THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 476/2023

In the matter between:

KROHNE (PTY) LTD **APPELLANT**

and

STRATEGIC FUEL FUND ASSOCIATION **RESPONDENT**

Neutral Citation: *Krohne (Pty) Ltd v Strategic Fuel Fund Association* (Case no 476/2023) [2024] ZASCA 99 (14 June 2024)

Coram: NICHOLLS, MOTHLE and MOLEFE JJA and SMITH and MBHELE AJJA

Heard: 9 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 14 June 2024 at 11h00.

Summary: Arbitration law – whether the appellant's claim, based on the enforcement of an arbitral award is founded on a valid cause of action – whether the trigger event in the arbitral award has occurred – whether the paragraphs of the appellant's replying affidavit as set out in the respondent's strike-out application falls to be struck out.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wanless AJ, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of the application for leave to appeal, such costs to include the costs consequent upon the employment of two counsel.

2 Orders 1 to 4 of the high court are set aside and replaced with an order in the following terms:

'The second point in limine raised by the respondent is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.'

3 The matter is remitted to the high court to be determined on the merits.

JUDGMENT

Mothle JA (Nicholls and Molefe JJA and Smith and Mbhele AJJA concurring)

[1] The crisp issue in this appeal is whether the appellant's claim against the respondent, based on the enforcement of an arbitral award ('the interim award'), is founded on a valid cause of action.

[2] Krohne (Pty) Limited (the appellant) instituted motion proceedings in the Gauteng Division of the High Court, Johannesburg (the high court), wherein it claimed payment of the agreed outstanding balance, with interest, in terms of a service contract concluded with the Strategic Fuel Fund Association (the respondent). The high court dismissed the claim on the basis

that the appellant did not have a valid cause of action. The high court issued the following orders:

'1. The application is dismissed.

2. The Applicant is to pay the costs of the application, such to include the costs of two counsel.

3. The interlocutory application instituted by the Respondent for the striking out of paragraphs 5.2, 5.7, 5.12 to 5.14 and 8 to 12.7 of the Applicant's undated replying affidavit, deposed to by Mr George Topper and filed on the 15th of May 202[0], is postponed sine die.

4. Each party is to pay their own costs in respect of the aforesaid interlocutory application.

5. The Respondent is to pay to the Applicant the sums of 60 689.50 US Dollars (or the equivalent in South African rands); R150 799.91; 67 859.49 Euros (or the equivalent in South African rands) and 10 264.35 British Pounds (or the equivalent in South African rands).

6. The Respondent shall pay to the Applicant interest on the amounts as set out in paragraph 5 above calculated at the rate of 10% per annum from the 27th of October 2019 to the date of final payment, both days inclusive.

7. The Respondent shall pay the costs in respect of the application by the Applicant insofar as same pertain only to the amounts as set out in paragraph 5 hereof which will be determined by the Taxing Master, such to include the costs of two Counsel.'

[3] The appellant successfully applied for leave to appeal paragraphs one to four (excluding paragraphs five and six) of the order of the high court. It is thus with leave of the high court that this appeal is before us.

[4] It is common cause between the parties that the respondent was established in 1964 as a s 21 non-profit company. It acquires, maintains, monitors and manages South Africa's strategic energy feedstocks and carriers, in order to ensure security in the supply of energy. The respondent's oil storage installation at the Saldanha Terminal comprises six in-ground concrete storage tanks, with a combined capacity of 45 million barrels of oil. A crucial aspect of the respondent's function is to be able to measure accurately the precise volume of crude oil that is discharged into the tanks and subsequently exported out. To achieve this mandate, in February 2011, the

respondent issued a tender, to procure service providers. The appellant entered the competitive bidding process.

[5] The appellant is an international manufacturer of custody metering systems, which in January 2012, successfully tendered for the supply, installation and commissioning of the metering system at the Saldanha Terminal. In terms of the contract concluded with the respondent, the appellant's services included *'…the designing, calibration and installation of metering cabinets, flow computers and master metering skids and all associated electrical reticulation, including necessary and associated equipment for the system'* (the KOG metering system). It was a term of the contract that payment for the services would be made in tranches, with the final 10% being retained as a performance retention fee, payable upon completion and certification of the appellant's performance of the services.

[6] A dispute arose between the appellant and the respondent in regard to the accuracy of the KOG metering system. The appellant contended that it had completed its task as contracted and was entitled to payment of the 10% balance of the contract price. On demand of such payment, the respondent raised the query that the installed system did not operate within the specification agreed to in the contract, which is within the accuracy range of 0.3% (positive or negative), as set out in the International Metrology Organisation Standard OIML R117-1, 2007 Edition, Section 2.4 Accuracy Classes.

