IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. 13927/2010

DATE:10/10/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

THE WORLD FOOD PROGRAMME Applicant

and

MASSOUDI EMILE First Respondent

BARNABAS ASHWIN SYLWANUS Second Respondent

JUDGMENT

MONAMA J:

INTRODUCTION:

[1] This is an application in terms of Section 31(1) of the Arbitration Act 42 of 1965 ("The Arbitration Act") to have the final Arbitration Award ("the award") dated 18 January 2010 made. This application is opposed.

[2] The award was granted by an arbitration tribunal consisting of three arbitrators, the Honourable Mr Justice Johannes H Conradie SC ("Conradie"), Mr John F Myburgh SC ("Myburgh") and Professor Mervyn E King SC ("King").

[3] It is common cause that the Arbitration Act applies to the present application.

THE PARTIES

[4] The applicant is an autonomous joint subsidiary programme of the United Nations and the Food and Agricultural Organisation of the United Nations and has the legal personality and capacity to contract, to acquire and dispose of movable and immovable property and to be party to judicial proceedings.

[5] The applicant enjoys the privileges and immunities as provided for in the Diplomatic Immunities and Privileges Act 37 of 2001, as amended, read with the Convention on the Privileges and Immunities of the United Nations, 1946 and the Convention on the Privileges and Immunities of Specialised Agencies, 1947. These conventions are schedules to Act 37 of 2001 and have the force of law in the Republic of South Africa. The applicant has waived its immunity for the sole purpose of having the final arbitration order made an order of court.

[6] The respondents are former employees of the applicant. The first respondent resides in Morningside, Johannesburg and the second respondent in Highlands North, Johannesburg. The respondents appear in person.

ARBITRABLE DISPUTE

[7] During January 2003, the first and second respondents were appointed as the applicant's national financial officer and finance assistant respectively in terms of their service contract. They were all based in the applicant's offices in Johannesburg.

[8] The applicant alleged in its amended statement of claim "statement" that during the period of their employment, the respondents, acting in collusion, committed various acts of misappropriation of the applicant's funds over a period of time.

[9] The applicant alleged further in paragraph 7 of the statement that it was an implied term of the service contracts that the respondents would respect the proprietary rights and interests of the applicant and/or that they would not misappropriate the funds of the applicant and/or that they would not act dishonestly by misappropriating the funds of the applicant.

[10] The applicant alleges in paragraph 9 of the statement that the respondents breached the terms of the service contracts in that, during the currency of the contracts, they misappropriated funds belonging to the applicant instead of executing their obligations arising from the service contracts honestly and with respect for the applicant's proprietary rights and interests.

[11] In terms of the statement, it is alleged that during the period May 2003 to June 2004, the first and second respondents, acting together, the one acting in collusion with the other, unlawfully misappropriated sums of money belonging to the applicant. The amount is itemized as R 8 827 891.65 and USD 5 015 979.71 as more fully described in the statement.

THE LEGAL FRAME WORK

[12] The applicant's claim against the respondents was for damages suffered as a result of various breaches of the respondents' respective service contracts. The respondents' contracts were performed in South Africa and the breaches of the service contracts were committed in South Africa. Their respective contracts of services contain an identical clause which provides that:

> *"[a]ny claim or dispute relating to the interpretation or execution of the present contract which cannot be settled amicably will be settled by binding arbitration. Uncitral Arbitration Rules will apply. Binding arbitration must in all cases be preceded by a conciliatory procedure under Uncitral rules."* [Clause 15 of the service contract]

[13] During 1966 the United Nation General Assembly established the United Nations Commission on International Trade Law "Uncitral". Uncitral has the object of promoting the progressive harmonisation and unification of the law on international trade. On 15 December 1976, the General Assembly of the Uncitral adopted Arbitration Rules. On 4 December 1980, the General Assembly of the Uncitral adopted Conciliation Rules. The covenants are applicable in this matter

[14] By virtue of the service agreements, the Uncitral Arbitration Rules and the Uncitral Conciliation Rules provides the framework for the resolution of disputes between the applicant and the respondents arising from the "*interpretation or execution*" of the service contracts. In terms of the service contracts conciliation must precede arbitration.

