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DISPUTE RESOLUTION MATTERS

BOILERPLATE ARBITRATION CLAUSES

Does your clause cover what you want it to cover?

In the case of *North East Finance (Pty) Ltd vs Standard Bank of South Africa Ltd 2013 (5) SA 1(SCA)* the Supreme Court of Appeal (SCA) made it clear that where an agreement has been brought about under fraudulent circumstances, and is therefore invalid, a clause that requires parties to refer any dispute between them to arbitration is also invalid. However, it is in principle possible to draft an arbitration clause in such a way that it will remain enforceable even where the agreement it forms part of turns out to be invalid.

North East Finance (North East) and Standard Bank (Bank) entered into a settlement agreement following disputes between them. An arbitration clause in the agreement stated that *"in the event of any dispute of whatsoever nature arising between the parties (including any question as to the enforceability of this contract…), such dispute will be referred to arbitration…"*

The Bank chose to walk away from the agreement after learning that North East had been defrauding it at the time the agreement was signed. North East then asked the Bank to attend pre-arbitration meetings, pursuant to the arbitration clause. The Bank refused, arguing that due to fraud, the arbitration clause was as invalid as the rest of the agreement. North East countered that since the arbitration clause specifically included the phrase "including any question as to the enforceability of the contract" it meant that the clause covered a dispute over allegations that the agreement was induced by fraud.

The SCA found that the agreement "did not have to be cancelled or rescinded: it was void". This meant that there was no question as to the agreement's enforceability and the arbitration clause therefore did not cover the dispute. Had the arbitration clause been drafted to provide that the scope of a dispute to be referred to arbitration included validity of the agreement and not merely enforceability, the outcome would have been different.

When a court is called to interpret an agreement, so the judgment goes, the court must find out what the parties to the agreement intended the contract to mean. The court found it to be clear that the Bank did not expect that there might have been fraudulent conduct by North East and therefore when concluding the agreement the Bank did not intend that the validity of the agreement or questions of fraudulent misrepresentation could ever have been matters to be arbitrated.

Finally, the SCA found that the agreement was probably induced by fraud with the result that the entire agreement, including the arbitration clause, was void. The Bank was therefore not obliged to submit the dispute surrounding the agreement's validity to arbitration.

A further reminder to make sure that the boilerplate clauses in an agreement say what you want them to say.

Tim Fletcher and Llewellyn Angus

IN THIS ISSUE

THE IMPACT OF S23 (3) OF THE COMPANIES ACT 71 OF 2008 ON THE MEANING OF 'RESIDENCE'

The impact of s23 (3) of the Companies Act 71 of 2008 (Companies Act) on the meaning of 'residence' in the context of s19 (1)(a) of the Supreme Court Act, No 59 of 1959 (Supreme Court Act)

Section 19(1)(a) of the Supreme Court Act provides that the High Court has jurisdiction "over all persons residing or being in and in relation to all causes arising and offences triable within its area of jurisdiction…".

Under the old Companies Act, No 61 of 1973 this provision was accepted to allow for a company to reside at more than one place, and litigants could rely on either the principal place of business or registered address of a company to determine which court would have jurisdiction over a matter involving that company.

The new Companies Act, and specifically the case of *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening) 2013 (1) SA 191 (WCC),* has altered this position and litigants can no longer rely on a company's principal place of business to determine which court has jurisdiction to hear a matter if that address is not also the registered address of the company.

Section 23 (3) of the Companies Act requires companies to register the address of their office with the Companies and Intellectual Property Commission initially on their notice of incorporation and subsequently, if changed, by filing a notice of change of registered office.

In *Sibakhulu* Binns-Ward J held that that a company resides for purposes of jurisdiction, as contemplated in s19 (1)(a) of the Supreme Court Act, only at its registered office which for jurisdictional purposes under the Companies Act is required to be the same place as its principal place of business.

Binns-Ward J held that the requirement that a company register its principal office is clearly intended for the benefit of third parties who may wish to obtain information about the company, communicate with it, or in any manner formally transact with or in connection with it and that the registered address of the company is the address at which this can effectively be done.

The 'principal office' of a company as contemplated in s23 (3) of the Companies Act constitutes for jurisdictional purposes a company's statutory residence where it must be ready to perform its corporate functions and where it is regarded as present at all times ready to conduct and control its administrative functions.

While the decision in *Sibakhulu* may be seen as potentially narrowing or restricting the choice of litigants to initiate action in a particular jurisdiction, where it may previously have had the choice of two courts it now has only one (unless of course it founds jurisdiction on the basis of the place where the cause of action arose), the upside of this decision is that companies can no longer rely on registering addresses which they have little or no connection to in an attempt to avoid and frustrate potential litigants.

Burton Meyer and Faye Hoch

DOES AN ARBITRATOR HAVE THE SAME POWERS AS A COURT TO ADJUDICATE A DISPUTE WHERE THE CONVENTIONAL PENALTIES ACT IS RAISED AS A DEFENCE?

The ambit of the Conventional Penalties Act, No 15 of 1962 (CPA) is to provide for the enforceability of penalty stipulations, including those based on a pre-estimate of damages and forfeit clauses.

In terms of section 3 of the CPA, if upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, a court may reduce the penalty to such an extent as it may find equitable in the circumstances.

The question that arises is what the position will be if a matter is referred to arbitration and whether an arbitrator is entitled to exercise the same powers as a court to reduce a penalty which he deems excessive as contemplated by section 3 of the CPA.

To date it appears that there are no reported/unreported judgments that deal with this question. The Supreme Court of Appeal held in *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others [2007] 3 All SA 223 (SCA)* that an arbitrator may not decide an issue of his own jurisdiction where same is not provided for specifically and in the clearest terms in an arbitration agreement.

In *Radon Projects (Pty) Limited v NV Properties (Pty) Limited and Another [2013] JOL 30597 (SCA)* the court held that when an arbitrator is confronted with a jurisdictional objection, what is called for is sound judgment by the arbitrator on the course that should be followed based on his view of the strength of the objection and the circumstances that present themselves in the particular case.

An arbitrator therefore acts within the scope of his jurisdiction if he decides a matter within the scope of the arbitration agreement between the parties and his agreed terms of reference. An arbitrator may only decide an issue that falls outside of the scope of his original terms of reference should the parties to the dispute agree thereto.

Where parties have agreed that the rules governing arbitrations under the auspices of the Arbitration Foundation of Southern Africa (AFSA) apply, article 11 of the Commercial Rules of AFSA provides that the arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical and final determination of all the disputes raised in the proceedings, including the matter of costs.

Practice Note 23 (Revised) as issued by the Association of Arbitrators of Southern Africa (Association) expresses the view, in respect of the jurisdiction of an arbitrator to decide applications under section 3 of the CPA that an arbitrator, in material respects, acts as a court in adjudicating a dispute referred to him/her. Arbitrators are entitled to assume that they may deal with applications under section 3 of the CPA as if they were a court.

Practice Note 23 does provide some comfort to arbitrators dealing with such a matter, however, as stated by the Association "whether or not a Court would uphold this view remains to be seen".

To prevent uncertainty and to close the door on any review application based on section 3 of the CPA it would be advisable for parties to agree that an arbitrator deciding the dispute be empowered with the jurisdiction to adjudicate whether penalty stipulations in terms of an agreement between the parties are excessive or not.

Corne Lewis

CLERICAL ACTS AND ADMINISTRATIVE ACTION

The Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) makes it clear that administrative action entails a decision, or a failure to make a decision, by an administrator which has a direct, external legal effect on a party. As Nugent JA stated in *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005(6) SA 313(SCA)* "whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so…".

The Supreme Court of Appeal (SCA) recently decided the case of *Nebank Limited v Mendelow NO [2013] ZASCA 98* which affirmed the principle that mere clerical acts performed by an administrator do not constitute administrative action under PAJA and therefore cannot be judicially reviewed in terms of PAJA. The case dealt with a transfer of property that was vitiated by a fraud as the signature of the seller on the deed of sale had been forged. The seller died a week after the deed of sale was forged and the executors applied to the Master of the High Court to certify in terms of s42(2) of the Administration of Estates Act, No 66 of 1965 that no objection to the transfer existed. The property was subsequently transferred after the Master signed a certificate that permitted the transfer of the property as a result of a fraudulent misrepresentation that the deed of sale was genuine.

The executors then applied, among other things, to review and set aside the certificate issued by the Master. The trial court held that the decision of the Master in signing a certificate that authorised the transfer and the ensuing act by the Registrar of Deeds in registering the property in the name of the purchaser, constituted administrative action which was reviewable under PAJA. While the appeal was dismissed and the SCA ordered that the property be reregistered in the name of the estate, on the issue of whether the conduct by the Master in signing the certificate constituted administrative action within the definition of PAJA, the SCA found that it did not.

Lewis JA quoted *Kuzwayo v Estate Late Masilela 2011(2) A11 SA S99 (SCA)*, which stated that not "every act of an official amounts to administrative action that is reviewable under PAJA or otherwise". A decision therefore must entail some form of choice or evaluation and while the Master may perform administrative acts in the course of their statutory duties, where they have no decision-making function but perform acts that are purely clerical and that they are empowered to do so in terms of the statute that so empowers them, they are not performing administrative acts within the definition of PAJA or even under the common law. The distinction must be made between mechanical powers and discretionary powers, with only discretionary powers constituting administrative action.

It is therefore clear that administrative acts do not automatically translate to administrative action and that it is the nature of the power being exercised which makes a decision administrative action and not the identity of the decision maker.

Deshni Naidoo

'IT'S MY BODY' - MANDATORY HIV TESTING IN SOUTH AFRICA: A BRIEF LEGAL PERSPECTIVE

In 2011 there were around 34 million people in the world living with HIV. South Africa itself has the largest number of HIV infections in the world. Other African countries - including Malawi and Zimbabwe - have considered implementing mandatory HIV testing in certain circumstances. One pertinent question that our legislators must face is whether the law is responding fast enough, and in an appropriate manner, to these shocking statistics.

