CIV/APN/141/2002

IN THE HIGH COURT OF LESOTHO

In the matter between :

NTHABISENG MOTSOPA **Applicant**

and

KORI MOTSOPA **1st Respondent**
MINISTRY OF WORKS **2nd Respondent**
THE ATTORNEY GENERAL **3rd Respondent**

RULING ON POINTS IN LIMINE

Delivered by the Honourable Mrs. Acting Justice A.M. Hlajoane

On the 12th August, 2002

In this case, the Applicant launched an Application seeking for an interdict against the 2nd Respondent from releasing some money amounting to M41,200.00 being assessed value of her mother's premises and site situated at Ha Mohasoa. It is the Applicant's case that she is entitled to the said money as she has entered into an agreement with the 2nd Respondent for the same.

Applicant is saying that this compensation money is to be paid by the 2nd Respondent to the person entitled in law to be compensated in relation to the site of Mokhali Motsopa and Limakatso Motsopa, who were husband and wife both of which are now late. The compensation is a result of a public road construction work to be made upon the site in question.

It has also been the Applicant's case that she is the only child of the late Limakatso Motsopa and as such an heir to her estate. She goes further to state that she has filled an agreement form with the 2nd Respondent in which it is reflected the measurements and the amount of compensation she had to receive after the passing away of her mother Limakatso Motsopa.

In filing his opposing papers the Respondent raised the following points in limine ;-

(a) That the matter is not urgent.
(b) That there are serious dispute of facts.
(c) Non disclosure of material facts.

ON URGENCY

There was no delay in filing this Application by the Applicant once she came aware that the cheque was in the 1st Respondent's name, but the salient question is whether indeed the matter is urgent. **In Republic Motors v Lytton Service Station 1971(2), SA 516** cited in the case of **Lesotho University Teachers and Researchers Union v National University of Lesotho C of A (CIV) 13/1998,** the court had this to say that ;

> *" the procedure of approaching the court ex-parte for relief that affects the rights of other persons is one which in my opinion is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of audi alteram parterm".*

It would seem therefore that the abovementioned remarks were not heeded in the present case.

The relief sought in our case is for an interdict, which if the rule was to be confirmed would have the final effect. I will quote the relevant prayers,

> " *that the said amount of money shall not be released to the Applicant as the lawful heir of the late Limakatso Motsopa*".

As has been shown in the leading case of **Setlogelo v Setlogelo 1914 AD 221** on final interdicts, one of the requisites to a claim of interdict is a clear right. Could it therefore be said that the Applicant on the papers has managed to establish a clear right. On the papers Applicant has failed to establish such a right. She ought to have established a clear right right before coming to the compensation money. The Application therefore has failed the test for urgency

DISPUTE OF FACT :

In filing his opposing papers, the Respondent clearly disclosed his defence in that he is saying Applicant is in fact not the heir to the estate of Limakatso Motsopa as she is the daughter of one Meriam 'Molaoa who is the sister of Limakatso Motsopa. This of cause is denied by the Applicant. The dispute obviously cannot be resolved on papers as would be a matter of evidence.

In the case of **Majara v Majara and another 1985-90 LLR 344**, the court dismissed the Application when the question of legitimacy arose. The court in

dismissing the Application showed that the dispute of legitimacy could not easily be resolved on papers.

Even in our case the question of legitimacy is an issue, which issue can not easily be resolved on papers. Consequently therefore the Application falls to be dismissed.

NON-DISCLOSURE

It is the 1st Respondent's case that in fact the Applicant is only not the legitimate child of Limakatso Motsopa but also that she is also married into the Moshesha family and cannot therefore be an heir in the Motsopa family in the absence of any will.

