5 APRIL 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

ARBITRATION:
ARBITRARY ARBITRATIONS AND THE NEW COURTS OF EQUITY

The Constitutional Court often introduces principles of equity and fairness which are enshrined in the constitution when dispensing justice.

CONVERGENCE AND NEW MEDIA:
A TALE OF TWO DICTIONARIES - THE DIFFICULTY OF PROVING COPYRIGHT INFRINGEMENT

In the matter of *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA), the Supreme Court of Appeal confirmed the findings of the Western Cape Division of the High Court.

NEW SERIES

PUBLIC LAW:
ENFORCING ICC WITNESS PROTECTION OBLIGATIONS: PART 2

As the Rome Statute of the International Criminal Court (Rome Statute) itself does not contain an effective mechanism to enforce witness protection obligations, it is necessary to look beyond the confines of strict international criminal law.

CDH
CLIFFE DEKKER HOFMEYR

ARBITRATION: ARBITRARY ARBITRATIONS AND THE NEW COURTS OF EQUITY

Until the 9 February 2017 judgment, s12B(1) was interpreted rather restrictively which resulted in only a few disputes being referred to arbitration.

The Constitutional Court often introduces principles of equity and fairness which are enshrined in the constitution when dispensing justice. However, these principles are introduced against the background of the rule of law. Since the rule of law is preserved, the Constitutional Court is not a court of equity in the true sense of the word.

The Constitutional Court ultimately found in favour of Business Zone and set aside the decision of the SCA.

On 9 February 2017, the Constitutional Court handed down a judgment which may ultimately prove to be a significant departure from South Africa's established legal practice, at least insofar as contractual relations in the petroleum retail industry are concerned.

The Petroleum Products Act (duly amended) has introduced a statutory form of arbitration for the resolution of certain contractual disputes arising between licensed retailers and wholesalers operating in the petroleum industry (whether this satisfies the requirements for classification as an arbitration is a debate for another day). In terms of s12B(1), a party can refer a dispute alleging an "unfair contractual practice" to the Controller of Petroleum Products (Controller) who may then in turn, refer the parties to arbitration. No agreement to arbitrate is required.

Until the 9 February 2017 judgment, s12B(1) was interpreted rather restrictively which resulted in only a few disputes being referred to arbitration. In *Business Zone 1010cc v Engen Petroleum Limited and others* the Constitutional Court substantially widened the ambit of s12B by reducing the discretion afforded to the Controller to not refer a dispute alleging an unfair contractual practice to an arbitrator for determination.

In the Pretoria High Court, Engen argued that as the contract upon which the dispute arose had been cancelled, the question could not relate to a "contractual practice". Further, as the question of cancellation was then pending before another division of the High Court, Engen argued that the arbitrator was not entitled to consider the question of an alleged unfair contractual practice. These contentions were rejected by the High Court but Engen ultimately found favour with the Supreme Court of Appeal (SCA). Business Zone subsequently appealed the decision of the SCA to the Constitutional Court.

The Constitutional Court ultimately found in favour of Business Zone and set aside the decision of the SCA. As a result, the question of Engen's unfair contractual practice was then referred to an arbitrator for determination.

This judgment is significant in a number of ways – firstly, the scope of the dispute and ultimately the jurisdiction of the arbitrator is defined in s12B(4) of the Act which states that an arbitrator "shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice".

CDH
CLIFFE DEKKER HOFMEYR

ARBITRATION:
ARBITRARY ARBITRATIONS AND THE NEW COURTS OF EQUITY

CONTINUED

An unsuccessful party cannot appeal such an award where the statute prescribes that the award will be final and binding.

In terms of this section, an arbitrator is not empowered to make any determination which exceeds a finding on fairness or reasonableness. That means that principles of lawfulness for example fall outside the jurisdiction of the arbitrator. It would therefore appear that an argument that a lawfully concluded contract expressly permits the conduct concerned would fall outside of an arbitrator's jurisdiction. Such a defence is based on the law of contract and not on principles of fairness or reasonableness. The maxim that "agreements are to be upheld" therefore plays no role in such proceedings. Only principles of fairness and reasonableness are relevant - a drastic departure from the rule of law one might say.

South African law does not embody a historical jurisprudence based on principles of equity and fairness to the exclusion of private law rights. Equity and fairness are not legal concepts clearly defined in our law. Not only will an arbitrator be called upon to make a call without the assistance of years of jurisprudence to guide them in reaching a decision, their decision will be final and binding on the parties. To make that clear: an unsuccessful party cannot appeal such an award where the statute prescribes that the award will be final and binding.

Drawing on the jurisprudence of our labour courts is not extremely helpful either. Labour disputes are normally resolved in a different manner and are aimed at protecting entirely different interests compared to the purely commercial interests here relevant.

Arbitrations are mostly conducted in private. Most of the widely-accepted rules in terms whereof arbitrations are administered impose the strictest forms of confidentiality on the parties covering the proceedings and the ultimate award itself. Arbitral awards are kept secret and are not relied upon or even referred to in arbitrations which follow. A s12B arbitration is no exception, further fuelling arbitrary decision making and removing the ability to learn from previous advancements or mistakes in applying these principles.

CLICK HERE to find out more about our International Arbitration team.

CDH
CLIFFE DEKKER HOFMEYR

ARBITRATION:
ARBITRARY ARBITRATIONS AND THE NEW COURTS OF EQUITY

CONTINUED

Importantly, if the parties choose an arbitrator and the rules under s 12B(2), can this decision be regarded as having been made freely? Further, would such an agreement protect the arbitrator from the danger of a review under PAJA?

In light of this recent interpretation of s12B, we are now burdened with a mechanism to refer an alleged dispute relating to contractual unfairness against a possibly unwilling and un-consenting participant, to an arbitrator (in the absence of agreement) potentially appointed solely by the Controller, empowered to potentially apply principles of equity and fairness to the exclusion of principles of law and to force him or her to reach a decision to which no appeal will lie, which will most likely remain confidential, thereby depriving further arbitrators the opportunity to learn from such decisions.

How does this process affect well established private law rights? Is a claim based in contract then extinguished by such a decision? If so, how do we reconcile this with the principle that each party should be afforded equal opportunities to advance their own case and to exercise their own rights?

Importantly, if the parties choose an arbitrator and the rules under s 12B(2), can this decision be regarded as having been made freely? Further, would such an agreement protect the arbitrator from the danger of a review under PAJA?

I don't think that this beast has a name yet. But it has certainly reared its head.

Jonathan Ripley-Evans

CDH
CLIFFE DEKKER HOFMEYR

CONVERGENCE AND NEW MEDIA:
A TALE OF TWO DICTIONARIES - THE DIFFICULTY OF PROVING COPYRIGHT INFRINGEMENT

Identifying and proving whether or not there has been an infringement of copyright, may seem like an easy task but as the matter in point illustrates, this is not always the case.

In the matter of *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA), the Supreme Court of Appeal confirmed the findings of the Western Cape Division of the High Court and dismissed Media24's claim that the Oxford University Press had copied a selection of example sentences as well as the formulation and arrangement of those sentences from Media24's bilingual Afrikaans/English dictionary titled the "Aanleerderswoordeboek" in its Afrikaans/English dictionary, the "Oxford Woordeboek".

In dismissing Media24's claim, the court emphasised the importance in copyright infringement matters of not falling "into the trap of being misled by what has been referred to as similarity by excision".

Media24's allegation of copyright infringement was predominantly based on the substantial similarity in the example sentences included to illustrate the use of each word defined in the "Oxford Woordeboek". Both dictionaries were small in size, aimed at school children and as such, were quite uncomplicated. However, Media24 believed that the correspondence between the two works could have only been achieved through repetitive reference to its work.

In theory, identifying and proving whether or not there has been an infringement of copyright, may seem like an easy task but as the matter in point illustrates, this is not always the case. In the case of *Baigent and Another v The Random House Group Ltd*, Mummery LJ stated that: "it is easier to establish infringement of the copyright in a literary work if the copying is exactly word for word or if there are only slight changes in the wording, perhaps in some optimistic attempt to disguise plagiarism". Matters become trickier when the copying is not as obvious.

To establish a *prima facie* case that copying had occurred, Media24 had to demonstrate a substantial similarity between the original work and the alleged infringing work and it had to also prove that the Oxford University Press had access to Media24's dictionary. This was achieved, which shifted focus on the Oxford University Press to show how its dictionary was compiled.

The importance of documenting one's methodology in creating a literary work cannot be over emphasised as such records play a crucial role in countering any allegations of copying and in the present case, the compilers of the Oxford Woordeboek were able to attest to the methods used to compile the Oxford Woordeboek and were further able to provide a plausible explanation for the similarity between the example sentences contained in the Oxford Woordeboek. The Oxford University Press also lead expert evidence that it is more difficult to establish copying in a reference work such as a dictionary than in the case of novels, song books or textbooks. This is due to the fact that a reference work is an assemblage of generally available knowledge and thus there is likely to be a larger degree of correspondence between such works.

In dismissing Media24's claim, the court emphasised the importance in copyright infringement matters of not falling "into the trap of being misled by what has been referred to as similarity by excision". In this

CDH
CLIFFE DEKKER HOFMEYR

CONVERGENCE AND NEW MEDIA:
A TALE OF TWO DICTIONARIES - THE DIFFICULTY OF PROVING COPYRIGHT INFRINGEMENT

CONTINUED

What also did not assist Media24 was its election to resolve the matter on application as opposed to trial proceedings

regard, the court found that Media24's narrow focus on the extensive similarities in the wording of the illustrative examples had been an incorrect approach in that in order to establish a copyright infringement all evidence had to be examined and not only that which created an illusion of copying. Of equal importance was the evidence of the Oxford University Press that its dictionary was compiled without copying which Media24 had not managed to refute.

What also did not assist Media24 was its election to resolve the matter on application as opposed to trial proceedings. This eradicated the opportunity to challenge the credibility of the Oxford University Press' witnesses and the possibility of arriving at a different outcome.

Janet MacKenzie and Keitumetse Makhubedu

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

PUBLIC LAW:
ENFORCING ICC WITNESS PROTECTION OBLIGATIONS: PART 2

NEW SERIES

This is the **fifth alert in an ongoing series of six exploring the legal ramifications of an African exodus from the International Criminal Court for its witness protection programme**. In particular, the alerts will focus on the implications for witnesses currently in the relocation process, previously relocated witnesses, as well as future witness relocations.

UPDATE

Last week the Zambian government engaged in a widespread public dialogue to discuss its potential withdrawal from the International Criminal Court (ICC). The dialogue concluded on Friday, 31 March 2017 after public hearings held in 30 districts where members of the public could make oral and written submissions. The Zambian government will now decide whether to pursue a withdrawal. Meanwhile, this week at the First Conference of the African Chiefs Justice and Heads of Supreme Courts in Khartoum, Sudan's Chief Justice called for an alternative regional justice system in Africa in lieu of the ICC.

A possible way of addressing non-compliance in the event of an African walkout could be through bringing these issues before the domestic courts in the protective states.

As the Rome Statute of the International Criminal Court (Rome Statute) itself does not contain an effective mechanism to enforce witness protection obligations, it is necessary to look beyond the confines of strict international criminal law.

Article 87(4) of the Rome Statute provides that the International Criminal Court (ICC or Court) may take "measures ... as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families". A possible way of addressing non-compliance in the event of an African walkout could be through bringing these issues before the domestic courts in the protective states.

A glaring weakness of the option of ensuring enforcement of this option is the fact that everything about witness relocation is confidential. The existence of these agreements and their contents is not public information, so even if someone in a position to take action did become aware of a particular set of facts which may necessitate further legal action, how would they know the extent of the obligations of the protective state?

This problem may not be insurmountable though. There may be are two routes open to the ICC to ensure enforcement through domestic courts:

1) partnerships with independent, local organisations; or

2) extending the Victims and Witnesses Section's (VWS) role to include a more active role in monitoring compliance with relocation agreements.

Independent partner organisations

Partnerships between the Court and local non-government entities are not unprecedented. By expanding the list of organisations involved in witness protection under the International Criminal Court Protection Programme (ICCPP), one also expands the list of fora available to those organisations to ensure compliance. This is so as, theoretically, different organisations may have standing to bring legal action

CDH
CLIFFE DEKKER HOFMEYR

PUBLIC LAW:
ENFORCING ICC WITNESS PROTECTION OBLIGATIONS: PART 2

CONTINUED

A domestic organisation's more specialised knowledge of the local court system will enable the ICC or the witness to bring litigation before the domestic courts more easily.

before different judicial or quasi-judicial bodies in each state. However, unless the protective states have legislation permitting civil society organisations to launch proceedings in the interests of a third party, they may not be able to institute proceedings at all.

An alternative solution may be for the witness to act in her own name. Under ordinary circumstances, this may depend on whether she is herself a party to the relocation agreement. If the witness is aware of a breach or threatened breach of the obligation (which she may not be), however, she is likely to be prejudiced in any litigation of this nature due to her lack of knowledge of the protective state's legal system. Even if she is aware that she can institute proceedings in a bid to protect herself, she may lack the necessary funds to pursue legal action.

A further alternative may be for the ICC to act in its own name to enforce the obligations under the relocation agreement. This would likely bring it within the standing provisions in many jurisdictions given that it would be a contracting party to the relocation agreement in issue before the domestic court.

In these two alternatives, partnerships with local organisations would not be rendered nugatory. As the local organisations will be located within the protective state, they will have a greater knowledge of the political situation there and will be able to monitor the witness more effectively. This extended network would also provide the witness with easier access to immediate security assistance should she feel threatened.

A domestic organisation's more specialised knowledge of the local court system will also enable the ICC or the witness to bring litigation before the domestic courts more easily. The ability to bring urgent proceedings, and more tangible enforcement options (such as access to a police force) mean that there is a more realistic chance of effective action being taken to ensure that the witness remains protected.

Entering into a partnership with a local organisation would entail a careful selection of the right organisation committed to the goals of the Court and the ICCPP, with a robust operational structure and ethic such that increasing the number of parties with access to the confidential information would not increase the risk to the protected person by any significant degree. The Court, through its Registry, would also have to negotiate a watertight contract with the independent organisation to ensure that its confidentiality obligations are inescapable and the precise scope of its mandate is clear.

Extended Registry involvement

An alternative solution – which broadly addresses the confidentiality concerns set out above – is to create greater means for the ICC's Registry to monitor the witness once she has been relocated. This could be achieved through increasing the capacity of the VWS in its offices on the ground in situation countries.

CLICK HERE to find out more about our Administrative and Public Law team.

CDH
CLIFFE DEKKER HOFMEYR

PUBLIC LAW:
ENFORCING ICC WITNESS PROTECTION OBLIGATIONS: PART 2

CONTINUED

The conclusion to be drawn from this analysis is that there is very little to provide witnesses with a sense of comfort that the ICC will be able to ensure their protection once they have entered the ICCPP.

An unavoidable consequence of this option is an additional burden on the VWS in terms of monitoring the ongoing risk status of witnesses, something which the Court prefers to leave to protective states. This also means that the Court may require additional resources in order to implement this solution, both human and financial.

Neither of these solutions is perfect. Therefore, the conclusion to be drawn from this analysis is that there is very little to provide witnesses with a sense of comfort that the ICC will be able to ensure their protection once they have entered the ICCPP. The implications of this will be considered in the final alert in this series.

Sarah McGibbon,
overseen by Lionel Egypt

This schedule briefly outlines the focus of the previous and coming instalments in this series. It also includes links to previous instalments.

Date of release	Topic
8 February 2017	Introduction: the factual foundation setting the context in which this issue must be considered.
22 February 2017	The Witness Protection Framework: the mechanisms used by the ICC to place witnesses into protection, and the important role of state cooperation in this framework.
8 March 2017	Potential Problems with the Witness Protection Framework: What problems may arise as a result of any African exodus?
22 March 2017	Enforcement Mechanisms – Part 1: Possible ways of holding states accountable in respect of their obligations to protected witnesses – for what does the Rome Statute provide?
5 April 2017	**Enforcement Mechanisms – Part 2:** Possible ways of holding states accountable in respect of their obligations to protected witnesses – what about new approaches?
19 April 2017	**Concluding remarks:** Summarising key points from the series and potential future steps.

Public Law
NEWS BULLETIN

South Africa will appear before the Pre-Trial Chamber of the International Criminal Court (Court) on Friday, 7 April 2017 to account for its failure to arrest Sudanese President Omar al-Bashir when he attended the 2015 African Union Summit in the country. South Africa has been invited to make written and oral submissions at the hearing on this issue. The Court will then decide whether South Africa failed to comply with its obligations under the Rome Statute of the International Criminal Court by failing to arrest President al-Bashir. Should a finding of non-compliance be made, the matter may be referred to the Assembly of States Parties (Assembly). For our exploration of the powers of the Assembly in cases of non-compliance by a States Party, see the **previous alert** in this series. For more information failure to arrest President al-Bashir in 2015, see the **first alert** in this series.

CDH
CLIFFE DEKKER HOFMEYR

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)11 562 1140
E byron.oconnor@cdhlegal.com

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

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

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Kerry Spies
Director
T +27 (0)11 562 1045
E kerry.spies@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.

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

CDH
CLIFFE DEKKER HOFMEYR