



BRIEF ENCOUNTERS IN THE REALMS OF BEST ENDEAVOURS

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The concept of best or reasonable endeavours in a contractual context is one which has been beset with uncertainties and lack of clarity in many jurisdictions. The notion of what constitutes best endeavours (as opposed to reasonable or other endeavours) will invariably carry with it a degree of subjectivity. It therefore remains a matter of speculation as to the degree to which a party is in a position to enforce an obligation which carries with it the requirement of "best endeavours".

INTRODUCTION

Whilst any number of contracts might contain wording to the effect that a party will undertake something and utilise his/her best endeavours to achieve it, there is no guidance in our local case law as to the measure of what such conduct amounts to and what constitutes a failure to meet that standard. The issue, however, has enjoyed the aviation of Courts in other jurisdictions.

In a recent matter where Werksmans was involved, we had occasion to have some insights into this issue.

THE FACTS OF THE MATTER

The facts were briefly as follows:

- > A shareholder ("seller") disposed of its shareholding in a going concern ("the business") to another shareholder ("buyer"). The business consequently had only one shareholder, being the buyer.
- > Whilst a shareholder of the business, the seller had executed a suretyship as security for 50% of the business' exposure to the business' financial lending institution ("the bank"), exposing the seller to a contingent liability of approximately R7 500 000 ("the suretyship").
- > The relevant clause of the shareholders agreement recorded the following:

"If one or more of the shareholders purchase the entire shareholding of another shareholder pursuant to the provisions of this agreement, the MOI and/or the Companies Act, the purchasing shareholder/s shall be obliged to use it/their best endeavours to procure the release of the selling shareholder from any guarantees given for the obligations of the company, provided that such best endeavours shall not require the discharge or material variation of any principal obligation and, until the release is procured, the purchasing shareholder/s shall indemnify the selling shareholder against liable under any such guarantee."

- > The seller was concerned, for a number of reasons, that the business was in financial difficulties.
- > The seller was accordingly concerned that the purchaser should procure the release of the selling shareholder from the suretyship.
- > After addressing no fewer than 3 letters over a 4-month period to the purchaser requesting confirmation that a release had been procured, the purchaser's attorneys eventually, and against threat of proceedings being brought, indicated that the purchaser had done all he could do in regard to procuring a release and in any event furnished the necessary indemnity to the seller.
- > No information was furnished as to what had been done. In circumstances where little was known concerning the purchaser's financial standing and the materiality of whether he could fulfil any demand for payment on the suretyship, this response and position was not acceptable to the seller, particularly so in view of the requirement that the purchaser should use his best endeavours.
- > Through enquiries raised directly with the bank, the seller was able to ascertain that the purchaser had made telephonic enquiries as to the bank's willingness to release the suretyship and had done little else. On the face of it, in addition to barely making any discernible effort in reaching out to the bank, the purchaser had not even considered presenting alternative forms of security to the bank by way of substitution of the security which he had undertaken (on a best efforts basis) to seek to remove.

The seller invoked the relevant dispute resolution clause and brought the matter before an arbitrator by way of motion proceedings seeking an order directing the purchaser:

- > To account to the seller for the steps taken in order to procure the release;
- > To utilise his best endeavours to procure the release of the seller from the suretyship;
- > To utilise his best endeavours to procure the limitation of any such exposure of the applicant to the financial institution under any suretyship; and
- > To account to the seller for whatever its obligations were under the suretyship.

ARBITRATION PROCEEDINGS

The matter was heard before the arbitrator. However, before judgment was delivered, this and other disputes between the purchaser and the seller were settled on a full and final basis. This meant of course that no clear pronouncement was ever made concerning whether the purchaser's conduct was defensible or the seller had any rights to compel the purchaser to make a more meaningful effort to secure the release. The hearing itself, however, revealed some curious and useful insights into what one might expect to have been raised by way of judicial inquiry and scrutiny concerning the shortcomings and difficulties one might encounter in the course and scope of seeking to enforce a best endeavours claim under a clause such as the one referred to above.

One would imagine, in the conclusion of a best endeavours provision of the nature outlined above, that the party seeking performance on a best endeavours basis would want to be in the position to assess meaningfully whether the efforts undertaken constitute best efforts or not. This expectation (that the purchaser should account), together with the suggestion that the purchaser could have formulated and proposed alternative security to substitute the suretyship, was broadly premised upon the assertion that these obligations flow naturally from the best endeavours undertaking and ought to be read as tacit or implied terms of the contract.

The suggestion that the duty to account or to explore and put forward alternative forms of security to the bank constituted either tacit or implied terms was generally rejected by the arbitrator in the course of argument. His first bone of contention was that with respect to the duty to account, it was within the purview of the seller in this instance to make enquiries of the bank and itself ascertain what had been done and how much was outstanding under the suretyship etc (notwithstanding that it was far easier for the purchaser to have done so). The suggestion that alternative security ought to have been explored was equally unappealing in that it had quite clearly not been contemplated in the drafting of the clause and there was no case law to demonstrate that such an approach had been adopted on the basis of trade usage or custom in other similar agreements in our law of precedent.

According to the case law in a number of jurisdictions which bear similarities with ours in the realm of the law of contract, the use of terms such as "best endeavours" infers a degree of inconvenience being incurred by the performing party, even to the extent of a limited degree of financial prejudice. Best endeavours in other words, should require a measure of material effort. Moreover, and as is stated in one of the relevant decisions, best endeavours does not mean second best endeavours.

CONCLUSION

What "best endeavours" are supposed to mean in clauses like the one quoted in this article, and whether they are enforceable in South Africa in circumstances where a court is unwilling to imply or read in any meaning which lends any substance to their intended purposes, is doubtful in the extreme in the light of our recent experience. One is therefore cautioned in the use of a reference to such a contractual measure (be they "best endeavours", "all reasonable efforts", "best efforts" etc), to reference such a measure to an obligation to account and a list of *sui generis* actions which one might ordinarily contemplate in the pursuit of that outcome on a best efforts basis. It seems that with these additional measurements and guidelines in place, one might make more progress in the pursuit of enforcing a right against a party for failing to utilise its "best efforts".

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Jennifer Smit has been with Werksmans Attorneys since 2007. She has wide-ranging experience in commercial litigation and dispute resolution and is currently a director in the firm's Insolvency, Business Rescue & Restructuring practice as well as the Construction & Engineering practice.

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