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DISPUTE RESOLUTION **ALERT**

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Do sureties who bind themselves as co-principal debtors become co-debtors with the principal debtor and each other?

In the recent reportable case of *Liberty Group Limited v Warren Patrick Broughton Illman* (1334/2018) [2020] ZASCA 38, the Supreme Court of Appeal of South Africa (SCA) had to consider whether sureties who bind themselves as co-principal debtors become co-debtors with the principal debtor, and with each other. Ancillary thereto, whether the service of summons on any of the sureties interrupts the running of prescription in favour of the others.

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Do sureties who bind themselves as co-principal debtors become co-debtors with the principal debtor and each other?

As was pointed out in *Jans v Nedcor Bank Ltd* [2003] (6) 646 (SCA), there were significant differences between the relationship existing between the principal debtor and surety on the one hand, and that between co-debtors, *in solidum* on the other. An interruption or delay in the running of prescription in favour of the principal debtor, interrupted or delayed the running of prescription in favour of the surety. As between co-debtors, the common law allowed the judicial interruption of prescription of a co-debtor by service on another co-debtor.

In the recent reportable case of *Liberty Group Limited v Warren Patrick Broughton Illman* (1334/2018) [2020] ZASCA 38, the Supreme Court of Appeal of South Africa (SCA) had to consider whether sureties who bind themselves as co-principal debtors become co-debtors with the principal debtor, and with each other. Ancillary thereto, whether the service of summons on any of the sureties interrupts the running of prescription in favour of the others. The court *a quo* answered the question in the negative, dismissing the application with costs whilst upholding the special plea of prescription.

The facts before the High Court

In March 2003, Charter Life Insurance Ltd (now Liberty Active Ltd (Liberty Active)) concluded a broking agreement with ECE Financial Holdings (ECE). The Respondent, Mr Illman, along with seven other individuals had signed separate but identical deeds of suretyship in terms of which they bound themselves as sureties and co-principal debtors *in solidum* with ECE.

During March 2003 and March 2011, Liberty advanced commissions to ECE, prior to receiving any premiums in respect thereof. However, during the same period, the contracts in respect of which commissions were advanced lapsed, were cancelled or terminated, due to non-payment of premiums. The commissions accordingly became repayable in terms of the agreement, and by the sureties in terms of the deeds of suretyship.

Liberty Active ceded its rights to Liberty Group, who issued summons in March 2011 against the sureties and co-principal debtors. Summons was served and default judgment was obtained against one of the sureties, Mr September in January 2012. However, surprisingly summons was only successfully served on Mr Illman approximately five years later, in March 2016.

In defending the action Mr Illman raised a special plea claiming that the debt had prescribed. Liberty Group in turn delivered a replication in which it submitted that Mr Illman and Mr September became co-debtors when they bound themselves as sureties and co-principal debtors and as a result, service of the summons on Mr September within the prescription period had interrupted the running of prescription in favour of ECE and all co-debtors, which included Mr Illman.

Do sureties who bind themselves as co-principal debtors become co-debtors with the principal debtor and each other?*...continued*

The addition of the words *"co-principal debtor"* in a suretyship did not transform the contract into any contract other than one of suretyship.

Proceedings before the SCA

In deciding the issues before the SCA, namely (i) whether the court *a quo* correctly held that the effect of the surety agreement was not that the sureties become co-debtors and (ii) whether the service of summons on one surety does not interrupt the running of prescription in terms of the other, the court stated that:

- the legal position in relation to the first issue has been the established jurisprudence of the court, where it was emphasised in *Kilroe-Daley v Barclays National Bank* 1984 (4) SA 609 (A) that the surety's liability was accessory to that of the principal debtor, despite it being based on a different contract;
- as was pointed out in *Jans v Nedcor Bank Ltd* [2003] (6) 646 (SCA), there were significant differences between the relationship existing between the principal debtor and surety on the one hand, and that between co-debtors, *in solidum* on the other. An interruption or delay in the running of prescription in favour of the principal debtor, interrupted or delayed the running of prescription in favour of the surety. As between co-debtors, the common law allowed the judicial interruption of prescription of a co-debtor by service on another co-debtor.
- the addition of the words *"co-principal debtor"* in a suretyship did not transform the contract into any contract other than one of suretyship. Consequently, if the principal debt became prescribed, the surety's debt also became prescribed and ceased to exist.

