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DISPUTE RESOLUTION
ALERT

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Stakeholders' high hopes of the commercial legalisation of cannabis go up in smoke with the publication of the draft Bill on cannabis for private purposes

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As officially introduced in Government Gazette No. 43595 of 7 August 2020, the so-called Cannabis for Private Purposes Bill made its debut into the public sphere and was recently tabled in Parliament on 1 September 2020.

This Bill was drafted at the direction of the Constitutional Court in the seminal case of *Minister of Justice and Constitutional Development & Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* [2018] ZACC 30. In this judgment, Judge Zondo referred certain legislation back to parliament to be redrafted to cure its deficiencies insofar as the legislation unconstitutionally infringed on one's right to privacy by criminalising the private use and cultivation of cannabis.

While it was not expected that the referral back to parliament would result in the wholesale legalisation of cannabis in South Africa, those with skin in the game felt quietly optimistic that the coming Bill would be the first step in a revised, progressive approach to cannabis, one which would in due course see the unlocking of the myriad benefits of the plant, such as the tax revenue which could be generated, the jobs created, or the environmentally-friendly textiles and building materials which could be sustainably and cost-effectively produced.

Upon even a cursory glance at the Bill, those hopes were very quickly dashed. The first, and possibly one of the more concerning problems with the Bill, is that it has been drafted by the Department of Justice and Correctional Services. This belies a particularly conservative approach to the drafting process. The focus remains on restricting access to, and the use of, cannabis against the threat of rather severe legal consequences in the form of fines and jail time. What those in the industry were hoping for was a collaborative effort between the various departments such as Health, Agriculture, Finance, and the like. The drafters have seemingly adopted a rather narrow and traditionalist perspective in their preparation of the Bill, which as currently constructed, does not give an inch more than was mandated by the Constitutional Court.

This is indeed a great pity. In the Constitutional Court, Justice Zondo went to great length to detail the global approach to cannabis, namely, the total legalisation thereof in developed economies and the rationale behind such thinking, plus the very real benefits to society as weighed against the exaggerated and unsupported case made so far against legalisation. In the last few weeks, we have even seen a call from the Governor of Pennsylvania in the United States to legalise cannabis saying that the government could use the tax revenue to support small businesses – in the wake of the COVID-19 pandemic - and restorative justice programs.

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Stakeholders' high hopes of the commercial legalisation of cannabis go up in smoke with the publication of the draft Bill on cannabis for private purposes*...continued*

Having consulted widely in the industry from large corporates to young entrepreneurs, there is a multitude of commercial concepts and ideas waiting in the shadows to be launched upon commercial legalisation.

However, perhaps the most glaring of all the omissions from the Bill, is its complete failure to address any commercial aspects and opportunities of cannabis, short of de-scheduling hemp with an extremely unrealistic Tetrahydrocannabinol (THC) level of less than 0.2% - this is almost impossible when considering the favourable South African growing conditions. Furthermore, by prohibiting the exchange of remuneration for cannabis, cannabis plants, seeds and seedlings, the Bill envisages idealistic altruism while completely ignoring the commercial realities involved in growing, processing and supplying cannabis for personal consumption. In practice, this amounts to self-defeating legislation, forcing the average person to obtain cannabis illicitly, reinforcing the existing black market and depriving the economy of attainable tax income.

Currently, the only commercial opportunities available in the industry relate to farmers who can obtain a licence to either export their yield or supply it to a laboratory which has the necessary licences for the treatment, processing and manufacturing of cannabis related products. This in insufficient to ensure that the whole country has the opportunity to participate in, and benefit from, the cannabis economy.

Having consulted widely in the industry from large corporates to young entrepreneurs, there is a multitude of commercial concepts and ideas waiting in the shadows to be launched upon commercial legalisation. This includes retail shops for cannabis supplies and products, cannabis dispensaries, businesses offering kits for the DIY cultivation of cannabis at home, *"Grow Clubs"* which offer professional services to grow your cannabis on your behalf, plus all of the small-scale farmers who could be brought into the formal economy and generate tax revenue by being able to utilise small holdings to grow cannabis – particularly in rural areas – which grows easily and abundantly in South Africa. These enterprises are, for the time being, forced to operate as part of the informal economy, meaning that there is a lack of regulation and a haemorrhaging of potential tax revenue.

What the current Bill does offer is a detailed schedule of the quantities of cannabis and related products, including derivatives that can be grown and possessed by individuals in accordance with their right to privacy. While this is welcome clarity, the Bill ignores the daily lived realities of most South Africans who live on or below the poverty line. Such persons do not have the benefit of garden space to grow their plants, or enough rooms in their dwellings to ensure that they can participate in the benefits of the Bill while not violating the stringent conditions applied therein. As such, the Bill is exclusionary and does not offer equal opportunity to all South Africans.

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Stakeholders' high hopes of the commercial legalisation of cannabis go up in smoke with the publication of the draft Bill on cannabis for private purposes*...continued*

The industry now waits with bated breath for any announcements or Bills on the commercial unlocking of cannabis and its potential.

Lastly, we must give credit where it is due in that the Bill provides for the expungement of criminal records resulting from previous convictions which would not have materialised had this Bill been of force and effect at the time of such conviction. It has long been voiced by critics to the criminalisation of cannabis, that the incarceration of cannabis users is irrational and disproportionate to the balance of our legal system, such as when comparing an arrest and incarceration for possession of a small amount of cannabis, to the public's ability to purchase, possess and consume as much alcohol as they desire, which is arguably far more damaging to society as a whole.

Where to from here?

The next steps in the legislative process are for Parliament to engage stakeholders and the public at large on the draft. Even in the short time that the Bill has been circulating, it has become abundantly clear that Parliament are in for a marathon public participation process in which the stakeholders and public will pick apart the shortcomings of the Bill. This will hopefully result in the drafters revisiting the Bill and the general approach to cannabis regulation and legalisation which is currently taking place in such a piecemeal fashion that it will likely become more burdensome on the state to enforce such provisions.

In summary, the Bill is receiving criticism more for what it lacks, than for what it contains. The Bill (as currently constructed) is a conservative unduly limited document which, if proclaimed into law, would be considered a step backwards in the legislative process as it aims to harshly criminalise absolutely anything relating to cannabis that falls outside the narrow scope of Judge Zondo's judgment.

The public is now left to wonder what, if anything, is being done about the commercial potential of cannabis. The commercialisation of cannabis has been alluded to by senior government officials - in addition to the eulogising of the plant's potentialities by Judge Zondo. We have seen this at, for example, the President's State of the Nation Address in February 2020 which claimed that the next twelve months would see the acceleration of the commercialisation of hemp and cannabis products, and also in Finance Minister, Tito Mboweni's viral tweets about the benefits to the economy of the legalisation of cannabis, inspired from his own cannabis plants on his family's farm.

The Bill is therefore simultaneously promising, but also very disappointing. The industry now waits with bated breath for any announcements or Bills on the commercial unlocking of cannabis and its potential.

Andrew MacPherson, Malerato Motloung and Shaad Vayej

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A Sub-Saharan Africa focus: Fraud and financial crime amidst the pandemic

In an environment where capital is scarce and economic opportunity narrows, the pressure to operate outside the norms of governance best practice increases. One of the leading global providers of risk solutions, UK-based outfit, Kroll has a history of casework that confirms this.

Sub-Saharan Africa (SSA) boasts some of the world's fastest growing economies. While emerging markets hold huge untapped potential, these economies also come with inherent vulnerabilities. In the wake of COVID-19, emerging markets are, for example, more likely to be affected by factors such as capital outflows, rapid currency devaluations, sovereign debt burdens, revenue loss linked to lower commodity prices, and limited capacity for fiscal support. In short, the global pandemic will hit these economies the hardest.

In an environment where capital is scarce and economic opportunity narrows, the pressure to operate outside the norms of governance best practice increases. One of the leading global providers of risk solutions, UK-based outfit, Kroll has a history of casework that confirms this. Having worked closely with clients to fulfil their regulatory reporting obligations in the SSA region, CDH's Corporate Investigation experts predict that as the threat of unemployment or reduced income increases, business leaders and employees may feel pressured to engage in unlawful activity or, at the very least, turn a blind eye to it.

Business and regulators in SSA must be alert to employees looking to take advantage of a less regulated environment, resorting to fraud, corruption and asset misappropriation to remain financially viable.

CDH is regularly called upon to lead clients through complex legally privileged forensic investigations. Our experts also have extensive expertise in preventative measures, working closely with public and private sector clients in the SSA region to implement internal anti-corruption frameworks, policies and protocols. CDH recommends that businesses focus on reinforcing existing controls and adopting proactive measures to deter and prevent fraud and financial crime before the economic impact of COVID-19 intensifies in SSA. We discuss a number of such measures below.

Perform a fraud risk assessment

An organisation must proactively identify the specific fraud risks that could threaten its financial, operational and brand stability. A structured fraud risk assessment aids management in understanding its particular vulnerabilities, allowing for effective management of those risks. In the early stages of the crisis, regulators in the UK and SSA suggested that the pandemic could prevent full adherence to best practice in terms of oversight and controls. A fraud risk assessment would identify and address any such exposure.

Despite organisations' different responses to not only COVID-19 but to economic downturns in general, one thing is and will always remain constant: The ultimate responsibility for preventing and detecting fraud rests with an organisation's senior management and staff. It is therefore vital that, despite all other pressures, organisations take a proactive approach to mitigating fraud risk. Organisations should review their existing fraud risk management protocols or adopt one if they do not already have one in place.

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A Sub-Saharan Africa focus: Fraud and financial crime amidst the pandemic*...continued*

Organisations are encouraged to follow the tried-and-tested recipe to mitigate their exposure to fraud and financial crime by regularly performing fraud risk assessments, reinforcing existing controls - such as the investigation of whistleblower complaints - and adopting policies and protocols to detect and prevent fraud during the pandemic and beyond.

Keep abreast of forecasted economic impacts

The unprecedented nature of COVID-19 increases the need for up-to-date information for decision-makers. One resource designed to address this information gap is Kroll's COVID-19 Heat Map, a snapshot of forecasted economic impacts of the pandemic and related government restrictions across multiple geographies and sectors, including several countries in Africa.

Implement proactive measures

Besides the headline-grabbing sovereign debt issues, the effects of financial distress on private debt is evident too. This manifests in a range of situations such as companies struggling to collect receivables from business partners to banks holding increasing amounts of non-performing loans on their books. While these issues are not specific to financial crises, these are features which have become more pertinent in the current climate.

The sudden and concentrated impact of COVID-19 is already evident in the market. An indicator of this is companies' increasing concern about issues such as personal guarantees provided for loans, which under normal circumstances may not have raised much alarm. To mitigate the risk of high rates of non-recovery, proactive steps such as analysing loan books, reviewing guarantees and verifying assets used as collateral ahead of the expected worsening of debt distress is recommended.

As debt is renegotiated and assets trade hands rapidly, there are ample opportunities for fraud and embezzlement. Government injections of capital via recovery and stimulus packages are also likely to create opportunities for foul play that will require investigation. In South Africa, for instance, several allegations of fraud and procurement irregularities in regard to the award of lucrative personal protective equipment State contracts have already surfaced.

Conclusion

Grappling with the acute affects of the COVID-19 pandemic in SSA, organisations are encouraged to follow the tried-and-tested recipe to mitigate their exposure to fraud and financial crime by regularly performing fraud risk assessments, reinforcing existing controls - such as the investigation of whistleblower complaints - and adopting policies and protocols to detect and prevent fraud during the pandemic and beyond.

Krevania Pillay and Tim Fletcher, in collaboration with Kroll Inc.

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The debate on the meaning of section 129's "*initiated*" continues

The court had to decide whether Pan African's actions, in passing the resolution of 27 March 2020, fulfilled the section 129(2)(a) requirement of "*initiated*".

Section 129(2)(a) of the Companies Act 71 of 2008 (Companies Act) prohibits a company from voluntarily placing itself under business rescue supervision if liquidation proceedings have already been "*initiated by or against the company*". There has been some controversy over the meaning of "*initiated*".

Pan African Shopfitters (Pty) Limited v Edcon Limited and Others (10652/2020) [2020] ZAGPJHC 158 (10 July 2020) is the most recent judgment contributing to the ongoing debate.

The facts of the *Pan African* case

On 26 March 2020 Edcon Limited informed its suppliers that it only had sufficient liquidity to pay salaries, and could not otherwise honour its operating costs. After receiving this news, Pan African Shopfitters (Pty) Limited – a long-time supplier to Edcon – sought to launch liquidation proceedings. Due to the impending Level 5 lockdown beginning at midnight of 26 March 2020, Pan African was unable to launch the application until 4 May 2020. It did, however, adopt a resolution on 27 March 2020 resolving to apply for the liquidation of Edcon "*as soon as practically possible*".

On 28 April 2020, the Edcon board, unaware of Pan African's intentions, passed a resolution in terms of section 129(1) to place Edcon under business rescue supervision. Having lodged with resolution with CIPC, Edcon was accordingly placed in business rescue on 29 April 2020, and rescue practitioners were duly appointed.

