
THE DISPUTE RESOLUTION REVIEW

NINTH EDITION

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DAMIAN TAYLOR

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

Ninth Edition

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EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 40 jurisdictions. I am delighted to take over as editor of this work from Jonathan Cotton of Slaughter and May, and would like to thank him for his valuable contribution to its development over his tenure as editor.

The Dispute Resolution Review offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

This ninth 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.

I first began working on this publication in 2008 as a contributor during the early stages of the global financial crisis. At that point, there was much uncertainty about how the then financial world order would change and what that meant for disputes practices. Many predicted a surge in disputes as companies tightened their belts and fought more keenly over diminishing assets. Certainly, in my home jurisdiction – England and Wales – the commercial courts have been extremely busy. Since then we have seen green shoots of recovery followed by new crises both within the eurozone and globally, such as the more recent sharp fall in oil prices and consequential increase in disputes in the energy sector.

2016 may be seen as yet another benchmark year. Two major events have shaken investor confidence and are likely to have an impact on the legal profession for years to come. The UK's vote to leave the EU has created considerable uncertainty in the region, and Donald Trump's election as the US president is likely to affect the global international community. The special Brexit chapter in this edition explores some of the key issues that will form part of the UK–EU negotiations likely to commence this year. A top priority for disputes lawyers

in the region will be whether there will continue to be mutual recognition of judgments across Europe. How will this affect London as a popular global centre for dispute resolution? No one knows the answer to these issues, but what is certain is that clients and practitioners across the globe are likely to continue to face novel and challenging problems. *The Dispute Resolution Review* aims to shine a light on where to find the answer.

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 629 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.

Damian Taylor
Slaughter and May
London
January 2017

Chapter 33

SOUTH AFRICA

*Grégor Wolter, Jac Marais, Andrew Molver and Renée Nienaber*¹

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 that shaped procedural and mercantile law. Customary law is also recognised as 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 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 tax court, 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 designated 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 for litigants to pursue claims of 12,000 rand or less without legal representation.

II THE YEAR IN REVIEW

Key developments over the past year followed global trends and included:

- a* clarification of the effect of a pending application for a restraining order and the scope of issues capable of referral to court in terms of Section 20(1) of the Arbitration Act;⁸
- b* further progress towards more active judicial management of the dispute resolution process;
- c* approval of the International Arbitration Bill; and
- d* the Community Schemes Ombud Services Act⁹ coming into effect.

In *City of Tshwane Metropolitan Municipality v. Afriforum and Another*,¹⁰ the Constitutional Court considered the requirements for the granting of an interim interdict and held that

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 Act 42 of 1965.

9 Act 9 of 2011.

10 [2016] ZACC 19; 2016 (9) BCLR 1133 (CC) (21 July 2016).

the mere existence of a pending application for a restraining order does not restrain, and a respondent is thus not precluded from acting contrary to the order sought before such order has been granted. The judgment essentially disposed of the notion that acting contrary to an interdictory order still being sought through pending proceedings constitutes constructive contempt.

In *Padachie v. The Body Corporate of Crystal Cove*,¹¹ the Supreme Court of Appeal refused to adjudicate issues based on a statement of case to court where the appellant had made a qualified request for a referral to court under Section 20(1) of the Arbitration Act. Section 20(1) permits an arbitration tribunal, prior to making an award, to state a question of law arising during the referral to arbitration for determination by a court of law or advocate, on the basis that such determination shall thereafter be binding upon the arbitrator. In *Padachie*, the Court held that Section 20(1) only finds application where questions of law arise during the course of arbitration. A party to arbitration is not entitled to refer to court the very issues referred for arbitration.

The move towards judicial case management continued, particularly within the Gauteng Division of the High Court. Multiple new directives and amendments to the practice manuals for the division were published that varied, among others, the prevailing practices in respect of unopposed motions, allocation of trial dates and the filing of practice notes, expert testimony and joint reports, as well as trial readiness certification and other measures aimed at promoting judicial oversight over trial preparation and ensuring that matters are ready for hearing on the allocated trial date.

The Community Schemes Ombud Services Act¹² came into force on 6 October 2016, and aims to promote good governance of community schemes and to provide a dispute resolution mechanism in respect of community schemes. The ombud established by the Act has oversight over all disputes pertaining to community schemes and the alternative dispute resolution process contemplated in the Act makes provision for conciliation and, thereafter, adjudication. Any competent ruling made by the adjudicator has the same effect as a court order and may be registered as such.

