27 FEBRUARY 2019

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

CLICK HERE

CDH
CLIFFE DEKKER HOFMEYR

BACK TO BASICS – LOCUS STANDI IN LITIGATION

Locus standi should be one of the first things to establish in a litigation matter.

Locus standi in iudicio concerns "the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted", and should be one of the first things to establish in a litigation matter.

In *Four Wheel Drive Accessory Distributors CC v Leshni Rattan NO 2018 JDR 2203 (SCA)*, the Supreme Court of Appeal (SCA) scrutinised the *locus standi* of the appellant, the powers of the court *a quo* to venture outside of the issues raised on the papers, as well as whether leave to appeal should have been granted at all.

Firstly, the facts. Mr Rattan delivered his motor vehicle to the Land Rover dealership in Umhlanga for repairs. He signed an agreement between himself and Land Rover Experience Rentals CC (a non-existent entity – and not the appellant) for the use of a courtesy vehicle. Two days later another courtesy vehicle (owned by Land Rover SA – also not the appellant) became available, and was delivered to Mr Rattan, who signed a document identical to the first agreement. In terms of the agreement, Mr Rattan was obliged to return the vehicle in the same condition as he received it. Mr Rattan was shot and fatally wounded whilst driving the vehicle, and as a result of his demise, did not return the vehicle.

The appellant sued the executrix of Mr Rattan's estate for breach of contract and claimed the cost of the repairs to the vehicle (which was riddled with bullet holes and had to be retrieved from the police).

The evidence led before the court *a quo* did not establish a sufficient or adequate interest in the vehicle entitling the appellant to claim damages from Mr Rattan's estate. The appellant was not the owner of the vehicle and could not convince the court of its version that Land Rover SA had concluded an oral lease agreement in terms of which the appellant bore the risk of loss and damage to the vehicle. The SCA considered the requirements for *locus standi*, being that the appellant must have an adequate interest in the subject matter of the litigation; the interest must not be too remote; the interest must be actual; and the interest must be current (not hypothetical), and concluded that the court *a quo* rightly found that the appellant had failed to establish *locus standi.*

The evidence led before the court a quo did not establish a sufficient or adequate interest in the vehicle entitling the appellant to claim damages from Mr Rattan's estate.

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

CDH
CLIFFE DEKKER HOFMEYR

BACK TO BASICS – LOCUS STANDI IN LITIGATION

CONTINUED

Leave should only be granted when there is a "sound, rational basis for the conclusion that there are prospects for success on appeal."

Irrespective of having found that failure to prove *locus standi* was dispositive of the entire action, the court *a quo* went to great lengths to analyse whether the agreement between Mr Rattan and the appellant was against public policy and contrary to the provisions of the Consumer Protection Act, even though these issues had not been raised in the pleadings. The SCA expressed its dissatisfaction with the court *a quo* for introducing issues on its own accord, and emphasised that a judgment must be confined to the issues before the court. The SCA went even further and warned that *"when a judge intervenes in a case and has recourse to issues falling outside the pleadings which are necessary for the decision of the case and departs from the rule of party presentation, there is a risk that such intervention could create an apprehension for bias."*

In a final paragraph, the SCA felt obliged to mention that leave to appeal should not have been granted in the matter. Leave should only be granted when there is a "sound, rational basis for the conclusion that there are prospects for success on appeal." In light of the failure to prove *locus standi,* there was no reasonable prospect of an appeal to succeed. The parties were put through the unnecessary expense of the appeal which should have been avoided.

What do we take away from this case? It is always worth analysing the basics before rushing into court.

Jonathan Witts-Hewinson and Elizabeth Sonnekus

CDH
CLIFFE DEKKER HOFMEYR

STRICT LIABILITY: DOG OWNERS (AND INSURERS) BEWARE!

The plaintiff had been attacked when three dogs escaped from their owner's property, after a third-party intruder had opened the locked gate.

The prevalence of crime in South Africa prompts many home owners to have vicious dogs in the hope of safeguarding their property and deterring burglars. However, dog owners and their insurers should be wary of attracting liability under the *actio de pauperie* (the actio) for harm caused by domesticated animals. Under this *actio*, a victim of a dog bite can claim damages from a dog owner without having to prove fault.

In order to succeed with the recognised defence, a dog owner would have to prove that he delegated control of the animal and that the controller was negligent in exercising control over the dog.

In the recent Eastern Cape High Court matter of *Cloete v Van Meyeren* case no. 732/2017 "the Cloete-case", the plaintiff instituted a claim for damages against a dog owner under the *actio de pauperie*. The plaintiff had been attacked when three dogs escaped from their owner's property, after a third-party intruder had opened the locked gate. In the circumstances, the dog owner denied liability. However, the plaintiff did not do anything to provoke the dogs and he was lawfully present in the public road where the attack took place. As a result of the attack, the plaintiff lost his left arm and instituted a claim for R2,4 million.

The court found in favour of the plaintiff on the separated issue of liability in the judgment of 27 November 2018.

Having regard to the facts of this case, the court had to revisit the history of the *actio de pauperie* with specific reference to one of the recognised defences available to dog owners. Other defences to claims under the *actio de pauperie* fall outside the scope of this alert.

The recognised defence

The defence was confirmed in the seminal judgment of *Lever v Purdy 1993 (3) SA 17 (AD)*, where a dog owner was absolved of liability on the basis that control of the animal had been delegated to a third party who failed to adopt reasonable precautionary measures to prevent the animal from injuring the victim when he could and should have done so. In order to succeed with the recognised defence, a dog owner would have to prove that he delegated control of the animal and that the controller was negligent in exercising control over the dog. Should this defence succeed, the victim may have a claim in delict against the controller under the *actio legis aquiliae*.

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.

CDH
CLIFFE DEKKER HOFMEYR

STRICT LIABILITY: DOG OWNERS (AND INSURERS) BEWARE!

CONTINUED

An application for leave to appeal was heard on 21 February 2019 and leave to appeal was denied.

Extension of the defence

In the *Cloete-case*, it was argued on behalf of the dog owner that the recognised defence should be extended to include negligence of an intruder, who did not exercise control over the dogs, but merely left the gate open. This argument finds support in the dictum of *Le Roux v Fick (1879) 9 Buch 29* where it was said that, *"... an actio de pauperie lay in all cases of damage caused by animals when the damage was brought about through the fault of the party using the animal or of some third party"* (our emphasis). The possibility of an extension of the recognised defence was also mentioned *obiter* in the *Lever-case.*

Although Lowe, J in the *Cloete-case* acknowledges that the proposed extension finds some, though tenuous, support in *Le Roux v Fick,* the court ultimately held that an extension of the pauperian defence, to include a defence founded on a third party's negligence who was *not in control of the dogs* (our emphasis), is not justified by logic nor by the existing rules in respect of pauperian liability.

Discussion

The competing interests of dog owners seeking to protect their property, on the one hand; and the interests of dog bite victims in having a remedy to claim damages without having to prove fault, on the other hand; must be carefully considered to determine the necessity of an extension of the recognised defence. The *Cloete-case* made reference to the case of *Brahman and Another v Dippenaar 2002 (2) SA 477 (SCA),* where it is specifically stated that it is the court's duty to expand or curtail the operation of the *actio* where circumstances warrant same. It follows that it is open to a court to extend the aforesaid recognised defence, should it be deemed necessary, having regard to public policy considerations.

An application for leave to appeal was heard on 21 February 2019 and leave to appeal was denied. A petition to the SCA for leave to appeal may be in the interests of legal certainty for both dog owners and insurers.

Willie Van Wyk and
Marissa Van Der Westhuizen

CDH
CLIFFE DEKKER HOFMEYR

CORPORATE INVESTIGATIONS: THE OBLIGATION TO REPORT SUSPICIOUS TRANSACTIONS IN TERMS OF SECTION 29 OF THE FINANCIAL INTELLIGENCE CENTRE ACT, NO 38 OF 2001

Reporting of suspicious and unusual transactions are widely recognised as an essential mechanism to proactively monitor transactions suspected to be linked to money laundering or the financing of terrorist activities.

South Africa's rate of reported economic crime is approximately 28% higher than the global average and is at its highest level in the last decade, according to PWC's Global Economic Crime and Fraud Survey 2018. Suspicious activity monitoring was identified in this survey as a leading corporate control in the detection of economic crime within organisations.

South Africa is a member of the Financial Action Task Force in terms of which it has expressed a level of commitment to anti-money laundering and counter terrorist financing initiatives.

Similarly, reporting of suspicious and unusual transactions are widely recognised as an essential mechanism to proactively monitor transactions suspected to be linked to money laundering or the financing of terrorist activities.

South Africa is a member of the Financial Action Task Force (FATF) in terms of which it has expressed a level of commitment to anti-money laundering (AML) and counter-terrorist financing (CFT) initiatives. FATF is an independent intergovernmental body which was established by the G-7 summit held in Paris in 1989. Its mandate includes developing policies to combat money laundering and terrorist financing in the global financial system.

FATF's recommendations provide a comprehensive framework of AML and CFT measures which are recognised internationally as the AML standard of best practice. FATF's recommendations 20 and 21 address the obligation on institutions to report suspicious or unusual transactions and the protections afforded to persons who report suspicious and unusual transactions, respectively.

FATF's Recommendation 20 recommends that Financial Institutions (FIs) and designated non-financial business and professions (DNFBPs) which reasonably suspect that funds are the proceeds of a criminal activity, or are associated with terrorist financing, should be required by law to promptly report their suspicion to the local branch of the Financial Intelligence Unit (FIU).

FATF's Recommendation 21 recommends that FIs and DNFBPs, including their directors and employees, be protected from criminal and civil liability if they report suspicious transactions in good faith to the FIU. To maintain confidentiality of the suspicious transaction report (STR) and the identity of the reporter, it is recommended that disclosure of an STR to any third party should be prohibited by law.

In compliance with its international obligations to combat, amongst others, money laundering and terrorist financing, South Africa promulgated the Financial Intelligence Centre Act, No 38 of 2001 (FICA) and the Prevention of Organised Crime Act, No 121 of 1998 (POCA).

CDH
CLIFFE DEKKER HOFMEYR

CORPORATE INVESTIGATIONS: THE OBLIGATION TO REPORT SUSPICIOUS TRANSACTIONS IN TERMS OF SECTION 29 OF THE FINANCIAL INTELLIGENCE CENTRE ACT, NO 38 OF 2001

CONTINUED

The obligation to report these types of transactions is placed on a person "who knows or ought reasonably to have known or suspected" such transactions.

Section 29 of FICA incorporates FATF's recommendations on reporting suspicious or unusual transactions. It requires any person carrying on, managing or who is employed by a business to report certain transactions to the Financial Intelligence Centre (FIC). These transactions are set out in s29 and include, amongst others, those:

- where the business has received or is about to receive the proceeds of unlawful activities;
- which have no apparent business or lawful purpose;
- which are facilitated or likely to facilitate the transfer of the proceeds of unlawful activities;
- conducted for the purpose of avoiding giving rise to a reporting duty in terms of FICA; or
- by which the business has been used or is about to be used in any way for money laundering purposes.

Examples of suspicious or unusual transactions include, amongst others:

- a deposit of funds accompanied by a request for immediate transfer elsewhere;
- the purchase of commodities at prices substantially above or below market prices;
- an unwarranted involvement of structures such as trusts and corporate vehicles in transactions; and
- an unwarranted desire to involve entities in foreign jurisdictions in transactions.

The obligation to report these types of transactions is placed on a person "who knows or ought reasonably to have known or suspected" such transactions. In terms of FICA, a reporter is not required to have actual proof of a suspicious transaction and a mere reasonable suspicion is sufficient for reporting purposes. The reporter's suspicion ought to be based on an assessment of all the known circumstances relating to the relevant transaction including, for example, knowledge of the client's business, financial history, background and behaviour.

The term 'proceeds of unlawful activities' referred to in s29 is not specifically defined in FICA. In terms of FICA, the definition of this term as defined in POCA is applicable. It is defined in POCA as "any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in [South Africa] or elsewhere, at any time before or after the commencement of [POCA], in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived".

There is no monetary threshold applicable to STRs. A suspicious transaction must, accordingly, be reported regardless of the amount of the transaction. An STR may be made in respect of a single transaction or a series of transactions to accommodate instances where a large amount is split into several smaller amounts to avoid triggering a cash threshold report (which is a reporting obligation placed on accountable and reporting institutions to report transactions above R24,999.99 to the FIC in terms of s28 of FICA).

CDH
CLIFFE DEKKER HOFMEYR

CORPORATE INVESTIGATIONS: THE OBLIGATION TO REPORT SUSPICIOUS TRANSACTIONS IN TERMS OF SECTION 29 OF THE FINANCIAL INTELLIGENCE CENTRE ACT, NO 38 OF 2001

CONTINUED

A reporter is also prohibited from informing anyone of the contents of an STR. This is to maintain the strictest confidentiality of the STR and the reporter.

A suspicious transaction must be reported as soon as possible and not longer than 15 working days after a person becomes aware of the facts which gives rise to the suspicion.

Once an STR is filed with the FIC, the reporter may continue with the transaction, unless the FIC issues an intervention order directing the reporter not to do so. The purpose of the intervention order is to prevent the dissipation of funds or property which may be the proceeds of unlawful activity.

A reporter is also prohibited from informing anyone of the contents of an STR. This is to maintain the strictest confidentiality of the STR and the reporter. FICA offers protection to individuals and entities who participate in making STRs and comply in good faith with FICA's reporting obligations by prohibiting legal action, either criminal or civil, from being instituted against them.

Any person who fails to report a suspicious transaction is guilty of an offence in terms of FICA and is liable to imprisonment for a maximum period of up to 15 years or a fine of up to R100 million. STRs must be made online using the FIC's web reporting platform "goAML".

The sufficiency of a reasonable suspicion for the purposes of reporting a suspicious transaction coupled with the absence of a monetary threshold applicable to suspicious transactions casts a net wide enough to ensnare the complex, structured transactions across multiple jurisdictions and involving multiple entities, individuals or beneficiaries typically used to disguise money laundering activities.

Consequently, the obligation to report suspicious and unusual transactions is a fundamental practice in strengthening the South African financial system against the dangers posed by economic crime through proactive detection and prevention.

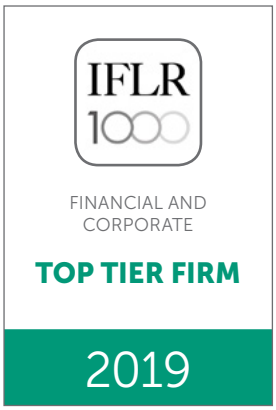
Zaakir Mohamed and Krevania Pillay

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

CDH
CLIFFE DEKKER HOFMEYR

Best Lawyers 2018 South Africa

NAMED CDH LITIGATION LAW FIRM OF THE YEAR



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

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

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
Business Development
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

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

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.rhoodie@cdhlegal.com

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

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 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.

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