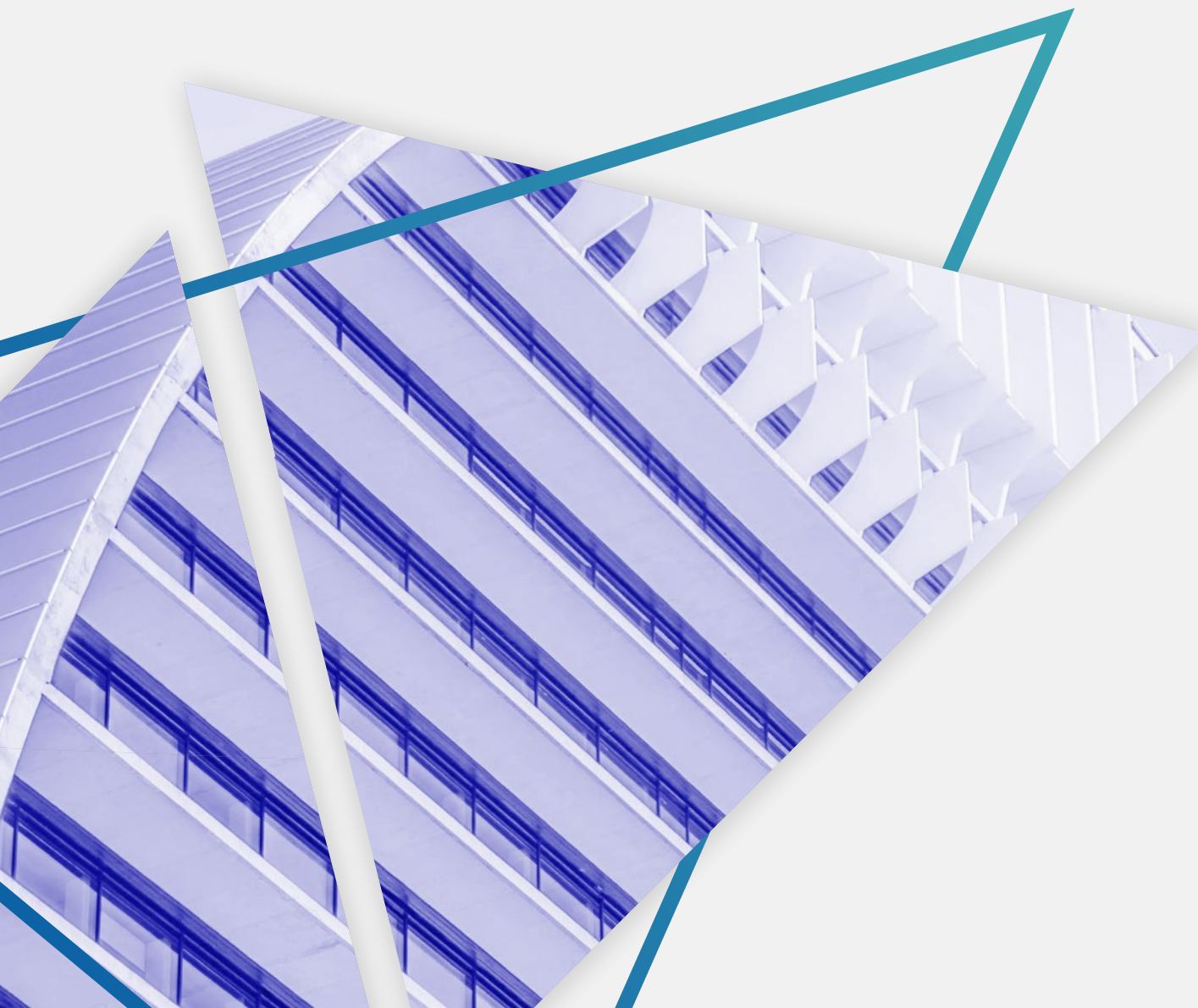


Corporate & Commercial

ALERT | 17 January 2024



In this issue

SOUTH AFRICA

Rogue directors counting the grains in the hourglass



For more insight into our expertise and services

Rogue directors counting the grains in the hourglass

There are many famous quotes about the passage of time, and miscreant directors may well be pondering a number of these in light of recent developments regarding the time-barring of claims based on breach of duty.

