31 OCTOBER 2018

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

CDH
CLIFFE DEKKER HOFMEYR

CORPORATE INVESTIGATIONS: THE POLITICIAN AND THE DIRTY MONEY: DOES GRATIFICATION GIVEN AFTER THE ACT CONSTITUTE CORRUPTION IN TERMS OF THE PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT, NO 12 OF 2004?

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Section 3 of PACCA provides for an all-encompassing general offence of corruption. PACCA also criminalises specific corrupt activities.

The Prevention and Combating of Corrupt Activities Act, No 12 of 2004 (PACCA) is the primary piece of legislation in South Africa's arsenal of anti-corruption legislation.

The purpose of PACCA is, amongst others, to:

- strengthen measures to prevent and combat corruption and corrupt activities;
- criminalise various specific corrupt activities, in addition to creating a general offence of corruption;
- place a duty on certain persons holding a position of authority to report certain corrupt and/or fraudulent activities; and
- prescribe penalties for those found guilty of committing offences in terms of the Act.

Section 3 of PACCA provides for an all-encompassing general offence of corruption. Basically, in terms of this section, anybody who accepts (or even agrees to accept or offers to accept) any gratification from anybody else or gives (or even agrees to give or offers to give) any gratification to anybody else to influence the receiver to conduct himself or herself in a way which amounts to the unlawful exercise of any duties, commits the offence of corruption. PACCA also criminalises specific corrupt activities relating to, amongst others, public officers, contracts and the procurement of tenders. The term gratification is defined in PACCA. The definition is quite broad and includes, amongst others, cash, a gift, donation or loan, an offer of employment, a discount, etc.

PACCA also recognises the link between corrupt activities and other forms of crime such as organised crime and financial crimes including money laundering. As a simple example, a criminal may attempt to integrate the funds he/she received from corrupt activity, such as a bribe or kickback, into the financial system by channelling the funds through complex financial transactions. During the transaction(s), he/she may involve several entities as conduits and use legitimate financial institutions as a means to disguise the corrupt source of funds as well as the ultimate beneficial owner of the proceeds of unlawful activity.

In a recent judgment: *Scholtz & others v The State (428/17, 491/17, 635/17, 636/17)* [2018] ZASCA 106 (21 August 2018), the Supreme Court of Appeal (SCA) considered a matter involving corruption and money laundering, along with the question of whether the receipt of gratification after the conclusion of the relevant contracts constituted corruption.

The first appellant, a Pretoria businessman, and the eighth appellant, a high-profile politician, along with several entities from which they benefited, brought an appeal against the ruling of the Kimberley High Court in 2016 relating to their previous conviction on charges of corruption and money laundering. The first and eighth appellant, respectively, also appealed the duration of their respective sentences.

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CONTINUED

"If there is any prospect of fighting the endemic corruption which exists in South Africa, it is for our political leaders to set the example and not to misuse public offices to corruptly obtain personal wealth."

The matter concerned several lease agreements that had been concluded in the Northern Cape between various State entities and certain individuals (as well as entities in which they had an interest), during the period May 2006 to August 2008. In most instances, the execution of these lease agreements were plagued by procurement irregularities, non-compliance with the relevant protocols and procedures prescribed for provincial government leases and the incorporation of excessive rental escalations or inflated rental amounts.

The Kimberley High Court had found that the eighth appellant, a senior politician in the province, had corruptly used his influence to ensure that the lease agreements were awarded to certain individuals and their companies. In return, the eighth appellant had received gratification, including payments of R228,000.00 and R500,000.00 (gratification amounts), respectively, after the conclusion of two lease agreements. It was argued that the gratification amounts were paid several months after the conclusion of the leases and, accordingly, no inference linking them to the conclusion of the leases could be drawn. In its finding, the SCA stated that the relevant lease agreements were concluded by an entity which required financial assistance to purchase the leased properties. The SCA found that the entity lacked the funds to immediately make payment of the gratification amounts, however, the gratification amounts were paid once the leased properties became income producing. Contrary to the argument that had been made, there was no substantial delay in making the payments.

