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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

INTERNATIONAL ARBITRATION: THE INVESTOR PROTECTION LANDSCAPE IN SOUTHERN AFRICA

The economic community in Southern Africa is known as the Southern African Development Community (SADC) formed in terms of the SADC Treaty. The purpose of SADC is to promote trade and investment intra-SADC and encourage foreign direct investment from outside the SADC region. The principle instrument which intends to encourage finance and investment in SADC is the Southern African Development Community Protocol on Finance and Investment (SADC Protocol).

A CAUTIONARY TALE FOR ALL FINANCIAL SERVICE PROVIDERS

In the case *Reynecke v Odinfin (Pty) Ltd* (86753/2014) [2016] ZAGPPHC 486 (21 June 2016), the High Court was called on to consider whether reporting a representative of an authorised financial service provider (FSP) and the consequent removal of the representative from the register of FSPs could attract liability for delictual damages.

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INTERNATIONAL ARBITRATION:
THE INVESTOR PROTECTION LANDSCAPE IN SOUTHERN AFRICA

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The economic community in Southern Africa is known as the Southern African Development Community (SADC) formed in terms of the SADC Treaty. The purpose of SADC is to promote trade and investment intra-SADC and encourage foreign direct investment from outside the SADC region. The principle instrument which intends to encourage finance and investment in SADC is the Southern African Development Community Protocol on Finance and Investment (SADC Protocol).

SADC Protocol provides any investor with qualifying investments in the territory of any member state within the SADC region (depending on when such country acceded to the SADC Treaty) with uniform protection.

Annex 1 to the SADC Protocol provides more or less similar investment protection to investors as found in certain Bilateral Investment Treaties (BITs). The benefit of the SADC Protocol is, however, that it intends to ensure uniform protection to foreign investors (including intra-SADC investors) in any of the 15 member states.

In terms of the SADC Protocol the following protection measures are, among others, guaranteed for investors to any SADC member state:

- in the event of expropriation, a right to prompt, adequate and effective compensation. Investments shall not be nationalised or expropriated in the territory of any member state except for public purpose, under due process of law, on a non-discriminatory basis and subject to payment of prompt, adequate and effective compensation;
- right to fair and equitable treatment. Investments and investors shall enjoy fair and equitable treatment in the territory of any state party, which shall not be less favourable than granted to investors of the third state with the exception that state parties may (in accordance with their respective domestic legislation) grant preferential treatment to qualifying investments and investors in order to achieve national development objectives;
- right to repatriation of investment and returns in accordance with the rules and regulations stipulated by the host state; and
- right to international arbitration for the investor state.

Thus despite any domestic legislation adopted or BITs concluded by member states, the SADC Protocol provides any investor with qualifying investments in the territory of any member state within the SADC region (depending on when such country acceded to the SADC Treaty) with uniform protection. Such investors will be able to demand the protection afforded in terms of the SADC Protocol relating to, among others, property rights, transfer of funds/returns and investor-state international arbitrations. This protection may be relied on despite the investor protection in terms of the domestic law of a member state being less than what is provided in terms of the SADC Protocol. The SADC Protocol grants all qualifying investors (whether from a SADC state or from any other state outside SADC) in the region with the right to bring any claim against a SADC member state in an international arbitration for breach of the SADC Protocol.

There is pressure from South Africa and other SADC countries (such as Botswana and Namibia) to align the level

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CONTINUED

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of protection currently afforded by the SADC Protocol with domestic approaches to ensure that SADC as a region has a harmonised approach to the protection of investments. These changes will align it with domestic legislation, such as the Protection of Investment Act, No 22 of 2015 (Act) of South Africa (not yet in operation). The changes will also provide scope for member states to adopt the Model SADC BITs.

The SADC Subcommittee on Investment has proposed an amendment to Annex 1 of the SADC Protocol to specifically amend article 5 (expropriation), article 6 (national treatment) and article 28 (right to investor-state arbitration). Once the amendments are adopted the rights of foreign investors in terms of the SADC Protocol will, to some extent, align with the position proposed in terms of the Act.

For any investor it is important to understand under what circumstances its rights as an investor are not only protected in terms of domestic laws, but also in terms of BITs or other multilateral treaties such as the SADC Protocol. Knowing and understanding the domestic and international limits of a state's right to regulate in the public interest and whether any specific legislative or executive measure by the state complies with any bilateral or multilateral obligations will allow an investor to better navigate a potential impasse with a host state flowing from its investment decisions.

