Republic of South Africa

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

Case No: 24218/2012

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

BAREND PETERSEN First Applicant
ANDREW MARALACK Second Applicant

and

SIZWENTSALUBA VSP Respondent

JUDGMENT: DELIVERED: 5 JUNE 2013

BINNS-WARD J:

[1] It is convenient in this case to first describe the relevant factual and legal context before turning to address whether the applicants are entitled to obtain in this forum that which they seek, which is orders directing the rendering by the respondent of a corrected or improved account. The account which they contend is incorrect or insufficient was rendered in purported compliance with an award made by an arbitrator in the course of as yet uncompleted arbitration proceedings for (a) the rendering of an account, (b) its debatement, and (c) the payment by the respondent of what might be ascertained thereby to be due by it to the applicants.

[2] On 9 October 2012, at the commencement of proceedings on the second day of the arbitration, the arbitrator acceded to a request by the parties to make an award by agreement in the following terms:

> By agreement between the claimants and the respondent the following award is made:
>
> 1. The final determination of claims 1 and 2 of the statement of claim in respect of Barend Petersen, the counterclaim of the respondent and the latter's defence of rectification shall stand over pending the final determination of paragraph 2 hereunder.
> 2. In respect of both the claimants respondent is directed to:
>
> 2.1 cause the valuation contemplated by clause 17.2 read with clause 17.3.3.4 of the partnership agreement to be performed;
>
> 2.2 cause the termination financial statements contemplated by clause 17.3.1 of the partnership agreement to be completed;
>
> 2.3 render a full account, supported by vouchers in respect of both the aforesaid valuation and the termination financial statements;
>
> 2.4 debate such valuation and such termination financial statements with the claimants; and
>
> 2.5 thereafter pay forthwith to the claimants respectively whatever amounts are found to be due to them upon such debate in accordance with clause 17.3 of the partnership agreement.
>
> 3. Save for cost awards already made, the costs of this arbitration, including the costs of the arbitrator, shall stand over for later determination.
> 4. Pending such determination, the arbitrator's fees, the costs of the venue of the arbitration and the costs of the transcription shall be paid equally by the claimants and the respondent respectively.
> 5. 5.1 The respondent shall furnish the claimants with the valuation and financial termination statements within four weeks hereof; and
>
> 5.2 The claimants and the respondent's representatives shall meet within three weeks thereafter to debate such valuation and termination financial statements.
>
> 6. The award may be made an order of court.

On its face the award was plainly an interim one.[1] It did not represent the conclusion of the arbitration.

[1]The definition of 'award' in the Arbitration Act includes an interim award; so the interim nature of the award did not constitute any impediment to its terms being made an order of court in terms of s 31(3) of the Act.

[3] Thereafter, and pursuant to an application made to an acting judge in chambers - apparently without notice to the respondent - the applicants obtained an order in terms of s 31(3) of the Arbitration Act 42 of 1965 in the following terms:

> 'That the arbitration award dated 9 October 2012 annexed to the Order as Annexure "A" is made an Order of Court pursuant to Paragraph 6 of the arbitration award and section 21 of the Arbitration Act No. 42 of 1965'.

The aforementioned interim award was annexure 'A' to the order. (The application should not have been sought through the chamber book.[2] It should also, in any event, have been made on notice to the other party.[3]However, nothing turns on those irregularities for present purposes. Furthermore, the reference in the court order to 'section 21' is an evident typographical error.)

[4] The subject matter of the arbitration concerned a claim by the applicants for the ascertainment and payment of the amounts due to them consequent upon their resignation from the respondent partnership. Clause 17 of the partnership agreement regulated the financial consequences of the retirement or resignation of a partner. Technically, of course, the partnership terminated upon such an event, but in the current case - unexceptionally in the context of a going business or professional practice conducted by a partnership - there was a provision in the partnership agreement for the immediate reconstitution of the partnership by the remaining partners.

[5] As always with matters of interpretation, clause 17 falls to be construed together with the other provisions of the partnership contract read as a whole. When the clause is read contextually it becomes apparent that the partnership agreement contemplated that each partner would have two capital accounts. This followed from the manner in which the

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[2]An application in terms of s 31 of the Arbitration Act is not one of the types of matter on the list of matters in respect of which applications through the Chamber Book are authorised in terms of Practice Note 37 of the Consolidated Practice Notes of the Western Cape High Court, Cape Town.

[3]Notice to the other party is expressly required in terms of s 31(1) of the Arbitration Act.

partnership was originally established upon the amalgamation of what had been separate Cape Town and Johannesburg partnerships ('the prior partnerships'). The partnership agreement records that the respondent partnership had purchased the prior partnerships at given values. Clause 5.2 of the partnership agreement provided that the purchase prices of the 'prior partnerships' would be discharged by crediting the total amount thereof to the capital accounts of the prior partners in the books of the new partnership proportionately to the partners' respective interests in the new partnership. In this respect the agreement made the following provision: '*The amount credited for each partner shall comprise 2 accounts (i) the capital account relating to the net asset value of the purchase price (basic capital account) and (ii) the capital account relating to the goodwill of the purchase price (goodwill capital account).*' The further provisions of the partnership agreement indicated that the amount falling to be credited to the aforementioned 'basic capital account' fell to be computed with reference to the difference between the total of the written down values of the assets of the prior partnerships and their liabilities. A partner's capital account relating to the goodwill fell to be determined with reference to the difference between the amount credited to the partner's basic capital count and that partner's share of the total purchase price of the prior partnerships determined *pro rata* the partner's percentage interest in the new partnership.

[6] Clause 17.1 to clause 17.3 of the partnership agreement provided as follows:

17. **SUCCESSION**

17.1 Upon termination of the partnership, the remaining partners shall succeed to the retiring partner's share of the assets and liabilities of the partnership in proportion to their partners' interests or in such other proportions as they may agree, subject to the provisions of clause 6.4;

17.2 Upon termination of the partnership, the management committee shall forthwith appoint a firm of chartered accountants to effect a valuation of the partnership as at date of termination,

such valuation to be completed within 60 (sixty) days of termination of the partnership, provided that if the partnership has, within the previous 12 (twelve) months:

17.2.1 obtained a valuation of the partnership; or

17.2.2 agreed the value of the partnership, which value has been recorded in the minutes of the partnership,

That value shall be deemed to be the value of the partnership as at date of termination.

17.3 The remaining partners shall pay the retiring partner (or his successor, executor or assign), except in the case of resignation, in consideration of his share, the aggregate of:

17.3.1 the amount, if any, standing to the credit of his basic capital account as at date of termination of the partnership. As reflected in the termination financial statements; and

17.3.2 his proportionate share according to his partner's interest in the partnership of the value referred to in 17.2 above

17.3.3 Notwithstanding anything to the contrary contained in this agreement, in the event of a partner resigning the goodwill portion relating to the value of the practise of such resigning partner will be dealt with as follows:

17.3.3.1 the goodwill portion of the value of the practice of such partner or the goodwill capital account of such resigning partner shall be credited to a special loan account that is due to the resigning partner.

17.3.3.2 The special loan account shall be repaid as and when any part of the partnership is sold and/or new partners are admitted and/or as and when any partner acquire an increased interest as contemplated in paragraph 6.4.

17.3.3.3 The proceeds of such acquisition above will be applied to redeem the loan account of the former partner and to pay the existing partners in the ration of the interest of the partners prior to the resignation of the former partner.

17.3.3.4 Such acquisition should be effected at the values determined by the valuation referred to in 17.2 of the agreement unless otherwise agreed to by all current and former partners.

17.3.3.5 No dividends, profits, voting, rights or losses will accrue to the former partner as a result of any outstanding balance due on the special loan account.

17.3.3.6 The former partner will be provided annually with the financial statements of the partnership until such time as the special loan account due to the former partner is redeemed.

17.4 …..

17.5 …..

17.6 …..

17.7 …..

(The context makes it clear that the term '*retiring partner*' in clause 17.1 and the introduction to clause 17.3 falls to be read to include a partner who has resigned, as provided for in clause 17.3.3.)

[7] It follows plainly, I think, on the basis of what has been described thus far, that the resignations of the applicants from the partnership, with effect from 10 January 2007 and 31 March 2008, respectively, triggered an obligation on the remaining partners - if the applicable valuations had not already previously been agreed and recorded in the minutes of the partnership as contemplated in the proviso to clause 17.2 - to obtain a valuation from a firm of chartered accountants and to draw up 'termination financial statements'. The evident object of the latter exercise is to allow the amount standing to be reflected in the retiring or resigning partner's 'basic capital account' to be updated as at the effective date of retirement or resignation and for the difference between that amount and the partner's interest in the value of the partnership as a going concern to be treated as standing to the credit of the partner's 'goodwill capital account'. A retiring partner is entitled to immediate payment of the amounts in his capital accounts computed according to this methodology. A resigning partner, like both of the applicants, is entitled to the immediate payment of his 'basic capital account', but the amount in his 'goodwill capital account' falls to be transferred to a special loan account and paid, as further provided in terms of clause 17.3.3, only as and when any part of the partnership is thereafter sold, or new partners admitted, or when any remaining partner acquires an increased interest in the reconstituted partnership.

[8] It is evident that the arbitration proceedings were instituted because the remaining partners of the respondent had failed to discharge their obligations in terms of sub-clauses 17.2 and 3 of the partnership agreement, or had failed to do so to the satisfaction of the

applicants. The matter was submitted to arbitration because the partnership agreement contained a provision that '[a]*ny dispute arising from or in connection with* [the] *contract shall be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa by an arbitrator or arbitrators appointed by the Foundation*'. As mentioned at the outset, it is also evident from the terms of the award that the arbitration has not been concluded. One of the issues that have been stood over for later determination in the arbitration is that of claim by the respondent for the rectification of the partnership contract.

[9] In their founding affidavit the applicants described the rectification claim as follows: '*In the arbitration the respondent sought to rectify the partnership agreement to reflect that the actual agreement amongst the partners was that the special loan account there referred to, would only be repaid when the partnership was sold*'. Although the averment was cast in the past tense, it is manifest *ex facie* the terms of the interim award, that the rectification claim is still a live issue in the uncompleted arbitration proceedings. Its determination is bound up in the matters that will in all likelihood fall to be debated and decided in the debatement contemplated by the arbitral award, and the outcome of the rectification claim will inevitably inform the amount of any payments that the respondent may be required to make to the applicants at the conclusion of the arbitration proceedings.

[10] It is plain therefore that the debatement and payment provisions in the arbitration award set out above are merely procedural directions given to regulate the consequences of an implied concession by the respondent that the applicants are entitled to an accounting. It is clear that what the award does is to prescribe a three stage process: (i) a rendering of an account, (ii) a debate of that account and (iii) payment of what appears upon such debatement to be due. In order to properly understand the interim award and the consequent order one has to have an appreciation of what is necessarily entailed in the process they prescribe towards the final determination of the applicants' arbitration claim.

[11] The object of the applicants' arbitration claim is to obtain payment of what they contend is due to them. An ultimately final award determining that amount in a liquidated amount should be the culmination of the process prescribed in the interim award. At the end of the prescribed process the applicants will need to have the final award made an order of court in terms of s 31(3) of the Arbitration Act in order to render it exigible against the respondent. The path to the final award that the applicants seek in the arbitration claims entails, by its nature, a progression of measures that can each give rise to or identify disputes between the litigants that will require intermediate determinations for the process to be kept moving. Thus after a determination has been made that the claimants are entitled to an accounting, the question of the sufficiency of the accounting consequently rendered may arise. That may require a declaration as to the adequacy or degree of insufficiency of the account rendered and the giving of directions for the correction or amplification of the account.

[12] It is only after that stage has been determined and any directions given in relation to it have been complied with that a meaningful debate between the parties, as contemplated in para 2.4 of the interim award, can occur. A debatement of account frequently does not result in the determination of the amount of the claim. As often as not it serves only to crystallise various questions that are in dispute and require adjudication before any obligation to make payment in an ascertained amount can be confirmed. The issues in dispute thus identified then fall to be submitted for adjudication to the court or tribunal seized of the claim.

