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DISPUTE RESOLUTION MATTERS

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Causation: an interesting extension

In the law of delict, it is required that there should be a causal connection between the wrongful act (or omission) and the consequences that gave rise to the damages suffered by the person claiming damages.

Where third party compensation claims are concerned, under the Road Accident Fund Act, No 56 of 1996, a person can recover compensation if damages were caused by, or arose from the driving of a motor vehicle. This requirement confirms and defines the causation element in the context of third party claims. Ordinarily, this would involve collisions between more than one motor vehicle, or a single motor vehicle accident.

An unusual set of facts arose in the case of *Laas vs Road Accident Fund 2012 (1) SA 610 (GNP)*. The plaintiff was a cash in transit security officer who claimed for damages against the Road Accident Fund.

The plaintiff was employed as the driver of an armoured security vehicle. While delivering pension money to a post office, the plaintiff's stationary armoured vehicle was boxed in by two other vehicles and the plaintiff was approached by a number of armed men. The robbers fired shots at the vehicle in an attempt to gain access to it. The plaintiff managed to use his armoured vehicle to push the other vehicles out of the way and took off at high speed in the direction of the nearest police station, hotly pursued by armed men in one of the robbers' vehicles. In the process of driving away, the plaintiff traversed several speed bumps at high speed, causing injuries to his cervical spine.

The court had to decide whether the plaintiff's injuries were caused by or arose from the driving of the vehicle driven by the robbers and if so, whether the plaintiff was entitled to claim compensation for the injuries he sustained. In considering the facts, the court accepted that the plaintiff's injuries were caused by the manner in which he drove the armoured vehicle but that he was driving at high speed, recklessly and faster purely as an attempt to evade the pursuing vehicle. The court decided that, had the pursuing vehicle not been driven with the aim of enabling the occupants to shoot at the armoured vehicle, the plaintiff would not have sustained injuries.

The court found that the causal relationship between the driving of the pursuing vehicle, enabling the occupants to shoot at the vehicle driven by the plaintiff, and the injuries sustained by the plaintiff was "so real and close" that it was caused by, or arose from the driving of the pursuing vehicle.

There has always been a distinction between factual and legal causation.

Factual causation determines whether, but for a wrongful act or omission, a certain result would have occurred. The consequences of an act can theoretically stretch into infinity and it is therefore

continued

necessary to draw a line at the point up to which a person will be held liable for the consequences of an act.

The concept of legal causation refers to the consequences of an act for which a person should be held legally responsible. Legal causation entails such consequences that should be reasonably foreseeable to the person committing the wrongful act. It is not a requirement that the particular harm that resulted from the act should have been foreseeable to the wrongdoer, but it would suffice if harm of the kind that resulted from the wrongful act was or should have been foreseeable to the wrongdoer.

At first glance, the judgment appears to unduly extend the requirement of causation. While it can certainly be argued that the robbers did not and could not foresee that the plaintiff might have injured his cervical spine in the way he did, it should certainly have been foreseeable to them that their pursuit of the vehicle could result in an accident and that the plaintiff could have sustained injuries or that he could even have been killed.

The judge's findings therefore do not violate the way in which the causation requirement has always been applied in our law.

Roy Barendse

Arbitration: design your process

In the case of *Bidoli v Bidoli [2011] JOL 27352 (SCA)*, the Supreme Court of Appeal (SCA) concluded that an arbitrator's powers stem, not from statute or common law, but from the arbitration agreement itself. The defining feature of arbitration, as stated by Ponnan JA in the *Bidoli* case with reference to the judgment in *Total Support Management (Pty) Ltd v Diversfied Health Systems (SA) (Pty) Ltd 2002 (4) SA 661 (SCA)* is:

"...that it is an adjudication flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of a further agreement"

The *Bidoli* case is noteworthy because it emphasises the importance of having a comprehensive arbitration agreement when referring a dispute to arbitration. The parties in this case concluded a settlement agreement as an aside to the arbitration proceedings which were running concurrently. The SCA was asked whether or not the arbitrator had the power to make an arbitration award based on the settlement agreement. The context of that question is the principle that an arbitrator, and the entire arbitration itself, is redundant if no dispute currently exists between the parties.

