18 OCTOBER 2017

DISPUTE RESOLUTION ALERT

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INSURANCE LAW:
ACCOUNTABILITY FOR RISKS CREATED AT CHILDREN'S RECREATIONAL FACILITIES

In the case of *Van Vuuren v Ethekwini Municipality* (1308/2016) [2017] SCA the appellant, Ms Van Vuuren along with her eight-year-old son Jacques Van Vuuren were visiting the Durban beach front. On 21 May 2011, at a water slide and pool facility located on the promenade, Jacques was seriously injured while going down the water slide. The water slide and pool facility in question were provided for the use of children under 12 by the respondent, the eThekwini Municipality.

PART ONE

CORPORATE INVESTIGATIONS:
CRIMINALISING COMPLIANCE FAILURE: WILL THE UK MODEL BECOME THE GLOBAL NORM?

Compliance has just become even more onerous for anyone doing business in and with the UK. Two new failure-to-prevent offences became law on 30 September 2017: the failure to prevent the facilitation of UK tax evasion and the failure to prevent the facilitation of foreign tax evasion.

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In the case of *Van Vuuren v Ethekwini Municipality* (1308/2016) [2017] SCA (27 September 2017) the appellant, Ms Van Vuuren along with her eight-year-old son Jacques Van Vuuren (Jacques) were visiting the Durban beach front. On 21 May 2011, at a water slide and pool facility located on the promenade, Jacques was seriously injured while going down the water slide. The water slide and pool facility in question were provided for the use of children under 12 by the respondent, the eThekwini Municipality (Municipality).

The question on appeal was whether there was a legal duty on the Municipality to supervise and control access to the slide.

It is common cause that the Municipality did not employ or have in attendance any persons to supervise the children using the pool or to control the use of the slides. More importantly, the Municipality did not employ anyone to ensure that the child at the top of the slide would be safe from being pushed or from colliding with another child while using the slide.

In 2012, the appellant instituted action in her personal and representative capacity in the KwaZulu-Natal Division of the High Court for damages arising as a result of the injuries suffered by her son, Jacques. Jacques suffered a fractured jaw and loss of teeth which required surgical treatment and future medical operations. The appellant alleged that the Municipality, alternatively their employees or agents were negligent in failing:

- to ensure that the slide was properly constructed;
- to ensure proper supervision and control at the pool and slide facilities;
- to control or limit the number of children using the facilities; and
- to ensure that the slide was controlled in such a way that it remained safe for children to utilise.

In response, the Municipality denied that it was negligent in any way and raised the defence of voluntary assumption of risk and in the alternative sought a reduction in terms of s1 of the Apportionment of Damages Act, No 34 of 1956 for any damages which may be awarded to the appellant.

The court *a quo* found that it was unreasonable to place a burden on the Municipality which was greater than the duty of care which is imposed on parents. The court *a quo* subsequently dismissed the appellant's action with costs.

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The SCA concluded that the court a quo erred in not holding the Municipality liable for damages and the appeal was subsequently upheld with costs.

On appeal, the SCA found that the court *a quo* had misidentified the issue to be adjudicated and the question on appeal was whether there was a legal duty on the Municipality to supervise and control access to the slide.

The SCA stated that based on the evidence before them it was clear that the slide facility posed a potential risk of harm to others and that this risk was created by the Municipality. The SCA considered the fact that the facility was for children under 12 and this therefore suggested a degree of immaturity and indiscipline. Further, s28(2) of the Constitution dictates that a child's best interest is paramount in every matter concerning the child and public policy requires a municipality to prevent any chaos which would undermine the safety of children using the facility.

The SCA concluded that by gearing the facility for young children the Municipality created the potential risk of harm and in the circumstances the Municipality owed a legal duty to avoid negligently causing harm to persons in Jacques' position. The SCA also stated that access and control are simple to impose and would not inflict an intolerable financial burden on the Municipality.

As to negligence, the SCA stated that objectively a sensible person in the position of the Municipality would have foreseen the reasonable possibility of harm being caused to children in Jacques' position. The SCA held that by failing to provide supervision or access control at the slide facility the Municipality was indeed negligent.

The SCA concluded that the court *a quo* erred in not holding the Municipality liable for damages and the appeal was subsequently upheld with costs.

This case poses as a warning to municipalities and other entities where their child entertainment facilities create potential risks. In these circumstances they need to put in place adequate measures to negate the risk, ensuring the safety of the public, especially where minors are concerned.

Byron O'Connor
and Mershalene Naicker

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.

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CORPORATE INVESTIGATIONS:
CRIMINALISING COMPLIANCE FAILURE: WILL THE UK MODEL BECOME THE GLOBAL NORM?

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The new offence sends out "a clear message that anyone doing business in and with the UK must have the highest possible compliance standards".

The Criminal Finances Act, an act with extra-territorial application, has created the UK's second failure-to-prevent offence (mirroring s7 of the UK Bribery Act), leaving Chief Compliance Officers of all global companies with a new compliance obligation to manage and deal with. The UK has now confirmed its vanguard global role in leading the fight against commercial crime. As stated by the UK Home Office in the press release accompanying publication of the bill, the new offence sends out "a clear message that anyone doing business in and with the UK must have the highest possible compliance standards".

The observation that corporate compliance, internationally, is at a crossroads is now regarded as an understatement. Compliance professionals are drowning in daily regulatory alerts of which many currently relate to anti-money laundering (AML), anti-bribery and corruption (ABC), terrorist financing (TF) and illicit fund flow (IFF). With these new offences on their compliance radar, it looks as if they will not be coming up for air any time soon. In addition, inter-governmental bodies in the AML/TF and ABC environment such as the Financial Action Task Force (FATF) are also raising the bar and moving from checkbox and rules-based regulatory models to outcome or principle-based approaches, providing for risk management within a Risk Appetite Framework (RAF).

This new offence introduces a further level of compliance and a concomitant risk burden for businesses, and it is predicted to become the "gold standard" for other governments wishing to follow suit. After the Bribery Act and its feared s7 (the failure to prevent bribery), this is yet another development of the criminal law making companies responsible for the criminal acts of their employees and those with whom they do business. The financial services, accounting and legal sectors are likely to be most affected by the new legislation. Action will be required to address risk. A business will have a defence if it can prove that it had reasonable procedures to prevent the facilitation of tax evasion taking place, or that it was not reasonable in the circumstances to expect same. Failure-to-prevent offences place greater reliance on companies' compliance programmes as a means of avoiding criminal liability: companies will be criminally liable for acts committed by their employees, agents

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2017 has seen a number of new developments in AML, TF, IFF and ABC across the globe.

and contractors unless they have sufficient prevention programs for prevention. The somewhat harsh result: the failure-to-prevent model criminalises companies' compliance failures.

There are some guiding principles relating to the defence of having reasonable prevention procedures: risk assessment, top level commitment, due diligence, communication and training; and monitoring and review.

The Criminal Finances Act, as part of the legislation addressing AML/TF, ABC and IFF, also creates new "unexplained wealth" orders, which can be used to require those suspected of crime or corruption to explain the source of their wealth; it also enables the seizure and forfeiture of proceeds of crime and it extends disclosure orders to cover money laundering and terrorist financing investigations.

Experts anticipate that this act will help address the global problem regarding IFF. Globally, IFF is estimated at 2% to 5% per cent of global GDP with less than 1% seized by authorities. There is also an extensive and hidden global financial system of offshore financial centres and developed country banks that facilitates IFF and capital flight. It has been estimated that developed country banks, mainly in the US and UK, absorb between 56% and 76% of the illicit funds coming out of developing countries. The Global Financial Integrity Report (April 2017) shows that IFF in and out of the developing world is estimated to be at least 13.8% of total trade (or $2 trillion) in 2014. Countries like the US and UK have been criticised for their double standard approach in dealing with this problem. Speaking in Abuja in June 2017 at the Conference on Promoting International Co-operation in Combating Illicit Financial Flows, Nigeria's Acting President Yemi Osinbajo observed: "There is no way the transfer of this asset can happen without a handshake between the countries that they are transferred from and the international banking institutions of the countries to which they are transferred." The High Level Panel on Illicit Financial Flows from Africa, led by Thabo Mbeki, singled out Nigeria as source of most of the illicit fund flow out of Africa. Osinbajo called for criminalising financial institutions.

2017 has seen a number of new developments in AML, TF, IFF and ABC across the globe. Predictably, 2018 will be an important year for compliance as all these new models are implemented and developed to enhance the effectiveness thereof. Usage of data systems and data exchange, interacting with cyber-risk, will elevate the ability to combat crime to new levels by focusing on electronic systems and footprints. Speedy exchange of information, between agencies but also between jurisdictions, will become prevalent and the extent to which some legislative frameworks with extra-territorial application overlap, will reduce the criminals' freedom of movement substantially. Once algorithmic potential becomes fully utilised, Suspicious Transaction Reports will be processed

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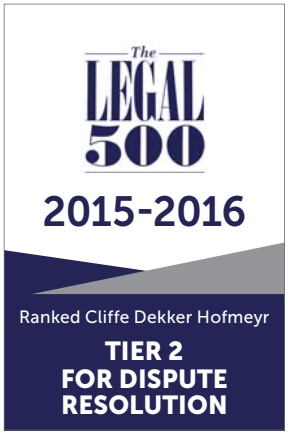
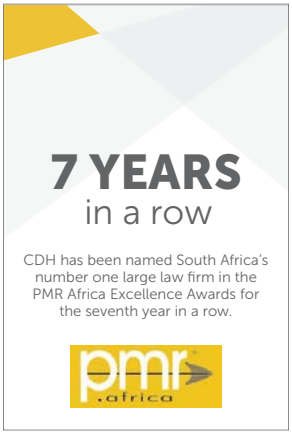
Delinquent governments might also find that sovereignty is not a complete defence where governments fail to prevent human rights abuses and grand corruption.

speedily and probability projections will provide platforms for proactive crime prevention. The development of UBO as an AML tool will provide for very useful transparency. Corrupt regimes will have to be creative in finding new ways to move illicit funds to safe havens. The number of eyes - informed and alert - following every flow of funds from source to destination will increase as companies implement and develop programs to comply with failure-to-prevent legislation. Financial institutions and other regular users of the AML systems need to prepare for coming changes and anticipate the effect of exchange of information between businesses in the regulated sectors.

Compliance as a function of governance and risk is coming into its own. Going forward into the cyber age, AML/TF and ABC will be premised, more and more, on international cooperation; a common approach; free flows of intelligence and information; and the closing of technological gaps which extremists exploit. Delinquent governments might also find that sovereignty is not a complete defence where governments fail to prevent human rights abuses and grand corruption. The AML/TF and ABC legislative frameworks provide very useful legal mechanisms and remedies to combat both.

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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