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DISPUTE RESOLUTION **ALERT**

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Lawful deprivation of property rights: An analysis of *National Director of Public Prosecutions v Botha*

The Supreme Court of Appeal held that the property could potentially be forfeited, but on a proportionality assessment as otherwise such forfeiture would amount to arbitrary deprivation of property in terms of section 25(1) of the Constitution.

"Corruption affects us all. It intersects at points of social, political, economic and ethical discourse with no end in sight and thus remains an elusive malignancy slowly eroding our hard-won democracy."

Government corruption and social, political and economic discourse have been at the front of South Africans' minds recently. Courts such as the Constitutional Court are burdened with a civic duty to protect both social and economic interests of the country and to remind every government official that no one is above the law. The Constitutional Court did just that in the case of *National Director of Public Prosecutions v Botha N.O. and Another* (2020) ZACC 6 . In this article we analyse how the Court tackled these issues.

The tender and kickback

During her time as Head of Department for the Northern Cape Department of Social Services and Population Development (HOD), Ms. Botha awarded tenders to a company known as Trifecta Investment Holdings (Pty) Ltd (Trifecta) which would acquire desolate buildings within the Northern Cape, renovate the buildings and lease the buildings to government departments at exorbitant rates. Ultimately this led to the government suffering a loss of an estimated R26 billion.

In return for the tenders, Trifecta renovated Ms. Botha's family home amounting to R1,169,068.49 and through convoluted and illicit means Ms. Botha undertook to pay for these renovations by issuing a certificate of indebtedness and entering into a "*loan agreement*" with Trifecta for amounts that the Court appreciated to be less than the costs of the renovations.

The fallout

Subsequently Ms. Botha left her employment as HOD and was elected to Parliament. She failed to declare the gratifications received from Trifecta as she was required to do which lead to a parliamentary inquiry being launched against her. Upon investigation the parliamentary committee ruled that, firstly, Ms. Botha was guilty of receiving a benefit from an improper relationship with Trifecta, and secondly, she was found guilty of having misled the parliamentary committee. This led to the National Director of Public Prosecutions (NDPP) launching civil proceedings against Ms. Botha for offences of tender corruption. The factual basis of these offences overlaps with the ethical breaches considered by the parliamentary committee. The NDPP then sought a forfeiture order in respect of the proceeds (in the form of the renovations to her property) Ms. Botha received pursuant to her alleged offences under Chapter 6 of the Prevention of Organised Crimes Act (POCA).

The High Court held that the property in question could be forfeited in terms of POCA. This judgment was taken on appeal and the Supreme Court of Appeal held that the property could potentially be forfeited, but on a proportionality assessment as otherwise such forfeiture would amount to arbitrary deprivation of property in terms of section 25(1) of the Constitution.

Lawful deprivation of property rights: An analysis of *National Director of Public Prosecutions v Botha*...*continued*

The issues that the SCA had to consider were, firstly, whether section 25(1) of the Constitution protects the unlawful proceeds of crime from arbitrary deprivation, and secondly, whether the doctrine of proportionality applies to both instrumentality and proceeds of unlawful activity in terms of section 50 of POCA.

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The minority judgment

The minority judgment first considered whether the unlawful proceeds constituted property that must be protected against arbitrary deprivation in the Constitution. The minority considered the fact that the ambit of the definition of 'property' must be widely construed to include various forms of interest in various categories of property. The minority reasoned that unlawful proceeds do form part of property as defined under section 25(1) which in turn led the SCA to consider the necessity of a proportionality assessment, which is required by the Constitution.

The forfeiture of property in terms of sections 48 and 50 of POCA is quite draconian in nature and this effect is mitigated by applying a proportionality analysis which in turn ensures that the forfeiture does not amount to an arbitrary deprivation of property. The mere fact that property had been unlawfully acquired did not mean it should not be protected against arbitrary deprivation which is sought to be prevented by section 25 of the Constitution.

The minority held that the protection against arbitrary deprivation of property is fundamental in nature and does not require an element of lawfulness. However, once it is found that the property in question was indeed unlawfully acquired, the deprivation thereof will not be arbitrary. On this basis, the minority found that it is possible to hold that unlawful proceeds can be property for the purposes of section 25(1), but that the forfeiture thereof does not lead to arbitrary deprivation.

