Constitutional Court lends strong support to arbitration

John Brand and Emmylou Wewege

The South African Constitutional Court strongly supports arbitration through having held that the Constitution's s 34 does not apply to arbitration.

The section in question states that

'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent or impartial tribunal or forum'.

The Supreme Court of Appeal (SCA) had previously considered the application of s 34 in private arbitration in the case of *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). It held that although s 34 did apply to private arbitration, when parties agree to arbitration, to that extent they waive their rights in terms of s 34.

The SCA referred to the judgment of the European Court of Human Rights in *Suovaniemi v Finland* (unreported case no 31737/96, 23-2-1999) (ECHR), which held that s 6 of the European Convention of Human Rights was applicable to private arbitration.

In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (6) BCLR 527 (CC); 2009 (4) SA 529 (CC),* Lufuno Mphaphuli and Associates, an electrical infrastructure contractor, was the main contractor on an Eskom project for the electrification of certain rural villages in Limpopo. Mphaphuli subcontracted some of the work on the project to Bopanang Construction CC. Bopanang vacated the site early and a dispute arose between the parties concerning the work undertaken by Bopanang and whether either party was liable to pay the other.

During April 2003, Bopanang issued a High Court summons claiming payment for work done and also launched an urgent application for a temporary interdict preventing Eskom from paying Mphaphuli. The proceedings were settled on the basis that an interim interdict would be issued and that the dispute between the parties would be referred to arbitration.

In October 2003, the parties entered into a written arbitration agreement. On 23 August 2004, the arbitrator published his award in favour of Bopanang, which applied to the High Court to have the award made an order of court.

The application was opposed by Mphaphuli, which also filed a counterclaim to have the award set aside. A primary argument by Mphaphuli was that the arbitrator had held 'secret meetings' with Bopanang. It had therefore not been accorded a fair and impartial hearing. The High Court and the Supreme Court of Appeal found in favour of Bopanang.

Mphaphuli appealed the decision to the Constitutional Court, which dismissed the appeal and upheld the award on the basis that s 34 had no direct application to private arbitration. It distinguished between the wording of s 34 and the manner in which private arbitration was conducted.

Private arbitration was ordinarily not held in public, nor could it ordinarily be said that arbitrators had to be independent in the way that courts and tribunals had to be.

As there was no direct application of s 34, by choosing private arbitration, the parties did not waive their rights in terms of s 34 but instead chose not to exercise them. Despite this, the court held that the Constitution was still relevant to private arbitration.

First, the Constitution had an indirect effect in terms of s 39, which obliged the court to promote the spirit, purport and object of the Bill of Rights when interpreting statutes or developing the common law.

Secondly, an arbitration agreement would be null and void to the extent that it was contrary to public policy in relation to the values of the Constitution.

Further, in interpreting arbitration agreements, it should be accepted that when parties submitted to arbitration they submitted to a process intended to be fair, highlighting that fairness was one of the core constitutional values.

Scrutiny of arbitration awards was to be done in terms of s 33(1) of the Arbitration Act 42 of 1965. The Constitution required a court to construe these grounds reasonably strictly in relation to private arbitration.

The court held that the arbitration agreement in this case required the arbitrator to adopt an informal, investigative method of proceeding and not a formal, adversarial one.

Conventional wisdom both in South Africa and abroad is that it is unsafe to have the seat of arbitration in South Africa because of concerns that the judiciary may not provide necessary support to the process and to the enforcement of awards.

This case contradicts that perception. It is a strong statement of support for arbitration by the highest court in South Africa.

The court emphasised the benefits of private arbitration – its flexibility, cost effectiveness, privacy and speed.

'In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.'

The case stressed that parties were free to subject their disputes to private arbitration voluntarily and to

'determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an [arbitrator] appeal body and other similar matters'.

Finally, it referred to the powers of the court to interfere in the arbitration process, noting that international and comparative law suggested that

'courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently'.

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* See also discussion in 2009 (Oct) *DR* 30 – *Editor*.