[13] As observed, it is the culmination of the aforegoing process that results in an order or award that can give rise to the enforcement of a payment. The following description of the applicable practices and procedures in matters of this nature by Holmes JA in *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A), at 762F-D, has long been accepted as the authoritative exposition of the position in South African law:

What then should be the practice, for example, as to what either side must prove, what degree of accounting is required, and whether the debate of an ordered account must in the first instance take place between the parties? In the absence of Rules, the following general observations might be helpful:

1. The plaintiff should aver -
   (a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;
   (b) any contractual terms or circumstances having a bearing on the account sought;
   (c) the defendant's failure to render an account.
2. On proof of the foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account.
3. The Court might find it convenient to prescribe the time andprocedure of the debate, with leave to the parties to approach if for further directions if need be. Ordinarily the parties should first debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues. These could be set down for debate in Court. Judgment would be according to the Court's finding on the facts.
4. ….
5. If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account.
6. Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any).
7. In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require.

(In a matter like the current one, in which the claim has been referred to arbitration, the references to '*the Court*' in the passage cited from *Doyle's* case should be read as referring to the arbitration tribunal and the reference to '*judgment*' as one to an award.)

[14] I have sought in the aforegoing discussion to illuminate the extent to which the interim award did no more, in effect, than to confirm that an accounting was due by the

respondent to the applicants and to delineate the procedures to be followed thereafter towards a determination of the applicants' claim for a final award sounding in money. I have also sought to demonstrate, by highlighting the interim nature of the award described in the introduction to this judgment, the uncompleted task of the arbitration tribunal thus far and the continuing role for it that is inherent in the process prescribed in terms of the interim award.

[15] Against that background it is time to address the application currently before the court. The respondent has purported to comply with its obligation to render an account by furnishing a valuation prepared by Ngubane Inc, a firm of chartered accountants. The valuation was premised on the net value of the assets of the partnership, excluding goodwill. It is clear from the valuation report that the partnership was not valued as a going concern. This was an obviously misconceived basis to have undertaken the valuation because it does not provide a valuation undertaken on the basis that clause 17.2 requires, that is a valuation of the partnership as a going concern. Mr *Sibeko* SC, who appeared for the respondent, conceded as much, advisedly so in my view. The question that arises is whether the identified flaw in the account rendered is a matter to be confirmed by the court, with directions to be given by it as to how and by when the shortcomings are to be remedied, or whether thoseare matters for the arbitration tribunal.

[16] The valuation report also contains a statement that the valuer had been informed by the respondent that it was not possible to prepare termination financial statements as required in terms of clause 17.3 of the partnership agreement. That seems an implausible assertion by the respondent, but whether it is actually correct or not requires a factual enquiry. The applicants' counsel sought to contend it was a baseless statement because what had purported to be termination financial statements had in fact been produced by the respondent at the first stage of the arbitration hearing. (Copies of these were annexed to the applicants' replying affidavit.) It is apparent, however, that what had been produced had not been acceptable to

the applicants as termination financial statements, so the applicants' argument does not take them anywhere for present purposes. It is evident that that the respondent's assertion is going to have to be investigated and its validity, or otherwise, determined. The question is by whom, a judge or the arbitrator?

[17] In paragraphs 2-4 of their notice of motion in the current application the applicants seek orders:

> 2. Directing respondent forthwith to comply with paragraph 2.1 and 2.2 of the order of this Honourable Court dated 12 November 2012 [this is an evident reference to para 2.1 and 2.2 of the interim arbitration award that was incorporated in the court order]by providing a full account to applicant in terms of paragraph 17.2 read with 17.3.1 and 17.3.3.4 of the partnership agreement, annexure BP1 to the founding affidavit of Barend Petersen.
> 3. Directing respondent, in furnishing such account, to make provision therein for the valuation of the applicants' goodwill capital account in accordance with paragraph 17.3.3 of the aforesaid partnership agreement.
> 4. Alternatively, directing respondent in accounting to applicants in respect of their respective capital accounts to base such accounting on the partnership valuation of R46 million of March 2006 in respect of first applicant and that of R47,5 million of September 2007 in respect of second applicant.

[18] The respondent contends in its papers that the application is an abuse of process because the applicants seek no more than what has already been provided for in terms of order made in terms of the arbitral award. If regard is had to paragraphs 2 and 3 of the notice of motion taken at face value there would appear to be some merit in the argument. The content of the supporting affidavits, however, makes it evident that what the applicants are in fact seeking is directions from the court for the production by the respondent of an improved or corrected valuation account. (In respect of the termination financial statements, the relief sought is indeed nothing more, in effect, than a reiteration of the already given order.) If it were contended that the respondent by failing to produce such statements was being wilfully

non-compliant, rather than unable to do so, as it contends, the proper course would have been for the applicants to apply for a committal of the remaining partners for contempt of court.

[19] The respondent has emphasised the uncompleted state of the arbitration proceedings and contended in its answering affidavit that the '*merits of the issues*' - which I have understood to mean the adequacy of the account that has been rendered and whether it was indeed impossible, for the reasons reported in Ngubane Inc's valuation letter, to produce termination financial statements - are the very subject matter of those proceedings. The deponent states '*The arbitrator is yet to hear and make an award on whether any of the Applicants have established a claim against the Respondent on the issues pleaded; whether the rectification that which the Respondent claims should stand, will be established and all the ancillary issues between the parties*'.

[20] Mr *Fitzgerald* SC, who appeared for the applicants assisted by Mr *Dewrance*, conceded that the wording of paragraphs 2 and 3 of the notice of motion could have been improved to express more pertinently the nature of the relief being asked for by the applicants, but moved to meet the opposition based on the notion that any difficulties with the account that had been rendered were a matter to be dealt with at the arbitration, not in this forum, by arguing that the relief sought arose out of inadequate compliance by the respondent with an order of this court. He submitted that they thus fell to be dealt with in the remit of the court and not in the arbitration. He also contended that by agreeing to the interim award, and in particular paragraph 6 thereof, the respondent had consented to the court disposing of the issue of the sufficiency of the account rendered.

[21] I am not persuaded by the arguments advanced on behalf of the applicants. They amount to this: Because the court has endorsed a provision in the arbitral award directing the respondent to render an account, it is seized of dealing with the adequacy of the account. Taken to its logical conclusion the argument would also have to hold that because the court

had furthermore endorsed the provision in the award that the account should be debated, it should also become seized of adjudicating any issues identified for determination in the course of that debate, and because it had ordered that payment should be made at the conclusion of the debatement process (one which takes place initially between the parties and thereafter in respect of unresolved matters before the adjudicating forum) it should, having determined the debatement, give a judgment sounding in money in favour or dismiss their arbitration claim, as the case may be. This plainly cannot be so.

[22] The effect of the interim arbitral award, properly construed in the context described above, was to do no more than confirm the applicants' entitlement to an accounting as directed and to identify the steps to be followed thereafter. The court's order in terms of s 31(3) of the Arbitration Act added nothing to the effect of the interim award other than to render the respondent liable to contempt proceedings should it wilfully and contemptuously fail to comply with the duty to render the account. Paragraph 6 of the award merely acknowledged the susceptibility of the award to this mechanism of state assisted enforcement. It was not directed at the introduction of a parallel means of determining any issues that are *res integra* in the arbitration proceedings.

[23] The sufficiency of any account rendered in purported compliance with the order is a matter to be determined in the arbitration. It is a matter that arises in the process for the further determination of the arbitration set out in the interim award and the subsequent court order. As observed in the passage from the judgment in *Doyle's* case quoted earlier, issues of the sufficiency of an account rendered and those arising in the context of debatement can sometimes be correlated, and the forum seized of them might find it appropriate to deal with them together. The current matter may or may not present such a case, but the fact that it is the forum seized of the case that in *its* discretion determines whether it is convenient to deal with the resulting issues in a particular way merely underscores the inappropriateness of this

court accepting the invitation of the applicants' counsel to deal with issues that trench on those falling to be dealt with by the arbitration tribunal.

[24] Mr *Fitzgerald* argued that the respondent had not contested the court's jurisdiction to deal with the relief sought in the application. I do not think that submission is supported on a proper reading of the answering papers. Although the point might have been more lucidly expressed, it is nevertheless sufficiently clear, in my view, that the respondent has contended that the issue of the sufficiency of the account is a matter to be dealt with in the arbitration; correctly so.

[25] In any event, even if the respondent had not expressly contested the court's jurisdiction, its failure to have done so would have been of no moment. Irrespective of any position adopted by the respondent, there are pertinent legal principles and important policy considerations that militate against the propriety of the court entertaining the application. When parties agree privately that a dispute between them be resolved through arbitration in terms of the Arbitration Act, they thereby impliedly exclude any right to an appellate process through the court system and they limit interference by courts in the determination of the dispute to the grounds set out in s 33(1) of the Arbitration Act.[4] They cannot thereafter purport by agreement to impose jurisdiction on the court which their reference to arbitration has impliedly excluded; cf. *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243), at para 51.

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[4]Section 33(1) of the Arbitration Act provides:
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 its powers; or
(c) an award has been improperly obtained,
(d) *the court may on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.*

[26] As I have sought to demonstrate, the issues that the applicants would have this court determine are integral to the processes inherent in the claims submitted to arbitration. It would be unwholesome and contrary to sound principle that the determination of some of them be amenable to appeal in terms of court system because of a misdirected assumption of jurisdiction by the court, and others not so, because they happen to be properly decided within the arbitration process to which the applicants' claims remain subject.

[27] By acceding to making the order in terms of s 31(3) of the Arbitration Act, the court did not - and indeed could not competently - ascribe to itself a jurisdiction which the very act of referral by the parties of the claims to arbitration had excluded. The purpose of an order in terms of s 31(3) is to lend force to an arbitral determination in the form of end-results; it is not to serve as a platform to transfer to the court for determination unresolved issues that fall within the scope of the arbitration. The fact that the order might pertain to an interim, rather than a final, award does not derogate from this principle. Assuming that no issue as to its legality or enforceability on grounds of public policy arises,[5] a court that makes an order in terms of s 31(3) does not go into the merits of the matter giving rise to the arbitral award. As already mentioned, the purpose of the order is only to assist in the enforcement of the award by the ordinary processes and procedures of the court quite unrelated to the merits of the matter.[6] It is a form of assistance to which any party who obtains relief in terms of an arbitral award is entitled. Dealing with the merits of an arbitration claim is a matter which,subject

[5]Cf. *Hubbard v Cool Ideas 1186 CC*[2013] ZASCA 71 (28 May 2013).

[6]As pointed out in the minority judgment of Kroon AJ in the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*2009 (4) SA 529 (CC) (2009 (6) BCLR 527), at para 25, arbitrators have no powers to enforce their awards and the effectiveness of the private process therefore rests on the binding, even coercive, powers that the state entrusts to its courts. Arbitration awards made orders of court may be enforced in the same manner as any judgment or order to the same effect, including execution by state mechanisms, which constitutes an integral part of the resolution of disputes between parties and,being antithetical to self-help, is an important facet of the rule of law. (The majority judgment of O'Regan J did not derogate from Kroon AJ's exposition in this respect.)

only to the provisions of the Arbitration Act,[7] falls exclusively within the jurisdiction of the arbitration tribunal.

[28] The applicants have thus misconstrued the import and effect of the order they obtained in terms of s 31(3) of the Arbitration Act. The application was consequently misconceived.

[29] The application is therefore dismissed with costs, including the costs reserved by Rogers AJ in the postponementorder made on 22 January 2013.

A.G. BINNS-WARD
Judge of the High Court

JUDGMENT	:	**The Honourable Justice A.G. Binns-Ward**
FOR THE APPLICANT	:	**Adv. M.J. Fitzgerald SC**
		Adv. M. Dewrance
INSTRUCTED BY	:	**Bowman Gilfillan Inc.**
		Cape Town
FOR THE RESPONDENT	:	**Adv. L.T. Sibeko SC**
INSTRUCTED BY	:	**MabuzaHewuInc**
		Johannesburg
DATE OF HEARING	:	**30 May 2013**
DATE OF JUDGMENT	:	**5 June 2013**

[7]See, for example, ss 3(2), 6, 7, 20, 21, 32(2) and 33 of the Arbitration Act.