

## Summary

The issue for determination was whether or not the arbitration award published on 27 January 2016 was subject to appeal.

The Applicant and Respondent entered into an arbitration agreement which expressly provided that either party may appeal the award of the arbitrator to an appeal tribunal consisting of three arbitrators and furthermore, that any party wishing to appeal must give notice of such intention within 20 days after the publication of the award.

The Applicant noted an appeal within the allotted time period. In addition, the Respondent also noted a cross-appeal. The Applicant proceeded to abandon its appeal and launched the present application to make the award an order of court.

The Applicant contended that the cross-appeal was unenforceable on the ground that the Respondents' right of appeal in terms of the agreement lapsed given that the 20 calendar days had elapsed, bringing an end to the opportunity to appeal.

The Respondent, in turn, relied on clause 5 of the arbitration agreement, which provided that the rules governing the arbitration shall be the High Court Rules of the Republic of South Africa, except as amended by the parties by agreement. This meant that the time limits should be computed, instead, as court days and also that the notice of cross-appeal was served within the twenty day period. As a corollary to this, the Respondent argued that, premised on the appeal procedure being governed by the Rules of Court, the Respondent was entitled, in terms of Rule 49(3) to cross-appeal within 10 days of the Applicant's notice of appeal. Lastly, that the Respondent remains entitled to seek an extension of time or condonation in terms of Rule 27, should it be found that the filing of the cross-appeal was out of time.

## Held

The Court considered whether the Respondent was entitled to note a cross-appeal. Rule 49 of the Uniform Rules of Court provides for the procedure when appealing and cross-appealing and is based on the construction of statutory provisions relating to appeals by the courts.

Another question looked at by the Court is whether a right to cross-appeal is afforded to the Respondent, once one of the parties has appealed an arbitration award. This could only be answered by looking at the arbitration agreement and the provisions thereof, which, in light of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) required the agreement to be viewed with regard to the circumstances attendant upon its coming into existence. The Court also considered *Bothma Batho Transport v S Bothma & Seun Transport* (802/2012) [2013] ZASCA 176 (28 November 2013) and the process of interpretation.

The Court regarded clause 10.5 of the arbitration agreement to be of importance in that it conferred the right to appeal to “either” party. The right was held to be phrased in wide terms and there were no indications in the wording of the clause which would justify a restriction of the right of appeal to only the aggrieved party. The parties, having invoked the Rules of Court to govern the arbitration and expressly conferring a mutual right of appeal, must moreover assume to have been aware of the Rules of Court providing for the procedures to be followed in regard to appeals and cross-appeals. Had it been their intention to exclude a cross-appeal, words to that effect would have been used, of which there were none. On a proper interpretation of the arbitration agreement as a whole, it was held that the right of appeal conferred on both parties, includes a right to cross-appeal.

The Court then proceeded to consider whether the Rules of Court apply to the arbitration agreement. Whether the terms, which specifically prohibit appeals, apply where the parties provide for the right of appeal, as in this case.

The Court held that an appeal procedure (except for the nomination of members of the

appeal tribunal) was not provided for in the arbitration agreement. The Arbitration Act also does not contain any such provisions. It was held that the arbitration agreement was accordingly capable of one meaning only which is that the parties intended the Rules of Court to apply to the appeal procedure and accordingly allow an appeal regardless of what the Arbitration Act provides.

The Court also noted that had the Respondent been out of time, it would have been entitled to invoke the Rules of Court in regard to condonation or extension of time and in the absence of a Rule 30A application by the Applicant for the setting aside of the cross-appeal as an irregular step, it remains valid and effective.

## Value

This case looks at arbitration proceedings and contracting parties freedom to regulate the rules and limit the applicable legislation, through the terms of the agreement.

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