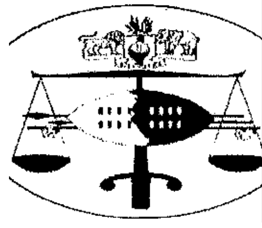

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 95/2020

HELD AT MBABANE
In the matter between:

PHUZAMOY A LIMITED **Appellant**

And

BEBESHA INVESTMENT (PTY) LTD **1st Respondent**

NHLANHLA E. GININDZA N.O **2nd Respondent**

Neutral Citation: *Phuzamoya Limited* vs *Bebesha Investment (Pty) Ltd and Nhlanhla E. Ginindza* N.0.(95/2020) [2021] *SZSC 43* (03/12/2021)

Coram: **S.B. MAPHALALA JA., S.J.K. MATSEBULA JA., J.M. CURRIE AJA**

Heard: 23rd August 2021.

Delivered: 3rd December, 2021.

SUMMARY : Civil law - Contract law - arbitration - Review by High Court - Appeal to Supreme Court - Principles relating arbitration discussed - Arbitrator's decision final and binding but subject to section 16 of the Arbitration Act, 1904 - Misbehaviour or misconduct of arbitrator and improper procurement of arbitrator's decision are grounds for review.

Held: Arbitrator misconducted or misbehaved himself in carrying out the arbitration. The decision of the arbitrator and the judgment of the Cou1i *a quo* are both set aside.

Held further: The matter is referred back to the parties for re submission to another arbitrator if they so decide.

JUDGMENT

S.J.K. MATSEBULA - ,JA

THE PARTIES

[!] The Appellant is Phuzamoya Ltd, a sugar cane grower, the 1'[1] Respondent is a sugar cane harvester, loader and carrier of sugar cane to sugar mills and the 2nd Respondent is, amongst other fields of work, an arbitrator.

The Appellant and the I ' [1] Respondent entered into a three (3) year contract where the I st Respondent would transport sugar cane to a sugar cane mill for the Appellant.

BRIEF HISTORY

(2] As aforesaid the parties entered into a contract for the haulage of sugar cane to the sugar mills on the 22"'[1] February, 2017 which was to endure up to the 30th December, 2019 (three years). Some six months or so before the expiry of the contract the Appellant issued an invitation (advert) to all interested haulers to apply for a haulage contract for the following year's harvesting season. The 1st Respondent, amongst other haulers , also responded to the invitation. The l st Respondent was not awarded a new contract nor was the old one renewed when it expired on the 30thDecember, 2019.

(3] A dispute arose between the parties and it was referred to an arbitrator as per clause 20.1 of the contract and the arbitrator found for the I st Respondent. The arbitrator as well the Court *a quo* concluded that, in the circumstances of the case, the expired contract must be held to have been renewed. The Appellant was dissatisfied with the decision of the arbitrator and caused it to be reviewed by the High Court (Couti *a quo)* which confirmed the arbitrator's decision. The Appellant still not satisfied with the Court *a quo's* decision has now appealed to this Court against the whole judgment of the Court *a quo.*

[4] This Couti heard arguments on the appeal and reserved judgment and later invited the patiies to file additional authorities on the question of jurisdiction of the Cowi *a quo* to hear and review the decision of the arbitrator.

SALIENT CLAUSES OF THE CONTRACT

[5] "Clause 20. Dispute Procedures.

20.J Any dispute arising out of the provisions of this Agreement whether arising before or afier the termination thereof shall be submitted to and decided by arbitration;

20.2 The arbitration shall be held at Mbabane (or some other place agreed to by the parties) in a summary manner on the basis that it shall not be necessary to observe or carry out the strict rules of evidence or the usual formalities or procedures;

20.3 This said arbitration shall be with a view to it being completed within 21 (twenty one) days after it is *demanded, and the parties shall use their best endeavours to procure that the arbitration* is *complete within 21 (twenty one) day period:*

20.4 The arbitrator's decision shall be final and binding upon the parties and each of them shall be entitled to have the award of the arbitration made an Order of the High Court a/Swaziland or any other competent Court.

