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DISPUTE RESOLUTION
ALERT

Claiming compensation for not being awarded a tender?

Every other day in South Africa there is a news headline about tenders being awarded irregularly, unlawfully or through corruption and fraud by organs of state. This discussion will focus on the remedy that an aggrieved tenderer has in law for a tender that has been awarded through corruption and fraud. It must be noted that not all unlawful actions amount to fraud in our law.

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Justice delayed: A stain on the rainbow

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Ahmed Timol was murdered by the police on 27 October 1971. He was 29 years old.

Salem Essop was arrested with Timol on 22 October 1971 and interrogated by Security Branch policemen on the tenth floor of John Vorster Square in Johannesburg. Initially, Essop was repeatedly punched and slapped, but then alternating pairs of policemen suffocated him with a plastic bag, applied electric shocks to his tongue and legs, deprived him of sleep and forced him to sit in an imaginary chair or squat for long periods, giving mule kicks to his legs if he couldn't hold the position. If he fell unconscious, they revived him by urinating on him or throwing water over him. He was also held by his ankles 10 stories up, dangling in the void of a spiral staircase.

Essop saw Ahmed Timol one last time. He was being dragged by policemen with a hood over his head.

Two days later, Timol was pushed out of a window on the tenth floor – or off the roof – of John Vorster Square.

This evidence was given at the 2017 inquest in the Pretoria High Court which found that Ahmed Timol was murdered after having been tortured and brutalised by Security Branch police. This finding was in stark contrast to the 1972 inquest, which found that Timol's was a "*death by suicide*". In the 2017 inquest, High Court found that:

> *"Timol's death was brought about by an act of having been pushed from the tenth floor or roof of the John Vorster Square building to fall to the ground, such act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder. There is prima facie evidence implicating Gloy and Van Niekerk who were on duty and interrogating Timol at the time he was pushed to fall to his death. Rodrigues, on his own version, participated in the cover up to conceal the crime of murder as an accessary after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution."*

Rodrigues is former Security Branch police sergeant Joao Rodrigues, the star witness in the 1972 inquest who was then arrested on 30 July 2018, some 47 years after Timol's death and charged with murder. He applied to the High Court in Johannesburg for a permanent stay of the charges saying that the 47 year delay violated not only his constitutional right to a fair trial but more specifically his right to adduce evidence and to challenge the state's evidence. He was unsuccessful.

He appealed. The Supreme Court of Appeal in *Rodrigues v The National Director of Public Prosecutions and Others* ZASCA 87 (21 June 2021) analysed the delay by dividing the 47-year period into three chunks. The court excluded first the period until the end of apartheid as Rodrigues was shielded from prosecution by the finding of the 1972 inquest. Second was 1994 to 2002 when the Truth and Reconciliation Commission (TRC) was considering applications for amnesty from confessed perpetrators of apartheid-era political crimes. Rodrigues did not apply for amnesty and, as the court noted, "*those who did not apply for amnesty accepted the risk of future criminal prosecution*". The court said that "*to the extent that it [the TRC period] constituted a delay, [it] was a delay of the kind that was regarded as necessary and important to allow a new society to come to terms with its past*".

Justice delayed: A stain on the rainbow...*continued*

Twenty-seven years into our constitutional democracy there has been no justice for Ahmed Timol.

Then, in the third period from 2003 to 2017, the executive branch of government adopted a policy that apartheid-era crimes ventilated during the TRC process would not be prosecuted. The court described it as "*perplexing and inexplicable why such a stance was taken both in the light of the work and report of the TRC advocating a bold prosecutions policy, the guarantee of the prosecutorial independence of the NPA, its constitutional obligation to prosecute crimes and the interests of the victims and survivors of those crimes*".

On that analysis the court dismissed Rodrigues' appeal, finding that he hadn't shown any violation of his rights and noting that "*the Timol family have also been victims of this delay; they have waged what can only be described as a heroic struggle with dogged determination to bring the alleged perpetrators of these crimes to trial. The public interest demands that their efforts are not in vain.*"

Writing almost 1800 years ago, the Roman jurist Domitus Ulpian said that "*Justice is the constant and perpetual will to allot to every man his due.*" In the 19 years since the TRC completed its work, nothing has happened in more than 50 cases where terrible crimes were confessed but amnesty was denied. Twenty-seven years into our constitutional democracy there has been no justice for Ahmed Timol, no sign for him and many others of that constant and perpetual will described by Ulpian.

A few days after the decision of the Supreme Court of Appeal, the National Director of Public Prosecutions and the Hawks announced the establishment of a specialised unit to investigate and prosecute these apartheid crimes.

Do the families of the victims dare hope that justice will eventually be their due?

