Analyses

THE USE OF ALTERNATIVE DISPUTE RESOLUTION METHODS IN CORPORATE DISPUTES: THE PROVISIONS OF THE COMPANIES ACT OF 2008

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I INTRODUCTION

It has been said that companies 'desire among all things that ... controversies be rapidly as well as equitably decided', and that prolonged lawsuits are 'the tumors and cancers of business men, eating into the very substance of their lives'.[1] These concerns have had the result that the use of alternative dispute resolution (ADR) processes to resolve commercial disputes has become a growing trend internationally over the last few decades.[2]

The trend towards the increasing use of ADR processes to resolve commercial disputes has also been evident in South Africa where there has been increasing support for mediation, rather than adjudication, over the last few decades.[3] There are currently nearly 50 statutes in South Africa which provide for mediation in some form or other.[4]

Arbitration is also used to resolve commercial disputes (in terms of the Arbitration Act 42 of 1965). But, due partly to the structural and procedural similarities between arbitration and litigation, there is a

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[1] These were statements made by Elliott Cowdin, a leader in the Chamber of Commerce of New York State, as quoted by Benjamin F Tennillee, Lee Applebaum & Anne Tucker Nees in 'Getting to yes: The unique role of ADR in business court cases' (2010) 11 *Pepperdine Dispute Resolution Journal* 35 at 36.

[2] Thomas J Stepanowich 'ADR and the "vanishing trial": The growth and impact of "alternative dispute resolution"' (2004) 1 *Journal for Empirical Legal Studies* 843 at 879.

[3] John Brand, Felicity Steadman & Christopher Todd *Commercial Mediation* (2012) 2.

[4] Alan Rycroft 'Settlement and the law' (2013) 130 *South African Law Journal* 187 at 197.

growing trend internationally of dissatisfaction with arbitration, especially relating to delays and high costs associated with arbitration.[5]

Another growing trend in many industries in South Africa is to make use of ombudsmen to resolve commercial disputes.[6] The procedure followed generally entails a fact-finding exercise accompanied by recommendations or determinations, but the role of mediation has become increasingly important.[7]

In addition, both the High Court Rules (Rule 37 of the Uniform Rules of Court) and the rules of the magistrates' courts (Rule 3 of the Court-Annexed Mediation Rules of the Magistrates' Courts) make provision for the use of mediation to resolve disputes. There is no obligation, though, on any party to either attempt to settle or to participate in ADR processes.

It is against this background that the provisions of the Companies Act 71 of 2008 ('the Act') relating to the use of ADR methods to resolve corporate disputes will be analysed. The recommendations in the *King Report on Governance in South Africa 2009* (King III) relating to the use of ADR methods to resolve commercial disputes will also be discussed.

II KING III AND THE USE OF ADR PROCESSES

King III contains recommendations that apply to all corporate entities and sets out a number of key corporate governance principles. Compliance with King III is mandatory for companies listed on the Johannesburg Stock Exchange (JSE)[8] , but voluntary for all other entities.[9]

ADR is identified by King III as an emerging governance trend internationally. It recommends that directors should preserve business relationships and, when a dispute arises, should attempt to resolve it expeditiously, efficiently and effectively.[10] The board of directors should adopt formal dispute resolution processes for both internal and external disputes.[11] Mediation should be used to resolve disputes, and if that fails, expedited arbitration.[12]

By comparison, the corporate governance codes of the UK (*UK Governance Code* (2012)), the USA (Sarbanes-Oxley Act of 2002;

[5] Tennillee op cit note 1 at 39.

[6] Neville Mellville 'Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution' (2010) 22 *SA Merc LJ* 50 at 58.

[7] Idem at 54.

[8] See para 7.F and para 8.63*(a)* of the JSE Listings Requirements.

[9] King III at 6.

[10] Idem principle 8.6.

[11] Idem principle 8.6.1.

[12] Idem at 13.

Dodd-Franks Act of 2009) and Australia (*ASX Principles of Good Corporate Governance and Best Practice Recommendations* (2007)) do not make explicit mention of the need for companies to make use of ADR methods to resolve disputes. These codes do, however, stress the need for companies to facilitate good shareholder communication and interaction. They have in common with King III a focus on good stakeholder relations.