The much-anticipated International Arbitration Bill was approved by Cabinet in April 2016. The Bill incorporates the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) as the cornerstone of the international arbitration regime in South Africa, and will provide much-needed reform in South Africa's arbitration regulatory framework. Currently, the Arbitration Act, a 51-year-old statute, regulates both domestic and international arbitrations.

Once enacted, the International Arbitration Act will govern all international arbitrations (both commercial and investment arbitrations) seated in South Africa. A key theme of the legislation is to distinguish between the law governing international arbitrations seated in South Africa, through the incorporation of the UNCITRAL Model Law, and domestic arbitrations, which will continue to be regulated by the Arbitration Act.

The Bill seeks to align the South African statutory framework with international best practice and will position South Africa as an attractive venue for international parties to resolve their commercial disputes, particularly multinational corporations with subsidiaries in South Africa. The South African courts are reluctant to interfere with arbitration agreements,

11 [2016] ZASCA 145 (30 September 2016).

12 Act 9 of 2011.

and awards, and have continually upheld the sanctity and integrity of the arbitration process. The courts' views in this regard should not be any different when faced with international arbitrations, which are expected to enjoy equal respect and protection.

The duties and obligations of South Africa in the context of the Implementation of the Rome Statute of the International Criminal Court Act¹³ came under scrutiny in the case of *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*.¹⁴ The court held that South Africa, as a ratifying state, was enjoined to cooperate with the International Criminal Court (ICC) and that the Minister's assertion that the President of the Republic of Sudan, Omar Hassan Ahmad Al-Bashir, would be protected by diplomatic immunity, was therefore without merit. This led to the publication in November 2016 of the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill. The Bill contemplates the repeal of South Africa's implementation of the Rome Statute and withdrawal from the ICC, and is the subject of much controversy, both locally and abroad.

Other noteworthy developments can be found in cases dealing with discovery of documents and applications to compel compliance with the rules of court,¹⁵ legal submissions made in affidavits in motion proceedings,¹⁶ the grounds for rescinding a compromise agreement made an order of court,¹⁷ granting of declaratory orders,¹⁸ the extent of the extra-territorial jurisdiction conferred by Section 15 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act,^{19,20} the correct approach to the interpretation of contracts and the parole evidence rule,²¹ applications to found jurisdiction,²² the enforceability of restraint of trade clauses after a period of commercial inactivity arising from a 'garden leave' clause in an employment contract,²³ and prescription of debts.²⁴

Further changes in the law include the determination of new areas of jurisdiction of the Gauteng Division, the Gauteng Local Division and the Limpopo Division of the High

13 Act 27 of 2002.

14 [2015] 3 All SA 505 (GP).

15 *Centre for Child Law v. Hoërskool Fochville* 2016 (2) SA 121 (SCA).

16 *Venmop 275 (Pty) Ltd v. Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ).

17 *Slabbert v. MEC for Health and Social Development, Gauteng* (2016) ZASCA 157 (3 October 2016).

18 *Rumdel Cape v. SA National Roads Agency* [2016] ZASCA 23 (18 March 2016).

19 Act 33 of 2004.

20 *Okah v. S* (2016) ZASCA 155 (3 October 2016).

21 *Padayachee v. Adhu Investments CC* [2016] 2 All SA 555 (GJ); *Afgri Corporation Ltd v. Eloff* [2016] ZASCA 141 (29 September 2016).

22 *Travelx Limited v. Maloney* ZASCA 128 (27 September 2016).

23 *Vodacom (Pty) Ltd v. Motsa* 2016 (3) SA 116 (LC).

24 *Muller v. Sanlam* [2016] ZASCA 149 (30 September 2016); *Trinity Asset Management (Pty) Ltd v. Grindstone Investments (Pty) Ltd* [2016] ZASCA 135 (29 September 2016); *Standard Bank v. Miracle Mile Investments* ZASCA 91 (1 June 2016); *Masilo v. Betterbridge* [2016] ZASCA 73 (25 May 2016); *Off-Beat Holiday Club v. Sanbonani Holiday Spa* [2016] ZASCA 62 (25 April 2016); *First National Bank v. Scenematic One (Pty) Ltd* ZASCA 60 (14 April 2016); *Foxlake Investments v. Ultimate Rafi Foundation Design* [2016] ZASCA 54 (01 April 2016); *Kosmos v. Leopont* [2016] ZASCA 48 (31 March 2016); and *Fisher v. Natal Rubber Compounders (Pty) Ltd* [2016] ZASCA 33 (24 March 2016).

Court, and the restructuring of the Magistrates' Courts in Limpopo and Mpumalanga, the amendment of the Magistrates' Courts Rules and the issuing of new practice directives for the Constitutional Court, the Gauteng Division, the Gauteng Local Division, the Limpopo Division and Mpumalanga circuit courts of the Gauteng Division of the High Court.

The Legal Practice Act²⁵ is expected to come into partial operation in February 2017. A joint working committee has been established to facilitate the Act's implementation and marks the first step in the process that will fundamentally change the organisation of the legal profession, representation in proceedings and regulation of legal costs.

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 oral evidence to be led. 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.²⁶ Three types of summonses are differentiated, namely simple summons (for claiming debts of liquidated amounts), combined summons (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. 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. A waiting period of nine to

25 Act 28 of 2014.

26 Uniform Rule 17.

14 months for trial dates is currently the norm. Recent developments in court procedure have seen a move towards case management of matters by judges, aimed at ensuring that matters are brought before the court more efficiently and expeditiously.

Applications initiating proceedings must be brought by notice of motion,²⁷ addressed to the registrar and the respondent (where applicable)²⁸ as an essential first step²⁹ and must be accompanied by a founding affidavit setting out the facts upon which the applicant relies for relief³⁰ as well as true copies of all annexures thereto.³¹

A respondent must be given no less than five days from delivery of the notice of motion to notify the applicant of an intention to oppose.³² The respondent's answering affidavit must be delivered together with relevant annexures within 15 days of the notice of intention to oppose.³³ If the respondent fails to give notice of an intention to oppose, the applicant may enrol the matter on an unopposed basis.³⁴

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.³⁵ The filing of further affidavits will only be allowed with the leave of the court upon consideration of the facts in dispute³⁶ and such leave will only be granted in exceptional circumstances.³⁷

The process for enrolling opposed applications are governed by the Uniform Rules read with the particular division's practice manual or directives. The current waiting period for a hearing date for an opposed motion varies between divisions and can be between four and eight 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 governments and other organs of state are prescribed by legislation. This includes deviations from the 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 motion rolls.

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

28 Uniform Rule 6(2).

29 *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).

30 Uniform Rule 6(1).

31 Uniform Rule 6(5)(a).

32 Uniform Rule 6(5)(d).

33 Uniform Rule 6(5)(d)(ii).

34 Uniform Rule 6(5)(c).

35 Uniform Rule 6(5)(e).

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

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

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 being 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 Rights³⁸ 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*³⁹ it was held that an opt-in class action may only be used in exceptional circumstances.

The Companies Act,⁴⁰ the Consumer Protection Act⁴¹ and the National Environmental Management Act⁴² all provide standing to persons acting on behalf of a 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*⁴³ 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 Centre v. Pioneer Food (Pty) Ltd*⁴⁴ 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 a prerequisite for instituting a class action.⁴⁵

38 Chapter 2 of the Constitution.

39 2013 (5) SA 89 (CC).

40 Act 71 of 2008.

41 Act 68 of 2008.

42 Act 107 of 1998.

43 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).

44 2013 (2) SA 213 (SCA).

45 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.

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.⁴⁶

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.

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.⁴⁷

The rules pertaining to service in a foreign country apply equally to all process of court and not only to the initiation of proceedings.⁴⁸

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.⁴⁹

Where a person over whom the court exercises jurisdiction is outside South Africa, an *ex parte* application⁵⁰ 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.⁵¹

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

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

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

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

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

50 Uniform Rule 5.

51 Uniform Rule 5(2).

have been authorised in terms of Uniform Rule 4(2). In *CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens*⁵² 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*⁵³ 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:

- 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.⁵⁴

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*⁵⁵ 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.

52 2012 (5) SA 604 (KZD).

53 1995 (1) SA 677 (A).

54 Act 99 of 1978.

55 2007 (2) SA 283 (SCA).

