13 JULY 2016

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

COMMERCIAL:
LURKING IN THE BACK OF THE COMPANIES ACT IS A POTENTIALLY DEVASTATING PROVISION

The gist of the section means that any person, including shareholders, directors and creditors could use it to claim back a loss caused by any other persons for any contravention of the Act.

Lurking in the back of the Companies Act, No 71 of 2008 (Act) is a potentially very devastating provision.

Section 218(2) provides that:

> Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

The High Court had cause recently to consider this legislation in *Sanlam Capital Markets v Mettle Manco* 2014 (3) All SA 454 (GJ).

The terms of law do not come wider than this: the gist of the section means that any person, including shareholders, directors and creditors could use it to claim back a loss caused by any other persons for any contravention of the Act.

The court was faced with a complex transaction concerning buying and selling of financial instruments based on debts. The claimant engaged in transactions as a result of representations made by the defendants. Things did not go according to plan and the claimant lost money. In suing the defendants, the claimant argued that the defendants had a duty of care not to make the representations to the claimant unless they were correct in all material respects. In the alternative, the claimant claimed that the defendants contravened s76(3) of the Act by acting recklessly, and further in the alternative that the defendants were liable to the claimant for the loss they had suffered in terms of s218(2).

The defendants tried to invoke various legal arguments to have the claim based on s218(2) dismissed at the exception stage.

The defendants tried to invoke various legal arguments to have the claim based on s218(2) dismissed at the exception stage. The court dismissed these arguments, reinforcing what has already been established in common law: s218 imposes liability on any person who contravenes any provision of the Act and by so doing causes that person to suffer a loss.

Section 218 of the Act is therefore hugely significant as it enables persons who allege they have suffered losses to found such claims provided that they can link such losses to a contravention of any provision of the Act. It may become even more powerful when read in combination with the section of the Act dealing with directors' duties (ss 76 and 77) and s424 of the Companies Act, No 61 of 1973 (dealing with fraudulent and reckless trading).

Richard Marcus

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ADMINISTRATIVE AND PUBLIC LAW:
THE DUTIES OF A FINANCIALLY DISTRESSED BIDDER TO DISCLOSE A CHANGE IN ITS FINANCIAL POSITION DURING THE PROCUREMENT PROCESS

In the High Court, Umso raised Tau Pele's non-disclosure as a ground upon which the Department's decision to award the tender to it should be set aside.

In *Umso Construction (Pty) Ltd v Member of the Executive Council for Roads and Public Works Eastern Cape Province and Others* ((20800/2014) [2016] ZASCA 61), the Supreme Court of Appeal considered the legal position where, following the award of a tender, it is discovered that the preferred bidder had been placed under business rescue during the bid evaluation process.

The High Court found that there was a legal duty on Tau Pele to disclose that it was financially distressed when it became aware of this fact and that its failure to do so constituted a material non disclosure.

The Eastern Cape Provincial Department of Roads and Public Works (Department) awarded a tender to Tau Pele Construction (Pty) Ltd (Tau Pele). Umso Construction (Pty) Ltd (Umso), was one of four unsuccessful tenderers.

Umso instituted proceedings asking the High Court to review and set aside the Department's decision to award the tender to Tau Pele and to substitute it as the successful tenderer. The High Court set aside the decision to award the tender to Tau Pele but declined to substitute Umso as the successful tenderer.

Th timeline in this matter is crucial. The essential dates are:

- The Department advertised the tender on 27 July 2012.
- The closing date for the submission of bids was 8 August 2012.
- Tau Pele applied to be placed under business rescue on 17 September 2012. It was placed under business rescue on 21 September 2012, but did not disclose this information.
- Tau Pele's business rescue was successfully terminated on 21 May 2013.
- On 27 May 2013, the Department awarded the tender to Tau Pele.
- After Umso initiated proceedings in the High Court in August 2013, it discovered that Tau Pele had been under business rescue during the bid-evaluation process. It filed supplementary founding papers to address this issue. The Department learnt that Tau Pele had been placed under business rescue in Umso's supplementary founding papers.

In the High Court, Umso raised Tau Pele's non-disclosure as a ground upon which the Department's decision to award the tender to it should be set aside. The Department agreed with this contention. Tau Pele argued that it had no legal duty to inform the Department of its business rescue status, and that its non-disclosure did not invalidate the award of the tender.

The High Court found that there was a legal duty on Tau Pele to disclose that it was financially distressed when it became aware of this fact and that its failure to do so constituted a material non-disclosure. The Supreme Court of Appeal (SCA) agreed. According to the SCA, this duty emanated from two sources:

1. One of the Department's tender conditions was that the Department would "only consider tenders from tenderers who can prove to its satisfaction that they have the necessary financial resources to undertake and complete the work". According to the SCA "it can hardly be disputed" that a prospective tenderer would fall foul of this condition if it had applied to be placed under business rescue because it was financially distressed.

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ADMINISTRATIVE AND PUBLIC LAW:
THE DUTIES OF A FINANCIALLY DISTRESSED BIDDER TO DISCLOSE A CHANGE IN ITS FINANCIAL POSITION DURING THE PROCUREMENT PROCESS

CONTINUED

This case illustrates that a bidder may have to disclose a change in its financial position to a procuring entity.

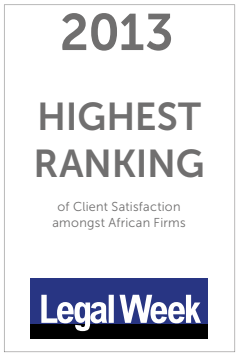
2. According to the law of contract, in contracts "of utmost good faith", such as contracts of insurance and agency, the non disclosure of a material fact amounts to misrepresentation by silence. There has been "a steady progression in our law" towards applying this rule to contracts other than those "of utmost good faith". In these cases the rule is applied because one party involuntary relies on the other party to disclose certain facts that are only known to that party. According to the SCA, the present case was such a situation.

The SCA concluded that, once Tau Pele's financial position had changed materially after it submitted its bid, it was under a duty to disclose that material fact.

It is noteworthy that Tau Pele was found to be under a duty to disclose its materially changed financial position, even though it applied for, and was placed under, business rescue after it submitted its bid; and even though its business rescue was successfully terminated before the Department awarded the tender to it.

This case illustrates that a bidder may have to disclose a change in its financial position to a procuring entity. Whether this duty arises will depend on whether the change was material. This is often difficult to determine. A bidder should therefore proceed with caution if, after submitting its bid, its financial position changes markedly – particularly where this change affects its ability to deliver the goods and/or services that it tendered for. The prudent course of action would be to disclose this to the entity that solicited its bid.

Lionel Egypt and
Henri-Willem van Eetveldt



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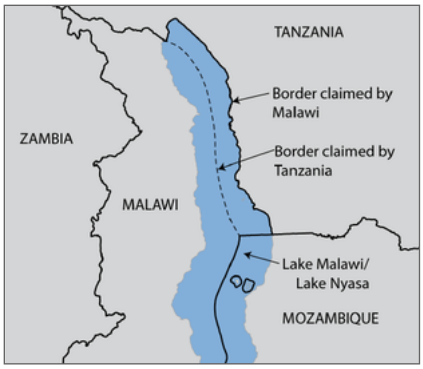
INTERNATIONAL ARBITRATION:
NOT SO PEACEFUL DOWN BY THIS LAKE – THE TANZANIA AND MALAWI LAKE DISPUTE

The tension escalated in 2011 when Tanzania took exception to the Malawian government's award of four oil & gas exploration licences in the eastern shoreline of the Lake that Tanzania regards to be within its sovereign jurisdiction.

The central question to be determined is whether Tanzania or Malawi exercise sovereignty over the eastern half of the northern part of the Lake separating Tanzania and Malawi.

The Tanzania and Malawi lake dispute and the underlying risk to Malawi from an investor protection perspective.

Tensions have been flaring between the United Republic of Tanzania (Tanzania) and the Republic of Malawi (Malawi) for the past few years relating to whether the boundary demarcating the respective states' sovereign territory or territorial waters in respect Lake Malawi or Lake Nyasa as Tanzania refers to it (Lake) runs along the middle of the Lake or along the Lake's eastern shoreline of the territory of Tanzania.

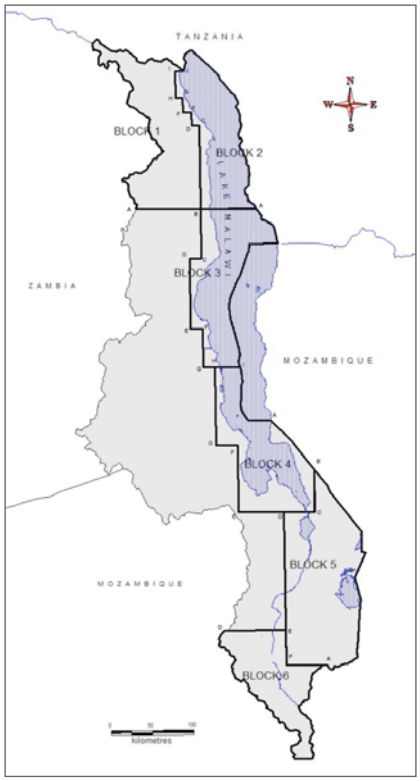


www.miningmalawi.com and http://www.tzaffairs.org/

The tension escalated in 2011 when Tanzania took exception to the Malawian government's award of four oil & gas exploration licences in the eastern shoreline of the Lake that Tanzania regards to be within its sovereign jurisdiction. The potential for lucrative revenue streams to be generated from the exploitation of oil & gas resources in this region has further encouraged the dispute.

The central question to be determined is whether Tanzania or Malawi exercise sovereignty over the eastern half of the northern part of the Lake separating Tanzania and Malawi.

This map depicts the blocks awarded by the Malawian government to four multi-national firms (mostly on the north-eastern side of the Lake).



Citizens for Justice Report: Oil Exploration and Production in Malawi dated September 2014

From a legal perspective it appears that Malawi has a legitimate right in asserting its sovereignty along the Lake's eastern shoreline. The border between Malawi and Tanzania was initially demarcated by colonial powers, Britain and Germany, in terms of the Heligoland Treaty of 1890 (Treaty). By virtue of the Treaty, customary

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CONTINUED

So what does this dispute mean for the multi-national firms who have been awarded exploration licences by Malawi, where Malawi has a clear legal right (if confirmed by the ICJ), but decides to conclude a political settlement with Tanzania on the boundary of the Lake?

international law dictates that the default legal position is that the border of Malawi runs along the north-eastern shoreline of the Lake and is, in its entirety, under the sovereign control of Malawi. The onus is on Tanzania to demonstrate that the legal position established by the Treaty was amended to reflect that the border runs along the middle of the Lake and that the shoreline boundary is accordingly incorrect.

From a South African Development Community (SADC) dispute resolution perspective the former presidents of Botswana and Mozambique have been appointed as mediators to resolve the border dispute. In the event that a mediated settlement is not achieved, Malawi or Tanzania could resolve the dispute by international arbitration. Both Malawi and Tanzania are parties to the Statute of the International Court of Justice (ICJ Statute) annexed to the Charter of the United Nations. Article 36 of the ICJ Statute allows states, without first exhausting diplomatic negotiations to refer, among others, cases involving treaty interpretation to the International Court of Justice (ICJ) for arbitration. Tanzania may, however, view any ICJ arbitration as a serious threat, as an arbitral award by the ICJ will extinguish any claim Tanzania has to the Lake. This will most probably encourage Tanzania to rather seek a political solution to the dispute, having regard to the economic benefit flowing from the natural resources (minerals, petroleum, fisheries and so on) of the Lake.

So what does this dispute mean for the multi-national firms who have been awarded exploration licences by Malawi, where Malawi has a clear legal right (if confirmed by the ICJ), but decides to conclude a political settlement with Tanzania on the boundary of the Lake? If a political settlement results in the boundary of the Lake being amended the sovereignty of Malawi in exercising regulatory control over the exploration blocks (specifically blocks two and three) will be extinguished. By virtue of that it means that the right of the exploration licences holders would be extinguished or limited, making the commercial exploitation of the blocks impossible or uneconomical as Tanzanian law will apply to the awarding and exploitation of oil & gas resources within its territory.

Although a political settlement of the Lake dispute would be in the best interest of SADC region, when crafting a political resolution to the dispute parties must be careful not to expose Malawi to potential international arbitration where vested rights of investors are either limited or extinguished as a result of the compromise reached between the two states. Investors who were granted exploration licences may be of the view that they have a legitimate expectation that their rights will not be materially affected or extinguished by any decision by Malawi to conclude a political settlement. For Malawi it appears that any settlement which prejudices vested rights of investors would not be in Malawi's best interest. The least risky route might be for the ICJ to resolve the dispute through international arbitration.

Jackwell Feris

CLICK HERE to find out more about our International Arbitration team.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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