DLA CLIFFE DEKKER HOFMEYR

March 2013

DISPUTE RESOLUTION MATTERS

HOME OWNERS ASSOCIATIONS RECEIVE PROTECTION

In *Silver Tunnels Investments 7 (Pty) Ltd (In Liquidation) v The Kyalami Estate Home Owners Association - Case No 12/11377*, the court was faced with a clause in a title deed that provided that the immovable property could not be disposed of without a clearance certificate from the Home Owners Association (HOA). The question that arose was what the effect of the clause would be once the company was liquidated.

The court held that the clause in the title deed created real rights, which were capable of being registered against the title deed and as such enforceable against all successors in title, including the liquidator. The liquidator could not merely ignore the clause and transfer the property.

A further issue that arose was whether the claim by the HOA constituted a concurrent claim, or whether in addition to being a concurrent claim it was also a cost of realisation, as envisaged in s89(1) of the Insolvency Act, No 24 of 1936.

Section 89(1) provides that the cost of maintaining, conserving and realising property must be paid out of the proceeds of that property. These costs are paid from the property itself and not out of the free residue, eliminating the danger that there is no free residue to effect payment to creditors.

The court stated that there is no distinction between municipalities and body corporates on the one hand and HOAs on the other and that the functions and purpose of HOAs are indistinguishable from those provided by municipalities and body corporates.

The court, in its reasoning, stated that HOAs acquired a similar status by the registration of the condition in the title deed as to municipalities and body corporates. It is uncertain whether the court is correct in this regard as the rights of municipalities and body corporates to which the court refers are based in legislation and not title deeds as with HOA.

The court concluded that an HOA has the same rights as a body corporate and a state authority as envisaged in terms of s89, and are empowered to be paid out of the cost of maintaining, conserving and realising the property prior to such property being capable of being transferred.

The court also recognised that a HOA will have a right to veto any transfer of property in the event that there is any monies outstanding to the HOA. This is a right that was previously only reserved for municipalities and body corporates having been granted to them by legislation.

The practical question that arises from this judgment is whether liquidators will, where the property is heavily bonded and substantial arrears is owed to the HOA, simply abandon the property or still seek to dispose of it. Given that the property market is already embattled, it will be interesting to see what the liquidators do.

Julian Jones

IN THIS ISSUE

DEBT REVIEW APPLICATIONS DO NOT CONSTITUTE AN ACT OF INSOLVENCY

The *FirstRand Bank Limited v Janse Van Rensburg [2012] 2 ALL SA 186 (ECP)* decision has finally resolved the confusion of whether debt review applications constitute an act of insolvency in terms of the provisions of s8(g) of the Insolvency Act, No 24 of 1936 (as amended).

FirstRand Bank Limited applied for the provisional sequestration order of Mr and Mrs Janse Van Rensburg on the basis that they had committed an act of insolvency in terms of s8 (g) of the Insolvency Act. FirstRand Bank relied on the fact that the Janse Van Rensburgs had made applications for an order in terms of s86(7)(c) of the National Credit Act, No 34 of 2005 (NCA) for a declaration of over-indebtedness. In support of the application, FirstRand Bank relied on a consumer profile report issued by a credit bureau, reporting that the Janse Van Rensburgs had applied for debt review.

In terms of s8 (g) of the Insolvency Act, a debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts. In order to meet the requirements of s8(g) of the Insolvency Act, there must be a notice in writing to a creditor in which the debtor states that he is unable to comply with his financial obligations. The court found that FirstRand Bank's application did not meet the requirements of s8(g) of the Insolvency Act.

The court scrutinised the procedure of applying for debt review and found that the application for debt review does not involve notice given by the debtor to a creditor in which the debtor declares an inability to pay one or more of its creditors. It is important to note that the application for debt review in terms of s86 of the NCA read with the NCA regulations is by the debtor to a debt counsellor and not by a debtor to his creditor. It does not constitute a notice if given by the debtor to the creditor in which the debtor declares an inability to pay one or more of his creditors.

The notice of inability to pay in terms of s8(g) of the Insolvency Act must be given deliberately and with the intention of giving such notice. The notice must be such that on receiving it, a creditor can reasonably conclude that the debtor is unable to pay his debts.

FirstRand Bank did not rely on a written communication addressed to it by the Janse Van Rensburgs but on a profile report issued by the credit bureau reflecting that they made application for debt review in terms of the NCA. The court held that the profile report provided no details of the application for debt review, contained no reference to statements and declarations made by the Janse Van Rensburgs and contained no information on which a creditor may determine that the debtor is unequivocally stating an inability to pay. As a result, the court held that the profile report did not constitute a written notice envisaged by s8(g) of the Insolvency Act and dismissed the applications.

This decision brings relief and clarifies confusion that might have been created by earlier cases regarding the impact of debt review applications constituting an act of insolvency.

Tshepisho Mokgorwane

SCOPE AND STATUS OF LEGAL ADVICE PRIVILEGE

As a client, it is of paramount importance that communications between you and your legal adviser remain privileged. While legal professional privilege belongs to the client, and can therefore only be waived by the client, it is important to realise that confidential communications between a client and its legal adviser, whether attorney, advocate or in-house legal adviser, must, in order to qualify as being privileged, be for either the purposes of obtaining or receiving advice or communications pertaining to *existing* or *contemplated litigation.*

From a client's perspective there are two main types of legal privilege that may become relevant to it in the legal arena namely:

- Commercial legal advice privilege such as the right to claim privilege from disclosure [to others] of information provided by way of general advice received from a legal professional and reciprocal communications in such regard.

- Litigation advice privilege such as information and advice provided by and to a legal professional within the context of existing or contemplated litigation and that meets the standard test of whether such advice was provided in contemplation of litigation.

Where the latter form of advice is concerned, it is generally accepted that such advice is privileged from disclosure to any unauthorised person or to a court in due course (if it comes to that) should such advice emanate from a legal professional such as an attorney or advocate or an expert who has prepared a report in contemplation of litigation.

As far as the former is concerned, general legal advice within the commercial sphere can be provided in terms of an array of issues and is most commonly encountered in the field of tax advice.

The right to legal professional privilege belongs to the client and can only be waived by that client. Before claiming legal professional privilege a client's situation would need to meet the following essential requirements:

- Communications or advice must be given by and to a legal adviser, while the adviser is or was acting in a professional capacity.

- Communications must have been made in confidence.

- Communications must be for the purpose of obtaining legal advice.

- Legal professional privilege must and can only be claimed by the client.

In *S v Safatsa and Others 1988 (1) SA 868 (A)*, the court deliberated the scope of legal professional privilege, specifically pertaining to that of advice and communications, and among other things, stating that "privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice...".

While privilege exists between clients and legal advisers, one needs to consider what effect the modernising legal sphere has on clients' scope of material to which it is entitled to claim legal professional privilege. Recently, the United Kingdom Supreme Court R *(on application of Prudential PLC and another) v Special Commissioner of Income Tax another [2013] UKSC 1* was faced with deciding the issue of whether legal professional privilege could be extended to include legal advice provided by accountants or other non-legal professionals, for example legal tax advice provided by a tax consultant.

In R *(on application of Prudential PLC and another) (Appellants) v Special Commissioner of Income Tax another (Respondents) Ibid*, the Appellants sought the judicial review of certain UK tax laws requiring the Appellant by law to disclose tax advices given by the Appellants in relation to a commercial tax avoidance scheme. The Appellants refused to disclose tax advice given by said accountants on the basis that these advices were the object of and subject to legal advice privilege as claimed by the client.

The issue before the court was therefore whether the advice given by accountants permitted the client to claim such privilege. This introduced the issue of whether legal professional privilege could be extended to accountants or non-legal professionals who provided legal advice, albeit providing legal advice within their scope of profession and knowledge.

continued

While the majority of the court cautioned that it did not intend to exceed its judicial powers and functions, and that this was a matter of policy for parliament to make law on, the majority held that the Appellant provided a "strong case in terms of logic" for extension of the privilege. This argument was based on the fact and contention that members of a non-legal profession, which as an ordinary part of their profession included giving such advice, should entitle clients to claim such advice as privileged. However, despite this, the majority finding of the court confirmed the limited scope of legal professional privilege, and held that privilege *only applied to advices or communications with a legal adviser acting in its capacity as a legal professional* [our emphasis].

While this judgment does not constitute a binding precedent where South African courts are concerned, it remains relevant and persuasive.

It is worthwhile for clients to understand the scope and ambit of legal professional privilege and the effect that it could potentially have on their business and present or future litigation.

Importantly, clients should fully understand what types of communications would be regarded as privileged. Inevitably this knowledge will maximise clients' prospects of claiming the protection of privilege should the need arise.

Grant Ford And Jacques Odendaal

THE EFFECTS OF DEREGISTRATION ON PRESCRIPTION

In the matter of *Village Freezer t/a Ashmel Spar v CA Focus CC 2012 (6) SA 80 (ECG)*, the respondent close corporation issued a summons against the appellant for payment in respect of services rendered. In its special plea, the appellant (the debtor) raised the defences that the respondent (the creditor) was not in existence at the time of issuing of summons and that the claim had prescribed. It was common cause that the summons was issued after the creditors deregistration and that, in the absence of interruption of prescription by the issue of summons, the respondent's claim would have prescribed while it was still deregistered.

The provisions of the Close Corporations Act, No 69 of 1984 were applicable at all relevant times. In particular, s26 regulated the deregistration and re-registration of close corporations and provided that a re-registered close corporation is deemed to have continued to exist as from the date of its deregistration.

In *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd 2007 (4) SA 467 (SCA)* the Supreme Court of Appeal's interpretation of s26 was that a restoration order validates the institution of legal proceedings by a de-registered company.

The respondent creditor in *Village Freezer* relied on this judgment in support of its argument that a re-registration of a close corporation has retrospective effect. The court, however, upheld the debtor's argument that the purpose of s26(7) of the Close Corporations Act could never have been to grant a corporation retrospective legal personality and *locus standi* to perform judicial acts or to validate proceedings which commenced during the period of deregistration.

The court accordingly held that a deregistered entity cannot issue a summons that could effectively interrupt prescription as the respondent did not have independent judicial existence at the time that summons was issued, rendering the summons a nullity.

The appellant's indebtedness could not be revived once it had been extinguished by prescription merely on account of a legislative fiction that deemed the respondent to have been in existence at the time of issuing of summons.

At the time when the debt was extinguished by prescription, a right was created in favour of the appellant debtor, which right existed at the time of the creditor's deregistration. The debtor could not have been deprived of that right merely on account of the deeming provisions of s26.

This judgment has vital consequences for companies and close corporations alike, since the provisions of s82 of the Companies Act, No 71 of 2008 that substituted s26 of the Close Corporations Act, impose a duty on the Commission to deregister a company that has, failed to file an annual return for two or more successive years without a satisfactory explanation – something that occurs regularly in practice. The process of re-registration and restoration of a close corporation can take up to a year to complete. Companies and close corporations should therefore be vigilant, as there is a risk that their claims will prescribe during the period of deregistration without the possibility of revival.

Liuba Stansfield

THE LEGAL CONVICTIONS OF SOCIETY, REVISITED

On 26 September 2012, the Supreme Court of Appeal (SCA) handed down judgment in *Paixao v RAF (640/2011) [2012] ZASCA 130.* The issue to be decided was whether a legal duty of support should be recognised between permanent heterosexual life partners. The Appellants, Mrs Paixao and her daughter, sued the respondent, the Road Accident Fund, for loss of maintenance and support arising from the death of Mr Gomes (G) in a motor vehicle accident.

The Appellants claimed that G had contractually undertaken to maintain and support them, was legally obliged to do so, and would have done so for the remainder of Mrs Paixao's life and until her daughter became self-supporting. Mrs Paixao and G had lived together for four years and planned to marry. G supported Mrs Paixao and her children financially, had formed strong bonds with the children, referred to Mrs Paixao as 'his wife' and had a joint will wherein they referred to 'our daughters'. On her part, Mrs Paixao nursed and supported G when he was unable to work. They were accepted by their relatives and friends as a family unit and the community acknowledged that they were living together as if they were married. The South Gauteng High Court held that to recognise these actions would be an affront to the fabric of society and an erosion of the institution of marriage.

The SCA acknowledged that only those with a legally enforceable duty to maintain and support could successfully institute the dependant's action. A dependant must have a right that is worthy of the law's protection to claim support. This is determined by the legal convictions of the community, which are in turn determined by factors such as society's history, its ideas of morals and justice, its perception of where the loss should fall and the convenience of administering the rule. The SCA held that as the legal convictions of the community is the decisive factor in the determination, the dependant's action has always had the flexibility to adapt to social changes and modern conditions. Consequently, there was no reason to restrict the action to traditional family and blood relationships when social change did not require it. Cachalia JA recognised that the nuclear family has, for a long time, not been the norm in South Africa and that for religious, legal, social, cultural and financial reasons, millions of South Africans live together without entering into formal marriages.

It was found that there was a tacit agreement creating a binding and legal obligation between the Appellants and G. Further, the Appellants had established that they had an enforceable agreement with G and that the obligations created by the nature of their relationship was worthy of the law's protection. Consequently it was held that where an agreement between parties to a permanent heterosexual life partnership establishes a reciprocal duty of support it should be afforded the protection of the common law dependant's action.

Roy Barendse

DLA CLIFFE DEKKER HOFMEYR

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

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

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

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

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

Richard Marcus
Director
T +21 (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 +21 (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 +21 (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