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CONSTRUCTION LAW BULLETIN

ARBITRATION AWARD CHALLENGE

INTRODUCTION

The Supreme Court of Appeal described the appellant's case as unusual, contrived, opportunistic and entirely without merit.[1]

The appellant, an attorney, was retained in 2003 by Thales South Africa (Pty) Ltd ("Thales"), the South African subsidiary of a well-known French arms manufacturer that had become mired in controversy following the South African arms deal. The appellant's services were required *inter alia* in relation to an impending prosecution and related litigation.

In 2011 the appellant, Mr Sooklal, instituted an action in the Johannesburg High Court against his client for payment of R50m said to be payable in respect of services rendered.

ARBITRATION

After pleadings in the case had been exchanged, the parties agreed to have the matter determined by arbitration before a retired judge.

There were a number of unusual features relating to Mr Sooklal's claim, including an alleged right to claim a daily fee irrespective of the time spent on the affairs of Thales, part of the claim having been acquired by cession, and an alleged right to payment of a success fee.

[1] Ajay Sooklal v Thales South Africa (Pty) Ltd [2018] ZASCA 130, Judgment delivered 27 September 2018.

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One of the defences raised by Thales to Mr Sooklal's claims was that his entitlement to payment was prohibited by virtue of the provisions of the Attorneys' Act.[2] The Act precludes a practising attorney from recovering any fee while practising on his own account without being in possession of a Fidelity Fund Certificate.

A similar rule applies in relation to estate agents who are also prohibited from receiving any remuneration unless in possession of a valid Fidelity Fund Certificate issued by the Estate Agency Affairs Board.[3]

Thales also complained that some of the fees being claimed by Mr Sooklal amounted to contingency fees which were not claimable in the circumstances by virtue of the Contingency Fees Act, 66 of 1997.

The arbitrator favoured Mr Sooklal's version of events and issued an award directing Thales to pay approximately R37m as attorney's fees, approximately R400 000,00 for non-legal work and approximately R4m as a success fee, together with interest and costs.

An interesting feature of the arbitration was that Thales did not call any witnesses to counter Mr Sooklal's evidence on his various claims.

APPEAL

The arbitration agreement between the parties provided for an appeal process. Thales took advantage of that, and the matter was referred on appeal to three eminent retired judges, two of whom had served on the Supreme Court of Appeal and one in the Gauteng Division of the High Court, Pretoria.

Mr Sooklal was less fortunate on appeal.

The appeal tribunal found that he was not entitled to payment for the non-legal work because on his own version he had already been paid more than he was entitled to in that regard.

It found it unnecessary to decide whether the Contingency Fees Act applied to the success fee but stated that, if it was covered by the Act, it was not enforceable because there had been no written agreement as required in terms of the Act. It instead relied on the common law to dispose of the claim. In terms of the common law, contingency or success fee arrangements with a lawyer are unenforceable.[4]

The appeal tribunal also dismissed Mr Sooklal's R37m fees claim for attorney's work because he had not been in possession of a Fidelity Fund Certificate at the time he allegedly performed the work concerned.

On the fact that Thales had not presented any witness to challenge Mr Sooklal's testimony during the arbitration, the appeal tribunal stated that it did not inevitably follow that where evidence is uncontradicted it must be accepted.

Whilst it is so that an appeal court is reluctant to overrule a trial court's findings on credibility, it can do so in appropriate circumstances.

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[2] Section 41 of Act 53 of 1979.
[3] Section 34A of the Estate Agency Affairs Act, 112 of 1976.
[4] Goolam Mahomed v Janion (1908) 29 NLR.

The appeal tribunal in this case, after a lengthy analysis, came to the conclusion that the case was one in which it was entitled to override the arbitrator's findings with regard to the veracity of Mr Sooklal's evidence.

On the issue of the lack of a Fidelity Fund Certificate Mr Sooklal argued before the appeal tribunal that, because he was not a partner but merely working in a legal firm as a consultant, he was not obliged to have a Fidelity Fund Certificate. His argument was that it was only attorneys who had the status of ownership or proprietorship in a firm that were obliged to hold Fidelity Fund Certificates.

The Act's wording is to the effect that a legal practitioner may not "practise or act as a practitioner on his or her own account or in partnership unless he or she is in possession of a Fidelity Fund Certificate".

The Act goes on to say that a practitioner is not entitled to any fee, reward or disbursement in respect of anything done by him or her while so practising or acting.

The appeal tribunal ruled, correctly, that any person who practises as an attorney, whether as an employee, consultant, partner or otherwise, is obliged in terms of the Act to have a Fidelity Fund Certificate.

The appeal tribunal published its award in November 2015 upholding Thales's appeal and dismissing all of Mr Sooklal's claims with costs.

ENFORCEMENT OF AWARD

In order to confirm the legal enforceability of an arbitration award, the Arbitration Act provides for an arbitration award to be made an order of court.

If a party fails to comply with an arbitration award, the beneficiary of the award must apply to have the award made an order of court before it can take appropriate legal steps to compel compliance with it.

As an aside, if an award sounding in money is not made an order of court within three years, the award prescribes and becomes unenforceable.

Despite the award not conferring any monetary reward on Thales, the costs award aside, Thales applied to the Johannesburg High Court to make the appeal tribunal's award an order of court.

At this point the case took an unusual twist.

Mr Sooklal argued that in fact the whole matter was tainted as there had been corruption on a grand scale involving Thales and the former President of the Republic, therefore the arbitration award against him should be treated as invalid because of its unlawful origins.

He called in aid the case[5] where an arbitration award in favour of a building contractor for payment of the price for constructing a house had been overturned by the Constitutional Court on the grounds that the builder's claim was prohibited under the Housing Consumer Protection Measures Act[6] because the builder had not been registered with the NHBRC.

There is a principle in our law, popularly known as the "par delictum rule", which our courts have described as follows:

[5] Cool Ideas 1186 CC v Hubbard and Another 2014(4) SA 474 CC.
[6] Act 95 of 1998.

> *"The principle underlying the par delictum rule is that, because the law should discourage illegality, it would be contrary to public policy to render assistance to those who defy the law."*[7]

The Johannesburg High Court dismissed this argument, upheld Thales's application and made the appeal tribunal's award an order of court.

APPEAL

Mr Sooklal lodged an appeal against the decision with the Supreme Court of Appeal in Bloemfontein.

The view of the Supreme Court of Appeal was as stated at the outset of this bulletin.

The court found that the arbitration award in the housebuilder's case was distinguishable. In that case the underlying contract was treated as illegal whereas in Mr Sooklal's case his employment by Thales was not illegal and at no stage had Mr Sooklal contended that his mandate was tainted by illegality. In fact his counsel was constrained to concede that Mr Sooklal would have been content to accept the benefit of the original arbitrator's award in his favour.

Neither the arbitrator's award nor the award of the appeal tribunal had the effect of upholding an unlawful contract or illegal transaction.

The Supreme Court of Appeal summarised the requirements for enforcing an arbitration award as follows:

> *"The applicant … must prove that there was a valid arbitration agreement covering the award, that the arbitrator was duly appointed and that there was a valid award in terms of the reference."*[8]

CONCLUSION

Arbitration does not always lead to speedy relief.

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[7] Afrisure CC v Watson NO 2009(2) SA 127 SCA, para 39, Brandt JA.
[8] Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC 2006(6) DA 91 C.