7 DECEMBER 2016

DISPUTE RESOLUTION ALERT

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Landmark Judgment

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CDH
CLIFFE DEKKER HOFMEYR

"DIRTY DOZEN" TACTICS – ADMISSIBLE OR CONSTITUTING DURESS?

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The general rule is that a contract induced by the threat of criminal prosecution is unenforceable on the grounds of duress. To this end, the Supreme Court of Appeal (SCA) held in *Medscheme Holdings (Pty) Limited & another v Bhamjee* 2005 (5) SA 339 (SCA) that "an undertaking that is extracted by an unlawful or unconscionable threat of some considerable harm, is voidable". This would also be the case if there was extortion or what is commonly known as blackmail involved.

Say that your company discovers that an employee is stealing from the company. A representative of the company is instructed to deal with the issue. Although pressed by the company representative, the arrogant employee does not want to admit to the crime, although the company is in possession of CCTV footage to prove that the employee indeed committed the crime.

How does one approach such matters?

On 30 November 2016, the SCA handed down a judgment in the matter of *DL Hohne v Super Stone Mining (Pty) Ltd* (case no 831/2016) where an employee (as appellant) stole diamonds, as confirmed via CCTV footage. The value of the diamonds was approximately R6 million.

The employee had handed over R530,000 to his employer, which was money received by the employee from the selling the stolen diamonds. The amount was only a small portion of the money received by the employee for the stolen diamonds. During a recorded interview with the employee, it appeared that the employee kept the stolen diamonds (those still in his possession) in a solvent canister in a safe. When questioned by representatives of his employer about the canister, the employee did not co-operate and the employer then introduced what the employer referred to as "the dirty dozen" part of the interview. The "dirty dozen" included, among other threats, reporting the matter to the Hawks, SARS, publishing details of the theft in The Star newspaper, polygraph testing, and reporting the theft to the Kimberley Club, the Diamond Board and ETv. Thereafter, the employee spilled the beans and signed an acknowledgement of debt in respect of the loss suffered by the company. At no stage during the confrontation was the employee threatened with physical violence or anything unlawful.

In the criminal proceedings regarding theft and money-laundering, the State sought to rely on a statement made by the employee to the police, as well as subsequent pointing-out of the diamonds

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In light of the evidence regarding the confrontation which took place with the employee during which he admitted the theft, the court held that the employee's statement had not been freely and voluntarily made.

and the cash received for selling the stolen diamonds. In light of the evidence regarding the confrontation which took place with the employee during which he admitted the theft, the court held that the employee's statement had not been freely and voluntarily made in terms of the requirements of the Criminal Procedure Act, No 51 of 1977 (CPA) and was therefore inadmissible. Further, the evidence of the pointing-out of stolen diamonds and cash was also inadmissible as being "fruit of the poisoned tree" and the employee was ultimately acquitted.

Thereafter, the company instituted a civil action against the employee to recover the damages it had suffered as a result of the theft. After the employer succeeded in holding the employee civilly liable in the court a quo, the employee appealed to the SCA. The appeal turned on the admissibility of certain evidence: (i) a video recording of interviews conducted with the employee; (ii) an acknowledgement of debt signed by the employee in terms of which he admitted being liable to his employer in an amount of R5 million for the loss the company suffered as a result of the conduct of the employee; and in particular, (iii) a confession made to the police.

Considering the question of admissibility of evidence in criminal as opposed to civil matters, the SCA found that the admissibility of evidence in a criminal trial stood on a different footing from a civil dispute and was adjudicated according to different criteria. In a criminal matter, the might of the State is pitted against the individual. Section 35(5) of the Constitution requires that evidence "must be excluded" from a criminal trial if it would render the trial unfair or if it would otherwise be detrimental for justice. An adverse result for an accused person based on the consideration of inadmissible evidence, may result in loss of freedom for the accused. By contrast, s34 of the Constitution, which extends to civil matters as well, contains no equivalent guarantees and there is no provision regarding the exclusion of evidence.

Were the "dirty dozen" threats made by the employer's representatives contra bonos mores?

In the *Hohne* matter, the SCA found that both the theft and the evidence of the quantum of the employer's damages had been established in documents in which the employee had acknowledged his wrongful acts, his liability and the amount in question. The employer did not exact or extort evidence to which it was not otherwise entitled and no "unconscionable threat of some considerable harm" was levelled at the employee – although the employee claimed that the acknowledgement of debt was signed

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The SCA further stated that an exhortation to tell the truth will not exclude a confession and a threat of the probability of arrest does not constitute undue influence. The test was whether there was "any risk of a false confession".

under duress, the employee chose not to give evidence to substantiate his claims. The evidence was therefore both admissible and enforceable against the employee as it had been obtained without there being any duress.

The SCA further stated that an exhortation to tell the truth will not exclude a confession and a threat of the probability of arrest does not constitute undue influence. The test was whether there was "any risk of a false confession".

However, it should be borne in mind that in *Ilanga Wholesalers v Ebrahim and others* 1974 (2) SA 292 (D), the court held that it was impermissible to threaten someone to extort an undertaking from him to pay a specific amount which the creditor does not know and will not be able to prove is owing, as this would amount to an abuse of legal rights.

Conclusion

The same evidence which may be inadmissible in criminal cases will not necessarily be excluded in civil cases. Whether, following some criminal conduct, a threat to prosecute or take further action would be contra bonos mores, is ultimately a policy consideration. For instance, one cannot threaten to lay criminal charges against someone for an act irrelevant to the damages suffered and for which one attempts to secure payment, as this would constitute blackmail. The same would apply to embarrassing but not criminal acts that have no bearing on the claim in question. You can only exact or extort something to which you would in any event have been entitled.

It is important to note that an employer is not only entitled to confront an employee about alleged wrongdoing, but is obliged to do so, in order to give an employee an opportunity to respond thereto in accordance with the audi-principle.

It should further be remembered that an employer should not threaten to prosecute a debtor or employee so that the debtor undertakes to pay an amount which a company estimates to be due in an arbitrary way. Where the company does not know the exact amount stolen, the company is within its legal rights in threatening to prosecute, but to use the threat of prosecution to extort an undertaking to pay an amount which the company knows it cannot prove to be due, is an abuse of its legal rights.

If a company has evidence to prove the crime in question, then a threat for reporting the matter to SAPS is in order. However, if the company does not have evidence to prove the crime and there are only rumours and facts that point to the possibility of theft being committed by an employee, but there is no substantive proof, then caution should be exercised when such employee is interviewed. The company will act within its rights to inform the employee that it will refer the matter for investigation to the police or private forensics.

Lawful evidence obtained may be used in disciplinary hearings and in civil matters.

Anja Hofmeyr and Pieter Conradie

CDH
CLIFFE DEKKER HOFMEYR

DEMAND LOANS PRESCRIBE AFTER 3 YEARS! OUCH!

On 9 December 2013, more than five and a half years after the loan was advanced, Trinity served a letter of demand on Grindstone claiming repayment of the loan capital plus interest.

On 29 September 2016, the Supreme Court of Appeal (SCA) issued a reality check to practitioners and businesspeople alike. *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* (1040/15) [2016] ZASCA 135 (29 September 2016) clarified misconceptions regarding the impact prescription plays on debts which are payable "on demand".

A creditor may not, by his/her own action or inaction, delay the running of prescription to his/her advantage and to the prejudice of the debtor.

The case in question concerned a loan agreement between Trinity and Grindstone in terms whereof Trinity advanced a loan to Grindstone during February 2008. The parties did not agree the date upon which the debt was to be repaid. Instead, the parties expressly agreed in writing that, "The Loan Capital shall be due and payable to the Lender within 30 days from the date of delivery of the Lender's written demand." (own emphasis)

On 9 December 2013, more than five and a half years after the loan was advanced, Trinity served a letter of demand on Grindstone (in accordance with s345 of the old Companies Act) claiming repayment of the loan capital plus interest. Grindstone denied its indebtedness and insisted that the debt had prescribed in February 2011, some two and a half years prior.

The only issue before the SCA was whether or not Grindstone's debt owing to Trinity had prescribed or not.

The first lesson taken from this judgment relates to the format of the section 345 letter of demand. The time period stipulated in section 345 of the (old) Companies Act is three weeks, or 21 days. The time period agreed upon by the parties in their contract, however, was thirty days. The Court found that Trinity's letter of demand did not comply with the parties' agreement and was thus formally defective. A "schoolboy error", some might say and one which is easy to avoid.

The second and more fundamental lesson relates to the date upon which prescription began to run. Surely, if the parties agreed that a debt would become "due and payable" upon demand, that would be the date from when prescription would run? Not quite...

The Prescription Act provides that prescription will be completed three years after the debt became "due". The Court differentiated between when a debt is "due" and when it is "payable". It is now established law that a debt that is "repayable on demand" becomes due the moment the money is lent or advanced by the creditor, as it is from that moment that the debt is "claimable".

The Court found in this case that prescription ran from the date of the advance, even though the debtor may procedurally be entitled to a longer period of time within which to make its actual repayment. In support of its finding, the SCA reiterated that a creditor may not, by his/her own action or inaction, delay the running of prescription to his/her advantage and to the prejudice of the debtor.

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Trinity may very well have rewritten the general understanding of a debt "due and payable on demand".

The Court found in the circumstances that the issuing of a letter of demand satisfied a mere procedural requirement which triggered the payment obligation and it was not intended to be a condition precedent for the creation of the debt, which would have then triggered the running of prescription. It was Trinity's advance of the loan which created Grindstone's indebtedness, because from that date Trinity was entitled to demand repayment thereof.

The Court found that the wording "due and payable... within 30 days of... demand" was not sufficient to constitute a clear indication of the agreement between the parties that the debt was only to become due once demanded, thereby delaying the running of prescription. Although the Court confirmed that it was indeed possible for the parties to agree to postpone the running of prescription, no guidance was provided as to what wording would have been sufficient to achieve this outcome.

One can understand why the reasoning advanced by the SCA would apply to a loan simply "payable on demand". It is however more difficult to understand why the express inclusion of the word "due" was insufficient to delay the running of prescription, as was the case here. The surrounding circumstances clearly pointed to a mutual understanding that the debt would remain alive until demanded.

The consequences of this judgment are clearly exposed when considering its application to shareholder loans (which are almost always "payable on demand"). Signed financial statements may constitute an acknowledgement of debt thereby interrupting prescription, but this would only be relevant to amounts owed by the company and not in respect of amounts owed to the company, by shareholders.

Unfortunately, insofar as a shareholder loan to a company has already prescribed (in accordance with this judgment), there is nothing which can be done to revive it after the fact. The loans can of course be "re-instated" but this will require cooperation and agreement from all parties concerned.

Trinity may very well have rewritten the general understanding of a debt "due and payable on demand". It has now become vital that parties agree (and record) that the debt will only become due in clearly specified circumstances. In the absence of such an agreement, the timely filing of an acknowledgement of debt will be required, in order to interrupt prescription. A failure to do so may result in your claim for repayment being left dead in the water.

Jonathan Ripley-Evans and Nicole Brand

CDH
CLIFFE DEKKER HOFMEYR

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In our Alert of 30 November 2016 entitled 'Reinforcing the Responsibility of Broadcast Media' we considered the High Court ruling that sub-rule 3.9 of the Broadcasting Complaints Commission of South Africa (BCCSA) voluntary Code of Conduct (Code) was inconsistent with s192 of the Constitution.

In our *Alert of 30 November 2016* entitled 'Reinforcing the Responsibility of Broadcast Media' we considered the High Court ruling that sub-rule 3.9 of the Broadcasting Complaints Commission of South Africa (BCCSA) voluntary Code of Conduct (Code) was inconsistent with s192 of the Constitution. The direct consequence of this decision is that that members of the public may now proceed to lodge complaints with the BCCSA without fear that they will be called upon to abandon other rights which they may have (and which would discourage them from making such complaints before the BCCSA as they would be at risk of losing such rights).

The downside is that certain print media houses have elected to withdraw from the Press Council (because they no longer have the protection of the waiver requirement and to appoint their own "internal " ombudsman).

What has happened is this matter also has precedent in other spheres. In fact, the Press Council which deals with the print media has already eliminated from its constitution a similar rule to that now eliminated from the BCCSA's Code. (Supporting this was a recent article in the Daily Maverick).

The downside is that certain print media houses have elected to withdraw from the Press Council (because they no longer have the protection of the waiver requirement and to appoint their own "internal" ombudsman).

This, with respect, will lead to negative consequences:

- Complainants will not necessarily receive fair hearings or proper sanctions for their complaints by such internal tribunals since it offends the fundamental principle that one cannot be a judge in one's own cause. In other words, media houses who elect to regulate themselves directly, ie not through any independent body, are unlikely to punish themselves for their own sins, or give complainants a genuinely fair hearing;
- The credibility of the media will decline since they will no longer be accountable to objective standards of fair and accurate reportage;
- The fact that independent bodies no longer regulate media (because the media withdraws from such regulatory bodies), will increase the risk of Government imposing its own code of conduct on the media and thus discourage press freedom. In this way the media "shoots itself in the foot".

One would hope that the media (especially the broadcast media) will not take a defensive attitude to what has happened. It should rather encourage its members to apply the standards they have set for themselves in the Code. This will minimise the risk of complaints or civil suits.

Richard Marcus

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

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

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

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

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR
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.

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@cdhlegal.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@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR