
THE DISPUTE RESOLUTION REVIEW

EIGHTH EDITION

EDITOR
JONATHAN COTTON

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

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For further information please email
Nick.Barette@lbresearch.com

THE DISPUTE RESOLUTION REVIEW

Eighth Edition

Editor
JONATHAN COTTON

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Gideon Robertson

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EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 45 jurisdictions. In a world where commercial disputes frequently cross international boundaries, it is inevitable that clients and practitioners across the globe will need to look for guidance beyond their home jurisdictions. *The Dispute Resolution Review* offers the first helping hand in navigating what can sometimes, at first sight, be an unknown and confusing landscape, but which on closer inspection often deals with familiar problems and adopts similar solutions to the courts closer to home.

This eighth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward looking and the contributors offer their views on the likely future developments in each jurisdiction.

Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments. For instance, over the past year the EU has adopted a new regulation on jurisdiction which fortifies the freedom of parties of any nationality to choose to litigate in their preferred forum and grants Member State courts discretion to stay proceedings in favour of proceedings already on foot in non-Member State courts. At the other end of the spectrum, 2015 saw the Supreme Court in the United Kingdom clarify the law on penalty clauses 101 years after the seminal House of Lords' case on this issue (see the review of *ParkingEye Ltd v. Beavis* and *Cavendish Square Holding BV v. El Makdessi* [2015] UKSC 67 at page 181). But even seemingly local decisions such as this have a broad audience and can have far-reaching consequences in global commerce. It is always a pleasure – and instructive for my own practice – to observe the different ways in which jurisdictions across the globe tackle common problems – sometimes through concerted action under an umbrella international organisation and sometimes individually by adopting very different, but often equally effective, local solutions.

Over the lifetime of this review the world has plunged into deep recession and seen green shoots of recovery emerge as some economies begin to prosper again, albeit

uncertainly. One notable development over the course of 2015 has been the sharp and sustained fall in the oil price (along with commodities more generally). This has had, and will continue to have, far-reaching economic and geo-political effects which may take some time to manifest themselves fully. As many practitioners will recognise from previous global shocks, these pressures typically manifest themselves in an increased number of disputes; whether that is joint venture partners choosing to fight over the diminishing pot of profits, customers seeking to exit what have become hugely expensive long-term contracts, struggling states renegotiating or exiting their contracts (or simply expropriating commercial assets) or insolvency-related disputes as once-rich parties struggle to meet their obligations. The current economic climate and short to medium term outlook suggests that dispute resolution lawyers operating in at least the energy and commodities sectors will continue to be busy and tasked with resolving challenging multi-jurisdictional disputes for years to come.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 747 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2016

Chapter 36

SOUTH AFRICA

Grégor Wolter, Jac Marais, Andrew Molver and Renée Nienaber¹

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

South Africa has a hybrid legal system characterised by constitutional supremacy underpinned by uncodified common law rooted in its history of diverse influences. Historically, South African private law was based on Roman-Dutch principles introduced by the first European settlers in the 17th century. Subsequent British colonialisation imported English legal principles and traditions which shaped procedural and mercantile law. Customary law has also become an important part of the South African legal framework.²

The advent of constitutionalism brought about a shift in legal development. The Constitution is the supreme law³ and legislation not congruent with the Constitution must be amended. Furthermore, the courts have a constitutional duty to develop the common law to promote the values enshrined in the Constitution.

The doctrine of precedent is an integral feature of the legal system and lower courts are bound by the decisions of courts higher in the hierarchy.⁴

The court structure consists of the superior courts, being the Constitutional Court, Supreme Court of Appeal and the various divisions of the High Court, and the lower courts, comprising the regional and district Magistrates' Courts.

1 Grégor Wolter, Jac Marais and Andrew Molver are partners and Renée Nienaber is a senior associate at Adams & Adams.

2 Also known as indigenous law; Section 211(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution).

3 Section 2 of the Constitution.

4 Du Plessis, *An Introduction to Law*, 3rd Edition 1999, p. 77.

The Constitutional Court is the highest court in respect of constitutional matters, with both original and appeal jurisdiction as set out in Section 167(3) of the Constitution.⁵ Generally operating as a court of appeal in respect of constitutional issues, the court may also be approached directly in special circumstances.⁶

The Supreme Court of Appeal serves as final court of appeal in respect of all non-constitutional matters. It hears appeals in both civil and criminal matters from the High Court and may not be approached directly.

The High Court is divided into nine provincial divisions, and various local divisions with jurisdiction over prescribed territories. The High Court has inherent jurisdiction and has the discretion to make any order that the law does not prohibit, including regulating its own procedure and adjudicating the unlawful interference with rights.⁷

The High Court functions both as court of first instance and court of appeal for the lower courts, and a full bench of the High Court serves as court of appeal for judgments in the first instance.

The High Court also comprises specialised courts and tribunals such as the income tax courts, labour and labour appeal courts, competition tribunal and appeal court, land claims court, consumer courts and equality courts, which have jurisdiction to hear matters specifically defined in legislation.

The Magistrates' Courts are creatures of statute, deriving their powers from the Magistrates' Court Act 32 of 1944, with no jurisdiction to hear matters beyond the parameters of the enabling legislation. These courts have jurisdiction over defendants residing or working in the court's geographical area of jurisdiction as well as over specified causes of action that arise therein.

Small claims courts, located within the district Magistrates' Courts and presided over by volunteering attorneys, provide an opportunity to litigants to pursue claims of 12,000 rand or less without legal representation.

II THE YEAR IN REVIEW

Perhaps the two most significant developments in the past year were in the courts' approach to the review of arbitration awards and security for costs by local plaintiff companies. The court also confirmed South Africa's duties regarding implementation of the Rome Statute of the International Criminal Court.