Tim Fletcher, Tim Smit and Lisa de Waal

Claiming compensation for not being awarded a tender?

It is clear from the provision that courts have the discretion to order compensation to be paid in exceptional circumstances.

Every other day in South Africa there is a news headline about tenders being awarded irregularly, unlawfully or through corruption and fraud by organs of state. This discussion will focus on the remedy that an aggrieved tenderer has in law for a tender that has been awarded through corruption and fraud. It must be noted that not all unlawful actions amount to fraud in our law.

The question is whether an aggrieved tenderer has a damages claim against the organ of state or public body that has awarded a tender fraudulently or through corruption. The answer to this question is not a simple *"yes"* or *"no"* as there are many factors that come into play. Section 6 of the Promotion of Administrative Action Act 3 of 2000 (Act) makes provision for instances when a person may institute proceedings in a court or tribunal for the review of an administrative action. There are remedies stipulated in section 8 of the Act that the court or tribunal may order in a judicial review.

Section 8(1)(c)(ii)bb) of the Act makes provision for a claim for compensation as follows: the court or tribunal, in proceedings for judicial review in terms of section 6(1) of the Act, may grant any order that is just and equitable, including orders setting aside an administrative action and, in exceptional cases, directing the administrator or any other party to the proceedings to pay compensation. It is clear from the provision that courts have the discretion to order compensation to be paid in exceptional circumstances, but what the provision does not define is what is meant by exceptional circumstances. The courts have indicated that what is meant by exceptional circumstances will depend on the facts of the case.

Ordinarily, a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt, correct or reverse an improper administrative function and to afford the prejudiced party administrative justice, to advance efficient and effective public administration.

The Supreme Court of Appeal in *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* [2005] (1) SA 299 (SCA) and *Minister of Finance and Others v Gore N.O* [2007] (1) SA 111 (SCA) dealt with disappointed tenderers claiming damages in instances where there was fraud in the awarding of tenders. In those cases, the appeal court was of the view that if, in the process of awarding a public tender, there was fraud or deliberate dishonest conduct then liability for it should follow in damages. The appeal court held in the Transnet case that the aggrieved tenderer was entitled to be placed in the position it would have been in if the tenderer had not been fraudulently deprived of the tender award.

It must be noted that not every aggrieved tenderer who submitted a tender bid that was ultimately awarded fraudulently will be entitled to compensation. Only the tenderer who can show that they would have won the tender but for the fraudulent conduct of the administrator may claim for damages.

In *Olitzki Property Holdings v State Tender Board and Another* [2001] (8) BCLR 779 (SCA) the aggrieved tenderer had complained of an irregular, unreasonable and arbitrary tender process and instituted a delictual claim for damages against the tender board, but no case was made to show that it would have been awarded the tender had there not been for the wrongful

Claiming compensation for not being awarded a tender?*...continued*

It is very important for aggrieved tenderers to consult with legal professionals if they suspect that the awarding of a tender was fraudulent in order to get advice on the remedies that may be available to them.

conduct by the administrator. Failure to make out a case that it would have been awarded the tender was fatal in this case and the claim for damages was dismissed.

In conclusion, the courts have shied away from defining or listing what is meant by the "*exceptional circumstances*" referred to in section 8(1)(c)(ii)(bb) of the Act, and have instead stated that the exceptional circumstances will be determined on a case-by-case basis. However, as shown in the Transnet case, it can be argued that fraud does qualify as an exceptional circumstance. As such, it is very important for aggrieved tenderers to consult with legal professionals if they suspect that the awarding of a tender was fraudulent in order to get advice on the remedies that may be available to them.

Lucinde Rhoodie and Muwanwa Ramanyimi

Mall owners and management companies need to be on their guard not to slip up

Spillage cases refer to instances where a floor becomes unsafe when something is accidentally spilt onto it.

Is it enough for a mall owner or management company to discharge its duty of taking responsibility of its shoppers by appointing an independent cleaning company in so-called "*spillage cases*"? And what constitutes a spillage? These questions and others were settled in our law until recently when the Western Cape High Court of Cape Town in the case of *Holtzhausen v Cenprop Real Estate (Pty) Ltd and Another* [2021] 2 All SA 457 (WCC) created some doubts on the legal position of an owner or manager of a shopping mall in "*spillage cases*". Spillage cases refer to instances where a floor becomes unsafe when something is accidentally spilt onto it. These cases then decide on who is responsible if an injury is sustained as a result of the spillage, and who should pay for the consequent medical costs.

In the Cenprop case, the plaintiff had instituted a legal action against the defendants (the management company and the mall owner). The plaintiff sustained injuries after she had taken a fall in the Goodwood mall, which is managed by the first defendant and owned by the second defendant, due to the fact that the floors of the mall were slippery. It was raining on the day of the incident and water was brought into the mall by its patrons, which made the floors slippery. The plaintiff had argued that the defendants were negligent in that they knew or ought to have known that the area on which the plaintiff had a taken a fall was slippery when it became wet and therefore should have taken steps to prevent injuries to patrons. The first defendant denied these allegations by pointing out that it had discharged its legal duty by appointing a competent and professional contractor (the second defendant) to maintain, clean and check the mall and ensure that the mall was kept clean and would not be a danger to patrons. In turn, the second defendant had acquired the services of a cleaning company and a security company to ensure that the mall was safe for its patrons.

Applicable law in regard to spillage cases

In the case of *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W), the court made it clear that the owner or the entity in control of a shopping mall has a legal duty to take reasonable steps to ensure that the mall is reasonably safe for its patrons. Such a person or entity could be held liable where steps are not taken to ensure the safety of its patrons. The court further held that, although the owners or management of a mall may obtain the services of a cleaning company, the former still remains liable for any negligent failure on the part of the cleaning company to perform its duties with due care and in the event of a failure of its cleaning system.

Furthermore, in the case of *Chartaprops 16 (Pty) Ltd and Another v Silberman* [2009] (1) SA 265 (SCA), the Supreme Court of Appeal held and confirmed that a mall owner could conceivably be held liable for the wrongs committed by an independent contractor if the owner negligently failed to take reasonable steps to prevent the risk of harm. In this case, the mall owner had acquired the services of a cleaning company and the owner had no knowledge of the services of the cleaning company being defective. The court held that the mall owner had taken all steps a reasonable person would have taken to ensure that the mall was safe for its patrons.

Mall owners and management companies need to be on their guard not to slip up...*continued*

The Appeal court came to the conclusion that this case did not fall within the ambit of so-called spillage cases as the rainwater brought into the mall by its patrons could not be considered a spillage.

Thus, considering the above cases, the owner or person or entity in control of a mall would only be liable for harm or danger which was foreseeable to the hypothetical reasonable man in its position, and is obliged to take no more than reasonable steps to guard against such harm occurring.

Court *a quo*

The court *a quo* in the Cenprop case held that the mall owner was exempt from liability as he had appointed a duly qualified management company to attend to the daily running and maintenance of the mall. In turn, the management company had appointed a competent cleaning contractor to keep the premises clean and free of spillages and, in addition, security guards were placed to be on the lookout for potential harm and to call the cleaners if they were needed. Therefore, the court was of the opinion that the first and second defendant had done all they could reasonably be expected to do.

The court further held that if any party had to be held accountable for the injuries sustained by the plaintiff, it would be the cleaning company as it bore the ultimate responsibility of ensuring that the mall was safe for its patrons.

Appeal court

The court *a quo's* judgment was taken on appeal to the full bench of the Western Cape High Court (Appeal court), which overturned the finding of the court *a quo*. First of all, the Appeal court held that the court *a quo* erred in holding that the cleaning company bore the ultimate responsibility. The Appeal court, while referring to case law, made it clear that the mall owner or a person or entity who may be in control of the mall, bears the ultimate responsibility of taking reasonable steps to safeguard patrons to a mall and to ensure that the floors are safe.

Spillage cases refer to instances where a floor which would in the ordinary course of normal everyday use be safe, becomes unsafe when something is accidentally spilt onto it. The Appeal court came to the conclusion that this case did not fall within the ambit of so-called spillage cases as the rainwater brought into the mall by its patrons could not be considered a spillage and, secondly, the type of tile that was used on the floor was slippery when wet, and such risk could not be passed on to the cleaning company. Therefore, the Appeal court did not have to decide whether the cleaning company had an efficient cleaning system in place or whether its failure to mop up the water created liability for the cleaning company.

The Appeal court found that the defendants were negligent because they had failed to take reasonable steps to ensure that the floors remained safe for its patrons when it rained. The Appeal court pointed out that the defendants could have contracted the cleaning company to dry the sections of the floor that became wet when it rained, or could have closed the entrances that were exposed to the rain, but because such steps were not taken, the fault could only lie with the defendants.

This case clearly points out that that even where a mall owner or management company employs the services of a cleaning company to attend to spillages and the like, the former bears the ultimate responsibility of ensuring the mall is safe for its patrons, be it in spillage cases or otherwise.

Mall owners and management companies need to be extra cautious in protecting patrons so as to avoid liability for patrons falling and injuring themselves when frequenting a mall.

Burton Meyer and Muzammil Ahmed

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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.

TOP RANKED Chambers Global 2021

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, 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

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

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Clive Rumsey
Director
T +27 (0)11 562 1924
E clive.rumsey@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

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

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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.

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

NAIROBI
CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA