13 MAY 2020

DISPUTE RESOLUTION
ALERT

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The setting aside of an adjudicator's determination: Is the court hamstrung?

A question that has troubled legal practitioners for some time is whether a party unsatisfied with the outcome of an ADR process can and should challenge that outcome and what form that challenge should take.

The rise of alternative dispute resolution (ADR) in the last decade or so cannot be overstated. The plethora of ADR institutions and a quick survey of general commercial and service level agreements prove this to be the case. Stripped to its bare bones, ADR refers to any means of settling disputes without reference to litigation i.e. the courtroom. This typically takes the form of negotiation, conciliation, mediation, adjudication, arbitration (or a combination of any of these). In most cases it's voluntarily and in some instances it is obligatory. With ever-rising costs of litigation and the time delays occasioned by litigation, ADR offers an attractive offering in that it is suitable for multi-party disputes; the costs are lower (and in many cases free when involving consumers or employees); it produces relatively speedy settlement of disputes; there is flexibility in the process; the parties are generally in control; the parties chose a forum; it can offer practical solutions; a wide range of issues can be considered; shared future interests may be protected; it is generally private and confidential; and it is a less confrontational alternative to the court system.

With more and more parties resorting to ADR as a means to settle their disputes, the courts are often inundated with applications to either enforce or review and set aside awards and/or determinations arising from ADR proceedings. It is trite that parties to an agreement are bound by the provisions contained therein including the dispute resolution clause. As a result and in relation to dispute resolution clause/s, the parties often waive their rights to approach the courts until the dispute resolution mechanisms provided for in the agreement have been exhausted and even then they can only approach the courts on a limited basis. A question that has troubled legal practitioners for some time is whether a party unsatisfied with the outcome of an ADR process can and should challenge that outcome and what form that challenge should take. Even though it only was in the context of an adjudication, the Supreme Court of Appeal (SCA) recently grappled with some of these issues in *Ekurhuleni West College v Segal and Another* (1287/2018) [2020] ZASCA 32 (2 April 2020). In Segal, the SCA was called upon to adjudicate an appeal on two interrelated issues. Firstly, whether an adjudicator's determination in unterminated proceedings was reviewable. Secondly, whether the rules of natural justices applied to adjudication proceedings.

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The setting aside of an adjudicator's determination: Is the court hamstrung?*...continued*

The court therefore concluded that the College's review application was premature as the ADR proceedings had not terminated and there were no grounds warranting judicial interference, at least at that stage.

First the facts: Ekurhuleni West College (College) entered into an agreement for the construction of a conference centre on its premises with Trencon Construction (Pty) Ltd (Trencon). Various disputes arose between the parties upon completion of the project. As per the provisions of the agreement, Trencon referred these disputes to adjudication. Having considered the submissions by the parties and without requiring appearance, the adjudicator made a determination in favour of Trencon. Aggrieved by it, the College exercised its right in terms of the agreement and gave a notice of dissatisfaction and thus referred the dispute to arbitration. In addition, the College launched an application to review and set aside the determination, which application was dismissed by the High Court.

Did the notice of dissatisfaction and the pending arbitration, on their own, preclude the review application?

The construction agreement contained a provision stating that should either party be dissatisfied with the decision given by the adjudicator, such party may deliver notice of dissatisfaction to the other party and to the adjudicator within a specified period and refer the dispute to arbitration. The arbitrator would then have the power to revise the adjudicator's determination as if it had not been issued or given.

The SCA held that the central issue in this question was the nature and purpose of the adjudication in terms of the agreement. Adjudication was designed for the summary and interim resolution of disputes expeditiously and inexpensively as possible. However, the adjudicator's determination was not exhaustive of the disputes, as it may be overturned during the final stage of the dispute resolution process. This meant that the determination could be revisited during a further step in the agreed procedure. The court therefore concluded that the College's review application was premature as the ADR proceedings had not terminated and there were no grounds warranting judicial interference, at least at that stage.

Were the rules of natural justice applicable to the adjudication proceedings?

In deciding this issue, the court referred to the generally accepted ratio that in the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment, while in the case of a tribunal created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected. A statutory tribunal would for example be the housing tribunal established terms of the Rental Housing Act 1999; the Commission for Conciliation, Mediation and Arbitration established in terms of the Labour Relations Act, 1995; the Competition Tribunal established in terms of the Competition Act, 1998; the National Consumer Tribunal established in terms of the National Credit Act, 2005; the Water Tribunal established in terms of the National Water Act, 1998 etc.

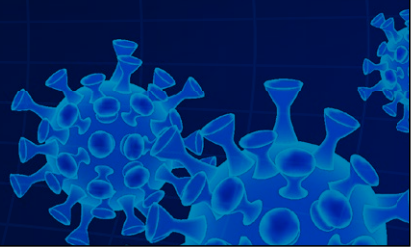
The setting aside of an adjudicator's determination: Is the court hamstrung?*...continued*

With the growing popularity of ADR as a means of resolving disputes, this decision adds to the rising body of jurisprudence demonstrating the judiciary's deference to the ADR process.

In this instance, the matter concerned a tribunal created by greement (i.e. adjudication) and the court readily accepted that courts should be very slow to import a tacit term into an agreement particularly where the parties have concluded a comprehensive written agreement that deals in great detail with the subject matter of the agreement and it is not necessary to give the agreement business efficacy. This is of course subject to the express terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified. Consequently, the court found no merit in the College's reliance on procedural unfairness and the rules of natural justice and held that the adjudicator conducted the proceedings as per the agreement. This was so because the adjudicator operated as a tribunal created by contract and the express contractual provisions regulated the procedure that he had to follow. The College did not challenge any of these provisions as being contrary to public policy and nor show that the express contractual provisions were breached. As a result, the SCA dismissed the appeal with costs and upheld the decision of the High Court.

With the growing popularity of ADR as a means of resolving disputes, this decision adds to the rising body of jurisprudence demonstrating the judiciary's deference to the ADR process. The matter is also important in that it demonstrates that parties should always be aware that provisions agreed upon in an agreement will trump any rules of natural justice unless such rules are expressly included. Lastly, parties should seek guidance, not only in the enforcement of obligations by means of an ADR process but at the contracting stage to ensure that their rights are sufficiently protected.

Vincent Manko and Mayson Petla



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Your JBCC Contract: COVID-19 and other curse words

As a "*hands-on*" industry for which working from home is generally impossible, the construction sector is one of many which has had to grapple with the COVID-19 induced contractual mayhem.

What can parties to a JBCC (Joint Building Contracts Committee) Construction Contract do to prevent the COVID-19 pandemic infecting your contract? We look at a situation where washing your hands and sterilising surfaces may not be enough.

COVID-19 and the consequential lockdown period in South Africa are unprecedented circumstances which no party to any construction contract has ever had to deal with, until now. As a "*hands-on*" industry for which working from home is generally impossible, the construction sector is one of many which has had to grapple with the COVID-19 induced contractual mayhem.

The construction sector and the work performed, in general, was not regarded as an essential service, being the only types of services capable of being rendered during the initial and extended Alert Level 5 national lockdown. This led to the suspension of the works for most construction projects throughout the country, invariably causing delay to completion of projects.

Under the current Alert Level 4 conditions, most construction projects except for public works projects, road and bridge projects, and critical maintenance and repairs, are still not permitted to resume. According to the Schedule of Services: Draft Framework for Sectors published on 25 April 2020, commercial building projects will only be permitted to resume operations once the country reaches Alert Level 3 and private residential projects only when Alert Level 2 is reached. This would mean that activity would, in a large portion of the construction sector, still be suspended until, at the earliest, the transition to Alert Level 3. No date has, at the time of publishing this article, been forecast for the transition to Alert Level 3.

However, while works have been suspended at most construction sites until Alert Level 3 is reached, what is not yet clear is how Contractors and Employers are going to deal with the contractual aftermath once operations resume. Although one cannot provide definitive, broad stroke answers that cater to all construction projects, there are several key provisions that parties to the 2018 editions of the JBCC Principal Building Agreement and the JBCC Nominated/Selected Subcontract Agreement (cumulatively JBCC Agreements) should consider, particularly relating to the revision of the practical completion date and termination.

Revised Practical Completion Date: How long can the extension be and will I need to pay for the delay?

It is inevitable that the suspension of the works will result in the need for parties to revise the date for the practical completion of a project. Clause 23.1

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Your JBCC Contract: COVID-19 and other curse words...*continued*

Clause 23.1 of the JBCC Agreements only provides for the award of time and not the adjustment of the contract value, and does not deal with who should bear the ancillary costs incurred as a result of COVID-19.

entitles a Contractor to *"a revision of the date for practical completion by the principal agent without an adjustment of the contract value for a delay to practical completion caused by one or more of the following events:*

...

23.1.5 Exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works

23.1.6 Force majeure" (our emphasis)

In order to claim for the revision of the practical completion date, a Contractor would need to comply with the notification and claim provisions set out in clauses 23.4 to 23.6 of the JBCC Agreements. In short, the Contractor must:

- Within 20 working days of becoming aware of such delay, give notice to the Principal Agent of the intention to submit a claim, failing which the claim for a revised practical completion date will be forfeited;
- Within 40 working days from when the Contractor is able to quantify the delay caused to the programme submit a fully substantiated claim; and
- The claim should reference the clause the Contractor relies on, identify the cause and effect of the delay on the practical completion date and identify the working day period claimed.

Once the claim is submitted the Principal Agent has 20 working days to respond either granting, in full or in part, or refusing the claim.

It is accordingly imperative that all parties comply with the JBCC Agreements in submitting and analysing claims relating to the extension of time. Clause 23.1 of the JBCC Agreements only provides for the award of time and not the adjustment of the contract value, and does not deal with who should bear the ancillary costs incurred as a result of COVID-19, a prime example being the security services provided to secure the site, which, for the purposes of the lockdown, is an essential service and can accordingly operate during this period. In an advisory note, the JBCC suggests that parties ought to consider sharing these costs amicably between them as fault would seemingly not be attributed to either party in the circumstances.

Termination: Is this a ground to cut ties?

On the other end of the spectrum, construction projects may need to be suspended again in the future should the Alert Levels fluctuate and/or other circumstances occur which may lead to the impossibility of the completion of the project for either party. Clause 29.20 provides that *"either party may give notice of intention to terminate this agreement where:*

29.20.2 Progress of the works has ceased for a continuous period of ninety (90) calendar days, or an intermittent period totalling one hundred and twenty (120) calendar days as a result of a force majeure event or the exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works" (our emphasis)

Your JBCC Contract: COVID-19 and other curse words...*continued*

The clauses considering termination and the revision of the practical completion date in these circumstances would be academic, if the relevant party cannot establish whether the disease, or the effects thereof, is a force majeure or an exercise of statutory power. So, is it?

Termination under clause 29.20.2 will not, aside from other contributory fact specific circumstances, be available to either party unless the required time period for the suspension of the works is satisfied. The applicability of this clause is thus largely dependent on regulatory time periods which have yet to be determined.

However, the clauses considering termination and the revision of the practical completion date in these circumstances would be academic, if the relevant party cannot establish whether the disease, or the effects thereof, is a *force majeure* or an exercise of statutory power. So, is it?

The "*F-word*": *Force majeure*

The JBCC Agreements define a *force majeure* as "*an exceptional event or circumstance that:*

- *could not have been reasonably foreseen*
- *is beyond the control of the parties, and*
- *could not reasonably have been avoided or overcome*".

Parties may argue that it is not necessarily the COVID-19 disease itself that is stopping activities on site, for example due to a large number of infected workers, but rather that it is the lockdown which would be the main cause of the temporary suspension of the works. However, it can be further argued that the disease, and the possible effects on the construction sector generally, fits into this definition as it could not have been foreseen at the time of contracting, it would be beyond the control of the parties to the JBCC Agreements and could not reasonably be overcome except for, ironically, ceasing to work and self-isolating. The facts of each case will invariably have to inform whether it would indeed be a *force majeure* for the purposes of the JBCC Agreements. However, it would seem that very few contracting parties could have predicted the far-reaching effects of the disease which emanated on the other side of the world. This would in itself be both indicative and persuasive.

The "*S-word*": Statute

The JBCC Agreements include another provision which would apply to the present circumstances. This is the "*exercise of statutory power by a body of state or public or local authority that directly affects the execution of the works.*" While there may be room for debate as to whether the national lockdown qualifies as a *force majeure*, there can be little doubt that the lockdown implemented under the Disaster Management Act 57 of 2002 (Act) and the myriad of accompanying regulations would constitute an exercise of statutory power as envisaged in the JBCC Agreements.

Does the Principal Agent need to issue a Contract Instruction?

The Contractor, in terms of clause 2 of the JBCC Agreements, is under an obligation to comply with the law specified in the JBCC Agreement.

In terms of clause 17 of the JBCC Agreements the Principal Agent may issue contract instructions to the Contractor regarding the compliance with the laws and regulations. The Principal Agent therefore has a discretion in this regard.

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Your JBCC Contract: COVID-19 and other curse words...*continued*

During these uncertain times, Contractors and Employers alike should strive for more innovative methods to conduct their business.

The JBCC, in its advisory note, is of the opinion that the Contractor has an overarching statutory and contractual obligation to comply with the law. It is accordingly unnecessary for the Principal Agent to issue a contract instruction regarding compliance with any extension to the lockdown, the Act and its accompanying Regulations.

Once the fever stops?

During these uncertain times, Contractors and Employers alike should strive for more innovative methods to conduct their business.

For instance, WinSun3D – a Shanghai based 3D printing company – is manufacturing and selling "*Print-While-You-Wait Isolation Pods*". In South Africa, the current Regulations under the Act permit businesses to operate if they are supplying an essential service. Moreover, construction firms who are able to undertake projects which meet the definition of an essential service will be able to operate during various Alert Levels. This should be seen as an opportunity for parties to JBCC Agreements to innovate, contribute to the market and add value to society during these unprecedented times.

To ensure clarity going forward, parties to future JBCC Agreements should consider the effects that future pandemics and government interventions may have on a project and tailor their contracts accordingly. This will ultimately ensure certainty, and minimise risks and costs associated with future disputes and litigation.

For current projects, communication between the Employer, Contractor, Sub-Contractors and the Principal Agent will be vital to establish clear milestones post lockdown, reach reasonable compromises and ensure that this contractual fever doesn't turn into a full-blown infection.

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Is the ban on tobacco and liquor unlawful and irrational?

In order to fully appreciate and discuss the Regulations, the starting point is to understand the levels of legislative hierarchy in South Africa.

Is the continued ban on the sale of liquor and tobacco products really justifiable? And, if so, is there a less-restrictive means for government to achieve the same objective, while ensuring sectors in the entire value chain remain going concerns that provide secure jobs and contribute to much needed tax revenue? We unpack the lawfulness of the respective ban on liquor and tobacco, including whether the ban is unlawful but rationale and if that is enough for government to continue to enforce it.

On the eve of Thursday, 29 April 2020, the Minister of Cooperative Governance and Traditional Affairs, Dr Dlamini-Zuma published the Alert Level 4 Regulations (Regulations). The more-detailed Regulations replaced all previous iterations. Of relevance to this article are Regulations 26 and 27 which state respectively:

> *"26 Sale, dispensing or transportation of liquor*
>
> *(1) the sale, dispensing and distribution of liquor is prohibited.*
>
> *(2) the transportation of liquor is prohibited, except where alcohol is required for industries producing hand sanitizers, disinfectants, soap, alcohol for industrial use and household cleaning products.*
>
> *(3) the transportation of liquor for export purposes is permitted.*
>
> *(4) no special or events liquor licenses may be considered for approval during the duration of the national state of disaster.*
>
> *27 Tobacco products, e-cigarettes and related products*
>
> *The sale of tobacco, tobacco products, e-cigarettes and related products is prohibited."*

The singling out of these products is unique in that they appear as provisions and not just as items listed (or excluded) in the Regulations' annexure dealing with essential items.

In order to fully appreciate and discuss the Regulations, the starting point is to understand the levels of legislative hierarchy in South Africa. The hierarchy applicable to legislation is as follows:

- The Constitution, which is the supreme law of the Republic and any law of conduct inconsistent with it is invalid.
- Original legislation, which includes Acts of Parliament such as the Disaster Management Act 57 of 2002 (DMA).
- Subordinate or delegated legislation such as the promulgation of regulations or directives. This law-making power is usually delegated to certain persons, for instance under the DMA the power is given to the Minister of Cooperative Governance and Traditional Affairs. The power may also be granted to bodies established under a particular piece of legislation.

Is the ban on tobacco and liquor unlawful and irrational?*...continued*

Considering the nature of the pandemic, it appears that the Minister is within her powers to regulate the sale of alcohol, even though it amounts to a complete ban.

In terms of the relationship between original legislation and subordinate legislation, subordinate legislation may not be in conflict with original legislation, otherwise it would be *ultra vires*. However, if apparently contradictory provisions are capable of a sensible interpretation which would reconcile the apparent contradiction, that interpretation should be preferred.

Dealing with the liquor ban first, section 27(2)(i) of the DMA is clear in that the Minister may issue regulations or directions concerning "*the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster-stricken or threatened area*". Considering the nature of the pandemic, it appears that the Minister is within her powers to regulate the sale of alcohol, even though it amounts to a complete ban.

With respect to tobacco products, the DMA *does not* expressly empower the Minister with any specific powers relating to the regulation of the supply chain and ultimate sale of tobacco products. However, what the DMA does allow the Minister to do is to publish regulations or directions concerning "*the regulation of the movement of persons and goods to, from or within the disaster-stricken or threatened area*" and "*the control and occupancy of premises in the disaster-stricken or threatened area*". Again, considering the nature of the pandemic, this could mean that transportation of tobacco products (and any other products) could be subject to regulation as well as compelling the closure of a premises where tobacco may be sold.

That being said, the DMA *does not* empower the Minister to prevent the actual sale of tobacco and any other goods. The only way that transactions may be regulated is in respect of transportation, and separately by preventing people from physically attending at a premises where tobacco is being sold. It is arguable then that where a retailer or wholesaler/distributer has been granted permission to trade, it must be granted permission to trade in its entire line of stock at least until it is depleted. Regulation 27 is aimed only at the sale of tobacco products and does not at all refer to the transportation or control of such products nor to access of premises where tobacco may be sold. This casts serious concerns over the blanket prohibition against the sale of tobacco products (and indeed against the sale of other products that an authorised retailer or wholesaler/distributer has in stock). It must always be remembered that as a state functionary, the Minister is only entitled to act within the limits of the empowering legislation and any acts outside of those parameters will be unlawful.

Furthermore, even if the Regulations did control the transportation and access to premises where tobacco products are sold, under the DMA and in relation to the specific list of powers, the Minister is only empowered to publish regulations and directions to the extent that they:

- assist and protect the public;
- provide relief to the public;
- protect property;
- prevent or combating disruption; or
- deal with the destructive and other effects of the disaster.

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Is the ban on tobacco and liquor unlawful and irrational?*...continued*

In the case of banning the sale of tobacco, the power just does not seem to be present and no amount of rational behaviour can justify acting outside of the confines of the law.

These are broad objectives and the Regulations or Directions published (in respect of all aspects thereof including the sale of liquor and tobacco) must serve these purposes.

The ban on tobacco sales appears to be more of a general public health issue than something directly related to flattening the curve of infections; and in the absence of proper reasons from the Minister, the decision also reeks of irrationality.

Relatedly, and on that score, South Africa is founded on the Rule of Law. This means that the government and its institutions (including the President and members of the national executive when they make high-level decisions) must, at all times, act in accordance with the "*principle of legality*": they must act lawfully, in good faith, for a proper purpose and rationally – no arbitrary public conduct is permissible in a constitutional democracy. Where the decisions have failed to meet this standard, they have been set aside by the courts.

As it currently stands, government has been threatened with legal action by tobacco manufacturers for the ban, with Fair Trade Independent Tobacco Association (FITA) representing some of the countries tobacco manufacturers proceeding with a court application to, amongst others, set a side Regulation 27. We understand that pursuant to Part A of the court application Government has decided to provide reasons to FITA for the ban. At the date of writing this article we have not had sight of the reasons from Government. The reasons, to the extent disclosed, may assist FITA to supplement Part B of its application to refine its argument and grounds that the ban is unlawful.

As mentioned above, arbitrary conduct is impermissible. The reasons by government, to the extent disclosed, may end up revealing such arbitrary/irrational conduct or they could reveal that government considered the matter thoroughly and acted rationally. But even if the latter proves true, rationality is not the only standard with which to judge state conduct. State functionaries like the Minister may only act within the confines of the empowering legislation or law. In the case of banning the sale of tobacco, the power just does not seem to be present and no amount of rational behaviour can justify acting outside of the confines of the law.

Ultimately, if FITA does not withdraw its application, it is hoped that the judgment will clearly delineate the powers of the Minister under the DMA.

Jackwell Feris, Imraan Abdulla and Mukelwe Mthembu

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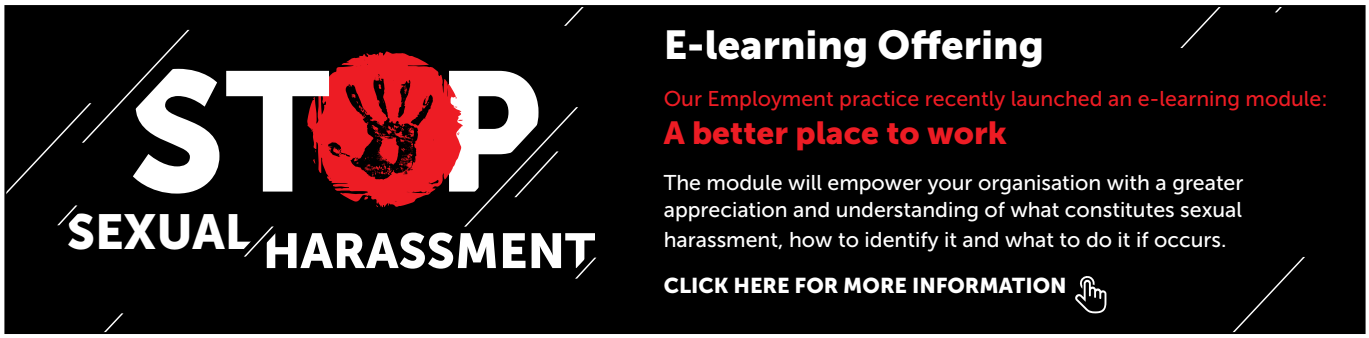

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