THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 427/2012

REPORTABLE

In the matter between:

LEADTRAIN ASSESSMENTS (PTY) LTD	**FIRST APPELLANT**
COLLEGE-ON-LINE CC	**SECOND APPELLANT**
STEVE BYRON	**THIRD APPELLANT**

and

LEADTRAIN (PTY) LTD	**FIRST RESPONDENT**
RICHARD LILFORD	**SECOND RESPONDENT**
RICHARD LILFORD N.O. ON BEHALF OF THE RIVAL SHARE TRUST	**THIRD RESPONDENT**
RICHARD LILFORD N.O. ON BEHALF OF THE LEADTRAIN EMPLOYEES SHARE TRUST	**FOURTH RESPONDENT**
D P DE VILIERS N.O	**FIFTH RESPONDENT**

Neutral citation: *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd* (427/12) [2013] ZASCA 33 (28 March 2013)

Coram: Nugent, Ponnan and Tshiqi JJA and Swain and Saldulker AJJA

Heard: **11 March 2013**

Delivered: **28 March 2013**

Summary: Arbitration awards in terms of the Arbitration Act 42 of 1965 – final and binding in terms of s 28 – correct interpretation of s 32(2) – no good cause shown for remittal.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mabesele J sitting as court of first instance)

a. The appeal is upheld with costs to be paid by the respondents jointly and severally.

b. The orders of the court below are set aside and the following orders are substituted:

'(i) The application succeeds to the extent that paragraphs 4 and 5 of the costs award made by the arbitrator on 5 August 2011 are made an order of court. The respondents are to pay the costs of the application.

(ii) The counter-application is dismissed with costs.

(iii) In each case the costs are to be paid by the respondents jointly and severally.'

JUDGMENT

NUGENT AND TSHIQI JJA (PONNAN JA AND SWAIN AND SALDULKER AJJA CONCURRING):

[1] Various disputes between the appellants, on the one hand, and the respondents, on the other hand, were referred to arbitration by agreement. The nature of the disputes, and the award that was made on the merits, are not material to this appeal. The appeal concerns only the costs that were awarded by the arbitrator.

[2] In his costs award the arbitrator ordered the first respondent – Leadtrain (Pty) Ltd – to pay 80 per cent of the costs of the arbitration, and 80 per cent of certain costs that had been incurred in the high court. He went on in paragraph 4 of the award to direct

that certain costs be included in the costs of the arbitration. In paragraph 5 he ordered the second respondent – Mr Lilford – to bear half the costs jointly and severally with Leadtrain (Pty) Ltd. It is those two paragraphs that are relevant to this appeal.

[3] The appellants applied to the South Gauteng High Court for the award to be made an order of court as provided for by s 31 of the Arbitration Act 42 of 1965. That prompted a counter-application by Mr Lilford for an order setting aside paragraph 4 (partially) and paragraph 5 of the costs award, alternatively, remitting those portions of the award to the arbitrator under s 32(2) of the Act for reconsideration.

[4] By agreement between the parties the award – excluding paragraphs 4 and 5 of the costs award – was made an order of court by Meyer J. The application so far as those paragraphs were concerned, and the counter-application, were postponed and the costs of the proceedings were reserved.

[5] The matter then came before Mabesele J. The effect of the order that had been made by Meyer J was that only a remnant of the prayers in the application – the remnant being a prayer that paragraphs 4 and 5 of the costs award be made an order of court – and the counter-application were before the learned judge. That notwithstanding, the learned judge purported to dismiss the application in toto. He also granted the counter-application, and set aside the contentious parts of the costs award. This appeal against his orders is before us with his leave.

[6] The order dismissing the application has now been abandoned so far as it relates to those parts of the award that were made an order of court by Meyer J. The dispute before us thus centres on the remaining two orders – the orders granting the counter-application and setting aside the contentious paragraphs of the costs award. If the appeal against those orders succeeds then the appellants are entitled to have paragraphs 4 and 5 of the costs award made an order of court.

[7] An arbitrator, like a court, exercises a discretion when he or she makes an award of costs. In support of the counter-application it is alleged by Mr Lilford that the arbitrator in this case misdirected himself in exercising that discretion. We need not

elaborate upon the manner in which he is said to have done so. The central question is whether misdirection in the exercise of his discretion – if it occurred – entitles Mr Lilford to have the affected part of his award set aside and the matter remitted for reconsideration by the arbitrator.

[8] It is trite that the award of an arbitrator is ordinarily final. That is provided for expressly in s 28 of the Act:

'Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.'

[9] Section 33(1) of the Act permits a court to interfere with an award where an arbitration tribunal has misconducted itself, or committed a gross irregularity, or exceeded its powers, or the award has been improperly obtained, but Mr Lilford does not seek to bring himself home on any of those grounds. On the contrary, conduct of that kind has been disavowed. He confines himself instead to s 32(2), which provides as follows:

'The court may, on the application of any party to the reference after due notice to the other party or parties made 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] In support of his submission that misdirection on the part of an arbitrator in exercising his discretion in relation to costs allows a court to set aside his award and remit the matter for reconsideration counsel for Mr Lilford relied upon various decisions in which that has been done - *Joubert t/a Wilcon v Beacham,*[1] *Benab Properties CC v Sportshoe (Pty) Ltd,*[2] and *Clarke v Semenya NO.*[3]

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[1] *Joubert t/a Wilcon v Beacham* 1996 (1) SA 500 (C).
[2] *Benab Properties CC v Sportshoe (Pty) Ltd* 1998 (2) SA 1045 (C).
[3] *Clarke v Semenya NO* 2009 (5) SA 522 (W).

