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DISPUTE RESOLUTION **ALERT**

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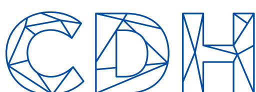

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Fish cannot sometimes be fowl: Part 1

A court is obliged by law to hear any matter that falls within its jurisdiction and has no power to decline to hear such a matter on the grounds that another court has concurrent jurisdiction to hear it.

In a previous alert titled *"Courts grappling with their own jurisdiction"*, we reported on an issue that was awaiting the attention of the Supreme Court of Appeal (SCA). The issue was broadly whether the High Court could refuse to entertain a matter that fell within the jurisdiction of the Magistrate's Court. On 25 June 2021 the SCA, in a judgment criticising the courts *a quo*, in the cases of *The Standard Bank of SA Ltd and Others v Thobejane and Others* (38/2019 & 47/2019) and *The Standard Bank of SA Ltd v Gqirana N.O and another* (999/2019) [2021] ZASCA 92 (25 June 2021), ruled that a court is obliged by law to hear any matter that falls within its jurisdiction and has no power to decline to hear such a matter on the grounds that another court has concurrent jurisdiction to hear it.

It is heartening to read the SCA judgment and to know that it will not tolerate judgments from lower courts that are simply wrong in law. The SCA judgment was delivered by Acting Judge of Appeal Sutherland, who has now been appointed as the Deputy Judge President of the Gauteng Local Division of the High Court.

This alert deals with the High Court of South Africa, Gauteng Division, Pretoria's judgment that was overturned on appeal. The High Court's initial judgment included a view that matters which fall within the jurisdictions of both the Magistrate's Court and the High Court, were clogging up the High Court rolls.

The High Court was also of the view that, in the cases in question, impecunious debtors were being prejudiced because should they wish to oppose a claim, they would have to travel to a High Court when a Magistrate's Court was supposedly closer by and more convenient to attend. It also held that, should a debtor wish to resist a claim, legal costs in a Magistrate's Court would be less than in the High Court.

The High Court went so far as to say that the fact that banks were instituting these types of claims in the High Court was an abuse of process. The High Court sought assistance from several friends of the court – the South African Human Rights Commission (SAHRC), and the Department of Justice – but it would seem that these friends of the court were less than helpful as they did not approach any debtors or, if they were approached, no debtors came forward.

The High Court took it upon itself to provide some statistics relating to the workload faced by the High Court, which the appellant banks saw for the first time in the court's judgment. One friend of the court, the SAHRC, made some allegations in its affidavit, but these were described by the SCA as "*broad, sweeping generalisations, and not facts*". These friends of the court "*were driven to present arguments on the basis of speculative extrapolations from moral sensibilities rather than from established fact*".

Fish cannot sometimes be fowl: Part 1*...continued*

The High Court judgment left much to be desired as it was premised on factual findings with no proper evidential basis and the court had resorted to generalised and speculative conclusions.

'No proper evidential basis'

The SCA stated that in neither of the courts of first instance were material facts adduced to substantiate the arguments that were presented. The factual averments about the clogging up of the rolls upon which the High Court relied to reach its conclusions, were ventilated in the judgment and the appellant banks were not given the opportunity in the hearing to address these averments. Not one of the matters was defended, and not one of the many defendants participated in the process at all. The SCA lamented that the primary premise for the conclusions reached in the courts of first instance was the notion that by an appeal to "*constitutional values*" the plight of impecunious litigants could be alleviated.

In recognising the importance of the issues raised in the two judgments, the SCA pointed out that these issues implicate policy considerations which quite obviously do not fall within the domain of the High Court but belong within the prerogative of Parliament.

However, the SCA explained that the High Court judgment left much to be desired as it was premised on factual findings with no proper evidential basis and the court had resorted to generalised and speculative conclusions with no proper evidential foundation. Further, the SCA averred that the High Court had indefensibly ignored or rejected the only evidence before it.

The SCA analysed various sections of the Constitution, the Supreme Court Act 10 of 2013, the Magistrate's Court Act 32 of 1944, the Uniform Rules of Court and some of its own previous judgments in order to formulate its well-reasoned judgment. Its ruling found that litigants may institute matters within the High Court's territorial jurisdiction notwithstanding the fact that they fall within the jurisdiction of the Magistrate's Court, without a prior application to do so.

