



**IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

Date: **8 September 2022** Signature:

Case No: **61282/2021**

In the matter between:

**BIGEN AFRICA GROUP HOLDINGS (PTY)
LIMITED**

Applicant

and

NEMAI CONSULTING (PTY) LIMITED
DHANASHREE NAIDOO

First Respondent
Second Respondent

JUDGMENT

NEUKIRCHER J:

- [1] At issue here is whether or not the applicant is entitled to have an arbitral award (the award) dated 14 September 2021 made an order of court in

terms of Section 31 of the Arbitration Act 42 of 1965. The application is opposed.

THE AWARD

[2] The award reads as follows:

- “1. The First Defendant must pay to the Claimant the sum of R14 890 884.*
- 2. The First Defendant must pay to the Claimant interest on that amount, at the prescribed rate, calculated from 2 October 2019 to date of payment, but only to the extent it exceeds the sum of R1 650 000.*
- 3. The counterclaims are dismissed.*
- 4. The First Defendant must pay the costs of the Claimant and the costs of the arbitration, including the fees of the arbitrator.*
- 5. The Claimant must pay the costs of the Second Defendant.”*

THE ARBITRATION ACT

[3] The relevant provisions of the **Arbitration Act No. 42 of 1965** read as follows:

- “31. (1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party 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 same the effect.*

33. (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.”*

[4] This case concerns solely the provisions of Section 31(1) of the Arbitration Act and I am not enjoined to consider any of the grounds listed in Section 33, as the respondents no longer seek an order setting aside the award. At the hearing, the sole issue raised was whether this application should be stayed pending the outcome of the proceedings lodged by the first respondent against applicant at the Broad-Based Black Economic Empowerment Commission (the Commission).

BACKGROUND

[5] The first respondent is a Level 1 B-BBEE company whose sole shareholder and director is a black female. The applicant and the first respondent entered into several agreements of which one was a convertible loan agreement (CLA) in terms of which the first respondent would sell 26% of its shares to the applicant. The CLA provided for an advance of R22 million to the first respondent with both parties having an election to convert the loan to equity in the first respondent in certain circumstances. If neither party elected to convert the loan by 1 October 2019 it became repayable. Neither party made the election and the loan of R22 million thus then became repayable. The applicant sued the first respondent for payment of the amount and this formed the subject matter of the arbitration.

[6] Subsequent to the arbitration award, the first respondent lodged a complaint with the Commission, which is established in terms of Section 13B of the Broad-Based Black Economic Empowerment Act No 53 of 2003 (the B-

BBEE Act). In its complaint it alleges that the CLA was structured in such a way that it amounted to no more than a fronting practice as defined in the B-BBEE Act.

- [7] According to the first respondent, the Commission has finalised its merit assessment and has concluded that the matter warrants an investigation, which has not yet been finalised.

THE DEFENCE

- [8] The first respondent argues that, although this issue was not raised in the arbitration as it was not relevant to the issues raised there, the effect of the arbitration award is that it sanctioned unlawful conduct thus subverting the purpose of the B-BBEE Act. The arbitration award is therefore unenforceable.

- [9] The first respondent has also filed a counterclaim in which it seeks a) a dismissal of the application or alternatively b) a stay of the application pending the conclusion of the Commission's investigation. At this hearing, the dismissal was not pursued.

THE COMMISSION COMPLAINT

- [10] In its complaint, the first respondent asks for the following remedy:
- 10.1 firstly that the CLA should be interest free;
 - 10.2 secondly that the applicant should pay the legal fees associated with the arbitration

[11] Thus, paragraphs 1, 3 and 5 of the award are not attacked at all in the complaint.

[12] This must also be seen in the context of the common cause fact that the fronting issue was never raised during the arbitration and, even if successful, the only power the Commission has would be to refer the matter to the NPA for prosecution.

[13] On 16 August 2022 I received further submissions from the respondents via email. These submissions are the following:

13.1 that Regulation 15(4)(g) provides that the Commission must, within one year of receipt of a complaint, take a number of steps which includes making a finding, with or without recommendations;

13.2 as the complaint was lodged in October 2021, the one-year period expires in October 2022 and the findings should be released by then.

[14] Furthermore, Regulation 15(11) provides the following:

“(11) if the Commission upon investigation is of the view that a complaint can be resolved through alternative dispute resolution mechanism, the Commission –

(a) May facilitate the resolution of the matter or refer, , such a matter to any appropriate dispute resolution process or forum in terms of its procedures, and

(b) Where the appropriate alternative dispute resolution process failed to resolve the dispute between the parties, the Commission may continue to investigate the matter if it is justifiable to do so.”

[15] Thus it appears that if the Commission invokes Regulation 15(11)(a), there will be no finding or recommendation in terms of Regulation 15(11)(g) as the investigation will only be finalised if the alternative dispute resolution fails. If the alternative dispute resolution procedure is invoked then the matter may well not be finalised soon.

[16] In **Cool Ideas 1186 CC v Hubbard**¹ the court found that an agreement that falls foul of the legislative requirements that govern it is not capable of enforcement by the party who has transgressed these requirements. It found that, as a result, an arbitration award granted in favour of the transgressing party cannot be enforced even though the arbitration agreement and the original contract itself remain valid.

[17] Whilst the applicant has sought to differentiate the **Cool Ideas** case from the present on its facts, it is the principle set out in **Cool Ideas** that is relevant: if indeed the applicant is guilty of the fronting practice, which is an offence under the B-BBEE Act, it may well not be entitled to enforce its award in its entirety. It is this issue which is at the heart of the order sought in the counterclaim.

¹ 2014 (4) SA 474 (CC)

[18] Given that this issue is presently under investigation by the Commission – a Specialist Tribunal established in terms of the B-BBEE Act – it would not be appropriate for me to comment on the merits of the complaint as that may well pre-judge the outcome.

[19] I am therefore of the view that the counter-application to stay these proceedings has merit and should be granted and once that investigation is concluded this application may be set down for hearing on supplemented papers (if necessary). I am also of the view that costs should be reserved.

ORDER

[20] Thus the order granted is the following:

20.1 The application is stayed pending the outcome of the complaint lodged by the first respondent against the applicant at the Broad-Based Black Economic Empowerment Commission, which is set out in Annexure X to the respondents answering affidavit.

20.2 Costs of the application are reserved.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 8 September 2022.

For the applicant : Advocate EC Labuschagne
Instructed by : Ledwaba Mazwai

For the 1st respondent : Advocate N Segal
Instructed by : Cranko Karp & Associates Inc