
KNOWLEDGE

MANAGEMENT

KNOWLEDGE MANAGEMENT

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Knowledge and Know-how

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At Cliffe Dekker Hofmeyr, our Knowledge Management initiatives are aimed at putting law and the combined expertise of the firm at our lawyers' fingertips. In doing so, we leverage our intellectual capital, minimise risk, avoid duplication and ultimately enhance the quality of our service to clients.

This KM Alert offers a high level overview of selected recent developments with regard to case law and legislation and reflects the position as at date of publication.

KM ALERT

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- Employment law
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1. CASE LAW UPDATE

A selection of recent cases

***Kubyana v Standard Bank of South Africa Ltd and Another* [2014] ZACC 1 (20 February 2014)**

The previous KM Alert (February 2014) considered the case of *Absa Bank Ltd v Mkhize (and two similar cases)* 2013 JDR 2187 (SCA) which reaffirmed the decision in *Sebola v Standard Bank of South Africa and Another* 2012 (5) SA 142 (CC).

In the *Absa* decision it was held that a credit provider cannot merely provide proof of despatch of a s129(1) notice in terms of the National Credit Act, No 34 of 2005 (NCA) to allege compliance with the pre-litigation steps required by the NCA. It was decided that a credit provider must at least show that the notice was sent by registered mail and to the correct Post Office. Furthermore, the court held that it will be unlikely that a court would ignore positive proof that the notice was in fact never received by the consumer.

The decision in *Kubyana* in the Constitutional Court (CC) provides some guidance as to how courts should deal with allegations of non-receipt of a s129(1) notice going forward, albeit without clearing up all ambiguity in this regard. *Kubyana* entered into an instalment sale agreement (Agreement) for the purchase of a motor vehicle with Standard Bank. *Kubyana* fell into arrears and ultimately Standard Bank despatched a s129(1) notice to *Kubyana*'s chosen address for service in terms of the Agreement. A 'track-and-trace' record from the Post Office confirmed that the notice reached the correct branch. There the notice lay for approximately two months, and despite notifications from the branch, *Kubyana* neglected to collect it. Standard Bank issued summons and was successful in its claim against *Kubyana* in the High Court - *Kubyana* giving no account of why he did not collect the s129(1) notice. The Supreme Court of Appeal dismissed *Kubyana*'s application for leave to appeal. *Kubyana* then appealed to the CC.

Kubyana alleged that the return of the notice 'undelivered' by the Post Office constituted positive proof that he did not in fact receive the notice (as allegedly envisaged in the *Sebola* judgment). On that point the CC held that despite the fact that the NCA is directed at consumer protection, it is not relentlessly one-sided in favour of the consumer and furthermore that, "[w]hile a credit provider must take certain steps to ensure that a consumer is adequately informed of [his] rights, such a credit provider cannot be non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided."

The *Sebola* judgment, it therefore seems, cannot be interpreted as allowing a consumer to rely on his own unreasonable behaviour in failing/refusing to collect a s129(1) notice to set up an argument that, subjectively, the notice was not received. The appeal in the present case therefore failed.

Jafta J however added in separate reasoning (but concurring with the main decision of the CC) his interpretation of s129(1), and of the decision in *Sebola*. He noted that the NCA does not define the word deliver or 'delivered' as used in s130(1) and that the phrase "delivered to the consumer" is of crucial importance to understanding what is required of a credit provider. Notably, Jafta J stated that "[m]atters of evidence" do not come into the equation when interpreting an Act. He concluded, therefore that "[i]n delivering the notice, the credit provider may follow any method. This is so because sections 130(1) and 129(1) do not specify a particular method of delivery. All that they require is that the notice be delivered. If a particular method is chosen, whatever is done must constitute adequate proof that the notice has reached the consumer."

Reading the main judgment of the CC with the separate reasoning of Jafta J leads to the following conclusion - the credit provider must aver and be able to prove that the notice was delivered to the consumer. "Delivered" in the context of the NCA means that the s129(1) notice must "reach the consumer but this does not mean that the notice must actually be viewed by the consumer." Despatching the s129(1) notice by registered post and showing that it reached the correct Post Office assists in proving the averment, but the facts necessary to prove delivery will be peculiar to the particular case and is a matter to be decided on a balance of probabilities.

***Absa Bank Ltd v Mahomed* (876/12) [2012] ZASCA 1 (20 January 2014)**

This examines when and whether a bank might be held liable for unauthorised actions of its agent. The agent in this case (who subsequently fled the country) made off with money allegedly invested by the respondents with Absa. The respondents were, so it turned out, in cahoots with the agent to use fictitious names to hide the investments and taxable funds from SARS. The court considered the questions before it to be whether the agent in this case was duly authorised, and when might a principal be liable for the unauthorised actions of its agent. In this case, the agent was clearly not expressly authorised to conclude agreements tainted with the underlying objective of circumventing tax laws.

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On the possibility of there being implied authority to bind the bank on the part of agent the court referred to the case of *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) which stated:

"The appointment by a bank of a branch manager [or, as in this case, an agent] implies a representation to the outside world that the [agent] is empowered to represent the bank in the sort of business (and transactions) that ...[an agent] would ordinarily conduct. The notion of "ordinary business" in turn implies a qualification in the form of a limitation... [The agent's] authority [to bind the bank] is not unlimited both as to the nature and the extent of the business he purports to transact in the bank's name... An outsider dealing with [an agent] is entitled to assume that the latter's functions encompass, but do not exceed, the activities that [an agent] would commonly be known to perform."

The court found that the agreements – tainted with the intention to evade tax – concluded in this case clearly fell outside the scope of the 'ordinary business' of an agent and that the respondents could not reasonably have believed that Absa had authorised the agent to represent it in unlawful activity. Consequently, the bank's appeal succeeded.

***Stabilpave (Pty) Ltd v South African Revenue Service* 2014 (1) SA 350 (SCA)**

This case deals with the question of whether payment can properly be said to have been made where a debtor pays a creditor by cheque; the creditor has no choice as to the mode of payment; and that cheque and its proceeds are stolen after it is posted. In this case the South African Revenue Services (SARS) posted a cheque to Stabilpave which was stolen and subsequently paid to a thief. The cheque was in respect of a tax refund in the amount of R724 494.29 which SARS paid by cheque because Stabilpave's banking details were not available to it. When Stabilpave instituted action against SARS, SARS admitted the debt but raised the defence that payment had been made, or alternatively – and based on the wording in Stabilpave's tax assessment – that by not providing SARS with any banking details Stabilpave elected, alternatively accepted that payment be effected by way of cheque which would be collected at the nearest Post Office.

The cheque was stolen in a fairly skilful manner by fraudsters who intercepted the delivery receipt sent by the Post Office, and posing as accountants - authorised by a fake letter to collect the cheque - obtained the cheque and deposited it into an

account in the name of Stabilpave (Pty) Ltd. The account was opened by a fraudster after fraudulently changing the details of the directors of Stabilpave in the records kept by the Registrar of Companies, thus making him seem authorised to do so. The proceeds of the cheque were subsequently withdrawn.

The crisp question before the courts was whether Stabilpave as creditor had a choice as to mode of payment, and if it did, whether a choice was made by Stabilpave expressly or by implication, in which case Stabilpave as creditor would bear the risk.

SARS argued that payment had been made and that the assessment form gave Stabilpave a choice of mode of payment – either by cheque or, if it provided its bank details, by EFT. SARS was effectively relying on the principle "that if a creditor requests a debtor to settle his debt by sending a cheque through the post he agrees to run the risk in the transit."

The court accepted this principle and held that Stabilpave's claim should be dismissed. The Supreme Court of Appeal (SCA) disagreed. It held that, on a plain reading of the tax assessment, SARS dictated the method of payment and Stabilpave had no election to make. The SCA held that "[t]he mere fact that a creditor knows or expects to be paid by cheque through the post or that it does not raise an objection does not in itself give rise to an implied request or election by the creditor to be paid in such manner." Accordingly, the risk of loss lay with SARS and Stabilpave's appeal succeeded.

This is a cautionary tale showing that one should always ensure that the consent of the creditor to the method of payment is obtained.



“ Getting the right information to the right people at the right time matters to us ”

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WORTH NOTING

In South Africa **Legal Professional Privilege** - which is for a client to claim and for a legal professional to respect - consists of two distinct components –

(i) Legal Advice Privilege:

protects communications between an attorney, advocate and/or admitted in-house legal advisor and their client, provided that:

- a. the attorney, advocate or admitted in-house legal advisor must have been acting in his/her professional capacity as a legal professional; and
- b. the communication must have been made in confidence; and
- c. the communication must have been made for the purpose of obtaining legal advice; and
- d. the advice should not have been sought for an unlawful purpose.

(ii) Litigation Privilege:

protects communications between an attorney, advocate or admitted in-house legal advisor and their client; and between the client and third parties; as well as between third parties and the attorney, advocate or admitted in-house legal advisor, provided that:

- a. the attorney, advocate or admitted in-house legal advisor must have been acting in his/her professional capacity as a legal professional; and
- b. the communication must have been made in confidence; and
- c. the communication must have been made for purposes of being placed before the attorney, advocate or admitted in-house legal advisor in order to enable him/her to advise; and
- d. the communication must have been made for the dominant purpose of intended or contemplated litigation; and
- e. the communication/advice should not be for an unlawful purpose.

*The so-called **Dominant Purpose Test** in claiming litigation privilege*

On 31 May 2013 the Supreme Court of Appeal (SCA) handed down judgment in **Competition Commission v Arcelormittal South Africa Ltd and Others 2013 (5) SA 538 (SCA)** which, amongst other things, concerned whether the Competition Commission, by making reference in its pleadings to a leniency application (purportedly the subject of litigation privilege), waived privilege and had to disclose the document to the respondents. The SCA noted that for litigation privilege to exist two requirements (in addition to the general requirements for privilege ie confidentiality, lawfulness and communication to a legal professional in his/her professional capacity) had to be satisfied:

- (i) "the document must have been obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and
- (ii) that litigation was pending or contemplated as likely at the time."

The SCA however noted that it is not clear in South African law whether "documents prepared for litigation must have submission to legal advisors as their **sole purpose, substantial purpose, definite purpose or dominant purpose**" in order to attract litigation privilege. The SCA left this question open.

