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CONSTRUCTION LAW BULLETIN

CAN AN ARBITRATOR MAKE AN AWARD BY CONSENT?

Introduction

It frequently happens in arbitrations that parties settle their disputes before the conclusion of the arbitration proceedings.

In these circumstances it has often been the practice for the parties to ask the arbitrator to make an award by consent setting out the terms of the settlement between them.

The question as to whether such a practice is legally competent and gives rise to an award that can be enforced in the normal way recently received the attention of the Supreme Court of Appeal¹.

Arbitration awards are enforced firstly by having the award declared to be an order of court on application to the appropriate High Court having jurisdiction over the parties and secondly by invoking the usual machinery for the enforcement of court orders such as execution proceedings or even contempt proceedings.

The Facts

The three Bidoli brothers, Guido, Fabrizio (since deceased and represented in the proceedings by his wife Barbara) and Romolo, immigrated to South Africa from Italy in the 1950's. For many years they conducted business in partnership in South Africa, Namibia and Italy, mainly in the building contracting field. Their partnership took various guises. In some cases it was a specific joint venture, in other cases it was a company in which they held shares jointly and in other cases and for certain periods of time they operated as a straightforward partnership.

¹ GB Bidoli v BL Bidoli and R Bidoli, Case No 436/10, judgment delivered 27 May 2011.

In the 70's the brothers sent money back to Italy for their late father to construct a block of flats on the outskirts of Rome. This was done and an adjoining vacant piece of land acquired, both of which were registered in the joint names of the brothers.

The block of flats was subsequently sold and the proceeds put into a bank account in the joint names of the brothers in Rome.

In 2007 disputes arose between the brothers regarding their financial affairs including what their shares were in the bank account in Rome.

The arbitration agreement provided for the Arbitration Act, 42 of 1965, to govern the arbitration including the enforcement of the arbitration award.

After the parties had filed their respective statements of claim and statements of defence, the hearing was convened for 3 December 2007.

The hearing ran for a few days and then negotiations took place between the parties resulting in a settlement being concluded on Friday 7 December 2007.

On Monday 10 December 2007, Romolo expressed dissatisfaction with the settlement on the grounds that he felt that the amount that he had agreed to pay Guido was more than it should be. However, despite this, the arbitrator, on the application of Guido and Barbara, made an award in accordance with the terms of the settlement agreement *inter alia* dealing with how the money in the Rome bank account was to be divided up.

When Guido applied to the Western Cape High Court to have the arbitration award made an order of court, Romolo opposed the application and counter-applied for the arbitration award to be declared void and ineffective.

One of the arguments raised by Romolo was that once the parties had settled their dispute, the arbitrator's mandate terminated automatically and as such he never had any legal standing or jurisdiction to make the award that he had made.

The Cape High Court judge found favour with this argument and set aside the award. Guido, not content with this outcome, appealed to the Supreme Court of Appeal in Bloemfontein.

The Decision

The SCA pointed to the fact that:

- the English Arbitration Act specifically provides for the arbitrator to issue an award recording the terms of a settlement between the parties;
- as long ago as May 2001 the South African Law Commission recommended a new Arbitration Act which contains a provision permitting an arbitrator to record any settlement in the form of an award on agreed terms;

- the hallmark of arbitration is that it is a dispute resolution process flowing from the consent of the parties who define the powers of the arbitrator and are equally free to modify or withdraw those powers by way of further agreement.

The SCA said it was clear that the parties intended their arbitration to come to an end with the issue by the arbitrator of an arbitral award on agreed terms.

The court held that there was nothing in the South African common law which precluded such an arrangement which was consistent with the rules of various international arbitration tribunals including the Association of Arbitrators (Southern Africa) Rules which specifically provide for this.

Romolo argued that an essential ingredient of an arbitration is that there must be a dispute between the parties. If there is no dispute, there can be no arbitration. Whilst the SCA agreed with this proposition, it said that there had been a dispute between the parties, the arbitration had run for a number of days and the parties had agreed to their settlement agreement being made an award so that it could if need be be enforced by the process provided for in the Arbitration Act.

Romolo had two other arguments aimed at undermining the arbitrator's award, namely:

- part of the award issued by the arbitrator comprised a declaration of the parties' rights which Romolo argued was not legally competent for an arbitrator to do; and
- part of the award related to matters falling outside the court's territorial jurisdiction, namely in Italy.

The court held that an arbitrator is fully entitled to make an award in whatever format is appropriate including an award which declares the rights of the parties such as a ruling on the existence or meaning of a contract.

As to the second point, the SCA stated that Romolo was resident in South Africa and as such the award if made an order of court could be enforced against him if only via contempt of court proceedings.

Conclusion

In the result the court upheld Guido's appeal, made the arbitrator's award an order of court and directed Romolo to pay the costs of all of the proceedings.

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