Eugene Bester and Nomlayo Mabhena

CONSTRUCTION

Prompt payment regulations: Is it time to revisit the past?

The South Africa construction industry is under severe financial pressure, which has impacted the cash flow on projects.

The saying that "*cash is king*" can be applied to many industries, but nowhere does it find greater application than in the construction industry.

In the construction sector, cash flow and the flow of money down the project hierarchy, from an employer to contractors and then on to subcontractors, is vital to the success of any project. In the absence of adequate or effective cash flow, projects stall, contractors and subcontractors are placed under financial pressure and, ultimately, the timeous completion and overall satisfactory achievement of project milestones, including the contracting relationships, are negatively affected.

As has been the case for many years, the South Africa construction industry is under severe financial pressure, which has impacted the cash flow on projects. These cash flow issues have been exacerbated due the ongoing COVID-19 pandemic and have resulted in employers resorting to withholding payments that are due to contractors. There has also been a continued reliance on *"pay when paid"* provisions, which has left many subcontractors without any recourse when seeking payment for the work which they have performed.

This has brought the need to regulate contractual payment regimes in South African construction contracts back into the spotlight.

Alternative payment regimes

In jurisdictions such as the UK and Australia, legislation, such as the Housing Grants Construction and Regeneration Act 1996 and the NSW Building and Construction Industry Security of Payment Act 1999, were enacted to regulate payment regimes under construction contracts, with the ultimate goal of ensuring sustainable cash flow. While the mechanisms provided for in the aforementioned legislation differ slightly, they both have two main objectives:

1. To establish payment practices that are predictable, transparent and regulated, thus ensuring that any party that contracts to carry out construction work or supply related goods or services on construction projects, promptly receives and recovers all payments which are due to it.
2. In the event that there is a dispute relating to a payment, to provide for a quick, inexpensive and statutorily prescribed adjudication procedure to resolve such disputes.

Crucially, these legislations also provide for a prohibition on the *"pay when paid"* or conditional payment provisions which are common in the South African construction industry.

Prompt Payment Regulations

The concepts around regulated payments are not new in South Africa. In May 2015, the Minister of Public Works issued a notice of the ministry's intention to amend the Construction Industry Development Regulations of 2004 (as amended) published under the Construction Industry Board Act 38 of 2000. This amendment proposed the enactment of "*Prompt Payment Regulations*" similar to those in the jurisdictions outlined above.

CONSTRUCTION

Prompt payment regulations: Is it time to revisit the past?*...continued*

With the focus shifting towards these infrastructure projects to revive the South African economy, it could be argued that now is an opportune time to revisit the Prompt Payment Regulations.

The Prompt Payment Regulations were viewed as a breath of fresh air and a revolutionary option for the industry as they ultimately sought to:

- prohibit conditional or *"pay when paid"* clauses in contracts;
- prohibit the withholding of payment and requiring regular progress payments within defined time frames;
- introduce the right to suspend construction activities or performance for non-payment;
- introduce the right to charge interest on late payments; and
- introduce a mandatory statutory form of adjudication for resolving payment disputes.

Despite the Prompt Payment Regulations being regarded by many as a step in the right direction, in October 2017 in response to a question in the National Assembly, the minister confirmed that the draft Prompt Payment Regulations had been withdrawn, seemingly on the grounds that the they had *"received the legal opinion from the Office of the Chief State Law Advisor which emphasised that the regulations were ultra vires and if challenged would not pass the constitutional validity threshold"*.

Since the confirmation of the withdrawal of the draft Prompt Payment Regulations, it does not appear that any further steps have been taken towards amending such regulations to address the issues raised in the legal opinion. The draft regulations and the ground-breaking ideas which they represent have seemingly been indefinitely mothballed.

Large infrastructure project opportunities

The past year has seen the South African Government pledge more to infrastructure projects and identify high priority road, rail and energy projects to be completed over the next 10 years. With the focus shifting towards these infrastructure projects to revive the South African economy, it could be argued that now is an opportune time to revisit the Prompt Payment Regulations.

The adoption of these regulations would ensure that smaller contractors, who rely on timeous payments to stay afloat, are presented with the best opportunity for survival. The survival of these smaller contractors is essential for job creation in South Africa and for economic growth.

