5 JULY 2017

DISPUTE RESOLUTION ALERT

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INSURANCE:
FACEBOOK POSTS MAY COME BACK TO BITE YOU

In challenging the credibility of the plaintiff's evidence, the defendant, among other things, lead evidence obtained from the plaintiff's Facebook posts which depicted her living life in an ordinary manner, contradicting the plaintiff's version.

The plaintiff claimed that she had suffered damages between 2005 to the date of the trial that commenced on 25 October 2016 as a result of the defendant's failure to inform her of her condition.

With the advancement of modern technology, insurers are finding new ways of mitigating their losses in respect of claims by policyholders, including reference to Facebook posts in evidence to challenge the credibility of a version.

In the English case *Satveer Rathore vs Bedford Hospitals NHS Trust 2017* All ER (D) 142 (Apr) (2017) EWHC 863 (QB), the plaintiff claimed damages from the defendant for failing to inform the plaintiff timeously that she suffered from a sexually transmitted infection (STI).

The plaintiff gave birth to her second child in the Bedford Hospital during September 2005 and was subsequently discharged. She returned to hospital a month later suffering from post-partum bleeding and various other complaints. Tests were then conducted which revealed that the plaintiff was suffering from chlamydia, which would have been treatable by administering antibiotics. However, the hospital failed to inform the plaintiff of her condition which resulted in the plaintiff only being treated a year later.

The plaintiff claimed that she had suffered damages between 2005 to the date of the trial that commenced on 25 October 2016 as a result of the defendant's failure to inform her of her condition. The defendant accepted that the failure to inform the plaintiff and to ensure that both she and her husband received appropriate treatment was a breach of its duty of care.

The defendant alleged that a significant portion of the plaintiff's claim related to injuries suffered after the chlamydia had been detected and treated. The determination before the court was, among other things, whether the failure to treat, alternatively, alert the client of her condition for a year had resulted in the plaintiff suffering damages, and if so, to what extent.

At the trial from October 2016 to January 2017, the plaintiff arrived in court in a wheel chair and a covering blanket and needed the assistance of her husband.

One of the aspects considered by the court in assessing the plaintiff's damages, was the plaintiff's Facebook posts. In challenging the credibility of the plaintiff's evidence, the defendant, among other things, lead evidence obtained from the plaintiff's Facebook posts which depicted her living life in an ordinary manner, contradicting the plaintiff's version (for example, playing badminton, attending Zumba exercise class, going for walks with her children and attending theme parks).

CLICK HERE to find out more about our Insurance Law team.

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INSURANCE:
FACEBOOK POSTS MAY COME BACK TO BITE YOU

CONTINUED

It is clear that the court did take cognisance of the Facebook evidence, although it did not rely exclusively on such evidence.

To conclude, the court held that the defendant's negligence had only caused the plaintiff injury, loss and damage during the period 2005 to 2009. The court stated that one must tread carefully when considering Facebook evidence. However, it is clear that the court did take cognisance of the Facebook evidence, although it did not rely exclusively on such evidence.

The trend of using social media in investigating claims has gained support in the domestic insurance market in that insurers are relying on information posted on publically accessible social media accounts. It is clear that insurance companies will increasingly use social media to consider the veracity of claims.

Willie van Wyk and Denise Durand

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BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY

THE IMPORTANCE OF RECORD KEEPING FROM BOTH A LENDING AND RECOVERY PERSPECTIVE

The estates or financial positions of each surety and the principal debtor are interrelated and often the fall of one leads to the fall of another.

When the time comes, the bank will rely on its suretyships, or any other tangible security it might have had, to recover what it could not from the principal debtor.

Since 1956, legislation has required suretyship agreements to be embodied in a written document. A suretyship agreement involves three parties; simplistically if A does not pay B, then C will. C will step into the shoes of A and perform A's obligations for them.

In the banking environment, the most common situation for a suretyship to be concluded is when a business is in need of an overdraft or finance for new equipment. The bank would agree to provide the funds to the business on condition that a member or shareholder of the business stands surety for the debts of the business. An omnibus of suretyships is often created where companies in a group stand surety for each other together with directors. The estates or financial positions of each surety and the principal debtor are interrelated and often the fall of one leads to the fall of another.

When the time comes, the bank will rely on its suretyships, or any other tangible security it might have had, to recover what it could not from the principal debtor.

In the case of *Ndubu v First Rand Bank t/a Wesbank* (1113/2016) [2017] ZASCA 61, Wesbank financed trucks and trailers for Sizwe Personal Service (Pty) Ltd. As security, it held four suretyships by the directors and related entities. Sizwe placed itself into liquidation, which resulted in the liquidator authorising Wesbank to sell the vehicles on auction.

