

CONSTRUCTION LAW BULLETIN

ARBITRATION

Removal of arbitrator

If an arbitrator unreasonably delays the issue of an award, he may, upon application to the High Court, be removed as arbitrator and forfeit his remuneration.

To remove an arbitrator from office, a party is required to show good cause in terms of the Arbitration Act. The Act provides that good cause includes *failure on the part of the arbitrator to use all reasonable despatch in making an award*.

The court in the matter of Kelly and Another v Lane¹ had to make a decision regarding the removal of an arbitrator on such grounds.

The chronology in the arbitration was as follows:

- From the appointment of the arbitrator to the first hearing – six months.
- From the first hearing to the next hearing – 11 months.
- From the last hearing to the date when the parties delivered their final written submissions – 10 months.
- From the date of the final submissions to the date of publishing of the award – one year three months.

The parties wrote to the arbitrator and expressed their

dissatisfaction and gave fair notice of their intention to remove him as arbitrator if he failed to deliver his award. The arbitrator, unprofessionally, ignored this correspondence. It was only upon receipt of the application papers relating to a joint application by the parties for his removal that the arbitrator delivered his award.

The court indicated that what amounts to reasonable despatch will vary from case to case and should be determined with reference to *inter alia*:

- the nature of the arbitration;
- the complexity of the dispute;
- the interests of the parties; and
- the manner in which the parties, including the arbitrator, conducted themselves during the course of the arbitration proceedings.

The individual circumstances of the arbitrator causing the delay, such as illness, are irrelevant. The delay however must be culpable in that the arbitrator must be to blame for the delay.

In all cases the court has a discretion as to whether or not to remove an arbitrator in such circumstances. The court indicated that courts would not lightly intervene in order to remove an arbitrator and would be inclined to do so only if that was manifestly the right course to take.

In the case in question the court found that much of the

¹[2001] 2 All SA 161(W)

delay in the arbitration had been caused by the parties themselves. However, it also found that the arbitrator had been guilty of an inexcusable delay of at least 11 months.

In the result, and because the arbitrator's award had not been final and there were outstanding issues still to be ruled upon, the court made an order removing the arbitrator and depriving him of any remuneration from the date when the inexcusable delay, in the court's view, had commenced. The court did not however order the arbitrator to pay the costs of the High Court proceedings for his removal as a mark of its displeasure at the unco-operative manner in which the parties themselves had conducted the arbitration proceedings and the delays which had been caused by them.

The court in its judgment offered the following useful guidance to arbitrators and parties engaged in arbitration proceedings:

- An arbitrator should not shirk from making a decision, irrespective of how difficult it might be.
- An arbitrator must be firm and must act without undue delay.
- An arbitrator should grasp the nettle and take control of the proceedings and not let cases drift.
- An arbitrator should not try and fit every case into the same procedural straitjacket.
- When parties agree to arbitration, they are under a duty to act in good faith towards one another.
- Parties should at all times be courteous towards each other and act professionally and avoid being drawn into unnecessary point-taking.
- The parties should be focused on resolving the disputes between them and their conduct to each other and the arbitrator must be consistent with the aim of seeking to resolve the dispute quickly, fairly and without an undue waste of costs.
- Practitioners representing parties should co-operate with each other and the arbitrator and maintain a professional and courteous relationship.

Notwithstanding having ordered the removal of the arbitrator, the court made it clear that this left the arbitrator's awards already made in the arbitration proceedings intact and unaffected.

Absence of party

In the matter of Body Corporate Houghton Villas v Got Construction (Pty) Ltd² the court refused to make an arbitrator's award an order of court where it appeared that the arbitrator, in making his award, had relied on a report and calculations of an auditor whom he had retained without the parties having been given an opportunity to lead evidence on the report or challenge the auditor on it.

In its judgment the court reiterated that arbitrators act in a quasi judicial capacity and, whilst not obliged to observe the precision and forms of a court of law, must proceed in such a manner as to ensure the fair administration of justice between the parties. This includes the duty to afford the parties a proper hearing and not to conduct proceedings in the absence of one or other of the parties.

The court's ruling in this matter does not detract from an arbitrator's entitlement to proceed in the absence of a party who has failed or refused to participate in the proceedings or attend a hearing of which he has been given due and adequate notice.

Intervention by court

In the matter of Badenhorst-Schnetler v Nel³ upon the application of one of the parties to the arbitration, the court intervened in the arbitration proceedings and directed the arbitrator to allow evidence and questioning on the issue of whether or not the claimant in the arbitration had mitigated its damages.

One of the issues before the arbitrator was the determination of the quantum of the claimant's damages claim. The arbitrator however appeared disinclined to consider or allow evidence and cross-examination on the issue of whether or not the claimant could and should have mitigated its damages.

The court held that such a limitation of the issues, albeit imposed by the arbitrator acting in good faith, would be tantamount to an irregularity in the proceedings. The court held further that there was no reason why it should not intervene before the irregularity occurred to correct matters as opposed to allowing the matter to proceed and leaving the arbitrator's award open to attack later on by reason of the irregularity.

The court also reaffirmed the fact that an arbitrator is not competent to rule on the issue of his own jurisdiction. This is due to change when the new domestic Arbitration Act is introduced in terms of which arbitrators will be given the

² 2002(1) SA 760 W

³ 2001(3) SA 631 C

authority to decide issues affecting their own jurisdiction.

In arriving at its decision, the court explained that an integral part of the determination of the quantum of damages was that such damages fell to be reduced by virtue of an omission by the innocent party to have mitigated those damages. The court quoted from an Appellate Division (now Supreme Court of Appeal) decision which succinctly sets out what a party's remedy is vis-à-vis a breach of contract:

"... for a breach of contract the sufferer should be placed by an award of damages in the same position as he would have occupied had the contract been performed, so far as that can be done by the payment of money, provided:

- (a) *that the sufferer is obliged to mitigate his loss or damage as far as he reasonably can, and*
- (b) *that the parties, when contracting, contemplated (actually or presumptively) that that loss or damage would probably result from such a breach of contract."*

Costs

In the matter of South African Forestry Co Ltd v York Timbers Ltd⁴ the court reiterated the principle that, in making an award of costs, an arbitrator is required to observe the same principles as a court of law does in litigation.

Section 35 of the Arbitration Act provides that the arbitration tribunal has a discretion with respect to an award of costs and, in making an award, must give directions as to the scale and taxation of the costs.

The court confirmed that an arbitrator must exercise his discretion judicially – i.e. as would a judicial officer in a court of law – when awarding costs.

One of the issues before the court was whether or not the costs of expert witnesses were automatically recoverable where costs had been awarded in favour of a party.

The court held that the costs of expert witnesses did not as a matter of course form a component of an award of costs by an arbitrator (or for that matter by a court). Such costs had to be specially and specifically awarded by the arbitrator after consideration of whether those costs had been necessarily incurred and to what extent. The mere fact that an expert witness is called to give evidence does not automatically entitle the party calling him, if successful,

to be awarded his qualifying fees as part of the costs award.

ALASTAIR HAY
12th Floor, Victoria Maine
71 Victoria Embankment
P O Box 3032
DURBAN
Tel: (031) 304 2851
Fax: (031) 301 3540
INTERNET ADDRESS:
ahay@coxveats.co.za

⁴ 2001(4) SA 884 T