30 MARCH 2016

DISPUTE RESOLUTION ALERT

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JURISDICTION: INSOLVENT CORPORATES – THE UNTOLD STORY

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AN INTERESTING DEVELOPMENT IN PUBLIC LIABILITY OF LOCAL AUTHORITIES

Local authorities often face claims for damages arising from the use of their facilities and infrastructure. Many, if not most claims against local authorities arise from alleged failures to prevent a loss where there was a legal duty to do. so. Local authorities insure themselves against these claims and insurers are faced with the decision of whether to admit or repudiate these claims.

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JURISDICTION: INSOLVENT CORPORATES – THE UNTOLD STORY

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Controversially, in *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd intervening)* 2013 (1) SA 191 (WCC) (Wedgewood), Binns-Ward J answered in the negative, ruling that jurisdiction in business rescue and liquidation proceedings is dependant only on the registered address. In short he found that:

- Dual jurisdiction was a creature of statute created under the Old Act;
- As the New Act made no provision for such a principle, it did not survive under the auspices of the New Act.

The Companies and Intellectual Property Commission (CIPC) viewed the decision of Wedgewood as important enough to release *Practice Note 2 of 2012*, which highlights the decision. The CIPC was cautious not to express a view on the matter but acknowledged that the decision may be supported and followed in other jurisdictions. It was therefore of 'general public interest' to bring its implications to the attention of relevant parties. The note summarises the implications as follows:

- As the transitional provisions of the New Act do not deal with the registered office of pre-existing companies, s23(3) of the New Act is equally applicable to both pre-existing companies as well as companies incorporated in terms of the New Act;
- Companies should cease registered office addresses chosen for convenience (for example, the address of the company's auditors);
- Companies should ensure that their records at CIPC reflect a registered office address which is the address of the administrative office of the company or, if there is more than one office, the company's principal office; and
- Service of legal process on a company should be at its registered address and not, alternatively, at its principal place of business (especially in respect of business rescue proceedings and/or winding-up applications).

The *Sibakhulu* decision was received in other jurisdictions with mixed reactions.

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Section 66 of the Close Corporations Act, No 69 of 1984 (as amended) incorporates the relevant insolvency provisions of the Old Act. The dual jurisdiction principle therefore also remains available to creditors of a close corporation. However, it would be advisable to seek the adjudication of business rescue issues in the court that has jurisdiction over the juristic entity's registered address.

Lacock J in ***Lonsdale Commercial Corporation vs Kimberly West Diamonds Mining Corporation*** **(case no 312/2012)** (reportable) was not persuaded that the reasons advanced in *Wedgewood* justified such a drastic limitation on the courts' jurisdiction. The legislature would have made provision, in clear and unambiguous terms, for such a limitation had that been the intention. Lacock J was supported by Phatshoane J in ***Phillippus Johannes De Bruyn vs Grandselect 101 and One Other*** **(case number: 1961/2013)** (Northern Cape High Court) (reportable), and Koen J in ***Lanarco Home Owner Association vs Prospect SA Investments 42 (Pty) Ltd*** **2014 JDR 2273 (KZP)** (unreported).

This discord in the varying jurisdictions has created uncertainty.

A full bench decision, delivered by Judges Gamble and Baarman in ***Van der Merwe v Duraline (Proprietary) Limited*** **(case number 7344/2013)** (reportable), seeks to clarify the issue in respect insolvent companies' liquidations. The court concluded that Binns-Ward J's decision was *obiter dictum*, and therefore not binding. Even if not *obiter*, they disagreed with the conclusions made by Binns-Ward, especially in relation to liquidation proceedings.

The crux of their reasoning is as follows:

- Liquidations of insolvent companies remain governed by the Old Act, as per Item 9 of Schedule 5 of the New Act;
- The applicable provisions of the Old Act must be interpreted in accordance with the definitions of that Act, and in applying the jurisprudence developed in terms of that Act; and
- Therefore the widespread precedence developed under the Old Act, including the dual jurisdiction principle, continues to be of general application to liquidations of insolvent companies notwithstanding the New Act.

Therefore, based on this decision, the dual jurisdiction principle is still applicable to liquidation of insolvent companies (this would also be the case for close corporations). Section 66 of the Close Corporations Act, No 69 of 1984 (as amended) incorporates the relevant insolvency provisions of the Old Act. The dual jurisdiction principle therefore also remains available to creditors of a close corporation. However, because business rescue is specifically governed by the New Act, for the reasons put forward by Binns-Ward, it would be advisable to seek the adjudication of business rescue issues in the court that has jurisdiction over the juristic entity's registered address.

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AN INTERESTING DEVELOPMENT IN PUBLIC LIABILITY OF LOCAL AUTHORITIES

The mother instituted action proceedings and alleged that the waterslide presented a risk of injuries to the children using it and that the Municipality had a legal duty to guard against such injuries.

Local authorities often face claims for damages arising from the use of their facilities and infrastructure. Many, if not most claims against local authorities arise from alleged failures to prevent a loss where there was a legal duty to do so. Local authorities insure themselves against these claims and insurers are faced with the decision of whether to admit or repudiate these claims. In *Administrateur,Natal v Trust Bank van Afrika Bpk* 1979 (3)SA 824 (A) it was held that "factors determining the existence of such a duty include our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall".

The court held that the child's mother failed to prove the presence of a legal duty and consequently failed to prove the element of wrongfulness.

In the recent unreported judgement of *Karlien van Vuuren v Ethekwini Municipality*, KZN High Court, Durban, case number 7099/2012 delivered on 19 February 2016, the court considered, among other things, if wrongfulness (an element of delict) had been established on the part of the Ethekwini Municipality. The important facts were as follows: a minor child sustained injuries while using a slide on the Durban beachfront in the presence of the child's mother. The mother instituted action proceedings and alleged that the waterslide presented a risk of injuries to the children using it and that the Municipality had a legal duty to guard against such injuries.

The element of wrongfulness, which is often confused with that of fault, required the court to examine whether the Municipality has a legal duty to supervise children who are using its waterslides. This determination involves policy considerations and the exercise of a value judgement. The court concluded that it was reasonable for a Municipality to expect that parents of young children would supervise and control them. It was deemed an unsustainable if not an intolerable burden on local authorities to supervise children in instances where the parents are present but fail to do so and that imposing such a duty would saddle the local authority with a greater duty of care than that imposed on parents. The cost implications of imposing such a duty on local authorities were also considered to be crucial. The court held that the child's mother failed to prove the presence of a legal duty and consequently failed to prove the element of wrongfulness.

This ruling underlines the primary duty on parents to exercise parental care and protect the interests of their own children. The judgment is also highly relevant to the short term insurance industry, particularly to insurers who have to assess risks, premiums and claims for indemnity.

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