Recently, an English decision in the High Court of Justice, Queen's Bench Division, Commercial Court, namely **Starbev GP Ltd v Interbrew Central European Holding BV (13 December 2013)** dealing with litigation privilege espoused the dominant purpose test stating "[i]t is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must show that the relevant communications were for the *dominant purpose* of either (i) enabling advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings." [Our emphasis] It held further that it is the duty of the party claiming privilege to establish that the dominant purpose was litigation. Furthermore if there is another purpose to the communication the dominant purpose test will not be satisfied.

Whilst the *Starbev* case is not a South African case, South African law of privilege traditionally tracks closely the English jurisprudence on the matter. It is not uncommon for South African courts to have regard to English decisions on this aspect of the law, and it is therefore worth taking note of the English position.

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2. LEGISLATION UPDATE

EMPLOYMENT LAW –

THE STATUS OF EMPLOYMENT LEGISLATION

Of the four major employment statutes, only the legislative process relating to the Labour Relations Amendment Bill (LRAB) has not yet been finalised. This bill has however now been approved by the National Assembly on Tuesday, 4 March 2014, and has been submitted to the President for assent. No date(s) have yet been fixed by the President, for the other two acts that have been amended (Employment Equity Act and Basic Conditions of Employment Act) to come into operation.

Even before completion of the amendments to the Labour Relations Act however, the Minister of Labour has, on 28 February 2014, invited representations from the public on which categories of work should be deemed to be temporary service. This was done in terms of s38 of the LRAB. The LRAB allows for the Minister of Labour to proclaim certain categories of work as deemed temporary service work. Employers who make use of TES employees should consider making representations before the deadline of 29 April 2014.

EMPLOYMENT SERVICES ACT 4 OF 2014

THIS ACT WAS PUBLISHED IN THE GOVERNMENT GAZETTE ON 7 APRIL 2014

It aims "to provide for public employment services; to provide for the establishment of schemes to promote the employment of young work seekers and other vulnerable persons; to provide for schemes to assist employees in distressed companies to retain employment; to facilitate the employment of foreign nationals in a manner that is consistent with the objects of this Act and the Immigration Act, 2002; to provide for the registration and regulation of private employment agencies; to provide for the establishment of the Employment Services Board; to provide for the establishment of Productivity South Africa and to provide for the establishment of Supported Employment Enterprises".

The Act comes into operation on a date determined by the President by proclamation in the Gazette.

EMPLOYMENT EQUITY -

DRAFT EMPLOYMENT EQUITY REGULATIONS PUBLISHED FOR COMMENT

On 28 February 2014, the Minister of Labour published draft Employment Equity regulations, in terms of the Employment Equity Act, No 55 of 1998 (EEA).

Employers should take note of two material aspects of the draft regulations. The first is it provides guidelines to employers on how to determine whether it is guilty of paying employees who render the same, or substantially the same work, on an unequal basis for unfairly discriminatory reasons. The regulations explain the meaning of equal work, the methodology to be used to determine a breach of the equal work provisions, how to assess whether work is of equal value, factors justifying differentiation in terms and conditions of employment, and consultation requirements over elimination of unfair discrimination in terms and conditions of employment.

The second material aspect that we wish to draw your attention to, relates to the indicated comparator that all designated employers **should** apply, when determining whether it is sufficiently representative for purposes of the Employment Equity Act. Setting of affirmative action goals and targets should then speak to such under-representation identified.

The regulations provide that employers who employ 150 or more employees, should use the nationally economically active population (EAP) as the comparator for the upper three levels of the categories of employment reported on for purposes of this Act, and the average of the national and regional EAP for the lower three levels. Smaller designated employers (employing below 150 employees) should use the national EAP for the upper two levels of employees, and the regional EAP for the lower four levels.

This echoes the changes to s42 of the EEA, brought about by the Employment Equity Amendment Act, No 47 of 2013 (Amendments), where all previously listed comparators that could be used as alternatives to national or regional EAP, have been deleted. We suggest however that such other comparators may remain of relevance, as employers may still (in terms of the Amendments), take into account reasonable steps taken: (a) to train suitably qualified people from the designated groups; (b) to implement its employment equity plan; (c) to appoint and promote suitably qualified people from the designated groups; as well as

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(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and (e) any other prescribed factor. In furtherance of this argument, we point out that the regulations use the word 'should', rather than 'must' when describing the employer's obligations in this regard.

OTHER LEGISLATION

BILLS AWAITING THE PRESIDENT'S SIGNATURE

■ **Employment Services Bill [B38D of 2012]**

This aims "to provide for public employment services; to provide for the establishment of schemes to promote the employment of young work seekers and other vulnerable persons; to provide for schemes to assist employees in distressed companies to retain employment; to facilitate the employment of foreign nationals in a manner that is consistent with the objects of this Act and the Immigration Act, 2002; to provide for the registration and regulation of private employment agencies; to provide for the establishment of the Employment Services Board; to provide for the establishment of Productivity South Africa; to provide for the establishment of Supported Employment Enterprises and to provide for transitional provisions".

