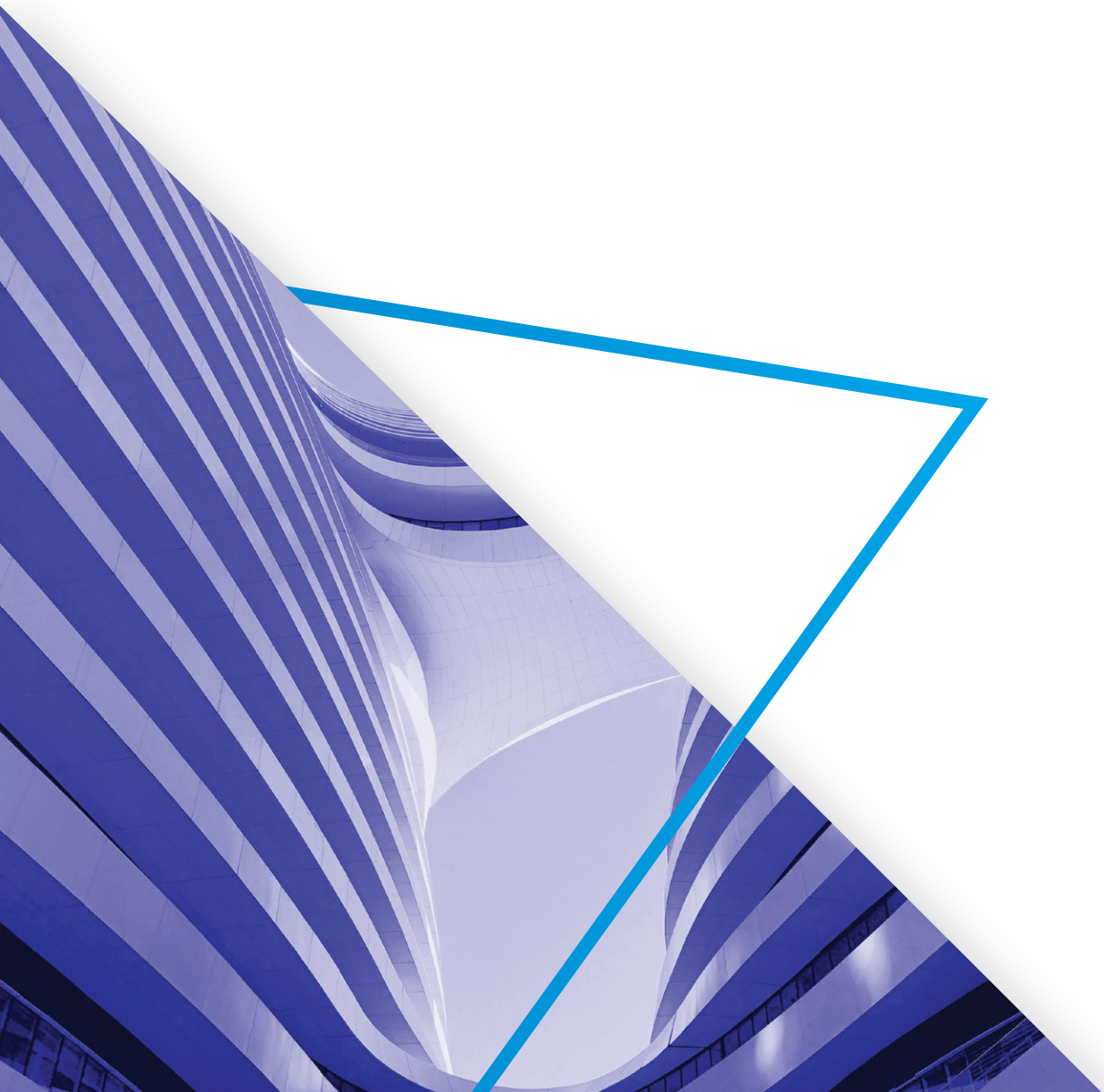
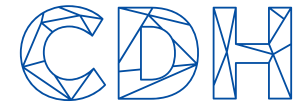


Corporate & Commercial

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Establishing the necessary elements of a repudiation

In the matter of African Zaibatsu Corporation Ltd and another v Industrial Development Corporation of South Africa Ltd [2024] 4 All SA 739, African Zaibatsu Corporation Ltd (AZC) and Mr Kotane (Kotane) brought a claim against the Industrial Development Corporation of South Africa Ltd (IDC) for allegedly repudiating a loan agreement.

AZC and Jasco Electronic Holdings Limited (Jasco) entered into a sale agreement on 26 September 2019 in terms of which AZC would purchase Jasco's electrical business. The sale agreement was conditional upon AZC securing funding for the purchase of the business. On 27 February 2020, the IDC agreed to provide funding to AZC in terms of a loan agreement, which was subject to the registration of certain security, including a special notarial bond, and the IDC acquiring an equity interest in AZC.

On 26 March 2020, the IDC sent an email to AZC requesting a telephonic discussion seeking information about the impact of the COVID-19 pandemic on its clients and the measures taken to minimise its financial impact. In response, Kotane provided the IDC with a cash flow forecast which stated that the company required a short-term facility of R10 million at the end of May 2020 to ensure business continuity.

Kotane also noted that there would be a shortfall as a consequence of a loss of trade due to the lockdown, and requested 12-month and 18-month payment holidays in respect of the two loans owing to the IDC.

