**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

**CASE NUMBER: 30053/2020**

1) REPORTABLE: NO
2) OF INTEREST TO OTHER JUDGES: NO
3) REVISED: NO
4) Date: 8 December 2021

In the matter between: -

**VODACOM GROUP LIMITED** Applicant

and

**CONGOLESE WIRELESS NETWORK SARL** First Respondent

**ABRAM MOGOBOYA** Second Respondent

**Coram:** Booysen: Acting Judge of the High Court of South Africa

**Heard on**: Tuesday 16 November 2021

**Delivered:** 7 December 2021

**Summary:** **Arbitration Award –** Once a challenge, in terms of Section 32 or 33 of the Arbitration, 42 of 1965, fails, the Court must make the award an Order of Court, in terms of section 31 of the Arbitration Act.

**Arbitration Jurisdiction** – Attorney not a party to the arbitration agreement. Costs *de bonis propriis* not within the Arbitrator's jurisdiction. Liability under arbitration is limited to parties to the arbitration agreement.

---

**JUDGMENT**

---

**BOOYSEN AJ**

[1] The applicant seeks three arbitral awards to be made orders of this Court in terms of section 31 of the Arbitration Act 42 of 1965 ("the Arbitration Act").

[2] The issues arose from a written loan agreement concluded between the applicant and the first respondent, which required disputes to be referred to and resolved by arbitration under the Arbitration Foundation of Southern Africa ("AFSA").

[3] Retired Judge Bertelsmann was appointed as the Arbitrator to determine the disputes. The AFSA Rules empowered the Arbitrator to direct the scale on which costs were taxed and recovered.

[4] Retired Judge Bertelsmann delivered three costs awards in the applicant's favour regarding an application for a postponement, an application to compel compliance with the Arbitrator's directives and costs against the second respondent, *de bonis propriis*, in respect of the application to compel.

[5] The second respondent was the first respondent's attorney of record.

[6] The applicant taxed the costs orders in the sum of R220 650.45 regarding the application to compel and R301 999.31 regarding the postponement application.

[7] The first and second respondents refuse to comply with the awards, which awards they admit.

[8] In terms of Section 32(2) of the Arbitration Act, 42 of 1965: -

> *"The court may on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for making of a further award or a fresh award or for such other purpose as the court may direct."*

[9] Section 33 of the Arbitration Act provides an arbitration award that may be set aside: -

> *(1) Where –*
>
> *(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as Arbitrator or umpire; or*
>
> *(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers; or*

*(c) an award has been improperly obtained,*

*the Court may, on application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.*

*(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties."*

[10] "*Good cause*" in Section 32(2) of the Arbitrator Act is nothing less than the requirements for an order in terms of Section 33(1). Accordingly, a party cannot take an Arbitrator on appeal on the premise of a remittal or review, on the points which the Arbitrator, after due consideration, found against such a party. See **Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others; Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another** 2001(2) SA 1097 (C) at 1110 to 1113: - Relying on Selikowitz J's dictum in **Benjamin v Sobac South African Building and Construction (Pty) Ltd** 1989(4) SA 940 at paragraph [53] - page 1110.

[11] The Supreme Court of Appeal confirmed an arbitrator's entitlement to make mistakes per Harms JA in **Telcordia Technologies Inc v Telkom SA Ltd** 2007(3) SA 266 (SCA) at 302, paragraphs 85 and 86.

[12] The respondents bear the onus to satisfy the Court that the Arbitrator has overlooked some material point or has exceeded his powers.

[13] The second respondent, appearing for the respondents, had difficulty taking the Court through its defence, within the ambit of the Arbitration Act, in the application papers. He instead reargued the merits of the Arbitrator's

decisions. The defences raised in the papers are that "*the award dated the 29 September 2019 read with the award dated the 31 October 2019 are contradictory…*" and de *bonis propriis* cost award against the second respondent, "*the award…is not supported by the evidence produced by the parties….*"

[14] In conflict with the provisions and the underlying philosophy of the Arbitration Act, the first respondent attempted to take the awards on appeal. Once the challenge fails, the Court must make the awards Orders of Court. See **Kolber and Another v Sourcecom Solutions** *supra* at paragraphs [69] to [72] 1115B.

[15] The dispute submitted for resolution confines the authority of an arbitrator. An award that falls outside that authority is invalid. An award on issues not raised for decision is a misconduct and could exceed the Arbitrator's jurisdiction. See **Tao Ying Metal Industry (Pty) Ltd v Pooe No and Others** 2007 (5) SA 146 (SCA) par [5]

[16] The source of an arbitrator's power is the arbitration agreement as such the Arbitrator cannot go beyond it and the submissions made to which it expressly defines and limit the issues. See **Hos+Med Medical Aid Scheme V Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others** 2008 (2) SA 608 (SCA) paragraph [30].

[17] The second respondent was not a party to the arbitration agreement, so it did not fall within the ambit of the Arbitrator's reference to order him to pay costs *de bonis propriis*. I raised this with Mr Franklin SC who appeared for the

applicant. Mr Franklin SC conceded that the second respondent was not a party to the arbitration agreement but submitted to the Court that he could not raise the issue mero moto and argued that section 35(1) of the Arbitration Act connects an attorney of record to the reference. Mr Franklin SC relied upon para [6] of **South African Forestry Co Ltd v York Timbers Ltd** 2003 (1) SA 331 (SCA) which held that an arbitrator's discretion in terms of s 35(1) to award *'costs in connection with the reference and award*' is sufficiently broad to allow him to grant the qualifying costs of expert witnesses who are in support of this submission.

[18] Relying on the authority of **South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others** 2009 (1) SA 565 (CC), he further submitted that the Arbitrator was correct and justified in making the special cost order.

[19] A court may disregard and refuse to enforce a nullity without formally setting it aside. See **Provincial Government: North West Province and Another v Tsoga Developers CC and Others** [2016] ZACC 9 and **Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd** 2014 (3) SA 481 (CC).

[20] Being a nullity, a pronouncement to that effect is unnecessary. An order contrary to a direct law prohibition is void and of no force and effect. See **Schierhout v Minister of Justice** 1926 AD 99 at 109. I see no reason why an arbitration award should be treated differently from an invalid court order.

[21] No matter how fair and correct an arbitrator conducts himself or how accurate

in law his award might be, he cannot stray beyond the confines of the arbitration agreement and the submission, i.e., the issues delineated in the pleadings before him. Granting the experts' qualifying costs is a cost against a party to the reference. A related party such as the attorney or expert simply is not a party to the reference.

[22] A party's liability can only be determined by arbitration if that party is a party to the arbitration agreement. Similarly, a party can only enforce an arbitration against a party to the arbitration agreement.

I make the following order: -

1.) The arbitral awards dated 29 September 2019, annexed to the founding affidavit as "FA1.1" and "FA1.2 ", are made orders of Court, in terms of section 31 of the Arbitration Act No.42 of 1965.

2.) Costs of the application are to be paid by the first respondent.

3.) The costs award against the second respondent, dated 31 October 2019, is invalid.

4.) The application against the second respondent is dismissed with costs.

**AJR Booysen**
**Acting Judge**
**8 December 2021**

| | |
|---|---|
| FOR THE APPLICANT: | adv AE Franklin SC<br>adv S Tshikila<br>Instructed by Cliffe Dekker Hofmeyer Inc.<br>E-mail: zanele.ngakane@cdhlegal.com |
| FOR THE RESPONDENTS: | Mr Mogoboya<br>Instructed by Mogoboya Dooling & Associates<br>E-mail: lawabram@yahoo.com |