DISPUTE RESOLUTION
ALERT

7 DECEMBER 2023

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Side-stepping subpoenas

A long-standing favourite of court-room dramas, the service and use of subpoenas plays a central role in the functioning of our legal system.

Given their sensationalised reputation and both the perceived and real consequences of not complying with them, it is useful to return to basics in understanding when a party can elect not to abide by a subpoena and apply to have it set aside.

A subpoena is a mechanism that empowers litigants to procure evidence or witness attendance during ongoing litigation, with a subpoena *duces tecum* relating to the provision of documentary evidence. Simply put, it allows a litigant to present and defend a matter in a meaningful way, which forms part of their right to a fair hearing. A person failing to comply with a subpoena without reasonable excuse is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months. As such, failure to comply with a properly issued subpoena has serious consequences, not only for the resolution of the issues in dispute, but also for the parties themselves who fail to comply.

A recipient of a subpoena may apply to court to have a subpoena set aside if there are legitimate grounds for doing so. Such grounds include where a litigant issues a subpoena erroneously, or the subject of the subpoena is, amongst other things, irrelevant; unnecessary; relates or belongs to a party who is far removed from the dispute; is private or confidential; or could be properly produced by another party or through an alternative process.

The issue of setting aside a subpoena came before the Supreme Court of Appeal in *Deltamune (Pty) Ltd v Tiger Brands Limited* [2022] (3) SA 339 (SCA), where the court held that *"third parties may be subpoenaed to attend court and produce documents. Third parties ought not to be required to do so unless it is absolutely necessary and there is some certainty that such documents are relevant to the issues in the underlying action."*

Side-stepping subpoenas

CONTINUED

The threshold for relevancy is higher for subpoenas than discovery, as the discovery of documents is only applicable to litigating parties and not third parties. As such, there ought to be a greater degree of certainty that a document which is subpoenaed is relevant to the pleaded issues.

It is important to clarify that *Deltamune* did not establish the principle that a party seeking a document under subpoena must show the document is "*absolutely necessary*". Rather the position established in *Deltamune*, which is consistent with the existing precedent, is that a party seeking to set aside a subpoena bears the burden to demonstrate that the document sought would not be relevant, either directly or indirectly, to a pleaded issue. This party must demonstrate this lack of relevance with certainty.

It is important to remember that recipients of subpoenas have remedies available to them to resist compliance, provided that they have a valid reason to do so. While the burden is on the recipient to set aside a subpoena, litigants must also remain cautious when issuing subpoenas to ensure that the document or evidence sought is relevant to their pleaded case.

Denise Durand, Jonathan Sive and Gabriella Schafer

Can you unscramble the egg? The retrospective effect of forfeiture clauses for partly fraudulent insurance claims

Insurers are the 'masters of their own policies' and, accordingly, they are free to devise their own policies unilaterally. The insured often has no say in the process and derived terms and they simply elect to buy into what the insurer is selling, or not.

Insurers often insert forfeiture clauses in their insurance policies which are designed to protect them from fraudulent claims. However, the Supreme Court of Appeal (SCA) in *Discovery Insure Limited v Masindi* (534/2022) [2023] ZASCA 101 recently had to decide upon the consequences of a claim which ends up being partly legitimate and partly fraudulent. The question was asked as to whether the insurer has the right to reclaim the full amount paid out in settlement of a partly legitimate and partly fraudulent claim emanating from the same event.

It has long been established that fraud vitiates all, however, unscrambling the proverbial egg of a claim tainted by fraud is no simple task.

Background

The appellant was Discovery Insure Ltd (Discovery), a registered long-term insurance company, and the respondent Mr Tshamunwe Masindi, a client who entered into a contract with Discovery for, *inter alia*, the insurance related to risks or losses or damage to Masindi's residential property and household contents. In terms of the insurance contract, not only was Masindi insured for damage to his residential property and household contents, he would also be entitled to claim for the costs associated with emergency accommodation upon the occurrence of an insured event which rendered his property uninhabitable

The insurance policy contained a clause contending that where a claim or part thereof was fraudulent, Discovery had the right of cancellation of the policy from the date of either the:

- reporting of the incident; or
- on the date of the incident.

The importance of these dates and this election was fundamental to the SCA's finding insofar as, if the insurer elected to cancel the agreement from the date of the incident, then this would ultimately result in Masindi's retrospective forfeiture of all benefits awarded by the policy after cancellation.

In November 2016, because of storms and flooding, Masindi's residential property was rendered uninhabitable and he suffered damages to his residence and household contents. Masindi claimed reimbursement for expenses incurred for emergency accommodation, as well as household content, which was fully paid by Discovery per the insurance contract (the settlement amount). Following the settlement of the claim, investigations were conducted and Discovery found out that Masindi had falsely issued invoices for the emergency accommodation after the insured event had taken place. This fact was common cause on appeal.

In the High Court

Accordingly, Discovery instituted proceedings in the High Court for the repayment of the settlement amount that was paid to Masindi. It did so on the grounds that the full amount paid to Masindi was as a result of a claim that was tainted by fraud.

Can you unscramble the egg? The retrospective effect of forfeiture clauses for partly fraudulent insurance claims

CONTINUED

The High Court was able to quantify what portion of the settlement amount related to fraudulent emergency accommodation and the court held that Discovery was only entitled to recover that portion which related to the fraudulent emergency accommodation. The High Court said this based on the doctrine of accrued rights and held that at the time of the breach, the right to claim all benefits arising from the insured risk, which were paid by Discovery, had already accrued to Masindi. Further, the High Court held that termination on breach of the policy only finds application to a claim tainted by fraud and not to a right which has been settled (and accordingly accrued). In the circumstances, the High Court deemed the fraud clause contained in the insurance policy as being equivalent to a penalty clause in terms of the Conventional Penalties Clause Act 15 of 1963 (Act). Essentially, a penalty clause contained in a contract creates liability for the payment of a sum of money if a contractual obligation is not fulfilled either through an act or omission. The High Court consequently declined to enforce the clause because the fraud clause was deemed out of proportion to the harm that the fraud caused Discovery. This, in turn, led to Discovery taking the matter on appeal to the SCA.

Before the SCA

The SCA disagreed with the court *a quo's* interpretation of the forfeiture clause as the High Court overlooked the express provision in the clause which stated that upon the breach of the terms contained in policy, Discovery would be entitled to terminate the policy with effect from the date upon which the incident which gave rise to the claim occurred. Upon such termination, there would be no policy in existence at the time of the incident to claim any benefit.

Thus, there was no obligation on Discovery to pay out to Masindi because the policy had already been retrospectively terminated. Accordingly, no rights could have already accrued to Masindi. Ultimately, it was on this basis that the SCA ordered Masindi to repay the full settlement amount that was paid to him in respect of his total claim as well as costs and interest.

The SCA also looked at the case of *Schoeman v Constantia Insurance Company Limited* [2003] 2 ALL SA 642 (SCA), which Masindi alleged showed that the clause in Discovery's policy did not go far enough so as to encompass genuine claims to absolve the insurer of liability to indemnify the insured in respect of rights that had already accrued prior to the fraud that led to the retrospective termination of the policy by the insurer. *Schoeman* found that the implications of a judgment where there is one incident that gives rise to a claim that is partly

Can you unscramble the egg? The retrospective effect of forfeiture clauses for partly fraudulent insurance claims

CONTINUED

fraudulent is not entirely clear, but by virtue of the doctrine of accrued rights, where there is no express clause to the contrary, the liability of an insurer which arose prior to a fraud would not be extinguished.

The SCA stated that express terms providing for the forfeiture of the entire claim, even if only a part of the claim is fraudulent, are commonly used in insurance policies. However, the SCA also stated that the common law relating to fraud and insurance policies provides that there is no implied term that the overvaluation of loss amounts to fraud and ultimately the forfeiture of all claims under the policy. Be that as it may, the SCA interpreted the policy purposively and within the context of the entire agreement and found that there was an express term provided for in terms of the Discovery policy.

Accordingly, the *Schoeman* case shows us that the absence of an express fraud and forfeiture clause in a policy relating to the overvaluation of loss cannot be regarded as being tacitly included in a policy or having been so included by operation of law. The SCA found that on the one hand, the insured cannot be prevented from claiming what is owed under the policy by a subsequent fraud because the right to claim indemnification accrued prior to the making of the partially fraudulent claim. On the other hand, the fraudulent claim of the insured upon claiming a legitimate claim under the policy ultimately results in the forfeiture of all benefits and the cancellation of the insurance contract from the date upon which the incident gave rise to the claim.

Insurers, as the creators of their own contracts, cannot underestimate the importance of the wording of their elected forfeiture clauses in protecting themselves from fraudulent claims. In this instance, the election to terminate and the relevant dates for the triggering thereof salvaged what may have otherwise been deemed an accrued right. Not only are these important ramifications for insurers, but this stands as a moral reminder to society that the penalties for your crimes can extend far beyond the obvious consequences. It is vital, even in the private sector, to have forfeiture clauses like these applicable in insurance policies to deter society from fraudulent behaviour.

Roy Barendse and Paige Winfield

Your 'home away from home' is not in fact your home: Students be warned

Many students across South Africa are fortunate enough to benefit from student residence when attending a higher education institution.

Earlier this year, in *Stay At South Point Properties (Pty) Ltd v Mqulwana and Others (UCT intervening as amicus curiae*) (1335/2021) [2023] ZASCA 108 the Supreme Court of Appeal (SCA) had to decide whether student accommodation can be described as a "*home*" for the purposes of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The University of Cape Town (UCT) applied for and was admitted as an amicus curiae in the appeal before the SCA.

The appellant, Stay At South Point Properties (Pty) Ltd (South Point), represented by Cliffe Dekker Hofmeyr, appealed against the order of the Western Cape High Court (High Court) in terms of which South Point's application to evict the respondents was dismissed on the basis that South Point had not *inter alia* brought the application in terms of PIE.

Background

South Point is the owner and manager of various private residences, one of them being New Market Junction (NMJ). NMJ houses Cape Peninsula University of Technology (CPUT) students based on an umbrella agreement concluded between CPUT and South Point. The 90 respondent students before the High Court, as well as the SCA, were all students who were studying at CPUT and residing at NMJ during the 2020 academic year. These students refused to leave the residence at the end of the 2020 academic year, despite only being allocated accommodation by CPUT until the end of November 2020.

South Point required the students to vacate the premises so that they could attend to necessary, and legally required, maintenance and COVID-19 decontamination.

Despite receiving notification to vacate and, in some instances, being provided with alternative accommodation, the students refused to vacate NMJ.

South Point then summoned private security guards to remove the respondents on 12 January 2021. This too was resisted by the respondents. South Point then approached the High Court on 15 January 2021 for an order to evict the respondents from the residence, relying on its real right as owner of the residence, to do so. The respondents contended that the application was fatally defective, as South Point did not rely on and comply with the provisions of PIE. In response, South Point contended *inter alia* that a student residence did not constitute a home, and thus PIE did not find application. The High Court granted the *rule nisi* in terms of PIE, calling upon the respondents to

Your 'home away from home' is not in fact your home: Students be warned

CONTINUED

show cause why they should not be evicted from NMJ. On the return date the *rule nisi* was discharged and the High Court dismissed South Point's application to evict the respondents. The High Court ruled that student accommodation can be viewed as a student's home for the purposes of applying PIE, South Point should have brought the application in terms of PIE, and had failed to do so.

Before the SCA

At the commencement of the hearing before the SCA, the respondents were no longer in occupation of the residence. Although this rendered the factual issues to be decided by the SCA purely academic, the SCA found that the legal issues to be decided were wider than and had far-reaching implications beyond just this singular incident, especially as they were issues of recurring controversy.

In determining whether PIE finds application in the eviction of students from student residences, the SCA considered the wording of various provisions, as well as the preamble, of PIE. Although the substantive provisions of PIE make reference to the occupation of land, the SCA held that it is plain that PIE gives effect to the Constitution's protection against the peril of homelessness, as in section 26 of the Constitution. It follows, according to the SCA, that if the occupation of land does not constitute the home of an occupier, PIE does not find application. This proposition had already been confirmed by multiple previous judgments, and it was also confirmed that the meaning of "*home*" is a place with *"regular occupation coupled with some degree of permanence"*.

The SCA's finding

With the above in mind, the SCA had to determine whether a student residence constitutes a home for the students residing therein, so as to render PIE applicable. In this regard, there are three material features of the accommodation afforded by CPUT to the respondents.

First, the students already come from homes before they take up residence at the university to study. Unless otherwise demonstrated, student accommodation does not displace or replace the homes from which students come. The students therefore have homes other than the residence. According to the SCA, there is then no basis to seek the protection of PIE, as eviction under these circumstances does not render the students homeless.

Your 'home away from home' is not in fact your home: Students be warned

CONTINUED

Second, the provision of student accommodation is for a finite period of time and it has a limited and defined purpose, being to accommodate students for the duration of the academic year and thereby assist them to study at the university. The arrangement is by its nature temporary and for a purpose that is transitory, and students are well aware of this.

Finally, UCT, as *amicus*, advanced submissions which placed the provision of student accommodation within the context of the Higher Education Act 101 of 1997. It was submitted that student accommodation is primarily an incident of the right to access to higher education, and higher education institutions regulate access to student accommodation in terms of its institutional rules. It is well-known that there is a current scarcity of student housing in the higher education sector in our country. As new students join higher education institutions each year, they should be provided with the same assistance provided to students in previous years, and those who had the benefit of accommodation should yield to those who have not.

Accordingly, the SCA concluded that the above three features of the student accommodation made available to the respondents indicated that the residence was not a home to students. Rather, it was *"a residence, of limited duration, for a specific purpose, that is time-bound by the academic year, and that is, for important reasons, subject to rotation"*. It follows that PIE did not apply to the respondents' occupation of the property, and South Point was entitled to rely on its real right as owner to evict the respondents. The appeal against the order of the High Court was thus upheld. South Point did not seek a cost order against the respondents.

This judgment has come as a welcome relief to those institutions providing student accommodation, especially when that accommodation has to be made ready for the new academic year, and for new academic enrolments. Had the judgment gone the other way there may have been a serious accommodation crisis for new students requiring residence in order to advance their education.

This is also a warning to students as we near the end of the 2023 academic year. Students are advised to abide by the policies of student residence when being requested to vacate accommodation at the end of the year. Failure to do so could result in forcible removal by private security, or an urgent eviction application ordering their eviction, with the potential of a costs order against them. Rather, students should start planning their trips home now.

Belinda Scriba, Burton Meyer and Claudia Grobler

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:

Rishaban Moodley
Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Tim Fletcher
Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Timothy Baker
Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana
Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Claudette Dutilleux
Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris
Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Tiffany Gray
Director:
Dispute Resolution
T +27 (0)11 562 1388
E tiffany.jegels@cdhlegal.com

Anja Hofmeyr
Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tendai Jangara
Director:
Dispute Resolution
T +27 (0)11 562 1136
E tendai.jangara@cdhlegal.com

Corné Lewis
Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Vincent Manko
Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Richard Marcus
Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Mongezi Mpahlwa
Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie
Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Clive Rumsey
Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba
Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Joint Sector Head:
Consumer Goods, Services & Retail
Director: Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

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.

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.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA