11 JULY 2018

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

INSURANCE - A FACTOR WHEN DETERMINING CIVIL LIABILITY?

Whether and to what extent the existence of insurance will influence a judge when deciding to impose civil liability on a defendant, remains unsettled in South African law. In foreign jurisdictions, such as America, the existence or absence of insurance is considered a major factor in the imposition of liability. To illustrate the status of insurance as a factor in imposing civil liability in South Africa, we consider the role of insurance in the interpretation of exemption clauses. More specifically, we examine the case of *Durban's Water Wonderland Ltd v Botha & Another* 1999 (1) SA 982 (SCA) in this regard.

DOES THE FACT THAT NO VOTE HAS BEEN TAKEN TO APPROVE A BUSINESS RESCUE PLAN MEAN THAT THE PLAN HAS BEEN REJECTED AND CAN BUSINESS RESCUE PROCEEDINGS CONTINUE INDEFINITELY?

The Western Cape High Court in the case of *South African Bank of Athens Limited v Zennies Fresh Fruit* CC 2018 (3) SA 278 (WCC) essentially had to determine two main issues: (i) whether the fact that no vote was taken to approve a business rescue plan at a second meeting convened in terms of s151(1) of the Companies Act, no 71 of 2008 to consider the plan justified a conclusion that the plan was rejected; and (ii) whether business rescue proceedings can simply continue indefinitely.

CDH
CLIFFE DEKKER HOFMEYR

INSURANCE - A FACTOR WHEN DETERMINING CIVIL LIABILITY?

In light of the existence of insurance, the court interpreted the notice to not be an exemption of liability and consequently imposed liability on the defendant.

Whether and to what extent the existence of insurance will influence a judge when deciding to impose civil liability on a defendant, remains unsettled in South African law. In foreign jurisdictions, such as America, the existence or absence of insurance is considered a major factor in the imposition of liability. To illustrate the status of insurance as a factor in imposing civil liability in South Africa, we consider the role of insurance in the interpretation of exemption clauses. More specifically, we examine the case of *Durban's Water Wonderland Ltd v Botha & Another* 1999 (1) SA 982 (SCA) in this regard.

The SCA did not settle the moot question relating to the extent, if at all, insurance should be considered when determining civil liability, rather the SCA emphasised that where an exemption clause is drafted in unambiguous terms effect must be given to that meaning.

Facts

In the *Durban's Water Wonderland* case, the plaintiffs were injured on a ride at an amusement park and subsequently claimed damages against the owner, the defendant. The defendant denied liability and relied on a notice which held that "we regret that the management…must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever howsoever".

Court *a quo*

The court *a quo* held that any "reasonable person would assume, correctly in this case, that the proprietors are insured". The defendant's presumed insurance played an important factor in the court's reasoning. The court reasoned that "the notice was capable of meaning no more than that the management…would not accept liability in the sense of admitting liability but would require any claimant to prove his or her claim, presumably in a court of law". Hence, in light of the existence of insurance, the court interpreted the notice to not be an exemption of liability and consequently imposed liability on the defendant.

Supreme Court of Appeal

The Supreme Court of Appeal (SCA) rejected this interpretation and held that the words "unable to accept liability" used in the notice are unambiguous and hence exclude the defendant's liability. The SCA held that the court *a quo* interpreted the clause as being, at most, a clause which informs users in advance that the owner will always litigate against claims made against the owner. The SCA held further that this interpretation did not serve the owner's interests nor did it serve the interests of the owner's insurers.

The SCA did not settle the moot question relating to the extent, if at all, insurance should be considered when determining civil liability, rather the SCA emphasised that where an exemption clause is drafted in unambiguous terms effect must be given to that meaning.

The SCA in relation to the court *a quo*'s reasoning did not rule that, in general, insurance is an irrelevant consideration in the imposition of civil liability. In fact, the SCA considers the insurer's interests when reasoning against the court *a quo*'s interpretation. Furthermore, the SCA references *Government of the Republic of South Africa v Fibre Spinners & Weavers* (Pty) Ltd 1978 (2) SA 794 (A) as

CDH
CLIFFE DEKKER HOFMEYR

INSURANCE - A FACTOR WHEN DETERMINING CIVIL LIABILITY?

