

REPUBLIC OF NAMIBIA



SUPREME COURT OF NAMIBIA, WINDHOEK

JUDGMENT

REPORTABLE

CASE NO: SA 23/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MERIT INVESTMENT ELEVEN (PTY) LTD

Appellant

and

NAMSOV FISHING ENTERPRISES (PTY) LTD

Respondent

Coram: DAMASEB DCJ, MAINGA JA and SMUTS JA

Heard: 13 March 2017

Delivered: 24 March 2017

APPEAL JUDGMENT

SMUTS JA (MAINGA JA concurring):

[1] The respondent in this appeal (Namsov) successfully applied to the High Court to make an arbitration award in its favour against the appellant (Merit) an order of that

court in terms of s 31 the Arbitration Act, 42 of 1965 (the Act). That application was opposed by Merit on the ground that the award did not dispose of all obligations between the parties, essentially seeking a postponement of its obligations under the award until other disputes had been resolved.

[2] The High Court rejected that opposition and granted its order. Merit's opposition raised in the High Court is no longer in issue. Instead a single new point is raised by Merit on appeal for the first time, namely that Namsov did not meet the requisites of the Act when applying to make the award an order of court, contending that Namsov failed to establish that the arbitration itself proceeded in terms of a valid agreement in writing to arbitrate. As a consequence of failing to do so, it is contended that the award would be null and void. Namsov's counsel, Mr S P Rosenberg SC, contends that Merit is precluded from raising this new point on appeal and that it is in any event without foundation in fact and in law.

Background facts

[3] Namsov instituted an action against Merit in October 2013. After Merit entered an appearance to defend, Namsov applied for summary judgment. In resisting summary judgment, Merit raised a preliminary point that clause 6 of the quota sourcing fee agreement between the parties required that disputes between them be resolved by arbitration. The matter then proceeded to arbitration. The claim was opposed in the arbitration by Merit which also raised a counterclaim. The arbitrator made an award in favour of Namsov, ordering Merit to pay the amounts of N\$7,360,000 and N\$3,750,000 together with interest and costs and dismissed Merit's counterclaim.

[4] Namsov thereafter successfully applied to make the award an order of court under the Act. In its founding papers, Namsov referred to and attached the sourcing fee agreement which included the arbitration clause which had formed the basis of the preliminary point in the summary judgment application.

[5] It was also stated in Namsov's founding affidavit that the parties agreed upon the appointment of an arbitrator and agreed that the arbitration be conducted in accordance with the Standard Procedure Rules applicable in South Africa under the Act. The terms of the agreement governing the conduct of the arbitration were set out in a letter by Namsov's lawyers to Merit's lawyers on 21 February 2014, also attached to the founding papers.

[6] It was further stated that the arbitrator accepted his appointment and that the arbitration proceeded, culminating in the arbitrator's award. These facts were not disputed. In opposition to making the award an order of court, Merit also did not raise any non-compliance with s 31 of the Act. It instead contended that the obligations between the parties were not complete and that a court order should only be granted when other obligations had been resolved or finalised. As I have already said, the High Court correctly rejected that argument.

[7] At no stage did Merit, in its answering affidavit, seek to retract its position that the sourcing fee agreement required a referral to arbitration. Nor was the subsequent agreement concerning the terms of arbitration contained in the letter of 21 February 2014 placed in issue. On the contrary, the opposition contained in the answering

affidavit accepts that a valid award had been made but essentially seeks its postponement.

