

SOUTH AFRICA / JUDGMENT

Vecchio Modo (Pty) Ltd v Mitchell and Others (10304/2003) [2011] ZAWCHC 482 (17 November 2011) [2011] ZAWCHC 482

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

10304/2003

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 10304/2003

DATE: 17 NOVEMBER 2011

In the matter between:

VECCHIO MODO (PTY) LIMITED

(J L KONSTRUKSIE)Applicant

and

J W MITCHELL & OTHERSRespondents

JUDGMENT

Application for Leave to Appeal BOZALEK, J: The applicant seeks leave to appeal against the whole of the order and judgment handed down by this court on 30 June 2011. In that judgment the applicant's application for an order directing an arbitrator to state questions of law, said to have arisen in the course of an arbitration, in the form of a special case for the opinion of this court in terms of section 20 of the Arbitration Act 42 of 1965, was dismissed with costs. The application is opposed by the second to fourth respondents I believe, represented by Mr Duminy and Mr Howie. The grounds of appeal are numerous and are set out in the applicant's notice of application for leave to appeal dated 21 July

2011. In argument, however, Mr Walters, who appeared with Mr Cooper, concentrated on two central and related grounds. These were that when regard is had to the judgment of Irish, AJ, the reasons for which were given on 27 March 2009, in an earlier interlocutory application, read together with the arbitrator's last award, referred to as his interim award, then to all intents and purposes this court had already decided to state a question of law for its determination. It is correct that paragraph 3 of Irish, AJ's order reads: "The question of law identified by the first respondent in the third paragraph on page 24 of his interim award dated 15 December 2005, is referred for determination by this court in terms of section 20(1) of Act 42 of 1965, in application number 10304/2003, on the basis of the findings contained in such interim award." As I understand the argument now put forward on behalf of the applicant, it is either that Irish, AJ's judgment and particularly the order which I have just quoted, settled the question of whether a question of law should be stated for this court by making such a direction pursuant to his interpretation of the arbitrator's interim award. See in this regard paragraph 11.3 of the applicant's written submissions in support of its application for leave to appeal. In the alternative, again as I understand Mr Walters' argument, even if Irish, AJ's finding and order did not state a question of law for this court, then at the least his judgment is confirmation that another

court could reasonably come to the conclusion that the question of law, apparently identified by the arbitrator and/or Irish, AJ, should be determined by this court. The first argument was, I must emphasise, not raised before me in the original application, apparently because neither party considered

that part of Irish, AJ's order had resolved the question, or was binding on the parties or the court. Be that as it may, I must deal with the argument in determining whether to grant leave to appeal or not. I must also deal with the alternative argument which addresses the question of whether there are reasonable prospects of an appeal court finding differently to this court. As regards the first argument, I do not consider that Irish, AJ was empowered, at the stage and in the application which he heard, to make an order that any question of law identified by the first respondent, i.e. the arbitrator, was referred for determination by this court in terms of section 20(1) of Act 42 of

1965. The starting point here is the terms of the order made earlier by Traverse DJP and the relevant provisions of section 20 of the Act. The order of Traverso, DJP made provision for a staged approach to the dispute between the parties, in the last or possibly the penultimate stage of which the court would decide whether to state any question of law for the opinion of this court or put more accurately, whether to direct the arbitrator to state any question of law for this opinion of this court. That stage was reached when the matter came before me and not earlier in the interlocutory application which served before Irish, AJ. In that application, the applicant sought an order setting aside the arbitrator's interim award, as well as certain ancillary relief, none of which encompassed the relief which it now suggests Irish, AJ validly granted. That application was opposed by the respondents, apart from the arbitrator, who launched a counter-application in which the main relief sought was a declaration that any findings by the arbitrator in his interim award were findings of fact,

alternatively not questions of law appropriate for determination by the court in terms of section 20 of Act 42 of 1965. It is so that the respondents also sought a raft of further relief in the alternative, which could encompass the stating of a question of law in terms of section 20 by Irish, AJ, but the short answer to this point is that Irish, AJ, dismissed both the interlocutory application and the counter-application. There can in the circumstances be no question of a question of law having been properly stated for determination by this court either by Irish, AJ or the arbitrator in his interim award. In regard to the arbitrator, it must be noted that he initially exercised his discretion to refuse to state any question of law for the court. Although he left the door open to any further or reformulated application by the parties, by the time he delivered his interim award, he was clearly doing so pursuant to the directions in the order of Traverso, DJP and was not exercising a fresh discretion on a fresh application by any of the parties. Furthermore, it is clear that Traverso, DJP reserved to the court the power to state any question of law, if at all, once the process she crafted through her order, had run its course. As regards the alternative argument raised by Mr Walters, in my view how Irish, AJ would have, or how he purported to exercise his discretion in relation to the question of whether a question of law should be stated in terms of section 20 for this court to answer, is irrelevant to the question of the applicant's prospects of success

on appeal. It may very well be that Irish, AJ or another court could or would arrive at a different decision to mine on the question of whether a question of law should be stated or not. However, I was seized with this question, I heard the argument on this question and in the absence of a cogent argument that I failed to exercise my discretion properly or judicially, I consider that the mere fact that another court might have exercised such discretion differently, does not, perse, constitute a ground of appeal. The applicant relies on further grounds of appeal, but none of them relate to issues which I did not deal with at some length in my judgment and I do not propose to cover that ground again. It suffices to state that I am not persuaded that there are reasonable prospects that another court will find that I erred in not stating a question of law for the determination of this court, or directing the arbitrator to state a question of law for the determination of this court in terms of section 20 of Act 42 of 1965. In the result, THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED WITH COSTS, such costs to include the costs of two counsel. BOZALEK, J

Application for Leave to Appeal

BOZALEK, J:

The applicant seeks leave to appeal against the whole of the order and judgment handed down by this court on 30 June 2011. In that judgment the applicant's application for an order directing an arbitrator to state questions of law, said to have arisen in the course of an arbitration, in the form of a special case for the opinion of this court in terms of section 20 of the Arbitration Act 42 of 1965, was dismissed with costs. The application is opposed by the second to fourth respondents I believe, represented by Mr Duminy and Mr Howie.

The grounds of appeal are numerous and are set out in the applicant's notice of application for leave to appeal dated 21 July

2011. In argument, however, Mr Walters, who appeared with Mr Cooper, concentrated on two central and related grounds. These were that when regard is had to the judgment of Irish, AJ, the reasons for which were given on 27 March 2009, in an earlier interlocutory application, read together with the arbitrator's last award, referred to as his interim award, then to all intents and purposes this court had already decided to state a question of law for its determination. It is correct that paragraph 3 of Irish, AJ's order reads:

"The question of law identified by the first respondent in the third paragraph on page 24 of his interim award dated 15 December 2005, is referred for determination by this court in terms of section 20(1) of Act 42 of 1965, in application number 10304/2003, on the basis of the findings contained in such interim award."

As I understand the argument now put forward on behalf of the applicant, it is either that Irish, AJ's judgment and particularly the order which I have just quoted, settled the question of whether a question of law should be stated for this court by making such a direction pursuant to his interpretation of the arbitrator's interim award. See in this regard paragraph 11.3 of the applicant's written submissions in support of its application for leave to appeal.

In the alternative, again as I understand Mr Walters' argument, even if Irish, AJ's finding and order did not state a question of law for this court, then at the least his judgment is confirmation that another

court could reasonably come to the conclusion that the question of law, apparently identified by the arbitrator and/or Irish, AJ, should be determined by this court.

The first argument was, I must emphasise, not raised before me in the original application, apparently because neither party considered

that part of Irish, AJ's order had resolved the question, or was binding on the parties or the court. Be that as it may, I must deal with the argument in determining whether to grant leave to appeal or not. I must also deal with the alternative argument which addresses the question of whether there are reasonable prospects of an appeal court finding differently to this court.

As regards the first argument, I do not consider that Irish, AJ was empowered, at the stage and in the application which he heard, to make an order that any question of law identified by the first respondent, i.e. the arbitrator, was referred for determination by this court in terms of section 20(1) of Act 42 of

1965.

The starting point here is the terms of the order made earlier by Traverse DJP and the relevant provisions of section 20 of the Act. The order of Traverso, DJP made provision for a staged approach to the dispute between the parties, in the last or possibly the penultimate stage of which the court would decide whether to state any question of law for the opinion of this court or put more accurately, whether to direct the arbitrator to state any question of law for this opinion of this court.

That stage was reached when the matter came before me and not earlier in the interlocutory application which served before Irish, AJ. In that application, the applicant sought an order setting aside the arbitrator's interim award, as well as certain ancillary relief, none of which encompassed the relief which it now suggests Irish, AJ validly granted. That application was opposed by the respondents, apart from the arbitrator, who launched a counter-application in which the main relief sought was a declaration that any findings by the arbitrator in his interim award were findings of fact,

alternatively not questions of law appropriate for determination by the court in terms of section 20 of Act 42 of 1965. It is so that the respondents also sought a raft of further relief in the alternative, which could encompass the stating of a question of law in terms of section 20 by Irish, AJ, but the short answer to this point is that Irish, AJ, dismissed both the interlocutory application and the counter-application.

There can in the circumstances be no question of a question of law having been properly stated for determination by this court either by Irish, AJ or the arbitrator in his interim award. In regard to the arbitrator, it must be noted that he initially exercised his discretion to refuse to state any question of law for the court. Although he left the door open to any further or reformulated application by the parties, by the time he delivered his interim award, he was clearly doing so pursuant to the directions in the order of Traverso, DJP and was not exercising a fresh discretion on a fresh application by any of the parties. Furthermore, it is clear that Traverso, DJP reserved to the court the power to state any question of law, if at all, once the process she crafted through her order, had run its course.

As regards the alternative argument raised by Mr Walters, in my view how Irish, AJ would have, or how he purported to exercise his discretion in relation to the question of whether a question of law should be stated in terms of section 20 for this court to answer, is irrelevant to the question of the applicant's prospects of success

on appeal. It may very well be that Irish, AJ or another court could or would arrive at a different decision to mine on the question of whether a question of law should be stated or not. However, I was seized with this question, I heard the argument on this question and in the absence of a cogent argument that I failed to exercise my discretion properly or judicially, I consider that the mere fact that another court might have exercised such discretion differently, does not, per se, constitute a ground of appeal.

The applicant relies on further grounds of appeal, but none of them relate to issues which I did not deal with at some length in my judgment and I do not propose to cover that ground again. It suffices to state that I am not persuaded that there are reasonable prospects that another court will find that I erred in not stating a question of law for the determination of this court, or directing the arbitrator to state a question of law for the determination of this court in terms of section 20 of Act 42 of 1965.

In the result, THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED WITH COSTS, such costs to include the costs of two counsel.

BOZALEK, J

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