In reply the Applicant says that the 1st Respondent is only making bare allegations which he does not support with any evidence by saying she is married to the Moshesha family. **Room Hire Co. (Pty) Ltd. V Jeepe Street Mansions 1944 (3) S.A 1155.** But the Applicant in our case in her founding affidavit shows that she is a married woman. To quote her she says *" I am the Applicant herein, a female adult (duly assisted by husband)"*. You cannot be duly assisted by a husband when you are not married. This shows that Applicant has not been candid with the court, she did not find it befitting to take this court into her confidence,

CIV/APN/476/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

Raubex Construction Lesotho (Pty) Ltd **Applicant**

and

T. Moruthane **Respondent**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On the 12th day of August 2002

The story that is about to unfold in this matter goes like this. In January 2000 the parties herein signed a "Joint Venture Agreement" annexure "GMR 2" (the Agreement) the sole object of which was to negotiate and conclude a contract with the Government of Lesotho for the execution of the road construction works and to carry out such works to finality. It is common cause that the profit and losses of the joint venture would, in terms of clause 3.1 of the Agreement be borne by the Applicant and the Respondent in the proportions 60% and 40% respectively. It is

important to bear in mind here that the parties were then on good terms and no foul play was probably anticipated.

As matters turned out however, as they sadly often do in business transactions of this nature, one of the parties, as I read the papers before me, was subsequently overcome by greed to the extent that he seized the monies earmarked for the Joint Venture and simply refused to pay the other party's share thus breaking in the process the fundamental duty of utmost good faith (*uberrima fidessima)* which is the cornerstone for any partnership or joint venture.

In due course resort was made to arbitration in terms of the Agreement between the parties and the arbitrator, one Adv. M.H. Wessels, S.C. ruled in favour of the Applicant and thereby made the following award:-

1. The defendant (now Respondent) is found to be indebted to the claimant (now Applicant) in the amount of **M1,836,129.00**, liable to pay such an amount to the claimant and ordered to do so.

2. The defendant is found to be liable to pay interest to the claimant on the aforesaid amount from date of publication of this award (**12 October 2001**) to date of payment of the said sum and ordered to pay such interest to the claimant.

3.

3.1 The defendant is found to be liable to pay the costs of this arbitration and ordered to do so.

3.2 Such costs shall be taxable and taxed on the High Court scale as between party and party and shall include the costs of the pretrial conference which was held on **17 July 2001** and the application by the claimant for a ruling which was heard on **22 August 2001** as well as the qualifying fees/expenses of the expert witness, the chartered accountant, Mr. **KRITZINGER.**"

Relying on section 32 of the Arbitration Act 1980 (the Act), the Applicant has then applied to this Court for an order in the following terms:-

"1. That the Award of the Arbitrator in the Arbitration between Applicant and Respondent dated 12 October 2001 be made an order of this Court.

2. That the costs of this application be paid by the Respondent.

3. Further and/or alternative relief."

For the avoidance of doubt section 32 of the Act referred to above in turn provides as follows:-

"32. Award may be made an order of Court –

(1) An award may, on the application to a court of a court (sic) of competent jurisdiction by any part to the reference after due notice to the other part or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any

> patent error arising from any accidental slip or omission.
>
> (3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

It is sufficient for me to say at this stage that I approach this matter on the basis that the Court has a discretion whether or not to make the award in question an order of Court. It requires to be emphasized, however, that this is a judicial discretion which must not be exercised arbitrarily or for a wrong purpose. It is, in my view, a discretion that must be exercised after due consideration of all the relevant factors. I proceed then to deal with such facts as are relevant in the determination of this matter purely in that context.

It is Applicant's uncontroverted case that after completion of the construction works referred to above it procured the preparation and auditing of, *inter alia*, a profit and loss account for the undertakings of the Joint Venture. Save for a bare denial, it is not seriously disputed that such audit in turn revealed a total loss suffered by the Joint Venture in the amount of M3,060,215.00.

It is Applicant's case which is again met with no more than a bare denial that sixty percent (60%) of the aforesaid loss of M3,060,215.00 totals an amount of M1,836,129.00 which the Respondent has failed and/or refused to pay to Applicant being the latter's share in terms of the Agreement.

Against the above-mentioned background, the Applicant wrote to the Respondent on the 11th May 2001 per annexure "GMR3" in terms of which it gave him notice, as required by the Act, of a referral of the dispute to arbitration. It is further important to note that the letter annexure "GMR3" also referred to the Arbitration Agreement between the parties in the following terms:-

> "Our client is desirous of resolving the disputes as soon as possible in order to give effect to the provisions of clauses 12.2 and 13 of the JOINT VENTUE AGREEMENT. In terms of clauses 15.2 and 16 of the Agreement any unresolved differences or disputes between our client and yourself shall be submitted to and decided by arbitration.
>
> Therefore, kindly take notice that this letter serves as a notification in terms of Section 5(3) of the Lesotho Arbitration Act of 1980 in that you are hereby required to agree to the appointment of Jacobus Jan Daniel Havenga (an independent accountant) as an Arbitrator to direct all further arbitration proceedings and to arbitrate all existing and remaining disputes between the parties.
>
> Should you agree to such appointment, writer hereof must be notified accordingly and in writing on or before 22 May 2001. If no reply is received from you on or before such date, a meeting of the partners and/or their representatives of the Joint Venture will take place on 29 May 2001 at 9:00 am in the foyer

of the Lesotho Sun Hotel in order to reach agreement as to the appointment of another arbitrator. Should you fail to attend the said meeting, or should the required agreement not be reached, we shall, without any further delay and in terms of Section 13(2) of the Arbitration Act, apply to court for the necessary appointment of the Arbitrator."

Clauses 12.2, 13, 15.2 and 16 of the Agreement in turn provide as follows:-

"12.2 After the completion of the contract and the release of all bonds, guarantees and obligations given for the performance of the parties in the Joint Venture, the Joint Venture shall procure the preparation and auditing of a final balance sheet and profit and loss account, which shall be approved by the Management Committee, and from which the final profit and loss sustained by the Joint Venture shall be ascertained, and distributed to or contributed by the Parties in proportion to their participation in the Joint Venture. This clause shall not be construed as prohibiting the interim distribution of profits or contribution towards losses in the discretion of the Management Committee.

13. Upon the determination of the Joint Venture in accordance with the provisions of this agreement, a full and general account shall be taken of the assets and liabilities of the Joint Venture and of the transactions and dealings thereof, and with all convenient speed, such assets shall be sold and realized and the proceeds applied in paying and discharging such liabilities and the expenses of and incidental to the winding-up of the Joint Venture affairs and thereafter in paying to each Joint Venture member its share of such proceeds in the Specified Proportions. The Joint Venture members respectively undertake to do all such things as may be necessary so as to give effect to the above.

15.2 In the event of any differences or dispute of whatsoever nature arising from this agreement (which shall include any failure to agree on any matter which requires the Parties' agreement for the purposes of implementation of this agreement) or any other matter related thereto which cannot be settled by direct negotiation between

the Parties, such differences or dispute shall be referred to arbitration in terms of Clause 16 hereof.

ARBITRATION

16.1 Save as hereinafter provided, any dispute at any time between any of the Parties hereto in regard to any matter arising out of this agreement or its interpretation or rectification shall be submitted to and decided by arbitration.

16.2 The arbitration referred to in 16.1 shall be held:-

16.2.1 At **Bloemfontein**

16.3 The arbitrator shall be, if the question in issue is:-

16.3.1 Primarily an accounting matter, an independent accountant;

16.3.2 Primarily a legal matter, a practicing Senior Council (sic) of not less than five years standing as such;

16.3.3 Any other matter, an independent person unanimously agreed upon between the parties and failing agreement appointed by the President for the time being of the South African Federation of Civil Engineering Contractors.

16.4 The arbitrator shall decide the matters submitted to him according to what he considers just and equitable in the circumstances and, therefore, the strict rules of law need not be observed or be taken into account by him in arriving at his decision."

On 18 June 2001 the Respondent reacted to the Applicant's proposal to have Mr. Daniel Havenga appointed as arbitrator in the following terms in annexure "GMR12":-

"Following our meeting on Friday 15th June we wish to advise that the firm Havenga Rossouw Viljoen via their Mr. F.W. Liebenberg have been appointed by our company Mashai Group Holdings to act as our consultants. We do not know whether the appointment of Mr. Daniel Havenga will be objective (sic).

> We advise again that the dispute is not only of an accounting nature but there are legal implications as well. We suggest that Mr. Havenga be appointed and a legal professional person to be agreed upon by the joint venture partners as another arbitrator."

As will become evident later in the course of this judgment the Applicant did in fact object to Mr. Havenga's appointment as per annexure "GMR15" dated 27 June 2001.

As previously stated, the Applicant in turn proposed the name of Advocate M.H. Wessels S.C. as joint arbitrator with Mr. Havenga per annexure "GMR13" dated 21 June 2001.

In his response as per letter annexure "GMR14" dated 22 June 2001 or annexure "TM2" attached to Respondent's opposing affidavit (the two annexures are in fact identical), the Respondent quite significantly did not object to the appointment of Adv. M.H. Wessels S.C. as arbitrator as such. On the contrary, a proper reading of annexure "GMR14" has left me in no doubt, and I accordingly so find, that the Respondent accepted the appointment of Adv. M.H. Wessels S.C. as arbitrator. That letter which was addressed to Applicant's attorneys reads as follows:-

> "Webber Newdigate
> P.O. Box 2176

MASERU 100
Kingdom of Lesotho

Attention: Mr. D.P. Molyneaux

Dear Sirs,

Re: Partnership Dispute: Mashai/Raubex Joint Venture: Contracts 330 – 99/2000 and 317 – 99/2000

We acknowledge with thanks receipt of your letter dated 21st June regarding the appointment of advocate M.H. Wessels S.C.

We need a meeting with your client (Raubex), Mr. Havenga and advocate M.H. Wessels, so as to agree on how the arbitration will be conducted.

Details of Mr. F.W. (Erick) Liebenberg, mobile phone (083) 308 4232, (051) 448-8188 Office, (051) 448-8179 telefax. We will phone your office to agree on dates, time and venue.

Our regards.

T. Moruthane

Cc: Havenga Rossouw Viljoen

Raubex: Bloemfontein

Webber Wentzel Bowens."

As could well be expected, on 27 June 2001 the Applicant's attorneys wrote a letter annexure "GMR15" to the Respondent in terms of which they communicated to him the fact that Mr. Havenga had in fact declined to act as arbitrator in the matter in the light of the fact that, as previously stated, the Respondent had already instructed him to act on his behalf in the arbitration. More importantly, the Applicant then proposed that Adv. M.H. Wessels S.C. be the sole arbitrator and that the meeting proposed by the

Respondent as per annexure "GMR14" referred to above would be held on 17 July 2001 at Counsel's Chambers where the latter would "meet the parties and their representatives."

What transpired at the meeting with the arbitrator, Adv. M.H. Wessels S.C. on the 17th July 2001 was recorded by Applicant's attorneys in a letter annexure "GMR16" addressed to the Respondent and bearing the same date in the following terms.

"Mr. T. Moruthane
Mashai Transport Hire
P O Box 2176
MASERU
100

Your ref: Mr. T. Moruthane
Our ref : Mr D.P. Molyneaux/kb (R137) Date 17 July 2001

****Facsimile: (09266)316488****

Dear Sir.

Re: PARTNERSHIP DISPUTE: MASHAI / RAUBEX JOINT VENTURE: CONTRACTS 330-99-2000 AND 317-99-2000: MEETING ON 17/7/2001 WITH ARBITRATOR

We record that a meeting was held with the arbitrator, Advocate M.H. Wessels SC, at 10 am on 17/7/2001. The writer represented Raubex (Applicant) and you were represented by Mr. H. Tlali.

In the course of the meeting Mr. Tlali indicated that, although he had authority to represent you at the meeting, he did not have authority to bind you to specific time limits or pre-trial formalities. In these circumstances, the arbitrator suggested that the meeting be postponed and that the parties attempt to reach agreement on the formalities leading up to the hearing of

> the arbitration and that, should the parties not be able to reach such agreement, then a further meeting be held with him at which meeting he will give a ruling on the pre-trial formalities which cannot be agreed upon. Both the writer and your Mr. Tlali agreed to this suggestion with the result that the meeting was then postponed for us to put forward a proposal for agreement in respect of such pre-trial formalities and for you to either agree or disagree with such proposals and, in the event of such disagreement, to make any counter proposals which you see fit.
>
> We now enclose herewith our proposal in respect of such pre-trial formalities and would be pleased if you would respond thereto by either indicating agreement or disagreement with any or all of the proposals. Such indication must reach us by the 25th July 2001.
>
> Please note that we have taken the liberty of sending a copy of this letter to your representative, Mr. Liebenberg of the firm Havenga, Rossouw and Viljoen.
>
> Yours faithfully
>
> **WEBBER NEWDIGATE**".

Indeed it is not disputed that the meeting with the arbitrator, Adv. M.H. Wessels S.C., did take place as arranged on the 17th July 2001 and that annexure "GMR16" accurately records what transpired thereat. In particular I accept that one Mr. H. Tlali actually represented the Respondent at the said meeting before the sole arbitrator, Adv. M.H. Wessels S.C.

On 23 July 2001 the Respondent wrote a letter annexure "TM1" to the Applicant's attorneys in which he now sought to suggest that he did not attend the meeting with the sole arbitrator on 17 July 2001 because it was the King's birthday in Lesotho. The

second paragraph of this letter is crucial in the determination of this matter and therefore merits quotation in full. It reads:-

> "We are not happy with Advocate Wessels being appointed as a sole arbitrator in this case. We are proposing a more practical manner of this arbitration case, which will be fair to both parties. As you are a lawyer by profession we will need to appoint our representative who is equally qualified as you to advise us on this matter" (emphasis added).

I have underlined the word "sole" to highlight the fact that the Respondent did not object to the appointment of Adv. M.H. Wessels S.C. as arbitrator as such. The real objection was directed at the latter acting as a sole arbitrator. Support for this view is to be found in the fact that the Respondent then made his own counter proposals in annexure 'TM1" in which he stated as follows in paragraph 17 thereof:-

> "Mashai (the name under which Respondent was trading) will not pay any fees to advocate M.H. Wessels because they do not approve of him as a sole arbitrator (Raubex so Mashai understands will pay whatever fees advocate Wessels charges" (emphasis added).

It will be recalled that Raubex is the present Applicant.

In my view, therefore, it is as clear as daylight that the Respondent fully accepted that Adv. M.H. Wessels S.C. would sit as arbitrator afterall. Otherwise there would be no need for

Applicant to pay him fees as an arbitrator at all as suggested by Respondent.

Alternatively, it is my considered view that if the Respondent did not want Adv. Wessels S.C. to act as arbitrator at all, he would have said so in clear and unambiguous terms. He would not have associated himself with the latter as arbitrator as suggested by his subsequent conduct coupled with correspondence referred to above.

If authority be needed for the proposition that it is permissible to have regard to the subsequent conduct of the parties to identify what they intended in their contract see for example *Twenty Seven Bellevue CC v Hilcove 1994 (3) SA 108(A) at 114.*

Which brings me to the defence raised by the Respondent in this matter. The Respondent's trade-mark answer to Applicant's claim is no doubt to be found in paragraph 6 of his opposing affidavit wherein he complains that the arbitration in question was proceeded with by the Applicant "unilaterally without an Arbitration Agreement having been entered into in terms of clause 16.3.3 of the Joint Venture Agreement and indeed without any

compliance with the applicable clauses of the Arbitration Act of 1980."

In my view the complaint relating to the "applicable clauses of the Arbitration Act of 1980" can quickly be dismissed for lack of particularity to enable the Applicant to know exactly what case to meet. This is a principle so fundamental, indeed so elementary that no authority is strictly called for.

The Respondent's complaint that the arbitration was proceeded with "unilaterally without an Arbitration Agreement having been entered into in terms of clause 16.3.3. of the Joint Venture Agreement" is also without merit and stands to be dismissed. As I read clause 16.3.3 of the Agreement, that clause only applies to "any other matter" other than one that is primarily an accounting matter (clause 16.3.1) or one that is primarily a legal matter (clause 16.3.2). Now it is common cause in this matter that the dispute in question was primarily a legal matter for which it was sufficient to have one arbitrator only, namely a Senior Counsel of not less than five years standing as such (clause 16.3.2). There was no dispute, and indeed I so find, that Adv. M.H. Wessels S.C. qualified. As I have stated above, and as I repeat now, there was

no real objection to Adv. M.H. Wessels S.C. acting as an arbitrator as such in the matter. Nor is it disputed, as the arbitrator himself states in his ruling, that Mr. H. Tlali actually represented the Respondent at the latter's request at the hearing of the arbitration on 1 October 2001. Nor is this Court unmindful of the fact, which is again common cause, that at no stage did the Respondent seek the removal of Adv. M.H. Wessels S.C. as arbitrator in the matter by order of Court. Nor did he propose any other arbitrator to replace him. In this regard it is pertinent to have regard to the provisions of section 14 (2) (a) of the Act. It says this:-

> "The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office."

Lest it be thought that the Court has overlooked it, something must be said briefly about the definition of the term "arbitration agreement" in the Act. This is to be found in section 2 thereof and it provides as follows:-

> "arbitration agreement" means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not."

In my view an arbitration agreement does not have to be cast in stone in order to qualify as such. It is sufficient if, on a proper

reading of an agreement between the parties, it can reasonably be construed that the parties intended their written undertaking to be an arbitration agreement. On this test therefore, and bearing in mind the contents of clauses 15.2 and 16 of the Agreement between the parties, I am satisfied that they did in fact enter into an arbitration agreement.

One final complaint by Respondent remains to be dealt with shortly. He complains in paragraph 23 of his opposing affidavit that Applicant is not entitled to payment in terms of the award "as it (the Applicant) has even failed to prove to this Honourable Court how the figures therein were computed and arrived at ....." He further complains that the arbitration proceedings were irregularly conducted – once more a bare allegation devoid of any particulars necessary to enable the Applicant to know exactly what case to meet. I should add that the same thing goes for the Respondent's complaint that the dispute between the parties is "riddled with disputes of fact" without identifying them. Nor is the Court, in the particular circumstances of this case, impressed with the Respondent's further complaint that the Order prayed for shall subject him to extreme prejudice and irreparable harm merely because of "the magnitude of amounts involved." It is, in my view,

the Respondent's delaying tactics that are prejudicial to the Applicant. The history of this matter as fully set out above is self evident in that regard.

I have looked at the arbitrator's award forming the subject matter of this application and can find nothing in support of the Respondent's complaints as set out above. Certainly, in my view, the arbitrator did not commit any irregularity in the conduct of the arbitration proceedings. He considered the correspondence between the parties and the Respondent's conduct as fully set out above and came to the conclusion that the latter was "well aware" that the arbitration hearing would take place "at the time and venue when and where it did." The Respondent has got only himself to blame for having absented himself.

In any event, it is clear from the arbitrator's award that the evidence of an independent chartered accountant, Mr. Kritzinger, as well as Mr. Fourie, the Manager of the Joint Venture Project, was placed before the arbitrator and that the amount claimed was proved to the satisfaction of the arbitrator "on a balance of probabilities." More importantly the arbitrator in my view correctly took into account the fact that "not one of the claimant's

(Applicant) allegations as contained in his statement of claim was contradicted or placed in issue." The oral evidence placed before the arbitrator equally remained uncontradicted.

It is salutary to bear in mind that, putting aside the question of downright invalidity *ab initio,* an award by the arbitrator remains valid and enforceable until it is set aside or remitted to the arbitrator by an Order of Court notwithstanding any perceived irregularities. See for example *Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another 2002 (2) SA 1097 (C) at 1114D-1.*

Indeed section 29 of the Act significantly provides that unless the arbitration agreement provides otherwise, an arbitration award shall, subject to the provisions of the Act, be final and not subject to appeal and that each party to the reference shall abide by and comply with the award in accordance with its terms. In this regard the remarks of Goldstone JA in *Amalgamated Clothing & Textile Workers Union v Veldspun Ltd 1994 (1) SA 162 (A) at 169* bear reference. The learned Judge of Appeal said this:-

> "When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the Supreme Court under s3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the

> decision of the arbitrator. There are many reasons for commending such a course, and especially so in the labour field where it is frequently advantageous to all the parties and in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the Courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith."

It is a matter of cardinal importance in favour of the Applicant then that the Respondent has not even applied to Court either to remit the arbitration award to the arbitrator or set it aside in terms of sections 33 and 34 of the Act. Those sections provide as follows:-

> "33 Remittal of award –
>
> (1) The parties to a reference may within six weeks after the publication of the award to them, by any writing signed by them remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the parties may specify in the said writing.
>
> (2) The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.
>
> (3) When a matter is remitted under sub-section (1) or (2) the arbitration tribunal shall, unless the writing signed by the parties or the order of remittal otherwise directs, dispose of such

matter within three months after the date of the date (sic) of the said writing or order.

(4) Where in any case referred to in sub-section (1) or (2) the arbitrator has died after making his award, the award may be remitted to a new arbitrator appointed, in the case of a remittal under sub-section (1), by the parties or, in the case of a remittal under sub-section (2), by the court.

34. Setting aside of award –

(1) 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, 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.

(2) 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 of the award is requested on the ground of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.

(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

> (4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court."

I have further taken into account the fact that the Respondent has no *bona fide* defence to Applicant's claim. He simply relies on a bare denial of liability without more and, as I have previously stated, his conduct clearly amounts to delaying tactics.

To highlight this point it is no doubt necessary to refer briefly to the affidavits filed in this matter.

In paragraph 9 of the founding affidavit George Muller Raubenheimer deposes as follows:-

"9

> The abovementioned profit and loss account showed a total loss suffered by the Joint Venture in the amount of M3 060 215,00 in its undertaking of the construction works referred to above, for which loss the Respondent is liable towards the Applicant in his specified proportion of 60% of the said loss."

Respondent's bare denial appears in paragraph 10 of his opposing affidavit in the following terms:-

"10.

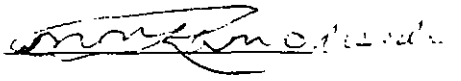
AD PARA 10 THEREOF:

> Contents herein made are specifically denied as Applicant has intermittently failed to act in accordance with clause 7.1 of the Joint Venture Agreement, inclusive of other relevant clauses of the said Agreement. Applicant is put to the proof of the averments herein made."

It requires to be stressed that referral to arbitration is a procedure designed to ensure finality and expeditious disposal of litigation between parties. This was no doubt the scheme and object of the Act. It follows therefore that bare denials such as is the case here cannot be allowed to frustrate the arbitration process.

All factors being considered, as indeed I have endeavoured to demonstrate in the course of this judgment, I have come to the conclusion that this is a fit case for the exercise of the Court's discretion in favour of the Applicant.

The application is accordingly granted in terms of prayers 1 and 2 of the Notice of Motion.



M.M. Ramodibedi

JUDGE

12th August 2002

For Applicant: Adv. P.J. Loubser

For Defendant: Mr. N. Mphalane