4 OCTOBER 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

DAMAGES AND BREACH OF CONTRACT - ARE YOU COVERED TO RECOVER ALL OF IT?

When a breach occurs in terms of an agreement, the innocent party to the agreement is entitled to claim damages for such breach. However, the common law and the agreement itself can place limitations on the extent to which the defaulting party would be liable for the damages suffered as a result of the breach.

SOCIAL MEDIA AND COMPANY REPUTATION: WAY OUT?

We exist in a new era of consumer activism: comments made by consumers, customers, former employees or just those with strong opinions about a company or a brand are commonplace on social media. Social media has enabled "consumer voice", placing companies and brands on the defensive when exposed to negative publicity and criticism, which might have an impact on their reputation and brand equity. A study published in Forbes notes that businesses risk losing as many as 22% of customers when users find even one negative article when considering buying a company's product.

CDH
CLIFFE DEKKER HOFMEYR

DAMAGES AND BREACH OF CONTRACT - ARE YOU COVERED TO RECOVER ALL OF IT?

The law presumes that the contracting parties could reasonably have foreseen all natural consequences of breach of contract at the time of conclusion of the contract.

When a breach occurs in terms of an agreement, the innocent party to the agreement is entitled to claim damages for such breach. However, the common law and the agreement itself can place limitations on the extent to which the defaulting party would be liable for the damages suffered as a result of the breach.

A court will need to be convinced, on a balance of probabilities, of the existence of an agreement whereby the defaulting party undertook to pay the special damages claimed.

When a breach occurs in terms of an agreement, the innocent party to the agreement is entitled to claim damages for such breach. However, the common law and the agreement itself can place limitations on the extent to which the defaulting party would be liable for the damages suffered as a result of the breach.

The common law of contract draws a distinction between general and special damages suffered. General damages are damages considered to flow naturally and generally from a breach in the normal course of events and are recoverable without a need to prove anything more. This is because the law presumes that the contracting parties could reasonably have foreseen all natural consequences of breach of contract at the time of conclusion of the contract. The innocent party need only prove that the particular damage was of the kind that flows naturally and generally from the type of breach in question.

Examples of general damages will include the loss of interest resulting from a failure to pay a sum of money; damages that result from the use of a product for its normal purpose; and regulatory fines imposed in the event of the breach of a statutory duty. Interestingly, loss of profit is generally not recoverable as general damages, but as special damages.

A defaulting party will only be liable for special damages if two things can be proven: First, the innocent party must prove that there are special circumstances which make it reasonable to presume that the contracting parties contemplated the damage as a probable result of the breach of contract. This is known as the contemplation requirement and similar to the well-known 'reasonable foreseeability' test in English law. Secondly, it must also be proved that the contracting parties entered into the contract with these special circumstances in mind or, more strictly formulated, that the parties had agreed, expressly or tacitly, that there would be liability for such damages. This is known as the convention requirement.

A court will need to be convinced, on a balance of probabilities, of the existence of an agreement whereby the defaulting party undertook to pay the special damages claimed. Factors to consider in determining what a defaulting party can be expected to have known and foreseen when contracting: expertise and knowledge, the commercial context of the contract, the scope and purpose of the contract and previous dealings between the contracting parties.

CDH
CLIFFE DEKKER HOFMEYR

DAMAGES AND BREACH OF CONTRACT - ARE YOU COVERED TO RECOVER ALL OF IT?

CONTINUED

The courts will not interfere with exemption clauses if the language is clear enough to be given its clear meaning.

Unfortunately, for an innocent party, the limitations to recover damages suffered do not stop there. Such damages can be limited even further in the agreement by:
(i) capping the amount recoverable for special damages to not exceed a certain amount and/or
(ii) by excluding liability for special damages in terms of a limitation of liability or exemption clause.

An exemption clause deprives contracting parties of rights that they would otherwise have had at common law. These clauses are therefore interpreted restrictively within the normal confines of interpretation, especially where the exemption clause is couched in wide language or in general terms that do not exclude liability on specific grounds. However, the courts will not interfere with exemption clauses if the language is clear enough to be given its clear meaning. Liability for intentional or fraudulent misrepresentation or fraudulent conduct cannot be excluded by exemption clauses.

In the absence of legislation regulating unfair contract terms and where a provision does not offend public policy or considerations of good faith, careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect themselves against liability insofar as it is legally permissible.

Exemption clauses can furthermore exclude any liability whether in contract, delict, under statute or otherwise for any special, indirect or consequential loss or damage. In this instance, an innocent party's rights are even more restricted when it is precluded from bringing an action based on a delict of loss of profits, rather than the contractual arrangement. Should the agreement contain such an exemption clause, the innocent party will be precluded from bringing an action based on delict.

