8 MARCH 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

COURTS WILL NOT RESCUE PARTIES WHO FAIL TO PERFORM THEIR OWN DUE DILIGENCE

The October 2016 judgment of *Slabbert v MEC for Health and Social Development, Gauteng* (432/2016) [2016] ZASCA 157 concerned a compromise agreement voluntarily entered into by two willing parties and subsequently made an order of court by consent. The court had to determine whether such a compromise agreement could be set aside and consequently, the consent order rescinded.

NEW SERIES

PUBLIC LAW: POTENTIAL PROBLEMS RAISED BY THE AFRICAN ICC EXODUS

With a greater understanding of the witness protection framework and the role of state cooperation, it is now possible to consider the possible ramifications to be addressed by the International Criminal Court (ICC or Court) – the Victims and Witnesses Section (VWS) in particular – in dealing with an African walkout.

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The October 2016 judgment of *Slabbert v MEC for Health and Social Development, Gauteng* (432/2016) [2016] ZASCA 157 concerned a compromise agreement voluntarily entered into by two willing parties and subsequently made an order of court by consent. The court had to determine whether such a compromise agreement could be set aside and consequently, the consent order rescinded.

A compromise agreement is a contract which creates new rights and obligations between the parties. The court may only set it aside if it is satisfied that the consent of either party was obtained fraudulently or in error.

The applicant had given birth to a child with severe brain damage, which she claimed was as a result of hospital staff negligence at the Edenvale and Johannesburg General Hospitals. The MEC received a memorandum from their legal counsel detailing the liability of the staff and instructed them to enter into a compromise agreement in which the MEC assumed 90% liability for the damages incurred by Slabbert. This was accepted by the applicant and the agreement was made an order of court. Subsequently, the MEC abruptly hired a new attorney and brought an application to set aside the compromise agreement and to rescind the consent order on the basis that new evidence had surfaced which would materially alter the terms of, and the extent of, any compromise agreement between the parties.

The Gauteng High Court in Pretoria did exactly that: setting aside the consent order and the underlying compromise agreement. The applicant appealed this decision in the Supreme Court of Appeal (SCA).

A compromise agreement is a contract which creates new rights and obligations between the parties. The court may only set it aside if it is satisfied that the consent of either party was obtained fraudulently or in error. Consent is obtained fraudulently when one party's misrepresentations cause the other to enter into a contract with them. An agreement entered erroneously by either party can only be set aside if the court is convinced that such an error was reasonable. Furthermore, if both parties labour under a common error regarding the contents or purpose of the contract, then the court may set it aside.

A unilateral mistake that does not flow from the misrepresentation of a party and is not reasonable, does not permit the mistaken party to resile from the agreement. The unmistaken party is entitled to certainty and the right to enforce a contract lawfully entered into. If through their own negligence a party fails to perform a thorough due diligence, they are not subsequently entitled to ask the court to set aside the agreement. If a party could allege that it contracted

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The SCA refused to set aside the agreement and overturned the decision of the High Court to rescind the consent order and set aside the compromise agreement.

mistakenly and thereby resile from any contract, contracts would lose their efficacy as enforceable agreements. This is obviously untenable.

The MEC relied on ignorance of the records which were under her control and her sudden awareness of evidence which was not new, but just not been properly considered, as the basis upon which she attempted to resile from the contract. This clearly amounts to a unilateral mistake resulting from the MEC's own negligent conduct.

Accordingly, the SCA refused to set aside the agreement and overturned the decision of the High Court to rescind the consent order and set aside the compromise agreement.

This case serves as a reminder that the courts will not come to the aid of a litigant who fails to assist themselves. Furthermore, business transactions, and accordingly the entire economy, requires certainty with regard to the efficacy of contractual arrangements. It is therefore of vital importance that a contract, validly entered into, remains enforceable save for very select criteria of errors, particularly those which negate the true consensus of the parties to enter into that contract for the purpose and on the terms therein contained.

Andrew MacPherson and Roy Barendse

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PUBLIC LAW:
POTENTIAL PROBLEMS RAISED BY THE AFRICAN ICC EXODUS

NEW SERIES

This is the **third 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

In the first alert in this series, it was stated that Gambia had notified the International Criminal Court of its intention to withdraw. However, President Barrow recently confirmed that Gambia will discontinue its withdrawal process in pursuit of a less insular foreign policy.

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With a greater understanding of the witness protection framework and the role of state cooperation, it is now possible to consider the possible ramifications to be addressed by the International Criminal Court (ICC or Court) – the Victims and Witnesses Section (VWS) in particular – in dealing with an African walkout.

