



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 31 March 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another (286/2022) [2023] ZASCA 43 (31 March 2023)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the high court). The appeal was dismissed with costs, including the costs of two counsel, where so employed. The SCA further ordered the second respondent to pay the costs of volumes 4-12 of the record.

The facts of the matter were as follows. The second respondent, Lutzkie Group of Companies (Pty) Ltd (the Lutzkie Group), brought arbitral proceedings against the appellants, Close-Up Mining (Pty) Ltd, Willem Pieter Tenner and Close-Up Machinery and Plant Hire (Pty) Ltd, respectively (collectively, Close-Up Mining). The arbitrator, appointed by the parties, was the first respondent, retired Judge Phillip Boruchowitz (the Arbitrator). The dispute submitted to arbitration concerned two agreements. In the award, the Arbitrator declined to consider a defence raised by Close-Up Mining to the effect that the Lutzkie Group had repudiated the agreements. The Arbitrator found that the defence had not been pleaded, and hence fell outside his jurisdiction. Close-Up Mining considered the Arbitrator to have fallen into error. Consequently, Close-Up Mining brought review proceedings in the high court.

The high court found that the disputes raised in the arbitration proceedings were those raised on the pleadings. And since the repudiation defence had not been raised on the pleadings, the Arbitrator had correctly decided that he lacked the jurisdiction to entertain the defence.

The question to be determined in the appeal was whether a party to arbitration proceedings that had failed to plead an issue may nevertheless seek to have the arbitrator decide that issue.

The SCA found that the competence of an arbitrator to decide matters was determined by the arbitration agreement. The arbitration agreement may confine the submission to the issues that have been pleaded. But there was no rule of law that required the parties to confine their agreement in this way. The arbitration agreement can therefore confer a competence upon an arbitrator to decide matters upon an exercise of a discretion of the kind recognised in *Shill v Milner* 1937 AD 101 (A). All depended upon what the parties had agreed, and the proper interpretation of their agreement.

The SCA turned next to the question of whether the arbitration agreement concluded between the parties in fact conferred a discretionary competence upon the Arbitrator to entertain the defence of repudiation, raised by Close-Up Mining in its heads of argument. The arbitration agreement, the parties had agreed, was taken to include the Arbitration Foundation of Southern Africa (AFSA) rules.

In this regard, the SCA found that the AFSA rules did not confer a discretionary power upon the Arbitrator to decide whether to adjudicate the defence of repudiation. If the AFSA rules recognised no such power, then it was common ground that the arbitration agreement did not do so. Consequently, the Arbitrator made no error when he declined to entertain the defence of repudiation. And hence, Close-Up Mining had failed to establish that the Arbitrator committed a gross irregularity. The SCA held that the appeal on this ground consequently had to fail.

Notably, the SCA held further that the costs occasioned by the inclusion of the record of the arbitration proceedings, amounting to nine volumes (some 1 500 pages), had to be borne by the Lutzkie Group. This was because a party responsible for the unnecessary inclusion of documents in the record should be rendered liable for the costs occasioned thereby.

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