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CORPORATE & COMMERCIAL **ALERT**

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CLIFFE DEKKER HOFMEYR

Can a shareholder recover loss caused by a wrong done to the company in which it holds shares?

The natural question is whether a shareholder has a claim against a party which commits a wrong against the company?

It is trite law that a company is a separate legal entity distinct from its shareholders. Shareholders enjoy the benefit of this primal distinction in that they cannot be sued as shareholders for the liabilities of the company. However, when a company suffers loss due to a wrongful act perpetrated against the company, the shareholders of that company also suffer as a result of the value of their shares decreasing.

The natural question then is whether a shareholder has a claim against a party which commits a wrong against the company? The short answer is that a shareholder does not have the right to claim for a reduction in the value of its shares that only reflects the loss suffered by the company itself.

The so-called reflective loss principle was succinctly articulated in *Johnson v Gore Wood & Co* [2001] 1 All ER 481 where Lord Bingham stated that:

> *"Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company."*

Lord Bingham did however identify two narrow exceptions, namely:

> *"Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding."*

and

> *"Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other."*

The Supreme Court of Appeal in *London & others v Department of Transport, Roads and Public Works, Northern Cape & others* (1035/2018) [2019] ZASCA 144 (30 October 2019) recently had to determine whether the shareholders of a company could institute an action for damages against the Department for an alleged breach of contractual duty owed by the Department to the company in which they held shares.

Can a shareholder recover loss caused by a wrong done to the company in which it holds shares?*...continued*

Shareholders enjoy the benefits of this separation in that liabilities of the company cannot be claimed from them.

That is, was the reflective loss principle applicable, non-suiting the shareholders, or could the shareholders have a claim against the Department for the diminution in value of their shares?

The facts in *London* essentially boiled down to an alleged breach by the Department of the contract between the company and the Department which caused the company to fail and led the shareholders to suffer loss. The Department's response to the shareholders' averments that they had a cause of action against the Department for a breach of the agreement (to which the shareholders were not a party), can be summarised as follows:

I. firstly, if any wrong was committed at all, it was not a wrong done to the shareholders of the company, whose shareholding remained unaffected by the legal breach of duty, but against the company;

II. secondly, the Department owed a contractual duty in terms of the agreement to the company and not to the shareholders; and

III. thirdly, there was no allegation in the shareholders' particulars of claim that the loss allegedly suffered by them was separate and distinct from that suffered by the company and arose from a breach of legal duty independently owed to them as shareholders.

The Supreme Court of Appeal upheld that the reflective loss principle dictated that the shareholders were precluded from suing in their own right as the claim was based on a wrong done to the company. This is so even where the result was to diminish the value of the shareholders' shares and even where the company had declined or failed to take steps to recover such loss. Accordingly, neither of the exceptions to the application of the reflective loss principle could come to the shareholders' aid and no cause of action had been made against the Department.

When dealing with the law relating to the relationship between a company and its shareholders our courts recognise that a company is a separate legal entity from its shareholders and, accordingly, in the ordinary course, any loss caused to the company must be recovered by the company, and not by its shareholders on the basis of the diminution in the value of their shares. Our courts do seem to recognise the need for narrow exceptions to this principle, and therefore shareholders will be entitled to recover loss caused to the company and reflected in their shares if they have an independent cause of action against the wrongdoer. Our law (under section 165 of the Companies Act, 2008) also allows shareholders a derivative action to either compel the company to recover its own losses, or to do so on its behalf.

Although the *London* case does not introduce any new legal principles, it affirms the basic tenet upon which our corporation's law and economic system is founded: that a company is autonomous from its shareholders. Shareholders enjoy the benefits of this separation in that liabilities of the company cannot be claimed from them. But they are also then bound by the logical consequence of the principle: shareholders must rely on the company to recover its own losses.

David Pinnock and Boipelo Diale

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Direct marketing – the way forward

> The CPA is premised on an "opt-out" approach in terms of which consumers are deemed to have opted in to receive communication via direct marketing until such time as they have formally opted out.

Direct marketing is big business. It is frequently used by businesses as a marketing tool. Many businesses undertake research about prospective customers by accessing information already in the public domain. This includes gleaning information from publicly accessible websites (such as LinkedIn, Facebook and the like), and obtaining information via company switchboards. The personal information is then captured and stored. The business then reaches out to these prospective customers (in person, via post, via personalised or mass-generated emails and/or via telephone calls) to market goods or services. The communication via person, mail or electronic communication for the purpose of promoting any goods or services, or requesting a donation constitutes direct marketing.

CPA vs POPI

There are two pieces of legislation which regulate direct marketing activities, namely the Consumer Protection Act, No 68 of 2008 (CPA) and the Protection of Personal Information Act, No 4 of 2013 (POPI). The former deals with direct unsolicited marketing while the latter deals with the collection, storage and dissemination of personal information (including for purposes of direct marketing).

The CPA is premised on an "opt-out" approach in terms of which consumers are deemed to have opted in to receive communication via direct marketing until such time as they have formally opted out. POPI, however, is premised on an "opt-in" approach in terms of which consumers are deemed to have opted out of receiving communication via direct marketing unless they have expressly opted-in. Although certain provisions of POPI are already in force (such as those mandating the establishment of the regulator), the primary provisions dealing with direct marketing have not yet been enacted.

The Future of the Direct Marketing Landscape

There is currently a great deal of confusion about the rules of direct marketing. For example, it is unclear if "cold-calling" prospective customers will still be allowed, if and how consent must be requested, and what will generally be required when the remaining provisions of POPI (in particular those in respect of direct marketing) come into force. At the moment (while only the provisions of the CPA and not POPI which regulate direct marketing are in force), provided that marketing campaigns clearly allow for consumers to "opt-out" or "unsubscribe" from any direct marketing, such communication is seemingly lawful. However, POPI will change this. It will impact how the initial contact with a prospective consumer can take place, and will impose a significant administrative burden as regards the collection, storage and distribution of personal information.

POPI regulates direct marketing by means of any form of *electronic communication* including automated calling machines, faxes, SMSes and email. The CPA still regulates direct marketing via telephone and the post. So, what will this mean in practice?

Direct marketing via any form of electronic communication including automated calling machines, faxes, SMSes and email will no longer be permitted, unless the person has either given his/her consent to

Direct marketing – the way forward...

continued

POPI's direct marketing provisions are going to make using contact details obtained from lead generation businesses for direct marketing a great deal trickier.

receive such electronic communication, or is an existing customer. Otherwise, the person's consent will be required. For this purpose, the responsible party may approach a person whose consent is required, and who has not previously withheld such consent, only once in order to request the consent of such person. If the person is an existing customer, the responsible party may only send direct marketing to such person if (1) the customer's contact details were obtained in the context of a sale of a product or service; (2) for the purpose of direct marketing of similar products or services; and (3) the customer has been given a reasonable opportunity to object to the direct marketing (i) at the time the personal information was collected; and (ii) on every communication.

All direct marketing communications must contain the sender's details and an "unsubscribe" option. Any communication sent for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent; and an address or other contact details to which the recipient may send a request that such communications cease.

POPI's direct marketing provisions are going to make using contact details obtained from lead generation businesses for direct marketing a great deal trickier. Companies are also going to need to manage their customer databases a lot more effectively, and keep records of where, how and when was the personal information initially obtained; whether the person is an existing customer and, if so, in respect of what products or services; whether the person has consented to receiving direct marketing; and whether the person has unsubscribed from receiving direct marketing.

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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.

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