New point on appeal

[8] Mr Heathcote SC, who together with Ms Bassinghtwaite who appeared for Merit, argued that a court, before making an award, an order of court must be satisfied that the award was made pursuant to a valid arbitration agreement.¹ Counsel submitted that Namsov did not establish a valid written arbitration agreement as required by s 31 read with the definition of an arbitration agreement in s 1 of the Act. It was correctly pointed out that Namsov had the onus to do so.² Counsel pointed out that the arbitrator found that the quota sourcing fee agreement had become superseded by a subsequent cession agreement which did not contain an arbitration clause. Reliance upon the former agreement as an arbitration agreement was thus, according to counsel, misplaced. It was further contended that the letter of 21 February 2014 by Namsov's lawyers had not been confirmed in writing by Merit and did not amount to a written arbitration agreement. The arbitration award, so counsel contended in heads of argument, was a nullity as a consequence, because the arbitrator lacked jurisdiction to conduct the arbitration. This stance shifted in oral argument (presumably because of the common law) and it was rather contended that an absence of a written agreement to arbitrate would mean that the High Court would not have jurisdiction to make the award an order of court under s 31. Counsel further argued in reply that the parties could not by agreement confer the court with jurisdiction if it lacked it in the first place.

¹ *Da Cunha do Rego v Beerwinkel t/a JC Builders* 2012(2) NR 769 (SC) at para 29 where the requirements of an application under s 31 are neatly set out.

² *Christopher Brown Ltd v Genossenschaft Oesterrichascher Genossenschaft Oesrerreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft Mitt Beschränkter Haftung* [1953] 2 All ER 1039 (QB) at 1040 d-e.

[9] The principles applicable to the raising of new defences on appeal were recently summarised by this court in *Di Savino v Nedbank Namibia Ltd.*³

‘As a general matter the appeal court is disinclined to allow a party to raise a point for the first time on appeal because having chosen the battle-ground, a party should ordinarily not be allowed to move to a different terrain. However, the court has a discretion whether or not to allow a litigant to raise a new point on appeal. In the exercise of its discretion, the appeal court will have regard to whether: the point is covered by the pleadings; there would be unfairness to the other party; the facts upon which it is based are disputed; and the other party would have conducted its case differently had the point been raised earlier in litigation. In *Cole v Government of the Union of SA*, supra, Innes J, as he then was, put the matter thus:

“The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset.”

(Footnotes excluded)

[10] Mr Rosenberg pointed out that this point was not taken in the answering affidavit. Furthermore, had it been raised, he argues that Merit would need to deal with why the arbitration clause in the sourcing fee agreement, relied upon to stave off summary judgment and for the referral to arbitration, should not apply. He also argued that Merit would have needed to address why the recordal in the letter of 21 February 2014 was not a proper record of the terms of the agreement to arbitrate.

³ 2012 (2) NR 507 (SC).

[11] As I have already said, Merit not only did not dispute the arbitration clause relied upon and the recordal of the terms of arbitration set out in the letter of 21 February 2014, but had earlier in the summary judgment proceedings sought the referral of the claim against it to arbitration under the arbitration clause.

[12] After Namsov obtained the award in its favour, it referred to and attached the sourcing fee agreement to the application to make the award an order of court. The founding affidavit also expressly refers to agreement reached on the appointment of the arbitrator and the terms of the agreement to conduct the arbitration in accordance with certain rules and the other terms set out in the letter of 21 February 2014. The founding affidavit proceeds to refer to the arbitration proceedings which culminated in the award.

[13] In the answering affidavit, the managing director of Merit does not deny any of these allegations. On the contrary, he in fact states that ‘. . . during the first half of 2014 the terms of the arbitration agreement were settled and the parties filed statements of claim, defence and counterclaim, which were later amended’. The agreement to arbitrate and the amplified terms of referral were not only undisputed but were indeed confirmed by Merit under oath. The amplified terms were also given effect to. The arbitration proceeded with Merit filing a counterclaim. No objection was raised to it. Nor was any point taken in the answering affidavit of an absence of a *prima facie* case in by failing to meet the requisites for making the award an order of court.⁴ On the contrary, Merit’s opposition is premised upon a valid agreement to arbitrate a valid award and as

⁴ On the basis of a respondent’s right to argue that an applicant has not made out a case for the relief claimed as acknowledged by this court in *Stipp and another v Shade Centre and others* 2007(2) (SC). See also *Valentino Globe BV v Phillips and Another* 1998 (3) SA 775 (SCA) at 779. The *Stipp* matter is distinguishable because the preliminary point was squarely taken in the answering affidavit whereas in this matter the factual basis to raise the point had not been placed in issue.

a matter of fact confirmed the terms of the arbitration (which had been set out in the letter of 21 February).

