An arbitrator is allowed to be wrong

By Jeffrey Kron & Sarah Forshaw

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Legislation and case law has helped to foster South Africa as an arbitration-friendly jurisdiction, in which courts are loath to interfere with the decisions of arbitrators...

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In January 2020, the Johannesburg High Court handed down judgement in *Khum MK Investments and Bie Joint Venture (Pty) Limited v Eskom Holdings Soc 2020 JDR 0187 (GJ)* reaffirming this position.

The applicant brought review proceedings to set aside an arbitration award in which the arbitrator upheld the first respondent's special plea of prescription. The court had to resolve the question whether, in terms of section 33(1)(b) of the Arbitration Act 1965 (which deals with the power of a court to deal with arbitration awards), the arbitrator committed an error of fact and law resulting in gross irregularities in the conduct of the proceedings and/or exceeded his powers. If so, the award would be set aside.

The court recognised that there are no residual common law grounds on which the court may review an arbitration award and the power of a court to review a consensual arbitration award is limited to the grounds listed in section 33(1) of the Arbitration Act.

Two grounds

The court also recognised that there are effectively two grounds of review under section 33(1)(b), either:

- The arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings; or
- The arbitrator has exceeded their powers.

In terms of the first ground of review, the court found on the facts that if an arbitrator commits a factual error which leads the arbitrator to a wrong conclusion, that alone is not sufficient to render an arbitral award reviewable. An arbitrator's decision is not reviewable merely because it is wrong. The court went on to state explicitly that "an arbitrator is allowed to be wrong". The court found that section 33(1)(b) will not apply in cases where an arbitrator has made a bona fide error of fact or law. Only where the mistake is so gross or manifest as to evidence misconduct, *mala fides* or partiality on the part of the arbitrator will the award be reviewable in terms of section 33(1)(b).

The applicant must not only allege that the arbitrator's decision was legally wrong. It must show that no reasonable arbitrator could have made the decision on the material before the tribunal. The effect of the judgment is to narrow the scope of section 33(1)(b) of the Arbitration Act.

By way of illustration, in terms of the second ground of review under section 33(1)(b), the court pointed out that the prior to the second arbitration, the parties had agreed on the issues to be determined by the arbitrator, which included the prescription point. By determining this point, the arbitrator acted within his mandate and did not exceed his powers. The applicant's complaint lies with the result of the finding, rather than on the ground that the arbitrator exceeded his powers.

Conduct of arbitrator

The court found that the applicant had not established any irregularities in the proceedings. The arbitrator's determination that the claims had prescribed, invariably had the effect that those claims became excluded from the rest of the arbitration. This is the consequence of the nature of the legal question that the arbitrator was called upon to determine. It is not consequent upon the arbitrator's conduct. The applicant's attempt to attribute the exclusion of the claims to the conduct of the arbitrator is disingenuous. The court held that the application had therefore been brought on spurious grounds, which warranted a punitive costs order.

This case illustrates our courts' reluctance to interfere with arbitration awards except in the limited circumstances set out in the Arbitration Act.

Parties entering into an arbitration agreement must be aware that the arbitration award will be final, except in limited circumstances. If parties want the option of appealing the award, such right of appeal must be set out in the arbitration agreement itself.

ABOUT THE AUTHOR

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