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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

INTERNATIONAL ARBITRATION:
INTERNATIONAL ARBITRATION IN THE BANKING FINANCE INDUSTRY – RELEVANCE FOR AFRICA?

During October 2016, the International Chamber of Commerce (ICC) Commission on Arbitration and ADR published their report on Financial Institutions and International Arbitration. In the report, certain specialist sectors of the banking and finance industry including derivatives, sovereign finance, international financing, Islamic Finance, advisory matters and asset management were investigated, analysed and reported upon. Over 50 financial institutions and 13 international arbitral institutions from across the globe were interviewed during the process.

ADMINISTRATIVE AND PUBLIC LAW:
COSTS IN PURSUING CONSTITUTIONAL RIGHTS: WHO IS LIABLE?

The Constitutional Court handed down a judgment on a costs order granted by a High Court against a non-profit organisation litigating in pursuit of constitutional rights in the case of *Limpopo Legal Solutions and Others v Vhembe District Municipality and Others* [2017] ZACC 14.

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It is no secret that Africa is witnessing an awakening of sorts in the field of international arbitration, it makes sense that the use of an independent tribunal to resolve international disputes, is on its way to becoming the first (and often only) choice for both commercial and investment transactions.

The report confirms a growing trend in the referral of financial sector disputes to international arbitration for resolution. Importantly, however, the growth in referrals to international arbitration has not been as significant as in areas outside of the financial sectors.

There are a number of possible reasons for this relative slow growth. The report suggests that one of these reasons may be an apparent lack of awareness and understanding of the benefits of international arbitration. Another: the apparent view that international arbitration does not satisfy the needs of specialised financial disputes.

The report concludes that financial institutions perceive international arbitration to be most appropriate when, for example, the transaction out of which the dispute has arisen was "significant" or complex and where confidentiality is important to the parties. The report also suggested that international arbitration may be appropriate where a counter party is a state-owned entity or where enforcement may become problematic.

Both of the last suggestions are particularly relevant to Africa.

Certain institutions indicated that there was often a need to seek interim or urgent relief from state courts which could not easily be obtained through arbitration proceedings. In addition, default procedures are scarce if not totally unavailable. High costs, lack of transparency, an inability to join additional parties to proceedings and the lack of judicial precedent were all raised as further reasons for not resorting to international arbitration. All of these points have merit.

It is interesting that two areas in particular - derivatives and sovereign finance – have seen more referrals to international arbitration than any other banking and finance industry sector.

It is no secret that Africa is witnessing an awakening of sorts in the field of international arbitration. On a continent where sovereignty reigns supreme and civil court judgments are anything but predictable, it makes sense that the use of an independent tribunal to resolve international disputes, is on its way to becoming the first (and often only) choice for both commercial and investment transactions.

There is no reason why this shouldn't apply to financial disputes. Many of the reasons parties choose a civil court for relief (over arbitral proceedings) appear to be less convincing in the African context. Urgent relief is a relative concept. The intervention of the state is a constant concern, especially in matters in which the state (or an organ of state) is a party to the proceedings.

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CONTINUED

There is, no reason why international arbitration cannot evolve and adapt to become the solution required, but this will only happen once parties fully embrace international arbitration as a legitimate alternative to court proceedings.

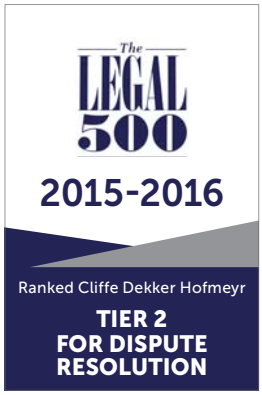
The above, against the background of some novel innovations in arbitral procedural rules (such as urgent, *ex parte*, interim and conservatory relief) suggests that Africa may have more to gain from referring financial disputes to international arbitration than one might expect in other regions of the globe.

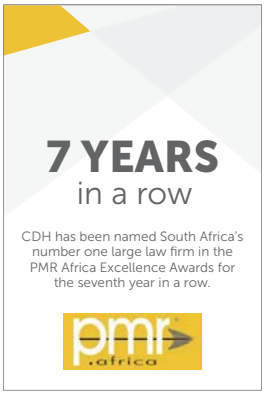
Then there is the obvious question: how does one actually enforce an arbitral award? Through the courts, of course. Then surely it would make sense to go straight to the courts without incurring the costs of an international arbitration first? Not entirely. By enforcing an arbitral award through a court in a region where the state concerned is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, any court interference in the substance of the award is almost entirely negated. The New York Convention effectively ties the hands of a local court when seized with an application for the enforcement of a foreign arbitral award. More than half of the states in Africa are signatories to the New York Convention. In contrast, a local court will have the fullest discretion to apply the local law, as it sees fit, to the substance of the dispute if the parties choose not to resort to arbitration - a situation which may encourage or at least facilitate outside interference or influence in the proceedings.