South African law has already contemplated mandatory HIV testing in the workplace and in sexual offences legislation. And, of course, there is government's campaign to increase voluntary testing by means of informed consent. Below we consider two more instances where blood testing may be mandatory - and the possible implications for HIV testing.

The Road Accident Fund Act, 56 of 1996 (RAF Act)

This Act gives the Road Accident Fund (RAF) the powers to "take any… action or steps which are incidental or conducive to the exercise of its powers and performance of its duties" - that is, to achieve the objects of the RAF Act, including the 'investigation and settling' of claims arising from loss or damage sustained as a result of the negligent driving of a motor vehicle, and to pay compensation accordingly.

It is common for a claimant to be sent for a battery of medical assessments to properly ascertain the injuries sustained for which the RAF is liable, for determination of the quantum of the claim. Such medical assessments often include blood tests - from which a person's HIV status may, *inter alia*, be established. It is submitted that whether HIV-testing may be included in such mandatory assessments will depend on the circumstances of each case. This is because a plaintiff's life expectancy, a factor in the actuarial calculations for loss of future earnings, will be negatively affected by a positive HIV status.

The Criminal Law (Forensic Procedures) Amendment Bill, 2013 (passed by the National Assembly on 22 August 2013)

This Bill seeks to amend our Criminal Procedure Act, No 51 of 1977 to bring South African forensic procedures in line with international standards, by, among other things, regulating the taking of bodily samples' in addition to the already-permissible 'bodily prints'.

The Bill provides for blood samples to be taken by an authorised medical practitioner from persons arrested for a certain class of offences (such samples to be taken "from the genitals or anal orifice area" of the body) and for 'forensic DNA analysis' to be done, provided that this analysis, does not relate to "any analysis pertaining to medical tests or for health purposes". A profile created from such analysis is prohibited from containing any information on the health or medical condition of a person (other than such person's gender).

Although this appears to be a highly invasive form of medical testing for the purposes of analysis which may still need to pass the constitutional muster, it appears that any such samples taken would not be permitted to be tested for HIV, which is a medical condition concerning an individual's health.

From a constitutional perspective, both the right to privacy and bodily integrity are closely linked to the right to dignity, a founding principle of the constitution, and both these rights would *prima facie* be infringed by mandatory medical testing.

Any person wishing to compel another to, without his consent, undergo an HIV test, will have to demonstrate that such measures are justifiable, in accordance with both the bill of rights as well as underlying constitutional principles.

This standard would indeed also be required of a litigant wishing to compel an HIV test in order to obtain some benefit by the outcome thereof.

Willie van Wyk and Philene Blom

CONCOURT DOORS WIDE OPEN? - COMMENT ON THE CONSTITUTION 17TH AMENDMENT ACT OF 2012

On 23 August 2013, the Constitution Seventeenth Amendment Act of 2012 came into force. The wording of the Amendment Act has drastically changed what was widely understood to be the reason for the existence of the Constitutional Court - to adjudicate on Constitutional matters.

The Constitutional 17th Amendment Act of 2012 has amended, inter alia, Section 167 of the Constitution as follows:

> *"(3) the constitutional court -*
>
> *(a) Is the highest court of the republic; and*
>
> *(b) May decide -*
>
> *(i) constitutional matters; and*
>
> *(ii) Any other matter, if the constitutional court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that court; and*
>
> *(c) Makes the final decision whether a matter is within its jurisdiction. …"*
>
> (underlining denotes new insertions)

It is clear that the constitutional court is no longer restricted to only decide matters of a constitutional nature. It is however not as clear as to whether this amendment will actually promote or facilitate easier access to that court. The Constitutional Court has now been appointed as the highest court in SA in all matters (where previously it only held this title in relation to constitutional matters).

In order to understand the impact of this amendment, one has to understand how the Constitutional Court determined its jurisdiction to hear a matter, in the past. Traditionally, the court applied a strict rule of constitutional relevance, refusing to entertain a matter which did not raise a constitutional issue. Over time this has changed, with the court hearing more and more matters which are not, strictly speaking, "constitutional disputes". The court has become much more willing to accept that, as all law is subject to the constitution, just about every dispute arriving at the constitutional court, will contain a certain constitutional element.

Against this background, the Constitution 17th Amendment Act of 2012 comes as no real surprise, as the amendment seeks to merely formalise what has developed as a trend in the constitutional court. Whilst it is clear that each of the High Court, the Supreme Court of Appeal and the Constitutional Court have the inherent jurisdiction to rule on constitutional matters, it is less clear as to when it is appropriate for a party to appeal directly to the constitutional court in non-constitutional matters. The only hurdle which exists for a potential litigant to be heard in the Constitutional Court is that leave to appeal (to the constitutional court) must be granted on the grounds that the matter raises an *"arguable point of law of general public importance which ought to be considered by that court"*.

Only time will tell what the constitutional court deems an "arguable point of law of general public importance" to be, but it is unlikely that the constitution will not be used as a guide in making this determination. As a result, the practical effect of the amendment is likely to have a lesser effect on a party's ability to approach the constitutional court than was originally understood, and is unlikely to open the proverbial floodgates to "non-constitutional" litigation in the Constitutional Court.

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