



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
DATE 27 May 2011
STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Bidoli v Bidoli & another
(436/10) [2011] ZASCA 82 (27 May 2011)

Media Statement

Today the Supreme Court of Appeal (SCA) upheld an appeal by Guido Bidoli against a judgment of the Western Cape High Court dismissing his application to have an arbitral award made an order of court in terms of s 31 of the Arbitration Act 42 of 1965.

The brothers Bidoli conducted business with their father in various joint and separate enterprises, mainly as building contractors in South Africa, Namibia and Italy. Disputes arose amongst the brothers and in 2007 they concluded an arbitration agreement with the view to having their disputes determined by an arbitrator.

An arbitrator was appointed and the hearing commenced on 3 December 2007. On 7 December 2007 the parties met outside the arbitration hearing, which meeting led to the conclusion of a settlement agreement. This settlement agreement, at the request of the parties, was incorporated into the arbitral award by the arbitrator.

Guido Bidoli applied to have the arbitral award made an order of court in terms of s 31 of the Arbitration Act. Romolo opposed this application and counter applied for an order declaring the arbitral award void, on the basis that as the parties had settled their dispute, the

arbitrator's mandate had terminated and as a result the arbitral award issued by the arbitrator after the settlement of the matter was void.

The high court upheld this argument, finding that neither our Arbitration Act, unlike its English counterpart, nor our common law, makes provision for an arbitrator to record a settlement reached by the parties in the form of an agreed award.

The SCA held that none of the authorities cited by the high court bear directly on the question of whether an arbitrator may make an award by consent. According to the SCA, all of the authorities relied upon by the high court deal with the fairly trite principle that at the time of referral to arbitration, there must be a dispute between the parties. In this case there was a dispute when arbitration proceedings were entered upon.

The SCA took the view that it does not seem to follow that in the absence of statutory provisions parties are not free to elect to regulate their relationship with each other in such a way as to allow for a settlement agreement to be made an arbitral award. The arbitrator derived his powers from his acceptance of a reference by the parties to the arbitration agreement. He undertook to hear their dispute and make an award. Accordingly, his authority as arbitrator only comes to an end when a final order has been made.

The SCA noted that as long ago as May 2001, the South African Law Reform Commission had recommended to the then Minister of Justice that a new Arbitration Act be drafted, which should include, amongst others, provision for an award on agreed terms to bring South African arbitration law in line with modern trends worldwide. The SCA thought it lamentable that a decade later those recommendations were yet to be acted upon.

The appeal was upheld with costs and the order of the court below set aside and replaced with an order making the arbitration award and order of court.

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