The SCA held that the arbitrator did in fact have the necessary power and authority to make the settlement agreement an arbitration award, despite the fact that the parties had already settled the dispute themselves, by virtue of the arbitrator having been specifically mandated by the parties to do so in the arbitration agreement. It follows that the award, and thus the settlement agreement, could then be made an order of court in terms of section 31 of the Arbitration Act No 42 of 1965.

The point to take from this is that one should take care when considering what one wishes to achieve through arbitration and to then ensure that all of the steps required to achieve this outcome are carefully and meticulously included in the arbitration agreement.

The benefit of arbitration is that it can be tailored to fit the specific needs of the parties to the dispute, affording them the opportunity to pre-empt, and thus attempt to circumvent, any difficulties which may arise during the course of and following the arbitration. This benefit can only be enjoyed, however, if time is taken at the outset of the proceedings to plan ahead effectively.

Tim Fletcher and Matthew Ward

To control or not? The disposal of a "controlling interest" by a shareholder of a mining company

Section 11(1) of the Mineral and Petroleum Resources Development Act No 28 of 2002 (Act) provides that a "controlling interest" in a company or close corporation may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister of Mineral Resources, except in the case of a controlling interest in listed companies.

As the Act does not define "controlling interest", the South Gauteng High Court has in the recent case of *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others 2011 (6) SA 96 (GSJ)*, had the opportunity to interpret what the legislature meant by the disposal of a "controlling interest" in section 11(1) of the Act.

In this case, a written agreement was concluded between Mogale, Nuco and the late Edward Butler whereby Butler sold 33% of his shares (52%) in Nuco to Mogale. As a result of Butler's failure to transfer the 33% shares, Mogale then sought an order for specific performance of the agreement pertaining to the delivery of the shares purchased from Butler. One of Mogale's arguments was that the minster's consent as contemplated in section 11(1) was not required, as there was no transfer of a "controlling interest" from Butler to Mogale.

Mogale argued that the phrase "controlling interest" meant something other than a shareholding of more than 50%. Mogale stated that section 11(1) of the Act could imply a different permutation, depending on the circumstances, and the mere fact that Butler held 52% of the shares did not mean that he had a "controlling interest" in Nuco.

In support of its argument, Mogale contended that since Butler was not entitled to a majority of the votes and did not have the ability to appoint a majority of directors, he was not in control of Nuco. In response, Nuco and the executors of Butler submitted that clause 13 of the written agreement that dealt with the voting provisions had the effect of vesting control over Nuco in Mogale.

It was further argued that section 11(1) of the Act was not directed at the acquirer of the interest (Mogale), and if that was so, the section would have said so expressly and rather that the section focuses on the disposer of the interest (Butler). As to the meaning of "controlling interest", Nuco and the executors argued that the term "controlling interest" refers to a majority shareholding in a company that owns a prospecting or mining right. They stated that at the date of the agreement, Butler owned 52% of the shares and by selling 33% to Mogale, Butler was no longer in control of Nuco and since the sale was going to have the effect of removing the controlling interest from Butler, the minister's written consent was required.

In deciding the case, the court stated that when issues call for an interpretation of a section of an act, it is trite that when interpreting words in a statute they must be interpreted within their context. The "context" refers not only to the language of the remainder of the statute but also to the scope, purpose and background of the statute.

The court stated that the fact that the shareholder, by virtue of his majority shareholding (more than 50%), was entitled to more than half of the company's assets or profits denoted the "control" envisaged there. As to "interest" and what constitutes a "controlling interest", the court held that one cannot be confined to a single characteristic or criteria. It could therefore mean that 50% of the issued share capital of the company or more than half of the voting rights in respect of the issued shares of the company could constitute a "controlling interest" and as a majority shareholder, the minister's consent would be required.

