



DISPUTE RESOLUTION

IN THIS ISSUE

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THE CONSTITUTIONAL COURT RESTRICTS AN ORGAN OF STATE'S POWER NOT TO AWARD A TENDER

This note concerns the Constitutional Court's decision in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC).

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In liquidation proceedings one of the main concerns for a creditor is the setting aside of transactions in which a company's assets have been disposed of. These dispositions directly impact on how much a creditor will receive once the assets have been realised and distributed. The courts, in certain instances, have the discretion to validate dispositions that would otherwise be void, this is particularly so in terms of s341(2) of the Companies Act, No 61 of 1973.

CONTRACTING WITH THE STATE – CAVEAT!

Contracting with the state is not an easy feat and can have its fair share of challenges accompanied by legal consequences for all involved. The global financial crisis has placed intense pressure on states to tackle major budget deficits and companies who provide goods and services to governments and state organs must be willing and able to contend with ever-changing procurement rules and regulations in this sphere.

NON-COMPLIANCE WITH PRESCRIBED MODE OF ACCEPTANCE

It is trite law that, as a general rule, no special formalities are required for the conclusion of an enforceable agreement save for those required by law or imposed by the contracting parties. The courts are increasingly faced with disputes on whether an agreement exists in circumstances where the parties fail to comply with a prescribed mode of acceptance.

NEW INTERNATIONAL ARBITRATION FORUM OPENS AFRICA UP TO THE INTERNATIONAL COMMUNITY

The global commercial and trading industry is riddled with legal complexities and judicial uncertainties. In this booming commercial landscape, disputes are inevitable, and investors require established structures that allow them to resolve such disputes cost effectively with (proficiency and competence).

In June of 2015, the signatories of the Beijing Consensus, including the Arbitration Foundation of Southern Africa (AFSA), recognised the necessity for a dispute resolution mechanism for commercial dealings between Africa and China. Echoing these sentiments, on 17 August 2015, a number of stakeholders including lawyers, members of other arbitration forums and the Secretary General of the China Law Society signed the Johannesburg Consensus, which served to supplement the Beijing Consensus and brought the China Africa Joint Arbitration Centre (CAJAC) into being.

The China-Africa International Arbitration Centre (CAIAC) is designed to resolve commercial disputes between China and African nations. The establishment of this Africa-China arbitration forum affirms the expansion of alternative dispute resolution in South Africa and the rest of the continent.

CAIAC reportedly began accepting cases in Johannesburg in October 2015. Although the initiative is still in its early stages, the forum will develop further and operate from Shanghai, China in the near future. The Arbitration Forum has not specified the nature of the cases it will accept, however it's expected that disputes will include international investment agreements, securities

exchange transactions, maritime trade and transport contracts, and other transcontinental commercial dealings that stem from bilateral investment treaties.

Arbitration is commonly defined as the procedure in which a dispute is submitted by agreement between the parties', to one or more arbitrators who make a binding decision on the issue. In choosing arbitration, the parties opt for a private dispute resolution procedure as opposed to traditional courtroom process.

Following closely on CAIAC's tail is another important development in the alternative dispute resolution space, this being the new International Arbitration Bill which is expected to be passed in parliament and enacted later in 2016. The new Act will facilitate and govern all the structures and components of the new International Arbitration Forum.

In recent years South Africa and China have aimed to increase their commercial and trading relations. The growing number of transactions concluded under bilateral investment treaties naturally warrants a neutral forum to manage the international legal anomalies that exist in transnational investment and commercial trade.

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The establishment of CAIAC will see standardisation of the commercial and legal structures that will govern commercial and trade interactions between China and Africa. Largely accepted by the international community, structured arbitration forums such as CAIAC bring commercial and legal stability to previously indeterminate economic environments. This kind of security is fundamental for the African economic climate which is often viewed as inexact and perilous – traits which have often dissuaded international investors.

