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DISPUTE RESOLUTION ALERT

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ARBITRATION IS A TOOL, NOT A MAGIC WAND

Any tradesman will tell you that turning a screw with a chisel is at best inefficient, at worst dangerous. Just like a chisel, arbitration is a tool with a clear purpose and if used in the wrong application or by an unskilled operator it will at best underperform, at worst bring disaster.

IN WHAT CIRCUMSTANCES CAN PROVISIONAL TRUSTEES SELL AN INSOLVENT ESTATE'S IMMOVABLE PROPERTY?

The Supreme Court of Appeal (SCA) in *Swart v Starbuck & Others* 2016 ZASCA 83, reaffirmed the necessary authorisation for a trustee of an insolvent estate to sell an insolvent estate's immovable property.

HOW MANY SUBMISSIONS CAN THE MASTER HEAR WHEN CONSIDERING A CREDITOR'S CLAIM?

In the recent case of *Constantia Insurance Company Limited v Master of the High Court, Johannesburg* (23968/2015) [2016] ZAGPJHC 121 the High Court considered whether the provisions of the Insolvency Act, No 24 of 1936 (Act) permit the Master to consider liquidators' additional submissions in response to a creditor's substantiation of its claim.

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CLIFFE DEKKER HOFMEYR

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Any tradesman will tell you that turning a screw with a chisel is at best inefficient, at worst dangerous. Just like a chisel, arbitration is a tool with a clear purpose and if used in the wrong application or by an unskilled operator it will at best underperform, at worst bring disaster. Arbitration is often favoured over resolving disputes in open court for reasons of cost, confidentiality and the ability to choose an arbitrator with deep experience in the subject matter of the dispute. These points are all relevant and important and arbitration remains a powerful and often appropriate mechanism for dispute resolution but it remains a dispute resolution tool, not all things to all people.

A strong arbitral institution with good rules and a strong arbitrator prepared to apply the rules significantly reduces the opportunity for a party intent on delay.

Arbitrations can be very cost effective and speedy when the parties are able to work together to get the real dispute to a hearing. However, when one of the parties wants to delay or avoid the hearing altogether arbitration can be a very slow and frustrating process. That is when the choice of arbitral institution and arbitrator becomes very relevant. A strong arbitral institution with good rules and a strong arbitrator prepared to apply the rules significantly reduces the opportunity for a party intent on delay. Much of the success of an arbitration then is in the hands of the people drafting the initial agreements. Unfortunately arbitration clauses in agreements are often regarded as standard or boilerplate clauses and are included without much thought being given to the potential parties to a dispute, the nature of the dispute and the circumstances in which a dispute might arise. Although this will involve substantial crystal ball gazing those are the kind of factors vital to the crafting of an arbitration arrangement.

Confidentiality of arbitration may turn out to be more perceived than real if the enforcement of the arbitration award requires an application to in court. Aside from the fact that courts are public and the business of the courts is reported on daily, a listed company may also attract reporting obligations to its shareholders on matters and issues dealt with in an arbitration or an award.

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CLIFFE DEKKER HOFMEYR

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A broader consequence of arbitrations, particularly where there is no right of appeal, is that the courts' opportunity to develop and explain the common law is stifled.

An arbitrator "has the right to be wrong" according to the Supreme Court of Appeal in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). Bearing that in mind and that the arbitration process is final and binding and not subject to appeal to the courts, building into the arbitration process an appeal mechanism is often prudent. The right to appeal to a further arbitrator or panel of arbitrators must be weighed against the need for a speedy resolution of disputes but disallowing an appeal process in the interests of certainty and finality in the dispute may not always be in the interests of the parties. Absent an appeal process, the only remedy is to apply to court to review the award on the basis of gross irregularity, misconduct or on the basis that the award was improperly obtained. These grounds of attack are very challenging being directed at the process by which an arbitrator came to making the award, as opposed to the finding itself being wrong.

A broader consequence of arbitrations, particularly where there is no right of appeal, is that the courts' opportunity to develop and explain the common law is stifled. The common law must be developed and explained by the courts to keep pace with technological advances and increasing globalisation of trade and commerce. Arbitrators unfortunately can only apply the law, not develop it.

While arbitration remains an extremely useful tool for the resolution of disputes in a confidential forum, it remains a tool not a magic wand.

Sonia de Vries and Terrick McCallum

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CLIFFE DEKKER HOFMEYR

IN WHAT CIRCUMSTANCES CAN PROVISIONAL TRUSTEES SELL AN INSOLVENT ESTATE'S IMMOVABLE PROPERTY?

The sales were subject to the suspensive condition that the trustees must obtain consent from the Master to sell the Properties.

A provisional trustee has the same powers and duties as a final trustee, except that he shall not have the power to sell any property belonging to the insolvent estate unless authorised to do so by the court or the Master,

The Supreme Court of Appeal (SCA) in *Swart v Starbuck & Others* 2016 ZASCA 83 reaffirmed the necessary authorisation for a trustee of an insolvent estate to sell an insolvent estate's immovable property.

Mr Swart's estate was finally sequestrated on 1 November 2005. On 24 January 2006, three provisional trustees were appointed by the Master of the High Court. At the time of Mr Swart's provisional sequestration, he owned certain immovable properties (Properties).

On 16 November 2005, a third party submitted written offers to purchase the Properties to one of the trustees only. At the time the trustees were not yet formally appointed as provisional trustees of the insolvent estate, but had only been advised by the Master of the intention to appoint them as such.

The sales were subject to the suspensive condition that the trustees must obtain consent from the Master to sell the Properties. The offers to purchase were accepted by the trustees as the 'seller', before his formal appointment.

In terms of s18(3) of the Insolvency Act, 24 of 1936 (Act) a provisional trustee has the same powers and duties as a final trustee, except that he shall not have the power to sell any property belonging to the insolvent estate unless authorised to do so by the court or the Master, and subject to such conditions as the Master may direct.

However, s80bis of the Act permits a trustee, at any time before the second meeting of creditors, if satisfied that immovable property of the estate should be sold, to recommend, with reasons, such sale to the Master in writing. The Master may then authorise the sale of such property on such conditions and in such manner as the Master may direct.

The trustees submitted a written application to the Master in terms of s80bis, as read with s18(3) of the Act, for the extension of their powers to enable them to sell the Properties by way of private treaty, which consent was granted by the Master.

The issue before the court a quo was whether the sale of the Properties was irregular and constituted a maladministration of the insolvent estate because:

- the trustees did not have the necessary authority, alternatively, capacity, to accept the offers, as at the relevant time they were not yet appointed as provisional trustees;
- the trustees did not have extended powers in terms of s18(3) of the Act; and
- the trustees had not been granted any authorisation by the Master in terms of s80bis of the Act, to sell the Properties to the purchaser.

The SCA confirmed the decision of the court *a quo* and found that the trustees were permitted to sell the Properties, having been duly authorised by the

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IN WHAT CIRCUMSTANCES CAN PROVISIONAL TRUSTEES SELL AN INSOLVENT ESTATE'S IMMOVABLE PROPERTY?

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The trustees had not been granted any authorisation by the Master in terms of s80bis of the Act, to sell the Properties to the purchaser.

Master in terms of s80bis of the Act, notwithstanding the fact that when the trustees entered into the sale agreement they were not formally appointed. The SCA based its decision on the fact that the acceptance of the offers to purchase was made subject to the Master granting the necessary consent. Without this suspensive condition, the SCA may have declared the agreement void.

As a warning to trustees, the SCA made reference to s82(8) of the Act which, if applicable, holds trustees liable for damages payable to an insolvent estate if the trustees dispose of property without being duly authorised to do so.

The SCA reiterated the principles of South African law of property's abstract system of valid transfer of ownership, being:

- delivery, which is effected by the registration of transfer in the deeds office; and
- a real agreement, which is the intention on the part of the transferor to transfer ownership and an intention on the part of the transferee to become owner, irrespective of any legal defect to the written sale agreement.

Despite South African law recognising an abstract system of transfer of ownership, it may be prudent for trustees to include a suspensive condition in the sale agreement stipulating that the sale is subject to the necessary Master's authorisation being obtained at the date of transfer of the immovable property. This precautionary measure could prevent wasteful litigation, the possibility of agreements being declared null and void, and trustees being held liable for damages towards the insolvent estate.

Lucinde Rhoodie and Mari Bester

HOW MANY SUBMISSIONS CAN THE MASTER HEAR WHEN CONSIDERING A CREDITOR'S CLAIM?

