DLA CLIFFE DEKKER HOFMEYR

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DISPUTE RESOLUTION MATTERS

FOREIGN JURISDICTION CLAUSES

Many South African companies doing business internationally are faced with contractual provisions that determine that any dispute arising between them and their international counterpart will be decided in a foreign jurisdiction and according to a foreign country's laws. These so called foreign jurisdiction clauses are far from ideal for South African entities – international litigation can be exorbitantly expensive and an uncertain process for a South African party.

In the recent case of *Foize Africa v Foize Beheer (752/11) [2012] ZASCA 123,* the Supreme Court of Appeal (SCA) confirmed that contractual clauses that provide exclusively for disputes to be determined by a foreign court do not necessarily oust the jurisdiction of a South African court to deal with a dispute arising from these contracts.

This case concerned a licensing agreement concluded between a South African entity and a Dutch entity. The agreement required that any dispute between the parties would be determined by way of arbitration in Holland, and that Dutch law would apply. The Dutch entity breached the licensing agreement and the South African party approached the North Gauteng High Court seeking an urgent interim interdict against the Dutch company to protect its rights under the licensing agreement. The Dutch company successfully raised the legal objection that the foreign jurisdiction clause prevented our courts from determining the issue.

The matter was taken on appeal to the SCA, which was asked to determine two important issues.

The first issue was whether a South African court could grant an interdict against a foreign person or entity. The Respondent's argument had been that it would be futile for a South African court to grant an interdict against a party if that same court would be unable to ensure that party complied with the interdict, by way of, for example, contempt proceedings. The SCA found that indeed it could, provided that the act that was sought to be interdicted was to be performed in South Africa.

The second issue was whether parties to a contract could exclude the jurisdiction of South African courts by agreement. The SCA found that they could not – even where parties have agreed that a dispute will be determined in a foreign country and according to that country's laws, South African courts retain a discretion whether or not to enforce the clause in question. There is no definitive list of factors that a court may consider when exercising this discretion; our courts may take into account a broad number of factors, such as where the evidence is situated, how materially different the law of the foreign court is, how closely the parties are connected to either country, the likelihood of there being a multiplicity of actions in different countries, the issue of costs and so on.

So a South African party to a contract is open to challenge the enforcement of a foreign jurisdiction clause on a number of grounds and each case must be determined on its own merits.

Brigit Rubinstein

IN THIS ISSUE

THE DISCHARGE OF A DEBT WITH STOLEN FUNDS

The Supreme Court of Appeal (SCA), in the matter of *ABSA Bank Ltd v Lombard Insurance Company Ltd,* recently handed down an insightful judgment, in which it clarified certain misconceptions that have arisen, pursuant to unjustified interpretations given by some to various prior judgments, dealing with the ability of an offended party to recover stolen funds, transferred to the credit of the bank account, of a fraudster or thief.

A certain Ms Manickum was the financial accountant of Lombard Insurance. Ms Manickum was indebted in substantial amounts to both ABSA and FNB (where she held various credit card, current account as well as home loan facilities). Heavily indebted, Ms Manickum could not resist the temptation to use her position to cause funds to be dishonestly transferred from the bank account of Lombard Insurance to her current account at FNB, to which she credited the sum of R2.1 million. From that account, Ms Manickum then caused numerous transfers to be made, extinguishing her overdraft and credit card facilities (as well as her home loan indebtedness) in respect of her various accounts both with FNB and ABSA. Once these liabilities had been extinguished, certain credit balances remained. Lombard Insurance, on uncovering the fraud perpetrated by Ms Manickum, instituted action against both ABSA as well as FNB, seeking repayment of the sums received in the various accounts held by Ms Manickum.

Lombard Insurance did not limit its action to recovery of the credit balances which stood to the credit of Ms Manickum's various accounts, but sought to recover the sums used to discharge the debit balances on Ms Manickum's account.

The important question which therefore arose was whether or not payment by Ms Manickum of her debts to the banks, with stolen funds, validly discharged those obligations.

Malan JA, delivering judgment on behalf of the SCA, confirmed that a bank overdraft is indeed discharged by the receipt (into that overdraft account) of stolen funds. Put differently, Lombard Insurance was not entitled to repayment from either ABSA or FNB of any sums which had served to extinguish the overdraft obligations of Ms Manickum.

