Republic of South Africa

REPORTABLE JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **A590/2009**

In the matter between:

A.J DU TOIT N.O **Appellant**

And

THE ROAD ACCIDENT FUND **Respondent**

PRESIDING JUDGES	:	N.C Erasmus, Fourie et Le Grange, JJ
Counsel for Appellant	:	Adv R.F Van Rooyen (SC)
Instructed by	:	Simpsons Attorneys (WD Simpson)
Counsel for Respondent	:	Adv D. Potgieter (SC)
Instructed by	:	Z Abdurahman Attorneys
Date of Hearing	:	27 January 2010
Date of Judgment	:	19 May 2010

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(WESTERN CAPE HIGH COURT, CAPE TOWN)

Coram: ERASMUS, FOURIE et LE GRANGE, JJ

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In the matter between:

A.J. DU TOIT N.O **Appellant**

and

THE ROAD ACCIDENT FUND **Respondent**

JUDGMENT DELIVERED: 19 MAY 2010

Le Grange J:

[1] I had the opportunity of reading the judgment of my learned brother Fourie, J. It is correct as articulated in his judgment that in adjudicating the appeal, a distinction should be drawn between an arbitral award and a procedural ruling made in the course of arbitration. I also agree with Fourie, J's finding that the order made by the arbitrator on 7 April 2008 amounted to no more than an interlocutory procedural ruling and that our common law, and not section 33 of the Arbitration Act, dictates the approach

in dealing with an application for the setting aside of an interlocutory procedural ruling.

[2] Regrettably, I am constrained for the reasons stated herein, to disagree with Fourie, J's conclusion that the Respondent has failed to show the conduct of the arbitrator on 7 April 2008, considered against the factual matrix and circumstances underpinning this matter as well as the applicable legal principles and read with the rules of the Arbitration Forum, does not constitute a reviewable irregularity in the proceedings.

[3] In recent years, our Courts have repeatedly emphasised the important requirement of procedural fairness in the conduct of arbitral proceedings where an arbitrator acts in a quasi-judicial capacity. The same level of procedural fairness in court proceedings are however not required in arbitration proceedings, but it is accepted that the concept of fairness in arbitrations is context-related. In this regard see Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another 2009(4) SA 529 (CC) at 563 D and 599 C-D.

[4] Having regard to the facts of this matter, it is common cause that the Respondent's counsel were allowed to make introductory remarks concerning the merits of the application, whereupon the arbitrator *mero motu* initiated the debate with regard to the right to privacy with the Respondent's counsel. The Respondent's main complaint is that their counsel was not given a fair

and proper hearing by the arbitrator. In paragraph 29 of the Respondent's founding affidavit, the following is recorded:-

> *"...First Respondent never allowed Applicant's counsel an opportunity to present his argument on the merits or even fully to respond to the constitutional issue raised by First Respondent himself. None of the parties raised the issue on the application papers and Applicant certainly never raised or dealt with the issue in its argument. In fact First Respondent had not heard any argument at all from Du Preez's counsel but simply summarily and totally unexpected dismissed the application without allowing Applicant's counsel an opportunity to present his full argument."*

[5] The Appellant, in its replying papers, responded as follows to these allegations:-

> *"9.54 I did not share the alarm of the Deponent and neither did my counsel. It was in fact my firm view and that of my counsel, that Application was rightly refused. The only alarm and surprise which I expressed during the course of argument was in respect of Applicant's counsel's failure to readily accept the proposition put by First Respondent at the outset of argument relating the constitutionality or otherwise of the relief sought.*
>
> *9.55 In my respectful submission, First Respondent conducted himself appropriately in the proceedings and refused an application which was ill considered. The suggestion by the Deponent that inasmuch as the constitutional question had not been raised on the papers and therefore it was inappropriate for First Respondent to raise same, is absurd. It is trite that any aspect of law can be argued without reference thereto in papers before a Court or forum."*

[6] On a proper reading of the Appellant's papers, it is not in dispute that the Respondent's counsel was denied an opportunity to properly respond to the constitutional issue raised by the arbitrator and to present his argument on the merits. The Arbitrator, who abides by the decision of this Court, also does not take issue with these allegations.

[7] I am well aware that the aim and purpose of private arbitration, like in this instance, includes the fast and cost-effective resolution of disputes. In my view, robust debate and investigative procedures should be allowed and encouraged, as long as it is pursued in a just and fair manner. Moreover, if courts are too quick to find fault with the manner in which an arbitration has been conducted and too willing to conclude that faulty procedures are unfair or constitutes a gross irregularity, the goals of arbitration may well be defeated. In this regard see Lufuno Mphaphuli, *supra* at 599 E.