In *Eskom Holdings SOC Ltd v. Khum MK Investments & Bie Joint Venture (Pty) Ltd and Others*,⁸ where Eskom sought to review and set aside a partial award made by the arbitrator (the third respondent), the Court held that South African law governing the review of arbitration awards has been underpinned and applied so as to provide only narrow grounds for review, and these have been restrictively interpreted. The courts

5 Theophilopoulos et al., *Fundamental Principles of Civil Procedure*, 2nd Edition 2012, p. 4.

6 Section 167(6) of the Constitution.

7 Theophilopoulos et al., *Fundamental Principles of Civil Procedure*, 2nd Edition 2012, p. 57.

8 [2015] 3 All SA 439 (GJ).

have demonstrated a willingness to assist parties deprived of a fair hearing by procedural wrongs, but have limited their reviews to these issues alone and have refused jurisdiction in cases that requested a review of the arbitrator's legitimate exercise of discretion. The courts have maintained their lack of jurisdiction in review proceedings to enquire into the correctness of the conclusion arrived at by arbitrators so as to preserve the integrity of the arbitration process, except where the arbitrator him or herself has discredited it through *mala fides*, gross irregularity or the exercise of powers not conferred on him or her.

In *Boost Sports Africa (Pty) Ltd v. South African Breweries (Pty) Ltd*,⁹ the Supreme Court of Appeal had to consider whether it could still order an applicant or plaintiff company to provide security for payment of the costs of a potentially successful defendant, under the new company law regime introduced by the Companies Act 71 of 2008. Section 13 of the Companies Act 61 of 1973 provided a statutory exception to the common law rule that an *incola* (resident) plaintiff cannot be compelled to furnish security for costs, by vesting the court with the discretion to order a company that had instituted action to furnish security for costs if there were a reason to believe that it would be unable to pay the costs of its opponent, so as to discourage companies from instituting actions they could not afford and had little chance of winning. The new Companies Act contains no equivalent provision.

The court *a quo* upheld a notice in terms of Uniform Rule 47 calling on Boost Sports, which had no office or assets and was not trading, to provide security for costs. On appeal, the Court held that Rule 47 merely prescribes the procedure for claiming security for costs and not the substantive law conferring a right on a defendant to obtain security, which must be found in statute or the common law. The common law allows for exceptions to the general rule that an *incola* should not be required to provide security for costs, but an *incola* company cannot be ordered to do so merely because the chances of recovering costs from it appear remote. The Court also had to be satisfied that the action or application was vexatious or reckless or otherwise amounted to an abuse. On the facts the Court found this to be the case and the appeal was accordingly dismissed.

The decision in *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*¹⁰ attracted much attention. The duties and obligations of South Africa in the context of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 came under scrutiny and the Court had to decide whether a Cabinet Resolution coupled with a Ministerial Notice were capable of suspending South Africa's duty to arrest a head of state against whom the International Criminal Court (ICC) had issued arrest warrants. The Court held that as a ratifying state, South Africa was enjoined to cooperate with the ICC and the Minister's assertion that the President of the Republic of Sudan, Omar Hassan Ahmad Al-Bashir, would be protected by diplomatic immunity was held to be without merit.

9 [2015] 3 All SA 255 (SCA).

10 [2015] 3 All SA 505 (GP).

Other noteworthy developments can be found in cases dealing with the admissibility of documentary evidence,¹¹ the application of the *in duplum* rule *pendente lite*,¹² the place of residence of a company for jurisdictional purposes,¹³ establishing admiralty jurisdiction,¹⁴ access to court files,¹⁵ the superannuation of judgments¹⁶ and punitive cost orders.¹⁷

Further changes in the law include the restructuring of the Magistrates' Courts in various provinces, the issuing of new practice directives for the Constitutional Court, the Gauteng Local Division of the High Court, Johannesburg and the Free State Division, as well as the amendment of tariffs for sheriffs and attorneys' fees.

The enactment of the Legal Practice Act 28 of 2014 will result in significant changes in the organisation of the legal profession, representation in proceedings and legal costs once all sections of the Act become operational.

III COURT PROCEDURE

i Overview of court procedure

The South African judicial system is an adversarial system and the procedural rules governing the civil process are set out in various sources, including the Constitution and other enabling legislation, procedural rules and the common law. Commentary and interpretative authority on the rules, particularly the Uniform Rules of Court (the Uniform Rules) which regulate civil practice in the High Court, provide useful guidance to practitioners.

Matters may be brought to court either by action or application. Actions are characterised by disputes of fact and provide for the provision of oral evidence. Applications are decided on affidavit deposed to by or on behalf of the parties and are undertaken when the facts are common cause or can be determined without evidence being heard.

The focus of the summary below will be on the procedures and time frames applicable to civil proceedings in the High Court.

ii Procedures and time frames

Action proceedings are initiated by way of a summons issued by the registrar of the Court, directed at the sheriff to serve on the defendant.¹⁸ Three types of summonses are differentiated, namely simple summons (for claiming debts of liquidated amounts),

11 *Visser v. 1 Life Direct Insurance Ltd* 2015 (3) SA 69 (SCA).

12 *Paulsen v. Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC).

13 *PMG Motors Kyalami (Pty) Ltd v. FirstRand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA).

14 *Oxacelay v. MFV El Shaddai: MFV El Shaddai* 2015 (3) SA 55 (KZD).

15 *Cape Town City v. South African national Roads Authority* 2015 (3) SA 386 (SCA).

16 *Absa Bank Ltd v. Snyman* 2015 (4) SA 329 (SCA).

17 *Lushaba v. MEC for Health, Gauteng* 2015 (3) SA 616 (GJ).

18 Uniform Rule 17.

combined summons (used most often, which includes the plaintiff's particulars of claim setting out the cause of action and relief sought as an attachment) and provisional sentence summons (a hybrid and summary procedure for claims based on liquid documents).

The recipient of a summons may deliver a notice of intention to defend within 10 court days. If a simple summons was used, the plaintiff must deliver a declaration setting out his or her cause of action within 15 court days of delivery of the defendant's notice of intention to defend. If the plaintiff served a combined summons, the defendant will be required to deliver a plea within 20 court days of delivery of the notice of intention to defend.

