

SOUTH AFRICA / JUDGMENT

Mabra Construction (Pty) Limited v Ecolab (Pty) Limited (51998/2021) [2023] ZAGPPHC 660 (8 August 2023) [2023] ZAGPPHC 660

COURT

North Gauteng High Court, Pretoria

BEFORE

Yende

CASE / FILE NUMBER

51998/2021

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IN THE HIGH COURT OF
SOUTH AFRICA

(GAUTENG DIVISION,
PRETORIA)

Case No. 51998/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHERS JUDGES: NO

(3)

REVISED: 7/8/2023

DATE: 8 August 2023

SIGNATURE

In

the matter between:

MABRA
CONSTRUCTION (PTY) LIMITED APPLICANT
and
ECOLAB
(PTY) LIMITED RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploaded on caselines electronic platform. The date for hand-down is deemed to be 8 August 2023.

JUDGMENT

YENDE AJ

Nature of the Proceedings

- [1] This is an opposed application for an order to declare an arbitration award in recently concluded arbitration proceedings between the applicant and the respondent an order of court in terms of section 31 of the Arbitration Act 42 of 1965, the award was granted in favour of the applicant on 12 May 2021[1]. The respondent opposes this application and raises Points In Limine.
- [2] The applicant is MABRA CONSTRUCTION (PTY) LIMITED, a private company registered with limited liability in accordance with the company laws of the Republic of South Africa with registration number [...] and having its principal place of business within the jurisdiction of this Honourable Court at [...] P[...] Street, Tyger Valley, Pretoria.
- [3] The respondent is ECOLAB (PTY) LIMITED, a private company registered with limited liability in accordance with the company laws of the Republic of South Africa with registration number [...] and having its principal place of business within the jurisdiction of this Honourable Court at [...] A[...] Road, Chloorkop.

Ephemeral Factual Matrix

- [4] The respondent appointed the applicant to undertake construction in respect of infrastructure upgrade on 21 August 2019[2]. The applicant suspended operations on site on 27 March 2020. A pre-mediation meeting took place between the parties on 26 November 2020. On 14 April 2021 parties held a virtual meeting and agreed on arbitration, resulting in an Arbitration Agreement concluded on the 16 April 2021[3].
- [5] The parties having delivered the head of argument on 28 April 2021 the arbitration was heard and on 12 May 2021 the arbitrator delivered the Arbitration Award in favour of the applicant.
- [6] Armed with the Arbitration Award, the applicant terminated the JBCC PDA on the 24 June 2021[4]. On the same day the respondent served a Notice of Review / Appeal requesting reasons for the award from the Arbitrator. On 31 December 2021 the Arbitrator responded and informed the parties that the Arbitration Award sufficiently sets out his reasons for the award[5].

[7] The respondent aggrieved by the decision of the Arbitrator, on 24 June 2021 it launched a Notice of Review / Appeal in this Court[6] against the Arbitral award.

[8] On 15 October 2021 the applicant launched the present application seeking relief from the Court that;

[8.1] the Arbitration Award dated the 12 May 2021 be made an order of Court;

[8.2] there shall be no order as to costs, save in the event of opposition, in which case the respondent shall pay the costs of this Application[7].

Evidence.

[9] The Respondent opposes the relief sought on the following basis, inter alia with three points In limine, but not limited thereto[8]:

- a. RES JUDICATA
- b. LIS PENDENSE
- c. LOCUS STANDI
- d. JURISDICTION

[10] The respondent proceeded to examine the three Points In limine addressing same separately seriatim ;

[11] RES JUDICATA

- a. The Respondent's view is that the Applicant seek to broaden the scope of the application by bringing certain facts and information before the court which has already been deliberated on by the appointed Arbitrator.
- b. The view of the Respondent is that the Applicant is attempting to retry issues that was already deliberated on in the court, while the issues are no longer open for deliberation.
- c. In *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation*[9] the Constitutional Court by Khampepe (J) confirmed that the test for res judicata is standing on four legs:
 - i. Same parties (which in this matter is indeed the case),
 - ii. Same cause of action (which again is the case),
 - iii. Same relief (in bringing all the same issues before court, it is again the case),
 - iv. And a final judgment (the arbitrator's judgment)

- d. In the reading of the affidavit filed by the Applicant herein, it is thus clear that the requirements for successful reliance on the doctrine of res judicata by the Respondent is indeed fulfilled.
- e. Where the application should have been a simple application to make the arbitration award an order of court, the Applicant chose to mention and state all facts again and therefore, the Respondent took issue herewith.

