3 MARCH 2016

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

THE SUPREME COURT OF APPEAL HOLDS THAT CANCELLING A TENDER IS NOT ADMINISTRATIVE ACTION AND COMES DOWN IN FAVOUR OF MUNICIPAL AUTONOMY

The Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd* [2016] 1 All SA 332 (SCA) held that the cancellation of a tender is not administrative action and therefore not subject to the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA). The judgment is a clear affirmation of the primacy of the executive branch of government in setting procurement priorities.

BUSINESS RESCUE MORATORIUM, CONTINUES TO BE CONTENTIOUS

The restructuring of financially distressed companies is on the increase globally. In line with this international trend is Chapter 6 of the Companies Act, No 71 of 2008 (Act) which introduced business rescue into the South African corporate landscape.

CDH
CLIFFE DEKKER HOFMEYR

THE SUPREME COURT OF APPEAL HOLDS THAT CANCELLING A TENDER IS NOT ADMINISTRATIVE ACTION AND COMES DOWN IN FAVOUR OF MUNICIPAL AUTONOMY

The judgment is a clear affirmation of the primacy of the executive branch of government in setting procurement priorities.

The Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd* [2016] 1 All SA 332 (SCA) held that the cancellation of a tender is not administrative action and therefore not subject to the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA). The judgment is a clear affirmation of the primacy of the executive branch of government in setting procurement priorities.

Nambiti launched judicial review proceedings, seeking to set aside the decisions to appoint EOH Mthombo and to cancel the First Invitation. Nambiti also sought to interdict the City from acting on the Second Invitation.

In October 2012 the City of Tshwane issued an invitation (First Invitation) to submit tenders for the provision of information technology support services. Nambiti Technologies, the incumbent service provider with a contract running from 1 August 2009 until 31 December 2012, was among those service providers who submitted bids.

Shortly after publishing the first invitation, the City appointed a Chief Information Officer (CIO) to oversee its information systems. The CIO reviewed the terms of the First Invitation and concluded that they no longer served the City's technological needs. The City's Bid Adjudication Committee subsequently cancelled the First Invitation and resolved to re advertise it with amended specifications.

The City informed Nambiti of its decision to call for fresh bids. It also indicated that, because EOH Mthombo (a service provider to the City of Johannesburg) had been appointed to render the information technology support services on an interim basis, Nambiti's services would not be required beyond December 2012. In May 2013 the City duly published a new invitation to tender (Second Invitation), reflecting its revised specifications.

Nambiti launched judicial review proceedings, seeking to set aside the decisions to appoint EOH Mthombo and to cancel the First Invitation. Nambiti also sought to interdict the City from acting on the Second Invitation.

The High Court set aside the City's decision to cancel the First Invitation and directed the City to adjudicate the bids submitted in response to the First Invitation, duly updated, within a two-month period. Because EOH's contract only had two months left to run, the High Court declined to set it aside.

The City successfully appealed to the Supreme Court of Appeal.

Wallis JA, for a unanimous court, concluded that the decision to cancel the tender was not 'administrative action' in terms of PAJA. He found that a decision not to procure certain services does not concern the 'implementation of policies and functions of government'. He also found that the City's desire to procure was 'always provisional' and that it remained 'entirely free to determine for itself what it required'. He therefore concluded that the decision to cancel the First Invitation was not a decision 'of an administrative nature', which is a threshold requirement under PAJA.

Wallis JA was also of the view that none of Nambiti's rights were infringed by the City's decision to cancel the First Invitation: Nambiti had 'no legal right to a contract' flowing from the First Invitation

CDH
CLIFFE DEKKER HOFMEYR

THE SUPREME COURT OF APPEAL HOLDS THAT CANCELLING A TENDER IS NOT ADMINISTRATIVE ACTION AND COMES DOWN IN FAVOUR OF MUNICIPAL AUTONOMY

CONTINUED

The Court was clearly committed to upholding the autonomy of local government in procurement matters and to defending a decision that was, on the face of it, eminently reasonable.

and no right to be treated fairly once the First Invitation had been cancelled. He therefore concluded that the decision to cancel the First Invitation had no 'direct, external legal effect' and so failed to meet another threshold requirement for 'administrative action' under PAJA.

Because the City's decision did not constitute administrative action, it was not susceptible to review under PAJA and Nambiti's application fell to be dismissed.

The Supreme Court of Appeal also took the opportunity to rebuke the High Court for its unwarranted intrusion into municipal affairs. An organ of state's procurement of goods and services 'lies within the heartland of the exercise of executive authority by that organ of state'. For a court to interfere at all in procurement decisions is 'an extremely serious matter'. However, to interfere by compelling an organ of state to acquire goods and services it has determined not to acquire 'should only be done in extreme circumstances', if it can be done at all.

The decision of the Supreme Court of Appeal is curious for a number of reasons. For one, the Court appears not to have engaged with its own jurisprudence regarding the treatment of bidders when an invitation to tender is cancelled and reissued (compare *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA)). For another, its treatment of the Constitutional Court's decision in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) is far from convincing. And Wallis JA's application of PAJA's threshold requirements seems, at best, tendentious.

That being said, the Court was clearly committed to upholding the autonomy of local government in procurement matters and to defending a decision that was, on the face of it, eminently reasonable. While not without its flaws, the decision in Nambiti represents a clear assertion of the primacy of the executive branch of government in deciding procurement priorities.

An application for leave to appeal against the judgment of the Supreme Court of Appeal has been filed at the Constitutional Court. Should the matter eventually be heard by this Court, it will be interesting to see how the Supreme Court of Appeal's judgment is received.

Ashley Pillay,
Henri-Willem van Eetveldt
and Yana van Leeve

CDH
CLIFFE DEKKER HOFMEYR

BUSINESS RESCUE MORATORIUM, CONTINUES TO BE CONTENTIOUS

Although business rescue has brought a much needed and long overdue alternative to liquidation for businesses in distress, it is also responsible for many points of contention.

The restructuring of financially distressed companies is on the increase globally. In line with this international trend is Chapter 6 of the Companies Act, No 71 of 2008 (Act) which introduced business rescue into the South African corporate landscape.

In the matter of National Union of Metalworkers of South Africa obo Members v Motheo Steel Engineering CC [2014] JOL 32257 (LC), four employees were dismissed by a company which was undergoing business rescue.

Although business rescue has brought a much needed and long overdue alternative to liquidation for businesses in distress, it is also responsible for many points of contention. The most pertinent of these is currently the general moratorium found in s133 of the Act.

Section 133 of the Act provides that no legal proceedings or enforcement action may commence or continue against a company undergoing business rescue, save (among other exceptions to the rule) where consent is granted by the court or obtained from the business rescue practitioner. This moratorium offers critical breathing space to business rescue practitioners, allowing them to investigate the affairs of a distressed company and to develop an adequate business rescue plan.

The debate currently before the South African courts is what constitutes a 'legal proceeding' in terms of s133? Applying legislative interpretation to this rather underdeveloped area of law, the courts are often charged with determining whether proceedings relating to employment disputes, suretyship agreements and arbitrations, to name a few, fall within the ambit of precluded proceedings envisaged in s133.

EMPLOYMENT DISPUTES

In the matter of *National Union of Metalworkers of South Africa obo Members v Motheo Steel Engineering CC* [2014] JOL 32257 (LC), four employees were dismissed by a company which was undergoing business rescue. The company contended that the unfair dismissal application brought by the Trade Union was precluded by the s133 moratorium. The LC disagreed with the company's contention finding that s133 of the Act did not apply to legal proceedings brought in respect of the provisions contained in the Labour Relations Act, No 66 of 1995 (LRA).

The LC, relying on the provisions of s210(1) of the LRA which states that the provisions of the LRA (including claims of unfair dismissal) prevail in the event of any conflict with other law save for the Constitution or any act expressly amending the LRA, rejected the company's contention. On this premise, the LC decided that s133 of the Act did not expressly amend the LRA. While this judgment can be regarded as positive for employees, it highlights another exception to the application of the moratorium: proceedings brought in respect of the provisions of the LRA.

SURETYSHIPS

Similarly, the courts have been asked to determine whether a creditor's claim against sureties is extinguished when a business rescue plan provides for a compromise in full and final settlement of a debt. The cases of *New Port Finance Company (Pty) Ltd v Nedbank Ltd* [2014] ZASCA 210 and *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* 2014 (4) SA 521 (WCC) addressed this lacuna in business rescue and reached interestingly conclusions.

CDH
CLIFFE DEKKER HOFMEYR

BUSINESS RESCUE MORATORIUM, CONTINUES TO BE CONTENTIOUS

CONTINUED

In the New Port Finance case, the argument was again advanced by the sureties contending that because the principal-debtor's liability was altered by an adopted business rescue plan, the sureties' respective liabilities were also altered, so as to render their liability extinguished by compromise or settlement reached under the business rescue plan.

In the *Tuning Fork* case, the financially distressed principal-debtor adopted a business rescue plan which stipulated that the creditor would receive, among other things, a dividend in full and final settlement of its claims. The creditor attempted to claim the balance of the outstanding debt from the debtor's sureties who, in turn, argued that the compromise contained in the adopted plan released them from their obligations as sureties.

The court turned to the common law, in the absence of statutory clarity on the matter; where it held that the obligations of sureties were accessory in nature. Therefore, the extinction of the principal-debtor's obligation under business rescue would consequently extinguish the sureties' liability, unless the deed of surety contractually preserved the creditor's rights (which was not the position in this case).

In the *New Port Finance* case, the argument was again advanced by the sureties contending that because the principal-debtor's obligation was altered by the adopted business rescue plan, the sureties' respective liabilities were also altered, so as to render their liability extinguished by compromise or settlement reached under the business rescue plan.

Wallis J did not comment on the correctness of the judgment in the *Tuning Fork* case because in the *New Port Finance* case, the suretyship agreement contained clauses that entitled the creditor to recover the full amount of debt from the sureties irrespective of the release of the principal-debtor, in whole or in part, from its liability to the creditor. On the strength of these clauses contained in the deed of surety, the court found that the creditor's rights were preserved and therefore entitled it to recover the balance of the outstanding debt from the sureties, notwithstanding the compromise reached in the adopted business rescue plan.

This area of business rescue is yet to be settled in our law and there will, no doubt, be further developments on the issue. These decisions do, however, serve as a useful caution to creditors to pay particular attention to the specific wording used in drafting their security documents, including deeds of suretyships or guarantees.

ARBITRATION PROCEEDINGS

In the matter of *Chetty t/a Nationwide Electrical v Hart and Another* 2015 (6) SA 424 (SCA) the question was whether an arbitration award made while the company was under business rescue was invalidated or voided by the general moratorium on legal proceedings in terms of s133 of the Act.

In this matter an arbitration award was made in favour of Ms Chetty (Appellent) who was unaware of the ongoing business rescue proceedings. Due to the Appellant's dissatisfaction with the quantum of the arbitration award, the Appellant sought

CDH
CLIFFE DEKKER HOFMEYR

BUSINESS RESCUE MORATORIUM, CONTINUES TO BE CONTENTIOUS

CONTINUED

It seems clear that the prominence of business rescue within South Africa will continue to grow. This growth now necessitates legislative development to ensure that the spirit and objectives of Chapter 6 of the Companies Act are properly realised.

to have the arbitration invalidated in its entirety arguing that the arbitration hearing fell within the ambit of 'legal proceedings' precluded in terms of s133. The court considered the definitions attributed to 'legal proceedings' and held that:

> "the phrase 'legal proceedings' may, depending on the context within which it is used, be interpreted restrictively, to mean court proceedings or, more broadly, to include proceedings before other tribunals, including arbitral tribunals. The language employed in s133(1) itself suggests that a broader interpretation commends itself, an approach with which academic commentators concur."

Therefore, arbitration proceedings are likely to be considered legal proceedings going forward and will thus fall within the moratorium created by s133. However, the SCA found (on the particular facts) that failure to obtain the business rescue practitioner's permission to institute proceedings did not mean the arbitration award was a nullity (on a reading of s133 of the Act) but more fundamentally noted that the Appellant's attempt to invalidate the arbitration award merely due to its dissatisfaction with the result would not be considered by the courts.

CONCLUSION

It seems clear that the prominence of business rescue within South Africa will continue to grow. This growth now necessitates legislative development to ensure that the spirit and objectives of Chapter 6 of the Companies Act are properly realised.

Thabile Fuhrmann and Neo Tshikalange

CDH
CLIFFE DEKKER HOFMEYR

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

Craig Hindley
Director
T +27 (0)21 405 6188
E craig.hindley@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

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

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

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

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

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

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

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