The Constitutional Court also considered the enforcement of foreign judgments in the matter of the *Government of the Republic of Zimbabwe v. Fick & Others*⁵⁶ and found that the common law must be developed 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.

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.⁵⁷

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 request must be submitted via the South African Department of International Relations and Cooperation. 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 that 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 Act⁵⁸ 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*⁵⁹ 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.

56 2013 (5) SA 325 (CC).

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

58 Act 2 of 2000 (PAIA).

59 2015 (3) SA 386 (SCA).

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 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 that could affect the attorney's judgment in the conduct of a matter.

An attorney owes a fiduciary duty to the client during the period of the attorney–client relationship,⁶⁰ 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.

An attorney also owes a former client the remaining duty of confidentiality. 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.⁶¹ 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.⁶² By restraining attorneys from acting against their former clients in certain circumstances, South African courts protect the administration of justice.⁶³

Typically, the need for Chinese walls is most often encountered in commercial transactions but it is not unheard of in litigation. 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. To implement a Chinese wall, an agreement whereby the dissemination and processing of information is restricted is entered into, and to limit the parties' liability for breach of confidentiality it is recommended that the Chinese wall include the following:

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

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

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

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

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

Keeping pace with international developments, mechanisms to combat organised crime, money laundering and racketeering activities were introduced by the Prevention of Organised Crime Act (POCA),⁶⁴ aimed at depriving offenders of the benefit of their criminal activities and criminalising the act of assisting another to benefit from the proceeds of their unlawful activities.⁶⁵ 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 Act (FICA)⁶⁶ 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 they intend 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).⁶⁷ 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,⁶⁸ 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 Act (PCCAA)⁶⁹ 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, acts of corruption, fraud, theft, extortion, forgery and uttering. Where the offender is a South

64 Act 121 of 1998 (POCA).

65 POCA Preamble.

66 Act 38 of 2001 (FICA).

67 Section 21(1) of FICA.

68 Section 22(1) of FICA.

69 Act 12 of 2004 (PCCAA).

African citizen residing in South Africa, or a company incorporated in South Africa, South African courts will have jurisdiction over the offence.⁷⁰ The PCCAA provides for companies convicted of corruption to be placed on a blacklist.⁷¹

Following regulatory gaps that were identified in assessments conducted by the Financial Action Task Force and the International Monetary Fund, 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.⁷²

A dedicated data protection law in the form of the Protection of Personal Information Act (POPI)⁷³ 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,⁷⁴ the Promotion of Access to Information Act (PAIA), the Electronic Communications and Transactions Act⁷⁵ and the Regulation of Interception of Communications and Provision of Communication-Related Information Act.⁷⁶

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.⁷⁷

70 Section 35 of PCCAA.

71 Section 28 of PCCAA.

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

73 Act 4 of 2013 (POPI).

74 Act 35 of 2005.

75 Act 5 of 2002 (ECTA).

76 Act 70 of 2002.

77 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 (encompassing 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.⁷⁸

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.⁷⁹

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.⁸⁰ Similarly, legal professional privilege also extends to communications with in-house lawyers.⁸¹

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.

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

79 *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).

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

81 *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.⁸²

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 stick)⁸³ that are or were in the possession or under the control of such party, within 20 court days⁸⁴ 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.⁸⁵

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,⁸⁶ 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 under the control or in the 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.⁸⁷ A party would be obliged to make discovery of documents that 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.⁸⁸

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

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

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

84 Ten court days in terms of Rule 23 of the Magistrates' Court Rules.

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

86 Rule 35(12) of the Uniform Rules.

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

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

such as allowing parties to choose a presiding officer with specialised knowledge, convenience in choosing suitable times and venues for proceedings, a degree of flexibility regarding rules and procedures and the fact that proceedings are mostly private and confidential.

ii Arbitration

Arbitration is the most commonly used method of ADR in South Africa, and domestic arbitrations are regulated by the Arbitration Act.⁸⁹

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 adjudication by the courts, such as matrimonial matters and any matter relating to status.⁹⁰ A judicial review brought under the Promotion of Administration of Justice Act,⁹¹ which was enacted to give effect to the right to just administrative action under Section 33 of the Constitution,⁹² is also reserved for the High Court and cannot validly be referred to a private arbitrator.⁹³

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.⁹⁴

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 a valid award was made.

Unless an arbitration agreement provides otherwise, an arbitration award shall be final and not subject to appeal.⁹⁵ 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 High Court where the arbitrator misconducted himself or herself, committed any gross irregularity

89 Act 42 of 1965.

90 Section 2 of the Arbitration Act.

91 Act 3 of 2002 (PAJA).

92 Preamble to PAJA.

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

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

95 Section 28 of the Arbitration Act.

in conducting the proceedings or exceeded his or her powers or if the award was improperly obtained.⁹⁶ South African courts have, however, maintained their lack of jurisdiction to enquire into the correctness of the conclusion arrived at by an arbitrator.⁹⁷

South Africa is a member of the New York Convention of 1958 and enacted the Recognition and Enforcement of Foreign Arbitral Awards Act⁹⁸ in order to give effect to its obligations under the Convention, and to allow a foreign award to be made an order of court.⁹⁹ 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.¹⁰⁰ In addition, the award must be binding and it must not have been set aside by another competent authority.¹⁰¹ Foreign arbitration awards regarding transactions relating to raw materials require ministerial consent in terms of the Protection of Businesses Act.¹⁰²

The China-Africa Joint Arbitration Centre (CAJAC), which opened in October 2015, was the result of an agreement between AFSA, Africa ADR (AFSA's external arm), AASA and the Shanghai International Trade Arbitration Centre, to specifically resolve commercial disputes between Chinese and African parties.

The recently published International Arbitration Bill distinguishes between the law governing international arbitrations seated in South Africa, through the incorporation of the UNCITRAL Model Law, and domestic arbitrations, which will continue to be regulated by the Arbitration Act. Once enacted, the International Arbitration Act will repeal the Recognition and Enforcement of Foreign Arbitral Awards Act, and will apply to both private and public (state-owned) entities, subject to the Protection of Investment Act,¹⁰³ which provides for dispute resolution mechanisms in the event of a dispute between a state-owned company and an international investor. The Bill contemplates that arbitrators and their arbitral institutions (including their representatives) will have immunity (unless an act or award is shown to have been in bad faith). The Bill further provides that arbitrations involving any public body are to be held in public (unless the arbitrator directs otherwise based on compelling reasons), and that arbitrations held in private, including the award and all documents in relation to the arbitration that are not otherwise in the public domain, must be kept confidential by the parties and tribunal. Significantly, in terms of the Bill, the permission of the Minister of Economic Affairs will not be required for the enforcement of certain foreign arbitral awards and an award, irrespective of the country in which it was made, shall be binding and, upon application in writing to the court, shall be enforced, save for certain exceptions (including

96 Section 33 of the Arbitration Act.

97 *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.

98 Act 40 of 1977.

99 Section 1 of the Foreign Arbitral Awards Act.

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

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

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

103 Act 22 of 2015.

that the enforcement is against public policy, is in bad faith or the subject matter is not arbitrable in South Africa). A further welcome development for international companies is that, in terms of the Bill, security for costs may no longer be ordered against a foreign party at the commencement of the arbitration proceedings.

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 December 2014.¹⁰⁴ 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 may also be made an order of court. Legal representation is permitted but not required. The introduction of these Rules is likely to 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.¹⁰⁵

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 disputes are of a technical nature, and they 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 that 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.

104 Chapter 2 of the Magistrates' Courts Rules.

105 Act 66 of 1995.

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.

An overburdened court system and local legislation that has not always kept pace with global trends remain challenges to be overcome. Various reform initiatives that 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 firmly rooted in the constitutional democracy that the courts are mandated to uphold.

Appendix 1

ABOUT THE AUTHORS

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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 BBusSci (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.

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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 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.

RENÉE NIENABER

Adams & Adams

Renée Nienaber is a senior associate and practising notary public.

She holds an LLB degree (*cum laude*) from the University of Pretoria and was admitted as an attorney and notary in South Africa in 2011.

Renée's practice covers all aspects of commercial and contractual litigation, with a specific focus on property litigation, consumer law and franchise disputes as well as disputes around restraints of trade and unfair competition.

Renée's notarial practice involves assisting clients with all aspects of notarial work, including ante-nuptial contracts and other notarial deeds, as well as the legalisation and authentication of documents for use in other jurisdictions.

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