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DISPUTE RESOLUTION **ALERT**

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CDH
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The application of BBBEE prescripts when doing business with government

The Broad-Based Black Economic Empowerment Act 53 of 2003 is one of the national legislations envisaged in section 217 of the Constitution.

Section 217 of the Constitution of the Republic of South Africa directs National, Provincial or Local spheres of Government, or any other institution identified in national legislation to contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

The Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) is one of the national legislations envisaged in section 217 of the Constitution. The BBBEE Act is a framework for how Government may prefer historically disadvantaged companies when contracting for goods and services.

The applicability of the prescripts of the BBBEE Act when tendering for goods and services was considered by the Supreme Court of Appeal (SCA) in *Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others* (1306/18) [2020] ZASCA 02.

The Airports Company South Africa SOC Limited (ACSA) published a Request for Bids (RFB) inviting members of the public to submit tenders for the hiring of car rental kiosks and parking bays at nine airports operated by the ACSA. The ACSA's RFB set out a qualification criteria based on a 50/50 price and BBBEE compliance ratio.

Imperial Group Limited objected to the BBBE compliance ratio on the basis that it deviated from the criteria set out in the BBBEE Act.

In determining the applicability of the BBBEE Act in the circumstances, the court referred to section 9 and 10 of BBBEE Act.

Section 9 of the BBBEE Act empowers the Minister of Trade and Industry (Minister) to issue Codes of Good Practice on black economic empowerment (BBBEE codes) that may include a qualification criterion for preferential purposes for procurement and other economic activities.

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The application of BBBEE prescripts when doing business with government

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The BBBEE Act limits the discretion afforded to organs of state when drafting the BBBEE terms of their tender documents.

Section 9(6) of the BBBEE Act provides organs of state with recourse to deviate from the qualification criteria for procurement and other economic activities set out in the BBBEE codes. Sectio 9(6) of the BBBEE Act reads as follows:

> *"If requested to do so, the Minister may by notice in the Gazette permit organs of state or public entities to specify qualification criteria for procurement and other economic activities..."*

Further, section 10(2)(a) permits the Minister to consult with organs of state or public entities and pursuant to such consultations allow the organ of state to deviate form the requirements of the BBBEE code.

The SCA found that the provisions of the BBBEE Act constituted mandatory provisions and stated that "*it is plain that it is not open to an organ of state, without the Minister's consent, to design its own custom-made set of qualification criteria that deviate from the provisions of the applicable B-BBEE code.*"

The BBBEE Act, thus, limits the discretion afforded to organs of state when drafting the BBBEE terms of their tender documents. Organs of state must be careful that they follow the letter of the law in applying the prescripts of the BBBEE Act unless they have obtained the Minister's consent. In the event that an organ of state fails to obtain the Minister's consent, it exposes its tender to judicial scrutiny.

Corné Lewis and Neha Dhana

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A discussion of the recent High Court judgment confirming the validity of the tobacco ban under the Disaster Management Act 57 of 2002 and Regulations

This effectively means that the buying and selling of tobacco and related products remain prohibited in South Africa.

On 26 June 2020, the Gauteng Division of the High Court, Pretoria, dismissed an application brought by the Fair-Trade Independent Tobacco Association (FITA) challenging the validity of the regulations promulgated by the Minister of Cooperative Governance and Traditional Affairs (the Minister) pursuant to section 27(2) of the Disaster management Act 57 of 2002, which prohibits the sale of tobacco products as part of the measures introduced to curb the escalation of the COVID-19 virus. This effectively means that the buying and selling of tobacco and related products remain prohibited in South Africa.

The crux of the challenge by FITA was that there is no rational basis for the Minister's decision to outlaw the sale of tobacco products. In other words, FITA contended that banning the sale of cigarettes and tobacco products bears no rational connection to curbing the spread of the COVID-19 virus. The court therefore had to consider whether there was a rational connection between the purpose of containing the spread of the virus, and the means chosen, being the ban on the sale of tobacco products.

The Minister based her decision of banning tobacco products on the need *"to protect human life and health and to reduce the potential strain on the health care system"*. This decision largely revolved around South Africa's weak healthcare system, which has a shortfall of essential healthcare resources such as ventilators and ICU facilities. South Africa's healthcare system reportedly has less than half the ventilators that the Health Department estimates will be needed to treat patients at the peak of the COVID-19 pandemic. Therefore, the Minister contended that this places a duty upon her to take measures that would prevent an unnecessary strain on South Africa's healthcare facilities, in order to ensure that COVID-19 patients have access to such facilities when the need arises.

The medical literature consulted by the Minister showed that the use of tobacco products increases not only the risk of transmission of COVID-19, but also the risk of developing a more severe form of the disease. It therefore had to be determined whether such evidence considered by the Minister provided a rational basis for the prohibition.

The court was of the view that *"a vigorous attempt to contain the spread of the virus at all costs had to be made, especially bearing in mind the high COVID-19 mortality rates and the fact that, as a developing country with limited resources, South Africa is ill-equipped to survive the full brunt of the pandemic at its peak if no concerted efforts are made to contain the virus."*

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A discussion of the recent High Court judgment confirming the validity of the tobacco ban under the Disaster Management Act 57 of 2002 and Regulations...*continued*

The application was dismissed with costs.

It was therefore held that the evidence and material considered by the Minister to arrive at her decision, provided her with a rational basis to outlaw the sale of tobacco products, and that this was a rational decision *"intended to assist the State in complying with its responsibilities of protecting lives and thus curbing the spread of the COVID-19 virus and preventing a strain on the country's healthcare facilities."*

The court further rejected FITA's argument that the ban had the effect of encouraging trade in illicit cigarettes rather than the intended effect of preventing smoking. It reiterated that the objective of the Minister's decision was not to stop every smoker from continuing with smoking, but to alleviate the *"potential devastating burden on the already constrained healthcare system"*.

The argument that cigarettes ought to be deemed essential goods because they are addictive was rejected on the basis that cigarettes and related tobacco products do not fall into the same category as goods which are *"life sustaining or necessary for basic functionality."* The court held that a substance being addictive does not necessarily mean that it is essential.

The application was dismissed with costs. The buying and selling of cigarettes and tobacco products therefore remains banned in South Africa. Meanwhile, British American Tobacco South Africa has also filed papers challenging the ban on cigarettes and other tobacco products, a case due to be heard in August in the Western Cape High Court. This judgment has been received with mixed reactions and an application for leave to appeal was due to be heard on 30 June 2020.

Roy Barendse and Fatena Ali

CLIFFE DEKKER HOFMEYR

Repudiation: Does withholding supply automatically constitute repudiation?

The Supreme Court of Appeal (SCA) in *Micaren Exel Petroleum Wholesaler (Pty) Ltd v Stella Quick Shop (Pty) Ltd and Another* (Case no 471/2019) [2020] ZASCA 61 (9 June 2020) was recently required to ascertain whether Micaren Exel Petroleum Wholesaler (Pty) Ltd (Micaren) had repudiated the dealership agreement concluded with Stella Quick Stop (Pty) Ltd (Stella) by discontinuing the supply of petroleum products.

In the Petroleum Industry wholesalers often insert exclusivity provisions in their supply agreements prohibiting the retailer/dealer from storing and/or purchasing petroleum products from other wholesalers and that the wholesaler may discontinue supply if the retailer's account is in arrears.

The Supreme Court of Appeal (SCA) in *Micaren Exel Petroleum Wholesaler (Pty) Ltd v Stella Quick Shop (Pty) Ltd and Another* (Case no 471/2019) [2020] ZASCA 61 (9 June 2020) was recently required to ascertain whether Micaren Exel Petroleum Wholesaler (Pty) Ltd (Micaren) had repudiated the dealership agreement concluded with Stella Quick Stop (Pty) Ltd (Stella) by discontinuing the supply of petroleum products.

In summary, Micaren and Stella concluded a dealer agreement during 2014 in terms of which Micaren agreed to supply and deliver petroleum products to Stella. The petroleum products were to be stored in underground tanks, installed by Micaren prior to the effective date of the dealer agreement.