The position pertaining to credit balances, on accounts into which the stolen funds were transferred is, however, entirely different. In that instance, the monies have not been used to extinguish any existing liability or obligation, and the thief (in this instance Ms Manickum) has no entitlement to give instructions to the bank in regard to the funds (credit balance) held in her account. To the extent of those credits, Lombard Insurance was accordingly entitled to payment of the sums still held in the accounts of Ms Manickum with ABSA and FNB (but no more).

The position would, of course, be entirely different if both parties (in this instance both the bank and Ms Manickum) knew that the debt (her overdraft obligations) was being discharged with stolen money. In that instance the victim of the fraud would be entitled to a full recovery from the bank. In the present instance, however, there could be no suggestion that either FNB or ABSA might have been party to the machinations of Ms Manickum.

Plainly, Ms Manickum, through her conduct, intended to discharge her indebtedness to FNB and ABSA on her various accounts. Payments made into those accounts accordingly extinguished her debts to ABSA and FNB respectively. Neither bank was, in respect of those sums, enriched at all. The claims which were previously held against Ms Manickum for the payment of her overdraft facilities had been discharged. The only person who had been enriched in consequence of the fraud perpetrated was Ms Manickum herself, and it therefore follows that the claim in respect of those sums is a claim which Lombard Insurance stands to pursue against Ms Manickum.

This judgment finally lays to rest a number of misconceptions previously inferred from earlier judgments, which were incorrectly interpreted as amounting to a development in our law in terms of which a bank, which has credited a thief's account with the proceeds of stolen money, might be liable to the owner of the money. The clarification now furnished is most welcome.

Jonathan Witts-Hewinson

NO EXECUTION WITHOUT COURT INTERVENTION

No constitutional right is absolute in terms of Section 36 of the Constitution. In practice, a court can make an order limiting the provisions of Section 26 of the Constitution, which deals with the right to housing, by issuing a warrant of execution against immovable property.

In terms of the rules of court, a judgment debt must first be executed against movable property before any attempt is made to execute against immovable property. Should the amount recovered from the sale of movables not be enough to settle the debt, the plaintiff can approach the registrar of the High Court or the clerk of the Magistrates Court for a writ of execution against the immovable property of the debtor.

A number of court decisions have prompted a review of the impact of issuing a warrant of execution against immovable property and the right to housing enshrined in s26(1) of the Constitution. These decisions were revisited in the matter of *Mkhize v Umvoti Municipality and Others 2012 (6) BCLR 635 (SCA)*.

In this case, the circumstances were that the appellant had built a house on an undeveloped property, which he had bought. He never lived in this house or on the property - he owned other properties and lived on those. He fell into arrears with the rates and other charges owed to the municipality and judgment by default was taken against him in a Magistrate's Court.

The appellant's movable property was not enough to satisfy the judgment, so the sheriff rendered a *nulla bona* return. A warrant of execution under s66(1)(a) of the Magistrates Court Act was issued against the immovable property. The property was attached and sold in execution.

The appellant brought an action in the High Court seeking an order declaring that the sale in execution of his property was invalid. He argued that the *Jafta v Schoeman 2005(2) SA 140 (CC)* case required that in all cases relating to the execution against immovable property, judicial oversight was required. As there had been no such judicial oversight in his case, he argued that the sale in execution should be set aside.

The High Court rejected his argument. It held that the Constitutional Court order in the *Jafta case* should be construed as applying only when the immovable property in respect of which execution is sought is the debtor's home, that is, the primary residence.

In considering the High Court's approach, the SCA found that judicial oversight was required in all cases of execution against immovable property conducted under s66(1)(a) of the Magistrates Court Act. The sole object of such was to establish whether the constitutional right to adequate housing was breached by the order granted, and it was required also in the absence of formal opposition and where the debtor is in default or ignorant of his rights.

It found, however, that the appellant's right to adequate housing had not been compromised. The immovable property concerned was not the appellant's home, nor was it suggested that he did not have access to adequate housing and invalidity of the sale did not follow.

In the light of the recent increase in the jurisdictional amount of the Magistrates Court, it would be wise to consider the practical effects of s66(1)(a) of the Magistrate's Court Act as interpreted in the *Mkhize* decision, particularly when executing on the immovable property of the debtor.

In the Magistrates Court, the court will be required to establish whether a debtor's right to adequate housing has been compromised in all cases where execution against immovable property is sought, even if the debtor does not oppose the proceedings.

Byron O'Connor and Yasmeen Safedien

THE IMPORTANCE OF A BUSINESS RESCUE PLAN AT THE TIME OF INSTITUTING A BUSINESS RESCUE APPLICATION

Section 128(1)(b) of the Companies Act, No 71 of 2008 (Act) defines 'business rescue' as proceedings to facilitate the rehabilitation of a company by:

- providing for temporary supervision of the company, and the management of its affairs, business and its property;
- the temporary moratorium on the rights of claimants against the company or in respect of the property in its possession: and
- the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis; or
- if it is not possible for the company to so continue in existence, a plan that would result in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

It is clear from the definition of business rescue that, if a company cannot be rescued, a plan must be formulated that would achieve a better return (dividend) for the company's creditors than a dividend that would have been achieved if the company had immediately been liquidated.

This is termed the alternative object of business rescue.

The prerequisites for a business rescue order are that the company is financially distressed: it has failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract with respect to employment related matters; or it is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect for rescuing the company.

The court in the *AG Petzetakis International Holdings LTD v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening) 2012 (5) SA 515 (GSJ)* had to decide whether, on the contents of the founding affidavit before it, a business rescue order could be granted.

The court held that the requirement of a reasonable prospect of rescuing the company must be present, irrespective of whether the company is financially distressed, irrespective of whether the company has failed to pay over any amount as alluded to above, and irrespective of whether it is just and equitable for financial reasons to place the company in business rescue.

The court held also that the likelihood of achieving a better return for the company's creditors must appear on the founding papers.

Importantly, the case demonstrates that the court accepts that the business rescue application predates the actual business rescue plan.

However, the court contends that the future business rescue plan is a factor to be taken into account when it considers the business rescue application. If the court is given an achievable draft business rescue plan with substantial support at the time of the court application, the prospects of it granting the application will be improved.

It is also important to be aware that the absence of a final business rescue plan at the time of the hearing of the application will not necessarily be fatal to the application.

Petzetakis has now brought certainty to an issue that attorneys and business rescue practitioners have been debating since the Act came into effect: whether or not a business rescue plan must be in existence at the time of instituting business rescue proceedings.

The two most important issues to be remembered from the *Petzetakis* case when drafting business rescue applications are that the founding affidavit must:

- demonstrate a reasonable prospect of rescuing the company; and
- highlight a draft business rescue plan which is achievable and substantially supported. The draft plan can always be modified by the creditors later.

Julian Jones and Tshepisho Mokgorwane

A GOOD DAY FOR FREEDOM OF EXPRESSION

The famous American jurist, Benjamin Cardoso once remarked that "freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom".

Cliffe Dekker Hofmeyr recently represented Print Media SA and the South African National Editors Forum in the Constitutional Court in a challenge to certain provisions of the Films and Publications Act No, 65 of 1996 (Act) introduced by the Films and Publications Amendment Act, No 3 of 2009. The application was opposed both by the Minister of Home Affairs and the Films and Publications Board (FPB).

The contested provisions sought to introduce a system of pre-publication classification for various forms of publications. The system dictated that whenever a publication fell within the requirements of s16(2) of the Act, such as a publication that contained sexual conduct which violated or showed disrespect for human dignity, it had to be submitted to the FPB for classification before it could lawfully be distributed in South Africa. This meant that any magazine, which wanted to include an article containing sexual conduct, even if that article was reporting on it in an objective and fair manner, would have to be submitted to the FPB for classification before it was published.

The applicant argued that not only was this pre-publication classification entirely unwarranted and unjustified, but it would also have severe and highly negative consequences for the publications concerned as well as the public. In addition, various provisions of the amended Act granted an exemption to newspapers that are subject to a self-regulatory mechanism, but failed to grant magazines the same exemption.

The Constitutional Court held in its majority judgment that the requirement of pre-publication classification limited the right to freedom of expression, which was vital to a democracy.

The Court held that the limitation was not justifiable as pre-publication classification did not satisfactorily achieve its purposes in a proportional manner and that there were less restrictive alternatives for achieving the Act's purpose of controlling certain publications. For example, prior restraint through the courts (in the form of an interdict) could achieve the same purpose and place less severe restriction on the right to freedom of expression. The Court also held that the unequal treatment of magazines compared to newspapers offended the right to equality and the legality principle without justification.

The judgment affirmed the right to freedom of expression, declared unconstitutional the offending portions of the Act and afforded magazines the same protection as newspapers.

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