

# DISPUTE RESOLUTION MATTERS

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## Reap what you sign

A clause in a transport agreement for certain mining activities read as follows:

*"The employer may at any time at its absolute discretion terminate the contract for any reason other than the default of the contractor by written notice to the contractor."*

The very next clause in the agreement stated that if the agreement was entered into for an indefinite period, either the employer or the contractor could terminate the agreement by giving not less than three months written notice of the termination. The front page of the agreement in question clearly stipulated that the agreement was for a fixed period of time as it stipulated a commencement date and an expiry date.

The employer experienced certain difficulties with the contractor and informed the contractor that the specific contract would be put out for tender. The contractor was invited to submit its' tender. The contractor failed to submit a tender and accordingly the employer notified the contractor that it was exercising its rights in terms of the relevant clause and terminated the contract by written notice.

The contractor refused to adhere to the termination notice and refused to vacate the premises of the employer. This necessitated an urgent application to the High Court by the employer as the

employer had accepted the tender of another transport company and the new transporter was due to commence business with the employer.

The employer was successful with its urgent application and the court determined that the agreement had been terminated validly and directed the contractor not to enter the employers' premises after the date stipulated in the termination notice. Neither the Supreme Court of Appeal nor the Constitutional Court was of any assistance to the contractor.

In argument, the contractor argued that the discretion that was afforded to the employer in the agreement had to be exercised with absolute good faith. The contractor argued that this was not done, and accordingly, that the termination was bad.

The lesson to be learnt from this, is that parties to an agreement should carefully consider each and every clause of the agreement and appreciate what each clause means. This is not only relevant to issues such as warranties, conditions precedent, payment terms, breach terms, but also under what circumstances the agreement can be terminated. The only time to consider the agreement and all of its clauses is prior to signing on the dotted line and not afterwards.

*Brigit Rubinstein*

## Peace in our time - Mediation: the new way

In 2007, Lord Justice Ward stated the following -

*"What I found profoundly unsatisfactory, and made my views clear in the course of the argument, was the fact that the parties have between them spent in the region of £100,000 arguing over a claim which was worth about £6,000. In the florid language of the argument, I regarded them, one or other, if not both, of them as 'completely cuckoo' to have engaged in such expensive litigation with so little at stake ... In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."*

People who have been through litigation will know what an expensive, time consuming and frustrating exercise it can be. This is not helped by the fact that our courts, certainly as far as civil trials are concerned, have become largely dysfunctional. Very few parties - quite understandably - wish to wait two to three years before their matter is resolved at trial.

What compounds the problem is that there are only winners and losers. Courts, which are obliged to take crisp legal positions in respect of disputes, do not concern themselves with compromises or "fair" decisions. There is no middle way.

Arbitration, while it greatly reduces the time to resolve disputes, does not resolve the other two problems with conventional dispute resolution, namely its high cost and ultimate potential frustration.

For the resolution of many disputes, the time of mediation has come.

Mediation is nothing more than a process in terms of which the parties to a dispute, under the guidance of an expert mediator, attempt to reach a mutually acceptable resolution to their conflict.

The mediator is not a judge; she is an expert facilitator who assists the parties, through the application of mediation techniques and harmony, to resolve the conflict.

The great benefit of mediation is that it is a very short and inexpensive process. Most mediations do not last more than a day - albeit often a long and exhausting day - and most mediations are successful. Statistics from mediations in the United Kingdom show that approximately 80% of mediations lead to a negotiated solution between the parties. Even if the initial mediation is not successful, very often the parties have reached a point where they are able to resolve the fight shortly thereafter.

But mediation is not bunny hugging. It is often a tough process. The parties seldom "kiss and make up" or leave holding hands. The parties reach a mutually acceptable solution, not necessarily the ideal solution for each of them, but one which is the best practical outcome. The advantages, namely an enormous potential saving in time and cost, more than outweigh any disadvantage in not achieving the ideal result.

Mediation is also best implemented early in the dispute before parties' positions have hardened, and before they have invested so much in litigation or arbitration that they cannot afford to back down.

If you want to save time and money, and have less stress in your life, give mediation a chance. As the Judge said, the results can be astonishingly good.

*Richard Marcus*

## Caveat Subscriptor - a cautionary tale of a new breed of suspensive conditions

There appear to be two species of suspensive conditions: the first, benign and simply a means to ensure that a contract only becomes effective once all the necessary pre-requisites are in place and the

second (the new suspensive condition), a dangerous clause importing strict liability into that portion of the contract that is not suspended by the new suspensive condition - that is the condition itself.

