8 APRIL 2020

CORPORATE & COMMERCIAL **ALERT**

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

CLICK HERE

For more insight into our expertise and services

Claiming "COVID-19 made me do it" simply isn't good enough when deciding to defer or cancel the declaration or payment of a dividend

During the weeks preceding the date of this article, a number of JSE-listed companies published announcements purporting to defer the payment of declared dividends, whereas others have purported to cancel/withdraw declared dividends outright.

The national lock-down and the international effects of the COVID-19 pandemic have wreaked havoc on companies' cash flows and have in many cases made it very difficult to predict their short to medium term liquidity position with any degree of confidence. Many JSE-listed companies have therefore been desperately scrambling to cancel or defer their payment obligations in respect of dividends already declared or are hurriedly devising strategies to avoid declaring dividends at all. These companies, while appearing to have good commercial reasons for doing so, should ensure that their actions are lawful and that they do not expose themselves to legal risk.

During the weeks preceding the date of this article, a number of JSE-listed companies published announcements purporting to defer the payment of declared dividends, whereas others have purported to cancel/withdraw declared dividends outright. Common amongst these announcements is the explanation that the decision has been taken primarily due to the uncertainty introduced by the COVID-19 pandemic.

On 30 March 2020, the JSE issued a letter to sponsors and designated advisors in terms of which it confirmed that it had been approached by a number of issuers with requests to cancel payment, postpone payment or adjust the quantum of dividends which have been previously declared but not yet paid.

The upshot of the JSE's advisory letter is twofold:

- subsequent to the occurrence of the "*finalisation date*" (as contemplated in the JSE Corporate Action Timetable, a paraphrased version of the corporation action timetable applicable to cash dividends is displayed at the end of this article) in relation to a declared dividend, the declaration and/or payment of such dividend cannot be cancelled by the issuer; and
- should an issuer, subsequent to the finalisation date but prior to the LTD (last day to trade) in relation to a declared dividend, amend any of the pertinent details of such dividend this would cause the JSE-approved corporate action timetable to be terminated, and the issuer would be required to start afresh and obtain JSE approval for a new corporate action timetable in relation to the dividend.

While the JSE's letter is instructive in ensuring issuer compliance with the JSE's timetable for corporate actions, it by no means tells the whole story in relation to an issuer's legal ability to cancel, postpone or adjust dividends having been or to be declared. Nor was the letter intended to do so, it appears, as the JSE issued a letter of clarification on 2 April 2020, in which it stated that communications by the JSE are always issued subject to the provisions of applicable legislation.

Claiming "COVID-19 made me do it" simply isn't good enough when deciding to defer or cancel the declaration or payment of a dividend

...continued

At common law, the default position is that a dividend is payable immediately after it is declared (however, this position can be altered or modified by the terms of the declaration, as discussed below).

In particular the JSE cites, in its follow-up letter, the need to comply with the Companies Act 71 of 2008 (Companies Act), and states that any cancelations and changes to declared dividends can only be implemented if such actions comply in all aspects with the provisions of the Companies Act.

When deciding if, or how, to withdraw a declared dividend or postpone the payment of it, the following considerations should be considered by all JSE-listed issuers that are subject to South African company law (noting that issuers with inward listings on the JSE should have regard to the company law dispensation in their jurisdiction of incorporation).

When does an issuer incur the obligation to pay a dividend?

The event that causes the issuer to incur the obligation to pay a dividend is the declaration of the dividend.

For JSE-listed companies, a dividend declaration usually comprises two (possibly amongst other) steps having been taken:

- the board has applied the "*solvency and liquidity test*" (S&L Test), confirmed it is reasonably satisfied that the issuer will satisfy the S&L Test immediately after payment of the dividend and has resolved to declare the dividend (section 46(1)(c) Companies Act) (Declaration Resolution); and
- the issuer announced the declaration of the dividend via SENS.

Once these steps have been taken, the dividend has been declared and the issuer has incurred a legally binding obligation to settle (i.e. pay) the dividend.

