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DISPUTE RESOLUTION ALERT

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Can the real bidder please stand up: Fronting under the Broad Based Black Economic Empowerment Act

South Africa’s first democratic government set out to redress the gross inequalities of the past. Parliament, in 2003, enacted the Broad Based Black Economic Empowerment Act, No 53 of 2003 (Act). The fundamental objective of the Act is to advance economic transformation and enhance the economic participation of black people in the South African economy.

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To date, constitutional damages awarded by our courts have been linked to the monetary damages suffered as a result of an infringement of a constitutional right. For instance, in the *Modderfontein Squatters case* (2004 (6) SA 40 (SCA)), which related to the infringement of a right to property, the court awarded constitutional damages to the owner of the property, calculated in terms of the Expropriation Act, No 63 of 1975. In the *Kate case* (2006 (4) SA 478 (SCA)), where there was an unreasonable delay in considering an application for a disability grant, the Supreme Court of Appeal (SCA) awarded constitutional damages in the form of interest on the disability payments eventually approved.

The recognition of claims for constitutional damages for non-patrimonial damages by our courts, however, remains uncertain.

The recent appeal to the SCA in the matter of *Komape v Minister of Basic Education* 754/2018 and 1051/2018, concerning the death of Michael Komape (aged five) when he fell into a pit toilet, brings the issue of constitutional damages to the forefront. The Komape family instituted an action in the Limpopo High Court for, among other things, emotional shock and constitutional damages, which claims were denied. The appeal to the SCA was heard on 2 September 2019 with judgment reserved.

Having regard to the claim for emotional shock, existing common law recognises an action for pain and suffering, which allows a form of *imperfect compensation* in the case of an injury. The word “imperfect” is used because full and actual restitution is impossible. The common law nevertheless attempts to provide compensation. Claims for emotional shock or psychological injury fall under the damages category of pain and suffering which, in turn, falls within the ambit of “general damages”.

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Constitutional damages and grief – the SCA will soon say...continued

In the *Komape* case, it was argued on behalf of the plaintiffs that the common law ought to be developed to include an award for damages for grief which does not give rise to detectable or recognised psychiatric injury.

An immediate issue that arises in respect of constitutional damages is that many, if not all, delicts can be linked to a violation of a right in the Bill of Rights. Are constitutional damages recoverable in addition to the damages available under common law?

Considerations of overcompensation and the place of punitive damages in civil law in South Africa arise.

Life Esidimeni Arbitration

Arbitration proceedings followed the tragic death of 144 mental healthcare patients as a result of the state's irrational and unconstitutional decision to terminate a contract with Life Esidimeni. In his arbitration award, Justice Moseneke emphasised, "the breadth and depth and frequency of the arrogant and deeply disgraceful disregard of constitutional obligations, other law, mental health care norms and ethics by an organ of state, its leaders and employees".

Constitutional damages, in addition to general damages, were awarded to the claimants on 19 March 2018. It goes without saying that an arbitration award does not create a binding precedent in law. It is, nevertheless, worth considering in a field fraught with uncertainty.

Approximately a month after the Esidimeni arbitration award, judgment was handed down by the High Court of Limpopo in the *Komape* matter.

Komape and Others v Minister of Basic Education (1416/2015) [2018] ZALMPPHC 18 in the High Court

Muller J writing for the High Court, was scathing in his description of the state's conduct. He described the state's

conduct as displaying, "a complete lack of understanding of the basic human rights of learners [and is] without question reprehensible".

An argument for the extension of the common law to include a claim for grief

It is trite law that delictual damages are not recoverable for normal grief or sorrow following a bereavement (*Barnard v SANTAM 1999 (1) SA 202 (SCA) 217A-B*). Emotional shock gives rise to a claim of damages only to the extent that it results in psychiatric injury (*Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1987 (1) SA 769 (A)*).

In the *Komape* case, it was argued on behalf of the plaintiffs that the common law ought to be developed to include an award for damages for grief which does not give rise to detectable or recognised psychiatric injury. The High Court held that there was no basis upon which the common law can or should be developed. In this regard, Muller J said that, "policy considerations militate against compensation for emotional suffering short of recognisable psychiatric illness". He further stated that, "a claim for grief cannot be justified as such will no doubt lead to bogus and unwarranted proliferation of claims and pave the way for limitless claims for every conceivable cause of grief without expert psychiatric evidence."

The High Court in the *Komape* matter said that grief is not a condition. Grief consists of subjective feelings which take time to process. Bereavement and grief are part of a common human experience, which is a natural consequence following the death of a loved one.

Constitutional damages and grief – the SCA will soon say...continued

The imminent SCA judgment will hopefully provide legal certainty in respect of claims for constitutional damages, where no direct financial loss has been suffered due to the infringement of a constitutional right.

Having regard to the plaintiffs' claims for emotional shock, it is noteworthy and anomalous that although the state had conceded liability in respect of the merits of the plaintiffs' claim for emotional shock, the court held that no case for psychological injury was proved and consequently did not allow the claims for emotional shock.

