IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 17393/20

Date of hearing: 08/02/2023

Date judgment delivered:23/03/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

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IN THE MATTER BETWEEN:

MOVUNDLELA CONSULTING (PTY) LTD **APPLICANT**

AND

MMELA FINANCIAL SERVICES (PTY) LTD **RESPONDENT**

AND

CASE NO: 14804/20

IN THE MATTER BETWEEN:

MMELA FINANCIAL SERVICES (PTY) LTD	**APPLICANT**
AND	
THABISO J MACHANA N.O	**FIRST RESPONDENT**
MOVUNDLELA CONSULTING (PTY) LTD	**SECOND RESPONDENT**
THE CHAIRMAN, JOHANNESBURG SOCIETY OF ADVOCATES	**THIRD RESPONDENT**

JUDGMENT

Strijdom AJ

1. In the first application, the applicant ("Movundlela") sought an order making the arbitral award delivered by Adv Thabiso Machaba SC ("the Arbitrator") an order of the court in terms of section 31 of the Arbitration Act 42 of 1965. The respondent ("Mmela") opposed this application.

2. In the second application, Mmela sought various orders, including a declaratory order to the effect that the award delivered by the Arbitrator is a

nullity. In the event that the declaratory relief sought by Mmela is not granted, Mmela contended that:

2.1 The award falls to be set aside in terms of section 33 of the Arbitration Act, alternatively;

2.2 Mmela, having noted an appeal in respect of the award, the appeal ought to be referred to an arbitral appeal tribunal appointed by the chairman of the Johannesburg Society of Advocates.

3. The two applications were instituted separately, but the parties subsequently agreed to have the two matters consolidated because of the intricate nature of the facts. This court ordered a consolidation of the two applications which then proceeded under case number 17393/20.[1]

4. At the commencement of the application, I was informed by councel for Mmela that it no longer pursue the review in terms of section 33 of the Arbitration Act.

5. Mmela was awarded a tender by the Department of Transport for the provision and management of government subsidised vehicles of eligible government employees ("Scheme")[2]

6. The parties entered into an agreement in terms of which, Movundlela, for an agreed fee, rendered capital raising services for and on behalf of Mmela for the purpose of funding the Scheme ("Capital raising agreement").[3]

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[1] CL 010-1 to 2
[2] Paragraph 9 of the Answering Affidavit
[3] Paragraph 9 to 9.3 of the Answering Affidavit

7. The successful raising of the required capital by Movundlela from Standard Bank of South Africa Limited resulted in the conclusion of a service level agreement between Standard Bank and Mmela on 12 July 2010.[4]

8. A further agreement was concluded between the parties in relation to the settlement of fees owed by Mmela to Movundlela and emanating from the capital raising agreement ("the fee settlement agreement").[5]

9. The preamble to the fee settlement agreement recorded, amongst others that (i) Movundlela had satisfactorily rendered the defined services, (ii) the agreed fee of R10 million was due and payable by Mmela to Movundlela, and (iii) the agreement was entered into to record the terms of payment of the agreed fee of R10 million.[6]

10. Mmela breached the fee settlement agreement when it defaulted on the agreed payment terms. This resulted in the institution of the arbitration proceedings.

11. On 13 February 2019, the representatives of the parties held a pre-arbitration meeting ("pre-arbitration agreement") during which it was inter alia, agreed that:

    11.1 a party desiring to launch an appeal, shall be entitled to do so within (15) days from the date of the delivery of the arbitral award, failing which the other party shall be entitled to make the arbitral award an order of court, and

[4] Paragraph 12 of the AA.
[5] Paragraph 12 of the AA.
[6] Paragraphs 13.2.2 and 13.2.3 of the AA.

11.2 the appeal shall be to the Gauteng Local Division of the High Court.

12. In this statement of claim, Movundlela cited itself as a registered financial services provider, practicing as such and to which Mmela pleaded that it had no knowledge of.[7]

13. On 13 December 2020, the arbitrator delivered the arbitral award in favour of Movundlela.

14. On 22 January 2020, Mmela's attorneys served a purported notice of appeal on Movundlela's attorneys. The latter responded with a letter in which it took the following issues with the purported notice of appeal (i) it was outside of the agreed 15 days and therefore late, and (ii) it was a purported appeal to a non-existent appeal tribunal.

15. On 29 June 2020, Mmela launched a review application.[8]

16. In this matter I am not concerned with the setting aside of the arbitrator's award on one of the three grounds listed in s 33 of the Arbitration Act namely: Misconduct by the arbitrator, gross irregularity in the proceedings, or where an arbitral award has been improperly obtained. I am also not concerned with a remittal to the arbitrator in terms of s 32.

17. What I am seized with is not the correctness or otherwise of the arbitral award, but with the question whether the award ought to be made an order of court if the court order would be contrary to a statutory prohibition.

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[7] Paragraph 17 and 18 of the AA.
[8] Paragraph 1-4 of the Notice of Motion in the review application.

18. It was submitted by Mmela that Movundlela seeks an order of payment for rendering services in violation of a statutory prohibition, which attracts a criminal sanction and that the award is a nullity. It was argued that Movundlela rendered financial services and was required to be registered with the Financial Services Board, now the Financial Sector Conduct Authority, and offended the rule of law.

19. Movundlela contended that the services rendered under the capital raising agreement were not financial services as defined in the FAIS Act and that no offence was committed in terms of the FAIS Act.

20. Movundlela further submitted that the alleged conclusion of the financial service agreement was never pleaded before the arbitrator, nor was it ever Mmela's case that Movundlela was required to render financial services in terms of the FAIS Act. Mmela merely disputed Movundlela's citation as an FSP, but this was proven with the production of a copy of Movundlela's certificate in terms of the FAIS Act.[9]

21. The fee settlement agreement described the services purportedly provided by Movundlela to Mmela as follows:

    "All acts and efforts employed by M Consulting[10] in securing and facilitating procurement of the Capital for and on behalf of Mmela to finance the Scheme."[11]

22. The concept of the "facilitation" in clause 1.1.12 to be carried out by Movundlela was described as follows in the settlement agreement:

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[9] CL 004-12 para 44

[10] "M Consulting" is Movundlela, the claimant before the arbitrator.

[11] CL 011. 004-4, clause 1.1.12, CL 016-9, para 16.1

"The negotiation and finalisation of agreements for the procurement of funding for Mmela by M Consulting".[12]

[12] CL 011. 004-4, clause 1.1.7, CL 016-9 para 16.1

23. Mr Movundlela testifies as follows before the Arbitrator:

> "**Mr Movundlela**: The requirements for this tender were, obviously, to have the required capital close to 2 billion. Ordinarily Mmela Financial Services, by virtue of their operations, didn't have this capital. They approached M Consulting to be their lender, to go to the market and source this capital to be able to fund its contract.
>
> **Mr Milner**: Okay, please can you, despite this, following this agreement did you still assist Mmela in securing financing and in negotiation with other financial institutions?
>
> **Mr Movundlela**: Yes, whenever Mmela had any financial issues, they would run them by us or seek our advice on how to handle those matters."[13]

24. Movundlela's case before the Arbitrator was that it has duly rendered the said services, and it was entitled to payment in terms of the fee settlement agreement.

25. The Arbitrator described the essence of the dispute before him as follows:

> "Months after the second funder was secured, and on 25 March 2013, the parties represented by Mr Mohobi Ramtsitse for the Defendant and Mr Movundlela, for the Claimant, concluded a Fee Agreement, this is the nub of the dispute between the parties."[14]

26. It was common cause that when Movundlela rendered the services to Mmela, it was not registered with the FSB. In the affidavit Movundlela states the following:

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[13] CL 016-11. Para 19, CL 016-39, Annex SAA 3.
[14] CL 011. 009-9, para 22.1

"Indeed, M Consulting's became an FSP on 6 February 2018. Long after rendering the agreed services under the capital raising and fee settlement agreements."[15]

27. In its statement of claim Movundlela stated that it was:

"a registered Financial Services provider, duly registered in accordance with the provisions of the Laws of the Republic of South Africa, and is duly authorised to practice as such…"[16]

28. On the evidence placed before me I am persuaded that Movundlela provided financial services to Mmela.

29. It is trite that Movundlela being the party seeking the endorsement of the award, must convince the Court that by enforcing the award it would not offend the rule of law.

30. Section 1 of FAISA[17] defines a "financial service provider" as:

"Any person. Other than a representative, who as a regular feature of the business of such person –

(a) Furnishes advice. Or

(b) Furnishes advice and renders any intermediary service, or

(c) Renders an intermediary service…"

[15] CL 010.3-3, Annex FA 1, para 13.
[16] CL 011.022-28, para 58.
[17] The Financial Advisory and Intermediary Services Act 37 of 2002

31. The Act defines:

31.1 “Advice” as “subject to subsection (3)(a) any recommendation guidance or proposal of a financial nature furnished by any means or medium, to any client or group of clients.”

31.2 “Intermediary service” as “subject to subsection (3)(b) any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

(a) The result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier…”

32. Section 7(1) of FAISA provides that “a person may not act offer to act as a financial services provider unless such person has been issued with a licence under section 8.

33. Section 36 provides:

“36 Any person who-

(a) Contravenes or fails to comply with a provision of section (7)(1), 8(8), 13(1), 14(1), 18, 19 (2) or 34(4) or (6), or

(b) In any application in terms of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact, is guilty of an offence and is on conviction liable to a fine not exceeding R 1 000 000 or

to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment."

34. The aforesaid provisions clearly demonstrate that before a person can provide financial services, such person must be issued with a licence under section 8.

35. To condone belated registration to obtain a licence after the services were rendered would violate the clear language and meaning of s 7(1) of FAISA.

36. Section 36 of FAIS provides that noncompliance with section 7 constitutes a criminal offence.

37. It was stated in **Cool Ideas v Hubbard**[18] that:

"It cannot be expected of a court of law in such circumstances to disregard a clear statutory prohibition - that would be inimical to the principle of legality and the rule of law."

38. Constitutional values require courts to be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently.[19]

39. It would in certain circumstances be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. The force of the prohibition must be weighed against the important goals of private arbitration.

[18] 2014 (4) SA 474 CC at 492.
[19] Lufuno Mphaphuli E Associates (Pty) Ltd V Andrews and another 2009 (4) SA 529 (CC)

40. Courts are themselves subject to the fundamental principle of legality as they are bound to uphold the constitution.

41. It was further stated in Cool Ideas that “party autonomy in voluntary arbitrations will not trump the principle of legality where the enforcement of the arbitral award constitute a criminal offence” as is in this case.

42. In my view this award is contrary to public policy.

43. In light of the above findings, it is unnecessary for this Court to detain itself with the remainder of the relief sought by Mmela in its application.

44. In the result the following order is made:

1. The application by Movundlela to make the award an order of Court is dismissed,
2. Costs awarded for both applications, including the costs of two counsel.

STRIJDOM JJ

ACTING JUDGE OF

THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Date of hearing:

8 February 2023

Judgment: 23 March 2023

Appearances:

For the Applicant: Adv T Mpahlwa

Instructed by: Avela Nontso Attorneys

For the Respondent: Adv N Cassim SC

And Adv S Ntsikila

Instructed by: L Mbangi Inc.