Dispute Resolution

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SOUTH AFRICA

- Can the parties to an arbitration agreement restrict the arbitrator's powers to determine their procedure by way of email?

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Can the parties to an arbitration agreement restrict the arbitrator's powers to determine their procedure by way of email?

The Supreme Court of Appeal (SCA) recently handed down judgment in the case of *Rabinowitz v Levy and Others* (1276/2022) [2024] ZASCA 8 (26 January 2024) in which it, *inter alia*, addressed the rights of parties in an arbitration proceeding to amend or curtail the arbitrator's powers through email correspondence.

The facts

The parties concluded a sale agreement which required them to refer any disputes arising out of or in connection with the agreement to arbitration. The dispute resolution clause in the agreement provided that the arbitration would be conducted in terms of the Arbitration Foundation of Southern Africa (AFSA) Rules. Various disputes arose between the parties and were referred to arbitration. The parties sought to amend the arbitration agreement as it related to the procedure to be followed by the arbitrator by way of an email. The purpose of the amendment was to provide for a further hearing before the arbitrator issued his award.

The source of the arbitrator's powers

The court confirmed that the source of the arbitrator's powers and obligations is the arbitration agreement. This means that the agreement informs the arbitrator's authority. In terms of the agreement, the arbitrator had the wide discretion to determine the procedure he would follow in the proceedings. As the parties had selected the AFSA rules to apply to their arbitration, the arbitrator's discretion was enhanced by Rule 27.4 which requires an arbitrator to "*hear the matter on the most expeditious or least costly procedure*" and "*in such a manner as he deems appropriate*". The extent of the arbitrator's powers would of course be informed by any valid and binding amendments and variations to the arbitration agreement.

The parties, through their representatives, sought to effect an amendment to the arbitration agreement relating to the procedure by way of an email. The direct implication of this amendment would have been a restriction on the arbitrator's ability to determine the procedure he would follow in the proceedings. He would have had to convene a hearing even though he did not consider one necessary. The arbitrator interpreted the email as a mere suggestion and not a valid amendment to the arbitration agreement. He then issued his award without convening a hearing as agreed by the parties and conveyed to him in the email. The parties considered the arbitrator's refusal to comply with the terms of the email a gross irregularity and approached the court to set aside the decision.

The decisions of the High Court and Full Court

The High Court, as per Wright J, dismissed the review. It held that the arbitrator did not reasonably require further hearings to decide on the issues raised in the email by the parties as the issues had been disputed and debated in evidence and argument and were clear. The court concluded that the arbitrator's award was "*detailed, careful, comprehensive … and generally shows that [the arbitrator] took into account everything that both sides required him to consider*".

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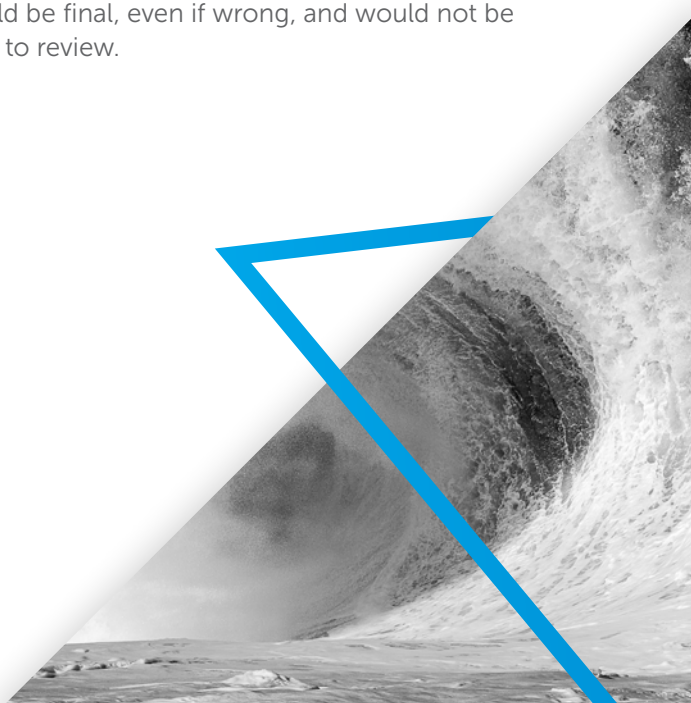
With the leave of Wright J, the buyers appealed to the full court. The full court found that the arbitrator ought to have complied with the terms of the email. The court considered the email an amendment to the agreement. It found that the arbitrator went against the agreement reached by the parties in relation to a further hearing. Due to the discrepancies in some of the issues, the arbitrator was obliged to convene another hearing to allow the parties to lead further evidence in respect of the issues, and, as such, a further hearing was necessary. The full court set aside the order of the High Court and upheld the review – setting aside the arbitrator's award.

The SCA on whether the email constituted an amendment

The SCA was not in agreement with the full court regarding the validity of the agreement. It held that the issue of whether the arbitrator was obliged to have had a further hearing was a question of law. The terms of the email could not have validly added to or amended the arbitrator's powers in terms of the agreement unless reduced to writing and signed by the parties. The parties' failure to comply with that formality constituted an invalid amendment or addition to the arbitrator's powers which would impose a binding obligation on him in law to have had a further hearing, irrespective of what the buyers and seller might have agreed. It was entirely in the arbitrator's discretion to conduct a further hearing and that was dependent on whether he thought it was necessary in giving effect to the terms of his original mandate.

Furthermore, the court held that even if its conclusion was incorrect and the email could have imposed valid obligations adding to and amending the wide terms of the arbitrator's original appointment, the email had to be interpreted to determine the ambit of such obligations. The arbitrator had to interpret the email and he would have had to do so by having regard to the wording of the email in the context within and the purpose for which it came into existence. Whether his interpretation was right or wrong, it would have been final and not subject to review. Importantly, the SCA further held that the email did not impose an unequivocal obligation requiring a hearing in respect of certain issues, otherwise, it would have said so. A **suggestion** as to what procedure the arbitrator can follow is not a definitive obligation. Given the interpretation of the email by the SCA, the question of whether some issues were clear or not clear, would have been an issue for the arbitrator to determine. The issued award would be final, even if wrong, and would not be susceptible to review.



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Key takeaways

A provision that requires parties to refer disputes to arbitration is common in construction contracts. The parties usually agree on the applicable procedure prior to the proceedings. This forms part of the arbitration agreement. The parties to an arbitration agreement are not prohibited from varying their agreement. However, for the amendment or variation to be valid, it must be in writing and signed by both parties as required by the relevant provision of the agreement, if any (i.e. the non-variation clause). Therefore, the parties can address email correspondence to the arbitrator during the proceedings which contains an amendment that has been reduced to writing and signed by them. The parties must give regard to the content of the amendment and ensure that it is clear on their intention as it relates to their envisaged procedure and definitive of the obligations of the arbitrator. This will ensure that the amendment is compliant with the formalities for any addition to or variation of the arbitrator's powers.

Clive Rumsey, Zodwa Malinga, and Iva Babayi

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:

Rishaban Moodley
Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Tim Fletcher
Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Timothy Baker
Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana
Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Claudette Dutilleux
Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris
Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Tiffany Gray
Director:
Dispute Resolution
T +27 (0)11 562 1388
E tiffany.jegels@cdhlegal.com

Anja Hofmeyr
Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tendai Jangara
Director:
Dispute Resolution
T +27 (0)11 562 1136
E tendai.jangara@cdhlegal.com

Corné Lewis
Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Vincent Manko
Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Richard Marcus
Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Mongezi Mpahlwa
Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie
Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Clive Rumsey
Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba
Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Joint Sector Head:
Consumer Goods, Services & Retail
Director: Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle
Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CDH INCORPORATED