DLA CLIFFE DEKKER HOFMEYR

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DISPUTE RESOLUTION MATTERS

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Section 129 of NCA notices: must a defaulting consumer be personally notified before legal proceedings are instituted?

Consumers who are in default under credit agreements are notified by credit providers of their default in terms of section 129, read with section 130 of the National Credit Act, No 34 of 2005 (NCA).

Prior to instituting any legal proceedings for the recovery of a debt under a credit agreement section 129 of the NCA requires credit providers to draw the defaulting consumers (consumers) attention, by written notice to their right to refer credit agreements to a debt counsellor, alternatively a resolution agent, consumer court, or ombud to resolve any dispute under the agreement.

Until now, it was sufficient for credit providers to show the court that the notice was sent to the consumers before the institution of legal proceedings without taking into consideration whether or not it was received by consumers. In the recent case of *Mashilo Shadrack Sebola and Another v Standard Bank of South Africa and Others CCT 98/11) 2012 ZACC 11*, the Constitutional Court had to decide whether the NCA requires the consumer to personally receive the section 129 notice before legal proceedings may be instituted or whether it was enough to simply prove that the notice was sent to the consumer's chosen address and whether any other method of notifying the consumer might be used.

In this case, the Applicants entered into a home loan agreement with the First Respondent whereby the agreement made provision for all letters, statements and notices to be delivered to a post office box. Subsequent to entering into the agreement, the Applicants fell into arrears and a notice was sent to their post office box. The notice was, however, never personally received by the Applicants as it was erroneously diverted to the wrong post office. The First Respondent unaware of this, took default judgement against the Applicants.

The Applicants asked the High Court to rescind the judgment due to the fact that they had not received the notice, which afforded them the opportunity to resolve the dispute outside of court. The High Court refused to rescind the judgment stating that the NCA did not require actual receipt of the notice and it was enough for a credit provider to show that it had sent the notice to the consumer's chosen address.

However, the Constitutional Court ruled that the NCA requires the credit provider to show proper delivery of the notice by proving registered despatch to the consumers address and that the notice reached the appropriate post office for delivery to the consumer.

The judgment provides that proof of registered dispatch is not enough, that the NCA requires the credit provider to take reasonable measures to bring the notice to the attention of consumers and to make averments that will satisfy a court that the notice reached consumers as required by section 129 of the NCA. The judgment was silent on whether there should be personal service on consumers.

Credit providers are relieved as they interpret the judgment to mean that personal service on consumers is not a requirement.

Tayob Kamdar and Corné Lewis

Interpretation of contracts

Language is susceptible to different meanings and the words and expressions used by the parties, when concluding agreements, may be vague or ambiguous. This is no less the case where they record their agreement in a document, writing being no guarantee of precision or clarity.

Disputes frequently arise, which require a court to interpret the contract.

The law regarding the interpretation of contracts is summarised in *Joubert, The Law of South Africa Contract (Second Edition)* (LAWSA) par 426 and in *RH Christie, The Law of Contract in South Africa (Sixth Edition)* (Christie) pages 199 - 234.

The fundamental objective is to ascertain and give effect to the common intention of the parties (LAWSA, par 426).

In order to ascertain the common intention of the parties, the court interprets or construes the words they have used. (Christie, page 199)

The 'golden rule' of interpretation is that, if the language of the contract is clear and unambiguous, effect must be given to its ordinary, everyday meaning, except where this meaning leads to an absurdity or to something that the parties obviously never envisaged, or it is shown that the parties used the words in a technical sense and not in their ordinary sense. (LAWSA, par 426).

On pages 213 - 227, Christie sets out the technique of interpretation adopted by our courts.

Christie refers to *Coopers & Lybrand v Bryant 1995 3 SA 761 (A) 767-768*, where such technique was summarised by Joubert JA:

"According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument . . . The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself . . . The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract . . .;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted . . .;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions".

Christie (at page 213) says that "the four steps of this technique must not be paced out in succession with military precision, but must be danced with some *pirouetting* and an *entrechat* or two".

When setting out to interpret a word or clause of disputed meaning, such word or clause is not read in isolation, but in its context.

In the first instance, it is read in its context within the contract as a whole (including the nature and purpose of the contract).

The context does not stop, however, at the four corners of the written contract. The word or clause of disputed meaning is also read within the wider context. Background evidence is admissible to show facts which the parties had in their minds and about which they were negotiating such as the purpose of the contract.

Until 2009, our courts distinguished between 'background evidence', which was admissible in all cases and 'evidence of surrounding circumstances', which was admissible only to resolve an uncertainty. It was often difficult to distinguish between these categories of evidence.

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However, in *KPMG Chartered Accounts (SA) v Securefin Ltd 2009 4 SA 399 (SCA) 409 - 410*, Harms DP stated:

"The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice".

Evidence of the construction put on the contract by one party is not admissible.

Christie (at page 227) then says that, if the technique of interpretation set out above does not lead the court to what it concludes is the only proper interpretation of the contract, the classical rules of interpretation come into play, and if these rules do not enable the court to decide what is the proper interpretation it will have to admit defeat and declare the contract void for vagueness.

Marius Potgieter

Pointy weapons and the Constitution: a delicate balance

'The Spear'. Not too long ago this expression would have been universally understood as meaning a traditional weapon with a long shaft and pointed tip used for thrusting or throwing. More recently you would be forgiven for thinking of Brett Murray's controversial painting by that name.

Art exhibitions (particularly modern art) are often intended to be provocative and controversial. The "*Hail to the Thief II*' exhibition including 'The Spear' could have run relatively unnoticed, appreciated only by art aficionados and regular visitors to the Goodman Gallery but for an article in the City Press. That article was followed by outrage voiced by politicians, civil society groups and comment on news websites and Twitter. An urgent application was brought in the High Court against the Goodman Gallery and City Press to compel the former to remove the 'The Spear' from the exhibition and the latter to remove images of the painting from its website. Parallel complaints were lodged with the Films and Publications Board, which was asked to classify the painting to ensure that children and sensitive people who might visit the art gallery would be alerted. COSATU called for a boycott of City Press and a march to the Goodman Gallery was arranged causing a section of Jan Smuts Avenue to be closed. Two men (acting independently of each other) then visited the gallery and defaced the painting.

Questions of rights and freedoms were raised and the extent of the freedom of expression in an open and democratic society was debated together with more nuanced considerations like the rights of children (both children in society in general and specifically the children of the President).

Eventually the gallery took down the painting (that had in the interim been sold) and the City Press removed the image from its website. This resolution was brought about by public pressure, the fact of the court application (not any court decision) and discussion between the parties involved. The Films and Publications Board classified the painting with a 16N restriction, which means that the painting is not to be viewed by anyone younger than 16 years and that there is a warning of nudity. The urgent court application was postponed without any final decision having been made and it seems likely that the application will simply be abandoned as the issue on the affidavits in that application is now moot.

No constitutional right is absolute and the uproar brought about by 'The Spear' has highlighted both the delicate balance that must be maintained in a constitutional democracy between competing rights and the ability of a society using all of the legitimate measures at its disposal (save for the unlawful and misguided damage to the painting itself) to bring a reasonably satisfactory conclusion to a contentious episode.

'The Spear' was certainly controversial but perhaps the controversy that was achieved was not the controversy that the exhibition as a whole intended to convey.

Tim Fletcher and Deshni Naidoo

Dependents' claim for loss of support and the application of the Assessment of Damages Act, No 9 of 1969

The legal basis for the entitlement of persons, to claim from the Road Accident Fund (RAF) due to the death of or bodily injury to any other person, is the existence of a legal duty of the deceased or injured person to support the claimant, without which there would be no claim. Petrus Geyser MacDonald and his wife Myra MacDonald were involved in a motor vehicle collision on 3 March 1994, which tragically claimed both their lives. They were survived by their three children. They were Appellants in the unreported case of *MacDonald v The Road Accident Fund (RAF) (453/2011) [2012] ZASCA 69*.

In terms of the Assessment of Damages Act, No 9 of 1969, insurance money and pensions are not deductible from a loss of support claim. Income or interest accrued as a result of investment of these monies will amount to an accelerated benefit and will thus be deductible.

The RAF had conceded that the collision was caused by the negligence of its insured driver and that it was liable to the Appellants for whatever loss of support they proved. In the court *a quo*, Bozalek J absolved the RAF from the instance as the appellants had failed to establish that their reasonable maintenance needs could not be met by the proceeds of the deceased father's estate.

The deceased parents were married out of community of property. The deceased father owned a farm and derived income from his farming activities as well as a small transport business. The deceased mother also generated a small income by way of selling items of pottery as well as milk and meat products on the farm. Six months before their untimely death the deceased parents executed a joint will, which provided that in the event of their simultaneous demise they would bequeath both their estates to a testamentary trust to be created for the benefit of their children. The will authorised the trustees to utilise as much of the income and capital assets of the trust as they regarded necessary, in the exercise of their absolute discretion, for the maintenance, upbringing, education and other interests of the children. It was further stipulated that the testamentary trust would be dissolved when the youngest child turned 21. The nett assets of the estates of the deceased parents, which eventually devolved into the trust, amounted to R2,2 million, which included the proceeds of insurance policies in the amount of R1 683 281. The non-insurance portion of his estate including his farm, shares in Orange River Wine Cellars Co-op Ltd and his farm implements and equipment, which were valued at less than R500 000, subsequently sold for almost R1,5 million in 1999.

The affairs of the trust were well managed and as a result the assets of the trust grew steadily towards the end of February 2010 to an amount of about R7,4 million, that was over and above the R1,97 million that had been expended over the years for the benefit of the applicants. In *Lambrakis v Santam Ltd 2002 (3) SA 710 (SCA*), the court found that any benefits coming to a child under a parents' estate must first be exhausted before a claim for maintenance may be considered. The court further found that the object of a claim for loss of support was to compensate claimants for material loss and not to improve their material prospects.

The appellants contended that the loss suffered by them as a result of their father's death should be reduced by 43,6% of the R1,97 million that they actually received from his estate via the trust. This was calculated on the basis that the total net capital received by the trust was R2 983 797, which left the non-insurance component at 43,6%. The question the SCA was faced with was whether the maintenance actually paid to the appellants could be covered by the non-insurance part of the trust assets. More relevant for that purpose is the purchase price actually received from those assets instead of the notional market value at some stage in the past indicated in the liquidation and distribution account.

The appellants Counsel conceded that from 1999 to 2001 the trust received an amount of R1,5 million together with interest in an amount of R270 000 from the sale of the farm and other moveables. That in itself would *prima facie* be sufficient to cover the maintenance payments. The trust was also the owner of a flat

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valued at R650 000 that was occupied by the appellants grandmother from which no income had been received by the trust. After all maintenance needs of the appellants had been met there was still an amount of about R7,4 million left in trust. Brand JA found that the sheer magnitude of the remaining amount supported the conclusion that the non-insurance part of the deceased father's estate was more than sufficient to provide the maintenance that the appellants actually received. In the absence of any exact actuarial calculations, the SCA adopted the more cautious approach as followed by the court *a quo*, to absolve the respondent from the instance rather than to dismiss the appellants' claims.

Craig Hindley

Is four years late too late? - *Opposition To Urban Tolling Alliance & Others v The South African National Roads Agency Limited & Others*

On 28 April 2012, the Honourable Judge Prinsloo handed down judgment in the North Gauteng High Court (Court) in an application that was launched by Opposition to Urban Tolling Alliance (OUTA), together with three co-applicants, against the South African National Roads Agency Limited (SANRAL) and four others, commonly referred to as 'the e-toll case'.

Briefly summarised, the applicants sought an urgent court order to interdict and restrain the first, second and third respondents from implementing the e-toll system that was scheduled to be rolled out at midnight on 30 April 2012, pending the outcome of an application to review and set aside the decision of the Minister of Transport to fund the infamous Gauteng Freeway Improvement Project (GFIP) by means of electronic toll collection.

The urgent interdict sought by the applicants was granted by Judge Prinsloo on 28 April 2012. The respondents have sought leave to appeal directly to the Constitutional Court and the application for leave to appeal is scheduled to be heard on 15 August 2012.

Prior to argument on the interdict application itself, Judge Prinsloo was called on by the respondents to rule on whether or not the application should be dismissed due to a lack of urgency. The respondents based their argument regarding urgency on the proposition that an applicant may not approach a court for urgent relief in circumstances where the applicant has created its own urgency. The respondents relied on the fact that the declaration of the various affected highways as toll-roads took place in 2007- some four years prior to the date when the applicants launched their application for an urgent interdict.

Having considered numerous factors such as the uncertainty created by SANRAL and the Minister of Transport as a result of the implementation of e-tolling having been suspended on a number of occasions and the fact that the roll out date of 30 April 2012 was looming, the Court found that the application was urgent and that the urgency was not self-created.

Arguments presented for the applicants and the respondents on urgency were very strong. It is important for clients to take heed of industry-specific Government Notices so as not to be caught unaware should such notices threaten to adversely affect clients in years to come. It is equally important for clients to interact with Government in relation to industry-specific notices and draft legislation where the opportunity presents itself and to demand the opportunity to be heard where it does not.

Conversely, clients should also bear this case in mind if faced with similar difficulties in relation to delays in launching proceedings. In this regard, *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others 2004 (6) SA 222 (SCA)* was relied on by the applicants and should be remembered by clients. In the Oudekraal case, a period of 50 years elapsed between the date when a decision was taken and the date when court proceedings were instituted. Four years late is not always too late.

Pieter Conradie and Rebecca Thomson

Email correspondence: enough to vary the terms of a contract

One of the most common terms of commercial contracts are the 'so called' non-variation clauses that provide that the terms of written contracts cannot be added to or varied unless such addition or variation is reduced to writing and signed by all parties to the contract.

In today's world of electronic media and the demands of the commercial world, parties to contracts often resort to email correspondence when agreeing to vary or add to the terms of contracts.

The question arises whether email correspondence exchanged between contracting parties, the content of which has the effect of varying a written contract containing a nonvariation clause complies with the requirements of such clause.

Contracting by email is governed by Chapter III of the Electronic Communications and Transactions Act, No 25 of 2002 (Act).

An electronic signature is defined in the Act as meaning data attached to, incorporated in, or logically associated with other data and that is intended by the user to serve as a signature.

An advanced electronic signature is defined as an electronic signature that results from a process that has been accredited by the Authority as provided for in Section 37 of the Act. A data message is defined, among others, as data generated, sent, received, or stored by electronic means.

Section 12 of the Act provides that a requirement in law that a document must be in writing is met if the document or information is in the form of data messages and accessible in a manner usable for subsequent reference.

In terms of Section 13(1) of the Act, where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used. Subsection (2), which is made subject to subsection (1), provides that an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form, with subsection (4) providing that where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.

In terms of Section 12 of the Act, a requirement in law that a document must be in writing is met if the document is in the form of an email. It follows that a requirement imposed by parties that a document must be in writing is met if the document is in the form of an email. Therefore email communication purporting to vary the terms of a contract fulfills the first condition of the non-variation clause that any variation to the contract must be in writing.

With regard to the second requirement of the non-variation clause that the parties must sign the document that purports to vary the contract, the Act's definition of 'electronic signature' read with the definition of 'advanced electronic signature', is wide enough to cover the situation where the author of an email signs the email off by inserting his name. In determining whether the insertion of one's name constitutes an electronic signature, the question is whether the author intended the insertion of his name to constitute his signature.

Section 13(2) of the Act clearly states that an electronic signature is not without legal force and effect on the grounds that it is in electronic form. This means that an electronic signature, as defined by the Act, is sufficient to fulfill the second requirement of the non-variation clause that the document must be signed by the parties.

It follows that email correspondence exchanged between the parties the content of which varies the terms of a written contract, which meet the requirements of Section 13 of the Act will constitute a lawful and valid variation of a contract.

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