<u>22 - Duration and termination of Agreement</u>

22.1 Notwithstanding the date of signature, this agreement shall commence on 22'"[1] February 2017 and shall, continue until 30th December 2019.

22.1.1 Provided that the customer may terminate this agreement by giving 6 calendar months' notice in writing to the carrier.

22.1.2 This agreement may be renewed at the instance of the carrier on similar or same terms and conditions to be agreed upon between the parties. "

APPELLANT'S CASE

[6] The Appellant submits that the court *a quo* erred or misdirected itself -

" *(a) By finding that the l" Respondent's tender was not declined and the tone of the letter of the* ***05'" of December 2019,*** *gave hope to the 1'1 Respondent that its tender had passed with flying colours.*

(b) By.finding that it was common cause that in the pre-arbitration it was agreed between the parties that the J-" Respondent will file comprehensive statement of claim and the Applicant a detailed reply thereto and the Arbitrator was to consider the documents and making the award.

(c) By finding that there was no merit in the argument that the Arbitrator ought to have cal/ed oral evidence to address the dispute of fact.

(d) By finding that the Appel/an/ was not being candid or honest in alleging that the JS' Respondent did not give notice of intention to renew the contract. The Honourable Court a quo erred in finding that 18' Respondent did file such notice which was an indication that the l" Respondent was interested in providing the services for a fitrther three (3) years. The Honourable Court a quo further erred, in this respect, in finding that the Appel/ant had a duty to find out fi·om the 1"

Respondent if it intended to renew the contract before calling for tenders.

(e) By finding that the Appellant was being overly technical in alleging that the JS[1] Respondent ought to have issued a notice of renewal instead of tendering and participating in the tendering process.

(I) The Honourable Court a quo fitrther erred in finding that the 1"[1] Respondent did notify the Appellant of its intention to renew the contract.

(g) By finding that the clause that; "... on the same terms and conditions to be agreed upon beti,veen the parties" was ambiguous and meant that the parties could agree that the contract is *renews and thereafter, negotiate the terms and conditions. The Honourable Court a quo ought to have found that the contract in question to be renewed, the parties ought to have agreed upon the terms and conditions, which did not happen.*

(h) *By finding that the Arbitrator's finding that the Appellant breached an implied obligation of honesty, fairness, and good faith, was obiter and fi1rther finding that the Appellant acted in bad faith by not enquiring ji·om the !' [1] Respondent if it intended to renew the contract, not responding to the 1'[1] Re.1JHmdent 's letter of the* ***20[1]/J of***

November 2019 *and in purporting to remind the JS' Respondent of the expiry of the contract on the* ***30[11] of December2019.***

(i) By failing to find that the Arbitration Award was improperly procured in light of same being issued without the hearing of oral evidence or without a proper determination of the glaring disputes of facts.

(j). By dismissing the Appellant's application with costs".

1'[1] RESPONDENT'S CASE

[7] The 1st Respondent is resisting the Appeal and, in summary, submits that-

(a) The Court *a quo 's* judgment correctly interpreted the contract and the correspondence between the parties;

(b) The contract was renewed as per the contract, clause 22.1.2;

(c) That the parties, prior to arbitration had agreed that the dispute will be resolved on comprehensive and detailed papers filed.

(d) Agreement provided that the arbitrator's decision shall be final;

(e) On jurisdiction as directed by the Court, the 1'[1] Respondent (the Appellant did submit as well) submitted authorities that tend to show that the Courts have limited jurisdiction as the patties through their agreement had ousted the Court's jurisdiction; and

(f) That the Arbitration Act, No. 24 of 1984 is applicable and an arbitrator can only be removed in terms of Section 16.

ANALYSIS OF THE CASE

[8] The contract or agreement as aforesaid was for the harvesting, loading and transportation of sugar cane to a sugar mill for fmiher processing and it was to endure up to 30th December, 2019 (3 years).

