22 MARCH 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

CORPORATE INVESTIGATIONS:
IS THERE AN ALIGNMENT OF US AND UK LAW ENFORCEMENT AND CRIME PREVENTION METHODOLOGY?

In February the Fraud Section of the United States Department of Justice (DOJ) published a list of 'important topics and sample questions' under the heading "Evaluation of Corporate Compliance Programs".

PUBLIC LAW:
MINING RIGHTS SAFE FROM LAND RESTITUTION CLAIMS

Earlier this year, the Constitutional Court issued an order in *Macassar Land Claims Committee v Maccsand CC and Others*, bringing to a close years of litigation that threatened the security and stability of mining rights granted under the Mineral and Petroleum Resources Development Act.

NEW SERIES

PUBLIC LAW:
ENFORCING ICC WITNESS PROTECTION OBLIGATIONS: PART 1

Where there is a duty to cooperate under the Rome Statute of the International Criminal Court (Rome Statute), but a state has adopted a position of contempt, there must be some enforcement mechanism to ensure cooperation in respect of witness protection.

CDH
CLIFFE DEKKER HOFMEYR

CORPORATE INVESTIGATIONS: IS THERE AN ALIGNMENT OF US AND UK LAW ENFORCEMENT AND CRIME PREVENTION METHODOLOGY?

A criminal investigation by the DOJ usually triggers what is known as the Filip Factors.

In February the Fraud Section of the United States Department of Justice (DOJ) published a list of 'important topics and sample questions' under the heading "Evaluation of Corporate Compliance Programs" on its official website. These topics and questions are provided by the DOJ as guidance for when an evaluation is done of a company's corporate compliance program for purposes of a criminal investigation. This is the first formal guidance issued by the Fraud Section since the change in US Presidential Administration and confirmation of the new US Attorney General.

As a result of a paradigm shift in corporate criminal liability on both sides of the Atlantic, the modern model for corporate compliance recognises compliance as a distinctly separate and responsible profession

A criminal investigation by the DOJ usually triggers what is known as the Filip Factors. These factors are described in the US Attorney's Manual under the section of "The Principles of Federal Prosecution of Business Organisations" in the United States as specific factors that prosecutors should consider when determining to bring charges and negotiating pleas or other agreements. One of the Filip Factors is the "existence and effectiveness of the corporation's pre-existing compliance program" and the corporation's remedial efforts to implement an effective corporate compliance program or to improve an existing one. The focus for these factors fall squarely on the corporation and its compliance program. In this formal guidance document the Fraud Section provides some important topics and sample questions that they have frequently found relevant in evaluating a corporate compliance program. It is emphasised that these topics and questions are neither a formula nor a checklist: the DOJ makes an individualised determination in each case.

This approach in the US is aligned with the UK approach where the UK Bribery Act, in s7, provides for a defence if a company can prove that it had in place 'adequate procedures' designed to prevent certain bribery actions from taking place. In both instances the focus falls on the proactive steps taken by the corporation to prevent the criminal actions taking place within the corporation. In the US, such actions are taken into consideration when prosecutors decide on 'co-operation credits' and in the UK it provides a complete defence to prosecution and, if the corporation discharges the onus of proving "adequate procedures" in place to prevent bribery, an acquittal follows.

A similar approach was adopted by the French legislature at the end of last year when French Law No. 2016-1691 of 9 December 2016, also known as Sapin II, was finally enacted. This new act strengthens the French anti-corruption armoury and constitutes a fresh and strong initiative to combat bribery and

CDH
CLIFFE DEKKER HOFMEYR

CORPORATE INVESTIGATIONS:
IS THERE AN ALIGNMENT OF US AND UK LAW ENFORCEMENT AND CRIME PREVENTION METHODOLOGY?

CONTINUED

Nowadays applicants in interviews for the position of Compliance Officer want to know upfront what the corporation's compliance and corporate structure looks like.

corruption. It creates an obligation on the representatives of companies to implement a compliance programme to detect and prevent corruption and 'traffic d'influence'.

It also creates an anti-corruption agency, Agence Française Anti-corruption (AFA), which is an independent administrative authority with sanctions power that will monitor the effectiveness of the compliance program implemented by legal entities and to punish those in breach of the law. Whistle blowers are protected. Provision is also made for a type of deferred prosecution agreement (following the US lead) which can be entered into between the corporation and the prosecutor to avoid a criminal trial and sentence. A corporation must adopt a code of conduct, introduce a training program, create internal systems of alerts and exercise risk mapping, implement internal and external accounting controls plus a disciplinary regime and an assessment program to monitor the efficiency of the internal procedures.

It has also been noted that, in banking Anti-Money Laundering (AML) Index, the Basel Institute has been focussing on effectiveness as a yardstick: the AML Index is a tool now used by the Institute to risk rate countries for the effectiveness of their compliance programmes as opposed to technical compliance.

If one takes into account the shifting of compliance standards of the Financial Action Task Force (FATF) and the Basel Institute, and the proactive approaches adopted by the USA, UK and France, it is clear, that a proper compliance program is no longer a question of just clearing minimum compliance hurdles: there is a movement on both sides of the Atlantic to reward good corporate behaviour and to sanction the absence of effective compliance and crime prevention programs. Gone are the days when the compliance tick box list was merely given to one individual in the legal department as an item on a task list over, and slightly below, the normal legal issues and challenges.

Nowadays applicants in interviews for the position of Compliance Officer want to know upfront what the corporation's compliance and corporate structure looks like and walk away if it seems absent or weak. The risks outweigh the salary.

As a result of a paradigm shift in corporate criminal liability on both sides of the Atlantic, the modern model for corporate compliance recognises compliance as a distinctly separate and responsible profession, quite separate from the legal department, in form and function with empowerment, independence and authority, never subservient, pliable or biased. It is already no longer sufficient for a compliance programme to pay lip-service to a series of tick boxes; compliance will have to be seen as part of the corporation's business policies and processes to be regarded as effective.

Willem Janse van Rensburg

CDH
CLIFFE DEKKER HOFMEYR

PUBLIC LAW: MINING RIGHTS SAFE FROM LAND RESTITUTION CLAIMS

Maccsand holds a mining right over one of the erven in relation to which the Committee seeks restitution.

Earlier this year, the Constitutional Court issued an order in *Macassar Land Claims Committee v Maccsand CC and Others*, bringing to a close years of litigation that threatened the security and stability of mining rights granted under the Mineral and Petroleum Resources Development Act (MPRDA).

The State delivered a special plea, with which Maccsand made common cause, to the effect that the LCC had no power to order the expungement and expropriation of a mining right.

In June 2003 the Macassar Land Claims Committee (Committee) launched an application before the Land Claims Court (LCC) seeking restitution of a right in land under the Restitution of Land Rights Act, No 22 of 1994 (Restitution Act). Maccsand holds a mining right over one of the erven in relation to which the Committee seeks restitution. As part of its restitutionary relief, the Committee sought orders expropriating and expunging Maccsand's mining right.

In 2008 the LCC (per Gildenhuys J) concluded that the Minister of Public Works was empowered to expropriate a mining right for purposes of restitution and that it had the power to order the Minister to effect such expropriation. This conclusion jeopardised mining rights as it allowed for the possibility that those rights could be expunged for reasons and by way of processes not contemplated in the MPRDA.

The State delivered a special plea, with which Maccsand made common cause, to the effect that the LCC had no power to order the expungement and expropriation of a mining right. The matter finally came before the Supreme Court of Appeal (SCA) in November 2016, where Maccsand argued that: in terms of the new legal regime ushered in by the MPRDA, a land owner may no longer prevent a properly licensed third party from mining on his or her land; the right to restitution under the Restitution Act does not include the right to land that is free from a mining right; the Restitution Act cannot be used to undo the consequences of the MPRDA; and just as the LCC has no power to confer under the Restitution Act a mining right that was never held by a claimant, neither does it have the power to order the expungement and expropriation of such a mining right.

The SCA found in favour of Maccsand and upheld the special plea. Although Wallis JA found against the Committee on a number of grounds, he also had occasion to consider the LCC's powers. He found that, whatever rights the Committee and the community it represents may once have had in relation to the erf in question, since the advent of the MPRDA the right to mine is independent of land ownership and comes about only in terms of that statute. To the extent that the community lost the

CDH
CLIFFE DEKKER HOFMEYR

PUBLIC LAW:
MINING RIGHTS SAFE FROM LAND RESTITUTION CLAIMS

CONTINUED

The SCA accordingly upheld the special plea and found that the LCC had no power to order the expungement or expropriation of Maccsand's mining right.

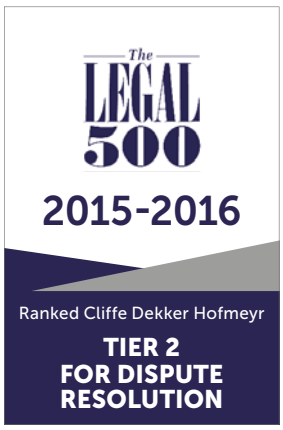
right to mine, that loss occurred as a result of South Africa's mining legislation and irrespective of the historical dispossession of which the community complained:

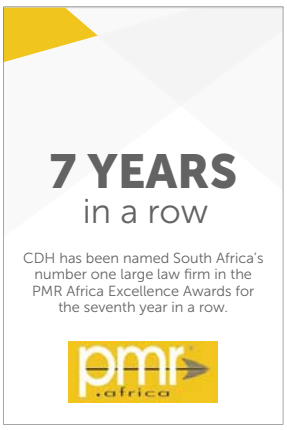
> "Where a claimant under the [Restitution Act] seeks restitution of a right in land they cannot claim that the right be free from the impact of current regulatory legislation enacted after the inception of democracy. Nor can they demand that it be free of the impact of the MPRDA and free of rights properly granted under it."

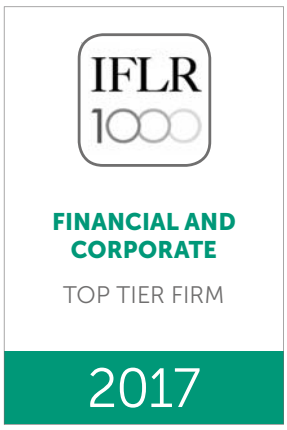
Wallis JA therefore found that even if the Committee were ultimately to acquire title to the erf in question, that would not afford it any right to undertake mining itself or to interfere with a right properly obtained by Maccsand under the MPRDA in relation to that erf. The SCA accordingly upheld the special plea and found that the LCC had no power to order the expungement or expropriation of Maccsand's mining right.

The Constitutional Court dismissed the Committee's subsequent application for leave to appeal on the basis that it bore no prospects of success, thus preserving the stability of the mining regime under the MPRDA and avoiding that stability from being engulfed with uncertainty and undermined.

Lionel Egypt, Ashley Pillay and Samantha Matjila







CLICK HERE to find out more about our Administrative and Public Law team.

CDH
CLIFFE DEKKER HOFMEYR

PUBLIC LAW:
ENFORCING ICC WITNESS PROTECTION OBLIGATIONS: PART 1

NEW SERIES

This is the **fourth alert in an ongoing series of six exploring the legal ramifications of an African exodus from the International Criminal Court for its witness protection programme**. In particular, the alerts will focus on the implications for witnesses currently in the relocation process, previously relocated witnesses, as well as future witness relocations.

Article 87(7) of the Rome Statute provides that where a States Party (or former States Party) fails to comply with the duty to cooperate, the International Criminal Court (ICC or Court) may refer the matter to the UNSC.

Where there is a duty to cooperate under the Rome Statute of the International Criminal Court (Rome Statute), but a state has adopted a position of contempt, there must be some enforcement mechanism to ensure cooperation in respect of witness protection.

The Rome Statute itself provides for two courses of action in the event of non-compliance:

1) referral to the United Nations Security Council (UNSC); and

2) referral to the Assembly of States Parties (Assembly).

Referral to the UNSC

Article 87(7) of the Rome Statute provides that where a States Party (or former States Party) fails to comply with the duty to cooperate, the International Criminal Court (ICC or Court) may refer the matter to the UNSC. However, this course of action is only available where the matter before the Court was referred to it by the UNSC (as is the case with Darfur). The UNSC will only refer a matter to the Court where the state concerned is not an ICC member state; and the state has not accepted the jurisdiction of the Court in respect of the issue under investigation. Therefore, this is not a readily-available route for the Court to pursue and will seldom find application.

Where a matter does make it to the UNSC for consideration, it will come up against the usual UNSC problem of the 'permanent five' veto powers. That is, the United States, United Kingdom, France, Russia and China each hold the power to veto any vote of the UNSC as a whole. It is widely accepted that this veto power can be used as a political tool. Of these five states, only Russia is an ICC member state (and, as mentioned in the first alert, it has indicated its intention to begin the withdrawal process).

Cooperation to protect the lives of witnesses may, therefore, be subjected to the political willpower of non-States Parties and the to and fro of political alliances by major countries with interests in maintaining good relations with African states. It may thus be possible for the non-compliance of a States Party to effectively go unpunished at an international level. In its 2015 report to the UN, the ICC noted that "the capacity of the [UNSC] to refer a situation to the Court is crucial to ensure accountability, but without the necessary follow-up, in terms of ensuring cooperation ... justice will not be done". Historically, the UNSC has been slow to respond to non-cooperation communications from the ICC.

Therefore, the route of UNSC referral may not be viable where matters have originated in the UNSC given its politicised nature and questionable track record as far as cooperation communications are concerned.

CDH
CLIFFE DEKKER HOFMEYR

PUBLIC LAW:
ENFORCING ICC WITNESS PROTECTION OBLIGATIONS: PART 1

CONTINUED

The Non-Cooperation Procedures document does not set out what the Assembly may actually do beyond a formal or informal response through a series of letters and meetings aimed at encouraging cooperation and accounting for non-cooperation by a States Party.

Referral to the Assembly

Article 112(2)(f) of the Rome Statute empowers the Assembly to consider questions relating to non-cooperation. However, the scope of the Assembly's powers is limited. In its Procedures Relating to Non-Cooperation (Non-Cooperation Procedures), the Assembly notes that any response by it to a referral from the ICC would be non-judicial and limited to its competencies under article 112 of the Rome Statute. It further notes that it "may certainly support the effectiveness of the Rome Statute by deploying political and diplomatic efforts to promote cooperation and to respond to non-cooperation. These efforts, however, may not replace judicial determinations to be taken by the Court".

The Non-Cooperation Procedures document does not set out what the Assembly may actually do beyond a formal or informal response through a series of letters and meetings aimed at encouraging cooperation and accounting for non-cooperation by a States Party. Article 112 of the Rome Statute, which restricts the Assembly's powers, authorises the Assembly to 'take appropriate action' in relation to reports of the Bureau of the Assembly. However, it is unclear from the Rome Statute and from the Non-Cooperation Procedures quite what 'appropriate action' is or may be.

The unfortunate conclusion to be drawn is that the Assembly is not empowered to do anything beyond 'deploying political and diplomatic efforts'. This would be of

CDH
CLIFFE DEKKER HOFMEYR

PUBLIC LAW:
ENFORCING ICC WITNESS PROTECTION OBLIGATIONS: PART 1

CONTINUED

As far as non-States Parties are concerned, article 87(5)(b) of the Rome Statute provides that the cooperation request procedures may be followed where the Court has entered into an agreement with a non-States Party.

little comfort to a relocated witness whose safety is at risk. Apart from this apparent impotence, there is the problem of the long delay between the act of non-cooperation and receipt of the referral by the Assembly inherent in its procedures. This all seems to suggest that, at best, some form of retrospective censure is the only real power which can be exercised by the Assembly, rather than the more helpful prevention or remedying of the actual non-compliance.

As far as non-States Parties are concerned (which the exiting states will eventually be), article 87(5)(b) of the Rome Statute provides that the cooperation request procedures (including referral to the Assembly) may be followed where the Court has entered into an agreement with a non-States Party. Therefore, the concerns raised above are equally applicable in the case of future relocations to these states on the basis of ad hoc relocation agreements.

The overarching conclusion that can be drawn from this is that the Rome Statute itself does not contain an effective solution to the problem of non-compliance in relation to protection of relocated witnesses. The next alert will consider whether a solution may lie elsewhere.

Sarah McGibbon,
overseen by Lionel Egypt

This schedule briefly outlines the focus of the previous and coming instalments in this series. It also includes links to previous instalments.

Date of release	Topic
8 February 2017	Introduction: the factual foundation setting the context in which this issue must be considered.
22 February 2017	The Witness Protection Framework: the mechanisms used by the ICC to place witnesses into protection, and the important role of state cooperation in this framework.
8 March 2017	Potential Problems with the Witness Protection Framework: What problems may arise as a result of any African exodus?
22 March 2017	**Enforcement Mechanisms – Part 1:** Possible ways of holding states accountable in respect of their obligations to protected witnesses – for what does the Rome Statute provide?
5 April 2017	**Enforcement Mechanisms – Part 2:** Possible ways of holding states accountable in respect of their obligations to protected witnesses – what about new approaches?
19 April 2017	**Concluding remarks:** Summarising key points from the series and potential future steps.

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

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@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

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@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

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@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