

9 MAY 2023

# Dispute Resolution ALERT

## IN THIS ISSUE

### Arbitration: Careful drafting applies as much to the arbitration agreement as to the pleadings

An agreement to arbitrate a specific issue will generally describe both the issue the arbitrator is required to decide and the arbitrator's powers. The arbitrator has no power beyond the agreed terms of reference. The parties will then usually set out their respective claims or defences in documents referred to as pleadings. Unless the terms of reference are broad, for example allowing the arbitrator to decide whatever issues arise from the pleadings, the arbitrator may be restricted by what is in the terms of reference. Even if the terms of reference are broadly to deal with any dispute that arises on the pleadings, anything not "*on the papers*" would seem to be excluded.



FOR MORE  
INSIGHT INTO  
OUR EXPERTISE  
AND SERVICES



INCORPORATING  
**KIETI LAW LLP, KENYA**

## Arbitration: Careful drafting applies as much to the arbitration agreement as to the pleadings

An agreement to arbitrate a specific issue will generally describe both the issue the arbitrator is required to decide and the arbitrator's powers. The arbitrator has no power beyond the agreed terms of reference. The parties will then usually set out their respective claims or defences in documents referred to as pleadings. Unless the terms of reference are broad, for example allowing the arbitrator to decide whatever issues arise from the pleadings, the arbitrator may be restricted by what is in the terms of reference. Even if the terms of reference are broadly to deal with any dispute that arises on the pleadings, anything not "on the papers" would seem to be excluded.

The recent matter of *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another* (286/2022) [2023] ZASCA 43 concerned the arbitrator's ability to entertain a defence not pleaded.

In the arbitration, Close-Up failed to plead that the Lutzkie Group had repudiated the agreements from which the disputes arose. The arbitrator held that the defence was not pleaded and therefore exceeded the scope of his jurisdiction. Close-Up took the arbitrator's award on review claiming that he had "committed a gross irregularity" in the arbitration. The High Court held that because the defence had not been raised in the pleadings, the arbitrator correctly declined to entertain it.

Close-Up appealed to the Supreme Court of Appeal saying that the defence of repudiation had been raised in its heads of argument before the arbitrator and that he had a discretion whether or not to consider that defence. While heads of argument summarise the main

arguments, they are not pleadings. The court found that parties to an arbitration agreement are free to provide the arbitrator with a discretion to entertain claims or defences not included in the pleadings, but in this case the parties had not done so. Close-Up then looked to the Rules of the Arbitration Foundation of Southern Africa for help, specifically Article 11.1 which, it argued, gives an arbitrator wide discretion to determine disputes raised in the proceedings and makes no reference specifically to disputes raised in pleadings.

The court then considered what it means for a dispute to have been raised in the proceedings, noting that in terms of the Arbitration Foundation Rules, disputes falling outside of the scope of the pleadings can be raised in the proceedings, and the arbitrator is empowered to decide issues in the proceedings. But the court nevertheless found that arbitrators don't have the same power as courts and are limited by the arbitration agreement. The agreement in this



Cliffe Dekker Hofmeyr

### 2023 RESULTS

**Chambers Global 2022 - 2023** ranked our Dispute Resolution practice in Band 2: Dispute Resolution.

**Chambers Global 2018-2023** ranked us in Band 2 for Restructuring/Insolvency.

**Tim Fletcher** ranked by **Chambers Global 2022 - 2023** in Band 2: Dispute Resolution.

**Clive Rumsey** ranked by **Chambers Global 2019 - 2023** in Band 4: Dispute Resolution.

**Tobie Jordaan** ranked by **Chambers Global 2022 - 2023** in Band 4: Restructuring/Insolvency.

**Lucinde Rhoodie** ranked by **Chambers Global 2023** in Band 4: Dispute Resolution

**Jackwell Feris** ranked by **Chambers Global 2023** as an upcoming dispute resolution lawyer.

**Kylene Weyers** ranked by **Chambers Global 2023** as an upcoming restructuring/insolvency lawyer.

## Arbitration: Careful drafting applies as much to the arbitration agreement as to the pleadings

CONTINUED

case did not include a discretion to entertain disputes outside the scope of the pleadings and the review was dismissed.

There is an obvious lesson here – that parties should carefully plead all of the available claims, or alternatively all of the available defences. But equally important is taking care in crafting the reference to the arbitrator. It is so important to take time to consider what should be available for the arbitrator to decide, or even to take

into account, and then to record that clearly and comprehensively in the arbitration agreement. Imagine how mortifying it must have been for Close-Up to identify the issue of repudiation, pivotal in the dispute, only to have it drift out of reach because it hadn't been pleaded and was then excluded by the terms of the arbitration agreement.

**Tim Fletcher and Lisa de Waal**

The  
**LEGAL  
500**

EMEA

**2022  
RESULTS**

The Legal 500 EMEA 2022 recommended our **Dispute Resolution practice** in **Tier 1** for dispute resolution.

The Legal 500 EMEA 2022 recommended **Tim Fletcher** as a leading individual for dispute resolution.

The Legal 500 EMEA 2022 recommended **Kgosi Nkaiseng** and **Tim Smit** as next generation lawyers for dispute resolution.

The Legal 500 EMEA 2022 recommended **Rishaban Moodley, Jonathan Witts-Hewinson, Lucinde Rhodie, Clive Rumsey, Desmond Odhiambo, Mongezi Mpahlwa, Corné Lewis, Jackwell Feris** and **Kylene Weyers** for dispute resolution.

## OUR TEAM

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



### Rishaban Moodley

Practice Head & Director:  
Dispute Resolution  
Sector Head:  
Gambling & Regulatory Compliance  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com



### Tim Fletcher

Chairperson  
Director: Dispute Resolution  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com

### Timothy Baker

Director:  
Dispute Resolution  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

### Eugene Bester

Director:  
Dispute Resolution  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

### Neha Dhana

Director:  
Dispute Resolution  
T +27 (0)11 562 1267  
E neha.dhana@cdhlegal.com

### Claudette Dutilleux

Director:  
Dispute Resolution  
T +27 (0)11 562 1073  
E claudette.dutilleux@cdhlegal.com

### Jackwell Feris

Sector Head:  
Industrials, Manufacturing & Trade  
Director: Dispute Resolution  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

### Thabile Fuhrmann

Joint Sector Head:  
Government & State-Owned Entities  
Director: Dispute Resolution  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

### Anja Hofmeyr

Director:  
Dispute Resolution  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

### Tendai Jangara

Director:  
Dispute Resolution  
T +27 (0)11 562 1136  
E tendai.jangara@cdhlegal.com

### Tiffany Jegels

Director:  
Dispute Resolution  
T +27 (0)11 562 1388  
E tiffany.jegels@cdhlegal.com

### Tobie Jordaan

Sector Head:  
Business Rescue, Restructuring & Insolvency  
Director: Dispute Resolution  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

### Corné Lewis

Director:  
Dispute Resolution  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

### Vincent Manko

Director:  
Dispute Resolution  
T +27 (0)11 562 1660  
E vincent.manko@cdhlegal.com

### Richard Marcus

Director:  
Dispute Resolution  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

### Burton Meyer

Director:  
Dispute Resolution  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

### Mongezi Mpahlwa

Director:  
Dispute Resolution  
T +27 (0)11 562 1476  
E mongezi.mpahlwa@cdhlegal.com

### Kgosi Nkaiseng

Director:  
Dispute Resolution  
T +27 (0)11 562 1864  
E kgosi.nkaiseng@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:  
Dispute Resolution  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

### Clive Rumsey

Sector Head: Construction & Engineering  
Director: Dispute Resolution  
T +27 (0)11 562 1924  
E clive.rumsey@cdhlegal.com

### Belinda Scriba

Director:  
Dispute Resolution  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

### Tim Smit

Director:  
Dispute Resolution  
T +27 (0)11 562 1085  
E tim.smit@cdhlegal.com

### Roxanne Webster

Director:  
Dispute Resolution  
T +27 (0)11 562 1867  
E roxanne.webster@cdhlegal.com

### Kylene Weyers

Director:  
Dispute Resolution  
T +27 (0)11 562 1118  
E kylene.weyers@cdhlegal.com

### Joe Whittle

Director:  
Dispute Resolution  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

### Roy Barendse

Executive Consultant:  
Dispute Resolution  
T +27 (0)21 405 6177  
E roy.barendse@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.

#### **PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

#### **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](mailto: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](mailto:ctn@cdhlegal.com)

#### **NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

#### **STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdh Stellenbosch@cdhlegal.com](mailto:cdh Stellenbosch@cdhlegal.com)

©2023 12273/MAY