[9] On or about the 25th July, 2019 the Appellant caused to be issued a Tender inviting interested contractors to apply for the provision of services of cane cutting loading and haulage. This was about five months before the expiration of the agreement in place between the Appellant and the 1st Respondent.

[IO] On or about the 20th November, 2019 the I st Respondent addressed a letter to the Appellant and the first paragraph reads-

"RE: Application.for Works"

"We the above mentioned Company would like to re-applvfor cane cutting, Cane Loading and Cane Haulage work at Phuzamoya Limited (Pty) LTD" (my underlining)

The second paragraph states the company profile and reads -

"Bebesha Investments (pty) LTD is a sugar cane harvesting company which was formed in 20 IO by a group of farmers. The company owns equipment which include 4 loaders, 8 trucks with Bin trailers and 200 cane cutters. The haulage company have (1·ic) vast experience in the sugar cane industry and their workjhrce share complimentary expertise

in the transport and logistics industry and our track record proves that. "

This paragraph is consistent with an ordinary application which one would not expect its inclusion when one is exercising an option to renew because by then the company profile is known to the job-offeror (the Appellant).

One but last paragraph, of the letter the I st Respondent informs the job-offeror (the Appellant) about the best rates they offer. Again this would not be necessary for one exercising an option under a contract which stipulates that the contract may be "renewed on similar or same terms and conditions to be agreed upon between the parties." Terms of a contract include the price or rates as in the present case.

[11] My analysis of the 1 st Respondent's letter of the 20th November,2019 (as stated above) convinces me that such a letter was in response to the general invitation to all interested contractors to apply for new haulage contracts. Nothing convinces me this letter was in terms of clause 22.1.2 seeking to exercise the option therein to renew the contract. There is just no indication, none at all, to suggest it was in terms of clause 22.1.2 of the contract.

[12] On or about the 5th December, 2019 the tender documents or applications for the cutting, loading and haulage of sugar cane were opened, determined and one tenderer (Magna l loldings (Pty) **LTD)** was awarded the tender. The conditions for the award has not been made available to the Court, On the same day and date the Appellant wrote to the **1st** Respondent notifying it about

the expiry of the contract which was about to take place at the end of the year (30th December, 2019) some 25 days away. In the letter, the Appellant thanked the 1 st Respondent for work well done during the contract.

[13] The relevant contents of this letter are as follows-

*"RE: **Notification** on Expirv o[Harvesting Contract*.

*We the B.O.D of Phuzamoya (pty) Ltd would like to **notifv** you on the expiry of our engagement which allowed your company to harvest (cutting), harvesting and haulage in our farm. The expiry refers to the year ending December 2019.*

We were so impressed with your service in the duration of our contract and we would like to pass our sincere accolades and words of thanks as you have displayed a great level of professionalism.

Thank you so much for your service" (my underlining)

[14) This letter contains essentially two paragraphs. The first paragraph notifies the I st Respondent about the expiry of the contract which will come into effect on the 30th December 2019.

The second paragraph thanks the I st Respondent for its impressive service and professionalism. Nothing more and nothing less. This letter needs no interpretation or inferences, it is in plain language and the main purpose is to **notify** th£..,Respondent about the expiry of the contract on the 30th December, 2019 as stipulated in the contract and an acknowledgement of the good

working relationship that existed during the tenure of the contract. The words **notification** and **notify** appears in the heading and on the first sentence of the letter and conveys the purpose or object of the letter. To assign any other meaning to these words or context of the letter contrary to the ordinary meaning of the words would constitute misconduct or misbehaviour in my view.

[15] Turning to the contract or agreement, it should be noted -

Clause 20.1 as cited in my paragraph [5] above stipulates that any dispute arising before or after the termination shall be referred to or submitted to and decided by arbitration; and

Clause 20.4 stipulates that the arbitrator's decision shall be final and binding on the parties and each of them shall be entitled to have the award of the arbitration made an order of the High Cou1i.

The Comi invited Counsel for both pmiies to submit additional authorities on the question of jurisdiction of the Comis in relation to matters that have been referred to arbitration, and especially where the contract says the arbitrator's decision shall be final and binding on the parties. Both Counsel, amongst other authorities submitted, both submitted the case of *Swazi Med Medical Aid Fund v Medscheme Administrators No. (/249/2018) [2020} SZHC 33 (05/03/2020).* The usefulness of this case lies in the authorities therein cited by the majority judgment as well as the dissenting judgment and I intend to use and rely on the legal wealth therein.

[16] Quoted in the *Swazi Med Medical Aid Fund* (Supra) hereafter *"Swazi Med* case " at page 83 paragraph I161]-

" Again in *Amalgamated Clothing and Textile Workers Union v Veldspun (Pty) LTD 1994 (1) SA 162 (A) at 169,* Goldstone JA stated that:

"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 Section 3 (2) of the Arbitration Act), abandon the right to litigate in Courts of law and accept that they will befinally bound by the decision of the arbitrator. There are many reasons for commending such course, and especially so in the labour field

-where it is fi"equently advantageous to all parties and the interest of good labour relation to have a binding decision speedily and finally made. in my opinion, the Courts should in no way discourage parties fi"om resorting to arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in goodfaith. "

This legal proposition or principle does not only apply to labour matters but equally applies to commercial matters. At page 80, paragraph [158.3] of this Swazi Med case *(Supra)* is stated -

"A Court will not generally inte1fere with an arbitrator's award where the arbitrator has made an error or mistake of

law or drawn a wrong inference fi"om the evidence before him

(see

Clark v AfNcan Guarantee and Indemnity Co. LTD 1915 CPD 68), "

[17] A further insight on the question of jurisdiction is found at page 16 of the Swazi Med case (Supra) at paragraph [35]-

> *"The up short of the Dickenson and Brown v Fisheries Executors judgment and the reasoning of the Court in that case as was equally applied in Dutch Reformed Church v Town Council of Cape Town l 55Cl 4 at 21* is *the first principles embedded in the statutory provisions that firstly-*

> *"When parties select an arbitrator and the arbitral process by which their dispute is to be adjudicated on bothfc1cts and the law, they, unless they have by express agreement provided for otherwise intend the award to be final and conclusive irrespective of how erroneous, factually or legally the decision was.* "

And secondly, they accept as per the script of the statute,

> " *...that the only permissible grounds on which such award may be set aside is -where the arbitrator has misconducted himself or the award was improperly procured.* "

To borrow from the same case: *"This* is *an old age position in South Aji·ica and for comparative reasons of equal persuasion in the Kingdom. These are the principles of "party autonomy" and ':finality" which underpin our statutory laws of arbitration as expressed in the Arbitration Act".*

[18] Still on jurisdiction of the Couti, Section 16 of the Arbitration Act, 1904 provides that:

16. (I) *The Court may remove an arbitrator or umpire who has misbehaved himself*

(2) If an arbitrator or umpire has misbehaved himself or an arbitration or award has been improperly procured, the Court may set such award aside and may award costs against such arbitrator or umpire personally.

[19] The conclusion, based on both the decided cases and the statutory provisions (The Arbitration Act, 1904) is that the Courts should not interfere with the arbitrator's award as it is final and binding between the pa1iies unless the arbitrator has misconducted or misbehaved himself or the award has been improperly procured. The award is binding between the parties ilTespective of any mistake or error of law or wrong inference from the evidence so made by the arbitrator except where the arbitrator has misconducted or misbehaved himself or the award has been improperly procured. At this juncture, accepting the bindingness and finality principles in arbitration cases, the Cou1i should then move to the next enquiry: did the arbitrator misconduct or misbehave himself in the conduct of the arbitration or whether the award was improperly procured. Improperly procured would, I presume, include issues of undue influence, fraud and other criminal elements or impropriety of some degree, that is, serious impropriety.

[20] To understand the matters involved, one must first appreciate that there were two parallel processes in place and both were open to the 1 st Respondent. The 1 st Respondent could either apply or **re-apply** if seeking new terms and if not, could alternatively exercise the option to **re-new** the old contract on same terms as before. On the other hand there were the other contractors who could only apply for the work being offered by the Appellant. It is common knowledge that in the commercial as well as in the labour world, the practice is that before a contract expires, the enterprise or employer, for purposes of continuity of the venture, starts looking for a replacement in advance before an existing contract expires. If one were to wait until the contract expires, the venture is more likely to face disruptions when the incumbent leaves on the expiry date without renewing and the enterprise without securing an alternative replacement. By parallel processes is meant that new replacements could be invited to tender for the new job whilst waiting for the Respondent to make up his mind whether to exercise or not to exercise the option to renew. Smart contracts usually stipulate time within which to exercise the option to renew. In *casu*, the option to renew was open until the last date of the contract, that is, 30th December, 2019. The evidence before Court is that the contract terminated on the 30th December as per clause 22.1 which stated -

> *"22.1 Notwithstanding the date of' signature, this agreement shall commence on 22^1d^1 December February 2017 and shall, continue until 30th 2019"*

[21] Clause 22.1.2 of the contract provides:

"This agreement may be renewed, at the instance of carrier, on similar or same terms and conditions agreed upon the parties" (my underlining)

This clause might look ambiguous as has been argued in this Cowi and the Court *a quo* but on a closer scrutiny it is not, it says:

(a) **The carrier (1st Respondent) must initiate the renewal processes. It must inform the Appellant of it's intentions to renew.**

I find as misconduct for anyone to say the Appellant should enquire from the I st Respondent if it wants to renew or not when the clause is clear and spells out under whose instance the contract should be renewed;

(b) The Respondent having initiated the renewal, **the renewal shall be on the same or similar terms *and* conditions to be agreed upon the parties.** This clause has two sentences joined by the word "and". The first paii is renewing on similar or same terms. The second part is that the conditions (of carrying out the contract) arc negotiable. It is common knowledge, that terms of a contract, as in this one, would include the price, the cutting, the loading, haulage and others. Under the option these are the same and therefore non-negotiable. Or the other hand, conditions for carrying out the contact would include - clause 9 - route to be used, clause 11 Demurrage, clause 13 - insurance when agreed upon, clause 14 - Permits and other. These are conditions that

can be negotiated at the time of renewal or can come soon after the intention or communication to renew is sent to the Appellant.

[22] The Respondent, as said earlier on the processes are two and parallel to each other, could either apply for a new contract or use the option to renew the old contract. The other or new contractors are confined only to responding to the invitation (to tender for the work), that is, to show interest in the work being offered. The 1 st Respondent stood in an advantageous position. It could elect whether to renew on the same or similar terms as the current contract or try its luck by competing with the other tenderers in the hope of better and improved terms through applying or re-applying as opposed to renewing.

[23] The 1st Respondent elected to compete with the other tenderers by the letter dated 20th November, 2019 and it states:

> *"RE: APPLICATION FOR WORKS*
>
> *We the above mentioned company would like to re-apply for the cane cutting, cane loading and cane haulage work at Phuzamoya Limited (sic) Pty Ltd."*

This is followed by a paragraph on the company profile (what the 1st Respondent company does and offers reasonable rates), my conclusion is that this was an independent and a new application divorced from the option offered under clause 22. l. l. There is no mention of the option clause at all in this letter, and to hold otherwise, the letter would be violating the renewal clause when it offers reasonable rates when such term is supposed to be the

same or similar to the previous contract. My view is that that the option to renew was not exercised nor invoked.

[24] When reading or interpreting a clause or a statute one is required to first give the words therein their ordinary meaning unless such would result in absurdity. For the arbitrator and the Court *a quo* to say this letter of "re application for works was a letter invoking clause 22.1.2 (option) was the first misconduct in this matter.