[7] The parties agreed to refer that dispute to arbitration as per Clause 17[1] of the contract. An arbitrator, Advocate CHJ Badenhorst SC was appointed and at the commencement of the arbitration, the parties reached a settlement agreement, whereby they agreed to refer the question of the accuracy of the KOG metering system to a third-party expert for determination. The settlement

[1] Clause 17 provides that disputes shall be resolved and determined by an arbitrator whose decision 'shall be final and binding, and save in the case of manifest error, shall not be subject to appeal and/or review.'

agreement was endorsed by the arbitrator, who issued it as an interim award. Of significance, the interim award, whose material terms are stated as follows:

'1. The arbitration is postponed *sine die*.

2. The costs of the arbitration are reserved . . .

5. Within 30 days from date hereof the parties shall jointly nominate and appoint an appropriately qualified and experienced specialist from an independent third party (intended to be SGS) ("the independent expert"). The findings of the independent expert shall be final and binding on the Claimant and Respondent…

6. The terms of reference of the independent expert shall be:

6.1 to conduct an assessment of the system to establish whether the system operates within the specification agreed to by the parties in their agreement [contract], and within the accuracy range of 0.3% (positive and negative) as set out in OIML R117-1 edition, section 2.4 Accuracy Classes and the South African National Standards; and

6.2 to ascertain why the meter readings obtained by the Claimant's [as in the arbitration] Krohne meters and the static measurements obtained by the Respondent's [in the arbitration] current system are so far apart, and to make recommendations of what measures, if any, can be implemented so as to bring the conflicting measurements as close together as possible. . .

8. In the event of the independent expert concluding that the system operates as set out in paragraph 6.1 above, within 30 days of such determination, the Respondent shall:

8.1 reimburse the Claimant that portion of the independent expert's costs paid by the Claimant;

8.2 pay the capital sum of R 7 669 363.74 claimed in prayer 3 of the Statement of Claim, together with mora interest thereon calculated at the rate of 9.5% per annum from 1 April 2014 to date of payment; and

8.3 pay the Claimant's legal costs of the arbitration proceedings as either agreed or taxed . . .

10. The Respondent undertakes to pay to the Claimant the full amount of R7 669 363.74 once the independent expert certifies that the system operates as set out in paragraph 6.1 . . .'

[8] The parties appointed SGS Gulf Limited (SGS) as the third-party expert. The terms of reference of the independent expert are stated in clause 6 of the interim award. SGS consultant, Mr Jim McCabe, conducted

the design review of the KOG metering System in stages, issuing a report at the end of each stage, with the first report dated 19 October 2017. SGS's Final Report was issued on 20 September 2019.

[9] On 14 October 2019, the appellant's attorneys, represented by Mr Alan Jacobs, sent an email to the respondent's attorneys, which read in part thus:

'Dear Marius ['Diemont']

Further to the report received from SGS and their findings, I refer you specifically to their summary at point 2 which is entitled "Management summary".

You will note that the last paragraph under this heading confirms that my client's metering systems operate within the specification agreed to by the parties.

In view of the above confirmation, kindly let me have payment from your client of the total **capital balance outstanding** including interest which my client has calculated, and I attach the calculation, demonstrating the outstanding amount of R12 745 881.89 . . .'

[10] The appellant received no response from the respondent's attorneys, even after a reminder in the e-mail of 12 November 2019. The appellant then issued an application in the high court in which he claimed payment on the basis of the SGS report, contending that the report disposed of the dispute between the parties. The respondent filed an answering affidavit in which it stated that the certificates issued by SGS 'do not serve as evidence of a certification by SGS of *the operation of the system,* but merely of the manner in which it was designed and installed by Krohne, which is not the subject of the dispute referred to in the settlement agreement'. (Emphasis added.)

[11] The respondent, in the answering affidavit, in essence raises two contentions in opposition to the appellant's claim. The first, with reference to clause 8 of the settlement agreement (the interim award), is that *'In the event of the independent expert [SGS] concluding that the system operates as set out in paragraph 6.1* [of the mandate] *above* [i.e. within the specification agreed upon in terms of the agreement, and within the accuracy range of 0.3% (positive or negative), within 30 days of such determination, the Respondent [SFF] shall: reimburse the Claimant . . .' This was the trigger

event for payment of the retention amount, as foreshadowed in the settlement agreement. (Emphasis added.)

