



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

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 25 September 2024

Case No. 2023-051229

In the matter between:

LEVEL SEVEN RESTAURANT (PTY) LTD t/a LEVEL 7

Applicant

and

SIGNATURE RESTAURANT GROUP (PTY) LTD

Respondent

Summary

Section 28 of the Arbitration Act 42 of 1965 cannot reasonably be read to permit an appeal to the High Court against an arbitral award. Even if it could, such an interpretation would not promote the spirit, purport and objects of the Bill of Rights any better than the interpretation that now prevails: that no such appeal is possible, even if the parties agree otherwise.

JUDGMENT

WILSON J:

- 1 Section 28 of the Arbitration Act 42 of 1965 states that arbitral awards are final, and not subject to appeal “[u]nless the arbitration agreement provides

otherwise". The question in this case is whether section 28 embraces arbitration agreements that purport to create a right of appeal to the High Court. In *Goldschmidt v Folb* 1974 (1) SA 576 (T) ("*Goldschmidt*") and *Blaas v Athanassiou* 1991 (1) SA 723 (W) ("*Blaas*") at 724G-I, this court held that section 28 of the Act permits no such right of appeal. Moreover, in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) ("*Telcordia*") at paragraph 51, Harms JA held that parties to an arbitration agreement cannot impose upon a court a jurisdiction it does not already have (see also *Goldschmidt* at 577A).

- 2 Against these authorities, the applicant, Level Seven, submits that section 28 ought to be reinterpreted to promote the spirit, purport and objects of the Bill of Rights, particularly the right of access to courts, and the contractual autonomy embraced by the constitutional rights to freedom, equality and dignity. Properly interpreted in the light of those constitutional rights, Level Seven submits, section 28 does in fact permit the parties to an arbitration agreement to create a right of appeal to the High Court.
- 3 In this judgment, I hold that this cannot be. I shall assume that I am not bound by *Goldschmidt* (a two-Judge decision of this court) or by *Telcordia* (a decision of the Supreme Court of Appeal) insofar as neither of those decisions evaluated the meaning of section 28 in light of the spirit, purport and objects of the Bill of Rights. Be that as it may, there is nothing in the spirit, purport and objects of the Bill of Rights that can make section 28 mean anything other than that the "appeal" against an arbitral award to which the parties may agree is

an appeal to an umpire or another arbitrator or panel of arbitrators, not an appeal to the High Court.

- 4 This meaning of section 28 arises from the text, context and purposes of the Arbitration Act. Read as a whole, the Act creates an arena of private dispute resolution. The Act makes clear that the High Court may, and in appropriate cases must, regulate the terms of engagement in that arena. The High Court must also ensure that no-one is forced to engage in the arena where there is good cause to release them from it – for example where there is something about the arbitration process which is, or is likely to be, intrinsically unfair. But there is nothing in the Act or in the Constitution, 1996 which permits the High Court itself to enter the arena, by assuming appellate jurisdiction over the merits of an arbitral award, even if the parties agree that it should do so.

The arbitration agreement

- 5 Level Seven concluded a management agreement with the respondent, Signature, under which Signature was to manage Level Seven's restaurant. The arrangement turned sour. Level Seven was dissatisfied with what it claimed was Signature's failure to comply with various accounting obligations under the agreement. On 21 December 2021, Level Seven issued a notice setting out the various respects in which it said that Signature was in breach of those obligations. In its reply, dated 28 December 2021, Signature denied that it was in breach of its obligations. Dissatisfied with Signature's response, and still taking the view that Signature was in unremedied breach of the management agreement, Level Seven cancelled the management agreement on 29 December 2021.