Consequently, in addition to its liquidation application, Pan African launched an urgent application on 18 May 2020, seeking a declaratory order invalidating the Edcon resolution and setting-aside the business rescue proceedings.

The crux of the debate

Pan African argued that, by passing the resolution to liquidate Edcon, it had already initiated liquidation proceedings on 27 March 2020. Edcon's board was thus, according to Pan African, prohibited from passing its business rescue resolution on 28 April 2020.

The court had to decide whether Pan African's actions, in passing the resolution of 27 March 2020, fulfilled the section 129(2)(a) requirement of "*initiated*". In arriving at its decision, the court analysed two previous High Court cases dealing with the issue, discussed below, and stressed longstanding principles of statutory interpretation, being '*...an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production...*".

The *Mouton* judgment

On 21 June 2019, the Western Cape High Court delivered its judgment in *Mouton v Park 2000 Development 11 (Pty) Ltd and others* 2019 (6) SA 105 (WCC).

The debate on the meaning of section 129's "*initiated*" continues

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Meyer J, in the *Pan African* case, confirmed the conclusion reached in the *Tjeka* case: "*The liquidation proceedings contemplated in section 129(2)(a) must be issued and served on the company to meet the requirements of the section*".

The *Mouton* judgment supported Pan African's contention that a mere resolution to launch liquidation proceedings could meet the section 129(2)(a) requirement of "*initiated*".

In *Mouton*, Sher J found that "*it cannot be a linguistic accident that the legislature chose to use the word 'initiated' rather than either the word 'commenced'*", the latter of which is used in section 131(6), and found that, "'*initiated' in section 129(2)(a) is...intended to refer to a preceding act or conduct by which liquidation proceedings are set in motion and is not intended to signify the moment in time when the proceedings are deemed to have formally 'commenced'*".

Tjeka judgment

A little over a month later, on 23 July 2019, the Gauteng High Court took the opposite view in *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and others* 2019 (6) SA 185 (GJ).

In *Tjeka*, a creditor issued a liquidation application, but only served it on the company after its directors, unaware of the liquidation application, filed a resolution to begin business rescue proceedings. In other words, although the liquidation application was issued before the passing of the section 129(2) resolution, it was only served on the company after the resolution was passed. The question then became whether the issuing of the application constituted the "*initiation*" of liquidation.

In reaching his conclusion Sutherland J emphasised that "*a word can never be interpreted on its own, because it exists only as part of a greater whole ... it is the work that the phrase or sentence performs in the context of the whole that must be examined.*" One therefore needed to contextualise the meaning of the word "*initiated*" within the framework of Chapter 6 of the Companies Act – dedicated solely to business recue – as well as within section 129 itself. In applying this, Sutherland J concluded that the company needed to be aware of the application before the section 129(2) prohibition could be applied. In this instance, the application had to be served on the company, "*not merely issued* ".

Returning to the *Pan African* case

Meyer J, in the *Pan African* case, confirmed the conclusion reached in the *Tjeka* case: "*The liquidation proceedings contemplated in s 129(2)(a) must be issued and served on the company to meet the requirements of the section*". He affirmed that to understand the true meaning of the word, section 129(2)(a) "*must be read as a whole*".

The prohibition of section 129(2)(a) is meant to stop a board from resolving to voluntarily begin business rescue proceedings when liquidation proceedings have been initiated. This implies there must be an awareness by the board of the liquidation proceedings. With that in mind,

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The debate on the meaning of section 129's "*initiated*" continues

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Until a final decision is made by our higher courts, third parties seeking to liquidate a company should ensure that their application is issued and served as a matter of urgency.

Meyer J found that it would be absurd to interpret section 129(2)(2) to mean that company A, in adopting a resolution to liquidate company B, prohibited company B from adopting a resolution to begin business rescue proceedings, especially when the board of company B was not aware of the liquidation resolution – *"[s]uch meaning militates against logic, leads to an insensible or unbusinesslike result, and undermines the purpose of the section"*.

Meyer J therefore dismissed the Pan African's urgent declarator application, as well as its liquidation application.

Comment

This is unlikely to be the end of the debate. The final word will no doubt have to come from the Supreme Court of Appeal, if not the Constitutional Court. With that in mind, until a final decision is made by our higher courts, third parties seeking to liquidate a company should ensure that their application is issued and served as a matter of urgency.

Belinda Scriba

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