[12] Second, and related to the trigger event, was the question whether after the trigger event had been met, would there still be outstanding issues in dispute between the parties, which would require adjudication by the arbitrator? The high court determined the matter on a completely different question which was not the central dispute in the affidavits. It was a question raised in the respondent's argument, namely whether the appellant was barred from advancing a cause of action based on the arbitral award.

[13] In dismissing the application, the high court reasoned and found in paragraphs 30, 31, 32, 35, 36 and 38, respectively, of its judgment thus:

'…The parties did not elect to place their dispute before a court which potentially could have given rise to the appointment of referee. Neither did they elect, without going to arbitration, *to appoint an expert whose decision would be binding upon them and finally resolve the dispute*. So it is to the provision of the Arbitration Act that this Court must look in order to decide whether the Applicant can rely on the Final Report by the expert to seek payment by the Respondent of the capital amount in terms of the Interim Award.

The crisp question then becomes whether the Interim Award complies with the provisions of the Arbitration Act or is in conflict therewith. *The answer thereto is that the Interim Award is patently in conflict with material provisions of the Arbitration Act.*

To begin, the very definition of "*arbitration proceedings*" makes it clear that these proceedings are ones which are **conducted by an arbitration tribunal** for the settlement **by arbitration** of a dispute which has been referred to arbitration in terms of an arbitration agreement. . .

In addition thereto, no provision was made in the Interim Award for the findings of the expert (in whatever form these findings were eventually contained) to be brought before the Arbitrator to be made an award as defined in the Arbitration Act. Hence, there was no compliance with the peremptory provisions of subsection 24(1) of the Arbitration Act. . .

Of course, what *would* have been permissible was for the parties to have agreed, with the consent of the Arbitrator, to seek the opinion of an independent expert on the workings of the system. This opinion could have proven invaluable to assist the

Arbitrator in resolving the dispute. Of course, it could also have had the practical effect of either bringing about a settlement of the dispute between the parties or, at the very least, narrowing the technical issues in dispute between the parties. But this report could never be final and binding upon the parties in terms of the Arbitration Act. It is for this reason, as pointed out by Adv Jamie SC, that the Arbitrator possibly made the orders in the Interim Award whereby the arbitration proceedings were postponed *sine die* and the costs of the arbitration proceedings were reserved. . .

Most importantly, the present application would never have seen the light of day and the various grounds of opposition, as raised by the Respondent (not without merit), would have been avoided (as would the incurring of costs). The aforegoing confirms (if confirmation is necessary) the correctness of the finding by this Court that the point taken by the Respondent that the Applicant is barred from advancing a cause of action based on the enforcement of an arbitral award, is a good one.

In light of the finding by this Court that the Applicant has no valid cause of action in respect of its claim for the capital sum, it is not necessary for this Court to deal with the remaining grounds of opposition raised by the Respondent thereto. This is so (despite this Court spending a great deal of time considering same) since the finding made disposes of the claim in respect of the capital sum in its entirety.'

[14] Before dealing with the high court's reasoning and conclusion as quoted above, it is apposite to revisit the trite concept of the arbitration. The Arbitration Act 42 of 1965 (the Act), defines an arbitration agreement as 'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not'. Section 3(1) of the Act provides that '[u]nless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto'.

[15] This Court in *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another*,[2] stated as follows: 'The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of

[2] *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* [2002] ZASCA 14; 2002 (4) SA 661 (SCA) at para 25.

adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. This is reflected in s 3(1) of the Act.' An arbitration is thus a product of an agreement.

[16] It is common cause, that the parties *agreed* in the contract of service, to have an arbitration clause, in this case clause 17 of the contract. It is further common cause that when a dispute was declared, the parties *agreed* to resolve the dispute through arbitration. They activated clause 17 of the contract. Prior to the commencement of the arbitration, they entered into a settlement *agreement,* to refer the essence of the dispute to an independent expert. The settlement agreement was made an interim award by the arbitrator, which in terms of s 1 of the Act, is an award. Therefore, the arbitration's jurisdiction, powers, procedures and processes were driven by *agreement* and consent between the parties to the dispute. (Emphasis added.)

[17] The high court erred in its approach when it digressed from the main dispute raised in the papers, and dealt with a collateral issue raised in argument, styled as a point in *limine*. The issue before the high court was not the validity or otherwise of the interim award. The issue before the high court was whether the SGS report concluded that the system operated as set out in clauses 8, 9 and 10, read with clause 6.1 of the interim award. Clause 10 of the interim award was the agreed condition precedent to the payment being affected, in terms of the interim award. The high court thus misconstrued the issue to be decided before it.