Lawful deprivation of property rights: An analysis of *National Director of Public Prosecutions v Botha*...*continued*

The court found that a person who obtained property unlawfully has no rights to that property and that property does not enjoy the protection against arbitrary deprivation that section 25 of the Constitution affords to property lawfully acquired.

The minority then turned its attention to whether a proportionally assessment is required in terms of POCA, notwithstanding the fact that this is already required by section 25(1) of the Constitution. The minority considered that in previous cases before it, it has held that a proportionality analysis must be done in terms of section 50(1)(a) of POCA, which relates to property being used as "*instrumentality in an offence*". Despite the current case being in terms of section 50(1)(b) of POCA, which dealt with property as "*unlawful proceeds*", the minority held that it would be difficult to accept that a court would have to conduct a proportionality analysis in respect of one, but not the other, and therefore, concluded that a proportionality analysis is required.

The minority ordered the renovated property be forfeited in repayment of the R1,169,068.49. It held that the money Ms. Botha had purportedly "*repaid*" was a mere attempt at a cover up and should not be credited from the full amount, which the majority judgment concurred with.

The majority judgment

The majority judgment, in its concurrence with the minority, also pointed out that while forfeiture was warranted, it did not constitute forfeiture of Ms. Botha's family home in its entirety, since not all of the home was constructed with proceeds from unlawful activities. Such a forfeiture would indeed amount to an arbitrary deprivation of rights. The majority thus agreed with the minority's order that failing payment of the amount, a curator bonis be appointed to sell the house in order to pay the R1,169,068.49 and have the net disbursed to the estate of Ms. Botha.

However, the majority differed with the minority on two issues: The first being that it was of the view that it is not necessary to determine whether section 25 of the Constitution is applicable since POCA itself has a relevant standard for determining arbitrary deprivation. It held further that even in the event that such a determination was necessary, as Ms. Botha had no rights to the proceeds in issue, such proceeds cannot constitute property which should be afforded protection under the Constitution. Secondly, it held that a proportionality analysis is only required where there are property rights that would be affected by the forfeiture order. In the instance where Ms. Botha had no right to the property in question, there were no property rights to be deprived. The majority thus found it inappropriate to apply a proportionality analysis where there is no lawfully recognised interest in the property to begin with.

This case provides clarity on the interplay between section 50 of POCA and section 25 of the Constitution. The court found that a person who obtained property unlawfully has no rights to that property and that property does not enjoy the protection against arbitrary deprivation that section 25 of the Constitution affords to property lawfully acquired.

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New lockdown regulations encourage arbitration or mediation for the resolution of disputes against the State or organs of State

Parties to the dispute are at liberty to elect whether they wish to proceed by way of mediation or arbitration at any stage before or after the commencement of litigation but before the granting of judgment by the court.

The Level 4 Lockdown Regulations published by the government on 29 April 2020 encourage the use of alternative dispute resolution for the resolution of disputes with the State or organs of State, in particular mediation or arbitration. This may be welcoming to potential litigants against the State or organs of State, as mediation or arbitration may result in a more efficient and effective resolution of potential disputes.

The relevant provision reads as follows:

Resolution of disputes

13. (1) The parties to a civil dispute against the State or any organ of State, which may potentially result in litigation, may –

(a) either before or after the commencement of litigation but before the granting of judgement by the court, agree to refer the dispute to mediation; or

(b) before the commencement of litigation, agree to refer the dispute to arbitration.

(2) Where the parties agree to mediation or arbitration:

(a) the Office of the Solicitor General shall assist the parties in coordinating and overseeing the process; and

(b) the parties may agree that a judge who has retired from active service shall act as the mediator or arbitrator as the case may be, in which event no fees shall be payable to such mediator or arbitrator.

(3) The Office of the State Attorney in whose area of jurisdiction a dispute arises shall immediately upon knowledge of such dispute engage the party raising the dispute, or such party's legal representative, in considering mediation or arbitration.

Based on the above Regulation it is apparent that the intended purpose is to ensure that disputes involving the State or organs of State are disposed of efficiently and in a cost-effective manner as opposed to protracted litigation in courts. Parties to the dispute are at liberty to elect whether they wish to proceed by way of mediation or arbitration at any stage before or after the commencement of litigation but before the granting of judgment by the court.

Some practical considerations in respect of arbitration to consider:

- Since arbitration is consensual in nature, can Regulation 13(1)(b) be viewed as an offer by the South African government to the parties involved in disputes with the State or organs of State to refer such disputes to arbitration?

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New lockdown regulations encourage arbitration or mediation for the resolution of disputes against the State or organs of State...*continued*

Parties should take advantage of the government's offer, flowing from the Lockdown Regulations, to amicably resolve any disputes or any other civil disputes against the State or organs of State.

- If Regulation 13(1)(b) is such an offer, would it then merely be for the disputing party "*accepting*" the State's offer set-out in Regulation 13(1)(b) by writing back to the relevant organ of State and the Office of the State Attorney?
- Could one potentially argue that by virtue of this provision, the State has agreed to arbitrate both commercial and investment disputes? The phrase "*civil disputes*" is used – which implies private parties in a dispute with the State. If so, the State may have inadvertently opened the door to investors being able to accept the offer to initiate any dispute against the government by means of arbitration.
- Save for South African parties, foreign parties that may want to proceed with arbitration against the State or organs of State may not want to appoint retired judges as arbitrators. Further, the retired judges that accept the mandate as arbitrator will not be paid by either party. Although that is beneficial to the parties, it raises doubts of whether there will be any retired judges that would be willing to act as arbitrator without being compensated.

It is encouraging to see the South African government's support for mediation and/or arbitration for the resolution of disputes with the State. Parties should take advantage of the government's offer, flowing from the Lockdown Regulations, to amicably resolve any disputes or any other civil disputes against the State or organs of State.

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Is this really the end? Reopening a case after an order of absolution from the instance

Liberty had the right to enforce its claim by instituting proceedings afresh, however, in early 2016 Liberty attempted to rather supplement the lacuna in its case by delivering a notice of amendment and a summary of expert evidence in terms of Rules 28 and 36 of the Uniform Rules of Court, respectively.

An order of absolution from the instance signals a release from a particular case. In South African law, such an order amounts to a dismissal of the plaintiff's case where such plaintiff did not lead sufficient evidence to support the different elements of their claim. In the recent case of *Liberty Group Ltd v K & D Marketing & Others* (1290/18) [2020] ZASCA 41, the Supreme Court of Appeal (SCA) considered whether, after an order of absolution from the instance, the plaintiff was entitled to reopen its case and to pursue its original claim on the same pleadings, in an attempt to thwart a plea of prescription.

In June 2009, the appellant (Liberty) and the first respondent, K and D Telemarketing (K & D), entered into an agreement in terms of which K & D would act as an independent intermediary of its insurance contracts. In 2010, Liberty served summons on K & D and its sureties for the repayment of advanced commission of R515,964.95, because the registered insurance policies had lapsed.

In April 2015, at the trial, K & D applied for absolution from the instance following Liberty's evidence. The test for absolution is set out in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) (SCA), being "*whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff*". K & D's application was refused and it proceeded to lead its evidence. Judgment was handed down in September 2015, absolving K & D from the instance as the court found that Liberty had not presented sufficient evidence to prove its claim.

Liberty had the right to enforce its claim by instituting proceedings afresh, however, in early 2016 Liberty attempted to rather supplement the lacuna in its case by delivering a notice of amendment and a summary of expert evidence in terms of Rules 28 and 36 of the Uniform Rules of Court, respectively. This was vehemently challenged by K & D as an irregular step. The court subsequently confirmed this, holding that an application for leave to proceed on the same papers was required to have the matter considered. By 2017, Liberty's claim, if instituted afresh, had prescribed. Due to this, Liberty brought an application for leave to reopen the trial, which the court subsequently dismissed.

The matter proceeded to the SCA where counsel on behalf of Liberty relied on the decision in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A), as authority for its submission that it was entitled to reopen its case on the same papers. In the cited case, it was held that an order dismissing an application in motion proceedings does not amount to an order of absolution from the instance. Liberty's submission in this regard was summarily dismissed by the SCA as it held that the dictum in the *African Farms* case related to motion proceedings and that it was not authority for the proposition that it is permissible after an order of absolution from the instance, to reopen a trial under the same case number on the same pleadings.

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Is this really the end? Reopening a case after an order of absolution from the instance...*continued*

This judgment confirms that orders of absolution from the instance in trial proceedings not capable of being successfully appealed and/or instituted *de novo*, will result in the conclusion of the matter.

In settling the matter, the SCA concurred with the court a quo finding that the decision in *Steytler v Fitzgerald* 1911 AD 295 was the definitive answer as to whether Liberty's application should succeed. In Steytler, it was held that although a judgment of absolution from the instance is classified as an interlocutory sentence, it had the effect of being a definitive sentence, resulting in that particular matter being finalised. It was further held that the court had no power or jurisdiction to hear any further evidence in relation thereto unless the order was subject to an appeal. To do so would allow actions to *"remain susceptible to resuscitation indefinitely"*. The SCA dismissed the appeal with costs and upheld the decision of the High Court.

This judgment confirms that orders of absolution from the instance in trial proceedings not capable of being successfully appealed and/or instituted *de novo*, will result in the conclusion of the matter.

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Business Inter/ruption/pretation

Pandemic and infectious disease risks do not typically fall within the terms of standard insurance cover, including the standard policy wording of a business interruption clause.

The COVID-19 pandemic has undoubtedly led every business to assess their existing insurance cover in the hope that they have business interruption cover in place. Many would have been excited at the inclusion of a section titled "*Business Interruption*" in their policy wording, but in the insurance world, that blanket term does not guarantee cover when business is interrupted.

In this regard, pandemic and infectious disease risks do not typically fall within the terms of standard insurance cover, including the standard policy wording of a business interruption clause. Ordinarily, coverage relating to losses sustained as a result of a pandemic and/or infectious disease outbreak (particularly in a business interruption context) is only available under a very specifically worded policy extension. That policy extension will include specific wording relating to the events that will give rise to a claim and the types of losses that will be covered under that extension.

The reason for specificity in policy wording and the interpretation thereof is because insurers only accept risk (and provide cover) under very specific terms, after having assessed the risk posed (and the premium payable) in terms of the disclosures made by the insured and the specific terms of the policy. An insurer cannot be expected to provide blanket cover under very general terms, as the insurer has not assessed its risk in general terms. The precision of the policy wording allows insurers to assess and manage their exposure.

The specificity of the policy wording dictates whether an insurance policy will respond to a claim. Even for those policy wordings that do contain wording relating to pandemic and infectious disease in a business interruption context, there is no guarantee that the policy will respond to a business interruption claim that has arisen as a result of the COVID-19 pandemic. Again, the policy wording needs to be carefully assessed in order to determine whether the facts giving rise to the claim are covered by the policy.

The uncertainty relating to the interpretation of policy wordings in respect of business interruption claims is something that is presently being grappled with by insureds, insurers and financial regulatory authorities globally. In an effort to provide some degree of certainty to insureds, the Financial Conduct Authority of the United Kingdom (FCA) published a statement on 1 May 2020 in which it announced that it intended to obtain a declaration from the courts (in the form of declaratory judgments) to resolve the contractual uncertainty relating to business interruption insurance cover, but more specifically to address the uncertainties relating to application by

Business Inter/ruption/pretation...*continued*

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insurers of the policy wordings of business interruption clauses. The hope in this regard is that the judgment(s) would clarify the meaning of the more frequently used policy wordings and guide insureds and insurers on the way forward.

Whilst the FCA does not regulate the South African short-term insurance market, the fact that a declaratory order is being sought in the English courts could have an impact on South African insureds and insurers. In this regard, English insurance law remains a persuasive source of South African insurance law and English decisions can potentially be relied on as authority in South Africa, particularly where we do not have developed law on the subject.

With so much uncertainty in the world, some certainty in relation to business interruption cover in the current context would be welcomed. Local insureds and insurers will undoubtedly pay close attention to the outcome of the FCA's declaratory actions.

Tim Smit

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