

December 2013

“It is far more impressive when others discover your good qualities without your help.”

DEATH IN DEADLOCK: UNMANAGEABLE COMPANIES FACE LIQUIDATION

The Supreme Court of Appeal (SCA) once again in *Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting and Investment (Pty) Ltd* confirmed that it is just and equitable, within the meaning of the Companies Act, to liquidate a company which is in “deadlock” due to a breakdown in the relationship between the directors and/or the shareholders of the company.

In this case, 50% of the shareholders (two of the four) wished to exit the company by way of selling their shares to the company, the remainder of the shareholders or a third party. In terms of the shareholders agreement however, this was not possible without the express permission of the remaining shareholders which permission was not given. The animosity which followed led to the cancellation of directors' meetings and a breakdown in the management of the company.

The court explained that the “deadlock” principle is founded on the analogy of a partnership and meant for small domestic companies, where an arrangement between the members is based on a particularly personal relationship of trust and confidence.

Apart from not being able to properly conduct meetings, or to come to an agreement regarding the exit from the company of some of the shareholders, the parties got involved in litigation amongst themselves. Accusations of misconduct were also leveled at principals of the shareholders. The business atmosphere and relationship of trust had thus replaced with animosity, confrontation and litigation.

The court further found that a party to blame for the deadlock is not necessarily precluded from relying on the same deadlock when applying for liquidation of the company. The application was granted (in the court a quo and upheld on appeal) and the company subsequently liquidated.

It is therefore crucial that a company invests in a proper shareholders agreement and founding document so as to avoid and manage conflict between members and ensuring that alternative dispute resolution mechanisms are employed as soon as conflict arises, as failing to do so could have dire consequences for all involved.

Law & Laughter

Q: “What's the difference between a lawyer and a boxing referee?”

A: “A boxing referee doesn't get paid more for a longer fight.”

Visit us online for the latest news and info on upcoming events!

www.vanhuyssteens.co.za

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION: IS LEGAL REPRESENTATION ALLOWED

In a judgment handed down in the matter of *The Law Society of the Northern Provinces v Minister of Labour and Others* earlier this year, the North Gauteng High Court declared Rule 25(1)(c) of the Commission for Conciliation, Mediation and Arbitration (the “CCMA”) rules unconstitutional and suspended the invalidity of the Rule for 36 months in order to have a new sub rule promulgated.

Rule 25(1)(c) limits the right of a party to legal representation during CCMA arbitration proceedings dealing specifically with the fairness of dismissals for misconduct and incapacity. This limitation applies automatically unless the commissioner or parties allow legal representation at the hearing. The CCMA appealed the court's decision and during September the Supreme Court of Appeal (the “SCA”) handed down judgment in the matter, effectively overturning the High Court's judgment.

The CCMA initially contended that legal representation in disputes relating to dismissal for misconduct or incapacity was usually of a less serious nature and less complex. In light of the aforesaid it was decided that these kinds of matters should be adjudicated with less legal formalities resulting in swift and cost effective resolution of disputes which levels the playing fields between the parties involved.

The SCA accordingly found in favour of the appellant and overturned the High Court judgment declaring the sub-rule unconstitutional.

In light of the judgment it is likely that CCMA commissioners will in future be more reluctant to allow legal representation in arbitration proceedings relating to the fairness of dismissals for these kinds of conduct. It would therefore be recommended that employers and employees obtain legal advice prior to the hearing of arbitration proceedings relating to the fairness of dismissals and properly prepare their respective cases with the assistance and input from their legal representative.

Contact Van Huyssteens

T +27 12 349 2306
F +086 6151 183

Address:

De Haviland Crescent Nr. 5,
III Villaggio Nr.12, Torino Suite
Persequor Park
Pretoria, South Africa

Van Huyssteens appreciates your feedback:

For information or editorial contributions, please e-mail: commercial@vanhuyssteens.co.za.

If you would like to subscribe to this service, please send a blank e-Mail to: commercial@vanhuyssteens.co.za with the word 'Subscribe' in the subject line. To unsubscribe send a blank e-Mail to: commercial@vanhuyssteens.co.za with the word 'un-Subscribe' in the subject line. As a subscriber, your name will not be released to any third party, but you may receive research surveys and similar communications about activities relating to Van Huyssteens and your fields of interest.

Van Huyssteens Commercial Attorneys disclaims all liability for any loss, damage, injury or expense however caused, arising from the use of, or reliance upon, in any manner or form, the information provided through this newsletter. It does not, in any form or manner, warrant, or purport to warrant, the truth, accuracy and/or completeness of the information provided. Should any of the information provided herein be applicable to (or interest) you, please consult with a legal professional for comprehensive advice and guidance thereon. The publisher's prior written permission is required to reproduce, publish, use and/or display the contents hereof in any form or manner and/or for any reason whatsoever.