REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 2982/08

In the matter between:

GUIDO BRUNO BIDOLI Applicant

and

BARBARA LIESELOTTE BIDOLI First Respondent

(in her capacity as executrix in the estate of
the Late Fabrizio Bidoli as well as in her personal
capacity by virtue of her marriage in community
of property.)

ROMOLO BIDOLI Second Respondent

JUDGMENT DELIVERED: 15 MARCH 2010

FOURIE, J:

INTRODUCTION

[1] The main issue for decision in this application, is whether an arbitral award made by consent (i.e. an award simply incorporating a settlement agreement) constitutes a valid award which may be made an order of court.

BACKGROUND

[2] Applicant, first respondent's late husband and second respondent were brothers who engaged in various business ventures with their late father. Disputes subsequently arose regarding these ventures and the parties agreed to submit their differences to arbitration. To this end, they concluded a written arbitration agreement in terms of which senior counsel was appointed as the arbitrator.

[3] The hearing of the arbitration took place in Cape Town from 3 – 10 December 2007. During the course of the hearing the parties were able to facilitate a narrowing of their disputes, with the result that the arbitrator was only required to receive evidence on limited issues. However, on 7

December 2007 the parties succeeded in settling all their disputes and concluded a written settlement agreement to that effect. The hearing was then adjourned to 10 December 2007.

[4] On 10 December 2007, second respondent indicated that he was not satisfied with the settlement agreement, and that he wished to reopen the proceedings. After hearing second respondent, the arbitrator concluded that there were no grounds upon which second respondent could avoid the settlement agreement. He then published his written award which simply incorporated the terms of the settlement agreement.

[5] In paragraph 12 of the award the arbitrator recorded the settlement reached by the parties, as follows:

"12. There is no need to state the full extent of the various claims and counterclaims made by the parties. They have settled all of their disputes, whether by set-off of various claims against each other; compromise or abandonment; by agreeing that:

a. The remaining property in Rome, presently registered in the name of the three brothers, shall remain registered in equal undivided shares, to which the parties shall have equal rights and remain responsible, in equal shares, for the

maintenance and upkeep, rates, taxes, levies and other charges as may be payable;

b. *The remaining money held in the aforesaid account in Banca Intesa, Rome, shall be divided in accordance with the written agreement signed by the parties and handed in as exhibit "C" and a true copy of which is annexed to this award.*

c. *Should the amount presently held in the said account be any different to the amount reflected in exhibit "C", then the funds shall be divided in accordance with the following ratio of division agreed upon, namely to Barbara (in her aforesaid capacities) 7.21%; to Romolo 17.50%; and to Guido 75.29%."*

[6] Paragraph 13 of the award provides as follows:

"13. The parties, or any one or more of them, are hereby confirmed to be entitled to apply to the High Court of South Africa (Cape Provincial Division) to make this award an order of Court to enable the registration thereof as an Order of Court in Rome, Italy, to enable and facilitate the withdrawal of funds from the said bank account in accordance with this Arbitral Award and to enable such steps (to be taken?) as they may be advised necessary to transact also with regard to the immovable property."

[7] Applicant subsequently approached the court for an order that the arbitral award published on 10 December 2007, be confirmed and made an order of court in terms of section 31 of the Arbitration Act No. 42 of 1965 ("the Arbitration Act"). Second respondent opposes the application, while first respondent abides the decision of the court. Second respondent has also filed a counter application in which he seeks the setting aside of the award as *void ab initio,* and that the settlement agreement concluded by the parties be declared *void ab initio*. In the affidavit filed by second respondent, which serves as an opposing affidavit and a founding affidavit for the counter application, second respondent contends that due to a common mistake, alternatively a unilateral mistake on his part, the settlement agreement concluded on 7 December 2007, is *void ab initio*. On this basis, he maintains that the arbitral award published on 10 December 2007, is likewise *void ab initio*.

SUBMISSIONS OF THE PARTIES ON THE VALIDITY OF THE ARBITRAL AWARD

[8] At the hearing of the application, Mr. Burger SC, with him Mr. Trengove, indicated that second respondent would no longer be moving for an order, in terms of the counter application, that the settlement agreement of 7 December 2007, be declared void *ab initio*. According to Mr. Burger, second respondent would, in reconvention, only seek an

order that the arbitral award of 10 December 2007, be set aside as void *ab initio*. As I understood Mr. Burger, the main string to second respondent's bow, for purposes of its defence to the application and for the relief it seeks in terms of the counter application, is that an arbitral award made by consent does not constitute a valid award which is capable of being made an order of court. It would therefore not be necessary, for purposes of the adjudication of the application and counter application, to decide whether a common mistake, or unilateral mistake on the part of second respondent, gave rise to the conclusion of the settlement agreement of 7 December 2007, as alleged by second respondent in his answering/founding affidavit.