In our view, the date on which an issuer declares a dividend may not, in all instances, also be the "*declaration date*" (per the JSE Corporate Action Timetable). The declaration date is the date that effectively kicks off the JSE Corporate Action Timetable in respect of the payment of a dividend. Where an issuer announces the declaration of a dividend but does not include in that announcement the "*declaration data*", then in our view:

- the dividend has been declared and the issuer has incurred a legally binding obligation to settle payment of the dividend; but
- the clock has not started ticking on the JSE Corporate Action Timetable.

Once declared, when must payment of the dividend be settled to shareholders?

At common law, the default position is that a dividend is payable immediately after it is declared (however, this position can be altered or modified by the terms of the declaration, as discussed below).

The Companies Act prescribes that once the board has adopted a Declaration Resolution, the relevant distribution must, subject to section 46(3) of the Companies Act, be carried out (section 46(2) Companies Act). But the Companies Act does not prescribe a time period within which the declared dividend must be paid.

CLIFFE DEKKER HOFMEYR

Claiming "COVID-19 made me do it" simply isn't good enough when deciding to defer or cancel the declaration or payment of a dividend

...continued

There is a risk that shareholders recorded in the register on the record date could, where payment is deferred or the dividend is withdrawn altogether, lodge a claim for payment of the dividend together with a possible damages claim. Whether any such claims will ultimately succeed is a different matter.

Given that the Companies Act does not prescribe when a declared dividend must be paid, the common law position, that a dividend is payable immediately after it is declared, applies.

Are there circumstances in which an issuer is precluded from making payment of a declared dividend?

The Companies Act provides that if a declared dividend is not paid within 120 business days after the board passed the Declaration Resolution, then the issuer is precluded from paying the dividend until the board has re-applied the S&L Test and, then being reasonably satisfied that the issuer will satisfy the S&L Test after payment of the dividend, passes the Declaration Resolution afresh (section 46(3) Companies Act).

Where, prior to the expiry of the 120-business day period, there is a change in the financial position or outlook of the issuer, there is in our view no reason why the board should be precluded from re-applying the S&L Test voluntarily. If the board, on a re-application of the S&L Test, is unable to reasonably conclude that the issuer will satisfy the S&L Test after payment of the declared dividend, then the issuer is in our view prohibited from paying that dividend. The reason for this is that an issuer is precluded from making a distribution where it does not reasonably appear that the issuer will satisfy the S&L Test immediately after completing the distribution (section 46(1)(b) Companies Act).

This payment prohibition is equally applicable after the "*finalisation date*" in respect of a declared dividend in terms of the JSE Corporate Action Timetable, meaning that notwithstanding the issuer's obligations under the JSE Listings Requirements, the issuer must not in any circumstances make payment of a dividend where it does not reasonably appear that the issuer will satisfy the S&L Test immediately thereafter. Accordingly, there appears to be some tension between the company law position and the JSE Listings Requirements; non-payment at this juncture would seemingly cause the issuer to breach the JSE Listings Requirements, thereby exposing the issuer (and, possibly, its directors) to the risk of, amongst other things, censure and/or the imposition of a fine by the JSE.

In addition, by the finalisation date the issuer's board would have determined and announced the "*record date*" for participation in the dividend, leading investors to trade in the issuer's securities on a *cum* dividend basis. There is a risk that shareholders recorded in the register on the record date could, where payment is deferred or the dividend is withdrawn altogether, lodge a claim for payment of the dividend together with a possible damages claim. Whether any such claims will ultimately succeed is a different matter.

In these circumstances, the board is between the proverbial rock and hard place, where non-payment exposes the issuer (and possibly its directors) to

Claiming "COVID-19 made me do it" simply isn't good enough when deciding to defer or cancel the declaration or payment of a dividend

...continued

There is no case-law under section 46 of the Companies Act that has held that a unilateral withdrawal of a declared dividend by the issuer is competent.

the risk of punitive measures by the JSE and possible litigation by investors, but payment would cause the directors to act in contravention of the provisions of the Companies Act.

How can the payment of a dividend be validly deferred?

While the inability to satisfy the S&L Test prohibits an issuer from making payment of a declared dividend, the board itself is (in principle) capable, when declaring a dividend, of modifying when and how the dividend will become due and payable.

When declaring a dividend, the board is capable of determining the terms on which such dividend is declared. It appears to be perfectly competent for a dividend to be declared such that the payment obligation is deferred to a later time or that such obligation is subject to fulfilment of certain conditions, thereby effectively modifying the default position under the common law that declared dividends become due and payable immediately.

When determining whether an issuer has scope to defer the payment of a declared dividend, regard should be had to:

- the authority conferred on the board in the company's constitution in relation to the manner in which dividends are to be declared and paid; and
- the terms on which the dividend was declared.

Where the terms on which the dividend was declared do not leave scope for the deferral of the payment obligation, then, in the absence of the payment being prohibited by virtue of section 46(1)(b) of the Companies Act, it would be unlawful for the issuer to defer payment of the dividend. In such circumstances the deferral could provide grounds on which claims could be brought against the issuer by investors.

Once declared, is it competent for an issuer to unilaterally withdraw/cancel the dividend?

Upon declaration of a dividend, the issuer incurs an obligation to settle the dividend. Conversely, the shareholders become legally entitled to enforce the distribution (i.e. it becomes a debt owing to them).

There is no case-law under section 46 of the Companies Act that has held that a unilateral withdrawal of a declared dividend by the issuer is competent.

An analogous legal position may be found in the law of contract (to the extent that the debtor/creditor relationship created between an issuer and its shareholders upon declaration of a dividend justifies such analogy).

Where a contractual obligation becomes impossible to perform due to a supervening impossibility, this constitutes grounds for (i) the suspension of the obligation to perform until performance becomes possible or (ii) the termination of the contract. Whether a contract may be terminated by virtue of a supervening impossibility of performance, turns on whether the impossibility is temporary in nature or causes performance under the contract to be absolutely and inevitably

Claiming "COVID-19 made me do it" simply isn't good enough when deciding to defer or cancel the declaration or payment of a dividend

...continued

A failure to comply with this distribution requirement would eventually result in the issuer's REIT status being revoked by the JSE (paragraphs 13.49 and 13.50 JSE Listings Requirements).

impossible. Where the impossibility of performance is temporary in nature, it provides a ground only for the suspension of the requirement to perform and not for the termination of the contract (see World *Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W)).

A board being unable to reasonably conclude that the issuer will satisfy the S&L Test immediately after the payment of a dividend would, all else being equal, constitute a temporary supervening impossibly of performance and would therefore not justify the cancellation/ withdrawal of the dividend.

In our view, therefore, unless the terms on which the dividend was declared entitle the issuer to unilaterally withdraw or cancel the dividend, it is not competent for an issuer to do so. In such circumstances, the unilateral withdrawal or retraction of a declared dividend by an issuer would be unlawful.

Do REITs remain obligated to declare and pay dividends in order to retain their reit status?

The obligation to declare and pay dividends is particularly important where the issuer is a "*REIT*" (as such term is defined in the Income Tax Act 58 of 1962).

In order for a REIT to enjoy the benefit of the tax dispensation applicable to REITs, it must (amongst other things) maintain its REIT-status in terms of the rules of the securities exchange on which its shares are listed as shares in a REIT.

For JSE-listed REITs, one such requirement is that a REIT must comply with the applicable distribution provisions of the JSE Listings Requirements (paragraph 13.49 JSE Listings Requirements).

In terms of paragraph 13.47(a) of the JSE Listings Requirements, a REIT must distribute at least 75% of its total distributable profits as a distribution to the holders of its listed securities by no later than 4 months after its financial year end. A failure to comply with this distribution requirement would eventually result in the issuer's REIT status being revoked by the JSE (paragraphs 13.49 and 13.50 JSE Listings Requirements).