The judgment demonstrates that "controlling interest" and its disposal in a mining company is not limited to the powers of a shareholder. Even if a shareholder is not in control of half the voting rights in respect of the issued shares or the power to either directly or indirectly appoint or remove the majority of directors, this does not imply that such a shareholder does not have a "controlling interest". The list is not exhaustive and the right of a shareholder to more than half of the company's profit or assets constitutes a "controlling interest".

Butler was the holder of 52% of the shares of Nuco, which would constitute a "controlling interest" as held by the court.

Rishaban Moodley

Mandatory mediation as integrated into the process of dispute resolution in South Africa

In September 2011, the Department of Justice and Constitutional Development released draft Mediation Rules for comment, to be applied in the anticipated mandatory mediation pilot projects that the department seeks to implement in selected courts later this year.

The draft mediation rules anticipate that parties will, after appearance to defend has been entered, be directed to a dispute resolution administrator for compulsory mediation prior to the matter developing further in the litigious process.

It is therefore necessary to consider the suitability of this conciliatory form of dispute resolution to our country's adversarial legal system.

Mandatory mediation: a problematic model for South Africa

The benefits that participants of alternative dispute resolution (ADR) seek to achieve include, among others, a more expedient solution to a dispute; preservation of the relationship between the opposing parties; finding an "everybody-wins" solution to a dispute; and fewer cost implications for the parties who resolve a dispute using this method.

The potential benefits of voluntary mediation for certain types of disputes, for instance those which characterise family law, are obvious.

However, the South African proposal for the implementation of mandatory mediation into the litigious process involves a blanket-inclusion of mediation as a preliminary step to all civil matters in the designated pilot-project courts where appearance to defend has been entered. This blanket-inclusion appears to have disregarded the fact that not all disputes are suited to ADR. In some cases, rather than being a helpful step to finding an amicable solution between the parties, the legislature may be forcing the parties to expend resources on a futile process, the outcome of which is inevitably destined to result in a trial.

The mandatory use of mediation in all civil disputes may therefore prejudice a litigant with limited resources from achieving a desired legal outcome at the lowest possible cost, in a matter where the opposing party is simply not willing to compromise. It may also assist the recalcitrant defendant in frustrating the plaintiff in enforcing a judgment, especially, for example, in debt collection procedures. Furthermore, although the South African model of mediation has been implemented under the auspices of lessening the burden on the judicial system, obliging parties to undergo a further process prior to litigious resolution may not necessarily expedite the process of dispute resolution. Matters where mediation is destined to fail will take longer to be resolved, leaving parties tangled in an even more undesirably prolonged and costly dispute resolution process.

Furthermore, obligatory use of mediation by all litigants is paradoxical to the underlying goal of its use - self-determination. Imposing mediation on a party as a formal and involuntary process may undermine the very purpose of mediation itself, and diminish the rights of parties to resolve a dispute as they deem appropriate. Forced collaboration could therefore breed even more hostility between opposing parties. In most instances, litigation would have materialised as a result of one or both parties rejecting mediation *in casu* in the first instance. The proposed mediation procedures will also diminish the impact of the High Court Rule 37 pre-trial conference procedures, which in any event aids parties to narrow the scope of a dispute.

It may be argued that the integration of mediation in South African judicial proceedings requires much more comprehensive statutory regulation. For instance, provision should be made for specific circumstances when mediation should either be unnecessary or may be dispensed with.

The global trend is towards quicker, simpler methods of conflict resolution. The minister's proposed integration of mediation into court-dispute resolution procedures is a step in the right direction. However, it is suggested that the proposed rules provide for the implementation of voluntary mediation procedures in most civil disputes, rather than over-arching mediation's reach as an ADR mechanism over all civil disputes. Care should be taken not to force unnecessary procedural burdens onto litigants. In this vein, it is important for government to acknowledge that ADR, in particular mediation, is not appropriate in all circumstances.