[9] Mr. Burger submitted that the sole purpose of appointing an arbitrator is to have a dispute decided by him or her. From this it follows, he argued, that once the dispute has fallen away the arbitrator's appointment is at an end, for there is nothing for him or her to decide. In regard to the arbitral award of 10 December 2007, Mr. Burger submitted that, as it was made by consent and did not involve a decision by the arbitrator on the disputes referred to arbitration, it is not a valid award which may be made an order of court.

[10] Mr. Mitchell SC, for applicant, submitted that where parties to an arbitration reach a settlement of their disputes, at least one that affects matters *in futuro* and must be given effect to, an arbitrator is entitled upon the request of the parties to make an award in terms of the settlement. To hold otherwise, Mr. Mitchell argued, would lead to unnecessary and cumbersome proceedings by way of an illiquid action based on the agreement, if one party should (as is the case here) seek to resile from the agreement or refuse to perform his or her obligations thereunder.

[11] Mr. Mitchell also submitted that it is not correct to argue, as does second respondent, that the arbitrator was not able to make an award as no dispute remained to be adjudicated. He submitted that it is clear that the conclusion of the written settlement agreement did not end the disputes between the parties, as it required the arbitrator to adjudicate upon the enforceability of the written agreement.

DISCUSSION

[12] In their written arbitration agreement, in terms of which the parties submitted all their disputes to arbitration, the following provisions are included:

"11. Award

The arbitrator shall submit a written award based on law as applied to the facts. The Award of the Arbitrator shall be binding upon the parties without any right of appeal except for any review as may be allowed by or under The Arbitration Act (No. 42 of 1965) and each party shall abide by and comply with the Award in accordance with its terms. Each party undertakes to forthwith thereafter sign all such documents and authorities as may be necessary to give effect to the Award and failing which the Case Manager is hereby authorised and empowered to do so.

12. <u>Enforcement of the Award</u>
Judgment may be entered on the Award rendered in this case, and such judgment may be enforced pursuant to processes available under section 31 of the Arbitration Act (No. 42 of 1965).”

[13] As appears from the provisions of clause 12 of the arbitration agreement, the parties have agreed that the award of the arbitrator may be enforced under section 31 of the Arbitration Act. Section 31(1) provides that an award may, on the application to a court of competent jurisdiction by any party to the reference, after due notice to the other parties, be made an order of court. Section 31(3) provides that an award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.

[14] In **Arbitration in South Africa: Law and Practice, Butler and Finsen**, (1993), at page 273, the following is said regarding the

enforcement of an arbitral award in terms of section 31 of the Arbitration Act:

"The application procedure under the Arbitration Act is designed as a quick remedy for the enforcement of the award. The court will not usually consider the merits of disputes submitted to the arbitrator. The applicant will have to prove that there was a valid arbitration agreement covering the dispute; that the arbitrator was duly appointed and that there was a valid award in terms of the reference. In making the award an order of court the court in effect adopts the arbitrator's decision as if it were its own."

[15] In **Vidavsky v Body Corporate of Sunhill Villas** 2005 (5) SA 200 (SCA), it was stressed, at 208B, with reference to **Butler and Finsen,** supra, at 273, that in an application under section 31 (1) of the Arbitration Act, the applicant accepts an onus to prove that it is in possession of an award that can properly form the subject of an order of court. The Arbitration Act contains no definition of an award, although certain formal requirements for a valid award are prescribed, e.g. it has to be in writing and signed by the arbitrator and published in a prescribed manner. Apart from these formal requirements, it seems that what is required to constitute a valid arbitral award, is that all issues submitted must be resolved in a manner that achieves finality and certainty. (See **SA**

Breweries Limited v Shoprite Holdings Limited 2008 (1) SA 203 (SCA) at 213G-I and the authorities there cited).

[16] In English arbitration law, which served as a model for the development of South African arbitration law, there is also no statutory definition of an award. In considering what an award is, **Russell on Arbitration**, 22nd Edition, paragraph 6-001, states that, in principle, an award is a final determination of a particular issue or claim in the arbitration.

