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DISPUTE RESOLUTION **ALERT**

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Fans of the sitcom The Big Bang Theory will remember Sheldon Cooper's three-legged "*like a milking stool*" opening statement in which he schooled the judge who occupies "*the kiddie table*" of his profession on the principle of *quod est neccessarium est licitum*. As he eloquently explained, the principle entails the sentiment that, that which is necessary is by definition, automatically lawful.

At the wake of the outbreak of COVID-19, which has necessitated a nationwide lockdown, a lot of regular activity has become unlawful. The Minister of Justice published directives in terms of which legal practitioners' movement to the courts would be limited to urgent and essential matters, subject to the legal practitioners holding permits. This issue was explored by the court in the case of *Administrator of Dr J S Moroka Municipality and Others v Kubheka* (1170/20) [2020] ZAMPMHC 3 (3 April 2020).

In this case, various advocates, including senior counsel attended at the High Court, Mpumalanga Division in Middelburg for a matter regarding the supply of water during the outbreak which is essential to the combating of the pandemic, rendering it an essential matter, to which the court is available for a hearing. However, in contravention of the regulations put in place by the Minister, it was apparent to the court that the permits carried by the legal practitioners were invalid or non-existent.

Consequent to this breach, the court held that the legal practitioners representing the parties, albeit in an urgent and essential matter, were not entitled to charge any fees for their appearance on behalf of the parties. Further, the court directed that the legal practitioners be reported to the Legal Practice Council as they had possibly committed a criminal offence.

This was notwithstanding the fact that in terms of the directives, the court may, in the interest of justice, order that the application of any provision in the directives be deviated from. The directives further state that if a practitioner is not able to secure a permit from the Director of the Legal Practice Council, he/she may travel to a court if he/she has various identification documents as prescribed by the directives.

In drawing the directives to the effect that should the matter be of such a nature that the breach of the directives meets the urgency, the court may condone such breach, the Minister embodied the principle that, that which is necessary would be, by definition, automatically lawful.

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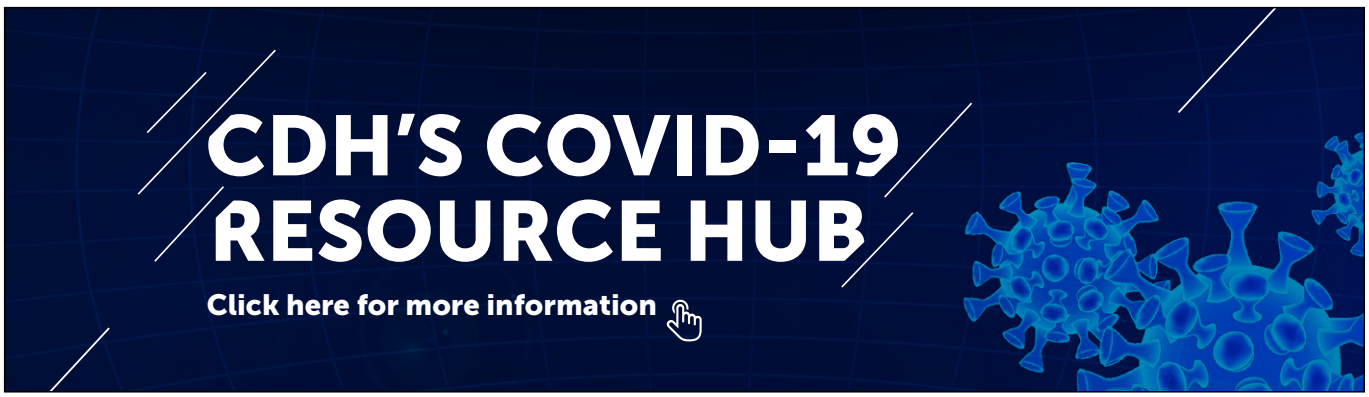
Necessary and essential may well be two different things...*continued*

This principle is applied by the courts with circumspection especially as the president has declared a state of national disaster.

This principle is applied by the courts with circumspection especially as the president has declared a state of national disaster. The necessity for counsel to travel from the Gauteng Province to the Mpumalanga Province, especially without a permit, was not proven to the court. It is clear that the principle of *quod est neccessarium est licitum* will only be applicable in very limited circumstances.

The country has moved to level 4 restrictions which enables certain businesses to resume operations; including the professional services of legal practitioners. It appears that those legal practitioners that will be rendering services outside of their homes will still be required to be in possession of permits in order to perform such duties. In light of the above judgment, legal practitioners as well as the country at large, will not get away with contravention of the various directives solely on the principle that it was a necessary breach.

Eugene Bester and Nomlayo Mabhena



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Public Procurement Bill, 2020: Proper change or a damp firework?

The unnecessary complexity in procurement regulation often results in confusion and that confusion has led to disputes and lots of litigation.

Contracting with an organ of state is not easy. Firstly, because the Constitution requires an organ of state to contract for goods or services in a way that is fair, equitable, transparent, competitive and cost-effective. To achieve those exacting requirements the state must maintain a procurement system of interrelated statutes, regulations and directives. But secondly, the system has developed over time with some of the rules governing state procurement pre-dating the constitutional dispensation. The State Tender Board Act, 1968 and National Supplies Procurement Act, 1970 are notable examples. That development over time has introduced a level of unnecessary complexity.

This complex procurement system has been fertile ground for litigation over many years and the law reports are replete with cases dealing with public procurement. Litigation in this context almost invariably brings significant delays in public procurement. Those delays cost money and cause much frustration and inefficiency within the organs of state and are a significant contributor to the regular calls from our citizenry for better service delivery.

The unnecessary complexity in procurement regulation often results in confusion and that confusion has led to disputes and lots of litigation. In that context, the draft Public Procurement Bill, 2020 – published for public comment on 19 February 2020 – has been awaited with much anticipation. A single regulatory framework for public procurement is crucial and the Bill is intended to provide that and specifically to address fragmentation in the regulation of public procurement. Areas addressed by the Bill include the description of a framework for the disposal of assets and the establishment of a Public Procurement Regulator within National Treasury. The Regulator will be required to ensure that state institutions comply with the rules by guiding and supporting state officials towards proper compliance with the regulatory framework and by ensuring generally that state funds are spent prudently. These are welcome developments particularly if the Regulator ultimately appointed is allowed to be effective.

Unhappily though there are some unclear issues. The most contentious provision in the Bill is likely to be the repeal of the Preferential Procurement Policy Framework Act, 2000 which defines the parameters for the current preference points system, generally known as the 90/10 and the 80/20 preference points systems. There, the Bill is short on detail providing instead that the Minister of Finance must prescribe a framework for preferential treatment for categories of preferences, and the protection or advancement of persons, or categories of persons, previously disadvantaged by unfair discrimination. The Minister's

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Public Procurement Bill, 2020: Proper change or a damp firework?*...continued*

Any effort by government to organise the presently fractured public procurement regime in South Africa should be welcomed.

discretion seems to be unfettered and it is theoretically possible for the Minister to go for an extreme such as a 95/5 or 50/50 preference points system. Whatever decision the Minister makes, it would be an excellent bet that the decision will be challenged under the provisions of the Promotion of Administrative Justice Act, 2000 or under the rubric of legality. There is no indication when the Minister will publish the framework. On this point particularly and although the Bill was much anticipated, it has turned out to be a bit of a damp firework.

Still, any effort by government to organise the presently fractured public procurement regime in South Africa should be welcomed. Whether entities that provide goods and services to organs of state should be bracing themselves for new procurement rules and regulations is an open question as the timing of any change has not been stipulated. Also, we are still dealing with a Bill and the deadline for comments has been extended to 30 June 2020. It is hoped that this extended period will see significant comments and ultimately legislation and a preference points framework that is fair, equitable, transparent, competitive and cost-effective and promotes efficient administration. That efficiency will benefit us all.

The Bill is available on the National Treasury's website and public comments can be emailed to commentdraftlegislation@treasury.gov.za by 30 June 2020.

Vincent Manko

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The synergy between the Promotion of Administrative Justice Act, 2000 and section 38 of the Constitution in Reviews conferring legal standing

Section 6(1) of PAJA states that *"any person"* may institute proceedings for the judicial review of administration action.

The Promotion of Administrative Justice Act, 2000 (PAJA) was enacted to amongst others confer the right to review a decision taken in the exercise of public power or the performance of a public function that "*adversely affects the rights of any person and which has a direct, external legal effect*".

As conferred by Olsen J in the matter of *The Premier of KwaZulu-Natal and Others v KwaZulu-Natal Gaming and Betting Board and Others* 2019 (3) All SA 916 (KZP), review proceedings under PAJA have as their purpose the vindication of rights under section 33 of the Constitution to administrative action that is lawful, reasonable and procedurally fair. Section 6(1) of PAJA states that *"any person"* may institute proceedings for the judicial review of administration action. Section 38 of the Constitution however deals with who may approach a competent court for appropriate relief upon the basis that a right in the Bill of Rights is being infringed or threatened with infringement.

In this matter, the court had to decide whether an applicant operating a casino establishment had legal standing to join the review proceedings challenging the use of electronic bingo terminals in bingo halls throughout the KwaZulu-Natal Province.

In the aforesaid matter it was suggested by one of the applicants in argument that, as a participant in the gambling industry, the applicant had an interest in seeing that all administrative decisions made by the Gambling Board in connection with the gambling industry are made in compliance with PAJA.

The applicant, however, did not assert the aforesaid argument in its founding papers where it advanced two arguments that [1] the decisions made in favour of bingo operators would result in a significant loss of *"gross gaming revenue"* for the applicant and [2] that it was a party affected by the decision in that *"from the outset it submitted objections to attempts to licence electronic bingo terminals and also submitted objections to the applications ..."*

The court did not entertain the applicant's claim that the right to approach the court on the basis that it is acting in its own interest, as provided for by section 38(a) of the Constitution. It was held that simply participating in hearings which preceded the award of licences (in this instances gambling licences), cannot afford you legal standing (*locus standi*). The court referenced *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at para 22, which held that:

> *"It is not logical to assert that an own-interest standing qualification arises from participation in a process if the objection remain hypothetical and academic."*

What the applicant relied upon in the matter to confer its standing was the detrimental effect upon its gaming revenue should the use of the electronic

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The synergy between the Promotion of Administrative Justice Act, 2000 and section 38 of the Constitution in Reviews conferring legal standing

...continued

It is important not to confuse *"direct external legal effect"* in terms of PAJA with legal standing in terms of section 38 of the Constitution.

bingo terminals be allowed for use. The court held that *"fanciful claims of potential prejudice are not sufficient to justify a conclusion that a claim to standing is premised on real interest, as opposed to ones which are hypothetical or academic."*

Having regard to the above, it's imperative in review proceedings to note that an interest to ensure lawful decisions are taken is insufficient to demonstrate legal standing in review proceeding. It is important not to confuse *"direct external legal effect"* in terms of PAJA with legal standing in terms of section 38 of the Constitution. *"Direct external legal effect"* is a characteristic used to determine whether any particular exercise of power constitutes *"administrative action"* within the meaning of PAJA, but it's not used to determine legal standing.

The test for own interest legal standing is more akin to a *"direct and substantial interest"* test, but broader. Put differently, the facts may suggest that the decision has direct external legal effect on a litigant, but the [own interest] litigant must demonstrate that his or her interests or potential interests are directly affected by the unlawful decision sought to be impugned for example, the award of a tender is established administrative action, but it cannot be used as a test to determine any litigant's legal standing.

Corné Lewis and Neha Dhana

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OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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