Once pleadings have been exchanged, the preparation for trial phase commences, which includes discovery and exchange of documents, delivery of expert summaries and compulsory pretrial conferences between the parties. Depending on the nature of the matter and the prevailing practice in that particular Division of the High Court, the registrar may require a pretrial conference to be convened before a trial date will be allocated. Currently there is a waiting period of between nine and fourteen months for trial dates. Recent developments in court procedure have seen a move towards case management of matters by judges, aimed at ensuring that matters are brought before court more efficiently and expeditiously.

Applications initiating proceedings must be brought by notice of motion,¹⁹ addressed to the registrar and the respondent (where applicable)²⁰ as an essential first step.²¹ Applications initiating new proceedings must be accompanied by a founding affidavit setting out the facts upon which the applicant relies for relief²² as well as true copies of all annexures thereto.²³

A respondent must be given no less than five days from delivery of the notice of motion to give notice to the applicant of an intention to oppose.²⁴ The respondent's answering affidavit must be delivered together with relevant annexures²⁵ within 15 days of the notice of intention to oppose.²⁶ If the respondent fails to give notice of an intention to oppose, the applicant may enrol the matter on an unopposed basis.²⁷

Where an answering affidavit is filed, the applicant has an opportunity to file a replying affidavit within 10 days of delivery of the respondent's answering affidavit.²⁸

19 Every notice of motion must comply with Uniform Rule 6(5)(b).

20 Uniform Rule 6(2).

21 *Finishing Touch 163 (Pty) Ltd v. BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA), overruling *BHP Billiton Energy Coal South Africa Ltd v. Minister of Mineral Resources* 2011 (2) SA 536 (GNP).

22 Uniform Rule 6(1).

23 Uniform Rule 6(5)(a).

24 Uniform Rule 6(5)(d).

25 Uniform Rule 5(d).

26 Uniform Rule 6(50)(d)(ii).

27 Uniform Rule 6(5)(c).

28 Uniform Rule 6(5)(e).

The filing of further affidavits will only be allowed with the leave of the court upon consideration of the facts in dispute²⁹ and such leave will only be granted in exceptional circumstances.³⁰

The process for enrolling opposed applications are governed by the Uniform Rules read with the practice manual or directives applicable in each division. Depending on the division, the current waiting period for a hearing date for an opposed motion is approximately four to six months.

Judicial review proceedings follow a *sui generis* application procedure.

Specific requirements and notice periods for civil proceedings instituted against the state, local and provincial government and other organs of state are prescribed by legislation. This includes deviations from the time periods detailed above.

The ordinary forms, procedures, time frames and service requirements for applications may be departed from on the grounds of urgency. The applicant's founding affidavit, which may be brought on notice or *ex parte*, must clearly set out the circumstances giving rise to the urgency, which may include commercial interests. Varying degrees of urgency are dealt with in different ways in the different divisions, with some divisions providing for both an urgent and a semi-urgent roll that operates in parallel to the ordinary roll.

Interdicts are granted to protect against an unlawful violation of rights and may be granted on an interim or final basis. Various special interdicts have been developed in terms of statute and common law, including certain automatic interdicts in terms of statute as well as *Anton Piller* (i.e., preservation) orders.

iii Class actions

The advent of South Africa's current constitutional dispensation has seen class actions utilised as an instrument for collective redress. Section 38 of the Constitution enshrines the right of anyone acting as a member of, or in the interest of, a group or class of persons to approach a competent court alleging that a right in the Bill of Rights³¹ has been infringed or threatened. When a suit is brought by way of a class action, parties who form part of the group are bound by, and are able to benefit from, the outcome of the litigation. Individuals may invoke procedures to either opt out of the litigation, if they want to be exempt from the consequences flowing therefrom, or to opt in, should they wish to benefit from the outcome. In *Mukaddam v. Pioneer Foods*³² it was held that an opt-in class action may only be used in exceptional circumstances.

The Companies Act,³³ the Consumer Protection Act³⁴ and the National Environmental Management Act³⁵ all provide standing to persons acting on behalf of a

29 *Hano Trading CC v. JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA).

30 Van Loggerenberg DE, *Erasmus Superior Court Practice*, Vol 2, 2nd Edition, 2014 at D1-68.

31 Chapter 2 of the Constitution.

32 2013 (5) SA 89 (CC).

33 Act 71 of 2008.

34 Act 68 of 2008.

35 Act 107 of 1998.

class when seeking specific relief in terms of these acts. In more general terms, Uniform Rule 10 provides that any number of persons may be joined as plaintiffs to a matter provided that the relief sought by all parties depends on the same question of law and fact.

A few landmark cases have resulted in the emergence of more class actions. In *Ngxuza v. Permanent Secretary, Department of Welfare, Eastern Cape*³⁶ it was held that class actions are tailor-made for claimants who are lacking in 'protective and assertive armour' with claims unsuitable for individualised enforcement. In *Child Resources Center v. Pioneer Food (Pty) Ltd*³⁷ the Supreme Court of Appeal held that class action proceedings are available even when a non-constitutional right is involved. The case further detailed the requirements for certification, which is required before a class action may be instituted.³⁸

iv Representation in proceedings

The legal profession is characterised by a split bar comprising attorneys (solicitors) and advocates (barristers). A litigant may be represented in the High Court by an advocate, or an attorney who has been granted the right of appearance.³⁹

It is not compulsory to have legal representation, and a party may conduct his or her own case and appear in person before the court. A party may not, however, be represented by a third party who is not a qualified attorney or advocate.

Provision is made for indigent persons to approach the Legal Aid Board and various legal aid clinics for legal representation at a significantly reduced rate. In addition, the law societies have set up *pro bono* initiatives in terms of which attorneys are required to assist indigent clients on a *pro bono* basis. The Uniform Rules also make specific provision for persons possessed of property totalling less than 10,000 rand to bring or defend proceedings *in forma pauperis*, in terms of which an attorney or advocate will be mandated to represent such person gratuitously.

A juristic person cannot be represented by an official or employee and must be represented by a qualified legal representative. Municipal and other local authorities must be similarly represented.

36 2001 (2) SA 609 (E), see also *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v. Ngxuza and Others* 2001 (4) SA 1184 (SCA).

37 2013 (2) SA 213 (SCA).

38 Such requirements are (1) the existence of a class identifiable by objective criteria; (2) a cause of action raising a triable issue; (3) the relief sought must stem from issues of law and fact common to all members of the action; (4) there must be no conflict of interest between the interests of the class and those of the representative; and (5) the representative must be able to adequately protect the interests of the class and have capacity to properly conduct the litigation.

39 Section 4(1) of the Right of Appearance in Courts Act 62 of 1995.

v **Service out of the jurisdiction**

Substituted service may be applied for in circumstances where the defendant or respondent is believed to be in South Africa but where one of the normal forms of service set out in the rules cannot be effected. Edictal citation is required where the defendant or respondent is (or is believed to be) outside the borders of South Africa, or where their exact whereabouts are unknown.⁴⁰

The rules pertaining to service in a foreign country apply equally to all process of court and not only to the initiation of proceedings.⁴¹

A defendant is permitted one month to defend a summons served outside the area of jurisdiction of the division that issued the summons, if the summons was served at a place more than 150 kilometres from the seat of the court.⁴²

Where a person over whom the court exercises jurisdiction is outside South Africa, an *ex parte* application⁴³ for leave of the High Court is required for legal process to be served either to institute application proceedings or prosecute actions. The application must set out the nature and extent of the claim, the grounds upon which the claim is based and upon which the court has jurisdiction to determine the matter, the manner of service that the court is asked to authorise, the inquiries made to determine the person's whereabouts and, if a manner other than personal service is requested, the last known whereabouts of the person upon whom service is required.⁴⁴

Service of process by fax or other electronic means is provided for in Section 44(1) and (2) of the Superior Courts Act, and substituted service via fax and even via Facebook messages have been authorised in terms of Uniform Rule 4(2).⁴⁵ In *CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens*⁴⁶ it was held that substituted service via a Facebook message, where the defendant's attorneys withdrew and the defendant evaded service on various instances, was in order. The applicant successfully demonstrated that service via Facebook was warranted since the normal forms of service set out in the rules were not successful and that by using a Facebook message the notices would be brought to the attention of the defendant.

vi **Enforcement of foreign judgments**

The position in relation to the enforcement of foreign judgments is regulated by common law. In *Jones v. Krok*⁴⁷ it was held that a foreign judgment is not directly enforceable, but constitutes a cause of action that will be enforced by the courts provided that:

40 *CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD).

41 See Uniform Rule 4(3) that refers to 'any process of the court'.

42 Section 24 of the Superior Courts Act 10 of 2013.

43 Uniform Rule 5.

44 Uniform Rule 5(2).

45 Uniform Rule 4.

46 2012 (5) SA 604 (KZD).

47 1995 (1) SA 677 (A).

- a* the court that pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by South African law with reference to the jurisdiction of foreign courts (international jurisdiction or competence);
- b* the judgment is final and conclusive in its effect and has not become superannuated;
- c* the recognition and enforcement of the judgment by the South African courts would not be contrary to public policy;
- d* the judgment was not obtained by fraudulent means;
- e* the judgment does not involve the enforcement of a penal or revenue law of the foreign state; and
- f* the enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act.⁴⁸

A judgment of a foreign court is enforced by launching proceedings out of a competent South African court with jurisdiction over the person against whom the foreign judgment was granted, for an order in the same terms as the foreign judgment. The foreign judgment is regarded as irrefutable proof of the defendant's indebtedness and once the requirements in *Jones v. Krok* have been met, a South African court does not have the authority to investigate the merits of the matter. A dissatisfied party must take up any issues on the merits with the foreign court in terms of its processes and procedures.

Important recent developments include the Supreme Court of Appeal's finding in *Richman v. Ben-Tovim*⁴⁹ that, in order to satisfy the requirement of jurisdiction (particularly the international competence leg of the enquiry), it is not necessary for the plaintiff to establish that the defendant was either domiciled or resident within the foreign jurisdiction. It is sufficient for the defendant to have merely been physically present in that foreign jurisdiction at the time that the proceedings were instituted provided that the laws regarding jurisdiction in that foreign country recognise mere physical presence as a sufficient basis to find jurisdiction. This more flexible approach to jurisdiction is a welcome development in the context of international commerce.

The Constitutional Court also considered the enforcement of foreign judgments in the matter of the *Government of the Republic of Zimbabwe v. Fick & Others*⁵⁰ and found that the common law should be extended to allow for the enforcement of judgments and orders handed down by international courts or tribunals which are established by international agreements or treaties that are binding on South Africa.

vii Assistance to foreign courts

South African courts may provide assistance to foreign courts in a number of ways, including providing evidentiary support, execution of warrants or judgments, and issuing subpoenas.

48 Act 99 of 1978.

49 2007 (2) SA 283 (SCA).

50 2013 (5) SA 325 (CC).

Where a foreign state or a foreign court wishes to obtain evidence within South Africa, such request must be transmitted to a consular official of South Africa within the foreign country, a registrar of the High Court or an official in the South African Department of Justice, who will refer the request to a High Court judge in chambers.⁵¹

The manner of dealing with letters of request and documents for service originating from foreign countries is dealt with in legislation. Where a litigant in a foreign country wishes to serve civil process in South Africa, the registrar of the court will arrange for such service to be effected according to the Uniform Rules, provided the Minister of Justice deems it appropriate.

In addition to its domestic provisions, South Africa is also a signatory to international instruments which provide a basis for local courts to assist foreign courts, including The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters and the Rome Statute of the International Criminal Court, and is obliged to cooperate fully with the International Criminal Court in the investigation and prosecution of crimes within the jurisdiction of the Court.

viii Access to court files

Section 32(1)(a) and (b) of the Constitution entrenches the right of access to information in possession of public and private bodies, and imposes a responsibility on the state to promulgate legislation to give effect to this right. Section 11 of the Promotion of Access to Information Act⁵² provides that any person may request records in possession of the government or private bodies. This would include judicial records held by the court.

