4 SEPTEMBER 2019

DISPUTE RESOLUTION **ALERT**

IN THIS ISSUE >

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Investor's Remorse: Can you take action against your investment broker for a failed investment?

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In the *Symons* case, the plaintiff invested R5 million into a property syndication with Sharemax Investments (Pty) Ltd (Sharemax) based on the advice of the defendant - the plaintiffs' former investment broker and financial advisor. The defendant, a registered financial service provider, had previously advised the plaintiffs on various investment opportunities and had also personally invested R600,000 into the Sharemax property syndication. The investment initially yielded returns, however, the South African Reserve Bank stepped in and instructed Sharemax to change its funding model as it was deemed to be unlawfully taking deposits from the public. Sharemax was unable to do so and the property syndication scheme subsequently collapsed, with the plaintiff losing his entire investment. The plaintiff sought damages against the defendant for the failed investment.

The plaintiff argued that:

- he was ill advised by the defendant and was under the impression that the investment was low risk;
- the defendant breached its contractual duties as the plaintiff believed he was guaranteed a return on his investment as well as the capital amount invested; and
- the defendant had not properly applied his mind to the investment and the associated risks.

The defendant, however, argued that:

- the plaintiff was well informed of the risks involved as the plaintiff was provided with various materials relating to the investment;
- the defendant was well versed with Sharemax and its investment opportunities as the defendant had attended numerous Sharemax presentations;
- Sharemax had a respectable track record, which the defendant supported through expert evidence; and
- the contracts signed by the plaintiff indicated on numerous occasions that the investment was not guaranteed and that there was a risk that the plaintiff could lose his entire investment.

The plaintiff was an experienced businessman in dealing with property syndications and therefore was deemed by the court to be adequately versed in the risks involved.

Investor's Remorse: Can you take action against your investment broker for a failed investment?*...continued*

The courts are yet to develop a hard and fast test for such matters and rather deal with such on a case by case basis having regard to, among other factors, the investor's emotional state, the actual risk of the investment compared to the risk the investment was sold to be as well as the reason for the investment's failure.

The court found that the plaintiff went into the investment with open eyes due to his experience as a businessman, his interactions with similar schemes and the fact that the defendant had given the plaintiff adequate documentation on the investment. The court also took cognisance of the fact that the plaintiff took two weeks to make a final decision on whether to invest and that this was, according to the court, a sign that the plaintiff gave due consideration to the investment. The court highlighted that the defendant took advice on the investment structure from an accountant as well as a compliance officer and could not have reasonably foreseen the reason for the collapse of the investment. Ultimately, the court handed judgment down against the plaintiff and dismissed the action with costs.

The *Symons* decision does not mean that your investment broker is completely safeguarded from any and all wrongdoing as was shown in the case of *Oosthuizen v Castro 2018* (2) SA 529 (FS) where the court held the financial advisor liable for the failed investments of the plaintiff due to the fact that the financial advisor led the plaintiff to invest under the impression that the investment was a low risk investment, when in actual fact if the risk was properly explained to the plaintiff she would never have invested in the first place.

The courts are yet to develop a hard and fast test for such matters and rather deal with such on a case by case basis having regard to, among other factors, the investor's emotional state, the actual risk of the investment compared to the risk the investment was sold to be as well as the reason for the investment's failure.

Roxanne Webster and Merrick Steenkamp

Will the country evaluation by the financial action task force recognise the South African judiciary's contribution regarding effectiveness?

The High Court held that the Commission failed to enquire fully and comprehensively into the issues which it was required to investigate on the basis of its terms of reference.

On 21 August the Gauteng Division of the High Court handed down a judgment setting aside the findings of the Arms Procurement Commission, chaired in 2015 by Justice W. Seriti. This ground-breaking judgment sets South African precedent regarding the powers of a court to review the findings of a judicial commission of inquiry. Importantly, it also redefines the role, function and obligations of a commissioner tasked with uncovering the truth.

The applicants, two non-profit organisations Corruption Watch NPC and Right2know Campaign, contended that the Arms Procurement Commission failed to comply with the requirements of legality and rationality. The High Court held that the Commission failed to enquire fully and comprehensively into the issues which it was required to investigate on the basis of its terms of reference. It criticised the Commission for asking peripheral questions to implicated witnesses, thus failing "to test the veracity of the evidence in terms of documents, reports and records which were readily available to it".

This judgment empowers the Zondo Commission of Inquiry into State Capture and reaffirms the role of the fourth estate (the media) in confronting and uncovering grand corruption and state capture. The judge stated that "whereas a Court of law is bound by rules of evidence and pleadings, a commission is not so bound. It may inform itself of facts in any way it pleases, including by hearsay evidence, newspaper reports or representations or submissions without sworn evidence. Commissions are designed to allow an investigation which goes beyond what might be permitted in Court." In the judgment, in a footnote to paragaraph [62], reference is made to the three books which were published on the arms deal controversy and it is noted that "...none of these texts appear to have been examined carefully by the Commission..."

This judgment goes a long way to establish a clear standard for the numerous other commissioners currently sitting in similar public inquiries in the country, affirming the duty to inquire fully into the matters they have to investigate. The case also serves as important evidence to the outside world and, in particular, global regulating bodies such as the Financial Actions Task Force (FATF), that South Africa's Rule of Law is alive and well, and protected by an independent judiciary willing to hold itself accountable. This new precedent will turn the Commission of Inquiry, a very useful fact-finding mechanism, into a very powerful inquisitorial mechanism to uncover the truth and to introduce a dynamic new level of effectiveness into our criminal justice system.

Why would this be relevant for FATF and important for South Africa?

