

SOUTH AFRICA / JUDGMENT

**Movundlela Consulting (Pty) Ltd v Mmela
Financial Services (Pty) Ltd
(17393/20;14804/20)
[2023] ZAGPJHC 279 (23 March 2023)
[2023] ZAGPJHC 279**

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strijdom

CASE / FILE NUMBER

17393/20;14804/20

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)
CASE NO: 17393/20

Date of hearing:

08/02/2023

Date judgment

delivered:23/03/2023

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

REVISED

IN THE MATTER
BETWEEN:

MOVUNDLELA
CONSULTING (PTY) LTD
APPLICANT
AND
MMELA
FINANCIAL SERVICES (PTY) LTD
RESPONDENT
AND
CASE
NO: 14804/20
IN

THE MATTER BETWEEN: MMELA
 FINANCIAL SERVICES (PTY) LTD
 APPLICANT
 AND
 THABISO
 J MACHANA N.O
 FIRST
 RESPONDENT
 MOVUNDLELA
 CONSULTING (PTY) LTD
 SECOND
 RESPONDENT
 THE
 CHAIRMAN, JOHANNESBURG SOCIETY OF ADVOCATES
 THIRD
 RESPONDENT

JUDGMENT

Strijdom AJ

1. In the first application, the applicant (“Movundlela”) sought an order making the arbitral award delivered by Adv Thabiso Machaba SC (“the Arbitrator”) an order of the court in terms of section 31 of the Arbitration Act 42 of 1965. The respondent (“Mmela”) opposed this application.
2. In the second application, Mmela sought various orders, including a declaratory order to the effect that the award delivered by the Arbitrator is a nullity. In the event that the declaratory relief sought by Mmela is not granted, Mmela contended that:
 - 2.1 The award falls to be set aside in terms of section 33 of the Arbitration Act, alternatively;
 - 2.2 Mmela, having noted an appeal in respect of the award, the appeal ought to be referred to an arbitral appeal tribunal appointed by the chairman of the Johannesburg Society of Advocates.
3. The two applications were instituted separately, but the parties subsequently agreed to have the two matters consolidated because of the intricate nature of the facts. This court ordered a consolidation of the two applications which then proceeded under case number 17393/20.
[1]
4. At the commencement of the application, I was informed by counsel for Mmela that it no longer pursue the review in terms of section 33 of the Arbitration Act.
17. What I am seized with is not the correctness or otherwise of the arbitral award, but with the question whether the award ought to be made an order of court if the court order would be contrary to a statutory prohibition.

18. It was submitted by Mmela that Movundlela seeks an order of payment for rendering services in violation of a statutory prohibition, which attracts a criminal sanction and that the award is a nullity. It was argued that Movundlela rendered financial services and was required to be registered with the Financial Services Board, now the Financial Sector Conduct Authority, and offended the rule of law.
19. Movundlela contended that the services rendered under the capital raising agreement were not financial services as defined in the FAIS Act and that no offence was committed in terms of the FAIS Act.
20. Movundlela further submitted that the alleged conclusion of the financial service agreement was never pleaded before the arbitrator, nor was it ever Mmela's case that Movundlela was required to render financial services in terms of the FAIS Act. Mmela merely disputed Movundlela's citation as an FSP, but this was proven with the production of a copy of Movundlela's certificate in terms of the FAIS Act.[9]
21. The fee settlement agreement described the services purportedly provided by Movundlela to Mmela as follows:

"All acts and efforts employed by M Consulting[10] in securing and facilitating procurement of the Capital for and on behalf of Mmela to finance the Scheme."[11]
22. The concept of the "facilitation" in clause 1.1.12 to be carried out by Movundlela was described as follows in the settlement agreement:

"The negotiation and finalisation of agreements for the procurement of funding for Mmela by M Consulting".[12]
23. Mr Movundlela testifies as follows before the Arbitrator:

"Mr Movundlela: The requirements for this tender were, obviously, to have the required capital close to 2 billion. Ordinarily Mmela Financial

Services, by virtue of their operations, didn't have this capital. They approached M Consulting to be their lender, to go to the market and source this capital to be able to fund its contract.

Mr Milner: Okay, please can you, despite this, following this agreement did you still assist Mmela in securing financing and in negotiation with other financial institutions?

Mr Movundlela: Yes, whenever Mmela had any financial issues, they would run them by us or seek our advice on how to handle those matters."[13]
24. Movundlela's case before the Arbitrator was that it has duly rendered the said services, and it was entitled to payment in terms of the fee settlement agreement.
25. The Arbitrator described the essence of the dispute before him as follows:

“Months after the second funder was secured, and on 25 March 2013, the parties represented by Mr Mohobi Ramtsitse for the Defendant and Mr Movundlela, for the Claimant, concluded a Fee Agreement, this is the nub of the dispute between the parties.”[14]

26. It was common cause that when Movundlela rendered the services to Mmela, it was not registered with the FSB. In the affidavit Movundlela states the following:

“Indeed, M Consulting’s became an FSP on 6 February 2018. Long after rendering the agreed services under the capital raising and fee settlement agreements.”[15]

27. In its statement of claim Movundlela stated that it was:

“a registered Financial Services provider, duly registered in accordance with the provisions of the Laws of the Republic of South Africa, and is duly authorised to practice as such...”[16]

28. On the evidence placed before me I am persuaded that Movundlela provided financial services to Mmela.

29. It is trite that Movundlela being the party seeking the endorsement of the award, must convince the Court that by enforcing the award it would not offend the rule of law.

30. Section 1 of FAISA[17] defines a “financial service provider” as:

“Any person. Other than a representative, who as a regular feature of the business of such person –

- (a) Furnishes advice. Or
- (b) Furnishes advice and renders any intermediary service, or
- (c) Renders an intermediary service...”

31. The Act defines:

31.1 “Advice” as “subject to subsection (3)(a) any recommendation guidance or proposal of a financial nature furnished by any means or medium, to any client or group of clients.”

31.2 “Intermediary service” as “subject to subsection (3)(b) any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

- (a) The result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier...”

32. Section 7(1) of FAISA provides that “a person may not act offer to act as a financial services provider unless such person has been issued with a licence under section 8.

33. Section 36 provides:

“36 Any person who-

- (a) Contravenes or fails to comply with a provision of section (7)(1), 8(8), 13(1), 14(1), 18, 19 (2) or 34(4) or (6), or

- (b) In any application in terms of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact, is guilty of an offence and is on conviction liable to a fine not exceeding R 1 000 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment.”
34. The aforesaid provisions clearly demonstrate that before a person can provide financial services, such person must be issued with a licence under section 8.
35. To condone belated registration to obtain a licence after the services were rendered would violate the clear language and meaning of s 7(1) of FAISA.
36. Section 36 of FAIS provides that noncompliance with section 7 constitutes a criminal offence.
37. It was stated in *Cool Ideas v Hubbard*[18] that:
- “It cannot be expected of a court of law in such circumstances to disregard a clear statutory prohibition - that would be inimical to the principle of legality and the rule of law.”*
38. Constitutional values require courts to be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently.[19]
39. It would in certain circumstances be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. The force of the prohibition must be weighed against the important goals of private arbitration.
40. Courts are themselves subject to the fundamental principle of legality as they are bound to uphold the constitution.
41. It was further stated in *Cool Ideas* that “party autonomy in voluntary arbitrations will not trump the principle of legality where the enforcement of the arbitral award constitute a criminal offence” as is in this case.
42. In my view this award is contrary to public policy.
43. In light of the above findings, it is unnecessary for this Court to detain itself with the remainder of the relief sought by Mmela in its application.
44. In the result the following order is made:
1. The application by Movundlela to make the award an order of Court is dismissed,
 2. Costs awarded for both applications, including the costs of two counsel.

STRIJDOM JJ

ACTING JUDGE OF

THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Date of hearing: 8 February 2023

Judgment:

23 March 2023

Appearances:

For the Applicant: Adv T Mpahlwa Instructed by: Avela Nontso Attorneys For the Respondent: Adv N Cassim SC And Adv S Ntsikila Instructed by: L Mbangi Inc.

[1] CL 010-1 to 2

[2] Paragraph 9 of the Answering Affidavit

[3] Paragraph 9 to 9.3 of the Answering Affidavit

[4] Paragraph 12 of the AA.

[5] Paragraph 12 of the AA.

[6] Paragraphs 13.2.2 and 13.2.3 of the AA.

[7] Paragraph 17 and 18 of the AA.

[8] Paragraph 1-4 of the Notice of Motion in the review application.

[9] CL 004-12 para 44

[10] “M Consulting” is Movundlela, the claimant before the arbitrator.

[11] CL 011. 004-4, clause 1.1.12, CL 016-9, para 16.1

[12] CL 011. 004-4, clause 1.1.7, CL 016-9 para 16.1

[13] CL 016-11. Para 19, CL 016-39, Annex SAA 3.

[14] CL 011. 009-9, para 22.1

[15] CL 010.3-3, Annex FA 1, para 13.

[16] CL 011.022-28, para 58.

[17] The Financial Advisory and Intermediary Services Act 37 of 2002

[18] 2014 (4) SA 474 CC at 492.

[19] Lufuno Mphaphuli E Associates (Pty) Ltd V Andrews and another 2009

(4) SA 529 (CC)

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