

SOUTH AFRICA / JUDGMENT

Universal Coal Development IV (Pty) Ltd v Omega Risk Solutions (Pty) Ltd and Another (64256/2021) [2022] ZAGPPHC 797 (14 October 2022)

[2022] ZAGPPHC 797

COURT

North Gauteng High Court, Pretoria

BEFORE

N Mazibuko

CASE / FILE NUMBER

64256/2021

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IN THE HIGH
COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA

Case no:

64256/2021
REPORTABLE: NO
OF INTEREST TO
OTHER JUDGES: NO
REVISED: NO
14 OCTOBER 2022
In the matter

between:

UNIVERSAL
COAL DEVELOPMENT IV (PTY) LTD APPLICANT
and
OMEGA RISK
SOLUTIONS (PTY) LTD FIRST
RESPONDENT
PAT ELLIS SC
NO
SECOND
RESPONDENT

JUDGMENT

MAZIBUKO AJ

Introduction

1. The applicant seeks to have an Interlocutory arbitration award (the award) delivered by the second respondent (the arbitrator) on 13 December 2021 in a domestic arbitration reviewed and set aside.

Background

2. The applicant and first respondent (Omega) concluded a written contract that Omega was to provide security services at the New Clydesdale colliery in Kriel, Mpumalanga Province, of which colliery the applicant is an owner.
3. On 14 June 2021, the Applicant dispatched a letter to Omega stating that employees of Omega were facilitating and/or participating in multiple and extensive coordinated thefts of significant amounts of coal at the New Clydesdale colliery. That conduct constitutes a material breach, warranting an immediate cancellation of the contract.
4. Omega disputed the validity of the cancellation, contending that it amounted to a repudiation of the agreement. In that before receipt of the letter of cancellation and contrary to reciprocal duties in suspected circumstances in the agreement, the applicant did not disclose information relevant to the alleged involvement of their employees, to allow a possible joint eradication of such occurrence.
5. Subsequently, Omega instituted arbitration proceedings against the Applicant, claiming specific performance against a tender to resume its duties. The Applicant, in turn, opposed the arbitration proceedings and instituted a counterclaim against Omega for R300 million. The second respondent, the presiding officer of the arbitration proceedings, did not participate in this application.
6. At the first pre-arbitration meeting, the parties agreed to an informal exchange of documentation. A discovery affidavit and redacted documents were served. After discovering the redacted documents in the arbitration, the applicant offered to provide unredacted versions of the papers to Omega's legal representatives on the condition that they would not disclose the redacted information to third parties who may relay that information to members of the coal theft syndicate.
7. Omega accepted that the whistle-blowers' lives were at risk; however, they rejected the proposal. They insisted on unfettered access to the redacted information.
8. In the arbitration, an opposed application to compel the discovery of unredacted copies of the documentation was presented and argued by the parties.

9. The arbitrator handed down the award. This is an extract from paragraph 20, which reads as follows:

“20.1 The defendant is directed to provide the claimant’s attorney with a clearly legible and unredacted copy of all documents listed in the first schedule to its discovery affidavit by close of business on 15 December 2021.

20.2 No further copies may be made of any document, the redacted version of which has been previously provided to the claimant, save with the consent of the defendant’s attorney or, failing such consent, the consent of the arbitrator.

20.3 The copy provided to the claimant’s attorneys must at all times remain in the possession of the claimant’s attorney or under his control.

20.4 When not used, these documents shall be safely stored so that no unauthorized person shall obtain possession of such documents.

20.5 The identity of any witness or whistle-blower revealed in any discovered document may not be disclosed by the Defendant’s

legal representatives to any person unless such disclosure is strictly necessary for purposes of preparation for the trial.

20.6 Each party shall bear its own costs relating to this application.”

Applicant’s case

10. The applicant raised no issue regarding 20.1 to 20.4 of the award. The issue is with paragraph 20.5 of the order. In this application, the applicant seeks the setting aside of the order granted by the arbitrator on the following grounds: -

10.1. The redactions protect the identities of whistle-blowers who are assisting them in uncovering the coal theft syndicate operations. The provision of unredacted documents to Omega will put the whistle-blowers' lives at risk, referencing death threats made on two previous occasions.

10.2. The award made by the arbitrator was contrary to public policy. It should be set aside premised on the grounds set out in either Section 33(1)(a) or 33(1)(b) of the Arbitration Act 42 of 1965, essentially based thereon that the award, compelling the discovery of unredacted documents, is in contravention of the provision of Section 17(9) read with Section 22 of the Witness Protection Act, 112 of 1998; and Section 3 of the Protected Disclosures Act, 26 of 2000.

11. The applicant, through its counsel, submitted that at least one whistle-blower had been designated as a ‘protected person’ under the Witness Protection Act. Section 18 of the Witness Protection Act statutorily obliges the Arbitrator to make an order prohibiting the publication of certain information concerning the protected person. The Award is inconsistent with that statutory obligation.