■ **Independent Communications Authority of South Africa Amendment Bill [B18D of 2013]**

This aims "to amend the Independent Communications Authority of South Africa Act, 2000, so as to insert new, amend existing and repeal obsolete, definitions; to provide for further clarity on the powers and duties of the Authority; to introduce mechanisms to ensure the accountability of the Authority, including that of councillors and committees and to confirm the use of electronic communications networks and services for the purpose of electronic transactions".

■ **Infrastructure Development Bill [B49B - 2013]**

This aims "to provide for the facilitation and co-ordination of public infrastructure development which is of significant economic or social importance to the Republic; to ensure that infrastructure development in the Republic is given priority in planning, approval and implementation; to ensure that the development goals of the State are promoted through infrastructure development and to improve the management of such infrastructure during all life-cycle phases, including planning, approval, implementation and operations".

■ **Labour Relations Amendment Bill [B16D of 2012]**

This aims "to amend the Labour Relations Act, 1995, so as to facilitate the granting of organisational rights to trade unions that are sufficiently representative; to strengthen the status of picketing rules and agreements; to amend the operation, functions and composition of the essential services committee and to provide for minimum service determinations; to provide for the Labour Court to order that a suitable person be appointed to administer a trade union or employers' organisation; to enable judges of the Labour Court to serve as a judge on the Labour Appeal Court; to further regulate enquiries by arbitrators; to provide greater protection for workers placed in temporary employment services; to regulate the employment of fixed term contracts and part-time employees earning below the earnings threshold determined by the Minister; to further specify the liability for employer's obligations and to substitute certain definitions".

■ **Legal Practice Bill [B20D – 2012]**

This aims "to provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic; to provide for the establishment, powers and functions of a single South African Legal Practice Council and Provincial Councils in order to regulate the affairs of legal practitioners and to set norms and standards; to provide for the admission and enrolment of legal practitioners; to regulate the professional conduct of legal practitioners so as to ensure accountable conduct; to provide for the establishment of an Office of a Legal Services Ombud and for the appointment, powers and functions of a Legal Services Ombud; to provide for a Legal Practitioners' Fidelity Fund and a Board of Control for the Fidelity Fund and to provide for the establishment, powers and functions of a National Forum on the Legal Profession".

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■ **Local Government: Municipal Property Rates Amendment Bill [B33B - 2013]**

This aims "to amend the Local Government: Municipal Property Rates Act, 2004, so as to provide for the amendment and insertion of certain definitions; to delete the provisions dealing with district management areas; to provide that a rates policy must determine criteria for not only the increase but also for the decrease of rates; to delete the provisions of section 3(4) and to provide for a rates policy to give effect to the regulations promulgated in terms of section 19(1)(b); to provide that by-laws giving effect to the rates policy must be adopted and published in terms of the Municipal Systems Act; to provide for the determination of categories of property in respect of which rates may be levied and to provide for a municipality to apply to the Minister for authorisation to sub-categorise property categories where it can show good cause to do so; to regulate the timeframe of publication of the resolutions levying rates and what must be contained in the promulgated resolution; to provide for the Minister to make a decision in terms of section 16(2) with the concurrence of the Minister of Finance; to provide for the exclusion from rates of certain categories of public service infrastructure as well as mining rights or mining permits, to provide that infrastructure above the surface in respect of mining property is rateable and the rates are payable by the holder of the mining right or mining permit; to provide that the exclusion from rates in respect of land belonging to a land reform beneficiary is extended to the spouse and dependants; to provide that an exclusion from rates in respect of the seashore lapses if any part thereof is alienated; to provide that a municipality may levy different rates on vacant residential property; to provide that a municipality may not recover rates in respect of a right of exclusive use registered against a sectional title unit from the body corporate; to provide that a person liable for a rate must furnish the municipality with his or her postal address; to provide that municipalities are not required to value properties fully excluded from rates; to provide for the period of validity of a valuation roll to be four years in respect of a metropolitan municipality and five years in respect of local municipalities; to provide for the MEC for local government to extend the period of validity of valuation rolls by two additional years where the provincial executive has intervened in terms of section 139 of the Constitution and by one financial year and two financial years for metropolitan and local municipalities respectively on request by a municipality in any exceptional circumstances; to provide that a body corporate, share block company or managing association is required to provide information to a valuer; to delete the requirement for the payment of interest in specific instances; to

delete the requirement for the establishment of a valuation appeal board in every district municipality; to provide that a professional associated valuer may be appointed to the valuation appeal board if a professional valuer cannot be appointed; to amend the quorum of an appeal board to include the valuer member of the valuation appeal board; to amend the dates on which a supplementary valuation takes effect; to provide for the notification of owners of property affected by a supplementary valuation; to limit condonation by the MEC for local government through the framework to municipalities only; to provide for more effective monitoring and reporting by municipalities and provinces on critical areas of the implementation of the Act; to extend the Minister's regulatory powers; to provide for the phasing in of certain regulations; to provide for the phasing in of the prohibition on the levying of rates on certain types of public service infrastructure; to provide for transitional arrangements in respect of municipalities that have been affected by a redetermination of municipal boundaries and to provide for transitional arrangements for the implementation of section 8".

■ **Minerals and Petroleum Resources Development Amendment Bill [B15B - 2013]**

This aims "to amend the Mineral and Petroleum Resources Development Act, 2002, as amended by the Mineral and Petroleum Resources Development Act, 2008 (Act No. 49 of 2008); so as to remove ambiguities that exist within the Act; to provide for the regulation of associated minerals, partitioning of rights and enhance provisions relating to the regulation of the mining industry through beneficiation of minerals or mineral products; to promote national energy security; to streamline administrative processes; to align the Mineral and Petroleum Resources Development Act with the Geoscience Act, 1993 (Act No. 100 of 1993), as amended by the Geoscience Amendment Act, 2010 (Act No. 16 of 2010); to provide for enhanced sanctions and to improve the regulatory system".

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■ **National Credit Amendment Bill [B47B – 2013]**

This aims "to amend the National Water Act, 1998, so as to make provision for the correct designation of the Department and Minister; to correct outdated references; to provide for an alignment and integration of the process for consideration of water use licences, relating to prospecting, exploration, mining or production activities; to provide for the appointment of the Minister as the responsible authority for appeals relating to prospecting, exploration, mining or production activities; to amend the authority of the Water Tribunal as appeal authority relating to prospecting, exploration, mining or production activities and to provide for the concurrence between the Minister, the Minister responsible for mineral resources and the Minister responsible for environmental affairs when amending provisions of the Agreement related to prospecting, exploration, mining or production activities".

■ **National Environmental Management: Air Quality Amendment Bill [B27D – 2013]**

This aims "to amend the National Environmental Management: Air Quality Act, 2004, so as to substitute certain sections; to provide for the establishment of the National Air Quality Advisory Committee; to provide for the consequences of unlawful commencement of a listed activity; to provide for monitoring, evaluation and reporting on the implementation of an approved pollution prevention plan; to empower the MEC or Minister to take a decision in the place of the licensing authority under certain circumstances; to provide for the Minister as licensing authorities in situations where the province, as a delegated licensing authority by the municipality, is the applicant for an atmospheric emission licence, where the applications are trans-boundary, where the air activity forms part of national priority project, where the activity is also related to the environmental impact and waste management activities authorised by the Minister, where the air activity relates to a prospecting, mining, exploration or production activity; to delete cross references to the Environmental Conservation Act, 1989; to clarify that applications must be brought to the attention of interested and affected parties soon after the submission to the licensing authority; to provide for a validity period of provisional atmospheric emission licence; to create an offence for non-compliance with controlled fuels standards; to provide for the development of regulations on climate change matters and the procedure and criteria for administrative fines and to delete certain obsolete provisions".

■ **National Environmental Management Laws Third Amendment Bill [B26B - 2013]**

This aims "to amend the:

- National Environmental Management Act, 1998, so as to amend certain definitions and to define certain words and expressions; to provide for the review of environmental management instruments; to provide for minimum information requirements to be included under environmental management instruments; to provide for the Minister responsible for mineral resources to be the competent authority for environmental matters in so far as they relate to prospecting, exploration, mining or production of mineral and petroleum resources; to empower the Minister to take an environmental decision in so far as it relates to prospecting, exploration, mining or production instead of the Minister responsible for mineral resources under certain circumstances; to clarify the provisions relating to integrated environmental authorisations; to strengthen the financial provisions in the Act; to provide for consultation with State Departments; to provide for the management of residue stockpiles and residue deposits; to empower the Director-General of the Department responsible for mineral resources to issue section 28 directives in so far as they relate to prospecting, exploration, mining or production; to empower the Minister responsible for mineral resources to designate environmental mineral resource inspectors within the Department responsible for mineral resources for compliance monitoring and enforcement of provisions in so far as they relate to prospecting, exploration, mining or production; to provide the Minister with the power to direct environmental management inspectors to perform compliance monitoring and enforcement duties instead of mineral resource inspectors under certain circumstances; to empower the provincial head of department to delegate a function entrusted to him or her under this Act; to provide for the suspension of a decision on receipt of an appeal; to provide for appeals against directives; to further provide for the power of the Minister to make regulations; to provide for consultation in the event that an Act of Parliament or regulations are amended that impact on the Agreement; to provide for the criteria for condonation applications in the case of appeals that relates to prospecting, exploration, mining or production;

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- National Environmental Management: Waste Act, 2008 so as to insert certain definitions; to empower the Minister to prohibit or restrict waste management activities in specified geographical areas; to empower the Minister responsible for mineral resources to be the licensing authority to issue waste management licences in so far as it relates to prospecting, exploration, mining or production activities of mineral and petroleum resources; to empower the Minister responsible for mineral resources to delegate a function entrusted to him or her under this Act;
- National Environmental Management Amendment Act, 2008, so as to provide for transitional arrangements; to amend the commencement provisions and to delete certain obsolete provisions".

■ **National Environmental Management: Protected Areas Amendment Bill [B28B - 2013]**

This aims "to amend the National Environmental Management: Protected Areas Act, 2003, so as to amend or insert certain definitions; to authorise the declaration of marine protected areas; to provide for the management of marine protected areas; to provide for transitional measures and to effect certain textual alterations".

■ **National Environmental Management: Waste Amendment Bill [B32B - 2013]**

This aims "to amend the National Environmental Management: Waste Act, 2008, so as to substitute and delete certain definitions; to exclude the department from the spheres of government that are required to compile integrated waste management plans; to require the MEC responsible for waste management to act in concurrence with the Minister when requesting certain persons to compile and submit industry waste management plans; to provide for the exclusion of the provincial department responsible for waste management from the requirement to compile an industry waste management plan; to establish a pricing strategy; to provide for the content and application of the pricing strategy; to establish the Waste Management Bureau; to provide for the determination of policy and the Minister's oversight in relation to the Waste Management Bureau; to provide for the determination of policy and the Minister's oversight in relation to the Waste Management Bureau; to provide for the objects, functions, funding, financial management, reporting and auditing, immovable property of the Waste Management Bureau; to provide for the employees of the Waste Management Bureau; to provide for the appointment and the functions of the Chief Executive Officer of the Waste Management

Bureau; to prescribe certain matters in relation to the Waste Management Bureau and to provide for transitional provisions in respect of existing industry waste management plans".

■ **National Water Amendment Bill [B3 of 2014]**

This aims "to amend the National Water Act, 1998, so as to make provision for the correct designation of the Department and Minister; to correct outdated references; to provide for an alignment and integration of the process for consideration of water use licences, relating to prospecting, exploration, mining or production activities; to provide for the appointment of the Minister as the responsible authority for appeals relating to prospecting, exploration, mining or production activities; to amend the authority of the Water Tribunal as appeal authority relating to prospecting, exploration, mining or production activities and to provide for the concurrence between the Minister, the Minister responsible for mineral resources and the Minister responsible for environmental affairs when amending provisions of the Agreement related to prospecting, exploration, mining or production activities".

■ **Private Security Industry Regulation Amendment Bill [B27D of 2012]**

This aims "to amend the Private Security Industry Regulation Act, 2001, so as to amend certain definitions; to provide for additional powers of the Minister; to provide for the appointment of the director and deputy directors for the Authority; to provide for cooperation with the Civilian Secretariat for Police; to provide for the finances and accountability of the Authority; to provide for limitation on foreign ownership; to provide for the establishment and functions of the Exemption Advisory Committee; to regulate security services rendered outside the Republic; to empower the Minister to make regulations for the transportation of cash and other valuables and to provide for offences and penalties".

continued

■ **Property Valuation Bill [B54B - 2013]**

This aims "to provide for the establishment, functions and powers of the Office of the Valuer-General; to provide for the appointment and responsibilities of the Valuer-General and to provide for the regulation of the valuation of property that has been identified for land reform as well as property that has been identified for acquisition or disposal by a department".

■ **Public Administration Management Bill [B55B -2013]**

This aims "to promote the basic values and principles governing the public administration referred to in section 195(1) of the Constitution; to provide for the transfer and secondment of employees in the public administration; to regulate conducting business with the State; to provide for capacity development and training; to provide for the establishment of the National School of Government; to provide for the use of information and communication technologies in the public administration; to establish the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit; to provide for the Minister to set minimum norms and standards for public administration; to establish the Office of Standards and Compliance to ensure compliance with minimum norms and standards and to empower the Minister to make regulations".

■ **Restitution of Land Rights Amendment Bill [B35B - 2013]**

This aims "to amend the Restitution of Land Rights Act, 1994, so as to amend the cut-off date for lodging a claim for restitution; to further regulate the appointment, tenure of office, remuneration and the terms and conditions of service of judges of the Land Claims Court; to make further provision for the advertisement of claims; to create certain offences and to extend the Minister's powers of delegation".

■ **Special Economic Zones Bill [B3D – 2013]**

This aims "to provide for the designation, promotion, development, operation and management of Special Economic Zones; to provide for the establishment, appointment of members and functioning of the Special Economic Zones Advisory Board; to provide for the establishment of the Special Economic Zones Fund; to regulate the application, issuing, suspension, withdrawal and transfer of Special Economic Zones operator permits; to provide for functions of the Special Economic Zones operator and to provide for transitional arrangements".

■ **State Attorney Amendment Bill [B52B - 2013]**

This aims "to amend the State Attorney Act, 1957, so as to provide for the establishment of offices of State Attorney; to provide for the appointment of a Solicitor-General and State Attorneys; to provide for the powers of the Minister relating to the functions of the offices of State Attorney and to provide for the powers and functions of the Solicitor-General".

BILLS TABLED IN PARLIAMENT

■ **Development Bank of Southern Africa Amendment Bill 2 of 2014**

This aims "to amend the Development Bank of Southern Africa Act, 1997, so as to define certain expressions; to delete an obsolete provision; to provide afresh for the regions in which the Bank may operate; to increase the authorised share capital of the Bank; to align a provision with the terminology in the Companies Act, 2008; to amend the provisions regarding the issuing of certificates for issued shares; to enable the Minister to increase the authorised share capital; to require the shareholders' approval for subscription by the shareholders to any portion of the balance of the authorised share capital on request of the board; to amend the power of the Minister to make regulations by amending the introductory provision, empowering the Minister to regulate the use of callable capital of the Bank to calculate the leverage ratio of the Bank, omitting the provision empowering the Minister to determine the region in which the Bank may operate and limiting the general regulation-making power to ensure constitutionality and to adjust the provision enabling the application to the Bank of any provision of the Companies Act, 2008, the Banks Act, 1990, and any other appropriate legislation".

continued

■ Medicines & Related Substances Amendment Bill 6 of 2014

This aims "to amend the Medicines and Related Substances Act, 1965, so as to define certain expressions and to delete or amend certain definitions; to provide for the objects and functions of the Authority; to provide for the composition, appointment of chairperson, vice-chairperson and members, disqualification of members, meetings and committees of the Board of the Authority; to replace the word "products" with the word "medicines" and expression "Scheduled substances" in order to correctly reflect the subject matter of the said Act; and to effect certain technical corrections and to provide for matters connected therewith".

■ Unemployment Insurance Amendment Bill B7 of 2014

This aims "to amend the Unemployment Insurance Act, 2001, so as to provide for the extension of the unemployment insurance benefits to learners who are undergoing learnership training and civil servants; to adjust the accrual rate of a contributor's entitlement to unemployment insurance benefits; to finance employment services; to extend a contributor's entitlement to benefits under certain circumstances and to provide for the process of application for maternity benefits".

■ Medical Innovation Bill (Private Bill) PMB1 of 2014

This aims "to make provision for innovation in medical treatment and to legalise the use of cannabinoids for medical purposes and beneficial commercial and industrial uses".

■ Protection of Crucial Infrastructure Bill (Private Bill) PMB2 of 2014

This aims "to make provision for the establishment, composition, function and duties, meetings, financing and reporting of the Crucial Infrastructure Board; the determination and declaration of crucial infrastructure and ensuring that security measures are implemented at crucial infrastructure and the creation of a register containing the areas declared as crucial infrastructure".

OTHER LEGISLATIVE DEVELOPMENTS

■ Banking and Finance

Financial Services Laws General Amendment Act - Commencement dates published.

■ Black Economic Empowerment

The Department of Trade and Industry has extended the transitional period for the **Broad-Based Black Economic Empowerment (BBBEE) Codes of Good Practice** for a period of six months.

For more information, refer to our website: <http://www.cliffedekkerhofmeyr.com/en/results.html?query=bbbee&search=search>

■ Budget

2014 Budget update on retirement reforms:
Non-retirement savings - tax free savings accounts

■ Business rescue, Restructuring and Insolvency

Policy on the appointment of insolvency practitioners

■ Courts

New monetary jurisdiction for courts:
- Small Claims Court: R15 000 (not R12 000) &
Magistrates' Courts:
- District courts (R200 000) (not R100 000)
- Regional courts (R200 000 – R400 000) (not R100 000 – R300 000)

■ Employment

Draft Employment Equity Regulations, 2014 published for comment.

■ Environmental

Regulations for the National Pollution Prevention Plan and the declaration of greenhouse gases as priority air pollutants have been published in terms of the Air Quality Act (2004).

■ Information and Communications

Public inquiry into the state of competition in the Information and Communications Technology Sector.

■ Interest rate

Prescribed Rate of Interest. Invitation for public comments on the draft notice to adjust the rate of interest.

continued

3. RECENT DEVELOPMENTS

Banking and Finance

The Banks Amendment Act, No 22 of 2013 came into force on 10 December 2013.

For more information, please refer to the following Alert on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/corporate/corporate-and-commercial-alert-29-january.html>

Competition

Recent publications include –

- Commission appoints head of Mergers and Acquisitions
- Evidence of on-going collusive conduct and the Competition Tribunal's obligation to direct proceedings before it
- ICASA announces inquiry into the state of competition in the ICT sector
- Commission refers power cable investigation
- Commission refers fishing collusion investigation
- Africa Insights Competition Alert – Kenya
- A recent Competition Tribunal (Tribunal) decision: Standard Chartered Private Equity (Mauritius) III Limited with two others and ETC Group (Mauritius)
- Competition Commission appoints new executives
- Constitutional Court rules on costs awarded against the competition commission
- Publication of healthcare inquiry terms of reference and appointment of healthcare inquiry panel

For more information, please refer to the following Alerts on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Competition>

Corporate and Commercial

Recent publications include –

- A thought on round-robin resolutions
- SCA case on non-cession / non-transfer clauses
- The responsibility of brokers in relation to market abuse

For more information, please refer to the following Alert on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/corporate/corporate-commercial-alert-19-march.html>

Dispute Resolution

Recent publications include –

- Seller beware!
- Shady deals and swindling – duly authorised?
- Security and liquidation in terms of Section 141(2)(a) of the Companies Act
- No room for PAJA in independent schools
- Credit providers' obligations in terms of the National Credit Act's default notice

For more information, please refer to the following publication on our website:

www.cliffedekkerhofmeyr.com/en/news/publications/2014/dispute/dispute-resolution-matters-19-march.html

Dispute Resolution: Class Actions

While the SCA ruled in November 2012 that our common law should be developed to permit class actions for damages (the only previous class actions that were recognised were those relating to the enforcement of rights under the Constitution and the enforcement of rights under specific pieces of legislation where this was permitted (such as under the Consumer Protection Act, 2008)), there have not since then been any class certification orders awarded. Class certification is a prerequisite for instituting a class action for damages. This is a process in terms of which the court approves the right of a class to form, to sue the defendant, appoints class representatives and may set certain parameters for the action.

There are, however, certain class certification applications pending.

We are monitoring these closely and will be reporting on the continued development of this important innovation to our legal system as the relevant matters unfold.

continued

Data Protection and Privacy

Recent publications include –

■ **SPAM a friend...to recommend or not to send**

Users of online shopping websites and social media platforms would recently have encountered the 'send-to-a-friend' or 'tell-a-friend' option and in some cases this is accompanied with a gift or voucher when they recommend friends and family.

■ **POPI**

The introduction of the Protection of Personal Information Act, No 4 of 2013 will affect the position of a prospective employer in verifying the credentials of candidates. References would include those from past employers and, where appropriate, a background investigation into the criminal and credit history of the applicant.

For more information, please refer to the following Alerts on our website:

[http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Technology, Media and Telecommunications](http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Technology,MediaandTelecommunications)

Employment

Recent publications include –

- Section 6(4) of the Employment Equity Amendment Act, No 47 of 2013 (EEA) brands an employer's failure to adhere to the 'equal pay for work of equal value' principle an act of unfair discrimination
- Section 34 of the Basic Conditions of Employment Act, No 75 of 1997 regulates deductions that an employer can make from an employee's remuneration. The general rule is that a written agreement is required from an employee prior to any deduction being made from their remuneration
- The Women Empowerment and Gender Equality Bill (Bill) has been passed by the National Assembly and is now awaiting approval by the National Council of Provinces.
- Processing of personal information in terms of the Protection of Personal Information Act, 4 of 2013 – Processing limitations
- Changes to immigration law

For more information, please refer to the following Alerts on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Employment>

Energy

Government has indicated and confirmed its intention to issue requests for proposals in respect of the procurement both base load and co-generation power. The base load procurement would consist of coal (2500 MW), natural gas (2 652 MW) and hydro (2 609 MW). Co-Generation procurement would be for 800 MW and consist of bio-mass, industrial and heat & power. Government would also be procuring a further 200MW of concentrated solar power under the renewable energy independent power producer procurement programme (REIPPP).

For more information, please refer to the following Alert on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/publications/2013/projects/projects-and-infrastructure-alert-18-september.html>

Environmental

Recent publications include –

- Constitutional Court decision – potential implications for the mining industry
- Activities requiring a Waste Management Licence

For more information, please refer to the following Alerts on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/environmental/environmental-alert-3-march.html>

continued

Infrastructure

Infrastructure Development Bill

On 25 February, the National Assembly passed the redrafted Infrastructure Development Bill. This aims to fast-track infrastructure development by removing unnecessary delays in planning, but has faced much criticism from stakeholders in the industry. This Bill is awaiting signature.

Budget Speech

In his 2014 National Budget Speech, Minister Pravin Gordhan announced that the budgeted spending for public-sector infrastructure would be R847 billion over the next three years. The Government has also indicated that it will, over the medium term, increase investment in economic infrastructure, which includes rail, roads and ports. An integrated city development grant has been introduced to encourage private investment in urban planning. Spending on social-infrastructure (health, education and community facilities) will increase from R30 Billion in 2012/13 to R43 Billion in 2016/17.

Recent publications include an overview of the 2014 Budget speech with regard to accelerated public infrastructure investment.

For more information, please refer to the following Alert on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/projects/Projects-and-Infrastructure-Alert.html>

Real Estate

Recent publications include –

- Non-compliance with regulations (electric fencing certificates and certificates of compliance)

For more information, please refer to the following Alert on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Real Estate>

Tax

Recent publications include –

- Judgment in the Western Cape High Court in the case of A Company v Commissioner of the South African Revenue Service
- An interesting advance tax ruling was released by the South African Revenue Service (SARS) on 12 March 2014. Binding Private Ruling 164 (Ruling) deals with the buy-back of ordinary shares by a company at an amount in excess of the market value of the shares
- Deductibility and apportionment of holding company expenses
- New developments in oil and gas Tax
- Tax Pocket Guide
- National Budget
- Amalgamation transactions following asset-for-share transactions
- On South African tax compliance, tax morality and taxpayers' freedom to do tax planning – Canada, Ireland and South Africa not worlds apart
- Toll fees and VAT invoices: vendors must get the necessary documentation to substantiate VAT input claims
- Barter transactions and tax invoices
- Poorly drafting and implemented tax planning arrangements: Rectification v "Grin and bear it"
- Assumption of contingent liabilities

For more information, please refer to the following Alerts on our website:

<http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Tax>

continued

Technology, Media and Telecommunications

Recent publications include –

- Technological revolution in the ICT sector
- Deadline extended for submissions in respect of the ICT Green Paper

For more information, please refer to the following Alerts on our website:

[http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Technology, Media and Telecommunications](http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Technology,MediaandTelecommunications)

TRAINING, LEARNING AND SKILLS DEVELOPMENT

We value training and skills development as an important part of our corporate culture.

We offer various training sessions, presentations, updates and workshops on a range of topics.

Please visit our website for more information about upcoming events.

The KM Team

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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