DLA CLIFFE DEKKER HOFMEYR

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DISPUTE RESOLUTION MATTERS

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But what about retrospectivity?

What is the effect of a judgment handed down by the Constitutional Court that has retrospective effect and there is no limit on its retrospectivity?

The Constitutional Court (Court) delivered a judgment last year that dealt with default judgments granted by the Registrar of the High Court in 2003, in terms of which a defendant's immovable property was declared executable. In short, the Court declared that it was unconstitutional for a Registrar of the High Court to declare immovable property executable when ordering default judgment to the extent that it permits the sale in execution of the home of a person. This order has retrospective effect.

Banks have been requesting and Registrars of the various divisions of the High Court have been granting default judgment in accordance with the Rules of the High Court for many years, in cases where there has been a valid service of the summons and the defendant has failed to defend the action. Subsequent to default judgment, the defendant's property was put up for sale in accordance with the Rules of the High Court and either the property was sold at an auction to an unsuspecting third party, or the bank purchased the property at the auction and later sold it to a third party.

The retrospective effect of this order can have potentially disastrous consequences for the innocent third party that purchased the house at the auction or from the bank.

This judgment has caused many defendants who lost their houses as a result of default judgments granted by the Registrar to seek redress many years after the event. The redress is to the effect that the default judgment and the subsequent sale in execution of the property can be set aside. The Court, in handing down this judgment, was fully aware of the potential for large scale legal uncertainty about its effect on past matters.

A measure of limiting the potential effect of this judgment came in the form of a second requirement that defendants, affected by the default judgment, have to satisfy. This requirement is that the defendants must have legal grounds to have the default judgment rescinded. In the words of the Court, "...in many cases those aggrieved may find these requirements difficult to fulfil".

The potential still exists, even with the requirement that the defendant must have the judgment rescinded, that the innocent third party may experience great discomfort many years after purchasing the repossessed house at an auction, on being notified that the house must be given back to the original owner.

Eugene Bester and Chanelle Bristol

Silk or polyester: What does the future hold for Senior Counsel?

Public perception, following the February decision of the *North Gauteng High Court in Mansingh v The President of the Republic of South Africa and Others 2012 (3) SA 192 (GNP)* seems to be that the status of Senior Counsel no longer exists. The award of Senior Counsel status is known informally as 'taking silk', a reference to the square yoked silk gowns worn by Senior Counsel (informally referred to as 'silks'). Taking silk is a recognition of leading status at the Bar that carries with it a corresponding obligation to lead.

The parties agreed that the interim Constitution prescribed the powers of the President of South Africa and removed any previous powers existing prior to 27 April 1994. The applicant argued that neither the interim nor the final Constitution affords the President the power to confer silk and specifically that section 84(2)(k) of the Constitution, which allows the President to confer honours does not include the power to confer that status on practising advocates. The applicant did not ask the Court to declare the status of Senior Counsel invalid but instead asked for a ruling on the powers of the President in terms of the Constitution.

Mr Justice Phatudi found that he was not required to consider the implication in the relief sought that all such awards by the President made since the advent of the Interim Constitution on 27 April 1994 would be invalid. He said that the only issue he was required to determine was "whether the President's responsibility of 'conferring honours' include the power to confer the status of senior council on practising advocates" (sic). In the result he agreed with the applicant and found that the President does not have the power in terms of the Constitution to confer silk.

As to the future, he referred to the ball being in the capable hands of the legislature and the legal profession and referred in particular to the December 2010 version of the draft Legal Practice Bill, which he believed would deal with the application, procedure and criteria for the conferring of senior status on legal practitioners. The latest version of that Bill allows existing silks to retain that status but makes no provision for the conferring of silk status in the future. As the judge specifically declined to deal with the effect of his ruling on awards of silk post 1994, it is incorrect to suggest that all awards of the status of Senior Counsel by the President since 1994 are ineffective and it is intended that existing silks will retain their status even after the promulgation of the Legal Practice Bill.

The case has been taken on appeal and while that appeal is pending and the Legal Practice Bill is being debated in Parliament, it is an open question whether our courts will become uniform polyester or whether the rustle of silk will still be heard.

Tim Fletcher and Kerry Plots

Grounds for judicial review in South African Law - the effect of section 6(2) of the Promotion of Administrative Justice Act, No 3 of 2000

Prior to the promulgation of the Constitution Act No 108 of 1996 (Constitution), judicial review took place on the common law grounds determined by the Supreme Court of Appeal by virtue of its inherent jurisdiction and through the use of the *ultra vires* doctrine. The common law grounds for judicial review were encapsulated in the catch-all phrase of the administrator's "failure to apply his mind to the matter". The foremost common law grounds of review are lawfulness, symptomatic unreasonableness and procedural fairness. The common law grounds for review are fairly similar to the grounds of review listed under the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA), except that the common law grounds are not as far-reaching or well-developed.

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Section 33(1) of the Constitution entitles everyone the right to administrative action that is lawful, reasonable and procedurally fair. PAJA was enacted to give effect to the Constitutional right to lawful, reasonable and procedurally fair administrative action.

Section 6 (2)(a)-(i) of PAJA sets out the grounds for the judicial review of administrative action. They are as follows:

- Administrative action taken by an administrator when he was not authorised to do so, acted under a delegation of power not authorised by an empowering provision or was biased or reasonably suspected of bias [Section 6 (2)(a)].
- When there is non-compliance with a mandatory and material procedure or condition that was prescribed by an empowering provision [Section 6 (2)(b)].
- Where administrative action taken that was procedurally unfair [Section 6 (2)(c)].
- Where the administrative action was materially influenced by an error of law [Section 6 (2)(d)].
- Where administrative action was taken for a reason not authorised by the empowering provision, taken for an ulterior purpose or motive, if it took into account irrelevant considerations or excluded relevant considerations, because of unauthorised or unwarranted dictates of another person or body or in bad faith or arbitrarily or capriciously [Section 6 (2)(e)].
- If the administrative action contravenes a law or is not authorised by the empowering provision concerned or is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision or the information before the administrator or the reasons given for it by the administrator [Section 6 (2)(f)].
- Where the administrator failed to take a decision [Section 6 (2)(g) read with section 6 (3)].
- Where the administrative action taken is so unreasonable that no reasonable person could have so exercised the power or performed the function [Section 6 (2)(h)].
- Where the administrative action is otherwise unconstitutional or unlawful [Section 6 (2)(i)].

In *Pharmaceutical Manufacturers Association of SA & Another*: in re *ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC)* at 33, the Court noted that "[t]he common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts".

From this, it can be inferred that PAJA has codified the common law grounds of review.

Tayob Kamdar

The implications of the new Companies Act on the residence of a company

The concept of 'residence' may be of fundamental importance for the purpose of determining which division of the High Court has jurisdiction over a company in respect of a particular matter. The 'residence' of a company is a thorny issue at best as, being a juristic person, it only acts through its officers wherever such officers may be physically present at any given time.

This concept was adjudicated on by Judge Binns-Ward in the Western Cape High Court case of *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf and Country Estate (Pty) Ltd 2011 JDR 1565 (WCC)* in the context of concurrent liquidation and business rescue proceedings in different jurisdictions. The question of a company's 'residence' is often settled by locating the company's registered address and determining its principal or main place of business, which often are within the same division or even located at the same address. It is, however, also common practice for companies to nominate a convenient address, such as the address

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of their auditors, as the registered address of the company. It is not uncommon for companies to have a registered office and another distinguishable 'principal place of business.'

Under the previous Companies Act, No 61 of 1973 (old Act), section 12(1) provided that in any matter under that Act in respect of a company, any division of the High Court within the area of the jurisdiction where the registered office of the company or the main place of business of the company is situated, had jurisdiction. The new Companies Act, No 71 of 2008 (new Act), that for the most part repealed the previous Companies Act, notably has no equivalent provision to the old section 12(1). When an Act is repealed by the legislature and it does not contain provisions demonstrating a different intention, any question in dispute needs to be determined by reference to common law. Judge Binns-Ward therefore examined the common law relating to jurisdiction and the changes between the old and new Companies Acts.

Judge Binns-Ward found that the old Act was consistent with the common law and in particular with the principle of *actor sequitur forum rei*, which provides a ground for jurisdiction based on residence. There are of course other grounds for jurisdiction, which are considered in other matters depending on the nature of the right or claim in issue. For purposes of the case before the court, the judge determined that liquidation and business rescue proceedings are matters affecting the status of a company and that residence is therefore the appropriate ground of jurisdiction.

