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The finality principle in construction arbitration: An evolutionary perspective

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Abstract

Arbitration is one of the most popular and widely applied dispute resolution mechanisms used in the construction sector. There are purported advantages in using arbitration relative to litigation. Among these advantages are the '*final*', '*conclusive*' and '*binding*' nature of arbitration proceedings and the awards that flow from these proceedings. Yet the finality of arbitration is dependent on a number of interrelated factors including historical legal traditions, judicial attitudes towards the finality principle and the operation of national legislative frameworks and constitutional provisions. Drawing upon its historical evolution and utilising relevant domestic case law and legislation in South Africa, this study explores the finality principle within arbitration jurisprudence through an analysis of two seminal construction dispute cases. The study finds that the courts engage in both major and delicate balancing of constitutional considerations when considering the finality of arbitration and that, ultimately, these constitutional considerations will trump the finality of arbitration.

Keywords: Finality, Arbitration, Principle, Construction

Introduction

The South African construction industry

South Africa's construction industry plays a significant role in the country's economic growth. Despite downturns in the industry, South Africa's construction industry remains one of the leading construction sectors in Africa (Ludick, 2022), alongside that of Egypt (Faria, 2021). However, over the last decade, the industry has suffered from a fall in productivity and output

(Bierman et al., 2016) leading to weakening of investor confidence in the industry (Muguto et al., 2019). Furthermore, construction output has been greatly impacted by the inability of the country's national power provider (ESKOM) to meet its power/electricity demands (Ludick, 2022). Furthermore, major infrastructure projects which could have served as a catalyst for increased construction activity, such as the Renewable Energy Independent Power Producer Programme, are generally in hiatus. Construction projects are particularly susceptible to failure given their unique characteristics including, for example, the heterogeneity associated with its stakeholders (Ojiako et al., 2015; Chipulu et al., 2019), variations in client requirements (Nguyen and Do, 2021), and the complexity of its delivery process (Oti-Sarpong et al., 2022). The same applies to the South African construction industry which is largely susceptible to the majority (if not all) of the critical failure drivers reported in most construction projects (Amoah et al., 2020).

There are a number of drivers behind failure within the South African construction industry. These include difficult operational conditions, policy uncertainty (particularly as it relates to the National Development Plan), and the country's labour environment which is particularly political and volatile (Ranchhod and Daniels, 2021). Put together, the peculiarity of the South African construction industry accounts for a major reason for the prevalence of both time and cost delays and overruns within the industry (Shivambu and Thwala, 2019). These delays and overruns represent reasons for increases in the number of construction disputes in the country.

Dispute resolution in South Africa

The laws and legal system in South Africa can best be described as hybrid in nature. This hybrid system is a characteristic of the country's diverse legal traditions. South Africa's law primarily consists of elements of Roman-Dutch ('*Roomsch Hollandsch Recht*') legal principles (Williams, 1909-1910), English legal principles (Beinart, 1981) (particularly in areas such as precedent), and customary (indigenous) laws (Huizenga, 2018). Private law in South Africa which arbitration falls within is primarily based on Roman-Dutch and English legal principles (Brand, 2014). There are, nonetheless, numerous advantages of South Africa's eclectic legal traditions. The hybrid nature of South Africa's legal system means that it is neither trammelled by nor restricted in the use of

available sources and authorities in its quest to solve legal problems (Erasmus, 1989). There are major differences between Roman-Dutch law and the laws of England Wales as relates to arbitration and, more specifically, the question of appeals and *vacatur*. For example, while under the laws of England & Wales, arbitration generally excludes rights of appeal, under Roman-Dutch law, appeals were allowable under the principle of '*reductie*'[1]. Under Roman-Dutch law (as against common law), an arbitration award still required confirmation by the courts. Further understanding of the Roman-Dutch attitude towards arbitration can be drawn from the treatise of the seventeenth-century Dutch lawyer and Supreme Court Judge, Simon van Leeuwen (1886).

In South Africa, when a disputes emerges in a construction project, unless by expressed provisions set out in a contract, the dispute will be heard either in the magistrate's court or in the high court under their respective rules, with the allocation to either being made based on the monetary value involved. There are some provisions for 'alternative' dispute resolution under both the magistrate's court and the high court rules. For example, under Rules 18 and 25 of Magistrate's Court Rules, provisions are made for settlement of disputes as part of the 'Pre-trial conference' (Department of Justice and Constitutional Development, 2010). Similar provisions are made under Rule 37 of the High Court Rules (Department of Justice and Constitutional Development, 2009). There are also similar provisions that apply to the superior courts (e.g., The Supreme Court of Appeal and The Constitutional Court). For example, Section 38 of the Superior Courts Act 10 of 2013 makes provisions for referrals to be made to external experts where the court requires specialist advice. Unlike the United Kingdom, there are no designated construction courts (such as the Technology and Construction Court, England & Wales).