Jackwell Feris

A CAUTIONARY TALE FOR ALL FINANCIAL SERVICE PROVIDERS

The Financial Advisory and Intermediary Services Act, No 37 of 2002 provides that all FSPs have an obligation to satisfy themselves that their representatives are "competent to act and comply with" the requirements as determined by the registrar of FSPs.

In the case *Reynecke v Odinfin (Pty) Ltd* (86753/2014) [2016] ZAGPPHC 486 (21 June 2016), the High Court considered whether reporting a representative of an authorised financial service provider (FSP) and the consequent removal of the representative from the register of FSPs could attract liability for delictual damages.

The Financial Advisory and Intermediary Services Act, No 37 of 2002 (Act) provides that all FSPs have an obligation to satisfy themselves that their representatives are "competent to act and comply with" the requirements as determined by the registrar of FSPs. Of relevance here, the representative must meet the "fit and proper requirements" which deal with the honesty and integrity of the representative, such as whether the representative has been found guilty of a transgression involving "dishonesty, negligence, incompetence or mismanagement". However, the transgression must be "sufficiently serious to impugn the honesty and integrity of the FSP or the representative". In the event that a representative no longer complies with these requirements, their authority to act on behalf of the FSP must be withdrawn and their name must be removed from the register of representatives.

Without notice to Reynecke, Odinfin took steps to have Reynecke's name removed from the register.

Under the current case, Odinfin (Pty) Limited (Odinfin) was an authorised FSP in terms of the Act and Reynecke was employed by Odinfin to provide financial services to its clients, and was thus employed as its representative in terms of the Act. However, Reynecke was dismissed for attending a training course with another FSP (Second FSP) without informing Odinfin, rather claiming that he was providing services to a particular client of Odinfin. The dismissal was based on "dishonesty and/or competing with the employer and/or conflict of interest". Thereafter, and without notice to Reynecke, Odinfin took steps to have Reynecke's name removed from the register. This caused Reynecke to be suspended from his employment with the Second FSP, who had subsequently employed him. As a result, Reynecke sought to recover his loss of income from Odinfin.

Odinfin neither informed Reynecke of its intention to have his name removed, nor provided reasons for its decision to do so. In fact, Odinfin denied that it had debarred Reynecke, claiming it had merely reported the findings of Reynecke's disciplinary hearing during which he was dismissed. Despite this claim, when Reynecke launched proceedings to have the debarment set aside, Odinfin initially opposed the proceedings, only withdrawing its opposition at (what the court viewed) a very late stage in the proceedings.

Reynecke alleged that a decision taken to remove a representative from the register constitutes an administrative act under the Promotion of Administrative Justice Act, No 3 of 2002 (PAJA). Therefore, the argument was that Reynecke was entitled to a fair administrative action and as he should have been notified of the nature and purpose of the decision and given an opportunity to be heard before the decision was taken.

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A CAUTIONARY TALE FOR ALL FINANCIAL SERVICE PROVIDERS

CONTINUED

The court was critical of Odinfin's actions in not following a fair administrative process, and, as these actions prevented Reynecke from acquiring any other remedy or coming to court earlier to prevent the damage, the circumstances demanded that Reynecke be awarded damages.

It was said that as Odinfin did not notify Reynecke of the decision or give him a reasonable opportunity to be heard, it breached the statutory duty imposed by PAJA to ensure a fair administrative process.

Odinfin conceded, and the court agreed, that its actions fell under PAJA. For a fair process to be followed, an informed decision must be taken regarding whether the dishonesty in question is sufficiently serious to justify the removal of a FSP representative's name from the register. Furthermore, the representative must be notified and given an opportunity to be heard. However, as this was conceded by Odinfin, the question before the court was whether the violation of public law could attract a private law damages claim.

The court stated that Odinfin's failure to follow a fair process could not automatically lead to its liability for the damages sustained by Reynecke (being his loss of income while suspended from the second FSP). The creation of a damages claim would depend on whether the particular circumstances demanded such a sanction. In other words, whether the failure could be said to be wrongful and unlawful.

In this regard, the court was critical of Odinfin's actions in not following a fair administrative process, and, as these actions prevented Reynecke from acquiring any other remedy or coming to court earlier to prevent the damage, the circumstances demanded that Reynecke be awarded damages.

Thus, this case is a warning to all FSPs to behave responsibly when taking steps to remove a representative from the register, by making sure an informed and considered decision is taken, that the relevant representative is notified of the FSP's intention and is given an opportunity to be heard.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. 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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