3 OCTOBER 2018

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

A TENDER TO PAY DOES NOT CONSTITUTE PERFORMANCE BUT...

In letters of demand, claimants normally call for specific performance failing which the agreement will be cancelled. Issues arise where the liability is admitted but the extent of such liability is disputed. In other words, what is the validity and legal effect of a tender to pay in *lieu* of actual payment in a contractual setting?

GLOBAL ANTI-CORRUPTION: SOUTH AFRICA FAILS TO MAKE THE GRADE ON OECD STANDARDS

On 12 September 2018, Transparency International published its 12th annual report on enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials. The report, titled Exporting Corruption, labelled South Africa as a country with 'limited enforcement' of foreign bribery – a country where foreign bribery goes largely unchecked and whose OECD obligations remain unfulfilled.

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A TENDER TO PAY DOES NOT CONSTITUTE PERFORMANCE BUT...

Smeg contended that a tender for payment does not constitute payment which is what Origo was required to do to avoid cancellation of the agreement pursuant to the demand.

In letters of demand, claimants normally call for specific performance failing which the agreement will be cancelled. Issues arise where the liability is admitted but the extent of such liability is disputed. In other words, what is the validity and legal effect of a tender to pay in *lieu* of actual payment in a contractual setting?

The High Court held that a tender to pay is a promise or an undertaking to pay and accordingly does not constitute actual payment.

The High Court recently considered this issue in *Origo International (Pty) Ltd v Smeg South Africa (Pty) Ltd* (33541/2017) ZAGPJHC 412 (25 June 2018). Upon receipt of a letter of demand, Origo prepared a detailed reconciliation of the accounts and established that whilst it was indebted to Smeg, it owed a lesser amount than that demanded. Origo therefore admitted the lesser liability and tendered to pay it upon Smeg's acceptance that the amount would be full and final settlement of the dispute. Subsequent to Origo's tender of the lesser amount, Smeg proceeded to cancel the agreement. Origo approached the High Court for an order declaring Smeg's purported cancellation invalid and that Smeg be ordered to comply with the agreement. The validity of the demand was not challenged.

The dispute between the parties concerned the correctness of the amount claimed. The issue was whether Origo's tender constituted compliance with the demand. Origo contended that it made a proper tender in that it admitted and subsequent duly proved the amount of indebtedness, which disentitled Smeg to cancel the agreement. Smeg disputed that Origo made a proper tender and in any event, contended that a tender for payment does not constitute payment which is what Origo was required to do to avoid cancellation of the agreement pursuant to the demand.

The High Court was of the view that in order to qualify as a proper tender for payment, a tender must be unconditional. The court had little difficulty in accepting that the tender in question was unconditional.

The next issue that arose was whether a tender to pay constituted performance. The High Court held that a tender to pay is a promise or an undertaking to pay and accordingly does not constitute actual payment. It therefore followed that the tender did not constitute payment. Did that mean that Origo's tender, although not constituting payment, did not have legal effect? The court found the opposite.

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

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The court therefore found that the validity of the cancellation was wholly dependent upon proof of the amount claimed and that failing such proof, Smeg's purported cancellation ought to be declared invalid.

By analogy, the court referred to the well-known offer to settle and tender procedure, provided for in Rule 34 of the Uniform Rules of Court and the effect thereof in the exercise of the court's discretion in awarding costs.

On the facts in *Origo International*, the court held the tender had this effect: should it be found that the admitted amount (or the lesser amount subsequently paid) was in fact the true amount owing, Origo would be protected from the consequences of non-compliance set forth in the demand for payment, which was the cancellation of the agreement. The court therefore found that the validity of the cancellation was wholly dependent upon proof of the amount claimed and that failing such proof, Smeg's purported cancellation ought to be declared invalid.

It is clear that cancelling an agreement in the face of a tender for payment, albeit not for the amount claimed, can have serious consequences. In light of the above, one must seriously consider the tender and consult legal representatives before taking any steps such as cancelling the agreement in those circumstances.

