THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 436/10

GUIDO BRUNO BIDOLI — Appellant

and

BARBARA LIESELOTTE BIDOLI — First Respondent
(in her capacity as executrix in the estate of the late Fabrizio Bidoli as well as in her personal capacity by virtue of her marriage in community of property)

ROMOLO BIDOLI — Second Respondent

Neutral citation: ***Bidoli v Bidoli & another*** **(436/10) [2011] ZASCA 82 (27 May 2011)**

BENCH: **HARMS DP, NUGENT, PONNAN, MALAN and THERON JJA**

HEARD: **17 MAY 2011**
DELIVERED: **27 MAY 2011**
CORRECTED:

SUMMARY: Arbitration - arbitrator – power of - to record a settlement reached by the parties in the form of an award on agreed terms.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Fourie J sitting as court of first instance).

The appeal is upheld with costs and the order of the court below is set aside to be replaced with:

‘1. The applicant’s application succeeds with costs.

2. The arbitrator’s award published on 10 December 2007 in the terms set out hereunder is made an order of court:

a. The remaining property in Rome, at present registered in the name of the three brothers, shall remain as registered in equal undivided shares, to which the parties shall have equal rights and remain responsible, in equal shares, for the maintenance and upkeep, rates, taxes, levies and other charges as may be payable;

b. The remaining money held in the aforesaid account with Banca Intesa, Rome, shall be divided in accordance with the written agreement signed by the parties and handed in as exhibit “C” and a true copy of which is annexed to this award.

c. Should the amount at present held in the said account be any different to the amount reflected in exhibit “C”, then the funds shall be divided in accordance with the following ratio of division agreed upon, namely to Barbara (in her aforesaid capacities) 7.21%; to Romolo 17.50% and to Guido 75.29%.

3. The second respondent’s counter application is dismissed with costs.’

JUDGMENT

PONNAN JA (HARMS DP, NUGENT, MALAN and THERON JJA concurring):

[1] The brothers Bidoli – Guido, the appellant (the appellant); Fabrizio, the first respondent (who is deceased and whose estate is represented by its executrix, his wife, Barbara, who takes no part in these proceedings); and, Romolo, the second respondent (the respondent) - conducted business together with their father in various joint and separate enterprises since 1960. Much of that business as building contractors in South Africa, Namibia and Italy was conducted until 1995 under a partnership styled Bidoli and Sons. During that time as the respondent puts it they 'operated as partners, as *de facto* partners in joint ventures, as joint shareholders in companies and on [their] own in partnerships with the parties'.

[2] Although the partnerships and companies kept separate books of account, accurate records of how the profits from the various projects were distributed were not maintained. That was complicated by the fact that often the different partnerships and companies shared equipment or rendered services to each other. Since 1971 the brothers sent moneys to their late father in Italy which was used to finance the construction of a block of flats on the outskirts of Rome. The block of flats, which was completed in 1984, was registered by their father in the names of the three brothers. A vacant piece of land which adjoined the block of flats was acquired and also registered jointly in their names. During 2000 the block of flats was sold and the proceeds of that sale deposited into a bank account in Rome in the joint names of the brothers.

[3] Disputes arose amongst the brothers and in 2007 they concluded an arbitration agreement with a view to having an arbitrator determine all of their disputes including those pertaining to their partnership and other claims and the funds standing to their credit

in the joint bank account in Rome. The agreement provided that the arbitration would be governed by the Arbitration Act 42 of 1965 (the Act) and would deal with all of the parties' disputes. Advocate Joe van der Westhuizen SC was appointed the arbitrator and attorney Hans Botma the case manager. The agreement further provided:

'9 Hearing

The hearing shall be commenced and conducted by the Arbitrator. All relevant evidence shall be admissible subject to the discretion of the Arbitrator. The general order of these proceedings shall be similar to that used in courts, subject to the discretion of the Arbitrator. Hearings, as well as all other activities, will be convened privately. The Arbitrator may proceed with the hearing if a party is absent without good cause. The Arbitrator shall administer an oath to each witness to tell the truth. Adjournments and/or postponements may be granted by the Arbitrator only for good cause as determined by the discretion of the Arbitrator.

. . .

11 Award

The Arbitrator shall submit a written award based on law as applied to the facts. The Award of the Arbitrator shall be binding upon the parties without any right of appeal except for any review as may be allowed by or under The Arbitration Act (No. 42 of 1965) and each party shall abide by and comply with the Award in accordance with its terms. Each party undertakes to forthwith thereafter sign all such documents and authorities as may be necessary to give effect to the Award and failing which the Case Manager is hereby authorised and empowered to do so.

12 Enforcement of the Award

Judgment may be entered on the Award rendered in this case, and such judgment may be enforced pursuant to processes available under section 31 of the Arbitration Act (no.42 of 1965).'

[4] The parties filed their respective statements of claim during September 2007 and the hearing commenced before the arbitrator on 3 December 2007. On Friday 7 December 2007 the parties and certain family members met outside of the arbitration hearing to discuss a settlement of the matter. That led to the conclusion of a settlement agreement. However, on Monday 10 December 2007 the respondent contacted the case manager and expressed his dissatisfaction with the settlement agreement. As he put it:

'At my request, the Arbitrator then re-opened the arbitration on Monday 10 December 2007. He requested me to state why I was dissatisfied with the settlement agreement and I tried to explain that I had signed the agreement by mistake. I felt that the calculation of the amount that I owed the Applicant was wrong.

However, I was not able to articulate my grounds very well and the Arbitrator ruled that he would adopt the settlement agreement for his Award but that I could raise my objections before this Court when the

Applicant or the First Respondent applied for the Arbitral Award to be confirmed and made an order of Court.'

[5] After a brief recitation of the history of the matter and the nature of the disputes between the parties, the arbitral award concluded:

'12 There is no need to state the full extent of the various claims and counterclaims made by the parties. They have settled all of their disputes, whether by set-off of various claims against each other; compromise or abandonment; by agreeing that:

a The remaining property in Rome, presently registered in the name of the three brothers, shall remain as registered in equal undivided shares, to which the parties shall have equal rights and remain responsible, in equal shares, for the maintenance and upkeep, rates, taxes, levies and other charges as may be payable;

b The remaining money held in the aforesaid account with Banca Intesa, Rome, shall be divided in accordance with the written agreement signed by the parties and handed in as exhibit "C" and a true copy of which is annexed to this award.

c Should the amount presently held in the said account be any different to the amount reflected in exhibit "C", then the funds shall be divided in accordance with the following ratio of division agreed upon, namely to Barbara (in her aforesaid capacities) 7.21%; to Romolo 17.50% and to Guido 75.29%.'

[6] During February 2008 the appellant applied to the Western Cape High Court, Cape Town for the arbitral award to be made an order of court in terms of s 31 of the Act.[1] He sought an order that:

'1 the Arbitral Award published on 10 December 2007 be confirmed and made an order of court; and

2 the Respondents' be ordered to pay costs jointly and severally in the event that they oppose this application.'

The respondent opposed the application. He, moreover, counter applied for the following relief:

'(a) That the Arbitral Award published on 10 December 2007 be set aside as void *ab initio*;

(b) That the arbitration settlement agreement concluded by the parties on 7 December 2007 be declared void *ab initio*;

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[1]Section 31 provides:
'(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.'

(c) In the alternative to (a) and (b), that the Arbitral Award published on 10 December 2007 and the arbitration settlement agreement concluded by the parties on 7 December 2007 both be declared void *ab initio* and that the arbitration hearing of the parties' disputes as set out in their Agreement to Arbitrate be re-opened;

(d) That the Applicant and the First Respondent be restrained from taking any steps to have the Arbitral Award enforced, pending the Court's determination of the matters before it;'

[7] Before Fourie J in the high court respondent's counsel specifically abandoned his attack on the validity of the settlement agreement. He intimated rather that he was restricting himself in the counter application to the contention that the arbitral award fell to be set aside as being void *ab initio*. In support of that contention he advanced an argument not foreshadowed on the papers, namely that the parties having settled their dispute, the arbitrator's mandate terminated automatically and in the result any such award as issued thereafter was void for want of jurisdiction. That argument found favour with Fourie J, who in dismissing the application and setting aside the arbitral award, held:

'I accordingly agree with the submission of [counsel], that, upon the settlement of their disputes by the parties, the arbitrator's appointment was at an end, for there was nothing left for him to decide in terms of the referral to arbitration. The publication of any award thereafter, which merely incorporates the settlement concluded by the parties, did not, in my opinion, bring about a valid award which may be made an order of court in terms of section 31 of the Arbitration Act. Nor can it, in terms of our common law, be regarded as a valid arbitral award.'[2]

The learned judge however thought it just and equitable to issue a special costs order that recognised that the ground upon which the counter application succeeded had not been advanced on the papers by the respondent.

[8] What appeared to weigh with Fourie J was the fact that our Arbitration Act, unlike its English counterpart[3] does not make provision for an arbitrator to record the settlement

[2] *Bidoli v Bidoli* (2982/08) [2010] ZAWCHC 41 (15 March 2010) para 28.

[3] Section 51 of the English Arbitration Act 1996 provides:

'(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.

(2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.

(3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.

(4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.

(5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.'

reached by the parties in the form of an agreed award. The English Act recognises that many cases settle before reaching the stage of a final award. And where the parties settle their dispute in the course of the arbitration it enables the arbitrator to issue an award recording the terms agreed. An agreed award thus has the status and effect of any other award on the merits. Accordingly, an agreed award is enforceable even though the arbitrator has not actually made a decision but simply recorded agreed terms.[4]

[9] I pause to record that as long ago as May 2001 the South African Law Commission recommended[5] to the then Minister of Justice that we should have a new statute combining the best features of the United Nations Commission on International Trade Law (UNCITRAL) Model Law for domestic arbitrations and the English Act, while retaining certain provisions of our own Act that has worked well in practice. To that end a Draft Arbitration Bill was proposed. One of the suggested provisions of the proposed Bill reads:

'Award on agreed terms

44. (1) If, during arbitral proceedings, the parties settle the dispute, the tribunal must terminate the proceedings and, if requested by the parties and not objected to by the tribunal, record the settlement in the form of an award on agreed terms.

(2) An award on agreed terms must be made in accordance with the provisions of section 43(1) and (2) and must state that it is an award.

(3) An award referred to in subsection (2) has the same status and effect as any other award on the merits of the dispute and may be made an order of court under section 53 if it is otherwise within the competence of the court to grant such order.'

Many developed and developing countries have adopted the UNCITRAL Model Law for domestic and international arbitrations.[6] It is thus lamentable that a decade later the Law Commission's recommendations are yet to be acted upon.

[10] Fourie J took the view that 'our common law relating to arbitration . . . does not provide for the making of an "agreed award" by an arbitrator'.[7] Thus, according to him, in the absence of a statutory provision there was 'no legal basis upon which the arbitral award . . . can be regarded as a valid award for the purpose of having same made an

[4]David St John Sutton and Judith Gill *Russell on Arbitration* (2003) 22 ed para 6-023 and 6-025.
[5]South African Law Commission Project 94 Report on Domestic Arbitration.
[6] SA Law Commission Project 94 p 11; Marna Lourens 'The issue of "Arbitrability" in the context of International Commercial Arbitration (Part1)' 1999 *SA Merc Law Journal* at 363.
[7]Para 25.

order of court in terms of section 31 of the Arbitration Act'.[8] In support of his view the learned judge called in aid Voet and the judgment of Didcott J in *Parekh v Shah Jehan Cinemas (Pty) Ltd & others* 1980 (1) SA 301 (D).

[11] The relevant passage from Voet (4.8.11), upon which Fourie J relied, provides:

'Paulus advises that it is no arbitration by which it has been arranged for the arbitrator to give a particular decision, nor by which it was agreed what the judgment ought to be. Since the whole force of a decision to be given by an arbitrator proceeds from the covenant of the parties, it would be absurd that he should proceed still to take in hand and settle matters which have already been so disposed of by compromise of the litigants that no greater stability can be added to them by the arbitrator's judgment.'

Whilst that from *Parekh v Shah Jehan Cinemas* reads (at 304E-F):

'Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default.'

But that was not the full dictum. It continued:

'All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise.'

That last sentence, which Fourie J lost from sight, qualified what had come before it in the quoted passage.

[12] So qualified, Didcott J's dictum, I daresay, lends no support for the more general conclusion reached by Fourie J that our common law does not provide for the making of an agreed award by an arbitrator. Nor, in my view, does Voet. The passage quoted from Voet is headed: 'No arbitration where decision previously fixed'. Both authorities do no more than state a fairly trite principle, namely that a procedure cannot be an arbitration unless there is a formulated dispute in existence at the time when the arbitrator is appointed.[9] The self evident absurdity that Voet alludes to is that of an arbitrator proceeding 'still to take in hand and settle matters' that have already been disposed of by the parties. In a similar vein Huber (4.21.13) states: 'When arbitrators have accepted the reference, they must take the case in hand and dispose of it. . . .' Indeed in *Telecall (Pty)*

[8]Para 27.
[9]MJ M and SC Boyd *The Law and Practice of Commercial Arbitration in England* 2ed p 46-7.

Ltd v Logan 2000 (2) SA 782 (SCA) para 12, which approved the dictum of Didcott J, Plewman JA reiterated that general principle in these terms:

'I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there can not be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word "dispute". If, for example, the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon.'

[13] In my view none of the authorities cited by Fourie J bear directly on the question of whether an arbitrator may make an award by consent in the course of a hearing following upon a valid referral. They deal rather with whether an arbitrator can enter the arbitration if there is no dispute between the parties. Where there is no dispute between the parties the reference to arbitration would be a complete nullity from the outset. In this case however there was a dispute between the parties when the arbitration proceedings were entered upon. The arbitration had in fact commenced and run for several days before it was settled by the parties. The parties had agreed to the arbitrator issuing an award and it was furthermore envisaged that the award could be made an order of court in terms of s 31 of the Act.

[14] The hallmark of arbitration, as reflected in s 3(1) of the Act, is that it is an adjudication flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement (*Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) para 25). Here it was intended by the parties that the arbitration would come to an end with the issue by the arbitrator of the arbitral award. The settlement agreement was dependent upon the issue of that award. Both parties approached the arbitrator before then with the request that the arbitrator issue an award recording the terms agreed. I hesitate to say that it is not possible for parties to an arbitration to order their affairs in that way. For, as *Russell on Arbitration*[10] points out with reference to s 51 of the English Arbitration Act:

[10]D StJ Sutton and J Gill *Russell on Arbitration* (2003) 22 ed para 6-023.

'[It] is an "opt out" provision so it applies unless the parties have agreed that it should not. The section apparently does not apply where the parties settle part only of their dispute. The tribunal may nevertheless at common law make an award dealing both with the issues requiring determination and recording the terms agreed in relation to issues settled by agreement between the parties.'

Moreover, various international tribunal rules[11] also expressly provide for any settlement to be recorded in an award. Closer to home Rule 37 of the Rules for the Conduct of Arbitrations for the Association of Arbitrators - Southern Africa provides:

'If, during the arbitration proceedings the parties settle the dispute or any part thereof, the Arbitrator may, if requested by the parties, record the settlement in the form of an Award on agreed terms.'

[15] It does not appear to me to follow that in the absence of a statutory provision the parties would not be free to elect to regulate their relationship with each other as occurred here. It must be added that almost immediately after the matter settled, the respondent, far from contending that the arbitrator's mandate had terminated, made application to re-open the proceedings. That application was entertained by the arbitrator. Moreover the arbitrator issued an order for costs. That he could hardly have done had his mandate already been terminated, for, that was not encompassed by the settlement agreement, but rather the arbitration agreement which provided that '. . . the Arbitrator, in the exercise of a judicial discretion, at the conclusion of the Hearing, would be empowered to make an award of costs in favour of one or more of the parties'. The arbitrator here – as all arbitrators do - plainly derived his powers from his acceptance of a reference from the parties to the arbitration agreement. He thereby undertook to hear their dispute and to make an award. Only when a final award was made did his authority as an arbitrator come to an end and with it his powers and duties in the reference. I thus hold that Fourie J was

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[11]The following are cited by way of example:

Article 26 of the International Chamber of Commerce (ICC) Rules, which reads:

> 'If the parties reach a settlement after the file has been transmitted to the Arbitral Tribunal in accordance with Article 13, the settlement shall be recorded in the form of an Award made by consent of the parties if so requested by the parties and if the tribunal agrees to do so.'

And Article 26.8 of the London Court of International Arbitration (LCIA) Rules, which reads:

> 'In the event of a settlement of the parties' dispute, the Arbitral Tribunal may render an award recording the settlement if the parties so request in writing (a "Consent Award"), provided always that such award contains an express statement that it is an award made by the parties' consent. A Consent Award need not contain reasons. If the parties do not require a consent award, then on written confirmation by the parties to the LCIA Court that a settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceedings concluded, subject to payment by the parties of any outstanding costs of the arbitration under Article 28.'

wrong in his conclusion that our common law does not permit for the making of an agreed award by an arbitrator.

[16] That however is not the end of the matter, for, there were two further strings to Counsel's bow. First, he contended that subparagraphs a, b and c of the arbitral award are merely declaratory of the parties' rights. The short answer to that contention as *Mustill and Boyd* point out is that the law affords an arbitrator a considerable variety of forms from which to choose the type of award best suited to the circumstances of the case, including the power to make an award declaring what the rights of the parties are.[12] According to *Russell on Arbitration* (6-117):

'A tribunal now has power under section 48(3)[13] of the [English] Arbitration Act 1996 to make declarations in an award as to any matter to be determined in the proceedings, provided the parties have not agreed otherwise in writing in the arbitration agreement. A declaration may be made with or without a decision on a related money claim and will be appropriate, for example, where the parties simply want a decision on their rights, or to determine the existence or meaning of a contract. The reference in the statute to "any matter to be determined" suggests that the power is to be construed widely.'

[17] Second, counsel contended that subparagraphs a, b and c of the arbitral award dealt with matters outside the court's territorial jurisdiction and that, in principle, the high court ought not to make an order which can only be carried into effect outside of its area of jurisdiction. The respondent, who is an 81-year old Italian citizen, emigrated to this country in 1952. Both he and the appellant were (and had been for a considerable period of time) within the high court's jurisdiction at the time the matter was heard. It is clearly within the respondent's power to comply with the order of the high court. If needs be the order could be enforced against him by contempt of court proceedings. That remedy, which is available to the appellant in the event of respondent's failure to comply with the order, renders it sufficiently effective. Moreover, to borrow from Streicher JA:

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[12] Mustill and Boyd at 371 and 390.

[13] Section 48 headed 'Remedies' reads

'(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
(2) Unless otherwise agreed by the parties, the tribunal has the following powers.
(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
. . .'

'The order does not affect the sovereignty of a foreign court at all. It is an order *in personam* against respondents subject to the Court's jurisdiction and not against third parties. It will, if not complied with, be enforced in South Africa against the respondents concerned.'

(*Metlika Trading Ltd & others v Commissioner, South African Revenue Services* 2005 (3) SA 1 (SCA) para 52.)[14]

[18] It follows that the appeal must succeed and it is accordingly upheld with costs and the order of the court below is set aside to be replaced with:

'1. The applicant's application succeeds with costs.

2. The arbitrator's award published on 10 December 2007 in the terms set out hereunder is made an order of court:

a. The remaining property in Rome, at present registered in the name of the three brothers, shall remain as registered in equal undivided shares, to which the parties shall have equal rights and remain responsible, in equal shares, for the maintenance and upkeep, rates, taxes, levies and other charges as may be payable;

b. The remaining money held in the aforesaid account with Banca Intesa, Rome, shall be divided in accordance with the written agreement signed by the parties and handed in as exhibit "C" and a true copy of which is annexed to this award.

c. Should the amount at present held in the said account be any different to the amount reflected in exhibit "C", then the funds shall be divided in accordance with the following ratio of division agreed upon, namely to Barbara (in her aforesaid capacities) 7.21%; to Romolo 17.50% and to Guido 75.29%.

3. The second respondent's counter application is dismissed with costs.'

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant: D R Mitchell SC

[14]See also *Carmel Trading Co Ltd v Commissioner, South African Service and others* 2008 (2) SA 433 (SCA).

Instructed by:
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Webbers
Bloemfontein

For First Respondent: Abides the decision of the Court

Instructed by:

For First Respondent: W G Burger SC
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