III THE COMPANIES ACT

The Guidelines for Corporate Law Reform ('Guidelines')[13] acknowledged that previous mechanisms to enforce corporate rights and duties and to resolve corporate disputes were complex.[14] The Guidelines thus proposed that the new company law should be decriminalised, and that an independent and suitably empowered body should be created for the purpose of ensuring compliance with the provisions of the Act.[15] It was also foreseen that a less formal dispute resolution mechanism should be established that can provide first recourse to aggrieved parties outside a court or tribunal system.[16]

The Act resulted from the corporate law reform and came into effect on 1 May 2011. Section 156 of the Act sets out alternative procedures for addressing corporate disputes:

> 'A person . . . may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, . . ., or a transaction or agreement contemplated in this Act, . . ., by —
> *(a)* attempting to resolve any dispute with or within a company through alternative dispute resolution . . .;
> *(b)* applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of this Act;
> *(c)* applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or
> *(d)* filing a complaint . . . with —
> (i) the Panel, if the complaint concerns a matter within its jurisdiction; or
> (ii) the Commission in respect of any matter arising in terms

[13] South African Company Law for the 21st Century Guidelines for Corporate Law Reform ('Guidelines') GN 1183 in *GG* 26493 of 23 June 2004.
[14] Guidelines at 12.
[15] Idem at 46.
[16] Idem at 50.

of this Act, other than a matter contemplated in subparagraph (i).'

These provisions clearly indicate the intention of the legislature to provide alternative methods of dispute resolution to parties involved in corporate disputes. It provides for administrative enforcement of the provisions of the Act by the Commission, for adjudication by the Companies Tribunal, and for the use of ADR processes to resolve corporate disputes. The use of the courts to resolve corporate disputes is only one of the dispute resolution processes available.

In addition, section 158 of the Act provides guidelines as to how to interpret the provisions of the Act relating to remedies available:

'When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act —

(a) . . .

(b) the Commission, the Panel, the Companies Tribunal or a court —

(i) must promote the spirit, purpose and objects of this Act; and

(ii) if any provisions of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.'

This leaves considerable scope for a flexible interpretation of the provisions of the Act, or other document in terms of the Act (such as the Memorandum of Incorporation of a company), when resolving a dispute.

IV REFERRING A DISPUTE TO ADR

The first method of dispute resolution allowed for by section 156 is through ADR methods. Section 166(1) of the Act regulates the use of ADR in further detail:

'As an alternative to applying for relief to a court, or filing a complaint with the Commission . . ., a person who would be entitled to apply for relief, or file a complaint in terms of this Act, may refer a matter that could be the subject of such an application or complaint for resolution by mediation, conciliation or arbitration to —

(a) the Companies Tribunal;

(b) an accredited entity, . . .; or
(c) any other person.'

The wording of section 166(1) could be interpreted as to provide for compulsory ADR as any person to a company law dispute *may* refer such a matter to mediation, conciliation or arbitration. No indication is given in the Act that the consent of the other party is required. But section 166(2) provides that, if the Companies Tribunal or accredited entity concludes that either party is not participating in good faith, or that the dispute has no reasonable prospect of being resolved by that process, the Companies Tribunal or accredited entity must issue a certificate stating that the process has failed. No penalty is provided for in the Act should a party not participate in good faith or refuse to participate in the ADR process. Participation in the ADR process thus seems to require the consent and good faith of both parties to the dispute.

Referral of a dispute to ADR may be done as *an alternative* to applying for relief to a court, or filing a complaint with the Commission. This is understandable when referring disputes to arbitration as the legislature does not want the same matter to be adjudicated in more than one forum. But the result of this provision could be that a dispute that is referred to mediation or conciliation, and which is not resolved by way of an agreement between the parties, cannot thereafter be referred to the Commission for investigation, or a court for adjudication. The unintended consequence would be that parties would be reluctant to attempt to resolve a dispute by way of mediation or conciliation as non-agreement to a settlement would result in no further remedy being available. This would be contrary to the intention of the legislature to allow for a speedy and inexpensive resolution of disputes through less formal mechanisms.[17]

It would be possible to argue, though, that it was not the intention of the legislature to preclude a party from obtaining further relief should attempts at mediation or conciliation not result in an agreement between the parties. Such an approach would be supported by the provisions of section 158*(b)*(ii), which provides that 'if any provision of this Act, . . ., read in its context, can be reasonably construed to have more than one meaning, . . . the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights' must be preferred. Should it, however, be found that the provisions of section 166(1) are clear and not open to inter-

[17] Guidelines op cit at 50.

pretation as having more than one meaning, the wording of section 166(1) should be amended.

V ADJUDICATION AND RESOLUTION OF DISPUTES BY THE COMPANIES TRIBUNAL

The second method for dispute resolution provided for by section 156 is to refer a dispute for adjudication by the Companies Tribunal. The main functions of the Tribunal are to adjudicate any application made to it in terms of the Act, and to assist in the resolution of disputes.[18]

When adjudicating a matter, the Tribunal must conduct the proceedings expeditiously and in accordance with the principles of natural justice.[19] Proceedings may be conducted informally[20]) and the Tribunal may determine the procedural rules, with due regard to the circumstances of the case.[21] Parties may be represented at an adjudication hearing.[22]

Despite the provisions of the Act that allow for informal procedures, the regulations to the Act[23] make detailed provisions regarding the conduct of tribunal proceedings[24] on such matters as pre-hearing conferences, settlement conferences, set down of matters, matters struck-off, default orders, record of hearings, and costs and taxation. The regulations also provide that the presiding member of the Tribunal may give directions as to proceedings and may have regard to the High Court Rules.[25]

The danger exists that the provisions of the regulations may take on a life of their own, which in turn may mean that the proceedings before the Tribunal become overly formal and mimic trial proceedings in the high court. This is especially so in light of the fact that legally qualified persons will be members of panels and the fact that parties may be represented by lawyers who might fall back on the court procedures familiar to them. It would up to the presiding member in each case to ensure that the aim of the Act, namely to provide for speedy, informal and cost-effective adjudication and dispute resolution[26] , is not subverted.

[18] See s 195 of the Act.
[19] Section 180(1)*(a)*.
[20] Section 180(1)*(b)*.
[21] Section 183.
[22] Section 181.
[23] Companies Regulations, 2011, published in GNR 351 in *GG* 34239 of 26 April 2011.
[24] See regs 149–162 of the Companies Regulations, 2011, op cit note 23.
[25] Regulation 154 of the Companies Regulations, 2011, op cit note 23.
[26] Guidelines op cit at 50.

Neither the Act, nor the regulations to the Act provide any detail as to the procedure to be followed when the Tribunal acts in a dispute resolution capacity. It seems that the chairperson of the Tribunal must assign such a matter to a panel of three persons, one of whom must have suitable legal qualifications and experience, to attempt to resolve such dispute.[27] It is of paramount importance that the members of such a panel have the requisite skills to effectively mediate or arbitrate such a matter.

It is submitted that it would have been better for the Act to provide that when a matter is referred to the Tribunal for mediation, such a matter be referred to a one member panel with the relevant qualifications and experience. The requirement for a three member panel, one of whom must be legally qualified, should only apply when a matter is referred to the Tribunal for arbitration. Lawyers, due to their training and experience, often are ill-suited to the task of resolving disputes through mediation.

VI COMPLAINTS TO THE COMMISSION

Another dispute resolution process allowed for by section 156 is to file a complaint with the Commission. The functions of the Commission include the promotion of voluntary dispute resolution through ADR methods[28] , and the investigation of complaints.[29]

Section 169(1) of the Act, which regulates investigations by the Commission, provides as follows:

> 'Upon initiating or receiving a complaint . . . in terms of this Act, the Commission . . . may —
> *(a)* . . . issue a notice to the complainant . . . that it will not investigate the complaint, if the complaint appears to be frivolous or vexatious, or does not allege any facts that, if proven, would constitute grounds for remedy under this Act;
> *(b)* if they think it expedient as a means of resolving the matter, refer the complainant to the Companies Tribunal, or to an accredited entity, . . . with the recommendation that the complainant seek to resolve the matter with the assistance of that agency or person; or
> (c) direct an inspector or investigator to investigate the complaint as quickly as practically possible, in any other case.'

[27] Section 195(2) of the Act.
[28] Section 187(2)*(a)* of the Act.
[29] Section 187(2)*(c)* of the Act.

When a party files a complaint with the Commission, the Commission could thus attempt to promote the voluntary resolution of the dispute in terms of section 169(1)*(b)*. The Act is not clear what would happen if such voluntary dispute resolution does not result in an agreement. It seems from the wording of section 169(1), which provides that the Commission may refer the matter to ADR *or* investigate the complaint, that the Commission would then be functus officio and not be able to investigate the complaint as such investigation is provided for as an alternative to ADR. A party would in such an instance also not be able to approach a court for relief as section 156 *(c)* and *(d)* provides that a party may apply to a court for relief *or* file a complaint with the Commission.

