IN THE CAPE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2587/2006

In the matter between:

DALJOSAPHAT RESTORATIONS (PTY) LTD Applicant

and

KASTEEL HOF CC Respondent

JUDGMENT DELIVERED ON: 15 JUNE 2006

Meer, J:

[1] The Applicant seeks an order in terms of Section 31 of the Arbitration Act No. 42 of 1965 ("the Act") that the arbitration award of Arbitrator, Mr R Q le Roux, dated 20 January 2006, be made an order of Court. Respondent opposes the relief sought on the basis that the arbitration award is in terms of an agreement, subject to an appeal to this Court, an appeal has been noted and not yet disposed of.

[2] Respondent has also filed a counter application in terms whereof it seeks *inter alia*:

1. that the arbitration agreement, made an order of Court on 21 April 2005, be declared void;
2. that the proceedings before the Arbitrator and the Arbitrator's award be declared a nullity.

The Applicant opposes the counter application.

Background facts.

[3] The Respondent owns the Royal Hotel in Riebeeck Kasteel. From August 2004 the Applicant, a construction company, performed extensive building work and renovations to the hotel for which it was paid an amount of 2,6 million rand.

[4] Towards the end of 2004, a dispute arose between the parties and on 08 February 2005 the Applicant cancelled the building contract due to the alleged non payment of architect's certificates. The Respondent in turn contended that there was no contract between the parties. The Applicant asserted a builder's lien over the hotel and refused to give up possession thereof.

[5] In April 2005 the Respondent launched an urgent application in this Court for the Applicant's ejectment from the premises as against provision by it of security in the sum of R959 125.00, and the institution of a High Court action by the Applicant for amounts allegedly due to it within 30 days. That application was opposed and the parties then set about negotiating a settlement thereof. The ejectment application was settled on 20 April 2005 and the settlement agreement was made an order

of Court on 21 April 2006 by agreement. The order provides as follows[1]:

~~Having heard counsel for the applicant and having read the documents filed of record~~, the following order is made by agreement between the parties:

1. That Applicant provide security in the form of a Bank Guarantee in the amount of R1 200 000.00 to Respondent in respect of its alleged claim against Applicant, arising from building work effected upon Erven 73, 1364 and 1018 Riebeeck Kasteel, known as the Royal Hotel ("the premises");
2. That, against provision of the original Bank Guarantee, Respondent vacate the premises and place Applicant in possession thereof;
3. That the dispute relating to the amount allegedly owing to Respondent by Applicant in respect of building work done and material supplied by Respondent to Applicant in regard to the Hotel, as well as the recovery of any alleged damages, is referred to Arbitration;
4. That the Arbitrator will be appointed from a list to be supplied by the Cape Provincial Institute of Architects and that the Arbitration will be conducted in terms of an Arbitration agreement which will be concluded between the parties, failing which the Arbitration will be governed by the Arbitration Act subject thereto that the Arbitration process and award will not be final and the parties having the right of appeal to this Court;
5. That the application is postponed *sine die;*
6. That the costs of the application will be adjudicated in the Arbitration except if the appointed Arbitrator finds him/herself unable to do so, in which event the Applicant will be entitled to approach this Court on the same papers for an order thereon."

1 The deleted part of the order indicates that the order was granted without the judge either hearing counsel or reading the papers. The order was granted by the Motion Court Judge.

[6] Both the main application and the counter application before me are concerned with clause 4 of the settlement agreement, more specifically the appeal provision contained therein. The arbitration award which the main application seeks to have declared an order of Court has its genesis in clause 4. The counter application, in seeking that the arbitration agreement made an order of Court on 21 April 2005 be declared void, attacks clause 4 on the grounds *inter alia* that there was dissensis pertaining to the appeal provision, and consequently no agreement was concluded.

[7] The settlement agreement was concluded after fairly comprehensive discussions and negotiations between the parties' attorneys about, in particular the nature of the appeal that was contemplated at clause 4. Given the significance of this issue it is necessary to consider their discussions in some detail.

[8] During settlement negotiations Applicant was initially represented by its attorney, Mr Malan and later by Mr Egypt, whilst Respondent's attorney was Ms Ms Neethling. In an affidavit Ms Ms Neethling states that on 15 April 2005 she informed Mr Malan, that she would advise Respondent to agree to an arbitration by an architect, on condition that the award would not be final but would be made subject to an appeal to the High Court. Her insistence stemmed from her concern that an architect as an Arbitrator might not be able to interpret the legal principles of contract which an adjudication of the dispute entailed, and hence recourse by way of appeal to the High Court was necessary. She explained that a review would not suffice, given its narrow ambit which would not enable a consideration of any incorrect interpretation and

application of the law.

[9] The founding affidavit (in the counter application) of Mr Brendel, Respondent's sole member, likewise states that due to the nature of the dispute and extent of the claim, Respondent would not have agreed to an arbitration without the right of appeal to the High Court.

[10] As to the High Court's jurisdiction to entertain an appeal against an arbitration award, Ms Ms Neethling expressed the opinion that were the agreement providing for such appeal to be made an order of Court, the effect of the Court's acceptance of the agreement, would mean that it would be seized with jurisdiction to hear an appeal.

[11] An affidavit by Mr Malan in response states that he did not seriously consider the implications of Ms Neethling's remarks pertaining to an appeal to the High Court, and certainly did not point out to Ms Neethling that such an appeal was a nullity. Mr Malan went on leave soon thereafter and his colleague, Mr Egypt dealt with Applicant's case in his absence.

[12] On 18 April 2005, Ms Neethling faxed to Applicant's attorneys a draft order which she contemplated would be made an order of Court by agreement, in settlement of the matter. Clause 3 of the order provided for the dispute to be referred to arbitration. Clause 4 stated that the parties would have the right of appeal to this Court against an arbitration award. The Applicant's response faxed to Ms Neethling the next day rejected the notion of an appeal, proposing instead that the decision of the Arbitrator would be final and binding and there would be no provision for an appeal either to appeal tribunal or the High Court.

[13] Ms Neethling was surprised at this response given her discussions with Mr Malan, and the agreement which she assumed therefrom, had been reached on the appeal issue. She telephoned Mr Egypt on the same day and pointed out that a right of appeal equal to an appeal from a magistrate's Court to the High Court, as opposed to a review, had been agreed between her and Mr Malan. She once more emphasized that if Applicant accepted a full right of appeal, she would advise Respondent to agree to an Arbitrator appointed by the Council of Architects. Mr Egypt undertook to obtain instructions.

[14] On 20 April 2005, Mr Egypt informed Ms Neethling that Applicant would agree to the draft order proposed by her, if paragraph 4 was amended to indicate that the Arbitrator would be appointed from a list supplied by the Cape Provincial Institute of Architects.

[15] Later that day, Ms Neethling faxed an amended draft order to Mr Egypt. Clause 4 which provided for an appeal to the High Court was accepted by Applicant, as conveyed per return fax by Mr Egypt. The version of Clause 4 agreed to is, as appears in the Court order of 21 April 2005, and which appears at paragraph 5 above.

[16] Ms Neethling's affidavit in reply in the counter application states that she was, at the time of concluding the agreement with Mr Malan and Mr Egypt and still is of the opinion that, (and I quote):

> "as superior Courts can do anything that the law does not forbid (see *Herbstein and van Winsen* The Civil Practice of the Supreme Court of South Africa (fourth edition Cape Town Juta and Co. 1997 at page 38), there should be no doubt that the High Court would have jurisdiction to hear and adjudicate such an appeal if

> parties in a High Court matter agree to refer a portion of their dispute to arbitration; and want to seize the High Court with jurisdiction to consider an appeal against an award by the Arbitrator in such arbitration; and have their agreement reflected in an order of the High Court (and thus accepted by the Court)."

[17] An affidavit by Mr Egypt indicates a different understanding. Mr Egypt states he always understood as a matter of law that arbitration proceedings are final and binding unless there is specific agreement in relation to an appeal tribunal. He assumed that this was Ms Neethling's understanding of the situation as well, and reasonably concluded from the following words in her letter of 20 April 2005 accompanying the final amended draft order,

> "Please consider paragraph 4 of the order, which we have amended to reflect your request, although not in the exact words you suggested",

that her client was in agreement that the proposed arbitration would not be subject to an appeal properly so called but rather an approach to the High Court under Section 33[2] of the Arbitration Act. He understood that the use by Ms Neethling of the word appeal in the draft order was a reference to the right enjoyed under Section 33 of the Act.

[18] At this juncture it should be noted that the settlement agreement negotiated between attorneys Ms Neethling and Mr Egypt and specifically clause 4 thereof which became an order of Court did not contain an arbitration agreement. Clause 4 reflects an agreement to

2 Section 33 permits a High Court to set aside an arbitration award, on application of a party to an arbitration in circumstances of misconduct or gross irregularity by a member of an arbitration tribunal or where an award has been improperly obtained. The section also allows for the enforcement of an award to be stayed, pending determination of the application to set aside and for the subsequent referral to a new arbitration tribunal constituted in a manner directed by the court.

submit to arbitration which will be conducted in terms of an arbitration agreement which will be concluded between the parties.

[19] The terms of the arbitration agreement were concluded at two meetings held on 09 June 2005 and 28 October 2005 respectively. It was decided that the Arbitrator should first determine whether there was an enforceable building contract between the parties and, if so, what the terms thereof were. The issue of quantum was left over for later

determination. Clause 10.3 of the minutes of the first meeting and clause 2.7 of those of the second meeting record the right of appeal to this Court.

[20] On 01 November 2005 shortly after the second meeting Mr Raymond, Applicant's sole director wrote a letter to the Arbitrator, (which he copied to Respondent's attorney), recording his reservations about the enforceability of the agreed right of appeal. He cited the case *Goldschmidt and Another v Folb and Another* 1974 (1) SA 576(T) as authority for the proposition that this Court lacked jurisdiction to hear such an appeal.

[21] Respondent in reply pointed out that Applicant had agreed to a right of appeal to the High Court and that it was bound thereby. On 02 December 2005 the Arbitrator himself indicated that he had been advised that there may be a successful challenge to the appeal provision. He cautioned the parties "to consider an appeal very carefully".

[22] On 06 December 2005 Respondent's attorneys informed the Arbitrator that unless the Applicant agreed to the appeal provision, Respondent would not be prepared to proceed with the arbitration.

[23] In response Raymond in a letter also of 6 December, clearly spelt out the Applicant's stance on the right of appeal and its motive for agreeing to the appeal. He stated:

> "1. The right of appeal to the Supreme Court was inserted at your client's instance, in an agreement drafted by your client's advocate. The arbitration clause was agreed to facilitate a speedy and efficient resolution to the problems.

In agreeing to vacate the property we accepted a guarantee less than our actual claim to ensure arbitration from which will flow the necessary legal consequences.

2. We conceded to you the right of appeal to the Supreme Court. This we did in full knowledge of the law (as you must have), which allows appeals only under very limited circumstances and this right still exists. The general right to appeal on the merits that you so forcefully insisted upon at the meeting of 28.11.2005, at the same time rejecting my opinion out of hand does not and never did exist, nor was it our intention…"

[24] On 07 December 2005 the Respondent's attorneys once again stated their understanding of the content of the right of appeal. The arbitration thereafter commenced on 12 December 2005. The Applicant was represented by Raymond and the Respondent by their legal representatives. After hearing evidence and argument the Arbitrator delivered his award on 21 January 2006. The award which was in favour of the Applicant, held that there was a binding contract between the parties and that the terms thereof were, "the JBCC principle building agreement (2000 ED)".

[25] On 25 January 2006 the Respondent filed a notice of appeal against the whole award and finding of the Arbitrator. Thereafter a further dispute ensued concerning the validity of the notice of appeal and Respondent's right to prosecute the appeal.

[26] On 13 February 2006 Respondent itself informed Applicant that there was uncertainty about the jurisdiction of the High Court to hear its

proposed appeal and asked Applicant to agree to a rectification of the arbitration agreement by affording an appeal to a tribunal appointed by the President of the Cape Bar. The Applicant was advised that should it deny the existence of a right of appeal, such denial would constitute a repudiation of the arbitration agreement entitling the Respondent to cancel the agreement. The Applicant refused to agree to such an appeal tribunal and maintained that the arbitration agreement was valid and enforceable.

The Main Application

[27] The provisions of Section 31 of the Arbitration Act grant this Court a general discretion to make an arbitrator's award an order of Court, thereby adopting the arbitrator's decision as if it were its own. The Applicant in a case such as this must prove that there was a valid arbitration agreement covering the award, that the Arbitrator was duly appointed, and that there was a valid award in terms of the reference. See *Butler and Finsen* "Arbitration in South Africa" Juta & Co. Ltd 1993 at page 273. Mr Gamble for Applicant submitted that Applicant had established these criteria and was entitled to the relief sought in the main application.

[28] Mr Olivier for the Respondent argued that the award could not be made an order of Court under Section 31 of the Arbitration Act as the award was not final and the appeal had not been disposed of. He argued further that should it be found that the appeal provision at paragraph 4 of the settlement agreement was invalid, the settlement agreement would likewise become invalid.

[29] The first issue to be considered is whether the filing of a notice of appeal by Respondent to this Court is a bar to the granting of an order in terms of Section 31 of the Arbitration Act as sought by Applicant. It will be so if this Court has the requisite jurisdiction to entertain an appeal against an arbitration award, for then a valid appeal would be pending.

[30] Generally the appeal jurisdiction of a High Court is circumscribed by Section 19 of the Supreme Court Act No. 59 of 1959, which at Section 19(1)(a)(i) provides for the jurisdiction of a High Court to hear and determine appeals from all inferior Courts within its area of jurisdiction.

[31] In addition appellate power may be vested in the High Court by Statute. Here, Mr Gamble pointed by way of example to Section 20 of the Health Professions Act, No 56 of 1974, which accords the right of appeal to a High Court by a person aggrieved with a decision of the Health Professions Council. The Arbitration Act does not accord a similar right of appeal to a High Court. There is no other general power which a High Court may exercise in relation to the hearing of an appeal to it other than from an inferior Court or in terms of a statutory provision. Certainly, a High Court does not have such power in terms of the common law or its inherent jurisdiction.

[32] Accordingly and flowing from this, a High Court has no jurisdiction to hear an appeal against an arbitration award. This much has been acknowledged by our Courts. In *Goldschmidt supra* at 577A - D Hiemstra, J stated;

> "The appellant labours under an erroneous reading of Section 28. The section is unfortunately phrased and can *prima facie* raise the impression that a right of appeal can be created by agreement. The

appeal there meant can, however, within the context only mean an appeal to an umpire or another Arbitration Tribunal. The common law in arbitration has always been that there is no appeal. Voet says so at 4.8.25… The only function of the Courts in regard to arbitration are to enforce an award, to give an opinion on a question of law in a stated case, to set aside an award because of some illegality or generally to regulate the proceedings. The Court will not take the place of the Arbitrator and decide the disputes on their merits."

In *Blaas v Athanassiou* 1991 (1) SA 723W at 724H, Hartzenberg J stated:

"I know of no legislation or Rule of any Court which creates a right or an opportunity for a party to arbitration to appeal directly to the Appeal Court. I think it can safely be accepted that the parties were wrong when they thought that the Appeal Court would entertain an appeal against the Arbitrator's award"

[33] These views are echoed in *Butler and Finsen*, *supra* at page 271:

"The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end; The Arbitrator's decision is final and there is no appeal to the Courts. For better or worse, the parties must live with the award, unless their arbitration agreement provides for a right of appeal to another arbitration tribunal".

McKenzie, *The Law of Building and Engineering Contracts 5th Edition* 1994 Juta and Company at page 184, similarly states,

"A provision for an appeal to a Court of law in an arbitration agreement is void".

[34] It is acknowledged that the very essence of arbitration is to

consensually remove a matter from the jurisdiction of the ordinary courts of the land, thereby depriving a party of the right to avail itself of a court's appellate jurisdiction. See *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun Pty Ltd* 1994 (1) SA 162A at 169F-H; *Patcor Quarries QCC v ISSROFF and others* 1998 (4) 1069 (SECLD) at 1085E-H.

[35] The further question that then arises is whether a High Court, by declaring a settlement agreement an order of court as in the present matter, can confer upon itself jurisdiction to hear an appeal, in this instance from an arbitration award. In *Goldschmidt supra,* at 577A Hiemstra, J confronted also with an application to declare an arbitration agreement appealable to a High Court by agreement, stated,

> "Private individuals cannot confer jurisdiction on the Courts which they do not possess in terms of the common law or of statute; Nor can they impose tasks upon the Courts which they are not legally obliged to perform".

It would be ludicrous if, for example, parties to a divorce who do not fall under the jurisdiction of a particular High Court were permitted to consent to its jurisdiction and that Court by confirming their consent would thereby be allowed to adopt jurisdiction.

[36] I therefore find that the appeal provision at clause 4 of the settlement agreement, in so far as it relates to an appeal to this Court is of no force and effect, and incapable of implementation as this Court lacks the requisite jurisdiction to hear an appeal against an Arbitration award. The filing of a Notice of Appeal by Respondent to this Court cannot, in the circumstances, be a bar to an order in terms of Section 31 of the Arbitration Act.

The Counter Application

Severability

[37] Mr Olivier argued that were I to find the appeal provision to be invalid, the settlement agreement must likewise be found to be invalid. The appeal provision, he stated, is a material term of the settlement agreement without which clause 4 of the settlement agreement would not have come into effect. That provision accordingly cannot be severed and the whole agreement must be declared invalid.

[38] In *Blaas v Athanassiou supra*, in circumstances very similar to the present, a clause in an agreement between the parties also provided for an appeal against the decision in an arbitration to the High Court. It was also there argued by the Respondent that as the appeal provision was a material term of the agreement, the agreement itself became invalid because of the invalidity of the appeal provision. Respondent's stance similar to the present case was that he would not have agreed to arbitration at all without the appeal provision. Finding against the Respondent Hartzenberg J at 725 C-D stated:

> "In my judgment, further, the right in the agreement as to an appeal, as opposed to an automatic right of review, was merely incidental to the main agreement, ie to submit to arbitration. In my view the Respondent is bound by the agreement."

These words are particularly apposite to this case where too, the appeal provision at clause 4 is clearly incidental to the main decision which is to refer the dispute to arbitration. That this must be so, appears from the fact that even though the issue of the appeal jurisdiction was not resolved between the parties prior to the actual arbitration, Respondent elected to participate in the arbitration. Respondent did so knowing full well there

was no certainty that an appeal against the arbitration award would lie to the High Court.

[39] This being so, I find that the appeal provision is clearly severable from the rest of the agreed order, it being incidental thereto. Its severance does not affect the validity of the settlement agreement.

Dissensis

[40] I now turn to consider whether the settlement agreement can nonetheless be set aside on the basis of dissensis, and whether the proceedings before the Arbitrator and the Arbitrator's award can accordingly be declared a nullity, as claimed in the counter application.

[41] There are two agreements which have a bearing on this enquiry. The first is the settlement agreement which was made an order of Court on 21 April 2005, and more specifically clause 4 thereof. The second is the arbitration agreement which has its genesis at clause 4, but the terms whereof were, as specified by the clause, still to be concluded between the parties.

[42] The principles guiding an enquiry into dissensis were referred to by Harms AJA (as he then was) in *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA)(Pty)(Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 239 G – 240B and restated by the SCA in *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 at 353J to 354D. In the latter case Brand JA referring to *Sonap* stated as follows:

> "In that case Harms AJA referred as his starting point (at 239 G-H) to the following frequently quoted statement by Blackburn J in *Smith v Hughes* (1871) LR6 QB 597 at 607, namely:

> ‘If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms’
>
> He then proceeded to formulate the key inquiry into matters of this kind as follows (at 239I-240B):
>
> ‘In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party as a reasonable man to believe that his declared intention represented his actual intention?... To answer this question, a threefold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party’s intention; secondly, who made that representation; and thirdly was the other party misled thereby?... The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?”

[43] It is clear that when the settlement agreement was being negotiated and importantly concluded, Ms Neethling insisted on and agreed to an appeal on the merits to the High Court, no more no less. Her reasons for doing so were made clear to both Mr Malan and Ms Neethling. She wanted the High Court to have the last say on the legal issues of contract raised in the arbitration. She specifically rejected a review stating that it would be too narrow to deal with any incorrect legal interpretation which might flow from the arbitration.

[44] Mr Egypt, in contrast as aforementioned stated he understood that the arbitration would not be subject to an appeal on the merits but a more limited approach to the High Court under section 33 of the Arbitration Act, akin to review, and he assumed Ms Neethling's understanding to be likewise on the basis of the contents of her letter of 20 April. I have difficulty in understanding how the words in her letter referred to by him convey what he suggests and how they lead to such an understanding, given the Respondent's clear and explicit insistence on an appeal on the merits, as conveyed to him by Ms Neethling.

[45] Mr Egypt did not during his discussions with Ms Neethling disclose his understanding of the term appeal. The reason for his silence, and for Respondent agreeing to the arbitration, notwithstanding Egypt's knowledge of the law that such an appeal would not be permitted, and notwithstanding Respondent's intention not to be bound by the appeal provision, was to facilitate a speedy and efficient resolution of the problems. This much is clear from Raymond's letter of 06 December. To achieve this Applicant misled Respondent into believing that what had been agreed to, was an appeal on the merits. Applicant's contention that it had no obligation to disclose to Respondent what the correct position in law was, given that Respondent was legally represented, does not detract from this.

[46] Applying the principles formulated in the *Sonap* case (supra) to these circumstances, dissensis was present when the settlement agreement was being negotiated. There was a misrepresentation as to applicant's intention to be bound by the appeal provision. Respondent was misled thereby into believing Applicant had agreed to an appeal on the merits. A reasonable person in the position both of Ms Neethling and indeed

Respondent, her client, would similarly have been misled given the preceding discussions, the clear expression by Ms Neethling of Respondent's understanding of the appeal provision, and the failure not only to disclose Respondent's differing understanding of the appeal provision, but its knowledge about the invalidity of the provision agreed to.

[47] Is the Respondent entitled to an order declaring the settlement agreement, proceedings before the Arbitrator and arbitration award void, given my finding on dissensis? I think not. For their subsequent conduct in performing in terms of the settlement agreement and participating in the arbitration, notwithstanding the existence of dissensis, is, in my view, a bar to their claiming such relief.

[48] It is clear that whatever dissensis existed when the settlement agreement was being concluded, at the stage when the provisions of the arbitration agreement were being concluded there was no dissensis, and certainly by the time the arbitration agreement was to be put into operation each party knew precisely what the other understood by the appeal provision.

[49] Notwithstanding the differences in opinion about an appeal, the Respondent chose to go ahead with the arbitration. It could at that stage have taken steps to prevent the arbitration but elected not to do so.

[50] To the extent that Applicant through its conduct may have been regarded by the Respondent at that stage already to be in breach of the agreement, such conduct could have been seen as constituting an anticipatory breach giving rise on the part of the Respondent to

immediate entitlement to exercise its remedies at law. The Respondent could have resiled from the agreement, or it could have held the other party thereto.

[51] The Respondent chose not to resile from the agreement but in fact demanded strict compliance with its terms, fully participated in the arbitration proceedings and later purported to exercise the right of appeal. In electing not to resile Respondent abandoned the right to challenge the validity of the contract. It is trite that a party to an agreement who is faced with two inconsistent remedies, must make an election between them and cannot both approbate and reprobate. A classic statement of this well established principle of the law of contract is that of Innes CJ in *Bowditch v Peel and Magill* 1921 AD 561 at 572:

> "A person who has been induced to contract by the material and fraudulent misrepresentation of the other party may either stand by the contract or claim rescission… It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception and the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate".

[52] In the circumstances there is no basis for the cancellation of the arbitration agreement, nor is there any basis upon which the proceedings before the Arbitrator and the Arbitrator's award can be declared a nullity. This, and my finding that the phrase at clause 4 of the settlement agreement providing for an appeal to this Court, is severable, does not entitle the Respondent to the relief it seeks in the counterclaim.

Costs in the Application for Security for Costs brought by Applicant.

[53] On 18 April 2006, after the Counter Application was launched, Applicant filed a Notice in terms of Rule 47 requesting Respondent to provide Security for Costs in the sum of R150 000.00. The grounds upon which security was claimed were as follows:

- Respondent had difficulty in providing security in its claim against Applicant by way of bank guarantee in the amount of R1 200 000.00 as provided for by an order of court under Case No. 3160/05;
- Mr Rober Richard Brendal, the sole member of Respondent, is not a South African citizen;
- Respondent's property is mortgaged up to its value;
- In the event of the Respondent's liquidation, the Applicant would not be able to recover costs from Respondent.

[54] The application for Security for Costs did not proceed. Applicant seeks an order that Respondent bear the costs occasioned in the drafting of the application. The application appears to have been well founded and Applicant should, I believe, be entitled to such costs.

The following order is made:

AD THE MAIN APPLICATION:

1. The arbitration award of Arbitrator Mr R Q le Roux, granted on 20 January 2006, is made an order of Court pursuant to the provisions of Section 31 of the Arbitration Act;
2. The Respondent is ordered to bear the costs of the main application;
3. The Respondent is ordered to bear the Costs

occasioned in the preparation of the application for security for costs.

AD THE COUNTER APPLICATION:

4. The counter application is dismissed with costs.

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MEER, J