The public have free access to court papers before the matter is heard in court. In the matter of *City of Cape Town v. South African National Roads Authority Limited*⁵³ the Supreme Court of Appeal had to reconsider the court *a quo*'s decision to invoke Uniform Rule 62(7) to conclude that only persons with a direct interest in the matter may have access to judicial records before the matter is heard. The Court overturned the restrictive interpretation adopted by the High Court and held it to be inconsistent with the Constitution as it impinged on the principles of open justice, public hearings, freedom of expression and access to information. Prior restrictions to access court documents should only be imposed where a substantial risk of grave injustice is posed.

ix Litigation funding

A litigation funding agreement is not *per se* contrary to public policy or void, having regard to the constitutional right to access to justice. The Court does, however, retain the power to prevent third-party litigation funding if it amounts to an abuse of process.

Recent High Court decisions reflect the Court's circumspection in allowing for third-party litigation without adequate measures in place to avoid *mala fide* or fraudulent conduct by third-party funders. In one instance the Court granted relief to the defendant in funded proceedings in the form of an order joining the funder to the litigation as a

51 See Sections 39 and 40 of the Superior Courts Act.

52 Act 2 of 2000 (PAIA).

53 2015 (3) SA 386 (SCA).

co-plaintiff, against its will, so that the defendant could seek a costs order directly against the funder. In another recent matter the Court held that where the funder substantially controls the proceedings or will benefit from them, if successful, then it is considered just that such third party be held liable for any adverse costs order.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Attorneys are ethically bound to act in the best interests of their clients, which includes a duty to avoid conflicts of interest which will likely affect the attorney's judgment in the conduct of matter.

An attorney owes a fiduciary duty to the client during the period of the attorney–client relationship, which entails a principle duty to act in the best interests of the client. In fulfilment of this duty an attorney is not permitted to act for two clients in a matter in which their interests conflict. This fiduciary duty persists for the duration of the fiduciary relationship as attorney–client.⁵⁴

An attorney also owes a former client the remaining duty of confidentiality after termination of their relationship. The Supreme Court of Appeal has confirmed that South African law affords protection to a former client of a legal practitioner insofar as he or she will be precluded from acting against a former client where the practitioner has confidential information about the former client that might be misused.⁵⁵ As with English law, such a client may apply to court for an interdict to restrain the attorney, where the attorney is in possession of information that is confidential to the client (and the client has not consented to its disclosure), and the information is relevant in the new matter in which the interest of the other client is adverse to his or her own.⁵⁶ By restraining attorneys from acting against their former clients in certain circumstances, South African courts protect the administration of justice.⁵⁷

Typically, the need for Chinese walls is most often encountered in commercial transactions but it is not unheard of in litigation matters. While there is currently no legislation regulating the implementation of Chinese walls in South Africa, practitioners may look to English law principles to guide their actions and to manage conflicts of interest. In this regard, the parties will enter into an agreement whereby the dissemination and processing of information is restricted. Where the need for a Chinese wall arises, in order to limit the parties' liability for breach of confidentiality, it is recommended that the Chinese wall include the following:

- a* the physical separation of various departments to insulate them from one another (this may even extend to dining arrangements);

54 *Waste Products Utilisation v. Wikes* 2003 (2) SA 515 (W).

55 *Wishart v. Justice P Blieden* [2014] 4 All SA 334 (SCA).

56 *Prince Jefri Bolkiah v. KPMG* [1999] 2 AC 222 (HL).

57 *Monsanto South Africa (Pty) Ltd and Another v. Bowman Gilfillan and Others* [2011] ZACAC 5 (18 August 2011).

- b* an educational programme to emphasise the importance of not divulging confidential information;
- c* implementing strict procedures for dealing with a situation where it is felt the wall should be crossed and the maintaining of proper records where it occurs; and
- d* monitoring the effectiveness of the wall.

In addition, to minimise the risk of unauthorised dissemination of confidential information, the parties should evaluate the need to implement technological measures, for example, increasing IT security by introducing password protection for electronic documents.

ii Money laundering, proceeds of crime and funds related to terrorism

South Africa has developed a broad regulatory framework for the prevention of organised and financial crimes.

Mechanisms to combat organised crime, money laundering and racketeering activities were introduced by the Prevention of Organised Crime Act⁵⁸ and keep pace with international developments. POCA's main objective is to deprive offenders of the benefit of their criminal activities and criminalises assisting another to benefit from the proceeds of their unlawful activities.⁵⁹ To curb corruption and related crimes (such as theft and fraud), POCA places a duty on certain office bearers of companies to report certain crimes.

The Financial Intelligence Centre Act⁶⁰ was promulgated to assist with the identification and combating of money laundering activities and the financing of terrorist activities. FICA places a duty on accountable institutions such as attorneys, bankers, insurers and estate agents to adequately identify the clients it intends to transact with prior to establishing a business relationship or concluding a single transaction. The accountable institution is required to establish and verify the identity of the client (as well as the person on behalf of whom the client is acting).⁶¹ Records of the client's identity, the nature of each business transaction, the amounts and parties involved in the transaction must be kept for a prescribed period of time,⁶² and certain financial transactions must be disclosed to the Financial Intelligence Centre.

A failure to comply with the reporting obligations provided for in POCA and FICA is a criminal offence.

More recently, the Prevention and Combating of Corrupt Activities Act⁶³ brought South African legislation in line with the UN Convention against Corruption and the AU Convention on Preventing and Combating Corruption. The PCCAA prohibits cross-border acts of corruption and creates reporting obligations for known, or suspected,

58 Act 121 of 1998 (POCA).

59 POCA Preamble.

60 Act 38 of 2001 (FICA).

61 Section 21(1) of FICA.

62 Section 22(1) of FICA.

63 Act 12 of 2004 (PCCAA).

acts of corruption, fraud, theft, extortion, forgery and uttering. Where the offender is a South African citizen residing in South Africa, or a company incorporated in South Africa, South African courts will have jurisdiction over the offence.⁶⁴ The PCCAA provides for companies convicted of corruption to be placed on a blacklist.⁶⁵

Following regulatory gaps that were identified in assessments conducted by the Financial Action Task Force and the International Monetary Fund, in April 2015, the South African Treasury has indicated that FICA is being reviewed to better align South Africa's legal framework with global anti-money laundering and counter-terrorist financing standards.

iii Data protection

The right to privacy is considered a fundamental personality right, protectable as part of the rights to human dignity or reputation enshrined in the Constitution. Where legislation does not adequately protect personal data, a wronged party may have recourse in terms of the common law. The courts have recognised two forms of invasion of the right to privacy: an unlawful intrusion upon the personal privacy of another and the unlawful publication, or public disclosure, of private facts about a person.⁶⁶

A dedicated data protection law in the form of the Protection of Personal Information Act (POPI) has been promulgated, but apart from a few limited sections dealing with the establishment of the regulator and the provisions allowing for the drafting of the regulations, POPI is not yet in force. Once the commencement date of the Act is determined, South African organisations will have a one year grace period to establish POPI-compliant practices. Until then, protection of personal data will continue to be governed by various statutes, including the Consumer Protection Act, the National Credit Act,⁶⁷ PAIA, the Electronic Communications and Transactions Act⁶⁸ and the Regulation of Interception of Communications and Provision of Communication-Related Information Act.

POPI is applicable to the processing of all personally identifiable information entered into a record, which includes any recorded information regardless of its form or medium (i.e., whether recorded and stored physically or electronically).

In the context of dispute resolution, POPI's provisions do not apply to court proceedings, but personal data that is regulated by POPI includes, *inter alia*, the criminal behaviour of a data subject to the extent that such information relates to the alleged commission of any offence or any proceedings in respect of any offence allegedly committed or the disposal of such proceedings.⁶⁹

64 Section 35 of PCCAA.

65 Section 28 of PCCAA.

66 *Financial Mail (Pty) Ltd v. Sage Holdings Ltd* 1993 2 SA 451 (A).

67 Act 35 of 2005.

68 Act 5 of 2002 (ECTA).

69 Section 26(b) of POPI.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Legal privilege in South Africa is governed by the common law and has historically been premised on English legal principles, applied in a South African context.

Legal privilege is also recognised by PAIA, which specifically upholds privilege, firstly, by excluding its application to pending litigation, where the rules of discovery remain unchanged, and secondly, by expressly prohibiting access to privileged records.

The recognised categories of legal privilege include legal professional privilege (which encompasses litigation privilege and legal advice privilege), ‘without prejudice’ privilege, the privilege against self-incrimination and marital privilege.

Litigation privilege protects communications between a litigant and a legal representative, as well as between a litigant or his or her legal representative and third parties, where such communications are made for the purpose of pending or contemplated litigation.⁷⁰

Legal advice privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving legal advice. Oral and written communications between a legal representative and a client, even if litigation is not specifically contemplated, are protected from disclosure provided that the legal representative was acting in a professional capacity at the time and was consulted in confidence, the communication was made for the purpose of obtaining legal advice, the advice does not facilitate the commission of a crime or fraud, and privilege is claimed by the client.⁷¹

Communications with advocates, attorneys, their candidate attorneys and other law firm employees who act under the control and direction of an attorney that satisfy the requirements of legal professional privilege are also protected from disclosure.⁷² Similarly, legal professional privilege also extends to communications with in-house lawyers.⁷³

South African courts have not pronounced on the question whether the rules of privilege apply to foreign lawyers. Given that legal professional privilege is based on the notion that freedom of consultation between lawyers and clients, with the assurance that the information exchanged will not be subject to disclosure, is required for the optimal functioning of an adversarial legal system, and further that legal professional privilege belongs to the client and not the lawyer, it is likely that a foreign qualified lawyer’s legal advice would also be regarded as privileged.

70 *Competition Commission of SA v. Arcelormittal SA Ltd* (680/12) [2013] ZASCA 84 (31 May 2013).

71 *Thint (Pty) Ltd v. National Director of Public Prosecutions and Others, Zuma and Another v. National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

72 *S v. Mushimba* 1977 2 SA 829 (A); *International Tobacco Co (SA) Ltd v. United Tobacco Cos (South) Ltd* 1953 (4) SA 251 (W).

73 *Van den Heever v. Die Meester* 1997 (3) SA 102 (T); *Mohamed v. The President of the Republic of SA* 2001 (2) SA 1145 (C).

Legal professional privilege is a right of the client and cannot be raised *mero motu*. Only the client may claim legal professional privilege and only the client can waive legal professional privilege. A waiver of legal professional privilege can be express, implied or imputed.⁷⁴

ii Production of documents

The Uniform Rules confer an obligation on a party to civil proceedings to make full disclosure of all documents and tape recordings (including electronic documents stored on a computer hard drive or other storage device such as a flash stick⁷⁵) which are or were in the possession or control of such party, within 20 court days⁷⁶ from the date of receipt of a written notice from any other party to the proceedings requesting such disclosure, or from the date of receiving notice of a trial date.⁷⁷

In addition, a party may also be required, at any time before the hearing of the matter, to disclose any document or tape recording to which reference is made in its pleadings or affidavits,⁷⁸ and may not rely on documents or records it has not discovered.

