Dispute Resolution

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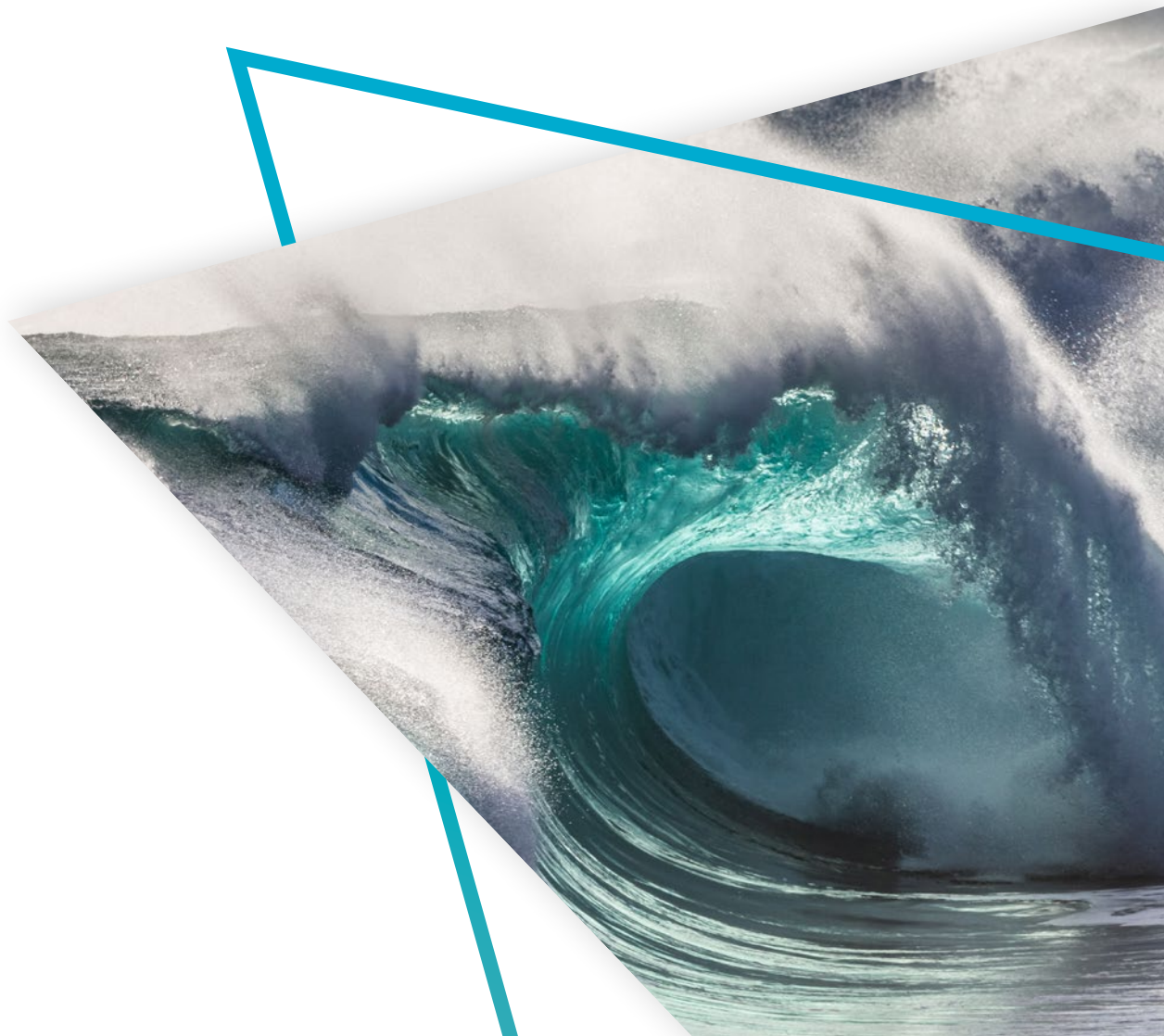

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DISPUTE RESOLUTION ALERT

No more free pass: Electronic service to hold foreign peregrini accountable

The common law position on the establishment of jurisdiction when dealing with a foreign peregrinus (a party that is not resident or domiciled in South Africa) was recently developed in the High Court (HC) case of *The Financial Sector Conduct Authority v The Financial Services Tribunal and Others* (009838/2023) [2025] ZAGPPHC 675 (9 July 2025).

Background

The Financial Sector Conduct Authority (FSCA) applied for the review and setting aside of a decision taken by the Financial Services Tribunal (Tribunal) where the Tribunal had found that the FSCA did not have the jurisdiction necessary to hold individuals who were peregrinus of South Africa liable.

Viceroy, a corporation established in the US by a partnership, and whose partners were resident in England, France and Australia, published a document titled "*Capitec: A wolf in sheep's clothing*". The fallout was devastating for Capitec, resulting in its share price dropping by more than 20% and costing it more than R25 billion in market capital. Upon investigation by the FSCA, Viceroy was found liable for making false, misleading and deceptive statements, promises and forecasts in terms of section 81 of the Financial Markets Act 19 of 2012, and as such a financial penalty of R50 million was imposed upon it and its partners.

Viceroy and its partners launched an application to the Tribunal for reconsideration of its decision, raising the issue of jurisdiction; specifically, that the FSCA lacked the required jurisdiction to hold the partners liable. Upon reconsideration, a majority of the Tribunal found in Viceroy's favour and set aside the penalty on the basis that the FSCA did not have jurisdiction over the partners of Viceroy, as they were peregrinus of the Republic of South Africa.

The FSCA approached the HC to review and set aside this decision on the grounds that the Tribunal misdirected itself in finding that the FSCA did not have jurisdiction over the partners, including that the common law should be developed to dispense with the requirement for personal service of process in the case of an investigative body such as the FSCA.

Common law on the jurisdiction over peregrinus

Prior to this decision, in order to establish jurisdiction over peregrinus, summons would have had to been served on the peregrini while they were present in South Africa.

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Development of the common law

Section 39(2) of the Constitution provides that the common law may be developed in order to "*promote the spirit, purport and objects of the Bill of Rights*" if it is in the interest of justice to do so.

In this vein, the FSCA advocated for the development of the common law, providing that the law currently in place served to limit its powers as a financial regulator combating breaches in the financial sector where global and financial markets are concerned, as it was unable hold a peregrini liable where they had deliberately caused substantial financial harm in South Africa.

The FSCA argued that the requirement to serve peregrinus while they are in South Africa was not practical and limited its effective regulation of financial activity in the global and digital spheres. As part of this, the court considered the introduction of Rule 4A in the Uniform Rules of Court, which provides for the delivery of documents and notices, except those that initiate proceedings, by means that include facsimile and electronic services. By introducing this rule, the legislator effectively acknowledged the advances in technology in the serving of documents.

As the purpose and objectives of regulating financial markets are more important than the way in which documents are served, the court found that the development of the common law in this regard would ensure the effective regulation of global financial activity. The court further analysed the facts of this case and found that as the misinformation published by Viceroy and its partners had a disastrous effect on a prominent South African financial institution, Viceroy and its partners could not be absolved from liability purely on the basis that they would not be physically present in South Africa. The court considered that this would not be in the interest of justice.

Foreigners looking to do business in South Africa should be aware that they are not likely to escape liability by virtue of their not being domiciled or resident within the jurisdictional area of South African courts. Where they have received a notice of the intention to hold them liable for their conduct, including by electronic means, and the connection between their conduct and South Africa is sufficiently close enough to make it appropriate and convenient to do so, they may be held liable.

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