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PIKE'S LAW MONTHLY

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Welcome to the January 2008 edition of Pike's Law Monthly, our legal window to the South African legal and business scene. We intend keeping the content light and readable. If we don't achieve that, please let us know.

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We will cover a variety of topics in each edition. If there is sufficient demand for particular subjects such as shipping, we will in future carry dedicated newsletters on specific subjects.

We will be mailing out our newsletter at the end of each month. If you would like a friend to receive it, please feel free to forward it. We would welcome to any [comments](#) you may have.

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COMPANIES

Misleading financial information could be costly

In terms of the [Corporate Laws Amendment Act](#) which became law on 14 December, a new financial reporting investigations panel is planned. The panel's job will be to scrutinize all company announcements, including financial statements. In terms of the law, any company which publishes incorrect or misleading financial information could incur fines of up to 1 million rands. Previously, there were no punitive sanctions to enforce compliance with international financial reporting standards.

The new financial panel has wider panels of investigation than the GAAP panel. These powers include powers of subpoena and investigation. Companies are therefore going to need to exercise significant caution when publishing financial statements. No doubt, this will place significant additional pressure on auditors.

CONTRACT

Beware those "in full and final settlement" cheques

In the recent Supreme Court of Appeal case of *BE Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* [2008] JOL 21174 (SCA), the question arose as to whether a cheque offered "in full and final settlement" and accepted by the creditor in fact put an end to the creditors claim.

The Appellant in this case (BE Bop a Lula – Yes, its real name!) had ordered T-shirts from the Respondent (Kingtex Marketing) who was a garment manufacturer. Subsequently, a dispute arose concerning the quality of the shirts. They were repaired by BE Bop a Lula and sold at half price. The latter then sent a "credit request" to Kingtex Marketing in which it claimed a discount on the balance which was still outstanding. Thereafter BE Bop a Lula sent a cheque for the balance less the credit which it had requested. It had closed its "final reconciliation" showing that the credit had been deducted and it wrote on the cheque "in full and final settlement of account".

Kingtex Marketing's employees deposited the cheque, but later Kingtex wrote to BE Bop a Lula to say that the proceeds had been placed in a trust account pending an action by Kingtex Marketing to recover the full amount. A trial court upheld the claim by Kingtex Marketing for the full amount and the appeal by BE Bop a Lula was dismissed by a full bench of the provincial division in question. In the appeal to the Supreme Court of Appeal, the issue was whether there had been an agreement of compromise between the parties. In order to make a determination, the court considered the classic contractual principles of offer and acceptance. The court first of all asked whether the cheque, accompanied by a credit request and final conciliation

constituted an offer of compromise. The words which had been written on the cheque "*in full and final settlement of account*" had to be looked at in the context of the two letters and the background to the dispute between the parties in order to determine whether the cheque was intended to affect a compromise or to pay an admitted liability. The court found that the words could only be interpreted to mean that this was an offer to Kingtex Marketing to resolve the dispute by payment of the amount of the cheque. Kingtex Marketing could either have accepted or declined the offer. The fact that BE Bop a Lula admitted liability in a certain amount was no impediment to their proposal being construed as a compromise. Kingtex Marketing had deposited the cheque and retained the money for its own benefit in a trust account. The court found, therefore, that the Respondent had not rejected the offer. In fact, the Respondent could not both keep the money and reject the offer. The court said that BE Bop a Lula had acted reasonably by relying on the impression that Kingtex Marketing was accepting the offer and therefore upheld the appeal.

The obvious lesson to be learnt is that, when a cheque is accepted and has been said to be "*in full and final settlement*", that may well bring about a settlement of the matter and clients are cautioned to examine short paid cheques closely.

EVIDENCE

"Books and documents" include electronic documents

In the recent Supreme Court of Appeal case of *A Le Roux v the Honourable Magistrate Mr. Viana*, [2007] SCA 173 (RSA), the SCA had to consider whether a warrant issued by a magistrate in terms of Section 69(3) of the Insolvency Act authorising a sheriff to attach books and documents relating to two companies in liquidation included books and documents which were stored in electronic form on a computer hard drive rather than in hard copy.