Until the promulgation of the new Act, the position regarding the residence of a company was set out authoritatively in a decision of the then Appellate Division of the High Court, namely *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A)*, which resolved earlier conflicting decisions. A company could either reside at its registered office or, if it carried on business in a different jurisdiction, it resided at the place where it carried on its operations or business. If a company carried on business in more than one place, it resided at the place where its general administration was centred, being most often its head office. It was therefore possible for a company to reside in more than one place and therefore for various High Courts to have jurisdictions over matters involving the status of a particular company.

As alluded to earlier, the new Act does not contain a section dealing with jurisdiction which is an equivalent to the old section 12, but instead it states in section 23(3) that each company or external company must have at least one office in the Republic and that its office (singular) must be registered, or if it has more than one office, then its 'principal office' must be registered. Section 23(3) is not novel in requiring companies to have a registered office, but the material difference, as Judge Binns-Ward puts it, is that the registered office must now be the company's only office or, if it has more than one office, its 'principal office'. The new Act does not define 'principal office'. Judge Binns-Ward cautioned that section 23(3) of the new Act makes it "clear that the registered office must be an office maintained by the company and not the office of a third party used for convenience as a registered office".

Essentially, the concept of registered office and main place of business, in the opinion of the court, has now become one. Judge Binns-Ward concluded that the result for a pre-existing company must mean that it is obliged in terms of section 23(3) to change its registered office to be that of its principal place of business or principal office (if it has more than one office in order that it may be 'resident' in only one place). To hold otherwise, in the judge's opinion, would also defeat the effect of the provisions of the Act and the purpose of the Act. What is more, the definition of 'court' in the business rescue chapter, refers to court by the definite article, which clearly envisages only one court.

The outcome of the decision in the *Sibakhulu Construction* case is likely to have significant implications with regards to jurisdiction in matters concerning companies in that the new Act does not provide for the possibility of a company residing in more than one place. Companies may now need to consider a change of address. The location of a company's registered address has further implications for record-keeping, as set out in sections 24, 25 and 28 of the Act. Judge Binns-Ward premises his conclusion on the purpose of Chapter 6 of the Act (the chapter dealing with business rescue) and on the purposes of the Act itself set out in section 7, one such purpose being "to provide a predictable and effective environment for the efficient regulation of companies".

A further obvious implication is that failure to comply with this requirement could constitute a contravention. Companies need to reconsider and properly regulate where their registered office is located. The necessity for this is both practically and legally warranted as such office then serves as an office where, and via which, third parties can transact and communicate with it.

Grant Ford

When is an urgent application really urgent?

The Oxford dictionary defines urgency as "requiring immediate action or attention". When dealing with applications to court (as opposed to trial matters that proceed by way of action) urgency has the same meaning. The criteria for determining if an application actually requires immediate action or attention by the court, however, are well established and are being applied strictly. An application to court brought in the ordinary course may see argument on the application within six to eight weeks at the earliest and a lot later in some courts where delays of up to eight months in obtaining a date for an opposed hearing are not unusual.

In Gauteng, the 1977 case of *Luna Meubel Vervaardigers (EDMS) BPK v Makin and Another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W)* sets out guidelines in regard to urgent applications and it is these guidelines that must be observed. The guidelines determine different categories of urgency and it is up to the attorney concerned to decide on the degree of urgency created by the facts of the particular matter. Depending on that evaluation the attorney will then pursue one of the following options:

- If the matter is too urgent to follow the normal time periods in terms of the Rules of Court, a party may enrol their application for the next available Tuesday. The applicant must then approach the registrar of the court on or before the preceding Thursday.
- If the matter is more urgent, the matter can be heard on the next Tuesday even if the applicant did not set the matter down with the registrar by the preceding Thursday.
- If the matter is still more urgent and the applicant cannot wait for the next Tuesday the matter can be enrolled for the next court day or even the same day if the court has not yet adjourned.
- Finally, if the matter is desperately urgent the matter may be heard at night or over a weekend. In matters of the utmost urgency it is even possible to have the matter heard without first drawing any papers.

Affidavits supporting an urgent application must set out very specifically the facts that give rise to the urgency and must explain why the applicant cannot wait for a hearing in the ordinary course.

Urgency will be the first issue that the court considers and the court has a discretion to dismiss the application if it believes that the facts do not justify the urgency.

The court may also refuse to consider a matter urgently if the applicant is relying on 'self-created urgency', where the applicant's delay had turned a matter that should have been dealt with in the ordinary time periods into an urgent application.

Where a court finds that there is no urgency, it may strike the matter off the roll with an adverse cost order against the applicant (the most likely result) or it may postpone the matter to give the opposing party time to prepare and respond to the application.

Urgency is not there for the asking. It must be carefully motivated and you daren't push your luck.

Tim Fletcher and Nicole Meyer

Prescription - Be careful, it bites!

Generally, prescription runs for three years from the date that a cause of action becomes complete. In plain English that means you have three years to sue from the date that a debtor becomes liable to pay you. Once a valid summons is issued, prescription will be interrupted in respect of that claim and provided you do not withdraw the summons or it is not dismissed by the court on a technical ground, prescription is no longer a worry.

While it is vital to get a summons served in time to interrupt prescription, it can be just as important not to jump the gun. A summons issued before a loss has actually been suffered will be premature and defective. The risk is that the defect is discovered too late for a fresh summons to be served in time to interrupt prescription. That said, a summons will not be premature if damages were suffered before summons was issued and in respect of that cause of action simply continues to accrue in addition to those originally sustained.

A defendant facing a claim for payment of money but who has a claim against a third party, in the event that the first claim is successful, needs to consider carefully when and how action should be taken against the third party. In this scenario, the loss will be suffered by the defendant only if the first claim is successful.

Although there are mechanisms in the Rules of Court that allow a claim for an indemnity from a third party to be brought conditional on the main claim succeeding, each set of facts requires careful analysis as the third party procedure is not always available or appropriate.

In a similar vein, one needs to be careful not to blur the distinction between a single cause of action in respect of which damages continue to accrue and a situation where an entirely new cause of action arises. In the 1980 decision in *Evins v Shield Insurance Co Ltd [1980] 2 All SA 40 (A), alternatively 1980 (2) SA 814 (A*), the Appellate Division of the Supreme Court held that where an amendment to a summons amounts to nothing more than "a fresh quantification of the original claim" or "the addition of a further item of damages" and the additions made by the amendment are "part and parcel of the original cause of action" then such an amendment is permissible.

If, however, the purpose of the amendment is to introduce an entirely new cause of action, the party wishing to bring the amendment will bear the onus of showing that exceptional circumstances exist justifying the amendment. Then, even if the court is happy that exceptional circumstances exist, the amendment will still constitute an entirely new claim effective from the date that the amendment is made. If the claim would have prescribed by the time the amendment was effected a special plea of prescription should succeed.

It is important to be sure as a prescription point, when properly taken, is a killer.

Tim Fletcher and Matthew Ward

CONTACT US

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
Director
National Practice Head
T +27 (0)11 562 1061
E tim.fletcher@dlacdh.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@dlacdh.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@dlacdh.com

Grant Ford
Director
Regional Practice Head
T +27 (0)21 405 6111
E grant.ford@dlacdh.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@dlacdh.com

Sam Oosthuizen
Director
T +27 (0)11 562 1067
E sam.oosthuizen@dlacdh.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@dlacdh.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@dlacdh.com

Marius Potgieter
Director
T +27 (0)11 562 1142
E marius.potgieter@dlacdh.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@dlacdh.com

Tayob Kamdar
Director
T +27 (0)11 562 1077
E tayob.kamdar@dlacdh.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@dlacdh.com

Pieter Conradie
Director
T +27 (0)11 562 1071
E pieter.conradie@dlacdh.com

Richard Marcus
Director
T +21 (0)21 481 6396
E richard.marcus@dlacdh.com

Brigit Rubinstein
Director
T +21 (0)21 481 6308
E brigit.rubinstein@dlacdh.com

Lionel Egypt
Director
T +21 (0)21 481 6400
E lionel.egypt@dlacdh.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@dlacdh.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@dlacdh.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@dlacdh.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@dlacdh.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@dlacdh.com

Craig Hindley
Director
T +27 (0)21 405 6188
E craig.hindley@dlacdh.com

Nick Muller
Director
T +21 (0)21 481 6385
E nick.muller@dlacdh.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@dlacdh.com

DLA CLIFFE DEKKER HOFMEYR

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com

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