However, the obligation to make the distribution in terms of paragraph 13.47(a) of the JSE Listings Requirements is not absolute, but rather is expressly subject to the REIT satisfying the S&L Test.

Accordingly, where the REIT (i) fails to make the distribution within 4 months of its financial year end and (ii) such failure is a result of the issuer failing to satisfy the S&L Test in relation to that distribution, then the failure to have made such distribution should not result in it losing its REIT status.

Claiming "COVID-19 made me do it" simply isn't good enough when deciding to defer or cancel the declaration or payment of a dividend

...continued

The term "distribution" is defined in the Companies Act to include, amongst other things, the repurchase and/or redemption of shares.

Miscellaneous matters for consideration

Many other interesting questions have arisen in this context:

Share repurchases and redemptions

The term "*distribution*" is defined in the Companies Act to include, amongst other things, the repurchase and/or redemption of shares. To the extent that an issuer implements any of the measures discussed above (i.e. the withdrawal of a dividend or deferral of payment of it) on the basis that it does not reasonably appear that the issuer will satisfy the S&L Test immediately after completing the distribution, the issuer should be cognisant that any share repurchases or redemptions are subject to the same requirement and should likewise be refrained from.

Capitalisation issues

Capitalisation issues, being the issuance of shares to shareholders pro rata to their shareholding, do not constitute a "*distribution*" and therefore the ability of a board to undertake and implement a capitalisation issue is not subject to the S&L Test. However, where shareholders are offered cash as payment in lieu of the issue of capitalisation shares, this would constitute a "*distribution*" and would be subject to the same dispensation as dividends.

Setting the record date for participation in a dividend

From a Companies Act perspective, the record date for participation in a dividend must not be more than 10 business days prior to the date on which payment of the dividend is scheduled to occur (section 59(2)(a)(ii) Companies Act). The JSE Corporate Action Timetable prescribes that the record date must be the business day immediately prior to the payment date.

For this reason it would generally not be possible to "*freeze the register*" of the issuer for purposes of the distribution and for the shares then to trade ex dividend for an extended period.

Will declared but unpaid dividends be seen as debt for purposes of funding and other covenants?

If a board intends to declare a dividend on the basis that it will become payable at a specified date or a date to be determined, the issuer should consider whether such declared but unpaid dividend would constitute "*financial indebtedness*" or "*debt*" and, if so, whether this would have any ramifications under its funding agreements and/or funding covenants.

Claiming "COVID-19 made me do it" simply isn't good enough when deciding to defer or cancel the declaration or payment of a dividend

...continued

Interest would typically not be payable on deferred dividends unless the company's constitutional documents provided otherwise.

Will interest accrue on deferred dividends?

Interest would typically not be payable on deferred dividends unless the company's constitutional documents provided otherwise. However, to the extent that pursuant to the matter being litigated on, a Court were to find that a deferral of payment of a dividend constituted non-payment of a debt which became due and payable, a Court may also grant successful claimants default interest for the period between the due date and the actual payment date.

Miscellaneous matters for consideration

DAY	EVENT	DESCRIPTION
D – 13	Declaration date	Publication of declaration data, this date must be at least 13 business days before the record date.
D – 8	Finalisation date	Publication of finalisation announcement.
D – 3	Last day to trade (LTD)	Must be 3 days before the record date, but note that to be recorded in the register on the LTD the trade must take place 3 days prior as trades are settled on a T+3 basis.
D – 2	List date	Securities start trading *ex* dividend.
D + 0	Record date	Record date to determine who receives dividend (must be on a Friday, unless Friday is a public holiday in which case it must be on the last business day of that week).
D + 1	Pay date	Electronic transfer of funds or cheques posted/CSDP's and brokers credited.

For more information on our Listed Companies service offerings, please click here.

Peter Hesseling, Dane Kruger, Johan Green and Yaniv Kleitman
CDH Corporate & Commercial Listed Companies Working Group

Limited Companies and Intellectual Property Commission (CIPC) services during the National COVID-19 Lockdown

The CIPC confirmed that it would continue to provide limited services through either its e-Services and/or BizPortal online portals during the lockdown.

