

SOUTH AFRICA / JUDGMENT

Vodacom International Limited and Another v Mabanga (17/29804) [2019] ZAGPJHC 551 (12 December 2019) [2019] ZAGPJHC 551

COURT

South Gauteng High Court, Johannesburg

BEFORE

Notshe

CASE / FILE NUMBER

17/29804

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Source record

REPUBLIC
OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO. 17/29804
In

the matter between:

VODACOM
INTERNATIONAL
LIMITED
First Applicant
VODACOM
GROUP
LIMITED
Second Applicant
and
MOTO
MATIKO
MABANGA
Respondent

JUDGMENT

NOTSHE AJ

- [1] In this matter, the applicants apply that an award by the International Court of Arbitration of the International Chamber of Commerce made on 3 November 2015, be made an order of Court. They also seek costs of the application.
- [2] The respondent opposes the application on the grounds that the enforcement of the award concerned would be contrary to public policy in the Republic of South Africa.
- [3] The application for an award to be made an Order of Court is governed by the provisions of Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 (Act 40 of 1977).[1]
- [4] Despite its repeal, the Act is still applicable to applications that were brought before 20 December 2017.[2]
- [5] As stated above the respondent opposes the granting of the Order on the ground that the enforcement of the Award concerned will be contrary to public policy. In this regard he relies on the provisions of section 4 of the 1977 Act. He avers that he was denied a Schengen visa and was unable to attend the arbitration proceedings.
- [6] Section 4(1) of the Act provides that a Court may refuse to grant an application for an order making an award an order of Court if the enforcement of the order would be contrary to public policy. The Act, however, does not define "public policy". As a result, one has to resort to common law insofar as meaning of public policy is concerned.
- [7] Lord Denning MR is reported to have said the following regarding public policy[3]:
- "I know that over 300 years ago Hobart C.J. said that 'Public policy is an unruly horse'. It has often been repeated since. So unruly is the horse, it is said [Burrough J. in Richardson v Mellish [1824] EngR 715; (1824) 2 Bing 229 at 252], that no judge should ever try to mount it lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fiction and come down on the side of justice ...It can hold a rule to be invalid although contained in a contract".*
- [8] Public policy is described as concerning a body of principles that underline the operation of legal systems in each country. It addresses the social, moral and economic values that tie society together. These are values that vary in different cultures and change over time.
- [9] Our Courts seem to have found a bridle for the unruly horse and the Judges have been good persons in the saddle. They have applied the principle of public policy in the development of a number of aspects of our law. In the law of delict, the Courts had to determine whether conduct is unlawful by relying on the principle of public policy.[4]

[10] It has been held that public policy is closely associated with and cannot be separated from, the community's perception of

justice, equity, good faith and reasonableness.[5] In principle it concerns only the legal convictions of a particular community at a given time, however much such convictions may or may not, also reflect ethical or moral considerations.[6] Public reaction is not necessarily indicative of society's legal convictions. It is but one of the aspects that are taken into account in determining public policy.

[11] It must however be emphasised that public policy has to be fettered by the constitutional norms. The values reflected in the Constitution

must now permeate principles of policies underpinning the common law. If the public policy expressed in our common law conflicts with the values underlying the Constitution, then the latter must prevail.[7] In this regard the Constitutional Court had this to say[8]:

“What contracts and actions public policy would permit or enforce in the future will have to be re-examined. Such a constitutionally

defensible and competent source of invasion would flow not from a direct and literal extension of the provisions of s 7(1) of the

Constitution to relations between private persons inter se. It would flow from a source potentially no less rich and creative than such an extension. It would be sourced in s 35(3) of the Constitution, which compels the Courts to have due regard to the spirit, purport and objects of the chapter in the interpretation of any law and the application and development of the common law. The common law is not to be trapped within the limitations of its past. It need not to be interpreted in conditions of social and constitutional ossification. It needs to be revisited and revitalised with the spirit of the constitutional values defined in chapter 3 of the Constitution and with full regard to the purport and objects of that chapter.” [9]

[12] The community referred to are reasonable members of our community irrespective of origin, gender, race, color, religion or creed. It includes your passenger on a “Siyaya/Sesfikile” minibus taxi on its way to SOWETO or Ekhugqwala. They do not have some Solomonic wisdom, high reflexive skills of a Formula 1 driver, the agility of a Bafana-Bafana soccer player nor the gullibility of Nongqawuse. They are us and thread pathways and rub shoulders with us.

[13] In this case, the respondent avers that the enforcement of the award is against public policy because he was refused a Schengen Visa and was unable to attend the arbitration proceedings.

- [14] This, however, has turned out to be factually incorrect. By the time the respondent applied for a Schengen Visa, the proceedings had been finalised. His attorney, a certain Mr Shein, informed the arbitration tribunal that the respondent would not attend the arbitration proceedings because there were some irregularities in them. Despite the reminder of the proceedings he refused to attend. Furthermore he failed before the French Court to have the award set aside.
- [15] It is clear therefore that the failure to attend the arbitration proceedings was not caused by the visa refusal but the respondent chose not to attend.
- [16] In my view, there is nothing that prevents the enforcement of the Award. It is not against public policy to make an order that the Award be made an order of Court.
- [17] Accordingly, I make the following order:
- (a) The award made by the International Court of Arbitration of International Chamber of Commerce on 3 November 2015 is made an order of Court;
 - (b) The respondent is to pay the costs of the application.

V S NOTSHE

Acting Judge of the High Court

HEARD ON: 29 November 2019 JUDGMENT DATE: 12 December 2019 FOR THE APPLICANT: Adv L Sisilana INSTRUCTED BY: Messrs Cliffe Dekker Hofmeyr Inc. FOR THE RESPONDENT: In Person

- [1] This Act was, however, repealed with effect from 20 December 2017 by the International Arbitration Act, Act 15 of 2017.
- [2] See: section 20(3) of the International Arbitration Act of 2017.
- [3] In Enderby Town Football Club v Football Association [1971] Ch. 591.
- [4] Minister van Polisie v Ewels 1975 (3) SA 590 (A); Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A); Minister of Law and Order v Kadir [1994] ZASCA 138; 1995 (1) SA 303 (A); Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) [2001] ZACC 22; 2001 (4) SA 938 (CC)
- [4] Minister van Polisie v Ewels 1975 (3) SA 590 (A);
Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A);
Minister of Law and Order v Kadir [1994] ZASCA 138; 1995 (1) SA 303 (A);
Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) [2001] ZACC 22; 2001 (4) SA 938 (CC)

- [5] Compass Motors Vehicle Industries (Pty) Ltd v Callguard (Pty) Ltd 1990 (2) SA 520(W) at 528-529.
 - [6] Minister of Law an Order v Kadir 1995 (1) SA 30 (A) at 319 – 320.
 - [7] Hassam v Jacobs 2009 (5) SA 572 (CC).
 - [8] In DuPlessis v De Klerk 1996 (3) SA 850(CC).
 - [9] At [86].
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