It could not have been the intention of the legislature not to provide a party with alternative relief should attempts at mediation or conciliation not result in agreement. The provisions of section 158*(b)* would have to be relied upon to argue that such an outcome would not 'promote the spirit, purpose and objects' of the Act. It could then be argued that section 169 'can be reasonably construed to have more than one meaning' and that it would best promote 'the spirit and purpose' of the Act, and will 'best improve the realisation and enjoyment of rights' if section 169 is interpreted to provide that the Commission must then investigate the matter. However, such an interpretation of section 169 would be contrary to its clear wording, which provides that a complaint can either be referred to ADR *or* investigated.

An alternative argument could be that section 156 should be interpreted in such a way that it does not preclude a party from approaching the court for relief, should the filing of a complaint to the Commission not result in an agreement by way of mediation or conciliation. Such an argument would, however, also be contrary to the wording of section 156*(c)* and *(d)*, which provides that a party can attempt to resolve a dispute either by applying to a court for relief, *or* by filing a complaint with the Commission.

Unfortunately the wording of the Act has the effect that parties might be reluctant to file a complaint with the Commission, because it could result in a referral to mediation where a negotiated settlement might not be reached. This would have the result that a party is left with no effective redress. It is thus submitted that the legislature should amend the wording of the Act to resolve this issue.

Should the Commission decide not to refer a complaint for resolution through ADR, it may investigate the complaint.[30] Upon completion of

[30] Section 169(1)*(c)* of the Act.

an investigation, the Commission may, inter alia, commence proceedings in the High Court in the name of the complainant, or issue a compliance notice.[31]

The administrative enforcement powers of the Commission are similar to the enforcement powers provided to the regulators in the UK[32], the USA[33] and Australia[34] . It allows for a quicker and cheaper way for a party in a company law dispute to have his or her concerns or complaint investigated and adjudicated than if he or she were to approach the courts for relief.

Disgruntled shareholders can use the enforcement provisions of the Act to pressure the board of a company to attend to their concerns. It is unclear at this stage how the Commission will approach its administrative enforcement mandate in resolving complaints and disputes between companies and shareholders and directors.

VII CONCLUSION

The Companies Act 71 of 2008 introduced the use of ADR processes in the resolution of corporate disputes.

Unfortunately the Act suffers from unclear drafting. The Act fails to provide for alternative methods of dispute resolution in those instances where mediation or conciliation does not result in the resolution of a dispute by agreement. It is submitted that the wording of the Act should be amended to ensure parties have alternative dispute resolution mechanisms available when mediation or conciliation fails to result in agreement by the parties.

It is also submitted that the Act should provide for compulsory mediation before a dispute is referred to the next dispute resolution process. Compulsory mediation of certain disputes is contained in the dispute resolution framework of the Labour Relations Act 66 of 1995 and is also recommended in King III. Experience in the labour arena shows that compulsory mediation results in speedy, inexpensive and informal resolution of most disputes.[35] Compulsory mediation would greatly assist in achieving the goal of increased informal resolution of corporate disputes as envisaged by the legislature.

[31] Section 170(1) of the Act.

[32] Sections 1035–1039 of the UK Companies Act 2006.

[33] The Securities and Exchange Act 1934; the Sarbanes-Oxley Act 2002.

[34] Section 50 of the Australian Securities and Investment Act 2001.

[35] Paul Benjamin 'Beyond dispute resolution: The evolving role of the Commission for Conciliation, Mediation and Arbitration' (2013) 34 *Industrial Law Journal* 2441 at 2452.

It is possible, though, for a company to overcome the shortcomings in the Act relating to the use of ADR mechanisms by providing for suitable ADR processes in all agreements entered into by the company. In addition, the Memorandum of Incorporation (MOI) of a company could provide for suitable ADR processes in the instance of disputes between a company and its shareholders and between a company and its directors.[36] The institution of formal dispute resolution processes for both internal and external disputes would be prudent and would comply with the recommendations in King III.

The use of ADR processes to resolve commercial and corporate disputes has become part of the South African corporate governance framework through the provisions of the Act and the recommendations contained in King III. The boards of directors of companies should thus design and implement suitable ADR frameworks in the best interest of their companies and stakeholders.

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[36] The MOI is binding between a company and its shareholders and between a company and its directors — see s 15(6) of the Act.