DISPUTE RESOLUTION

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URGENT APPLICATIONS – DON'T FALL INTO THE TRAP

The very last result that a company wants when proceeding with an urgent application is for its application to be dismissed for lack of urgency. Not only does the company not achieve the desired outcome, but it has to pay its opponents costs as well as its own legal team. Talk about a double whammy! This trap should be avoided at all costs.

Our courts have prescribed rules and procedures that govern the way they function and how legal proceedings are commenced and adjudicated. Applications are generally brought before the court when there are no anticipated disputes of fact and the court can make a determination based on the affidavits filed by the parties, usually without the need for oral evidence as in action proceedings, which require witnesses to give evidence.

Ordinarily, parties are obliged to afford each other time for the filing of notices and affidavits and the applicable normal time periods are set out in the Rules of Court. There are, however, unique disputes that give rise to circumstances that would result in grave prejudice and harm to a party if such party were required to follow the normal time periods strictly. In such circumstances, time is a critical factor and the applicant cannot follow the normal time periods due to the harm that the applicant will suffer if it were to do so.

In launching an urgent application, an applicant will request the court to condone the applicant's non-compliance with the Rules of Court that prescribe the manner and time periods that are applicable. The court will essentially be called upon to give preference to the applicant to prevent the prejudice and harm that may materialise or continue if the respondent's behaviour complained of continues unabated.

Our courts generally allocate an urgent judge or two urgent judges weekly to hear urgent applications. In seeking condonation from the court, the applicant must clearly demonstrate to the court that the application is urgent and warrants being heard as such. In doing so, the applicant must justify the truncated time periods placed on the respondent for the filing of affidavits.

Every issue that potentially threatens a client's business is urgent to the client and understandably so. However, it is important to distinguish what clients consider to be urgent from what our courts consider to be urgent. Our courts generally do not recognise commercial urgency.
By commercial urgency I am referring to disputes regarding a claim for payment of money from one party to another. The courts are generally not tolerant of such disputes being enrolled on the urgent roll as alternative remedies are available in the normal course.

What do the courts consider to be urgent? Whether or not a dispute is urgent for purposes of a court application should be determined carefully on a case-by-case basis. An example that immediately springs to mind is a case of spoliation or 'self-help', which our law does not allow. A spoliation would involve, by way of example, the disabling of access permits or changing locks on doors to address a dispute regarding the termination of a lease or a default by the tenant in terms of the lease. Spoliation applications are generally brought on an urgent basis even though they often have a commercial element to them. Further examples are cases that involve injury to minor children and unlawful actions that threaten the continued employment and livelihood of employees.

What are the important factors to consider before launching an urgent application? The party intending to launch the application should carefully consider what its prejudice is;

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how serious it is and its impact; and whether such prejudice can be cured by some other remedy in law. Sometimes an alternative remedy is available, however, interim urgent relief may be required.

When the applicant gained knowledge of the respondent's prejudicial behaviour or actions is vitally important because the applicant must take steps to launch its application as expeditiously as possible after learning of the harm or prejudice.

An applicant that knows of harm that it is suffering and does nothing about it for a period of time and then launches an urgent application is likely to have its application struck from the urgent roll with an order to pay the costs of the respondent. Once the harm has materialised or come to the knowledge of the applicant, the applicant must immediately prepare court papers and file its application promptly to demonstrate that the matter is urgent and warrants being heard as such. The presumption if an applicant delays in filing its application is that the prejudice or harm being suffered is not of such a serious nature and the court is therefore unlikely to entertain the application.

