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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

INSURANCE:
RUGBY, INTENTIONAL CONDUCT, INSURANCE AND INSOLVENCY – ALL IN ONE?

Among other issues considered by the court was the delictual ground of intent: whether Roux junior, if he had in fact executed the manoeuvre which injured Hattingh, acted negligently or intentionally in doing so.

In *Hattingh v Roux NO & Others* 2011 (3) SA 135 (WCC), the plaintiff, Hattingh, sought to show that the defendant, Roux junior, intentionally and unlawfully injured Hattingh by executing an illegal and highly dangerous manoeuvre during a scrum in an Under 19 rugby match between two Western Cape high school teams.

Among other issues considered by the court was the delictual ground of *intent*: whether Roux junior, if he had in fact executed the manoeuvre which injured Hattingh, acted negligently or intentionally in doing so.

In the Western Cape High Court, Fourie J rejected Roux junior's evidence and found that Roux junior executed the manoeuvre intentionally.

At the time of the rugby match when the manoeuvre took place, Roux junior's father had an insurance policy in place that, among other things, included public liability cover that covered him for losses incurred due to actions of his son. In terms of this cover Roux junior was insured against risks caused by his negligent conduct during the rugby match.

Clause 8 of the policy's general conditions read as follows:

> Fraud
>
> If any claim under this policy is in any respect fraudulent or ...if any event is occasioned by the wilful act ...of the insured, the benefit afforded under this policy in respect of any such claim shall be forfeited.

On Roux junior's version of the incident he was not negligent and certainly did not intend to perform the manoeuvre he was accused of executing. Based on this version, the insurer agreed to defend Hattingh's claim against Roux junior.

In the Western Cape High Court, Fourie J rejected Roux junior's evidence and found that Roux junior executed the manoeuvre intentionally.

Roux junior appealed to the Supreme Court of Appeal (SCA) against Fourie J's finding. However, in *Roux v Hattingh* 2012 (6) SA 428 (SCA), the SCA confirmed the judgment of the Western Cape High Court.

During the course of 2013 Roux junior's estate was sequestrated. Hattingh thus had a judgment in his favour against Roux junior, but could not recover anything from him.

Seeking some recourse, Hattingh then instituted an action against Roux senior's insurer in terms of s156 of the Insolvency Act, No 24 of 1936. This section permits

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CONTINUED

The dispute between Hattingh and Roux senior's insurer – as to whether Roux junior's actions are covered by the policy of insurance in view of the two court decisions – has since proceeded on the question of whether general condition 8 excluded cover for intentional conduct.

Judgment has been reserved.

a third party to hold an insurer liable for a liability incurred by the insured towards the third party which falls within the ambit of the insolvent insured's policy of insurance.

What Hattingh did not reckon with was that the insurer was discharged from any liability under the policy of insurance in view of general condition 8, since Roux junior had been found by two courts to have acted *intentionally*. In other words, insofar as the insurer was concerned, s156 of the Insolvency Act did not apply in view of the findings of the Western Cape High Court and SCA.

The dispute between Hattingh and Roux senior's insurer – as to whether Roux junior's actions are covered by the policy of insurance in view of the two court decisions – has since proceeded on the question of whether general condition 8 excluded cover for intentional conduct.

The insurer argued that general condition 8 of the policy must be interpreted on the basis of the legal and factual findings of the Western Cape High Court and the SCA. The insurer argued that, because the general principle is that insurance for personal legal liability does not cover an insured's intentional conduct, general condition 8 is not limited to fraud but applies to any intentional act of the insured.

Judgment has been reserved.

A decision in favour of Hattingh will be contrary to well-established judicial precedent concerning insurance disputes involving intentional conduct and an insurer's right to repudiate should the policy conditions – however strict – not be met.

The outcome, either way, will be noted.

Willie van Wyk and Philene Spargo

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COMMERCIAL:
THE BALISO WARNING – WHAT CONSTITUTES PROPER NOTICE UNDER SECTION 127(2)(B) OF THE NATIONAL CREDIT ACT?

Section 127(1) allows a consumer to terminate the credit agreement by written notice to the credit provider, and to require that the goods be sold, with the ultimate objective of discharging the consumer's obligations under the credit agreement.

One of the provisions of the National Credit Act 34 of 2005 (NCA) that has not received much attention by our courts, is s127, which is triggered when a consumer elects to surrender goods purchased on credit, to a credit provider.

Section 127(1) allows a consumer to terminate the credit agreement by written notice to the credit provider, and to require that the goods be sold, with the ultimate objective of discharging the consumer's obligations under the credit agreement.

After receipt of the termination notice, the credit provider must, in terms of s127(2)(b) of the NCA, give the consumer written notice of, among other things, the estimated value of the goods. If the consumer disagrees with the credit provider's estimate, the consumer may withdraw the termination notice, resume possession of the goods and resume making payment under the credit agreement (unless the consumer was in default of the credit agreement).

Where a consumer does not respond to the credit provider's s127(2)(b) notice, the credit provider is obliged, in terms of s127(4) of the NCA, to sell the goods for the best price reasonably obtainable. If the proceeds of such a sale are insufficient to settle the consumer's indebtedness under the credit agreement, the credit provider must demand payment of the outstanding balance within 10 days, before it can institute legal proceedings for the recovery of the balance.

In the recent case *Baliso v Firstrand Bank Limited t/a Wesbank* (CCT150/15) [2016] ZACC 23 (4 August 2016) (the main action of which is currently still pending before the Western Cape High Court), Baliso noted an exception to Wesbank's claim, contending that it lacked averments necessary to sustain a cause of action. The basis of the exception was that the s127(2)(b) notice was sent to Baliso by Wesbank by ordinary mail, and not by registered mail, with the consequence that Wesbank (according to Baliso) failed to prove that the s127(2)(b) notice was delivered in accordance with the NCA. Baliso's argument was that there is no logical reason to distinguish between the manner of giving notice in terms of s127(2)(b) of the NCA (which does not expressly state how notice must be given) and s129 of the NCA (in respect of which it has repeatedly been found that notice should be given by registered post).

The basis of the exception was that the s127(2)(b) notice was sent to Baliso by Wesbank by ordinary mail, and not by registered mail, with the consequence that Wesbank (according to Baliso) failed to prove that the s127(2)(b) notice was delivered

The High Court dismissed Baliso's exception, finding that the issue which Baliso sought to have determined by way of exception, was an issue that could (and should) be determined at a trial in due course. The Full Bench of the High Court and the Supreme Court of Appeal agreed with the High Court's decision and refused leave to appeal against the dismissal of the exception. Aggrieved by the appellate courts' refusal to allow the exception, Baliso turned to the Constitutional Court for help, but that appeal was also dismissed.

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Although the majority of the Constitutional Court refused Baliso's appeal, their reason for doing so was based on a purely procedural hurdle which Baliso failed to overcome.

Although the majority of the Constitutional Court refused Baliso's appeal, their reason for doing so was based on a purely procedural hurdle which Baliso failed to overcome. In essence, the majority of the judges found that the appeal could not be granted because the High Court's decision to dismiss the exception was not final in effect and therefore not appealable. In addition, the court was of the view that the issue which Baliso sought to raise on exception was not capable of being raised as an exception but could be raised as a defence at trial.

Despite the dismissal of the appeal, Froneman J (writing the majority judgment) commented – without finding – that there was "much force" in Baliso's argument that it was illogical to distinguish between the manner of giving notice under s127(2) and s129(1) of the NCA. The learned judge opined in this regard that without proper notice under s127(2)(b) of the NCA, the consumer would be deprived of the choice to decide whether to withdraw the termination notice and thereby resume with the credit agreement (arguably to avoid a potential shortfall after a sale). Similarly, the creditor's claim for the outstanding balance due under the credit agreement may potentially be defeated if proper notice was not given.

The Constitutional Court's judgment was not unanimous. In his dissenting judgment, Zondo J (with Mogoeng CJ, Bosielo AJ and Jafta J concurring) expressed the view that the leave to appeal should have been granted as the High Court's judgment was, in his view, appealable. With regard to the question of whether or not a s127(2)(b) notice sent by ordinary mail complied with the delivery requirements of the NCA, Zondo J expressed the view that it did not and that notice should have been given by registered post.

Because the matter has now been remitted to the Western Cape Division of the High Court for further determination at a trial in due course, it would be inappropriate for us to comment on the merits of the issues raised. The Constitutional Court's judgment, and in particular the minority judgment of Zondo J, however serves as an early warning to credit providers to reassess how s127(2)(b) notices are sent to consumers, having regard to, among other things, the Constitutional Court's explanation of the reasons for such notices.

Freddie Terblanche

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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