Constitutional damages

Muller J, specifically referred to the state's positive obligation "to promote, protect and fulfil" the rights in the Bill of Rights as provided in s7(2) of the Constitution. Despite having held that numerous constitutional rights had been breached, the court held that the plaintiffs' claims for constitutional damages would, if allowed, amount to punitive damages. It is trite that punitive damages in civil law are against public policy and foreign to South African law (*Jones v Krok* 1995 (1) SA 677 (AD) 696C-H).

The court did not consider an award of constitutional damages in this matter as just and equitable, nor a remedy that would serve the interests of society. Instead, the court granted an order directed at the enforcement, protection and prevention of future encroachment of the rights protected in the Bill of Rights in the form of a structural interdict.

Whether or not the plaintiffs' claims for emotional shock in the *Komape* matter should succeed, having regard to the evidence before the High Court as well as the state's concession of liability in respect of the plaintiffs' claims for emotional shock, will no doubt be addressed by the SCA judgment.

The imminent SCA judgment will hopefully provide legal certainty in respect of claims for constitutional damages, where no direct financial loss has been suffered due to the infringement of a constitutional right.

Anja Hofmeyr, Willie van Wyk and Marissa van der Westhuizen

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Can the real bidder please stand up: Fronting under the Broad Based Black Economic Empowerment Act

Fronting practice is defined in the Act as a transaction, arrangement or other act or conduct that undermines the achievement of the objectives of the Act.

South Africa's first democratic government set out to redress the gross inequalities of the past. Parliament, in 2003, enacted the Broad Based Black Economic Empowerment Act, No 53 of 2003 (Act). The fundamental objective of the Act is to advance economic transformation and enhance the economic participation of black people in the South African economy.

The Act seeks to achieve Broad Based Black Economic Empowerment (BBBEE) by ensuring viable economic empowerment of all black people through diverse but integrated socio-economic strategies such as:

- increasing the number of black people that manage, own and control enterprises and productive assets;
- facilitating ownership and management of enterprise and productive assets by communities, workers, co-operatives and other collective enterprises;
- human resource and skills development;
- achieving equitable representation in all occupational categories and levels in the workforce;
- preferential procurement from enterprises that are owned or managed by black people; and
- investing in enterprises that are owned or managed by black people.

The Act is mindful of any deliberate circumvention or attempted circumvention of its precepts, known as "fronting practice".

Fronting practice is defined in the Act as a transaction, arrangement or other act or conduct that undermines the achievement of the objectives of the Act. Section 1(c) refers to "the conclusion of the legal relationship with a black person for the purpose of that enterprise achieving a certain level of Broad Based Black Economic Empowerment compliance without granting the black person the economic benefits that would reasonably be expected to be associated with the status or position by that black person".

The issue of fronting was considered in the Supreme Court of Appeal (SCA) case of *Swifambo Rail Leasing (Pty) Ltd v PRASA* (1030/2017) 2018 ZASCA 167. In this case, the Passenger Rail Agency of South Africa (PRASA), pursuant to a tender process, entered into a contract with Swifambo Rail Leasing (Pty) Ltd (Swifambo) for the purchase of locomotives. Prior to the tender process, a Spanish company, Vossloh España S A U (Vossloh) inspected PRASA's fleet and made recommendations as to what PRASA needed in respect of the locomotives. After the bid was awarded, Swifambo and Vossloh entered into a contract in terms of which Vossloh would supply all the locomotives to Swifambo and in turn, Swifambo would supply the locomotives to PRASA.

PRASA raised an allegation of fronting, claiming that Swifambo was a front for Vossloh and Vossloh was the real bidder. In analysing whether PRASA's allegation was indeed true, the SCA considered whether Vossloh would have been able to bid itself having regard to the fact it was not based in South Africa and therefore not BBBEE compliant. The SCA found that Vossloh was not eligible to bid.



Can the real bidder please stand up: Fronting under the Broad Based Black Economic Empowerment Act...continued

The SCA's decision illustrates that businesses should carefully consider whether their corporate structures and arrangements uphold the provisions of the Act otherwise they run the risk of losing their contracts for directly or indirectly circumventing the Act's legal precepts.

As part of its bid documents, Swifambo described Vossloh as a sub-contractor and stated that the only relationship between the two was Vossloh's obligation to deliver the locomotives. The SCA, however, found that the obligation was not the true contractual relationship but rather that Vossloh was discharging the main obligation, being the supply of the locomotives to PRASA.

The SCA held that "Swifambo personnel played no role insofar as PRASA was concerned, and so there were no skills transfer and no change of asset holding. Vossloh had complete control over

every aspect of the contract between Swifambo and PRASA, including the appointment of members of the steering committee overseeing the transaction and commissioning of locomotives. Swifambo's real role was undoubtedly to enable Vossloh to become the real bidder for the tender".

The SCA's decision illustrates that businesses should carefully consider whether their corporate structures and arrangements uphold the provisions of the Act otherwise they run the risk of losing their contracts for directly or indirectly circumventing the Act's legal precepts.

Rishaban Moodley and Neha Dhana



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To illustrate our support of the development and strengthening of International Arbitration in Africa, CDH is a sponsor of the Hot Topics in Investment Arbitration Conference which will be held on Friday, 8 November 2019.

The conference will be hosted by Africa International Legal Awareness (AILA) with networking cocktails at CDH's Johannesburg office to end the day on a high note.



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