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Arbitrarily speaking ...

Newsletter of the Association of Arbitrators (Southern Africa)



CHAIRMAN'S LETTER

Welcome to the second newsletter of the year. On 28th May we held a very successful 29th annual general meeting at the Inanda Club in Illovo. The formal presentation was followed by a most interesting and enlightening single malt whisky tasting hosted by the Scotch Malt Whisky Society. The lively evening was enjoyed by many of the members and their partners.

**LIFE FELLOWSHIP CONFERRED ON
ADV. PATRICK LANE S.C.**

The Association has, over the years, honoured certain of its members who have made a major contribution to the Association by making them life fellows of the Association. The following persons have been honoured previously:

Mr E Finsen
Mr T B C Ahier
Professor R H Christie
Professor D Butler

At the recent AGM it was my pleasure to confer life fellowship on Advocate Patrick Lane S.C., a past Chairman of this Association. Life fellowship recognises the very significant contribution made by an individual and the Association owes them a debt of gratitude for

their contribution over the years.

Those of you who were unable to attend will, in due course, receive the minutes of the annual general meeting which will include a copy of the Chairman's annual report. In this newsletter I thought it appropriate to repeat some statistics which are very encouraging for the Association. In the 2005/2006 year the

Association nominated 92 panels of Arbitrators for the 12 months ended December 2005. For the equivalent period ending December 2008 the figure had grown to 172. This of course includes both arbitration panels and adjudication panels for which latter the Association is increasingly being required to provide suitably qualified Adjudicators. In addition the total number of members as at December 2008 had grown to 710, an increase of 27% from the 556 at the end of December 2006. I am sure you will agree that this represents a very healthy position for the Association.

In Gauteng we have already had one evening lecture by Michael Murphy on the topic of arbitration in sport and in particular looking at

the very topical issues of arbitration in football. By the time you receive this newsletter we will also have run, in Gauteng, a half day programme on writing an Arbitrator's award and depending upon the response we may offer this course through the Durban and Cape Town branches.

**ARBITRATION ... ONE OF THE
FOREMOST METHODS OF DISPUTE
RESOLUTION IN THE
INTERNATIONAL COMMERCIAL
ENVIRONMENT**

Elsewhere in this newsletter there is reference to arbitration in 47 jurisdictions worldwide from which it is apparent that internationally arbitration is still seen as one of the foremost methods of dispute resolution in the commercial environment. With the inauguration of the new President of South Africa together with his new cabinet, it is to be hoped that the new Minister of Justice may be more enlightened than some of his predecessors who have occupied this position and will give serious consideration to the promulgation of long overdue legislation to take us into the 21st

**AN UPDATE OF THE RULES IS
ALMOST COMPLETED**

century. Whilst there do seem to be some glimmers of light at the end of that particular tunnel I would be surprised to see new domestic legislation in place before 2010. This will be some 12 years after the law commission approved the draft legislation to amend Act 42 of 1965. It also probably means that the draft legislation which was approved some 12 years ago may well have sections which are already outdated. I believe that as an Association

promoting arbitration, it is incumbent upon us to review the draft with a view to making further recommendations to update the draft

before new legislation is promulgated. In this regard I have asked Professor David Butler, who had a major hand in the drafting of the original proposed upgraded legislation, to make recommendations.

An update of the rules is almost completed and once approved will be published on the Association's website. The current 5th edition dates back to August 2005 and experience with the 5th edition has dictated that certain rules needed to be re-visited albeit the next edition will not constitute a major revision to the 5th edition. The Association will present the details and motivation for the change in a road

show to be organised later this year to be combined with a series of topics which we know will be of interest both to practising Arbitrators and

other members of the Association.

Finally I hope you are enjoying the format of the new look newsletter and would encourage members to submit items of interest to the Secretariat for possible inclusion in future newsletters.

Sincerely,

CHRIS BINNINGTON



Introduction

Towards the end of last year the Supreme Court of Appeal (“SCA”) reminded us of the basic principles governing the relationship between the owner and hirer of plant.¹

The Facts

In June 2000 Mutual Construction Company (Tvl) (Pty) Ltd (“Mutual”) hired a CAT 769 articulated dump truck to Komati Dam Joint Venture (“the Joint Venture”) together with the services of an operator.

The Joint Venture comprised a partnership between a number of major civil engineering companies that was engaged in the construction of the Maguga Dam in Swaziland. The Joint Venture required the truck for use in its operations at the site.

In the early hours of 5 October 2000 the operator of the truck fell asleep while driving it along a haul road. The truck left the road and collided with an embankment and was extensively damaged.

Mutual sued the Joint Venture in the Johannesburg High Court for the cost of repairing the truck as well as for loss of rental income over the period of several weeks that the truck was out of commission whilst being repaired.

The Johannesburg High Court found that the accident was attributable to the negligence of the operator in having fallen asleep. However, it took the view that the Joint Venture ought not to be visited with liability for the operator’s

negligent conduct.

Mutual appealed this decision to the SCA in Bloemfontein.

The Contract

The SCA recorded that it is a trite principle of our common law that the hirer of an article is obliged to return it in the same condition in which it had been received at the outset of the period of hire, fair wear and tear excluded.

Accordingly, in the absence of any contractual agreement to the contrary, all the owner of a hired article has to allege and prove, when claiming for damage to the article, is that it was in an undamaged state when delivered and that it was in a damaged state when returned. The onus then rests on the hirer to show that the damage was not caused by any negligence on his part or on the part of any person under his control or for whose acts he is liable.

The case in the circumstances turned on which of the parties was responsible for the negligence of the operator.

There were a few important contractual provisions in the contract of hire which specified that:

- the operator supplied with the truck would be under the sole and absolute control of the Joint Venture who undertook to give the operator clear instructions and to provide responsible supervision for the operator whilst the truck was in use
- Mutual would not be responsible to the Joint Venture for any damages arising out of the acts or omissions of

¹ Mutual Construction Company (Tvl) (Pty) Ltd v Komati Dam Joint Venture, Case No 466/2007, date of judgment 23 September 2008.

the operator whilst carrying out his duties on site;

- the Joint Venture agreed to be responsible for all expenses arising from the breakdown, loss or damage to the plant occurring through the Joint Venture's negligence, misdirection or misuse; and
- the risk of loss or damage to the truck would pass to the Joint Venture upon the truck being delivered to site.

The SCA construed these contractual provisions so as to make the Joint Venture liable for the negligence of the operator, despite him being Mutual's employee, and accordingly held that the Joint Venture was liable for Mutual's damages claim.

Conclusion

The conditions contained in the contract between Mutual and the Joint Venture were based on the Contractors Plant Hire Association's standard conditions of hire.

It can accordingly be accepted that where plant is hired in terms of these conditions, as a basic starting point, damage caused to plant due to the operator's negligence whilst the plant is in

use by a hirer will be the hirer's responsibility.

The SCA referred to one of its previous decisions on the same contract conditions².

In this case a crane had collapsed and been damaged when the owner's operator, acting under the supervision of the hirer's rigger, attempted to lift a heavy load that was beyond its capabilities.

The court upheld the owner's claim for damages on the basis that:

- the damage was caused by the operator's negligence, for which negligence the hirer was liable in terms of the contract; and
- the hirer had not proved that its own rigger, for whose negligence it was liable under the common law, had not been negligent.

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² RH Johnson Crane (Pty) Ltd v SA Iron and Steel Industrial Corporation Ltd, Case No 207/87, date of judgment 31 March 1987.

INTERESTING READING

Global arbitration review recently published, under the general rubric "arbitration in 47 jurisdictions worldwide" a review of arbitration law as it applies in Italy, by Angelo Anglani, a partner at Italian law firm Ughi e Nunziante, dealing comprehensively with the state of arbitration in Italy. Whilst Italy now has a civil law code much of its legal system will be very familiar to those of us who operate under a

Roman Dutch legal system. In addition Italy is a signatory to the New York Convention in respect of the enforcement of foreign arbitral awards. South Africa is also a signatory to the New York Convention and accordingly many of the comments raised in the article are both apposite and interesting for South African arbitration practitioners. The complete article is far too long to incorporate in this newsletter

but we do recommend that interested persons should log on to the Association's website

which will provide a copy of the relevant article through an appropriate link.

Ex parte - MISCONCEPTIONS

Ex parte is to a varying degree misunderstood by practicing arbitrators particularly those who are not legally trained.

Much of the misconception and the perpetuation of it arise out of the application of section 15(2) of the Arbitration Act.

The arbitrator not infrequently receives requests from a claimant to proceed '*ex parte*' where a recalcitrant defendant fails to appear at either the preliminary meeting or at the hearing itself.

Some litigants attempt mistakenly and incorrectly make representations to the arbitrator before the proceedings even begin that the arbitrator may well have to proceed '*ex parte*'.

So what is meant by proceeding *ex parte*?

Ex parte is defined³ as the sole interested party; or by (or from) one party only; or a proceeding brought by one person in the absence of another

An application is made *ex parte* when the respondent is not given notice of the application. This may be necessary where for example where the possibility exists that should a person become aware that the court was for example going to order his or her arrest or attach his or her property they would prevent this from taking place.

The *ex parte* principle runs contrary to the

³ Trilingual Legal Dictionary, by Hemstra and Gonin, Juta, 1992

intention of arbitration as a voluntary consensual alternative dispute resolution mechanism to litigation. More specifically the rules of natural justice require that any person must be given adequate notice of the impending hearing, reasonable and timeous notice to allow one them to prepare and the right to personally appear to present or defend any information or arguments presented.

Section 15(2) of the Act entrenches the rules of natural justice by expressly directing that the arbitrator may only proceed where a party "*at any time fails after having received reasonable and timeous notice of the time when and the place where the arbitration proceedings will be held, ...*". Of particular importance is the fact that the parties are required to have received notice. It is not sufficient that the arbitrator has given notice, there is a duty placed on the arbitrator to ensure that the party received the notice, failing which the arbitrator runs the risk of having his award set aside on the basis of a gross irregularity⁴.

Section 15(2) clearly states that the arbitrator may proceed in the absence of the defaulting party to show good and sufficient cause for such failure to proceed in the absence of such party.

Clearly an arbitrator may only proceed in the absence of the defaulting party there is no authority in the Act nor in the common law for the arbitrator to proceed *ex parte*.

⁴ Vidavsky v Body Corporate of Sunhill Villas 2005 (5) SA 200 (SCA)