

Seeing beyond what is expected

Dispute Advisory

KPMG Forensic

This paper explains what we do assisting clients in disputes.

It traverses what we do, how we do it and why we do it, including our experience and team.

What we do - We help parties understand and determine their case, provide expertise in respect of technical matters in a dispute requiring opinion and resolve disputes.

Understanding - We help parties, attorneys and counsel with developing understanding of their case by:

- Investigating claims, defences and positions
- Providing litigation support in terms of investigation, accounting, evidence discovery and management
- Rendering forensic technology solutions in the process of discovering evidence and provide insights and analysis into data for purposes of supporting the resolution of disputes before courts, in arbitration, subject to mediation, or in terms of facilitation of resolution of disputes.

Expert - We possess expertise which can be testified to, or applied to facts before a dispute resolution forum, such as a court, an arbitrator, or a mediator, enabling or supporting such forum to resolve the dispute before it. Such expertise comprise:

- Valuations
- Capital formation and construction
- Economics
- Cyber science
- Public procurement
- Financial modelling

Dispute resolution - We can resolve or help to resolve disputes by acting as arbitrator, mediator, facilitator, expert, negotiator or contracted adjudicator, as the case may be, on formal platforms of arbitration and mediation, or as KPMG is contracted to do by the parties to a dispute, whether by way of commercial contract or convention.

Where we work - Our work typically entails investigation, evidence advice, litigation support, expert opinions and dispute resolution, usually in, but not limited to, the following environments:

- Commercial contract breaches
- Shareholder disputes
- Insurance disputes
- Business interruption and loss of profit
- Investor/state disputes
- Post-acquisition disputes
- Professional negligence claims
- Competition and other regulatory disputes
- Data security disputes
- Insolvency litigation
- Government contract claims
- High value family and matrimonial disputes
- Construction and capital formation disputes
- Loss determination
- Disputes of value of businesses and instruments

How we do it - We recognise that the quality of this solution to clients asserting offensive or defensive positions in multi-faceted industries, multiple stakeholders' environments and multiples of issues arising within the client's environment when asserting offensive or defensive positions is dependent on the following behaviours in understanding the problem subject to the dispute:

- Our ability to aggregate the right information accurately and reliably to the point of being defensible in a court of law.
- Bringing the right industry and situational knowledge and experience to bear on the problem to be solved.
- Applying sound and consistent methodologies and guidance to the execution of the work.
- Independence and objectivity.
- Consistent multi-faceted and multi-layered analysis of the problem so as to advise on all weaknesses, strengths, risks, outcomes and scenarios of the client's assertions.
- Knowledge and experience in assisting clients in the three facets in which they assert their position.
- Ability and permission to provide forthright, independent and objective advice to clients and their representatives, such as legal representatives.
- The ability to explain our work in the various forums in which clients assert their positions, be it in front of regulators, clients, courts.
- The ability to critically evaluate our work enabling a robust solution to the client.

We apply these behaviours to obtain understanding of the problem across the following three perspectives in which the problem, or subject of dispute, persist and exist:

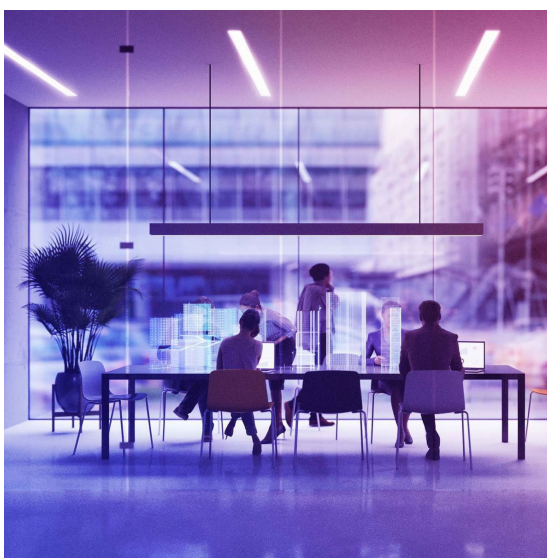
- The law, or the legal position;
- The concepts flowing from the above and the factual context within which the problem persists; and
- Analysis of the detailed evidence relevant to the legal position and concepts.

Why we do it - The proliferation of stakeholders and parties with whom clients deal in complex transactions and environments, multiple regulatory and legal frameworks, with unprecedented volumes of information and data reflecting such, many times in a worldwide context, and the speed with which businesses and people interact with each other against diverse political, legal, and economic policy frameworks seem to have led to a proliferation of complex relationships in which clients need to assert their position from time to time.

For instance, a single event at a company may attract enquiries from various regulators, and the company need to decide how to assert its position in a way keeping it defensible. It may want to prevent being in a position where it cannot assert its position in an offensive posture and thus need advice on potential such pitfalls in the actions it wants to take. Or it finds itself in a litigious dispute.

