

2 OCTOBER 2019

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

TERMINATION OF NEGOTIATIONS: DO YOU HAVE A CLAIM IF THE PROPOSED DEAL GOES SOUTH?

Parties to commercial transaction negotiations can be falsely naïve in their early management of the process, with the misguided belief that everything will work out positively, resulting in one or both parties failing to take business decisions in anticipation of a deal being struck.

CONSTITUTIONAL COURT PUTS FOOT DOWN - REASONABLE CHASTISEMENT DEFENCE UNCONSTITUTIONAL!

In a month where women and children abuse has been squarely in the spotlight, the Constitutional Court also declared the common law defence of reasonable chastisement to be unconstitutional.

VICARIOUS LIABILITY OF AN EMPLOYER WHEN AN EMPLOYEE COMMITS AN INTENTIONAL WRONG ENTIRELY FOR HIS/HER OWN PURPOSE

Since as early as Roman times, it has been the case that an employer is vicariously liable for a wrong committed by an employee during the course or scope of his or her employment.

Termination of negotiations: Do you have a claim if the proposed deal goes south?

In order to claim that the contract that the parties are negotiating is indeed enforceable, it would be necessary to show all of the essentialia of that contract are present, and that both parties subjectively intended to conclude a contract.

Parties to commercial transaction negotiations can be falsely naïve in their early management of the process, with the misguided belief that everything will work out positively, resulting in one or both parties failing to take business decisions in anticipation of a deal being struck.

This article considers what legal remedies, if any, are available to an aggrieved party against the party withdrawing from negotiations, and what precautions may be taken to ensure the other party continues to negotiate in good faith.

Contractual liability

In order to claim that the contract that the parties are negotiating is indeed enforceable, it would be necessary to show all of the essentialia of that contract are present, and that both parties subjectively intended to conclude a contract.

The general principle in respect of negotiations is that parties are free to withdraw at any time until the conclusion of the actual agreement, provided the party withdrawing has acted in good faith. However, it may be argued that negotiations have created the expectation

that a contract will eventually be concluded and should accordingly have legal consequences (particularly where one party has incurred expenditure in preparation for performance in terms of the contract). This argument is generally upheld in most European jurisdictions.

However, while South African courts have recognised that the principle of good faith applies to pre-contractual negotiations, the implications thereof are not yet certain, and parties are therefore still free to break off negotiations for any reason. The only exception to this general rule, from a contractual perspective, is where parties have expressly agreed to negotiate in good faith. Even so, the SCA in *Southernport Developments (Pty) Ltd v Transnet Ltd* held that an agreement to negotiate in good faith must include a deadlock breaking mechanism (such as an arbitration clause).

The difficulty generally lies in proving that the other party's undertaking was an offer made with the intention to contract, and that it was not merely a proposal made during negotiations on the way toward a more precise and comprehensive agreement. The Appellate Division in *Lambons (EDMS) BPK v BMW (South Africa)* held that every case has to be judged on its own facts in determining whether the

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

Termination of negotiations: Do you have a claim if the proposed deal goes south?

...continued

The difficulty generally lies in proving that the other party's undertaking was an offer made with the intention to contract, and that it was not merely a proposal made during negotiations on the way toward a more precise and comprehensive agreement.

parties concluded a legally enforceable contract. The courts will apply an objective test based on the facts in order to determine if parties intended to enter into a binding and enforceable contract.

Delictual liability

If an aggrieved party is unable to show that all of the essentialia of the contract are present, and that both parties subjectively intended to conclude a contract, it may be argued that a party withdrawing from negotiations could be held delictually liable for negligently misrepresenting that they would continue to negotiate in good faith, and that a contract would eventually be concluded. Negligent misrepresentation may result in delictual liability where a person was under a legal duty to another to speak the truth, or to disclose facts not known to the other person.

