THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 406/2001

In the matter between :

SOUTH AFRICAN FORESTRY COMPANY LIMITED **Appellant**

and

YORK TIMBERS LIMITED **Respondent**

Coram: **HOWIE, MPATI *et* NUGENT JJA**

Heard: **5 SEPTEMBER 2002**

Delivered: **19 SEPTEMBER 2002**

Summary: **Costs of arbitration – whether award includes qualifying costs of experts – remittal to arbitrator**

J U D G M E N T

NUGENT JA/

NUGENT JA:

[1] This appeal raises two questions – whether an award of costs that was made by an arbitrator includes the qualifying costs of expert witnesses and, if not, whether the award should be remitted to the arbitrator for reconsideration. Both questions were answered in the negative by the court *a quo* (Van der Walt J in the High Court at Pretoria, whose judgment is reported at 2001 (4) SA 884 (T)) and the appeal is brought with the leave of this Court.

[2] The arbitration to which the award relates took place pursuant to two agreements between the parties for the supply of timber over an extended period. The price at which the timber was to be supplied was subject to revision from time to time and was to be fixed by an arbitrator if the parties could not reach agreement. The award that is now in issue fixed the price

for timber that was supplied during 1995. In the course of the arbitration both parties called a number of expert witnesses to give evidence but neither party requested the arbitrator to make express provision in his award for the recovery of the qualifying costs of the witnesses. The arbitrator's award in relation to costs was as follows: 'The [respondent] is to pay the costs of the arbitration, inclusive of all costs previously reserved by me.'

[3] The award was made on 31 March 2000. On 1 August 2000 the appellant submitted a bill of costs to the taxing master of the Pretoria High Court that included the qualifying costs of its expert witnesses. Three weeks later the appellant was advised that the respondent objected to the inclusion of those costs in the bill because the award made no express provision for their recovery. The appellant's attorney wrote to the respondent's attorney alleging that 'the whole arbitration was conducted and concluded on the

basis that the evidence of [the] expert witnesses was necessary and that the successful party would be entitled to these costs' and requested the respondent to agree to the inclusion of the item in the bill or to the remittal of that part of the award to the arbitrator for reconsideration. The respondent declined to agree to either proposal and the appellant immediately launched the application that is the subject of this appeal.

[4] The relief sought by the appellant, after the notice of motion had been amended, was essentially twofold. Primarily the appellant sought an order declaring, as a matter of law, that the arbitrator's award allowed for the recovery of the qualifying costs of the expert witnesses. In the alternative it sought an order remitting that part of the award to the arbitrator for reconsideration.

[5] The agreements pursuant to which the arbitration was held contained no express provision relating to the costs of the arbitration but they provided that the Arbitration Act 42 of 1965 would apply to matters referred to the arbitrator. Section 35 of the Act deals with the question of costs in the following terms (only the first two subsections are relevant for purposes of this appeal):

> '**35. Costs of arbitration proceedings -**
>
> (1) Unless the arbitration agreement otherwise provides, the award of costs in connection with the reference and award shall be in the discretion of the arbitration tribunal, which shall, if it awards costs, give directions as to the scale on which such costs are to be taxed and may direct to and by whom and in what manner such costs or any part thereof shall be paid and may tax or settle the amount of such costs or any part thereof, and may award costs as between attorney and client.
>
> (2) If no provision is made in an award with regard to costs, or if no directions have been given therein as to the scale on which such costs shall be taxed, any party to the reference may within fourteen days of the publication of the award, make application to the arbitration tribunal for an order directing by and to whom such costs shall be paid or giving directions as to the scale on which such costs shall be taxed, and thereupon the arbitration tribunal shall, after hearing any party who may desire to be

> heard, amend the award by adding thereto such directions as it may think proper with regard to the payment of costs or the scale on which such costs shall be taxed'

[6] An arbitrator's discretion in terms of s 35(1) to award 'costs in connection with the reference and award' is sufficiently broad to allow him to award the qualifying costs of expert witnesses (cf *De Villiers en 'n Ander v Stadsraad van Pretoria* 1968 (2) SA 607 (T); *Community Development Board v Katija Suliman Lockhat Trust* 1973 (4) SA 225 (N) in relation to similar provisons of other statutes). The appellant submitted in its written heads of argument that the award in the present case of the 'costs of the arbitration' must be taken to have been an award of all the 'costs in connection with the reference and award' as contemplated by that section and thus includes such qualifying costs. In my view the submission is fallacious and it was not persisted in before us. Merely because the

arbitrator had the discretion to award such costs does not mean that he exercised that discretion and awarded them. Whether or not he did so is to be determined by construing his award rather than by construing the empowering statute.

[7] In *Kathrada v Arbitration Tribunal and Another* 1975 (2) SA 673 (A), which concerned similar powers of an arbitrator in terms of s 45(3) of the Community Development Act 3 of 1966, Botha JA pointed out at 680H that the arbitrator's discretion to award costs was 'a discretion which must be exercised judicially upon a consideration of all the relevant facts and in accordance with recognised principles' and that the 'failure to act in accordance with the settled practice and principles upon which costs are generally awarded' would constitute an irregularity. One such settled principle is that the qualifying costs of expert witnesses are not recoverable

unless they are specially awarded. In *Lockhat Trust, supra,* at 229A, Van Heerden J pointed out that the rule is too well established to be questioned. The rationale for the rule was expressed as follows in *Wocke v Williams* 1922 TPD 78 at 80:

> 'It is not advisable that discretion should be given to a litigant to get the expert evidence of professional men and so increase the costs against his opponent. There ought always to be an application to the Court, so that the Court's mind may be directed to the question of whether, in the particular case, expert evidence was or was not necessary.'

[8] There is no suggestion in the present case that the arbitrator acted irregularly or in conflict with established principles when making his award and indeed, in my view, he clearly did not, for the qualifying costs of expert witnesses were not even addressed at the hearing. In those circumstances I see no grounds for construing his award as if it included the qualifying costs of expert witnesses, which would properly have required a special order to

be made. In my view the court *a quo* correctly held that the award made by the arbitrator does not include the qualifying costs of the expert witnesses.

[9] Ordinarily an arbitrator is *functus officio* once his award has been made but s 32 of the Act allows for an award to be remitted for reconsideration in certain circumstances. The first two subsections provide as follows:

> '**32 Remittal of Award**
>
> (1) The parties to a reference may within six weeks after the publication of the award to them, by any writing signed by them remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such purpose as the parties may specify in the writing.
>
> (2) The court may, on the application of any party to the reference after due notice to the other party or parties within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.'

[10] The respondent submitted (and it was so held by the court *a quo*) that it is not competent to remit an award of costs to the arbitrator for reconsideration because the question of costs is not a 'matter that was referred to arbitration' as contemplated by s 32(2). The only 'matter' that is referred to arbitration, so it was submitted, is the principal issue referred to in the arbitration agreement, which in the present case was the question of the price to be fixed for the timber.

[11] It would be most anomalous if the legislature intended that the principal award should be capable of being remitted for reconsideration (whether by agreement, or by a court on good cause shown) but not the ancillary award of costs. The respondent submitted that the purpose of excluding a costs award from the ambit of s 32 was to ensure finality but that begs the question why finality was sought in relation to one part of the

award and not in relation to the other. The respondent also submitted that in order to uphold the appellant's construction of the section it would be necessary to overrule the decision in the *Lockhat Trust* case, *supra*, in which it was said, in relation to an arbitrator's award of costs, that '[i]t is not possible to remit the matter to the arbitrators for their further consideration as they have become *functus officio'.* That case concerned an award made in terms of the Community Development Act 1966 which had no provision comparable to s 32 of the Arbitration Act and has no bearing on the issue before us. It was submitted further that s 35(2) of the Act (the terms of which were set out earlier in this judgment) would be superfluous if an award of costs were to be capable of being remitted to the arbitrator in terms of s 32(2). I do not think that is correct. The two subsections serve quite different purposes. Section 35(2) applies where the arbitrator has failed to make an award, or has failed to direct upon which scale the award is to be

taxed. In such cases either party is entitled, as of right, to request the arbitrator to make an award or to give a direction as the case may be. The circumstances in which s 32(2) comes into play are quite different – the section applies where an award has been made, but the award requires reconsideration, as in the present case, in which the award is said to be deficient.

[12] In *John Sisk & Son (SA) (Pty) Ltd v Urban Foundation and Another* 1985 (4) SA 349 (N) it was accepted without question that an award of costs is capable of being remitted to an arbitrator in terms of s 32(2) of the Act and in my view that must be correct. The issue of costs is as much a 'matter that [is] referred to arbitration' as any other matter that falls within the arbitrator's terms of reference (unless it is excluded by the terms of the agreement). Clearly the section was intended to apply to all matters that are

capable of forming the subject of an award. Not only does the language of the section admit of that construction but the alternative construction would result in absurdity.

[13] An application for remittal must be made within six weeks after the publication of the award but s 38 permits a court to extend any period of time fixed by the Act on 'good cause shown'. In the present case the application was made some 22 weeks after the award was published. Notwithstanding its view that the award was not capable of being remitted the court *a quo* nevertheless went on to consider whether the appellant had made out a case for extending the period of time referred to in s 32(2) and for remitting the award to the arbitrator and found that in both respects the appellant must fail. In my view the court *a quo* misdirected itself in

reaching its conclusions on both those issues. It is convenient to deal with the two issues in reverse order.

[14] The court *a quo* expressed the view that a remittal should be permitted only 'when there are compelling reasons put forward' and that none had been advanced in the present case (precisely what considerations were taken into account in that regard do not appear from the judgment). That is not the test that the court was enjoined to apply - an award may be remitted where 'good cause' has been shown for doing so and not only where the circumstances are 'compelling'. 'Good cause' is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances. As pointed out by Innes CJ in *Cohen Brothers v Samuels* 1906 TS 221 at 224 in relation to the meaning of that phrase albeit in another context:

> 'No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether good cause has been shown.'

Undoubtedly the principle of finality will weigh heavily with a court that is charged with considering an application to remit (*Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 963I-964D) but against that must be weighed other relevant factors and in particular the relative prejudice that will be caused to the parties if the matter is or is not remitted.

[15] The reason why a special order was not sought from the arbitrator in the present case was quite simply that the appellant's attorney erroneously overlooked the necessity for doing so and failed to instruct counsel accordingly. Careless though that error might have been in my view that is

not decisive. I can see no prejudice that will be caused to the respondent by remitting the award to the arbitrator (other than that the respondent might forfeit a windfall which it would ordinarily not have received). The respondent alleged that its holding company, which is listed on the Johannesburg Stock Exchange, reported the outcome and financial effect of the arbitration in its annual and interim reports, which received widespread publicity, and that to revive the matter now would cause 'profound uncertainty and speculation'. Why a remittal should have any of those effects was left unexplained and a close examination of the company's interim report and preliminary annual report does not substantiate that bald allegation. It must also be borne in mind that the remittal is sought on a narrow issue relating only to an ancillary issue. There is no question of further evidence being required or of matters being reopened that have already been thrashed out. What is required of the arbitrator is little more

than to refresh his memory in order to determine whether and to what extent the qualifying costs should be recoverable. That might cause some inconvenience but I can see no material prejudice to the respondent in the sense in which it is understood in law (cf *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G and 279A-E). Not to remit the matter to the arbitrator will do no more than enable the respondent to defeat what might be a good claim against it merely on the grounds of a procedural technicality.

[16] The appellant, on the other hand, will clearly be materially prejudiced if the matter is not remitted, for it will forfeit the prospect of recovering substantial costs to which it might otherwise be entitled. There is no suggestion by the respondent that the appellant's claim in that regard is without substance nor that the amount to which it might be entitled is trivial.

The substantial prejudice to the appellant if the matter is not remitted in my view far outweighs the inconvenience to the respondent if the order is granted. Bearing in mind the relative prejudice to the parties, and the narrow scope of the matter in issue, in my view there is indeed good cause to remit the award.

[17] The remaining question is whether the appellant has shown 'good grounds' for condoning the delay in seeking the remittal. The court *a quo* said that the appellant had given no explanation at all for the delay and on that ground it found that good grounds for the delay had not been shown. In my view the court *a quo* misdirected itself in that regard. There was indeed an explanation for the delay, which was inherent in the reason for seeking the remittal. It is clear from the evidence of the appellant's attorney that he remained oblivious to the necessity for a special order until the time that the

respondent objected to the bill. Once the appellant became aware of the oversight it acted promptly in seeking a remittal. I can see no prejudice that was caused to the respondent by the delay and in my view there is good cause to condone it.

[18] Notwithstanding the conclusion to which I have come I do not think it was unreasonable for the respondent to insist that the appellant apply to a court for the matter to be remitted, nor was it unreasonable to oppose the application. In those circumstances the appellant ought to bear the costs of the application.

[19] Accordingly the appeal is upheld with costs. The order of the court *a quo* is set aside and the following order is substituted:

‘1. The costs award made in the arbitration between the parties concerning the 1995 price revision is remitted to the arbitrator in terms of s 32(2) of the Arbitration Act 42 of 1965 to consider whether and to what extent an additional award should be made in respect of the qualifying costs of the expert witnesses who testified on behalf of the applicant.

2. The applicant is to pay the costs of the application, including the costs of opposition, which are to include the costs of two counsel.’

R W NUGENT
JUDGE OF APPEAL

HOWIE JA)
MPATI JA) CONCUR