



/SG
IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 13/09/2011
CASE NO: 6406/2011

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

8/9/2011

DATE

SIGNATURE

In the matter between:

CASH PAYMASTER SERVICES
(NORTH WEST) (PTY) LTD

APPLICANT

And

THE SOUTH AFRICAN SOCIAL SECURITY AGENCY

RESPONDENT

JUDGMENT

KOLLAPEN, J

[1] The applicant seeks an order in the following terms:

1. Declaring that the respondent has no right to appeal the ruling of the arbitrator, Advocate E S J Van Graan SC, dated 11 November 2010, in terms of which ruling the arbitrator

dismissed the respondent's exception to the applicant's statement of claim filed in the arbitration between the parties.

2. Setting aside the respondent's notice of appeal dated 24 November 2010 in terms of which the respondent noted an appeal against the ruling of the arbitrator to dismiss the respondent's exception.

Background

- [2] The applicant and the respondent entered into a service level agreement (SLA) on 4 June 2001 at Mafikeng in terms of which the applicant undertook to provide certain services with regard to the social grant cash payment system of the respondent.
- [3] The SLA contains an arbitration clause and a dispute arose in terms of the SLA which was then referred to arbitration.
- [4] Two preliminary meetings were held on 21 October 2009 and thereafter on 7 June 2010 and were presided over by Advocate Fabricius SC the initial arbitrator, and then Advocate Van Graan SC his successor.

[5] The minutes of those meetings were reduced to writing and in broad terms dealt with the procedure to be followed in the arbitration, the timeframes for the arbitration and the conditions of appointment of the arbitrator. In addition and at the meeting of 21 October 2009, the parties agreed to a right of appeal notwithstanding anything contrary contained in the SLA.

[6] The applicant then filed its statement of claim to which the respondent filed an exception which was dismissed by the arbitrator with costs on 11 November 2010.

The respondent on 24 November 2010 filed a notice of appeal against the decision of the arbitrator of 11 November 2010.

The Dispute

(i) The extent of the right of appeal

[7] The applicant's stance is that the pre-arbitration agreement that provides for an appeal does not provide the respondent with the right of appeal against the interlocutory decision of the arbitrator to dismiss the exception.

The respondent in turn contends that the wording of the pre-arbitration agreement is sufficiently wide to confer a right of appeal against any decision of the arbitrator.

(ii) Jurisdiction

[8] The respondent contends that the High Court has no jurisdiction to entertain the application as the pre-arbitration agreement provides for a right of appeal to be heard by an appeal tribunal consisting of three senior counsel and that the dispute with regard to the appealability of the arbitrator's decision should be determined by the appeal tribunal including the question of whether an appeal could lie against the dismissal of the exception.

[9] (iii) At the hearing of the matter the court raised a further issue for consideration by the parties, namely whether the SLA which provides in clause 25.6.1 that any dispute between the parties unless resolved amongst the parties will be referred to and be determined by arbitration could mean that the dispute involving the interpretation of the right to appeal in the pre-arbitration agreement should then have been referred to arbitration for its resolution.

The parties were afforded the opportunity to make written submissions on this further aspect and both parties provided useful heads of argument in this regard.

[10] Having regard to the above the issues in dispute and for determination are the following:

- (a) The interpretation of clause 25.6.1 of the SLA and in particular whether arbitration was mandatory in respect of the dispute around the meaning of the right of appeal.
- (b) The scope and extent of the right of appeal and whether it could be interpreted to cover interlocutory rulings.
- (c) The jurisdiction of the High Court.

Clause 25.6 of the SLA

[11] The SLA provides as follows:

“Settlement of Dispute:

25.6.1 Should any dispute arise between the parties in connection with the interpretation or application of the provisions of this Agreement or its breach or termination or the validity of any documents furnished by the parties pursuant to the provisions of this Agreement, that dispute will unless resolved amongst the

parties, be referred to any be determined by arbitration in terms of this clause.