In terms of the dealer agreement only the petroleum products purchased from Micaren could be stored in the tanks and Stella was prohibited from buying petroleum products from any other wholesaler. It was specifically recorded that the underground tanks would remain the property of Micaren and Stella would be liable for any damages suffered by Micaren if the tanks are used for any other purpose other than those agreed upon.

During January 2017, Stella started buying petroleum products from the second respondent, Elegant Fuel (Pty) Ltd, and storing such petroleum products in the tanks installed on the premises. This was pursuant to Micaren discontinuing the supply of petroleum products to Stella, in November 2016.

On 22 November 2016, Stella had admitted liability to Micaren for R504,455.36 in respect of petroleum products previously supplied and delivered. Thereafter Stella made certain payments, reducing the amount to R449 720.39. On 24 January 2017 Micaren's attorneys issued a notice in terms of section 345 the old Companies Act to Stella demanding payment of R449,720.39 within 21 days, failing which Stella would be wound up. On 25 January 2017, Stella's attorneys addressed a letter to Micaren alleging repudiation of the dealer agreement by Micaren in failing to supply Stella with petroleum products it had ordered, and by unilaterally and unlawfully imposing the Regulatory Accounting System (RAS).

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Repudiation: Does withholding supply automatically constitute repudiation?

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'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract.'

Stella consequently accepted the alleged repudiation and cancelled the dealer agreement. On 28 January 2017, Micaren approached the High Court seeking an order that Stella be interdicted and restrained from buying petroleum products from any other wholesaler other than Micaren. Stella's opposition to the interdict application was that Micaren had repudiated the dealer agreement as a result of which it was cancelled, the tanks were its own property and thus the requirements for an interdict had not been met.

The High Court found that the clauses of the dealer agreement only prohibited the storage of petroleum products purchased from other wholesalers and not the purchase of petroleum products from other wholesalers. The court further held that there was no basis for the interdict sought by Micaren since the dealer agreement had been cancelled. The interdict application was therefore dismissed.

On appeal, Micaren argued that it had not repudiated the dealer agreement, but that it had stopped delivering petroleum products to Stella due to the outstanding payment for petroleum products it had previously supplied and delivered. Micaren argued that the alleged repudiation and purported cancellation of the dealer agreement had to be considered within the context of the preceding events.

The SCA held that the traditional approach to an enquiry into an allegation of repudiation is to examine the objective intention of the repudiator and the response or acceptance thereof by the aggrieved party. The question is whether the conduct of the repudiator or non-performing party, when fairly considered by a reasonable person in the place of the aggrieved or innocent party, demonstrates an intention to no longer be bound by the contract. Such conduct must be viewed comprehensively.

In *Nash v Golden Pumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22C-F Corbett JA described repudiation as follows:

> *'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . .'*

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Repudiation: Does withholding supply automatically constitute repudiation?

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It can therefore be concluded that withholding performance in terms of an agreement does not automatically constitute repudiation and the court is required to consider the full context of the matter.

The SCA held that the High Court erred by simply accepting Stella's assertion that Micaren's failure to supply and deliver petroleum products constituted a repudiation of the dealer agreement without considering the full context of the matter. The SCA held further that Micaren's refusal to deliver petroleum products to Stella had persisted over a period of at least two months, yet it was only when Micaren issued the section 345 notice that Stella raised the issue of repudiation.

At no point did Micaren demonstrate an intention not to be bound by the dealer agreement, and that on the contrary, its actions were strictly in accordance with the provisions of the dealer agreement.

The SCA thus held that a reasonable person in Stella's position, would not have concluded that Micaren was repudiating the agreement.

Consequently, the dealer agreement had not been repudiated and Stella had breached its obligation under the dealer agreement by purchasing petroleum products from another wholesaler. This conduct was to Micaren's detriment and Micaren had satisfied the requirements for a final interdict.

The appeal was thus upheld, and Stella was interdicted and retrained from purchasing and storing petroleum products from any other wholesaler.

It can therefore be concluded that withholding performance in terms of an agreement does not automatically constitute repudiation and the court is required to consider the full context of the matter.

Tiffany Jegels and Jackwell Feris

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
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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