

DISPUTE RESOLUTION ALERT

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THE (NON)-PUBLICATION OF AN ARBITRATION AWARD

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DELICTUAL LIABILITY IN THE ADMINISTRATIVE LAW PARADIGM

The SCA's recent ruling in *Odinfin (Pty) Ltd v Reynecke (906/2016) ZASCA 115 (21 September 2017)* is one that clarifies the legal position pertaining to delictual liability for pure economic loss arising from a breach of administrative law. It further confirms the long-standing legal position pertaining to the requirements for delictual liability in instances where there have been breaches of administrative law.

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The court further noted that this strict requirement had been omitted from what was then the South African International Arbitration Bill.



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In this case, the arbitration agreement between the parties provided that “in order to expedite matters, the arbitrator shall be entitled to initially furnish his award to the legal representatives of the parties by way of electronic mail and, thereafter, furnish the respective parties with a signed hard-copy thereof”.

The arbitrator then sent a hard copy of his award dated 14 August 2014 to each party, which, in each case, was delivered on 18 August 2014. No email was transmitted. No summoning of the parties to his presence was directed and no award was handed down in the presence of the parties. But both parties did receive a copy of the award.

One of the parties, in a Johnny-come-lately manner, contended that no arbitration award was published because what purported to be an “award” was neither delivered in the peremptory manner prescribed by s25, nor in accordance with the procedure agreed

between the parties. This was one of the grounds of review in seeking to set aside the award, which application was dismissed and the matter came before the full bench on appeal.

The full bench noted that s25 of the Arbitration Act provides for a high degree of formality. Unlike in other comparable jurisdictions, s25 places a duty on an arbitral tribunal to “deliver” an arbitration award in the presence of the parties. The full bench further undertook a comparative study of the English Arbitration Act, 1996, the Federal Arbitration Act, 9 USC in the United States of America, the Rules of the American Association of Arbitrators and the UNCITRAL model law, 1985. It noted that the South African legislation is exceptional in its prescription as to delivery of an award in the presence of the parties. The court further noted that this strict requirement had been omitted from what was then the South African International Arbitration Bill.



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THE (NON)-PUBLICATION OF AN ARBITRATION AWARD

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But is s25 of the Arbitration Act capable of variation? Can the parties, by agreement, vary the application of what appeared to be a peremptory provision? The court held that the basis of arbitration is consensus between the parties and to hold that publication in a manner agreed between the parties could result in an invalid award is contrary to the consensual nature of arbitration. Accordingly, the court held that the provisions of s25 the Arbitration Act are not immune from variation by agreement, but are merely a default procedure which shall apply in the absence of a contrary intention evinced by the contracting parties. The full bench found that the arbitrator's conduct of hand-delivering hard copies of the award to each party on 18 August 2014 satisfied his obligation in terms of the arbitration agreement and thus the arbitration award was validly delivered and published in terms of the Arbitration Act.

The *Buildcare* case has once again highlighted South Africa's badly out-of-date Arbitration Act. Hot on the heels of the revision to the law on international arbitration with the recent promulgation of the International Arbitration Act, 2017, our legislature should take steps to bring the Arbitration Act in line with international best practice.

For the time being, litigants can take comfort in the fact that South African courts are supportive of the institution of arbitration, setting awards aside only in limited circumstances. With that said and in order to avoid technical challenges, parties would be well advised to ensure that the arbitration proceedings including the publication of the award are undertaken in a manner that fully complies with the arbitration agreement as well as the Arbitration Act.

Vincent Manko

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



Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



DELICTUAL LIABILITY IN THE ADMINISTRATIVE LAW PARADIGM

The SCA found that PAJA does not suggest an intention of the lawmaker to extend a delictual remedy for non-compliance with its provisions .

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The SCA's recent ruling in *Odinfin (Pty) Ltd v Reynecke (906/2016) ZASCA 115 (21 September 2017)* is one that clarifies the legal position pertaining to delictual liability for pure economic loss arising from a breach of administrative law. It further confirms the long-standing legal position pertaining to the requirements for delictual liability in instances where there have been breaches of administrative law.

This ruling flows from a decision by the court *a quo*, wherein an employer, who was a registered FSP, debarred an employee who was a representative in terms of s14 of the Financial Services Advisory and Intermediary Services Act, No 37 of 2002 (FAIS Act), without complying with the requirements of procedural fairness as set out in the Promotion of Administrative Justice Act, No 3 of 2002 (PAJA). The question before the court was whether such non-compliance was wrongful and whether it entitled the employee to delictual damages. The court found in the employee's favour and awarded him damages.

On appeal, the SCA found that PAJA does not suggest an intention of the lawmaker to extend a delictual remedy for non-compliance with its provisions as PAJA provides extensively for the rights of an aggrieved person affected by unfair administrative action in s6 and s8. The court, however, qualified this by stating that where there was a breach of the statute pursuant to which the administrative action was taken and if such statute on a proper interpretation confers a delictual remedy, then delictual liability is possible.

The general requirements for delictual liability and the test for wrongfulness were confirmed by the court. It found in relation to the "fault" requirement that the employee did not allege that the employer's alleged breach was either knowingly wrongful (*dolus*) or negligent (*culpa*) therefore, on the merits, he was required to show not only that the breach of procedural fairness was wrongful in the delictual sense but that it gave rise to strict liability. In reaching its decision, the court relied on *Home Talk v Ekurhuleni Metropolitan Municipality (225/2016) [2017] ZASCA 77 (2 June 2017)* wherein it was held that generally, delictual liability will not be imposed for a breach of administrative law unless there are convincing policy considerations that warrant such imposition.

Further, in instances where a tender was negligently awarded contrary to the principles of administrative justice and where that tender is subsequently set aside after the successful tenderer has incurred significant expenses in attempting to comply with its contractual obligations, the position remains that policy considerations preclude a disappointed tenderer from recovering delictual damages that were purely economic in nature.



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This was confirmed in *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] JOL 18364 (CC), where the court found that neither the statute under which the tender was issued nor the common law imposed a legal duty on the tender board to compensate for damages where it had bona fides but negligently failed to comply with the requirements of administrative justice.

Similarly, and in addition, it follows that a claim against an administrative body will lie only if it is established that the award of the contract to a rival tenderer was brought about by dishonest or fraudulent conduct on the part of one or more of the officials for

whose conduct the appellant was vicariously liable, but for which the contract would have been awarded to the complainant. (*South African Post Office v De Lacy and another* [2009] 3 All SA 437 (SCA))

The court's position thus remains unchanged in respect of their unwillingness to extend delictual liability to matters concerning breaches of administrative law unless policy considerations necessitate delictual liability, a statute confers delictual liability or there has been fraudulent or dishonest conduct.

.....
Byron O'Connor and Farrhah Khan



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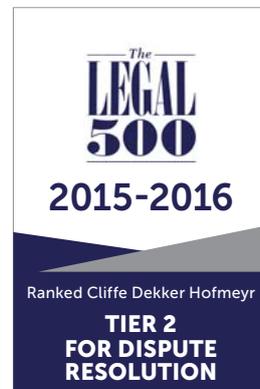
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