- 6 Signature claimed that the cancellation was in fact a repudiation of the agreement. It accepted the repudiation and referred a claim for the damages allegedly sustained as a result of that repudiation to arbitration, in line with the arbitration clause in the management agreement. Level Seven defended the claim for damages and brought its own counterclaim. Signature then excepted Level Seven's statement of defence and counterclaim on the basis that it failed to disclose a cause of action. The contention was that Level Seven had cancelled the management agreement prematurely, and that its notice of cancellation was void as a result. On 3 April 2023, the arbitrator upheld the exception, and granted Level Seven leave to amend its statement of claim by 30 April 2023.
- 7 Clause 19.9 of the management agreement provides that either party "shall be entitled to review or appeal the arbitrator's decision, in which case the High Court of South Africa, Gauteng Local Division shall be authorised to determine such review or appeal". Level Seven noted an appeal against the arbitrator's decision under that clause. The appeal was enrolled as a special motion before me on 13 August 2024.

The claim for rectification

- 8 There was a dispute about whether the text of the management agreement can be read to create the right of appeal that Level Seven wishes to exercise. Clause 19.4 of the agreement provides that all disputes under the agreement which cannot be mediated "shall be finally determined in accordance with the Commercial Arbitration Rules of the Arbitration Foundation of South Africa ("AFSA") without recourse to the ordinary courts of law, except as explicitly

provided for in 0". Level Seven claimed that the reference to "0" in clause 19.4 was meant to be a reference to clause 19.9, which contains the right of appeal on which Level Seven relies. Level Seven applied to rectify the contract accordingly. Signature opposed the application for rectification, contending that the cross-reference was meant to be to clause 19.10, which preserves either party's right to approach this court for urgent interim relief pending the outcome of any arbitration.

- 9 A written contract must be rectified where its text fails to reflect the common continuing intention of the parties to it (PV v EV [2019] ZASCA 76 (3 May 2019), paragraph 13). In this case, I cannot imagine what purposes clauses 19.9 and 19.10 of the agreement serve if the parties did not intend to make them both exceptions to the finality of an arbitral award asserted in clause 19.4. Mr. Rossouw, who appeared together with Mr. Strydom for Signature, did not press Signature's contrary claim in respect of clause 19.9 particularly hard. The agreement must plainly be rectified such that clause 19.4 cross-refers to both clauses 19.9 and 19.10.

The availability of an appeal

- 10 In the event that the management agreement was so rectified, Signature contended that clause 19.9 is unenforceable, because it confers on this court a jurisdiction it does not have. Signature relied principally upon the *Goldschmidt* case, and argued, as was found in that case, that section 28 of the Arbitration Act only permits an appeal, by agreement between the parties, to an umpire, another arbitrator or to an arbitral panel.

- 11 Level Seven contends that *Goldschmidt* was wrongly decided, largely because it interpreted section 28 of the Arbitration Act against the background of a misunderstanding of the Roman-Dutch law of arbitration. It was also contended that the court in *Goldschmidt* wrongly applied the Roman-Dutch common law, when the English law of arbitration in fact supplied the better background against which to determine the meaning of the provision.
- 12 Since *Goldschmidt* is a two-Judge decision of this court, I may not depart from *Goldschmidt's* excursus of the common law even if I think it is wrong. I understood Level Seven's heads of argument to seek to avoid this reality by asking me to develop the common law of arbitration under section 39 (2) of the Constitution to permit appeals from arbitral awards to the High Court where the parties agree to such a right. The contention seems to have been that the common law having been so developed, I could then reinterpret section 28 to permit such appeals in light of that development.
- 13 This is an unnecessarily complex approach. The question is rather whether section 28 of the Arbitration Act itself can reasonably be read to permit an appeal to the High Court. If it can, the question is whether such an interpretation "better" promotes the spirit, purport and objects of the Bill of Rights than the interpretation that currently prevails: that no such appeal is possible (see *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC), paragraph 46).
- 14 In what follows, I conclude that section 28 of the Arbitration Act cannot reasonably be interpreted to permit appeals against arbitral awards to the High

Court. I go on to conclude that, even if it could, such an interpretation would not “better” promote the spirit, purport and objects of the Bill of Rights.