The SCA also considered the case of *Neon and Cold Cathode Illuminations (Pty) v Ephron* 1978 (1) SA 463 (A), where it was held that the sole consequence of a surety binding himself as a co-principal debtor is that, as regards to the creditor, he renounces the benefits such as excussion and division available to him, and he becomes liable with the principal debtor jointly and severally. It did not make him a co-debtor.

The SCA dismissed the appeal with costs and upheld the decision of the High Court.

This judgment is a reminder that all creditors with claims against sureties who bind themselves as co-principal debtors must, immediately upon the principal debtor defaulting on its payment obligations, issue and serve summons against all the sureties simultaneously, as far as practicable. This requires a reliable and up-to-date record of all sureties' personal details such as their contact details, residential address and/or work address, in order to fast track the service of court process.

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Bank guarantees in a time of uncertainty

A bank issuing an on demand guarantee is only obliged to pay where a demand meets the terms of the guarantee. Such a demand, which complies with the terms of the guarantee, provides conclusive evidence that payment is due.

The COVID-19 pandemic and the national lockdown has brought about significant commercial uncertainty in South Africa. Commercial banks may confront questions regarding their obligations in terms of on-demand bank guarantees. This is especially so where a dispute may exist between contracting parties as to their respective obligations in terms of a contract. To mention a practical example, in circumstances where a tenant alleges that it is entitled to a rental remission and fails to make payment of rental during the national lockdown, but a landlord, notwithstanding such allegation by the tenant, demands from the bank as issuer of the on-demand guarantee, to make payment to the landlord in terms of the on-demand guarantee.

In this alert we ask: What is the status of on-demand guarantees? Should commercial local banks concern themselves with *force majeure* events affecting the underlying contract between for instance a tenant and a landlord to the bank guarantee? Does it matter that the occurrence of the event triggering the guarantee came about due to COVID-19?

Status of the on-demand guarantee

An *"on demand"* bank guarantee establishes a contractual obligation on the part of the guarantor to pay the beneficiary on the occurrence of a specified event and is independent of the underlying contract which gave rise to the guarantee. Regardless of a dispute between the parties to the underlying contract, the guarantee must be paid on demand. The South African common law position was defined in the Supreme Court of Appeal when it stated in the matter between *State Bank of India and another v Denel Soc Limited* [2015] 2 All SA 152 that *"a bank issuing an on demand guarantee is only obliged to pay where a demand meets the terms of the guarantee. Such a demand, which complies with the terms of the guarantee, provides conclusive evidence that payment is due."*

What obligations, if any, does the bank have towards third parties?

A guarantee constitutes an autonomous agreement between the guarantor and beneficiary party and must be paid according to its terms. The Supreme

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Bank guarantees in a time of uncertainty...*continued*

A third party thus cannot prevent payment of the on-demand guarantee when all the requirements as set out in the specific guarantee have been met.

Court of Appeal made it clear in *First Rand Bank Ltd v Brera Investments CC* 2013 (5) SA 556 (SCA), stating that: *"A guarantee of this nature must be paid according to its terms, and liability under it is not affected by the relationship between other parties to the transaction that gave rise to its issue"*. Put differently, the guarantee agreement is not tied to the underlying agreement which gives rise to the obligation between, for example, a retail tenant and retail landlord. It is a separate agreement, with distinguishable obligations and to which the third party, in this example the retail tenant, is not party to.

A third party thus cannot prevent payment of the on-demand guarantee when all the requirements as set out in the specific guarantee have been met – it is for the guarantor (the bank) to determine whether the conditions are met. Notably, our common law also recognises that where the payment mechanism in the guarantee is *"payment on first demand"*, that such form of payment does not require any proof of default from, for instance, the retail tenant.

When a demand is received, a bank has to determine whether the terms and conditions set out in the guarantee itself have been met, and once that is the case, then it has an obligation to perform in terms of the guarantee. It is generally sufficient for the guarantor to rely on the statement of events presented by the person (who would have to be entitled to do so and have the requisite representative authority) demanding payment. The guarantor (the bank) must determine, based on the documents alone, whether they appear on the face of it to comply with the terms and conditions of the guarantee. This must be done without consideration whatsoever to the underlying contract or a dispute between the third party and beneficiary of the guarantee. There is thus no duty on the bank to look behind the demand or matters between the beneficiary and third party at the time of assessing whether it should pay or not. All it has to do is to satisfy itself that the beneficiary complied with the formal requirements set out in of the on-demand guarantee.

Presence of fraud

"The only exception to the rule that the guarantor is bound to pay without demur, is where fraud on the part of the beneficiary has been established. The party alleging fraud has to establish it clearly on a balance of probabilities": The Supreme Court of Appeal stated in *State Bank of India and another v Denel Soc Limited* [2015] 2 All SA 152 (SCA).

Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. It is likely that banks may be faced with a situation where a party to the underlying agreement claims that, due to the presence of *force majeure* causing their inability to perform (and thus triggering the guarantee), a claim for payment by the beneficiary amounts to fraud. Our courts have yet to deal with the merits of such a contestation and until such time, a mere claim of potential fraud by a third party is not enough to prevent a bank from paying in terms of the guarantee.

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Bank guarantees in a time of uncertainty...*continued*

Despite the presence of COVID-19, the subsequent impact of the nation-wide lockdown and the economic uncertainty that has come with it, an on-demand guarantee should be able to live up to its name: *payment is guaranteed, on-demand*.

As stated above, all that is required in law of the guarantor in this situation is to evaluate the claim for payment against, and based on, the conditions set out in the guarantee itself. If the conditions have been met, the guarantor is required to pay in terms of the guarantee and cannot be held liable for such action.

To mitigate the risk, especially in circumstances where, for instance, a tenant notifies a bank that it disputes the obligation to pay rental during the national lockdown, banks must consider giving a tenant notice when a demand is received from a landlord for payment in terms of the guarantee. This will afford the tenant the opportunity to approach a court for an interdict to be granted against payment in terms of the guarantee, pending the outcome of the dispute between the tenant and the landlord.

Impact of COVID-19

In the midst of uncertainty surrounding COVID-19 and a variety of *force majeure* events rippling through various industries, on-demand bank guarantees appear to be relatively unaffected. In the regulations issued by Government under the national lockdown imposed as a result of COVID-19, it specifically makes provision for the continued operations of banks as "*essential services*". Banks, and the payment of bank guarantees, can continue to function as normally as possible under the circumstances.

As already mentioned, a guarantee constitutes a separate agreement, with distinguishable obligations to the agreement underlying the guarantee. Therefore, if the underlying agreement is affected by COVID-19 (in that the "*trigger event*" for payment of the guarantee came about as a result of a *force majeure*), this does not necessarily mean that the *force majeure* is of any relevance to the bank, unless:

1) The guarantee agreement itself makes provision for a *force majeure* event or the guarantee is subject to the international Uniform Rules on Guarantees (URDG 758), which makes provision for *force majeure*; or
2) Government issues directions that directly impact on the banks' ability to perform due to economic measures it elects to enforce to assist business during the COVID-19 lockdown.

In these uncertain times, beneficiaries of on-demand guarantees have, at the very least, some certainty regarding the payment of such a guarantee if the beneficiary is able to show that it has met all the conditions set out in the guarantee and that they have lawfully made a demand. Despite the presence of COVID-19, the subsequent impact of the nation-wide lockdown and the economic uncertainty that has come with it, an on-demand guarantee should be able to live up to its name: *payment is guaranteed, on-demand*.

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The use of drones in the war against COVID-19

The benefit of using drones to transport medical samples is that it can significantly reduce unnecessary human contact and therefore, transmission of the virus. Drones can also deliver the samples much faster via air compared to road travel, which accelerates the feedback process for critical tests needed by medical workers and patients.

Life as we know it has changed overnight with the rapid spread of the COVID-19 Contagion. For some of us it feels as though we have taken a Wrong turn and at Daybreak, have awoken to a Whole New World, Far from Home where a deadly virus has caused a global shutdown. If you haven't picked up on all the movie and television series references in the first two sentences, then you are among the rare individuals that have not spent their lockdown time binge watching Netflix – congratulations!

But seriously, the virus is a game changer and not just for how humans will conduct themselves in the future but also for innovation. Governments and industries have to adapt to new realities and implement innovative strategies of operating whilst keeping their workers at a safe distance to prevent transmission. China's healthcare industry for instance has utilized innovative ways to incorporate drones into their response to the COVID-19 pandemic.

Gone are the days where drones were merely used for military surveillance (and uhm "*political assassinations*"). Today you might find a travel blogger capturing the imposing landscape of Machu Picchu or see a drone whizzing through the streets of Hollywood filming an action-packed movie. This is largely due to advances in technology that have made the technology more affordable. Against that backdrop, the Chinese government has been piloting ways to incorporate drones into their response to the Coronavirus, namely for:

1. Aerial spray and disinfection;

2. Transport of samples; and

3. Drone delivery for essential goods.

The co-founder of agricultural drone company XAG, Justin Gong stated that drones which were originally designed to spray pesticides in the agricultural industry have been adapted for aerial spray of disinfectant in China. He confirmed that aerial spray of disinfectant can be *50 times more efficient than people spraying*. The benefit of using drones to transport medical samples is that it can significantly reduce unnecessary human contact and therefore, transmission of the virus. Drones can also deliver the samples much faster via air compared to road travel, which accelerates the feedback process for critical tests needed by medical workers and patients. Lastly, the utilization of drones for delivery of consumer goods such as food and basic necessities, makes it easier for citizens to comply with the regulations regarding social distancing and limiting human contact.

In order to circumvent the obvious safety risks that are associated with the use of drones, such as injuring people or damaging property, the municipal governments in China, its health department, major drone company (Antwork) and the Civil Aviation Administration of China worked in collaboration to approve routes and ensure proper safety measures were implemented.

Can South Africa successfully utilize drones for similar functions in our war against COVID-19 and will our regulatory framework allow for it?

The Eighth Amendment to the Civil Aviation Regulations (Regulations) was introduced in 2015 and governs, in Part 101, the operation of Remotely Piloted Aircraft Systems (RPAS), described in the

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The use of drones in the war against COVID-19*...continued*

In order for a company to use drones for aerial spray of disinfectant, sample transport or consumer delivery in the time of COVID-19, the holder of an ROC needs to include this plan in the operator's operations manual, which has to be approved by the Director of Civil Aviation.

Regulations as an unmanned aircraft which is piloted from a remote pilot station, which includes drones.

There is a distinction in the Regulations between private use versus commercial use of RPAS. If drones are to be used for the three functions detailed above, this would fall under the commercial use category.

An RPA will only be allowed to operate for commercial reasons if:

1 it has been issued with a letter of approval by the Director of Civil Aviation;

2. it has been issued with a certificate of registration by the Director of Civil Aviation;

3. an RPAS Operating Certificate (ROC) has been issued; and

4. an air services licence has been issued in terms of the Air Services Licensing Act, 1990.

In terms of the Regulations a ROC holder is required, *inter alia*, to:

1. develop an operations manual containing all the information required to demonstrate how such operator will ensure compliance with the Regulations and how safety standards will be applied and achieved during such operations;

2. establish a record-keeping that allows adequate storage and reliable traceability of all activities developed;

3. establish a safety management system commensurate with the size of the organisation or entity; and

4. conduct security checks on personnel employed in deployment, ensure the RPA is protected from personal interference, ensure that security awareness training is conducted.

Furthermore, the operator is required to obtain an RPA pilot's licence. In order to acquire the licence, the pilot needs to undergo medical certification, certification of radiotelephony, English proficiency and flight training, as well as pass both a theoretical examination and skills test. The licence is valid for 24 months and applicants must be over 18 years old. The licence holder will have to undergo a revalidation check 90 days prior to the expiry of the licence in order to renew it.

In terms of regulation 101.05.4 of Part 101 of the Regulations, *"no object or substance shall be released, dispensed, dropped, delivered or deployed from an RPA except by the holder of an ROC and as approved by the Director in the operators' operations manual"*.

It follows that in order for a company to use drones for aerial spray of disinfectant, sample transport or consumer delivery in the time of COVID-19, the holder of an ROC needs to include this plan in the operator's operations manual, which has to be approved by the Director of Civil Aviation.

As is apparent from the above, the Regulations for commercial use of a drone are extremely stringent with approvals and oversight required by the Civil Aviation Authority. However, the Regulations are strict for a reason, ensuring safety, top-notch security and adequate training, and protecting against the potential infringement of people's human rights,

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The use of drones in the war against COVID-19*...continued*

As is apparent from SANBS's drone-based blood delivery programme, South Africa's healthcare industry is fully capable of using drones for aerial sprays of disinfectant, to transport medical samples and to deliver essential goods in the time of the COVID-19 crisis.

such as privacy, dignity and safety. Relaxing these Regulations would create an opportunity for abuse and for criminals to use drones for illegal activity.

Is South Africa equipped to implement drone technologies for delivery services in the health industry?

In May 2019, the South African National Blood Service (SANBS) launched a new drone-based blood delivery system to help deliver blood to people in rural areas. Its purpose is to reduce the cost and time it takes to deliver blood. The programme is in the process of being piloted in Eastern Cape, Northern Cape and KwaZulu-Natal. The long-term prospects of the programme see it expanding nationwide, making drone technology the standard in the healthcare system in South Africa.

In relation to obtaining Civil Aviation Authority approval, SANBS has stated that:

> *"The CAA is very strict about whom they give the licence to, and everyone has to go through the process. It's not just about being granted a licence, it's also about going through the right regulatory procedures and certifications of compliance. Once this has been achieved, we will see the real impact of our return on investment by the number of lives saved."*

Some nine months after the project launch, it appears as though SANBS has not yet been granted the licence to operate.

As is apparent from SANBS's drone-based blood delivery programme, South Africa's healthcare industry is fully capable of using drones for aerial sprays of disinfectant, to transport medical samples and to deliver essential goods in the time of the COVID-19 crisis. The real issue seems to lie in the time it takes the Civil Aviation Authority to grant the requisite licence.

During a national disaster, where time is of the essence, additional formalities and authorisations to comply with the Regulations, together with the hefty cost restraints, act as hindrances to the swift and successful utilization of this technology. But if it had the appetite, the Civil Aviation Authority could jump on the *"publishing special time-barred regulations for the duration of the state of national disaster"* bandwagon and expedite this process by either lobbying the Minister of Transport to issue a directive under the Disaster Management Act 57 of 2002 (Disaster Management Act); or by publishing its own set of regulations under the Civil Aviation Act 13 of 2009. The impressive speed at which the state has otherwise acted under the powers granted to it by the Disaster Management Act has led to South Africa emerging as a leader in the war against COVID-19. Depending on how the situation unfolds, having an arsenal of cutting edge, custom built disinfectant drones could prove useful in maintaining South Africa's top position – or it could be the beginning of Skynet's master plan (and if you didn't get that reference, you are truly Lost!).

Imraan Abdullah, Ashleigh Gordan and Anja Hofmeyr

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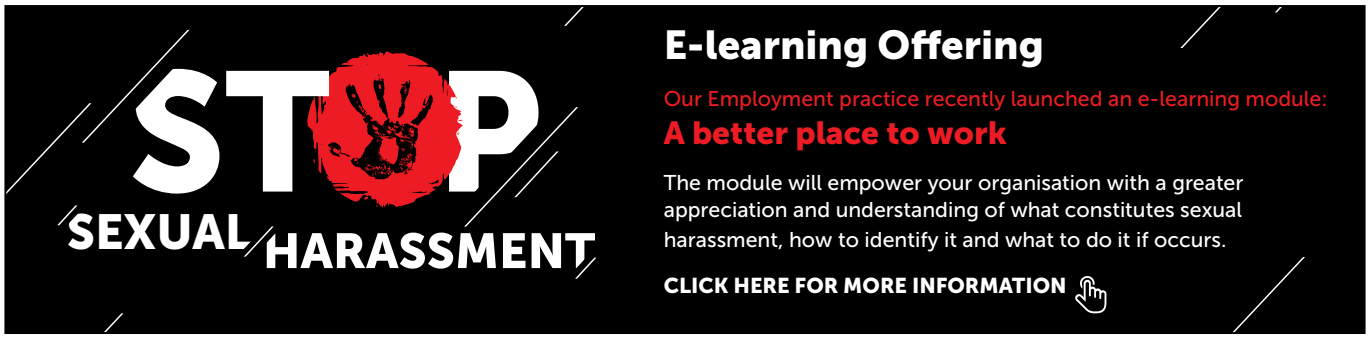

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