[18] The high court also erred in concluding that the SGS report was not final and binding between the parties. It is evident from clause 5 of the interim award, that the SGS report would be final and binding on the parties. Clause 5 of the interim award provides that 'the findings of the independent expert shall be final and binding on the Claimant and Respondent.' It is the finding in the final report of SGS which constitutes the cause of action.

[19] The high court further erred in stating the following: 'The crisp question then becomes whether the Interim Award complies with the provisions of the Arbitration Act or is in conflict therewith. *The answer thereto is that the Interim Award is patently in conflict with material provisions of the Arbitration Act.'* The learned Judge was not aware of two important sources of law dealing with this issue. First, in terms of the definitions in s 1 of the Act, 'award includes an interim award.' The settlement agreement signed by the appellant and the respondent to refer the dispute to an independent expert, was endorsed as an award by the arbitrator, Mr Badenhorst SC. (Emphasis added.)

[20] Second, this Court has endorsed the principle that it is permissible for an arbitrator to record a settlement agreement concluded by the parties to the dispute before him or her, as an award in terms of common law. In *Bidoli v Bidoli and Another* [3] (*Bidoli*), three brothers had conducted business together with their father in separate entities. Disputes arose between the brothers which were by agreement, referred to arbitration. On the day of commencement of the arbitration, the parties met and reached a settlement agreement, which they signed. Three days later, one of the parties requested the arbitrator to re-open the arbitration, stating that he was dissatisfied with the settlement agreement. He explained that he signed the settlement agreement by mistake, but the arbitrator informed him that he intended to make the settlement agreement his award and he was at liberty to raise his objection at court. When an application was made to the Western Cape Division of the High Court, Cape Town (the Western Cape high court), for the arbitral award to be made an order of court, the dissatisfied party opposed the application and sought an order declaring the award and the settlement agreement void *ab initio,* alternatively, that it be declared void and the arbitration hearing be re-opened. After considering the arguments, the Western Cape high court held:

'I accordingly agree with the submission of [counsel], that, upon the settlement of their disputes by the parties, the arbitrator's appointment was at an end, for there was nothing left for him to decide in terms of the referral to arbitration. The publication of any award thereafter, which merely incorporates the settlement

[3] *Bidoli v Bidoli and Another* [2011] ZASCA 82; 2011 (5) SA 247 (SCA).

concluded by the parties, did not, in my opinion, bring about a valid award which may be made an order of court in terms of section 31 of the Arbitration Act. Nor can it, in terms of our common law, be regarded as a valid arbitral award.'[4]

[21] *Bidoli* came on appeal in this Court where the decision of the Western Cape high court was reversed. This Court, following a section of an English statute on arbitration, accepted the principle that 'where the parties settle their dispute in the course of the arbitration it enables the arbitrator to issue an award recording the terms agreed. An agreed award thus has the status and effect of any other award on the merits. Accordingly, an agreed award is enforceable even though the arbitrator has not actually made a decision but simply recorded the agreed terms.'[5]

[22] Where the parties to a dispute referred to arbitration reach a settlement agreement on the main issue in the dispute, that could result in the arbitration proceedings being redundant, as there would be no further dispute to adjudicate. This question would be best answered with reference to the circumstances of each case, primarily on the merits. In this instance the high court did not deal with the merits. This Court therefore declines to adjudicate the merits as it is not a court of first instance. An appropriate order in this regard would be to refer the matter back to the high court for the adjudication of the merits.

[23] In this case the high court erred in law and fact, in dismissing the appellant's claim on a point *in limine*. The parties agreed in clause 5 of the interim award that the final report of the independent expert will be binding on them. The appellant's cause of action is therefore founded on that report. The appeal should therefore succeed and the order of the high court should be set aside. As regards the costs, these should follow the result.

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[4] *Bidoli v Bidoli* [2010] ZAWCHC 39 para 28.
[5] *Bidoli v Bidoli and Another* [2011] ZASCA 82; 2011 (5) SA 247 (SCA) para 8.

[24] The following order shall issue:

1 The appeal is upheld with costs, including the costs of the application for leave to appeal, such costs to include the costs consequent upon the employment of two counsel.

2 Orders 1 to 4 of the high court are set aside and replaced with an order in the following terms:

‘The second point in limine raised by the respondent is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.’

3 The matter is remitted to the high court to be determined on the merits.

_____
S P MOTHLE
JUDGE OF APPEAL

APPEARANCES:

For appellant:	A. G Sawma SC with D.L Williams
Instructed by:	Alan Jacobs & Associates, Johannesburg
	Lovius Block Attorneys, Bloemfontein
For respondent:	I Jamie SC with L Stansfield
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