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THE BEARER OF THE WRONGS OF AN INDEPENDENT CONTRACTOR

In the *Cenprop Real Estate (Pty) Ltd versus Holtzhauzen [2022] ZASCA 183 (19 December 2022)* case, it was found that a principal can, depending on the facts of each case, be held liable for the wrongs of an independent contractor, in the circumstances where the principal's conduct deviates from the standard of reasonable care.

Duty of reasonable care

In this matter, the claimant slipped and fell in a mall managed by Cenprop Real Estate (first appellant) and owned by Naheel Investments (Pty) Ltd (second appellant), and sustained injuries. The incident was caused by the slippery floors in the mall, as a result of rain. As consequence thereof, the claimant instituted a delictual action against the mall owner, and the company managing the mall, for the damages she sustained.

The evidence presented on behalf of the claimant was that the floor was wet, because of the rain outside. There was a 'wet floor' sign placed at the entrance, used to warn customers visiting the mall.

The appellants contended that the claimant was well acquainted with the mall and should have foreseen that on rainy days, the floor would be wet and possibly slippery.

The appellants further contended that employing a reputable cleaning company to clean the mall is sufficient proof that they have discharged their duty of reasonable care towards patrons. Accordingly, there were no other reasonable steps they could have taken, to guard against the occurrence of the incident in question.

Shifting the consequences of neglect

The company managing the mall relied on the *Chartaprops 16 (Pty) Ltd versus Silberman 2009 1 SA 265 (SCA)* case and contended that they had outsourced an independent contractor for cleaning services in the mall, and this cleaning company is highly reputable, and for that reason, they should be exonerated from liability. In the *Chartaprops versus Silberman* case, the court held that it is untenable to shift the deleterious consequences of negligent conduct of an independent contractor to the principal.

In arriving at its decision, the court remarked that by simply assigning the cleaning responsibility of the mall to an independent contractor, however reputable, is inadequate to guard against the occurrence of injuries to patrons who are frequenting the mall on rainy days. As a result, the steps taken by the management fall short of the standard of reasonable care expected of them.

The court held that the appellants were the ones who were negligent, as they were personally at fault by failing to take reasonable steps to prevent harm that was reasonably foreseeable. Accordingly, the defence that the manager of the mall employed a cleaning company did not come to their assistance. Furthermore, the court held that the appellants could not escape liability by placing reliance on the disclaimer notice, which was displayed at the mall, as the disclaimer was not visibly displayed to come to the attention of customers, let alone the claimant.

The ultimate responsibility

This judgement has loosened the protection that was afforded to principals through the Chartaprops judgement. A notable feature of this judgement is that even where owners and/or managing agents of a mall decide to outsource cleaning services (or any service) to an independent contractor, they still bear the ultimate responsibility to ensure that the mall is safe for its customers, and will bear the economic costs of negligent conduct of an independent contractor, in the event that the principal's conduct itself falls short of the standard of reasonable care.

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NON-COMPLIANCE MAY INVALIDATE AN BACKED BY AN INSURANCE

In the *Constantia Insurance Company Limited versus the Master of the High Court, Johannesburg and Others [2022] ZASCA 179 (13 December 2022)* case, the court found that failure to comply with the procedural requirements of the Companies Act may render the indemnity invalid and therefore, unenforceable by the insurer against the indemnitor.

Constantia, whose business included the provision of performance guarantees, entered into a performance guarantee agreement with Protech Holdings, a holding company with Protech Investments and Protech Khuthele as subsidiaries. Constantia guaranteed the contractual obligations of Protech Khuthele for the sum of R182 million towards third parties, in return for an undertaking by Protech Investments to indemnify Constantia in respect of any claims under those guarantees.

Protech Khuthele was obliged to furnish performance guarantees, in terms of its contract with third parties. It obtained these guarantees because of Protech Investments indemnifying the guarantor. Due to Protech Khuthele defaults, the guarantees were called up.

In a meeting with creditors, Constantia successfully proved its claims against the insolvent estate of Protech Investments. The liquidators acted in terms of Section 45(2) of the Insolvency Act and disputed the claim. The liquidators contended that the performance guarantees constituted unauthorised financial assistance to directors, as such, the liquidators believed that Protech Investments was not in fact indebted to Constantia. Thereafter, the liquidators proceeded to refer Constantia's claim to the Master of the High Court for consideration. The Master is permitted, by law, to consider any disputed claim afresh, and thereafter decide on whether to confirm, reduce, or disallow the claim.

The Master expunged the claims, on the basis that there were reasonable grounds that they were invalid. Aggrieved by the decision of the Master, Constantia took the decision to the High Court, for review, and it was dismissed, and thereafter, it appealed to the Supreme Court of Appeal (SCA).

Does indemnity constitute financial assistance?

The starting point is section 45(1)(a) of the Companies Act 71 of 2008, and it defines financial assistance to directors of a company as including lending of money, guaranteeing a loan or other obligation, and securing any debt or obligation. Section 45(1) provides that the board of directors may not authorise direct or indirect financial assistance, unless the company's Memorandum of Incorporation provides otherwise.

The court remarked that the matters mentioned in section 45(1)(a) are exhaustive of the meaning of financial assistance and applies to direct and indirect financial assistance. The Court held that Protech Investments indirectly secured the obligations of Protech Khuthele within the meaning of section 45(1)(a) of the Companies Act.

Was there compliance with section 45?

The board of a company must adopt a resolution to provide financial assistance to a company or person mentioned in section 45(2) of the Companies Act.

The Court held that there was no evidence at its disposal to prove that the board of Protech Investments had adopted a resolution to conclude the indemnity. As such, Protech Investments provided financial assistance to Protech Khuthele in terms of the indemnity which, in material respects, did not comply with the requirements of section 45 of the Companies Act.

Consequently, section 45(6) of the Companies Act renders the indemnity invalid. The implications of such invalidity are that Protech Investment is not indebted to Constantia. Accordingly, Constantia's claim against the insolvent estate inevitably falls away.

Does section 20(7) of the Act assist Constantia?

Section 20(7) of the Companies Act states that a person dealing with a company in good faith is entitled to assume that the internal requirements and procedures have been complied with.

The court pointed out that the difference between procedural and substantive requirements for the validity of a resolution

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should be appreciated. The court remarked that the requirement that the board of a company must resolve to provide financial assistance under section 45 of the Companies Act and that it must be satisfied of the matters mentioned in section 45(3)(b), are substantive requirements. Therefore, the court held that section 20(7) of the Companies Act does not assist Constantia.

The judgement has far reaching implications for underwriters of guarantees. In the sense that the provisions of section 45 are peremptory and non-compliance with procedural requirements renders the indemnity invalid and thus, unenforceable. Therefore, it is advisable that underwriters of guarantees should ascertain with greater precision that there is strict compliance with all procedural requirements, and that the contracting party that provides the indemnity has actual authority to do so.

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