In response to the national COVID-19 lockdown (lockdown) that began at midnight on Thursday, 26 March 2020, and which is scheduled to end on 16 April 2020, the CIPC announced certain operational measures that it would put in place for the duration of the lockdown.

The CIPC, on 24 March 2020, confirmed that it would continue to provide the following limited services through either its e-Services and/or BizPortal online portals during the lockdown:

CIPC SERVICES	
1	The filing of annual returns (including annual financial statements or financial accountability supplement)
2	The filing of compliance checklists
3	The incorporation of private companies (with the short standard memorandum of incorporation and without name)
4	Enterprise searches
5	R30 disclosure requests
6	The filing of company and close corporation financial year end changes
7	The filing of company and close corporation address changes
8	The filing of auditor, accounting officer and company secretary changes
9	The filing of company name changes
10	B-BBEE certificate requests
11	Domain name registration

Limited Companies and Intellectual Property Commission (CIPC) services during the National COVID-19 Lockdown*...continued*

Unless a name has been reserved prior to 24 March 2020, a customer will only be able reserve a name and file the relevant company name change after the lockdown.

It is understood that the CIPC will suspend all of its service-related mailboxes and that the upload functionality on its platforms will be de-activated during the lockdown.

In these uncertain times, it is important that the board of directors (board) and shareholders (shareholders) of companies are aware of the implications that the limited services offering by the CIPC may have on certain corporate actions. In this alert, we will revisit a few key concepts and principles relating to common corporate actions that companies may wish to effect during the lockdown.

Registration of new private companies and company name reservations

During the lockdown, the CIPC will only register new private companies with the short standard memorandum of incorporation (MOI), as set out in the regulations to the Companies Act 71 of 2008 (Companies Act). The CIPC will not register other profit and non-profit companies during the lockdown.

Unless a name has been reserved prior to 24 March 2020, a customer will only be able reserve a name and file the relevant company name change after the lockdown. All company name reservations that are due to expire during the period of 25 March 2020 to 15 April 2020 will automatically be extended until 30 April 2020.

Amendments to the documents governing a company

The documents governing a company may comprise an MOI (or Memorandum and Articles of Association, if an MOI has not been adopted), a shareholders agreement (shareholders agreement) and governance rules (rules), if any.

Shareholders are generally entitled to amend a company's MOI, which includes the adoption of a new MOI in substitution of an existing MOI, by passing a special resolution. Amendments to an MOI adopted by shareholders (other than name changes) will take effect on the later of (i) the date on, and time at, which the prescribed notice of amendment (notice of amendment) is filed with the CIPC, or (ii) the date, if any, set out in the notice of amendment. Companies are required to file the prescribed notice of amendment within 10 business days after the amendment has been approved.

Based on the CIPC's limited list of services and the suspension of its service-related mailboxes, it is unlikely that companies will be able to file any amendments to MOIs (other than name changes in limited circumstances), with the consequence that any such amendments will not take effect during the lockdown. This may have far-reaching, and potentially adverse consequences, for companies that require amendments to their capital structure

CDH
CLIFFE DEKKER HOFMEYR

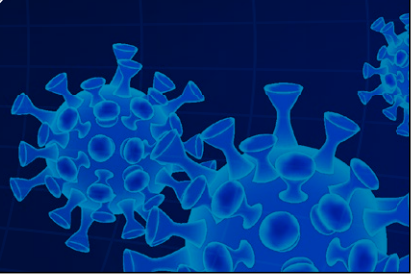
Limited Companies and Intellectual Property Commission (CIPC) services during the National COVID-19 Lockdown...*continued*

In contrast to amendments to MOIs and rules, the amendment of an existing shareholders agreement, or the conclusion of a new shareholders agreement, need not be filed with, or approved by, the CIPC for it to become effective.

and/or changes to their governance provisions such as reserved matters and/or the powers of the board or shareholders which may be necessitated by the changing economic climate in which companies currently operate.

