DLA CLIFFE DEKKER HOFMEYR

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# DISPUTE RESOLUTION MATTERS

## MISREPRESENTATION IN CONTRACT: THE DOCTRINE OF ELECTION

A party asking a court for relief can't ask for mutually exclusive remedies. This seems to be self evident but is important where a party to a contract has been induced to do the deal by a fraudulent misrepresentation of the other party. Again at the risk of stating the obvious, there could not have been any actual agreement between the parties if one party was mistaken as to the facts as a result of a misrepresentation. Consequently, there was no contract from the beginning.

The doctrine of election arises in this setting. The 'innocent' party can choose to enforce the contract notwithstanding the misrepresentation, or cancel it. Clearly these remedies are mutually exclusive, most obviously because the remedy of enforcement asks the court to confirm the existence of the contract, while cancellation asks for a statement that the contract never existed in the first place. The choice of one necessarily implies the abandonment of the other.

In the 1981 appeal case of *Feinstein v Niggli*, this choice of remedy is framed as a waiver where the innocent party electing to uphold the contract is said to have waived the right to cancel it, the two remedies being mutually inconsistent. It is up to the fraudulent party to prove that the innocent party has waived its right to cancel and the onus is stringent. They must at least show that the innocent party knew of the facts constituting the misrepresentation when the choice was made to cancel or enforce the contract.

Curiously, and despite this, the innocent party may employ the 'double-barrelled remedy' in that they may ask for specific performance, together with a request for cancellation and damages, the latter subject to the defendant not complying with the court's order of specific performance within a certain time. The remedies are not truly inconsistent as the cancellation is conditional on the order of specific performance proving ineffective and then only within a specified period.

The election will also not necessarily be binding where, subsequent to the choice being made, an important fact comes to the knowledge of the innocent party which impacts on the foundations of that choice. Murray J in *Clarke Brothers & Brown (1913) Ltd v Truck & Car Co Ltd* decided in 1952 stated the principle as follows "…when [the] right to one or other of particular remedies on … breach is dependent upon some condition or fact which has to be ascertained at a later period, [the elector] does not forfeit his

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claim to one remedy by mere claim of another." In 1961 in *United Dominions Corporation (Rhodesia) Ltd v Van Eyssen,* Van Winsen J states the principle event more succinctly "It is of the essence of the doctrine of election that the party whom it is sought to hold to an election is fully aware of the facts, and is therefore in a position to make an election: [if not,] then he cannot at the same time approbate and reprobate the contract."

So, when heading to court with a claim based on misrepresentation, be clear on what you want achieve from the start. If you elect to uphold the fraudulent contract, the opportunity to change your mind later (and cancel it) is very rare. The 'double-barrelled remedy' must be claimed at the outset. Relying on an undiscovered fact popping up later is hardly a reliable strategy. The court wants to know what you are asking of it without ambiguity. Decide this before you begin.

*Tim Fletcher and Samantha Brener*

## CLASS ACTION: CONSTITUTIONAL COURT UPHOLDS APPEAL OF BREAD DISTRIBUTOR

Our Constitution expressly recognises class actions in our law but no legislation has been promulgated to regulate these actions. The Constitutional Court handed down a judgement on 27 June 2013, upholding an appeal against a decision of the Supreme Court of Appeal in *Imraahn Ismail Mukaddam v Pioneer Foods (Pty) LTD and Others.*

Imraahn Mukaddam instituted proceedings in the Western Cape High Court during November 2012 for permission to institute a class action against the respondents. His business was the distribution of bread in the Western Cape. He purchased bread from the respondents who are major bread producers. In turn he sold bread to informal traders from whom consumers bought their bread. There are approximately 100 distributors like the applicant in the Western Cape.

The Competition Commission launched an investigation into the conduct of the respondents following complaints by the applicant and others and they were found guilty of engaging in anti-competitive conduct. The applicant and others approached the High Court on application for certification authorising them to bring a class action against the respondents, which was opposed. The High Court focused on two requirements, firstly whether the cause of action identified by the Applicants raised triable issues. Secondly whether common issues of fact or law would be raised in the proposed class action. The applicants alleged that Pioneer Foods and Premier Foods had breached agreements with the applicants for the supply of bread. The court compared his claims to those of the other two applicants and found that the issues to be raised were different and therefore refused certification. The applicant obtained leave to appeal to the Supreme Court of Appeal against the High Court Order refusing permission to institute a class action.

In *Children's Resources Centre Trust v Pioneer Foods (PTY) LTD and Others [2012] ZASCA 182; 2013 (2) SA 213 (SCA)* Willis, JA held that courts must prescribe an appropriate procedure to enable litigants to institute class actions. The following procedural requirements for a class action were laid down:

- Certification is required, which involved the applicants applying to a court for the certification of a 'class';
- A certification application should define/identify the class with sufficient precision so that a particular membership can be determined objectively with reference to the class definition;
- A certification application must prove the existence of a cause of action raising a 'triable' issue (ie the case should have a reasonable prospect of success);
- There must be an issue of fact or law, or both, that are common to all members of the class that can appropriately be determined in one action;
- The proposed representative must have no conflict of interests with those that they intend(s) to represent; and
- The proposed representative must have the capacity to conduct the litigation properly on behalf of the class which they intend(s) to represent.

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The SCA thereby endorsed the notion that prior certification by a court was necessary for the institution of a class action.

Nugent, JA in the Applicant's appeal to the SCA applied the requirements laid down by Wallis JA set out above in the *Children's Resources Centre Trust v Pioneer Foods (PTY) LTD and others [2012] ZASCA 182; 2013 (2) SA 213 (SCA).* The SCA considered the claim based on s22 of the Constitution and listed the following hurdles standing in the way of this claim:

- Evidence did not show that members of the class were citizens, in view of the fact that s22 guarantees rights to citizens only;
- Some of the proposed claimants would be juristic persons on whom no rights were conferred by the section;
- On a reading of the section by the Supreme Court of Appeal, it did not guarantee success once a trade, profession or occupation has been entered.

The SCA held that this claim was not tenable in law.

The Constitutional Court overturned the judgements of the High Court and Supreme Court of Appeal in the majority judgement written by Jafta J and held that the High Court applied the incorrect test to Mr. Mukaddam's request. Jafta J noted that in terms of s173 of the Constitution, the guiding principal in exercising the powers in this section, is the interest of justice and that this was the standard which must be applied in adjudicating applications, for certification to institute class actions. Mhlantla AJ, concurred with Jafta J, except in respect of his judgement that circumscribes the reach of certification in class actions involving Bill of Rights claims. She concluded that considering the rationale for certification and the nature of class actions, the benefits of the certification process apply in all class action suits.

Froneman J, in a separate concurring judgement, with whom Skweyiya J concurred, recognised the valuable contribution to the development of the common law, undertaken by the Supreme Court of Appeal in the *Children's Resource Centre Trust* case, in non-Constitutional matters. It provided the courts with flexible guidelines to apply in applications for certification of class actions, on a case-by-case basis. He however noted that the SCA's application of these guidelines, in Mukaddam's potential claim in the proposed class action were far too strict. He also held the view that the finding that the applicant had no tenable claim in law was premature during the early stages of certification.

The effect of this judgement was therefore to remit this case to the High Court to be dealt with in the light of this judgement and possibly opening the floodgates.

*Craig Hindley*

## FACEBOOK / TWITTER AND DISCOVERY

As social networking usage grows lawyers are beginning to leverage communications on social networking sites - including Facebook and Twitter - as a source of evidence in court. Tweeters and those posting to Facebook must therefore be fully aware that what they publish is discoverable.

Just as emails are discoverable - and if deleted can easily be traced - caution should be exercised when a person communicates on Facebook/Twitter. Not only is such communications discoverable, but may also qualify as a defamatory statement and therefore actionable.

In two court cases in America the communications on MySpace surprised litigants. In the first case a young woman claimed damages for an injury sustained in a car accident. She exaggerated her injuries and was confronted by her MySpace pictures of her skiing in the Swiss Alps. In the second case, an accused in a criminal matter pleaded guilty to aggravated assault with a gun. At thesentencing stage his attorney in mitigation endeavored to portray the accused as a peaceful man who had found religion. However, the prosecution found a picture of the accused holding a gun on the accused's MySpace page as well as his comments. The photo was used as evidence against the accused.

The message is therefore that the red light should flicker when players on the various networks publish on their page communications which may find its way to court and may be damaging.

*Pieter Conradie*

## THE IN DUPLUM RULE: LIMITS ON INTEREST

The *in duplum* rule has always formed part of our common law. It is based on public policy and its purpose is to protect debtors from exploitation by creditors. The rule provides that interest due in respect of a debt ceases to run when it reaches the amount of the unpaid capital. It is confined to arrear interest alone, whether it accrues as simple or compound interest. It is applicable to all contracts in terms of which a capital amount is due, which is subject to a specific rate of interest.

It is not a blanket prohibition on a creditor recovering interest which is more than the capital amount of the debt. The rule merely states that the unpaid arrear interest cannot exceed the capital outstanding. It is irrelevant if you add up all the monthly amounts of interest and they exceed the capital. Once the unpaid arrear interest equals the capital amount outstanding, interest will cease to run. When the debtor makes a payment which reduces the interest, interest will again accrue until it reaches the capital amount outstanding. In the absence of an agreement to the contrary, all payments will be appropriated to interest first, and then to capital. Interest will stop running when it is equal to the capital which is outstanding. This principle was accepted by the court in the case of *Commercial Bank of Zimbabwe v MM Builders & Suppliers 1997 (2) SA 285 (ZH)*.

This is to allow for consistency in the application of the rule in those cases where there is an advance of a single lump sum, as well as those cases such as overdraft facilities where the amount of the capital outstanding may be susceptible to constant variation, whether upwards or downwards. Capitalisation, which is common in banking practice, amounts to nothing more than the charging of compound interest, ie interest on interest. This has to be expressly agreed upon by the debtor to render a provision for compound interest enforceable.

In *Standard Bank of South Africa Limited v Oneanate Investments (Pty) Ltd (in liquidation) 1998 (1) All SA (A)*, it was held that the practice of capitalisation of interest by financial institutions could not result in interest losing its character for the purposes of *in duplum*. When interest is compounded, it remains interest. When a creditor institutes action for the recovery of an outstanding debt the in duplum rule is suspended. This was confirmed by the Supreme Court of Appeal in *Gardner and another v Margo 2010 (6) SA 385 (SCA)*. Many people misinterpret this to mean that interest is suspended, but it is the rule which is suspended. Interest will therefore continue to run during litigation and it is possible for interest to exceed the outstanding capital in certain circumstances.

The amount claimed in the summons will be the outstanding capital inclusive of arrear interest, ie your summons will not have separate claims for capital and interest.

Once judgment has been granted it brings about a compulsory novation of the original debt, and there is no basis warranting a distinction to remain between capital and interest which make up the judgment debt. Thus, interest will be calculated on the full amount of the judgment debt. The *in duplum* rule will then apply in respect of arrear interest on the judgment debt itself.

*Hayley Laing*

## HOW SAFE ARE COMMERCIAL LANDLORDS: EFFECT OF THE CONSUMER PROTECTION ACT

Lease agreements fall within the ambit of the Consumer Protection Act, No 68 of 2008 (Act) as a 'service' which is defined as including the provision of access to or use of premises or other property in terms of a rental.

A landlord operating a rental enterprise will be a 'supplier' or 'service provider' in terms of the Act, if leasing commercial property to third parties is in the ordinary course of its business. The Act applies to all commercial leases entered into with natural persons as well as juristic persons with an annual turnover or asset value of less than R2,000,000.

What does this mean for landlords? The most significant implication of the Act on commercial leases relates to unfair, unreasonable or unjust contract terms and the impact thereof. It is a well-established principle of the law of contract that a party, when it signs a contract, is taken to be bound by the ordinary meaning and effect of the words that appear over its signature.

Because of the provisions of the Act, a landlord can now no longer assume that a court will enforce a lease agreement simply based on the signature principle. Where the courts previously adopted the policy that it will avoid 'rewriting the bargain between parties', the Act now expects the courts to do so to give effect to the Act.

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The Act prohibits certain specific contractual provisions and declares others to be unfair, unreasonable or unjust and obliges landlords to bring certain provisions of lease agreements to the tenants' attention.

Sections 48 to 52 of the Act deal with unfair, unreasonable and unjust contract terms. Section 48 and s49 *inter alia* prohibit suppliers ie landlords from entering into agreements on terms that are unfair, unreasonable or unjust, including terms that require consumers ie tenants to waive any rights or assume any obligations; waive any liability of the landlord or which impose as a condition of entering into a transaction terms that are unfair, unreasonable or unjust and prohibits agreements that are excessively one-sided in favour of the landlord. It also requires a landlord, at the time of entering into any lease agreement, to bring to the notice of the tenant any term of the lease agreement that purports to limit in any way the risk or liability of the landlord or any other person; purports to constitute an assumption of risk or liability by the tenant; purports to impose an obligation on the tenant to indemnify the landlord or any person for any cause; purports to be an acknowledgement of any fact by the tenant; and concerns any activity or facility that is subject to certain specified risks.

The provisions of s48(1) will apply typically to standard clauses found in commercial lease agreements which limit the liability of landlords in respect of damages claims by tenants and indemnify landlords from any claims by third parties. The provisions of s48 and s49 are fairly vague and beg the question: how will courts determine whether a term of a lease agreement falls foul of the provisions of s48 and s49?

Although there is an attempt to define these terms in the Act it remains open to subjective interpretation. Each case will have to be determined on a case by case basis and it is likely that the courts will have regard to customary terms used in the trade. The most likely consequence of the Act will be tenants relying on s48 to s51 to escape certain liability created by the terms of lease agreements, for instance, being joined as a defendant in an action by an individual who sustained injuries in a leased premises, by virtue of an indemnification provided by the tenant in favour of the landlord.

Tenants may also attempt to use the Act to declare null and void those terms which either absolves landlords from damages claims by tenants or limits the quantum of such claims or terms which take away tenants' rights to cancel lease agreements in certain circumstances, if a tenant can show that such terms are unfair, unjust and unreasonable.

If any term falls foul of the provisions of s48 to s51 of the Act, the tenant will be entitled to request the courts to make an order to the effect that the term contravening the Act is void; or that such term is severed from rest of agreement or altered to the extent that it will be unlawful.

So what can landlords do to better protect themselves? The overriding principles remain that of fairness and reasonableness. Landlords must ensure that when entering into lease agreements any term which may fall within the categories mentioned in s48 to s51 are not drafted on any unreasonable terms and are, prior to and at the time of entering into the agreement explained to the tenant, with the tenant signing a declaration that such terms were brought to its attention, the consequences explained and understood.

Indeed uncertain times ahead for landlords and industry old provisions in lease agreements and there is no doubt that tenants will start to rely more on the provisions of the Act to escape onerous terms imposed by commercial leases.

*Lucinde Rhoodie*

## ABSA BANK V ROBB – THE COST OF FRIVOLOUS DEBT REVIEW APPLICATIONS

In the past, courts have been reluctant to grant orders for costs against statutory functionaries, for example debt counsellors, as a result of the belief that such orders would dissuade public functionaries from carrying out their statutory functions effectively, and have an adverse effect on the public interest. However, case law has developed over the years and in appropriate cases, such an order can be made, as seen in *ABSA Bank v Robb 2013 (3) SA 619 (GSJ).*

The facts briefly are as follows: During July 2011 the respondent (a debt counsellor) brought an application for debt review of two consumers (Mr and Ms Cassim). The debt counsellor did not fulfil her statutory obligation in determining whether or not the Cassims were over-indebted, having failed to comply with the National Credit Act, No 34 of 2005, the Regulations or the National Credit Regulator Guidelines. The day before the hearing of the application the respondent withdrew the application and refused to pay the appellants costs. The Magistrate refused to grant an order for costs against the respondent. On appeal the South Gauteng High Court held that such a costs order could be made.

Rule 27(3) of the Magistrates' Court Rules provides that the party withdrawing shall pay the applicant's costs of the action or application withdrawn, together with the costs incurred in so applying. Where the plaintiff or applicant in the notice of withdrawal consents to pay the costs, such consent shall have the force of an order of court. Boruchowitz J stated "…from the reading of Rule 27(3), read with Rule 33(1)…an application for costs may be made where a party withdrawing a matter does not tender costs."

Previous case law held that a departure from the principle that costs must be awarded to the party who incurred the expenses of defending withdrawn proceedings is only justified in exceptional circumstances. Ordinarily, a costs order will only be made against state functionaries where they have acted improperly or *mala fide* in the discharge of their statutory duties.

The court examined existing case law and concluded that developing case law demonstrates that the court has in appropriate cases relaxed the principle that costs orders shouldn't be awarded against public functionaries, and awarded costs against public officials where it was justified by the circumstances.

The order of the High Court serves the important purpose of cautioning debt counsellors to properly abide by the provisions of the Act, Regulations and Guidelines before bringing a debt review and ensuring that an application for debt review will be made only when there are reasonable grounds for concluding that a consumer is over-indebted.

It is important to note that the discretion to award costs against a debt counsellor is not limited to instances where the application for debt review is withdrawn. The court may award costs against a debt counsellor who acts improperly or mala fide in the discharge of his or her statutory duties.

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