Legally privileged documents must be identified but are not discoverable, and discovery is limited to those documents and tape recordings that are relevant to the matter and in the control or possession of a party irrespective of where these documents are stored. Relevance is a factual question to be determined by the court from the issues raised in the parties' pleadings or affidavits.⁷⁹ A party would be obliged to make discovery of documents which may enable the party requiring discovery to advance his or her own case or to damage the case of his or her opponent. It has been held by our courts, as in foreign jurisdictions, that the protection of confidential information and trade secrets is a valid consideration to be weighed up against the interests of an applicant to be placed in a position to present its case fully when determining relevancy.⁸⁰

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Alternative dispute resolution (ADR) mechanisms, such as conciliation, mediation and arbitration, have become increasingly popular in South Africa, mainly due to the lengthy delays which can be associated with court proceedings, contrasted with the relative speed with which disputes can be resolved using ADR methods. ADR mechanisms offer advantages such as allowing parties to choose a presiding officer with specialised

74 *Competition Commission of SA v. Arcelormittal SA Ltd* [2013] ZASCA 84 (31 May 2013).

75 *Makate v. Vodacom (Pty) Ltd* 2013 JOL 30668 (GSJ).

76 Ten court days in terms of Rule 23 of the Magistrate Court Rules.

77 Rule 35 and Rule 37(1) of the Uniform Rules.

78 Rule 35(12) of the Uniform Rules.

79 *Swissborough Diamond Mines (Pty) Ltd v. Government of the Republic of South Africa* 1999 (2) SA 279 (T).

80 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v. Coucourakis and Another* 1979 (2) SA 457 (W).

knowledge, convenience in choosing suitable times and venues for proceedings, the fact that proceedings are mostly private and confidential and offer a certain degree of flexibility regarding rules and procedures.

ii Arbitration

Arbitration is the most commonly used method of ADR in South Africa, and is regulated by the Arbitration Act.⁸¹

Most civil disputes can be referred to arbitration, but a limited number of disputes are not permitted to be resolved by private arbitration and are reserved for the adjudication by the courts, such as matrimonial matters and any matter relating to status.⁸² A judicial review brought under the Promotion of Administration of Justice Act,⁸³ which was enacted to give effect to the right to just administrative action under Section 33 of the Constitution,⁸⁴ is also reserved for the High Court and cannot validly be referred to a private arbitrator.⁸⁵

Before a dispute can be referred to arbitration, the parties must enter into an arbitration agreement setting out the terms and basis for the arbitration, including the rules that will govern the proceedings and the arbitrator that will oversee the process. In domestic arbitrations, parties usually choose to apply the Uniform Rules or the rules of the South African arbitration institutions, such as the Arbitration Foundation of Southern Africa (AFSA) or the Association of Arbitrators (AASA). Foreign parties often elect to have the arbitration proceedings held according to the rules of the London Court of International Arbitration and the rules of the International Chamber of Commerce.

An arbitrator is not obliged to follow the rules of evidence, but this is subject to the terms of the arbitration agreement, and to the provision that the arbitrator must adopt a procedure that is fair to all parties and conforms to the requirements of natural justice.⁸⁶

Although arbitration awards are considered binding on the parties by agreement, in order for such award to be enforced, the successful party must apply to court to have the award made an order of court by way of provisional sentence or application proceedings. The court will not consider the merits of the dispute, and the applicant must merely show that the dispute was submitted to arbitration according to the terms of an arbitration agreement, that the arbitrator was appointed and that there was a valid award.

Unless an arbitration agreement provides otherwise, an arbitration award shall be final and not subject to appeal.⁸⁷ It is, however, common for parties to agree to an appeal procedure in their arbitration agreement. An arbitration award may be set aside by the

81 Act 42 of 1965.

82 Section 2 of the Arbitration Act.

83 Act 3 of 2002 (PAJA).

84 Preamble to PAJA.

85 *Airports Company SA Ltd v. ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ).

86 *Dexgroup (Pty) Ltd v. Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA).

87 Section 28 of the Arbitration Act.

High Court where the arbitrator misconducted him or herself, committed any gross irregularity in conducting the proceedings or exceeded his or her powers or if the award was improperly obtained.⁸⁸ South African courts have, however, maintained their lack of jurisdiction to enquire into the correctness of the conclusion arrived at by an arbitrator.⁸⁹

South Africa is a member of the New York Convention of 1958 and enacted the Recognition and Enforcement of Foreign Arbitral Awards Act⁹⁰ in order to give effect to its obligations under the convention, and to allow a foreign award to be made an order of court.⁹¹ South African courts will not enforce a foreign arbitration award if it is contrary to South African public policy, the parties do not have the requisite capacity to contract, the agreement is not valid under the foreign law, the defendant did not receive notice of or participate in the arbitration proceedings or if the dispute is not arbitrable.⁹² In addition, the award must be binding and it must not have been set aside by another competent authority.⁹³ Foreign arbitration awards regarding transactions relating to raw materials require ministerial consent in terms of the Protection of Businesses Act.⁹⁴

The International Arbitration Bill, which is expected to be finalised in early 2016, will incorporate the United Nations Commission on International Trade Law (UNCITRAL) Model Law into South Africa's international arbitration regime.

The China-Africa Joint Arbitration Centre (CAJAC) is a new international arbitration centre opened in October 2015 to specifically resolve commercial disputes between Chinese and African parties. The centre is the result of an agreement between AFSA, Africa ADR (AFSA's external arm), AASA, and the Shanghai International Trade Arbitration Centre. Together with the impending introduction of the International Arbitration Bill, the CAJAC may lead to the establishment of South Africa as an international commercial arbitration hub.

iii Mediation

Mediation is a form of ADR in which an impartial third-party mediator assists parties to resolve their dispute by negotiation and mutual agreement. Mediations do not produce binding resolutions unless the parties reduce the agreement reached to a binding contract. Due to the non-binding nature of mediation proceedings, parties often agree to refer the dispute to arbitration if mediation is unsuccessful.

There is no legislation governing the application of mediation in South Africa generally, but the Rules of Voluntary Court-Annexed Mediation came into operation in

88 Section 33 of the Arbitration Act.

89 *Eskom Holdings Soc Limited v. Khum MK Investments & Bie Joint Venture (Pty) Ltd and others* [2015] 3 All SA 439 (GJ), see also *Clark v. African Guarantee and Indemnity Company Ltd* 1915 CPD 68, *Telcordia Technologies Inc v. Telkom SA Limited* 2007 (3) SA 266 (SCA), *Lufuno and Associates (Pty) (Ltd) v. Andrews and another* 2009 (4) SA 529 (CC) 221.

90 Act 40 of 1977.

91 Section 1 of the Foreign Arbitral Awards Act.

92 Sections 4(1)(a)(ii), (b)(i), (b)(iii), (b)(ii) and (a)(i) of the Foreign Arbitral Awards Act.

93 Section 4(1)(b)(v) of the Foreign Arbitral Awards Act.

94 Act 99 of 1978, Section 1(1) read with Section 1(3).

December 2014.⁹⁵ These rules provide for court-annexed mediation in civil proceedings in the Magistrates' Courts in order to assist in the reduction of disputes appearing before courts and to promote access to justice. The rules make provision for the referral of disputes for mediation at any stage during civil proceedings, provided that judgment has not yet been delivered. As with other forms of mediation, the mediator merely assists with the negotiation of settlement, which may lead to the conclusion of a settlement agreement, which is a binding and enforceable contract and also be made an order of court. Legal representation is permitted but not required. The introduction of these rules will likely lead to an increase in the use of mediation as a method of dispute resolution.

Mediation is also commonly used in labour disputes before the Commission for Conciliation, Mediation and Arbitration (CCMA), an independent dispute resolution body established in terms of the Labour Relations Act.⁹⁶

iv Other forms of alternative dispute resolution

Other alternative dispute resolution methods commonly used in South Africa are expert determinations and conciliation. Expert determinations are mostly used in professional industries where the dispute is of a technical nature and involve parties to a dispute entering into an agreement providing for the appointment of an independent and neutral expert to determine the dispute in private. The confidential nature of the proceedings ensures the protection of trade secrets, the limited adversarial interaction between the parties preserves business relationships, it is cost-effective and the referee's decision is likely to be accepted as it is based on expert knowledge and an intricate understanding of the subject matter.

Conciliation is used for labour disputes by the CCMA. A commissioner or panellist meets with the parties in a dispute and seeks resolution of the dispute by mutual agreement. The conciliation process is fast, uncomplicated, inexpensive and does not allow for any legal representation. The decision to settle is in the hands of the parties involved and the commissioner may determine a process which could include mediation, facilitation or making recommendations in the form of an advisory arbitration award. If the dispute is settled, an agreement to that effect will be concluded and the commissioner will issue a certificate.

VII OUTLOOK AND CONCLUSIONS

The ongoing integration of South Africa into the global economy and the prevalence of international commerce have facilitated the development of commercial dispute resolution in South Africa to meet the contemporary demands of multinational dispute resolution processes. Much progress has been made in this regard, particularly within the realm of commercial arbitration and the recognition of foreign judgments and arbitration awards.

95 Chapter 2 of the Magistrates' Courts Rules.

96 Act 66 of 1995.

An overburdened court system and local legislation which has not always kept pace with global trends remain challenges to be overcome. Various reform initiatives which are under way to streamline civil proceedings, promote accountability and align local anti-corruption legislation with global developments aim to address some of these challenges.

Notwithstanding the challenges faced, the South African dispute resolution framework continues to offer reliable, established and predictable processes for the resolution of disputes, firmly rooted in the constitutional democracy which the courts are mandated to uphold.

Appendix 1

ABOUT THE AUTHORS

GRÉGOR WOLTER

Adams & Adams

Grégor Wolter is a partner specialising in dispute resolution and is the chairman of the commercial, property and litigation department of the firm, which has shown significant growth over the past few years.

He holds B.Bus.Sci (Hons) (1991) and LLB (1993) degrees from the University of Cape Town, was admitted as an attorney in South Africa in 1996 and has more than 20 years' post-admission experience.

Grégor's practice areas include commercial litigation and dispute resolution (including contractual disputes, delictual and enrichment claims, disputes around restraints of trade and unfair competition, construction and insolvency), regulatory and administrative law.

JAC MARAIS

Adams & Adams

Jac Marais is a partner with a general litigation practice. His particular areas of expertise include commercial litigation (including arbitration), competition law and constitutional law (including litigation).

Jac holds qualifications from the University of Stellenbosch, Wits and King's College, London.

Jac advises and represents a number of corporate and public entities in a wide range of dispute resolution and regulatory forums in South Africa and abroad. He and his team represents clients in numerous high-profile matters and their experience spans various sectors, including agriculture, defence, tax administration, construction, financial regulation, health, and government at all levels.

Jac presents annual pre- and postgraduate lectures on competition law at the University of Pretoria and is a regular author and speaker on a range of corporate legal matters.

ANDREW MOLVER

Adams & Adams

Andrew Molver is a partner and has particular expertise in constitutional and administrative law (including public procurement law), regulatory law and general commercial litigation.

Andrew advises and represents both private sector clients and public authorities on a range of constitutional and administrative law issues. He has recently represented the Public Protector (a prominent constitutional institution) in various matters before both the Supreme Court of Appeal and Constitutional Court concerning the legal effect of her powers and the enforcement of her remedial action.

Andrew's constitutional and administrative law experience extends across several practice areas, including public procurement, education, health insurance, environmental matters, energy, property, licensing and registration, local government and general regulatory matters.

Andrew represents multiple local and foreign clients from various industries on all types of commercial and contractual disputes in both the High Courts and private arbitration bodies. His expertise in this regard relates primarily to contractual and delictual damages actions, restraint of trade enforcement, unlawful competition claims, shareholder and director disputes, defamation matters and enrichment claims.

ADAMS & ADAMS

Lynnwood Bridge

4 Daventry Street

Lynnwood Manor

Pretoria 0081

South Africa

Tel: +27 12 432 6000

Fax: +27 12 432 6599

gregor.wolter@adamsadams.com

jac.marais@adamsadams.com

andrew.molver@adamsadams.com

renee.nienaber@adamsadams.com

www.adamsadams.com