[15] In terms of the Conciliation Rules any party conciliation initiating is required to send a written invitation to the other party inviting it to conciliation. Conciliation shall commence when the other party accepts the invitation to conciliate.

[16] If there is no conciliation, the parties shall proceed to arbitration under the Arbitration Rules which provides, *inter alia,* the procedure, the number of arbitrators, the time frames for the proceedings. These Rules have also the deeming provisions.

[17] Should the parties not agree on the choice of the arbitrator, the appointing authority shall appoint the sole arbitrator. Should the parties again fail to agree on the appointment of the appointing authority then, the Secretary-General of the Permanent Court of Arbitration, The Hague, Netherlands ("PCA"), shall designate the appointing authority. The PCA was established by the convention for the Pacific Settlement of International Dispute. Its purpose is to provide services for the resolution of disputes between various states, states entities, intergovernmental organizations and private parties. The parties herein fall within the scope of the said convention.

THE STEPS TAKEN BY THE APPLICANT TO CONCILIATE AND ARBITRATE

[18] On 2 June 2008 the applicant invited the respondents to conciliate the question of whether the respondents, while in the employment of the applicant, and acting in collusion, misappropriated funds from the applicant. This was done through the respondents attorneys of record.

[19] The respondents rejected the invitation on 13 June 2008. As a result, on 4 August 2010 the applicant delivered a notice to arbitrate at the offices of the respondents attorneys. The applicant's statement of claim was attached to the notice to arbitrate.

[20] On 10 September 2008 the applicant invited Myburgh to accept an appointment as the first arbitrator and Myburgh accepted the invitation on the same day.

[21] In the meantime on 1 October 2008 the respondents were notified of the appointment of Myburgh as the first arbitrator and the respondents were afforded 30 days from the date of receipt of the notice within which to appoint the second arbitrator.

[22] On 3 November 2008 the Secretary-General of the PCA was requested to appoint an appointing authority, the respondents having failed to appoint a second arbitrator within 30 days after having been notified to do so. On 17 November 2008 the Secretary-General of the PCA appointed Professor Ahmed El-Kosheri ("El-Kosheri") as the appointing authority.

[23] On 21 November 2008, the applicant's attorney requested El-Kosheri to appoint the second arbitrator. On 24 November 2009 the respondents acknowledged the appointment of the appointing authority. On 6 December 2008 the appointing authority appointed King as the second arbitrator and on 9 December 2009 the respondents accepted the appointment of King as the second arbitrator.

[24] On 9 December 2008 Myburgh and King in their capacity as the arbitrators invited Conradie to act as presiding arbitrator which invitation he accepted. On 6 January 2009 the first respondent delivered an application for the stay of the arbitration proceedings.

[25] On 20 January 2009 the respondents' attorneys of record, Boloka Mphele Attorneys "BMA" notified the applicant's attorney that they were no longer representing the respondents.

[26] On 6 February 2009 the applicant's attorneys served a notice on the respondents personally calling upon them to attend a pre-arbitration meeting

on 26 February 2009. The time and place of the meeting were clearly identified in the said notice.

[27] On 9 February 2009, the first respondent, purporting to act on behalf of both respondents, addressed an email to Conradie, El-Kosheri, Myburgh, King and the applicant's attorney challenging the validity of the notice served on 6 February 2009 and challenging the arbitration tribunal's impartiality. The respondents failed to attend the pre-arbitration meeting on 26 February 2009, which proceeded in the respondents' absence.

[28] On 3 March 2009 the applicant's attorneys served directives, issued by the arbitration tribunal, on the respondents, regulating the future conduct of the arbitration proceedings.

[29] On 4 March 2009 the respondents addressed a complaint to El-Kosheri about the arbitration tribunal's alleged lack of impartiality and requested that the arbitration tribunal recuse themselves. On 24 March 2009 El-Kosheri dismissed the challenge to the arbitrators.

[30] On 20 April 2009 the arbitration tribunal issued amended directives affording the respondents time to supplement their application for a stay of the arbitration proceedings.