FATF last evaluated South Africa in February 2009 and the onsite FATF inspection is scheduled for October/ November this year with the possible Plenary discussion regarding the Mutual Evaluation Report (MER) scheduled for June next year.

This mutual evaluation is very important as the process is extremely thorough and the scrutiny and analysis intensive, taking 14 months to complete. The FATF assesses over 40 jurisdictions while the remaining global jurisdictions are assessed by the FATF Regional Bodies in conjunction with

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South Africa's risk lies in FATF's recognition that corruption and money laundering are intrinsically linked: With corruption as the predicate offence, subsequent financial transactions deal with "proceeds of crime".

the World Bank and IMF. The FATF Plenary considers and adopts only two mutual evaluation reports at each of its three annual Plenary meetings; each assessment cycle is therefore eight years' long.

Will South Africa be found compliant with global Anti-Money Laundering (AML) and Combating of Terrorist Financing (CTF) standards or will the chickens of corruption and state capture come home to roost?

South Africa has a fairly robust, albeit pressured, economy and one of the most efficient and modern financial sectors in the world and a well-structured and funded Financial Intelligence Unit (FIU). We have been on the red carpet before. When FATF evaluated South Africa in 2009, it already raised certain caveats. The MER noted that corruption already presented a problem. Regarding Recommendation 32 it was recorded that "the assessment team was not provided with comprehensive data or statistics on details of money laundering investigations, prosecutions and convictions which could have been helpful in gauging the effectiveness of the AML/CFT regime in South Africa".

Since South Africa was regarded as "partially or non-compliant" for certain core FATF Recommendations, we had to report, under a targeted follow-up process, to every FATF Plenary on the progress made in addressing the deficiencies in the 2009 MER. This sword kept hanging over us until November 2017 when, as a result of the Financial Centre Amendment Act (which came into operation in October 2017 and which, among other things, addressed deficiencies relating to customer due diligence (CDD) and record keeping) the FATF decided to remove South Africa from its targeted follow-up process. The country was off the hook, for a while.

FATF's imminent evaluation of South Africa

South Africa's risk lies in FATF's recognition that corruption and money laundering are intrinsically linked: With corruption as the predicate offence, subsequent financial transactions deal with "proceeds of crime". We can hardly deny that corruption has inflicted extreme pain on our country. After all, South Africa does not have an ongoing Commission of Inquiry into State Capture for nothing. Corruption, as we know from experience, features as part and parcel of any syndicate system, whether it relates to arms, drugs, human trafficking or terror. This is why corruption issues are very important during a country's mutual evaluation process which serves to assess a country's compliance with the FATF Recommendations. Anti-Bribery and Corruption (ABAC) and AML go hand-in-hand.

For its fourth round of mutual evaluations, the FATF has adopted complementary approaches for assessing compliance. The assessment comprises two distinctly separate components namely:

1. Technical compliance, regarding the legal and institutional framework; and
2. Effectiveness, regarding a country's ability to meet a defined set of outcomes thus testing whether the technical framework produces required results.

Will the country evaluation by the financial action task force recognise the South African judiciary's contribution regarding effectiveness?

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Even if we have to live on a follow-up list for a few plenary meetings, we have an opportunity to prove our effectiveness in producing the required outcomes that FATF seeks.

South Africa's track record over the last decade regarding money laundering and corruption paints a less-than-perfect picture. In the Basel AML Index of 2018, measuring effective enforcement of Anti-Money Laundering measures, South Africa is listed as one of the Top 10 "decliners". The Corruption Perception Index, published internationally by Transparency International has also given us a score of 43 - a score below 50 indicative of corruption issues. The 2019 Rule of Law Index places South Africa in position 47, in the lower half of the world, just above Argentina and just below Ghana, with Denmark in the top position and Venezuela at the bottom of the list. The reports by the State Capacity Research Project (entitled, Betrayal of the Promise: How SA is being stolen), the SA Council of Churches and the Parliamentary Committee on Public Enterprises have clearly connected the dots illustrating the country's systemic corruption.

South Africa has fortunately recently started a healing journey with a new President who has appointed a Commission of Inquiry into State Capture. We also have a new Head of the NPA, Ms Shamila Batohi, who is said to have everything it takes to get the wheels of justice turning again. There has, however, been concerns that little is going to change; that the Commission of Inquiry will not translate into real action; that no one will be prosecuted. But it is often said that "the show ain't over till the fat lady sings".

If the commissions truly discharge their duties in accordance with the standards so clearly defined by the latest High Court judgment, there may be a lot of singing still to come. Supplemented by responsible and truth-seeking journalism, Ms Batohi and her colleagues should have ample evidence for the prosecutions to follow.

The FATF Methodology Manual for this round of evaluations clearly indicates that assessment of effectiveness is not a statistical exercise and that the evaluation should be completed "within the context of the country's circumstances". Assessors should note international and domestic contextual factors that might significantly influence the effectiveness of the country's AML/CFT measures. "This could include such factors as the maturity or sophistication of the AML/CFT regime and the institutions which implement it, or issues of corruption (own emphasis) or financial exclusion".

Will the FATF accept these new developments as sufficient evidence of South Africa's effectiveness in its AML/TF and Anti-Bribery regime? Perhaps not. But even if we have to live on a follow-up list for a few plenary meetings, we have an opportunity to prove our effectiveness in producing the required outcomes that FATF seeks. In doing so, returning to the Rule of Law and eradicating corruption, South Africa will resume its place as a leading African State.

Willem Janse van Rensburg

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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

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

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

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

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

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

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

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

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

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@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

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

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

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

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR