14 AUGUST 2019

CORPORATE & COMMERCIAL **ALERT**

IN THIS **ISSUE**

Warrantors beware: An independent contractor can be your "agent"

When negotiating commercial agreements (such as sales and leases), parties typically spend a lot of time on the warranties. A warranty is a contractual term by which a party to a contract assumes absolute liability for the accuracy and proper performance thereof, to the extent that he cannot rely on impossibility of performance or absence of knowledge of fault to escape liability (but this may of course be modified by the wording of the warranty in question). Sometimes one finds a qualification / limitation to a party's liability under a warranty to the effect that a party shall not be liable for damages other than those occasioned by the party's "employees, servants or agents" (Agent Qualification).

CDH
CLIFFE DEKKER HOFMEYR

CLICK HERE

For more insight into our expertise and services

Warrantors beware: An independent contractor can be your "agent"

The failure by the independent contractors to activate the gas fire system in the factory caused a fire to break out.

When negotiating commercial agreements (such as sales and leases), parties typically spend a lot of time on the warranties. A warranty is a contractual term by which a party to a contract assumes absolute liability for the accuracy and proper performance thereof, to the extent that he cannot rely on impossibility of performance or absence of knowledge of fault to escape liability (but this may of course be modified by the wording of the warranty in question). Sometimes one finds a qualification/limitation to a party's liability under a warranty to the effect that a party shall not be liable for damages other than those occasioned by the party's "employees, servants or agents" (Agent Qualification).

The doctrine of vicarious liability holds that an employer is liable for harm or loss arising from the negligence, or other forms of wrongdoing of its employees, that occur in the course and scope of employment. One of the more interesting questions is whether an employer may be held liable for a breach of warranty based on the omission of an independent contractor, in circumstances where the warranty happens to be limited by an Agent Qualification? This was one of the questions dealt with in the recent Supreme Court of Appeals decision of *Rehau Polymer (Pty) Ltd v Brunettes Electrical & others* (641/2018) [2019] ZASCA 101 (25 July 2019).

The facts in *Rehau* essentially boil down to an attempt by the sublessee to attribute the omission of certain independent contractors to activate a gas fire suppression system as a breach of the warranties given by the sublessor to the sublessee in terms of a lease agreement entered into between the two parties in terms of which the sublessor subleased a factory to the sublessee. The failure by the independent contractors to activate the gas fire system in the factory caused a fire to break out.

In terms of the lease agreement the sublessor undertook to construct and lease a factory to the sublessee and warranted that the lease premises structures to be erected on the property would be fit for the purpose for which it was let to the sublessee and would comply with all relevant laws and regulations relating to fire and health safety. The sublessee's claim against the sublessor was founded upon the alleged breach of warranties by the sublessor as a direct consequence of the independent contractors' failure to activate the fire suppression system. The lease agreement contained an Agent Qualification in favour of the sublessor, worded as follows:

> "The Sub-Lessee shall not, under any circumstances, have any claim or right of action whatsoever against the Sub-lessor for damages, loss or otherwise that occurs on the Lease Premises or the Supplier Park save for damages or destruction directly caused by any act or omission of the Sub-Lessor, its employees, servants or agents."

CDH
CLIFFE DEKKER HOFMEYR

Warrantors beware: An independent contractor can be your "agent" *...continued*

On the facts and evidence of the case the minority held that the independent contractors could indeed be said to be agents of the sublessor.

Whether an Agent Qualification such as the above can be interpreted as limiting liability under a warranty, is debatable. The majority of the court adopted a relatively narrow and literal interpretation of the lease agreement and found that the wording of the relevant warranties found no application to the actual subsequent activation of the fire suppression system in the first place, and thus the majority did not have to debate the proposition that an independent contractor could be said to be an "agent" of the sublessor.

The minority however adopted an interpretation that the warranty did extend to the proper arming of the fire suppression system, and therefore proceeded to determine *inter alia* whether the Agent Qualification assisted the sublessor. Were the independent contractors "agents" of the sub-lessor in this context?

On the facts and evidence of the case the minority held that the independent contractors could indeed be said to be agents of the sublessor. Witness testimony of the relationship between the sublessor and the independent contractor, and the nature of the services agreement between the parties, strongly indicated that the relationship was one of agency or mandate. Accordingly, the Agent Qualification could not come to the sublessor's aid, even if it was intended to be applied to liability under a warranty (which ordinarily is strict and absolute in its terms).

Accordingly, the minority held that the sublessor should have been held liable in contract for the damages caused by the independent contractors, as its agents.

The minority judgment in *Rehau*, although not binding (but at the same time also not contradicted by the majority judgment, given that the majority did not have to consider the question), clearly does show support for extending vicarious liability to the acts (and omissions) of independent contractors, in appropriate circumstances. Where the commercial principle is agreed that there will be an Agent Qualification drafted into an agreement, the parties should express themselves clearly on whether independent contractors are "agents" or otherwise of either party, and also the extent to which the Agent Qualification applies to warranties given under the agreement. Certainly, it must not be assumed by a party that its independent contractors cannot be its agents.

Yaniv Kleitman and Boipelo Diale

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com

David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Emma Dempster
Projects & Energy
Director
T +27 (0)11 562 1194
M +27 (0)79 491 7683
E emma.dempster@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Sandra Gore
Director
T +27 (0)11 562 1433
M +27 (0)71 678 9990
E sandra.gore@cdhlegal.com

Jay Govender
Projects & Energy Sector Head
Director
T +27 (0)11 562 1387
M +27 (0)82 467 7981
E jay.govender@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@cdhlegal.com

Kendall Keanly
Director
T +27 (0)21 481 6411
M +27 (0)83 645 5044
E kendall.keanly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Nkcubeko Mbambisa
Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Francis Newham
Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers
Oil & Gas Sector Head
Director
T +27 (0)21 481 6429
M +27 (0) 79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen
Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com