And then there is the pesky issue of "public policy" grounds for refusing to recognise an arbitral award. This is not a problem unique to Africa. It is also not a problem unique to arbitral proceedings.

In conclusion, there is clearly scope for the development of referrals of African financial sector disputes to international arbitration. But international arbitration is not a panacea for all problems currently faced. There is, however, no reason why international arbitration cannot evolve and adapt to become the solution required, but this will only happen once parties fully embrace international arbitration as a legitimate alternative to court proceedings.

Jonathan Ripley-Evans





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ADMINISTRATIVE AND PUBLIC LAW: COSTS IN PURSUING CONSTITUTIONAL RIGHTS: WHO IS LIABLE?

Limpopo Legal Solutions argued that the High Court had not applied the Biowatch principles, which provided that in constitutional litigation against the state; a private litigant is spared costs unless the application is frivolous or vexatious.

The Constitutional Court handed down a judgment on a costs order granted by a High Court against a non-profit organisation litigating in pursuit of constitutional rights in the case of *Limpopo Legal Solutions and Others v Vhembe District Municipality and Others* [2017] ZACC 14.

When a matter does not involve constitutional litigation between a private party and the state, the general rule is that, subject to exceptions, the successful party should have costs.

Limpopo Legal Solutions brought an urgent application against the Vhembe District Municipality in the High Court in which they sought a final interdict directing the Municipality to immediately dispatch a team of contractors to fix a burst sewage pipeline in Section B, Malamulele. The Municipality opposed the application and contended that they became aware of the problem, for the very first time, when the Limpopo Legal Solutions served their urgent application on them. Furthermore, they contended that Limpopo Legal Solutions did not meet the requirements for an interdict because they had alternative remedies, such as reporting the leak to their ward councillor or to the local authority. In light of this, the High Court dismissed the application and it awarded punitive costs on an attorney and client scale against Limpopo Legal Solutions. It concluded that the punitive costs order was warranted because Limpopo Legal Solutions had failed to make out a case for relief and because the application should have not been brought in the first place.

The main application on the merits

On appeal, the legal question before the court was whether Limpopo Legal Solutions was entitled to come to court without notice to the Municipality. The High Court held that they should not have come to court entirely without notice to the Municipality and the Constitutional Court confirmed that the High Court's decision on the merits was correct.

Argument on costs

In the written submissions filed in the Constitutional Court, Limpopo Legal Solutions argued that the High Court had not applied the *Biowatch* principle, which provided that in constitutional litigation against the state, a private litigant is spared costs unless the application is frivolous or vexatious. According to Limpopo Legal Solutions, the application concerned health and environmental rights thus it was neither frivolous nor vexatious.

On the other hand, the Municipality submitted that Limpopo Legal Solutions acted improperly by not first bringing the problem to their attention. Litigation brought with no prior warning amounts to an abuse of process that justifies the punitive cost order imposed.

The decision in the Constitutional Court

When a matter does not involve constitutional litigation between a private party and the state, the general rule is that, subject to exceptions, the successful party should have costs. If a matter involves constitutional litigation between a private party and the state, the general rule is that the private party who is substantially successful should have its costs paid by

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The Constitutional Court concluded that the application was not frivolous nor was it vexatious and that the High Court had misdirected itself by imposing a punitive cost order against the Limpopo Legal Solutions.

the state but no costs order should be made if the state wins. The general rule of costs in constitutional litigation between a private party and the state is, subject to exceptions, if an application is frivolous or vexatious or in any way manifestly inappropriate then the private party should not expect to be protected from an adverse costs award.

The Constitutional Court concluded that the application was not frivolous nor was it vexatious and that the High Court had misdirected itself by imposing a punitive cost order against the Limpopo Legal Solutions. The High Court should have applied the *Biowatch* principle and made no costs order. The costs order against Limpopo Legal Solutions was set aside and each party was ordered to pay its own costs in the High Court. Limpopo Legal Solutions achieved substantial success in overturning the High Court's costs award therefore they were awarded their costs in the Constitutional Court.

The importance of the *Biowatch* principle in enforcing Constitutional rights

The rules on costs have a critical effect on access to justice, which is a fundamental right in the Constitution. The fear of having to pay the costs of the other side may deter people from bringing matters to court and enforcing their rights. Constitutional litigation is important in a democracy and when a private party is successful, it serves a good purpose in society in the sense that the organisations or private parties who institute litigation secure a benefit for the rest of the public who had no part in the litigation.

This judgment is a significant victory for litigants seeking to enforce their constitutional rights against the state. Although this judgment reaffirms the principles enunciated in the *Biowatch* case, litigants should always be mindful that any litigation against the state that is found to be frivolous and vexatious may be met with an adverse order of costs. Furthermore, it is also unlikely that the courts will apply the *Biowatch* principle in matters involving the enforcement of constitutional rights which are purely commercial in nature.

Mongezi Mpahlwa and Johanna Lubuma

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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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