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DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

Whose expert are you?

Good reputations are earned by experts who place honesty and objectivity above business relationships.

Conflicts of interest: An analysis by the Supreme Court of Appeal within the context of business rescue

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Whose expert are you?

Expert witnesses are essential to courts facing complex issues whether psychiatry, ballistics, ichthyology, or any other specialist topic beyond the knowledge of the judge.

"He was rigidly truthful, where the issue concerned only himself. Where it was a case of saving a friend, he was prepared to act in a manner reminiscent of an American expert witness."
P.G Wodehouse.

Expert witnesses are essential to courts facing complex issues whether psychiatry, ballistics, ichthyology, or any other specialist topic beyond the knowledge of the judge. The expert's foremost ethical duty is to provide the court with an objective opinion, but maintaining objectivity is not easy.

As early as 1873, in the English case of *Lord Arbinger v Ashton* (1873) 17 LR Eq 358 at 374, the judge remarked that "*There is a natural bias to do something serviceable for those who employ... and ... remunerate you.*"

In 2010, Judge Davis cautioned experts against being hired guns (*Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC)) and remarked that "*an expert comes to court to give the court the benefit of his... expertise*". The result in *Schneider* stands as a caution to attorneys not to pressure their experts to provide a particular opinion, or to select experts who will tailor their opinions. The court ordered punitive costs in that matter where the expert was clearly not objective, having been shown to have a vested interest in the outcome to the knowledge of the attorney and counsel. The attorney and counsel were reported to the then Law Society and Bar Council and the expert suffered a blow to his professional reputation.

The Court of Appeal of England and Wales recently considered whether two expert witnesses from the same group of companies can act both for and against the same client (*Secretariat Consulting Pte Ltd and other v A Company* [2021] EWCA Civ 6, [2021] 4 W.L.R. 20).

One firm in the Secretariat Group provided a delay expert for a party in an arbitration and another firm in the group provided a quantum expert for the opposition in a second arbitration, relating to the same project. The court agreed that a conflict of interests would arise if the quantum expert in the second arbitration were to testify. Importantly, the appeal court confirmed that an expert's overriding duty remains to be objective and to avoid any conflict that might impact this.

Our Uniform Rule of Court 36(9A) requires parties as far as possible to appoint a joint expert on any one or more or all of the issues in the case. In that regard, Lord Justice Coulson in *Secretariat* noted that his judgment doesn't mean the same expert cannot ever act both for and against the same client. A single expert though would only work where the expert testimony was not contentious, experts only starring in cases where they disagree. The point is not that experts cannot hold different opinions but that they must disagree because of an objectively held opinion, not an opinion formulated to assist the client who has hired them. Easy to say, more difficult to do when an expert is part of the team fighting a case, and where opinions can be nuanced.

Good reputations are earned by experts who place honesty and objectivity above business relationships. Different values are likely to earn them reputations more akin to P.G Wodehouse's American expert.

Paige Winfield and Tim Fletcher

Conflicts of interest: An analysis by the Supreme Court of Appeal within the context of business rescue

Section 139(2)(e) of the Companies Act 71 of 2008 (the Act) empowers the court upon the request of an affected person, or on its own motion, to remove a business rescue practitioner (BRP) from office on the ground of *'conflict of interest or lack of independence'*.

Section 139(2)(e) of the Companies Act 71 of 2008 (the Act) empowers the court upon the request of an affected person, or on its own motion, to remove a business rescue practitioner (BRP) from office on the ground of *'conflict of interest or lack of independence'*.

The Supreme Court of Appeal (SCA) in the recent case of *Oakbay Investments (Pty) Ltd v Tegeta Exploration and Resources (Pty) Ltd and Others* (1274/2019) [2021] ZASCA 59 (21 May 2021), considered the scope of this section when determining the outcome of the Oakbay Group's application for leave to appeal, which was ultimately dismissed with costs.

In the High Court

In February 2018, eight companies in the Oakbay Group (Oakbay) were placed in voluntary business rescue. These included Tegeta Exploration and Resources (Pty) Ltd (in business rescue) (Tegeta) and its three wholly owned subsidiaries, Optimum Coal Mine (Pty) Ltd (OCM), Koornfontein Mines (Pty) Ltd and Optimum Coal Terminal (Pty) Ltd, of which Mr Klopper, Mr Knoop or both were business rescue practitioners (BRPs).

In an application before the High Court, Gauteng Division Pretoria, Oakbay sought the removal of Mr Knoop and Mr Klopper as BRPs of Tegeta. The application was dismissed, with the court refusing leave to appeal. Oakbay petitioned the Supreme Court of Appeal.

On appeal

In the application before the SCA, Oakbay's primary contention was that the appointment of the same BRPs in respect of companies in a single group was *'inappropriate as it had led to conflicts of interest due to the existence of inter-company loans and claims'*. This contention was not pursued *in casu* as the SCA had already rejected it in *Knoop NO and Another v Gupta* (Tayob as intervening party) [2020] ZASCA 163; 2021 (3) SA 88 (SCA) (the Knoop case), which involved an attempt to remove the same two BRPs from office in two other Oakbay Group companies.

The secondary issue was that the BRPs treatment of the Tegeta claim against OCM - which the BRPs deemed irrelevant, as it was their contention that there would be no free residue available to pay a dividend to Tegeta after paying all other OCM creditors - demonstrated that they were conflicted because, when acting on behalf of Tegeta, they were obliged to pursue the claim with vigour, while on behalf of OCM, they were required to resist the claim.

When does a conflict of interest arise?

In discussing the grounds for removal of BRPs in terms of the sub-sections of section 139(2) of the Act, the court stated that each appears to be concerned with a personal quality or action of the BRP whose removal is sought. These qualities include:

> *'incompetence; failure to perform their duties; failing to exercise due care in the performance of their duties; engaging in illegal acts or conduct; no longer satisfying the requirements of s 138(1) for their appointment; conflict of interest or lack of independence; or incapacity or inability to perform their functions.'*

Conflicts of interest: An analysis by the Supreme Court of Appeal within the context of business rescue...*continued*

Where an inter-company conflict arises, it may still necessitate the BRP resigning or being removed from office, but this would be due to the conflict preventing them from performing, or resulting in their failure to perform their duties, or alternatively it might render it impossible to exercise the proper degree of care owed to each company.

The ordinary understanding of a conflict of interest, being *'a situation where the private interests of the BRP conflict with their obligations to the company in respect of which they have been appointed'* did not accord with the complaint in the present case, as Oakbay has alleged that the conflict arose between the interests of Tegeta and OCM, rather than between the BRPs and either company.

The duties of the BRP

Where an inter-company conflict arises, it may still necessitate the BRP resigning or being removed from office, but this would be due to the conflict preventing them from performing, or resulting in their failure to perform their duties, or alternatively it might render it impossible to exercise the proper degree of care owed to each company.

The underlying misconception arose from a submission that the main difficulty lay in the fact that when the BRPs were *'wearing their Tegeta hats, they had a duty to pursue the Tegeta claim on behalf of Tegeta'*. However, the court cautioned that this confused concepts of business rescue with insolvency. During insolvency, an obligation rests on the trustee or liquidator to collect the assets, reduce them to monetary amounts and distribute them among the creditors, whereas this obligation does not rest on a BRP. The BRP must investigate and ascertain whether there is a reasonable prospect of the company being rescued, which means more than that the company will return to solvent trading, and includes a situation where the company is wound down on terms that provide better return for creditors or shareholders than on immediate liquidation.

The court stated that unless third party creditors' conflicting interests must be addressed, there is little point in the BRPs becoming *'embroiled in arguments'* regarding inter-company indebtedness within a complex group of companies.

The current case was distinguished from that of *Standard Bank of SA Limited v The Master of the High Court* (Eastern Cape Division) 2010 (4) SA 405 (SCA), where there was a fundamental conflict between the claim being advanced by liquidators on behalf of the holding company and the interests and claims of the two banks. The liquidators of the subsidiary were also liquidators of the holding company and had concluded a fee-sharing agreement with their co-liquidators, which would be affected depending on the outcome of the disputes regarding the claims.

Ultimately, the court was satisfied that Oakbay's complaints were not established and there was no reasonable possibility of an appeal succeeding, the application for leave to appeal being dismissed with costs.

Conclusion

In light of this decision, it appears that the scope of section 139(2)(e) of the Act contemplates a personal conflict or lack of independence, resulting in the private interests of the BRP conflicting with their obligations to the company in respect of which they have been appointed. This does not extend to inter-company conflicts, unless these conflicts have prevented the BRP from performing, or resulted in their failing to perform their duties, or renders it impossible to exercise the proper degree of care owed to each company.

Mongezi Mpahlwa and Jessica van den Berg

RISK ASSESSMENT DATE LOOMING – 2 JULY 2021

THE OHSA DIRECTIVE REQUIRES EMPLOYERS TO UNDERTAKE A RISK ASSESSMENT BY 2 JULY 2021.

The risk assessment requires employers to indicate whether they intend adopting a mandatory vaccination program and if so, the categories of employees who will be required to be mandatorily vaccinated.

FOLLOW OUR LINK **HERE** TO UNDERSTAND WHAT YOUR OBLIGATIONS ARE BY 2 JULY 2021.

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CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.
Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Lucinde Rhoodie is recommended in Dispute Resolution in THE LEGAL 500 2021.
Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.
Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.
Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2021.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2021.
Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2021.
Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2021.
Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2021.
Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2021.

The LEGAL 500 EMEA

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.

TOP RANKED Chambers Global 2021

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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.

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