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Recent Constitutional Court decision on arbitration raises questions

By Jonathan Ripley-Evans

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On 9 February 2017, the Constitutional Court handed down a judgment that may ultimately prove to be a significant departure from South Africa's established legal practice, at least insofar as contractual relations in the petroleum retail industry are concerned.

The Petroleum Products Act (duly amended) has introduced a statutory form of arbitration for the resolution of certain contractual disputes arising between licensed retailers and wholesalers operating in the petroleum industry (whether this satisfies the requirements for classification as an arbitration is a debate for another day). In terms of s12B(1), a party can refer a dispute alleging an ‘unfair contractual practice’ to the Controller of Petroleum Products (Controller), who may then in turn, refer the parties to arbitration. No agreement to arbitrate is required.

Until the 9 February 2017 judgment, s12B(1) was interpreted rather restrictively, which resulted in only a few disputes being referred to arbitration. In Business Zone 1010cc v Engen Petroleum Limited and others, the Constitutional Court substantially widened the ambit of s12B by reducing the discretion afforded to the Controller not to refer a dispute alleging an unfair contractual practice to an arbitrator for determination.

In the Pretoria High Court, Engen argued that, as the contract upon which the dispute arose had been cancelled, the question could not relate to a ‘contractual practice’. Further, as the question of cancellation was then pending before another division of the High Court, Engen argued that the arbitrator was not entitled to consider the question of an alleged unfair contractual practice. These contentions were rejected by the High Court but Engen ultimately found favour with the Supreme Court of Appeal (SCA). Business Zone subsequently appealed the decision of the SCA to the Constitutional Court.

The Constitutional Court ultimately found in favour of Business Zone and set aside the decision of the SCA. As a result, the question of Engen’s unfair contractual practice was then referred to an arbitrator for determination.

Significant judgement for arbitration matters

This judgment is significant in a number of ways.

The scope of the dispute, and ultimately the jurisdiction of the arbitrator, is defined in s12B(4) of the Act, which states that an arbitrator 'shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice'.

In terms of this section, an arbitrator is not empowered to make any determination, which exceeds a finding on fairness or reasonableness. That means that principles of lawfulness for example fall outside the jurisdiction of the arbitrator. It would therefore appear that an argument that a lawfully concluded contract expressly permits the conduct concerned would fall outside of an arbitrator's jurisdiction. Such a defence is based on the law of contract and not on principles of fairness or reasonableness. The maxim that 'agreements are to be upheld' therefore plays no role in such proceedings. Only principles of fairness and reasonableness are relevant - a drastic departure from the rule of law one might say.

South African law does not embody a historical jurisprudence based on principles of equity and fairness to the exclusion of private law rights. Equity and fairness are not legal concepts clearly defined in our law. Not only will arbitrators be called upon to make a call without the assistance of years of jurisprudence to guide them in reaching a decision, their decision will be final and binding on the parties. To make that clear: an unsuccessful party cannot appeal such an award where the statute prescribes that the award will be final and binding.

Drawing on the jurisprudence of our labour courts is not extremely helpful either. Labour disputes are normally resolved in a different manner and are aimed at protecting entirely different interests compared to the purely commercial interests here relevant.

Arbitrations are mostly conducted in private. Most of the widely accepted rules, in terms whereof arbitrations are administered, impose the strictest forms of confidentiality on the parties covering the proceedings and the ultimate award itself. Arbitral awards are kept secret and are not relied upon or even referred to in arbitrations, which follow. A s12B arbitration is no exception, further fuelling arbitrary decision making and removing the ability to learn from previous advancements or mistakes in applying these principles.

Unwieldy mechanism

In light of this recent interpretation of s12B, we are now burdened with a mechanism to refer an alleged dispute relating to contractual unfairness against a possibly unwilling and un-consenting participant, to an arbitrator (in the absence of agreement) potentially appointed solely by the Controller, empowered to potentially apply principles of equity and fairness to the exclusion of principles of law and to force him or her to reach a decision to which no appeal will lie, which will most likely remain confidential, thereby depriving further arbitrators the opportunity to learn from such decisions.

How does this process affect well-established private law rights? Is a claim based in contract then extinguished by such a

decision? If so, how do we reconcile this with the principle that each party should be afforded equal opportunities to advance their own case and to exercise their own rights?

Importantly, if the parties choose an arbitrator and the rules under s 12B(2), can this decision be regarded as having been made freely? Further, would such an agreement protect the arbitrator from the danger of a review under PAJA?

I do not think that this beast has a name yet but it has certainly reared its head.

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