11 MARCH 2020

DISPUTE RESOLUTION **ALERT**

IN THIS **ISSUE**

Arbitrations: time-bar provisions in contracts not set in stone

"A claim in respect of any undertakings or warranties contained in this agreement shall be wholly barred and unenforceable unless proceedings in respect thereof has been issued and served prior to the sixth anniversary of the effective date".

Arbitration, insurance and construction agreements often have clauses like this which say that any claim is barred unless some step to commence litigation proceedings is taken within a time fixed by the agreement.

Failing municipalities – hope in sight?

Edmund Burke, an 18th century Irish statesman, famously ridiculed the Revolution that had just taken place in France and the period of Parisian Enlightenment that followed in his *Reflections of the French Revolution.* But as a critic of Democracy, he could not have known that Democracy would later permeate almost every government across the globe (including his own). It is tempting to idle the discussion in this alert on the *romanz* of historical revolution and early Democracy, but we will forbear that urge. Why? Because modern democracy (and constitutionalism) is far more exciting.

CDH
CLIFFE DEKKER HOFMEYR

CLICK HERE
FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Arbitrations: Time-bar provisions in contracts not set in stone

Section 8 of the Arbitration Act 42 of 1965 gives the court the power to extend the time fixed for commencing proceedings under an arbitration agreement.

"A claim in respect of any undertakings or warranties contained in this agreement shall be wholly barred and unenforceable unless proceedings in respect thereof has been issued and served prior to the sixth anniversary of the effective date".

Arbitration, insurance and construction agreements often have clauses like this which say that any claim is barred unless some step to commence litigation proceedings is taken within a time fixed by the agreement. This sees the parties regulating prescription of claims outside the three years prescribed by the Prescription Act of 1969. In *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC), the Constitutional Court held that time-bar clauses are enforceable where the notice period is clear and reasonable. Here's the curve ball though. Section 8 of the Arbitration Act, No 42 of 1965 gives the court the power to extend the time fixed for commencing proceedings under an arbitration agreement.

In *Samancor Chrome Holdings (Pty) Ltd and another v Samancor Holdings (Pty) Ltd and others* 2019 4 All SA 906 (GJ) the High Court recently considered section 8 which is modelled on section 27 of the 1950 English Arbitration Act and states that *"...the Court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, may extend the time for such period as it considers proper, whether the time so fixed has expired or not, on such terms and conditions as it may consider just but subject to the provisions of any law limiting the time for commencing arbitration proceedings."*

The English Supreme Court prescribed guidelines in *Liberian Shipping Corporation (the Pegasus) v A King and Sons Ltd* 1967 1 All ER 934 (CA) (the Pegasus case) on how *"undue hardship"* in section 27 should be interpreted, which include that:

- the words 'undue hardship' should not be construed too narrowly.
- undue hardship means excessive hardship and, where the hardship is due to the fault of the claimant, it means hardship the consequences of which are out of proportion to the fault.
- in deciding whether to extend time periods or not, the court should look at all the relevant circumstances of the case in particular:
    - the length of the delay;
    - the amount at stake;
    - if the delay was the fault of the claimant or was outside his control;
    - if applicable the degree of the claimant's fault;
    - whether the claimant was misled by the other party;
    - whether the other party has been prejudiced by the delay, and, if so, the degree of prejudice.

The Pegasus case is considered the key authority on such applications under Section 27 of the English Arbitration Act which has since been replaced by the more restrictive section 12 in the 1996 English Arbitration Act. South Africa's Legislature has not adopted the more restrictive wording but a new Domestic Arbitration Act is on the cards.

CDH
CLIFFE DEKKER HOFMEYR

Arbitrations: Time-bar provisions in contracts not set in stone

...continued

The Samancor case reiterates that a time-bar defence is not necessarily a slam-dunk...

In the matter of *Samancor Chrome Holdings (Pty) Ltd and another v Samancor Holdings (Pty) Ltd and others* a sale of shares agreement provided indemnities to the applicants in respect of income tax to be paid to SARS. The parties anticipated delays obtaining tax assessments and rendering outstanding tax returns and included a time-bar clause of six years. There was a delay in the submission of tax returns and the tax calculation was also incorrect which led to an incorrect payment to SARS and a statement of claim against the respondents to recover the shortfall. But the statement of claim was issued outside of the six year period.

The court, in applying the Pegasus-guidelines, found that undue hardship would be caused to the applicants if the time bar was not extended as contemplated in section 8 of the Arbitration Act. The court emphasised that, but for the time-bar, the claim by the applicants was good; the applicants were not at fault; and the respondents were not prejudiced by the delay.

Notwithstanding contractual autonomy and its importance in South African law, the court found that holding the parties to the contractual terms would not accord with the approach applied under section 27 of the 1950 Arbitration Act or under our section 8. The court extended the time-bar period.

The *Samancor* case reiterates that a time-bar defence is not necessarily a slam-dunk given the right of the affected party to approach the court for an extension of the period. Contrast the Prescription Act which kills a prescribed matter stone dead.

Tim Fletcher and Elizabeth Sonnekus

CDH
CLIFFE DEKKER HOFMEYR

Failing municipalities – hope in sight?

The Constitutional Court has confirmed that *"[a] municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits".*

Edmund Burke, an 18th century Irish statesman, famously ridiculed the Revolution that had just taken place in France and the period of Parisian Enlightenment that followed in his *Reflections of the French Revolution.* But as a critic of Democracy, he could not have known that Democracy would later permeate almost every government across the globe (including his own). It is tempting to idle the discussion in this alert on the *romanz* of historical revolution and early Democracy, but we will forbear that urge. Why? Because modern democracy (and constitutionalism) is far more exciting.

Take for instance the very recent judgment of the Eastern Cape High Court, Grahamstown, in *Unemployed Peoples Movement v Premier, Province of the Eastern Cape and Others* [2020] ZAECGHC 1 that decided a matter brought by the Unemployed Peoples Movement — an association in Makana Municipality (formerly Grahamstown Municipality) constituted to organise and mobilise the unemployed masses, to explore alternatives which undermine unemployment, to expose corruption on the part of government officials, and to take the necessary steps to prevent poor people from suffering the worst effects of unemployment, poverty, starvation, homelessness and similar social ills. And one might add, in the wake of the resulting judgment of the High Court, *"to bring successful High Court applications to dissolve municipal councils that do not fulfil their constitutional obligations and serve the people that elected them into office"*. Confused somewhat? Let us start at the beginning.

The Constitutional Court has confirmed that *"[a] municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits"*. The implication being that only under certain circumstances, usually exceptional, will the National and Provincial governments be permitted to interfere in the affairs of a municipality. One of those circumstances arise when a municipality fails to fulfil an executive obligation (section 139(1) of the Constitution), another is when the municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basis services or meet its financial commitments (section 139(5) of the Constitution). The first is involves a discretionary interference by the Provincial government (section 139(1) of the

Failing municipalities – hope in sight?

...continued

It is well documented in the media that Makana has been afflicted with a severe multi-year drought that has brought the Municipality to its knees.

Constitution), *whereas* the second involves a mandatory interference (section 139(5) of the Constitution). Both prescribe certain actions to be taken by the Provincial government to remedy the situation, but for purposes of this note we quote the entirety of section 139(5) as those actions are relevant to the discussion at hand:

> *"If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-*
>
> *(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which –*
>
> *(i) is to be prepared in accordance with national legislation; and*
>
> *(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and*
>
> *(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and-*
>
> *(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and*
>
> *(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or*
>
> *(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan."*

This distinction between discretionary interference and mandatory interference becomes important later, but for the meantime, the facts giving rise to the matter must be noted. It is well documented in the media that Makana has been afflicted with a severe multi-year drought that has brought the Municipality to its knees. What is not as well documented is that the Municipality's inability to manage the drought effectively is due to it being in a state of complete financial disarray for more than a decade. The judgment sets out an impressive chronology of events that explain how Makana has spiralled into the abyss, the mains event being:

- On 6 October 2014 after mounting pressure from groups such as the Public Service Accountability Monitor of University of Rhodes, calling for provincial intervention in terms of section 139, the Provincial government intervenes and appoints an administrator under section 139(1)(b) of the Constitution;

Failing municipalities – hope in sight?

...continued

The Unemployed Peoples Movement also asked the court to direct the Executive Council for the Province to dissolve the Municipal Council of Makana Municipality and to appoint an administrator until a newly elected Municipal Council has been declared elected.

- then in February 2015, the Provincial government is forced to intervene once again and this time an extensive 100 page financial recovery plan is developed;
- the plan never gets off the ground due to the unwillingness of the Makana Municipal Council;
- on 1 September 2015 the Select Committee on Co-operative Government and Traditional Affairs (CoGTA) releases a report on the intervention further damning the Makana Municipality's executives;
- during March 2016 the administrator is substituted for another administrator in terms of section 139(1)(b) of the Constitution;
- in 2015 the Unemployed Peoples Movement address a memorandum to Makana Municipality, its Council, the mayor, the acting manager and the MEC for CoGTA calling for the Municipality to inter alia implement the financial recovery plan adopted two years ago;
- on 7 May 2018 the Legal Resource Centre on behalf of the Unemployed Peoples Movement address a letter of demand to the CoGTA MEC to conduct a mandatory intervention in terms of section 139(5) of the Constitution;
- thereafter on 1 August 2018 the Minister of CoGTA responds to the letter stating that they have heard the calls from the people of Makana but that the responsible branch of government for intervention is the Provincial government who is copied into the reply;
- after the letter from the Minister there is silence from all three branches of government.

The Unemployed Peoples Movement were then forced to launch an application, asking for several declaratory orders including a declaration that the Makana Municipality is in breach of s 152(1) of the Constitution, in that it has failed to ensure the provision of services to its community in a sustainable manner and has failed to promote a safe and healthy environment and that the jurisdictional facts for "mandatory" intervention in terms of section 139(1)(c) are present. The Unemployed Peoples Movement also asked the court to direct the Executive Council for the Province to dissolve the Municipal Council of Makana Municipality and to appoint an administrator until a newly elected Municipal Council has been declared elected.

The opposing respondents grouped themselves into three categories, the Provincial respondents, the Municipal respondents and the Minister for CoGTA. None of the respondents denied the allegations regarding the deplorable state that the Municipality is in, and of consequence, did not oppose the declaratory relief. Rather, what becomes the crisp issue before the court is the distinction between the discretionary interference by the Provincial government (section 139(1) of the Constitution), and the mandatory interference (section 139(5) of the Constitution) referred to above. After all affidavits were exchanged, the Provincial respondents filed a further affidavit, stating that the Provincial government had taken a resolution, after the applicants launched proceedings, for mandatory intervention in Makana Municipality. But the resolution was unsigned, and no further affidavits were filed to explain what steps the Provincial government had taken or were going

Failing municipalities – hope in sight?

...continued

Accountable democracy and constitutionalism is alive and well in South Africa (despite our many other problems), where the people residing within the jurisdiction of a municipality can and have exercised their rights to bring change.

to take. Nevertheless, in essence the respondents alleged that what the applicant asked for was discretionary and the court could not grant them their relief as the Provincial government had now taken a decision in terms of section 139(5) for mandatory intervention.

The court did not entertain the argument, but it did agree with the Provincial respondents that mandatory intervention was required. Consequently, it granted the applicants all of their declaratory relief and instead of ordering intervention under section 139(1) of the Constitution ordered mandatory intervention in terms of section 139(5) of the Constitution, which incidentally also allows for the Province to dissolve a municipality's Council, and which was further ordered by the court.

What are the implications of this judgment? The long story is that intervention by the National or Provincial government into the affairs of Local government will only happen under exceptional circumstances in terms of our Constitution. Such circumstances were present in Makana Municipality, and it is arguable that similar circumstances are present in many other municipalities across South Africa – with media outlets reporting on service delivery issues on a daily basis, let alone the shocking statistics relating to irregular expenditure recorded in the Auditor General's annual reports on the state of municipalities. Clearly, many municipalities are in a state of crisis. Which leads us to the short story, being that accountable democracy and constitutionalism is alive and well in South Africa (despite our many other problems), where the people residing within the jurisdiction of a municipality can and have exercised their rights to bring change. With local government elections around the corner in 2021, aspirant Council members and their political parties would do well to remember that.

Imraan Abdullah and Anja Hofmeyr

CDH
CLIFFE DEKKER HOFMEYR

PROTECTION OF INVESTMENT IN AFRICA

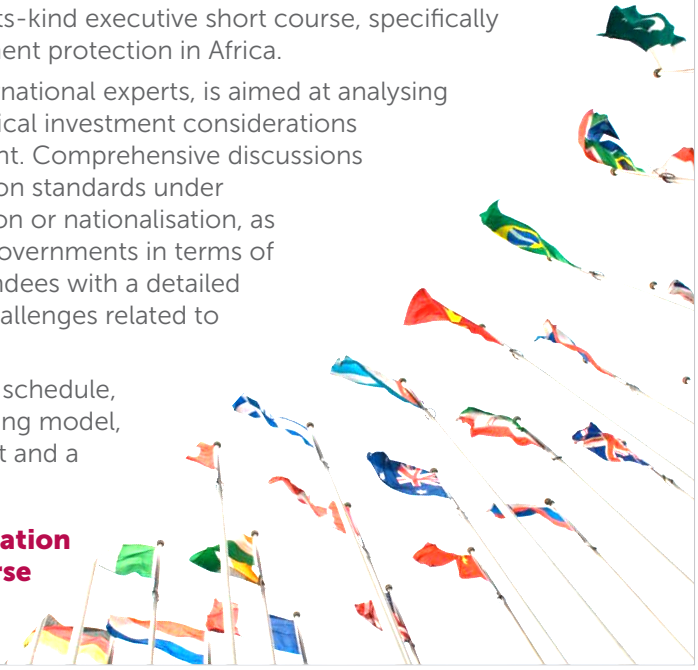
20–22 April 2020

Presented by the Faculty of Law, University of Pretoria in collaboration with Cliffe Dekker Hofmeyr (CDH).

The Protection of Investment in Africa is a first-of-its-kind executive short course, specifically focused on unpacking the fundamentals of investment protection in Africa.

The course, presented by leading national and international experts, is aimed at analysing a unique and holistic blend of theoretical and practical investment considerations for host governments and investors on the continent. Comprehensive discussions on international investment law principles, protection standards under investment treaties/agreements against expropriation or nationalisation, as well as the recourse available to investors or host governments in terms of Investor State Dispute Settlement, will provide attendees with a detailed understanding of contemporary legal and policy challenges related to investments.

In order to allow for a flexible and accommodating schedule, the course will be delivered through a hybrid teaching model, incorporating a combination of both online content and a three-day contact session.



CLICK HERE to access the course registration details and fees, presenter profiles, course content and programme.

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2020 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2020 ranked our Public Procurement sector in Band 2: Public Procurement.

CHAMBERS GLOBAL 2017 - 2020 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2020 in Band 3: Dispute Resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2020 as Senior Statespeople: Dispute Resolution.

Julian Jones ranked by CHAMBERS GLOBAL 2017 - 2020 in Band 3: Restructuring/Insolvency.

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 as an up and coming Restructuring/Insolvency lawyer.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 - 2020 in Band 2: Dispute Resolution.

Willie van Wyk ranked by CHAMBERS GLOBAL 2020 in Band 3: Insurance.

TOP RANKED Chambers GLOBAL 2020

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

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

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

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

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

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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