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DISPUTE RESOLUTION MATTERS

STATE OF MIND – AN IMPORTANT CONSIDERATION FOR THE DOCTRINE OF FICTIONAL FULFILMENT

While there is no doubt that the doctrine of fictional fulfilment requires an act or omission that prevents the fulfilment of a suspensive condition in a contract, such act or omission in itself is not enough. The doctrine also requires a deliberate intention on the part of the party preventing the fulfilment of the condition to escape the consequences of the contract.

Suspensive conditions are commonplace in agreements. Where such a condition in an agreement is not fulfilled, the agreement lapses and is of no force or effect. Occasionally the fulfilment of the suspensive condition is within the control of one of the parties. In this instance, an opportunity is created for the party to fulfil it, allowing the party to avoid the contract and any consequences that may result.

Our law provides an equitable remedy for an innocent party where the other party deliberately prevents the fulfilment of a suspensive condition in a contract, namely the doctrine of fictional fulfilment. In *Scott and another v Poupard and another 1971 (2) SA 373 (A) at 378H*, the Appeal Court referred to the principle underlying the doctrine of fictional fulfilment as follows:

"Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him."

Recently, the Supreme Court of Appeal (SCA) had to consider a matter concerning a party's state of mind for the doctrine to be invoked successfully against that party. The facts of *Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (5) SA 246 (SCA)* can be briefly summarised as follows.

The appellant, Lekup owned immovable property in Sandhurst that it sold to Wright in April 2004. The sale agreement was subject to sub-division being formally approved and registered by 31 October 2004. It was also agreed that in the event of sub-division not being registered by that date the agreement would lapse. The date was subsequently extended.

Lekup accepted that it had a tacit contractual duty to take all reasonable steps to ensure that the property was sub-divided and the sub-division registered. Lekup's town planner prepared an application for the sub-division but did not file the application for enrolment due to certain uncertainties and challenges by the City of Johannesburg regarding the procedure to be followed in applying for the sub-division. When the sub-division was still not approved by the agreed date, Lekup applied to court to declare that the agreement lapsed.

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Wright opposed the application in light of the circumstances. He claimed that Lekup had deliberately and intentionally failed to procure the required sub-division of the property and based on the doctrine of fictional fulfilment, the suspensive condition in the agreement must be deemed to have been fulfilled.

The SCA considered case law on the subject and confirmed that in certain cases a contracting party should be held to a bargain where it has deliberately not performed an obligation for the purpose of avoiding the contract. A condition would be considered fulfilled against a person bound by an obligation and who has prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part. The SCA held that *dolus* in this context did not carry its usual meaning of deliberate wrongdoing or fraudulent intent but a more specific meaning of the deliberate intention of preventing the fulfilment of the condition to escape the obligation. The doctrine focuses on intention rather than motive and negligence would not suffice.

The onus was on Wright to show that it was Lekup's intention, by not taking steps to secure sub-division of the property, to escape its obligations under the contract. Whether Lekup acted reasonably was irrelevant except where it might indicate its intention. As Wright failed to show that the action or inaction of the town planner, acting on Lekup's behalf, was prompted by a desire to escape the obligations it had under the agreement, the relief based on the doctrine of fictional fulfilment was refused.

This judgment demonstrates the difficulties involved in relying on the doctrine of fictional fulfilment where a party's intention will, in most cases, have to be deduced from the surrounding circumstances. Holding a party to a bargain may prove to be easier said than done.

Anja Hofmeyr

TAKEOVERS OF COMPANIES IN LIQUIDATION

Section 114 of the Companies Act, No 71 of 2008, 2008 (Act) has thrown a spanner in the works concerning schemes of arrangement in relation to companies in liquidation. There may be various commercial reasons as to why someone would want to take over a company that is in liquidation, an important one being the benefit (for tax purposes) of the assessed losses in the company. The acquiring party might also be of the view that if it takes control of the company, it may be able to resuscitate it or integrate it beneficially into their structure.

In instances where the acquirer could rustle up support for the takeover by a 75% majority of shareholders, a scheme of arrangement was open to any company under s311 of the previous Act. Section 311 provided for a scheme with both shareholders and creditors. A 'white knight' could approach the company in liquidation and purchase the claims of all the creditors as well as the entire shareholding, thus gaining complete control of the company. It was naturally a condition of the scheme that the company is taken out of liquidation on the acceptance of the scheme.

Section 155 (read with s114 of the Act) has fundamentally changed the position under the old Act and has left some practitioners and liquidators scratching their heads about how to achieve the same object.

Section 155 of the Act provides that "The board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors" (emphasis added). It is apparent that this provision only pertains to compromising the rights of creditors and not shareholders. As the aim of the acquirer is to obtain voting control over the company, he needs to acquire the shares and therefore a compromise only in terms of s155 with creditors won't assist.

Section 114, similarly to the old s311, deals with any arrangement between the company and its shareholders. However, it provides that "[u]nless it is in liquidation or in the course of business rescue proceedings in terms of Chapter 6, the board of a company

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may propose and, subject to subSection (4) and approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities" (emphasis added). It is clear that the scheme as envisaged in s114 is not available to companies in liquidation.

It seems as if a very useful tool to liquidators and others in the context of takeovers of liquidated companies has been lost and the legislature's intention behind this is not entirely clear, although it would seem to be aimed at encouraging the use of business rescue as an alternative.

The only alternative available to the company (in liquidation) would be to discharge the (provisional) liquidation order and then use a s114 scheme of arrangement. However, such a discharge may bring about major tactical disadvantages for any acquirer.

"The future ain't what it used to be" where takeovers of companies in liquidation are concerned, and it will be very interesting to observe how advisors surmount the obstacles brought about by the proviso in s114.

Julian Jones and Yaniv Kleitman

A TALE AS OLD AS TIME - RENT IS NOT PAYABLE IN SOMETHING OTHER THAN MONEY OR FRUITS

Amidst the quick advancement of the types of contractual arrangements entered into between parties, the contract of lease and the concept of rent appear to be lagging decades behind.

A contract of lease of immovable property is defined as "a reciprocal agreement between one party (the lessor) and another party (the lessee), whereby the lessor agrees to give the lessee the temporary use and enjoyment of property in return for the payment of rent" (W E Cooper Landlord and Tenant, 2nd edition 1994).

For an agreement of lease to come into effect, the following essential elements must be agreed on:

- the lessor is to give, and the lessee has the right to receive, the temporary use and enjoyment of property;
- the property to be let; and
- the rent in exchange for the use and enjoyment of the property.

The definition of the word 'rent' is important as an essential element of an agreement of lease. Rent is the consideration that the parties agree the lessee shall give the lessor for the use and enjoyment of the property. While agreement on the rent is a requirement for all contracts of lease, the fact that the word 'rent' is used in a contract does not necessarily render the agreement a contract of lease.

Although in a great majority of cases, the rent is paid in money, in certain circumstances parties may reach an agreement that the consideration payable for the right to receive the temporary use and enjoyment of a property is in something other than money or fruits of a property. The question then arises whether the agreement entered into between the parties constitutes an agreement of lease.

The traditional approaches by our courts have been that rent must be in money or a certain quantity of the fruits of a property as seen in *Partrdige v Adams 1904 TS 472 at 476; De Jager v Sisana 130 AD 71* and *Crous v Crous 1937 CPD 250.* This rule has its origin in Roman law. Roman-Dutch writers adopted the principle that rent had to be in money, and in circumstances of rural leases, allowed payment to be a portion of the fruits of the land let.

There is a plethora of case law limiting the definition of rent to the exchange of money or payment of fruits.

W E Cooper, a leading author on lease agreements, considers that the three main objections to allowing rent to be something other than money appear to be:

- that it may not be possible to ascertain the identity of the lessor and the lessee;
- that it may not be possible to fix consideration with certainty; or
- that it may not be possible to apply the rule regarding remission of rent.

These three objections are considered below in relation to fungibles; non-fungibles; services; and use and enjoyment.

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Fungibles

Fungible goods are those that can readily be estimated and replaced with identical things of the same, weight or amount. It is accepted that rent may be at a certain price, or a definite weight, or a measure of the fruits or a proportion of the produce of the land let.

Non-fungibles

Non- fungibles are goods that have an original value and cannot be replaced exactly. The objection to allowing rent to be a non-fungible is that it may not be possible to apply the usual rules regarding remission of rent where there is the impossibility of performance. In the case of *Partridge v Adams,* Solomon J said "The consideration for the cession of the lease given by Dennant (the sub-tenant), was an iron building, which cannot be treated as payment of rent, inasmuch as rent must consist either of money or of a certain quantity of the fruits of the property. The ordinary doctrine of remission of rent would appear therefore, to have no application to a case such as this".

Services

The objection to accepting rent in the form of services is that it may be difficult to ascertain which party is the lessor and which party is the lessee. In the cases of *De Jager v Sisana, Crous v Crous; Black v Scheepers 1972 (1) SA 268 (E)* and *Rosen v Rand Townships Registrar 1939 WLD 5,* it was accepted that rent cannot be paid in services.

The brief facts of the matter in *Black v Scheepers* are as follows: Scheepers, the owner of a house, entered into an agreement with Black where Black was permitted to occupy the house. Black was not required to pay rent but undertook to pay the water and electricity and to supply Scheepers and his wife with daily meals and tea at night. The parties had not agreed on the termination of their agreement. After several months of this continued relationship, Scheepers gave notice to Black terminating the agreement. The courts found that the agreement was not a lease and that rent must consist of money or produce, not services. The court specifically held that the definition of rent is well established and accepted and that the obligation to supply meals was therefore not considered to be rent.

Exchange and use

Cooper deals with the objection to recognise an arrangement of exchange and consider it an agreement of lease. The scenario presented by Cooper is as follows:

> A contract is entered into between A and B where A allows B to occupy his home for one year and in return B permits A to occupy and use his farm for a year. In this situation and in relation to A's home, A is the lessor and B is the lessee. In relation to B's farm, B is the lessor and A is the lessee. In such a contract each party would both be lessor and lessee, and such a situation 'is incompatible with a lease'. Cooper advises that an exchange should not be regarded as a lease, but rather as one embracing reciprocal usufructs.

In the matter of *Jordaan NO and Another v Verwey 2012 (1) SA 643 (E),* the 'alleged lessee' was given the right to utilise five orchards on the property and the 'alleged lessee' was obliged to install and commission a microjetting system on the leased premises. No money exchanged hands.

When the 'alleged lessee' failed to fulfil this obligation, the 'alleged lessor' issued summons compelling the 'alleged lessee' to install the microjetting system and included in this summons a claim for an automatic rent interdict.

This matter relied on whether the common law rule that rent cannot consist of anything other than money or a certain quantity of the fruits of the property was still operative. The court found that the arrangement between the parties to 'lease' premises without the exchange of money did not constitute a lease. The court declined to change the position of the existing law that the definition of rent be limited to payment of money or fruit derived from a property.

Even though modern writers prefer a more liberal interpretation to the term rent, the courts adhere to the traditional rule that rent must be in money or produce of the land and with the *Jordaan* decision not yet being overturned; it remains the current authority on this issue.

While compelling arguments may be made that this age old principle should no longer be recognised and applied in our law, especially in view of the fact that contractual law is of a consensual nature, an equally compelling counter–argument may be made that this principle is fixed in our law, and that a party wishing to incorporate the incidents of a lease into an agreement of a non-lease are free to do so by agreement between themselves. A matter has yet to come to court in which a compelling reason is given to develop the definition of rent and alter the current law.

Lucinde Rhoodie and Nazeera Ramroop

INTERGOVERNMENTAL DEPARTMENT DISPUTES - POLITICAL SOLUTIONS OR COURT IMPOSED SANCTIONS

Section 41 of the Constitution of the Republic of South Africa (Constitution) placed a constitutional obligation on Parliament to provide ways of resolving disputes between government institutions by creating structures and introducing dispute resolution mechanisms encouraging inter-governmental departments in dispute to first make every effort to resolve disputes between themselves before approaching the courts for relief.

In 2005, the Intergovernmental Relations Framework Act, No 13 of 2005 (IRF Act) was promulgated and in 2007 the Guidelines were published for purposes of assisting organs of state in obtaining political solutions to problems, as opposed to litigating in court. The underlying rationale being that where a court based sanction is rule-based, politics deals with interests of government and a combination of diverse interests, the very purpose of co-operative government.

In *Uthukela District Municipality & Others v President of the Republic of South Africa 2002 (2) BCLR 1220 (CC),* the Constitutional Court (Court) indicated that compliance with the duty imposed by s41 of the Constitution is a serious consideration that should not be treated lightly. The view of the Court in relation to intergovernmental disputes was made clear, even prior to the promulgation of the IRF Act and the Guidelines.

The Uthukela case concerned the allocations of revenue to various classes of municipalities. Section 5(1) of the Division of Revenue Act, No of 2001 provided for the sharing of revenue for Categories A and B municipalities, and excluded the Category C municipalities. Three Category C municipalities successfully challenged the constitutionality of s5(1) in the High Court.

The matter was then referred to the Court for confirmation of the ruling. During the hearing the matter became settled between the parties without the settlement being made an order of court. The Court held that it should not exercise its discretion on the confirmation issue and held that a court "would rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level" (Ibid paragraph 14).

It is clear from the *Uthukela* case that even when a matter has been referred to the courts for dispute adjudication and subsequently settled at a political level, the courts will not exercise its discretion in deciding on any outstanding issue unless every reasonable effort is made by the organs of state to resolve the issue at a political level first. Political solutions in intergovernmental disputes are the pre-condition to possible court imposed sanctions even where such matter has been referred to the court for a decision.

It must be noted that, despite the strong emphasis in the IRF Act on a political solution, a disaffected party still has the right to approach the courts for relief if the parties were unable to settle the dispute amicably, after having made every reasonable effort to do so.

Tayob Kamdar

SARS UNPREFERRED

Recently we wrote an article on a pending case dealing with the status of SARS in business rescue. Judgment has now been delivered, and we report on this judgment below.

When SARS initially objected to the business rescue plan being put forward by the business rescue practitioners (BRPs), the primary objection that was made was that SARS were being treated on the same basis as all the other creditors for purposes of business rescue. It was SARS' position that they were entitled to be treated as a preferent creditor in business rescue – as would be the case in insolvency – and that a plan, to the extent it did not treat preferently, should be set aside.

In the application, SARS expressly acknowledged, with reference to the provisions of Chapter 6 of the Companies Act, No 71 of 2008, that they were not preferent creditors in business rescue. This was surprising considering their vehement defence of their status as preferent creditors during meetings and prior to the launch of the application.

SARS still objected to the plan, but on different grounds. They argued that ordinary creditors should vote in terms of the value of their claims in insolvency. This would mean, for example, that where an ordinary creditor would be likely to obtain 10 cents in the Rand in insolvency, then the value of such creditor's vote (when voting for a plan) would be 10% of its claim. SARS and secured creditors could vote on the full amount of their claims, and therefore rank ahead of ordinary creditors for voting purposes when plans are considered.

In addition to this, SARS also argued that there had been a failure of the BRPs to comply with the statutory requirements for the presentation of Business Rescue Plans.

The third and final leg of their argument was that once it should have been perceived that there was no longer a "trade-out" situation, the BRPs should have converted the business rescue to a liquidation as there was no apparent benefit to affected parties between business rescue, on the one hand, and liquidation on the other.

The Judge dismissed all of SARS' arguments.

He found that SARS' interpretation of the provisions of the Act was contrary to the ordinary grammatical meaning of the words used in the Act, as well as the intention of the legislature. If SARS' interpretation was to be followed, an illogical result would arise in that there would be an imbalance in the rights and interests of all relevant stakeholders. More pertinently, creditors having claims amounting to in this case 86% of the value of all claims would have been disenfranchised from voting in respect of the proposed plan – a completely unacceptable outcome.

The Judge also confirmed that the statutory provisions dealing with preference in insolvency were not applicable in business rescue. The value of SARS' vote was therefore the same as all other creditors.

Finally, absolute and strict compliance with the requirements of the Act as regards what a plan should contain is not required. The legislature has prescribed the content of a proposed plan in general terms, and the content of plans may differ from case to case. It was up to the affected parties themselves to consider whether a plan as presented substantially complied with the requirements of the Act.

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The application by SARS was therefore dismissed with costs.

The judgment has important consequences.

Most importantly, as SARS themselves conceded, it is not a preferent creditor in terms of business rescue as it would be in insolvency. SARS does not have any preference as regards its vote as it would have in insolvency. The judgment makes plain that creditors are ranked differently in business rescue and insolvency. The only preferences in business rescue are for post-commencement finance, and for the protection of employees' rights. The concept of preference for concurrent creditors does not exist in business rescue.

SARS may still appeal the matter – they have 15 days from judgment to do so and we will advise if an appeal is lodged and report on the outcome of this appeal.

In the meantime, and if SARS do not appeal, they will have to accept that they have no preference in business rescue, to the extent they have been treated on this basis in past plans, any benefit they obtained under such plans ought to be refunded to the BRPs and re-distributed to the other affected parties.

This may change SARS' 'attitude' to BRP's. They may oppose business rescue simply to preserve their preference in insolvency. This would be regrettable as business rescue is a desired outcome in South Africa. SARS is often a substantial creditor and may be able to use its influence as a substantial creditor – especially bearing in mind the voting threshold of 75% of voting value to approve plans – as a basis to secure an appropriate deal for itself.

It is also clear, from the practical experience in the case, that SARS needs to reconsider its policies as regards compromises in the context of business rescue, and this may also assist in achieving business rescue without a detrimental outcome to SARS.

The fact that SARS does not enjoy in business rescue the – with respect antiquated – preference it enjoys in insolvency, is another reason why business rescue, if achievable, provides a better outcome to all parties. This is also the case for SARS as, especially in trade and work-out situations, where the business remains a trading entity and going concern, and therefore continues to pay tax. Even if the business is not able to trade out of its distress, the fact that the general body of affected parties enjoy a better outcome in business rescue, to the sole detriment of SARS preference in insolvency, provides no basis for SARS – for selfish reasons – to attempt to block the implementation of the plan.

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