MEMBERSHIP NUMBER: 2255

Assignment. 1

Module 2: Law and Practice of Arbitration

4/6/2020

QUESTION 1

1.1 Section 14[1] confers various powers on the arbitration tribunal that the arbitrator obtains or derived from.

1) An arbitration tribunal may:

a) On the application of any party to a reference, unless the arbitration agreement

Otherwise provide:

> i) Require any party to the reference, subject to any legal objection, to make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection;
>
> ii) Require the parties to the reference to deliver pleadings or statements of claim and defence or require any party to give particulars of his claim or counterclaim, and allow any party to amend his pleadings or statements of claim or defence;
>
> iii) Require any party to the reference to allow inspection of any goods or property involved in the reference, which is in his possession or under his control; and
>
> iv) Appoint a commissioner to take the evidence of any person in the Republic or in the territory or abroad and to forward such evidence to the tribunal in the same way as if he were a commissioner appointed by the court;

b) Unless the arbitration agreement otherwise provides:

> i) From time to time determine the time when and the place where the arbitration proceedings shall be held or be proceeded with;
>
> ii) Administer oaths to, or take the affirmations of, the parties and witnesses appearing to give evidence;
>
> iii) Subject to any legal objection, examine the parties appearing to give evidence in relation to the matters in dispute and require them to produce before the tribunal all books, documents or things within their possession or power which may be required or called for and the production of which could be compelled on the trial of an action;

[1] Arbitration Act 42 of 1965

(iv) Subject to any legal objection, examine any person who has been summoned to give evidence and require the production of any book, document or thing which such person has been summoned to produce;

(v) With the consent of the parties or on an order of court, receive evidence given by affidavit; and

(vi) Inspect any goods or property involved in the reference.

2) Where an arbitration tribunal consists of two or more arbitrators, any oath or affirmation may be administered by any member of the tribunal designated by it for the purpose.

3) Where an arbitration tribunal consists of two arbitrators, their unanimous decision, and where it consists of more than two arbitrators, the decision of the majority of the arbitrators, shall be the decision of the arbitration tribunal.

4) Where the arbitrators, or a majority of them, do not agree in their award, their decision shall not be taken to be either the least amount or least right of relief awarded by them, or the average of what has been awarded by them, but the matter shall thereupon become referable to the umpire, unless the arbitration agreement otherwise provides.

Section 15[2]. Notice of Proceedings to Parties

1) An arbitration tribunal shall give to every party to the reference, written notice of the time when and place where the arbitration proceedings will be held, and every such party shall be entitled to be present personally or by representative and to be heard at such proceedings.

2) If any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.

Section 16[3]. Summoning of Witnesses

1) The issue of a summons to compel any person to attend before an arbitration tribunal to give evidence and to produce books, documents or things to an arbitration tribunal, may be procured by any party to a reference in the same manner and subject to the same conditions as if the reference were a civil action pending in the

[2] Arbitration Act 42 of 1965
[3] Act 42 of 1965

court having jurisdiction in the area in which the arbitration proceedings are being or are about to be held: Provided that:

a) No person shall be compelled by such a summons to produce any book, document or thing the production of which would not be compellable on trial of an action; and

b) The clerk of the magistrate's court having jurisdiction in the said area, may issue such summons upon payment of the same fees as are chargeable for the issue of a subpoena in a civil case pending in the magistrate's court.

2) Any summons issued out of any court in terms of sub-section (1) shall be served in the same manner as a subpoena issued out of that court in a civil action pending in that court.

3) The provisions of sub-sections (3) and (4) of section eighty-seven of the Prisons Act 8, 1959, 1959 (Act 8 of 1959), relating to the service of a subpoena upon any prisoner to give evidence in civil proceedings in any court, shall mutatis mutandis apply with reference to the service of a summons upon any prisoner required to give evidence before an arbitration tribunal as if the proceedings before such tribunal were civil proceedings pending in a court.

4) On the application of any party to a reference, the court may order the process of the court to issue to compel the attendance of a witness before the arbitration tribunal or may order any prisoner to be brought before such arbitration tribunal for examination.

1.2 Statutory duty of the Arbitrator to the parties.

Duties of arbitrators and umpires

- An Arbitrator has the duty to act fairly towards the parties when deciding the dispute[4].
- there is a further duty on an arbitrator to act fairly towards the parties when deciding the dispute[5].
- the arbitrator must exercise care, proceed diligently and act impartially and without any personal interest in the proceedings[6].
- Arbitrators may not delegate their power or function to another[7].
- Arbitrators are bound by relevant substantive law in making their decisions on the merits[8].

[4] Johan Louw Konstruksie (Edms) Bpk v Mitchell 2002 3 SA 171;
[5] Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews 2009 6 BCLR 527 (CC); 2009 4 SA 529 (CC) para 221
[6] Graaff - Reinet Municipality v Jansen 1917 CPD 604 607
[7] Mervis Brothers v Interior Acoustics 1999 3 SA 607 (W)

Act in accordance with the arbitration agreement to be independent of the parties and in an unbiased way arbitration rules to make themselves acquainted with the facts of the case and the claims, allegations and defences of the parties and, within a reasonably short period of time, to make a reasoned award fulfils the requirements for the award to be enforceable accordance with the arbitration agreement.

1.3 Common law obligation does an arbitrator have to the parties

The tribunal's obligations include (Arbitration Act):

- Giving written notice of the proceedings to the parties.
- Recording the proceedings.
- Setting the time periods for making awards.
- Making the award in writing (an award must be signed by all the members of the tribunal).
- Publishing the award in the presence of the parties or their representatives (or having them summoned to appear).
- Exercising care, proceeding diligently and acting impartially.

The Arbitration Act contains various enabling provisions, including procedural rules and directions for the arbitrator to follow. Whether or not they apply may depend on the arbitration agreement.

QUESTION 2

2.1 The Arbitration Act governs those arbitrations where the agreement to submit the dispute to arbitration is in writing, (Section 1(i)[9]. Oral agreements to arbitrate are not governed by the Arbitration Act, such arbitrations are then conducted in terms of the common law, and particularly the common law regarding contracts.

An oral agreement to submit a dispute to arbitration is binding on the parties and the party renouncing such agreement would be guilty of breach of contract[10]. The usual remedies for breach of contract, that is, damages or alternatively an order of specific performance, would, however, appear to be inappropriate.

Under English law an oral arbitration agreement is said to be capable of being unilaterally. It has also been said that the common law provides only for the arbitration of existing disputes, not for the arbitration of future disputes, that an oral arbitration agreement is incomplete and unenforceable until the arbitrator has been nominated and that the courts have no power to remove an arbitrator appointed

[8] (Dickenson and Brown v Fisher's Executors 1915 AD 166 176)
[9] Arbitration Act 42 of 1965
[10] Jacobs, in The Law of Arbitration in South Africa12

under common law, nor does such arbitrator have the power to make an interim award.

Arbitration is a consensual arrangement adopted willingly by each of the disputants. Consequently, the agreement to take a dispute to arbitration is contractual in nature and most of the rules applying to contracts have application to the agreement to take a dispute to arbitration.

2.2 When and under which circumstances will a court not enforce an arbitration agreement?

The court, however, on the application of any party thereto, has the power, on good cause shown, to set aside the arbitration agreement or to order that any particular dispute shall not be referred to arbitration. 'Good cause' could include:

- Serious doubt that the arbitrator may be biased or may not be trusted to give a fair decision. Bias does not have to be proved; it is sufficient if there are grounds for a party to fear that he would not receive fair treatment;

- Where allegations of fraud have been publicly made, and the person against whom they were made is desirous of clearing his name in public;

- Where there is a number of a claim, not all of them falling within the scope of the arbitration agreement, and the balance of convenience favour their being determined together.

- Where the arbitrator was involved in active litigation between the parties;
- Where there had been misconduct in the discharge of his duties by the arbitrator;
- Where the only, or the principal, issue is a question of law.

QUESTION 3

3.1 Natural justice rules

- The first rule is that a party in a trial must be informed of the case that he has to answer. Where the trial is a criminal trial the accused must know what it is he is being charged with so that he may formulate his defence. In a civil trial the defendant must be told exactly what it is that the claimant is claiming so that he has adequate opportunity to prepare his defence. Surprises have no place in trials – hence the requirement for submissions.

- The second rule, the "audi alteram partem" rule (literally "hear the other side"), requires that the court shall give a full and fair hearing to both parties and may hear one party only in the presence of the other. This ensures that one party will hear everything which the other party tells the court and will be afforded opportunity to deny any of the statements and refute any of the allegations that may have been made. This rule should be scrupulously observed in arbitrations.

- The third rule is that the judge, or arbitrator, should be neutral and unbiased. He should not stand to gain or lose in any way dependent on the outcome of the hearing. He should not be involved in any relationship, whether business or personal, with either of the parties.

3.2 Seven ways in which an arbitrator's appointment can come to an end.

The arbitrator's appointment may be terminated in one of seven ways:

- The parties may, by mutual agreement, terminate the arbitrator's appointment in terms of Section 13(1) of the Arbitration Act. But mutual agreement is required to do so, and neither party can unilaterally terminate the arbitrator's appointment. It has, however, been held that a common law arbitration agreement (one not in writing) may be unilaterally terminated;

- By making an award. In making an award, the arbitrator completes his mandate and his appointment is automatically terminated. He is said to be functus officio; in other words, that he has discharged his function and is now devoid of authority. His authority may be revived if the award is referred back to him for correction of a patent or admitted error, or for amplification (see Section 32 of the Arbitration Act);

- By a settlement of the dispute before an award is made. Once the dispute has been settled there is nothing for the arbitrator to determine and his appointment is automatically terminated;

- By the resignation of the arbitrator. An implied term in the arbitrator's appointment is that he shall be personally available at reasonable times to perform all necessary duties until the final award is made. Failure by the arbitrator to discharge all his duties without good reason constitutes breach of contract and the parties could hold him liable for any damages which they might suffer. His resignation might be tendered at a time before the hearing itself has started (e.g. during the stage of submissions) when a new

appointment could be made without delay and expense to the parties, and, in such case, it would be unreasonable for the parties not to accept such resignation. Once the hearing has started, however, the arbitrator's resignation would put the parties in a position of having to appoint a new arbitrator who would probably have to recommence the hearing. The wasted costs, particularly if the parties had engaged attorneys or counsel to represent them at the hearing, would represent damages suffered by the parties which could probably be claimable from the arbitrator. Nor would he be entitled to the fees to which he would otherwise have been due.

- By removal by the Court. In terms of Section 13(2) of the Arbitration Act the court has the power to remove an arbitrator from office on the application of a party.
- By the death of the arbitrator or his inability to act for reasons beyond his personal control. Death automatically terminates an arbitrator's appointment and the parties will need to appoint a new arbitrator who will have to recommence the hearing.
- The arbitrator's appointment is not automatically terminated where he becomes unable to perform his duties for reasons beyond his control. He may be prevented by illness or physical infirmity (e.g. an accident incapacitating him for an extended period). Or he may be prevented from acting because he has been imprisoned for a criminal offence. His appointment may be terminated by the parties by mutual agreement, or by the court in terms of Section 13(2) of the Arbitration Act.

- By the failure of the arbitrator to make an award within four months of entering on the reference. Section 23 of the Arbitration Act requires that the arbitrator makes an award within four months of "entering on the reference". The Act is silent about the consequence of his failure to do so, but in the unreported case of Pasa Construction v Roofing Guarantee Co (Pty) Ltd it was held that his power to make an award automatically ceased, and hence it might be said that his appointment had terminated.

QUESTION 4

4.1 General Powers of the Court in terms of Section 21[11] provides as follow:

1) For the purposes of and in relation to a reference under an arbitration agreement, the court shall have the same power of making orders in respect of:

a) Security for costs;

b) Discovery of documents and interrogatories;

[11] Arbitration Act 42 of 1965

c) The examination of any witness before a commissioner in the Republic or in the territory or abroad and the issue of a commission or a request for such examination;

d) The giving of evidence by affidavit;

e) The inspection or the interim custody or the preservation or the sale of goods or property;

f) An interim interdict or similar relief;

g) Securing the amount in dispute in the reference;

h) Substituted service of notices required by this Act or of summonses; and

i) The appointment of a receiver, as it has for the purposes of and in relation to any action or matter in that court.

2) The provisions of sub-section (1) shall not be construed so as to derogate from any power which may be vested in an arbitration tribunal of making orders with reference to any of the matters referred to in the said sub-section.

3) Notwithstanding anything to the contrary in the arbitration agreement, the court may at any time, on the application of any party to the reference, order that the umpire shall enter upon the reference in lieu of the arbitrators in all respects as if he were a sole arbitrator.

4.2 Common law provides only for the arbitration of existing disputes, not for the arbitration of future disputes, that an oral arbitration agreement is incomplete and unenforceable until the arbitrator has been nominated and that the courts have no power to remove an arbitrator appointed under common law, nor does such arbitrator have the power to make an interim award.

It would appear that the courts will enforce the arbitrator's award where the arbitration has taken place under the common law, on the same basis that any other oral agreement would be enforced, that is, as a valid contract.

Any discussion on arbitration under the common law is somewhat academic because virtually all arbitrations arise out of written agreements and thus fall within the ambit of the Arbitration Act. It is submitted that it would be most ill-advised to proceed on any basis other than a written agreement.

Where there is an agreement between two or more parties that any dispute between them shall be referred to arbitration and one of the parties initiates legal proceedings

against another in respect of the dispute the defendant in the matter may apply to court for a stay of the proceedings provided he does so after having given notice of his intention to defend the action but before delivering any pleadings and, if the court is satisfied that there is no reason why the dispute should not be referred to arbitration, it may make an order staying such proceedings (Section 6).

Unless the arbitration agreement states otherwise, the reference of the dispute to arbitration shall intend the appointment of a single arbitrator (Section 9).

The arbitrator should be identified by name or a procedure should be laid down for securing his appointment (see Section 3.3 below). Failure to provide for the appointment of an arbitrator does not render the agreement invalid or unenforceable. If the parties are unable to agree on a suitable candidate or on the manner in which he might be appointed,

QUESTION 5

5.1 In the scenario given, there was a clause that the parties have in their contract; however, the dispute procedure was not outlined.

The parties are no longer in good terms, Mr A – B is not taking calls from Mr X-Y neither to respond to the letters. It is clear that the parties cannot reach any agreement pertaining to the appointment of the Adjudicator that is required by Arbitration Act, where both parties must agree to the appointment and such appointment must in writing and signed off by both parties.

In this case a dispute has already arisen and the parties are unable to agree on the appointment of a single arbitrator several alternatives present themselves.

- Mr A-B could draw up a list of, say, five possible candidates and invite the Mr X-Y to choose one.
- Alternatively, he might ask the Mr X-Y to draw up a list of candidates from which he himself might choose one. Where the Mr A-B and Mr X-Y have already failed to reach agreement on the appointment of an arbitrator it is sometimes unlikely that either will be able to produce a list of candidates which will contain a name acceptable to the other.
- An alternative procedure available for Mr A-B would be for each party to appoint an arbitrator and the two arbitrators to sit jointly to hear the dispute and make the award.

In case where Mr A-B and Mr X-Y are unable to agree on a suitable candidate or on the manner in which he might be appointed, Section 12[12] provides that on the application of one of the parties the courts shall appoint an arbitrator.

1) Where:

a) In terms of an arbitration agreement or this Act the reference shall be to a single arbitrator and all the parties to the reference do not, after a dispute has arisen, agree in the appointment of an arbitrator; or

b) An arbitration agreement provides that the reference shall be to an even number of arbitrators and the parties to the reference or the arbitrators are at liberty to appoint an umpire and do not appoint him in any case where such appointment is necessary for the decision of the matters in dispute or the due conduct of the arbitration, or where the parties or such arbitrators are required to appoint an umpire and do not appoint him; or

c) Where an arbitration agreement provides that the reference shall be to two or more arbitrators one to be appointed by each party, and any party fails to appoint reference is or are removed by the court, or his or their appointment or appointments is or are set aside by the court and the arbitration agreement does not provide otherwise, the court may, on the application of any party to the reference, either:

a) Appoint an arbitrator or arbitrators or an umpire to act in the place of the arbitrator, arbitrators or umpire so removed or whose appointment or appointments has or have been so set aside; or

b) Appoint a sole arbitrator to act in the place of the sole arbitrator or all the arbitrators or umpire so removed or whose appointment or appointments has or have been so set aside; or

c) Order that the arbitration agreement shall cease to have effect with respect to the dispute referred.

5) An arbitrator or umpire appointed by the court shall have the like power to act in the reference and make an award as if he had been appointed in accordance with the terms of the arbitration agreement.

6) An arbitrator or umpire appointed in the circumstances described in sub-section (1) of section ten or sub-section (2) of section eleven or sub-section (2), (3) or (4) of this section or an arbitrator appointed after the court has granted an extension of time to do so in the circumstances described in sub-section (3) of section ten, may

[12] Arbitration Act 42 of 1965

avail himself of the evidence recorded in the arbitration proceedings before his appointment and may, if he think fit, recall for further examination any person who has given such evidence.

It is clearly advisable in any arbitration agreement to make a personal nomination of an arbitrator failing which a suitable procedure should be laid down for the appointment of the arbitrator or the nomination of candidates for selection as arbitrator by some third party. Where no such provision is contained in the agreement, or where the parties are unable to agree on the adoption of any procedure, the final resort will be to the Courts

5.2 Acceptance of Appointment by Arbitrator

The acceptance by the arbitrator of his appointment concludes a contract between himself and the parties in terms of which he is obliged to be reasonably available to hear the dispute and to make the award within a reasonable time, but not later than a particular stipulated date (unless otherwise agreed, this shall be four months after entering on the reference - Section 23 of the Arbitration Act), while the parties in turn undertake to accept and be bound by his award and to pay his fees.

The acceptance may be formal and in writing, or it may be informal and tacit, to be implied when the arbitrator commences to perform his duties.

Before accepting appointment, the arbitrator should ensure that he fully appreciates all the implications of the appointment.

The appointment is a personal one and the arbitrator may not delegate any of his duties to another except those of a purely mechanical nature, such as the performance of calculations or the typing of the award. He must therefore establish how much time he may be required to spend on the matter and when and satisfy himself that he will be able to make himself available at such times and for such lengths of time as may be required of him.

He must also consider whether there are any aspects of the matter which might debar him from acting. Any circumstances which could affect his impartiality might serve to do so. To have a financial interest in the outcome of the arbitration would afford reasonable grounds for doubting his impartiality. Emotional or personal relationships with one of the parties might also influence his judgment, as would be the case for example if one of the parties was a close relative or friend, or, on the other hand, a business rival or a personal enemy.

Bibliography

1. Arbitration Act 42 of 1965
2. Dickenson and Brown v Fisher's Executors 1915 AD 166 176
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7. Mervis Brothers v Interior Acoustics 1999 3 SA 607 (W)