The measure with which clients can assert their positions depends on the control clients have of their positions, as evidenced by the view stakeholders and decision makers have of the sustainability of such positions, in turn being dependent on how such positions can be exhibited and advocated. For instance, a loss of profit claim asserted by a property developer upon an event of loss of sales may not be sustainable exhibiting of the developer's position if the true nature of the developer's business is actually that of acting as a financier until delivery of the properties when revenue can be recognised. Independent and objective exhibiting of the client's position provides comfort and acceptance to other parties of the sustainability of a position asserted by a client. It provides the basis from which such position can be advocated if in dispute, such as in the third above mentioned facet of assertion of a client's position, whether in either an offensive or defensive posture.

We believe that our independence, objectivity, knowledge and experience, and consistent methodologies and guidance enable us to assist clients in being able to hold consistent reliable views of the positions they assert, acceptable by their various stakeholders and relative decision makers in the various facets within which they assert their positions.



Case studies



JCI-RGE

The mediation of a R14 billion claim between JCI Limited and Randgold and Exploration Company Limited before Schalk Burger SC, Charles Nupen and Harvey Weiner, in which KPMG determined the factual events giving rise to the claim mediated between the companies and presented the evidence thereof to the mediation panel, including determining the cash flows between the companies and the accounting thereof. The reduction of Randgold's claim against JCI from R14 billion to R1.3 billion by the mediators followed.

Recently, the court remarked on this work, in the matter of Standard Bank Nominees (Transvaal) (Pty) Limited and 32 Others versus Investec Bank Limited and Randgold and Exploration Company Limited, case 19269 heard in the Gauteng Division, sitting in Pretoria. At paragraph 83 of his judgement judge Basson wrote "[83] What the KPMG report showed at the time was that Randgold's claims against JCI were very much disputed to such an extent that a winding-up application would have been rendered futile as a result of these factual disputes.

More in particular, what this report also showed was that the facts which underpinned the legal basis upon which Randgold sought to attribute the alleged thefts perpetrated by the Kebbles and others to JCI, were strongly in dispute. It also emerged from this report that significant proceeds derived from the sale of the assets of Randgold Resources and Randgold, were seemingly not directly applied for the benefit of JCI, but had been channelled through its subsidiary and associated companies for the benefit of others. This conclusion made it considerably more difficult for Randgold to assert that JCI was liable."

And, at paragraph 292 of the judgment, Judge Basson wrote:

"[292] Steyn disagrees with this assessment and submitted that this contention is wholly "misleading and simply untrue". In brief he explains with reference to the various JCI defences that were raised against Randgold's proposed action. One of the many challenges which confronted Randgold in its efforts to hold JCI liable under the various claims, related to its inability to sustain the fundamental factual premise which underpinned the greater portion of their claim. Whilst it was able to establish that Kebble (assisted by a Mr Buitendag, Mr Poole, Mr Roger and others) caused the assets of Randgold or of its wholly owned subsidiary holdings to be sold, it did not follow axiomatically that such thefts fell to be attributed to JCI (or any of the subsidiaries). Steyn further explained that, in many instances, the funds were ultimately channelled to parties other than JCI and its subsidiaries, where they were used, at least on the face of it, for the benefit of such other entities. Randgold, in pursuing its case against JCI, thus faced insurmountable evidentiary difficulties.

He also explained that Randgold would have faced difficulties in, inter alia, establishing the paper trail linking to the movement and sale of its (Randgold's) assets (as many of these documents were either forged or untraceable) and to establish how these funds were distributed through a variety of conduits and their dissipation amongst a host of beneficiaries. To establish this, expert forensic evidence would have been needed and would have taken many months to lead. The six-volume report filed by KPMG on behalf of JCI underscores how difficult this task would have been. In this report KPMG dealt with and sought to discredit each of the claims which Randgold proffered against JCI in its statement of claim.

We testified in the arbitration of a R150 million claim between JCI Limited and Vulisango (Pty) Limited before retired judge Meyr Joffe. Our evidence covered the events of a loan account. R130 million was awarded to JCI in arbitration with Vulisango/Xelexwa following our evidence in that arbitration.



JCI-Vulisango



Company and its auditor

In anticipation of a decision by a company to sue its auditor, KPMG gathered evidence relevant to certain auditing standards and generally accepted accounting principles enabling the company's lawyers to advise the company on the causa and prospects of a claim. The matter was settled between the parties.



Asset disposal and value conversion in a divorce

We were required to identify and trace the assets of a man in a high profile divorce. Critical were the event of transfer of assets to a trust and the conversion impact on the value attributable to distributable assets. The matter was settled between the parties.

Case studies



A property developer and its chief executive officer

In response to a claim of AED1.9 billion by its former CEO, a property developer wanted to claim loss of profit against the former CEO upon cause of neglect of duty to have affected property sales and construction by a certain date.

The key issues arising were:

- Whether sales made in terms of a contractual framework where sales comprise funding for the development of property and the resultant liability only being recognisable as revenue when the property is delivered, give rise to a loss of profit claim in respect of sales made, not all cash having being received and the property had been partially constructed but not handed over and would, at a certain point in time, not be handed over in light of certain intervening circumstances, such as creditor default on paying purchase price or the global financial crisis
- Whether unsold properties give rise to a loss of profit claim given the nature of a the sales contract
- Whether a cash flow approach to determining loss of profit was appropriate in the event of a legal relationship between developer and buyer being one of vendor finance;
- Whether loss of profit can be causally determined in the light of an incomplete project resulting from various different intervening events



Expert determination – construction

Our client had a dispute with a main contractor on a major engineering project regarding materials used. Our task was to analyse the cost our client asserted for materials to the major contractor, collate the evidence underpinning same, analyse the accounting for such cost and consider the impact of processes and absent records on the accounting for such cost.



Treatment and use of marketing expenses of a hardware developer

A mobile hardware developer litigated with its marketing agent regarding a dispute on the use and accounting of marketing budgets. Besides collating the evidence relevant to the dispute, we considered the marketer's case and advised client on it and calculated the claim.



Determining causa and quantum – construction of a road (Botswana)

A government-based university commissioned the construction of an access road into the university. The construction was hampered by significant delays and ultimately, a significant cost overrun was charged. We investigated the reason for the delay and whether the cost of the overrun was justified. We determined that the overrun was significantly miscalculated resulting in a significantly higher overrun than actually incurred.



Determining causa and quantum – services contract dispute (South Africa)

Our client, an owner of a large sport stadium, litigated with the manager of the stadium operations regarding amounts due by and between the parties in terms of a contractual dispute. We analysed the dispute with regards to identifying and articulating the amounts due by and between the parties with regards the terms of the operator's contract, concepts resulting from such and the detailed evidence applied thereto relevant to cause and quantum.



Telecommunications business in South Africa

Investigation services into payments to local suppliers overseas upon certain pretexts. To regulate its exchange control affairs, KPMG Forensic assisted the entity to trace its funds overseas, inter alia providing litigation support in obtaining bankers books orders in a foreign jurisdiction.

Case studies



Determining causa and quantum – construction of a building (Malawi)

We investigated the dispute between an employer and principal agent, on the one part, and the main contractor, on the other part in terms of building construction works, against the background of specific macro-economic events, in particular with respect to the questions:

- Did the respective parties involved play the role they were supposed to?
- What percentage of the building was completed prior to the currency devaluation, and what was the real impact of the currency devaluation on the remainder of the works, completed after the currency devaluation and, therefore, subject to subsequent escalation?
- Has the employer paid what constitutes fairvalue?



Facilitation of a municipal billing dispute

A large manufacturer had a dispute with its local municipality in respect of the tariffs charged for municipal utilities. We were requested to determine the correct tariff to be charged, articulate the differences between the correct charge and that calculated by both the manufacturer and the municipality. We further assisted in entering into discussions with the municipality to provide clarity on the number which had been calculated.



Losses incurred by client in its distribution business

We calculated the loss impact our client suffered as a result of manipulation of the process of services provided to our client by a distribution service provider. The work entailed the conversion of a number of events in the distribution process, measured by means of different criteria, into a single measuring criteria for purposes of performing analysis indicating the impact of the manipulation and then converting such into monetary value for purposes of an insurance claim, which was met by our client's insurer in the main.



Agricultural sector (Eswatini)

Investigation services into a scheme where the accountant at an agricultural client recycled invoices of a supplier for payment into the bank account of an associate who then withdrew the funds and provided same in cash to the accountant.

The work resulted in both civil and criminal cases being pursued. The civil matter was instituted on the back of slow progress in respect of the criminal case, with the goal to seize property which the accountant constructed with the funds obtained from the scheme. We testified in the civil matter before the Eswatini High Court and the ruling was made in favour of our client.



A large multibillion-dollar global online retailer

Client experienced their largest breach in company history. User accounts were discovered to have exfiltrated their network due to a compromise of VPN and user credentials. KPMG was asked to assist with the investigation when the client realized they needed a holistic approach to dealing with the breach, including global digital evidence recovery/analysis, Incident Response planning, crisis management support, data analytics, and security monitoring. Within 4 hours, KPMG had "boots on the ground," and within 48 hours, had a full team on site.

KPMG helped the client identify the point of exfiltration and discovered that over 100 million customer records had been stolen. Security agents were deployed to tens of thousands of computers across their enterprise to analyze the extent of the breach, and KPMG digitally preserved over 100 systems located across the United States, United Kingdom, Ireland, Germany, and India.

KPMG engaged with the client's outside counsel to maintain privilege, became the central support in the war room as well as a hub for crisis planning and management – 24/7 support was provided for the duration of the crisis.

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