THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 133/06
REPORTABLE

In the matter between:

GUTSCHE FAMILY INVESTMENTS (PTY) LTD	**1ST APPELLANT**
FORMEX HOLDINGS PTY) LTD	**2ND APPELLANT**
THE TRUSTEES FOR THE TIME BEING OF THE LYNCH TRUST	**3RD APPELLANT**

and

METTLE EQUITY GROUP (PTY) LTD	**1ST RESPONDENT**
JEREMY JOHN GAUNTLETT SC N.O.	**2ND RESPONDENT**
THE ARBITRATION FOUNDATION OF SOUTHERN AFRICA	**3RD RESPONDENT**

Before: Harms ADP, Farlam, Jafta, Ponnan, Cachalia JJA

Heard: 19 March 2007

Delivered: 29 March 2007

Summary: Jurisdiction – Arbitration – In the absence of an express agreement an appeal arbitrator is not entitled finally to decide his own jurisdiction.

Neutral citation: This judgment may be referred to as *Gutsche Family Investments v Mettle Equity Group* [2007] SCA 45 (RSA).

CACHALIA JA

[1] This is an appeal against a judgment of the Johannesburg High Court (CJ Claassen J) reviewing and setting aside an appeal arbitrator's award. It deals with whether an arbitrator's dismissal of an exception is appealable and also examines the appeal arbitrator's jurisdiction finally to determine this question in the context of an arbitration agreement.

[2] The appellants and first respondent entered into a sale agreement as sellers and purchaser respectively. The agreement required disputes arising therefrom to be referred to arbitration. During April 2004 the appellants referred such a dispute to arbitration. It involved a claim in an amount of R4 803 558.89 against the first respondent, which they alleged was due and payable to them in terms of the agreement. The first respondent filed a statement of defence and a counterclaim to the appellants' claim admitting that it was indebted to the appellants in the amount claimed, but pleaded that such indebtedness was extinguished by set-off arising from losses it had suffered in the sum of R5 398 394.91 in consequence of the appellants' breach of warranties contained in the agreement. In its counterclaim the first respondent claimed payment of that amount from the appellants.

[3] The appellants took exception to the counterclaim on two grounds. First they averred that the claim was premature in that the first respondent had failed to comply with its contractual obligation to notify them of the alleged breaches within 30 days of their occurrence; secondly they asserted that the first respondent's claim was not liquidated and hence could not be set-off against the amount admittedly owed. In response the first respondent sought to amend its pleading, but the appellants objected to the proposed amendment on the basis that it would not cure the defect complained of.

[4] The arbitrator dismissed the first exception. In relation to the second, he upheld

it to the extent only that the first respondent's claims did form part of the schedule of liquidated claims, but not those that were not. He thus declared that the appellants were not entitled to an award in their favour at that stage.

[5] The appellants sought to appeal against the arbitrator's ruling dismissing the exception in part to the second respondent, the appeal arbitrator. The first respondent, however, objected to his jurisdiction on the basis, so it maintained, that the parties had agreed on an appeal procedure ('the appeal agreement') against the arbitrator's final award only, not against interlocutory rulings. The dismissal of the exception, being in the nature of a ruling and not final in effect was, the first respondent submitted, not appealable in terms of the appeal agreement. The parties however agreed that appeal arbitrator could determine both the appealability issue and, in the event that he decided this against the first respondent, also the merits of the disputed claims in a single hearing.

[6] The scope and content of the appeal agreement was not contained in a single document but had to be gleaned from the correspondence that had passed between the parties before the arbitration commenced. The correspondence was made available to the appeal arbitrator who, after considering it, concluded that the arbitrator's ruling was appealable. He thus dismissed the jurisdictional objection and proceeded to decide the merits of the dispute in the appellants' favour.

[7] The first respondent then instituted review proceedings in the Johannesburg High Court to review and set aside the appeal arbitrator's award on the basis that he had wrongly assumed jurisdiction over the appeal. The High Court upheld the first respondent's interpretation of the appeal agreement (as contained in the correspondence) as envisaging a single right of appeal against a final award only and hence also its jurisdictional objection. It consequently set aside the appeal arbitrator's award and also refused the appellants leave to appeal. The appeal is with leave of this

court.

[8] In this court the first respondent no longer contends, as it did before the two other tribunals, that the appeal agreement limits appeals to a single appeal against a final award only. It now contends that their agreement extended only to any appeal that this court would consider appealable – and because, so it contends, according to this court's jurisprudence the dismissal of an exception is not appealable, the appeal agreement does not permit an appeal against a dismissal of an exception. This is the first issue in this appeal; the second is whether the appeal arbitrator could finally determine this issue in the context of the appeal agreement.

[9] As I have mentioned, the sale agreement contained an arbitration clause – hence the referral of the disputed claims to arbitration. The clause made no provision for an appeal against any award of the arbitrator, but it did provide for disputes to be 'submitted to and decided by arbitration in accordance with the rules of and by an arbitrator or arbitrators appointed by, the Arbitration Foundation of South Africa' (AFSA).

[10] The AFSA rules relevant to this appeal are the following: Rule 22.1 provides that when the parties (who have agreed to arbitration according to AFSA's rules) have in writing agreed that an interim award or the final award of the arbitrator shall be subject to a right of appeal, 'the following rules shall, save to the extent otherwise agreed by them in writing, apply'. Rules 22.2 to 22.7 then deal with procedural matters: the time limits and requirements of a notice of appeal and cross-appeal; payment of fees to the AFSA Secretariat; the appointment of the appeal arbitrator or arbitrators; and the determination of the time and place for the appeal hearing. Then follows rule 22.8, which deals with and circumscribes the powers of the appeal arbitrator or arbitrators –

'22.8 The nature of the appeal and cross-appeal, and the powers of the appeal arbitrator or arbitrators shall, **save to the extent that the written agreement between the parties or this article 22 provides otherwise,** be the same as if it were a civil appeal and cross-appeal to the Appellate Division of the Supreme Court of South Africa.' (My emphasis.)

