10 MARCH 2021

CORPORATE & COMMERCIAL **ALERT**

Information Regulator weighs in on WhatsApp Privacy Policy

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IN THIS ISSUE >

Personal lease agreements: Regulating the relationship when it's close to home

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FSRA: Requirements for significant owners of financial institutions

Chapter 11 of the Financial Sector Regulation Act, 2017 (FSRA), which came into effect on 1 January 2019, read with Joint Standard 1 of 2020 (Joint Standard 1), which recently came into effect on 1 December 2020, provides for the regulation of significant owners of financial institutions. This note highlights the key requirements relating to approval and notification for changes in significant ownership, and the fit and proper requirements applicable to significant owners of financial institutions.

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Personal lease agreements: Regulating the relationship when it's close to home

A *delectus personae* exists where a right is of such a personal nature that the identity of the creditor could make a reasonable and substantial difference to the debtor.

For most lessors, the identity and commercial standing of a lessee is of vital importance. Where a lease is silent as to whether the rights of a lessee can be ceded to third parties, the lessee is generally free to do so. But to what extent can the importance of the identity of a lessee preclude that lessee from ceding its rights to use and enjoy the property?

Unless cession is expressly prohibited in an agreement of lease (or permitted subject to the lessor's consent), a lessor would have to rely on the doctrine of *delectus personae* to prevent a lessee ceding its rights under a lease to a third party. A *delectus personae* exists where a right is of such a personal nature that the identity of the creditor could make a reasonable and substantial difference to the debtor. In the case of a lease agreement, the question is thus essentially whether it matters to the lessor to whom it leases its premises.

Courts have held that rights and obligations in a lease agreement are not ordinarily *delectus personae* – particularly so in the case of long-term leases. That the commercial standing of the lessee is important to the lessor is insufficient to establish *delectus personae*. There must be additional pointers to the personal nature of the obligation in question, as illustrated in a matter soon to be decided by the Constitutional Court in CCT 70/20 *University of Johannesburg v Auckland Park Theological Seminary* (*UJ v ATS*).

In *UJ v ATS*, the parties agreed to a long-term lease in 1995, during the subsistence of a cooperation agreement in terms of which the lessor – the University of Johannesburg (UJ) – would offer a theology degree, for which certain courses would be taught by the lessee – Auckland Park Theological Seminary (ATS). UJ offered the premises to ATS, for a once-off payment below market value, so that ATS could establish a theological college to this end. The lease agreement itself merely stipulated that the premises must be used for the purpose of education. ATS did not establish a college on the premises. Instead, it ceded its rights under the lease agreement – for a substantial amount of money – to a third party, which intended to establish a primary and high school on the premises.

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Personal lease agreements: Regulating the relationship when it's close to home...*continued*

How, then, does one differentiate contextual evidence establishing a *delectus personae* from evidence varying the express terms of a lease agreement?

UJ argued that the rights in the lease agreement were personal to ATS, and that ATS had thus repudiated the lease. In support of this argument, UJ tendered evidence of negotiations, and letters sent prior to the conclusion of the lease. The High Court agreed that this evidence pointed to the personal nature of the rights, which thus could not be ceded.

On appeal, the Supreme Court of Appeal (SCA) held that the evidence considered by the High Court, rather than forming part of the context and background of the lease agreement, was inadmissible in terms of the parol evidence rule. This rule essentially requires that what is written in a contract – where that contract was intended to be a complete record of the agreement between the parties – cannot be contradicted, added to or modified by extrinsic evidence. The SCA, applying this rule, found that nothing in the lease itself points to the rights being personal and incapable of cession, and thus overturned the High Court's orders.

This case thus also raises important questions regarding the admissibility of evidence of negotiations and preparatory material in interpreting an agreement. Although the parol evidence rule is well established, its relationship with the rules regarding the interpretation of contracts is not always clear. The rules of legal interpretation, which are settled, require that when interpreting a contract, the language of a provision must be read in context, and with regard to its purpose and the background to the preparation and production of the document. The SCA has emphasised that context, purpose and background are not only relevant where the language is ambiguous – all factors must always be considered in one unitary exercise.

How, then, does one differentiate contextual evidence establishing a *delectus personae* from evidence varying the express terms of a lease agreement? Until the *UJ v ATS* case is decided by the Constitutional Court, this will remain a grey area in our lease.

Those concluding a lease are thus well advised to regulate the permissibility of cession clearly and appropriately in the agreement. Where this is not done, lessors' may nevertheless find safe harbour in the principle of *delectus personae*, where it is evident that the specific identity of the lessee is of particular importance to the lessor. This is most likely to be the case in the context of a joint venture or a similar strategic arrangement between the lessor and the lessee. As evidenced in *UJ v ATS*, this may however prove difficult to prove and disputes regarding the admissibility of the evidence tendered to establish such relationship may arise. For those who have already concluded leases where the permissibility of cession is not clearly regulated, the Constitutional Court will hopefully soon provide further clarity on the circumstances in which *delectus personae* precludes the cession of rights under lease agreements.

Joshua Reuter and Tessmerica Moodley

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Information Regulator weighs in on WhatsApp Privacy Policy

The Information Regulator's view is that its consent is required for the implementation of the updated privacy policy, regardless of whether users of WhatsApp specifically agree to this.

In January 2021, WhatsApp sparked a public outcry with a proposed update to its Privacy Policy to enable it to share information with its parent company, Facebook. As a result of the public response to these proposed changes, WhatsApp later announced that these updates would be delayed until later in the year. On 3 March 2021, the Information Regulator (IR), who is a new regulator tasked with (amongst other things) monitoring and enforcing compliance with the Protection of Personal Information Act 4 of 2013 (POPIA) issued a statement about WhatsApp's proposed changes to its Privacy Policy and its compliance with POPIA.

The IR's statement says that it has a number of concerns about how this revised policy applies to South Africa, giving the following as an example:

> *"... it is the IR's view that the processing of cell phone numbers as accessed on the user's contact list for a purpose other than the one for which the number was specifically intended at collection, with the aim of linking the information jointly with the information processed by other responsible parties (such as Facebook companies) does not require consent from the data subject, but prior authorisation from the IR".*

In simple terms, the IR's view is that its consent is required for the implementation of the updated privacy policy, regardless of whether users of WhatsApp specifically agree to this.

The IR also expressed concerns about differences in the approach WhatsApp have taken in respect of users in Europe and Africa, with European users receiving *"significantly higher privacy protection"* than people in Africa and South Africa, notwithstanding that the South African legislation is modelled on, and very similar to, privacy legislation in the EU.

On 1 July 2020 the majority of the dormant sections of POPIA came into force and, in terms of the transitional arrangements under section 114 of POPIA, responsible parties are given until 1 July 2021 to ensure that all processing of personal information complies with its provisions.

Relevantly, section 57 of POPIA came into effect and requires a responsible party (i.e. WhatsApp) to procure prior consent from the IR if it intends to process any unique identifiers of data subjects (i.e. WhatsApp users):

- for a purpose other than the purpose for which the unique identifier was specifically intended at collection; and
- with the intention of linking the information together with information processed by other responsible parties (i.e. Facebook).

A unique identifier is defined as:

> *"any identifier that is assigned to a data subject and is used by a responsible party for the purposes of the operations of that responsible party and that uniquely identifies that data subject in relation to that responsible party".*

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Information Regulator weighs in on WhatsApp Privacy Policy*...continued*

To further complicate matters, an abundance of misinformation has been disseminated about the proposed amendments to WhatsApp's Privacy Policy since they were first published in January 2021.

In the present context, unique identifiers would likely include cell phone numbers, usernames and email addresses. POPIA is a new piece of legislation and, as such, our courts have not had much opportunity to interpret its key terms and provisions.

To further complicate matters, an abundance of misinformation has been disseminated about the proposed amendments to WhatsApp's Privacy Policy since they were first published in January 2021. In response to this, WhatsApp created a webpage to specifically address questions about its Privacy Policy. Pertinently, WhatsApp makes it very clear that it does not share its user's contacts or contact lists with Facebook which is seemingly in contrast with the main issue raised by the IR in its statement. The IR says that it will be having round-table discussions with Facebook SA regarding the newly proposed Privacy Policy.

Non-compliance with section 57 of POPIA is an offence and, under section 107(b) of POPIA, any person convicted of such an offence is liable to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

Given that WhatsApp (as a responsible party who determines the purpose of and means for processing its users' personal information) is required to ensure compliance with POPIA by 1 July 2021, we are likely to hear about the outcome of the IR's concerns and hopefully obtain greater certainty on the matter, and the status of the new Privacy Policy, within the coming months.

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FSRA: Requirements for significant owners of financial institutions

Section 157 of FSRA provides that a person (natural or juristic) is a "*significant owner*" of a financial institution if the person, directly or indirectly, alone or together with a related or inter-related person, has the ability to control or influence materially the business or strategy of the financial institution.

Chapter 11 of the Financial Sector Regulation Act, 2017 (FSRA), which came into effect on 1 January 2019, read with Joint Standard 1 of 2020 (Joint Standard 1), which recently came into effect on 1 December 2020, provides for the regulation of significant owners of financial institutions. This note highlights the key requirements relating to approval and notification for changes in significant ownership, and the fit and proper requirements applicable to significant owners of financial institutions.

Please note that this is a non-exhaustive high-level summary and we recommend that you consult the detailed provisions of the relevant regulations to ensure proper compliance. This note is for information purposes only and does not constitute legal advice.

1. Significant Owners

1.1 Section 157 of FSRA provides that a person (natural or juristic) is a "*significant owner*" of a financial institution if the person, directly or indirectly, alone or together with a related or inter-related person, has the ability to control or influence materially the business or strategy of the financial institution. A person has this ability if:

1.1.1 the person, directly or indirectly, alone or together with a related or inter-related person, has the power to appoint 15% of the members of the governing body of the financial institution;

1.1.2 the consent of the person, alone or together with a related or inter-related person, is required for the appointment of 15% of the members of a governing body of the financial institution; or

1.1.3 the person, directly or indirectly[1], alone or together with a related or inter-related person, holds a 'qualifying stake' (as that term is defined in FSRA[2]) in the financial institution.

2. Approval and Notification Requirements

2.1 The approval and notification requirements provided for in section 158 of FSRA apply specifically to significant owners

[1] It is unclear from the legislation how an "*indirect*" stake is determined.

[2] Section 1 of FSRA defines "*qualifying stake*" to mean, in respect of a company that is a financial institution "*that a person, directly or indirectly, alone or together with a related or inter-related person*":-
(i) holds at least 15% of the issued shares of the financial institution;
(ii) has the ability to exercise or control the exercise of at least 15% of the voting rights attached to securities of the financial institution;
(iii) has the ability to dispose of or control the disposal of at least 15% of the financial institution's securities; or
(iv) holds rights in relation to the financial institution that, if exercised, would result in the person, directly or indirectly, alone or together with a related or inter-related person:-
(aa) holding at least 15% of the securities of the financial institution;
(bb) having the ability to exercise or control at least 15% of the voting rights attached to shares or other securities of the financial institution; or
(cc) having the ability to dispose of or direct the disposal of at least 15% of the financial institution's securities.
Section 1 also provides for a definition of "*qualifying stake*" in respect of financial institutions which are close corporations or trusts.

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FSRA: Requirements for significant owners of financial institutions*...continued*

The provisions of FSRA capture a significantly wider range of transactions *inter alia* through an expansive definition of a "*qualifying stake*", and catching "*indirect*" acquisitions of such stakes, which acquisitions need not even be "*active*" in the sense of purchases, sales or subscriptions for shares in an Applicable Financial Institution.

of 'eligible financial institutions' (defined to include banks, long-term and short-term insurers, and market infrastructures such as stock exchanges and central securities depositories), managers of collective investment schemes, and any other financial institutions as may be prescribed from time to time by the regulators (Applicable Financial Institutions). Certain changes in significant ownership of Applicable Financial Institutions require the prior *written approval* of the relevant Authority (being either the Financial Sector Conduct Authority or Prudential Authority, collectively referred to as the "*Authorities*"), whereas other changes in significant ownership merely require prior *notification* to the relevant Authorities, as more fully described below. Whilst our financial sector laws have for many years contained similar provisions regulating changes of significant holdings in such financial institutions, the provisions of FSRA capture a significantly wider range of transactions *inter alia* through an expansive definition of a "*qualifying stake*", and catching "*indirect*" acquisitions of such stakes, which acquisitions need not even be "*active*" in the sense of purchases, sales or subscriptions for shares in an Applicable Financial Institution.

2.2 Section 158 of FSRA requires:

2.2.1 prior *written approval* of the relevant Authority to become a significant owner of an Applicable Financial Institution;

2.2.2 prior *written approval* of the relevant Authority to cease being a significant owner of an Applicable Financial Institution which has been designated by written notice from the Governor of the South African Reserve Bank as a systemically important financial institution in terms of Part 6 of the FSRA[3];

2.2.3 prior *notification* to the relevant Authority to cease being a significant owner of a non-systemically important Applicable Financial Institution;

2.2.4 prior *written approval of or notification* to the relevant Authority, depending on the requirements of the relevant Authority as specified at the time of granting the initial approval referred to in paragraph 2.2.1, to increase or decrease the extent of the ability of the significant owner, alone or together, with a related or inter-related person, to control or influence materially the business or strategy of the financial institution.

[3] In November 2019, the South African Reserve Bank (SARB) designated six of South Africa's largest banks as systemically important financial institutions, namely Absa Bank Ltd, The Standard Bank of South Africa Ltd, FirstRand Bank Ltd, Nedbank Bank Ltd, Investec Bank Ltd, and Capitec Bank Ltd. In October 2020, the SARB published a discussion paper on the methodology to determine which insurers are systemically important within the South African context. The designation of a systemically important financial institution must be published and the relevant financial institution will receive notification of such designation.

FSRA: Requirements for significant owners of financial institutions*...continued*

If a person enters into an arrangement in contravention of section 158, the arrangement, insofar as it results in a change in significant ownership of an Applicable Financial Institution, is void.

2.3 For the purposes of 2.2.4, Joint Standard 1 provides that an increase or decrease of 5 or more in the percentages specified in paragraphs 1.1.1, 1.1.2, and the definition of "*qualifying stake*" referred to in 1.1.3, constitutes an increase or decrease in the extent of the ability of the significant owner, alone or together, with a related or inter-related person, to control or influence materially the business or strategy of the financial institution. This includes a cumulative increase or decrease over a period of time or a single increase or decrease.

2.4 An Applicable Financial Institution must notify the Authorities, in the manner and form determined by the Authorities[4], within 30 days of it becoming aware of a change in significant ownership or potential change in significant ownership in respect of the Applicable Financial Institution.

2.5 If a person enters into an arrangement in contravention of section 158, the arrangement, insofar as it results in a change in significant ownership of an Applicable Financial Institution, is void. For the purposes of section 158, such arrangement need not involve the acquisition of, or disposition of, shares or other interests or property.

2.6 It is important to note that section 158 does not affect any other requirement in terms of a financial sector law to obtain approval or consent in respect of an acquisition or disposal. In other words, to the extent that any other relevant financial sector law requires the approval of any regulatory authority in respect of an acquisition or disposal, such approval should be obtained in addition to the approval and/or notification requirements under section 158.

2.7 In light of the above, and given that the interpretation of section 158 has significant practical implications which may easily be overlooked, it is critical to obtain advice as to the applicability and requirements of section 158 in transactions involving Applicable Financial Institutions.

[4] Application and notification forms for significant owners of financial institutions registered under financial sector laws for which the Prudential Authority is the responsible authority are available at: http://www.resbank.co.za/PrudentialAuthority/FinancialSectorRegulation/Pages/Significant-owners---applications-and-notifications.aspx

The Financial Sector Conduct Authority has advised that it will publish the application and notification forms for significant owners of financial institutions registered under financial sector laws for which it is responsible in due course. In the interim, applicants must submit applications in terms of section 158 in a format of their choice.

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FSRA: Requirements for significant owners of financial institutions*...continued*

Joint Standard 1 requires that all significant owners of financial institutions and financial institutions (as that term is defined in section 1 of FSRA) must meet certain fit and proper requirements.

3. Fit and Proper Requirements

3.1 Joint Standard 1 requires that all significant owners of financial institutions and financial institutions (as that term is defined in section 1 of FSRA[5]) must meet certain fit and proper requirements. It sets out the criteria that must be met by significant owners of financial institutions in order to be considered fit and proper as well as factors that would constitute, on a *prima facie* basis, evidence of the absence of fitness and proprietary. Fitness and proprietary of significant owners is linked to financial standing, competence and integrity.

3.2 The Authorities recognise that the assessment of fitness and proprietary requires an application of judgment, therefore the Joint Standard sets out the factors to be considered when exercising such judgment. In order to assist the Authorities with oversight of the fitness and proprietary of significant owners, Joint Standard 1 places certain reporting obligations on financial institutions.

3.3 Although Joint Standard 1 applies to all financial institutions, the Authorities issued exemption notices which exempts significant owners of certain financial institutions from the application of Joint Standard 1, including, *inter alia*, authorised financial services providers[6], credit rating agencies, friendly societies, pension fund organisations, branches of foreign institutions as referred to in section 18A of the Banks Act, branches of foreign reinsurers, co-operative banks, co-operative financial institutions, co-operative insurers, and Lloyds or Lloyds underwriters.

3.4 A copy of Joint Standard 1 and the relevant exemption notices is accessible here.

Nuhaa Amardien
Under supervision of John Gillmer

[5] Not restricted to the Applicable Financial Institutions discussed in paragraph 2, but excluding the exempt financial institutions referred to in paragraph 3.3.
[6] Other than authorised financial services providers who are 'eligible financial institutions' or managers of collective investment schemes.

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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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