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DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

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What's good for the goose is not necessarily good for the gander: Prescription periods for the *State vs Organs of State*

The recent judgment handed down by the Supreme Court of Appeal discusses some considerations to be taken into account when dealing with prescription-related issues concerning the State and organs of state.

Amongst other things, the Prescription Act 68 of 1969 (Prescription Act) sets out the time periods governing the prescription of debts and also includes a list of grounds upon which, if satisfied, may be deemed sufficient to interrupt the running of prescription. When considering whether a particular debt might have prescribed, a question which may arise is whether any special time periods apply to debts owed to the State as opposed to so-called organs of state.

Section 239 of the Constitution of the Republic of South Africa, 1996 (the Constitution) defines an 'organ of state' to include any department of state or administration in the national provincial or local sphere of government; or any other functionary or institution exercising a power or function in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation but does not include a court or a judicial officer.

The judgment handed down by the Supreme Court of Appeal (SCA) in the matter of *Madibeng Local Municipality v Public Investment Corporation Ltd* (955/2019) [2020] ZASCA 157 (30 November 2020) (the *Madibeng* Case) discusses some considerations to be taken into account when dealing with prescription-related issues concerning the State and organs of state.

Background

During the 1980s to 1990s, the then-Brits Transitional Local Council (Brits) – the predecessor of the Madibeng Local Municipality (Madibeng) – borrowed large sums of money from various institutions and invested these monies in the hopes that the returns earned would outperform the costs of the loans, so that the surplus monies earned could be used to fund various capital projects.

Unfortunately, the markets did not perform as well as Brits had hoped, and Brits faced a looming fiscal crisis when the debts fell due for repayment. In an attempt to address this crisis, Brits re-scheduled number of short-term loans and borrowed money from the Public Investment Corporation SOC Limited (PIC) to repay its short-term debts. During the early part of 1994, Brits issued the PIC with several zero-coupon stock certificates – essentially promissory notes – and pledged numerous insurance policies to the PIC in order to repay the PIC's loans.

One of the three stock certificates in question had a face value of R93 million and fell due for payment on 30 June 2003, whilst the other two stock certificates had face values of R37 million and R87 million respectively and fell due for payment on 30 November 2003.

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In terms of section 14 of the Prescription Act, prescription is normally interrupted by service of legal processes on a debtor (such as the issuing of summons) or by a tacit or express acknowledgement of debt by the debtor.

In the meantime, Brits had become known as Madibeng. Although Madibeng failed to repay some of the debts owing to the PIC by the relevant due dates, Madibeng had however made a number of partial repayments to the PIC over time in respect of all three debts. It was only in 2010, however, that the PIC issued summons against Madibeng to recover the balance of the unpaid debts.

Madibeng raised a special plea of prescription in response to the PIC's summons, alleging that the PIC's claim had prescribed and that the PIC was not entitled to proceed with its claims. In defence of Madibeng's special plea, the PIC alleged that –

1) the applicable prescription period was fifteen years as opposed to three years, as the debt owed to the PIC was equal to a debt being owed to the State; and

2) the running of prescription had in any event been interrupted on numerous occasions by several admissions of liability made by Madibeng.

The main issue for determination by the SCA was whether the PIC's claims had prescribed in terms of section 11 of the Prescription Act (with section 11 informing the different time periods which apply to different types of debts) or whether the running of prescription was otherwise interrupted in terms of section 14 of the Prescription Act (with section 14 setting out the various grounds upon which the running of prescription may be deemed to be interrupted).

Prescription periods

Although the general rule is that a debt prescribes after a period of three years from the date of it falling due for payment, section 11(b) of the Prescription Act provides a prescription period of fifteen years in respect of debts owed to the State.

Moreover, in terms of section 14 of the Prescription Act, prescription is typically interrupted by service of legal processes on a debtor (such as the issuing of summons) or by a tacit or express acknowledgement of debt by the debtor.

The SCA had previously dealt with a similar issue regarding whether the applicable prescription period was three or fifteen years in the matter of *Holeni v Land and Agricultural Development Bank of South Africa* [2009] ZASCA 9; 2009 (4) SA 437 (SCA). Amongst other things, the SCA was required to determine whether the Land and Agricultural Development Bank of South Africa (the Bank) was the State or an 'organ of state' as envisioned in section 239 of the Constitution in order to determine which prescription period would apply.

Acting Judge Navsa observed that the term 'the State' does not have one settled meaning; that its precise meaning in any given case depends on the context; and that the Courts have consistently relied upon on practical considerations to determine its scope. The learned Judge rejected the argument that, for purposes of the Prescription Act, an organ of state was 'the State' and accordingly held that

What's good for the goose is not necessarily good for the gander: Prescription periods for the *State vs Organs of State*...*continued*

The second issue that the SCA considered in the *Madibeng* Case was whether the running of prescription had been interrupted on numerous occasions owing to several admissions of liability by Madibeng.

the Bank was not an 'organ of state', but instead was a state-owned entity that went about the business of the State by recovering moneys due to the treasury. The reference to 'State' in section 11(b) of the Prescription Act therefore means the State as government.

Applying this logic to the PIC, the SCA held that the PIC is a state-owned entity created by the Public Investment Corporation Act 23 of 2004 and although the PIC goes about the business of government, operating as a financial services provider in respect of government funds, it is distinct from the government in that its public function is not dictated by the Constitution. Accordingly, the usual three-year prescription period would apply to debts owed to the PIC and other similar organs of state.

Interruption in the running of prescription

The second issue that the SCA considered in the *Madibeng* Case was whether the running of prescription had been interrupted on numerous occasions owing to several admissions of liability made by Madibeng.

The general principle is that where prescription is interrupted by an acknowledgement of debt or an admission of liability by the debtor, the prescription period begins to run afresh from the date of such interruption. However, the SCA noted that an admission of liability alone (in other words, the debtor merely pronouncing in some form or another that it is indebted to the creditor) does not necessarily amount to a fresh undertaking to discharge the debt – instead, the SCA held that the admission must be accompanied by the conduct of the debtor, meaning that the debtor must truly convey its intention to repay the debt.

What's good for the goose is not necessarily good for the gander: Prescription periods for the State vs Organs of State*...continued*

The SCA held that the PIC's claim for repayment of the loans had not prescribed, particularly as a number of partial repayments had been made by Madibeng over time, amounting to tacit acknowledgements of liability deemed sufficient to interrupt the running of prescription.

Significantly, Madibeng had on numerous occasions been vocal about the debt that it owed to the PIC. Not only did Madibeng make several partial repayments of the debt owed to the PIC over time, but Madibeng also regularly made balance enquiries and even requested the PIC for an extension of time to repay the loans. The SCA held that the effect of this was that the prescription period began to run afresh after the repayments were made by Madibeng. The SCA held that it was determinative of the prescription issue that a payment was made by Madibeng during 2008, shortly before summons was issued, meaning that the summons had been served timeously before the three-year prescription period took effect.

Conclusion

The SCA held that the PIC's claim for repayment of the loans had not prescribed, particularly as a number of partial repayments had been made by Madibeng over time, amounting to tacit acknowledgements of liability deemed sufficient to interrupt the running of prescription.

Accordingly, the SCA ordered Madibeng to repay the PIC the sum of R162,639,962.00, together with interest running from the dates on which the respective debts had fallen due for repayment.

Given the fact that Madibeng had never disputed owing money to the PIC, the quantum of its indebtedness or the partial repayments that it had previously made to the PIC, the SCA was critical of Madibeng's conduct in defending the summons and thereafter appealing to the SCA, in circumstances where Madibeng ought to have known that it had no prospect of successfully defending the PIC's claims.

An important lesson from the *Madibeng* Case is that the relevant prescription periods will depend upon whether the creditor in question is the State or an organ of state. By contrast, an important lesson for debtors is that repeatedly requesting confirmation of the outstanding balance on a loan, making part-payments towards a debt, or otherwise conveying an intention to repay the outstanding debt may be construed as an acknowledgement of liability sufficient to interrupt the running of prescription.

Gareth Howard and Phathutshedzo Nekhavhambe

The future of commercial litigation: Online dispute resolution

Businesses have begun to make use of what is known as *"smart contracts"* to conclude deals remotely. Smart contracts are digitalised contracts developed through blockchain technology.

The COVID-19 global pandemic has proverbially brought about a *"new normal"* characterised by social distancing, lockdown regulations and remote working. As a result, there has been an increase in e-commerce transactions worldwide. These transactions range between ordering essential goods and services from online shopping platforms to conducting business both online and remotely. A question that arises is which mechanism would be appropriate to resolve disputes which may occur from these transactions?

Smart contracts

Businesses have begun to make use of what is known as *"smart contracts"* to conclude deals remotely. Smart contracts are digitalised contracts developed through blockchain technology. They utilise computer programmes which are coded with protocols that have the ability to facilitate, verify, execute and incorporate contractual terms. This computer programme therefore fully records the agreement between the parties. The main benefit that is seen when utilising blockchain technology is the ability to utilise the secure nature of the 'chain' of recordable information within each of the blocks that make up such. In other words, each block can be seen as a digital ledger that stores information, when new information is added, a new block is created and chained with the previous block. Thus allowing a recordable chain of developments that is not subject to the often fallable *status quo* of using 'track changes' for example.

Online dispute resolution

Logic dictates that disputes arising out of smart contracts should be resolved through online dispute resolution mechanisms (ODR). ODR is the use of sophisticated technology in an attempt to enhance, support and replicate the existing alternative dispute resolution processes (ADR). ODR is not an entirely new concept. This is illustrated by the various academic literature written by Ethan Katsh, who is globally recognised as the father of ODR after his work with eBay in 1999 and the proposal in 2010 by the United Nations Commission on International Trade Law in respect of the use of ODR in cross-border electronic commerce transactions. ODR is popular amongst some reputable companies such as eBay and PayPal, which use the online mechanism to solve the numerous disputes they receive each year. This is because it is flexible to use (as parties may be continents apart); inexpensive as legal fees may be substantially reduced; and of course, it is efficient.

How ODR works

At a practical level, ODR simply employs arbitration, mediation, and negotiation techniques on an online internet-based platform. Put differently, technology and artificial intelligence (AI) have joined forces with the well-known forms of ADR namely mediation and arbitration. AI is a form of technology whereby machines have the ability to learn and make decisions on their own. The machine may learn or be trained to recognise various patterns in data in order to improve their performance. This

The future of commercial litigation: Online dispute resolution*...continued*

AI is only as accurate as the data from which it draws. If no such data exists, then human intervention will be necessary to create the necessary precedent.

technology is designed to mimic human thought processes and intelligence. ODR simply automates ADR processes in order for a computer programme to perform the human role of third parties in the mediation or arbitration process.

Similarly to ADR, confidentiality, transparency, legality, private autonomy, and efficiency are standards that should be adopted by ODR. An example of how the two techniques are joined is in automated and assisted negotiations. This may be used in settlement proceedings whereby technology will replace the negotiator to assist the parties in resolving their dispute. The parties will use a software that was designed to make decisions of this nature. Each party will determine the settlement range and then make an offer. Should this offer fall within the agreed range the software will calculate a mean value using the two offers and that will be the amount the dispute is settled for. Should an offer not be in this range, then the parties may start the process over. It must be borne in mind that accepting the use of technology to resolve disputes does not mean that human intervention will be eradicated. AI may find legal issues too complex or that the legal principles need to be analysed further, therefore human intervention will still be required. This will especially be true when there is no precedent or past data to determine how a particular issue is usually resolved. AI is only as accurate as the data from which it draws. If no such data exists, then human intervention will be necessary to create the necessary precedent. That being said, this type of technology should be part of a sophisticated lawyer's arsenal in the future to solve client disputes efficiently.

The world as we know it is fast-changing and the use of technology and AI in the practice of law cannot be avoided. Seemingly, our courts have caught up to modern day technology through the introduction of the sophisticated electronic court filing system known as Caselines and the fact that court hearings are now conducted virtually. The long-term sustainability of any sophisticated dispute resolution practice requires concepts such as AI and ODR to be fully embraced.

Mongezi Mpahlwa and Storm Arends

Virtual cats and affidavits

In a world of virtual cats and deep fakes, what about virtual affidavits?

"*I'm here live, I'm not a cat.*" The words of US lawyer Rod Ponton achieving instant notoriety in a court hearing over Zoom in February this year. Mr Ponton was only a virtual cat - not existing physically but made to look real by software - but it is troubling that someone can appear in real time video as something that they are not. We are OK with virtual reality – a software generated experience that appears real but isn't – but are we really OK with deepfake technology, which allows people's images to be transposed onto a pre-existing video and enhanced by a voice clone to create a fake.

Predictions are that soon the technology will allow this to happen live and make it impossible to tell the real from the fake. Judges are unlikely to be hoodwinked into allowing talking animals to appear in a virtual court, but real-time deep fakes could convince the judge to accept a criminal imposter as the actual person.

Meanwhile, many of us are enjoying the freedom to work from wherever and expect this to be embraced universally. Hence the question: In a world of virtual cats and deep fakes, what about virtual affidavits?

The Justices of the Peace and Commissioners of Oath Act dates back to 1963 (three years before television audiences marveled at Captain Kirk and Mr Spock using handheld communicators in the first series of Star Trek) so we know there can be no reliance on the intention of the legislature to include Zoom, Teams or WebEx. That Act also has a peremptory requirement that the deponent should be "*in the presence of*" the commissioner of oaths. The intention of that Act was undoubtedly to require a physical presence and pointing to the Electronic Communications and Transaction Act doesn't help. Though it legislates the validity of electronic documents and regulates electronic signatures it doesn't speak at all to the act of commissioning.

Courts hearing evidence over a virtual link, have cautiously required safeguards like the actual presence with the witness of an independent attorney to verify the identity of the witness, that the witness is not being coached by someone off camera and on recent experience to make sure that the witness or lawyer appearing on the screen is a real person, not a cat.

Although most affidavits are accepted without issue, if an affidavit is challenged it is for the party relying on the affidavit to prove its validity. Whilst virtual affidavits for administrative purposes might pose minimal risk, virtual affidavits in litigation should be approached with more caution especially when weighed against the potential consequences of a successful challenge by a clever opponent. Commissioners of oaths should also be aware of their own risk in agreeing to fulfilment of a statutory function outside the dictates of the statute. Unquestionably the law should already have changed to avoid an unnecessary and in current times, potentially hazardous requirement of physical presence but whether that change is through development of the law by our courts or amendments by Parliament it should include a tailored process like in some foreign jurisdictions including Australia and Ireland.

Until then, deponents and commissioners will determine their own appetite for risk while we look forward to the imminent appearance in one of our virtual courts of a unicorn or pirate and the witty comments that will surely follow. Comments on Mr Ponton's claims that he is not a cat included "*That's exactly what a cat pretending to be a human would say*", "*He suspiciously denies being a cat even though no one accused him*" and, referring to the judge's statement "*I think it's a filter*", one comic noted that the judge was "*Not totally ruling out that he [Mr Ponton] may be a cat*".

Tim Fletcher and Esther Ooko

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CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.
Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Lucinde Rhoodie is recommended in Dispute Resolution in THE LEGAL 500 2021.
Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.
Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.
Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2021.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2021.
Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2021.
Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2021.
Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2021.
Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2021.

The LEGAL 500 EMEA

2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2021 as Senior Statespeople: Dispute Resolution.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.

TOP RANKED Chambers Global 2021

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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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