Sam Oosthuizen and Philene Blom

The National Credit Act v the Insolvency Act: a need for reconciliation in a consumer friendly society

The National Credit Act, No 35 of 2005 (NCA) was enacted to promote a fair, transparent, responsible and accessible credit market, and to protect consumers. These goals are to be attained by, among others, encouraging consumers to fulfil the financial obligations for which they are responsible. The NCA makes provision for various mechanisms to give effect to its purposes, with the most noteworthy and contemporary of these being the process of debt review.

In stark contrast to the NCA is the Insolvency Act, No 24 of 1936 (Insolvency Act), with one of its main functions being the beneficial distribution of an insolvent's estate to various creditors. When sequestration proceedings are instituted, an insolvent is to an extent allowed to circumvent and avoid the fulfilment of his financial obligations.

In light of the differences in the purposes for which the Acts were promulgated, it stands to reason that the compulsory sequestration of a consumer in terms of the Insolvency Act, before he or she has had recourse to mechanisms such as debt review that are focused on satisfaction of the consumer's financial obligations, may conflict with some of the provisions of the NCA. However, there is no substantive mention of the Insolvency Act or its provisions in the NCA.

Section 129, read together with section 130(3) of the NCA, provides that a credit provider may not commence "any legal proceedings to enforce [a credit] agreement" before giving the consumer notice in writing and informing the consumer of his or her right to refer the matter to a debt counsellor. The question therefore arises if sequestration proceedings instituted under the Insolvency Act by a credit grantor qualifies as a "legal proceeding to enforce an agreement" under section 129.

This matter was dealt with extensively in *Naidoo v ABSA Bank 2010 4 SA 597 (SCA)*, an appeal to the Supreme Court of Appeal (SCA) by the appellant who was sequestrated at the respondent's instance in the Durban High Court on 25 May 2009. The appellant had failed to meet his payments to the respondent under instalment sale agreements to which the NCA applied and the appellant contended that the procedures set out in the NCA should have been followed before ABSA launched the sequestration proceedings.

In support of its case, the appellant implicitly conceded that sequestration proceedings are not "legal proceedings to enforce the agreement" within the plain legal meaning of section 129(1)(b) of the NCA and instead purported to have a wider interpretation attributed to the relevant sections. The appellant relied on the strength of the phrase "in any proceedings commenced in a court in respect of a credit agreement to which this Act applies" in section 130(3) of the NCA to argue that the relevant sections should be interpreted to cover all proceedings of which the underlying cause of action is a credit agreement to which the NCA applies, including sequestration proceedings.

The SCA made it clear from the outset that it agreed with the concession of the appellant that sequestration proceedings are not in and of themselves "legal proceedings to enforce the agreement" within the meaning of section 129(1). However, the interpretation of section 130(3) was at issue.

The court confirmed the case of *Investec Bank Ltd & another v Mutemeri & another 2010 (1) SA 265 (GSJ)* in which the High Court held that an application for sequestration is not a legal proceeding whereby the creditor "enforces" a debt and hence it does not amount to a legal proceeding to enforce an agreement under section 129 of the NCA.

Sections 129 and 130 are concerned with debt enforcement under Chapter 6 of the NCA and the court held that section 130(3) must be interpreted in the context of the chapter in which it is situated and not in isolation, as was argued by the appellant. On doing so, Cachalia JA confirmed the Mutemeri case and held that it was clear from the language that the proceedings referred to in sections 130(3) do not extend the ambit of section 129. Given that the appellant accepted that sequestration proceedings are not "legal proceedings to enforce the agreement" within the meaning of section 129(1), and as section 130(3) was held not to extend the ambit of section 129, the court concluded that the appellant's assertion that the respondent had to comply with section 129 was without merit. A credit grantor may now proceed immediately with sequestration proceedings without the necessity of having regard to the preliminary procedures provided for in the NCA. In essence, the issue of sequestration proceedings remains to be dealt with in terms of the all-encompassing provisions of the Insolvency Act.

