March 2022 e-periodical issue 13

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FROM THE ACTING EDITOR'S PEN:

Advocate Cassie Badenhorst SC is the acting editor of this e-periodical for the duration of Eric Dunn SC's temporary absence. Cassie is a member of the Maisels Group of Advocates, a senior member of the Johannesburg Society of Advocates, a long serving Fellow of the Association of Arbitrators (Southern Africa) NPC, and an internationally renowned ADR practitioner.

Welcome to ***Arbitrarily Speaking!***

Our regular editor, Eric Dunn SC, has unfortunately suffered the loss of Miranda who was the love and the light in his life. We sympathise with Eric's sad loss and express our heartfelt condolences. I am honoured to step in to assist Eric on a temporary basis.

Patience is the best way forward.

O tempora! O mores! Shame on this age and on its lost principles is the famous lament uttered by Cicero to deplore the sorry condition of the Roman Republic in 63 BC.

This is a moment where we justifibly express a collective, *O tempora! O mores!* For two years mankind has faced the worst pandemic in a century which destroyed countless lives and livelihoods; dark clouds of war are gathering in Europe; the Zondo commission report confirms our worst suspicions; and South Africans are warned to 'buckle up' for a bumpy ride in 2022, considering enterprises.

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ARBITRATION EDUCATION STATION

At the time of going to press the Association's Faculty is a beehive of activity with new course enrollments and the finalisation of course material for the commencement of the 2022 academic year in March.

The Association will this year continue presenting very successful arbitration correspondence courses that have been presented, updated, and modernised continuously over decades. These courses include the Certificate Course in Arbitration, the Fellowship Courses, the Expedited Fellowship Course and our flagship course, the Specialisation in Construction Law Course, all presented by experienced senior practitioners from the legal profession and the construction industry under the guidance of myself as head of Tutors and Emeritus Professors David Butler and Sieg Eiselen, respectively from the University of Stellenbosch and UNISA.

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TOOLS OF THE TRADE

INTERNATIONAL ARBITRATION WAIVER OF THE RIGHT TO REVIEW AN ARBITRATION AWARD

by Cassie Badenhorst S.C. and Penny Bosman

Arbitration, particularly in the context of legal disputes between parties in different countries, is the dispute resolution mechanism of choice. International arbitration allows parties to resolve disputes swiftly and in accordance with the applicable international principles of law. One of the greatest attractions of international arbitration is the finality of the award that is granted which, at least in theory, should lead to speedy payment for the claimant.

Parties who successfully engage in international arbitrations and receive awards in their favour, often find themselves bogged down in a quagmire of attempts by the unsuccessful party to avoid making payment. The unsuccessful party might, in an effort to stall making payment of the award, institute review proceedings. This might take place even though the rules applicable to international arbitrations in most jurisdictions, including South Africa, usually provide that, by submitting disputes to international arbitration, parties agree that the award made is final and binding on them and they are deemed to have waived any right to further recourse.

We recently dealt with a review application in the Johannesburg High Court, which was brought by an unsuccessful party to an international arbitration, to set aside an award granted in our clients' favour. As part of the review application, the applicant sought an order that rule 41(3) of the AFSA International Rules of Arbitration ("the AFSA International Rules"), the predecessor to the current article 33(9), be declared to be contrary to public policy and accordingly void insofar as it constituted a waiver of an unsuccessful party's rights to bring an application to set aside the award in terms of article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). The Model Law, which was adopted by UNCITRAL on 21 June 1985, forms part of the South African International Arbitration Act 15 of 2017 ("the International Arbitration Act") and permits an award to be set aside if it is in conflict with the public policy of South Africa.

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TOOLS OF THE TRADE ctd.

An esteemed Life Fellow of the Association, advocate Patrick Lane SC, recently published the following scholarly article in The International Construction Law Review. The article is hereby reproduced with the kind permission of Patrick Lane SC and The International Construction Law Review. It makes for interesting and educational reading for ADR practitioners who are, particularly in construction dispute resolution context, often confronted with the apparent conflict between two principles relevant to the law of contract namely good faith and *pacta sunt servanda.*

THE TENSION BETWEEN THE APPLICATION OF GOOD FAITH AND *PACTA SUNT SERVANDA*

PATRICK M M LANE SC
The Maisels Group

ABSTRACT

The law of contract in South Africa has until recently regarded "good faith" as an underlying principle. A different approach to the application of "good faith" has followed the advent of the Constitution and the approach adopted by the Constitutional Court. There is, however, tension between this approach and that subsequently adopted by the Supreme Court of Appeal. This paper examines these different approaches and the impact that the judgments of the Constitutional Court will have on the law of contract.

INTRODUCTION

The principle of "Good faith" as underlying principle of the South African law of contract has traditionally acted as an element of fairness in South African Law. Agreements must be obtained properly, there is a requirement of legality, and the process of interpreting contracts takes cognizance of it.1 More recently the Constitutional Court has applied a much broader application of the principle of "good faith". Tension has, however, arisen between the approach adopted by the Supreme Court of Appeal and that adopted by the Constitutional Court to the application of the Constitution to the law of contract and in particular the extent to which the principle of *pacta sunt servanda* is affected thereby.

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THE PLEA OF *LIS ALIBI PENDENS* IN ADJUDICATIONS

By Kiki Bailey SC

1. The defence or plea of *lis alibi pendens* is sometimes encountered in adjudication proceedings. This defence is raised in circumstances where there may be legal proceedings which were instituted prior to the commencement of adjudication proceedings. The most common example is a case where a payment certificate had been issued in favour of a contractor without the employer demurring. The employer simply remains silent whereupon the contractor launches legal proceedings in a court to claim judgement. The employer then, for the first time, in the court proceedings, raises a defence arising out of the contract between the parties. This leads to the contractor instituting adjudication proceedings for the determination of the contractual dispute, when the court proceedings are already pending.

2. *Lis alibi pendens* is a special plea that can be raised where there is litigation pending between the same parties, based on the same cause of action, and in respect of the same subject matter.

3. In order for the special defence to succeed, the Supreme Court of Appeal in **Caesarstone Sdol-Yam Ltd. v. The World of Marble and Granite 2000 CC and Others ("Caesarstone"),** in describing its requirements, stated:

> 'As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere, and therefore it is inappropriate for it to be litigated in the same court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties, and that it is desirable that there be finality in litigation …'.

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AOA BREAKING NEWS

The Board of the Association of Arbitrators (Southern Africa) NPC is pleased to announce that Judge Malcolm Wallis has accepted an invitation to become an Honorary Fellow of the Association. Judge Wallis was born in Durban and studied at the University of Natal (now the University of KwaZulu-Natal) (UKZN) where he obtained the degrees BComm, LLB (*cum laude*) and PhD. He is an honorary professor of law at UKZN and at the University of the Free State. Judge Wallis was admitted as an advocate in 1973 and took silk in 1985. He practised as an advocate until his appointment as a Judge of the High Court. While in practice, Judge Wallis was chairperson of the Natal Bar from 1991 to 1993. He subsequently, from 1994 to 1997, served as chairperson of the General Council of the Bar (GCB). Later, he co-chaired the Barristers Forum of the International Bar Association (IBA). He is an honorary president of the GCB and an honorary member of the Australian Bar Association. Judge Wallis is further an honorary bencher of the Honourable Society of Kings Inns in Dublin.

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