IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED NO
DATE:	** AUGUST 2020 – DELIVERED ELECTRONICALLY
SIGNATURE:	.....

Case No. 02966/2020

In the matter between:

KUYASA MINING (PTY) LTD **FIRST APPLICANT**

DELMAS COAL (PTY) LTD **SECOND APPLICANT**

And

ESKOM HOLDINGS SOC LIMITED **RESPONDENT**

JUDGMENT

MILLAR, A J

1. The applicants and the respondent are presently parties to an arbitration. The arbitration arises out of the cancellation of a coal supply agreement that had been entered into between them during September 2011. The coal supply agreement persisted until its cancellation in October 2018 by the applicants whereafter the respondent, which disputes the cancellation, referred the matter to arbitration in February 2019. In consequence of the referral of the dispute to arbitration by the respondent, the applicants then filed, also for determination at the arbitration, a counter claim.

2. The coal supply agreement provided in clause 33 for the referral of any disputes arising from the agreement to arbitration and the parties thereafter proceeded in terms thereof. A pre- arbitration meeting was held in February 2019 at which the parties agreed a timetable and they then proceeded in accordance therewith. In their respective preparations for the arbitration, both parties requested discovery of documents from the other. Each of the parties disputed the entitlement of the other to call for the discovery of the specific documents that they had and this subsequently resulted in the arbitrator hearing applications to compel.

3. On 19 December 2019, the arbitrator delivered a decision in respect of each of the applications to compel. The applicants have accepted and complied with the decision made in respect of the respondent's request for discovery against them and no more need be said about this. The respondent, however, does not accept the decision of the arbitrator and on 17 January 2020 delivered a notice of appeal in respect of that decision.

4. The decision of the arbitrator in the applicants' application to compel discovery is variously referred to as "the decision" and the "partial award" in the papers before the Court. For the purposes of this judgement the decision of the arbitrator will be referred to as "the decision".

5. It was argued for the applicants that the decision was not "the decision" referred to in clause 33.6.1 of the arbitration clause of the coal supply agreement. In the context of the agreement and the particular clause, this was the outcome of the arbitration or the "award" in respect of the main dispute referred to arbitration by the respondent and the applicants counter claim thereto. It was also argued that the decision in respect of the application to compel discovery was an interlocutory one and that were it in fact to be "the decision" in terms of clause 33.6.1 then this would have the consequence of making every single decision of the arbitrator

potentially appealable and defeating the very purpose for which the parties had agreed to arbitration – that any disputes arising out of their agreement be resolved expeditiously.

6. On the part of the respondent, it was argued that clause 33.6.2 afforded the respondent the right to appeal, and in particular the decision to order the discovery sought by the applicants.

7. The respondent also argued that the fact that the decision to compel discovery was interlocutory did not render it not appealable because the effect, at least insofar as the making of the discovery that had been ordered was concerned - the furnishing of the documents sought, was final in effect once the documents had been handed over.

8. It was also argued by the respondent that the discovery that had been sought by the applicants related to documents that contained confidential third-party information and that the respondent's future tender or business processes may well be adversely affected in consequence of such discovery. It was argued that an appeal in respect of the decision to order discovery was in the present circumstances "in the interests of justice".

9. The relevant provisions of the dispute resolution clause in the coal supply agreement provides:

"33.6.1.1 *either Party may refer the Dispute to be finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa ""AFSA")…*

and

33.6.1.5 *subject to the provisions of clause 33.6.2 the Parties irrevocably agree that the decision in any such arbitration proceedings will be final and binding on them, will forthwith be put into effect and may be made an order of any court of competent jurisdiction"*

and

33.6.2 *Either Party has the right to appeal against the decision of the arbitrator appointed in terms of clause 33.6.1.1 provided that this is done within 30 (thirty) days of receipt by the Parties of the arbitrator's award. .."*

10. There are two issues to be decided in this application – firstly whether the only the decision of the arbitrator on the main dispute is appealable or not; and secondly whether, in any event, the decision in question is appealable because, as the respondent argues, its effect is final.

11. In Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others[1] it was held by the Supreme Court of Appeal that:

> *"[12]The appeal agreement provides only for an appeal procedure according to the AFSA rules including rule 22.8. It does not provide "otherwise", ie it does not provide that interim awards which are not of final effect are appealable and the appellants do not advance their contention. The real and only issue is whether the arbitrator's order dismissing the exception, would if it had been made by the High Court have been regarded as an order having final effect, and thus appealable to the SCA. This is precisely the test prescribed by rule 22.8 and (in the absence of agreement "otherwise") is applicable in the present case. On this matter it is settled law that a High Court order dismissing an exception in the High Court is not appealable to the SCA. It follows that the first issue, whether the arbitrator's order was appealable, must be decided in the first respondent's favour. The arbitrator is entitled to reconsider the interpretation issue."*

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[1] [2007] 3 ALL SA 223 (SCA)

12. The parties had, at least initially sought to have their dispute determined through the process of a private arbitration. In Lufuno Mphaphuli & Associates (Pty) v Andrews and Another[2] in the Constitutional Court held in this regard that :

> *"Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been concluded, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated."*

13. Clause 33.6. of the coal supply agreement refers only to "the decision". The use of the definite article "the" as opposed to the indefinite article "a", on a plain reading of the relevant clauses refers to a single and specific instance. The respondent argues that the use of the definite article is "*used to make a generalized reference to something rather than identifying a particular instance.*[3] " However, the juxtaposition of the word "decision" with it makes plain that what is referred to is a specific "*choice or judgment made after*

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[2] 2009 (4) SA 529 (CC), at para 236.
[3] Concise Oxford English Dictionary, 12th Ed, Oxford University Press, 2011.

considering something."[4] with reference to clause 33.6.1.1 – the dispute between the parties referred to arbitration in the first place. Attributing this meaning is consonant with the accepted approach to interpretation where the court held in Natal Joint Municipal Pension Fund v Endumeni Municipality[5] that:

"[18]. Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of document in order to trace those developments. The relevant authorities are collected and summarized in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, considerations must be given to the language used in the light of the ordinary rules of grammar and syntax; the

[4] Compact Oxford English Dictionary, Third Edition, Oxford University Press, 2005.
[5] 2012 (4) SA 593 (SCA), para [18] footnotes omitted.

context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself," read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

14. Axiomatically then the agreement between the parties provides only for an appeal in respect of a final decision made by the arbitrator. However this is not the end of the enquiry. Is the decision made by the arbitrator, on a proper interpretation, final in effect?

15. The process of discovery is fundamental to the entire dispute resolution process – it is described thus:

> *"The object of discovery was stated in Durbach v Fairway Hotel Ltd 1 to be 'to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated.'*
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> *'Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be, and often is a deva-stating tool.' 2*
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> *The underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries the duty to put those documents in proper order for both the benefit of his adversary and the court in anticipation of the trial action. 3 Discovery assists the parties and the court in discovering*

the truth and, by doing so, helps towards a just determination of the case. It also saves costs. 4

'But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased.' 5

The employment of discovery should be confined to cases where parties are properly before the court and are litigating 'at full stretch'. 6 *The essential feature of discovery is that the person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established.* 7 *Discovery is not intended to be used as a sniping weapon in preliminary skirmishes.* 8 "[6]

16. An order or decision to compel discovery is in the ordinary course of an arbitration or litigation before a court , an interlocutory matter. It is made in the course of bringing the proceedings to finality. Such orders are not usually appealable but this is not an inflexible rule and there are circumstances where leave to appeal such orders has been granted.[7]

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[6] DE van Loggerenberg Erasmus, Superior Court Practice, Juta, Vol. 2, RS 9, 2019 D458 – 459, footnotes omitted.

[7] Nova Property Group Holdings v Cobbett 2016 (4) SA 317 (SCA) at paras 9 – 10

[9] It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts. 8 The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us. However, the most compelling, in my view, is that a consideration of the merits of the appeal will necessarily involve a F resolution of the seemingly conflicting decisions in *La Lucia Sands v Barkhan*9 and *Bayoglu v Manngwe*, 10 on the one hand, and *Basson v On-Point Engineers*11 and *Mail & Guardian Centre for Investigative Journalism v CSR E-Loco*, 12 on the other.

Whether it is granted or not will depend on the specific circumstances of each matter[8].

17. The respondent argued that the present case is one in which the "interests of justice" militate for the decision of the arbitrator to be regarded as a final decision – the decision referred to in clause 33.6.1 and that it ought to be appealable. It was argued that once the discovery sought by the applicants had been made the respondents prejudice would be irreparable.

18. The parties argued their respective applications to compel fully before the arbitrator. The prejudice that the respondent claimed would eventuate from having to make the discovery sought by the applicants was fully ventilated before the arbitrator and her decision on the matter reflects this. The arbitrator provided that:

"*50.3 In each case where the financial data contains particulars of third-party suppliers of coal to Eskom, their full names and such further*

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[10] Section 17(1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act), which provides for the circumstances in which a judge may grant leave to appeal, gives express recognition to this consideration. It provides:
'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that —
(a) (i) the appeal would have a reasonable prospect of success; or
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
(b) the decision sought on appeal does not fall within the ambit of section 16(2)*(a)*; and
(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'
The provisions of s 17(1) of the Superior Courts Act are tailor-made for this appeal principally for two reasons. First, as already alluded to, there are at least four conflicting judgments, including that of the court a quo, on the proper interpretation of s 26(2) of the Companies Act. Second, the appeal would lead to a just and prompt resolution of the real issues between the parties for the reasons set out below.

[8] Santam Ltd and Others v Segal 2010 (2) SA 160 (N) at para 7

particulars as may render their identity determinable shall be redacted from the said financial data."

19. The prejudice that the respondent claims it will suffer when weighed against the specific terms of the arbitrator's decision and the applicant's rights to properly defend the claim against them and to prosecute their counterclaim is to my mind illusory. It would be absurd were the respondent who had initiated the arbitration proceedings be permitted to frustrate the proper ventilation of the dispute by withholding relevant documents. Litigation or arbitration is not an endeavor to be entered into lightly and once in motion the participants must bear the consequences of their decision to do so.

20. I find that the decision of the arbitrator to order the respondent to make discovery as she did is not appealable within the terms of the arbitration agreement between the parties or that there are any other compelling reasons for it to be regarded as such.

21. In the circumstances I make the following order:

21.1 The partial award published by the Arbitrator, Madame Nkosi-Thomas dated 20 December 2019 compelling the respondent to produce documents relevant to the arbitration proceedings, in the terms set out therein is not appealable by the respondent;

21.2 The respondent is ordered to deliver the documents referred to in the Partial Award dated 20 December 2019 to the applicants within 15 business days of the granting of this order; and

21.3 The respondent is ordered to pay the costs of this application which costs are to include the costs consequent upon the employment of two counsel.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

HEARD ON:	3 AUGUST 2020
JUDGMENT DELIVERED ON:	7 AUGUST 2020

(HANDED DOWN ELECTRONICALLY BY EMAIL DELIVERY TO THE PARTIES)

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