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# CORPORATE & COMMERCIAL ALERT

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### What's up with WhatsApp – Is it time to vary our non-variation clauses?

WhatsApp has become an integral part of many people's lives and their preferred platform for communicating. WhatsApp is simple and convenient to use. It allows you to send messages, make and receive voice and video calls and it also potentially allows one to conclude contractual agreements as seen in the recent court decision in *Kgopana v Matlala* (1081/2018) [2019] ZASCA 174 (2 December 2019).

### The SCA provides clarity on the power of the CIPC to investigate matters

From prescription to pending civil litigation, the Supreme Court of Appeal (SCA) in *Singh & Others v The Companies and Intellectual Property Commission and others* (822/2018) [2019] ZASCA 69 (30 May 2019) has clarified the applicability of the limitations on the powers of the Companies and Intellectual Property Commission (Commission) to investigate a complaint.

## What's up with WhatsApp – Is it time to vary our non-variation clauses?

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The facts in *Kgopana v Matlala* essentially boiled down to an allegation by the respondent (Matlala) that a contract was entered into between herself and the appellant (Kgopana). Matlala (the mother of one of the appellant's seven children) sent a message to Kgopana stating that she knew that Kgopana won South Africa's National Lottery. In response to Matlala's message, Kgopana sent a WhatsApp message stating that "*if I get 20m I can give all my children 1 m and remain with 13m .I will just stay at home and not driving up and down looking for tenders*" (sic).

Relying on the WhatsApp message, Matlala issued summons against Kgopana and alleged that the WhatsApp message was an agreement which had been concluded when she accepted the offer contained in the message and therefore, Kgopana was obliged to pay the amount of R1,000,000 for the benefit of their minor child.

Kgopana argued that he had no intention to make an offer to contract and had sent the WhatsApp message to get rid of Matlala.

The court *a quo* found in favour of Matlala and held that the content of the WhatsApp message was clear and unequivocal and contained an offer that was 'certain and definite in its terms' and held that an offer had been made 'with the necessary *animus contrahendi*' and that Matlala had 'readily accepted the offer'. The court *a quo* held that Kgopana was contractually liable even if he might not have intended to make an offer to contract when he sent the WhatsApp message.

The issue before the Supreme Court of Appeal (SCA) was whether the WhatsApp message sent by Kgopana to Matlala constituted an offer which, upon acceptance, could give rise to an enforceable contract i.e. could Matlala, as a reasonable person, believe that Kgopana intended to enter into an agreement with her?

The SCA held that the context of the matter strongly suggested that Kgopana did not intend to enter into an agreement with Matlala. The SCA was of the view that the WhatsApp message in fact related to what Kgopana could possibly do in the hypothetical future event of him receiving R20 million. Kgopana subjectively had no

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In terms of the Electronic Communications and Transactions Act 25 of 2002 electronic documents have the same status as documents which are reduced to writing.

intention to contract and the WhatsApp message did not suggest otherwise. The SCA accordingly held that the WhatsApp message clearly did not contain an offer that could on acceptance be converted into an enforceable agreement and in doing so overturned the decision of the court *a quo*.

In terms of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) electronic documents have the same status as documents which are reduced to writing. There are, however, certain types of agreements which can only be valid if they are reduced to writing and are signed by the parties such as an agreement for the sale of immovable property, wills, antenuptial contracts etc. The legal validity of electronic messages was confirmed by the SCA in the case of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another 2015 (2) SA 118 (SCA)* (21 November 2014).

The SCA in *Spring Forest* confirmed the legal validity of the use of an email and an ordinary signature when varying or cancelling a contract which contains a non-variation clause. The SCA also

confirmed that the legal requirement for an agreement to be in writing, with the exception of a contract that is required to be reduced to writing, is satisfied if it is in the form of a 'data message' as defined in ECTA. The definition of a 'data message' as defined in ECTA could be interpreted to include a WhatsApp message. A WhatsApp message is sent, received and stored by electronic means, and therefore by extension of the application of the decision in *Spring Forest*, WhatsApp may be used to conclude binding contracts. An interesting question is whether an agreement with a non-variation clause can be amended by a WhatsApp message.

Where a contract provides that it cannot be amended unless it is signed in writing by both parties and does not specify the type of signature that is required, by application of the decision in *Spring Forest*, that contract can be amended by the use of an email and by extension the use of WhatsApp. However, for the amendment to be valid, the sender and recipient of the email or WhatsApp message must sign their names (which can be electronic signatures) at the end of the email or WhatsApp message.

**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.  
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### 2017

2<sup>nd</sup> by M&A Deal Value.  
1<sup>st</sup> by General Corporate Finance Deal Flow for the 6th time in 7 years.  
1<sup>st</sup> by General Corporate Finance Deal Value.  
2<sup>nd</sup> by M&A Deal Flow and Deal Value (Africa, excluding South Africa).  
2<sup>nd</sup> by BEE Deal Flow and Deal Value.

### 2016

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by General Corporate Finance Deal Flow.  
2<sup>nd</sup> by M&A Deal Value.  
3<sup>rd</sup> by General Corporate Finance Deal Value.

### 2015

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by General Corporate Finance Deal Flow.

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### 2014

1<sup>st</sup> by M&A Deal Flow.  
1<sup>st</sup> by M&A Deal Value.  
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### 2013

1<sup>st</sup> by M&A Deal Flow.  
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## What's up with WhatsApp – Is it time to vary our non-variation clauses?

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Although WhatsApp has made communication between parties easier and more convenient, WhatsApp messages, as with other electronic communication can often be easily misunderstood and do not necessarily convey the true intention of the sender.

Although WhatsApp has made communication between parties easier and more convenient, WhatsApp messages, as with other electronic communication (i.e. emails or texts from other social media platforms), can often be easily misunderstood and do not necessarily convey the true intention of the sender. The misunderstanding can be caused by various reasons, for example, poor punctuation or the sender being rushed or distracted when sending the message etc. Furthermore, when people communicate over text messages, they do not have the benefit of verbal cues and body language to aid them in interpreting what a person means. The interpretation of text messages can be subjective and open to interpretation which can lead to

disputes as were the cases in *Kgopana v Matlala and Spring Forest*. In light of the above, is it wise to allow a contract to be concluded and amended by using emails and WhatsApp messages?

Non-variation clauses are included in contracts to prevent disputes, but as shown in *Spring Forest*, standard non-variation clauses are not foolproof and can be circumvented. Thus, to resolve the potential disputes which may arise as a result of electronic communications, it may be desirable to include a definition of writing which excludes a 'data message' as a form of writing and a non-variation clause which specifically excludes the use of electronic signatures as defined in ECTA, or alternatively, encourage people to think before they text.

*Etta Chang and Cyprian Mthembu*

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## The SCA provides clarity on the power of the CIPC to investigate matters

The SCA interpreted section 219(1)(a) of the Act and ruled that the Commission's obligation to maintain an accurate register of companies is not frozen in time.

**From prescription to pending civil litigation, the Supreme Court of Appeal (SCA) in *Singh & Others v The Companies and Intellectual Property Commission and others* (822/2018) [2019] ZASCA 69 (30 May 2019) has clarified the applicability of the limitations on the powers of the Companies and Intellectual Property Commission (Commission) to investigate a complaint.**

In this case, the Commission accepted and began to investigate a complaint from Ralston Smith (Smith) who alleged that about four years prior to that a fraudulently signed director resignation letter and accompanying director resignation documentation were fraudulently submitted with the Commission on his behalf in relation to Lahleni Lakes Proprietary Limited (Lahleni). When Smith made the complaint to the Commission, a dispute concerning, among other things, whether Smith had resigned as director of Lahleni had already been launched in the North Gauteng High Court. As part of its investigation, the Commission issued summons to Lahleni's current director Ramesh Singh (Singh) to appear before it.

In response, Singh initially launched an application to review the Commission's decision to investigate the complaint based on section 219(1)(a) of the Companies Act 71 of 2008 (Act).

This section provides that a complaint in terms of the Act may not be initiated by or made to the Commission more than three years after the act or omission that is the cause of the complaint. Singh contended that the Commission had no jurisdiction to investigate because Smith had lodged the complaint more than three years after the alleged fraudulent submissions were made removing him as a director and therefore the complaint had prescribed. The court *a quo* dismissed the application.

On appeal, when addressing the submission that the complaint was time barred, the SCA interpreted section 219(1)(a) of the Act and ruled that the Commission's obligation to maintain an accurate register of companies is not frozen in time. The SCA stated that section 219(1)(a) of the Act employs the words "the act or omission" to impose an obligation not to misrepresent the accuracy of the records or to omit to ensure that they are corrected. If there is a complaint that a company's records are inaccurate, it equates to a complaint that there has been an act or omission which in terms of section 219(1)(a) constitutes the cause of complaint. The failure to cure the inaccuracy or make the Commission aware constitutes a discrete act which is not frozen in time.

## The SCA provides clarity on the power of the CIPC to investigate matters

...continued

The SCA ruled that the issue before the High Court was contractual in nature and not based on the provisions of the Act, hence section 219(2) was not applicable.

Singh raised a further ground of appeal based on section 219(2) of the Act which provides that a complaint may not be prosecuted in terms of the Act against any person that is, or who has been, a respondent in proceedings under another section of the Act relating to substantially the same conduct. Based on this, he argued that the Commission had no power to investigate because a civil action on the same conduct was pending in the High Court. He further submitted that he could be prejudiced in the civil suit should he be compelled to co-operate with the Commission's investigation.

The SCA ruled that the issue before the High Court was contractual in nature and not based on the provisions of the Act, hence section 219(2) was not applicable. Addressing Singh's alleged prejudice, the SCA stated that where the issue concerns a choice between pursuing a civil action

and a refusal to comply with a lawful demand issued by the Commission, the way a party deals with the process in each forum is a matter of choice which holds consequences attached to his decision. The SCA further indicated that the court's powers to stay proceedings due to prejudice being proven is discretionary based on the prejudice shown. The court ruled that Singh had not proven that any prejudice would ensue to him should the Commission proceed with its investigation. The court further indicated that it would be expected that if there was an order of priority on competing fora, the statutory regulator would enjoy preference over private litigation.

The appeal was dismissed with costs.

*Lebohng Khoanyane and Verushca Pillay*





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