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Insurance Case Law Update: D&O Claims



Two recent judgments of the Supreme Court of Appeal have brought welcome clarity to key questions surrounding directors' and officers' liability. Both decisions address issues that have generated significant debate in recent years and provide important guidance on how courts will approach claims against directors, particularly in relation to prescription and the scope of directors' fiduciary duties.

Godfrey Goliath Nicholls N.O and Others v Magdalena Gaybba and Another 2026 (1) SA 111 (SCA)

In 2010, a trust acquired the business of a company, which included claims against third parties, one of which was against a close corporation for the alleged misappropriation of funds, amounting to approximately R10 million, through 'rondskyf' transactions. The trustees sued the sole member of the close corporation in her personal capacity for the aforementioned amount under section 64 of the Close Corporation Act 1984 (CC Act).

One of the defences raised by the defendant was prescription, claiming that the 'debt' had prescribed as more than a 3-year period had passed. The High Court found that the claim did constitute a debt in terms of the Prescription Act 1969, and thus that the claim had prescribed. However, the SCA found that a claim in terms of section 64 of the CC Act for reckless or fraudulent trading did not amount to a 'debt' in terms of the Prescription Act, and therefore, such a claim could not prescribe, stating that the High Court was incorrect in its finding. It stated that section 64 is instructive, and it depends on the court's exercise of its judicial discretion, afforded to it by the same section. The cause of action will only arise if the court issues the declaration, meaning that no debt would exist until such time, as there would not be anything due or owing.

In terms of D&O Cover, this highlights how in cases of reckless or fraudulent trading, the standard section 10 prescription defence no longer finds applicability, as directors or officers can be held personally liable years later for conduct that took place during the period of insurance cover. The effect thereof is the extended risk exposure now facing insurers in terms of such claims, and the need for clear policy limits, specifically relating to time periods in which third parties can institute claims against the insured, alleging liability for reckless or fraudulent trading.

Msibithi Investments (Pty) Ltd and Others v African Legend Investment (Pty) Ltd and Others 2026 (1) SA 394 (SCA)

In this matter, the main application brought before the court sought the setting aside of a resolution that was taken by the board of directors, in which a subscription agreement between the company and a trust was approved. Additionally, the applicants sought all acts flowing from the impugned resolution to be set aside. The High Court dismissed the application with costs. The applicants were granted leave to appeal, and the matter was heard before the SCA.

One of the points raised by the applicants was that the actual purposes of the agreement were not proper in nature in terms of section 76(3)(a) of the Companies Act 71 of 2008, which requires the exercise of powers and performance of functions by a director to be in good faith and for a proper purpose. The main difficulty that faced the court in making such a determination was that there was more than one purpose at work.

The SCA applied the dominant purpose approach, which focuses on whether the primary purpose is proper in nature. This approach holds that if a subsidiary purpose also exists that would be rendered improper if it were the primary purpose, it does not, on such grounds, render the exercise of power to be improper.

This, in turn, provides clarity for directors regarding the extent of their fiduciary duty in this sense, as mixed motives do not automatically render a breach of section 76(3)(a) of the Act, insofar as the primary purpose constitutes a proper purpose in terms of the same section.

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