

# DISPUTE RESOLUTION ALERT

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In the law of insurance, subrogation is a legal right reserved by insurers that allows them to, after having indemnified an insured, recover the loss from a third party who would otherwise have been liable to the insured.

#### **DO YOU THINK THAT THE MUTUALLY AGREED TERMS OF YOUR LEASE AGREEMENT ARE ABSOLUTE? THINK AGAIN!**

In the recent case of *AJP Properties CC v Sello* (39302/10) [2017] ZAGPJHC 255 (8 September 2017), the Gauteng Local Division of the High Court, Johannesburg had to decide whether the respondent, Ditonkana Abram Sello, the sole proprietor of Kempton Gate Pharmacy should be evicted by the applicant, AJP Properties CC. The court further had to determine whether it was in the interests of justice to grant an eviction order with immediate effect, or if the order should be stayed.

# INSURANCE:

## CPA TO THE RESCUE: HOW S60 AND S61 MAY ASSIST AN INSURER IN SUBROGATED RECOVERY ACTIONS

*Where goods are supplied in terms of a transaction that is exempt from the application of the CPA those goods, and the importer, producer, distributor and retailer of those goods are nevertheless subject to s60 and s61.*

*The crisp issue for consideration is whether s5(1)(d) read with s5(5) override the exemption imposed by s5(2)(b), thereby making s60 and s61 applicable to transactions excluded by s5(2)(b).*

**In the law of insurance, subrogation is a legal right reserved by insurers that allows them to, after having indemnified an insured, recover the loss from a third party who would otherwise have been liable to the insured.**

A multitude of subrogated recovery actions are premised on liability for product defects. Sections 60 and 61 of the Consumer Protect Act, No 68 of 2008 (CPA) provide for the strict liability of a producer, importer, distributor or retailer for:

- any harm caused by the supply of unsafe goods;
- any product line failure, defect or hazard in any goods; or
- an inadequate instruction or warning pertaining to such hazard.

The CPA's provision of faultless liability in this regard renders it more attractive than any claim under the common law, which requires negligence/fault to be proven.

However, the applicability of the CPA is circumscribed: Section 5 stipulates that it is applicable to every transaction concluded within the Republic unless the transaction is exempted by s2, s3 and s4. Section 5(2)(b) excludes transactions in terms of which the consumer is a juristic person with an asset value or annual turnover, at the time of the transaction, equal to or more than an amount determined by the Minister, which is currently R2 million. In many instances where a subrogated recovery claim is large

enough to warrant the risk and cost of a recovery action the consumer/insured is likely to be a juristic person with a turnover exceeding this threshold and as such would seem to be precluded from relying on the provisions of the CPA.

Section 5(1)(d) stipulates that the CPA applies to goods supplied in terms of a transaction that is exempted from the application of the Act, and also to the importer, producer, distributor and retailer of such goods but only to the extent provided for in s5(5). The latter provision provides that where goods are supplied in terms of a transaction that is exempt from the application of the CPA those goods, and the importer, producer, distributor and retailer of those goods are nevertheless subject to s60 and s61.

The crisp issue for consideration is whether s5(1)(d) read with s5(5) override the exemption imposed by s5(2)(b), thereby making s60 and s61 applicable to transactions excluded by s5(2)(b). At present, there is no case law of which we are aware that deals with the interpretation of the provisions in question.

Section 2 of the CPA requires that the Act be interpreted in a manner that gives effect to its purposes. Similarly, s4(3) provides that where a provision of the Act can



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# INSURANCE: CPA TO THE RESCUE: HOW S60 AND S61 MAY ASSIST AN INSURER IN SUBROGATED RECOVERY ACTIONS

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*Instead of having to invoke common law remedies with onerous evidentiary duties, insurers may in recovery actions rely on the strict liability provisions of the CPA.*



reasonably be construed to have more than one meaning, the meaning which best promotes the spirit and purpose of the Act or which will best protect vulnerable consumers is to be preferred. The primary purpose of the CPA is to promote and advance the social and economic welfare of consumers; however, this purpose is limited to consumers who have not been excluded from the application of the CPA.

Mindful hereof, s5 of the CPA draws an apparent distinction between (i) transactions and (ii) the supply of goods by importers, producers, distributors and retailers. For example, s5(2) seems to confine the CPA's non-applicability to transaction, whereas s5(5) refers to the supply of goods by importers, producers, distributors and retailers in terms of a transaction.

This suggests that the legislature intended to draw a distinction between the supply of goods by importers, producers, distributors and retailers pursuant to a sale/lease agreement and transactions, which, more broadly, comprises any agreement for the potential supply of such goods. While there is likely to be considerable overlap between the two concepts, they remain distinct.

Therefore, while s5(2)(b) excludes transactions involving certain juristic persons, s5(1)(d) read with s5(5) nevertheless make s60 and s61 applicable to the goods and to the importer, producer, distributor and retailer of such goods.

As such, notwithstanding a transaction being exempted under s5(2)(b), s5(1)(d) and s5(5) create a provision that provides, insofar as there is a supply of goods by an importer, producer, distributor or retailer, said importer, producer, distributor or retailer and the goods nonetheless remain subject to s60 and s61 of the CPA.

It is submitted that, instead of having to invoke common law remedies with onerous evidentiary duties, insurers may in recovery actions rely on the strict liability provisions of the CPA, regardless of whether the insured is a juristic person with a turnover or asset value that exceeds the threshold referred to in s5(2)(b).

*Roy Barendse and Preanka Gounden*

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# DO YOU THINK THAT THE MUTUALLY AGREED TERMS OF YOUR LEASE AGREEMENT ARE ABSOLUTE? THINK AGAIN!

*The question the court had to consider: Was it in the interests of justice for the eviction order to be made effective immediately or if the order should be stayed?*

*The court turned next to the question of whether, under the circumstances, the eviction order should be stayed.*

In the recent case of *AJP Properties CC v Sello* (39302/10) [2017] ZAGPJHC 255 (8 September 2017), the Gauteng Local Division of the High Court, Johannesburg had to decide whether the respondent, Ditonkana Abram Sello (Sello), the sole proprietor of Kempton Gate Pharmacy should be evicted by the applicant, AJP Properties CC (AJP Properties). The court further had to determine whether it was in the interests of justice to grant an eviction order with immediate effect, or if the order should be stayed.

The parties concluded a five-year lease agreement in 2010 in terms of which Sello rented premises in the Elgin Shopping Mall for the purposes of operating a pharmacy. The five-year period came to an end, but the lease continued based on a clause in the lease agreement which made provision for the extension of the lease agreement after the expiry of the lease. This clause further stated that in such an event, all the terms and conditions of the lease would remain in force and that the lease would be terminable by either party giving the other one calendar month's written notice of termination.

AJP Investments gave Sello one month's written notice of cancellation on 30 May 2017. However, Sello failed to vacate before 30 June 2017 and consequently AJP Properties instituted an urgent application for the eviction of Sello.

Although the court held that AJP Properties was entitled to an eviction order, the question the court had to consider: Was it in the interests of justice for the eviction order to be made effective immediately or if the order should be stayed?

The court considered a number of factors before reaching the decision that it was entitled to stay an eviction order under the circumstances, including that:

- our courts have the discretion to stay or suspend the execution of an ejection order in terms of the South African common law;

- a High Court, in terms of Rule 45A of the Uniform Rules of Court, can suspend the execution of any order for such period as it may deem fit;
- the principle of freedom of contract is not absolute; and
- there is no distinction between the delay of an ejection order from a residential property as opposed to a commercial property.

The court turned next to the question of whether, under the circumstances, the eviction order should be stayed. The court considered a number of factors:

- The unequal bargaining power of the parties. The court used the lease agreement as an example to prove this. The standard option to renew clause (although it was not operative in the present case) required the lessee to exercise its option to renew at least three months prior the termination of the lease. According to the court, this indicated the amount of time AJP Properties believed it would need to find a replacement tenant.
- Sello had not breached any of the terms of the lease and was up to date with the rent.

# DO YOU THINK THAT THE MUTUALLY AGREED TERMS OF YOUR LEASE AGREEMENT ARE ABSOLUTE? THINK AGAIN!

## CONTINUED

*The court held that there were sufficient grounds to justify a delay in the enforcement of the eviction order in the current circumstances.*



- AJP Properties did not inform Sello as soon as it had successfully negotiated a new lease for the same premises with another business. By failing to inform Sello, AJP Properties failed to afford Sello a fair opportunity to relocate.
- The economic realities - this included, among other things, that if Sello did not find alternative premises, he faced financial hardship and possibly even financial ruin and the fact that staff were likely to be laid off.
- The court further held that there was a socio-economic factor namely that the pharmacy provided for the essential medical needs of the people living in the area, which included the elderly.

Consequently, the court held that there were sufficient grounds to justify a delay in the enforcement of the eviction order in the current circumstances.

The court then turned to the issue of what would be the appropriate period to delay the order by. The court, among other findings, found that in terms of AJP Properties' standard lease agreement, it considered three months to be necessary to secure a new tenant if the lease is not extended. The court thus granted the eviction order but delayed the order for a period of three months in the interest of justice.

*Julian Jones, Roxanne Wellcome and Stephan Venter*

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

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