



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: 04 October 2024

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

The Minister of International Relations and Co-operation NO and Another v Neo Thando/Elliot Mobility (Pty) Ltd and Another (444/2023) [2024] ZASCA 134 (04 October 2024)

Today, the Supreme Court of Appeal (SCA) upheld an appeal from the Gauteng Division of the High Court, Pretoria (the high court).

The issue before the SCA was whether the arbitrator had jurisdiction to arbitrate a matter referred to him unilaterally by Neo Thando/Elliot Mobility (Pty) Ltd (Neo Thando) without the consent of the Department of International Relations and Co-operation (DIRCO) contrary to the terms of the arbitration clause. The factual background is as follows: On 11 August 2015, DIRCO invited tenders 'for the removal, packing, storage (in South Africa only) and insurance of household goods and vehicles of transferred officials, to and from missions abroad'. After due process, DIRCO awarded the tender to Neo Thando, and they signed a Service Level Agreement (SLA) which contained responsibilities of both parties ie that Neo Thando would be responsible for the packing according to the detailed specifications set out in the technical specifications of a transferred official's furniture and equipment.

The officials of DIRCO were to be transferred for a period of four years to and from missions abroad during which time their household goods and personal effects had to be kept safe for the duration of the transfer period and for re-delivery thereof, upon their return to South Africa. For that reason, Neo Thando wanted to store the goods for DIRCO as per the terms of SLA. Unknown to Neo Thando DIRCO had an existing SLA with AGS Frasers/Gin Holdings (AGS Fraser) which had stored the goods. Neo Thando wrote to AGS Fraser to hand over those goods and sought intervention from DIRCO. Due to no response from them, Neo Thando wrote a letter of demand and gave notice of having the matter heard before an arbitrator. There still was no response from DIRCO, they proceeded to make a request for an arbitration as they contended that there was a 'dispute' between them and DIRCO. Seven days after Neo Thando made a request for an appointment of an arbitrator, DIRCO responded by saying the letter from Neo Thando did not make it clear what the dispute was. That it did not believe that there was any dispute to arbitrate and accordingly did not agree to arbitration.

The matter proceeded for arbitration. DIRCO contended that the SLA required mutual consent for any referral to arbitration and that Neo Thando's unilateral action violated this particular requirement. It further contended that no formal notice identifying a dispute had been given as required in the SLA and that the demand letter constituted a claim for damages rather than an arbitrable dispute. Neo Thando maintained that it had followed proper procedures and that an arbitrator should determine jurisdiction. The arbitrator issued a final award and found that DIRCO has a contractual obligation to procure all household goods and vehicles stored with AGS Fraser and the goods to be transferred by AGS Fraser to Neo Thando. Not satisfied with this outcome, DIRCO approached the high court for a review of the arbitrator's awards. As a counterclaim, Neo Thando sought the high court to confirm the award of the arbitrator. The high court initially held in favour of Neo Thando, affirming the arbitrator's jurisdiction over the matter. The high court found that an implicit agreement existed allowing for arbitration despite DIRCO's objections.

The SCA held that, without a mutual agreement to arbitrate an existing dispute, there is no basis for arbitration under the SLA. It further held that, an arbitration by its very nature and as understood in the business world is voluntary. To force parties to arbitrate is 'unbusinesslike'. It also held that, the high court and so too the arbitrator misunderstood the crisp issue for determination and the interpretation of the SLA.

Therefore, the SCA overturned the high court's decision and concluded that the arbitrator lacked jurisdiction as there was no mutual agreement between parties to submit disputes for arbitration as required by their SLA. It further found that, at the time of referral, no substantive dispute existed between DIRCO and Neo Thando that warranted an arbitration. The SCA also highlighted that, proper procedures outlined in both the SLA and the Arbitration Act 42 of 1965 were not adhered to by Neo Thando when it unilaterally referred the matter for arbitration.

As a result, the SCA upheld the DIRCO's appeal with costs, and the award issued by the arbitrator was declared invalid and set aside.

~~~~ends~~~~