

SOUTH AFRICA / JUDGMENT

Croock v Lipschitz and Others (2019/18319) [2020] ZAGPJHC 80 (12 March 2020) [2020] ZAGPJHC 80

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wepener

CASE / FILE NUMBER

2019/18319

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBERS: 2019/18319

In

the matter between:

BRIAN
STEPHEN CROOCK
Applicant
vs
LARRY
LIPSCHITZ First
Respondent
M.D.
KUPER
N.O. Second
Respondent
C.M.
ELOFF N.O.
Third
Respondent
T.
BECKERLING
N.O. Fourth
Respondent

Coram: Wepener J
Heard: 11 to 12 February 2020
Delivered: 12 March 2020

JUDGMENT

Wepener, J:

[1] The applicant, Mr Croock, seeks to review and set aside the award of the second to fourth respondents, the arbitrators, which award is dated 11 April 2019. The award, made pursuant to a referral to arbitration by the parties, is primarily attack and pursuant to the provisions s 33(1)(b) of the Arbitration Act:[1]

‘Where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceeding or has exceeded its powers, the court may, on the application of any party to the reference of due notice to the other party or parties, make an order setting the award aside.’

[2] The issue in the arbitration was whether, and if so, in what terms the first respondent, Lipschitz, could enforce the terms of the agreements entered into between the parties against the applicant.

[3] A number of factual disputes arose during the arbitration and were determined by the arbitrators, mostly, adversely for the applicant. After considering rectification of the agreements between the parties the arbitrators issued an award in the following terms:

‘(1) The defendant [a reference to the applicant] is ordered to provide the Claimant [a reference to the respondent] within 90 . . . days from the date of this Award a list of:

1.1 all shares, members’ interests, warrants, options, comparable entitlements and other forms of equity held by the Defendant and by any third party on his behalf (collectively “the interest”) on or after 15 February 2012;

1.2 all dividends, distributions and other payments made to the Defendant in his personal capacity and / or arising out of the Interests (collectively “the Fruits”) on or after 2 December 2001;

1.3 all rights, options, distributions, positions and comparable entitlements held by the Defendant in his capacity as beneficiary of any trust or comparable vehicle (“the Trust Interests”) on or after 15 February 2012;

1.4 any distribution or payments made to the Defendant from any trust or other entity in connection with the Interests or Trust Interests on or after 2 December 2001;’

- [4] Croock argued that the terms of the agreement are such that it is contra bonis mores or against public policy, and consequently

unenforceable. Two legs were relied upon: firstly, that the agreement is contrary to public policy and that a court should not lend itself to its enforcement as was requested by Lipschitz in this matter[2] and secondly, whilst Croock pleaded that the terms of the agreement are contrary to public policy in his statement of defence in the arbitration proceedings the arbitrators did not deal with this defence at all. Due to the view that I take of the matter I deal with the second issue first.

- [5] The legal principle is that an arbitration tribunal has a duty to determine all the issues places before it.[3] Lewis JA put it thus in Hosmed:[4]

‘Thebe argues that the appeal tribunal both exceeded its powers and was guilty of a gross irregularity. The same conduct, however, was relied on as giving rise to both grounds for the setting aside of the award. The gravamen of the complaint is that the issues before the arbitrator, and thus before the appeal tribunal, were defined by the pleadings. The arbitration agreement said so expressly. The agreement also made provision for amendments, and both parties amended and added to their pleadings during the course of the proceedings. Hosmed even introduced an amendment at the stage of appeal. The arbitration appeal tribunal could not, it was argued, go beyond the pleadings and decide an issue not pleaded. Unlike a court, which has the inherent jurisdiction to decide a matter even where it has not been pleaded, an arbitrator has no such power. It was common cause that the issue of unanimous assent was not pleaded at any stage.’

- [6] Although the judgment dealt with the arbitrator exceeding his powers, the principle that the arbitrator’s powers and duties are determined by the pleadings remains applicable. In an alternative plea, Croock alleged:

‘In the further alternative to 35.2, 35.3 and 35.4 the first defendant [a reference to the applicant] pleads that on the plaintiffs’ construction of PD2 [the May 2010 document] and PD3 [the February 2012 document referred to below], they –

35.5.1 have the first that the first defendant must share equally with the first plaintiff [the first respondent herein] half of what the first defendant earns in perpetuity and cannot be cancelled;

35.5.1 entitled the first plaintiff to claim repayment of all loans and fifty per cent share without giving any consideration in return; and

35.5.3 are contrary to public policy and accordingly invalid.’

- [7] If regard is had to the award there is no mention of public policy or contra bonis mores. Although the arbitrators summarised the issues to include ‘further objections to the claim which preclude the relief sought’[5] it appears irrefutable that the arbitrators did not consider this substantive plea of Croock.

[8] The arbitrators referred to the possible unenforceability of the agreement due to its vagueness.[6] The arbitrators proceeded to ‘review’ the wording of the agreement and interpret the agreement in such a way as to limit its scope. This, I am of the view, they could do within their powers as arbitrators. However, despite that, the arbitrators were obliged to consider the plea of unenforceability due to the agreement being contra bonis mores. This they did not do.

[9] The argument advanced by counsel for Lipschitz was that a court cannot expect of the arbitrators to consider and mention each and every point in a matter before them. For this proposition counsel relied on Russel[7]. The reasoning and principle referred to are instructive. However, when a party enters a substantive plea that an agreement is

unenforceable due to the fact that it is against public policy, one expects the arbitrator to deal with the issue pertinently and record why the plea cannot or should not be upheld. There is nothing in the award that deals with or rejects the plea that agreement is against public policy and thus, unenforceable.

[10] It is not for this court to decide whether the agreement is indeed against public policy – that is and was the prerogative of the arbitrators. A plea that an agreement is against public policy and unenforceable is legally sound and must be determined on its merits when raised. [8]

[11] Croock advanced several reasons in this court why it is said that the agreement is against public policy. Again, it is not for this court to determine whether the plea is good based on the reasons advanced by Croock. It was the duty of the arbitrators to do so. It may be of importance in this court to actually determine the enforceability of the agreement if regard is had to the alternative relief sought by Croock, i.e. an order that the award may not be made an order of court due to its unenforceability. Again, by virtue of the conclusion reached herein, it is not necessary for me to make a finding in this regard as I am of the view that no order in terms of the alternative prayer is to be issued.

[12] In *Telcordia*[9], Harms JA said:[10]

‘Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. *Telcordia* posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith.’

[13] The learned judge further said:[11]

‘[72] It is useful to begin with the oft quoted statement from *Ellis v Morgan* where Mason J laid down the basic principle in these terms:

‘But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.’

[73] The Goldfields Investment qualification to this general principle dealt with two situations. The one is where the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate. . . .’

and further:[12]

‘As mentioned at the outset, according to the Integrated Agreement the arbitrator had to determine all disputes between the parties, including disputes relating to the interpretation of the agreement and disputes of a legal, financial and technical nature; the procedural rules of the ICC were to apply; the laws of the Republic would govern the agreement; and, subject to the arbitration clause, the parties consented to the jurisdiction of South African courts.’

[14] This brings one to the failure of the arbitrators to consider the enforceability of the agreement as pleaded. Counsel for Lipschitz,

correctly in my view, save as said in para 4 above, submitted that it was the arbitrator’s duty to consider the issue of *contra bonis mores* and that it is not for this court to consider it.

[15] The main argument for Lipschitz was that the question of enforceability based on public policy was not argued during the arbitration proceedings, although it is conceded that:

‘the case law relating to unenforceability based on public policy was comprehensively analysed in Lipschitz’s head of argument in the Arbitration’.

[16] Counsel for Croock differed and submitted that the question was foursquare before the arbitrators. He is supported by the pleading.

In these circumstances, I am of the view that the arbitrators failed to deal with a substantive issue pleaded by Croock which resulted in him not having his case fully and fairly determined.[13] Although there is provision in the Arbitration Act to refer such an issue back to arbitrators,[14] there was no application to do so.

[17] During preparation of this judgment the matter of Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd[15] came to my attention. My registrar addressed a letter to the parties as follows:

‘Should this court find that the arbitrators failed to consider a substantive plea of Crook, i.e. the plea that the agreement is *contra bonis mores* and thus unenforceable, what order is to be made having regard to Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd 2018 (5) SA 462 (SCA) at paragraph 43 and following.’

Both parties provided further submissions.

[18] There was eight days of evidence led and a substantial interim award issued by the arbitrators. Many of the issues contained in the award were uncontentious before me and I am of the view that those issues should not be disturbed, if at all possible. On the approach of Wallis JA that:

‘There does not appear to be any sound reason why an arbitration that has been properly conducted on certain issues and has properly determined those issues, should be set aside in its entirety because of an irregularity in relation to a wholly separate issue’[16],

I am of the view that this wholly separate issue can and should be referred back to the arbitrators.

[19] In the circumstances I am of the view that the reasoning of Wallis JA can be appropriately be applied in this matter and that the setting aside of para 106 of the award will attain just that. In the circumstances the matter should be referred back to the arbitrators to hear argument and determine the defence pleaded in para 35.5 of the applicant’s plea.

[20] In my view, the interests of justice will be fully served in this way and result in the remainder of the award that was not contentious remaining in full force and effect and binding upon the parties.

[21] I issue the following order:

1. Paragraph 106 of the arbitrators' award dated 11 April 2019 (‘the award’) is hereby set aside.
2. The matter is referred back to the same arbitration panel to hear argument and to determine the defence pleaded in para 35.5 of the applicant’s plea in the arbitration and any further issues that may arise consequent upon that determination.
3. No order is made on the counter-application to have the award made an order of court.
4. The costs of the application, including the costs of senior counsel and / or two counsel, shall be costs in the cause of the arbitration.

W.L. Wepener

Judge of the High Court of South Africa

APPEARANCES

Counsel for the Applicant: A. Subel SC with E. Rudolp

Attorney for the: David Kotzen Attorneys

Counsel for First Respondent: P.N. Levenberg SC

Attorney for First Respondent: Werksmans Attorneys

[1] Act 42 of 1965.

- [2] See *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) paras 55-57.
- [3] *Carlisle Place Investment Ltd v Wimpey Construction (UK) Ltd* 15 BLR 109 (QB 1980) at 116; *Hosmed Medical Aid Scheme v Thebe Ya Bopelo Healthcare Marketing & Consulting (Pty) Ltd*
- [2007] ZASCA 163; 2008 (2) SA 608 (SCA) para 28.
- [4] At para 28.
- [5] Award paras 23 to 70.
- [6] At para 88.
- [7] Russel on Arbitration 3rd Ed: 2007 p 8- 94, where it is said that a tribunal does not have to deal with every point raised in the proceedings. And see *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) para 62-63. '[62] When analysing the language of the decision-maker it needs always to be kept in mind that a judgment is generally written to inform the parties why they have respectively won and lost and not only with an eye to an appeal. For that reason a court of appeal should not scrutinize the language as if it was construing a statute. In particular it must not be thought that a point was overlooked only because it was not expressly mentioned. As this court said in *Lepholletsa v S*, which was an appeal against sentence, in which the same principles apply: "Soos opgemerk in vorige uitsprake van hierdie Hof (wat ek nie nodig ag om aan te haal nie) dui die blote versuim om 'n besondere feit of aspek van die saak pertinent in 'n uitspraak te opper, nie noodwendig daarop dat dit nie oorweeg is nie."
- [63] That is particularly relevant in the present case, in which the papers were voluminous and the case was argued over five days. To expect that everything that was taken into account by the court below would appear in its judgment would be unrealistic. Indeed, some matters might have been conceded, or argument on the matter might not have been advanced, in which case it can be expected that the court would not express itself on the issue, or at least not do so fully. I think it is also appropriate to bear in mind that in this case the judges who comprised the court below were themselves at one time senior advocates of long standing. That is no reason to defer to their conclusions but it is reason to expect that they would not always find it necessary to express themselves on matters that would be trite to those in the profession.'
- [7] Russel on Arbitration 3rd Ed: 2007 p 8- 94, where it is said that a tribunal does not have to deal with every point raised in the proceedings. And see *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) para 62-63.

[62] When analysing the language of the decision-maker it needs always to be kept in mind that a judgment is generally written to inform the parties why they have respectively won and lost and not only with an eye to an appeal. For that reason a court of appeal should not scrutinize the language as if it was construing a statute. In particular it must not be thought that a point was overlooked only because it was not expressly mentioned. As this court said in *Lepholletsa v S*, which was an appeal against sentence, in which the same principles apply:

“Soos opgemerk in vorige uitsprake van hierdie Hof (wat ek nie nodig ag om aan te haal nie) dui die blote versuim om 'n besondere feit of aspek van die saak pertinent in 'n uitspraak te opper, nie noodwendig daarop dat dit nie oorweeg is nie.”

[63] That is particularly relevant in the present case, in which the papers were voluminous and the case was argued over five days. To expect that everything that was taken into account by the court below would appear in its judgment would be unrealistic. Indeed, some matters might have been conceded, or argument on the matter might not have been advanced, in which case it can be expected that the court would not express itself on the issue, or at least not do so fully. I think it is also appropriate to bear in mind that in this case the judges who comprised the court below were themselves at one time senior advocates of long standing. That is no reason to defer to their conclusions but it is reason to expect that they would not always find it necessary to express themselves on matters that would be trite to those in the profession.'

[8] See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (SCA).

[9] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

[10] At para 69.

[11] At paras 72-73.

[12] At para 81.

[13] *Telcordia* para 73

[14] Arbitration Act s 32.

[15] 2018

(5) SA 462 (SCA).

[16] *Palabora* para 48.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2020/80.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/croock-v-lipschitz-and-others-unknown-topic-agpjhc-2020>

Prepared on 13 October 2026 · Esheria