DISPUTE RESOLUTION ALERT

25 JANUARY 2022

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No longer saved by the fine print

In the recent case of *UPS SCS South Africa (Pty) Ltd v Hendrik Cornelis van Wyk t/a Skydive Mossel Bay* the Supreme Court of Appeal (SCA) was called upon to determine an appeal against a claim for damages arising from a plane engine, a trailer fire and some fine print, or, more plainly, an alleged breach of contract.

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The appellant, UPS, had been approached by the respondent, Mr van Wyk, to transport an airplane engine from the United States (US). Van Wyk, who runs a skydiving business, had sent the engine to the US for repairs and overhaul. Although no formal contract had been signed between UPS and Van Wyk, an exchange of emails between the parties made it clear that a contract came into existence. The terms of the contract were simple – UPS would transport the engine from the US and deliver it to Van Wyk in South Africa via sea, in exchange for payment of a transport fee. UPS informed Van Wyk that he needed to have an account with it in order for the shipment to take place. Van Wyk signed a credit application in order to open the required account. The credit application contained certain terms and conditions, many of which limited UPS' liability, in very small print, which was difficult to read and not found on the front page of the credit application.

After concluding the agreement, Van Wyk informed UPS that the delivery of the engine had become rather urgent as the current engine used in one of his planes was approaching the 1,500-hour limit. As a result, UPS confirmed that it would send the engine via air freight, as opposed to via sea. Unfortunately, the engine did not leave the US by air or by sea. In a bizarre turn of events, the truck and trailer carrying the engine caught fire and the engine was completely destroyed. UPS then sent Van Wyk an insurance claim form, as well as a request for the estimated value of the engine. Three months later, UPS informed him that the shipment had in fact not been insured. Additionally, UPS claimed that in accordance with the terms and conditions set out in the credit application, it was only liable for an amount of US$500 per shipment (roughly R5,000 at the time). The cost to replace the destroyed engine was R386,140.30 and Van Wyk accordingly instituted action in the Western Cape High Court for the replacement value of the engine together with a claim for interest and costs.

HIGH COURT FINDING

Van Wyk alleged that (i) a written agreement had come into place based on the email exchanges between the parties; (ii) UPS had failed to deliver in terms of the agreement; and (iii) pre-empting a reliance by UPS on the terms of the credit application, that these terms, especially those limiting liability, contravened certain provisions of the Consumer Protection Act 68 of 2008 (CPA). Specifically, Van Wyk alleged that his attention had not been drawn to these conditions as required by sections 49(3) to 49(5) of the CPA, and as such they were subject to being severed from the credit application in terms of section 52(4)(a)(ii) of the CPA and not enforceable against him. UPS conceded that an agreement had come into place but insisted that the

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terms were written in plain language and were sufficiently noticeable. In response, Van Wyk alleged that the terms and conditions were in fact not applicable to the agreement, as the agreement had been concluded prior to him signing the credit application as a formality.

The High Court found in Van Wyk's favour on the basis that the relevant terms and conditions contained in the credit application were invalidated by the provisions of the CPA. This is because those terms were not brought to the consumer's attention, nor explained to him, as is required for terms that aim to limit liability or provide indemnity. Therefore, those terms were severed from the agreement. UPS was ordered to pay an amount of damages equal to the replacement cost of the engine. UPS subsequently took the matter on appeal to the SCA.

SCA FINDING

On appeal before the SCA, Van Wyk once again walked away victorious. Interestingly, however, the SCA disagreed with the approach adopted by the High Court. Specifically, it held that the High Court erred in finding that the terms and conditions contained in the credit application formed part of the agreement between the parties. The SCA held that Van Wyk only signed the credit application in order to be allocated an account with UPS, and that his understanding was simply that the application enabled UPS to capture his information and allocate an account number. Additionally, the terms were never explained to Van Wyk, nor were they attached to the initial credit application that was sent to him. As a result, it did not form part of the agreement between the parties and Van Wyk was not bound to the terms thereof. In essence, the SCA found it unnecessary to invoke the provisions of the CPA and simply found the entire terms and conditions contained in the credit application to be inapplicable.

This judgment makes it clear that the days of "*buyer beware*" are behind us and that the courts will not lightly import terms into an agreement that were not explicitly understood and agreed to between parties.

LUCINDE RHOODIE, MUWANWA RAMANYIMI AND KARA MEIRING

This judgment makes it clear that the days of "*buyer beware*" are behind us and that the courts will not lightly import terms into an agreement that were not explicitly understood and agreed to between parties.

A foreigner to litigation? Attaching property of a foreign entity to secure payment of an amount due

An important consideration for South African companies and individuals (local entity) when transacting with a foreign company or individual (foreign entity), is whether the local entity will ultimately have any recourse against the foreign entity, in the event of the transaction going sour.

Assuming the local entity has a valid claim against the foreign entity, the issue arises as to whether there is any prospect of the local entity recovering any amount due from the foreign entity. In legal terminology, whether the local entity can "*execute*" on any judgment that it obtains against the foreign entity. Noting that one would be concerned here with claims instituted in the courts, an alternative dispute resolution, such as arbitration will have its own rules and procedures which often do not include the attachment possibilities discussed in this article.

A key consideration is whether the local entity can attach property belonging to the foreign entity. Normally, it is only after a judgment in a party's favour that it can attach the property belonging to the defendant to execute on such judgment, i.e., attach and sell the property to satisfy the judgment debt.

However, there is also a procedure whereby the claiming party (in this case the local entity) can, before instituting its claim, attach the property of the debtor (in this case the foreign entity) , to "*found jurisdiction*", where there is no jurisdiction otherwise) or to "*confirm jurisdiction*", in the case where there is already jurisdiction, but not over the person of the defendant. Although the primary purpose in doing so is to bring the matter/defendant within the jurisdiction of the local courts, on the basis that the foreign entity holds property in the local country, an important benefit that flows from such attachment is that the property cannot in the meantime be disposed of by the foreign entity. Furthermore, if the local entity is then successful with its claim in the courts, it can execute against the attached property to satisfy the judgment debt. In the absence of such attachment, the foreign entity could simply dispose of the property in question before the local entity has an opportunity to execute against such property, thus making any order that the local entity may obtain in the courts a hollow one.

However, one should note that the foreign entity can normally avoid the attachment of its property by submitting to the jurisdiction of a South African court and/ or by providing suitable security for the costs of the plaintiff in the intended action.

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A foreigner to litigation? Attaching property of a foreign entity to secure payment of an amount due

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The recent Supreme Court of Appeal (SCA) case of *Federation Internationale de Football Association v Kgopotso Leslie Sedibe and Another* (303/2020) [2021] ZASCA (8 September 2021) dealt with and confirmed the principles relating to the civil procedure practice of attaching property to found or confirm jurisdiction.

One of the key issues in this case was the fact that Mr Sedibe, a local entity/person did not have a monetary claim against FIFA, a foreign entity. Rather, the application brought in the Gauteng Division of the High Court was for the review of a finding by the Adjudicatory Chamber of FIFA's Ethics Committee that Mr Sedibe was guilty of match-fixing, in friendly matches played leading up to the 2010 World Cup. Mr Sedibe successfully brought an application to attach the trademarks of FIFA to found jurisdiction.

At the SCA hearing, it was found that Mr Sedibe had not instated a claim for a monetary amount and that Mr Sedibe's lack of jurisdiction could not be cured by an attachment to found jurisdiction.

The SCA took issue with the High Court's finding that Mr Sedibe had a possible money claim, in that it had conflated Mr Sedibe's application to attach property and his potential defamation action. His attachment application was not on the basis of defamation.

The court found it unnecessary to deal with the various claims made by Sedibe as the lack of a money claim posed an insurmountable obstacle. The principles relating to the attachment of property to found or confirm jurisdiction are well established – a local entity (incola), such as Mr Sedibe, may only attach the property of a foreign entity (peregrinus), such as FIFA, if there is a monetary claim or a property-related claim. Mr Sedibe had neither.

It is therefore important when contracting with a foreign entity that you are protected should you need to bring a case in a South African court by, for example, ensuring you have sufficient security in place (e.g., a bond/guarantee). Failing which, you should act quickly to attach property held by the foreign entity to found or confirm jurisdiction if you have a monetary or property-related claim.

TIMOTHY BAKER AND
CLAUDIA MOSER

Motorists given a reprieve from the demerit system – for now…

"You got a fast car, I want a ticket to anywhere…", the words of the iconic song of Tracy Chapman conjures up images of the open road, freedom and traveling at high speeds to a better future. The Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (AARTO) creates a single national system of road traffic regulation and seeks to regulate *"every aspect of road traffic"*. The system is based on demerit points which are incurred for traffic offences or infringements.

On 13 August 2019, the President signed the Administrative Adjudication of Road Traffic Offences Amendment Act 4 of 2019 (AARTO Amendment Act). The AARTO Amendment Act contains important amendments to AARTO, shifting from the default system of judicial enforcement of traffic laws through criminal law to a compulsory system of administrative enforcement of traffic laws through administrative tribunals, administrative fines and demerit points system, including the introduction of the concept of habitual infringer and serving legal process via email.

The effect of AARTO and AARTO Amendment Act is that if you accumulate enough points in terms of the points-demerit system, the only ticket you will be receiving will be suspension or cancellation of your driver's license.

CONSTITUTIONAL CHALLENGE:

On 13 January 2022, the Pretoria High Court handed down its judgment in the constitutional challenge brought by the civil action organisation and non-profit company named Organisation Undoing Tax Abuse (OUTA) against the Minister of Transport, Minister of Co-operative Governance and Traditional Affairs, Road Traffic Infringement Authority (the Authority) and the Appeals Tribunal (the Tribunal), respectively.

Important to note is that the challenge did not concern the desirability of the legislation which provides for a penalty system for drivers who are guilty of traffic infringements or offences through the imposition of demerit points. In this matter, the court was called upon to decide whether the national government had the legislative competence to legislate on matters relating to provincial roads or traffic or in relation to parking and municipal roads at local level and whether the two aforementioned Acts violated the exclusive provincial legislative competence conferred upon provincial and local government in terms of section 44(1)(a)(ii) of the Constitution. In short, the question was whether the national government trespassed on the narrow constitutional areas over which the national government has no legislative or executive power.

The effect of AARTO and AARTO Amendment Act is that if you accumulate enough points in terms of the points-demerit system, the only ticket you will be receiving will be suspension or cancellation of your driver's license.

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OUTA submitted that the two Acts were inconsistent with the Constitution of South Africa, as:

1. The AARTO and AARTO Amendment Act took control of the exclusive legislative authority of the provincial legislatures by regulating road traffic and creating a sole national system, whereas the provincial, and municipal road and traffic regulations falls within the exclusive legislative competence of the provinces (Schedule 5, Part A and B of the Constitution).
2. The AARTO and AARTO Amendment Act took control of exclusive executive competence of local government (Schedule 5, Part B of the Constitution) to enforce traffic and parking laws at municipal level.

OVERLAPPING OF POWERS:

Governmental power is distributed between national, provincial and local spheres of government and each executive competency of each of these spheres of government are identified and listed in Schedule 4 and 5 of the Constitution. In some areas, the national and provisional spheres of government have concurrent legislative competence (for instance "*road traffic regulation*"), while in others, provinces have exclusive legislative competence (provincial roads and traffic) or municipalities have exclusive executive authority (traffic and parking" and "municipal roads).

In the matter *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC), one of numerous judgments confirming the position, the Constitutional Court held that the executive power conferred exclusively on municipalities and provincial government may not be encroached upon by national legislation. One of the reasons for this (as stipulated by the Constitutional Court in *Tronox KZN Sands (Pty) Ltd v Kwazulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC)), is that municipalities are best suited to make planning decisions as they are localised decisions which should be based on information which is readily available to them.

Where the Constitution confers functional areas regarding the same issue to different spheres of government, the functional areas should be interpreted based on what is appropriate in the different spheres. In resolving the issue relating to allocation of powers to the different spheres and to determine what is appropriate, regard should be given to the historical power allocation. The argument is that if power has traditionally been conferred to a municipality, then the power to enforce traffic laws should be dealt with on a municipal level.

In was also contended that the

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Schedule 4 functional competences should be interpreted as being distinct from and as excluding those competences listed in Schedule 5. The aforesaid was referred to as the "*bottom-up*" approach requiring carving out those listed competencies tarting from the bottom of the hierarchy and working up to the provincial and national sphere. In the Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill2000 (1) SA 732 (Liquor Bill) the approach was explained:

> *"[55] But the exclusive provincial competence to legislate in respect of 'liquor licences' must also be given meaningful content and as suggested earlier, the constitutional scheme requires that this be done by defining its ambit in a way that leaves it ordinarily distinct and separate from the potentially overlapping concurrent competences set out in Schedule 4.*
>
> *[58] The structure of the Constitution, in my view, suggests that the national government enjoys the power to regulate the liquor trade in all respects other than liquor licensing. For the reasons given earlier, this, in my view, includes matters pertaining to the determination of national economic policies, the promotion of inter provincial commerce and the protection of the common market in respect of goods, services, capital and labour mobility."*

It is important to note that competencies which resort under exclusive legislative and executive competence of municipalities must first be carved out and thereafter the competencies upwards.

In respect of Schedule 5, the national legislature may, in the event of a possible conflict between the competencies, only encroach upon the exclusive legislative competencies listed in Schedule 5 under section 44(2) of the Constitution. However, national government may do so "*in exceptional circumstances of compelling public interest but only in as far as it is "necessary'' to do so to maintain national security; to maintain economic unity; to maintain essential national standard; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole*".

Lastly, the court considered whether the offending provisions of the two Acts could be severed, to prevent both Acts in their entirety being declared unconstitutional. In this regard, the court held that once the provisions relating to provincial roads or provincial traffic law infringements or any provisions relating to municipal road, traffic or parking by-law infringements were removed, the

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remaining provisions would not be able to give effect to the main objective of the statute, which is to create a single, national system for administrative enforcement of road traffic laws.

CONCLUSION:

The High Court concluded that the AARTO and AARTO Amendment Act unlawfully intrude upon the exclusive executive and legislative competence of the local and provincial governments, respectively and as such, the two Acts are inconsistent with the Constitution. The declaration of constitutional invalidity would still have to be confirmed by the Constitutional Court and according to reports in the media, the Minister of Transport intends to take the judgment on appeal.

For now, map out the road but do it in pencil.

LIËTTE VAN SCHALKWYK AND ANJA HOFMEYR

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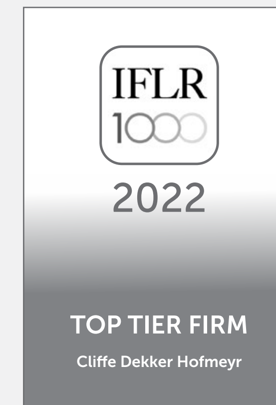

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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