The second misconduct relates to the letter of the 5th December 2019 from the Appellant to the 1st Respondent styled "Notification on expiry of harvesting contract"

The Appellant notifies the 1st Respondent that the contract is coming to an end or would terminate at the end of the year (30th December 2019) and further thanks the I st Respondent for work well done during the course of the contract and tells I st Respondent that Appellant appreciates the 1 st Respondent's professionalism. The words "notification" and "notify" of the expiration of the contract on 30th December, 2019 are just nothing more than what they say they are, that is, notification of the expiry of the contract. I find it a misconduct to read notification and notify as meaning "promise" of a job or new contract. This letter was written on the 5th December 2019 and the contract was still alive and there were still 25 days of it left. The 1st Respondent could have used the remaining 25 days to exercise its option to renew as per clause 22.1.2 and more especially as it had been notified by the Appellant of the looming expiry.

[25] I also find that the contract was never terminated, it ran its duration up to 30th December 2019. The suggestion of the Appellant having terminated it does not arise and so is clause 22.1.1 about the Appellant being required to give 6 calendar months' notice before terminating the contract. The contract ran its full course and expired.

I must re-emphasise that it is misconduct of the arbitrator to justify his untenable award to hold that the Appellant had a duty to enquire from the pt Respondent whether or not the I" Respondent wished to re-new or not. What could have been the purpose of insetiing the words *"This agreement may be renewed at the* ***instance*** *of the carrier ...* "

CONCLUSION

[26] It is trite that when one interprets a statute, clause or sentence, one must first give the words therein used their eve1yday meaning or usage unless by so doing the result would be an absurdity. One may not say "East" is "South" and if he does so he must give reasons for departing from the "known" to the "unknown". I am persuaded by an English case of *Bromilow and Edwards. LTD v Inland Revenue [1969} 3 ALL E.R 536 at 542* where the Court stated:

> "*... but J duly observe the warning that the case gives. A subsection must not be* ***tortured*** *into saying -what it ought to say but does not"* (my underlining)

To this end the letter of the 20th November, 2019 from the 1st Respondent to Appellant with the following words:

"We the above mentioned company would like to <u>re-apply</u> for cane cutting, cane loading and cane haulage ... "

Should not be tortured into saying:

"We the above company would like to exercise the option under clause 22.1.2 to renew the contract".

[27] Again the letter of the 5th December, 2019 from the Appellant to the 1st Respondent should not be tortured into saying something that it doesn't say:

<u>"Re: Notification on Expiry of'Harvesting Contract</u>

We the B.O.D of Phuzamoya (pty) LTD would like to <u>notify you on the expiry</u> of our engagement which allowed your company to harvest ... "

It should not be tortured into saying "we promise you a renewal of contract" because it doesn't say so.

[28] In the view of this Comi, the torture of words to say something they do not say (and without an explanation for the depaiiure from the rules of interpretation) is misconduct or misbehaviour which qualifies the arbitrator to be removed in terms of Section 16 of the Arbitration Act, 1904 which provides:

"16. The Court may at ony time upon motion remove any arbitrator or umpire agoinst whom a just ground qf' recusation is found to exist <u>or who has misbehaved himselfin connection with the matters referred to him for arbitration. "</u> (my underlining).

[29] The Court having come to the conclusion that the arbitrator misconducted or misbehaved himself in the conduct of this arbitration, I need not discuss the other grounds of appeal as a finding on misconduct or misbehaviour is sufficient to overturn the arbitrator's award and the Cou1i *a quo* 's decision which had confirmed the award.

[30] The paiiies exercised independence when they chose the law or manner of resolving any dispute arising from the contract, that is, the law of arbitration hence they should through the independence they enjoy, elect once again whether or not to re-submit the matter to arbitration.

ORDER

[31] Accordingly the Court makes the following orders:

(a) The appeal succeeds and the judgment of the cou1i *a quo* is set aside.

(b) The award of the arbitrator is set aside.

(c) The parties are at liberty to re-submit the matter to a different arbitrator if they so decide.

(d) Costs of suit to be paid by the 1st Respondent.

S.J.K MATSEBULA
JUSTICE OF APPEAL

I AGREE

S.B. MAPHALALA
JUSTICE OF APPEAL

I AGREE

J.M CURRIE
ACTING JUSTICE OF APPEAL

For the Appellant: K.

SIMELANE For the 1st Respondent: I.

DU PONT