CIV/APN/77/90

IN THE HIGH COURT OF LESOTHO

In the matter between :

THABISO LEBALLO Applicant

and

CANA HIGH SCHOOL Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 23rd day of November 1994

The applicant asks for an order that the award made by an arbitrator (Adv. J. Kambule) made on the 20th July 1989 be made an Orders of Court. He also asks for an Order for Costs, further -- and/or alternative relief.

"Arbitration is a procedure whereby a dispute between the parties is determined extra-curially. Certain statutes provided for compulsory arbitration but we are concerned with arbitration pursuant to a written contract which provides for the reference to arbitration of an existing on future dispute relating to matters specified in the contract whether an arbitrator is named or designated therein or not" (See Amler's Precedents of Pleadings, Harms, Fourth Edition, at page 28) (my underlining) "The award of an arbitrator is a final adjudication of the dispute between the parties and an arbitrators award can be raised in a plea of *res judicata*. Any award, may on application to a division of the Supreme Court of competent jurisdiction, be made an Order of Court and will then be enforceable as such" (See Amlers, page 30) (my underlining).

The proceedings herein consist in the Applicant's notice of motion to which was attached the agreement between the parties Annexure A), the arbitration proceedings (Annexure B) which is a bundle consisting of:

B1. a letter dated the 3rd January 1989 from Mrs Mahlakeng, Mr. Mahlakeng to the Headmaster of Cana High School. (page eight of the record).

B2. Submission to arbitration, (pages nine to ten of the record.

B3. Copy of a letter dated 23rd January 1989, from Adv. J. N. Kambule to Mr. Thabiso Leballo (Applicant) (page eleven of the record).

B4. A copy of a letter dated 23rd January 1989, from Adv J. N. Kambule, to the Headmaster Cana High School, (page twelve of the record).

B5. Submission (statement of the matter in dispute) to the Arbitrator by Mr. Mahlakeng Attorney for the Applicant. B5 (pages thirteen to sixteen of the record.

B6. A letter dated 20th July 1989 from Advocate J. N. Kambule addressed to Lesotho Centre (allegedly intended for Respondent), (pages seventeen and eighteen of the record).

B7. Proceedings of the arbitration between the parties, (pages nineteen to thirty seven). The proceedings themselves being numbered one to nineteen.

B8. A letter dated 30th May, 1988 from the Respondent (allegedly for Respondent), (page thirty eight of the record).

B9. Miscellaneous calculations for materials by Applicant dated 14th June 1988 (page 39 of record).

B10 Conditions of contract between Applicant and Respondent of 1st May 1988, (page 40 of record).

B11 Letter dated 6th October 1988 - headed "Application for financial assistance", (pages forty one and forty two).

B12 Estimated Bill of materials, 20th August 1988, (pages forty three to forty six.

B13 Letter dated 6 October 1988, from the Headmaster of respondent, headed "Revised Estimated Bill of Material (pages forty seven and forty eight).

B14 Letter dated 29th November 1988 from Applicant to Ntate Seipobi (page forty nine) B14.

A Notice of Intention to oppose was served on the 21st March 1990. It was only on the 18th June 1990 that the Respondent served an answering affidavit which accompanied a Notice of Counter-Application (being an application for review). I would find no fault with the procedure itself. This counter-application sought for the following Court Orders:

"1. That the appointment of Advocate J. Kambule as an Arbitrator in a dispute between the Applicant and the Respondent be reviewed and set aside.

2. That the Arbitral Award made by advocate J. Kambule in a dispute between the Applicant and the Respondent be reviewed and set aside.

3. The Respondent be awarded costs of this application.

4. That the Respondent be grated such further and/or alternative relief that the Honourable Court may deem fit."

The Applicant duly filed his replying affidavit on the 17th September 1990.

It became common cause that the parties entered into a building contract/agreement in terms of which (at a price of M60,000.00) the Applicant would reconstruct some classrooms of the Respondent's school. The written agreement of the parties is that B10. At some stage of the building works a dispute arose which the Applicant says was a result of the breach of the agreement is that :

(a) Respondent failed to effect payment as agreed in the contract.

(b) Respondent did, contrary to the provisions of clause one to eight of the agreement (B10 - Annexure A) engage Applicant's workmen without the Applicant's consent to complete the remaining portion of the job."

In terms of clause 1.9 of the written agreement the matter was referred for arbitration by the Applicant,. The Applicant says in his founding affidavit.

"8

The matter was duly arbitrated upon and the arbitrator made an award in terms of which the Respondent is to pay the sum of M15,012.00 together with the sum of M1,000.00 in respect

of the costs of the arbitration proceedings or such an amount as may be taxed on a scale established for legal practitioner in the High Court. Annexed hereunto marked "B" is a copy of the award and arbitration proceedings.

I am making this application in terms of section 32 of Act No.12 of 1980 to have the award made an Order of Court." This Act No.12 is the applicable Arbitration Act in Lesotho. The Act is to provide for the settlement of dispute by arbitrator tribunal of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals and for connected matters" (see preamble). In the Section 2 of the Act an arbitration agreement is defined as "a written agreement providing for reference to arbitration of any existing dispute or any

future dispute relating to a matter specified in the agreement whether an arbitration is named or designated therein or not."

I may right away single out the points that stood out for argument by Mr. Mahlakeng for Applicant and Mr. Mathe for Respondent. They were as follows:

(a) That the counter-application is irregular it being in contravention of section 34(2) of the Arbitration Act which requires that in seeking to set aside the arbitration award an application pursuant to this section shall be made within six weeks after the publication of the award to the parties.

Provided that when the setting aside at the award is requested on the ground of corruption, such application shall be made with six weeks after discovery at the completion and in any case not later than three years after the date on which the award was so published.

(b) That the award cannot be set aside on any of the grounds enumerated in section 34(i) of the Arbitration Act which are:

(i) misconduct on the part of a member of the tribunal in relation to his duties (see 34(1) (a) or

(ii) gross irregularity in the conduct of the proceedings exceeding the powers by the tribunal (see 34 1 (b)) or

(iii) obtaining the award improperly (see 34 1 (c))

(c) The appointment of the arbitrator (Advocate Kambule) was done by the Applicant unilaterally, without consultation with the Respondent and was therefore irregular. That the appointment, the referral and the award ought to be set aside.

(d) That the award was published irregularly and in contravention of section 26 of the Arbitration Act which reads:

"26 Publication of award -

(i) The award shall be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear."

It also became common cause that (despite this award having been made on the 29th July 1989) it was only on the 21st March 1990 that the award was sought to be challenged. That is, assuming the Notice of Intention to Oppose is deemed to be the beginning of such challenge. Then the question would be When did the Respondent begin to know of the award? Was it at the time it was made or was it on being served with the Application? What are the probabilities?

It furthermore became common cause that the award was made in the absence of the Respondent. The Applicant says that Respondent was duly summoned, for which he produced annexure B6. The letter is addressed to: Lesotho Centre, P. O. Box Kingsway, Maseru.

There is no indication that it was copied to anybody. This letter bears the same date as the awards itself. The letter reads in part:

> "I have completed the Arbitration proceedings in the above matter. Furthermore, I am in the process of typing the findings thereon and hope that they will be ready before the 27th July 1989, being the day on which I have to publish them".

This is followed by quite extensive summary of his findings, at the end of which (second page) he says:

> "Therefore Cana High School owes Mr. T. Leballo an amount of M15,012.00. Cana High School is to pay the costs of these proceedings in the sum of M1,000.00, or an amount to be taxed on a scale established for attorneys in the High Court of Lesotho."

It is this letter which the Respondent denies having received. It is this letter which is said to amount to a notice of the publication of the award. Not only is the form of notice debatable. To me it looks like at the time notice was given publication was being made (albeit in a summary form) of the award itself. It is significant to note that in the founding papers nothing is made to explain the circumstances of the publication of

the award. Any attempt towards attending to this aspect is found in paragraph 4.4 of the Replying Affidavit which reads:

> " I deny the contents therefore and aver that the award was indeed delivered on the 27th July 1989."

This is in reply to the Respondent's assertion that the award was not published nor delivered in terms of section 26 of the Arbitration Act, it having not been delivered in the presence of both parties to the dispute or their representatives. The Respondent was referred to the supporting affidavit of the arbitrator, Advocate Kambule which reads:

> "2.1 I did deliver the award on the 27th July 1989 after having duly summoned the parties to appear.
>
> 2.2 The Applicant appeared in person whereas there was no appearance for the Respondent. I duly delivered the award on the 27th July 1989 being the date set down for delivery of the same."

Indeed we are not told of how the notice was delivered nor any circumstances which can lead to an inference that the Respondent refused or neglected to attend having been accordingly summoned.

I agree with the Respondent's submission that when it comes to the appointment of an arbitrator it would be in accord with the spirit of the provisions of the Arbitration Act, as well as the intention of the parties that the appointment of an arbitrator should be agreed upon. (See Raphael vs Stephen 1915 CPD 16) I did not take to the view that the section 5(3), 6(3)(a) and section 11 (1) actually prevent one party appointing as arbitrator and asking the other to consent to the appointment. In this regard I refer to section 5(3) which speaks of that: "..... a dispute shall be deemed to have been referred to arbitration if any party to the dispute has saved on the other party or parties there to a written notice requiring him or them to appoint or to agree to the appointment of an arbitrator....." To the extent that the parties duly attended on arbitration proceedings without any objection from neither side I would decide that the requirements of this subsection were complied with. I do not accept the argument that appointing an arbitrator by one side is a sign of or a ground for suspecting bias. That is not sufficient. It must be shown that there was real bias (see LAWSA Vol.1 page 277 and cases referred to in footnote 17). It means that, therefore I find no fault with the Applicant having appointed the arbitrator. I do not agree that the law is that at all times the parties must mutually

appoint an arbitrator. I have found the two cases cited by the Respondent's Counsel not helpful. The case of Dipenta Africa Construction (Pty) Ltd vs Cape Provincial Administration 1973(1) SA 666 (c) concerned a dispute as to a choice of an arbitrator between a Senior Counsel and an architect where technical issues were involved. In this case each party had sought to appoint a single arbitrator. The Court ended up appointing an architect. The case is also authority for the proposition that in any agreement the reference is to a single arbitrator unless it is agreed otherwise in the arbitration agreement. The case of Graaff Reinet Municipality vs Jansen 1917 CPD 604 concerns the case of two arbitrators and an umpire appointed by Consent where the other arbitrator was found to have acted fraudulently and induced the award dishonestly. The award reached was set aside as a result. While the case might be authority for the proposition that the defect in the arbitrator's appointment will be cured by the subsequent appearance before the arbitrator, I would say that the decision in that case also rested on its individual set of facts. It did not address the crisp question of whether or not an arbitrator is disqualified by reason of his having been appointed by one party while no objection was raised during the proceedings to the appointment and where the other party was seen to consent to

such an appointment. I would decide that the Respondent is estopped from questioning the appointment of the arbitrator. I would furthermore observe that the Respondent acquiesced and consented to the appointment of the arbitrator, having had notice of such appointment. This appears to be just in these circumstances where there is no authority for the contrary view and where the Arbitration Act itself does not proscribe such conduct of the parties. (See also Section 11(3) of the Arbitration Act). The section provides for the setting aside of the appointed arbitrator by consent where the other party is dissatisfied. The Respondent had an opportunity to protest against the appointment. (See Grand Brothers vs Harsant 1931 WPD 477). The alleged irregularity did not amount to a denial of justice. I refer to the appointment of the arbitrator and the original sitting.

I am persuaded that the probabilities are that at the time of delivery of the award the Respondent was absent. I am not convinced that the Respondent did know of the date of the award or the fact of the award being due for delivery on a specific date. It is evident from the ruling in Annexure B that the ruling was made in the absence of Respondent on his legal representative. *Ex facie* the Annexure the parties were not present on the 20th July,

1989. Despite what the arbitrator Advocate J. N. Kambule in his evidence (in the Replying Affidavit) says that on the 27th July 1989 he had summoned the parties to appear, this allegation appears not proved. At least I am not persuaded. I am not convinced that the letter B6 demonstrates service and notice of its contents. The affidavit of Advocate Kambule is clearly unhelpful where he says only:

> "2.1 I did deliver the award on the 27th July 1989 after having duly summoned the parties to appeal.
>
> 2.2 The Applicant appeared in person whereas there was no appearance for the Respondent. I duly delivered the award on the 27th July 1989, being the date set for delivery of the same."

One does not see how he summoned the parties to appear. It is clear therefore that I would find it difficult to hold the Respondent to the time stipulated in the proviso to section 34(2) (six weeks) to apply for review of the proceedings. Interestingly the section speaks of corruption. Counsel for Respondent did not

go out to allege corruption being a ground for complaint. In any event the Respondent's complaint (in the counter application) is still within three (3) years as contemplated in the said proviso, "In any case not later than three years after the date on which the award was so published." I definitely find nothing to gainsay the Respondent when it says it first knew of the award when served with the application. I have already said that nothing points towards the Respondent having been served. It is clear therefore that I cannot decide for Applicant on this aspect.

What in law is the effect of my finding that there is no proof that the Respondent has not been summoned to appear and that it was absent when the award was published? I did not find a clear authority suggesting that the failure to summon a party to an award and the absence of such a party is one of the grounds on which an award may be set aside. Such ground on which an award shall be set aside are misconduct by the arbitrator, conduct not amounting to legal misconduct, gross irregularity is the conduct of arbitration proceedings and the arbitrator exceeding his powers. Voet says at 4.8.15 (as quoted in the Law of Arbitration in South Africa - paragraph 89 at page 94)." The judgment moreover must in the first place indeed be given by the arbitrator in the presence

of both parties, unless it has been arranged that that may be done even in the absence of them. Consequence of absence - otherwise if it has been pronounced in the absence of one or the other party, however lawfully he may have been summoned, then it is indeed *ipso jure null.*" (my underlining) It is clear that the position as at the time of Voet was even more rigorous in its requirement for attendance of the parties. "An award should be delivered by the arbitration tribunal to the parties or their representatives but may be delivered in the absence of any party or his representative if he has been summoned to attend and fails to do so. (See the Law of Building Contracts and Arbitration in South Africa 3rd Edition - W.S. Mckenzie)

I have in the course of my research come across the case of Collins and Co. vs Brown 1923 WDD 450 at 451 where there was an objection against confirmation of an award covering many items of dispute between the parties. It appeared that in respect of one portion the arbitrator had heard evidence in the absence of one of the parties. The Court (per Dove-Wilson JP) commented as follows in the judgment." In my opinion, therefore the proper cause at this stage, is to remit that part of the award which purports to determine the amount upon which the 10 per cent commission is

payable to the arbitrator for his reconsideration, he always have regard to the fundamental rule that he must hear both parties and take the evidence in the presence of both, unless after due notice either of them declines to take part in the proceedings, and the award, of course must be final and definite." The case of Grant Brothers vs Harsant 1931 WDD is indeed one of the extreme cases where the Court found proved that

> (1) a large number of the matters which were to be determined by the arbitrators were disputed questions of fact.
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> (2) On no occasion was the Respondent afforded an opportunity of leading evidence before the arbitrators on any of those questions or upon any of the other matters in dispute.
>
> (3) That the Respondent was never even advised that the arbitration proceedings had commenced and knew nothing of those proceedings until his solicitor was advised that the award was made. Where there was no suggestion of want of <u>bona fides</u> nor misconduct in the legal sense but one party having lost confidence in the arbitrators the award was set aside.

Acquiescence at various stages of the dispute between the parties may estop one party challenging the award (See Generally Russell on Arbitration 20th Edition A. Walton and M Vitoria pages 432-436 - Acquiescence and Estoppel and pages 266-272 Waiver of

procedural objections). When a meeting took place of which one of the parties had had no notice, but nothing was done except to discuss the question of adjournment, the meeting having been in fact adjourned without the subjects of the reference being entered upon, the Court refused to set aside the award on the mere ground of the party having had no notice of the meeting Re: Morphett (1845)2 and 967, 14 QB 259. In the English case of Harvey vs Sheldon 845 7 Beavans Reports page 114 the parties without notice to each other privately consulted the arbitrator and one wrote a letter not giving a copy to the other Lord Longdale MR had this to say:

> "This is not a matter of mere private consideration between the two adverse parties, but a matter concerning the due administration of justice, in which all persons who may ever chance to be litigants, in the Courts of justice or before arbitration, have the strangest interest in maintaining that the principles of justice shall be carefully adhered to in every case. Under these circumstances, I am of the opinion that this award cannot stand and I must therefore grant this motion.

The learned authors David Butler and Eyvind Finsen (in Arbitration in South Africa Law and Practice 1993) in commenting about the section 25(1) of the South Africa Arbitration Act (which is similar to section 26(1) of our Arbitration Act) have this to

say at page 267, which I quote at length:

> " The Arbitration Act requires the arbitrator to deliver the award in the presence of the parties or their representatives, having summoned them to attend upon him at an appointed time and place. The provision contemplates that the arbitrator will call on the parties to attend at his offence, or some other appropriate venue, where he will deliver the award to them. He may first read out his award to them, or merely hand each a copy. If one party fails to attend, it appears that the arbitrator can discharge his duty to deliver the award by handing a copy to the one who does attends.
>
> No similar provision was contained in the colonial predecessors of the present Arbitration Act or in current or previous English legislation. The requirement of delivering the award in the presence of the parties find some support in the common law, but as early as 1858, it was stated that it was the universal practice in the Cape Colony not to require the presence of the parties at the delivery of the award.
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> Prior to the commencement of the present Act, it became a common practice for an arbitrator to advise the parties, when he had completed his award, that it could be uplifted by the first party applying at his office to do so and paying his fee. The arbitrator thus exercised his lien on his award and, if the award was duly collected, ensured payment of his fee. If the party who uplifted his award was the successful party and was therefore awarded costs, he would be entitled to recover the amount disbursed on the arbitrators from the other party."

My initial impression in looking at the Section 26 (1) was that, on strict law, the effect of failure to attend by a party (who had not been summoned to attend) was to nullify the award. This seemed

unjust in the absence of an allegation tending to show mala fides or outright corruption in the legal sense. With these statement of the law by the learned authors (Finsen and Brutler) one can safely say that it appears just, in the circumstances of the present case and according to law to find that there are no serious grounds upon which the award would be set aside.

I accordingly allow the Application and dismiss the counter-application with costs to the applicant.

T. MONAPATHI
JUDGE

23rd November, 1994

For the Applicant : Mr. Mahlakeng

For the Respondent : Mr. Matsau