Section 28 of the Arbitration Act

15 Section 28 states that: “unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms”. This embodies the default position: that, by agreeing to arbitration, the parties generally waive their right to appeal, with the effect that the arbitrator’s decision is final, even if it is wrong (see *Telcordia*, paragraphs 50 and 85).

16 The only rights of appeal are those created by agreement between the parties. Section 28 does not set out to whom an agreed right of appeal lies. The question is accordingly whether the High Court is entitled to assume appellate jurisdiction merely because the parties, relying on section 28, agree that it should. I think not. I know of no general rule that permits a court to assume the power to resolve a dispute simply because the parties to the dispute agree that it should. The High Court has jurisdiction over “all causes arising and offences triable within its area of jurisdiction and all other matters which it may according to law take cognisance” (section 21 of the Superior Courts Act 10 of 2013). In other words, the High Court has jurisdiction to determine a cause of action recognised by law, not simply a dispute between the parties submitting to the court’s jurisdiction. Section 34 of the Constitution also makes clear that courts resolve only disputes that “are capable of being resolved by the application of law”.

- 17 It follows from all of this that something other than the parties' agreement is necessary to permit the High Court to assume jurisdiction over a dispute. The dispute must be justiciable. The justiciability of a dispute seldom has much to do with the parties' agreement to be bound by the court's ruling. The High Court derives its jurisdiction from the rules of law that empower it to determine the cases brought before it, and a set of rules that can be applied to resolve those cases. Without those rules, there is no "cause" in the sense conveyed by section 21 of the Superior Courts Act. There is, at best, a private controversy over which the courts hold no power.
- 18 Mr. Kruger did not, and I think could not, point to any rule of law that empowers the High Court to hear appeals against arbitral awards. Roman-Dutch law permitted appeals against such awards (see RH Christie, *Arbitration: Party Autonomy or Curial Intervention: The Historical Background* 1994 SALJ 143 at 148). However, the South African courts have seldom, if ever, exercised anything like an appellate jurisdiction over arbitral awards. This is clearest from what Solomon JA said in *Dickenson & Brown v Fisher's Executors* 1915 AD 166 – that a court cannot set aside an arbitral award on the basis of a legal mistake save insofar as a statute authorises it to do so (see especially 174, and 179 to 181. See also South African Law Reform Commission, *Project 94: Report on Domestic Arbitration*, May 2001, paragraphs 3.201, 3.230 and 3.236).
- 19 Accordingly, purely at the textual level, section 28 would have to say a lot more than it does to be read as creating a right of appeal against an arbitral award to the High Court. The natural reading is that section 28 leaves open only the

possibility of an appeal to an umpire or to another arbitrator or arbitral panel. That is because, unlike courts, arbitrators derive their jurisdiction from the consent of the parties submitting to them, supplemented, where necessary, by the Arbitration Act.

The Arbitration Act generally

- 20 Section 28 must, of course, be interpreted in the light of the text and purposes Arbitration Act as a whole, but that text and those purposes are even less hospitable to a right of appeal to the High Court against arbitral awards than the text of section 28 read in isolation.
- 21 The purpose of the Arbitration Act is to establish a system of private dispute resolution which may be engaged by agreement. The Act provides that the outcomes that system generates may be enforced in the courts (see section 31). The advantages of such a system are speed, economy and privacy. The Act seeks to preserve those advantages by requiring the courts to oversee the arbitral system, but to steer clear of dealing with the merits of any of the disputes submitted to an arbitrator.
- 22 This is clear from several features of the Act. Section 3 permits a court to set aside an arbitration agreement or to prevent an issue being submitted to arbitration. However, once a dispute is submitted to arbitration, a court may only set an arbitral award aside if the arbitrator misconducts themselves, if there is a gross irregularity in proceedings or if the award is otherwise improperly obtained (section 33). None of these powers approximates an appellate jurisdiction. They are narrower even than a court's normal powers of review.

- 23 Other than that, a court has the power to facilitate arbitral proceedings by determining questions of law submitted by an arbitrator for the purpose of reaching an award (section 20); by granting interim relief; authorising the taking of evidence by affidavit; ordering discovery; ordering security for costs; directing the preservation of property and so on (section 21 (1)). These powers must not be construed in a manner that derogates from any of the arbitrator's powers that may overlap with them (section 21 (2)).
- 24 A court has several other powers under the Act, but I do not think that it is necessary to deal with every one of them. The point is that the court's powers are all of the same type: to police the boundaries and facilitate the operation of arbitral proceedings. These types of powers are, it seems to me, fundamentally incompatible with the proposition that a court has any role in evaluating the merits of an arbitral award.
- 25 If a court could perform such a role, the principal purposes of the Act would plainly be undercut. A right of appeal to the High Court would make a private dispute public; it would stave off the achievement of finality (for once the High Court has pronounced on the merits of an award, the prospect of further appeals under the Superior Courts Act would no doubt follow); and all of this would escalate the expense that parties go to arbitration to avoid.
- 26 Accordingly, to read section 28 of the Act as permitting a right of appeal to the High Court would defeat everything else the Act seeks to achieve, and would contradict the numerous indications elsewhere in the Act that the courts should have no jurisdiction over the merits of an award. It would be one thing if the Act gave some indication of what sort of appeal (wide or narrow; on fact

or on law) section 28 envisages, or if it set out some sort of procedure to be followed (the production of a record, the submission of affidavits) in prosecuting the appeal. It may then have been possible to reconcile a High Court appeal with the fundamental purposes of the Act. None of this is indicated in the Act, however, or in any other source to which the parties could direct me.

- 27 It follows that the Arbitration Act cannot reasonably be interpreted to permit an appeal to the High Court against an arbitral award.

The Bill of Rights

- 28 Against all of this, Mr. Kruger, who appeared for Level Seven, urged me to respect the choice the parties in this case plainly made: to have the High Court hear any appeal against the arbitral award. The need to respect this choice was elevated in argument to one of constitutional importance. I was reminded that respect for contractual autonomy is underpinned by the constitutional rights to dignity, freedom and equality (see *Brisley v Drotsky* 2002 (4) SA 1 (SCA), paragraph 94). It was also contended that to shut the parties out of court would be to infringe the right of access to courts in section 34 of the Constitution.

- 29 I think there are two answers to these contentions. The first is that the Arbitration Act cannot be read to permit a right of appeal to the High Court if to do so would strain its meaning unduly (*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC), paragraph 24). For the reasons I have given, to read section 28 as permitting

a right of appeal to the High Court would contort the provision substantially beyond its meaning and purposes.

30 The second answer is that I fail to see anything constitutionally objectionable about refusing to afford the parties a right of appeal to the High Court. Insofar as the value of contractual autonomy is concerned, it is enough to point out that contractual choices, including the parties' choice in this case, are not made in a vacuum. The decision of the parties to allow an appeal against the arbitral award to the High Court presupposed that the legislative machinery necessary to give effect to that decision actually exists. As I have held, it does not. Contractual choices that require state action to give effect to them are not truly autonomous. They are dependent – like so many supposedly autonomous commercial decisions – on the state to provide an enabling environment. The mere fact that the state turns out not have facilitated the parties' choices in this case in quite the way the parties foresaw is no ground upon which to demand that a court give effect to them. In other words, there is no constitutional principle of which I am aware that requires the law to give effect to a contractual election that turns out to have been legally mistaken.

31 In respect of the right of access to court, the Constitutional Court long ago held that a submission to arbitration implies a choice not to exercise that right, at least in respect of the dispute so submitted (*Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC), paragraph 216). If that is true, then there can be nothing constitutionally objectionable about holding someone to that choice.