Arbitrations have become advantageous in the rapidly changing commercial environment. In the industry of commerce and trade, time is in fact money. An arbitration process is not always a cheaper alternative form of dispute resolution but, when time saving is factored in, it has been found to be more cost-effective.

Currently the waiting period for a trial date in the Gauteng High Courts is between seven months to over a year from the date that pleadings close. Arbitrations, however, do not have this time delay. Once pleadings have closed, the arbitrator and the parties can set the matter down for hearing on a convenient date. In most instances, the hearing date is fixed at the very beginning, during pre-arbitration discussion. This is due to the fact that arbitrations have minimal procedural requisites; therefore resolution is often reached earlier.

As a general point of departure, arbitration awards are enforceable and binding on all parties. However article 22 of the AFSA Rules affords unsuccessful parties with the right to appeal any arbitration award, provided that both

parties to the arbitration agree in writing that any final or interim award of an arbitrator or arbitrators shall be subject to appeal. Nevertheless, parties to arbitrations often abide by the arbitration award if not, parties may elect to make the award an order of court.

The attraction towards arbitration stems from its relatively malleable procedural framework; where parties are often given the scope to determine the procedures and manner in which their arbitration will be conducted. This procedural flexibility accommodates the diverse needs of international enterprises and local businesses often resulting in expeditious resolution.

CAIAC will be comprised of seasoned and highly experienced regional and international arbitrators. By employing local and international experts who have an appreciation for the relevant law, African trade and commercial markets, and the contemporary challenges faced, CAIAC brings the advantage of a streamlined dispute resolution framework partnered with a high level of expertise.

Alternative dispute resolution forums such as arbitrations have significant shortcomings, nonetheless one cannot obviate its ability to bring a degree of legal certainty to existing complex transnational transactions. A novel legal establishment such as CAIAC brings vast opportunity for Africa to develop and learn in both areas of law and commercial trade. The establishment of CAIAC suggests Africa’s growing global prominence in trade and commercial industry. With this growing prominence come significant challenges but more importantly immeasurable opportunity.

*Thabile Fuhrmann
and Neo Tshikalange*

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THE CONSTITUTIONAL COURT RESTRICTS AN ORGAN OF STATE'S POWER NOT TO AWARD A TENDER

This note concerns the Constitutional Court's decision in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC).

The Industrial Development Corporation (IDC) issued a tender to procure building services. The ultimate decision regarding the award of the tender was taken on review. The three courts that adjudicated the dispute had to decide whether the IDC had the power to decline to award the tender to any of the bidders.

Relying on the following clause in its standard conditions of tender, the IDC argued that it had a discretion not to award the tender at all (irrespective of the bids received):

"[The IDC] may cancel the tender process and reject all tender offers at any time before the formation of the contract."

The High Court rejected the IDC's argument, finding that there was no evidence supporting a need to withdraw the tender. The Supreme Court of Appeal disagreed, finding that the IDC "was not obliged to award the tender to the lowest bidder or at all"

While the Constitutional Court acknowledged that the IDC had a discretion not to award the tender, it found that "[the] IDC could only cancel the tender if one of the grounds stipulated in regulation 8(4) [of the Preferential Procurement Regulations]

existed." In terms of regulation 8(4), an "organ of state may, prior to the award of a tender, cancel a tender" if:

- there is no longer a need for the services requested;
- funds are no longer available; or
- no acceptable tenders are received.

The Constitutional Court concluded that the IDC could not, through a stipulation in the tender documents, confer on itself a power not to award a tender that is broader than the power contained in regulation 8(4). This interpretation of regulation 8(4) is, however, rather curious. The Preferential Procurement Regulations do not expressly state that the regulation-8(4) circumstances are the only circumstances in which a tender may be withdrawn. The Preferential Procurement Policy Framework Act, by way of contrast, uses much clearer language when indicating that discretionary powers may only be exercised in particular circumstances.

