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DISPUTE RESOLUTION ALERT

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Enforcement of general notarial bonds

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Courts grappling with their own jurisdiction

Litigators would know that one of the many questions that must be asked when dealing with a new instruction, is which court has jurisdiction to deal with the particular matter. The purpose of this article is not to discuss what determines whether a court has jurisdiction over a matter, but it will discuss how at least two different divisions of the High Court have approached the question of their own jurisdiction to deal with certain matters. These approaches resulted in the Supreme Court of Appeal having to make a final determination on the question.

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CLIFFE DEKKER HOFMEYR

Enforcement of general notarial bonds

A notarial bond in present-day South African law is a bond, attested by a notary public, which hypothecates movable property, either generally or specifically, and which has been registered in the Deeds Registry.

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A notarial bond in present-day South African law is a bond, attested by a notary public, which hypothecates movable property, either generally or specifically, and which has been registered in the Deeds Registry. It provides a means by which a debtor may hypothecate the movable property that serves as security without having to deliver the property to the creditor. The debtor may continue to use the property. Examples of movable corporeal property include: equipment and machinery; furniture; vehicles; stock-in-trade (including replacement stock);

animals (including any future offspring) etc. whereas examples of movable incorporeal property include: shares; licences and permits; book debt; unregistered leases or subleases and registered leases of immovable property etc.

These assets can be secured by means of either a general notarial bond (GNB) or a special notarial bond (SNB). An SNB burdens specifically described movable property belonging to a debtor. A GNB is registered over all the movable property of a debtor and does not entitle the creditor to a real right of security in the property. Nothing prevents the debtor from dealing and disposing of the property subject to the GNB. The creditor cannot prevent an alienation or pledge of the property subject to the GNB, cannot follow up the property in the hands of the acquirer and cannot prevent a judicial attachment. The rights of the creditor are of importance mainly upon insolvency. In that instance, a creditor is not secured and is only entitled to a preference over the concurrent creditors with respect to the proceeds of property subject to the GNB.

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Enforcement of general notarial bonds...*continued*

While much has been written about the impact of COVID-19 on the economy, there is no doubt that the pandemic will have far reaching consequences on the economy across the board.

A creditor will only obtain a real right of security (and therefore become a secured creditor in the event of insolvency) upon perfecting its GNB. A typical GNB contains a perfection clause which entitles the creditor to take possession of the movable property over which the GNB has been registered. The aforesaid clause amounts to an agreement to constitute a pledge and can be enforced at the instance of the creditor. Perfection of a GNB entails two things:

- First, a successful application to the High Court for an order that such property be attached; and
- Second, actual possession of the property is obtained via attachment by the sheriff of the High Court.

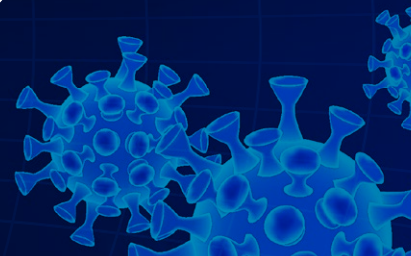
A GNB is therefore only perfected once a creditor takes physical possession of the property.

While much has been written about the impact of COVID-19 on the economy, there is no doubt that the pandemic will have far reaching consequences on the economy across the board. Creditors should therefore regularly perform an audit of the security package in place. As can be readily discernible from the above, debtors are likely to have easier access to movable property, as opposed to immovable property (which will likely be mortgaged) and are likely in a better position to provide security over movable assets. GNBs remains one of the mechanisms which debtors can utilise to unlock the full value of its assets by putting them up as collateral while providing a creditor with the necessary comfort. This is more so for debtors who do not own immovable property or whose immovable property is mortgaged.

Vincent Manko

CDH'S COVID-19 RESOURCE HUB

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Courts grappling with their own jurisdiction

It is generally not advisable from a cost point of view to pursue a defendant in the High Court for insignificant sums of money.

Litigators would know that one of the many questions that must be asked when dealing with a new instruction, is which court has jurisdiction to deal with the particular matter. The purpose of this article is not to discuss what determines whether a court has jurisdiction over a matter, but it will discuss how at least two different divisions of the High Court have approached the question of their own jurisdiction to deal with certain matters. These approaches resulted in the Supreme Court of Appeal having to make a final determination on the question.

A simplified overview of jurisdiction of the various courts, based on the quantum of the claim only, can be summarised as follows: Magistrate's Courts can deal with matters with a quantum up to R400,000.00 and the High Courts can deal with all matters. To illustrate the point, a plaintiff can sue a defendant in the Magistrate's Court for a rand value not exceeding R400,000.00, and the same plaintiff can sue the same defendant in the High Court for any monetary amount. It is a well-established and accepted principle in our law that High Courts have concurrent jurisdiction over matters that fall within the jurisdiction of the Magistrate's Court. As a disclaimer, it is generally not advisable from a cost point of view to pursue a defendant in the High Court for insignificant sums of money.

Most financial institutions that are forced, as a last resort, to repossess a debtor's residential home prefer approaching the High Court for a number of reasons. By far the most compelling reason is that a debtor's home is the roof over his and his family's head, and in many instances, the single biggest asset of the debtor. The financial institutions prefer that the High Court oversees this process. The judicial system has recognised the importance of overseeing the repossession process, and in recent years has introduced amendments to the High Court rules ensuring that default judgments involving primary residences, and writs of attachment in respect thereof, can no longer be granted by a Registrar of the High Court. These matters must now be dealt with by a Judge in open court.

In 2018, the Gauteng Division of the High Court convened a full bench consisting of three judges. The full bench issued a Directive and called on interested parties to address, *inter alia*, the following issues: Why the High Court should entertain matters that fall within the jurisdiction of the Magistrate's Court; and whether the High Court is obliged to entertain such matters falling within the jurisdiction of the Magistrate's Court.

In a fairly scathing judgment handed down on 26 September 2018, the Gauteng Division of the High Court stated that it is an abuse of process to allow a matter

Courts grappling with their own jurisdiction...continued

In respect of both judgments, the financial institutions that were parties to the matters and that were impacted by the orders, proceeded with applications for leave to appeal.

which falls within the monetary jurisdiction of the Magistrate's Court to be heard in the High Court. It further stated that irrespective of the principle of concurrent jurisdiction, the High Court is not obliged to entertain matters that could be argued in the Magistrate's Court. The order that the High Court handed down was that with effect from 2 February 2019, all civil actions and applications where the monetary value claimed was within the jurisdiction of the Magistrate's Court should be instituted in the Magistrate's Court. In support of its findings, the High Court bemoaned the workload of the judges in the division, the lack of resources at their disposal and the number of applications and actions that are issued out of that division every day.

A similar scenario played itself out in the Grahamstown High Court in 2019. A full bench was convened and a directive, similar to the directive mentioned above, was issued, and interested parties were called on to make submissions.

In its judgment, the Grahamstown High Court voiced its view that there was some criticism that was rightfully directed at the Gauteng High Court's judgment and that the judgment "...spreads the prohibition across the full range of actions and applications, without limit..." and whether "...the result therein arose from an exercise by the Court of its inherent power to regulate its own process or a development of the common law."

The Grahamstown High Court accepted that for over a century the principle of concurrent jurisdiction has and still does exist, and that the High Court has inherent

jurisdiction to regulate its own process by refusing to hear matters that constitute an abuse of process, a fact specific assessment being required in this regard on a case -by-case basis. It went as far as to say that a High Court does not have the power pre-emptively to prevent an abuse across all cases of a particular type unless empowered to do so by legislation or rules consistent with constitutional imperatives.

The Grahamstown High Court nevertheless made the following order. To promote access to justice in the context of the Magistrate's Court Act and the National Credit Act, as read with sections 9 and 34 of the Constitution, and as from 1 August 2019, Civil Actions and/or Applications arising within the ambit of the National Credit Act should be instituted in the Magistrate's Court having jurisdiction.

In respect of both judgments, the financial institutions that were parties to the matters and that were impacted by the orders, proceeded with applications for leave to appeal. In respect of the Gauteng matter, the full bench, after hearing lengthy argument, granted leave to appeal to the Supreme Court of Appeal. In respect of the Grahamstown matter, the full bench, on receipt of the various applications for leave to appeal, gave the leave without hearing any argument.

The two matters were consolidated for purposes of the appeal to the Supreme Court of Appeal. The appeals were argued under lockdown in August 2020 and the judgment is eagerly awaited.

Eugene Bester, Nomlayo Mabhena and Nyameka Nkasana

2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2021 as Senior Statespeople: Dispute Resolution.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.



Cliffe Dekker Hofmeyr's Dispute Resolution rankings in THE LEGAL 500 EMEA 2020:

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

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Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2020.

Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.

Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2020.

Siviwe Mccetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2020.



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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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.

PLEASE NOTE

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.

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