The judgment has sparked debate and raised concerns as to how this precedent, that does not give the consumer the option to continue with debt review when he is sequestrated, will affect the efficiency of the NCA. As pointed out above, one of the methods of fulfilling the aims of the NCA is the principle of satisfaction by the consumer of all of his financial obligations and many academics have suggested that the decision in Naidoo is inconsistent with this goal and aim.

An over-indebted consumer may have the financial potential to overcome his debt if assisted by debt restructuring and other mechanisms, and may consequently use the processes of the NCA to avoid becoming insolvent and having the stigma arising out of this title attached to him. However, any potential that the consumer may have to fulfil his or her financial responsibility may be undermined by a credit provider who applies for sequestration directly. It appears as if a lacuna exists in this regard and that the rectification of the conflicting objects of two of the most influential Acts in our legal system may well be necessary in order to provide for the protection of consumers as envisaged in the NCA.

Tobie Jordaan and Inge Schneider

Provisions governing winding-up and liquidation of close corporations via 21 day demand

The new Companies Act, No 71 of 2008 (new Act) does not impact on the winding-up and liquidation of insolvent companies. Schedule 5 item 9(1) of the new Act states that the provisions of the old Companies Act, No 61 of 1973 (old Act) are to remain in force.

Before the new Act commenced, the process of winding-up a close corporation unable to pay its debts would have involved section 68(c) of the Close Corporations Act, No 69 of 1984 (Close Corporations Act), which provides that a close corporation could be wound up by the court if it was unable to pay its debts, read with section 69 that provides that a close corporation is deemed unable to pay its debts if its creditor demanded monies due and the money was not paid within the 21 days from the date of demand. Section 69 makes specific reference to section 68(c), and is impotent without it. Section 66(1) of the Close Corporations Act, read with section 346(1) of the old Act, is the mechanism through which the application is made to court calling for the winding-up of the corporation.

With the concession provided by Schedule 5 item 9 of the new Act allowing the continued application of section 346, one would be forgiven for assuming that the provisions regarding the winding-up of a corporation via the 21 day winding-up mechanism would remain unchanged. In fact, many practitioners might conduct themselves accordingly. Who could blame them?

On closer inspection, Schedule 3 of the new Act has repealed section 68 of the Close Corporations Act. For some inexplicable reason, section 69 of the Close Corporations Act, unamended, remains part of the current amended legislation - remember that section 69 cannot exist in its form without section 68(c).

If you were among those logical thinkers and happened to review the winding-up provisions of the Close Corporations Act, you would have had a heart-attack on the spot, thinking, "without section 68 how is one ever going to wind-up a close corporation?"

While reaching for your oxygen mask and raising the alarm bells, you happen to page back and see the new, "improved" section 66. You put down the life-saving equipment, you action the "recall email messages", because section 66(1) now stipulates that the winding-up provisions applicable under the new Act will find application *mutatis mutandis* to the winding-up of corporations. That is, as per Schedule 5 item 9 of the new Act, sections 344, 345 and 346 of the old Act are now applicable under the Close Corporations Act.

So, the process for winding-up a corporation via 21 day winding-up mechanism therefore remains intact and sections 344 and 345 of the old Act (the equivalent of sections 68 and 69 of the Close Corporations Act) can be relied on.

The question remains, what of section 69 of the Close Corporations Act? Its continued existence appears to be an omission by the legislators to remove it. However, as ineffective as it now appears without section 68, the result of it remaining, unamended, in the Close Corporation Act, remains to be seen. Its presence can only cause confusion and provides an excuse for a dilatory respondent in winding-up proceedings to cause mayhem. All this might have been avoided if someone realised that section 68, read with section 69 of the Close Corporations Act, could have co-existed with the new Act in its current form.

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