**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Reportable

Case No: 536/2016

In the matter between:

**RIVERSDALE MINING LIMITED** **APPELLANT**

and

**JOHANNES JURGENS DU PLESSIS** **FIRST RESPONDENT**

**CHRISTO M ELOFF SC** **SECOND RESPONDENT**

**Neutral citation:** *Riversdale Mining Ltd v Du Plessis* (536/2016) [2017] ZASCA 007 (10 March 2017)

**Coram:** Cachalia, Wallis, Dambuza, Mathopo JJA and Coppin AJA

**Heard:** 21 February 2017

**Delivered:** 10 March 2017

**Summary:** Review of arbitrator's award in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965: whether arbitrator exceeded his jurisdiction and committed gross irregularity: whether the words 'existing dispute' in an arbitration clause to be given broad meaning: presumption in favour of 'one stop arbitration'.

## ORDER

**On appeal from:** Gauteng Local Division of the High Court, Johannesburg (Makume J sitting as court of first instance):

The appeal is upheld with costs.
The order of the court a quo is set aside and the following order is substituted in its place:
'The application is dismissed with costs.'

## JUDGMENT

**Cachalia JA (Wallis, Dambuza and Mathopo JJA and Coppin AJA concurring)**

[1] The appellant, Riversdale Mining Limited (Riversdale), seeks to reverse an order of the Gauteng Local Division, Johannesburg (Makume J). The order reviewed and set aside an arbitral award in its favour on grounds of gross irregularity. The court a quo granted Riversdale leave to appeal to this court.

[2] The dispute between the parties has its origin in a share subscription and loan agreement to which I shall refer as the Subscription Agreement. It was concluded between Riversdale and the first respondent, Mr Johannes Jurgens Du Plessis, in December 2010. The second respondent is the arbitrator who is a reputable senior counsel. As is customary with reviews of arbitration awards, the arbitrator was neither party to the review, nor is he party to this appeal.

[3] The purpose of the Subscription Agreement was to allow Du Plessis and other shareholders of a Mozambican registered company, Elgas SA (Elgas) to dispose of their shares and transfer them to a Mauritian registered Company, FTech Ltd (FTech). Du Plessis would also be given an opportunity to acquire shareholding in a Company called BPP Stage 1 Newco (Newco) to be formed later in Mozambique. This was subject to a 'condition precedent', contained in clause 4 of the agreement, that FTech or its nominee would acquire all the shares in Elgas within seven days of the agreement's conclusion. At the same time Du Plessis, Riversdale and FTech had also entered into a restraint of trade agreement that required Riversdale to remunerate Du Plessis in return for his undertaking not to compete with it or any other beneficiary covered by the restraint.

[4] A dispute arose between Du Plessis and Riversdale as to whether the condition precedent in the Subscription Agreement had been fulfilled. Du Plessis was of the view that the condition had been fulfilled; Riversdale maintained that it had not, and that for this reason the agreement was unenforceable.

[5] There was no clause in the Subscription Agreement requiring any disputes between the parties to be resolved by way of arbitration. Instead, clause 8 contemplated the referral of disputes to a referee to be mutually agreed upon by the parties. If the dispute was of a legal nature the referee would be a lawyer of suitable experience and in the event of an accounting related dispute a chartered accountant would be the referee. However, if the parties were unable to agree on a referee the South African Institute of Chartered Accountants (SAICA) would make the appointment, whatever the nature of the dispute. The referee's decision would be binding, with no right of appeal.

[6] The parties were unable to agree upon the appointment of a referee because of Riversdale's stance that the entire Subscription Agreement, including clause 8, was unenforceable. Du Plessis nevertheless referred the matter to SAICA to make the appointment as contemplated in the agreement. Riversdale persisted in its

opposition to the appointment. SAICA declined to appoint a referee, maintaining that it had no professional jurisdiction over legal practitioners. This meant that that the parties were left without a dispute resolution mechanism.

