19 APRIL 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

THE FOLLY OF DEFAMATION ACTIONS

A judgment was delivered by the Supreme Court of Appeal on 29 March 2017, in the matter of *Media24 Limited t/a Daily Sun (Media24) vs Bekker du Plessis (du Plessis)* in proceedings where, following the publication of an article by Media24 in the Daily Sun, du Plessis saw fit to pursue a defamation action against Media24.

BANKING:
ARE DEBTS SECURED BY MORTGAGE BONDS AND NOTARIAL BONDS TREATED EQUALLY?

Section 11(A)(i) of the Prescription Act, No 68 of 1969, (Act) stipulates that a debt secured by a mortgage bond prescribes after 30 years. Unlike the previous Prescription Act of 1943, the Act does not have a definitions clause and consequently the concept of a mortgage bond has not been defined. The Act also makes no reference to a notarial bond.

NEW SERIES

PUBLIC LAW:
WHAT NEXT FOR ICC WITNESS PROTECTION?

This series has illustrated that there is very little to provide witnesses with a sense of comfort that the International Criminal Court (ICC or Court) will be able to ensure their protection once they have entered the International Criminal Court Protection Programme (ICCPP).

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THE FOLLY OF DEFAMATION ACTIONS

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The relevance and significance of this judgment has little or nothing to do with the niceties of the law, but is rather a salutary example of exactly why an indignant plaintiff should be extremely slow to enter the court arena, for purposes of extracting a monetary award, following his or her defamation.

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Du Plessis was at all material times a director of a fresh produce company which operated at the Tshwane Fresh Produce Market. Certain events transpired at the market on 27 October 2010, which subsequently formed the subject matter of an article published in the Daily Sun on 29 October 2010. By the time of the appeal it was common cause that the article was defamatory in nature, insofar as the gravamen of the article was not substantially true, and was replete with inaccuracies. Indeed, the SCA held that "the article read in context and as a whole implied that [du Plessis] was callous and bereft of compassion for fellow human beings".

Notwithstanding the aforesaid finding, and notwithstanding the fact that the SCA held that the defence of media privilege, relied upon by Media24 was unsustainable on the evidence, the court nonetheless took the view that the award made in favour of du Plessis in the court *a quo* was "excessively disproportionate to the harm caused". Petse JA, delivering judgment on behalf of the SCA, emphasised the following in this regard:

> It is as well to bear in mind that the purpose of damages for defamation is not to punish the defendant but to offer solace to the plaintiff by payment of compensation for the harm caused and to vindicate the plaintiff's dignity.

Bearing the costs of litigation in mind, one would have thought that an award in the amount of R80,000 might not be regarded as excessive. The SCA, however, held a very different view and determined that, in all the circumstances of this matter, an appropriate award should have been in the order of R40,000. The sum of the award of the court *a quo* was, accordingly, reduced to the said figure, and each party was ordered to pay their own costs of the appeal.

Even though the plaintiff (du Plessis) remained entitled to the cost award made in his favour by the court *a quo*, that cost award (being on a party and party scale) will ultimately prove to be of little comfort to du Plessis. At the end of the day, du Plessis will in all probability be the poorer for the action pursued by him (notwithstanding his amended award and the costs order of

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THE FOLLY OF DEFAMATION ACTIONS

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If du Plessis were to be asked whether his legal battle was a worthwhile undertaking, it seems certain that he would more than likely concede that the litigation pursued was not worthwhile, and was indeed an act of folly.

the court *a quo*). In addition, the benefit gained by Media24, in consequence of its success on appeal (pursuant to which the damages award in favour of du Plessis were reduced), was a Pyrrhic one. The costs incurred by Media24, in pursuing the appeal will, by some considerable measure, have outweighed the benefit derived therefrom.

Defamation actions are, in almost all instances, an immediate reaction to understandably emotional circumstances. The SCA judgment followed nearly seven years after the events giving rise to the litigation. If one could turn back the clock, and if du Plessis were to be asked whether, with the benefit of hindsight (and what he has experienced in regard to the litigation process), his legal battle was a worthwhile undertaking, it seems certain that he would more than likely concede that the litigation pursued was not worthwhile, and was indeed an act of folly.

Jonathan Witts-Hewinson

BANKING:
ARE DEBTS SECURED BY MORTGAGE BONDS AND NOTARIAL BONDS TREATED EQUALLY?

The Supreme Court of Appeal held that the phrase mortgage bond appearing in the Act should be read as including a special notarial bond and therefore the applicable period of prescription of a debt secured by a special notarial bond is 30 years.

Section 11(A)(i) of the Prescription Act, No 68 of 1969, (Act) stipulates that a debt secured by a mortgage bond prescribes after 30 years. Unlike the previous Prescription Act of 1943, the Act does not have a definitions clause and consequently the concept of a mortgage bond has not been defined. The Act also makes no reference to a notarial bond. The question whether the phrase mortgage bond also includes a reference to a notarial bond was the focus of a Supreme Court of Appeal judgment last month in the matter of *Factaprops 1052 CC and Another v Land and Agricultural Development Bank of South Africa t/a Land Bank* (353/2016) [2017] ZASCA 45 (30 March 2017).

The Court then concluded that the there is no indication that the Legislature intended to deviate from that meaning when it used 'mortgage bond' in the Act.

Factaprops concluded a written loan agreement with the Land Bank. The Land Bank registered a special notarial bond over specified movable assets of Factaprops as security. The loan was to be repaid in five annual instalments. During October 2010, the Land Bank proceeded to summon Factaprops for payment. In its plea, Factaprops raised a special plea of prescription alleging that the debt became due and payable sometime between June 2000 and June 2004, and as the Land Bank's summons was issued in 2010, more than three years after the debt became due, the Land Bank's claim had prescribed. The Land Bank's response to the special plea was that the debt was secured by a special notarial bond and the applicable prescription period is like that of a mortgage bond, 30 years.