An innocent party to a contractual arrangement can prevent the extent to which its rights to claim damages are limited in a contractual arrangement. Parties should give specific thought to these clauses as only damages which were foreseeable at the time of conclusion of the agreement and agreed to, will be recoverable as special damages, taking into consideration the nature of the agreement, business model and operations of the contracting parties. It is thus key that both parties are extensively involved in the drafting and negotiation process of any agreement and that the clauses addressing recovery of damages and exemption thereof, be drafted meticulously.

Mari Bester
(overseen by Lucinde Rhoodie)

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

CDH
CLIFFE DEKKER HOFMEYR

SOCIAL MEDIA AND COMPANY REPUTATION: WAY OUT?

It has become increasingly important for companies to monitor and effectively manage any reputational risk a social media presence triggers.

We exist in a new era of consumer activism: comments made by consumers, customers, former employees or just those with strong opinions about a company or a brand are commonplace on social media. Social media has enabled "consumer voice", placing companies and brands on the defensive when exposed to negative publicity and criticism, which might have an impact on their reputation and brand equity. A study published in Forbes notes that businesses risk losing as many as 22% of customers when users find even one negative article when considering buying a company's product.

Facebook user posted statements and photographs, claiming that a cleaning service company based in Durban, was illegally dumping in a nature reserve.

Yet, brand reputation consists of various factors. A strong brand will endure criticism (and hopefully address any overt dissatisfaction). Since a consumer experience is subjective, no brand can get everything right, all the time. Long before the oracle power of social media, Henry Ford noted that "the two most important things in any company do not appear in its balance sheet: reputation and its people". As such, it has become increasingly important for companies to monitor and effectively manage any reputational risk a social media presence triggers.

What's the golden rule when faced with a social media challenge? Act promptly and respond to the comment. To the extent that the negative statements are factually inaccurate, are consistently and repeatedly published, unfairly threaten the company's reputational capital, compromise employees or individuals, or fall outside one of a number of grounds of protected speech, companies may also consider the available legal remedies to remove such statements from social media platforms. These include, an action for defamation or an application for an interdict.

An interdict is a summary remedy in the form of a court order, which can be either prohibitory (ordering someone to refrain from doing something) or mandatory (ordering someone to do something). A company can approach a court to order an individual (if such individual is known and identifiable) or the service provider, in certain circumstances, to remove the controversial statements made or refrain from posting further harmful statements on their social media platform/s. A company would however, have to prove that the relief sought meets the requirements of an interdict. The cases of *McKenzie v Braithwaite* 2015 (1) SA 270 (KZP) and *RM V RB* 2015 (1) SA 270 (KZP) make it clear, correctly, that courts will lean towards freedom of speech, and are unlikely to grant a blanket interdict preventing defamatory statements that could be made in future.

An individual might have greater prospects of success instituting a claim for defamatory posts, but prospects of success for a company in such a claim are more limited simply because the comments may very well be discounted as opinions or bad reviews.

Recently, a Facebook user posted statements and photographs, claiming that a cleaning service company based in Durban, was illegally dumping in a nature reserve. The post attracted disapprobation and a further call to make the post viral allegedly led to the cleaning service

CDH
CLIFFE DEKKER HOFMEYR

SOCIAL MEDIA AND COMPANY REPUTATION: WAY OUT?

CONTINUED

It is critical that companies learn to distinguish between damaging statements and those that can be chalked up to general customer or employee complaints.

losing two major contracts, estimated at R355,000 and led to the harassment of workers. No litigation, however, appears to have ensued. Generally, the majority of similar defamation cases play out in much the same way: either overtaken by the flow of newer social media posts or settled between the parties.

Whether it be an account security breach resulting in the release of information, damning statements or fair comment, companies face significant challenges in curbing so-called "social media harm". This is particularly true if such comments do not pass quickly and start to "storm". With the prevalent use of social media and its instantaneous reach, it is almost inevitable that most brands will face "some kind of social media drama" at some point in time. Since defamatory postings on social media pose a significant risk to brands' reputational integrity, it is critical that companies learn to distinguish between damaging statements and those that can be chalked up to general customer or employee complaints, regardless of how emotive the latter can be. Companies should take active steps to protect their reputations. Such steps include understanding the rules of engagement on such platforms; setting up internal escalation policies and processes for dealing with and evaluating comments, which appear to attack their brands; educating themselves on the potential risks to reputational value and investing in their online reputation management. Legal remedies exist, but in the case of social media, are usually instruments of last resort and given the power of social media to "flame", these should be very carefully evaluated before being pursued.

Tracy Cohen and Keitumetse Makhubedu

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

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@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

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@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

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@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

CDH
CLIFFE DEKKER HOFMEYR