

VAN AARDT vs. THE GLASGOW SOUTH AFRICAN COMPANY.

Award—Irregularities—Tacit Consent.

Where the parties to a dispute, which had been referred to arbitration, tacitly acquiesced in certain irregularities committed by the arbitrators, and after the giving of the award one of them applied to the Court to have it set aside on the ground of such irregularities, it was held that he was estopped from raising any objection, and was bound by the award.

The parties referred a dispute to two arbitrators. When asked by the arbitrators whether the witnesses should be sworn they said it was unnecessary, and when asked whether minutes should be kept, they remained silent. When the award was given the losing party applied to the Court to have it set aside, on the ground of the irregularities committed by the arbitrators. The respondent answered that both parties consented to the witnesses not being sworn and to no minutes being kept, that no protest had been made by the applicant, and that Law No. 2 of 1884, § 26, under which the arbitrators acted, does not prescribe that minutes must be kept, or that witnesses must be sworn in.

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Ford, with him *Meintjes*, for the applicant. Minutes must be kept by arbitrators. (*Vide Chabaud & Son vs. McKie, Dunn & Co.*, Buch. 1876, p. 190.)

Cooper, for respondent. According to Law No. 2 of 1884, § 27, the award is final, and the Court cannot set it aside. The parties acquiesced in their irregularities now complained of.

Postea (June 24th, 1886).

Korzé, C.J. It appears that one of the parties would not abide by a certain arrangement made by them in regard to certain land. They thereupon referred and submitted their dispute to the decision of two arbitrators. The arbitrators gave judgment against Van Aardt, the applicant, who now asks that the award may be set aside on the following grounds: firstly, that the witnesses were not heard under oath; secondly, that no minutes were kept by the arbitrators. From the declarations it has been proved that the arbitrators

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clearly put the question to the parties whether they desired the witnesses to be sworn in. Both parties answered that it was not necessary. The arbitrators then asked whether the parties desired that written minutes should be kept. Hereupon the parties remained silent, but raised no objection. The arbitrators then heard the witnesses, and afterwards gave a written award against the applicant (Van Aardt) and in favour of the Company. Before the award was read the arbitrators asked again whether the parties wished that the evidence already heard should be taken down under oath. The parties, however, did not desire this. It is clear that irregularities committed by arbitrators can be cured by the consent of the parties. The applicant is therefore bound by his consent that the witnesses should not be heard under oath, and he cannot now object to this. (*Russell on Awards*, 5th ed., pp. 193, 661, and 663.)

But a person may be bound by *tacit* consent as well as by *express* consent, especially when he had the opportunity of objecting. The express question was put to the parties whether they wished minutes to be kept. They remained silent and raised no objection. This must therefore be looked upon as consent on their part. Even when the award, which the applicant evidently expected to be in his favour, was given against him he made no objection. It was only afterwards that the petition was made to set aside the award. It appears to me that under the circumstances the applicant is bound by his conduct, which must be considered as a tacit consent. He cannot therefore now object to an irregularity in which he acquiesced. (Cf. *Broom's Legal Maxims*, 5th ed., p. 138, *in fine*, under the maxim "*Consensus tollit errorem*." See also *Chabaud & Son vs. McKie, Dunn & Co.*, Buch. 1876, p. 190.) Further, I wish to remark that neither the deed of submission nor the award of the arbitrators (both of which are in writing, as appears from the affidavits) is attached to the petition or filed in the application. It is not necessary to discuss the question whether this Court can sit in appeal from the award of arbitrators who have acted under Law No. 2 of 1884, where it is alleged that irregularities and illegal acts have been committed by the said arbitrators. The application must therefore be refused with costs.