

Case summary written by Sean Buskin and checked by Stefan Bezuidenhout

Background

This case concerns a coal supply agreement ("*the Agreement*", entered into in September 2011 between Kuyasa Mining (Pty) Ltd ("*the First Applicant*"), Delmas Coal (Pty) Ltd ("*the Second Applicant*") and Eskom Holdings Soc Limited ("*the Respondent*"), sought to be cancelled by the First and Second Applicants in October 2018. The proposed cancellation of the Agreement was then referred, in February 2019, to arbitration by the Respondent wherein the Applicants themselves filed a counterclaim.

The Agreement provided for an arbitration clause in the event of any disputes between the relevant parties. In line with the arbitration clause, the parties then held a pre-arbitration meeting in February 2019, wherein the parties agreed on an arbitration timetable. In lieu of the arbitration proceedings, the parties requested the discovery of documents from one another. The discovery of certain documents was then disputed by both the Applicants and the Respondent, leading to an application to compel being heard before the arbitrator.

On or about 19 December 2019, the arbitrator made a finding in respect of the applications to compel. The arbitrator's decision was accepted by the Applicants who complied with the relevant ruling. However, the Respondent failed to accept the arbitrator's decision and subsequently filed a notice of appeal in respect thereof.

It was disputed whether the decision of the arbitrator, in the application to compel, constituted the outcome of the arbitration or whether same constituted an interlocutory decision, resulting in the decision of the arbitrator being appealable. The court had to consider this contention in light of the very purpose for which the parties had agreed to arbitration being that any disputes between the parties be resolved expeditiously.

The Respondent argued, as per clause 33.6.2 of the Agreement, that it had been afforded the right to appeal, including an appeal of the decision of the arbitration in the application to compel. The Respondent further argued that the fact that the arbitrator's decision in an application to compel may be rendered interlocutory nature did not render same an appealable decision, arguing rather that the furnishing of the documents sought in the discovery would have an effect which would be final in nature once handed over.

Further in support of its argument, that Respondent alleged that the documents sought by the Applicants contained confidential third-party information and the furnishing of same would adversely affect future tender or business processes. As such, appealing the arbitrator's decision ordering the discovery of such information would, in the circumstances, be in the interests of justice.

The court thereafter cited the relevant clauses of the dispute resolution clause of the Agreement, which state, *inter alia*, as follows:

"33.6.1.1. either Party may refer the Dispute to be finally resolved in accordance with the rules of the Arbitration Foundation of Southern African "AFSA")...

and

33.6.1.5. subject to the provisions of clause 33.6.2 the Parties irrevocably agree that the decision in any such arbitration proceedings will be final and binding on them, will forthwith be put into effect and may be made an order of any court of competent jurisdiction"

and

33.6.2. Either Party has the right to appeal against the decision of the arbitrator appointed in terms of clause 33.6.1.1 provided that this is done within 30 (thirty) days of receipt by the Parties of the arbitrators award...."

Court held

The Court identified two issues to be decided upon in this matter:

1. whether the only decision of the arbitrator on the main dispute is appealable or not; and
2. whether the decision of the arbitrator is final in effect.

In deciding the above issues, the court made reference to the case of *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others*, wherein the court identified, *inter alia*, the following:

"The real and only issue is whether the arbitrator's order dismissing the exception, would if it had

been made by the High Court have been regarded as an order having final effect, and thus appealable to the SCA."

Thereafter, the court considered the nature of arbitration proceedings and same being the preferred mechanism for dispute resolution in the disputed Agreement. The court then referred to the judgment of *Lufuno Mphaphuli & Associates (Pty) v Andrews and Another*, which highlighted, *inter alia*, the following in relation to arbitration proceedings:

1. the need for courts to be respectful of the intention of the parties in referring their dispute to arbitration;
2. the purpose of arbitration proceedings, being the "...fast and cost-effective resolution of disputes."; and
3. if courts are too willing to find that arbitration proceedings are either unfair or constitute a gross irregularity, such a finding would destroy the very purpose of arbitration proceedings.

The court thereafter considered the wording of the Agreement concluded between the parties, referring to clause 33.6 thereof, which makes reference only to "*the decision*". In interpreting the Agreement, the court highlighted the wording of same, with the use of the definitive wording "*the*", as opposed to the indefinite wording that the inclusion of "*a*" would result in. The respondent argued that the use of such definitive wording is "*used to make a generalized reference to something rather than identifying a particular instance.*" However, the court found that the juxtaposition of the word "*decision*", grouped with the definitive wording, indicates that the Agreement is referring to a specific judgment having been made, following due consideration thereof.

The court, in highlighting the accepted approach to interpretation of the wording of the Agreement, identified the judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality*, in which it recorded, *inter alia*, the following pertinent rules of interpretation:

1. the particular provision/s must be read in light of the document in which they appear as a whole and the circumstances surrounding its creation;
2. due consideration must be given to:
 1. the language used in light of the ordinary rules of grammar and syntax;
 2. the context of the relevant provision in the relevant provision agreement;
 3. the purpose of the relevant provision; and

4. the material known to those responsible for the inclusion of such provision.
3. the process of interpretation is objective, rather than subjective, in nature;
4. a sensible meaning should be preferred to one that results in a situation which is insensible, contrary to the objectives of business or undermines the purpose of the agreement; and
5. the point of departure shall be the language of the provision itself, read in the context of and having regard to the overall purpose of the provision and the background leading to the creation of the agreement.

In light of the circumstances of the matter, the court found that the Agreement between the parties provides for an appeal procedure only in respect of a final decision of the arbitrator.

The court then considered whether the decision of the arbitration, in the application to compel, constituted a final decision. The court took into account the process of the discovery and the purpose served thereby. An order or decision to compel discovery would ordinarily constitute an interlocutory matter. As a result, such orders are not, in the ordinary course, appealable. The court however highlighted that this did not constitute an inflexible rule and there exist certain circumstances where parties have been granted leave to appeal such orders.

In the present matter, the Respondent argued that the decision of the arbitrator should be appealable as once the process of discovery had been complied, same would result in irreparable prejudice being inflicted on the Respondents.

However, the purported prejudice which the Respondent claims it would suffer following the process of discovery, was placed before the arbitrator in making the decision and same was referred to in the arbitrator's ruling, wherein the following was recorded:

"In each case where the financial data contains particulars of third-party suppliers of coal to Eskom, their full names and such further particulars as may render their identity determinable shall be redacted from the said financial data."

The court found that purported prejudice to be suffered by the Respondent, when viewed against the specific terms of the decision of the arbitrator, together with the Applicant's rights to properly defend the claim against them and prosecute their counterclaim, is misleading. Notwithstanding the aforementioned, the Respondent had, in fact, initiated the arbitration proceedings and thereafter sought to frustrate such proceedings by withholding relevant documents. The court

highlighted the need for parties to take into consideration the consequences of their decision to initiate litigation and arbitration proceedings.

The court concluded that the decision of arbitrator, in ordering the Respondent to make discovery of certain documents, was not an appealable decision, in light of the terms of the Agreement.

Value

The case provides significant value on the rules of interpretation applied by courts in relation to certain documents and the factors to be taken into account therein.

Meta Description

The court concluded that the decision of the arbitrator, in line with overall purpose of arbitration proceedings, the wording of the Agreement and the terms of the arbitrator's ruling, was not appealable.

Focus Keywords

Interpretation of arbitration agreements and the appealability of arbitrator's rulings.

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