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DISPUTE RESOLUTION

MATTERS

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CONTRACT SILENT REGARDING ITS DURATION?

It is not unusual for contracting parties to conclude either a long-term or an ever-green contract, especially if the contracting parties intended to be bound to such contract. However, problems usually arise when a contract is silent as to its duration and one of the contracting parties then wants to terminate same. This issue was considered in *Plaaskem (Pty) Limited v Nippon Africa Chemicals (Pty) Limited 2014 JDR 1126 (SCA).*

The contract concluded between Plaaskem and Nippon on 25 February 2005, concerned the importation of agricultural chemical products. Nippon had a business relationship with a Japanese manufacturer for the products and Plaaskem's function was to distribute the products and pay Nippon an amount equal to 15%, calculated on the gross profit earned in respect of products sold as a result of Nippon's endeavours. On 18 May 2010, Plaaskem provided Nippon with notice that it intended to cancel the contract with effect from 30 June 2010. Since the contract was silent on duration, Nippon disputed Plaaskem's entitlement to cancel the contract.

The court *a quo* held that the contract did not contain such a term and as a result, the notice of cancellation of the contract by Plaaskem was invalid and of no effect. In overturning the court *a quo's* decision, the SCA held that certain factors had to be taken into account to determine the existence of such a tacit term. Firstly, the SCA analysed the language used in the contract and held that from such language, there was no indication that the parties intended to be bound in perpetuity. Secondly, in considering the intention of the parties, the SCA noted that the contract was of such a nature that it required the parties to form and maintain a close working relationship and have regular contact and interaction with each other. Other aspects such as the contract covering a wide spectrum of products and that the nature of the relationship would change over time were strong suggestions that the parties did not intend to remain bound in perpetuity. Regarding the third factor, being the nature of the relationship, the SCA held that the court *a quo* erred in stating that the working relationship *inter parties* was open to serious doubt. *Ex facie* the contract, the relationship appeared to be one of good faith and trust. Fourthly, the surrounding circumstances had to be considered. Factors such as production costs, transportation costs, landing costs and the applicable exchange rates would lead one to conclude that the parties had no intention to be bound in perpetuity.

The SCA upheld Plaaskem's appeal and held that it was necessary for a tacit term to be imported, the tacit term being that the contract could be terminated by either party on reasonable written notice.

As a contracting party, you have the contractual freedom to decide the express terms of your contract such as, for example, the duration and manner of termination. Failure to do so impedes this freedom and affords a court with the discretion to decide on what you and the other contracting party intended, which could have dire consequences as either party may not be content with the court's decision. To avoid such a situation, exercise your contractual freedom as far as possible by reducing material terms to writing.

Anja Hofmeyr and Thato Thobakgale

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SECURITY FOR COSTS: A NEW DISPENSATION?

The new Companies Act, No 71 of 2008 (new Companies Act) has removed the courts' legislative discretion to require an impecunious plaintiff company to furnish security for costs. So what does this mean for defendants?

The repealed s13 of the Companies Act, No 61 of 1973, together with its predecessor s216 of the Companies Act, No 46 of 1926, provided the courts' with the power to require an impecunious plaintiff company to furnish security for costs if there was reason to believe that the plaintiff would not be able to pay an adverse costs order. These sections were aimed at curtailing risk-free litigation instituted by impecunious plaintiff companies.

The common law provides that where a plaintiff company is an incola (resident) of South Africa, regardless of whether it is in liquidation or financially distressed, it shall not be required to provide security for costs in proceedings instituted by it. Since the new Companies Act has omitted to provide a similar provision like s13 and s216, the common law position prevails.

The two cases of *Haitas & Others v Port Wild Props 12 (Pty) Ltd 2011 (5) SA 562 (GSJ)(Haitas) & Boost Sports Africa (Pty) Ltd v South African Breweries Ltd 2014 (4) SA 343 (GP)(Boost)* had to determine the effect of this omission and how to grapple with the common law position.

In both cases the plaintiffs' had conceded that they were unable to satisfy an adverse cost order. They argued that the effect of the omission immunised an impecunious plaintiff company to a demand for security for costs. The courts' in both these cases rejected the plaintiffs' arguments and granted the orders for security for costs.

The court in *Haitas* held that even at common law, the basis upon which a court could demand security for costs from an impecunious incola plaintiff vested in its inherent power to regulate its own process. Whilst engaging in this process the courts should guard against vexatious, reckless and unmeritorious litigation. It further held that each case must be decided on its own peculiar facts taking into account the interests of justice. The court found that the plaintiff had failed to finalise the matter in court and for a period of three years, failed to enrol the matter. In the interests of justice the court ordered the plaintiff to furnish security for costs.

Boost approved the decision taken in *Haitas* but qualified it by introducing a new test. The court held that one must look at whether there is any basis in law to order an incola plaintiff company to furnish security and in so doing it must take into account the following factors:

- How long did the defendant take to bring the application for security for costs?
- Why did the defendant bring the application?
- Is the plaintiff's claim in the main proceedings without merit or vexatious?
- Does the application for the security for costs infringe upon the plaintiff's right to a fair hearing?
- Is there a material dispute of fact?

It was also held that the defendant's defence in the main proceedings and any other pertinent factors should also be taken into account. The court, in granting an order in favour of security for costs, found that the costs in the main claim are likely to be substantial, the plaintiff conceded it will be unable to satisfy an adverse cost order, and the plaintiff must have considered and made provision for the consequence of unsuccessful litigation.

Although the new Companies Act does not provide the courts with the legislative discretion it previously enjoyed it still, through its inherent power to regulate its own process and taking into account the interests of justice, has the ability to grant orders for security for costs against impecunious plaintiff companies.

Willem Janse van Rensburg and Clayton Gow

SECTION 14 OF THE PRESCRIPTION ACT, NO 56 OF 1972 – A LIFE LINE

It's no joke, prescription is probably one of the most dreaded expressions in the legal profession, even more so when an attorney has to inform his client that his claim has prescribed. It's probably the closest we can get to understanding how a medical doctor must feel when walking out into the hospital's waiting room and having to tell hopeful family members that there was nothing more he could do for his patient.

Its effects can without a doubt be devastating.

In a recent unreported judgment of the South Gauteng High Court in *Anglo American Properties Limited v City of Johannesburg Metropolitan Municipality; Case No.35043/12*, Mokopo AJ reminded attorneys and their devastated clients of a life line that is sometimes forgotten.

The issue before the court was whether Anglo American Properties Limited's (Anglo) claim had prescribed or whether an oral acknowledgment of indebtedness

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and undertaking to pay by the City of Johannesburg Metropolitan Municipality (COJ) interrupted prescription as contemplated by s14 of the Prescription Act, No 56 of 1972 (the Act).

Section 14 of the Act provides that the running of prescription shall be interrupted by an express or tacit acknowledgment by the debtor.

The facts of the case are briefly as follows:

- Anglo's claim arises from a tax invoice issued by COJ on 28 July 2008 in terms of which COJ acknowledged that Anglo's account was in credit in the amount of R1,183,149.00 (the debt).
- Neither the tax invoice nor the debt was disputed by COJ.

COJ contended that Anglo's claim had prescribed because Anglo had knowledge of the debt more than three years before summons was issued on 14 September 2012.

Anglo denies that the claim has prescribed and argued that prescription was interrupted on 29 March 2011 when an employee of COJ orally acknowledged to Reon Louw (Louw) of Anglo that the debt was due to Anglo and that Anglo could claim it. In support of its case, counsel for Anglo relied upon *Adams v SA Motor Industry Employers' Association 1981 (3) SA 1189 at 1198 SCA* where it was held that an acknowledgement, in order to constitute a claim must reflect both the indebtedness and intent to pay. The intent may be implicit and reference can be had to surrounding circumstances. Counsel for Anglo argued that the debt as reflected on the tax invoice was common cause and that the remaining question to be determined was whether there was an intention to pay.

Mokopo AJ held that there is no doubt that the debt is due to Anglo and in the absence of evidence contrary to that of Louw, she has to accept that there was an acknowledgment and an implicit undertaking to pay. Accordingly, she found that the debt had not prescribed and that the oral undertaking by the employee of COJ to Louw was an express acknowledgment as contemplated in s14 of the Act and accordingly prescription was interrupted.

COJ has subsequently applied for leave to appeal.

The moral of the story - where three years have lapsed since your client has come to know of a claim and it appears that your client's claim has flat lined - dig a little deeper, you may be able to defibrillate the situation where there has been an express or implicit acknowledgment of debt.

Jackwell Feris and Nicolette du Sart

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THE SALE OF A RENTAL ENTERPRISE

Commercial property including the rental 'enterprise' is often transferred to new owners as a going concern in terms of an agreement of sale. By operation of law, all rights and obligations in terms of any agreements of lease in respect of the premises are transferred to or assumed by the purchaser upon taking transfer of the premises[1]. This is referred to as the *huur gaat voor koop* maxim, which simply means 'lease trumps sale'.

In *Boschoff v Theron*[2] the court applied the said maxim and held that upon transfer being passed to the purchaser the previous landlord is divested of his rights and obligations as the lessor and a tenant cannot recover any loss or damages from the previous landlord[3].

In practice, purchasers often inherit poorly drafted agreements of lease, which contain certain ancillary charges for which tenants are liable, including turnover rentals, pro-rata operating costs and so on. Such agreements are common in rental enterprises comprising of shopping centres or malls, and often give rise to disputed claims.

A purchaser who has acquired commercial property may have tenants who have claims against the previous landlord (for example overpayment of rental or utilities). The tenants either claim remission of rentals or withhold future rentals in lieu of such overpayments. This is a cause for concern for any purchaser taking over a new rental enterprise.

The question that now arises is whether the purchaser would be liable to the tenant for obligations not fulfilled by the previous landlord during the currency of the lease but prior to transfer taking place? Who is liable for the tenants' rights flowing therefrom?

One would expect to find the answer in the sale agreement itself. However this is not always the case. Sale agreements often contain terms which are vague, ambiguous, and sometimes contradictory from a litigation point of view. The same goes for the terms of the lease. The *huur gaat voor koop* maxim also does not satisfactorily deal with this question.

The case of *Scrooby v Gordon & Co*[4] (cited in many judgments) dealt with this issue and held that the tenant has a right of action against the purchaser in respect of the 'ordinary obligations' of a landlord arising during the continuance of a lease. However, it still does not deal with the rights and obligations which arose prior to transfer taking place.

In our view (and unless the sale agreement provides otherwise) the tenant has, in the case of overpayment, an enrichment claim against the previous landlord. It is a personal claim and the tenant cannot therefore look to the purchaser in recourse.

Consequently, any rights or obligations which arise prior to transfer cannot be assumed by or carried over to the purchaser, unless the latter consents to this or it is contractually provided for. The purchaser assumes the previous landlord's future obligations but not retrospectively. In addition, it is our view that the rights and obligations assumed by the purchaser (in this case) cannot be said to constitute 'ordinary obligations arsing in the continuance of a lease' as held in *Scrooby v Gordon & Co*.

Purchasers are advised to ensure that agreements of sale are clear and unambiguous on this issue. We also advise that parties record the transfer by concluding an addendum to the lease, which stipulates the reciprocal rights and obligations which are now being assumed by the purchaser from the previous landlord. Preferably, the tenants should also be requested to become party thereto.

Grant Ford and Mongezi Mpahlwa

[1] Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd 1995 (2) SA 926 (A)

[2] 1940 TPD 299.

[3] Ibid at 295.

[4] 1904, T.S. at pg. 945

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UNDERSTANDING THE POWERS CONFERRED UPON AN ORGAN OF STATE IN BLACKLISTING PERSONS OR COMPANIES AS SUPPLIERS OR SERVICE PROVIDERS

As at June 2014 more than 500 individuals/companies (person(s)) have been added to the National Treasury's Restricted Supplier Database (Register) kept by National Treasury in respect of government departments. It is unknown how many persons have been blacklisted by other organs of state, such as public entities like Telkom, Eskom and so on. The effect and consequence of the blacklisting of the persons is that such persons are automatically disqualified from participating in any tender issued by the public entity.

Section 28 of the *Prevention and Combating of Corrupt Activities Act, No 12 of 2004 (Act)* empowers a court to direct that a convicted person's particulars, conviction and sentence be endorsed on the Register. If a company is convicted of corruption, the court may order that the company, any partner, manager, director or any other person exercising control over the company, who knew or should have known of the corruption, be endorsed on the Register. Section 28 of the Act does not make provision for blacklisting without judicial oversight.

