



CONSTITUTIONAL COURT OF SOUTH AFRICA

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another

CCT 97/07
[2009] ZACC 6

Date of Judgment: 20 March 2009

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today, 20 March 2009, the Constitutional Court handed down a judgment in the above matter.

Mphaphuli and Associates (Pty) Ltd, the applicant in this matter, is an electrical infrastructure contractor which was awarded a contract by Eskom to electrify certain rural villages in the Limpopo Province. The applicant subcontracted a portion of the work to the second respondent, Bopanang Construction CC. Prior to the completion of the work assigned to it, Bopanang vacated the site, alleging that Mphaphuli had failed to pay moneys owing to it. A dispute arose as to which party was indebted to the other and for what amount. The parties agreed that the dispute would be resolved by an arbitrator, namely Mr Nigel Andrews (the first respondent).

After remeasuring the work done, the arbitrator found Mphaphuli to be liable to Bopanang for a certain amount. Bopanang then applied to the High Court in Pretoria for the arbitration award to be made an order of court. That application was opposed by Mphaphuli, which also filed a counter-application to have the award set aside. The basis of Mphaphuli's argument was that it had not been accorded a fair and impartial hearing by the arbitrator, in that the arbitrator had held "secret meetings" with Bopanang in the absence of Mphaphuli, and that correspondence had passed between the arbitrator and Bopanang to which Mphaphuli had not been made privy. Mphaphuli also alleged that the arbitrator had exceeded his mandate in terms of the arbitration agreement.

The High Court found in favour of Bopanang, which judgment was subsequently upheld by the Supreme Court of Appeal. On 13 May 2008, the Constitutional Court heard an application by Mphaphuli for leave to appeal against the judgment of the Supreme Court of Appeal.

The case raises two main issues. The first concerns the manner in which the Constitution (particularly the right to a fair and impartial hearing enshrined in section 34) impacts on private arbitrations conducted in terms of the Arbitration Act 42 of 1965. The second issue is whether the private arbitration in this case was conducted unfairly.

O'Regan J, writing for the majority (in which Langa CJ, Mokgoro J, Van der Westhuizen J and Yacoob J concur), held that section 34 of the Constitution does not apply directly to private arbitrations. She held that the only reason why it might be argued that section 34 does apply to such arbitrations is to subject them to the requirement of fairness contained in that section. However, she held that, first, arbitrations have always been required to be conducted fairly, and that what is fair in a given arbitration will be dependent on the context. Secondly, she held that the Constitution is relevant to arbitrations in the sense that, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent.

On the facts of this case, O'Regan J held that the arbitration had been conducted fairly. She held that the intention of the parties was that the arbitrator would conduct the arbitration in an informal, investigative manner, rather than in the formal, adversarial manner consistent with a trial in a court of law. Whilst the conduct of the arbitrator may not have been perfect, O'Regan J held that it did not give rise to a gross irregularity which would warrant the arbitration award being set aside. Therefore, whilst O'Regan J granted leave to appeal, she dismissed the appeal.

Kroon AJ, dissenting (in whose judgment Jafta AJ and Nkabinde J concur), held that section 34 of the Constitution did indeed apply to private arbitrations. He held that this entailed that arbitrators were bound to observe the principles of natural justice, which precludes an arbitrator from meeting with one party in the absence of the other, and from corresponding with one party alone. On this basis, Kroon AJ held that the conduct of the arbitrator in this matter gave rise to gross irregularities. He held that he would have upheld Mphaphuli's appeal and set the award aside.

In a separate dissenting judgment, Ngcobo J held that the application for leave to appeal should not be entertained by the Court because it was not in the interests of justice to do so. He based this conclusion on the fact that the applicant did not raise the constitutional issues in either the High Court or the Supreme Court of Appeal; and that on the facts, the applicants do not bear any prospects of success. He therefore declined to consider the constitutional issues raised.

In the result, the application for leave to appeal was granted, but the appeal was dismissed with costs.*

* Although Madala J sat in the case, ill health prevented him from participating in the judgment