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DISPUTE RESOLUTION
ALERT

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Do not fear the never-ending opportunity to set aside tenders

As a general principle of law, decisions by organs of state, such as those concerning the award of a tender, must be challenged as soon as possible once the decision is made and communicated. For organs of state, the Constitutional Court has held that decisions must be challenged within a "*reasonable*" period and for private persons that reasonable time period is 180-days. Usually, absent an adequate explanation, a court is not obligated to consider late complaints.

Deregistration: A way for companies to potentially slip out the back door?

A company comes into existence once it is registered with the Companies and Intellectual Property Commission (CIPC). For the duration of its existence, a company is a separate legal entity and can be litigated against in its own name.

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Do not fear the never-ending opportunity to set aside tenders

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As a general principle of law, decisions by organs of state, such as those concerning the award of a tender, must be challenged as soon as possible once the decision is made and communicated. For organs of state, the Constitutional Court has held that decisions must be challenged within a "*reasonable*" period and for private persons that reasonable time period is 180-days. Usually, absent an adequate explanation, a court is not obligated to consider late complaints.

The delay rule serves an important public interest: certainty and finality in decision making. It also serves a constitutional purpose: promoting open, responsive and accountable government, particularly when the state seeks to review its own decision.

In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15 (16 April 2019), the Municipality sought to review its own decision to award a contract to Asla Construction (Pty) Ltd to build low cost housing. It was considerably late in launching the review, by some 14 months and, glaringly, without an explanation for its undue tardiness.

To put the issue in context: In 2003, the Municipality identified that there were housing shortages in Duncan Village, specifically within the area's informal settlements. Following a public invitation for tenders for a housing project to address these needs, Asla successfully bid for the tender. A Turnkey Agreement was concluded between the parties on 30 May 2014 which required that Asla provide between 3,000 and 5,000 housing units for the Duncan Village Development.

Later, a subsequent agreement (the Reeston Agreement) for engineering services and the construction of housing top structures within Reeston was concluded between Asla and the Municipality. The Reeston Agreement proved to be a source of dispute after the Municipality failed to pay Asla for their performance amid allegations that the agreement was concluded without a lawful tender.

As a result, Asla instituted provisional sentence proceedings based on payment certificates issued by the Municipality for work it had done under the Reeston Agreement. In response, the Municipality disavowed the agreement on the basis that

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it was unlawful for failing to comply with section 217 of the Constitution and various statutory procurement prescripts. Key among these was that Reeston was not part of the tender for which Asla had bid.

The High Court found that the Municipality had made out a proper case for condonation and that the Reeston Agreement was unlawful. It declared the contract invalid and dismissed the contractual claims connected with the provisional sentence proceedings. Asla successfully appealed to the SCA, which found that the Municipality's application for condonation could not be sustained. Expectedly, the SCA declined to make any findings in respect of the agreements' legality.

The Municipality then approached the Constitutional Court. In the majority judgment penned by Theron J, the court upheld the appeal and declared the Reeston Agreement constitutionally invalid. In assessing delay, Theron J held that the Municipality had failed to provide a sufficient explanation and that, as an organ of state, it had a higher duty to respect the law and to take the court into its confidence by providing a full and frank explanation for its delay. This, the Municipality had dismally failed to do. Instead it had undone all its goodwill by seeking to withdraw the challenge in order to perpetuate the constitutionally invalid contract by way of an unlawful settlement agreement.

However, despite the general approach adopted by the courts to reviews brought unreasonably late and the Municipality's questionable conduct, the majority judgment found that it was compelled to deal with the unlawfulness of the contract by declaring its invalidity and ameliorating the prejudice to Asla by preserving the rights it had accrued under the Reeston Agreement.

The dissenting judgment (second judgment) penned by Cameron J and Froneman J, adopted a different reasoning to arrive at the same practical outcome. Following the general approach to condonation, and Theron J's finding on the paucity of the Municipality's delay explanation, the Justices held that the Municipality's challenge should not have been entertained due to the unreasonable delay.

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On the importance of the delay rule, the Justices held that there is a clear insistence that delay must be explained so as to fully inform the court and that without such an explanation, justice may not require the courts to engage in an unlawfulness inquiry. Accordingly, the second judgment held that it was not in the interests of justice for the court to entertain the Municipality's application and that leave to appeal must be refused.

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"The objective served by legality review must therefore be borne in mind when evaluating the importance to be attached to the seriousness of the illegality."

"The objective served by legality review must therefore be borne in mind when evaluating the importance to be attached to the seriousness of the illegality. A court should be vigilant in ensuring that state self-review is not brought by state officials with a personal interest in evading the consequences of their prior decisions. It should scrutinize the conduct of the public body and its candour in explaining that conduct to ensure, in the public interest, open, responsive and accountable government. Where there is glaring arbitrariness and opportunism – that is, where the government actor's efforts to correct the suspected unlawful decision serve the antithesis of the rule of law – the interests of justice weigh against giving it a free pass by overlooking an unreasonable delay." (At paragraph 139)

It was therefore unnecessary for the majority judgment to have pronounced on the legality of the Reeston Agreement. In doing so, the majority judgment confirmed and extended the principles set out in *Gijima* and found that the unlawfulness of the contract could not be ignored, paving the way for organs of state to review their unlawful decisions at any stage, even years later.

Yana van Leeve and Rowan Bromham

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Deregistration: A way for companies to potentially slip out the back door?

A company is deregistered once it has been removed from the CIPC register.

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A company is deregistered once it has been removed from the CIPC register.

Section 82 of the Companies Act sets out various grounds for deregistration. CIPC can deregister a company if it has failed to file annual returns timeously or if the company itself applied for deregistration. Once a company is deregistered, it is no longer a legal entity and cannot function or be held accountable as such.

Below we consider the implications of self-deregistration by a company which is party to pending litigation proceedings, the consequence of this being that the company potentially escapes any or all liability, by slipping out the back door.

Application for deregistration

CIPC published a notice in 2015 in which it lays out the procedure by which a company can voluntarily deregister. The process is relatively simple and requires only that a written request, by a duly authorised representative of the company, on a company letter head is submitted via email, with supporting documentation, which include:

a) A certified ID copy of the person submitting the request;

b) The company tax number;

c) A tax clearance confirmation from SARS that no tax liability is outstanding; and

d) A statement confirming that the company is not carrying on business, and has no or alternatively, negligible assets.

There is no enquiry as to whether the company is currently involved in any litigation proceedings, be it arbitration or court proceedings. There is also no enquiry by CIPC as to the veracity of the statement submitted regarding the business activity or assets in the company applying for deregistration. The simplicity of the deregistration process leaves it open to any company, potentially as way to escape contentious litigation, selling its assets and then applying for deregistration.

Consequences of deregistration

In a notice published by CIPC in 2015, it made it clear that once a company is deregistered it loses its legal capacity and with immediate effect becomes dormant and/or inactive. It can no longer litigate or be litigated against and all the assets within the company (in the case where there were still assets held within the company) are declared bona vacantia i.e. are considered forfeited to the State.

Voluntary deregistration (and in some cases deregistration due to failure to file annual returns) can have a detrimental impact on the 'innocent' party engaged in litigation proceedings against such a company. The company is not required to give notice of its impending deregistration, so it is possible that a litigating party may only become aware of the deregistration once the company's assets have been sold off and the deregistration has been finalised.

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The Companies Act through CIPC appear to have foreseen the potential consequences of deregistration and has made certain provisions in order to protect a plaintiff in such a matter.

If a plaintiff deregisters, the defendant in a matter is afforded reprieve from needing to defend any action instituted against it. However, if the defendant company decides to slip out of this back door by deregistering, the plaintiff is likely to suffer economic harm. Put differently, the plaintiff is deprived of its ability to recover any losses arising from the litigation including legal costs incurred up to that stage. The impact is that the plaintiff can no longer litigate against the deregistered company or claim relief from the company, without taking additional costly legal steps which may not bear fruit.

Protection for a prospective plaintiff

The Companies Act through CIPC appear to have foreseen the potential consequences of deregistration and has made certain provisions in order to protect a plaintiff in such a matter. However, the effectiveness of these provisions is highly questionable, since CIPC places the additional burden of getting any relief on the plaintiff, by requiring the affected party try keep the back door closed, or to take further legal action in order to reel the defendant back in by jumping through legal hoops, resulting in additional and unforeseen legal costs.

CIPC provides that an objection against deregistration may be lodged in the form of a letter, prior to the date of final registration, thereby closing the defendant's proverbial door. However, since no notification of pending deregistration is sent to affected parties, it is possible that a plaintiff may only discover the deregistration too late and thus fail to lodge an objection within the required time. This was the case in *ABSA Bank v CIPC* 2013, where the bank had been unaware that a company whose property they were attempting to attach, had been deregistered. In this case, the court considered the protection provided by the Companies Act in the case where a defendant company had already been deregistered. A party may request the reinstatement of a deregistered company, either through the administrative requirements set out in section 82(4) of the Act, or via an application to court in terms of section 83(4), neither of which are without issue.

In the first instance, it is potentially impossible or practically very difficult to jump through the hoops that the administrative process prescribes. A party applying for reinstatement under section 82(4) needs to provide sufficient documentary proof confirming activity or economic value in the deregistered company. Further, Companies Regulation 40 requires that outstanding annual returns be filed, which only the company itself has a duty to file. In the case where a company deregistered amidst litigation proceedings, it is very unlikely that they will voluntarily file these returns.

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In the second instance, the court in the ABSA matter confirmed that an application in terms of section 83(4) is available to parties as an alternative and applies in all cases where a company has been deregistered. As such, any interested party can apply to court to have a company reinstated and the court is free to make any other order that if finds just and equitable.

In *Newlands Surgical Clinic v Peninsula Eye Clinic* 2015 the Supreme Court of Appeal held that an order under section 83(4) can have retrospective effect from the date of deregistration. This would include validation of litigious proceedings or company activities during that period. Notwithstanding the fact that such an application will be brought against CIPC, who is unlikely to oppose the matter, it still requires the plaintiff to incur further litigation costs by bringing an application to court.

The other alternative is to potentially hold the directors of the company personally liable for reckless trading (in the instance where the company owed a liquid debt and they knowingly deregistered). This process however is quite costly as it requires instituting fresh litigation proceedings against such a director(s).

Concluding remarks

Although there are certain protection measures in place to prevent parties from escaping litigation by deregistering a company, none of them are without issue.

As unlikely as it may seem, where companies are litigating against small to medium sized companies with potentially unscrupulous directors behind the scenes, plaintiffs must stay vigilant, as those defendants are likely to look to escape liability by any means including through the lawful deregistration process provided through the Companies Act and CIPC.

Parties to litigation, in particular the plaintiff, should take steps such as regularly checking CIPC for deregistration notifications, if possible applying to the court for security (which may at minimum force the defendant to provide proof of its existing assets such as immovable property) and even more importantly plaintiffs must endeavor with the assistance of robust attorneys that the litigation proceedings move as fast as possible. Once litigation has commenced getting it to the finish line, notwithstanding issues out of one's control, will depend on the plaintiff's will and tactful approach. Better to prevent, by making sure all your doors are locked before you go to bed.

Pauline Manaka and Kara Meiring

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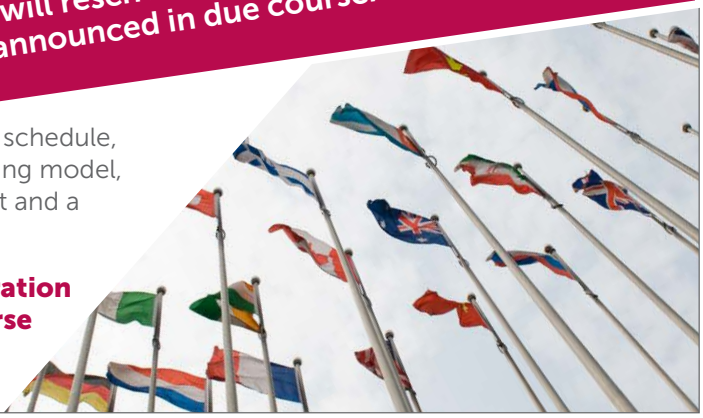

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