

21 AUGUST 2019


# DISPUTE RESOLUTION ALERT

## IN THIS ISSUE >

**Just what the High Court prescribed – A party may call up a Guarantee in instances where more than three years had passed since the date of the underlying contractual breach**

On 26 June 2019, the Pretoria High Court handed down a judgment in a matter in which the Court had to determine whether a party may call up a demand guarantee in instances where the underlying contractual basis for the guarantee may have prescribed.

FOR MORE INSIGHT INTO OUR  
EXPERTISE AND SERVICES

CLICK HERE 



CLIFFE DEKKER HOFMEYR

## Just what the High Court prescribed – A party may call up a Guarantee in instances where more than three years had passed since the date of the underlying contractual breach

The Guarantee provided that Lombard undertook to pay Investec the guaranteed sum upon receiving written notice from Investec that Esor had defaulted in performing its Obligation.

On 26 June 2019, the Pretoria High Court handed down a judgment in a matter in which the Court had to determine whether a party may call up a demand guarantee in instances where the underlying contractual basis for the guarantee may have prescribed.

Investec Bank Ltd (Investec) had entered into an agreement in terms of which it sold immovable property to Esor Uitvlugt (Pty) Ltd (Esor). This agreement required Esor to improve the property by installing internal services with a cumulative value of R20,000,000 by certain dates (Obligation). As a precondition to the agreement, and in order to secure Esor's performance, the agreement required that Esor provide a demand guarantee in favour of Investec for the due and proper performance of the Obligation.

Esor subsequently approached Lombard Insurance Company Ltd (Lombard) who issued a performance guarantee in favour of Investec (Guarantee). The Guarantee provided that Lombard undertook to pay Investec the guaranteed sum upon receiving written notice from Investec that Esor had defaulted in performing its Obligation.

As at 14 August 2018, Esor had not performed its Obligation and it was at this point that Investec made its demand in terms of the Guarantee for payment of the

guaranteed amount from Lombard. This date was more than 3 years after a portion of the Obligation, thus the trigger event for calling up the Guarantee, was to be performed by Esor.

Lombard's Counsel argued, amongst other things, that Investec's right to call up a portion of the guaranteed sum had prescribed due to the lapsing of three years since Esor's default in performing the Obligation as contained in the underlying agreement.

The Court considered the authorities on demand guarantees and the wording of the Guarantee itself and concluded that the Guarantee was a true demand guarantee and not a suretyship, as argued by Lombard's Counsel, and that the underlying contract had no effect on Lombard's liability to Investec, unless fraud was shown, which was not the case, and that any defence that Esor might have had, including that Investec's claim against it had prescribed, was not at Lombard's disposal.

The running of prescription is regulated under s12(1) of the Prescription Act, No 68 of 1969, which provides that prescription will commence to run as soon as a debt is due.

## Just what the High Court prescribed – A party may call up a Guarantee in instances where more than three years had passed since the date of the underlying contractual breach...continued

The calling up of a guarantee will invariably depend on the contractual terms of the guarantee itself and will have to be drafted so as to comply with the terms of the specific guarantee.

In considering when prescription would commence in this case, the High Court referred with approval to the case of *De Bruyn v Du Toit*, which was confirmed by the Constitutional Court in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*, and stated that:

*"...where the parties agree that the giving of notice is a condition precedent to a claim and is thus a necessary ingredient to a creditor's cause of action, the running of prescription would only commence when notice is given. Parties are entitled, in entering into an agreement, to determine when prescription will commence running, even if the agreement operates to the detriment of one of the parties."*

From the authority relied upon, it would appear that in this case prescription would begin to run from the date on which Investec gave notice calling up the Guarantee from Lombard.

The Court also considered the wording of the Guarantee which provided that: *"This guarantee ... shall remain valid until the Purchaser's obligations in terms of Clause 7 have been fulfilled under the Agreement or upon payment of the Guarantee in terms of this agreement"* and held that, in the circumstances, the Guarantee would only lapse when one of two scenarios occurred, either when Esor had complied with the Obligation, or when payment had been effected by Lombard in terms of the Guarantee. Consequently, the Court found that the claim under the Guarantee had not prescribed, as argued by Lombard, despite more than three years having passed since performance in terms of the underlying contract became due.

The calling up of a guarantee will invariably depend on the contractual terms of the guarantee itself and will have to be drafted so as to comply with the terms of the specific guarantee. This case illustrates that the parties to a guarantee are capable of not only determining the amount and the terms for performance under the guarantee but can also agree as to when prescription will begin to run.

*Joe Whittle, Reece May and Ndzalama Dumisa*

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

CHAMBERS GLOBAL 2017 - 2019 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2019 ranked our Public Law sector in Band 2: Public Law.

CHAMBERS GLOBAL 2018 - 2019 named our Corporate Investigations sector as a Recognised Practitioner.

CHAMBERS GLOBAL 2018 - 2019 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2018 - 2019 ranked our Dispute Resolution practice in Band 2: Media & Broadcasting.

CHAMBERS GLOBAL 2017 - 2019 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 in Band 3: Dispute Resolution.

Lionel Egypt ranked by CHAMBERS GLOBAL 2019 in Band 2: Public Law.

Julian Jones ranked by CHAMBERS GLOBAL 2017 - 2019 in Band 3: Restructuring/Insolvency.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 as Senior Statespeople: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2019 in Band 2: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 - 2019 in Band 4: Construction.



CDH HAS BECOME THE EXCLUSIVE MEMBER FIRM IN AFRICA FOR THE:

**Insuralex Global Insurance Lawyers Group**  
(the world's leading insurance and reinsurance law firm network).

[CLICK HERE TO READ MORE](#)



**insuralex**  
GLOBAL INSURANCE  
LAWYERS GROUP



**BAND 2**

Restructuring/Insolvency

Cliffe Dekker Hofmeyr



**RECOGNISED PRACTITIONER**

Corporate Investigations

Cliffe Dekker Hofmeyr



EMEA

**2017-2019**

Recommended us in

**TIER 1**

Dispute Resolution

**DealMakers**

**2018**

**1<sup>ST</sup> BY M&A DEAL FLOW FOR THE 10<sup>TH</sup> YEAR IN A ROW.**

**2018** 1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by M&A Deal Value.  
2<sup>nd</sup> by General Corporate Finance Deal Flow.  
1<sup>st</sup> by BEE M&A Deal Value.  
2<sup>nd</sup> by BEE M&A Deal Flow.  
Lead legal advisers on the Private Equity Deal of the Year.



**BAND 1**

Dispute Resolution

Cliffe Dekker Hofmeyr



**BAND 2**

Public Law

Cliffe Dekker Hofmeyr



**BAND 2**

Media & Broadcasting

Cliffe Dekker Hofmeyr



**BAND 2**

Insurance

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



**Thabile Fuhrmann**  
Chairperson  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

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

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@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

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@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

**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

**Zaakir Mohamed**  
Director  
T +27 (0)11 562 1094  
E zaakir.mohamed@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Mongezi Mpahlwa**  
Director  
T +27 (0)11 562 1476  
E mongezi.mpahlwa@cdhlegal.com

**Kgosi Nkaiseng**  
Director  
T +27 (0)11 562 1864  
E kgosi.nkaiseng@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)11 562 1140  
E byron.oconnor@cdhlegal.com

**Ashley Pillay**  
Director  
T +27 (0)21 481 6348  
E ashley.pillay@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

**Belinda Scriba**  
Director  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

**Tim Smit**  
Director  
T +27 (0)11 562 1085  
E tim.smit@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

**Roy Barendse**  
Executive Consultant  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Willem Janse van Rensburg**  
Executive Consultant  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Jonathan Witts-Hewinson**  
Executive Consultant  
T +27 (0)11 562 1146  
E witts@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.

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.

### 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 cdh Stellenbosch@cdhlegal.com

©2019 8217/AUG