Regulation 13 of the Preferential Procurement Policy Regulations, 2011 *(Regulations)* makes provision for the blacklisting of persons but only in the procurement environment. Regulation 13(1) provides that an organ of state can only act against the tenderer or person awarded the contract upon detecting that:

- the B-BBEE status level of contribution has been claimed or obtained on a fraudulent basis; or
- any of the conditions of the contract have not been fulfilled.

Regulation 13(2) further provides that an organ of state may, in addition to the aforesaid remedies:

- disqualify the person from the tender process;
- recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
- cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to such cancellation;
- restrict the tenderer or contractor, its shareholders and directors, or only the shareholders and directors who acted fraudulently from obtaining business from any organ of state for a period not exceeding 10 years, after the audi alteram partem (hear the other side) rules have been applied; and
- refer the matter for criminal prosecution.

Having established that statute makes provision for the blacklisting of persons, it is worth mentioning that such powers are with limitation and to be exercised with caution. Persons can be blacklisted by organs of state if a court so directs or if persons have breached the provisions of Regulation 13(1).

It would appear that Regulation 13 would only be applicable pursuant to the award of a previous tender in which the successful tenderer committed an act of fraud. However the provisions of s217 of the Constitution dealing with procurement by organs of state must be borne in mind before a person may be blacklisted. Essentially an organ of state is required to act in a system that is inter alia fair, equitable, reasonable and transparent.

Thabile Fuhrmann and Corne Lewis

LIQUIDATION: THE EFFECT ON LEASES

Landlords often have a false sense of security when entering into leases containing a clause providing that the lease will terminate automatically, or can be cancelled upon the tenant's insolvency as such clause is unenforceable

Although a tenant's insolvency does not automatically terminate the lease or confer a right upon a landlord to cancel the lease, a landlord is not left without any remedies where a tenant is in breach of the lease before the tenant is wound-up.

A recent judgment of the Supreme Court of Appeal (SCA) in *Ellerine Brothers (Pty) Limited (Ellerine) v McCarthy Limited*, clarified the legal position.

This case concerned the validity of a cancellation of a lease upon the insolvency of a tenant where the tenant was in breach of the lease and notice of cancellation was given before proceedings for the winding-up of

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the tenant was issued, but the period provided for the tenant to remedy its breach, as per the lease, had not yet expired when the proceedings commenced and cancellation of the lease followed thereafter. The question before the court was whether the right to cancel was lost because the *concursus creditorum* (a community of creditors) *(concursus)* came into existence.

The aim of the *concursus* is 'to give equal protection to all creditors without undue preference and to preserve and distribute the estate to the benefit of all of them.'

Ellerine submitted that the estate of the tenant had been frozen when the winding-up application was lodged with the court; that the *concursus* interposed between the giving of the breach notice to the tenant and the expiry of the period therein, and that the interruption of the required time period by the *concursus* prevented Ellerine from claiming any further performance from the tenant under the lease until the liquidator had elected to abide by the lease. The high court found that the lease was validly cancelled. This judgment was taken on appeal.

The SCA found that the conclusion arrived at by the high court was correct and confirmed that when a tenant is in breach of its lease obligations prior to any application for its liquidation being issued, a landlord is entitled to call upon the tenant to remedy its breach in accordance with the provisions of the lease and if an application for the liquidation of the tenant then follows within the time provided in the breach notice, the landlord retains its right to cancel the lease should the liquidator fail to remedy the breach of the insolvent tenant, within such period. This will entitle the landlord to re-let the premises after cancellation of the lease, leaving it with a monetary claim for damages suffered or unpaid rental against the insolvent estate of the tenant as a concurrent creditor.

This places the landlord in a much better position than it would be in if the tenant, at the time the winding-up process commences, is not in breach of the lease. In such event the liquidator has an election to cancel the lease and the landlord will have to wait for the liquidator to exercise its election, without having the right to cancel the lease and let the premises to a new tenant, while being left only with a monetary claim against the estate in due course.

This is the one (and possibly) the only instance when it will actually be better for a landlord to have its tenant be in breach of its obligations in terms of the lease.

Lucinde Rhoodie

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