[14] The point taken for the first time on appeal is contrary to admissions contained in Merit's answering affidavit as well as the position taken by it. It was plainly never in dispute that there was a valid agreement to arbitrate.

[15] This *volte face* on the part of Merit is thus contrary to its pleaded position on the facts concerning the very issue now raised on appeal. It is accordingly not permissible for Merit to raise the point for the first time on appeal.

[16] It is in any event entirely unsustainable on the facts, being against both the evidence and established legal principles.

[17] The Act defines an agreement to arbitrate as one in writing. But that requirement does not itself require that the agreement needs to be signed by the parties, as has been held in South Africa where the position was succinctly summarised in a full bench decision in *Mervis Bros v Interior Acoustics and another*⁵ in the following way:

'In terms of s 1 of the Arbitration Act 42 of 1965, an agreement providing for reference of a dispute to arbitration is required to be in writing. Generally such a provision postulates signature by both parties. However, a document may constitute an agreement in writing though it is signed by only one party. That the signature of one party is lacking does not matter, depending on the circumstances of the case. The test is whether the parties have deliberately intended to record their agreement in writing and have shown that the document so produced constitutes the agreement between them. *Union Government (Minister of Finance) v Chatwin* 1931 TPD 317.

⁵ 1999 (3) SA 607 (W) at 610.

In the present case the second document was sent in response to the first and constituted a counter-offer to the proposal of arbitration. It was received without demur and the parties proceeded to arbitration. By its conduct the appellant accepted the terms expressed therein. In my opinion it is clearly part of a written agreement within the meaning of s 1 of the Act.'

[18] This accords with the position in England.⁶

[19] As had occurred in *Mervis Bros*, the letter of 21 February 2014 was received without demur. An arbitrator was appointed. The arbitration itself also proceeded to finality. By its conduct, Merit plainly accepted the terms of the arbitration as set out in the letter of 21 February 2014. This is quite apart from not disputing the arbitration clause in the sourcing fee agreement which Merit had itself invoked to resist summary judgment.

[20] The fact that the arbitrator found that the sourcing fee agreement was superceded by the cession agreement between the parties did not mean that there was no jurisdiction to arbitrate and for the court to subsequently made the award an order of court. Clause 6 provided:

'Should a dispute arise between the parties in regard to the interpretation, effect, breach or termination of this agreement or any other matter arising out of the termination of the agreement, then in such event that dispute may be referred to arbitration by either party to that dispute and if so referred shall be decided by the unanimous arbitration of two arbitrators of whom one shall be nominated by Merit and one by Namsov.'

[21] Merit after all invoked clause 6. In the ensuing arbitration it sought to resist Namsov's claim and advanced a counter claim based upon the sourcing fee agreement. The dispute thus referred to arbitration entailed a determination as to whether Merit

⁶ Halsbury's *Laws of England* 4th ed Vol 2 at 267 para 521.

could rely upon its terms to resist the claim and for its counter claim. The dispute concerned an interpretation of the agreement and Merit's alleged entitlements under it. The arbitration clause would thus find application on that basis. But there is in any event the further agreement, recorded in writing in the letter of 21 February 2014, which also constituted a written agreement to arbitrate.

[22] Counsel for the appellant contended that if the agreement was not a written agreement as envisaged in the Act, 'then no conduct whatsoever can make it written'. This contention fails to take into account fundamental contractual principles. In this matter, it is clear that there was an agreement to arbitrate. Merit itself proposed that the claim be referred to arbitration under clause 6. Namsov agreed to this. The terms of the referral were agreed upon and set out in writing and embodied in a letter set by Namsov's lawyers to Merit's lawyers (of 21 February 2014). The terms were thus in writing and Merit's conduct throughout, and particularly in agreeing to the appointment of the arbitrator and its participation in the arbitration, plainly manifested its acceptance to the written terms of the agreement by its conduct. There was thus Merit's acquiescence to those written terms by its conduct. This was confirmed under oath on behalf of Merit. The terms of the agreement were thus in writing and thus a written agreement, as contemplated by the Act, was clearly established.

[23] The fact that the letter of 21 February 2014 called for written confirmation does not avail Merit in the facts of this case.⁷ It was open to Namsov to dispense with that requirement in its favour which it did by proceeding with the arbitration. The letter should be read in its entirety and portions not grasped and latched onto out of context.

⁷ *R v Nel* 1921 AD 339; *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA) at 958 A-H.

The letter commences by confirming that the parties had agreed to arbitration on the terms thereafter set out in writing. It also proposed that time periods referred to in the rules and procedure agreed upon be doubled. It concluded by requesting Merit's lawyers to confirm in writing the contents of the letter as soon as possible and revert with suggestions on any other adaptations of the procedure rules. While there is no evidence of a response by Merit's lawyers in writing, pleadings were thereafter exchanged, including a counter claim by Merit and the arbitration proceedings went ahead to finality. Counsel for Merit did not dispute that an agreement to arbitrate had been reached but instead raised on appeal for the first time that Namsov had not, in its founding affidavit, discharged its onus to show that it was a written agreement, despite Merit's express confirmation of the terms of the agreement under oath with reference to the 21 February letter and prior invocation of the arbitration clause in the sourcing fee agreement.

[24] The new point thus raised on appeal is without any merit and is utterly contrived. Merit's approach is not only unsustainable on the facts and as a matter of law, but is also unprincipled in the context of all the facts of this matter. Namsov has sought a special order as to costs against Merit by reason of its conduct in this litigation. Mr Rosenberg argued that Merit's approach to the litigation is in bad faith and purely directed at delaying making payments due to Namsov.

[25] The award found that Merit had been overpaid the substantial sums reflected in the award. When sued, it invoked the arbitration clause. After an award had been obtained against it, Namsov was obliged to apply to make it an order of court under s 31 in order to secure payment. When doing so, Merit confirmed the agreement to arbitrate but raised an unmeritorious point which the High Court roundly rejected. On

appeal, Merit endeavoured to raise a point for the first time which was completely at variance with its prior stance and the case it had pleaded and which was also demonstrably unsustainable. The unprincipled conduct in this litigation on the part of Merit, in my view, warrants censure and justifies a special order of costs on appeal.

[26] The following order is made.

1. The appeal is dismissed with costs on the scale as between legal practitioner and client. The costs include those of one instructed and one instructing counsel.

SMUTS JA

MAINGA JA

DAMASEB DCJ (concurring)

[27] I have read the judgement prepared by Smuts JA and wish to record that I agree with his reasoning and the order he proposes. I wish to add a few remarks of my own in support of the order that my learned brother proposes.

[28] There is something called the 'tyranny of litigation'. Its dangers are real and ever-present as shown by the facts of this case. It is to combat it that modern legal systems apply the principle, rooted in public legal policy, that parties must ventilate all justiciable legal issues and disputes during the course of the same legal contest. That principle is

to be departed from in only the rarest of cases. I need not go into them on this occasion as the appeal does not turn on that issue.

[29] Foundational to the appellant's (Merit) argument in this court, for the first time on appeal I may add, is the proposition made with great enthusiasm that a party who seeks to enforce an arbitration award in terms of s 31 of the Arbitration Act 42 of 1965 (the Act) must allege and prove that the arbitration took place in terms of a valid 'written' arbitration agreement. Now, that proposition is both simple and trite. Yet we have not the slightest hint from the litigation history why it was never made in the High Court either in the pleadings, in *limine* or, for that matter, during the course of the argument in that court.

[30] I agree with Smuts JA that the appellant had accepted in the court *a quo* that the arbitration proceeding, which followed after it demanded that course, was based on a written agreement as contemplated under the Act. Miller AJ proceeded from that premise and it is untenable to now accuse him of having misdirected himself in not engaging in some inquiry, independent of the pleadings or the parties' contentions, whether in fact the arbitration proceeding followed upon a written agreement.

[31] In argument, counsel for the appellant placed great store by the English case of *Christopher Brown Ltd v Genossenschaft Oesterreichischer* etc 1953 Q.B.D. 1039. In that case, after investigating the circumstances that vested him jurisdiction the arbitrator proceeded to issue an award which was then challenged in the High Court. Devlin J was called upon to decide if the arbitrator properly assumed jurisdiction. Devlin J observed (at 1042D-H) that an arbitrator had the duty to investigate the circumstances

from which his jurisdiction arose because the principle of *omnia praesemuntur rite esse acta* finds no application to 'proceedings of arbitration tribunals or, indeed, to the proceedings of inferior tribunals of any sort.' That is the first distinguishing feature of *Christopher Brown* from the present case: The case primarily concerned the assumption of jurisdiction by an adjudicator other than a court of law.

[32] Devlin J put it thus at the same page:

'It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to cease to act, and to refuse to act, until their jurisdiction has been determined by some court which has the power to determine it finally.

...

They are entitled, in short, to make their own inquiries in order to determine their own course of action, but the result of that inquiry has no effect whatsoever on the rights of the parties.'

[33] But even then, it was recognised in *Christopher Brown* that an arbitrator is entitled to assume jurisdiction if there is *prima facie* proof of jurisdiction. According to Devlin J at 1043H:

'They have thus discharged all that they are required to do by tendering *prima facie* proof that a valid submission was made, and . . . the arbitrators were entitled to act on the submission. That *prima facie* proof is sufficient for their purpose. They are not obliged to go into matters which might have been raised by the defence if that had been heard, and which might have rebutted the *prima facie* presumption to be drawn from the execution of the document that the document was binding on the parties'.

[34] It hardly needs emphasising that a court of law is subject to a different discipline from arbitrators. It was expressed in the following terms by Shivute CJ in *Namib Plains Farming & Tourism CC v Valencia Uranium (Pty) Ltd and 5 others* 2011 (2) NR 469 (SC) at 483:

[39] It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. If a point which a judge considers material to the outcome of the case was not argued before the judge, it is the judge's duty to inform counsel on both sides and to invite them to submit arguments.

[40] [I]n a civil case a judge cannot go on a frolic of his or her own and decide issues which were not put or fully argued before him or her. The cases also establish that when at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the court, the same principles would generally apply. The cases furthermore demonstrate that relaxation of these principles is normally only possible with the consent or agreement of the parties'.
(Footnotes omitted)

[35] The second, perhaps the most important, distinguishing feature of the *Christopher Brown* matter is that, unlike in the present case, in the former the party against whom the award was being enforced had, in the High Court proceedings, squarely placed lack of jurisdiction in issue. As Devlin J recorded in the course of his judgement at 104A:

'This, of course, naturally directs attention to the fact that the defendants are denying that the contract [containing the arbitration clause] was validly made and was binding on them.

And at H of the same page:

'The correspondence indicated the points which I have mentioned and also that the defendants were contending that the contract was not valid and was not binding on them'.

[36] I wish to make plain that I am by no means to be understood to be saying that a court of law can validly make an order in a matter where it has no jurisdiction. The point, rather, is how it goes about the issue of jurisdiction. Once the parties before it accept as established the facts necessary to bestow it with jurisdiction, it is not its place to second-guess them and to make inquiries of its own what the true facts are upon which its jurisdiction vests. In the present case, as found by Smuts JA, Merit, by its conduct, demonstrated that the arbitration was the result of a written agreement. The High Court, therefore, was entitled to assume that the jurisdictional facts for the invocation of s 31 of the Act were established.

[37] Once alerted by the pleadings or in legal argument to the absence of jurisdiction, a court of law would fall in error if it does not address that issue *mero motu*, not otherwise; as in that case, litigation would become unpredictable. What was Miller J to do when the litigants came to him after they had gone through an arbitration which, in the first place, was undertaken because it was insisted upon by the party who now wants to avoid it? In the second place, when faced with an arbitration which, as Smuts JA observes, was participated in without as much as a whisper by the party who brought it about in the first place - and who was not only invited to confirm the terms under which it was to take place - but did not offer even the slightest protest but proceeded with due deliberation to take part in it on the very terms which it is now said

on appeal it ought to have, but did not, confirm in writing? The High Court had *prima facie* evidence before it that the arbitration was the result of a written agreement.

[38] Merit's appeal is without merit; accordingly, I concur in the order proposed by my colleagues.

DAMASEB DCJ

APPEARANCES

APPELLANT: R Heathcote, SC (with him N Bassingthwaighte)

Instructed by Theunissen, Louw & Partners, Windhoek

RESPONDENT: S P Rosenberg, SC

Instructed by Francois Erasmus & Partners, Windhoek

REPUBLIC OF NAMIBIA**SUPREME COURT OF NAMIBIA, WINDHOEK****CASE NO: SA 23/2016****IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

MERIT INVESTMENT ELEVEN (PTY) LTD**Appellant**

and

NAMSOV FISHING ENTERPRISES (PTY) LTD**Respondent****Coram:** DAMASEB DCJ, MAINGA JA and SMUTS JA**Heard:** 13 March 2017**Delivered:** 24 March 2017**Summary:**

1. Namsov Fishing Enterprises (Pty) Ltd (the respondent) and Merit Investments Eleven (Pty) Ltd (appellant), entered into a sourcing fee agreement which included an arbitration clause. A disagreement pertaining to payments for fishing quota exploitation rights arose between the parties.
2. Namsov instituted an action against Merit for payment of the sums of N\$ 7,360 000 and N\$ 3,750 000. Merit resisted an application for summary judgment by relying upon the arbitration clause in their sourcing fee agreement. The matter proceeded to arbitration. The parties agreed upon an arbitrator and the terms of arbitration. This was confirmed in writing in a letter by Namsov's lawyers to Merit's lawyers.

3. The arbitrator appointed to adjudicate the dispute between the parties made an award in favour of Namsov for payment of those sums. Namsov then applied to the High Court to make the award an order of court in terms of section 31 of the Arbitration Act 42 of 1965. The application was opposed on the basis that the award did not dispose of all obligations between the parties. The High Court rejected this defence.
4. On appeal, Merit no longer pursued its defence in the High Court but raised a new point for the first time, namely that Namsov had not established a written arbitration agreement in its application papers as required by s 31 of the Arbitration Act.
5. The court reiterated the test for raising a point for the first time on appeal. It must be covered by the pleadings and its consideration should raise no unfairness to the other side. The court found that these requirements were not met and that there was also no basis for the point on the facts.
6. The court found that Merit's answering affidavit in the application confirmed the terms of the arbitration agreement set out in the letter by Namsov's lawyers. A written agreement need not have all the parties' signatures, but be reduced to writing. Merit's opposition in the High Court accepted the existence of a valid arbitration agreement. Furthermore, Merit would have had to deal with the arbitration clause relied upon it for the referral to arbitration and why the recordal of the terms of the arbitration as set out in Namsov's lawyer's letters was not a proper record of the agreement to arbitrate, particularly given the fact that Merit had participated in the arbitration and raised no point there or in the High Court as to a lack of jurisdiction by the arbitrator.
7. The court found that the new point raised on appeal was contrary to Merit's pleaded position on the facts and further found that a written agreement to arbitrate as contemplated by the Arbitration Act was established by Namsov.
8. In a concurring judgment, the Deputy Chief Justice found that the primary case relied upon in argument by Merit did not support the point taken on appeal for the first time. He also held that once the parties had accepted the High Court had jurisdiction, it was not for the presiding judge to second-guess them and make his own enquiry into the issue as to the true facts concerning jurisdiction. He held that the High Court was on the fact entitled to assume jurisdiction on the facts of the case.