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# DISPUTE RESOLUTION ALERT

## An empty judgment can be valuable insurance for better times ahead

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## A new guard and new mandate to tackle corruption – part one

On 9 December last year, the world observed the United Nation's International Anti-Corruption Day. In South Africa, it was pretty much a normal Monday. Scepticism still abounds in the country. Patience wearing thin, South Africans are tired of promises – they want action and they want it now! However, if one looks with eyes that see, and hopefully this article will facilitate this ability, it is clear that such action is already in motion.

## An empty judgment can be valuable insurance for better times ahead

A judgment debt survives for 30 years, appreciably longer than the three-year prescription period applying to ordinary, unsecured debts.

A matter which we recently finalised for a client pertinently demonstrates the value of obtaining a judgment carrying interest even if, at the time, there is no prospect of the judgment being satisfied by the debtor.

In June 1994, we obtained a judgment for our client for payment of the capital amount of R45,000. The judgment provided that the capital amount would attract interest at the rate of 15.5% per annum - the then promulgated legal rate of interest recoverable on outstanding debts. The circumstances of the judgment debtor rendered recovery of the judgment debt not possible at the time.

Fortunately for our client, after some 25 years, the circumstances of the judgment debtor had significantly improved, rendering recovery of the judgment debt viable. This resulted in our client receiving payment of an amount exceeding R230,000 - the substantial majority of which comprised interest on the original judgment debt.

The important aspects to note from this happily-ending story are the following:

- A judgment debt survives for 30 years, appreciably longer than the three-year prescription period applying to ordinary, unsecured debts;
- The legal rate of interest recoverable on a judgment debt remains the one in force and promulgated at the time of judgment, notwithstanding that the promulgated rate may have been reduced (and in this case was) during the intervening period; and
- Most importantly, the *in duplum* rule which prohibits the recovery of interest exceeding the amount of the capital debt or claim, does not operate in respect of judgment debts carrying interest. Therefore, the judgment interest recoverable on such a debt is unlimited.

The cost of obtaining a judgment, which is not immediately or even in the medium term recoverable, may therefore prove to be money well spent and an investment with a very reasonable return.

*Nick Muller*

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## A new guard and new mandate to tackle corruption – part one

*“the directorate will investigate any unlawful activities relating to serious, high-profile or complex corruption, including but not limited to offences or criminal or unlawful activities arising from current commissions and inquiries”*

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### A new guard

President Ramaphosa, in his inaugural speech in February 2018, used the lyrics “*thuma mina*” (send me) from the famous Hugh Masekela song. The President has acted by example, securing a new and dynamic prosecutor: Shamila Batohi. Batohi left the International Criminal Court to take charge of the National Prosecuting Authority (NPA) as of February last year. To add even more depth to the team, a new veteran prosecutor was appointed as the head of an Investigative Directorate (ID) within the NPA. Hermione Cronje was handpicked to lead this special Investigating Directorate, already dubbed the “new Scorpions”.

In the Presidency’s February statement last year, he explained that *“the directorate will investigate any unlawful activities relating to serious, high-profile or complex corruption, including but not limited to offences or criminal or unlawful activities arising from current commissions and inquiries”*. This new unit does not replace the Special Investigating Unit

(SIU) – an existing team that falls under the Department of Justice nor does it replace the Directorate for Priority Crime Investigation (DPCI)(Hawks) which, in turn, falls under the control of the police. The new ID operates inside the NPA under Batohi. If the ID is provided with sufficient resources and remain unhampered by political interference, Batohi and Cronje will surely create a formidable team turning the tables on corruption.

A further strategic step taken by President Ramaphosa was the Special Tribunal with Judge GM Makhanya as Tribunal President, together with a bench of seven other judges from the High Court. This Tribunal was already proclaimed in February last year, with its members appointed a month later.

The investigating units will hopefully serve complementary roles. Their success will be a relevant factor for submissions to the Financial Action Task Force, which is currently engaged in an assessment of South Africa’s compliance with international anti-corruption and anti-money laundering standards.

### Pressure from civil society

In August last year, at the instance of two civil society movements, our upstanding judiciary set aside the Report of the Seriti Commission of Inquiry into Arms Procurement. This judgment set new parameters, standards and obligations for commissions of inquiry. A more in-depth discussion of this landmark case follows in the second segment of this two-part article.

## A new guard and new mandate to tackle corruption – part one...*continued*

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To kick off the new year, the Makhanda High Court, at the instance of civil society movements, ordered the Makana Municipality to be dissolved and placed under administration for violating its constitutional mandate by failing to provide basic services to the community.

### **South Africa: A collaborative global citizen**

There are also clear indications that Batohi is cognisant of South Africa's role in the global community and currently actively engaged in processing information, assisted by the US and other jurisdictions, in order to gather the evidence required to successfully prosecute those involved in corruption and state capture. Such collaboration has been on the agenda of many meetings of the Financial Action Task Force in France and elsewhere.

### **Coming home to roost**

In November last year, Batohi placed the media in a position to report on the arrest of a former minister (and current chair of a parliamentary committee).

An urgent application launched by the National Prosecuting Authority followed a few days later, seeking to obtain urgent relief against certain key players in state capture in anticipation of serious criminal prosecution, to follow.

The SIU has also produced its first results this month: Judge Makhanya of the Special Tribunal has granted an interim order freezing the pension of the former head of the State Attorney pending the finalisation of proceedings against him. The irregularities underlying the order is estimated at R34 million.

In a country where corruption and mismanagement have become institutionalised to the point that load-shedding has become the norm, the national airline's future is uncertain, state-owned entities are under administration and prosecution of corruption has come to a grinding halt, it would be unrealistic to expect an instant turnaround. Given a little more time, the new guard has the means and skill to right the ship.

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*Willem Janse van Rensburg*

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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.

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