to have included specific claims to perfect security in this definition. So what's next for a creditor who has security over movable property, which is not perfected before the commencement of business rescue proceedings, and which property the Business Rescue Practitioner (BRP) intends to dispose of? Is the creditor's right to perfect the security suspended?

Firstly, the creditor may approach the BRP at any time after commencement of the business rescue proceedings, in terms s133(1)(a), for written consent to allow the perfection of the creditor's securities. However the BRP is unlikely to consent to this as the perfecting of notarial bonds will more than likely diminish the prospects of rescuing the business.

As such, we encourage creditors to utilise the protection afforded by s134, which seeks to protect the property interests of both the company and third parties. S134 provides as follows:

'If, during a company's business rescue proceedings, the BRP wishes to dispose of any property over which another person has any security or title interest the company must obtain the prior

consent of that person unless the amount is sufficient to satisfy the debt provided the company promptly pays same creditor.'

Chapter 6 of the Companies Act does not provide a definition of 'security' or 'title interest' and there has been some debate as to whether or not an unperfected notarial bond can be classified as either a security or title interest.

Commentary on the Act suggests that when taking into consideration the context surrounding s134(2), 'security' or 'title interest' undoubtedly refers to any situation where the property of the company is subjected to a valid form of security in favour of a third party creditor.

A purposive approach to interpreting the Act supports this view - while the holder of a security only obtains a real right once they have perfected their security – the perfection would mean the actual attachment of the assets and not a perfection order itself. It would be difficult to argue that before an attachment of movable property, the creditor had no interest or right to the movable property which formed the subject matter of the security.

THE LAZY BIRD CAN STILL CATCH THE WORM – PERFECTING NOTARIAL BONDS UNDER BUSINESS RESCUE

CONTINUED

Without a wide interpretation of the terms 'security' or 'title interest' creditors would have no protection against the reckless disposition of property over which they have an interest.

In the event of the notarial bond not being perfected whilst the company is under business rescue and the proceedings are converted to liquidation proceedings, the unperfected notarial bond will be treated as preferent security and the creditor will enjoy a higher ranking than normal concurrent creditors. This implies that an unperfected notarial bond can be interpreted as 'security' or 'title interest' as a preferential ranking is linked to it in liquidation proceedings.

The BRP will undoubtedly argue that allowing a creditor to perfect a notarial bond, during business rescue, and effectively precluding the practitioner to freely deal with the movable assets of the company, cannot support the rehabilitation of a company that is financially distressed and that this is not the purpose sought to be achieved by Chapter 6.

Nonetheless without a wide interpretation of the terms 'security' or 'title interest' creditors would have no protection against the reckless disposition of property over

which they have an interest. Creditors would more readily seek to protect themselves before business rescue, by perfecting their security and taking possession of property that could have otherwise been used to rescue the business and this too would circumvent the stated purpose.

We are of the view that creditors who have not perfected their security before the commencement of business rescue proceedings should approach the BRP and inform him of their right. The BRP must further be instructed to cease any disposal of their security. Should the BRP refuse, the creditor will be entitled to apply to court in accordance with s133(1)(b) to have their security perfected. Once perfected, the creditor will be entitled to remove all movable assets and proceed to sell same outside of the business rescue proceedings.

Therefore, whilst we advocate perfection before business rescue, it appears possible to perfect under business rescue, with or without the consent of the practitioner.

Tobie Jordaan and Jeffrey Long

CDH has one of the leading banking, refinancing, restructuring and insolvency teams in South Africa.



CLICK HERE to find out more about our in-depth experience and expertise.

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 TWO CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

©2016 1030/MAY