Vincent Manko and Thapelo Malakoane

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GLOBAL ANTI-CORRUPTION: SOUTH AFRICA FAILS TO MAKE THE GRADE ON OECD STANDARDS

The introduction of the OECD Anti-bribery Convention in 1997 provided solid support and a strong impetus in the fight against corruption, binding signatory countries to criminalise the bribing of foreign public officials and setting a global standard.

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As a report on South Africa, it clearly highlights our country's failure to meet its international commitments in combating corruption.

The US earned a reputation as "being alone out there" in combating bribery of foreign officials when it enacted its Foreign Corrupt Practises Act in 1977. The introduction of the OECD Anti-bribery Convention in 1997 provided solid support and a strong impetus in the fight against corruption, binding signatory countries to criminalise the bribing of foreign public officials and setting a global standard. The OECD proudly stated that it is the first and only anti-corruption instrument addressing the "supply side" of the bribery transaction. The Convention entered into force in South Africa in 2007.

The Exporting Corruption report is Transparency International's first update since 2015 and it provides for interesting, albeit (for some) alarming information and statistics. As a report on South Africa, it clearly highlights our country's failure to meet its international commitments in combating corruption. Some might even conclude that the report identifies South Africa as a haven for international syndicates specialising in global crime and money laundering.

The Exporting Corruption report categorised 44 countries, representing more than two-thirds of global exports. Forty of these countries are signatories to the OECD Anti-Bribery Convention. The additional four are all major exporting countries: China, Hong Kong, India and Singapore. The report provides for four categories of enforcement, starting at the top of the scale with 'active enforcement' and ending, at the bottom of the scale with 'little or no enforcement', with 'moderate' and 'limited enforcement' in the middle. South Africa finds itself in the third category, "limited enforcement", in the company of France, Greece, Hungary, Netherlands, New Zealand, Portugal, South Korea and Sweden. If one, however, compares the 2017 Transparency International Corruption Perceptions Index scores, one finds South Africa, compared to the other 8 countries in this third category, with the lowest CPI score namely 43. The CPI serves as a measure of perceived levels of public corruption, a score below 50 is indicative of a country struggling with corruption.

Summarised, Transparency International, utilising its two measuring tools, categorised South Africa as 'corrupt' with 'limited enforcement' against foreign bribery. Is this an accurate and fair reflection of South Africa in the world of anti-bribery and corruption, one might ask?

Comparing previous performance, one notices that the CPI score in 2016 was 45 and the Corruption Export Category ranking in 2015 was 'limited enforcement'. Criticism for showing little improvement in the past three years seems fair. South Africa has, however, always been

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In the 2018 TI report, after considering the preceding compliance gap and issues raised from 2012 to date, it is recorded that, South Africa has no history of convictions for foreign bribery to date.

considered a leader in Africa regarding export value. Last year South Africa ranked first with USD88.3bn in global shipments, comprising 19.1% of the continent's shipments (despite showing a decline of 7.2% within four years). This dominance is the reason the OECD expects South Africa to raise its standard of compliance.

The 2018 TI report has an historical basis and cannot simply be ignored as being unfair or too critical in naming and shaming offenders. The 2012 TI report categorised South Africa as a country with 'no enforcement' with no cases or investigations. The 2015 TI report specifically recorded that South Africa's safeguards to protect the Central Anti-corruption Bureau from politicisation were insufficient. In March 2016 the OECD Working Group on Bribery raised concerns about South Africa's lack of enforcement actions and it also noted that few steps have been taken to address concerns that political and economic considerations may influence the investigation and prosecution of foreign bribery. In the 2018 TI report, after considering the preceding compliance gap and issues raised from 2012 to date, it is recorded that, South Africa has no history of convictions for foreign bribery to date.

The report further raises concerns about the ease with which settlements and plea bargain arrangements are entered into in South Africa: 41 out of 42 corruption cases have ended with plea bargains and reduced sentences. Further concerns are that, despite the introduction of the Protected Disclosures Amendment Act, awareness of whistle-blower protections remain limited with no concrete steps being taken to ensure that reporting can occur without fear of reprisal.

Perhaps South Africa's current weak rating is not surprising taking into account that South Africa was one of only two countries that failed to make a single 'new commitment' at the UK Anti-Corruption Summit in London in 2016. The four-page country statement yielded only one commitment stating that the country 'was working towards the redrafting of a National Anti-Corruption Strategy'. According to Transparency International's report assessing the Summit, "South Africa's country statement was generally considered the weakest by civil society representatives."

