DLA CLIFFE DEKKER HOFMEYR

December 2013

DISPUTE RESOLUTION MATTERS

SECTION 18 OF THE SUPERIOR COURTS ACT: A NEW HURDLE

Having your day in court and winning is cause for celebration, but when should you celebrate? Your celebration can be cut short when your hard won court order is automatically suspended pending an application for leave to appeal. This was the case under Rule 49(11) of the Uniform Rules of the High Court but s18(1) of the Superior Courts Act, No 10 of 2013 (which came into operation on 23 August 2013) has tipped the scales in favour of the appellant.

Before s18 of the Superior Courts Act came on the scene earlier this year, Rule 49(11) of the Uniform Rules provided that unless the court otherwise directs, an order of court is suspended pending the decision of an application for leave to appeal. The common law gave the judge hearing such a matter a wide discretion to decide whether or not to allow the order to be put into effect notwithstanding the appeal. The applicant in terms of Rule 49(11) would need to show that it would suffer irreparable harm if the order was not executed, that irreparable harm would not be suffered by the appellant if the order were to be executed, that the prospects of success on appeal were poor and that the balance of hardship or inconvenience lay with the applicant.

S18 of the Superior Courts Act has introduced a stricter test which provides that the court must find as a matter of fact that there are exceptional circumstances rather than the court exercising its discretion. The automatic suspension of the order is still in place pending the decision of the application or appeal. To be successful in avoiding the suspension of an order, a party will now have to show that exceptional circumstances exist justifying the lifting of the suspension of the order. In addition the applicant will still need to show that it will suffer irreparable harm and that the other party will not suffer irreparable harm if effect is given to the order.

IN THIS ISSUE

The impact of s18 on Rule 49(11) was considered recently in the case of *Incuberta Holdings (Pty) Ltd v Ellis*[1]. The court held that the new test is twofold:

- First, exceptional circumstances must exist. Exceptionality is that which is out of the ordinary and of an unusual nature. The circumstances concerned must arise from or be incidental to the particular case. Whether exceptional circumstances exist is not a decision based on discretion, but must be a finding of fact.
- Secondly, there must be proof of irreparable harm to the party who wishes to put into operation the order and proof of the absence of irreparable harm to the party who seeks leave to appeal.

[1] [2013] ZAGPJHC 274

continued

S18 goes even further, however, to provide that even if a court does uplift the suspension of an order, that decision to lift the suspension is itself automatically appealable (in that an application for leave to appeal is not required) and in the event of the decision being appealed, the execution of the original order is suspended again.

Litigation is rarely a sprint, usually a marathon, sometimes a steeplechase but the trick is in knowing when to open the champagne.

Tim Fletcher, Deshni Naidoo and Llewellyn Angus

DEFECT PRODUCTS – RECALL – MANUFACTURERS GET YOUR ACT IN ORDER

Are your monitoring measures in place and are you covered by your insurance policy for costs suppliers will incur when recalling defect products and facing claims for damages? When last have you updated your product recall procedures to effectively recall unsafe products from consumers and from within your supply chain? Do you maintain proper records of consumers to enable you to facilitate fast and successful recalls? Are you in a position to notify international consumers?

The Consumer Protection Act, No 68 of 2008 became operational on 1 April 2011 (Act) and changed the way in which manufacturers, retailers, producers and importers (suppliers) will conduct themselves with regard to defect products in general and the recall of unsafe products. Are you aware of the steps to be taken when you receive information that your product has been manufactured or assembled with a device which caused the product to be unsafe, for example, motor vehicles, food, medicine, animal food, sweets, milk or do you want to wait until it's too late and face the music of monetary claims without your insurance being in place? In terms of the Act the suppliers are liable for any harm caused as a consequence of supplying unsafe goods, a product failure, defect or hazard in any goods or inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the supplier.

Safety monitoring and recall falls within the jurisdiction of the Consumer Commissioner who may recall a product and compel a supplier to supplement warnings. Failure to adhere to rulings by the Consumer Commissioner and which results in damages caused may result in criminal liability. Safety monitoring, investigations, notification of the public and recall of goods are dealt with in s60 of the Act. Safety recall guidelines were published on 3 June 2012. Those guidelines prescribe reporting requirements in respect of product recalls and regulate the internal procedures which must be followed in the event of a product found to be unsafe.

With the introduction of strict liability, the curtain has opened and the stage has been set for litigation and businesses must be fully aware of this and take the necessary precautions to protect themselves.

Suppliers must be alert and have proceedings in place to recall a product when it is discovered that the product has a defect which may harm a consumer if used as intended. Suppliers must know how the safety recall guidelines operate. If the supplier of a certain product falls within a certain industry, for example, the vehicle industry, then the supplier must be fully aware of the industry codes dealing with safety monitoring and recall and the requirements thereof.

Do not ignore the public guidelines until it is too late. Review your product recall procedures and take out insurance against damages suffered caused by a product recall. A product recall may cripple a supplier. A supplier may be faced with damages claims from the consumer when the product is recalled. Apart from damages claims, the supplier will also suffer damages as it may have to work overtime to fix the defect on the product before it is returned to the consumer or replace the defect part or remanufacture the entire product.

Suppliers are obliged to recall unsafe defect products but the Consumer Commissioner may also recall a product when it becomes aware of such unsafe product being distributed in the market. When a supplier recalls, it is obliged to give the Consumer Commissioner notice of such recall within two days after the recall occurred.

In certain instances, for example, the motor industry where there is regular service of a motor vehicle, suppliers may decide not to give notice of an unsafe product whilst waiting for a regular service to take place and then to replace the defect product/device, without informing the owner of the vehicle of the defect. This is called 'silent recall'. A manufacturer may find that a 'silent recall' may be too late as drivers and passengers of motor vehicles may have already been injured or killed prior to the regular service date. Suppliers may be charged with murder or culpable homicide if a consumer is injured and the supplier failed to recall the product.

Pieter Conradie

A BUSINESS RESCUE PLAN AND ITS EFFECT ON SURETYSHIPS

Suretyship agreements are integral to a creditor wishing to limit its financial exposure to its debtors. This article analyses the effect that the acceptance by a creditor of a business rescue plan of a debtor company has on the enforceability of that creditor's security, particularly in the form of suretyship agreements concluded in its favour.

There has been extensive debate around the subject, academically and in the courts. At the centre of this debate is s154 of the Companies Act, No 71 of 2008 (new Companies Act).

S154, reads as follows:

1. *A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.*

2. *If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.*

The focal point of the debate is whether, by assenting to the business rescue plan, the creditor compromised its security for the original debt. In other words, does s154 mean that, once a business rescue plan is accepted by a creditor, such creditor can only recover from the surety that part of its debt as is recoverable under the business rescue plan?

Acting Justice Rogers (as he then was), in *Investec Bank Limited vs Bruyns 2012 (5) SA 430 (WCC)* (*Bruyns* case), stated, in passing and without deciding, that if a business rescue plan was approved, and then implemented in accordance with its terms and conditions, an assenting creditor may, as a result of s154(1), lose the right to enforce the original outstanding debt against any surety.

The commentators in both *Henochsberg on the Companies Act* and *Contemporary Company Law* appear to interpret this section similarly. In their opinion the adoption of a business rescue plan could potentially have the effect of discharging and/or extinguishing the debt against the surety.

One of the main underlying practical problems with this interpretation is that it will discourage those creditors with suretyship agreements in place from approving a business rescue plan. The creditor's dissent not necessarily being as a result of disapproval of the business rescue plan, but instead resulting from a desire not to compromise its underlying suretyship security.

As a possible solution for a creditor wishing to approve a business rescue plan without compromising its security, Rogers AJ alludes to the fact that the underlying terms of the suretyship agreement may be a saving grace to the creditor. Suretyship agreements, in most instances, contain provisions which allow the creditor to compromise with the principal debtor without prejudicing the creditor's rights against the sureties. These types of provisions are not unusual. Rogers AJ however reaches no conclusion in this regard. Furthermore, historically suretyship agreements do not cover business rescue proceedings as the business rescue process has only recently been introduced into South African Company Law.

In an unreported judgment (*Nedbank Limited v New Port Finance Company (Pty) Limited and other*) delivered on 3 July 2013, Blignault J gives great credence to the notion alluded to by Rogers AJ, that one needs to look to the terms of the suretyship agreement to analyse the effects of the business rescue provisions in the Companies Act on the obligations under the suretyship agreement. Ultimately, Blignault J held that the adoption of a business rescue plan and the statutory moratorium afforded to the company in business rescue in terms of s133 of the Companies Act do not extend to a surety and do not affect a creditor's rights to enforce its claim against a surety.

Clarity on this issue was further received in the recent reportable judgment of *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd (in business rescue) and five others, case number 20947/12 in the North Gauteng High Court Pretoria* (African Banking decision).

In that case, Judge Kathree-Setiloane was required to make a finding *inter alia* whether:

(i) a binding offer in terms of s153(1)(b)(ii); and

(ii) the subsequent adoption of a business rescue plan affected a creditor's rights under certain suretyship agreements.

Kathree-Setiloane J, on this aspect of the matter, did not refer to s154 of the New Companies Act. In this instance the creditor had not assented to the business rescue plan. In fact, the creditor, for reasons which are beyond the scope of this article, was not even permitted to vote on the adoption of the business rescue plan.

continued

However, what is important for the purposes of this article is that Kathree-Setiloane J specifically found that "*there is no express provision contained in chapter 5 of the Companies Act [the business rescue chapter] which provides that the adoption of a business rescue plan will deprive creditors of the company in the business rescue, of their rights as against sureties for the debts of the company in business rescue*". In so doing Kathree-Setiloane J differs from the *obiter dictum* view adopted in the *Bruyns* case. According to Kathree-Setiloane J if the legislature had intended the effects of a business rescue plan to be so drastic it would have made express provision therefor. In the absence of such an express provision, Kathree-Setiloane J was of the view that "[t]*here is no basis to suggest that such a provision could be read into the business rescue regime*".

In coming to this decision, Kathree-Setiloane J emphasises that the purpose of business rescue, as specifically provided for in s7(k) of the New Companies Act, is to make provision for the efficient rescue of a financially distressed company in a way that balances the rights and interests of all relevant stakeholders. In Kathree-Setliloane J's view "*the interests of sureties do not fall within the scope of the objective of the business rescue regime*".

This is the first judgment which deals, in its *ratio decidendi*, with the effect (or lack thereof) of the business rescue plan on the rights of a creditor to pursue its sureties.

It is clear from this judgment that the mere adoption of a business rescue plan does not deprive creditors of their rights to enforce suretyships. There is little doubt that at some point or another this issue will be brought before the highest courts in South Africa.

Until that time, and to safeguard against a decision which opposes that of Kathree-Setiloane J, creditors should make specific provision in their suretyship agreements for instances where compromises with a principal debtor do not automatically release sureties and co-principal debtors. This should specifically include the protection of the creditor's rights as against the sureties in cases where the principal debtor has gone into business rescue, and a business rescue plan has been approved and/or duly implemented.

Grant Ford, Belinda Scriba and Jacques Odendaal

THIRD PARTY AUDITOR'S MISSTATEMENT - ARE YOU THE AUTHOR OF YOUR OWN MISFORTUNE?

In general, auditors have no duty to third parties with whom they have no relationship. In the recent case of *Cape Empowerment Trust (CET) Limited v Fisher Hoffman Sithole 2013 (5) SA 183 (SCA)*, the Supreme Court of Appeal (SCA) had to decide whether a third party's auditor could be held liable for a grossly negligent misstatement which allegedly caused pure economic loss.

In this matter, CET, as purchaser, entered into a sale of business agreement with Paradigm Interactive Media Limited (Paradigm). In terms of the agreement, Paradigm warranted that the business had made a profit of R10 million. The agreement was further subject to various suspensive conditions, including that CET's auditors would be allowed to complete a due diligence investigation into the business and that the agreement had to be approved by CET's board of directors and shareholders in a general meeting. In anticipation of the shareholders' meeting, CET, in lieu of the due diligence, requested an audit certificate from Fisher Hoffman Sithole (FHS), the auditors of Paradigm, to confirm the profit of R10 million for the business. A partner at FHS provided such certificate, despite serious doubts having been raised, and it was later revealed that the statement of profit was wholly untrue. CET claimed that this misstatement induced it to enter into the sale agreement and to incur wasted expenses, which wasted expenses were subsequently claimed from FHS as damages.

The SCA first dealt with three of the elements of Aquilian liability, namely wrongfulness, fault and factual causation. The SCA accepted that FHS was grossly negligent in making the false statement contained in the profit certificate and held that factual causation was established. Regarding the wrongfulness of the misstatement, the SCA confirmed that in instances of pure economic loss, wrongfulness is not presumed and considerations of public and legal policy come into play. Whilst cautioning against confusing wrongfulness and negligence, the SCA referred to two considerations relevant in the context of negligent misstatements, namely whether the misstatement was made in a business context and in response to a serious request and whether the plaintiff was dependent upon the defendant to provide the advice sought.

On the one hand, it would have been evident to FHS that the confirmation of profits sought by CET was for consideration at the meeting of shareholders, the object of which was to consider whether to approve the transaction or not and that the information sought was for a serious purpose. On the other hand, the correct

continued

information was available to CET from another source, being the due diligence investigation by its own auditors, for which the sale of business agreement stipulated. Had a comprehensive due diligence investigation been completed, CET's auditors would in all probability have been able to establish the true financial situation of the business being purchased.

The SCA's main consideration for not imposing legal liability on FHS was CET's vulnerability to risk. Vulnerability to risk signifies that a party could not reasonably have avoided the risk of harm by other means. *In casu*, the court found that CET was not vulnerable to risk at all: it had covered itself against potential risk by obtaining an express profit warranty from Paradigm; it failed to allow its own auditors to finalise a thorough due diligence investigation into the business as it was looking to save on fees; and it failed to claim restitution for all the performance it had made under the agreement when it found out that the agreement was of no force and effect due to suspensive conditions not being met but instead continued to engage with Paradigm by concluding settlement agreements to maximise its tax benefits.

Due to these reasons, the SCA held that CET was the author of its own misfortune and as a result, its appeal was dismissed with costs.

Anja Hofmeyr and Thato Thobakgale

EFFECT OF FOREIGN JURISDICTION CLAUSES ON THE JURISDICTION OF A COURT WHICH WOULD OTHERWISE HAVE JURISDICTION ON A DISPUTE

In the decision of *Foize Africa v Foize Beheer (752/2011) [2012] ZASCA 123*, handed down by the Supreme Court of Appeal (SCA) in September 2012, it was confirmed that foreign jurisdiction clauses do not preclude the jurisdiction of a court which would otherwise have been competent to hear the dispute, and that parties cannot exclude the jurisdiction of a court through mere agreement.

In the *Foize* decision the SCA held that foreign jurisdiction clauses, in this instance a clause in an agreement providing that in the event of a dispute the dispute would proceed by way of arbitration in Holland with Dutch law applied, do not oust the jurisdiction of a court which would otherwise have jurisdiction and that the proper response to an action raised in such a court would be to raise a special or dilatory plea seeking a stay of the proceedings until the matter had been heard in the agreed forum in accordance with the provisions of the agreement.

Once a special or dilatory plea has been raised to this effect, it will then fall to the discretion of the court as to whether to enforce the foreign jurisdiction clause and whether the exercise of its own jurisdiction should be stayed pending the outcome of the foreign proceedings or arbitration.

At present there are no set rules as to when foreign jurisdiction clauses should be enforced. The decision of the SCA in the *Foize* matter, while maintaining that each given case will depend on its own particular facts and circumstances as well as the stage at which and the manner in which the issue of enforcement is raised, set out a number of factors which a court may take into consideration when deciding the direction in which it will exercise its discretion.

These factors include those iterated in previous case law, such as:

- in which country the evidence of the issues of fact is situated and the effect of this on the cost of the litigation;
- whether foreign law applies, and the extent to which it materially differs from local law;
- how closely connected the parties are to a particular jurisdiction;
- whether the defendant genuinely desires the matter to be conducted in a foreign jurisdiction or whether it is merely seeking a procedural advantage; and
- whether the plaintiff would be prejudiced by having to sue in a foreign court by reason of it being: deprived of security for its claim; unable to enforce its claim; faced with a time bar which would not exist had the matter proceeded locally; and for any political, racial, religious or other reasons which would circumvent the prospects of a fair trial.

The relevant factors identified by the SCA in the *Foize* decision included: the strength of the case made out for the foreign jurisdiction clause not to be enforced; the desirability of avoiding a multiplicity of actions with potentially conflicting outcomes; the expense and time saved if a single action was conducted in one jurisdiction; the relative expense of litigating in foreign jurisdictions compared to litigating locally and that matters involving disputes of law should not readily proceed by way of arbitration.

Caution should be exercised when inserting foreign jurisdiction clauses in any agreement, taking into account that decided in the *Foize* decision.

Burton Meyer and Faye Hoch

CONTACT US

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

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

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

Adine Abro
Director
T +27 (0)11 562 1009
E adine.abro@dlacdh.com

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

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

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

Sonia de Vries
Director
T +27 (0)11 562 1892
E sonia.devries@dlacdh.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@dlacdh.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@dlacdh.com

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

Munya Gwanzura
Director
T +27 (0)11 562 1077
E munya.gwanzura@dlacdh.com

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

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

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

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

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@dlacdh.com

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

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

Nick Muller
Director
T +27 (0)21 481 6385
E nick.muller@dlacdh.com

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

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

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

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

Brigit Rubinstein
Director
T +27 (0)21 481 6308
E brigit.rubinstein@dlacdh.com

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

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

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

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

Cliffe Dekker Hofmeyr is a member of DLA Piper Group,
an alliance of legal practices