May an arbitrator use his or her own knowledge and/or expertise to decide a matter?

Parties, the Courts and appointing authorities such as the Association of Arbitrators (Southern Africa) very often appoint arbitrators to determine disputes because the appointees are perceived to have special knowledge and expertise. An example is the case of ***Dipenta Africa Construction (Pty) Ltd v Cape Provincial Administration***[1] where the Court was asked to appoint an arbitrator in a dispute arising out of the building of a bridge. The Judge formed the impression that the arbitration would likely give rise to technical issues of considerable difficulty and complexity and as such, he decided to appoint an engineer as arbitrator rather than an advocate.[2]

The question arises to what extent, if at all, an appointed arbitrator can use his or her special knowledge and expertise on an issue which he or she may be required to decide. Should such personal expertise serve only to understand the issues properly? Should it go even further, i.e. to the extent that the arbitrator would be entitled to apply his or her own knowledge and expertise in determining any of those issues? It may lead to a decision where the arbitrator, in addition to the evidence presented, uses his or her own knowledge and expertise to decide the case without disclosing his or her views to the parties. This has the potential of giving rise to a result that may be considerably unfair.

An interesting example is the case of ***Rhodesia Electricity Supply Commission v. Joelson Brothers and Bardone (Pvt) Ltd***.[3] The Electricity Supply Commission (**the Commission**) employed Joelson Brothers and Bardone (Pvt) Ltd (**Joelson Brothers**) to construct certain works as part of a water supply scheme to a power station. Disputes developed between the Commission and Joelson Brothers. The Commission terminated the building contract and evicted Joelson Brothers from the site. The dispute was submitted to arbitration and the arbitrator found for Joelson Brothers. The Commission then made application to Court for the setting aside of the arbitrator's award. One of its complaints was that '*the arbitrator misconducted the proceedings by failing to disclose to the parties the particulars of the engineering usage relied upon by him but not referred to in the evidence*'.[4] Pittman J, who heard the case, found '*that where an arbitrator has been appointed because he possesses technical knowledge appropriate to the submission, he is entitled to act on that knowledge in making his award, without having witnesses called before him covering the points in question. It is, in my view, a necessary corollary of that rule that he is not obliged to reveal to the parties exactly how he proposes to use that knowledge in relation to any particular point, whether or not evidence has been led on it. Otherwise, the absurd position would arise that the arbitrator would in fact have to become a witness in the proceedings.*[5]

In arriving at this finding, Pittman J relied upon two judgments by English Courts, namely ***London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd***[6] and ***Mediterranean and Eastern Export Co. Ltd v Fortress Fabrics (Manchester) Limited***.[7] These authorities appear not to support the finding made by Pittman J.

In the ***London Export*** case application was made for the setting aside of an award made by an appeal board consisting of three arbitrators. The Court was concerned with a procedural question. The finding made by an umpire was the subject of the appeal before the board of appeal. It appears from the Court's judgment that the umpire participated in the appeal proceedings by communicating his views to the appeal board in the absence of the parties. This appeared to the Court to be in conflict with the terms of the arbitration agreement which required the umpire to be a stranger to the board of appeal's decision. Consequently, Diplock J set the appeal board's decision aside.

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1 1973 (1) SA 666 (C).

2 See p. 672D-H.

3 1977 (4) SA 639 (R).

4 At p. 644H.

5 At p. 645B-D.

6 (1958) 1 All ER 494.

7 (1948) 64 TLR 337.

In the ***Mediterranean*** case the parties concluded a contract for the sale of certain textile goods. The buyers refused to accept the goods, alleging that they were not up to sample and were unmerchantable. The parties agreed to submit the dispute to arbitration in accordance with the rules of the Manchester Chamber of Commerce. The arbitrator held a meeting which was attended by the parties without professional representation. Neither party presented expert evidence. The arbitrator found for the sellers. The buyers were dissatisfied and applied to Court to have the award set aside. Lord Goddard, who gave the judgment, stated:[8]

'The reason for this is obvious. They had the advantage of an arbitrator who himself was an expert, and he would be in as good or better position than expert witnesses to come to a decision on his own knowledge, which is the reason why he was appointed.'

The arbitrator made a finding with regard to the quantum of damage and it was argued that, as neither side had tendered evidence with regard to damage, the arbitrator was in no position to fix an amount. In this regard Lord Goddard said:[9]

'This would be a formidable and indeed fatal objection in some arbitrations. If, for instance, a lawyer was called on to act as arbitrator on a commercial contract he would not be entitled, unless the terms of the submission clearly gave him power so to do, to come to a conclusion as to the amount of damages which should be paid without having evidence before him as to the rise or fall of the market, as the case may be, or as to other facts enabling him to apply the correct measure of damage. But, in my opinion, the case is different where the parties select an arbitrator or agree to arbitrate under the rules of a chamber of commerce by which the arbitrator is appointed for them and is chosen or appointed because of his knowledge and experience of the trade.'

Lord Goddard referred to examples where arbitrators, with regard to questions of quality and matters of that description, can act on their own knowledge, and then stated that one of the reasons why parties go before such arbitrators '*is because it saves the expense of calling witnesses and having the conflicting views of experts thrashed out and decided on. The parties are content and intend to accept the judgment of a man in their own trade on whose judgment they know they can rely.*'[10]

The ***Electricity Supply Commission*** case involved complex technical, factual and legal issues. The hearing continued intermittently for 44 days before the arbitrator. The arbitrator then relied upon engineering usage but failed to disclose this to the parties. This case is clearly distinguishable from the ***Mediterranean*** case. The ***Electricity Supply Commission*** case was not one where the parties had agreed to appoint an expert as arbitrator to determine a '*narrow*' issue of quality or similar description by virtue of his knowledge and experience of that trade.

The case of ***Annie Fox and Others v PG Wellfair Ltd (in liquidation)***[11] is very instructive. Lord Denning delivered one of the judgments. Application was made to set aside an arbitrator's award. The arbitrator heard a damages claim arising out of a badly constructed block of flats. According to Lord Denning the arbitrator '*was of acknowledged competence and skill*'.[12] Only the claimants were represented at the hearings before the arbitrator and expert evidence was given by a structural engineer, a chartered surveyor and a chartered quantity surveyor. The arbitrator, utilising his own knowledge, rejected the expert evidence without giving any indication of same during the hearing to the witnesses or to the legal representatives of the claimants.

According to Lord Denning, there are arbitrations where an arbitrator '*is expected to form his own opinion and act on his own knowledge without recourse to evidence given by witnesses on either side:*

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8 At p. 337.

9 At p. 338.

10 *Ibid*.

11 [1981] 2 Lloyd's Rep 514 (CA).

12 At p. 520.

such as an arbitrator who is to decide as to whether goods are up to sample.[13] Lord Denning referred to the ***Mediterranean*** case and stated:[14]

'But there are other arbitrations in which the arbitrator is expected to receive the evidence of witnesses and the submissions of advocates, and to be guided by them in reaching his conclusion: such as arbitrations on shipping contracts or on building contracts. In such cases the arbitrator is often selected because of his knowledge of the trade – so that he can follow the evidence and the submissions. But he must act judicially. He must not receive evidence in the absence of the other party, and so forth.'

Lord Denning went on to say that an arbitrator can and should use his special knowledge so as to understand the evidence. However, he held that an arbitrator must not '*throw his own evidence into the scale*' and he must certainly not do so without giving the experts a chance of dealing with it '*for they may be able to persuade him that his own view is erroneous*'.[15]

It matters not that in the ***Annie Fox*** case one party was unrepresented. The fundamental difficulty was that the arbitrator applied his own knowledge and expertise without giving those who were before him the opportunity to deal with his views. An important distinction was made in the ***Annie Fox*** case, between arbitrations in which the arbitrator is expected to arrive at a decision based on his or her own knowledge and without recourse to evidence, on the one hand, and other arbitrations, for instance on shipping or building contracts, on the other. In those cases, the arbitrator must act judicially, and he should use his special knowledge and expertise only to understand the case properly. At a very minimum, the arbitrator should put his own views to the legal representatives and witnesses so that they may be able to deal with it.

It appears that the Court adopted a strict approach in ***Owen v Nicholl***.[16] Tucker LJ found that it would be wrong for an arbitrator to introduce into the proceedings evidence other than that adduced by the parties. To this end an arbitrator should be careful to avoid making use of any knowledge which he has acquired in a different capacity[17].

It is necessary to return briefly to Pittman J's judgment and his remark that an absurd position would arise if an arbitrator should reveal exactly how he proposes to use his own knowledge, because that would in effect make the arbitrator a witness[18]. If an arbitrator secretly uses his or her own knowledge and expertise to arrive at a decision, the arbitrator in fact does make himself or herself a clandestine witness. However, this comes at a price to the parties, or at least one of the parties, because they would have had no opportunity to address it.

In conclusion, it seems that except for special cases where the parties have agreed on arbitrators to act as experts to determine narrow issues of quality and the like, arbitrators should act judicially and employ their own knowledge and expertise only to understand the case before them properly. This is a strict approach. However, it appears to be preferable to the more relaxed approach, where the arbitrator is required to at least put his or her views to the parties so that they are given the opportunity of counteracting such views. The strict approach has the self-evident advantage that the arbitrator retains his or her neutrality, by not becoming a clandestine witness with undisclosed views held in opposition to any one of the parties' respective cases. By adopting this approach, an arbitrator encourages even-handedness and ensures that he remains beyond reproach.[19]

Pierre Rossouw, SC

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13 At pp. 521 and 522.

14 At p. 522.

15 *Ibid*.

16 [1948] 1 All ER 707 (CA).

17 At p. 709.

18 At p. 645D.

19 ***The King v Sussex Justices*** [1924] 1 KB 256 at p. 259 where Lord Hewart famously stated: '[*J*]*ustice should not only be done but should manifestly and undoubtedly be seen to be done*.'