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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

ADMINISTRATIVE AND PUBLIC LAW:
COURTS ORDER ERRANT STATE OFFICIALS TO PAY LEGAL COSTS OUT OF THEIR OWN POCKETS

Judges have done a great deal in scrutinising the conduct of various state officials alleged to have abused their power in exercising public functions.

The Constitution guarantees everyone the right to just administrative action that is lawful, reasonable and procedurally fair. To give effect to those principles, the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) was enacted to lay down rules and principles that apply to and bind all levels of government (national, provincial and local). PAJA applies to organs of state when exercising, among other things, a public power of performing a public function in terms of any legislation. PAJA also empowers the courts to scrutinise the lawfulness, reasonableness and procedural fairness of administrative action taken by public officials.

It is often the taxpayers who are left to pick up the tab from such behaviour, and the courts are no longer prepared to condone it.

In recent judgments handed down by superior courts, judges have done a great deal in scrutinising the conduct of various state officials alleged to have abused their power in exercising public functions. Seemingly our courts have become increasingly impatient towards state officials who frustrate members of the public in their attempts to enforce their constitutional rights by holding officials accountable to the principles underlying just administrative action. This is most evident in review proceedings involving tender irregularities where procurement processes are ignored or circumvented. Notably, it is often the taxpayers who are left to pick up the tab from such behaviour, and the courts are no longer prepared to condone it.

The Supreme Court of Appeal (SCA) dealt with this issue in the matter of *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) 27 May 2013.

The appeal was launched by the Gauteng Gambling Board (Board) following the termination of the membership of all members of the Board by the MEC for Economic Development Gauteng (MEC). The MEC dissolved the Board, ostensibly on the basis that they had unanimously decided against complying with her instruction to relocate the Board's offices to a central hub in Johannesburg's central business district, in which her Department and associated statutory organs are housed. A further complaint was that the MEC terminated their membership because they had refused to obey her earlier instruction to accommodate, in a building owned by the Board, the offices of a commercial entity alleged to be owned by her. The appellants contended that the MEC had no power to dissolve the Board for the reasons given by her or on any other basis.

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CONTINUED

The court...added that it was time to seriously consider holding officials who behave in the highhanded manner... personally liable for costs incurred.

The SCA showed displeasure towards the manner in which the MEC behaved, over and above the manner in which she terminated the membership of the entire board, and in particular, her conduct after the litigation was launched. The court took umbrage to the MEC's responses to the Board's challenge describing her as indignant and playing the victim. The court stated that she adopted this attitude while acting in flagrant disregard to constitutional norms and noted that:

> *Our present constitutional order is such that the State should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by the courts of constitutional rights.*

The court found that the special costs order, namely, on the attorney and client scale, sought by the Board was justified, but added that it was time for courts to seriously consider holding officials who behave in the highhanded manner such as the MEC, personally liable for costs incurred. This, the court stated, might have "a sobering effect on truant public office bearers".

The Constitutional Court also recently dealt with similar behaviour in the matter of *MEC for Health, Gauteng v Lushaba* [2015] ZACC 16 23 June 2015, in which the MEC was ordered by the High Court to pay the costs of the action on a punitive scale. In addition, and unusually, the High Court held various state officials (not part of the proceedings) personally liable for the costs of the action on a punitive scale jointly and severally with the MEC.

In this matter Lushaba instituted a damages claim in the High Court, arising from medical negligence at the hands of officials in the employ of the MEC. The MEC defended the action. The High Court found that the defence advanced by the MEC was devoid of any merit and held the MEC liable for Lushaba's damages. The court was also critical of the manner in which the MEC's defence was presented, and queried the decision taken by the MEC to defend the action and how the decision was taken.

Although the Constitutional Court held that the High Court was not competent to hold state officials personally liable for costs of an action to which they were not a party, it agreed with the findings made by the High Court insofar as the accountability of state officials in exercising public power was concerned.

It is clear that there is a trend slowly being adopted by the courts in holding to book those state officials who frustrate the principles of just administrative action enshrined by the Constitution. These long awaited new developments pave the way for litigants who are forced to look to our courts to enforce their constitutional rights to be recompensed for the inevitable financial prejudice.

Thabile Fuhrmann
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CORPORATE INVESTIGATIONS:
WHO ARE YOU REALLY DOING BUSINESS WITH?

With the Panama papers still fresh in the mind, the US and the UK are aligning their compliance frameworks with the standards set by the Financial Action Task Force.

Until recently you could start up a company or open a bank account in most countries around the world without providing any information on beneficial ownership and factual control. This frustrated forensic investigations substantially. This is changing rapidly as "beneficial ownership" becomes the regulatory benchmark for transparency in compliance. Financial institutions will now be obligated to ask their clients to lift their corporate mask and reveal their true identity and controlling mind. Three weeks ago, the United States Financial Crimes Enforcement Network (FINCEN) implemented final rules that introduced beneficial ownership disclosure obligations. This substantially raises the bar for customer due diligence standards in the US financial sector. Financial institutions have until 11 May 2018 to comply.

The FATF Recommendation 24 is that countries should ensure that there is adequate, accurate and timely information available on the beneficial ownership of all legal persons, and that their authorities can access this information in a timely manner.

Three months ago, the UK implemented legislative measures requiring incorporated companies to keep their own register of "people with significant control" (PSC). The registers will contain information on the company's beneficial ownership and control, and will be available for public inspection. The second stage of this new requirement involves the PSC information being held on a publicly searchable database. With the Panama papers still fresh in the mind, the US and the UK are aligning their compliance frameworks with the standards set by the Financial Action Task Force (FATF) - the independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing.

In 2011 the World Bank published its Puppet Masters Report highlighting the abuse of corporate vehicles to conceal beneficial ownership and, in the following year, the FATF published its revised Recommendations which now also provide for transparency and beneficial ownership. The G20, at the Brisbane Summit in November 2014, recognised the importance of collecting beneficial ownership information and a month later the European Union consented to create an anti-money laundering directive and, at national level, registers of beneficial ownership information throughout the European Union.

The FATF definition of a beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted and includes those persons who exercise ultimate effective control over a legal person or arrangement. The FATF Recommendation 24 is that countries should ensure that there is adequate, accurate and timely information available on the beneficial ownership of all legal persons, and that their authorities can access this information in a timely manner.

Although the UK became the first government in the world to commit to creating a fully public beneficial ownership register of companies, several other countries have indicated their support for the concept and several have already started raising the bar on customer due diligence in their own jurisdictions.

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CONTINUED

The South African Financial Intelligence Centre Amendment Bill of 2015, which provides for beneficial ownership, was approved by cabinet and could become law as soon as it has been assented to by the President.

Australia updated its preventative measure requirements in 2014 to align its regulatory framework with the FATF Recommendations and, since 2014, Canada, has also made it mandatory for reporting entities to ascertain the beneficial ownership of their clients.

South Africa has not yet introduced beneficial ownership but the South African Financial Intelligence Centre Amendment Bill of 2015, which provides for beneficial ownership, was approved by cabinet and could become law as soon as it has been assented to by the President. Two weeks ago , at the High Level Conference on Illicit Financial Flows, the Minister of Finance, Mr Pravin Gordhan, stressed that it is in the interest of Africa to quickly develop the capacity to implement the concept of beneficial ownership and that the establishment of beneficial ownership is fundamental to detecting and preventing illicit financial flows. He reiterated that Africa must move swiftly to ensure that it has the right legislation in place emphasising that the lack of legislation to meet the expected standards of FATF recommendations, or poor enforcement, will expose domestic banks and other institutions to significant punitive action including massive fines.

This Bill is intended to align the South African regulatory framework with the standards set by the FATF. The Bill promotes the following:

- Enhanced Customer Due Diligence requirements by providing for the adoption of a risk based approach in the identification and assessment of anti-money laundering.
- Combatting the financing of terrorism risks by providing for the adoption of a risk based approach to customer due diligence and, in particular, introducing the concept of beneficial ownership.
- "Domestic Prominent Influential Persons" as potential clients presenting a potential higher risk and justifying "reasonable measures" to determine the source of the customer's wealth and the origin of funds in respect of a particular transaction.
- Enhanced "monitoring of the customer's account" in order to identify the background and purpose of all complex and unusual transactions and all unusual patters of transactions, which have no apparent or business or lawful purpose.

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If this Bill becomes law, it will undoubtedly be a formidable tool in the hands of investigators and law enforcement agencies to combat money laundering, bribery and corruption, tax evasion and financing of terrorism.

If this Bill becomes law, it will undoubtedly be a formidable tool in the hands of investigators and law enforcement agencies to combat money laundering, bribery and corruption, tax evasion and financing of terrorism. The Bill will also serve to place the financial institutions in South Africa centre stage for this process. South Africa's financial sector is regarded as one of its strongest sectors, internationally compliant with best international standards.

It is clear that the transparency in the global regulatory landscape is here to stay and that companies will have to adapt if they wish to continue conducting business within the global financial system.

Obviously, the concept of beneficial ownership is also very important for fiscal reasons.

For criminals, the world is about to become a smaller place: hiding behind anonymously owned corporate structures is going to become difficult. The financial sector's obligations will increase but forensic investigators will welcome this new initiative as following money to the criminal source will become easier.

Willem Janse van Rensburg

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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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