REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 014482/09

APPEAL CASE NO: 674/2010

DATE: 13/05/2011

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

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DATE SIGNATURE

In the matter between:

DAYAN, ARIEL Appellant
(Respondent *a quo*)

and

DAYAN, DOV Respondent
(Applicant *a quo*)

J U D G M E N T

LAMONT, J:

[1] This is an appeal against an order made by Brassey AJ making an arbitration award an order of Court.

[2] The submissions are twofold:

(1) The judge erred when he found that the proper approach to the matter was that consideration need not be given to section 129(1) of the National Credit Act No. 34 of 2005 (the Act) as the application before him concerned the making of an arbitration award an order of court. The submission was that the court should have regard to the "*underlying causa*".

(2) The arbitrator had made a number of awards during the course of the arbitration and was *functus officio* after he made the first interim award.

[3] On 4 March 2009 the appellant and the respondent referred a dispute between them concerning the right to payment of R360 900,00 to arbitration. The arbitrator was the Beth Din of Johannesburg. The appellant and respondent agreed to abide by its decision. In due course the arbitrator made a decision. Under and in terms of that decision the appellant was obliged to pay the respondent the sum of R176 400,00 immediately (11 August 2008).

[4] The Arbitration Act 42 of 1965 (the Arbitration Act) provides in Section 31 that an award may on application to a Court of competent jurisdiction be made an order.

[5] The application before Brassay AJ was for that relief. There was no counter-application for the setting aside of the award or for the interference with the award in any way.

[6] There being no attack on the award in the form of a properly launched application the question of the validity or otherwise of the award in my view does not arise. Issues considering whether there was a procedural irregularity, whether the award as a matter of law is incorrect and the fairness of the procedure do not arise before me as they did before courts in for example *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (2) All SA 243 (SCA) and *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2008 (1) All SA 321 (SCA) (and also 2009 (6) BCLR 527 (CC).

[7] I accordingly agree with Brassey AJ that unless there was an application before him to set aside the arbitration that this was not an issue for him to consider.

[8] The appellant contends that the provisions of the National Credit Act No 34 of 2055 (the Credit Act) are of application in that the debt is a mortgage bond debt. It appears from the founding affidavit that approximately R1 million was raised by way of obtaining a mortgage bond. From the proceeds some

R700 000,00 had been used by the respondent and some R360 900,00 ("the capital" forming the subject-matter referred to arbitration) had been used by the appellant. The capital was not interest-bearing and had no connection to the mortgage bond otherwise than that the bond was the source by which the capital used by the respondent to fund the loan to the appellant had been raised. The loan was not interest bearing. It is accordingly not a credit agreement as contemplated by Section 8 of the Credit Act.

[9] In addition the agreement was entered into by half brothers who had a close relationship and who concluded a number of transactions over the period. The transactions included loans, transfer of immovable property, an employment contract and a number of payments of salary. These two persons were related as contemplated by the Section. When they concluded the loan agreement in question were not dealing at arm's length. The parties were not independent of each other and were not striving to gain the utmost advantage for themselves out of the transaction. See: *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 495; *Cooper and Another NNO v Merchant Trade Finance Limited* 2000 (3) SA 1009 (SCA) at 1030. The transaction was accordingly excluded from being a credit transaction by reason of Section 4 (2) (b) of the Credit Act which provides.

> *"4. Application of Act.—(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, ….*
> *(2) For greater certainty in applying subsection (1)—….*
> *(b) in any of the following arrangements, the parties are not dealing at arm's length:…*
> *(iii) a credit agreement between natural persons who are in a familial relationship and—*
> *(aa) are co-dependent on each other; or*
> *(bb) one is dependent upon the other; and*

(iv) any other arrangement—
(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or
(bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length;"

[10] As the agreement was not a credit transaction it is unnecessary to consider whether or not the Court is obliged to consider the underlying cause by reason of an obligation arising out of the provisions of the Credit Act

[11] The second series of submissions concerned the fact that en route to making the final decision the arbitrator had made interim decisions. It appears from the arbitration that on 17 April 2008 an award was made in favour of the respondent for R180 000,00. The appellant had a counterclaim. From time to time the arbitrator dealt with the counterclaim. In the course of dealing with the counterclaim the arbitrator made rulings concerning the payment pro tem and on an interlocutory basis of a reduced amount to the respondent including an interim ruling that afforded the appellant time to pay. The indulgences and calculations were dependent upon the appellant making payment and establishing the reduced amounts. The appellant failed to do so and the arbitrator accordingly made a ruling that it "*… now issues a final ruling that Ariel is liable to pay to Dov the amount of R176 400.00 forthwith*". It is that final ruling which came before Brassay AJ and which he was asked to make an order of court. That ruling is the only final ruling and constitutes the award of the arbitrator.

[12] In my view the appeal must fail.

[13] I would accordingly dismiss the appeal with costs.

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LAMONT J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree

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TSOKA J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree

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BIZOS AJ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG