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DISPUTE RESOLUTION ALERT

IN THIS ISSUE >

To arbitrate, or not to arbitrate: That is the question - The development of jurisprudence in South Africa?

When electing to commence arbitration proceedings, one would seldom think of the maintenance and development of our judicial system. On the election to enter into arbitration proceedings, whether arising from an arbitration clause or not, one usually agrees to this form of dispute resolution for, *inter alia*, a speedy resolution of the matter (as the parties are able to set their own procedural time constraints), for the election of an arbitrator who is well acquainted with the subject matter of the dispute, as well as confidentiality of the proceedings.

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CLIFFE DEKKER HOFMEYR

To arbitrate, or not to arbitrate: That is the question - The development of jurisprudence in South Africa?

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When electing to commence arbitration proceedings, one would seldom think of the maintenance and development of our judicial system. When entering into arbitration proceedings, whether arising from an arbitration clause or not, one usually agrees to this form of dispute resolution for, *inter alia*, a speedy resolution of the matter (as the parties are able to set their own procedural time constraints), for the appointment of an arbitrator who is well acquainted with the subject matter of the dispute, as well as confidentiality of the proceedings.

Arbitration proceedings may be instituted for a range of disputes; the numbers for both commercial and contractual disputes being referred to arbitration having escalated in South Africa over the past number of years. The only disputes which may not be determined by way of arbitration proceedings are matters in respect of any matrimonial cause (or incidental thereto) and matters relating to status, for example sequestration or liquidation proceedings.

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Once an award is obtained through arbitration proceedings, the arbitration award is required to be made an order of court for it to be enforceable (usually for

execution purposes). For this to occur, an application for the award to be made an order of court is made to the appropriate High Court, in terms of Section 31(1) of the Arbitration Act, Act 42 of 1965.

During this application, the facts of the matter are not brought to the attention of the High Court in any detail as the basis for the determination is only whether the award was made in accordance with the requisite arbitration agreement and in accordance with the Arbitration Act. When the order of the High Court is delivered, the order is purely that the award (as a result of the arbitration proceedings) is made an order of court.

The arbitration award itself (whether made an order of court or not) does not form a legal precedent. Due to the fact that the legal fraternity and its clients are becoming more inclined to resolve matters by way of arbitration, especially for commercial and construction disputes, this begs the question whether this will stunt the development of jurisprudence in South Africa.

The doctrine of *stare decisis* (system of judicial precedent), which is relied upon in South African law, is founded on reported and unreported case law which has been delivered by courts of competent jurisdiction. Although the operation of the system of judicial precedent ensures uniformity amongst legal decisions – it also provides for significant development of our legal principles and jurisprudence as a whole.

To arbitrate, or not to arbitrate: That is the question - The development of jurisprudence in South Africa?

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There is no doubt that arbitration proceedings result in many advantages, not only to the individuals who have elected the path of alternative dispute resolution, but also to our heavily burdened judicial system.

The rise in arbitration proceedings, although providing a welcomed relief to the burden on the judicial court system, does not allow for the development of legal principles through the subject matter of a particular arbitration, the application of certain legal principles in respect thereof and the ultimate arbitration award itself.

The only way within which a dispute (which has been determined by way of arbitration proceedings) is referred to a court of competent jurisdiction, and therefore will indeed form part of legal precedent, is when an application is made for an arbitration award to be set aside. Due to the autonomy of arbitration proceedings, these grounds are very limited, namely: misconduct on the part of the arbitrator / arbitration tribunal, gross irregularity in respect of the arbitration proceedings and when an arbitration award has been improperly obtained.

The above limited scope in respect of arbitrations (should an application be made to the appropriate High Court) is the only way within which legal precedents will be formed on the back of an arbitration. The contemplation of the subject matter by the High Court in such an application will be very limited as the determination

is procedural and not substantive. The legal precedent in this regard will also be procedurally based and not founded of the legal principles in which the facts were applied and decided upon in the original arbitration proceedings.

Due to the fact that our jurisprudence is ever evolving due to the constant development of our country as well as the principles founded in judgments handed down by our court system every day, the incline of dispute resolution which is steered away from the traditional court system, may affect the development of the judicial system itself in South Africa.

There is no doubt that arbitration proceedings result in many advantages, not only to the individuals who have elected the path of alternative dispute resolution, but also to our heavily burdened judicial system. Amidst the positives of arbitration proceedings, we must remember that these advantages may come at a cost to the development of the legal principles on which our law is based as well as South African jurisprudence as a whole. It is hoped that in time recognition will be given to arbitral awards and that they will be recognised as part of South Africa's jurisprudence to the extent that the parties agree to the reporting of the arbitral award.

Claudette Dutilleux

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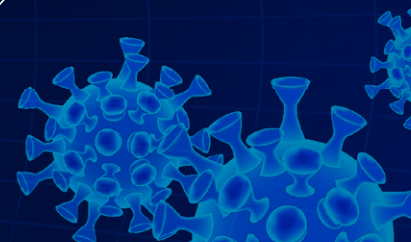
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The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

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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.

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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 cdh Stellenbosch@cdhlegal.com

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