These can broadly be divided into three strands:

1. the risks considered by the VWS in applications for admission to the International Criminal Court Protection Programme (ICCPP) and ongoing reassessment of risk to the protected witnesses;
2. the reduction in possible protective states; and
3. the question of what happens to the existing relocation agreements, and those persons relocated in terms thereof.

Assessment and Reassessment of Risk

Witnesses should always, where possible, be relocated to a state where the cultural, linguistic and geographic particularities are close to their country of origin. Given that the majority of situations currently before the Court are located in Africa, this principle is particularly important when considering the impact of an African exodus. If the Court has applied this principle in practice, many witnesses relocated under the ICCPP to date will presumably have been relocated within Africa. In 2016, a Court official confirmed that African participation in the ICCPP is "very good".

As protective states are presumably bound by fairly onerous confidentiality arrangements under the relocation agreements, problems for relocated witnesses are possibly unlikely to materialise. But, no matter how implausible, the possibility remains that protective states could renege on their commitments (feeling less obligated to honour them having severed ties with the ICC) which places the witnesses living under their protection at risk.

When a witness applies for admission to the ICCPP, the VWS conducts a risk assessment. Regulation 96(6) of the ICC Registry Regulations (ICC-BD/03-03-13) states that the need for continued participation in the ICCPP will be reassessed every 12 months. Due to the understandably-confidential nature of the ICCPP, it is unclear what factors are considered to

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It may be advisable for the VWS to reassess the risks posed to witnesses already relocated in African states participating in any walkout.

increase the risk to a witness to such an extent that it is considered necessary that she be relocated or remain in protection. A significant change in the protective state's attitude towards the ICC (especially where such a change is negative) arguably necessitates a reassessment of the risk to the relocated witness and her family. In this particular context, it may be advisable for the VWS to reassess the risks posed to witnesses already relocated in African states participating in any walkout.

Reduction in Potential Protective States

Given the confidential nature of the identity of the states who have accepted witnesses under the ICCPP, it is impossible to tell whether relocation agreements have been concluded with non-States Parties. Although this is possible in theory, if the Court has any kind of policy preferring relocation agreements to be concluded with States Parties, the withdrawal of a number of states in a walkout would reduce the number of potential relocation partners for future matters. This could make relocation difficult where a matter involving an African country necessitates the relocation of a witness. Given the priority principle of relocating witnesses to states similar to their home state, this reduction in the number of potential African states will hamstring the VWS and may compromise the best interests of the witnesses.

Existing Relocation Agreements

The Rome Statute of the International Criminal Court establishes a general duty of cooperation on States Parties under article 86, while article 93(1)(j) sets out a specific obligation in relation to the protection of witnesses. Article 127(2) provides that exiting states are not relieved of obligations that arose while the state was still a States Party. Therefore, the duty to cooperate will still be effective in relation to the exiting states insofar as current matters are concerned.

However, the context of the walkout is important. In *SALC v Minister of Justice*, the High Court (Pretoria) found that failure to arrest President al-Bashir amounted to a disregard for South Africa's international law obligations. The calls for the African exodus come on the back of this finding. However, regardless of the reasons for African states' indifference and their non-compliance with international obligations, it is the witnesses who will ultimately be prejudiced and need to be protected.

The threshold for admission to the ICCPP is high: "a high likelihood that the witness will be harmed or killed unless action is taken" (see *Lubanga*); and the VWS can only recommend participation in the ICCPP if the risk threshold has been met (see *Bemba*). The witnesses in the ICCPP were, and may continue to be, at great risk because of their assistance to the Court. It is conceivable that, at the extreme end of the scale, witnesses could be attacked or assassinated. It is possible (perhaps even probable) that a protected witness or the ICC would not be aware of the risk to the witness before it is too late to do anything. This renders the duty to cooperate that

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Where the duty to cooperate is in place but a state has adopted a position of contempt, there must be some enforcement mechanism to ensure cooperation in this high risk area.

continues to bind withdrawn States Parties meaningless, and there is little point to the duty if it has no meaning for the people it aims to protect.

Therefore, where the duty to cooperate is in place but a state has adopted a position of contempt, there must be some enforcement mechanism to ensure cooperation in this high risk area. The next two alerts will consider the possible enforcement mechanisms available.

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

On Tuesday, 7 March 2017, South Africa revoked its notice of withdrawal from the Rome Statute of the International Criminal Court in accordance with the recent **order of the High Court, Pretoria**. This action was **recorded** by the United Nations on the same date. To read more about the High Court's findings, see our **Special News Alert** on the judgment.

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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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