This article considers the circumstances when a company is time-barred from suing a director under the Companies Act 71 of 2008 (Companies Act) to recover losses incurred by the company as a result of that director breaching their fiduciary duties, and the envisaged amendments to the Companies Act in this regard.

Recovering losses from directors

Section 77 of the of the Companies Act provides that a director may be held personally liable for any loss, damage or costs sustained by the company as a direct or indirect result of, amongst other things, a breach of a fiduciary duty, or any other duty contemplated in the Companies Act or the company's memorandum of incorporation.

Such liability may arise in circumstances where, for example, a company suffered a loss as a result of its directors acting negligently, in an unauthorised manner, or where the directors were party to conduct which was calculated to defraud a creditor.

However, section 77(7) provides that proceedings to recover any loss suffered by a company for which a director may be held liable may not commence more than three years after the **act or omission** that gave rise to that liability. As a company would be barred from suing a director to recover such losses outside of this three-year period, it becomes important to consider when the period begins to run.

This is especially so given that breaches of duty by directors – take misstatements in financial reports as an example – often involve complex sets of facts, sophisticated modus operandi and perhaps even the concealment of facts, such that the realisation that loss has been suffered may only surface many years after the act or omission.

As a general rule, prescription in South African law only runs from when the claimant knew or ought reasonably to have known of the material facts underlying the cause of action.

The courts' approach

The time-bar in section 77(7) has recently been interpreted in *Nebavest 1 (Pty) Ltd t/a Minster Consulting v Central Plaza Investments 202 (Pty) Ltd and Others (4212/2017)* [2023] ZAWCHC 69 to create an absolute bar against the commencement of a claim outside the stipulated three-year period. In its judgment, the court remarked that the Companies Act prohibits the commencement of such proceedings outside of the stipulated period, irrespective of factors such as reasonable lack of knowledge by the company.

This is a rather startling interpretation in the context of the South African approach to prescription and on the basis of equity – albeit undoubtedly supported by the plain text of the provision. Plaintiff companies would be very eager to find a way to argue away or distinguish this finding on some plausible basis, especially in cases where the company only becomes aware of such an act or omission after the three years have passed.

It could be argued that the time-bar issue in *Nebavest* was dealt with in a relatively obiter manner given that it was a derivative action case and the court found numerous other,

Rogue directors counting the grains in the hourglass

CONTINUED



The LEGAL 500
EMEA

Corporate, Commercial/M&A 2023 Rankings

Corporate & Commercial practice is ranked in Tier 1.

CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.

Leading Individuals:
Willem Jacobs | David Pinnock

Recommended Lawyers:
Vivien Chaplin | Peter Hesselting
Justine Krige | Sammy Ndolo
David Thompson | Roxanna Valayathum
Njeri Wagacha

Next Generation Lawyers:
Justine Krige

Hall of Fame:
Ian Hayes

more important, reasons why it was not in the best interests of the company that the (poorly) pleaded case be pursued in the company's name. Another argument might be that section 77(7) pertains only to "purely statutory" causes of action in section 77(3) and not to common law claims, which should exist separately. These arguments are clearly not without considerable difficulty and the problematic Nebavest position seems likely to hold sway.

As an aside, it should be kept in mind that fraudulent concealment by the director of the breach would arguably bring in the common law "fraud unravels all" doctrine to hold a fraudulent director liable despite section 77(7) of the Companies Act.

Amendments to give courts discretion

Rogue directors, put that champagne back on ice.

Although research suggests that the three-year period conforms with international best practice, the proposed amendments to the Companies Act under the Companies Second Amendment Bill, 2023, amongst other things, seek to bestow upon courts a discretion to allow a section 77 claim against a director to be brought outside of the stipulated three-year period upon good cause shown.

The proposed amendments further envisage that the courts will be empowered to apply the provisions of this discretion for conduct which arose before the amendments come into law (i.e. there will be retrospectivity in this regard).

If the proposed amendments to section 77(7) are passed, courts, in determining whether to extend the time-bar, would presumably be able to consider whether the breach by the director was "latent" or supposedly "well-hidden" and could only reasonably have been discovered much later

(perhaps when the company was under new management). It may even be that the facts surrounding such breach were so complex that it was inherently overlooked until much later. While it is not clear how the discretion would be applied, there would seem to at least be the prospect of especially egregious cases not being precluded by a simple time-bar defence.

The approach to be considered by companies

In the interim, and pending the implementation of the legislative changes, all that could perhaps be considered would be to incorporate into the memorandum of incorporation of the company a provision which extends the time-bar in the Companies Act or perhaps having directors agree to be held liable for a period extending beyond the three years in, for example, their appointment letters. These approaches are not without considerable problems of their own, both around attempting to contract out of statutory provisions (especially given the Nebavest judgment) and whether an open-ended waiver (without reference to specific facts or context) is enforceable at all.

What is clear right now though, is that a company potentially has no claim against a breaching director if it only becomes aware of the cause of that claim after the three-year period has expired.

Ismail Makda and Akhona Mdunge, with assistance from Jocelyn Kganane and overseen by David Pinnock and Yaniv Kleitman

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:



Ian Hayes

Practice Head & Director:
Corporate & Commercial
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com



David Thompson

Deputy Practice Head & Director:
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Kate Anderson

Director:
Corporate & Commercial
T +27 (0)11 562 1105
M +27 (0)82 418 3784
E kate.anderson@cdhlegal.com

Tessa Brewis

Director:
Corporate & Commercial
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Vivien Chaplin

Sector Head: Mining & Minerals
Director: Corporate & Commercial
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel

Director:
Corporate & Commercial
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Johan de Lange

Deputy Practice Head:
Finance & Banking
Director: Projects & Infrastructure
T +27 (0)21 481 646
M +27 (0)78 642 5573
E johan.delange@cdhlegal.com

Andrew Giliam

Director:
Corporate & Commercial
T +27 (0)21 481 6363
M +27 (0)83 359 7069
E andrew.giliam@cdhlegal.com

John Gillmer

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Allan Hannie

Director:
Corporate & Commercial
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesseling

Director:
Corporate & Commercial
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey

Director:
Corporate & Commercial
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Willem Jacobs

Director:
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com

Brian Jennings

Director:
Corporate & Commercial
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@cdhlegal.com

Rachel Kelly

Director:
Corporate & Commercial
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman

Director:
Corporate & Commercial
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Dane Kruger

Director:
Corporate & Commercial
T +27 (0)21 481 6362
M +27 (0)74 914 1402
E dane.kruger@cdhlegal.com

André de Lange

Sector Head: Agriculture, Aquaculture
& Fishing Sector
Director: Corporate & Commercial
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Jaco Meyer

Director:
Corporate & Commercial
T +27 (0)11 562 1749
M +27 (0)83 477 8352
E jaco.meyer@cdhlegal.com

Anita Moolman

Director:
Corporate & Commercial
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Wayne Murray

Director:
Corporate & Commercial
T +27 (0)21 405 6018
M +27 (0)79 691 0137
E wayne.murray@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

Francis Newham

Executive Consultant:
Corporate & Commercial
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

David Pinnock

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid

Director:
Corporate & Commercial
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Jess Reid

Director:
Corporate & Commercial
T +27 (0)11 562 1128
M +27 (0)83 571 6987
E jess.reid@cdhlegal.com

Megan Rodgers

Sector Head: Oil & Gas
Director: Corporate & Commercial
T +27 (0)21 481 6429
M +27 (0)79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith

Joint Sector Head:
Financial Institutions, Services & Fintech
Director: Corporate & Commercial
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Tamarin Tosen

Director:
Corporate & Commercial
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum

Joint Sector Head: Pharmaceuticals
Director: Corporate & Commercial
T +27 (0)11 562 1122
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe

Director:
Corporate & Commercial
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Andrew van Niekerk

Head: Projects & Infrastructure
Director: Corporate & Commercial
T +27 (0)21 481 6491
M +27 (0)76 371 3462
E andrew.vanniekerk@cdhlegal.com

Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Charl Williams

Director:
Corporate & Commercial
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Christelle Wood

Director:
Corporate & Commercial
T +27 (0)11 562 1372
M +27 (0)83 498 2850
E christelle.wood@cdhlegal.com

Alistair Young

Director:
Corporate & Commercial
T +27 (0)11 562 1258
M +27 (0)84 676 1171
E Alistair.young@cdhlegal.com

Emma Hewitt

Practice Development Director:
Corporate & Commercial
T +27 (0)11 562 1635
M +27 (0)82 896 1332
E emma.hewitt@cdhlegal.com

Alecia Pienaar

Counsel:
Environmental Law
T +27 (0)82 863 6279
M +27 (0)82 863 6272
E alecia.pienaar@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

©2024 13024/JAN