REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/01407

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

……………………… DATE

………………………… SIGNATURE

In the matter between:

MORPHO SOUTH AFRICA (PTY) LTD Applicant

And

MUVONI TECHNOLOGY GROUP
(Formerly IDECO GROUP LIMITED) Respondent

J U D G M E N T

LAMONT, J:

[1] The applicant has brought an application against the respondent to have three arbitration awards made orders of court under and in terms of section 31 of the Arbitration Act No 42 of 1965 (the Act).

[2] The respondent opposed the application and brought a counter-application. The respondent's counter-application has been withdrawn by the respondent on the basis that the costs of the counter-application be costs in the cause of the applicant's application. The applicant has agreed to this and nothing more need to be said about the counter-application save that the costs are to be costs in the cause of the application.

[3] During December 2007 the applicant and the respondent concluded a written maintenance agreement in terms whereof the respondent became obliged to pay certain monies to the applicant. The respondent failed to make payment of the agreed amount and the payment of the liability was rescheduled by way of a letter agreement dated February 2010. The applicant later sought to recover the amount due to it in the International Chamber of Commerce, as the applicant and the respondent had agreed that to be the forum.

[4] Subsequently the applicant and the respondent entered into a private arbitration agreement replacing the referral to the International Chamber of Commerce and consenting to a private arbitration of their disputes including the right of the arbitration tribunal to determine jurisdiction.

[5] The arbitration agreement provided as follows:

> "*The parties hereby agree that the reference in the* [maintenance agreement] *to the ICC be replaced by private arbitration … The arbitral tribunal shall have such jurisdiction as the ICC has or would have had but for this arbitration agreement including the authority to determine the jurisdictional challenge.*"

[6] It was a further term of the arbitration agreement that the decision of the tribunal would be final and would not be subject to any appeal.

[7] The matter came before the arbitration tribunal.

[8] The jurisdictional issue was identified as being whether or not the tribunal had jurisdiction if as the respondent hoped to prove, the applicant's true cause of action was the *actio pro socio.* The evidence would be:

8.1 The applicant, a number of other entities and the respondent had entered into a partnership.

8.2 The maintenance agreement (pursuant to which the amount due to the applicant became due) was part of the establishment and conducting of the business of the partnership.

[9] The other defences of the respondent are irrelevant to the present proceedings.

[10] The tribunal separated the issue of jurisdiction and on 10 July 2012 handed down a reasoned interim award.

[11] The tribunal held that it had jurisdiction and the proceedings commenced. Although the respondent cross-examined on the issue of whether or not its defence of the alleged partnership existed at the end of the applicant's case it closed its case without calling evidence to establish the factual basis concerning the partnership. In due course the tribunal published an award in favour of the applicant.

[12] The respondent's contention both at the arbitral tribunal and before me was that the applicant had no claim against an individual partner of a partnership until such time as there had been dissolution of the partnership. The claim of the applicant so it was submitted, was that of a partner against the respondent who similarly was a partner together with other partners hence as there had been no dissolution of the partnership the applicant could not succeed and the forum had no jurisdiction.

[13] When the jurisdiction issue came before the tribunal the respondent sought an opportunity to lead evidence to establish the existence of the partnership and the state of affairs which would entitle it to raise the aforegoing defence. The tribunal held that the respondent had no right to lead such evidence during the proceedings by reason of the parol evidence rule.

[14] The only evidence before the tribunal at the time of the hearing of the jurisdictional issue was that contained in the writing namely that the respondent was indebted to the applicant in the amount claimed.

[15] The first submission by the respondent was that the tribunal had ruled on the admissibility of the evidence or the partnership issue both for the jurisdictional and the merits hearing. Hence the respondent had no right to lead evidence to establish the partnership it claimed existed.

[16] The second submission was that the question of the partnership was integrally bound up with both the jurisdictional issue and the merits issue.

[17] The Arbitration Act 42 of 1965 deals with awards in s 33.

"Where-

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside".

[18] The tribunal correctly heard the jurisdictional issue separately. See *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para [29].

[19] The test to be applied to the question of whether or not the award should be made an order of court is set out in:

> *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others* 2014 (1) SA 381 (WCC)
>
> *"A party to an arbitration which makes application in terms of s 31(1) for an award in its favour by the arbitrator to be made an order of court, 'accepts an onus to prove that [it] is in possession of an award that can properly form the subject of an order of court' (Vidavsky v Body Corporate of Sunhill Villas 2005 (5) SA 200 (SCA), in para 17 2). Thus, if it were to be apparent ex facie the award, or the reasons given for it, that it could not properly form the subject of an order of court, the application would be refused. A respondent in an application in terms of the subsection is entitled to oppose the application on the ground that the award is not amenable to properly being made an order of court; it is not obliged to be proactive and take steps, in terms of s 33 of the Arbitration Act, to have the award set aside.*
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> *This does not imply, however, that an unsuccessful party in arbitration proceedings may legitimately use its right to oppose an application by the successful party in terms of s 31(1) of the Act as a surrogate means to obtain an appeal to or review by a court. Save in cases in which evidence dehors the award might, as in Vidavsky, 3 demonstrate a fundamental failure of the arbitration process, the court's enquiry in a s 31(1) application will be limited to the award and any reasons given*

for it by the arbitrator if those reasons are furnished as part of the award. If the unsuccessful party should allege that what on its face might appear to be an unexceptionable award was obtained irregularly or improperly, then it would be incumbent on it, should it wish to avoid the effect, to make application in terms of s 33 of the Act for the setting-aside of the award.

In considering an application in terms of s 31(1) of the Arbitration Act a court will not concern itself with possible errors of fact or law by the arbitrator in making the award, but only with the propriety of lending the award the force of an order of the court. This approach reflects the policy of the courts, not only in this country, but also internationally, to strike the balance between party autonomy and judicial control (or curial intervention) in a way that attaches considerable weight to party autonomy (see Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243), in para 4 — in the context of international commercial arbitrations; and cf Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) (2009 (6) BCLR 527; [2009] ZACC 6) in paras 28 and 73; and Road Accident Fund v Cloete NO and Others 2010 (6) SA 120 (SCA) in E para 36 — in the context of domestic arbitrations)".

[20] The question of jurisdiction is bound up with issue of whether or not the tribunal had the right to hear and determine the dispute. That issue is an issue completely separate and distinct from the issue of whether or not the

applicant can succeed on the merits by reason of having sued the correct party, the correct number of parties or any other matter concerning the merits.

[21] In *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) it was held:

> *"I have pointed out that the term 'jurisdiction', as it has been used in this case, and in the related cases that I have mentioned, describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim.*
>
> *The submission that was advanced by counsel invites the question how a court would be capable of upholding the defence (and thus dismissing the claim) if it had no power in the matter at all. Counsel could provide no answer - because there is none.*
>
> *There is no answer because the submission offends an immutable rule of logic, which is that the power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim. The Chief Justice, writing for the minority in Chirwa, expressed it as follows: 29*
>
> *'It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it."*

[22] The issue raised by the respondent concerns the merits. It concerns the issue of whether or not the applicant has a cause of action against the respondent whether alone or together with others.

[23] The above issue is irrelevant to the issue of jurisdiction. The respondent was correctly precluded from leading evidence on an irrelevant issue. The finding of the tribunal that the respondent was not entitled to lead evidence to establish the partnership on the basis that such evidence was inadmissible.

[24] The finding that the parol evidence precluded evidence being led is a ruling only in the proceedings concerning jurisdiction. That ruling in no way infringes upon the rights of the respondent to have led evidence during the course of the hearing on the merits to establish its defence. The respondent voluntarily closed its case and led no evidence.

[25] The tribunal decided the issues before it in term of the rulings it made and evidence before it.

[26] It accordingly follows that the respondent's opposition in the present application should fail.

[27] I accordingly make the following order.

1 The awards granted on 10 July 2012, 13 November 2013 and 27 November 2013 are made an order of court.

2 The respondent is ordered to pay the costs of the application including the costs of the counter application and costs consequent upon the employ of Senior and Junior counsel.

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LAMONT J
JUDGE OF THE SOUTH GAUTENG HIGH COURT JOHANNESBUERG

COUNSEL FOR THE APPLICANT:	**Adv. Graves SC** **Adv. Partington**
APPLICANT'S ATTORNEYS:	**Bowman Gilfillan Inc**
COUNSEL FOR THE RESPONDENT:	**Adv. Coetzee SC** **Adv. Kruger**
RESPONDENT/S ATTORNEYS:	**Viljoen French & Chester Inc**
DATE OF HEARING:	**17 November 2014**
DATE OF JUDGMENT:	**24 November 2014**