Furthermore, the Preferential Procurement Regulations themselves set out circumstances other than those contemplated in regulation 8(4) when a tender may be withdrawn. For example, if the tender document in question stipulated that bids would be evaluated

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based on the 80/20 preference point system, but all bids received exceed R1,000,000, regulation 8(1)(a) of the Preferential Procurement Regulations stipulates that the tender must be withdrawn.

In addition, the courts have recognised circumstances other than those contained in regulation 8(4) in which it would be eminently sensible to withdraw a tender and commence the procurement process afresh. Thus, for example, the courts have accepted that an organ of state may withdraw a tender when there has been a material change in circumstances following the publication of the tender (*Logbro Properties CC v Bedderson NO and Others 2003 (2) SA*

460 (SCA) at paras 19 – 22) and where the integrity of the tender process has been compromised by political interference (*Thabo Mogudi Security Services CC v Randfontein Local Municipality and Another* [2010] 4 All SA 314 (GSJ) at paras 31 – 34).

These considerations notwithstanding, the Constitutional Court has greatly restricted the ambit of an organ of state’s discretion not to award a tender, which discretion may seemingly no longer be employed to correct irregularities or address defects in the procurement process.

Ashley Pillay

The Constitutional Court has greatly restricted the ambit of an organ of state’s discretion not to award a tender.



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VALIDATION OF DISPOSITIONS IN TERMS OF SECTION 341(2) OF THE COMPANIES ACT

In liquidation proceedings one of the main concerns for a creditor is the setting aside of transactions in which a company's assets have been disposed of. These dispositions directly impact on how much a creditor will receive once the assets have been realised and distributed. The courts, in certain instances, have the discretion to validate dispositions that would otherwise be void, this is particularly so in terms of s341(2) of the Companies Act, No 61 of 1973.

Section 341(2) provides that, "every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders".

That being said, how far does this discretion reach and how do our courts apply s341(2)?

In the recent case of *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd* (In Liquidation) 2015 (6) SA 21 (GJ), the court was faced with an application in terms of which Engen, post the issuing of the court application, sought the validation of payments made subsequent to the granting of a final winding-up order of Goudis, the respondent. The court had to determine whether, in terms of s341(2), it had the power to validate dispositions made:

- between the presentment of the application for winding-up and deregistration; or
- only where dispositions are made between presentment and the date upon which the final winding-up order is granted.

Engen had supplied fuel to Goudis since 2002. Goudis also had a credit account with Engen. However, a creditor of Goudis had filed a winding-up application on 14 September 2012. The final winding-up order was granted on 23 October 2012, establishing a *concursum creditorium* on 14 September 2012. Engen, being ignorant of the application and the order, supplied fuel to Goudis up until 30 November 2012 and received payment from Goudis after the final-winding up order was granted.

Sutherland J in handing down his judgment pointed out that s341(2) does not empower the court to validate an unlawful, invalid or otherwise unauthorised transaction. The disposition needs to be initially lawful and valid in order for the court to intervene in terms of s341(2). The court held that the purpose of s341 (2) is to address the anomaly that occurs as a result of the retrospective invalidation of dispositions by a company which were initially lawful and valid.

A company cannot validly make a disposition from the date upon which the *concursum creditorium* comes into effect (pursuant to the final winding-up order). This is because at the moment of *concursum* the office bearers of the company no longer have lawful authority or control of the company, such authority and control are given to the master, the liquidator and the will of the creditors in a general meeting.

Thus it was held that s341(2) confers a power on a court to intervene with dispositions that a company may lawfully make during the period between the date on which the application for a winding-up has been presented and the date on which the final winding-up order is granted. As such the court did not validate the payments, and ordered Engen to pay back all the money it received from Goudis subsequent to the granting of the final winding-up order on 23 October 2012.

The court had also recognised that a s341(2) order is effective and binding on creditors, the company being wound up and on the recipient of the payment, which payment, but for the winding-up, would have been uncontroversial.

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Clayton Gow and Julian Jones

The courts, in certain instances, have the discretion to validate dispositions that would otherwise be void.

CONTRACTING WITH THE STATE – CAVEAT!

Contracting with the state is not an easy feat and can have its fair share of challenges accompanied by legal consequences for all involved. The global financial crisis has placed intense pressure on states to tackle major budget deficits and companies who provide goods and services to governments and state organs must be willing and able to contend with ever-changing procurement rules and regulations in this sphere.

Before dealing with the issues at hand, it is convenient to set out the relevant statutory matrix. Section 217(1) of the Constitution stipulates that when an organ of state in the national, provincial or local sphere of government, or any other institution in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

Section 38(1)(a)(iii) of the Public Finance Management Act, No 1 of 1999 provides that an accounting officer for a department must ensure that the department has and maintains an appropriate procurement or provisioning system which is fair, equitable, transparent, competitive and cost-effective, thus echoing the provisions of s217(1) of the Constitution.

In a long line of decisions, the courts have found that contracts concluded in similar circumstances without compliance with prescribed competitive processes are invalid. It would seem that the rationale for nullifying these transactions is that they deprive the public of the benefit of an open and fair competitive process. Perhaps even more importantly, these statutory prescripts are aimed at ensuring accountability and good governance.

In the unanimous judgment of Marais JA in *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA), which involved the validity of two lease agreements of immovable property

concluded without any reference to the provincial tender board and thus peremptory statutory prescripts, the court after outlining the applicable statutory tender requirements, said the following:

As to the mischief which the Act seeks to prevent, that too seems plain enough. It is to eliminate patronage or worse in the awarding of contracts, to provide members of the public with opportunities to tender to fulfil provincial needs, and to ensure the fair, impartial, and independent exercise of the power to award provincial contracts. If contracts were permitted to be concluded without any reference to the tender board without any resultant sanction of invalidity, the very mischief which the Act seeks to combat could be perpetuated.

Turquand rule

Some litigants have, (unsuccessfully) advanced the argument that persons contracting with a company or state and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to enquire whether acts of internal management are regular. The gist of the argument is advanced under the rubric of the *Turquand* rule.

In the *Contractprops* case, the court said the following:

This is not a case in which 'innocent' third parties are involved. It is a case between the immediate parties to

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When an organ of state in the national, provincial or local sphere of government, or any other institution in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

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leases which one of them had no power in law to conclude and had been deprived of that power (if it ever had it) in the public interest. The fact that the respondent was misled into believing that the department had the power to conclude the agreement is regrettable and its indignation at the stance now taken by the department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were ultra vires the powers of the department and they cannot be allowed to stand as if they were intra vires.

Similarly at paragraph 9, the court said:

As to the consequences of visiting such a transaction with invalidity, they will not always be harsh and the potential countervailing harshness of holding the province to a contract which burdens the taxpayer to an extent which could have been avoided if the tender board had not been ignored, cannot be disregarded. In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one-sidedly harsh that the legislature cannot be supposed to have intended invalidity to be the consequence. What is certain is that the consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in the particular case.

Estoppel

In addition to the *Turquand* rule, some litigants have also attempted to rely on the doctrine of estoppel to enforce performance of these contracts (albeit unsuccessfully). The argument is often that the state represented to the counterparty, by conduct or otherwise, that it had complied with all statutory and internal processes including a competitive bid process. Relying on

such representations, the counterparty altered its position to its prejudice and performed in terms of the agreement, so the argument goes.

In considering and rejecting of the respondent's reliance on the doctrine of estoppel in the *Contractprops* case, the court said the following:

even if it be assumed in favour of the respondent that estoppel was pertinently raised in the papers (the matter came before the Court a quo by way of motion proceedings) and that all the necessary factual requirements for the doctrine to be applicable were canvassed, this is not a case in which it can be allowed to operate. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel.

