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DISPUTE RESOLUTION MATTERS

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FINALITY IN LITIGATION

Nugent AJA (as he then was) stated the following in the matter of *Nestle (South Africa) (Pty) Limited vs Mars Inc 2001 (4)(SA) 542 (SCA)*:

"The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, this suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties should be brought once and finally."

These principles were once again the subject of proceedings before the Supreme Court of Appeal in the recent judgment handed down in the matter between *Caesarstone Sdot-Yam Limited vs The World of Marble and Granite 2000 CC and Others*, in which a carefully considered and articulate judgment was handed down by Wallis JA. In that matter certain litigation had been initiated by Ceasarstone in Israel. The respondents subsequently initiated proceedings in the Western Cape High Court against Caesarstone. Both actions arose out of the same agreement. Not all the parties, however, were participants in both sets of proceedings.

Wallis JA emphasised the important philosophy which underlies the defences referred to by Nugent JA, namely, that our courts should seek to avoid a situation where different courts pronounce on the same issue, with the risk that they may reach differing conclusions.

Generally speaking, there are three requirements for a successful reliance on the plea of *lis pendens*. They are:

1. That the litigation is between the same parties;
2. That the cause of action is the same; and
3. That the same relief is sought in both sets of proceedings.

Certain of these requirements have, over the years, been tempered. In addition, as Wallis JA emphasised, a defendant can raise the plea of *lis pendens* even though it is the plaintiff in the other proceedings on which the plea is based.

The present matter was bedevilled somewhat by the fact that all the parties in the South African proceedings were not parties to the pending proceedings in Israel. Wallis JA nonetheless determined that *"the only sensible way in which to address the problem is for the court also to stay the proceedings as against the remaining [parties], not on the basis of lis pendens, but in the exercise of its inherent powers to regulate its own procedures"*.

The common sense approach adopted by the Supreme Court of Appeal in this matter is to be welcomed.

Jonathan Witts-Hewinson

REGISTERED MAIL TO A DEFAULTING CONSUMER RETURNED UNCOLLECTED? ADDITIONAL STEPS TO BE TAKEN BY CREDIT PROVIDERS TO DELIVER S129 NOTICE

The National Credit Act, No 34 of 2005 (NCA) provides in s129(1)(a) that, if a consumer is in default under a credit agreement, the credit provider *may* draw the default to the notice of the consumer in writing before commencing with legal proceedings to enforce the agreement, and in such notice propose that the consumer refer the agreement to a debt counsellor, alternative dispute resolution (ADR) agent, consumer court or ombud. Such proposal should be 'with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date'. This must, however, be understood in conjunction with s129(1)(b)(i) and s130 of the NCA, which together *require* delivery of the notice contemplated in s129(1)(a) before legal proceedings to enforce the agreement can be taken. The NCA – despite imposing this mandatory requirement or so-called 'pre-litigation layer to the enforcement process' - gives no clear meaning to 'deliver' or 'delivery'.

The decision of *Sebola v Standard Bank of South Africa Limited and Another 2012 (5) SA 142 (CC)* held that it was insufficient for a credit provider to simply provide proof of dispatch before instituting legal proceedings. While the court did not go so far as to require proof that the notice actually came to the attention of the consumer, the credit provider was required to provide proof that the notice at least reached the intended post office evidenced by a 'track-and-trace' printout. Once this is established by a credit provider, the burden shifts to the consumer to show that the notice went astray after reaching the post office, was not collected, or was not attended to once collected.

Sebola did not however deal with instances where the notice is 'returned to sender'. The *Absa Bank Limited v Mkhize (716/12) [2013] ZASCA 139* decision turns on the interpretation of Sebola. This was an appeal against a decision of the KwaZulu-Natal High Court, Durban to postpone certain applications for default judgment and to require Absa to take further steps to ensure that notices of the consumers' defaults were provided to the consumers before setting the matters down for hearing again. The High Court held that where the notices were returned undelivered, delivery as intended in s129 and s130 of the NCA had not been fulfilled.

On appeal, the minority dealt with two issues: firstly, whether one could conclude in light of Sebola that there had been compliance with s129(1) of the NCA despite the fact that the notices were returned uncollected and secondly, if one concludes that there has been non-compliance, what directions should be given under s130 of the NCA as to the steps to be taken before resuming the default judgment applications. The minority noted at the outset that the decision of the High Court was to postpone the applications for default judgment and that the High Court did not refuse judgment. The majority of the court held that the judgment of the High Court was for that very reason not appealable. The minority judgment is, nonetheless, worth noting from a practical point of view.

The minority stated that the High Court correctly found that it could not ignore conclusive evidence that a notice did not come to the consumer's attention and reiterated Olsen AJ's words that 'proof positive of the fact that the notice did not reach the consumer trumps any conclusion which may be drawn from facts which suggest that the notice ought to have reached the consumer'. Absa submitted that this conclusion would have the result that 'a consumer who deliberately avoided collection of the notice, could frustrate the credit provider's right'. The minority dealt with that averment by suggesting that in such cases, after adjourning the hearing and prescribing the steps to be taken by the credit provider, the court 'may conclude that the consumer was acting in bad faith and enter judgment'.

The minority held that although there will be additional costs (not foreseen in Sebola) incurred in adjourning matters so that credit providers can take further steps as well as provide (on affidavit) (i) evidence to establish that the notice was provided to the consumer; and (ii) an explanation of the credit provider's choice of mode of delivery, that did not make the order of the High Court incorrect. This decision seems to be in line with increased emphasis on consumer protection.

In practice this means that a credit provider - to satisfy the requirement that a notice in terms of s129 be 'delivered' to a consumer - must at the very least show that the notice, sent by registered mail, reached the intended post office (evidenced by a 'track-and-trace' printout). Where, however, the notice is returned uncollected a court will not ignore positive proof of the fact that the notice did not reach the consumer. It may well be shown that a consumer acted in bad faith in not collecting or dealing with the notice, but the High Court's decision does add an additional hurdle to clear before enforcing a credit agreement.

Joe Whittle and Yasmeen Raffie

SEE NO EVIL, HEAR NO EVIL

Social networking sites such as Facebook allow people to stay connected, to create online communities and to share the detail of their lives with friends or strangers. With instant access to an audience of thousands, or possibly hundreds of thousands, it is also the forum chosen by more and more people each day to air their grievances, vent their frustrations or settle scores.

Our courts have unsurprisingly made it clear that they will not hesitate to venture into the digital world and have held that the host of a Facebook page will be held liable for any defamatory matter that they post on their own page in exactly the same manner that the author of a defamatory article in the written press would be.

But one's responsibility as a Facebook user doesn't end there. Recently, our courts have held that the host of a Facebook page may also be held liable for defamatory or harmful comments posted on their page by third parties if they are not removed timeously by the host. The analogy of a notice board has been used to illustrate why the 'owner' of a Facebook page will be considered to be the publisher of third party comments on their page. Our courts have said the following in this regard; "the host of such a page may establish what is essentially a noticeboard which may be public and to which anyone may post comments or which may be private and restricted to postings from a specified group. In either case the host may control content and delete postings and may also block users. Those who host Facebook pages are not passive instruments or mere conduits of content on the page."

It has been suggested that hosts of a Facebook page will be regarded as publishers of a third party post if they knew of the defamatory statement and failed to remove it within a reasonable time; or where they did not know of the defamatory posting, but ought, in the circumstances, to have known that postings were being made which were likely to be defamatory. This may be the case where a party makes a posting which is not defamatory in itself but is clearly going to illicit controversial comments.

In a judgment recently handed down by the North Gauteng High Court, the court went even further by holding two defendants jointly and severally liable for damages where the first defendant made defamatory remarks about the second defendant's ex-wife and tagged the second defendant in the posts. The court pointed out that a user may 'tag' another user in a post placed on his or her wall and the name of the tagged user would appear at the end of the user's message. The message would also appear on the wall of the tagged person. Although the tagged person's consent is not required the court held that the tagged individual retains the ability to remove such tagged posts off their Facebook wall and thus liability would ensue should they fail to do so. Whilst the court's rationale seems sensible, one does wonder whether our courts aren't assuming a level of technological sophistication that is beyond many Facebook users.

In light of the approach adopted by our courts, users of social media sites are advised to take ownership and control of all content that appears on their pages. They should remove any third party comments that appear to be defamatory or gratuitously harmful and remove tags that link them to potentially defamatory postings on other people's pages. Similarly, 'liking' a comment that is potentially defamatory or harmful could expose one to a claim for damages.

Brigit Rubinstein and Alexia Tomazos

THE LONG ARMS OF THE NATIONAL CREDIT ACT

The recent judgments of *Sable Place Properties (Pty) Ltd v Bott* (as yet unreported) and *Carter Trading (Pty) Ltd vs Blignaut 2010 (2) SA 46 (ECP)* are a sober reminder to clients to bear in mind the provisions of the National Credit Act, No 34 of 2005 (NCA) when entering into an acknowledgement of debt or concluding a settlement agreement.

In Sable Place, the plaintiff applied for summary judgment by placing reliance on a settlement agreement concluded between the parties. The terms of the settlement agreement included provisions deferring payment of the settlement amount and charging interest on the deferred payments. The court held that the provisions of s8 of the National Credit Act (which relate to incidental credit) found application to the settlement agreement. Among the court's reasons for subjecting the agreement to the Act included that the Act must be interpreted in its widest terms, which aim at inclusion rather than exclusion. The court

continued

therefore held that the settlement agreement was an incidental credit agreement and accordingly subject to the Act. In the result, the plaintiff was required to follow the dictates of the Act to enforce its debt prior to the commencement of legal proceedings.

The Sable Place judgment follows the judgment handed down in Carter Trading, in which the court held that an acknowledgement of debt agreement, in terms of which a credit provider undertakes to supply goods to a consumer and to defer the consumer's obligation to pay any part of the cost of such goods, together with any charge, fee or interest payable to the credit provider in respect of any amount so deferred, is regarded as a credit facility and therefore to be a credit agreement.

However, in the recent judgments of *Grainco (Pty) Ltd v Broodryk en Andere 2012 (4) SA 517* and *Rodel Financial Service (Pty) Ltd v Naidoo and Another 2013 (3) SA 151* the courts have declined to apply the National Credit Act to acknowledgements of debt when asked to do so by debtors. There is therefore an ongoing debate in legal circles regarding the applicability of the National Credit Act to acknowledgements of debt and accordingly advice should be sought before concluding any such agreements lest they fall within the ambit of the Act.

Callum O'Connor

INSURABLE INTEREST: ARE YOU OUT OR ARE YOU IN(SURED)?

An indemnity insurance contract ("contract") seeks to indemnify the insured against financial prejudice either in full or in part upon the happening of a future uncertain event. Prior to concluding the contract, thereby accepting the risk on behalf of the insured, underwriters analyse information relating to the property to be insured and the risk insured against. For the contract to be enforceable the insured must have an insurable interest in the subject of the insurance. This interest was for some time defined with reference to the insured suffering direct financial harm. The case of *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd 2013 (5) SA 42 (WCC)* is illustrative of how the concept of insurable interest was extended to apply in a business relationship between two entities where the insured did not suffer direct financial harm due to the insured event but was nevertheless entitled to recover the market value of the property in terms of the policy concerned.

In the aforementioned case, Lorcom Thirteen (Pty) Ltd (plaintiff) sued Zurich Insurance Company South Africa Ltd (defendant) in terms of an insurance policy issued by the defendant in respect of a fishing vessel (vessel) that was lost at sea. The defendant repudiated the claim. One of the defences raised by the defendant was that the plaintiff did not have an insurable interest in the vessel. The vessel was owned by Gansbaai Fishing Wholesalers (Pty) Ltd (GFW), not the plaintiff, but which in turn was the plaintiff's wholly-owned subsidiary. Although the parties envisaged that the plaintiff would become the owner of the vessel in future it was not the owner at the time the vessel was lost. In essence, therefore, the plaintiff obtained cover over the property of a different company.

The judge confirmed that a liberal approach is adopted by courts both in South Africa and abroad in determining whether a person who has concluded an insurance contract has an interest in the event apart from the insurance contract itself. In finding in favour of the plaintiff the court found that the combination of the plaintiff's right of use, its well-founded expectation of becoming the owner of the vessel and that the plaintiff was the 100% shareholder of GFW established an insurable interest measured with reference to the market value of the vessel. In light hereof, it is possible that more than one party may have an insurable interest sufficient to recover the market value of the subject of the insurance.

This case makes it clear that in defining insurable interest one cannot adopt an overly strict approach. Provided that the insurance contract is not construed as a gambling transaction, ie the interest created by the insurance contract is not the only interest the insured has in the property insured; the insurer will be bound by the cover it provided. To prevent potential prejudice, underwriters should ensure that sufficient information in relation to the relationship between the insured and the insured property and the potential loss in the insured property is obtained at the proposal stage. In the event that misrepresentation or non-disclosure of information can be proven, the insurer will then be able to repudiate the claim on that basis. Regard should also be had to whether the exemption clauses in the contract sufficiently protect the insurer in light of what is set out above.

Byron O'Connor and Verusha Moodley

FACILITATING PAYMENTS: THE END IN SIGHT?

If you often represent your firm overseas, you may be familiar with the following: you arrive in the foreign country and the customs official tells you that a small amount needs to be paid to allow your samples into that country. Instinctively you want to refuse but you realise that if you do, you'll miss your meeting with your new supplier and return home empty handed. Do you refuse because your company's policy prohibits paying facilitation payments? Or do you pay because your company's policy is silent on this point?

Facilitating payments or 'grease payments' are payments paid to foreign officials to perform routine functions they are otherwise obligated to perform for example issuing licenses or permits and installing telephone lines and other basic services. Some countries, like the United States of America and Australia permit these relatively small payments to foreign officials as an exception. Facilitating payments, however, are illegal in almost every country in which they are paid.

For many years the United States stood alone in criminalising the payment of bribes to foreign public officials. The US Foreign Corrupt Practices Act (FCPA) however makes provision for an exception embodying facilitating payments: the statute does not apply to any facilitating or expediting payment to a foreign official, political party or party official, the purpose of which is to secure the performance of a routine governmental action. The statute itself provided a list of examples of facilitation payments, including obtaining payments, licenses or other official documents, processing government papers such as visas and other work orders and regarding utilities, cargo handling.

The United Kingdom has taken a hard line with their Bribery Act prohibiting facilitating payments.

The Organisation for Economic Co-operation and Development (OECD) has started taking a hard line as well describing these low level payments as "corrosive….particularly on sustainable economic development and the rule of law".

Four months ago Canada joined the ranks of those countries prohibiting facilitating payments: broad amendments to its Corruption of Foreign Public Officials Act (CFPOA) repeal the current exemption for facilitating payments but suspends the coming into force of this amendment until a future date to be determined by cabinet.

The delayed implementation of this Canadian Act is intended to afford Canadian entities adequate time, as the case may be, to adapt their business practices to the new regime. Eliminating the facilitating payment exemption brings Canada's legislation in line with the legislation of the United Kingdom and other anti-corruption regimes around the world but will be out of step with the US whose FCPA currently still exempts the facilitating payments. (These payments have also come under increasing fire in the US as inconsistent with the totality of US policy on anti-corruption).

Under South African law, the Prevention and Combatting of Corrupt Activities Act, No 12 of 2004 applies to all corrupt activities relating to foreign public officials. Section 5 creates the offence of corrupt activities relating to foreign public officials. South Africa, like the United Kingdom, draws no distinction between facilitating payments and bribes and does not make provision for any exception embodying facilitating payments.

This international shift brings the considerable problems associated with facilitating payments in the international business arena into keener focus. Just like large commercial bribes, grease payments abuse the public trust and corrode corporate governance. Treating them as anything other than outward bribery muddies the compliance waters and adds confusion where there should be clarity. The new stance by Canada, coupled with the OECD's hard line may well bode the end of facilitating payments, even from a US perspective.

The best protection against facilitating payments and bribery dilemmas and the concomitant risk affecting brand value is to ensure that your company has an established strong risk management procedure, policy and code of conduct which are adhered to by all employees. Join the ranks and make a stand.

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