[11] Thus, in terms of the arbitration clause, which incorporates the AFSA rules, including rule 22.8, the appealability of any interim award and the jurisdictional power of the appeal arbitrator depend on whether the matter would be appealable if it were a civil appeal to the Appellate Division of the Supreme Court of South Africa (now the Supreme Court of Appeal (the SCA)) – unless the written agreement between the parties or article 22 of the AFSA rules provided otherwise.

[12] The appeal agreement provides only for an appeal procedure according to the AFSA rules – including rule 22.8. It does not provide 'otherwise', ie it does not provide that interim awards which are not of final effect are appealable and the appellants do not advance that contention. 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. This is precisely the test prescribed by rule 22.8 and (in the absence of agreement 'otherwise') is applicable in the present case. On this matter it is settled law that a High Court order dismissing an exception in the High Court is not appealable to the SCA.[1] It follows that the first issue, whether the arbitrator's order was appealable, must be decided in the first respondent's favour. The arbitrator is entitled to reconsider the interpretation issue.[2]

[13] I turn to the second issue, whether the appeal arbitrator had the power to hear and finally decide the appealability point and thereby determine his own jurisdiction.

[1] *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at para 14.
[2] *Kett v Afro Adventures (Pty) Ltd* 1997 (1) SA 62 (SCA) at 65G-H.

The appellate jurisdiction of the SCA is derived from s 168(3) of the Constitution[3] read with the Supreme Court Act 59 of 1959.[4] Because, as I have mentioned, the dismissal of an exception (in the High Court) is not appealable under the Supreme Court Act, the SCA will decline to exercise jurisdiction over an appeal of this nature. The appeal will accordingly be struck from the roll.[5] Similarly where an arbitration agreement (incorporating the AFSA rules) does not confer on an appeal arbitrator the power to entertain the dismissal of an exception he has no power to entertain the appeal. He may consider the appeal only provisionally, as the SCA would, for the purposes of deciding the extent of his jurisdiction.

[14] Where the parties themselves disagree as to the powers conferred on an appeal arbitrator, the appeal arbitrator cannot extend the area of jurisdiction over the very matter which he is required to resolve. And if he does, he will act beyond his mandate.[6] The contention advanced by the appellants is that the appeal agreement empowered the appeal arbitrator finally to determine his own jurisdiction.[7] It is a far-reaching contention implying that the agreement constituted an ouster of the court's jurisdiction. Such an agreement must be provided for specifically, and in the clearest terms.

[15] It is clear that at the commencement of the arbitration appeal there was no agreement on the ambit of the appeal arbitrator's jurisdictional powers. All that was

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[3] Section 168(3) provides: 'The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only –
(a) appeals;
(b) issues connected with appeals; and
(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.'
[4] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (SCA) at 7D-G.
[5] *Kett v Afro Adventures (Pty) Ltd* 1997 (1) SA 62 (SCA) at 65H-I.
[6] Joubert (2 ed) *The Law of South Africa* vol 1 para 607; *McKenzie v Basha* 1951 (3) SA 783 (W) 788; *Attorney-General for Manitoba v Kelly* [1922] 1 AC 268 (PC) at 276.
[7] *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (SCA) at 169E-F.

agreed, in the face of the first respondent's jurisdictional objection, was that the appeal arbitrator would deal with both the issue of appealability and the merits in a single hearing. There is no suggestion in the correspondence that the appeal arbitrator was given the power contended for. Indeed, even the appeal arbitrator recognised that any finding he made as to his jurisdiction would be provisional. In these circumstances, where there was no clear agreement conferring such power on the appeal arbitrator, the appellants' contention must founder. Thus by deciding the jurisdictional question wrongly and then hearing and deciding the merits of the appeal (and the cross-appeal) the appeal arbitrator exceeded his powers, and his award fell to be set aside in terms of s 33(1) of the Arbitration Act 42 of 1965, and the arbitration appeal fell to be declared of no force and effect. The court below therefore arrived at the correct conclusion.

[16] I turn to the question of costs. Counsel for the first respondent submitted that it was entitled to the costs of two counsel. I do not agree with this submission for the reasons that follow. It is true, as the first respondent pointed out, that it objected to the jurisdiction of the appeal arbitrator at the very outset. The grounds for the objection were based on an interpretation of the appeal agreement as excluding appeals against interlocutory orders only. But the first time that it raised the present ground of objection based on AFSA rule 22.8 was when it filed its supplementary heads of argument shortly before the hearing of the appeal. Indeed had the first respondent pertinently raised the point in opposition to the appellants' application for leave this court would doubtlessly have refused leave and the costs of appeal would have been saved. To the extent that the appellants also failed to appreciate the appealability point it seems fair that it should shoulder the responsibility for costs, although not to the extent of two counsel.[8]

[17] The following order is made:

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[8] Cf *Kett v Afro Adventures (Pty) Ltd* 1997 (1) SA 63 (SCA) at 65I-67F.

The appeal is dismissed with costs.

A CACHALIA
JUDGE OF APPEAL

CONCUR:
HARMS ADP
FARLAM JA
JAFTA JA
PONNAN JA