DISPUTE RESOLUTION
ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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Prescription: Fairness trumps legal certainty

Prescription of debts is generally absolute in its impact, and can be said to have a *"guillotine effect"* as a claim for a debt is unenforceable once it has prescribed. The rationale behind prescription is to ensure the lapsing of claims which are not actively pursued by legal process to ensure legal certainty. There are, however, situations where prescriptive periods are extended under statute, and very recently the Constitutional Court has done the same, expressly to avoid unfairness.

No relief for sore losers: Accepting the risk of speculative investment

Schemes of arrangement are a commercial reality. These schemes are fundamental transactions, which fall within the purview of Chapter 5 of the Companies Act 71 of 2008 (Companies Act), in particular, section 114, which is subject to the approval requirements prescribed in section 115(1) and (2). Schemes of arrangement must be approved by means of a special resolution passed by shareholders entitled to exercise voting rights on such a matter, at a meeting convened specifically for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all the voting rights that are entitled to be exercised on that matter.

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MINORITY, MENTAL ILLNESS, AND CURATORSHIP

If a creditor cannot litigate without assistance because of an impediment such as being a minor, mentally impaired or under curatorship, it would be unfair for their claim to prescribe, at least until they are able to pursue the claim. Section 13(1) of the Prescription Act 68 of 1969 provides that if a claim prescribes while a creditor is suffering from such a prescribed impediment, the creditor will have one year from the date on which the impediment falls away to pursue the claim.

ARBITRATIONS

Section 8 of the Arbitration Act 42 of 1965 allows a court to extend the time limit for a claim subject to arbitration if a claimant would suffer "*undue hardship*" where the claimant is precluded from pursuing the claim. Interestingly, a court is allowed to extend the time limit in these circumstances beyond the normal three-year period stipulated by the Prescription Act.

SHORT-TERM INSURANCE CLAUSES

In 2007, the Constitutional Court in the matter of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) had to decide whether the enforcement of a 90-day time limitation clause in an insurance contract conflicted with public policy and was unenforceable on that basis. The insured in this matter had brought an action against his insurance company claiming an indemnity in respect of damages suffered in a car accident. The claim, however, was brought several years after the 90-day time limit prescribed and the policy had run its course. The insurer raised a special defence on the basis of the lapsing of the 90-day time limit which obliged the court on the one hand to consider principles of fairness, and on the other sanctity of contract. The insured's failure to provide reasons for non-compliance with the time bar, in the opinion of the court, precluded it from deciding whether the enforcement of the insurance clause would be unfair and contrary to public policy. In the circumstances, the court was compelled to decide that the enforcement of the clause was not unfair. Perhaps if the insured had put up cogent reasons for his delay, resulting in the unfair enforcement of the clause, the court would have decided differently.

VAN ZYL N.O. V THE ROAD ACCIDENT FUND

By contrast, the Constitutional Court's judgment in *Van Zyl N.O. v The Road Accident Fund* [2021] ZACC 44 concerned a Mr. Jacobs who suffered mental impairment in a car accident and as a result of his mental impairment was unable to

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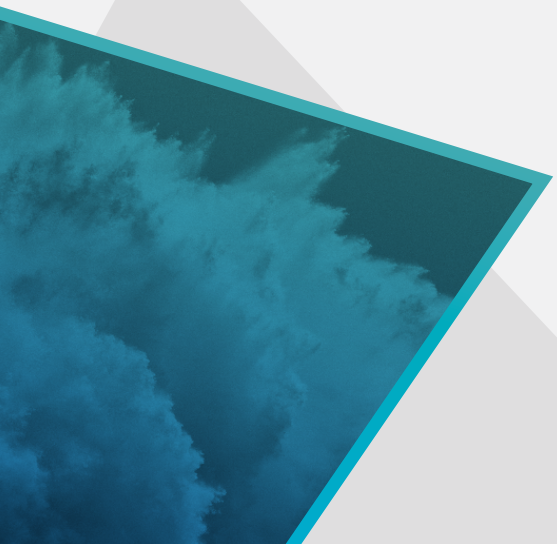
pursue his claim against the Road Accident Fund. A curator was only appointed to litigate against the fund on behalf Jacobs seven years after the accident but claims against the fund prescribe three years after a cause of action arises, the cause of action in this matter being the motor accident. As set out above, Mr Jacobs suffered from one of the impediments stipulated by the Prescription Act, but a 2010 judgment of the Constitutional Court in *Road Accident Fund v Mdeyide* [2010] ZACC 18 held that section 13(1) of the Prescription Act does not apply to Road Accident Fund claims. The unfairness of the situation is obvious and the Constitutional Court relied on the principle of law that one cannot be compelled to do the impossible. The court interpreted the Road Accident Fund Act 56 of 1996 to extend the prescriptive period for claims where a plaintiff is mentally impaired, irrespective of whether they are detained or under curatorship. The court said that it would be absurd if the Road Accident Fund Act were not to be interpreted in this way as lawmakers should not punish people for failing to do the impossible.

So prescription does operate harshly, as it should if we are to promote legal certainty, but it is gratifying to see that it will not be allowed to operate so harshly that it leads to a gross miscarriage of justice.

TIM FLETCHER, LISA DE WAAL & KEAGAN HYSLOP



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Schemes of arrangements are also affected transactions as defined in section 117 of the Companies Act and cannot be implemented without a compliance certificate being obtained from the Takeover Regulation Panel (TRP), or an exemption from the TRP. The TRP's function is to fulfil an oversight role in respect of an affected transaction and, *inter alia*, to ensure that the necessary information is provided to holders of securities of regulated companies to facilitate the making of fair and informed decisions about proposed schemes of arrangement.

Section 115(3)(b), read with section 115(6) of the Companies Act permits a shareholder who participated in a meeting and voted against the proposed scheme, to apply to court within 10 business days after the vote, to be granted leave to have the transaction, i.e. scheme of arrangement, reviewed and set aside by the court.

In terms of section 115(7) of the Companies Act, a court may grant such leave if it is convinced that an applicant is bona fide, appears able to sustain the proceedings, and has alleged facts which, if proved, will support an order to review and set aside the transaction.

The recent judgment in *Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holdings Ltd and Others* case no.6378/2022, heard in the Western Cape Division of the High Court, had to determine such an application.

PROPOSED SCHEME OF ARRANGEMENT

Distell Group Holdings Ltd (Distell) proposed a scheme of arrangement to its shareholders pursuant to an on-going acquisition by Heineken International B.V. (Heineken). The scheme of arrangement was approved by Distell shareholders holding 93,03% of the votes exercised on the scheme of arrangement. The applicants, referred to collectively as Sand Grove, are investment funds either managed or advised by Sand Grove Management LLP and are beneficial owners of Distell shares. Notably, the registered holders of these Distell Shares are First National Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd.

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This ownership structure in regard to the Distell shares became key in the determination of whether Sand Grove had the required standing to bring an application in terms of section 115 of the Companies Act.

Distell and Heineken argued that only the registered shareholders of the Distell shares have voting rights for purposes of any resolution in terms of section 115 of the Companies Act and only registered shareholders who voted against the proposed transaction are entitled to bring proceedings for the review of a shareholders' decision.

It was evident to the court, after hearing argument, that Sand Grove had no entitlement to any voting rights as they were not the registered shareholders of the Distell shares, and neither were they appointed by the registered shareholders as proxies. The individual who voted on the resolution did so pursuant to a proxy, not on behalf of Sand Grove, but on behalf of the registered shareholders and as such Sand Grove did not have voting rights nor the legal standing to bring the application for relief in terms of section 115 of the Companies Act.

INTERVENTION APPLICATION

Anticipating this difficulty, the registered shareholders, on a contingent basis, brought an application to intervene in the application. This intervention application was brought outside of the 10-business-days period prescribed in section 115(3).

The court held that the sort of time limit imposed in terms of section 115(3) has an effect akin to prescription. In other words, the right that can be exercised by means of the institution of proceedings in terms of section 115(3) lapses or expires if the proceedings are not instituted by a person with the requisite standing within the prescribed period. The court held that the authorities are clear that the courts enjoy no inherent power to meliorate the effect of such statutorily determined expiry periods.

As a result, although the registered shareholders had the requisite standing, the application could not be remedied by the application to intervene with the requisite standing brought outside of the 10-business-days period. The intervention application by the registered shareholders was accordingly also dismissed.

VALIDITY OF THE SHAREHOLDERS' MEETING

In a last-ditch attempt to challenge the implementation of the scheme of arrangement, Sand Grove brought an application for leave to amend their notice of motion, alleging that the resolution was invalid as it was voted on at an improperly constituted meeting. The applicants submitted that, on their interpretation of section 114 of the Companies Act, the impact of the implementation of the proposed scheme of arrangement would be that the holders of the ordinary shares would be affected differently than the holders of the B shares in that there is a possibility that holders of B shares may be obliged to accept their consideration at least partly in cash and partly in shares in the new company due to a mechanism designed into the scheme for the purpose of ensuring a minimum holding of 65% in the new company by Heineken. The applicants contended that this effectively meant that the proposal comprised of two different schemes of arrangement by virtue of the characterisation

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of classes of shares as set out in section 37(1) of the Companies Act and as such the schemes of arrangement should have been proposed at two separate meetings.

The court had regard to the position in terms of section 311 of the Companies Act 61 of 1973 (1973 Companies Act), whereby courts weighed up whether the difference was based on legal rights or on interests derived from such legal rights, the latter being insufficient to mandate the creation of a new class. The court found that although the 1973 Companies Act had been repealed, thereby removing this function of the courts, section 114 of the Companies Act requires directors, when deciding to convene a shareholders' meeting for the contemplation of a proposed scheme of arrangement, to use the same approach as courts would have under the 1973 Companies Act. The court found in favour of Distell and Heineken by asserting that, in applying this test, the difference between the holders of B shares as opposed to ordinary shares arose out of their interests, not their rights, which are in fact sufficiently similar to allow for all the shareholders to consult together.

MERITS OF LEAVE TO REVIEW

Although it was not necessary, due to the finding of lack of standing, the court did consider the merits on which the leave to review the transaction was brought. Section 115(6) outlines the factors that a court must consider and be satisfied with before granting an order upholding an application for review under section 115(7), namely that the prospective applicants are acting in good faith in bringing their application, that they appear prepared and able to sustain proceedings, and that they have alleged facts which, if proven, will support the order upholding an application for review.

The court found that Sand Grove would not succeed on the merits as they had not shown that the meeting was unlawfully constituted nor established that the vote had been materially tainted in any way. Further, the court held that the requirement of means to sustain proceedings was not a low threshold and that pursuant to this, Sand Grove had not given the court sufficient indication as to whether it would be able to bring any assets to bear in the litigation seeing as the assets were actually invested on behalf of its clients. Finally, seeing as Sand Grove's investment in Distell was initially made in anticipation of Heineken's acquisition of the company, the court was left with the impression that these review proceedings were brought to force Heineken to improve its offer price rather than genuinely obtaining redress for a sustainable complaint and as such the prospective applicants would not be bringing the application in good faith.

It flows from this judgment that courts have a vetting process before considering a review application, and mere dissatisfaction with a majority decision does not permit reliance on section 115(7) as a means of review unless the vote was also manifestly unfair. Finally, this case notes the importance of properly establishing locus standi as it can make or break a case.

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BBBEE STATUS: LEVEL ONE 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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