MATTERS

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DISPUTE RESOLUTION

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Any proceedings for judicial review in terms of s6(1) must be instituted without unreasonable delay and not later than 180 days after the date.

DO COURTS HAVE THE POWER TO SUBSTITUTE A DECISION TO AWARD A TENDER?

It is generally prudent and proper that upon review, a flawed decision is remitted to the administrative decision-maker (organ of state) for reconsideration. The reasons for this rule as held in the case of *Gauteng Gambling Board v Silverstar Development Ltd and others* 2005 (4) SA 67 (SCA) are not only constitutional, but institutional in nature as the administrative organ (Administrator) on which a power is conferred is the appropriate entity to exercise such decision-making powers.

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LITIGATION IS LIKE RUGBY?

"When you have your mind on rugby all of life's other rugby just seems to rugby into rugby." (Bloombury Sport on Twitter)

How often do we watch a loose forward get his hands on the ball after a tackle and through brute strength and determination, manages to stay on his feet and wrest the ball from the grasp of the opposition, only to have the referee penalise him for "not coming through the gate"?

Of course that is not the end of the game of rugby but for the applicant in the matter of *DDP Valuers (Pty) Ltd v Madibeng Local Municipality,* it was the end of its day in court. The Municipality had issued a tender and DDP Valuers submitted a bid. When the tender was awarded to somebody else with a far higher price DPP went to court. The Municipality claimed that DDP had not "come through the gate" and exhausted its internal remedies as it is required to do in terms of s7(1) of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA).

DDP disputed that regulation 49 of the Municipal Supply Chain Management Regulations constituted an internal remedy because that internal process did not have the power to declare the award of the tender invalid and set it aside. That regulation states that "the supply chain management policy of a municipality... must allow persons aggrieved by decisions... to lodge...a written objection or complaint to the municipality...". Regulation 50 goes on to provide for the appointment of an independent and impartial person "to assist in the resolution of disputes between the municipality...and other persons...or to deal with objections, complaints or queris...". Regulation 50 (4) provides that the person appointed must "strive to resolve promptly all disputes...received".

In the Gauteng Division of the High Court, Pretoria the court agreed with the Municipality and dismissed the review application on the technical point without determining the merits of the application. DPP appealed to the Supreme Court of Appeal which found that although the powers of the independent and impartial person are not set out in the regulations, "they clearly do not include powers to correct or set aside the decision of the Municipality complained of". The court found that this independent and impartial person has no decision-making powers and in the circumstances this falls far short of what would constitute an internal remedy. The appeal was successful and the parties must now return to Pretoria from Bloemfontein for the Gauteng Division to decide the substance of the review.

So DPP was found ultimately to have "come through the gate" and retrieved possession of the ball legitimately and it will get another day in court. The penalty imposed by the Pretoria court was set aside and DPP is allowed to continue with the review.

Unsurprisingly litigation does have some characteristics in common with rugby. Except that it is not a game, it is not over in 80 minutes (sometimes not even 80 weeks) and you don't have to wear really short shorts to participate.

Tim Fletcher

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DO OUR COURTS INTERFERE IN UNFAIR CONTRACTS?

Judge Davis in the Western Cape High Court, in the case of Combined Developers v Arun Holdings & Others 2015 (3) SA 215 WCC recently refused to enforce a clause in a contract where enforcement was unfair.

Legal academics have been calling for recognition of an ethical standard of good faith in the law of contract. Since 1996 our courts are enjoined by our Constitution, when developing the common law, to promote the spirit, purport and object of the Bill of Rights which represents a value system ordained by the Constitution as the supreme law of our country. Freedom of contract was not included as a fundamental right in the Bill of Rights.

The Supreme Court of Appeal (SCA), resistant to radical change, but aware of its duty to keep the law aligned with changing social needs and values, has adopted a conservative course of incremental change within a framework of existing legal principles, using public policy and refinement thereof, as an instrument for change. In an article in the 2009 SA Law Journal by Mr Justice F Brand SC, a judge in the SCA, he concedes that "maybe the fine tuning of 'public policy' may also require greater activism and ingenuity on the part of the judiciary than they have hitherto displayed". However, he warns that palm-tree justice is no substitute for the application of established principles of contract law.

Having regard to what is described as a Mexican stand-off between our twin apex courts, our high courts are not hesitant in dealing with contracts where intervention is called for by one of the parties. In the case of Potgieter & Another v Potgieter N.O. & Others 2012 (1) SA 637 SCA we see our SCA overturning a judgment of the Gauteng High Court where Judge Bertelsmann found that "under our new constitutional dispensation it is part of our contract law that, as a matter of public policy, our courts can refuse to give effect to the implementation of contractual provisions which it regards as unreasonable and unfair". In reversing this judgment as being fundamentally unsound, the SCA was adamant in stating that "acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty". The SCA justifies its criticism of Bertelsmann's judgment by referring to the Constitution. The failure by Judge Bertelsmann to follow the tenets of the common law offended the principle of legality, regarded by the SCA as part of the rule of law, which in turn constitutes a founding value in s1 of the Constitution. That was the last word on this topic from the SCA.

While the SCA is vehemently protecting contractual autonomy, we find statements in Constitutional Court judgments that "contract Law cannot confine itself to colonial tradition alone ... values embraced by an appropriate appreciation of Ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution", and "indeed it is highly desirable, in fact necessary, to infuse the law of contract with constitutional values including values of Ubuntu which aspire much of our constitutional compact".

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Recently, in the Western Cape High Court, Judge Davis, clearly taking up the challenge from Mr Justice Brand in his article, refused to enforce a contractual provision which he described as "startlingly draconian and unfair". In arriving at his judgment, he draws from the Constitutional Court judgment in Everfresh Market Virginia (Pty) Limited v Shoprite Checkers (Pty) Limited 2012 (3) BCLR 219 CC where reference is made to "an infusion of the law of contract with constitutional values including values" of Ubuntu. Judge Davis acknowledges the fact that his individual sense of propriety and fairness is not the test and then, recognising the SCA's acceptance of public policy as the legal mechanism for intervention, , looks to the normative framework of the constitution in order to identify an objective standard. Drawing from the SCA's judgment in Juglal v Shoprite Checkers (Pty) Limited 2004 (5) SA248 SCA, Judge Davis drills into the core of the SCA's judgment where it refers to "unconscionable immoral or illegal conduct" and concludes that implementation of the contractual provision, which may not itself be contrary to public policy, is so objectionable that it is sufficiently "oppressive, unconscionable or immoral" to constitute a breach of public policy and that public policy can be invoked in justification of a refusal to enforce such a provision.

It is clear that our High Court judges will not hesitate to intervene in contracts which they perceive to be sufficiently "oppressive, unconscionable or immoral" to be contrary to public policy and that they are prepared to apply greater activism and ingenuity, as suggested by Mr Justice Brand. We will have to wait and see to what extent the SCA will allow public policy to be "fine tuned" (or perhaps stretched?) in this process.

The Constitutional Court, however, may be champing at the bit to rewrite our law on good faith in contracts.

Willem Janse Van Rensburg

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BUSINESS RESCUE: MORATORIUM ON ALTERNATIVE DISPUTE RESOLUTION MECHANISM

Section 133(1)(a) of the Companies Act 71 of 2008 (Companies Act) states that inter alia no legal proceeding against a company in business rescue may be commenced or proceeded with in any forum, except with the written consent of the business rescue practitioner (BRP). The Companies Act does not define the phrase 'legal proceeding'.

The Supreme Court of Appeal (SCA), in the recent judgment of *Chetty v Hart N.O. and another [2015] ZASCA 112*, was called upon to interpret and determine 2 questions pertaining to this section, namely:

- whether "arbitrations" fall within the definition of "legal proceeding(s)" and are subject to the moratorium imposed by the commencement of business rescue proceedings; and
- if so, whether arbitration proceedings (leading to a subsequent arbitration award) conducted without the consent of the BRP, are a nullity.

In this specific instance, the Appellant and a company known as TBP Building and Civils (Pty) Ltd (TBP) had referred a dispute to arbitration which was heard on 12 October 2012, the award was handed down on 23 October 2012. Unbeknown to the Appellant and the arbitrator, TBP was placed into business rescue on 11 October 2012. The consent of the BRP to continue with the arbitration had neither been sought nor obtained, as per s133(1)(a) of the Companies Act.

The Appellant, dissatisfied with the arbitration award, subsequently applied to court to have it reviewed and set aside. Her argument centred on the premise that "legal proceeding(s)" under s133(1)(a) included 'arbitrations', she further submitted that the effect of non-compliance with s133(1)(a) meant that the arbitrator had no competence to determine the issues between the parties and the arbitration award was a nullity. The respondent conversely contended that "arbitrations" did not fall within the definition of "legal proceedings" and were not subject to the moratorium.

The court a *quo* in this instance had held that an arbitration did not constitute a "legal proceeding" and that the consent of the BRP was not required to commence or continue arbitration proceedings once a company was placed in business rescue.

In terms of point one above, the SCA considered *inter alia* the purpose of business rescue proceedings and held that it is to "give the company breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability", furthermore, the reason behind the requirement of consent from the BRP is so that s/he can assess how the claim will impact on the well-being of the company and its ability to regain financial health. In this regard, the SCA held that a general moratorium on the rights of creditors is crucial in order to achieve the aforementioned objective. Given the ubiquitous use of arbitrations to resolve commercial disputes, excluding these proceedings (which can be both costly and lengthy) from the moratorium

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created by s133(1)(a) would significantly hinder the attainment of the objectives of business rescue. Accordingly, the definition of "legal proceedings" in this context was held to include arbitrations.

In regard to the second point, the court held that the section was evidently enacted exclusively for the benefit of the BRP (as set out above) and confers no rights on creditors. Accordingly, a creditor has no *locus standi* to rely on non-compliance with the section, as the BRP could choose to either waive or seek the protection of the section.

It is submitted that the SCA was correct in its interpretation of s133(1)(a) and that the effect of the court a quo's ruling would have drastically impaired BRPs' abilities to attempt to rehabilitate companies in business rescue, as arbitrations can be lengthy, costly and often involve a diversion of the company's resources which may hinder the effectiveness of the business rescue proceedings.

Jonathan Witts-Hewinson and Fiorella Noriega Del Valle

A creditor has no locus standi to rely on non-compliance with the section, as the BRP could choose to either waive or seek the protection of the section.

OUT OF TIME: DO THE PAJA TIME PERIODS APPLY TO ORGANS OF STATE?

Section 7(1) of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) provides that:

Any proceedings for judicial review in terms of s6(1) must be instituted without unreasonable delay and not later than 180 days after the date:

(a) subject to ss2(c), on which any proceedings in terms of internal remedies as contemplated in ss2(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

The use of the words 'person concerned' creates some confusion in determining who this provision applies to. The pertinent question is whether this provision applies to an organ of state who elects to review or set aside its own decision?

The word 'any' in s7(1) of PAJA suggests that the section is intended to apply to all proceedings for judicial review including those involving organs of state. This interpretation was, however, dismissed in *Telkom SA Limited v Merid Training (Pty) Ltd and Other* [2011] JOL 26617 (GNP) where the first and fifth respondents contended that the applicant, Telkom SA Ltd, did not bring its application within the 180 day

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period specified in s7(1) of PAJA. Telkom maintained its view that s7(1) of PAJA does not apply when the decision-maker applied to set aside its own decision. According to Telkom, the review of a decision-maker's own decision is not covered by paragraphs (a) and (b) of s7(1) which dictates the date from which the 180 days must run.

The court held that while PAJA appears to govern all proceedings for judicial review, the failure of the legislature to provide for a date where the decision-maker elects to review its own decision, indicates that the legislature did not intend s7(1) to apply to such proceedings. It was further stated that a court cannot read something into an Act which was overlooked by the legislature.

The court further held that where the decision-maker seeks to review its own decision, the common law must be applied which requires all relevant circumstances to be taken into account, particularly the merits of the case. The court must decide whether the proceedings were instituted after the passing of a reasonable time and if so whether the unreasonable delay ought to be overlooked.

In contrast, the Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal 2014* (5) SA 579 (CC) held that litigants including public functionaries are bound by statutory and common law time limits and may not circumvent them by using procedural tricks or tactics. Although s7(1) stipulates a 180 day time limit, s9(1) of PAJA allows for the granting of condonation in appropriate circumstances where the proceedings were instituted outside the 180 day period.

Thus s7(1) does apply to organs of state and the answer lies in bringing an application for condonation under s9(1) of PAJA, if a justified explanation for the delay is put forward, the delay will be condoned.

Jackwell Feris and Tiffany Jegels

The court stated that a court cannot read into an Act, in this case PAJA, something which was overlooked by the legislature.

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There are, however, exceptions to the aforesaid norm in that a court of review may, in exceptional circumstances, depart from the rule and substitute its decision for that of the administrator. This power is expressly conferred upon a court of review by s8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) as part of its wide powers to grant "any order that is just and equitable".

In deciding whether 'exceptional circumstances' exist, the overriding principle is that of fairness. In *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A), the court held that "the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and ... although the matter will be sent back, if there is no reason for not doing so, in essence it is a question of fairness to both sides".

Courts have over the years developed guidelines for identifying 'exceptional circumstances'. These guidelines can be summarised as follows:

(a) where the end result is a foregone conclusion and it would be a waste of time to order the Administrator to reconsider the matter;

(b) where a further delay would cause unjustifiable prejudice to the applicant; and

(c) where the Administrator has exhibited bias or incompetence of such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* 2015 (5) SA 245 (CC) the principles as set out above were confirmed, in that the court held that once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a forgone conclusion. The court held that a foregone conclusion exists where there is only one proper outcome of the discretion exercised by an administrator.

Accordingly, courts taking into context the above principles have the power to substitute the decision of an Administrator (setting aside the award and substituting the successful tenderer with an unsuccessful tenderer), but can only do so upon a proper consideration of all the relevant facts.

Once a court is persuaded that a decision to exercise a power should not be left to the administrative organ it can exercise such power.

Thabile Fuhrmann and Corne Lewis

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