Unless the MOI of a company provides otherwise, a board may make, amend or repeal necessary and incidental rules relating to the governance of the company, and which rules will take effect on a date that is the later of (i) 10 business days after such rule/s is filed with the CIPC or (ii) the date specified in the rule. As with the amendments to MOIs, any new or amended rules, which have not yet been filed, will not take effect during the lockdown.

In contrast to amendments to MOIs and rules, the amendment of an existing shareholders agreement, or the conclusion of a new shareholders agreement, need not be filed with, or approved by, the CIPC for it to become effective. The Companies Act provides that shareholders agreements must be consistent with the MOI of a company. This means that the conclusion of a shareholders agreement, or the amendment of an existing shareholders agreement, may potentially be considered as a stopgap measure during the lockdown should a company be required to respond to any short-term funding or governance needs.



CDH
CLIFFE DEKKER HOFMEYR

Limited Companies and Intellectual Property Commission (CIPC) services during the National COVID-19 Lockdown*...continued*

Companies will not be able to file any notices of change of directors during the lockdown.

Changes to boards

A prescribed notice of change of directors (notice of change of directors) must be filed with the CIPC within 10 business days after a change of information or composition of the board. Notwithstanding the latter, changes to a board are not required to be filed with, or be registered by, the CIPC for such changes to take effect in law.

Provided that a person is not ineligible or disqualified to be a director, a person may be appointed or elected to be a director of a company, and such person will become entitled to serve as a director when that person has been validly appointed or elected and has delivered to the company a written consent to serve as its director. Similarly, resignations are final and unilateral acts, and generally become effective when tendered.

Companies will not be able to file any notices of change of directors during the lockdown. The users of information retrieved from the CIPC should therefore take caution as the records of the CIPC may not reflect changes made to boards during the lockdown.

CIPC Annual Returns (Annual Returns) and compliance checklists

Every company is required to file an annual return in the form prescribed by the CIPC within 30 business days after the anniversary of its date of incorporation.

Companies that are required to have their annual financial statements (AFS) audited in terms of the Companies Act (e.g. public companies, companies required to have audited AFS in terms of their MOIs, companies with public interest scores of at least 350, etc.) are also required to submit their audited AFSs to the CIPC. All other companies are required to file a Financial Accountability Supplement setting out certain basic information relating to the financial affairs of the company.

With effect from 1 January 2020, the filing of a compliance checklist by all companies, to confirm their compliance status in respect of certain provisions of the Companies Act, is mandatory.

The CIPC has provided an indulgence to all companies that have Annual Return filing periods that fall between 25 March 2020 and 15 April 2020, by extending such filing periods until 30 April 2020. The effect of the latter is that penalties, the filing of compliance checklists and the filing of AFSs are also deferred to 30 April 2020.

CDH
CLIFFE DEKKER HOFMEYR

Limited Companies and Intellectual Property Commission (CIPC) services during the National COVID-19 Lockdown...*continued*

The CIPC recognises that during the lockdown it will not be able to provide its full suite of services, and companies will equally find it difficult to comply with their CIPC compliance obligations.

The CIPC also indicated that it will not take any action to place non-compliant companies and close corporations into deregistration, or finally deregister any company or close corporation until further notice.

Impact

The CIPC recognises that during the lockdown it will not be able to provide its full suite of services, and companies will equally find it difficult to comply with their CIPC compliance obligations. While the indulgences granted by the CIPC is welcomed, it must be noted that the suspension of the ability to file amendments to MOIs of companies during the lockdown may potentially place further strain on companies that are required to effect changes to their capital structures and governance provisions in reaction to the fast-changing economic climate, largely triggered by the COVID-19 outbreak which has changed the economic landscape of at least 180 countries, including South Africa, within a matter of weeks.

Abrianne Marais and Etta Chang

CDH
CLIFFE DEKKER HOFMEYR

Lockdown: Companies beware of 'electronic signatures' whilst employees work remotely

Hackers are causing chaos across multiple industries and can cripple even the most resilient organisations by impacting on market share, brand and reputation.

The universal digitisation of society has completely transformed the way we do business today. Business may be conducted with the touch of a single button and contracts may be signed and entered into electronically. It is often far more convenient to sign a document electronically, opposed to having to print a document, sign it and initial each page, and scan it back in before sending it off. Particularly during the next few weeks of lockdown being implemented within South Africa, persons may not have access to printers and scanners and may often find themselves signing documents electronically whilst working from home.

However, with the increased level of connectivity comes greater risk to cybersecurity. Hackers are causing chaos across multiple industries and can cripple even the most resilient organisations by impacting on market share, brand and reputation.

Whilst electronic signatures are perfectly valid in terms of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), companies must be alert to the wording contained in their written agreements and whether electronic signature suffices. If the form of an electronic signature has not been expressly agreed to, uncertainty potentially arises.

In the recent case of *Global & Local Investments Advisors (Pty) Ltd v Nickolaus Ludick Fouché* (71/2019) [2019] ZASCA 08, the Supreme Court of Appeal (SCA) had to determine whether Global & Local Investments Advisors (Pty) Ltd (Appellant) had breached its mandate to invest and manage money entrusted to it by Nickolaus Ludick Fouché (Respondent), by releasing funds in response to fraudulent emails, ostensibly sent by the Respondent. In determining whether the Appellant was in breach of its mandate, the SCA had to consider the question of what constitutes "signed" in certain circumstances.

The Respondent had given a written mandate to the Appellant to act as his agent and invest money with a bank on his behalf. The written mandate specifically stipulated that all instructions must be sent by fax or by email with client's signature.

Fraudsters hacked the gmail account of the Respondent and sent three emails to the Appellant instructing it to transfer specified amounts to other account. These three emails had no attachments and each email ended with the words "*Regards, Nick*" or "*Thanks, Nick*".

CDH
CLIFFE DEKKER HOFMEYR

Lockdown: Companies beware of 'electronic signatures' whilst employees work remotely...*continued*

In Spring Forest an agreement had been entered into between the parties, which required cancellation thereof to be 'in writing' and to be 'signed by both parties'.

The Appellants completed the instructions by paying out three consecutive payments into the listed bank accounts in the amount of R804,000 in aggregate. The Respondent, becoming aware of the cyberattack, notified the Appellants that the instructions had not come from him and claimed the amount of R804,000 on the basis that the Appellant had acted contrary to their written mandate.

The Appellant tried to argue that it complied with the written mandate, as the "*Regards, Nick*" or "*Thanks, Nick*" constituted an electronic signature, which satisfied the mandate requirement of containing the client's signature.

The Appellant tried to rely on section 13(3) of the ECTA and the use thereof in the case of *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and another* 2015 (2) SA 118 (SCA), which dealt with the question of whether or not a person's email signature, which appeared at the foot of an email, was sufficient to satisfy the stock standard boilerplate provision in an agreement that its terms could be varied or cancelled only by way of a written document signed by the parties.

Section 13(3) of the ECTA states that, where an electronic signature is required by the parties to an electronic transaction (and the parties have not agreed on the type of electronic signature), that requirement is met if:

(1) a method is used to identify the person and to indicate the person's approval of the information communicated; and

(2) having regard to all the relevant circumstances at the time the method was used, the method was as reliable and appropriate for the purposes for which the information was communicated.

In Spring Forest an agreement had been entered into between the parties, which required cancellation thereof to be 'in writing' and to be 'signed by both parties'. The parties subsequently cancelled the agreement by way of email exchanges. The respondent later contended that the agreement had not been validly cancelled due to the fact that the (electronic) agreement of cancellation had not been signed by both parties. The SCA, in this case, held that the names of the parties at the foot of their respective emails were (i) intended to serve as signatures,

Lockdown: Companies beware of 'electronic signatures' whilst employees work remotely...*continued*

It is interesting that the two SCA cases have opposite outcomes.

(ii) constituted 'data' which was logically associated with the data in the body of the emails; and (iii) identified the parties and accordingly, satisfied the requirement of an electronic signature in terms of section 13(3) of the ECTA and had the effect of authenticating the information contained in the emails.

In Global & Local Investments, however, the Respondent contended that the instructions did not bear his signature, whether manuscript or electronic.

The SCA found that, by definition, sign, is "*to affix one's name to a writing or instrument, for the purpose of authenticating or executing it, or to give it effect as one's act; To attach a name or cause it to be attached to a writing by any of the known methods of impressing a name on paper; To affix a signature to... To make any mark, as upon a document, in token of knowledge, approval, acceptance, or obligation*" and ultimately found that the instruction was not accompanied by such a signature, concurring with the court *a quo* that the funds were transferred without proper instructions and contrary to the written mandate.

It is interesting that the two SCA cases have opposite outcomes. The SCA in Global & Local Investments noted that the distinguishing factor between the cases was that the authority of the persons who had actually written and sent the emails in Spring Forest was not an issue as it is in the present case and that the issue in Spring Forest case was whether an exchange of emails between the parties could satisfy the requirement imposed by them in the contract that 'consensual cancellation' of their contract be 'in writing and signed' by the parties. There was no dispute regarding the reliability of the emails, accuracy of the information communicated or the identities of the persons who appended their names to the emails.

Whereas, in Global & Local Investments, the emails in issue were fraudulent and not written nor sent by the person they purported to originate from. It is perhaps debatable whether this distinction made by the court is entirely convincing: Had the Appellant acted on a forged manually signed instruction (and assuming the forgery would have fooled any reasonable person in the Appellant's position), it would still factually be the case that the Respondent never signed the instruction and that is was therefore unauthorised. Yet the instruction would have appeared *ex facie* to be perfectly valid and compliant – and arguably the Appellant would have been in the clear in that scenario. The mandate was probably to be interpreted as saying that the financial advisor's reliance on a purportedly 'signed' instruction was sufficient.

CDH
CLIFFE DEKKER HOFMEYR

Lockdown: Companies beware of 'electronic signatures' whilst employees work remotely...*continued*

Ultimately the two judgments prove that the question of what constitutes 'signed' or 'in writing and signed' can be contentious

Perhaps the better distinction, then, is that of the intention of the parties as to what the word 'signed' means in their agreement, given the context and purpose of the particular agreement (and this may have been what the SCA was alluding to at the end of the Global & Local Investments case when referring to the issue of the reliability of emails). Given the nature of a financial services mandate and the attendant risks, on probability, the parties did not intend that a mere email signature could suffice – it needed to be manuscript. Those same considerations, arguably, were not present in Spring Forest, and so in that case it was more appropriate to allow electronic signature. 'Signed' really just means what the parties intended it to mean. Possibly, a default presumption is that it includes electronic signature (per Spring Forest) but in other cases, the parties' intention would override this (per Global & Local Investments).

Ultimately the two judgments prove that the question of what constitutes 'signed' or 'in writing and signed' can be contentious. It is important that parties specify in their agreements whether they intend to exclude all forms of electronic signature. While a provision excluding electronic signature may seem old fashioned, its primary purpose is to avoid disputes of this nature.

Yaniv Kleitman, Taryn Jade Moonsamy and Ashleigh Gordon

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com

David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Emma Dempster
Projects & Energy
Director
T +27 (0)11 562 1194
M +27 (0)79 491 7683
E emma.dempster@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Jay Govender
Projects & Energy Sector Head
Director
T +27 (0)11 562 1387
M +27 (0)82 467 7981
E jay.govender@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@cdhlegal.com

Kendall Keanly
Director
T +27 (0)21 481 6411
M +27 (0)83 645 5044
E kendall.keanly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina
Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

Nkcubeko Mbambisa
Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Francis Newham
Executive Consultant
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Gasant Orrie
Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers
Oil & Gas Sector Head
Director
T +27 (0)21 481 6429
M +27 (0) 79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith
Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen
Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum
Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@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.

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 cdhstellenbosch@cdhlegal.com