- 32 The pursuit of arbitration implies submission to the legal machinery that makes arbitration possible. Under the Arbitration Act, that means the waiver of any right of appeal to the High Court. It was not suggested that the Arbitration Act's failure to afford a right of appeal to the High Court (whether by agreement or otherwise) is unconstitutional, and no application to declare the Act inconsistent with the Constitution is before me.
- 33 It follows from all of this that the right of appeal agreed to in clause 19.9 of the management agreement does not exist, and that the clause is of no force or effect to the extent that it purports to confer such a right on the parties.

The validity of the arbitration agreement

- 34 Mr. Kruger asked me, in the event that I reached that conclusion, to declare the whole of the arbitration agreement void. This relief was added to Level Seven's notice of motion by way of an amendment I indicated at the hearing that I would allow. Level Seven asserted the voidness of the arbitration agreement on the basis that the parties would never have submitted to arbitration unless an appeal to the High Court was possible.
- 35 I do not think that is the correct test. Clearly the understanding that an appeal to the High Court was possible is a mistake common to the parties. But agreements struck on the basis of a common mistake are not void merely because they would not have been reached had there been no mistake. They are only void if the parties agreed, expressly or tacitly, that the validity of the contract was conditional on the existence of the particular state of affairs about which the parties were mistaken (see *Wilson Bayly (Pty) Ltd v Maeyane* 1995

(4) SA 340 (T) at 344I-J, which was approved in *Van Reenen Steel (Pty) Ltd v Smith* NO 2002 (4) SA 264 (SCA), paragraph 13).

36 There is no evidence before me that the parties agreed that the submission to arbitration would become invalid if it turned out that an appeal to the High Court was not competent. There is no such express term in the agreement. No tacit term of that nature was pleaded.

37 Level Seven says that it would not have agreed to submit to arbitration without a right of appeal, but that is something different. It is also insufficient in itself to release Level Seven from the consequences of the arbitral process it agreed to. The appellate provision in the agreement is merely incidental to the agreement to arbitrate, and may easily be severed from that agreement (see, in this respect, *Daljosaphat Restorations (Pty) Ltd v Kasteel Hof CC* 2006 (6) SA 91 (C), paragraphs 37 to 39 and *Blaas* at p725C-D).

Order

38 The upshot is that I have no jurisdiction to entertain Level Seven's appeal; that clause 19.9 of the management agreement is null and void to the extent that it purports to confer such jurisdiction on me; and that the remaining provisions of the management agreement dealing with arbitration stand. The overall effect of these conclusions is that the arbitrator's award also stands, and Level Seven's application must be dismissed. I am satisfied that the issues raised in this application are of a complexity sufficient to justify an award of counsel's costs on the "B" scale.

39 There were applications to introduce additional affidavits and an application to strike out new matter raised in reply. The application to strike out was not pursued with any vigour, so long as the additional affidavits were admitted. That was an entirely sensible approach, given that the additional affidavits added little to the heft of the record, and their admission dissolved any potential prejudice caused by the new matter raised in reply.

40 Accordingly –

40.1 Both parties' applications to admit their supplementary affidavits are granted.

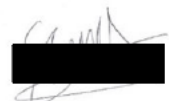
40.2 The application to strike out is dismissed.

40.3 Clause 19.4 of the management agreement is rectified, such that the phrase "clauses 19.9 and 19.10" is substituted for the phrase "0".

40.4 The application for leave to amend the applicant's notice of motion is granted.

40.5 The application to set aside the arbitrator's award is dismissed.

40.6 The applicant will pay the respondent's costs, including the costs of two counsel where employed, which may be taxed on the "B" scale.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on

Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 25 September 2024.

HEARD ON: 13 August 2024

DECIDED ON: 25 September 2024

For the Applicant: M Kruger
(Heads of argument drawn by JPV McNally SC
and M Kruger)
Instructed by Webber Wentzel

For the Respondent: PF Rossouw SC
FP Strydom
Instructed by the Thomson Wilks Inc