[17] In support of his submission that the instant award, which simply refers to and incorporates a settlement agreement, is not a valid award, Mr. Burger relied on the following common law authorities:

Voet 4.8.11

"Paulus advises that it is no arbitration by which it has been arranged for the arbitrator to give a particular decision, nor by which it was agreed what the judgment ought to be. Since the whole force of a decision to be given by an arbitrator proceeds from the covenant of the parties, it would be absurd that he should proceed still to take in hand and settle matters which have already been so disposed of by compromise of the litigants that no greater stability can be added to them by the arbitrator's judgment."

Digest 4.8.19

"Moreover, Labeo says that it is not the business of the praetor what sort of award an arbiter makes, provided that he states what he himself holds."

[18] Mr. Burger also referred me to certain decisions. In **Parekh v Shah Jehan Cinemas (Pty) Ltd & Others** 1980 (1) SA 301 (D) at 304E-F, Didcott J stressed that arbitration is a method for resolving disputes. He continued thus:

"A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default."

In **Telecall (Pty) Ltd v Logan** 2000 (2) SA 782 (SCA) at 786D-H the reasoning of Didcott J in the **Parekh**-case was approved, particularly that arbitration is a method for resolving disputes and that no purpose can be served by arbitration on an undisputed claim. In **Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another** 2002 (4) SA 661 (SCA) at 673F-H, it was stressed that the hallmark of arbitration is that it is an adjudication, which proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator, and as arbitration is a form of private adjudication, the function of an arbitrator is not administrative but judicial in nature.

[19] Reference can also be made to **Butler and Finsen**, supra, at page 271, where the legal consequences of an arbitral award are stated thus:

"The most important legal consequence of the final valid award is that it brings the dispute between the parties to an irrevocable end: the arbitrator's decision is final and there is no appeal to the courts…the issues determined by the arbitrator become res iudicata and neither party may reopen those issues in a fresh arbitration or court action."

[20] In **Verhagen v Abramowitz** 1960 (4) SA 947 (C) at 950H-951C the requirement of finality for a valid arbitral award was reiterated in the following terms:

"...a party to an arbitration is not entitled to seek a decision of the court on the very matters already referred to arbitration, and when an award has in fact been made it has been held that such an award is equivalent to lis finita and as between the parties the matter is res iudicata…it seems to me, however, that a matter can only be res iudicata if, in fact, there has been a full and final adjudication, otherwise one has the ridiculous result that the fact of an award can be pleaded as a bar, even if the arbitrator fails or refuses to adjudicate, wholly or partially, on the matters submitted to him."

See also **Strutt v Chalmers and Another** 1959 (2) SA 536 (N) and **Schoeman v Van Rensburg** 1942 TPD 175 at 177.

[21] In the instant matter the arbitrator was, as a consequence of the settlement agreement concluded by the parties, not required to decide the issues emanating from the disputes that were referred to arbitration. All that the arbitrator did, was to record and incorporate the settlement of the parties in his arbitral award. This resulted in the award being made simply as a procedural consequence of the parties settling their disputes and without the arbitrator bringing his mind to bear upon the issues between the parties as defined in their respective statements of claim.

[22] It seems to me, that the arbitral award does not meet the requirements for a valid award, as set out above. It does not represent an adjudication of any particular issue or claim in the arbitration, nor can it be said that this award is equivalent to *lis finite* with the result that as between the parties the matter is *res iudicata*. It is also significant, in my view, that, in terms of clause 11 of their arbitration agreement, the parties envisaged that the arbitrator would provide *"a written award based on law as applied to the facts"*. This conveys an intention that the arbitrator should determine their disputes in accordance with the law and the facts presented to him at the arbitration, which determination would then be made an order of court. Put differently, it shows that the parties did not intend that the mere recordal or incorporation of a settlement agreement

by the arbitrator, would constitute an award as envisaged in clauses 11 and 12 of the Arbitration agreement.

[23] I should also mention that the Arbitration Act does not make provision for an arbitrator to publish a consent or agreed award, i.e. an award simply incorporating the terms of a settlement agreement. It is significant to note that in terms of section 51 of the English Arbitration Act, 1996, an arbitrator is empowered to make an "agreed award." The relevant sub-sections of section 51 read as follows:

"51. Settlement
(1) If during arbitral proceedings the parties settle the disputes, the following provisions apply unless otherwise agreed by the parties.
(2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.
(3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case."

Reference can also be made to section 142A of our Labour Relations Act No.66 of 1995, which provides that the Commission for Conciliation, Mediation and Arbitration may make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.

[24] **Russell on Arbitration**, supra, at para 6-025, reiterates that an agreed award made in terms of section 51 of the English Arbitration Act, 1996, is enforceable even though the arbitrator has not actually made a decision, but simply recorded agreed terms. The agreed award may be enforced in the same manner as a full and final award made on the merits of the disputes referred to arbitration.

[25] Our common law relating to arbitration, also does not provide for the making of an "agreed award" by an arbitrator. On the contrary, the common law requires the arbitrator to make a decision on the merits, i.e. to "*state what he himself holds*" (Digest 4.8.19) or to "*deliver his opinion*" (Voet 4.8.14).

[26] In the report of the South African Law Commission on Domestic Arbitration (Project 94), May 2001, it was recommended that the Arbitration Act be repealed and replaced with a comprehensive new arbitration statute for domestic arbitration. To this end a Draft Arbitration Bill was proposed. Section 44 of the proposed Draft Arbitration Bill, which makes provision for an award on agreed terms, reads as follows:

"44. Award on agreed terms

[1] If, during arbitral proceedings, the parties settle the dispute, the tribunal must terminate the proceedings and, if requested by the parties and not objected to by the tribunal, record the settlement in the form of an award on agreed terms.

[2] An award on agreed terms must be made in accordance with the provisions of section 43 (1) and (2) and must state that it is an award.

[3] An award referred to in subsection (2) has the same status and effect as any other award on the merits of the dispute and may be made an order of court under section 53 if it is otherwise within the competence of the court to grant such order."

I should add that section 43 (1) and (2), referred to in section 44 (2), deals with the formalities prescribed for an arbitral award.

[27] To date the Legislature has not given effect to these recommendations of the South African Law Commission. In the absence of a provision in the Arbitration Act, similar to section 51 of the English Arbitration Act, 1996, or section 44 of the proposed Draft Arbitration Bill, 2001, I hold the view that there is no legal basis upon which the arbitral award of 10 December 2007, can be regarded as a valid award for the purpose of having same made an order of court in terms of section 31 of the Arbitration Act.

[28] I accordingly agree with the submission of Mr. Burger, that, upon the settlement of their disputes by the parties, the arbitrator's appointment was at an end, for there was nothing left for him to decide in terms of the referral to arbitration. The publication of any award thereafter, which merely incorporates the settlement concluded by the parties, did not, in my opinion, bring about a valid award which may be made an order of court in terms of section 31 of the Arbitration Act. Nor can it, in terms of our common law, be regarded as a valid arbitral award.

[29] The question may be asked whether the practice of the High Court to make orders by consent in suitable cases, does not afford support by way of analogy for allowing arbitral awards by consent to be validly made. I do, however, agree with the submission of Mr. Burger, that this is not a valid analogy, as the High Court has an independent and inherent jurisdiction to make orders in matters before it, which is in no way dependent on the agreement of the parties. In addition, the High Court has statutory jurisdiction in terms of rule 41 (4), in the event of the parties in pending proceedings reaching a written settlement agreement, to make such an agreement an order of court. To this one should add that our courts have frequently stressed that the court is not a mere registry of agreements and has a discretion in the matter, with the result that there are certain agreements which a court would decline to make an order of

court. See **Ex parte Venter & Spain NNO: Fordom Factoring Limited and Others Intervening**; **Venter & Spain v Povey & Others** 1982 (2) SA 94 (D) at 100D-E.

[30] An arbitrator, unlike a court, has no inherent power to decide issues or make orders that go beyond the issues which have been referred to arbitration and the pleadings filed pursuant thereto. In **Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others** 2008 (2) SA 608 (SCA), Lewis JA put it as follows at paragraph 30:

"In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator…had no jurisdiction to decide a matter not pleaded."

[31] As mentioned earlier, the arbitration agreement envisages an award being made by the arbitrator in accordance with the law and the facts presented to him at the arbitration. The arbitral award of 10 December 2007, which simply incorporates the terms of the settlement agreement reached by the parties, is accordingly not the type of award that the

arbitrator was mandated to make in terms of the arbitration agreement. As submitted by Mr. Burger, it is not an award in the proper sense at all and not something that can be made an order of court.