The question before the court was whether the Master has the discretionary power to call for and consider any additional submission by the liquidators in the absence of any express provision to this effect.

In the recent case of *Constantia Insurance Company Limited v Master of the High Court, Johannesburg* (23968/2015) [2016] ZAGPJHC 121 the High Court considered whether the provisions of the Insolvency Act, No 24 of 1936 (Act) permit the Master to consider liquidators' additional submissions in response to a creditor's substantiation of its claim.

In this case, Constantia Insurance (the applicant) proved a claim against an insolvent estate. In their written submissions the liquidators requested the Master to expunge the claim. In terms of s45(3) of the Act, the Master is allowed to reduce or disallow a creditor's claim. In this instance the Master afforded the applicant an opportunity to substantiate its claim. The applicant then submitted a substantiation of its claim as expressly allowed in s45(3) of the Act.

Thereafter, without there being any express provision in either the Act, the Companies Act, No 61 of 1973 (Companies Act) or the winding up regulations under the Companies Act, the Master provided the liquidators with a copy of the applicant's submissions and afforded them an opportunity to respond. The liquidators submitted a reply that the Master invited the applicant to deal with in reply. The applicant, however, declined, contending that the Master was obliged to make a decision based only on the parties' first two submissions as prescribed by the Act.

The question before the court was whether the Master has the discretionary power to call for and consider any additional submission by the liquidators in the absence of any express provision to this effect.

The liquidators argued that the principle of audi alteram partem (let the other side be heard) afforded the Master this discretion.

The liquidators argued that the principle of *audi alteram partem* (let the other side be heard) afforded the Master this discretion. The applicant, however, argued that the audi principle did not apply for two reasons:

- the liquidators are not persons who are potentially affected by the Master's decision; and
- in any event, the *audi alteram partem* principle does not permit the filing of a document that is not permitted by legislation.

The applicant's main contention was that s44 and s45 of the Act envisage a speedy procedure to kick-start the winding up process and was not the last word on the validity of a claim (the party aggrieved by a decision may challenge it under s151 of the Act or challenge the liquidation and distribution account). The liquidators countered that the legislation assigns a quasi-judicial function to the Master and that, unless *audi alteram partem* was expressly excluded, the section should be interpreted as including it and that this principle entitled the Master to call for and consider further submissions.

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The court held that the principle of audi alteram partem was now subsumed within the right to just administrative action in the Constitution and within the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA).

The court held that the principle of *audi alteram partem* was now subsumed within the right to just administrative action in the Constitution and within the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA). Unless PAJA afforded a right to be heard beyond that already provided for in s45(3) of the Act, then such right does not exist. Section 45(3) satisfied the requirements of PAJA having regard to the objective and purpose of s45(3) and the Act. The court held that the Master is obliged to determine the validity of a claim on the basis only of the liquidators' report and the applicant's written substantiation of its claim and no further submissions are allowed.

This case adds to a growing list of literature which affirms that in the post-constitutional era, the interpretation of legislation (including pre-constitutional legislation), is centrally informed by the Constitution and the values upon which it is founded. The general overarching principle remains that consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

Thabile Fuhrmann and Vincent Manko

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OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Adine Abro
Director
T +27 (0)11 562 1009
E adine.abro@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Sonia de Vries
Director
T +27 (0)11 562 1892
E sonia.devries@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

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.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Business Rescue and Insolvency sector and services, please contact:

Julian Jones
Sector Head
Business Rescue and Insolvency
T +27 (0)11 562 1198
E julian.jones@cdhlegal.com

Grant Ford
Regional Practice Head
Director
Dispute Resolution
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Thabile Fuhrmann
Director
Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Tobie Jordaan
Director
Dispute Resolution
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Richard Marcus
Director
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Lucinde Rhoodie
Director
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Mongezi Mpahlwa
Senior Associate
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Belinda Scriba
Senior Associate
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Vincent Manko
Associate
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Janine Matthews
Associate
Dispute Resolution
T +27 (0)11 562 1130
E janine.matthews@cdhlegal.com

Vusiwe Ngcobo
Associate
Dispute Resolution
T +27 (0)11 562 1329
E vusiwe.ngcobo@cdhlegal.com

Roxanne Wellcome
Associate
Dispute Resolution
T +27 (0)11 562 1683
E roxanne.wellcome@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR
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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR