

DISPUTE RESOLUTION ALERT

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CDH APPOINTS TIMOTHY BAKER TO OUR DISPUTE RESOLUTION TEAM IN CAPE TOWN

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INSURANCE: STRIKE III: LIABILITY OF THE INSURER FOR THE INSOLVENT INSURED'S DEBT

"Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured" – s156 of the Insolvency Act, No 24 of 1936 as amended (Act).

IGNORE THE RIGHTS OF LABOUR TENANTS AT YOUR PERIL

In 1996, the legislature enacted the Land Reform (Labour Tenants) Act, No 3 of 1996 (Act). The objective of the Act was to protect all persons denied access to land as a result of past racially discriminative laws, and which persons had taken occupancy and enjoyed the use of land on farms upon which they were providing labour.

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NEW APPOINTMENT



TIMOTHY BAKER
New Director
Dispute Resolution

Cliffe Dekker Hofmeyr (CDH) has appointed Timothy Baker as a Director in our Dispute Resolution practice in Cape Town, expanding the team's already impressive expertise.

Aside from his reputation as a litigator in South Africa, Timothy has experience in construction, infrastructure and energy disputes, including oil and gas and renewable energy, both locally and in African jurisdictions. He is particularly adept at handling matters where complex contractual and commercial issues arise and is experienced in all forms of alternative dispute resolution. He has also practised as a solicitor in the United Kingdom and that experience has proved invaluable when handling disputes that are subject to English law.

"As more businesses and individuals transact across multiple jurisdictions, the disputes we handle become ever more complex. Timothy's skills bring a further dimension to the specialist knowledge we offer to our clients and we are delighted that he has decided to join the team" says Grant Ford, Director and Regional Practice Head for Dispute Resolution in Cape Town.

Public Law NEWS BULLETIN

On Tuesday, 14 March 2017, the Minister of Justice and Correctional Services withdrew the Implementation of the Rome Statute of the International Criminal Court Repeal Bill [B23-2016] (Bill) in Parliament in accordance with the rules of the National Assembly. This Bill was the first step for South Africa to withdraw lawfully from the International Criminal Court (ICC), as clarified in a recent [High Court judgment](#). This development formally puts an end to South Africa's withdrawal from the ICC. To read more about the legal effects of an African walkout on the ICC's witness protection programme, follow our [ongoing series](#) on this topic.

INSURANCE: STRIKE III: LIABILITY OF THE INSURER FOR THE INSOLVENT INSURED'S DEBT

Section 156 of the Act deals with claims made by third parties against an insurer, in circumstances where the person insured has become insolvent.

The claim was for the breach of professional duties by the insured, in respect of which the insurer repudiated the professional indemnity that the insured held with the insurer, based on an exclusion clause in the policy.

“Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured’s liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured” – s156 of the Insolvency Act, No 24 of 1936 as amended (Act).

Section 156 of the Act deals with claims made by third parties against an insurer, in circumstances where the person insured has become insolvent. Prior to s156 of the Act coming into effect, the legal position regarding such claims was that, upon sequestration of the insolvent (i) the estate of the insolvent would vest in the trustee of the insolvent estate and (ii) the third party would be precluded from claiming directly from the insolvent’s insurer. However, s156 of the Act created an exception to (ii) above in that it allows a third party to claim directly from the insolvent’s insurer if the requirements of the Act in this regard have been satisfied.

In order to rely on s156 of the Act, a third party must prove that (i) the insured had incurred a liability to the third party, (ii) the estate of the insured had been sequestrated and (iii) the insurer was liable for the debt of the insured.

The above principles came before the court in *Bader and Others v Centriq Insurance Company Limited* (4572/2015) [2017] ZAGPJHC 12 (*Bader v Centric*), as a stated case. The crux of the matter was

whether the liability of the insured to the plaintiffs (which was established in the court a quo)] *Bader v Wentzel and Delru Makerlaars CC* 2014 JDR 0209 (GNP) (*Bader v Wentzel*) created an obligation for the defendant insurer, Centriq Insurance Company in terms of s156 of the Act.

Briefly, in *Bader v Wentzel*, the plaintiffs sued the insured, Delru Makerlaars who joined its insurer, Centriq Insurance Company as a third party. Judgment was given in favour of the plaintiffs and the third party proceeding against the insurer was dismissed. The claim was for the breach of professional duties by the insured, in respect of which the insurer repudiated the professional indemnity that the insured held with the insurer, based on an exclusion clause in the policy.

In *Bader v Centriq* the plaintiffs erroneously sought relief on the judgment against the insured in *Bader v Wentzel*, in submitting that simply because the insured had been found liable in the previous proceedings, it automatically followed that the insurer of the defendant would be similarly liable.

INSURANCE: STRIKE III: LIABILITY OF THE INSURER FOR THE INSOLVENT INSURED'S DEBT

CONTINUED

The court rejected the plaintiffs' claim stating that, they had failed to prove that the insurer was obligated to indemnify the insured in terms of the policy.



The court in *Bader v Centriq* found that the "plaintiff obtained no greater rights [against the insurer] than those enjoyed by the insured [against the insurer]". Essentially, it could not be found that in one instance the insured had no claim against the insurer, but in another instance, that a third party substituting the position of the insured would have recourse against the insurer. To do so would afford the third party more rights against the insurer than those held by the insured.

Furthermore, the court held that s156 of the Act "does not transfer, nor vest existing rights of an insolvent in the third party". The court ruled that, it "creates a new distinct cause of action for a third party on sequestration of the insured as a means to recover from the insurer

precisely what the latter owes the insured under the indemnity". Therefore, if there is no obligation on the insurer vis-a-vis the insured, a claim of a third party will fail.

The determination before the court was to establish a link between the liability of the insured and the terms of the indemnity. The court rejected the plaintiffs' claim stating that, they had failed to prove that the insurer was obligated to indemnify the insured in terms of the policy. Consequently, there was no link between (i) the liability of the insured to the plaintiffs and (ii) the liability of the insurer in terms of the indemnity, for the purposes of s156 of the Act.

*Denise Durand,
overseen by Willie van Wyk*



CLICK HERE to find out more about our Insurance Law team.

IGNORE THE RIGHTS OF LABOUR TENANTS AT YOUR PERIL

The right of a labour tenant to bring an application to acquire a right in land, will in most cases be obsolete considering that such a right lapsed on 31 March 2001.

Notably, what gives this Act its relevance to this day is the fact that the right of a person who was a labour tenant on or before 2 June 1995, together with their family, to occupy and use farm land still persists.

In 1996, the legislature enacted the Land Reform (Labour Tenants) Act, No 3 of 1996 (Act). The objective of the Act was to protect all persons denied access to land as a result of past racially discriminative laws, and which persons had taken occupancy and enjoyed the use of land on farms upon which they were providing labour.

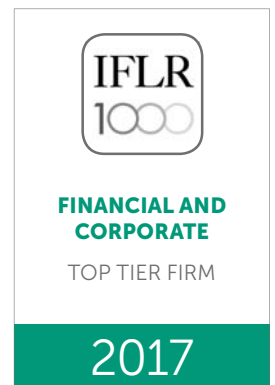
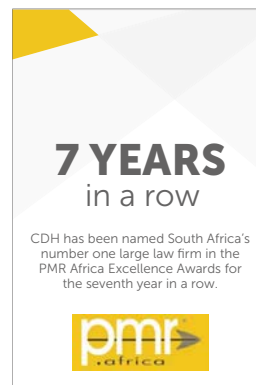
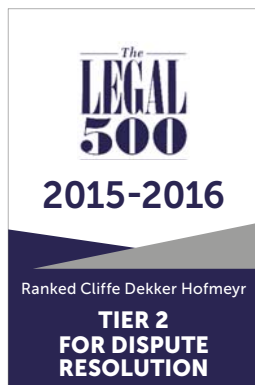
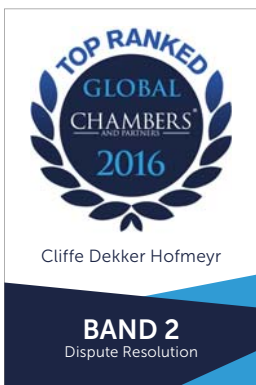
The Act confers certain rights on labour tenants and these rights create an encumbrance on farm owners' use and enjoyment of their farms, and will impact any potential transactions concerning such farms. But who qualifies as a 'labour tenant' and how should farm owners deal with their rights?

As defined in s1 of the Act, a labour tenant is "a person who has or has had the right to reside on a farm; has or has had cropping or grazing rights thereon, in consideration of which he provides labour to the owner or lessee; and whose parent or grandparent resided on the farm and had similar rights". As noted in *Mokwena v Marie Appel Beleggings CC and Another* [1999] 2 All SA 157 (LCC), the definition's elements are cumulative and are to be read conjunctively, and a determination of their satisfaction involves a factual inquiry in each case.

A labour tenant has two main rights which may impact a seller and purchaser of a farm where labour tenants are in occupation: (i) the labour tenant's right to occupy and use farm land in terms of s3 of the Act; and (ii) the labour tenant's right to acquire land in terms of s16 of the Act.

The right of a labour tenant to bring an application to acquire a right in land, will in most cases be obsolete considering that such a right lapsed on 31 March 2001. So unless such an application was made to the Director-General of the Department of Rural Development and Land Reform (DG) on or before 31 March 2001, and for some reason remains pending, any applications made post 31 March 2001 will fall on this hurdle alone.

Notably, what gives this Act its relevance to this day is the fact that the right of a person who was a labour tenant on or before 2 June 1995, together with their family, to occupy and use farm land still persists.



IGNORE THE RIGHTS OF LABOUR TENANTS AT YOUR PERIL

CONTINUED

Parties to transactions involving farms on which persons deemed to be labour tenants have taken occupancy need to be aware of the rights of labour tenants contained in the Act, and the impact those rights may have on their transactions and the enjoyment and use of their farms.

The Act provides that an agreement may be concluded with the labour tenant in terms of which the labour tenant is compensated, alternatively relocated in lieu of their right to occupy and use the farm land.

An important aspect regarding this latter agreement is that it will be of no force and effect until such time that it is certified by the DG or its terms incorporated in an order of court or that of an arbitrator in terms of s3(7) of the Act.

As such, parties to transactions involving farms on which persons deemed to be labour tenants have taken occupancy need to be aware of the rights of labour tenants contained in the Act, and the impact those rights may have on their transactions and the enjoyment and use of their farms.

*Wessel Ramatsekisa,
overseen by Burton Meyer*



CHAMBERS GLOBAL 2011–2016 ranked us in Band 2 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.



Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



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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.

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.

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