On the eve of the registration of a special notarial bond (the final outstanding condition to the draw down of the funds under the loan agreement and the payment of the purchase price to Jasco under the sale agreement), the IDC instructed the withholding of the registration of the special notarial bond pending a review of the valuation of the Jasco business. Jasco cancelled the sale agreement on 22 June 2020, allegedly as a direct result of the IDC's instruction and its frustration of the implementation of the sale agreement. In a letter dated 24 June 2020, the IDC communicated its reduced valuation of the business to AZC and stated that a new sale agreement would have to be presented to the IDC to enable it to reconsider the loan agreement.

It was AZC's submission that the IDC's conduct constituted a repudiation of the loan agreement in that, on the facts viewed objectively, a reasonable person placed in its position would conclude that proper performance of the funding agreements would not be forthcoming from the IDC.

Establishing the necessary elements of a repudiation

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The test for repudiation

The test for repudiation is an objective one and is not a matter of intention, but rather of perception. The Court relied on the case of *Datacolour International (Proprietary) Limited v Intamarket (Proprietary) Limited* [2001] 1 All SA 581 (A), which established the principles for determining a repudiation:

"Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to 'repudiate' the contract..."

The question posed was whether the acts of the IDC objectively exhibited "a deliberate and unequivocal intention" not to be bound by the loan agreement.

The Court considered a number of facts that collectively and objectively weighed against Kotane's allegation of a repudiation of the loan agreement. Firstly, that Kotane did not consider the instruction to delay of the registration of the special notarial bond as an act of repudiation at the time but instead consented and engaged with the IDC without objection.

Secondly, the effect of the letter from the IDC was to reduce the valuation of the Jasco business based on evidence demonstrating that trading circumstances had changed. The reduced loan amount offered by the IDC remained a significant amount *vis-à-vis* the purchase price, indicating that it was persisting with the transaction, albeit at a reduced amount. Furthermore, the other security for the loan had already been registered, and the equity investment by the IDC into AZC had finalised.

It was on these facts, amongst others, that the Court found that on a consideration of all objective evidence available, a reasonable person would not have concluded that the IDC indicated an unequivocal intention to no longer be bound by the loan agreement, and therefore that there had been no repudiation.

Conclusion

This case is a welcome reminder of the elements of a repudiation, as well as the importance of establishing those elements in light of all objective evidence available.

Kate Anderson and Kerah Hamilton

Non-executive, non-negotiable: Social and ethics committee membership

A recent ruling by the Companies Tribunal (Tribunal) in the matter of *Xone Control Room Management (Pty) Ltd, Ex Parte* (11 September 2024) has clarified the limits of the Tribunal's jurisdiction regarding the composition of a social and ethics committee (SEC), particularly focusing on the requirement for non-executive directors. The implications of this ruling are sharper given the recent amendments to the Companies Act 71 of 2008 (Companies Act) regarding SECs, which came into force on 27 December 2024.

Xone Control Room Management Proprietary Limited (Xone), a private company that meets the relevant public interest score for an SEC, sought a ruling from the Tribunal that it should be allowed to appoint an SEC composed entirely of its own staff, without the need to include an "independent member". (To be more technically correct, the Companies Act and regulations require a non-executive director to be appointed to the SEC, i.e. someone who is not involved in the day-to-day management of the company and has not been so involved in the past three financial years.) The key question at hand was whether the company could be exempt from the requirement to appoint an independent member to the SEC.

Defining the Tribunal's powers

The Tribunal concluded that while section 72(5) of the Companies Act allows for exemptions from the requirement to establish an SEC, it does not grant the Tribunal jurisdiction over the specific composition of the committee, such as the need for non-executive directors. The Tribunal emphasised that its jurisdiction is limited to determining whether the SEC requirement itself can be dispensed with altogether (for instance, on the ground that the nature of the company's activities do not warrant an SEC), but it cannot change the composition rules prescribed by the Companies Act.

This ruling means that Xone's request to be exempt from appointing a non-executive director was outside the Tribunal's powers.

The Companies Amendment Act 16 of 2024, which recently partially came into effect, requires public and state-owned companies to elect SEC members at their annual general meeting, as opposed to being appointed by the board. Additionally, the SECs of public companies must have no fewer than three members, with the majority being non-executive directors. This is an increase from the previous requirement of one non-executive director.

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For listed public companies, which typically have large boards, with a majority being non-executive directors, this change is unlikely to pose any issues. However, unlisted public companies – for example those that used to be listed and whose boards are now often more akin to those of private companies – may face difficulties if they need to constitute an SEC. These companies will now need to appoint at least two non-executive directors to their SECs, a requirement that could prove burdensome, especially for companies with smaller or more concentrated boards. For such companies, the ruling makes it clear that they cannot bypass the requirement for non-executive members of their SECs, even if they do not feel that these positions are necessary due to the nature of their operations.

For private companies, the requirements remain relatively unchanged, with section 72(7A)(b) mandating the inclusion of only one non-executive director on the SEC.

Notably, putting things in perspective, the Companies Act requirement is that the relevant member(s) be non-executive directors; they need not additionally be “*independent*”. This distinction is significant because it allows companies to appoint non-executive directors who are not necessarily independent in the strict King IV sense.

The Tribunal’s ruling serves as a reminder of the enhanced role and position of SECs under the Companies Act. If a company is required to have an SEC, there are no half measures available – the membership must comply with the legislation.

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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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