What do we advise clients? It is important for management to identify situations that present serious harm or possible serious harm to their business. The degree of prejudice caused by the harm should be carefully and promptly considered and a decision should be taken on whether or not to approach attorneys for advice. This should be done swiftly as this sequence of events is almost always articulated in court papers to demonstrate the alacrity with which the applicant acted after learning of the harm. It is important to be organised and to approach attorneys with all the relevant documents pertaining to the matter. Preferably all relevant documents should be indexed and chronologically sorted to assist the attorneys and counsel. In this regard, the speed with which the matter is dealt with and the time of filing extends to the attorneys as well. This should, of course, never compromise the matter and the quality of the papers filed at court. We urge our clients to be cautious when enrolling urgent applications and ensure same are in fact urgent.

Munya Gwanzura

LESSORS AND LANDLORDS - DO THEY HOLD ALL THE CARDS?

It is not unusual for lease agreements to contain clauses providing that a lessee who seeks to sublet or to cede and assign all their rights and obligations in terms of the lease agreement to a third party may only do so having first obtained the prior written consent of the lessor, whose consent will not be unreasonably withheld. Interestingly, the applicable case law suggests that the use of such a clause in this context will not be treated as an enforceable term of the agreement but, rather, as a mere proviso or qualification to the lessee's obligation not to sublet or assign the lease without the lessor's consent.

Although some may argue that this does not seem in keeping with the development of our contract law, the failure on the part of the lessor to (reasonably) consent, consequently, does not amount to a breach by the lessor and contractual damages can, therefore, not be claimed by the lessee. In terms of this approach, an aggrieved lessee's remedies would, instead, be to proceed to sublet or assign notwithstanding the lessors refusal and then to defend any proceedings by the landlord on the basis that his refusal was unreasonable or alternatively, to approach the court for a declaratory order declaring the lessee to be entitled to sub-let or assign notwithstanding the lessor's refusal to consent. It ought to be borne in mind, and while often a matter of contractual interpretation, that nothing prevents a lessor and a lessee from agreeing, if phrased properly, that the lessor is under a positive obligation not to withhold consent unreasonably.

Whether as a means of expressing its misgivings, the court in *Kouga Municipality v De Beer and Another 2008 (5) SA 503 (E)* refrained from deciding "to the effect that when the lessor has unreasonably withheld his consent the lessees are restricted to sublet without consent and resist legal action taken by the lessor or to approach the court for declaratory relief [is] correct or not" (para 10). Interestingly, this case is authority that a decision to unreasonably withhold consent by an organ of state (a municipality in this instance) will potentially constitute administrative action capable of being reviewed and set aside. This appears to open the door to the possibility of obtaining constitutional damages by reason of the organ of state's breach of its constitutional duty to act lawfully where, conceivably, such constitutional damages would be difficult to quantify. Given the fact that the Constitutional Court has recently shown its penchant to develop the contract law, the issue of unreasonably withholding consent may yet receive its attention.

The lesson to be learned by clients, particularly if they are tenants, is to define their rights and obligations clearly before entering into a lease agreement and whilst they still have some bargaining power. It is imperative to be as pedantic as possible before you sign on the dotted line.

Lionel Egypt and Jennifer Begg

ATTACK ON THE DRONES

The flying of Unmanned Aircraft Systems, commonly referred to as 'drones' is illegal in South Africa. This is according to statements issued by the South African Civil Aviation Authority (SACAA).

The invention and recent commercial availability of Unmanned Aircraft Systems (UASs or drones) has revolutionised military operation, and more recently, the entertainment industry. The advantages to these respective industries are obvious. One only needs to visit either YouTube or Vimeo to see the influence these devices have had on both professional and amateur film making.

It is only really the recent availability of these drones to professional and amateur film makers (as well as hobbyists), that has caused much of the confusion and uncertainty as to their use in South Africa.

In (SACAA) is a juristic body established in accordance with the provisions of the Civil Aviation Act, No 13 of 2009 (Act). The operation of aircraft in South African civil airspace is governed by the Civil Aviation Regulations, promulgated in accordance with the Act. These regulations were not drafted with the operation of drones in mind. Drones, as they currently exist, cannot comply with these regulations. Further, SACAA has not given any concession or approved any organisation, individual, institution or government entity to operate drones within the South African civil aviation airspace.

In a media statement issued on 2 April 2014, SACAA declared a 'crack down' on illegal drone flying. While South Africa, under the guidance of the International Civil Aviation Organisation, is 'working to understand, define and ultimately integrate into the Civil Aviation sector the use of UAS or drones' (as stated by SACAA), we are unlikely to see any amended regulations or policies adopted that would authorise the use of drones in South Africa in the very near future.

On the other hand, radio controlled aeroplanes, helicopters and model aircraft do not fall (directly) under the Civil Aviation Regulations. The director of the South African Civil Aviation Authority has designated an external organisation to oversee the use of radio controlled aeroplanes, model aircrafts and helicopters in South Africa -- the Recreation Aviation Administration South Africa (RAASA).

Neither SACAA, nor the International Civil Aviation Organisation (ICAO) has defined a UAS or drone and indeed what the difference is between such an aircraft and a radio controlled or model aircraft. What appears to be important from a local perspective is the intended use of the aircraft. Should a drone be used solely for sport or recreational purposes it would appear that its use would be governed by RAASA. These types of 'toys' are also referred to as 'park flyers'. Provided that communication with the drone is conducted through an open frequency (and as such does not require a spectrum licence from ICASA), is flown no higher than 150 feet (50m), always remains in visual range of the operator and does not fly within 5 nautical miles of any airfield, RAASA will most likely regard the machine as a toy and thus, legal.

On the other hand, if the aircraft is used in a manner which results in remuneration being received, or for any type of professional aerial work (this distinction was offered by SACAA), it is likely to fall under Civil Aviation Regulations. As stated earlier, drones currently cannot comply with these regulations (due to the absence of, for example, on-board anti-collision measures, among other things). This is where commercial film companies have picked up the fight with SACAA.

SACAA, in an attempt to clarify its declaration that the use of drones as 'illegal', issued a statement on 3 June 2014 in which it stated that the flying of drones has not been banned but that the flying of drones is currently illegal (due to non-compliance with SACAA regulations). This does not take the debate much further.

What is clear is that the SACAA regulations were not intended to govern the use of drones. Until such time as new regulations are promulgated, either by SACAA or RAASA, their commercial use will be in conflict with the current SACAA regulations. It is, however, anybody's guess as to how SACAA intends enforcing its regulations (although there has been at least one incident of a freelance film maker being detained by police for filming the hospital where Nelson Mandela was treated).

The issue of the invasion of a person's privacy by attaching a camera to a drone is an entirely different debate, which will no doubt emerge in due course.

Jonathan Ripley-Evans

A STEP IN THE RIGHT DIRECTION - COURTS ARE GOING FURTHER TO ESTABLISH INTENTION WHEN INTERPRETING CONTRACTS

"The goal of a legal draftsman is, by the nature of his [or her] craft, utilitarian rather than literary, but legal prose should be polished as diligently and refined as fully as though the goal were solely aesthetic." These words were written by Sidney F Parham Jnr in 1966, but the subject of good draftsmanship remains a pressing issue for attorneys and their clients. The practical importance of it was illustrated by a recent decision of the Supreme Court of Appeal (SCA).

In *Air Traffic and Navigation Services v Esterhuizen* (668/2013) [2014] ZASCA 138 (25 September 2014), the appellant (ATNS) had introduced an incentive scheme to attempt to retain its highly trained air traffic controllers. Esterhuizen had elected to participate in the scheme, which stipulated that he would receive monthly retention payments in addition to his normal remuneration.

He agreed to remain in the ATNS's employ for a fixed term and his employment contract was amended to reflect the terms of the agreement. More particularly, the notice period would be substituted with a clause preventing the termination of employment by either party during the fixed term. The agreement also provided for consequences that would follow upon a breach of its terms.

When Esterhuizen resigned, ATNS considered it a breach of the agreement and claimed R427,843, being the monthly incentive amounts it would have paid to Esterhuizen, but for his resignation.

The interpretation of the incentive agreement became the issue in dispute. The court noted that the intention of the parties, as it emerges from the language they have used, is the determining factor in problems of contractual interpretation. The nature, character and purpose of the contract must be ascertained from the language used, read in its contextual setting and in the light of any admissible evidence. The court considered the clauses of the contract and found that the agreement was poorly drafted and contained conflicting provisions. However, after an examination of the contract as a whole and having regard to its purpose, the SCA held that the agreement did yield a clear meaning.

Since the High Court's interpretation of the contract had rendered certain clauses meaningless, the SCA favoured an interpretation that gave greater effect to the contract's perceived purpose. Consequently, Esterhuizen was ordered to pay the full R427,843.

This decision follows on from the earlier Bothma-Batho Transport decision where Wallis JA pointed out that "[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document".

These decisions are a crisp reminder that contracts should be clear regarding the intention of the parties. While it is helpful that courts will consider background circumstances to establish what the intention was, it is a double edged sword as parties can no longer just stand by the plain wording of the contract. Where necessary, the court will have regard to the parties' negotiations, drafts or preliminary discussions in order to interpret unclear provisions of the contract and the results of such an exercise may not necessarily always be desirable.

Deshni Naidoo and Megan Badenhorst

THE CONSTITUTIONAL COURT DECLINES TO RECOGNISE A NOVEL EXTENSION OF THE LAW OF DELICT

***Dolus eventualis* is a phrase that has become bandied about in almost every social setting imaginable, given its prominence in the sensational Oscar Pistorius trial. It has also found itself in the spotlight in legal circles, although in the far-less sensational but more relevant purposes of commercial litigation context of delictual damages claims.**

In the case of *Country Cloud Trading CC v Member of the Executive Council, Department of Infrastructure Development, Gauteng [2014] ZACC 28,* Country Cloud sued the Member of the Executive Council (MEC) for damages as a result of the unlawful cancellation by the department of a construction contract awarded to a third party, iLima Projects (iLima). Country Cloud contended that it suffered a loss of R12 million which it lent to iLima and which iLima was unable to repay to Country Cloud as a result of the department's unlawful termination of a construction contract that was awarded to iLima.

The case was taken on appeal by Country Cloud from the High Court to the Supreme Court of Appeal (SCA) and, not succeeding there, Country Cloud appealed to the Constitutional Court.

The Constitutional Court agreed with the SCA on its finding on the facts that the department breached its contract with iLima, and caused loss to Country Cloud, acting with intent in the form of *dolus eventualis,* which is satisfied where a wrongdoer foresees the possibility of a consequence eventuating as a result of his conduct, but reconciles himself with the fact and proceeds anyway. The question that the Constitutional Court had to determine was whether or not the Department's conduct was wrongful, not in a general sense or towards iLima, but *vis-à-vis* Country Cloud.

Wrongfulness is an element of delictual liability, which functions to determine whether the infliction of culpably caused harm demands the imposition of liability or whether the social, economic and other costs would be too high to justify imposing liability in the circumstances of a case.

In contrast to cases of physical harm, this was a case of pure economic loss. Under South African law, conduct causing pure economic loss is not necessarily wrongful. Wrongfulness must therefore be positively established. It has thus far been established in limited categories of cases, such as intentional interferences in contractual relations or negligent misstatements. Recognition of liability in this case would have been novel and an extension of the law of delict.

The court found that the department did not owe a duty to Country Cloud, which was a third party to the department's contract with iLima. As such it cannot be said that Country Cloud was wronged by the department. While the department's conduct was objectionable, it did not rise to the level of dishonesty or corruption. The court also found that Country Cloud willingly exposed itself to the foreseeable risk of iLima's downfall for the promise of a large financial reward. The court was therefore unpersuaded that considerations of legal and public policy require the imposition of liability and dismissed the appeal.

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