25.6.2 Any party to this Agreement may demand that a dispute be determined in terms of this clause by written notice given to the other party. The party commencing legal action shall decide whether the dispute will be resolved by way of arbitration or litigation and in the even of the former, this clause shall be taken to constitute the submission of the parties to arbitration; and”

[12] The pre-arbitration agreement amends the SLA and is not an independent agreement. It amends clause 25.6.8 of the SLA which provides that “the decision of the arbitrator will be final and binding on the parties to the dispute” by expressly providing for a right of appeal. Accordingly it must follow that any dispute around the pre-arbitration agreement must be dealt with in terms of clause 25.6 which governs the procedure to be followed in the settlement of disputes.

It is common cause that a dispute has risen between the parties as contemplated in the SLA (as amended) and the question that follows is what are the procedures that are required to be followed in resolving such a dispute. While clause 25.6.1 provides clearly in relation to such a dispute that it will “unless resolved among the parties be referred to and determine by arbitration” suggesting that arbitration is the

preferred choice of the parties it is also instructive that clause 25.6.2 then provides the mechanism for this to happen and in particular provides that “any party to this agreement may demand that a dispute be determined in terms of this clause by written notice given to the other party.

- [13] It is common cause that the respondent at no stage gave written notice to the applicant that the new dispute be determined in terms of clause 25 of the SLA and accordingly if regard be had to the remaining provisions of clause 25.6.2 then the applicant had an election whether to proceed by way of arbitration or by way of litigation. As none of the parties invoked clause 25.6.2 by giving the requisite written notice it cannot be accordingly contended that arbitration was preemptory or that the provisions of clause 25 (read in their entirety) ousts the right of either party to approach court. At best it gives the parties the option of arbitration and if either of them elects such an option they are obliged to give written notice to this effect. This did not happen and accordingly it could not be contended that the new dispute around the interpretation of the right to appeal provisions in the pre-arbitration agreement could only be resolved through arbitration.

The Scope and Extent of the Right of Appeal

- [14] The relevant provisions of the pre-arbitration agreement of 21 October 2009 provide as follows: –

“12. APPEAL

12.1 The arbitrator will endeavour to make an award and give reasons for his award, within 15 (fifteen) days of conclusion of the hearing.

12.2 The parties shall have the right to appeal, notwithstanding anything to the contrary contained in the SLA.

12.3 Any party dissatisfied with the award shall, within 10(Ten) days after the award, give notice to the other of his intention to appeal the award.

12.4 The notice of appeal shall state whether the whole or only a part of the award is appealed against and if only part of such award, it shall state which part and shall further specify the finding of fact and or ruling of law appealed against and the grounds upon which the appeal is founded.”

[15] The applicant contends that clauses 12.1 and 12.2 of the pre-arbitration agreement do not provide the respondent with the right of appeal against the interlocutory decision to dismiss the exception

whilst the respondent contends that the wording of clause 12.2 is wide enough to confer a right of appeal against any decision of the arbitrator.

In interpreting clause 12.2 one should not interpret it in isolation but in context with the other clauses in the agreement and in this instance with clause 12 in its entirety. See *Swart v Cape Fabrix (Pty) Ltd* 1979 1 p202A at 202C.

- [16] The language of clause 12 refers consistently to an “award” of the arbitrator which could be the subject of an appeal. Notwithstanding that clause 12.2 provides that the parties “shall have the right to appeal” it must be clear from the clause as a whole that such an appeal would only lie in respect of “an award”.

The meaning of the term award must then be considered and in the Arbitration Act it simply defines award as including interim awards which does not take the matter much further.

To ascribe the wide and unrestricted meaning the respondent contends for in interpreting the term award would mean that every decision or ruling of the arbitrator would be appealable as opposed to a decision that disposes (in full or in part) of the dispute. It would then render rulings around postponements, the admissibility of documents

and the admissibility of evidence and all such interlocutory rulings appealable resulting in an arbitration process that could potentially be long drawn out and without any end in sight. If indeed the parties intended such an eventuality they would have used in conjunction with the term award the words ruling or decision or both. Award is in my view different and distinguishable from a ruling. The former would definitively dispose of a dispute while the latter would not.

[17] In this regard the arbitrator characterises the decision to dismiss the exception as a ruling and not an award which is a factor to be considered in determining whether the parties agreed to a right of appeal as wide as the respondent contends for. Surely if the arbitrator who was tasked with resolving the dispute and was privy to the pre-arbitration agreement of 21 October 2009 regarded his ruling as an award he would have stated this to be the case.

[18] I am not convinced that the pre-arbitration agreement provides for such a wide right of appeal and that accordingly the common law relating to appealability of purely interlocutory decisions would apply, namely that such decisions are not appealable. In my view the kind of appeals envisaged are appeals against an award. The ruling by the arbitrator on 11 November 2010 dismissing the defendant's exception to the plaintiff's statement of claim is ruling as it professes to be and not an award and therefore in my view no appeal would lie against such a ruling.

The Jurisdiction of the High Court

[19] The respondent contends that the pre-arbitration agreement provides for an appeal tribunal consisting of three senior counsel to consider appeals against an arbitrator's award and that accordingly the appeal tribunal should have had the opportunity to decide the issue or whether it has jurisdiction to adjudicate upon the matter. To that extent its submission is that while the jurisdiction of this court is not ousted, the application is premature in that it should have served before the appeal tribunal first.

In *Gutsche Family Investments (Pty) Ltd v Mettal Equity Group* 2007 5 SA 491 at 496 (A-B) the court held as follows:

"Where the parties themselves disagree as to the powers conferred on an appeal arbitrator, the appeal arbitrator cannot extend the area of jurisdiction over the very matter which he is required to resolve. And if he does, he will act beyond his mandate. The contention advanced by the appellants is that the appeal agreement empowered the appeal arbitrator finally to determine his own jurisdiction. It is a far reaching contention implying that the agreement constituted an ouster of the court's jurisdiction. Such an agreement must be provided for specifically, and in the clearest terms."

It is common cause that the parties are not in agreement with the scope and extent of the right of appeal provided for in the pre-arbitration agreement. Accordingly it must follow that the parties are also in disagreement as to the powers conferred on the appeal tribunal (that is whether it can consider an appeal against an interlocutory ruling) and as such and having regard to the dicta in *Gutsche (supra)* it would be impermissible to have the appeal tribunal determine its own jurisdiction.

- [20] The respondent's stance is in my view not sustainable and my finding is that this court does have the necessary jurisdiction to determine the issue. If there is to be merit in the submission that the court's jurisdiction is ousted this should be provided for in the clearest terms. This is not the case and the disagreement between the parties that effectively precludes the appeal tribunal from determining its own jurisdiction must lead to the inescapable conclusion that this court indeed has jurisdiction to determine the dispute between the parties.

For these reasons the application must fail and in the circumstances I make the following order:

1. It is declared that the respondent has no right to appeal the ruling of the arbitrator, advocate E S J Van Graan SC dated 11 November 2010, in terms of which ruling the arbitrator

dismissed the respondent's exception to the applicant's statement of claim filed in the arbitration between the parties.

2. The respondent's notice of appeal dated 24 November 2010 in terms of which the respondent noted an appeal against the ruling of the arbitrator to dismiss the respondent's application is hereby set aside.
3. The respondent is ordered to pay the cost of the application.

N J KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

<u>Heard on:</u>	28 July 2011
<u>For the Applicant:</u>	Adv R Strydom SC
<u>Instructed by:</u>	Smit Sewgoolam Incorporated, Johannesburg
<u>For the Respondent:</u>	Adv V S Notshe SC
<u>Instructed by:</u>	State Attorney, Pretoria
<u>Date of Judgment:</u>	13 September 2011