Dispute Resolution

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CDH INCORPORATED

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SOUTH AFRICA

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Considering applications for special leave to appeal

Section 17(3) of the Superior Courts Act 10 of 2013, read with section 16(1)(b), allows for persons dissatisfied with a decision of a full bench, to appeal the decision to the Supreme Court of Appeal (SCA).

To do so, the dissatisfied party must not only show the existence of reasonable prospects of success, but also the existence of special circumstances that merit a further appeal. Special circumstances may include a substantial point of law, a matter of great public importance, or instances where refusal of leave would likely result in a manifest denial of justice, the list is not closed.

In the recent case of *68 Wolmarans Street Johannesburg (Pty) Ltd and Others v Tufh Limited* (1263/2022) [2024] ZASCA 48 (15 April 2024), the SCA dismissed such an application for special leave to appeal against a judgment and order of the Gauteng Division of the High Court, Johannesburg on the basis that the applicants failed to prove the existence of reasonable prospects of success, let alone the existence of any special circumstances that would justify special leave to appeal being granted. So, what went wrong?

Background

The matter involved a written loan agreement concluded between 68 Wolmarans Street Johannesburg (Pty) Ltd (Wolmarans) and Tufh Limited (Tufh) in terms of which Tufh lent and advanced to Wolmarans money for the purchasing and refurbishing of a block of residential units in Hillbrow, Johannesburg. A material term of the agreement was that Wolmarans, in addition to paying a monthly instalment due to Tufh in terms of the agreement, would also promptly pay, to the City of Johannesburg (CoJ), all municipal charges relating to property taxes, water, electricity and other services that were rendered to the property, on the relevant due date and would provide Tufh with proof of such payment together with certified copies of the municipal statements. In the event of default by Wolmarans, the parties agreed that Tufh would be entitled to accelerate and declare the entire principal amount outstanding and immediately due and payable.

While Wolmarans paid its monthly instalments in terms of the loan agreement, a dispute arose between Wolmarans and Tufh in terms of which Tufh alleged that Wolmarans breached specific terms of the loan agreement by failing to pay amounts due to the CoJ as per the loan agreement. This, according to Tufh, placed its security in and to the property at risk, which security was provided to Tufh in the form of unlimited suretyship agreements by the second and third applicants.

In response to the allegations by Tufh, Wolmarans submitted that there was an ongoing dispute between it and the CoJ about the way the CoJ was billing Wolmarans for the municipal services rendered. According to Wolmarans, the accounts received from the CoJ contained patent errors which, despite demand and continuing negotiations, were not rectified. Tufh's response to this was that the billing query between Wolmarans and the CoJ was related to water and electricity and there appeared to be no dispute about the rates, refuse, sanitation and other charges levied by the CoJ to the property which according to Tufh, Wolmarans was obliged to pay to the CoJ on the due date. For this reason, Tufh was of the view that Wolmarans remained in breach of the loan agreement.

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This dispute between the parties resulted in an application being brought by Tufh against Wolmarans in the Gauteng Division of the High Court, Johannesburg, in which Tufh sought, as its primary relief, payment of the sum of R4,897,004.22 together with interest and costs as well as the foreclosure of a mortgage bond executed by Wolmarans in favour of Tufh. The application came before Senyatsi J, who dismissed the application with costs. Tufh then applied for and was granted leave to appeal the judgment of the court of first instance to the full court of the Gauteng Division of the High Court, Johannesburg. The full court, which consisted of Matojane, Molahlehi and Strydom JJ, upheld the appeal, set aside the judgment and order of the court of first instance, and essentially substituted it with the order sought by Tufh.

Application for special leave to appeal

On 5 December 2022, unhappy with the finding of the full court, Wolmarans applied for special leave to appeal the judgment and order.

Counsel for Wolmarans conceded that there was a breach of the loan agreement by Wolmarans. He further submitted, however, that there were reasonable prospects of success in the appeal and that leave should be granted. On the issue of "*special circumstances*" which embodied the test for special leave, counsel for Wolmarans indicated that he would address three aspects only which, according to him, went to the merits of the matter. The first was that Wolmarans was engaged in a *bona fide* dispute with the CoJ about the municipal charges levied against the property. The second was that Tufh's security was not in any way at risk as it still held suretyships by Mr Faber (the sole director and shareholder of Wolmarans) and the second respondent, and the third was that any risk to Tufh's security was caused by Tufh itself when it elected to accelerate and declare all amounts owing in terms of the loan agreement, immediately due and payable. Further, it was submitted that Wolmarans was not attacking any of the relevant clauses in the loan agreement or the agreement per se as being unconscionable and contrary to public policy, but rather the implementation thereof.

In respect of the first aspect raised by Wolmarans, the SCA held the view that it could not be found that Wolmarans' dispute with the CoJ was *bona fide*. The reasoning given was that while Wolmarans admitted that its dispute with the CoJ was limited to electricity and water charges, it nonetheless unreasonably, unlawfully, and inexplicably withheld payments for all municipal services and charges namely, electricity, water, sanitation, property rates, taxes and refuse. According to the SCA, Wolmarans had exploited the billing crisis which plagued the CoJ at the time and confirmed that the full court had come to the correct finding that there was no merit in the submission by Wolmarans that no amounts were due to the CoJ.

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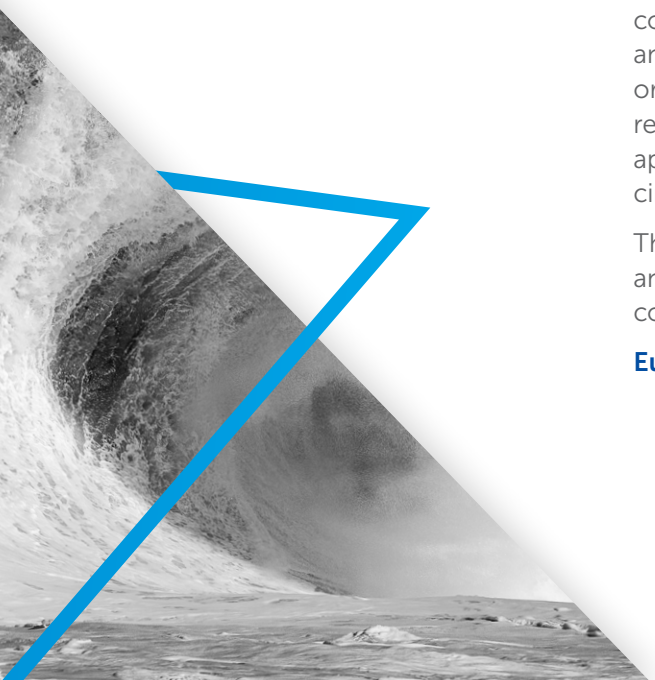
In respect of the second aspect raised by Wolmarans, the SCA found that Tufh made a request for other security from the second applicant, which was refused, and this refusal constituted a further breach of the loan agreement, which prompted Tufh to institute a further application in the High Court. There was therefore only one existing suretyship and thus Wolmarans' contention that Tufh had sufficient security in the form of two suretyships was without merit.

In respect of the third aspect raised by Wolmarans, the SCA found this to be fallacious. In its opinion, Tufh was merely implementing the terms of the loan agreement so as to ensure that its security in and to the property was not jeopardised in any way. The SCA was of the view that it could not therefore be said that the full court was incorrect when it found that Wolmarans failed to discharge the onus to show that the enforcement of the relevant clauses would be unconscionable and contrary to public policy.

The SCA went on to contend that a party seeking to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term. In this matter, the applicants were unable to show how the implementation of the loan agreement would be unconscionable and contrary to public policy. After all, this was an agreement entered into freely and voluntarily. There was no suggestion that there was anything out of the ordinary or that they imposed any undue hardship on the applicants. For this reason, the SCA concluded that there were no reasonable prospects in any appeal challenging the findings of the full court, nor were there any special circumstances that would justify the granting of special leave to appeal.

This case serves to reiterate the principles surrounding special leave to appeal and the degree to which the SCA scrutinises the merits of each case when considering whether or not to grant an application for special leave to appeal.

Eugene Bester and Serisha Hariram



A new African order: key initiatives and trends transforming international arbitration in Africa

CDH, together with the Arbitration Foundation of Southern Africa (AFSA) and other local and international co-hosts, presented the inaugural Johannesburg Arbitration Week (JAW) earlier this month. The conference showcased Africa's increasing prominence in international arbitration, highlighting the continent's arbitration capabilities as well as key initiatives and trends shaping and transforming dispute resolution in Africa.

Those trends include a focus on capacity building and the Africanisation of arbitration, the shift in client preferences in favour of arbitration rather than court litigation and investor-state arbitration under the African Continental Free Trade Area (AfCFTA) Investment Protocol outlined here.

This article explores some additional initiatives and trends that have shaped and are shaping, the international arbitration landscape in Africa.

Conciliatory dispute settlement

Historically, many African cultures placed emphasis on conflict management strategies aimed at reconciliation and resolution with the objective of maintaining community stability and harmony. Conversely, the imposition of Western systems primarily focused on a more rigid and adversarial approach within a tightly enforced technical process.

Presently, Africa trades more externally than with itself, but under AfCFTA and other initiatives, intra-African trade and investment is growing rapidly. With that expansion and the 'opening up' of Africa (for example Kenya introducing visa-free travel in 2024) economic and cultural relationships between African countries will continue to develop.

To better protect these developing relationships a preference for more traditional and conciliatory dispute resolution mechanisms may emerge, avoiding overly adversarial and contentious proceedings. The 2022 SOAS Arbitration in Africa survey study found that 40% of respondents believed that mediation was the most appropriate forum to resolve intra-Africa disputes and noted a growth in referrals to mediation.

This approach is being actively encouraged in some jurisdictions. For example, Kenya has introduced court-annexed mediators accredited by the judiciary, the Ugandan constitution advocates the promotion of reconciliation between parties in the administration of justice and the East African Community (EAC) dispute settlement regulations provide for the management of disputes with the objective of amicable resolution via conciliation or mediation. Many African arbitration centres, such as AFSA and the Nairobi Centre for International Arbitration (NCIA), already publish their own mediation rules and there may be greater promotion and revision of such rules in the future.

The growth of intra-African trade and disputes could therefore serve as a catalyst for the reintroduction or expansion of more conciliatory conflict management strategies. This may bridge the gap between traditional approaches with international commercial practice in the creation of a new order.

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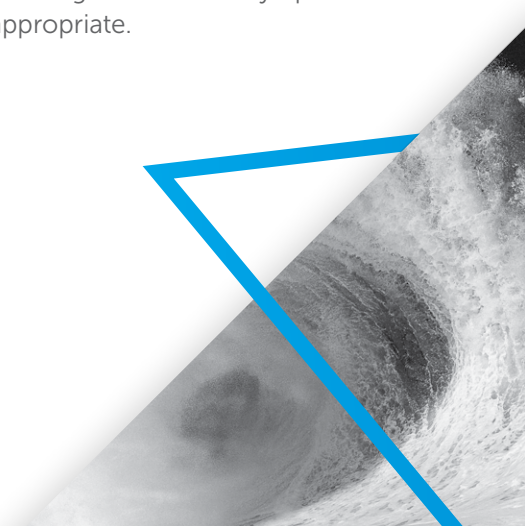
Standardisation

In a continent of 54 countries and diverse legal systems rooted in customary African law, Islamic law and European law, approaches between different African jurisdictions to international dispute can be inconsistent and incompatible. However, a trend towards greater standardisation of laws and procedures is expected to continue. For example:

- **BRICS:** Although only three African countries are BRICS members, the impact is significant as their economies are the second, third and sixth biggest in Africa (being Egypt, South Africa and Ethiopia respectively). The December 2023 Johannesburg Declaration confirms that BRICS countries will prioritise the creation of common rules based on the AFSA rules across the BRICS Dispute Resolution Network and proposes the creation of a specific institution to deal with BRICS investment disputes. This creation of a shared and standardised BRICS dispute resolution framework will impact BRICS' African members (for example changes to arbitration legislation may be proposed to achieve harmonisation with other BRICS entities), and may also impact non-BRICS countries that trade extensively with BRICS entities or have indicated a desire to join BRICS, such as Algeria, as they seek to demonstrate their ability and willingness to adhere to the BRICS framework.
- **Southern African Development Community (SADC):** The AFSA-SADC Alliance aims to promote and develop international arbitration practices and procedures in SADC countries, including to encourage members to standardise laws and rules to align with international conventions. For example, AFSA and the Malawi Law Society collaborated in making proposals for legislative reform, culminating in Malawi's 2023 International Arbitration Bill. This initiative may result in further legislative and procedural changes across the SADC region.
- **Organisation for the harmonisation of Business Law in Africa (OHADA):** The Uniform Act on Arbitration is directly applicable in all 17 OHADA member states, unifying the law on administering arbitral proceedings and the recognition and enforcement of arbitral awards. This has provided more consistency and standardisation, especially for OHADA countries that are not signatories to the New York Convention on enforcement of arbitral awards, such as Togo and Equatorial Guinea. With the growing popularity of arbitration in OHADA, there may be renewed focus and scrutiny on the applicable legislation and any updates or revisions that maybe appropriate.



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- **East African Community (EAC):** The EAC has established a Court of Justice with its own arbitration rules and a mandate to promote arbitration within the EAC. However, the conflicting legal approaches of Anglophone and Francophone members are arguably inhibiting the growth of commercial arbitration in the EAC. To address this there may be a trend towards harmonisation via legislative and procedural reform in the EAC.

Spotlight on corruption, fairness and integrity

Integrity in arbitration remains an important issue. This requires that the entire arbitral process, including the evidence put before the tribunal and the conduct of parties, their legal advisors, the arbitrators and the courts, should be free from improper influence, bias, and corrupt, fraudulent or inappropriate behaviour. The need to ensure the integrity of the arbitration and wider dispute resolution processes is under particular scrutiny for a variety of reasons including:

- High-profile instances of fraud or corruption tainting the arbitration process, like the example considered by CDH here. Allegations of fraud, corruption and illegality, whether substantiated or not, are generally more commonly made in emerging markets and so are of particular relevance in Africa. This is coupled with an increased focus on corruption, especially in countries facing upcoming elections where it remains a political hot-topic such as South Africa, Botswana, Namibia and Algeria.
- Calls for greater transparency and efforts to ensure arbitrators are independent and impartial, for example in 2023 the former International Chamber of Commerce (ICC) Court President Alexis Mourre called for urgent reform and a universal standard for the disclosures of potential conflicts of interest for arbitrators. Some recent high-profile cases have put arbitrator independence in the spotlight, such as the ICC upholding a challenge in 2023 against an arbitrator on the basis of anti-Muslim comments he had made.
- Concerns about the increasing use of technology and artificial intelligence (AI) in arbitrations in a manner that could undermine the integrity of the process. For example, evidence being compromised by forgeries or 'deepfakes' created through manipulations of AI. Technology could also be deployed in a manner that undermines due process, such as if there is an inequality of arms in terms of access to software, systems and technology that unfairly impacts a party's ability to present its case, especially in places with less reliable connectivity or less familiarity with particular software.

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A number of trends or consequences could result from the current scrutiny and discussions about integrity, such as:

- Arbitral institutions may develop more codified guidance or rules prescribing the conduct that is expected from participants in the process. For example, the London Court of International Arbitration's detailed Guidance Note for Parties and Arbitrators sets out best-practice including in relation to independence and impartiality, and the NCIA's Code of Conduct for Arbitrators sets out principles to achieve integrity and fairness.
- Legislation could be updated to codify requirements on impartiality or conflicts of interest. Changes expected to England's Arbitration Act this year include the statutory codification of an arbitrator's general duty of disclosure.
- Parties may feel more emboldened to challenge arbitrators on the grounds of bias or improper conduct, or seek to apply more stringent standards of disclosure and impartiality, such as the International Bar Association's (IBA) new Guidelines on Conflict of Interest in International Arbitration (effective from February 2024). Although successful challenges remain relatively rare, the prominence given to the issue could result in more challenges being made.
- Recalcitrant parties seeking to improperly defend arbitration proceedings or resist enforcement of an arbitration award against them may make spurious allegations of failures of due process, corruption or fraud, inspired by cases where awards have been set aside because of genuine and proven instances of corruption. For example, in April 2024 the Rwandan High Court set aside a $32 million UNCITRAL award on the grounds of public policy after the claimant was found (subsequent to the conclusion of the arbitration) guilty of bribery and corruption. This will require tribunals and courts to be alert and fully investigate such allegations, as considered here.
- The integrity of evidence gathering could also come under scrutiny, for example more rigorous application of guidelines like the IBA Rules on the Taking of Evidence in International Arbitration. This could also be a catalyst for greater standardisation of the evidence gathering process to address issues caused by inconsistent approaches to evidence and privilege that are grounded in different domestic legal systems such as court rules, education and cultural differences.

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- Legislative or procedural changes may be required to ensure that that greater use of technology does not compromise due process and fairness. For example, there are concerns that because the data sets from which AI is created weigh heavily towards the Western world that it may be subject to cultural and unconscious biases, and may not reflect or factor in African legal principles, ways of working and cultures. If decision-making or discretionary functions are delegated to AI, this could undermine the integrity and fairness of the proceedings. Care must be taken to ensure that African data is properly promoted and incorporated into AI systems and that functions are not inappropriately delegated to technology. Legislation or procedures can help ensure that technology does not inhibit the fairness and impartiality of the process, for example the Silicon Valley Arbitration and Mediation Centre's August 2023 Guidelines on the use of AI in Arbitration or the EU's AI Act which provides for greater regulation of AI, and which was endorsed in March 2024.

Increased focus on and scrutiny of the conduct of arbitrators and the arbitral process could be a catalyst for positive change. It could help to address some concerns about the current system, for example that it is challenging for arbitrators to remain neutral when accepting repeat appointments from clients.

A developing framework for Chinese disputes

Much of Africa's current international arbitration framework is based on Western and European practices and precedents, generally based on or similar to the UNCITRAL Model Law. However, this framework may not be suitable for disputes with entities in Africa's biggest trading partner, China.

China's international arbitration legislation is not based on the UNCITRAL Model Law and cultural approaches to arbitration vary considerably. Recent years have seen steps to develop an alternative framework that is compatible and acceptable to African and Chinese parties whose arbitral regimes may otherwise be incompatible. The China-Africa Joint Arbitration Centre (CAJAC) has devised a set of arbitration rules that represent a distinctive new brand of commercial arbitration, incorporating key influences from each side. For example, Chinese arbitral culture favours efforts to curb costs and save time by requiring a party to 'put its cards on the table' at an early stage, and Western arbitral culture includes the possibility of granting interim measures. Both are incorporated in the CAJAC Rules.

Following consultations in 2021 and 2022, significant reforms to China's arbitration law are anticipated. These reforms are expected to have an impact on the CAJAC Rules and other disputes between African and Chinese entities and may prompt further revision of the rules, resulting in a new framework that further narrows the gap between Africa and China, potentially marking a continued departure from the existing Western model.

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