[11] In *Joubert* it was said[4] that 'it is trite that an arbitrator is obliged to award costs on the same basis as would a Court' – and in that respect the court was no doubt correct. The court went on to say that 'his award is liable to be set aside on review if he fails to do so' – but in that respect it was not correct. The authority relied upon for that proposition was the decision of this court in *Kathrada v Arbitration Tribunal and another*[5] but that reliance was misplaced.

[12] *Kathrada* did not concern a consensual arbitration, which is what was in issue in *Joubert*, and is in issue in this case. It concerned an arbitration mandated by the Community Development Act 3 of 1966 to determine the compensation to be paid upon expropriation. The statute conferred a discretion upon the arbitrator to award costs, which, as the court said, 'must be exercised judicially and in accordance with recognised principles'. But in that case it was because the arbitrator was exercising statutory authority that his conduct was subject to judicial review – as is the case whenever statutory authority is exercised. The power of a court to review the exercise of statutory authority has no application to consensual arbitration under the Arbitration Act.[6] The grounds upon which a court may review the award of a consensual arbitrator are confined to those stipulated in s 33(1) of the Act – which are decidedly narrower than the grounds of review that were available in *Kathrada*.

[13] The other cases referred to by counsel take the matter no further. In *Benab* the parties agreed that the costs award of the arbitrator was reviewable on the same basis as that of the arbitrator in *Kathrada* and the case was disposed of on that basis.[7] *Clarke* founded itself on *Kathrada,* and for the reason we have already given the court's reliance upon that case was misplaced.[8] The power of a court to review the decision of a consensual arbitrator must be found in the Act or not at all.

[14] We have already said that the review grounds in s 33(1) have been disavowed in this case. The submission was instead that misdirection on the part of the arbitrator

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[4] At 502D.
[5] *Kathrada v Arbitration Tribunal and another* [5]1975 (2) SA 673 (A) at 680H-681B.
[6] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 59.
[7] At 1049E-F.
[8] At 528A.

provided 'good cause' for the matter to be remitted under s 32(2). It is true that the term has a wide meaning – as this court said in *South African Forestry Co Ltd v York Timbers*[9] – but the term falls nonetheless to be applied in the context in which it is used. That context in this case is the Arbitration Act, which is directed at the finality of arbitration awards.

[15] It is not desirable to attempt to circumscribe when 'good cause' for remitting a matter will exist. It will exist pre-eminently where the arbitrator has failed to deal with an issue that was before him or her – which was what occurred in *York Timbers*[10] – but once an issue has been pertinently addressed and decided there seems to us to be little room for remitting the matter for reconsideration. The guiding principle of consensual arbitration is finality – right or wrong – and we see no reason why an award of costs is to be treated differently to any other aspect of an award.[11] It would be extraordinary if the conduct of an arbitrator that falls short of the strict constraints of s 33(1) were nonetheless to be capable of being set aside and remitted for reconsideration under s 32(2). As pointed out in *Benjamin v Sobac South African Building and Construction (Pty) Ltd,*[12] correctly, the effect of so holding would be to emasculate the provisions of s 33(1). However one approaches the question what is 'good cause' it seems to us that it inexorably requires something other than to mere error on the part of the arbitrator.

[16] In this appeal the case that is made out amounts to alleged error on the part of the arbitrator without more. As Brand J observed in *Kolber v Sourcecom Solutions (Pty) Ltd*,[13] 'a party to arbitration proceedings should not be allowed to take the arbitrator on appeal under the guise of a remittal in terms of s 32(2)'. It seems to us that that is precisely what is sought to be done in this case and the counter-application ought to

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[9] *South African Forestry Co Ltd v York Timbers* 2003 (1) SA 331 (SCA) para 14.
[10] Para 15.
[11] In *John Sisk & Son (SA) (Pty) Ltd v Urban Foundation* 1985 (4) SA 349 (N) it seems to have been accepted by both parties that the conduct of the arbitrator in that case provided 'good cause' for remittal.

[12] At 960G-H.
[13] Para 61.

have failed. Opposition to the application was founded solely upon the counter-application and in those circumstances the court below ought to have dismissed the counter-application and ordered that paragraphs 4 and 5 of the award be made an order of court. The costs of the application and the counter-application were reserved by Meyer J for the decision of the court below. There is no reason why they should not follow the result. In this court the appellants sought a punitive award of costs but in our view there is no justification for such an award.

[17] The following order is made:

a. The appeal is upheld with costs to be paid by the respondents jointly and severally.

b. The orders of the court below are set aside and the following orders are substituted:

'(i) The application succeeds to the extent that paragraphs 4 and 5 of the costs award made by the arbitrator on 5 August 2011 are made an order of court. The respondents are to pay the costs of the application.

(ii) The counter-application is dismissed with costs.

(iii) In each case the costs are to be paid by the respondents jointly and severally.'

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R Nugent

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ZLL Tshiqi

Judges of Appeal

APPEARANCES:

For the Appellant	DJ Vetten Instructed by Thomson Wilks Incoporated, Johannesburg Webbers, Bloemfontein
For the Second Respondent	JH Josephson Instructed by Botha & De Klerk Attorneys, Midrand Honey Attorneys, Bloemfontein