[32] I am further of the opinion that the arbitrator's ruling of 10 December 2007, that second respondent is bound by the terms of the settlement agreement of 7 December 2007, cannot, as argued by Mr. Mitchell, be regarded as an adjudication of the disputes between the parties to the arbitration. The arbitrator's inquiry in this regard and his finding that second respondent has no grounds for the avoidance of the settlement agreement, were not related to any of the disputes which had been referred to arbitration. The issue as to the enforceability of the written settlement agreement of 7 December 2007, could obviously not have formed part of the disputes referred to arbitration, nor could it have been an issue in the pleadings filed by the parties. The issue as to the enforceability of the settlement agreement only arose on 10 December 2007 and, in my view, the arbitrator did not have the necessary jurisdiction to inquire into and rule on this issue. I incline to the view that upon being informed by the parties on 7 December 2007, that they had settled their disputes, with the result that he would no longer be required to determine such disputes, the arbitrator's mandate was terminated and he became *functus officio*.

[33] It is true, as submitted by Mr. Mitchell, that it would, for practical reasons, be convenient if an arbitrator were to be able to make an award in terms of a settlement agreement concluded by the parties to the arbitration. However, absent the necessary statutory authority to make an award on agreed terms, the arbitrator had no legal basis for making an award in the terms reflected in his written arbitral award of 10 December 2007.

[34] It should be borne in mind that second respondent is not left without a remedy. He contends that the parties concluded a valid and enforceable agreement of settlement, which would entitle him, albeit by means of a more cumbersome route, to enforce the terms thereof by means of action or application proceedings.

[35] It follows, in view of my aforesaid findings, that the main application falls to be dismissed, while the counter application should succeed. I should mention that in argument Mr. Burger relied on an additional ground, namely that even if the arbitral award of 10 December 2007 were to be made an order of court, such order will not turn the award into an enforceable judgment of this court. In view of my finding that the award does not constitute a valid award which may be made an

order of court, it is not necessary for me to deal with this additional ground relied upon by second respondent.

COSTS

[36] Mr. Mitchell submitted that, in the event of the court finding for second respondent, a special order in regard to wasted costs should be made in favour of applicant, as virtually all the affidavits filed by the parties have been rendered worthless due to second respondent's change of stance during argument.

[37] It is clear that second respondent's failure to raise the defence relating to the formal validity of the arbitral award at an earlier stage, resulted in costs being incurred unnecessarily by the filing of voluminous affidavits dealing almost exclusively with the issue of common mistake, alternatively unilateral mistake, raised by second respondent. It was only in the heads of argument, filed on behalf of second respondent shortly before the hearing of the matter, that the formal validity of the arbitral award was put in issue. The lion's share of the costs incurred in regard to the affidavits, has accordingly been wasted.

[38] In **Scheepers and Nolte v Pate** 1909 TS 353 at 356, Innes CJ stated the applicable principle thus:

"I think it is the duty of a litigant to avoid any course which unduly protracts a lawsuit, or unduly increases its expense. If there is a legal defence which can be effectively raised, by way of exception or otherwise, at an early stage, he ought at that stage to raise it. If he only takes it later on it may still be effective, but the fact that it came late, and that considerable expense was unnecessarily incurred in consequence, seems to me an element which may well affect the mind of the court in apportioning the costs."

[39] In the circumstances, I am satisfied that it would be just and equitable to make a special costs order in regard to such wasted costs in favour of applicant. I should also add, that I am satisfied that this matter justified the employment of two counsel.

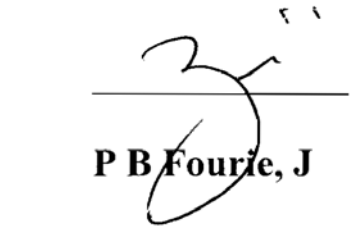
ORDER

[40] In the result the following order is made:

1. The main application is dismissed.
2. An order is granted in terms of paragraph (a) of the counter application, setting aside the arbitral award published on 10 December 2007, as void *ab initio*.
3. Save for the costs incurred by second respondent in connection with any of the affidavits (and annexures thereto) filed by either party in these proceedings, applicant is

declared liable for the payment of second respondent's costs in the main application and the counter application. The costs awarded to second respondent are to include the costs attendant upon the employment of two counsel.

4. Second respondent is declared liable for the payment of applicant's costs incurred in connection with any of the affidavits (and annexures thereto) filed by either party in the main application and the counter application.



P B Fourie, J