[8] In *casu,* the arbitrator summarily dismissed the application whilst argument was still being presented on the Respondent's behalf. Moreover, the Respondent's counsel was never granted an opportunity to address the arbitrator on the merits of the application as he was cut short when arguing the constitutional issue raised by the arbitrator himself. No reasons were then advanced by the arbitrator for his summary ruling. In the reasons filed subsequently, the arbitrator concluded it was not competent to grant the order sought by the Respondent, compelling Du Preez to submit to the assessment by Dr Paneri-Peter, because this would amount to an unjustified

infringement of Du Preez's right to privacy. The reasons advanced, in the context of this matter, are rather surprising as a similar order compelling Du Preez to submit to an assessment by Dr Hugo, was made by the arbitrator on a previous occasion.

[9] By agreement between the parties, the Rules of the Arbitration of Disputes in Road Accident Fund Claims are applicable to the arbitration under consideration. These rules do however not detract from the general requirement that an arbitrator should act in a just and fair manner which includes the rules of natural justice and in particular, the *audi alteram partem* rule.

[10] In my view, from the material facts underpinning this matter the arbitrator, despite his robust and investigative approach, failed to afford the Respondent a fair opportunity to properly and adequately present its case. In view of the history of this matter and the fact that the main issue in the arbitration is whether Du Preez has developed a psychiatric disorder (psychosis) as a consequence of the injuries sustained by him, the proper approach should have been to afford counsel of both parties a just and fair hearing. In this instance, even the claimant was not afforded an opportunity to present its case. This conduct on the part of the arbitrator exceeded the boundaries of robust debate and was manifestly unfair. This amounts to nothing less than extraordinary and exceptional circumstances that justify intervention.

[11] The fact that the Respondent did not specifically mention the wording that exceptional circumstances exist in their papers that justifies intervention, do not detract from the substratum of the Respondent's complaint.

[12] I am satisfied that the arbitrator's conduct, in the context of this case, amounts to a breach of the *audi alteram partem* rule which is a fundamental tenet of basic fairness and as such committed an irregularity that is reviewable. It is therefore unnecessary to deal with the other grounds of review raised by the Respondents in the Court *a quo*.

[13] The Court *a quo* accordingly did not misdirect itself in its finding and was justified in reviewing and setting aside the order granted by the arbitrator.

[14] The two remaining issues for consideration are, having regard to the finding that it was a procedural ruling, whether it will be in the interest of justice that the arbitration commence afresh before another arbitrator and the costs order granted by the Court *a quo*. In The Law and Practice of Commercial Arbitration in England (1989 ed) at 547, the authors Mustill and Boyd, stated the following:-

> *"Where a losing party complains that the reference has not been conducted in a fair and proper manner, it is almost invariable for him to claim in the alternative that the award should be set aside in whole*

or in part, or that it should be remitted to the arbitrator for further consideration; and even if setting aside alone is claimed, the Court will always consider of its own accord whether the remission would not be an appropriate remedy".

[15] A Court's discretion and power to remit even when no remittal was claimed in arbitration proceedings, was also confirmed in Basson v Herman 1904 TS 98 at 100 where Innes CJ, with whom Wessels, J and Curlewis, J concurred, held the following:-

"The Court has under our law a wide discretion, and could in my opinion refer the award back to the arbitrator to be rendered final and complete. But it does not follow that the Court will always follow that course; it will exercise its discretion. There may be circumstances when the Court would not only refuse to make an incomplete award a rule of Court but would treat it as null; but it does not follow that it is null unless the court so determines."

[16] Even though, the above-mentioned cases dealt with an award, I can see no reason why it could not apply to procedural rulings in arbitrations.

[17] I have considered the referral of this matter to commence afresh before another arbitrator. However, having regard to the history of this matter, the prohibitive costs and the fact that the arbitrator on a previous occasion made a similar order compelling Du Preez to submit to an assessment by Dr Hugo, I am of the view that justice will better be served if the matter is remitted to the arbitrator to afford counsel a proper hearing in respect of the application launched by the Respondent.

[18] For the reasons stated above, I am of the view that an appropriate costs order in the Court *a quo* should have been one that stood over for later determination.

[19] In the result the following order is proposed:-

The appeal is dismissed with costs. The order of the Court *a quo* is amended as follows:-

a) The ruling of the First Respondent (the arbitrator H M Carstens, SC) issued on 7 April 2008 is set aside;

b) The matter is remitted to the arbitrator to afford the legal representatives of both parties a fair and proper hearing in respect of the application, compelling Du Preez to submit to the assessment by Dr Paneri-Peter;

c) Costs to stand over for later determination.

LE GRANGE, J

I agree. It is so ordered.

ERASMUS, J