

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1586/2004

In the matter between:

BRUCE BARON HOUSTON-McMILLAN
SANDY LEE GROENEWALD

First Applicant
Second Applicant

and

EUGENE GROENEWALD
P.H. HERBST

First Respondent
Second Respondent

CORAM: **EBRAHIM, J**

HEARD ON: **17 JUNE 2004**

DELIVERED ON: **24 JUNE 2004**

[1] This is an application for the remittal of an award which was made by the second respondent on 15 December 2003 in his capacity as arbitrator pursuant to an arbitration held to determine the asset values of two close corporations, namely Megafoam and New Base.

[2] In terms of the award the applicants became indebted to the first

respondent and registered various complaints regarding the valuation of Megafoam with the second respondent. The second respondent, however, refused to alter the award. Repeated requests for compliance with the award were ignored by the applicants and on 19 April 2004 the first respondent filed an application in this Court under Case No. 1105/2004 to enforce compliance with the award. Some 20 weeks thereafter on 24 May 2004, the applicants launched the present urgent application. This application is based upon the provisions of section 32(2) of the Arbitration Act No. 42 of 1965, which essentially provides that on good cause shown a matter can be remitted to an arbitrator for further attention.

[3] A rule *nisi* in the following terms was granted:

“2. ‘n Bevel *nisi*uitgevaardig word wat respondente oproep om redes te verskryf, indien enige, op 17 Junie 2004 om 09h30, waarom die vlgende bevele nie finaal gemaak moet word nie:

2.1 dat die beregting van aansoeknommer 1105/04, soos uitgereik deur die eerste respondent op 19 April 2004 in bogemelde Agbare Hof, sal oorstaan vir beregting na afhandelng van hierdie aansoek en indien bekragtig, tot na

afhandeling van 'n verdere en/of nuwe
toekenning van 2de respondent.

2.2 dat die toekenning gemaak in arbitrasieverrigtinge, deur tweede respondent, terug verwys word na tweede respondent vir herooringe met inagneming van sodanige verdere inligting as wat die arbiter benodig, ooreenkomstig die bepalings van artikel 32(2) van die Wet op Arbitrasie 2 van 1965.

2.3 dat vir doeleindes van bed 2.2. hierbo, kondonasie aan die applikante verleen word vir die nie-voldoening aan die tydsbepaling soos uiteengesit in artikel 32(2) van die voormelde Wet, ooreenkomstig die bepalings van artikel 38 van die Wet op Arbitrasie, Wet 42 van 1965.”

[4] It is alleged by the applicants that the award of the second respondent is fundamentally flawed by reason of the fact that the valuation upon which the award is based is incorrect. In support of its contention the applicants referred me to Annexure “O” to the papers which is a letter addressed by the second respondent to the applicants’ attorneys of record relating to the calculations of the asset values of the two close corporations in question. While it is clear from Annexure “O” that there is a discrepancy in the calculation of the debtors value of one of the close corporations, namely New Base Consultant CC, in my view it is not necessary to go into the merits of why such a discrepancy occurs and what the effect of the discrepancy is on the final award made by the second respondent. More pertinent to the issues in this matter is the fact

that there was an omission of the lease obligations on certain vehicles owned by the said close corporation from the calculations of the second respondent prior to him making his award. On the papers it is quite clear and it was conceded by Mr Williams, who appeared on behalf of the first respondent, that these values which ought to have been included had been omitted from the calculation of the total asset value of the said close corporation and that consequently it did not form part of the valuation which was the basis of the final award. It was common cause that the second respondent had made a mistake in omitting the figures and this omission impacted on the nature of the final award he had made. That being so, it follows that the award was defective and in the circumstances the question is whether such a defect would suffice as good cause entitling this Court to remit the matter to the arbitrator for reconsideration.

- [5] I am of the view that this omission was a material omission and the elements of justice and equity dictate that these values must be taken into account in the final calculation of the asset value of the said close corporation. I am also of the view that the test for remittal has been satisfied and that good cause has been shown by

the applicants.

[6] In the circumstances I make the following order:

1. The application is granted.
2. The rule *nisi* granted on 28 May 2004 is confirmed.
3. The costs of this application is to be borne by the first respondent.

S. EBRAHIM, J

On behalf of Applicants:

Adv. P. Zietsman
Instructed by
E.G. Cooper & Sons Inc.

On behalf of 1st Respondent:

Adv. A. Williams
Instructed by
McIntyre & Van der Post

/scd