[7] They then agreed to refer their dispute to arbitration and entered into an Arbitration Agreement on 21 May 2013. An arbitrator was duly appointed to determine the dispute.

[8] Du Plessis appears to have had some difficulty formulating his claim. Riversdale excepted to his Statement of Claim on three separate occasions. The first time he amended the claim without demur. The second time the exception was argued and upheld. He amended his claim again – the third time – and, the exception was upheld once more, the arbitrator holding that the Subscription Agreement was unenforceable.

[9] Du Plessis was aggrieved at this outcome and instituted review proceedings under s 33(1)*(b)* of the Arbitration Act 42 of 1965 to set aside this award on the grounds that the arbitrator had exceeded his jurisdiction and had also committed a gross irregularity in the manner in which he had interpreted a clause in the Arbitration Agreement.

[10] The gross irregularity relied upon in his founding papers was that the arbitrator had merely ‘assumed and accepted’ Riversdale’s submission that clause 31 of the Arbitration Agreement had replaced clause 8.1.3 of the Subscription Agreement instead of interpreting the clauses himself. Put differently, the reviewable irregularity, according to Du Plessis, was that the arbitrator had abdicated his responsibility by failing to embark on an interpretive exercise himself.

[11] Du Plessis's second complaint was that the arbitrator was only empowered to adjudicate existing disputes arising from the Subscription Agreement, and not to determine whether clause 31 of the Arbitration Agreement had any impact on clause 8 of the Subscription Agreement, which was not an existing dispute. The arbitrator had thus exceeded his powers. I deal with clauses 8 and 31 later in the judgment.

[12] The court a quo set aside the award on grounds of gross irregularity, but not those upon which Du Plessis had relied. This was not permissible.[1] The judge held that the arbitrator had committed a gross irregularity by deciding an issue of contractual interpretation – whether or not the Subscription Agreement was unenforceable – on exception, which he was not permitted to do. But he erred grievously in coming to this conclusion, for if the arbitrator had committed this error, it was one of law, which was not reviewable.[2] In any event disputes regarding contractual interpretation can be resolved on exception; and frequently are.[3] It is thus apparent that the judge misunderstood the nature of the proceedings before him. He treated the review as if it were an appeal and failed to appreciate the ambit of a court's review power under the Arbitration Act. Du Plessis, wisely, did not seek to defend any of this reasoning.

[13] I turn to consider the first of Du Plessis's two review grounds: that the arbitrator did not have the power to adjudicate any dispute arising from the impact of clause 31 on clause 8. His power, it is contended, was limited to determining 'existing disputes' arising from the Subscription Agreement. It is thus necessary to understand which dispute or disputes were referred to the arbitrator for adjudication.

[14] On 12 September 2012, Du Plessis proposed the appointment of a referee in terms of clause 8 of the Subscription Agreement. In response to this, Riversdale, through its attorneys on 28 September 2012, responded as follows:

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[1] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) paras 32 and 38.
[2] *Telcordia Technologies Inc v Telkom SA Limited* 2007 (3) SA 266 (SCA) para 86.
[3] *Dettman v Goldfain & another* 1975 (3) SA 385 (A) 399G-400D; *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery (Pty) Ltd* 1993 (3) SA 424 (A).

'2. In your letter, you indicate that a dispute has arisen between Mr du Plessis and Riversdale concerning whether the condition precedent as contained in clause 4.1of the agreement has been fulfilled. *That is not the only dispute between the parties. There are a number of other disputes*. These include, *without limitation*:

2.1 Whether the share subscription and loan agreement between Riversdale and Mr Du Plessis dated 3 December 2010 ("the subscription agreement") has lapsed pursuant to the provisions of clause 7 thereof, as a consequence of the parties' failure to encapsulate the provisions of clause 6 of the subscription agreement into a more comprehensive agreement.

2.2 Whether the subscription agreement is too vague to be enforceable.

2.3 Whether Mr Du Plessis is entitled to claim specific performance of his alleged right to subscribe to shares in BPP Stage 1 Newco.

3. *It would be preferable if all of these issues (along with any others that may arise) be resolved in a single proceeding* . . . .

8. We agree that the dispute is clearly a legal matter. Therefore, should you agree that the matter go to arbitration, we would have no objection to arbitrate in the matter before Advocate C.M. Eloff SC.' (Emphasis added.)

[15] It is evident that Riversdale was of the view that *all* disputes between the parties, without limitation, and including any other disputes that might arise, should be resolved in a single proceeding. Du Plessis's attorneys did not take issue with Riversdale's view of the ambit of the arbitration. The content of Riversdale's letter was echoed in the Arbitration Agreement their attorneys had prepared and signed in May 2013, although not precisely in the same terms.

[16] Clauses D and H of the introduction set out the arbitrator's mandate as follows:

'D. A dispute has arisen between Riversdale and Du Plessis concerning the *validity, binding effect and enforceability of the Subscription Agreement . . . .*

H. Du Plessis and Riversdale wish to enter into this arbitration agreement in order to provide a mechanism for resolving *the various disputes* between them by way of arbitration conducted in South Africa pursuant to the provisions of the South African Arbitration Act 42 of 1965 ("the Act").

And also in clauses 1 and 2 of the agreement which read:

1. The parties agree to appoint Advocate CM Eloff SC ("the Arbitrator") as the arbitrator to resolve *the various disputes between them arising out of or relating to the Subscription Agreement*, the Restraint Agreement and the payment of the restraint amount by Riversdale to Du Plessis. *The parties shall be entitled to refer to the Arbitrator any and all claims and counterclaims they may have against each other arising out of or relating to the Subscription Agreement*, the Restraint Agreement, or the payment of the restraint amount.

2. The disputes referred to arbitration shall be any and all existing disputes between Du Plessis and Riversdale *arising out of, or relating to, the Subscription Agreement* . . . as specifically set out and identified in the pleadings filed by the parties in this arbitration.' (Emphasis added.)

[17] In short, the parties were entitled to refer any one of 'various' disputes between them 'arising out of, or relating to, the Subscription Agreement' to the arbitrator for decision.

[18] The principal dispute between the parties, as is clear from clause D of the Arbitration Agreement, concerned the validity, binding effect and enforceability of the Subscription Agreement. The relevant clauses to which reference was made earlier are described and set out in more detail below.

[19] Clauses 5.2-5.3 of the Subscription Agreement provided:

'5.2 Subject to clauses 6 and 7, Riversdale shall procure for JdP (Du Plessis) the right to acquire shares ("the Shares") in BPP Stage 1 Newco, at financial close, such shares to equal 1,5% . . . of the issued share capital of the BPP Stage 1 Newco.

5.3 The subscription price of the Shares shall be US$1 million . . . .'

[20] Clause 6 of the Subscription Agreement contemplated that, should Du Plessis 'elect to acquire the Shares' in Newco, Riversdale would advance (or procure the advance of) U.S.$1 million to Du Plessis in terms of a loan agreement to be negotiated. The loan agreement would, at a minimum, contain certain terms and conditions, which were stated in clauses 6.3-6.4.

[21] Clause 7 of the Subscription Agreement provided:

'The Parties shall negotiate in good faith to encapsulate the provisions of clause 6 in a more comprehensive agreement, *to be concluded within a reasonable time after the Signature Date, failing which this Agreement will lapse and be of no force and effect*.' (Emphasis added.)

