20 MARCH 2019

DISPUTE RESOLUTION ALERT

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LAW OF CONTRACT – THE EFFECT OF THINKING YOU'RE RIGHT WHEN YOU'RE WRONG

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TO BE...OR NOT TO BE (A LEGAL PRACTITIONER)

It was Jeremy Bentham who said, "The power of the lawyer is in the uncertainty of the law." However, with the coming into effect of s24 and s26 of the Legal Practice Act, No 28 of 2014, (LPA) on 1 November 2018, aspiring legal practitioners are not only uncertain about the law regarding admission as either attorneys or advocates but are ironically also left quite disenfranchised in their quest to be admitted as legal practitioners.

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The Supreme Court of Appeal (SCA) recently considered whether the insistence by a party on the incorrect interpretation of a contract constituted a repudiation thereof.

In the case of *Starways Trading 21 CC and Others v Pearl Island Trading 714 (Pty) Ltd and Another* (232/2018) [2018] ZASCA 177, a contractual dispute arose between Starways Trading 21 CC (Starways) (the seller) and Pearl Island Trading 714 (Pty) Ltd (Pearl) (the purchaser), in respect of payment of the purchase price in terms of the contract.

Starways contended that it was contractually entitled to payment of a certain purchase price (based on its incorrect interpretation of the contract) and demanded that Pearl make payment accordingly. Pearl regarded this insistence on the incorrect interpretation of the contract as a repudiation thereof. Pearl consequently gave notice to Starways that it accepted the repudiation and cancelled the contract.

Starways thereafter approached the Western Cape Division of the High Court, Cape Town (High Court) to enforce the contract against Pearl and the alleged contractual obligation for payment of a certain purchase price by Pearl.

The High Court dismissed Starways' application and also refused leave to appeal. Starways was however granted leave to appeal by the SCA.

The SCA concluded that a reasonable person in the position of Pearl was entitled to accept that Starways would not perform its duties.

The SCA held that Starways' interpretation of the contract (dealing with the purchase price payable by Pearl) was wrong, and that its insistence on this interpretation by demanding payment from Pearl of a certain purchase price, amounted to a repudiation of the contract.

In its judgment, the SCA noted the following:

1. It is well established that repudiation of an agreement takes place by unequivocal intimation, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor;
2. The test that should be applied is an objective test, and the matter should be approached from the vantage point of the innocent party; and
3. The *bona fide* insistence on an incorrect interpretation of a material term of a contract may amount to the repudiation of the contract.

The SCA concluded that a reasonable person in the position of Pearl was entitled to accept that Starways would not perform its duties in terms of the objective and

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LAW OF CONTRACT – THE EFFECT OF THINKING YOU'RE RIGHT WHEN YOU'RE WRONG

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This judgment demonstrates the importance of objectively interpreting the terms of a contract, from the vantage point of a reasonable person.

correct interpretation of the contract but would insist on its incorrect interpretation. Pearl was therefore entitled to cancel the contract by the acceptance of the repudiation.

This judgment demonstrates the importance of objectively interpreting the terms of a contract, from the vantage point of a reasonable person. The incorrect interpretation of a contract, notwithstanding that it may be *bona fide*, may lead to the severe consequence of an unintentional repudiation of the contract.

Kylene Weyers and Stephan Venter

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TO BE...OR NOT TO BE (A LEGAL PRACTITIONER)

The transitional provisions envisaged in s115 of the LPA have not only left a lacuna in relation to admissions of legal practitioners but have also inevitably triggered an impasse as the courts are indeterminate as to under which provisions legal practitioners can and should be admitted.

It was Jeremy Bentham who said, "The power of the lawyer is in the uncertainty of the law." However, with the coming into effect of s24 and s26 of the Legal Practice Act, No 28 of 2014, (LPA) on 1 November 2018, aspiring legal practitioners are not only uncertain about the law regarding admission as either attorneys or advocates but are ironically also left quite disenfranchised in their quest to be admitted as legal practitioners. The transitional provisions envisaged in s115 of the LPA have not only left a lacuna in relation to admissions of legal practitioners but have also inevitably triggered an impasse as the courts are indeterminate as to under which provisions legal practitioners can and should be admitted.

"Any person who, immediately before the date referred to in s120(4) [being 1 November 2018], was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act."

In terms of s115 of the LPA, "Any person who, immediately before the date referred to in s120(4) [being 1 November 2018], was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act." This raises the unanswered question of who was entitled to be admitted immediately before 1 November 2018, given that the Attorneys Act, No 53 of 1979 (Attorneys Act) and the Admission of Advocates Act 74 of 1964 (Advocates Act) have been repealed.

In its interim final order, the full bench of the High Court of South Africa, Gauteng Local Division, Johannesburg in the case of *Ex parte* R. Goosen and others, case number: 2137/2018, held that any person who applied for admission to practice as an advocate or as an attorney whose application was pending on 1 November 2018 is entitled to invoke the provisions of s115 of the LPA, in order to rely on the provisions of the Advocates Act or the provisions of the Attorneys Act, to be admitted to practice as a legal practitioner, in terms of s24 of the LPA. The balance of this order has not been delivered.

This however does not address the case of candidates who, as at 1 November 2018 were in partial fulfilment of the admission requirements in terms of the Attorneys Act. This is especially true for candidates, whose contracts of articles of clerkship were registered prior to the coming into effect of the LPA. Such contracts state that candidate attorneys shall satisfy all the requirements of s15 of the Attorneys Act, by the completion of their period of articles thereby entitling the candidate attorneys to complete their articles of clerkship within a period of two years in order to qualify for admission as attorneys.

A sensible and logical approach was taken by the Honourable Roberson J in the case of *Ex parte Drian Hendrik Bakkes and Five Similar Cases* (3211/18) [2019] ZAECGHC 3 (18 January 2019) (Bakkes case), where she held that candidates who obtained their LLB degrees prior to 1 November 2018 may use the LPA as a vehicle for the admission of such persons. She further held that to require such a person to satisfy the requirements of the LPA in addition to the Advocates Act or in this case, the Attorneys Act would unfairly require such persons to be dually qualified. Therefore,

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Persons who obtained their LLB degree prior to 1 November 2018 are entitled to be admitted.

persons who obtained their LLB degree prior to 1 November 2018 are entitled to be admitted. Section 115 must be used as a vehicle for the admission of those persons who were in partial fulfilment of the requirements of the repealed Attorneys Act.

This judgment is in line with the established principle that there is a presumption against a change in the law operating retrospectively so as to create a new obligation or impose a new duty or attach a new disability in regard to events already past. This principle was canvassed in the Constitutional Court case of *Donald Veldman v The Director of Public Prosecutions 2007* (9) BCLR 929 (CC) where Donald Veldman (Donald) was challenging the constitutionality of the imposition of a fifteen-year sentence on a charge of *inter alia* murder, by the regional magistrate's court. In this case, when Donald entered his plea, the maximum penal jurisdiction of the regional court for murder was ten years imprisonment. After the plea, and before sentencing, legislation was passed wherein the regional magistrate's court's maximum penal jurisdiction for murder was increased to fifteen years and Donald was therefore sentenced to fifteen years imprisonment. The Constitutional Court held that the retrospective application of the amendment adversely affected Donald's rights because he had a legal interest in the certainty that his sentence would not exceed the maximum penal jurisdiction of the trial court in terms of the applicable law at the time of the plea.

Section 26(1)(c) of the LPA imposes additional requirements for the admission of attorneys which were not required under s15 of the Attorneys Act. At the time of entering into their contracts of articles, prior to 1 November 2018, candidates were not only obliged to satisfy all the requirements in terms of s15 of the Attorneys Act but were also entitled to certainty as to the requirements for admission as at the time of the entering into and termination of the contracts. Imposing the requirements contained in the LPA, as stated in the Bakkes case, would unfairly require such persons to be dually qualified. This would amount to retrospectively creating new obligations on legal practitioners who obtained their LLB degrees prior to 1 November 2018 and were therefore entitled to be admitted as legal practitioners.

Imposing the requirements contained in s26 of the LPA would also create a rather bizarre situation in the case of 'candidate attorneys' whose contracts of articles have in fact lapsed and their applications, brought after 1 November 2018 are pending. These candidates would then have new obligations to fulfil as candidate attorneys when they in fact do not have standing contracts of practical vocational training with the Legal Practice Council (LPC). It raises an even further concern regarding which body regulates these candidates as they have no contract with the LPC, nor are they enrolled by the LPC.

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These regulations have not yet been promulgated and therefore, even if required to, candidates cannot actually comply with s26 until such time that the Minister prescribes the requirements for compliance.

Finally, complying with the provisions of s26 of the LPA is in fact an impossibility. Section 26(1)(c) states that legal practitioners must undergo community service as contemplated in s29. Section 29 states that the Minister of Justice and Constitutional Development must prescribe the requirements for community service. These regulations have not yet been promulgated and therefore, even if required to, candidates cannot actually comply with s26 until such time that the Minister prescribes the requirements for compliance.

In conclusion, there is a need for legal certainty in respect of admission requirements. Practically, it has created much confusion within the legal fraternity as some courts in the different jurisdictions have issued the applications for admission, whereas some have not. For our aspiring new legal practitioners, it certainly provides no comfort to them that the very profession that they have spent years studying for cannot give a definitive answer as to what provision in the law entitles them to practice as an attorney or advocate.

Luanne Chance and Nomlayo Mabhena

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BUSINESS RESCUE AND THE "COSTS" OF AN ULTERIOR MOTIVE

During April 2016 Pro-Wiz Group (Pty) Ltd (Pro-Wiz) instituted an application for Oljaco to be placed under business rescue in terms of s131(1) of the Companies Act, No 71 of 2008

The liquidator's application was dismissed in the Pretoria High Court and the liquidators appealed to the SCA.

It is trite that the purpose of business rescue proceedings is to rehabilitate companies that have fallen on hard times, with a hope of either rescuing them or to provide a better return to creditors than what they would receive on a liquidation. This was reiterated in the recent Supreme Court of Appeal (SCA) judgment of *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (412/2018) [2019] ZASCA 7 (8 March 2019).

Oljaco CC (Oljaco) was placed under final liquidation in May 2015 and the appellants were appointed as its liquidators. During April 2016 Pro-Wiz Group (Pty) Ltd (Pro-Wiz) instituted an application for Oljaco to be placed under business rescue in terms of s131(1) of the Companies Act, No 71 of 2008 (the Act). The liquidators opposed the application on several grounds, principally that the application was an abuse of process and that it was a ploy to enable the sole member of Oljaco to avoid interrogation in an enquiry under s418 of the Companies Act, No 61 of 1973, and that he was trying to strip Oljaco of assets and conceal them from creditors.

SARS, being the principal creditor of Oljaco, intervened and opposed the application. Two days before the hearing of the matter, Pro-Wiz delivered a notice of withdrawal of the application and tendered to pay SARS's costs. Pro-Wiz did not however, tender to pay the legal costs incurred by the liquidators. As a result, the liquidators sought an order in terms of Rule 41(1)(c) of the Uniform Rules of Court, ordering Pro-Wiz to pay their costs. It was at this point that Pro-Wiz challenged the application on the basis that the liquidators lacked locus standi, founded on an interpretation of s131(6) of the Act which disentitles them from opposing an application to have the company placed into business rescue. The liquidator's application was dismissed in the Pretoria High Court and the liquidators appealed to the SCA.

Section 131 of the Act deals with court applications to commence business rescue proceedings, and subsection (6) states that if the liquidation process has already begun at the time that an application is made to place a company into business rescue, the application will suspend those liquidation proceedings.

In respect of the issue regarding the liquidator's locus standi, the SCA held that in terms of s131(2)(a) of the Act, an application for business rescue must be served on the liquidators of a company, where it is under liquidation. This is due to the fact that upon liquidation, the directors are no longer in control of the company.

The SCA went on to hold *inter alia* that:

"It is apparent from the provisions of s131 that the company that is the subject of the business rescue application is entitled to oppose it. At the time the application is made in relation to a company under provisional or final winding up, its affairs will be in the hands of the liquidators.

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BUSINESS RESCUE AND THE "COSTS" OF AN ULTERIOR MOTIVE

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The appeal succeeded and the liquidators were granted their costs in the High Court.

On ordinary principles it seems obvious that liquidators, whether provisional or final, faced with such an application should be entitled either to support or oppose the application depending upon their judgment as to the interests of the company and its creditors."

In summary, the SCA found that Pro-Wiz's challenge to the liquidator's locus standi was based on an incorrect construction of s131(6) of the Act. This section does not divest liquidators of their right to oppose a business rescue application. The appeal succeeded and the liquidators were granted their costs in the High Court. Insofar as the computation of the costs, the SCA awarded a punitive costs order against Pro-Wiz on the basis that the application for business rescue was brought for reasons ulterior to any belief that Oljaco would benefit from being placed under business rescue.

This judgment is important in two respects. Firstly, it clarifies that s131(6) of the Act does not divest liquidators of their right to oppose business rescue applications. Secondly, it stands as a cautionary tale as to the potential cost implications that may be imposed by a court when it is clearly evident that business rescue proceedings are being abused.

Roxanne Webster and Courtney Jones

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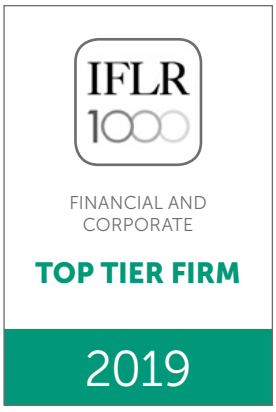

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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