Saner's commentary on Prescription in South African Law confirms that the position of whether the phrase mortgage bond includes a notarial bond is not clear, but the better view is that the 30-year period applies only to mortgage bonds in the narrow sense.

The Supreme Court of Appeal held that the phrase mortgage bond appearing in the Act should be read as including a special notarial bond and therefore the applicable period of prescription of a debt secured by a special notarial bond is 30 years. In arriving at its decision, the Court closely analysed the language used in s11 of the Act. It looked at the definition of 'mortgage' in the Shorter Oxford English Dictionary and concluded that mortgage may be used in relation to the hypothecation of both immovable and movable property. It also looked at the definition of 'verband' according to the HAT Verklarende Handwoordeboek van die Afrikaanse Taal and came to the same conclusion. It also looked at the history of the Prescription Act. The Transvaal Prescription Amendment Act 1908 made reference to "mortgage bond, general or special". The Court then concluded that the there is no indication that the Legislature intended to deviate from that meaning when it used 'mortgage bond' in the Act.

Eugene Bester

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PUBLIC LAW:
WHAT NEXT FOR ICC WITNESS PROTECTION?

NEW SERIES

This is the **final alert in a series of six exploring the legal ramifications of an African exodus from the International Criminal Court for its witness protection programme**. In particular, the alerts focused on the implications for witnesses currently in the relocation process, previously relocated witnesses, as well as future witness relocations.

If there is an African exodus despite the continuously shifting rhetoric on the ICC, it will not happen overnight: it will take time-consuming legislative action in each of the African states to reach a point where the relevant government is empowered to notify the United Nations of the withdrawal.

This series has illustrated that there is very little to provide witnesses with a sense of comfort that the International Criminal Court (ICC or Court) will be able to ensure their protection once they have entered the International Criminal Court Protection Programme (ICCPP).

The threat of an African exodus is constantly in flux. In January 2017, the African Union adopted a non-binding resolution (opposed by Nigeria and Senegal) in which it called on African states to follow its recommended withdrawal strategy. However, South Africa and Gambia have since terminated their withdrawal procedures. As it is open to these states and any others to begin withdrawal procedures at any stage, this does not rule out the possibility of a walkout.

If there is an African exodus despite the continuously shifting rhetoric on the ICC, it will not happen overnight: it will take time-consuming legislative action in each of the African states to reach a point where the relevant government is empowered to notify the United Nations (UN) of the withdrawal. South Africa's attempted withdrawal is an apt example of this point. As we analysed in a previous alert, the executive decision to deliver a notice of withdrawal prior to obtaining parliamentary approval was declared invalid by the High Court because it violated s231(2) of the Constitution and breached the doctrine of separation of powers. Even once a valid notice of withdrawal is delivered to the UN, that withdrawal will only come into force a year later under article 127(1) of the Rome Statute of the International Criminal Court (Rome Statute).

Regardless of whether there is a mass withdrawal or a small number of exiting states, there will be problems of witness safety and risk mitigation faced by the Victims and Witnesses Section (VWS) at the Court. These include the need to reassess the risk to relocated witnesses, a reduction in potential protective states and the lack of a suitable enforcement mechanism to ensure states comply with their witness protection obligations. However, these problems do not go much beyond the flaws already inherent in the witness protection framework. It is therefore necessary for the Court to address these problems as soon as possible, given that they may materialise regardless of a withdrawal. There is time, due to the prolonged withdrawal process, so the Court must take advantage of this opportunity to improve and reinforce the ICCPP. Pre-emptive action through, for example, considering the risk factor posed by the protective country's attitude towards the ICC, or the ability to bring urgent, confidential proceedings before domestic courts, should mitigate the current problems, and those that may be expected upon mass withdrawal.

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CONTINUED

Without a combined effort by all parties involved in the attempt to end impunity on an international level, these problems may become real in the lives of witnesses and terrible, irreversible consequences may result.

As it stands, there is no viable solution to the potential ramifications identified in this series absent additions to the Rome Statute or operational changes to the VWS. This is a disturbing conclusion to reach given the importance of witnesses in the prosecution of atrocity crimes, and the need for their protection to ensure full participation.

The next steps need to be taken by the ICC itself to determine ways in which to best address these problems. However, without a combined effort by all parties involved in the attempt to end impunity on an international level, these problems may become real in the lives of witnesses and terrible, irreversible consequences may result.

Sarah McGibbon,
overseen by Lionel Egypt

This schedule briefly outlines the focus of and includes links to the previous instalments in this series.

Date of release	Topic
8 February 2017	Introduction: the factual foundation setting the context in which this issue must be considered.
22 February 2017	The Witness Protection Framework: the mechanisms used by the ICC to place witnesses into protection, and the important role of state cooperation in this framework.
8 March 2017	Potential Problems with the Witness Protection Framework: What problems may arise as a result of any African exodus?
22 March 2017	Enforcement Mechanisms – Part 1: Possible ways of holding states accountable in respect of their obligations to protected witnesses – for what does the Rome Statute provide?
5 April 2017	Enforcement Mechanisms – Part 2: Possible ways of holding states accountable in respect of their obligations to protected witnesses – what about new approaches?
19 April 2017	**Concluding remarks:** Summarising key points from the series and potential future steps.

CLICK HERE to find out more about our Administrative and Public Law team.

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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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