After reconciling the amount received on auction against the indebtedness, Wesbank turned to the sureties for the shortfall. The Johannesburg High Court granted judgment in Wesbank's favour ordering the sureties to pay the shortfall of just under R700,000 plus interest.

The sureties took this judgment on appeal, raising various defences. The crux of their discontent was that Wesbank had allegedly rejected three offers and instead auctioned the vehicles. One such offer was made by a surety. If Wesbank had accepted the offers the shortfall for which the sureties were now being held liable would either not exist or have been reduced.

The sureties attempted to be released from their suretyship obligations on the grounds of prejudice suffered because Wesbank had breached its obligations, such as its obligation to mitigate its loss when realising the vehicles. The appeal court found it unnecessary to look into this legal position and dispensed with the case on a factual enquiry.

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.

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BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY

THE IMPORTANCE OF RECORD KEEPING FROM BOTH A LENDING AND RECOVERY PERSPECTIVE

CONTINUED

The court looked at the fact-based evidence and held that the first offer was withdrawn, the second offer was subject to finance which was not approved and the third offer came too late, being after the vehicles had been auctioned.

The court looked at the fact-based evidence and held that the first offer was withdrawn, the second offer was subject to finance which was not approved and the third offer came too late, being after the vehicles had been auctioned. The appeal was accordingly dismissed.

From the judgment, it is clear that Wesbank had maintained good records of the offers and communication with the client and with the liquidator. This documentary evidence, supported by the testimony of the liquidator and a Wesbank employee, clearly lead to the path of recovery.

Processes and record keeping such as KYC, credit assessments, data sweeps, valuations, system notes are not only important on the lending end but also on the recovery end. The importance of such systems becomes clear when fighting allegations with the use of documentary evidence. To Wesbank's credit, they were able to show, as the judge put it, the "genuineness, rationality and reasonableness of their decision making".

This time the sureties' estates were shaken and possibly undone, as the judgment for payment stands.

Janine Matthews,
overseen by Julian Jones

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CONVERGENCE AND NEW MEDIA:
THE CYBERCRIMES AND CYBERSECURITY BILL - CALL FOR SUBMISSIONS

When enacted, this law will have far-reaching implications for individuals and organisations.

Convergence and New Media
NEWS BULLETIN

THE CYBERCRIMES AND CYBERSECURITY BILL - CALL FOR SUBMISSIONS

The revised **Cybercrimes and Cybersecurity Bill [B6-2017]** was tabled in the National Assembly in February 2017. It attempts to provide a comprehensive approach to the myriad of issues implicit in tackling Cybercrime.

The Bill creates new crimes and offences including cyber fraud, cyber forgery and cyber uttering. It also establishes multiple structures to support the detection, combatting and prosecution of cybercrimes and affords police extensive powers of search and seizure or articles in the investigation of cybercrimes. With Cybercrime being the second most reported crime affecting organisations, as reported by PWC, it is an important piece of legislation. When enacted, this law will have far-reaching implications for individuals and organisations, particularly those that process data, as well as for banks or electronic communications service providers. It requires refinement and further alignment with various pieces of legislation, including the Protection of Personal Information (POPI) Act, No 4 of 2013 and the Regulation of Interception of Communications and provision of communication related information Act (RICA) Act, No 70 of 2002.

The Portfolio Committee on Justice and Correctional Services has invited written submissions on the Bill by **28 July 2017**. It has also indicated that it will hold public hearings in respect of this Bill.

Submissions should be emailed to Mr V Ramaano at **vramaano@parliament.gov.za**.

CLICK HERE to find out more about our Convergence and New Media team.

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INTERNATIONAL ARBITRATION:
INTERNATIONAL ARBITRATION ACT - CALL FOR SUBMISSIONS

International Arbitration
NEWS BULLETIN

INTERNATIONAL ARBITRATION ACT – CALL FOR SUBMISSIO

On 3 July 2017, the portfolio committee on Justice and Correctional Services extended invites for written submissions on the **International Arbitration Bill [B10 – 2017]**.

The International Arbitration Bill is intended to modernise South African legislation on International Arbitration, by, amongst other things, incorporating the provisions of the UNCITRAL Model Law on International Commercial Arbitrations and by addressing shortcomings of the Enforcement of Foreign Arbitral Awards Act 1977 by replacing it with a chapter designed to give full effect to South Africa's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.

Comments can be emailed to Mr V Ramaano at vramaano@parliament.gov.za by no later than **Friday, 28 July 2017**.

Submissions must be received by no later than **28 July 2017**. Please indicate your interest in making a verbal presentation. Public hearings will be held in Parliament.

For Public hearings' dates and enquiries please contact Mr V Ramaano on tel (021) 403 3820 or cell 083 709 8427.

CLICK HERE to find out more about our International Arbitration team.

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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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.

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