Media reports abound on South Africa's increasing global risks as a result of political interference in the economy and legal system. The Reserve Bank and the Special Investigative Unit (SIU) have been complaining publicly of a total systemic failure in prosecuting reported cases. An improper relationship between politics and capital has the risk of eroding the rule of law, ultimately affecting legal certainty. Transparency and proper corporate governance is not negotiable.

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There is, however, a new sense of optimism sweeping through the nation and one can only hope that South Africa will implement the 2018 TI report recommendations.

If South Africa fails to heed the call of global watchdogs like the OECD, it might find itself at the mercy of more money laundering syndicates. Fortunately, the judiciary has held its own and the State Capture Commission has the potential to usher in a return to the rule of law with a restoration of public confidence in the administration of justice.

There is, however, a new sense of optimism sweeping through the nation and one can only hope that South Africa will implement the 2018 TI report recommendations, including, among others, to:

- Dedicate adequate resources to anti-corruption enforcement agencies;
- Increase institutional capacity to detect, investigate and prosecute foreign bribery and systematically publish enforcement data;
- Improve coordination between investigating and prosecuting authorities;
- Ensure that investigations are free from political interference;
- Strengthen whistle blower protection; and
- Improve internal compliance programmes and corporate governance in SA companies that conduct business abroad including those not listed on the SA Stock Exchange.

Willem Janse van Rensburg

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

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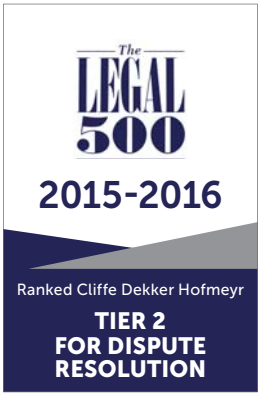

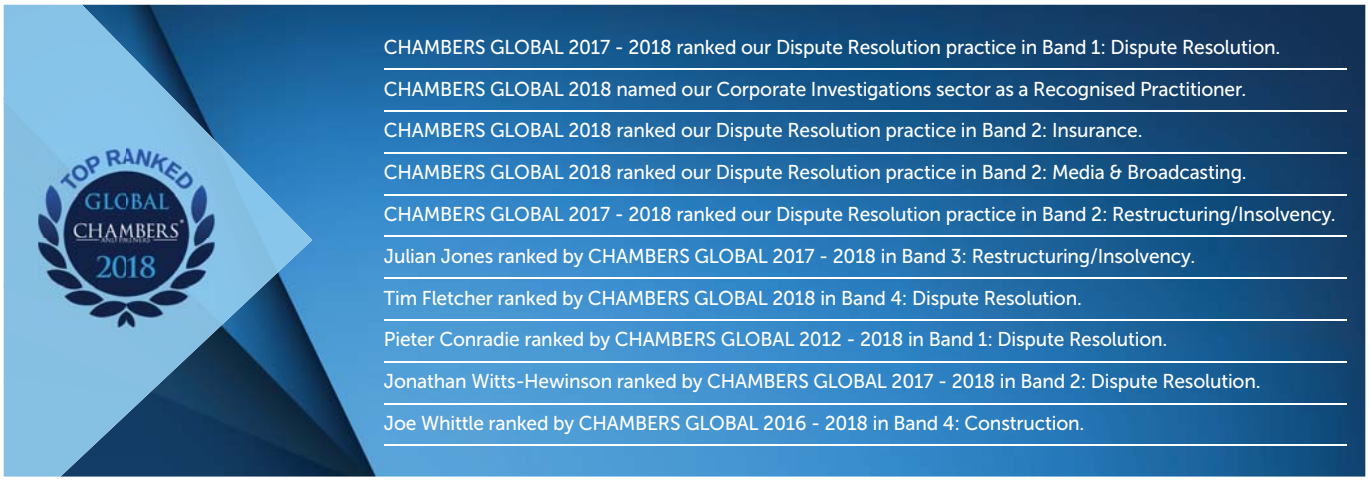

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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