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DISPUTE RESOLUTION ALERT

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CDH
CLIFFE DEKKER HOFMEYR

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After picking up what was left of his flying (or spying) machine, David Boggs laid a criminal charge against Merideth. Merideth was then arrested for "wanton endangerment and criminal mischief". The charges were ultimately dismissed by the Bullitt County District Court. Judge Rebecca Ward found that Merideth was entitled to shoot down the drone as it infringed upon his (or his daughter's) right to privacy.

Having lost round one, Boggs initiated proceedings to have the decision overturned seeking clarity on whether his conduct constituted trespassing and further sought an order directing Merideth to pay an amount of $1,500 in compensation for his damaged property.

In March 2017, Federal Judge Thomas Russel dismissed Boggs' lawsuit due to the Federal Court lacking jurisdiction to hear the matter. The ruling was met with disappointment as the questions of law – regarding the right to privacy, the right to property and trespass in airspace – remained unresolved.

South Africa has already encountered incidents where drones have been shot down by aggrieved property owners. The natural question: Does the Drone Slayer litigation have any relevance in a South African context?

In accordance with the South African common law, the owner of immovable property is essentially the owner of the "ground beneath and air above" such property. Therefore, at common law the delict of trespassing into air space above private property would appear, in theory, to be actionable.

However, s8 of the Civil Aviation Act, No 13 of 2009 (Aviation Act) provides a form of indemnification protecting the operators of aircraft flying over private property at a "reasonable" height. While this provision was introduced prior to the emergence of drones into South African culture, it is clear that insofar as an aircraft is flying in contravention of the provisions of the Aviation Act (or flying at an unreasonable height), the pilot may very well attract liability for trespassing. That is the theory at least.

The Eighth Amendment to the Civil Aviation Regulations was introduced in 2015 and governs, in Part 101, the operation of Remotely Piloted Aircraft Systems (including drones). There is, however, no reference to any form of indemnification against a claim of trespass (as is found in s8 of the Aviation Act).

While restrictions are placed on the operation of drones (such as the restriction not to fly a drone within lateral distance of 50m of any structure or building without permission of the owner), this does not address the question of trespassing. It is conceivable that a drone can fly in excess of 50m from any structure or building but still be trespassing on another's property (if flying without permission).

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CONTINUED

We suggest that the regulations be amended in accordance with developments in other jurisdictions, which oblige every drone operator to display a unique identification number on the underside of a drone which is to be visible from the ground.

Assuming that flying a drone over a private property may constitute trespassing, can the owner of the property use a firearm to protect his rights? The simple answer: no. In terms of s120(7) of the Firearms Control Act, No 60 of 2000, the discharge of a firearm in any built-up place or public area is a criminal offence. The discharge of a firearm on private property in a manner which endangers the life, safety or property of another is also an offence and insofar as a drone is damaged by the use of firearm, civil liability may follow.

The real question is then, what can one do if they feel that their rights are infringed by the operation of a drone? Well, one may resort to the courts in an attempt to enforce a civil claim against the pesky pilot, based in delict for trespassing or alternatively an invasion of privacy (insofar as the requirements are made). Civil litigation is, however, expensive and time consuming. More practical advice may be to lay a complaint with the South African Civil Aviation Authority based on a breach of the Aviation Act or Regulations.

The Civil Aviation Authority appears to be taking matters rather seriously and has initiated a number of investigations against drone operators in recent months. Sanctions include fines of up to R50,000 per incident or imprisonment not exceeding 10 years, or both.

Turning to the elephant in the room: what if you have no idea who the operator of the drone is? In this case, your legal remedies are extremely limited insofar as they exist at all.

In an effort to address this problem, we suggest that the regulations be amended in accordance with developments in other jurisdictions, which oblige every drone operator to display a unique identification number on the underside of a drone which is to be visible from the ground. This will promote further accountability and will provide any aggrieved person with a mechanism to trace the offending owner.

Until this happens, the moment the familiar buzz of a drone is heard one should either cover up or go indoors.

Jonathan Ripley-Evans and Elizabeth Sonnekus

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CABINET MINISTERS AND CEOS LIABLE FOR LEGAL COSTS IN THEIR PERSONAL CAPACITY

The Court, in the matter Black Sash v The Minister of Social Development & Others [2017] ZACC 20 reiterated the considerations to be taken into account for public officials to be held personally liable for legal costs in certain circumstances in light of the Constitution.

Section 77 of the Companies Act, No 71 of 2008 has always provided for the liability of directors of private companies in certain circumstances, but a recent Constitutional Court (Court) judgment necessitates revisiting this section.

On 15 June 2017, the Court, in the matter *Black Sash v The Minister of Social Development & Others* [2017] ZACC 20 reiterated the considerations to be taken into account for public officials to be held personally liable for legal costs in certain circumstances in light of the Constitution.

Although the Court, in no uncertain terms, spelt out the criteria for good governance, the same principles apply to the private sector.

What are the criteria?

There is nothing new about the criteria identified and applied by the Court. These criteria stem from our common-law rules for granting costs orders against people acting in a representative capacity. Simply put, where the impugned conduct was motivated by malice, negligent or unreasonable, liability will follow. Courts have also made costs orders against public officials who acted in bad faith.

However, the rules re-emphasised by the Court are now underpinned by the basic principles governing public administration under s195(1) of the Constitution, namely: a high standard of professional ethics; the promotion of the efficient, economic and effective use of resources; accountable administration, whether public or private; transparency; and reliance on accurate information.

In answering the question of what constitutes improper conduct, the Court argued that institutional competence and constitutional obligations must be considered. In particular, where specific constitutional and statutory obligations exist, the proper foundation for a personal costs order may lie in the Constitution or statute itself.

In the public sector, in the same way that a city manager is accountable for services delivered to the people within its municipal area, a cabinet minister is accountable to the people of South Africa. In the private sector, a CEO is accountable to the company's shareholders. In terms of s77(2) of the Companies Act, No 71 of 2008, directors or prescribed officers may be held liable in accordance with the principles of the common law relating to breach of a fiduciary duty or commission of a delict for any loss, damages or costs sustained by the company as a result. Section 77(3) further lists additional circumstances in which these persons may be held personally liable for damages suffered by the company and, as a consequence, the shareholders.

In *Black Sash* the Court employed some of the founding values of our democracy, being effectiveness and accountability, in establishing liability. Although the Court, in no uncertain terms, spelt out the criteria for good governance, the same principles apply to the private sector. CEOs in the private sector must take cognisance of this judgment. Failure

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CONTINUED

Where a CEO should have been aware, or is aware, of certain circumstances, but fails to act in good time, the CEO may be held liable for legal costs.

to do so may result in CEOs finding themselves in the same situation as the Minister of Social Development in future: with a sword hanging over them in respect of personal liability for legal costs.

An example of such improper conduct may be a failure to act where the CEO became aware of impropriety or incompetence within the company. In terms of s77(3) of the Companies Act, a prescribed officer or director may be held liable if they acquiesced in the carrying on of the company's business, despite knowing it was being carried on in a reckless manner. When such failure to act results in the company being subjected to litigation and the CEO's improper conduct comes to the fore, in accordance with s77 of the Companies Act, the CEO may be joined as a party and ordered to answer certain questions in their personal capacity and be ordered to pay legal costs on the highest scale possible.

CEOs cannot be held responsible for everything that happens in a company. However, in light of the developing precedent holding public officials personally liable for costs where gross misconduct has been committed, CEOs in the private sector should take heed that where a CEO should have been aware, or is aware, of certain circumstances, but fails to act in good time, the CEO may be held liable for legal costs.

Pieter Conradie and Sarah McGibbon

CHAMBERS GLOBAL 2017 ranked us in Band 1 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.

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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

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@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

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@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

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@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

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@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

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@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