The SCA added that it was immaterial whether the eighth appellant's influence led to the leases being signed at all. The offence of corruption would have been committed if he merely undertook to use his political influence to influence the relevant department to conclude the lease agreements and subsequently accepted a gratification for doing so.

In considering the duration of the first and eighth appellant's respective sentences, the SCA found that there were no substantial and compelling circumstances which justified a lesser sentence than the 15 years' imprisonment which the trial court had imposed. When addressing the issue of sentencing regarding the first appellant, the SCA stated that "*Successful business people should set the standard by acting properly, not corruptly. Corruption in the sphere of government contracts is an on-going blight upon our constitutional democracy, and those who offend must expect the full might of the law to be brought down on them.*"

Regarding the eighth appellant, the SCA drew attention to the high political office which he had achieved and subsequently abused to corruptly enrich himself. It added that "*if there is any prospect of fighting the endemic corruption which exists in South Africa, it is for our political leaders to set the example and not to misuse public offices to corruptly obtain*

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The conviction of the first and eighth appellant on different charges of corruption were confirmed as was the sentence of 15 years' imprisonment imposed upon each of them.

personal wealth." The SCA further stated that as a deterrent *"it is necessary for an unequivocal message to be sent out that corruption on the part of politicians, especially those holding high office, will not be tolerated and punishment for those who act corruptly will be severe."*

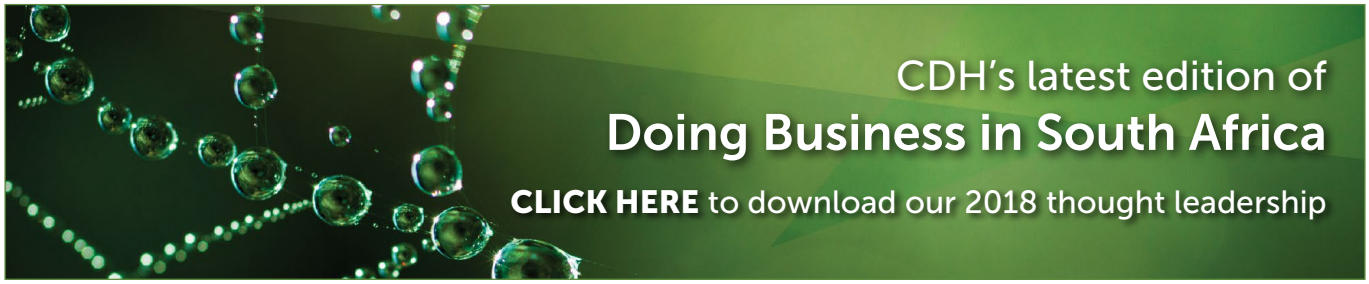
The first and eighth appellant were successful in appealing the counts of money laundering and, as a result, those convictions and sentences were set aside. The SCA found the reasoning of the Kimberley High Court in respect of those counts of money laundering to be disjointed and counsel for the State conceded that the guilt of the first and eighth appellant in respect of those counts had not been established. Despite this, the conviction of the first and eighth appellant on different charges of corruption were confirmed as was the sentence of 15 years' imprisonment imposed upon each of them.

The finding of the SCA accords with the spirit and purpose of PACCA to prevent the illicit acquisition of personal wealth through corrupt activity which, if unchecked, can be particularly damaging to democratic institutions, national economies and the rule of law.

Zaakir Mohamed and Krevania Pillay

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



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WHERE A BENEFICIARY MAKES DEMAND IN TERMS OF A GUARANTEE IS MATERIAL! ...OR IS IT?

Lombard was requested by Golden Sun to conclude a demand guarantee in favour of Sasol in accordance with the latter's terms and conditions.

According to the Johannesburg High Court, in the recent case of *Lombard Insurance Company Limited v Schoeman and Others 2018* (1) SA 240 (GJ), it really doesn't matter where a demand is made. In fact, it was held that, if the purpose of the demand (which is to inform the guarantor of the beneficiary's intention to demand payment in terms of the guarantee) is achieved, then the place where the demand is made is entirely insignificant.

Lombard duly paid these claims and claimed compensation for the amounts from Golden Sun under the counter indemnity and suretyships.

The background to this case is as follows: Golden Sun, a company of which the respondents were a director, employee, sureties and co-principal debtors respectively, entered into a credit agreement with Sasol in terms of which it would receive fuel. It then concluded a facility agreement with Lombard, which required it to conclude a counter indemnity agreement and suretyships in favour of Lombard as security. Lombard was then requested by Golden Sun to conclude a demand guarantee in favour of Sasol in accordance with the latter's terms and conditions. In terms of this demand guarantee, if Golden Sun failed to make payment to Sasol for the fuel purchased on credit, then Sasol could make demand (up to a certain amount) from Lombard in terms of the guarantee. Lombard, after making payment to Sasol, could then claim the amount paid to Sasol from Golden Sun in terms of the counter indemnity and suretyships.

Every month, Golden Sun was required to send Lombard information it received from Sasol to determine how much it owed the latter. However, it was discovered that it had been sending fraudulent information to Lombard for a few months to hide the actual amount it owed to Sasol, and, based on this and the outstanding balance owed, Sasol submitted two claims to Lombard in terms of the guarantee. Lombard duly paid these claims and claimed compensation for the amounts from Golden Sun under the counter indemnity and suretyships. Golden Sun failed to make payment, and it was this failure that Lombard based its first two claims in the High Court on. Its third claim was based on Golden Sun's failure to pay a premium in terms of the facility agreement, but it is the first two claims that we are concerned with for the purposes of this publication.

The respondents opposed the claims brought by Lombard for compensation for paying the demands on the basis that Sasol had not complied with the terms of the guarantee because the *place where they made the demands was different to the place stipulated in the guarantee*. The first clause of the guarantee provided that Sasol's first written demand had to be received by Lombard at the "*above-stated address*" for it to be made effectively. The "*above-stated address*" was Sasol's business address, however, Sasol made both demands by hand delivering them to Lombard's business address. The respondents argued that not having made the demands at the place stipulated in the guarantee, Sasol had not fulfilled the terms of the guarantee, and therefore there was no legal duty on Lombard to fulfil the demands. Consequently, there was no legal duty on Golden Sun or the respondents to compensate Lombard.

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WHERE A BENEFICIARY MAKES DEMAND IN TERMS OF A GUARANTEE IS MATERIAL! ...OR IS IT?

CONTINUED

The court emphasised that the strict compliance with a bond depends on its construction.

The court held that exact or strict compliance in terms of the place where the demands were made was not necessary for the demands to have been effectively made. This is because *inter alia*:

- neither Golden Sun nor the respondents suffered any risk or prejudice in terms of the guarantee due to where the demand was made;
- the clause stipulating that demand be made at a specific address did not create a right in favour of Golden Sun which it could exercise in terms of the guarantee, or benefit it in any way;
- there had been no insistence by Sasol that Lombard's representative avail themselves at the specified address so that it could effectively make its demand; and
- where Sasol made its demands was immaterial as the demands remained substantively the same regardless of where they were made.

Furthermore, the court, referring to the Namibian case of *Standard Bank of South Africa v Council of the Municipality of Windhoek* 2015 JDR 2331 (NmS), emphasised that the strict compliance with a bond depends on its construction, and stated in paragraph 50 – 51 of its judgment that:

> *"the very substance of or gravamen of the call for payment would have remained unaffected by the place at which the demand was received. The receipt of the demand was the essential requirement, not the place of receipt...as long as proper demand was made and received, the place at which it was received did not affect or compromise the rights and interests of (Golden Sun) beyond the parameters of the commitments acceded to in the demand guarantee."* (our emphasis)

To support its findings further, the court referred to the recent case of *MUR Joint Ventures BV v Compagnie Monegasque De Banque* [2016] EWHC 3107 (Comm) (which we have written on previously), which dealt with a similar contention, in that the demand was delivered by means other than registered mail as stipulated in the demand guarantee, and therefore, it was argued, the demand had not been made effectively. The court, in that case, found that "*the guiding principle is one of effective presentation of a demand*" and that the requirement of the method of delivery "*is directory, not mandatory*".

The Lombard case, along with many others before it, clarifies the distinction between 'strict' and 'sufficient' compliance with demand guarantees, and directs that, as long as the purpose for which a demand has been made is achieved, it is effective and the terms upon which it was made have been sufficiently complied with. Despite this, however, it bears emphasising that ambiguous as well as overly restrictive clauses must be avoided in drafting demand guarantees and that all parties must perform their obligations in terms thereof as much as they possibly can.

Joe Whittle and Reabetswe Mampane

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EVIDENCE IN DOMESTIC ARBITRATION PROCEEDINGS

The question of admissibility is therefore within the jurisdiction of the arbitrator and as a result the extent to which the rules of evidence are applicable will differ from one case to another.

Domestic arbitration proceedings in South Africa are governed by the Arbitration Act, No 42 of 1965 (Act). By virtue of the nature of arbitrations, parties to an arbitration agreement, with reference to the arbitral rules incorporated in such agreement, would ordinarily dictate the manner in which evidence is presented during the arbitration proceedings.

The Act does not provide statutory guidance with respect to the admissibility of evidence in arbitration proceedings. Section, 14, 16 and 17 of the Act deal with the issue of competence and compellability of witnesses and the recording of evidence, but are silent regarding the incorporation of the formal rules of evidence into arbitration proceedings.

The question of admissibility is therefore within the jurisdiction of the arbitrator and as a result the extent to which the rules of evidence are applicable will differ from one case to another.

The arbitrator is therefore not bound by the rules of evidence that are applicable in court proceedings and evidence which is inadmissible in court proceedings will not on that basis alone be rejected.

Are arbitrators bound by strict rules regarding the admissibility of evidence?

There are two divergent views: The first being that arbitrators are not strictly bound by the rules of evidence and the second being that arbitrators appointed under a statute are under a duty to act in accordance with the essential rules of natural justice and are therefore bound by the same rules of evidence as those applicable to any court of law, unless the parties have agreed otherwise.

In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* [2014] 1 ALL SA 375 (SCA) Wallis JA advanced the former view, stating that unless precluded by the arbitration agreement, arbitrators should be free to adopt procedures as they regard appropriate to resolve the dispute they are seized with. He went on further to state that arbitrators should be free to determine the admissibility of evidence without being shackled by the formal rules of evidence and the correct approach would therefore be that they can receive evidence in any form subject to such restrictions as they may deem appropriate.

The party autonomy of arbitration proceedings entails that the arbitration takes place pursuant to the referral by the parties. The parties may exclude the applicability of some rules by inserting the following clause in their arbitration agreement:

> The arbitrator shall have regard to evidence which would normally be inadmissible in a court of law, but which is relevant to the matter before him/her.

In the circumstances, an evidentiary provision in an arbitration agreement is valid and enforceable and the arbitrator is bound to adopt a procedure that conforms to natural justice. The arbitrator is therefore not bound by the rules of evidence that are applicable in court proceedings and evidence which is inadmissible in court proceedings will not on that basis alone be rejected. The arbitrator is entitled to admit any material which is logically probative, even hearsay evidence where it can be regarded as reliable.

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EVIDENCE IN DOMESTIC ARBITRATION PROCEEDINGS

CONTINUED

If the investigations of the arbitrator were to reveal something entirely new, the arbitrator should draw this to the attention of the parties who should be given an opportunity to deal with it.

If the evidentiary provision in the arbitration agreement properly construed demonstrates that the parties have expressly or impliedly agreed that evidence may be lead which would not be admissible in a court of law then the arbitrator's duty to receive such evidence is accordingly enlarged. The parties may also, by express agreement, exclude the right to lead certain types of evidence or to adduce any evidence at all on certain or all issues in dispute.

The parties do not have an unrestricted right to lead any type of evidence - the arbitrator may only receive evidence that is relevant to the issues in dispute. This means that the arbitrator must, within certain limits, permit all evidence tendered by the parties.

Third-party evidence

One of the other pivotal questions that arise in arbitration proceedings is whether the arbitrator is entitled to receive evidence from third parties that are not a party to the referral.

In Roman-Dutch law, the submission of a dispute to arbitration is subject to the implied condition that the arbitration should proceed in a fair manner or in accordance with the law and justice. The recognition of this implied condition is in accordance with modern constitutional values. Each party has the right, and must be given a reasonable opportunity, to challenge the case put forward by the other party.

In the scenario where the arbitrator obtains evidence which has not been led by either party to the referral, two premises emerge.

On the one hand, the nature of arbitration proceedings is that they are conducted with the consent of both parties and therefore an agreement that the arbitrator can conduct his own investigations without necessarily communicating the findings to the parties would be valid. However, if the investigations of the arbitrator were to reveal something entirely new, the arbitrator should draw this to the attention of the parties who should be given an opportunity to deal with it.

On the other hand, in the absence of an express or implied agreement permitting the arbitrator to receive evidence in this manner, the inclusion of such evidence would constitute an irregularity or an act in excess of the arbitrator's powers. It is, however, suggested that it would not be fatal to the award should the arbitrator admit evidence in the absence of the parties, provided that he subsequently informs the parties and affords them an opportunity to test the evidence. In terms of the Act, this perhaps would be a cause for the setting aside of an award on the basis of misconduct of the arbitrator or gross irregularity in the conduction of the arbitration proceedings and that the award has been improperly obtained.

Rishaban Moodley

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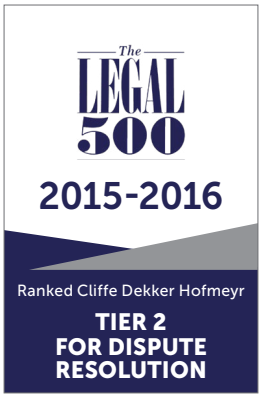

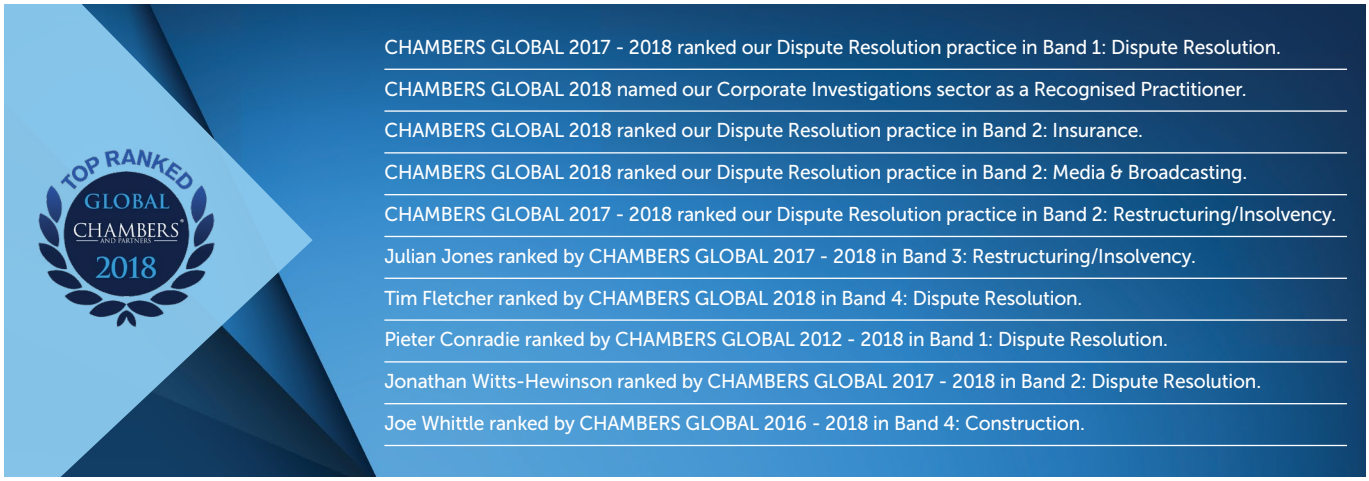

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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