[22] Clause 8 of the Subscription Agreement provided:

'8.1 In the event of:

8.1.1 any dispute or disagreement arising out of or relating to the assertion or enforcement of any rights or obligations by any Party against the others in relation to this Agreement or any of the provisions or in relation to the relationship between the Parties generally; or

8.1.2 any dispute or disagreement arising between the parties as to whether or not any of them is in breach of any of their respective obligations in respect of this Agreement; or

8.1.3 the Parties failing to reach agreement in respect of any other matter referred to in this Agreement which requires their prior consultation and agreement thereto; that dispute, disagreement or failure to reach agreement shall be referred by the aggrieved party for final determination to a referee to be mutually agreed upon between the parties within a reasonable time, *failing which such referee shall be appointed in his sole and absolute discretion by the President of the South African*

*Institute of Chartered Accountants or its successors in title for the time being* but who in making this appointment shall have regard to the considerations of this clause 8.

8.2 The referee shall be, if the question in issue is:

8.2.1 primarily an accounting matter, an independent practising registered chartered accountant of not less than 15 (fifteen) years standing;

8.2.2 primarily a legal matter, an independent practising *senior Counsel or attorney* of not less than 15 (fifteen) years standing; . . . .' (Emphasis added.)

[23] It is convenient to refer to clause 31 of the Arbitration Agreement, which lies at the heart of this dispute, here. The clause read thus:

'This agreement supersedes the provisions of clause 8 of the subscription agreement and the restraint agreement *in relation to the subject matter hereof*.' (Emphasis added.)

[24] Riversdale's exception to the claim read as follows:

'4. On the face of it, as a consequence of the condition contained in clause 7, the Alleged Agreement is unenforceable, *alternatively is unenforceable when read together with the arbitration agreement* for one or more of the following reasons:

4.1 It is subject to a potestative condition (clause 7) that is dependent upon the will of both parties.

4.2 An agreement that the parties will negotiate in good faith to conclude another agreement is not enforceable because of the absolute discretion vested in the parties to agree or disagree.

4.3 The condition is not one that can be fictionally fulfilled as alleged by the claimant.' (Emphasis added.)

[25] Both parties filed heads of argument before the relevant exception was argued. In its first written argument, Riversdale specifically argued that the dispute resolution mechanism of clause 8 of the Subscription Agreement was no longer available to the parties because it had been superseded by clause 31 of the

Arbitration Agreement. In his written response, however, Du Plessis chose not to deal with this issue.

[26] At the hearing, on 3 March 2013, Du Plessis filed his first set of supplementary heads of argument. There, he sought, for the first time, to address the argument that clause 31 of the Arbitration Agreement superseded clause 8 of the Subscription Agreement. He argued that the words 'in relation to the subject matter hereof' contained in clause 31 should be taken into account in interpreting clause 31 of the Arbitration Agreement. It followed, he argued, that the substitution of clause 8 with clause 31 was limited to the subject matter of the Arbitration Agreement which covered only existing disputes. The contention was repeated before us in the appeal. However, it must be borne in mind that this was an interpretational dispute, and not a dispute concerning the arbitrator's power to adjudicate the issue.

[27] At the end of the hearing, the arbitrator invited the parties to file supplementary heads of argument on this point. Riversdale delivered its supplementary argument on 6 March 2014, and Du Plessis lodged his on 17 March 2014. Here, he dealt explicitly with the impact of clause 31 of the Arbitration Agreement on clause 8.1.3 of the Subscription Agreement. Nowhere in his three sets of heads of argument did he take issue with the arbitrator's power to interpret clause 31 of the Arbitration Agreement in conjunction with the Subscription Agreement. Instead, his argument was that clause 31 of the arbitration agreement superseded clause 8 of the Subscription Agreement only for existing disputes, which did not include the inability to conclude an agreement in terms of clause 7. But this was a dispute about a point of law; there was no issue raised concerning the arbitrator's power to adjudicate the issue.

[28] So, did the arbitrator exceed his jurisdiction in deciding the issue? The basic principle in the interpretation of arbitration clauses is that they must be construed liberally to give effect to their essential purpose, which is to resolve legal disputes arising from commercial relationships before privately agreed tribunals, instead of

through the courts. When business people choose to arbitrate their disputes they generally intend all their disputes to be determined by the same tribunal, unless they express their wish to exclude any issues from the arbitrator's jurisdiction in clear language. There is thus a presumption in favour of 'one stop arbitration'.[4]

[29] Du Plessis fixates on the words 'existing' in the phrase 'any and all existing disputes' in clause 2 of the Arbitration Agreement to make the case that only disputes arising from the Subscription Agreement fell within the arbitrator's jurisdiction. The impact of clause 31 of the Arbitration Agreement, he contends, was therefore not an existing dispute. But the error he makes, I think, is that he misconstrues what constitutes a 'dispute' under the Arbitration Agreement and conflates it with the issues that were raised on the pleadings.

[30] The essential dispute between the parties, as I have mentioned, was the 'validity, binding effect and enforceability of the Subscription Agreement.' That dispute raised various legal and factual issues. The meaning of clause 7, for example, raised a legal issue. The question whether the suspensive condition had been fulfilled was one of fact. But these are not separate and distinct disputes. Similarly, the issue arising from Du Plessis's attempt to get around his problems with clause 7 by relying on clause 8 attracted the riposte that clause 31 had replaced clause 8. This was a legal issue – one of interpretation – that fell squarely within the arbitrator's power to determine. The result, I accept, is not without difficulty. But whether he was right or wrong is immaterial.

[31] Du Plessis was resident in Mozambique and Riversdale is an Australian Company. The textual and contextual indications point to the parties having intended all their disputes, without limitation, to be resolved by a single arbitrator in the same forum. In fact, the issue concerning the effect of clause 31 of the Arbitration Agreement on clause 8 of the Subscription Agreement was fully ventilated before the

[4] *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) paras 31, 32 and 59.

arbitrator with no question as to his jurisdiction being raised. On the probabilities the parties understood this issue to fall squarely within the ambit of the arbitrator's powers. It is therefore unbusinesslike and insensible to construe the Arbitration Agreement in a manner that gives the arbitrator the power to resolve all disputes concerning the validity and enforceability of the Subscription Agreement, but to exclude the power to decide Riversdale's defence regarding the impact of clause 31 on clause 8. If there was any residual doubt as to whether Riversdale's clause 31 defence fell within the ambit of an existing dispute, the presumption in favour of 'one stop arbitration' settles the issue. The attack on the arbitrator's jurisdiction must therefore fail.

[32] I turn to consider the second ground of review, which is that the arbitrator had merely 'assumed and accepted' Riversdale's submission that clause 31 of the Arbitration Agreement had replaced clause 8 of the Subscription Agreement, instead of interpreting the clause 31 himself according to established principles. It is thus contended that he failed to consider the meaning of the words 'in relation to the subject matter hereof' in clause 31. This contention was advanced before and rejected by the arbitrator. As a result, so the argument proceeded, he overlooked the fact that the 'subject matter' of the Arbitration Agreement referred to 'existing disputes' in clause 2, and did not include the effect of clause 31 on clause 8.

[33] I have, however, already found that the issue concerning the impact of clause 31 on clause 8 arose from the dispute before the arbitrator. The issue therefore fell within the ambit of the arbitrator's power to decide. Once that is accepted, the complaint advanced in the founding affidavit is simply that the arbitrator erred in his interpretation of the effect of clause 31 on clause 8. If this is so – a matter we need not decide – this was a mistake of law, which is not a reviewable irregularity as contemplated in s 33(1)*(b)* of the Arbitration Act.

[34] Mr Swart, who has represented Du Plessis throughout, was clearly alive to this problem. He thus sought to advance a different case before us, one that was not

made on the papers. This was that by failing to interpret clause 31 through following a proper 'interpretational process', Du Plessis was denied a fair hearing. While not lacking in ingenuity, the submission is utterly without merit. It too is simply an attempt to clothe an alleged error of law in the language of review.

[35] The impression sought to be created in this ground of review is that the arbitrator accepted Riversdale's interpretation of clause 31 at face value without interpreting clause himself. But it is apparent from the award that the arbitrator did consider the submissions of both parties before arriving at his decision. The relevant passages of the award read thus:

'14. The respondent/excipient argues that the decision in *Southernport Developments (Pty) Ltd v Transent Limited*, 2005 (2) SA 202 (SCA) is distinguishable from the present case, because (in) *Southernport*, the parties expressly provided that their failure to reach an agreement will be referred for final determination to a referee. In the instant case, the former clause 8.1.3 of the agreement (which provided that an inability on the part of the parties to agree on any matter referred to in the agreement, would be referred for a determination by a referee) placed the agreement in the same realm as that in *Southernport*. However, from 21 May 2013, clause 8.3.1 became replaced by clause 31 of the Arbitration Agreement, which does not empower the Arbitrator to afford contractual rights to, or to impose contractual obligations upon the parties. The Arbitrator's powers have been carefully circumscribed in the Arbitration Agreement. They do not include the power to determine a dispute as to what the terms of a clause 7 agreement ought to be in case of a deadlock. The result is that until 21 May 2013, when the arbitration agreement was concluded, clause 8.3.1 of the agreement saved it from the consequences of the *Namibian Minerals* decision.[5] Thereafter, the absence of clause 8.1.3 and the failure to substitute it with another deadlock resolution mechanism placed it squarely within the *Namibian Minerals* type of case, thereby rendering clause 7 unenforceable . . .

19. The claimant submits that since clause 8.1.3 of the agreement can only pertain to clause 7, it embodies a deadlock-breaking mechanism, as was the case in *Southernport Developments*, *supra*, having the effect that an inability of the parties to conclude a more comprehensive agreement in terms of clause 7 should result in a deadlock being resolved by way of a referee determination in terms of clause 8.1.3. I believe this to be correct, but the

[5] *Namibian Minerals Corporation Limited v Benguela Concessions Limited* 1997 (2) SA 548 (A).

effect of the replacement of clause 8.1.3 by clause 31 of the Arbitration Agreement is to be considered. The latter clause provides that “This agreement [ie the Arbitration Agreement] supersedes the provisions of clause 8 of the Subscription Agreement and the Restraint Agreement in relation to the subject matter hereof”. As I have pointed out earlier, the consequence of this substitution is, in my view, that at the time of the conclusion of the agreement (and until 21 May 2013, being the date of conclusion of the Arbitration Agreement), the parties procured the availability of a mechanism to cater for a deadlock in relation to their good faith attempts to reach an agreement in terms of clause 7, similar to that which existed in *Southernport*. However, from 21 May 2013, that mechanism was absent and the fulfilment of clause 7 was dependent on the will of the parties. That took the agreement outside of the *Southernport* type of case from that date.’

[36] To conclude, the Arbitration Agreement gave the arbitrator the power to determine all existing disputes that had arisen between the parties. The main dispute between the parties concerned the validity, binding effect and enforceability of the Subscription Agreement. The issue concerning the effect of clause 31 of the Arbitration Agreement on clause 8 of the Subscription fell within the ambit of this dispute. The Arbitration Agreement thus clothed the arbitrator with the jurisdiction to decide this issue. The arbitrator considered the submissions from the parties and interpreted clause 31. If the arbitrator erred in his interpretation, his error, being a mistake of law, was not reviewable.

[37] In the result the appeal is upheld with costs.

The order of the court a quo is set aside and the following order is substituted in its place:

‘The application is dismissed with costs.’

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**A Cachalia**

**Judge of Appeal**

APPEARANCES

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| For Appellant: | P Levenberg SC (with him S Mohapi)<br>Instructed by:<br>Bowman Gilfillan Inc, Johannesburg<br>McIntyre & Van der Post, Bloemfontein |
| For First Respondent: | B H Swart SC<br>Instructed by:<br>Viljoen Swanepoel Attorneys c/o Honey & Partners Inc, Sandton<br>Webbers Attorneys, Bloemfontein |