For such a claim to succeed, it would be necessary to establish that:

- the misrepresentation was made;
- the person who made the representation was under a legal duty to speak the truth or to disclose facts unknown to the person claiming damages;
- the misrepresentation was made negligently (that is, a reasonable person in that person's position would have made such a representation);
- the misrepresentation caused the other party to suffer damages; and
- the quantum of such damages.

The difficulty generally lies in the unlawfulness element; that is, in proving that the other party was obliged to disclose the actual state of affairs. The Full Court of the Western Cape High Court in *McCann v Goodall Group Operations (Pty) Ltd 1995 (2) SA 718 (C)* held that "a negligent misrepresentation may also be constituted by an omission, but, as in the case of negligent misstatement, liability in delict will only follow if... the defendant fails to comply with a legal duty to act in order to avoid the plaintiff's suffering loss". The Court then listed certain examples of such a duty, including situations in which the information is in the exclusive knowledge of one party; there are unusual characteristics relating to the transaction, or simply where public policy requires disclosure.

In light of the general rule that a party to negotiations may withdraw at any time, and that subjective intention to contract is required for enforceable obligations to arise, it is unlikely that a court will find that public policy requires disclosure of any commercial or other information to the other negotiating party. The former Rhodesian court in *Murray v McLean 1970 (1) SA 133 (R)*, which judgment has been referred to with approval by various South African courts, held that there is no delictual remedy for an improper breaking-off of negotiations, regardless of whether one party has incurred expenses in anticipation of the contract.

Termination of negotiations: Do you have a claim if the proposed deal goes south?

...continued

South African courts have expressed divergent views on the question of whether the doctrine of legitimate expectation applies to private relationships.

The doctrine of legitimate expectation

The doctrine of legitimate expectation was incorporated into South African law in 1989 by the Appellate Division in *Administrator, Transvaal and Others v Traub and Others*, in which the Appellate Division confirmed that *“even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law”*.

However, South African courts have expressed divergent views on the question of whether the doctrine of legitimate expectation applies to private relationships.

Even if one is able to convince a court that the doctrine of legitimate expectation forms part of our law of contract, the requirements of the doctrine must also be met, which our courts have summarised to be:

1. the expectation must be reasonable; and
2. the representation giving rise to the expectation must be –
 - a) clear, unambiguous and devoid of relevant qualification;
 - b) induced by the decision-maker (being the other negotiating party, should the doctrine of legitimate expectation extend to purely contractual relationships); and
 - c) one which it was competent and lawful for the decision-maker to make.

Due to the fact that negotiations are generally understood to precede a legally binding agreement, and that due diligence investigations are intended to merely allow a negotiating party the opportunity to explore the possibility of eventually concluding an agreement, it is unlikely that a court would find that either party could have reasonably expected that a contract would certainly be concluded.

Conclusion

Parties who have suffered damages as a result of another person withdrawing unreasonably from negotiations are unlikely to find comfort in the law of delict, the law of contract or the doctrine of legitimate expectation. Regardless of initial optimism, it is highly recommended that precautions be taken at the outset, to prevent later disappointment and protect against unnecessary financial loss. These may include:

- 1) parties concluding a memorandum of understanding outlining the broad terms that have been agreed thus far;
- 2) parties agreeing to continue negotiating in good faith, but including a deadlock breaking mechanism, such as an arbitration clause, in the agreement; and/or
- 3) parties seeking precautionary legal advice prior to incurring any costs or expenses during the negotiation process, making any financial commitments, or signing on the dotted line.

*Lucinde Rhoodie, Pauline Manaka
and Georgia Speechly*

Constitutional Court puts foot down - reasonable chastisement defence unconstitutional!

The vulnerability of children coupled with the availability of less restrictive means for disciplining children were strong arguments motivating the Constitutional Court to find that there is no place in our law for the defence of reasonable chastisement.

In times where women and children abuse has been squarely in the spotlight, the Constitutional Court also declared the common law defence of reasonable chastisement to be unconstitutional.

This issue has a long history going back to the early Roman law when the power of the *paterfamilias* as head of the family included the right of life and death. That was moderated in later Roman law and even in our jurisdiction for many years a husband retained the right to inflict moderate personal chastisement on his wife, apprentices and children. Our law has developed to the point that moderate and reasonable chastisement of children only constituted a lawful defence for parents who had been charged with assault. The justification for this defence was found in the close connection that was believed to exist between the need for reasonable chastisement in the execution of parents' rights and duties in educating and raising their children.

It was inevitable that this issue would be challenged in our constitutional democracy but surprising that it took more than 20 years for that challenge to come. In 2017, in the case of *S v YG* 2018 (1) SACR 64 (GJ), the Gauteng High Court found that the defence of reasonable chastisement is unconstitutional as it

infringes on (amongst others) s12 of the Constitution of South Africa which protects the freedom and security of the person.

That judgment went on appeal to the Constitutional Court which had to decide, in essence, whether chastisement is a form of violence as envisaged in s12(1)(c) of the Constitution which provides that:

*"Everyone has the right of freedom and security of the person, which includes the right –
... (c) to be free from all forms of violence from either public or private sources."*

The Court considered that chastisement involves, by definition, the causing of displeasure, discomfort, fear or hurt and that the actual or potential hurt that flows from physical chastisement is believed to have a greater effect than other reasonably available methods of discipline. Section 12(1)(c) addresses all forms of violence, and the Constitutional Court found that chastisement (moderate or not) is a form of violence and infringes on a child's s12 right. The vulnerability of children coupled with the availability of less restrictive means for disciplining children were strong arguments motivating the Constitutional Court to find that there is no place in our law for the defence of reasonable chastisement.

Constitutional Court puts foot down - reasonable chastisement defence unconstitutional! ...continued

Unfortunately, even if Parliament is able to craft practically workable legislation, enforcement of the prohibition of reasonable chastisement falls again on an overstretched and under resourced police force.

Where does this leave us practically? Self-evidently, parents can no longer rely on the concept of reasonable chastisement to justify physical discipline of their children. There remains the rule in our law of *de minimis non curat lex* which is that the law is not concerned with trifles which could help parents escape criminal punishment for physically chastising their children provided that the incident is patently trivial. The rule does not necessarily exclude a criminal conviction but could see no sanction applied. Given the risk of criminal punishment and indeed even a conviction, this is probably not an area of law that parents should test.

The Constitutional Court acknowledges the practical difficulties which now face law enforcement agencies in dealing with this development and the Court has suggested that Parliament considers an appropriate framework. Unfortunately, even if Parliament is able to craft practically workable legislation, enforcement of the prohibition of reasonable chastisement falls again on an overstretched and under resourced police force.

*Tim Fletcher and
Elizabeth Sonnekus*



ILA

AFRICA INTERNATIONAL LEGAL AWARENESS
ensuring participation in the global legal community

As a leading African business law firm, Cliffe Dekker Hofmeyr understands how to navigate the complexities of investment opportunities in Africa, the development of risk mitigation strategies and the resolution of disputes between private sector counterparts or between host governments and investors, including negotiation, mediation, remedies in domestic courts or international arbitration.

To illustrate our support of the development and strengthening of International Arbitration in Africa, CDH is a sponsor of the Hot Topics in Investment Arbitration Conference which will be held on Friday, 8 November 2019.

The conference will be hosted by Africa International Legal Awareness (AILA) with networking cocktails at CDH's Johannesburg office to end the day on a high note.

**AS A VALUED CLIENT OF CDH,
YOUR ATTENDANCE AT THE CONFERENCE IS FREE.**



PLEASE CLICK ON THIS LINK TO REGISTER AND VIEW THE CONFERENCE PROGRAMME.
[AILA JOHANNESBURG CONFERENCE 2019](#)



CLIFFE DEKKER HOFMEYR

Vicarious liability of an employer when an employee commits an intentional wrong entirely for his/her own purpose

The SCA concluded that South African law “should be further developed to recognise that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer.

Since as early as Roman times, it has been the case that an employer is vicariously liable for a wrong committed by an employee during the course or scope of his or her employment. The liability of an employer, however, under circumstances where an employee commits an intentional wrong entirely for his or her own purpose, is a very different kettle of fish. There have been many judgments, over the years (both in South Africa and abroad), which have developed the policy and principles applied in such matters.

In a judgment recently handed down by our Supreme Court of Appeal (SCA) in the matter of *Stallion Security (Pty) Limited v van Staden* (526/2018) [2019] ZASCA 127 (27 September 2019), the SCA, in a unanimous judgment, held that the considerations to be taken into account for purposes of determining the vicarious liability of an employer should be further developed, so as to recognise that the creation of risk of harm, by an employer may, in appropriate cases, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer, justifying vicarious liability on the part of the employer (even when the employee in fact acted entirely for his or her own purpose).

In the *Stallion* matter, an employee of that entity, Mr Khumalo, had been appointed by Stallion as a site supervisor in relation to certain security services provided by Stallion, in terms of a contract with a Bidvest entity. Mr Khumalo, as site manager, was provided with a bypass or override key in relation to Bidvest’s biometric system, so as to enable him to perform his duties. Using his knowledge of what he came to know of the Bidvest premises (and those employed at the premises), Mr Khumalo gained access to the office area, forced an employee of Bidvest, Mr van Staden, to transfer money to his (Mr Khumalo’s) personal bank account, and then shot and killed Mr van Staden.

Mr van Staden’s surviving spouse pursued a claim for delictual damages against Stallion, founded on vicarious liability for the wrong committed by Mr Khumalo. Self-evidently, the intentional wrongs of Mr Khumalo were committed entirely for his own purpose. The question to be determined, however, was whether, on the facts of this matter, a sufficiently close link existed between the wrongful act of the employee (on the one hand) and the business or enterprise of the employer (on the other).

Vicarious liability of an employer when an employee commits an intentional wrong entirely for his/her own purpose ...continued

It may be sage for employers to engage with their insurance advisers or brokers, with a view to ensuring that they have appropriate cover in place to mitigate the risk associated with extended forms of misconduct, on the part of employees, which might result in liability to third parties.

The SCA concluded that South African law "should be further developed to recognise that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer. Whether the employer had created the risk of the harm that materialised, must be determined objectively".

In this instance, and after analysing the relevant facts, the court found that Stallion had furnished Mr Khumalo with much more than a "mere opportunity" to commit the wrongs in question. It had enabled him to enter into and exit from the office area without detection; it had afforded Mr Khumalo the intimate knowledge of the layout and the security services at the premises. In addition, it was by virtue of his employment with Stallion that Mr Khumalo was in possession of the override key to the office area. That special position created a material risk that Mr Khumalo might abuse his powers. That risk rendered the deceased vulnerable and produced the robbery and consequentially the murder.

The fact that *Stallion* had placed Mr Khumalo in charge of discharging the contractual burden which Stallion had undertaken, provided a significant normative link between Stallion's business and the harm suffered by Ms van Staden. For that reason, the court held that there was a sufficiently close link between the business of Stallion and the death of the deceased. Stallion was, accordingly, held to be vicariously liable for the conduct of Mr Khumalo.

Whilst it might not seem that this development in our law is necessarily a seismic shift from the approach previously adopted by our courts, the development is, nonetheless, sufficiently significant to warrant a careful analysis of the extent to which it might impact upon corporates and employers, from the perspective of potential liability to third parties, arising from the misconduct of employees. Indeed, it may be sage for employers to engage with their insurance advisers or brokers, with a view to ensuring that they have appropriate cover in place to mitigate the risk associated with extended forms of misconduct, on the part of employees, which might result in liability to third parties.

Jonathan Witts-Hewinson

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

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@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

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

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@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.rhodie@cdhlegal.com

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

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@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

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@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

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

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2019 8339/OCT