The Appellant, Le Roux, maintained that the warrant covered only hard copy books and documents and that it was therefore invalid. However, the SCA found that the objective of the section was to enable a trustee of an insolvent estate to fulfill his responsibilities in terms of the Act. As the warrant was not targeted at the hard drive of the computer on which the documents were stored, but rather at the documents in their electronic form, the SCA concluded that the section covered books and documents wherever and in whatever form they were to be found.

Whilst the decision was specific to the particular section of the Insolvency Act, by extension it seems that the SCA has found that the concept of "*books and documents*" must necessarily be extended to include books and documents in electronic form. This appears to be consistent with, for instance, some of the provisions of the Electronic Communications and

Transactions Act of 2002 which gives legal recognition to data messages and is to be welcomed as a logical progression in the computer age.

FORFEITURE

Drink-drivers' cars safe from forfeiture (for the meantime)

Although our firm tends not to deal with criminal matters, the recent SCA case of *NDPP v Vermaak* [2008] JOL 21197 (SCA) makes for interesting reading. The case deals with drunken driving and forfeiture of vehicles. Whilst this of course will only be of academic interest to our readers, they may have friends who might be more interested in the decision.

Ms. Vermaak was convicted on two counts of drunken driving and the Director of Public Prosecutions sought an order that her motor vehicle should be forfeited to the State in terms of one of the provisions of the prevention of Organised Crime Act 121 of 1998. The basis of the application was that the vehicle was "*instrumental*" in the offence. The High Court refused the application saying that the Act did not apply to that particular offence and the motor vehicle was not instrumental in the offence.

On appeal, the SCA said that an order for forfeiture may only be made if the deprivation of the asset in a particular case is proportionate to the purpose for which the legislation was intended and distinctions between different classes of offence will feature heavily on that part of the enquiry. The SCA said that forfeiture is likely to be most effective where crime has become a business. The court then found that sentences for drunken driving adequately dealt with the offence and that forfeiture of the vehicle was not appropriate.

Readers will therefore be pleased to hear that the vehicles of their friends are all safe for the meantime, unless those vehicles are, perhaps, used for cash in transit heists and robbing of banks.

INSURANCE

Exclusion clauses: why would a contractor intend damage?

The Supreme Court of Appeal recently considered the effect and interpretation of an exclusion clause in an insurance contract in the case of *Allianz Insurance Ltd v RHI Refractories Africa (Pty) Ltd*, [2008] JOL 21179 (SCA). RHI undertook on behalf of a third party an epoxy lining of various parts of an acid plant in order to protect the underlying concrete from acid erosion. The contract with the third party provided that RHI would remain liable for all physical damage to the construction works during the course of completion. In order to safe-guard itself, RHI took out an insurance policy with Allianz in terms of which the latter undertook to indemnify RHI against physical loss or damage to the property insured (i.e. the works under

construction). The indemnity was, however, subject to certain exemptions. The construction work carried out by RHI turned out to be defective. It therefore lodged a claim under the insurance policy. However, Allianz relied on an exclusion clause in the policy to repudiate the claim. The clause said that Allianz would only indemnify RHI if "*unintended damage*" resulted from a particular defect.

The only question which the court had to consider was whether the physical damage resulting from the failure of the epoxy lining constituted unintended damage as contemplated by the exclusion.

In clarifying the approach to interpreting the provisions of insurance policies, the court found that the term "*unintended damage*" meant damage which was not deliberately caused by RHI. Although it is somewhat surprising that it took several court cases and five appeal court judges to come to this conclusion, the court finally found that RHI did not intend to cause the damage and therefore dismissed the appeal. Although the case may have been a little more complicated than has been sketched above, we have to say that we find it extraordinary that it required a full bench of the SCA to determine what seems to us to have been a fairly obvious point.

SHIPPING AND LOGISTICS

Maritime liens are scuppered by contractual terms

In the recent case of the *MT "FOTIY KRYLOV" v the owners of the MT "RUBY DELIVERER"* (case no. 181/06, Cape of Good Hope Provincial Division), the court was asked to consider whether the owners of the MT "RUBY DELIVERER" ("Bluebottle") could enforce a Maritime lien by way of proceedings *in rem* against the MT "FOTIY KRYLOV", an associated ship of the MT "NIKOLAY CHIKER".

Very briefly, the facts were that the tug "NIKOLAY CHIKER" took the "RUBY DELIVERER" on tow during August 2005. During the tow a collision occurred between the two vessels. The contract for the towage of the "RUBY DELIVERER", together with a submersible oil rig known as "P-22", was on a TOWHIRE form between Bluebottle and Tsavliris, the latter being the bareboat charterer of the "NIKOLAY CHIKER".

The relevant provisions of the TOWHIRE contract for purposes of this case exempted Tsavliris from loss or damage of whatsoever nature caused by or to the tow. In addition, there was a one year time bar under the TOWHIRE contract together with an exclusive jurisdiction clause which conferred jurisdiction on the High Court of Justice in London.

Following the commencement of *in rem* proceedings against the "FOTIY KRYLOV" by Bluebottle, alleging that the latter was a ship associated with the "NIKOLAY CHIKER", the "FOTIY KRYLOV" was arrested and security was

established. Tsavlis then appeared on behalf of the "FOTIY KRYLOV" to set aside the arrest.

The argument of Tsavlis was that, on the face of the TOWHIRE contract, claims for damage were excluded and, in any event, they could rely upon the one year time bar and the exclusive jurisdiction clause.

Bluebottle argued, however, the *action in rem* lay against the vessel itself in view of the fact that the maritime lien arising from damage caused by a ship attached to the ship which caused the damage. They therefore argued that Tsavlis, as bareboat charterer, was unable to intervene or rely upon the terms of the contract because the contract was not relevant to the *in rem* proceedings. In other words, they argued that you could not convert *in rem* into *in personam* proceedings.

However, the court found that Tsavlis had an interest in the matter and was entitled to rely upon the contractual exclusions by virtue of the principles of the Himalaya Clause (i.e. the clause which extended contractual exclusions to sub-contractors etc.). The court said that Tsavlis was in charge of the vessel and therefore entitled to rely upon the contractual exclusions. Accordingly, there was no lien because it had been contractually excluded by the TOWHIRE contract.

There were of course various other points to come out of the case, which is published on our website. However, what is clear is that no maritime lien will attach in circumstances where it has been contractually excluded.

Container lines obliged to provide cargo-worthy containers

In an interesting [judgment of the Supreme Court of the Netherlands](#) which was delivered earlier this month, the court found that container lines who provide containers to shippers must ensure that the containers are cargo-worthy. Although the judgment is not binding on South African courts, it would no doubt be persuasive.

In the case in question, Nile Dutch Africa Line BV ("Nile Dutch") provided a number of containers to the shipper, two of which were defective. The shipper, however, had accepted the containers for carriage of tobacco from Cameroon which, on discharge, was damaged. The insurer of the tobacco (Delta Lloyd Schadeverzekering N.V.) and the traders themselves brought proceedings against Nile Dutch. Nile Dutch raised a defence on the terms and conditions of the governing liner Bill of Lading which expressly provided that the carrier was under no liability for losses or damage caused by unsuitability or the defective condition of containers provided to the merchant.

Cargo interests then commenced proceedings before the Court of Rotterdam. In an interim decision, that court held that a container is to be considered as

part of the vessel and this implied that Nile Dutch could not invoke the terms of its bill of lading because the Hague Visby Rules were incorporated into the Nile Dutch Bill of Lading and these prevented a carrier from contracting out of liability. Nile Dutch then went on appeal.

The Court of Appeal found that a container could not be considered to be part of the vessel. However the court held that, by providing defective containers, the carrier was in any event in breach of the Hague Visby Rules.

Nile Dutch then appealed to the Supreme Court in The Hague which likewise did not expressly hold that a FCL/FCL container is part of the vessel. Nonetheless, the court found that the purpose and tenor of the Hague Visby Rules is to protect cargo from perils of the sea in terms of the "cargo-worthiness obligation". The court said that this implied that containers provided by the carrier to the shipper, having been especially designed to be carried on board on the vessel, must also be cargo-worthy so that no water ingress can take place.

This latest decision will place a heavy onus on shipping lines who provide containers to shippers to ensure the cargo-worthiness of those containers.

(Our thanks and acknowledgment to Ingen Gielen of the Quality and Claims Department, Nile Dutch Africa Line BV, for providing us with details of this case)

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