This is such a case. It was not the tender board which conducted itself in a manner which led respondent to act to its detriment by concluding invalid leases of property specially purchased and altered at considerable expense to suit the requirements of the department. It was the department. If the leases are, in effect, 'validated' by allowing estoppel to operate, the tender board will have been deprived of the opportunity of exercising the powers conferred upon it in the interests of the taxpaying public at large. Here again the very mischief which the Act was enacted to prevent would be perpetuated.

Similarly, in *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd* 2008 (3) SA 1 (SCA), the court said the following:

Estoppel cannot, as I have already stated, be used in such a way as to give effect to what is not permitted or recognised by law. Invalidity must therefore follow uniformly as the consequence.

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Estoppel cannot, as I have already stated, be used in such a way as to give effect to what is not permitted or recognised by law. Invalidity must therefore follow uniformly as the consequence

That consequence cannot vary from case to case. Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in a particular case.

What considerations should a party contracting with the state take into account?

- By not embarking on a competitive bid process, particularly given the nature and scale of the services to be provided, including the cost implications in any case, the state is erring fundamentally.
- By concluding the agreement without the approval of the employer and political principal and/or of the Cabinet or whatever the case may be, the state representative is acting *ultra vires*.

- By concluding the agreement and incurring a liability for which there had been no appropriation, the state representative not only errs, but acts against mandatory statutory prescripts and against the constitutional principles of transparent and accountable governance.
- For all these reasons, the agreement may be liable to be declared *void ab initio*.

CAVEAT!

*Thabile Fuhrmann
and Vincent Manko*

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NON-COMPLIANCE WITH PRESCRIBED MODE OF ACCEPTANCE

It is trite law that, as a general rule, no special formalities are required for the conclusion of an enforceable agreement save for those required by law or imposed by the contracting parties. The courts are increasingly faced with disputes on whether an agreement exists in circumstances where the parties fail to comply with a prescribed mode of acceptance. (See *Lepogo Construction (Pty) Ltd v The Govan Mbeki Municipality* [2015] 1 All SA 153 (SCA) and *Bosch Munitech (Pty) Limited v Govan Mbeki Municipality* [2015] 4 All SA 674 (GP)).

In the Bosch case, the ultimate question was whether the formalities for the acceptance of the offer were complied with in a manner resulting in a binding agreement between the parties in accordance with the prescripts of the tender process and the tender documents. The tender documents required the respondent to indicate acceptance of the offer by signing the acceptance part of the form and returning one copy of the document to the applicant before the end of the period of validity stated in the tender data, "whereupon the tenderer becomes the party named as the contractor in terms of the conditions of contract identified in the contract data". The respondent, however, did not sign the acceptance part of the form nor did it return a copy thereof, duly signed to the applicant before the end of the period of validity.

The provisions of the tender documents were clear and unambiguous in that an offer had to be made and accepted in accordance with its formalities, and notice of acceptance had to be given within the specified validity period. Any deviations had to be recorded in the schedule of deviations, failing which they would be invalid. Moreover, the tender documentation expressly provided that the contract would only come into effect "on the date when the tenderer receives

one fully completed original copy of this document, including the schedule of deviations". The applicant deviated from the proper tender process and did so at its own peril.

The court held that where the mode of acceptance in a proposed contract is stipulated, it is that mode that must be followed before a contract is concluded. Non-compliance with formalities imposed by one of the parties results in the nullity of the contract. Where a contract is not concluded between the parties because of non-compliance with the prescribed mode of acceptance, no contractual civil obligation (*vinculum juris*) exists and the parties may not assert the contractual remedies available under the flawed agreement. Performance rendered in terms of a formally defective agreement is regarded as having been made without legal ground (*sine causa*), and such performance is recoverable by means of an enrichment action and not by contractual remedies.

Non-compliance with prescribed formalities, whether imposed by the parties or by statute, results in the nullity of the transaction.

*Thabile Fuhrmann
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The courts are increasingly faced with disputes on whether an agreement exists in circumstances where the parties fail to comply with a prescribed mode of acceptance.

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