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DISPUTE RESOLUTION
ALERT

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Not a Teams player: A refusal to litigate remotely

The wheels of justice have continued to turn during the pandemic in South Africa through remote hearings and in some instances in the physical presence of a judge. In our experience, remote hearings have proceeded without complaint. Consequently, we would not hesitate to utilise any secure technology or forum that is available to benefit our clients and prevent unnecessary delay in the administration of justice. But not everyone is on the same page (or should be we say ... the same screen). In *Union-Swiss (Proprietary) Limited v Govender and Others* [2020] ZAKZDHC 30, the Durban High Court had to determine whether litigants can be forced to litigate remotely in the face of opposition to do so by a co-litigant.

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Not a Teams player: A refusal to litigate remotely

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The facts

Set down for hearing for a period of 10 days commencing 24 August 2020, the trial, concerning alleged unpaid royalties, was ripe for hearing – save for the difficulties introduced by COVID-19. The Judge President, in response to the pandemic, issued a directive discouraging the hearing of matters in open court unless the matter was deemed to be urgent. The plaintiff, being aware of the directive, wrote to the Judge President to request that the trial proceed as scheduled, but instead of proceeding in open court that it be conducted using either Microsoft Teams or Zoom. Included in the proposal to the Judge President was a well-thought-out plan that would cater to any defendants who were unable to shoulder the costs of the necessary connectivity or infrastructure needs by providing their offices as a forum for the parties to operate out of. In addition, the proposal contained a mechanism that would ensure witnesses who were based in Cape Town, Johannesburg and Durban would have a secure, well-lit venue, free from any unwarranted interference or noise. Social distancing was to be ensured and the plaintiff undertook to make available the trial bundles in both digital and hard copies to the court and the defendants. Clearly, the plaintiff left no stone unturned to ensure the trial would run efficiently, *albeit* remotely.

Yet the defendants met the request and proposal with opposition, contending, among other arguments discussed below, that conducting trials via an electronic medium was not the way business was conducted in South Africa. In response, the plaintiff was forced to bring a formal interlocutory application for the matter to proceed according to its carefully-laid plan.

The findings

Section 34 of our Constitution grants South Africans the universal right to have a dispute resolved "*in a fair public hearing before a court*". The court held that COVID-19 had "*obviously*" changed the way we must construe the meaning of section 34, and that various directives issued by the Minister of Justice, the Chief Justice and the various Judge Presidents demonstrated that remote hearings would not fall foul of the right to a fair public hearing before a court. In that regard, one of the defendants' primary defences in opposing the remote hearing which was that the atmosphere of the court would be lost in a remote hearing was rejected by the court: "*I am uncertain whether this is intended to operate as an*

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In an anti-climactic turn of events, the court retreated to principles of base equities. It held that before a court can order a hearing to proceed in a manner that is a departure from the rules that they know, it must be satisfied that both parties are placed on equal footing in respect of the matter before it.

advantage or disadvantage to the first defendant, or if he construes the imposing edifice of the court building or its period architecture from 1911 as somehow responsible for eliciting a version from a witness which would otherwise not emerge under cross examination in a virtual trial". The court further rejected the notion that it would not be possible to assess the demeanour of a witness or to adequately challenge a witness through a trial conducted by electronic means. As a whole, the defendants' "*practical difficulties*" were all rejected by the court as being difficulties that were not insurmountable.

Furthermore, the court was full of praise for the use of technology globally, and in particular in South Africa by the Supreme Court of Appeal in determining appeals as well as by the various High Courts in hearing motion proceedings.

Yet, in an anti-climactic turn of events, the court retreated to principles of base equities. It held that before a court can order a hearing to proceed in a manner that is a departure from the rules that they know, it must be satisfied that both parties are placed on equal footing in respect of the matter before it. Equality, the court held, "*would be severely strained by an order in terms of which the plaintiff seeks to impose a virtual trial on the defendants, who have voiced their opposition thereto. ... The situation would have been entirely different if both parties consented to a virtual trial and if the court were satisfied that the matter was sufficiently urgent to warrant it being heard*". Urgency, we are led to believe, "*will be the determining factor in all cases*". The application thus failed.

Discussion

We are not convinced that the decision naturally followed the ratio of the judgment. It is clear that the plaintiff was prepared to go to great lengths to place the parties on equal footing; and it is also abundantly clear that the opposition put up by the defendants was considered weak and was rejected by the court. Yet, it was held that equality would be sacrificed if the defendants were forced to litigate remotely. In our opinion, the judgment sets the wrong precedent in finding that mere opposition to a remote hearing will be sufficient to allow a court to refuse one - given that opposition is cheap, and almost always forthcoming, which means that it could be abused by unscrupulous opponents.

This is particularly so given the fact that the urgency requirement in this matter stemmed from the directive of the Judge President, which is not a legal principle but a procedural instruction, and which could change depending on how the pandemic unfolds. In other words, if the Judge President issues an updated directive which removes urgency as the threshold for the court to exercise a discretion to allow for trials to proceed during the pandemic, the court will be faced with the finding that mere opposition will tip the discretion in favour of the party opposing a remote hearing. This is not ideal.

It remains to be seen how courts in other provincial jurisdictions will deal with the findings of the Durban High Court in this matter. It also remains to be seen whether the judgment will have any impact on arbitrations in South Africa, where arbitrations proceed on a remote/virtual

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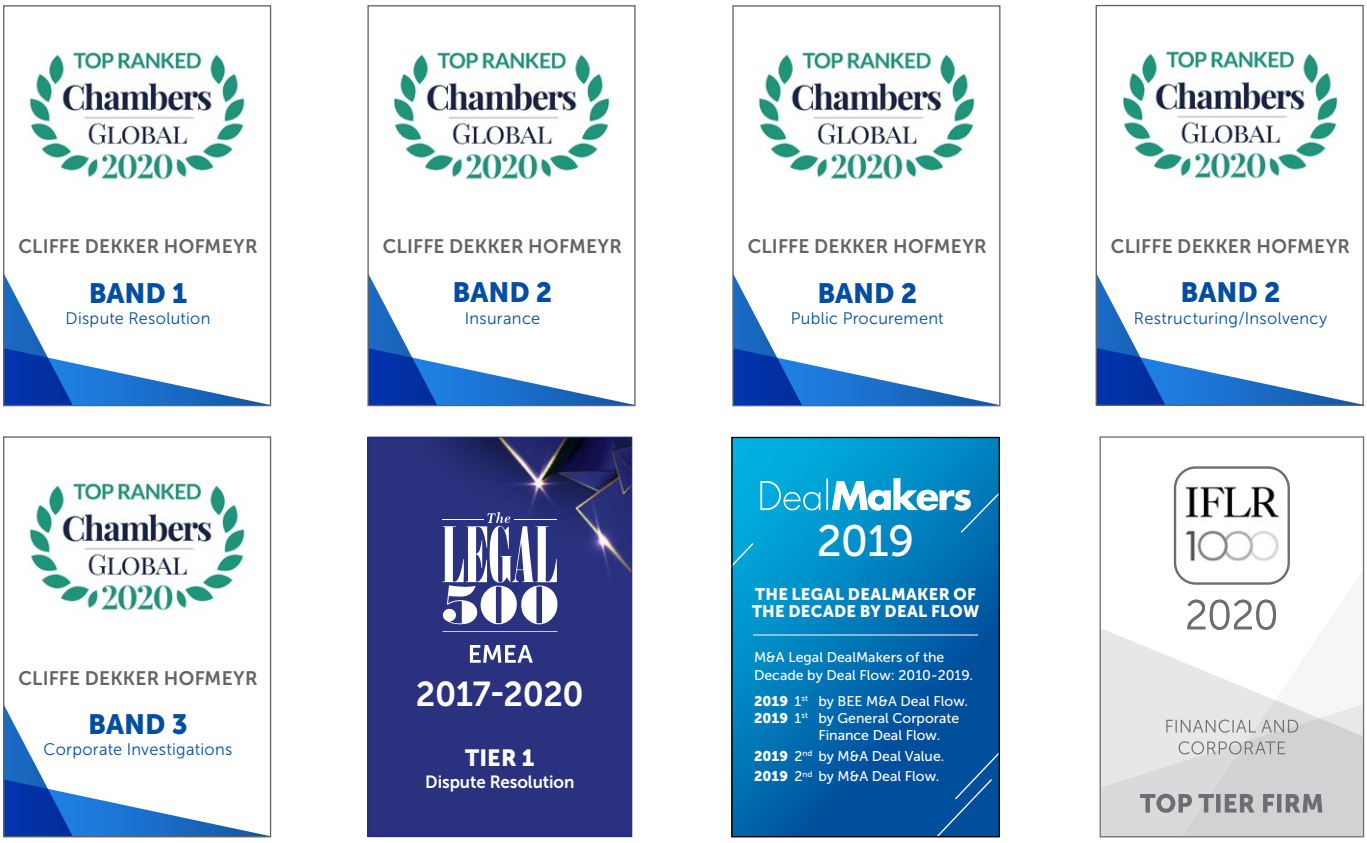
Only time will tell whether aggrieved parties would challenge arbitral awards flowing from remote/virtual arbitration hearings.

basis despite objections by one of the opponents. For international arbitrations the answer may be clearer, as the principle of equal treatment is enshrined in Article 18 of the UNCITRAL Model Law to the International Arbitration Act, 2017: "*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his or her case*". In balancing the principle of equal treatment, an arbitral tribunal, under Article 19, is empowered to conduct an arbitration in a manner that they consider appropriate (i.e. remotely/virtually), if there is no agreement between the parties. However, only time will tell whether aggrieved parties would challenge arbitral awards flowing from remote/virtual arbitration hearings. If that happens, we hope the courts will respect the discretion of the arbitral tribunal, unless there is a clear violation of the equal treatment principle.

Imraan Abdullah and Jackwell Feris



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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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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.

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

CLIFFE DEKKER HOFMEYR