[12] LIS PENDENSE

- a. The view of the Respondent is that the application before court, brings various aspects before court which has already been decided and ran its course in the arbitration proceedings.
- b. This is exactly where the prematurity of this application finds its feet. The Respondent filed a Notice of Appeal/Review on the 24th of June 2021 on the appointed Arbitrator, which result in the Arbitrator to give reasons for his award as granted.
- c. Whilst the Respondent still waited for the Arbitrator to supply his reasons, the Applicant proceeded on the 13th of October 2021 to give notice of the main application by serving a Notice of Motion praying that the arbitration award be made an order of court.
- d. The Arbitrator only gave his reasons for his reward in December 2021.
- e. This ultimately result in the application being pre-maturely set down for an order which is still subject to the process of appeal/review.
- f. In *Khum MK Investments and Bie Joint Venture (Pty) ltd v Eskom Holdings Soc*[10] the court recognized that there are two grounds for the review of an arbitration award under Section 33(1)(b).
 - i. Gross irregularity by the arbitrator in conduct of arbitration proceedings.
 - ii. Arbitrator has exceeded his powers.
- g. It is also submitted that if parties want a right of appeal, such right must be set out in the arbitration agreement.
- h. This was then also the case, so the Respondent are entitled to take the arbitration award on appeal[11].

[13] LOCUS STANDI

- a. The submission is that 'Smit' do not have the necessary locus standi to depose of the affidavit (Founding Affidavit).
- b. The resolution attached to the founding papers does not constitute a proper resolution as same is undated and the signature on the bottom thereof do not indicate whom signed same.

- c. According to the Applicant, in its Replying Affidavit, the lack of signatures and the date was a mere oversight[12].
- d. They accordingly rectified same by supplying a ‘new’ resolution which is dated 06 October 2021 and now suddenly signed by two directors.
- e. This is not the same document as was uploaded and served with the original Notice of Motion.
- f. Comparing the two ‘resolutions’ it is abundantly clear that the resolutions are an afterthought and does not even remotely correspond with each other and could not be compared as such.
- g. “Except to the extent that the company’s MOI provides otherwise, a decision that could have been voted on at a meeting of the board of that company, may instead be adopted by written consent of a majority of the directors[13]....”
- h. This section is self-explanatory and clearly shows that the original resolution falls far short of what is required by the act.

[14] The respondent contend that this application by the applicant is premature, a waste of time and resources in that the respondent’s

review/ appeal has not been finalized. According to the respondent until the review or the appeal is heard, the applicant

cannot approach this Court for the relief sought. This the respondent argued that it is against the bedrock that it was always the intention, and agreement, between the parties hereto that the matter, once being arbitrated ,can be taken on review or appeal by either party[14].

[15] The respondent further contend that any averments to the effect that the respondent is out of time in taking the Arbitral Award on review / appeal is wrong as the alleged AFSA did not apply. According to the respondent the reason for delay was as a result of the arbitrator furnishing his reasons for the award only on the 1 December 2021 this informed the respondent’s intention to oppose this application as the parties waited for the arbitrator to supply his reasons for the award. Thus, the respondent submitted that as the result of the delay both parties suffered a lot financially due to unforeseen circumstances ,each party should pay its own costs no matter what the outcome are[15].

[16] The applicant averred that its application is premised on section 31 of the Arbitration Act that elevates the arbitral award to an order of Court .

[17] Section 31 of the Act reads as follows:

“ 31. Award may be made an order of court-

- (1) an award may on the application to a court of competent jurisdiction by any party to the reference after due notice by the other party or parties be made an order of court.

(2) The court to which application is to be made, may before making the award an order of court, correct in the award any clerical mistake or any blatant error arising from any accident slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order as to the same effect”.

[18] The applicant further averred that the provisions of section 31 of the Arbitration Act grant this court a general discretion to make an arbitrator’s award an order of court and the applicant only has to prove to the court that there is or was a valid arbitration agreement covering the award that the arbitrator was duly appointed and that there was a valid award in terms of the reference therein[16]. The filing of a notice of appeal is not a bar to the granting of an order in terms of section 31 of the Arbitration Act, as the High Court does not have the requisite jurisdiction to entertain the appeal against an arbitration award[17].

[19] In response to the Points in Limine raised ad Res judicata :

[19.1] The applicant contend that this point has no merits, as in its Notice of Motion it is only seeking to make the arbitral award an order of court ,any facts so reiterated in its founding affidavit is merely done so, to give the Honourable Court a background in the matter .

[20] In reply to the Points in Limine raised ad Lis pendens:

[20.1] The applicant contend that the arbitration proceedings are not subject to review or appeal procedure. According to the applicant,

the respondent’s notice of appeal or review and/or reasons for the arbitrator to furnish reasons does not comply with Rule 10.3 of AFSA’s Expedited Rules and with Article 22.2 of AFSA’s Rules for commercial arbitrations. The applicant further contend that the respondent is time barred from proceeding with its purported appeal or review application as it was not instituted within 7 (seven) days after the arbitration was delivered .

[20.2] The applicant further contend that since the parties have agreed that the AFSA Rules to be applicable to their arbitration agreement and specifically in terms of Article 22.2 of the Commercial Rules the respondent is time barred from instituting the review and/or appeal application. Article 22.2 provides that -: “A notice of appeal should be delivered by the appellant, within 7 calendar days of publication of the award, failing which the interim award or final award shall not be appealable. If there is a cross appeal, a notice of cross appeal shall be delivered within 7 calendar days of delivery of the notice of appeal, failing which a cross appeal shall be precluded ”.

[20.3] The applicant contend further that the arbitration agreement entered between the parties is binding and where there has got to be a departure from the AFSA Rules which are applicable to the parties arbitration agreement in casu, such departure must be consensual, otherwise it would be non-sensical for the parties to agree on a guide which will be departed from, as and when any of the parties wishes to, and as and when it suit him[18]. Accordingly, the applicant averred a

party to a consensual arbitration under the Arbitration Act cannot review the decision of an arbitrator on administrative or common law grounds. The party seeking to review the decision of an arbitrator is limited to the grounds of review listed in section 33 of the arbitration Act. Even on the perfunctory reading of the respondent purported application for review or appeal no such grounds are listed.

[20.4] The applicant contend further that despite the fact that the respondent is time barred and precluded[19] from approaching this Court for appeal or review, the purported application was never issued by the Registrar of this Court and was only uploaded on caselines without a case number. The respondent never proceeded with its application since the date of the award being the 12 May 2021 including the date on which the arbitrator's reasons for the award was furnished (1 December

2021) until the date of hearing of the main application.

[21] In response to the Points in Limine raised ad Locus standi :

[21.1] The applicant proffers an explanation in that in its replying affidavit the correct resolution was attached as annexure "WJS1"

thereto with the explanation that the wrong document was attached due to an oversight there being challenge therein[20], this point in limine is meritless and stands to be dismissed. With regards to the fourth point in limine ad Jurisdiction, the respondent abandoned this point as the issue of jurisdiction was properly adjudicated by the Supreme Court of Appeal[21].

Legal framework .

[22] Section 31 of the Arbitration Act 42 of 1965 reads as follows :- Award may be made an order of court- (1) an award may on the application to a court of competent jurisdiction by any party to the reference after due notice by the other party or parties be made an order of court.

(2) The court to which application is to be made, may before making the award an order of court, correct in the award any clerical mistake or any blatant error arising from any accident slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order as to the same effect".

[23] As mentioned supra in this judgment the parties had entered into an Arbitration Agreement, which agreement incorporated the Expedited Rules-AFSA to be applicable to their arbitration agreement and specifically in terms of Article 22.2 of the Commercial Rules. Article 22.2 provides that :- " A notice of appeal should be delivered by the appellant, within 7 calendar days of publication of the award, failing which the interim award or final award shall not be appealable. If there is a cross appeal, a notice of cross appeal shall be delivered within 7 calendar days of delivery of the notice of appeal, failing which a cross appeal shall be precluded".

[23] In terms of the Expedited Rule – AFSA point 10 same reads as follows[22]

“10.1 The Arbitrator must give his\her award within (30) days after finalisation of the proceedings unless the parties otherwise agree or unless the AFSA Secretariat permits an extension of that time.

10.2 The Arbitrator’s award must be published to the parties in an appropriate fashion as determined by the AFSA Secretariat.

10.3 Unless the parties have in writing instructed the AFSA Secretariat otherwise at any time before the final award is given, there shall be no right of appeal from the award. In cases where the AFSA Secretariat has been instructed otherwise, the appeal provisions contained in Article 22 of the AFSA Rules for Commercial Arbitration will apply.”

[24] The High Court has no jurisdiction to hear an appeal against an arbitration award.[23]A party to a consensual arbitration under the Arbitration Act as is the case in casu, cannot review the decision of an arbitrator on administrative or common law grounds. The party aggrieved by the arbitral award may review such decision on the limited grounds of review listed in section 33 of the Arbitration Act.>

Application of the law

[25] The Arbitral award was made on 12 May 2021. The respondent on 24 June 2021 made an application for review/ appeal apparently requesting the reasons for the arbitral award. On 8 October 2021 the applicant launched the current application for an order to declare an Arbitration Award an order of court in terms of section 31 of the Arbitration Act 42 of 1965.

[26] A perfunctory read of the documents filed of record including the submissions from both counsels it is evident that the respondent is out of time with his purported review / appeal application to the Arbitrator in terms of the consensual arbitration agreement between the parties.

[27] The respondent’s purported notice of review or / appeal application is flawed and invalid in law for reasons mentioned supra in this judgment. Same does not even conform to the parties own arbitration agreement including the incorporated terms of reference

being the AFSA Expedited Commercial Rules- mentioned supra in this

judgment.

[28] As mentioned supra the respondent’s purported notice of review or/ appeal application is time barred and in effect well out of time having seriously considered the documents filed of record I believe that there is nothing that preclude this court from granting the order sought by the applicant.

[29] The Court is satisfied that the applicant’s application before court for an order that the Arbitration award dated the 12 May 2021 be made an order of court is proper before court and there is nothing to gainsay same in law ,as a consequence the following order is made;

- [1] The Arbitration Award dated 12 May 2021 is made an order of Court;
- [2] The respondent is ordered to pay the costs of this application, including the opposed application for filling of a further affidavit

by the respondent dated the 16 May 2022.

J YENDE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

Advocate for Applicant: J van der Merwe jana@gkchambers.co.za Instructed by: Couzyn Attorneys Hertzog & Horak petridc@couzyn.co.za Advocate for Respondent: W P Steyn wpsteyn@icloud.com Instructed by: HJV Attorneys clerk@hjevattorneys.co.za Heard: 29 May 2023

Judgment:

8 August 2023

- [1] Caselines paginated pgs. 001-33 to 001-58.
- [2] Caselines paginated pgs. 007-3 to 007-6.
- [3] See caselines paginated pgs. 014-39 to 014-41
- [4] See caselines paginated pgs. 007-4 to 007-5
- [5] See caselines paginated pgs. 008-9
- [6] See caselines paginated pgs. 014-99 to 014-112
- [7] See caselines paginated pgs. 001-1 to 001-83
- [8] See caselines paginated pgs. 007-22 to 007-25
- [9] Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others [2019] ZACC 41
- [10] Khum MK Investments and Bie Joint Venture (Pty) Ltd v Eskom Holdings Soc 2020 JDR 0187 (GJ)
- [11] Par. 6, page 001-30 to 001-31 of Arbitration Agreement
- [12] See caselines paginated pgs. 007-22 to 007-25
- [13] Section 74 of Companies Act, Act 71 of 2008
- [14] See footnote 11 vide.

- [15] See caselines paginated pgs. 007-27.
- [16] See DALJOSAPHAT RESTORATIONS (PTY) Ltd KASTEELHOF CC 2006(6)SA 91 (C) at par 27.
- [17] See DALJOSAPHAT RESTORATIONS (PTY) Ltd KASTEELHOF CC 2006(6)SA 91 (C) at par 29.
- [18] See Yunnan Engineering CC and Another v Chater and Others 2006
- (5) SA 571 (t).
- [19] See Goldschmidt and Another v Folb and Another 1974 (1) SA 576(T) at 577A-D
- [20] See caselines paginated pgs. 004-3 to 004-15
- [21] See Standard Bank of South Africa Limited and Others v Mphongo and Others 2021 (6) SA 403 (ZASCA)
- [22] See caselines paginated pgs. 001-68 to 001-69.
- [23] In Goldschmidt and Another v Folb and Another 1974 (1) SA 576 (T) at 557A-D Hiemstra J stated “ The appellant labours under an erroneous reading of section 28. This section is unfortunately phrased and can prima facie raise the impression that a right of appeal can be created by agreement. The appeal there meant can however within the context only mean an appeal to an umpire or an arbitration or tribunal. The common law on arbitration has always been that there is no appeal. Voet says so at 4.8.25...the only functions of the court in regard to the arbitration was to enforce an award to give an opinion on a question of law in a stated case to set aside an award because of some illegality or generally to regulate the proceedings. The court will not take the place of the arbitrator and decide the disputes on the merits” In Blaas v Athanassio 1991 (1) SA 723 (W) Hartzenberg J states at 724H: “ I know of no legislation or rule of any court which creates a right or an opportunity for a party to arbitration to appeal directly to the Appeal Court. I think it can safely be accepted that the parties were wrong and they thought that the Appeal Court would entertain an appeal against the arbitrator’s award”.
- [23] In Goldschmidt and Another v Folb and Another 1974 (1) SA 576 (T) at 557A-D Hiemstra J stated “ The appellant labours under an erroneous reading of section 28. This section is unfortunately phrased and can prima facie raise the impression that a right of appeal can be created by agreement. The appeal there meant can however within the context only mean an appeal to an umpire or an arbitration or tribunal. The common law on arbitration has always been that there is no appeal. Voet says so at 4.8.25...the only functions of the court in regard to the arbitration was to enforce an award to give an opinion on a question of law in a stated case to set aside an award because of some illegality or generally to regulate the proceedings. The court will not take the place of the arbitrator and decide the disputes on the merits”

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Prepared on 10 October 2026 · Esheria