12. The protected person has given evidence to the Hawks relating to the coal theft syndicate and associated criminal proceedings. Section 17(9)21, read with section 22(1)22 of the Witness Protection Act, makes it a criminal offence for the applicant to disclose information about a protected person's identity. A party who contravenes section 17(9) is liable for a fine or imprisonment for 30 years.
13. The coal theft syndicate operates at the New Clydesdale Colliery. If the applicant discloses the identity of its employees, who are whistle-blowers, it will place their lives at risk in their working environment. This constitutes 'occupational detriment', as defined in the Protected Disclosures Act, 26 of 2000 ("the Protected Disclosures Act"), because that employee will be, among other things, harassed or intimidated by the coal theft syndicate. The inevitable result is that the employee will adversely affect their employment and work security. Disclosure by Universal will therefore contravene the Protected Disclosures Act because it will expose its employees to this risk.
14. The applicant is denied its right to a fair hearing in that it is prevented from presenting its evidence to oppose Omega's claim in a manner that protects the identities of whistle-blowers. This constitutes a gross irregularity in the conduct of arbitration proceedings.

First respondent's case

15. The first respondent opposes the application, contending that the general approach is that full discovery should be given to a litigant to ensure a fair process. The exceptions to the general rule of full discovery are that a document cannot be produced or is privileged or irrelevant. It argued that it is, in fact, necessary to disclose the details of potential witnesses so that it can properly interrogate the evidence.

Issue

16. Whether the redacted copies of the relevant documents discovered to the legal representatives should be provided to Omega with safeguards.

Legal principles

17. Section 33 of the Arbitration Act 42 of 1965 provides that

33(1) Where—

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

33(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(4) If the award is set aside, the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.

18. The Witness Protection Act No. 112, 1998, among others, deals with Confidentiality and disclosure of information.

Section 17(9) provides that: “Notwithstanding any other law, no person in respect of whom proceedings are, or maybe or have been instituted

or conducted, or who is a suspect in such proceedings, shall have access to any information, record, document or statement relating to the proceedings concerned. Including any information, record, document or statement contained in, or forms part of, a police docket or is held by any police official charged with the investigation relating to such proceedings may disclose any information referred to in section 18. unless the Director otherwise directs.

Any person who-(a) wilfully or negligently allows any unauthorised person to gain access to any protected person;(b) wilfully or negligently discloses, in contravention of any provision of this Act-

(i) the identity of any protected person;

shall be guilty of an offence and, on conviction, be liable to a fine or to imprisonment for a period not exceeding 30 years.

19. Both Counsel referred to case law on a judicial evaluation of the balance between conflicting rights; see *Helen Suzman Foundation v Judicial Service Commission* 2018(4) SA 1 (CC), among others. In the matter of *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd and others* 1980 (3) SA 1093 (W), w it was said, “But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigants’ rights to a fair trial, of which the discovery procedures often form an important part.”

20. *Bridon International GMBH v International Trade Administration Commission and others* (2012) 4 All SA 121 (SCA) para 20, where it was held that “mere confidentiality did not render the documents immune from disclosure, but that “it may be very material considerations to bear in mind when privilege is claimed on the ground of public interest....”

Discussion

21. There exists a need to balance competing rights; the right to a fair trial, including disclosure of documentation the one party intends to use and that of confidentiality and public interest, as well as the right to life in respect of the whistle-blowers and any other persons with interest in the matter. It is common cause that whistleblowers are particularly exposed to danger due to their involvement and role, as well as the seriousness

of the criminal allegations and consequences thereof. However, no facts were placed before this court that the arbitrator did not

consider when he considered the matter.

22. I disagree with the applicant that the award made by the arbitrator was contrary to public policy and that it, to a certain extent, seems to expose the respondent's legal representatives to contravening the legislation. In my view, there is a sufficient safeguard that the arbitrator put in place when reading paragraph 20.5 of the award into context.
23. In preparation for its case, the respondent would need to consult with witnesses. Only then, the legal representative may, where it is strictly necessary to do so, give the identity of a whistle-blower, according to this paragraph 20.5. It is difficult to agree with the applicant's suggestion that the legal representative signs a document that they would not disclose the identity. The arbitrator balanced the conflicting right to fair process when he placed limitations on how the discovered information and documentation would be dealt with.
24. The application, therefore, cannot succeed as no irregularities committed by the arbitrator were placed before the court. There is no case made out for reviewing the arbitration award.
25. In the result, the following order is made for all these reasons,

Order

1. The application is dismissed with costs on a party and party scale.

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email by being uploaded to Case Lines.

The date for hand-down is deemed to be on 28 September 2022.

Counsel for the Applicant, Mr G Herholdt

Instructed by:

ENS Africa Attorneys

Counsel for Respondents: Mr J Roux

Instructed by:

Vezi & De Beer Inc.

Date of hearing:

20 July 2022

Judgment

delivered on:

14 October 2022

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