CONTINUED

When considering the validity of exemption clauses, the courts may consider open-ended factors, such as the existence or absence of insurance.

authoritative law. This case provided that "the agreement to insure was a satisfactory quid pro quo for the exemption". Again, the SCA does not provide any remark and does not attempt to distinguish this case on the ground that the court used insurance as a factor in determining liability.

Public policy

The *Durban's Water Wonderland* case deals with the interpretation of an exemption clause. Importantly, insurance may also be considered a factor in determining the *validity* of exemption clauses. It is well-established that exemption clauses contrary to public policy are invalid and unenforceable. To determine whether the exemption clause is contrary to public policy regard may be had to various open-ended factors. One such factor may be the existence or absence of insurance. There is thus room in which insurance as a factor can influence judicial decisions to hold that the relevant exemption clause is contrary to public policy, so as to render the exemption clause unenforceable and impose liability on the defendant.

Whether insurance should be a factor when determining a defendant's liability remains a moot question in South African law. In the absence of decisive authority, there is the possibility of a defendant being held liable more readily due to the defendant being insured. This remains possible as there are judicial indications that have not been overturned, such as the references to insurance in the interpretation of the exemption clause in the *Durban Water Wonderland* case. Furthermore, when considering the validity of exemption clauses, the courts may consider open-ended factors, such as the existence or absence of insurance.

Roy Barendse and Marzia Gertse

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.

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

CDH
CLIFFE DEKKER HOFMEYR

DOES THE FACT THAT NO VOTE HAS BEEN TAKEN TO APPROVE A BUSINESS RESCUE PLAN MEAN THAT THE PLAN HAS BEEN REJECTED AND CAN BUSINESS RESCUE PROCEEDINGS CONTINUE INDEFINITELY?

The crisp issue which the court had to determine was whether the fact that no vote was taken to approve the plan at the second meeting justified a conclusion that the plan was rejected as envisaged by s152(3)(a) of the Act.

The Western Cape High Court in the case of *South African Bank of Athens Limited v Zennies Fresh Fruit* CC 2018 (3) SA 278 (WCC) essentially had to determine two main issues: (i) whether the fact that no vote was taken to approve a business rescue plan at a second meeting convened in terms of s151(1) of the Companies Act, No 71 of 2008 to consider the plan justified a conclusion that the plan was rejected; and (ii) whether business rescue proceedings can simply continue indefinitely.

Section 152(3)(a) of the Act provides that if a proposed plan is not approved on a preliminary basis, the plan is rejected and may only be considered further in terms of s153.

The brief facts of the case are as follows:

- Zennies Fresh Fruit CC (Zennies) commenced with business rescue proceedings on 1 February 2017;
- On 9 March 2017, the Business Rescue Practitioner (BRP) published a plan;
- On 20 March 2017, one of the applicants, being Business Partners Limited (Business Partners) advised the BRP that it had concerns regarding the plan as it did not comply with the requirements of the Act and as a result it would raise a motion which would allow the BRP to amend the plan with the consent of the majority creditors or adjourn the meeting in order to revise a plan for further consideration;
- On 23 March 2017, the second meeting of creditors took place at which the plan was tabled for credits to discuss and vote on;
- According to Business Partners, the meeting was adjourned in order to prepare and publish a revised plan and the voting on the plan was adjourned until certain information and facts were more firmly established by the BRP;
- Business Partners further alleged that the BRP was required to prepare and publish a new/revised plan within 10 business days from the date of the second creditors meeting, that that period had lapsed and neither it nor the other applicant, being the South African Bank of Athens (Bank) (as majority creditors) had agreed to any extension to prepare and publish a new/revised plan;
- The Bank averred that Zennies was no longer under business rescue, as there was no agreement to extend the time period to file a new/revised plan. The Bank argued that the effect of this was that the plan was dismissed as contemplated in s152(3)(a) of the Act; and
- As a result of the aforementioned, Business Partners sought to proceed with its judgment against Zennies in respect of monies loaned and advanced including execution of properties and the Bank instituted an application for the liquidation of Zennies.

The crisp issue which the court had to determine was whether the fact that no vote was taken to approve the plan at the second meeting justified a conclusion that the plan was rejected as envisaged by s152(3)(a) of the Act.

This section provides that if a proposed plan is not approved on a preliminary basis, as contemplated in subsection 2, the plan is rejected and may only be considered further in terms of s153.

CDH
CLIFFE DEKKER HOFMEYR

DOES THE FACT THAT NO VOTE HAS BEEN TAKEN TO APPROVE A BUSINESS RESCUE PLAN MEAN THAT THE PLAN HAS BEEN REJECTED AND CAN BUSINESS RESCUE PROCEEDINGS CONTINUE INDEFINITELY?

CONTINUED

The court held that the mechanisms of business rescue proceedings were not designed to protect the company indefinitely to the detriment of creditors.

Section 153 provides for the remedies in the event that the plan has not been adopted. These include seeking a vote of approval by the BRP from holders of a voting interest to prepare and publish a revised plan and to apply to court set aside the result of the vote. Section 153 therefore only kicks in when a business rescue plan has not been approved and subsequently rejected. In terms of s153(5), if no person takes any action contemplated in subsection 1, the BRP must properly file a notice of termination of the business rescue proceedings.

It was common cause that the plan was presented to the creditors in terms of s151 of the Act and that the meeting was adjourned. On Zennie's version, the meeting was adjourned for the BRP to obtain more information. Zennies argued that there was no evidence that the vote had taken place.

Both Business Partners and the Bank placed reliance on s152(3) of the Act on the proposition that because the plan was not approved on a preliminary basis as envisaged in s152(1)(e) and s152(1)(d)(ii) of the Act, which meant that it was automatically rejected.

The court held that this argument presupposes that there was a vote on a preliminary basis of the plan as contemplated in subsection 2. In this case, there was no evidence to suggest that this had happened and accordingly the court found that both Business Partners and the Bank's reliance on s152(3)(a) and s132(2)(c)(i) was misplaced. The court accordingly found that there was no evidence to suggest that the plan was not approved.

The court, however, held that the enquiry did not end there. The court questioned whether a company can enjoy the protection of business rescue proceedings indefinitely to the detriment of creditors. In arriving at its conclusion, the court considered, among other things,the purpose of business rescue and stated that while such purpose is noble, it cannot lead to a situation where an extraordinary amount of time is taken to achieve the result at the expense of creditors' rights. The balancing of these rights should always be paramount in the ambit of fairness.

Based on the facts, the court held that in the absence of specific information received to finalise an amended plan, a BRP is under a statutory duty to file a notice of termination. Accordingly, the court held that the mechanisms of business rescue proceedings were not designed to protect the company indefinitely to the detriment of creditors. The delay in finalisation of the business rescue proceedings in these circumstances were found to be unreasonable and the court ordered that such proceedings be terminated.

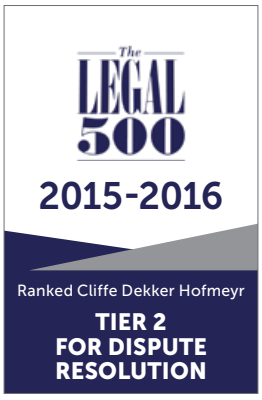
Julian Jones, Roxanne Wellcome and Courtney Jones

CLICK HERE to find out more about our Dispute Resolution practice.

CDH
CLIFFE DEKKER HOFMEYR

Best Lawyers 2018 South Africa

NAMED CDH LITIGATION LAW FIRM OF THE YEAR



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

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@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
Business Development
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

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

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

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

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

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@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

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

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

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 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