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The Supreme Court of Appeal (SCA) in the case of *Mia v Verimark Holdings (Pty) Ltd* [2009] ZASCA 99, made a finding that should alert the astute businessperson to a potential danger in the new suspensive condition. The following paragraphs intend to highlight what clients and attorneys should be aware of before signing a contract containing such a condition. Mia was faced with the second species of the clause. A *proviso* in the clause provided the following:

*"Purchaser shall be liable to the Seller for the costs incurred by the Seller in respect of the drafting, negotiation and signature of this Agreement and any other damages suffered by the Seller as a result of such non-fulfilment."*

The effect of the *proviso* in the new suspensive condition creates a contractual undertaking within the clause dealing with the suspensive condition itself, for liability to the Seller if the Purchaser fails to fulfil the new suspensive condition whether or not the Purchaser is at fault for such a failure. Any argument on the part of the Purchaser that he is not liable will fail, due to the fact that the contractual obligation is effective the moment he fails to fulfil the condition. The provision falls within the new suspensive

condition itself and is unaffected by any suspension in relation to the remainder of the agreement.

This type of strict liability has undesirable implications for the Purchaser. The damages that could be suffered by the Seller could be extremely wide and the liability of the Purchaser equally wide, should the condition fail. What saved Mia in this case is that Verimark failed to prove the damages it alleged it had suffered. However, a Seller worth its salt in the market may soon get wind of this judgment and may include in the contract, a list of possible heads of damage it may suffer as a result of non-fulfilment of the condition, making proving those damages more likely.

Should people be aware of the possible strict liability that can be hidden in plain sight within the new suspensive condition, then part of the Purchaser's battle is won. Suspensive conditions can vary greatly in content and form, but it may serve the cautious Purchaser well to cast a wary eye over any suspensive condition that it may encounter.

*Pieter Conradie and Neil Comte*

## The Road to Kroonstad Prison (and the obligation of a bank to perform its functions without negligence)

A decision was recently handed down in the Supreme Court of Appeal (SCA) in the matter of *McCarthy vs Absa Bank 2010 (2)(SA) 321 SCA*. This decision is interesting because of the underlying background and relevant facts, and because of the position clarified by the court relevant to the contractual relationship between a bank and its cheque account customer, and the requirement that the bank must perform its mandate with the required degree of care, good faith and without negligence.

Ms Cordier was, at all material times, employed by McCarthy as a creditor's reconciliation clerk. As a result of her greed (which got the better of her and caused substantial losses to McCarthy), she is now a long term guest of the South African government at its Kroonstad prison facility.

From time to time, Ms Cordier created fictitious debts in the accounts of her employer, and caused cheques to be drawn and

signed by authorised signatories of McCarthy for the payment of those fictitious debts. Ms Cordier was acquainted with a Mrs Fourie, who was persuaded to assist Ms Cordier in her dishonest scheme. The named payee on the cheques prepared by Ms Cordier was generally reflected as "Fourie" in conjunction with the name "Leathertech" (the latter name being the name of a firm with which McCarthy regularly conducted business). Mrs Fourie, like McCarthy, held her bank account at Absa. Once or twice a month, Mrs Fourie would arrive at Absa with a fraudulent cheque and deposit slip, obtain the approval of a supervisor for the proposed transaction, present the documents to the teller, and then leave with a substantial sum in cash. By the time the fraudulent scheme was uncovered, cheques had been deposited and cashed in amounts totalling more than R14 million.

Absa initially successfully resisted McCarthy's claim in the court *a quo*, where absolution from the instance was granted. On appeal,

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however, Nugent J A took a different view of the matter. Nugent J A emphasised that, on a proper reading of McCarthy's particulars of claim, it contended that Absa had breached its mandate which required Absa to exercise reasonable care when paying McCarthy's cheques. Put differently, the thrust of McCarthy's case was that Absa paid the cheques negligently in that it ought to have suspected that Mrs Fourie was not entitled to the cheques and should therefore have made enquiries before paying the same.

The SCA held that, where an agreement exists, such as existed between McCarthy and Absa (where McCarthy had a cheque account with Absa), there is a duty on the bank, when paying cheques, to not only strictly adhere to the customer's instructions, but also to perform its duties with "*the required degree of care,*

*generally, in good faith and without negligence*". The question as to whether or not a bank is in fact negligent will depend on what is known to the bank at the time that it performed the particular transaction.

The negligence or otherwise of Absa was not a question determined by the Supreme Court of Appeal in its judgment, as the finding in the court a *quo* had been made pursuant to an application for absolution. The principle and standard to be applied has, however, been clarified and determined. It will now be for the trial court to determine whether, on the facts, negligence can be established on the part of Absa (in which event liability will follow).

[Jonathan Witts-Hewinson](#)

## The *in duplum* rule

The *in duplum* rule has its origins in our common law and is based on considerations of public policy and is designed to protect borrowers from exploitation by lenders. The purpose of the rule is to ensure that debtors don't find themselves in an inescapable financial bind in respect of repayment of debt. It also ensures that lenders don't allow the unrestrained accumulation of interest on outstanding debts.

In essence, the common law provides that the unpaid interest on a debt that is due, but has not yet been paid should not exceed the outstanding capital. As soon as the unpaid interest equals the outstanding capital, interest ceases to run.

Section 103(5) of the National Credit Act 34 of 2005 (the Act) now concisely codifies the *in duplum* rule in respect of credit agreements. However, it qualifies the common law *in duplum* rule. It limits the entire cost of credit that may accrue during a period of default to the unpaid balance of the principal debt.

Section 101(1)(b)-(g) of the Act provides that the cost of credit includes initiation fees, service fees, interest, credit insurance, default administration charges and collection costs.

The limitation imposed by section 103(5) on the cost of credit that might accrue during a period of default has a concerning consequence. Because the costs of collecting a debt is considered

to be a component of the cost of credit, the legal costs that a credit provider will be able to recover from a consumer for having to enforce a debt could be limited significantly.

In *National Credit Regulator v Nedbank Ltd & others (2009) JOL 24127 (GNP)* it was held that section 103(5) adds an even further qualification to the common law *in duplum* rule.

Once the cost of credit equals the unpaid balance of the principal debt during a period of default, section 103(5) will operate and no further amounts will accrue. When a consumer thereafter makes a payment, common law dictates that such payment first be set off against the outstanding interest. The outstanding cost of credit will thus be reduced and no longer equal the unpaid balance of the principal debt, allowing for further costs of credit to accrue. However, the court held that no further interest may accrue in such a case because the consumer will still be in default and "*indebtedness in respect of cost of credit cannot grow by more than the stated maximum*".

Unfortunately, the court did not specifically indicate when a credit provider will again be able to charge the consumer. It is presumed that a credit provider may do so only once the default has been remedied.

[Sam Oosthuizen, Cara Gilmour and Heinrich Louw](#)

## The relief available to disgruntled tenderers

In the circumstances where a tenderer is unsuccessful with its tender submission to an organ of state (whether national, provincial or local government and/or state owned enterprises) for the supply of goods or services, such a tenderer has the right to take the decision of the organ of state on judicial review.

However, the reasons for taking an organ of state's decision on judicial review should be well-founded on the grounds that the procurement process followed was not fair, equitable, transparent, competitive or cost-effective, as required in terms of the prevailing legislation governing government procurement.

If an unsuccessful tenderer believes that the reason its tender submission was not properly considered by the organ of state was as a result of the aforesaid grounds, it should immediately after becoming aware of the decision of the organ of state inform its attorneys to take the necessary legal steps to safeguard its rights.

It must be noted that tender submissions by tenderers to an organ of state to supply goods or services do not create any contractual relationship and no clear contractual right flows out of the tender submission. The remedies available to an unsuccessful tenderer are restricted to the South Africa public law being judicial review as provided for by the Promotion of Administrative Justice Act, 3 of 2000.

In order to safeguard an unsuccessful tenderer's right to a successful judicial review, the unsuccessful tenderer must immediately approach a court for an interim interdict suspending the conclusions of a contract or the commencement of work under the contract pending the outcome of the judicial review proceedings. An unsuccessful tenderer will, in order to be successful with an interim interdict, need to show the following to a court:

- a clear right or, if not clear, that it has a *prima facie* right;
- that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief (by way of the review proceedings) is eventually granted;
- that the balance of convenience favours the granting of an interim interdict; and
- that the applicant has no other satisfactory remedy.

The unsuccessful tenderer should, immediately after becoming aware of the decision of the organ of state, proceed with an interim interdict to suspend the conclusion of a tender contract or the commencement of work under the tender contract. If not, the unsuccessful tenderer faces the real risk that a court could decline to set aside a clearly invalid administrative act as a result of the passing of time and due to the extent of the work already performed by the successful tenderer between the time the review proceedings were launched and when the court finally grants its order. The relief which the unsuccessful tenderer seeks from the court could then become incapable of practical implementation and merely be of academic interest only.

An unsuccessful tenderer, in exceptional circumstances, could have a claim for damages against the organ of state should the unsuccessful tenderer be able to prove fraud, corruption or dishonesty on the part of the organ of state or its employees.

*Tayob Kamdar and Jackwell Feris*

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