[31] On 28 April 2009 the respondents filed supplementary argument in support of their application to stay the proceedings. On 13 May 2009 the applicant filed submissions in response to the respondents' application to stay the proceedings.

[32] On 25 May 2009 the arbitration tribunal dismissed the respondents' application to stay the arbitration proceedings ("the interlocutory award"'). On the same day the applicant served the interlocutory award and an amended statement of claim on the respondents.

[33] The applicant served a notice of bar on the respondents on 24 June 2009 because the respondents were in default. They were obliged to file same on 23 June 2009. The respondent did not respond to the notice of bar and on 1 July 2009 the respondents became *ipso facto* barred from filing statements of defence.

[34] On 3 July 2009 the applicant served an application for default judgment on the respondents. On 12 August 2009 the arbitration tribunal issued directives for the receipt of affidavit evidence in support of the application for default judgment.

[35] On 13 November 2009 the applicant delivered affidavit evidence and heads of argument to the arbitration tribunal and the respondents in support of the application for default judgment. This constitutes the date of **entering of reference** as more fully explained hereinafter.

[36] On 17 November 2009 the respondents acknowledged receipt of the application for default judgment and the affidavit evidence but requested the arbitration tribunal not to proceed with the application until the question of the applicant's immunity had been resolved.

[37] On 4 December 2009 the arbitration tribunal issued further directives notifying the applicant that no further oral evidence or oral argument would be required in support of the application for default judgment.

[38] On 8 December 2009 a supplementary affidavit was served on the arbitrators dealing with the question of interest on the sums claimed by the applicant. On 19 January 2009 the arbitration tribunal published the arbitration award at the chambers of Myburgh in Sandton.

LEGAL PRINCIPLES GOVERNING ENFORCEMENT

[39] As the applicant seeks to enforce the award it bears the onus of showing the following requirements, namely that:

- the valid arbitration agreement between the parties, and in terms of which the arbitration was conducted.
- the arbitration tribunal was validly and correctly appointed;
- the dispute falls within the jurisdiction of the arbitration tribunal;
- the arbitration award is final; and
- the arbitration award is valid.

[40] The Arbitration Act prescribes the following statutory requirements for the validity of an arbitration award:

- the arbitration award must be in writing and signed by all the members of the arbitration tribunal;
- the arbitration award must be made, unless the arbitration agreement provides otherwise, within the period of four months after the date on which the arbitration tribunal entered on the reference or the date on which such arbitrators were called upon to act by notice in writing from any party to the reference, whichever date is the earlier unless the time period of four months has been extended;
- the award must be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear.

[41] The unsuccessful party may resist an application for the enforcement of an arbitration award on the grounds that the award is invalid or void *ab initio*. In the circumstances, and if the court is satisfied that the arbitration award is invalid, the court should refuse to enforce the arbitration award. By agreeing to arbitration, parties to a dispute agree that the fairness of the hearing will be determined by the provisions of the Arbitration.

[42] Unless they agreed otherwise by appointing an appeal tribunal, parties to arbitration waive the right to appeal which means the right to have the merits of their dispute re-litigated or reconsidered. By agreeing to arbitration parties limit the interference by the courts to the grounds of procedural irregularities set out in section 33 of the Arbitration Act. If the arbitration award is voidable for being procedurally irregular in terms of section 33 of the Arbitration Act, it is valid and enforceable until it is set aside or remitted to the arbitrator.

[43] Section 33 of the Arbitration Act determines that where the party against whom the arbitration award has been granted contends that any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator; or an arbitration tribunal has committed a gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; and the arbitration award was improperly obtained, the unsuccessful party is required to bring an application to court within six weeks after the publication of the award to the parties to have the award set aside. In the absence of such application, as it was the case in casu, the applicant can approach the court for enforcement.

[44] The unsuccessful party which contends for one or more of the grounds listed in section 33 of the Arbitration Act, cannot simply oppose the application for enforcement of the award but will have to take active steps to have the award set aside. However, if the application for the enforcement of the award is brought within the period of six weeks after the publication of the award, then the unsuccessful party may bring a counter-application to have the order set aside. When parties select an arbitrator as the judge of fact and law, the award

is nil and conclusive. An error in an award does not amount to misconduct unless the mistake was so gross and manifest that it could not have been made without a degree of misconduct or partiality, in which event the award will be set aside not because of the mistake but because of the misconduct.

[45] "Gross irregularity in the conduct of the arbitration proceedings", as a separate ground of review contemplated in Section 33(1)(b) of the Arbitration Act, relates to the conduct of the proceedings and not the result. Every irregularity in the proceedings will not constitute a ground for review, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.

RESPONDENTS' GROUNDS OF OPPOSITION

[46] The respondents allege that the award is invalid. They oppose the application for the enforcement of the award on the following grounds:

- the dispute between the parties are not regulated by the service agreements.
- the dispute is not within the scope of the service contracts but within the scope of the "Food Procurement Contracts";
- the constitution of the arbitration tribunal was not in accordance with the agreements.
- the respondents never received any communications from the arbitration tribunal notifying them of the commencement of the arbitration proceedings;
- the respondents' correspondence to the arbitration tribunal remained unanswered;
- the arbitration failed to stay the proceedings despite sufficient cause having been presented to them to stay the proceedings.

- the award should have been made within four months after the date on which the arbitrators were designated to act as no agreement was reached between the parties or the "Arbitration Court" to extend the time for making the award;

- the respondents doubt whether the arbitration award was signed by the arbitrators;

- the award was not delivered in the presence of the respondents or their representatives nor was the respondents summoned by the arbitration tribunal to appear for the publication of the award.

THE ARBITRATION AGREEMENT

[47] The parties are in agreement that the service agreement is valid and contains an arbitration clause. The applicant and the first and second respondents, respectively, entered into two service agreements regulating the employment relationship of the respondents. Clause 15 of each of the service agreements contains the arbitration clause and determines that any dispute between the parties should be referred to conciliation under the Uncitral Conciliation Rules; and arbitration under the Uncitral Arbitration Rules. The application was within his right to invoke the said procedure.

[48] The applicant's claims against the respondents arise from a breach of the service agreements. The existence and validity of the arbitration clause are admitted. However, the respondents claim food procurement contract applies. The applicant is *dominus litis*. Employees are expected to act honestly and not steal. Any breach of honesty is a sufficient ground to utilize the terms and condition of the service agreement. In the circumstances, the applicant was entitled to institute arbitration proceedings in terms of the service agreements as the disputes between the parties, as formulated by the applicant, fell within the ambit of the service contracts. The dispute as formulated related to dishonesty misappropriation and theft committed by the respondents in their

capacity as employees of the applicant. For this reason their defence lacks merits and is dismissed.

[49] The essence of the respondents' objections are that the disputes between the parties relating to the alleged misappropriation of funds, are governed by "Food Procurements Contracts" concluded between the applicant and the first respondent's company, Sizani (Pty) Ltd, and not the service contracts on the Food Procurement Contracts, although providing for arbitration, is not governed by the Uncitral Arbitration Rules. As stated above the applicany is *dominus litis* and had options to formulate his claim. In any event I do not express any view as regards the applicability of the said contract to the dispute as formulated.

[50] The applicant disputes the validity of the alleged "Food Procurement Contracts". The applicant persists that the entire service contract applies to the issue as formulated

[51] The respondents allege that they raised the arbitration tribunal's lack of jurisdiction on several occasions but the communications remained unanswered. Several notices were delivered to them personally to which they did not respond. The respondents chose not to respond. The applicant was entitled to proceed as he did.

[52] In terms of article 21(1) of the Uncitral Arbitration Rules the arbitration tribunal may hear any objection that it has no jurisdiction, including any objections to the existence or the validity of the arbitration clause or of a separate arbitration agreement. A plea that the arbitration tribunal does not have any jurisdiction should have been raised in the statement of defence. The respondents failed to raise, at the appropriate time, and in the arbitration proceedings, the objection to the arbitration tribunal's jurisdiction. The respondents were advised that the respondents could raise the defence of lack of jurisdiction at the appropriate time in the proceedings. The respondents continued to participate in the arbitration proceedings by acknowledging the

appointment of the appointing authority; by the appointment of King as the second arbitrator; by delivering an application to stay the arbitration proceedings; by challenging the arbitrators on the grounds of their alleged lack of impartiality; and by filing further submissions in support of the application to stay the arbitration proceedings. The respondents failed to file a statement of defence. They did not formally raise the arbitration tribunal's lack of jurisdiction at the appropriate time in the arbitration proceedings. Accordingly I find that this ground is without substance and legally untenable.

THE APPOINTMENT OF THE ARBITRATORS

[53] The respondents allege that the appointments of the arbitrators were irregular. I disagree. The applicant has religiously observed the rules in the appointment of the arbitrators without fail. The respondents again chose not to do so. Their attitude led to the appointment of the appointing officer. The challenge of these appointments is without merit and is hereby rejected.

ARBITRATION AWARD - FINAL

[54] The Uncitral Arbitration Rules make no provision for an appeal against the award. The arbitration award is therefore final and binding subject to the arbitration tribunal's right, on the written request of the parties, to correct errors in computation, any clerical errors or typographical errors or any errors of a similar nature and to the arbitration tribunal's right, on the written request of the parties, to make an additional award as to claims presented in the arbitration but omitted from the award. Section 28 of the Arbitration Act provides for an arbitration award to be final and not subject to an appeal and requires each party to the arbitration to abide by and comply with the award. The respondents has a right to, within six weeks after the publication of the award, remit the arbitration award to the arbitration tribunal for reconsideration. The respondents have failed remit the award to the arbitration

tribunal for reconsideration and the respondents have not applied to have the award set aside. In the circumstances, the award is final.

THE WRITTEN AWARD SIGNED BY THE ARBITRATION TRIBUNAL

[55] In terms of Section 24(1) of the Arbitration Act the award must be in writing and signed by both parties. This was done on 18 January 2010. The final award, in my view, is properly signed in terms of this section. This ground of opposition is otherwise groundless and is hereby rejected.

ARBITRATION AWARD MADE WITHIN FOUR MONTHS

[56] Finally the respondents raised the time limit as regards Section 23 of the Arbitration Act. In terms of section 23 of the Arbitration Act the arbitration award must be made, unless the arbitration agreement provides otherwise, within the period of four months after the date on which the arbitration tribunal entered on the reference or the date on which such arbitrators were called upon to act by notice in writing from any party to the reference, whichever date is the earlier, unless the time period of four months has been extended by the parties or the court, on good cause shown, whether before or after the expiry of the time period.

[57] The Uncitral Arbitration Rules confer the arbitration tribunal with the right to regulate the arbitration proceedings and to determine the time periods for the conduct of the arbitration proceedings. Where such Rules are silent as regards the time then the Arbitration Act must be resorted to.

[58] The arbitration process commenced on 2 June 2008 when the invitation was extended to the respondents for conciliation. In my view the date of 2 June 2008 cannot constitutes date:

"On which arbitrators entered on reference."

[59] From 2 June 2008 until the request for a default judgment the parties were engaged in pre-arbitration process in order to get the matter ready for adjudication. The applicant in their long heads of argument and in their submissions applied for the extension of the time limits in this regard. The application was in the alternative in the event that the court finds that 2 June 2008 is the applicable date. They submitted that in their view the Uncitral Rules dictated the procedure and they applied the said procedure.

[61] Section 23 provides for the time frames for making award by the arbitral tribunal. The relevant part of s 23 of the Act reds as follows*:*

> ***'23 Time for making award***
>
> *The arbitration tribunal, unless the arbitration agreement otherwise provides, makes its award-*
>
> *(a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and*
>
> *(b) .....,*
>
> *Or in either case on or before any later date to which the parties by any writing signed by them may from time extend the time for making the award: provided that the Court may, on good cause shown, from time to time extend the time for making any award, whether the time has expired or not.'"*

Section 32(b) deals with an award made by an umpire as opposed to an award by arbitrator and do not apply in the circumstances of the present case. The application for extension can even be made at anytime regardless whether the time has expired or not. Regard been had to the purpose of section 23 of the Arbitration Act, namely to conclude the process expeditiously with the greater

laxity for extension of time limits, a greater flexibility in such a case is called for.

[62] The phrase 'enter on reference' is not defined in the Arbitration Act. In my view, the date on entering reference can only mean the date when the matter is ripe to be allocated a date of hearing. In the matter of **Van Zijl v Von Haebler** 1993 (3) SA 654 SECLD the phrase was held to denote:

> *"-the date on which he [arbitrator] commences hearing evidence or entertains submissions from the parties as to the conduct of the matter"* (see page 664 E-F)

Similarly, in **Bhoola v Bhoola** 1945 NPD 109 at 113 it was held that:

> *"-Entering on reference means something more that giving notices-"*

This interpretation makes sense and is logically sound. In this case the 'pleadings' only became closed when application for default judgment affidavit was filed. I used the 'pleadings' by way of analogy. In a trial the matter comes before the court for adjudication on merits once all the pretrial issues have been resolved. This was on 13 November 2009. Any other step before then was still a preparatory step. The matter was still as yet not ripe for the arbitrators to evaluate the merits of the application.

[63] The respondents did not argue that the award has lapsed. Accordingly I hold the view that the award was made timeously. There was no need to apply for extension of the time limits. The applicant's application for extension of time limits was done ex *abudanti cautela* as any diligent litigant will do.

PUBLICATION OF THE AWARD

[64] On 18 January 2010, Myburgh invited a representative of the applicant to attend at his offices for purposes of collecting a copy of the award. On or

about 19 January 2010, and at the chambers of Myburgh at Group 1, Sandown Village, Sandton, the final award was published by delivery of the award to the applicant's representative. This satisfies the requirements of section 25 of the Arbitration Act.

[65] On 19 January 2010 the applicant delivered a copy of the award to each of the respondents at their residential addresses. The said delivery was at the instructions of the tribunal. On 22 January 2010 the first respondent acknowledge receipt of the award. Any delivery of notices and other related directive to the respondents were done to assist the tribunal and facilitate the process. To hold such steps as irregular is ludicrous.

THE APPLICANT'S CASE

[66] In summary, the applicant has satisfied the requirements. The service contracts in terms of which the arbitration was conducted, are valid; the arbitration tribunal was validly and correctly appointed; the dispute fell within the ambit of the service agreements; the arbitration award is final; the arbitration award is valid; the arbitration award is in writing and signed by all the members of the arbitration tribunal; the arbitration award was made within the time limits prescribed by the Uncitral Arbitration Rules read with the time periods imposed by the arbitration tribunal and the award was properly published.

THE RESPONDENTS FURTHER OBJECTIONS

[67] The respondents filed the following notices after having filed their answering affidavit. On 27 October 2010 - "Request for witness to appear personally in court in terms of section 6(5)(g) and production of documents"; on 29 October 2010 – "Notice in terms of Rule 30A(1)"; on 1 November 2010 – "Second notice in terms of Rule 35(3)"; on 11 November 2010 – "Notice in terms of Rule 33(4)". The above notices are misconceived and irregular steps in terms of Rule 30 of the Rules of Courts. The respondents have misconceived their right to request the delivery of documents. Such documents could only have

been requested if these documents are referred to in the applicant's affidavits or if the respondents. The filing of these notices demonstrate the delaying tactics and stratagem employed by the respondents throughout these proceedings.

CONCLUSION

I find that the applicant has made out a proper case for the relief it seeks

ORDER

From the reasons stated above I make the following order:

1. The arbitration award, a copy of which is marked "X" and attached to the applicant's notice of motion is made an order of court; and

2. Costs of suit; which costs shall include the costs consequent upon the employment of two counsel.

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RE MONAMA

JUDGE OF THE HIGH COURT

Date of Judgment: 10 October 2011

Counsel for the Plaintiff Counsel for the Defendant

Adv. M. Hellens SC	Unrepresented
Adv. TD Prinsloo	
Instructed by:	
Deneys Reitz Attorneys	