Further, while many standard form construction contracts, such as the JBCC and NEC, provide for dispute resolution mechanisms, it is common practice in the industry to allow disputes to accumulate and to thereafter have a large, costly adjudication or arbitration at the end of a project. The imposition of a mandatory statutory form of adjudication for resolving payment disputes will allow for disputes to be dealt with as and when they arise, thus ensuring that contractors are compensated fairly and timeously throughout the life of a project.

CONSTRUCTION

Prompt payment regulations: Is it time to revisit the past?...*continued*

The Prompt Payment Regulations provide the best solution for the creation and preservation of a sustainable construction industry in South Africa.

Despite the need for interventions to ensure that the payment practices in South Africa align with international best practice, the success of the regime proposed under the Prompt Payment Regulations is questionable, in particular on state-funded infrastructure projects where cash strapped state-owned entities, municipalities and departments may simply be unable to comply with their payment obligations. Accordingly, any regulations would need to have regard to the present-day realities and the various treasury and procurement regulations.

The Prompt Payment Regulations provide the best solution for the creation and preservation of a sustainable construction industry in South Africa. While the formulation and implementation of these regulations could be problematic, especially where the state is involved, the benefits which could be achieved through the enactment of such regulations far outweigh any potentially detrimental effects. The time is therefore right for the regulations to be revisited, failing which, South Africa could fall behind its counterparts around the world.

Danika Balusik and Kyle Bowles

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What should companies bear in mind when selling off assets?

If what is being sold is part of the core business of the seller, then the seller is a trader and must publish the notice.

There is no doubt that the current economic climate has led to companies becoming financially distressed and on the brink of insolvency. On the flip side, this may present an opportunity for the purchase and sale of property as companies sell non-core assets to generate working capital to weather the economic storm. But, what if the sale and transfer of the asset is subsequently declared void because the seller did not publish a notice of the sale and transfer of the asset?

Section 34 of the Insolvency Act requires, among other things, that a "trader" publish a notice of the transfer of property in the *Government Gazette* and newspapers – before the transfer takes place. This means that the seller must publish a notice about the sale and transfer of the asset before the asset is transferred to the purchaser. The idea behind the publication of the notice is to ensure that companies that are on the verge of insolvency do not covertly sell (or otherwise dispose of) their assets to the detriment of creditors.

Practically, the notice does not need to include every detail of the sale agreement, and the following minimum information may be included in the notice: who the seller is, who the purchaser is, a description and physical address of the asset, and that the transfer will be in terms of a sale agreement.

Failure to publish the notice will result in the transfer of the asset being void as against the seller's creditors for a period of six months from the date of transfer of the asset. Also, if the seller goes into liquidation within six months from the date of transfer, the transfer will be void as against the seller's liquidator. Effectively, it will be as if there was never a sale and transfer of the asset. This can have dire financial consequences for the purchaser and bondholder (if a bond was registered as security for a loan used to purchase the asset).

Only a 'trader' is required to publish the notice before selling and transferring its assets. Whether or not the seller of an asset is a trader depends on the facts. The principle is, if what is being sold is part of the core business of the seller, then the seller is a trader and must publish the notice. If what is being sold is 'incidental to' the business of the seller, then there is no need for the notice.

What should companies bear in mind when selling off assets?*...continued*

In *K2013046547/07 (South Africa) (Pty) Ltd v Hyde Construction CC* (Case no 513/2020) [2021] ZASCA 82 (17 June 2021), the seller sold and transferred a shopping centre to the purchaser. The purchase price was financed by a bank. A mortgage bond was registered over the property in favour of the bank. The seller did not publish the notice. A creditor of the seller's challenged the validity of the transfer of the shopping centre and registration of the bond, on the basis that the seller is a trader and ought to have published the notice.

The question was whether, at the time of transfer of the shopping centre, the core business of the seller was the buying and selling of immovable property. The court found that the seller's core business was not the purchase and sale of immovable property. The seller's core business was buying property as an investment and renting it out. Hence the sale of the shopping centre was incidental to the seller's business. Accordingly, the sale and transfer of the shopping centre were valid as there was no need for the notice to be published.

Lerothodi Mohale

2021 RESULTS

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.
Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Lucinde Rhoodie is recommended in Dispute Resolution in THE LEGAL 500 2021.
Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.
Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.
Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2021.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2021.
Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2021.
Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2021.
Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2021.

2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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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