

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

CONVERGENCE AND NEW MEDIA:

THE IMPACT OF PINTEREST ON COPYRIGHT LAWS

The traditional realm of copyright is being tested in a world where "liking", "retweeting", and "pinning" have become part of everyday life. Pinterest has made it easy for users to collect images and inspiration for everything from home décor to planning weddings.

CONSTRUCTION AND ENGINEERING:

A CAUTIONARY NOTE REGARDING THE 'RECTIFICATION OF UNLAWFUL PROCUREMENT PROCESSES'

In the judgment of the full bench of the High Court of South Africa, Free State Division, Bloemfontein, in the matter of *MEC for Public Works and Infrastructure, Free State Provincial Government v Mofomo Construction CC*, Case No.: A138/2016, (the Department and Mofomo respectively), the appeal court considered whether the court a quo had erred in finding that, consequent upon a valid procurement process undertaken by the Department, a valid and binding contract had been entered into with Mofomo for the building of classrooms at schools throughout the Free State.

CONVERGENCE AND NEW MEDIA: THE IMPACT OF PINTEREST ON COPYRIGHT LAWS

Pinterest has made it easy for users to collect images and inspiration for everything from home décor to planning weddings.

Where an image has been downloaded from its original source and uploaded to Pinterest, however, the Pinterest user is provided with the opportunity, and not the requirement, to provide the link to the original source.



The traditional realm of copyright is being tested in a world where “liking”, “retweeting”, and “pinning” have become part of everyday life. Pinterest has made it easy for users to collect images and inspiration for everything from home décor to planning weddings. Pinterest has also created a “Pin It” button for installation on to the Google Chrome browser so that a user can “pin” an interesting online article to his/her Pinterest board without opening the Pinterest homepage. While the perks are wonderful for the majority of Pinterest users, many artists are suffering as a result.

Copyright vests exclusively with the creator of the work or in the person who has commissioned or acquires the work from the creator (copyright holder). The right to control, exploit and distribute the work vests in the copyright holder. These rights are considered economic rights and may be licensed or assigned to third parties by way of agreement. Additionally, the creator of a work also maintains a moral right to the work which incorporates the right to authorship and integrity. If not contractually varied, these personal rights attach to the works even after the licence or assignment of rights to a third party. The creator must, therefore, always be credited and will be entitled to object to any modification of the work which would prejudice his/her reputation.

Pinterest poses a threat to the copyright and moral rights vested in an artist. By way of example, Pinterest users are able to “pin” an image directly from a website and are also able to download images from Pinterest itself. Where an image is “pinned” directly from the original source, the link to the source will be attached to the “pin”, visible to all other Pinterest users. Where an image has been downloaded from its original source and uploaded to Pinterest, however, the Pinterest user is provided with the opportunity, *and not the requirement*, to provide the link to the original source. Needless to say, there are many unsourced images being “repined” on a daily basis which directly impact the moral rights of the copyright holder. Pinterest not only provides its users with

CHAMBERS GLOBAL 2011–2016 ranked us in Band 2 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.



CLICK HERE to find out more about our Convergence and New Media sector.

CONVERGENCE AND NEW MEDIA: THE IMPACT OF PINTEREST ON COPYRIGHT LAWS

CONTINUED

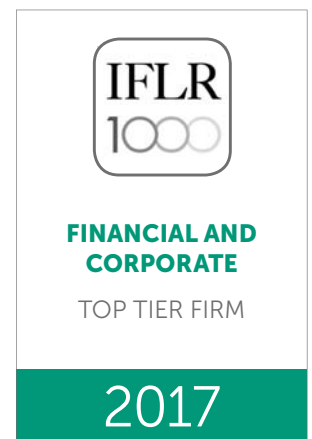
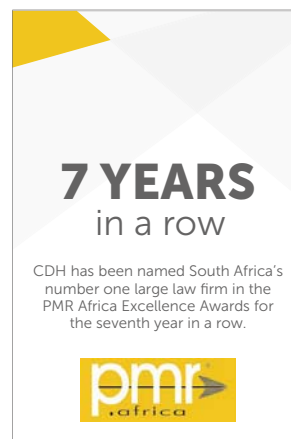
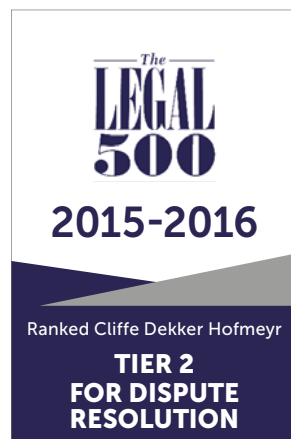
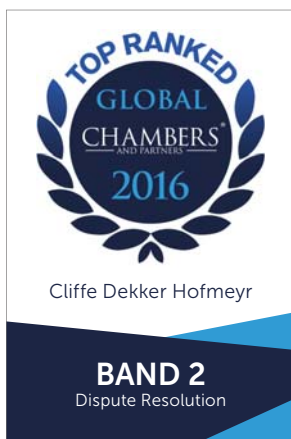
Pinterest is therefore able to provide access to an image and facilitate its distribution as part of its service resulting in many unlicensed images being exploited for commercial gain throughout the world without royalties being paid to the copyright owner.

the option to save a "pin" on to a "pin" board but also to embed or download an image directly from Pinterest for the user's own use. Pinterest is therefore able to provide access to an image and facilitate its distribution as part of its service resulting in many unlicensed images being exploited for commercial gain throughout the world without royalties being paid to the copyright owner.

Pinterest itself is protected against any claims of copyright infringement in terms of s512 of the Digital Millennium Copyright

Act of 1998 with the result that a copyright holder's sole remedy against Pinterest is to lodge a copyright complaint with Pinterest who will then investigate the complaint. If the complaint is found to be valid, Pinterest will remove the image from its platform. The copyright holder will then need to institute direct action against any Pinterest user who has infringed his/her copyright in order to recover any damages suffered as a result.

*Leanne Van Breda and
Janet Mackenzie*



Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017** in the litigation category.



CONSTRUCTION AND ENGINEERING: A CAUTIONARY NOTE REGARDING THE 'RECTIFICATION OF UNLAWFUL PROCUREMENT PROCESSES'

Mofomo launched an application seeking to stop the Department from not performing in terms of the contract and embarking on a new procurement process.

The Department opposed the application and filed a counter-application seeking an order that the appointment and/or contract be declared invalid, unlawful and unenforceable.



In the judgment of the full bench of the High Court of South Africa, Free State Division, Bloemfontein, in the matter of *MEC for Public Works and Infrastructure, Free State Provincial Government v Mofomo Construction CC*, Case No.: A138/2016, (the Department and Mofomo respectively), the appeal court considered whether the court a quo had erred in finding that, consequent upon a valid procurement process undertaken by the Department, a valid and binding contract had been entered into with Mofomo for the building of classrooms at schools throughout the Free State.

Subsequent to Mofomo receiving an appointment letter, executing works and receiving payment under a first progress payment, the Department withdrew Mofomo's appointment stating, among other things, that the process of appointment had failed to comply with government procurement legislation and policies and was unlawful, making any agreement null and void. Mofomo launched an application seeking to stop the Department from not performing in terms of the contract and embarking on a new procurement process. The Department opposed the application and filed a counter-application seeking an order that the appointment and/or contract be declared invalid, unlawful and unenforceable. The application by Mofomo was successful.

Before the full bench, it was submitted on behalf of the Department that:

- Mofomo had not proved that a contract was entered into and if it was, it was not lawful and binding;
- the letter of appointment was subject to two conditions, namely the signing of the JBCC contract and providing a construction guarantee, which Mofomo had failed to prove compliance with; and
- an invalid tender procedure was followed by the Department.

In considering the application and counter-application, the full bench referred to various judgments including *Minister of Land Affairs and Agricultural v D & F Wevell Trust* 2008 (2) SA 184 (SCA) wherein it was stated that in motion proceedings, the affidavits constitute both the pleadings and the evidence, and the issues and averments in support of the parties' cases should appear clearly therefrom.

The full bench stated that:

- The evidence indicated that Mofomo had presented the Department with a signed JBCC contract and a construction guarantee whereupon the site was handed over to it and the works started. The fact that the Department allowed Mofomo to perform and to draw the first progress payment was indicative of a *vinculum iuris* (legal obligation) between the parties.
- The Department did not rely on non-fulfilment of the aforementioned conditions in its withdrawal of the appointment letter. Furthermore, it did not disclose the procurement process followed prior to Mofomo's appointment, the reasons for its decision and all relevant documents in support of its allegations.

CONSTRUCTION AND ENGINEERING: A CAUTIONARY NOTE REGARDING THE 'RECTIFICATION OF UNLAWFUL PROCUREMENT PROCESSES'

CONTINUED

When an organ of state wishes to correct a decision made by it on the basis that it followed an "improper and invalid procurement process" in making such a decision, the subject affected by it is entitled to proper notice and to be afforded a proper hearing on whether such a decision should be set aside.



- Nowhere was it stated in the Department's papers that there was fraudulent activity between the parties.

The full bench held that:

- The lack of evidence was not sufficient to assist an organ of state which alleges that an improper procurement process was embarked upon to such an extent that the process could not be regarded as fair, equitable, transparent, competitive and cost-effective as provided for in s217 of the Constitution, the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of state procurement processes.
- A tender process implemented by an organ of state is an 'administrative action' within the meaning of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA), and any administrative decision must be treated as though it is valid until a court pronounces on its invalidity and upon a declaration of invalidity, a court must make an order in terms of s8 of PAJA, according to what justice and equity dictate. The court referred to the judgment in *MEC for Health,*

Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute 2014 (3) SA 481 (CC) wherein Cameron J held, among other things, that "the decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed".

- The Department was under a duty to approach the court for the review and setting aside of the decision to appoint Mofomo and did not have the power to do so itself, and the Department's appeal was dismissed with costs.

In conclusion, an executive in all spheres of government is constrained by the doctrine of legality that they may exercise no power and perform no function beyond those conferred upon them by law. Accordingly, when an organ of state wishes to correct a decision made by it on the basis that it followed an "improper and invalid procurement process" in making such a decision, the subject affected by it is entitled to proper notice and to be afforded a proper hearing on whether such a decision should be set aside.

Joe Whittle and Yasmeen Raffie



CLICK HERE to find out more about our Construction and Engineering team.

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



Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@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

Janet Mackenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@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

Byron O'Connor
Director
T +27 (0)21 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@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

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

©2017 1499/FEB