Parties to a construction dispute in South Africa who do not wish to have their dispute heard in state-constituted magistrates or high courts arguably have the option to choose to resolve their dispute via a range of private 'alternative' dispute resolution (ADR) mechanisms which includes mediation (de Jong, 2019), adjudication (Chuah and Chow, 2010), and arbitration (Rantsane, 2020). Adjudication and arbitration tend to be the most commonly used ADR mechanism in construction disputes in South Africa (Ludick, 2022). However, although the dispute clauses in contract forms such as the International Federation for Consulting Engineers

[1] Dutch Reformed Church v Town Council of Cape Town 15 SC 14

(2017), the New Engineering and Construction 4 (2019), and the General Conditions of Contract for Works of Civil Engineering Construction (2010) now primarily focus on adjudication over arbitration, as observed by The Constitutional Court of South Africa in the seminal case of *Lufuno Mphaphuli v Bopanang Construction*[2], arbitration still remains popular as a dispute resolution mechanism in the South African construction sector.

Literature review

What is arbitration?

Arbitration has variously been defined as either (i) "…*the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law"*[3], or (ii) "*A procedure regulated by law in which a dispute between one or more parties is submitted, by agreement of the parties, to an arbitral tribunal which makes a binding decision on the dispute"*[4]. Within the context of this study, the focus is on 'commercial arbitration', defined as "*The use of arbitration as an extra-judicial method of settlement of commercial and industrial disputes*" (Derenberg, 1942). This study focuses on commercial arbitration within the South African construction industry.

The essence of arbitration: arbitrability and finality

For a dispute to qualify for arbitration, it must meet a number of criteria. For example, it must entail an element of 'adjudication' which means that there must be a controversy or dispute between the parties[5], there must be an agreement to arbitrate which means that the parties must consent to arbitrate (Gelinas, 2016), and the dispute must be 'justiciable' which means that the subject matter of the dispute can be subject to litigation in the courts (Sturges, 1960). The

[2] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6 [at 30]

[3] Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (1998) 19 ILJ 892 (LC); [1998] 5 BLLR 510 (LC) [at 89]

[4] Article 1 of the United Arab Emirates Federal Law No. 6 of 2018 on Arbitration (United Arab Emirates), Unofficial translation obtained under license by the author from two UAE law firms; Baker & McKenzie Habib Al Mulla and Al Tamimi & Co.

[5] Bidoli v Bidoli and Another (2011 (5) SA 247 (SCA)) [2011] ZASCA 82; 436/10 (27 May 2011) [at 14]

dispute must also be '*arbitrable'*. This means that the subject matter of the arbitration should not be prohibited by the state from being capable of settlement outside state and national courts.

Arbitrability

Generally, the notion of arbitrability flows from the interest of the state to ensure that certain disputes cannot be settled outside the legal framework articulated through the courts. In most cases, these will be where the state maintains a concern that the subject matter of the dispute engages broader societal, public policy and/or public order interest (AlRaeesi and Ojiako, 2021; Ojiako et al. 2021). Thus, disputes that engage criminality, for instance, are not subject to arbitration (Arslan, 2014).

There is considerable international comparative case law on the scope of arbitrability. In India for example, the Supreme Court of India[6] has clearly articulated disputes that cannot be subject to arbitration. These include matrimonial matters such as divorce and child welfare. The position in the United Kingdom is, however, slightly different. More specifically, "*English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not*…" (Mustill and Boyd, 1989). Thus, most matters in the United Kingdom, except criminal matters, can be subject to arbitration. In the United Arab Emirates (UAE), Federal Law No. 6 of 2018 on Arbitration (United Arab Emirates) stipulates in Article 4 (2) that "*Arbitration is not permitted in matters which do not permit compromise*". Thus, in the UAE, disputes deemed *arbitrable* are only those that flow from contracts. Matters that engage tort or other statutory claims or seek relief which is deemed non-contractual are not *arbitrable*.

In South Africa, national arbitration legislation is encompassed in three distinct, but complementary, pieces of legislation. These are The Arbitration Act 42 of 1965, The Protection of Investment Act 22 of 2015, and The International Arbitration Act 15 of 2017. The Constitution of the Republic of South Africa also serves as a key source of national arbitration law in the country. As this study relates to domestic commercial arbitration in South Africa, the focus will be on The Arbitration Act 42 of 1965 which is the primary legislation governing domestic

[6] Booz- Allen and Hamilton Inc. v SBI Home Finance Ltd (2011) 5 SCC 532.

commercial arbitration in South Africa. Section 2 of the Act highlights very specific matters that are not *arbitrable,* an example being matters relating to personal status. Thus, it will appear that most if not all civil disputes are *arbitrable* under South African case law. Furthermore, South African case law recognises that arbitrators are empowered to determine their own jurisdiction on matters that flow from civil disputes referred to arbitration[7].

Finality

'Finality' implies that once an arbitration award is made as part of formal proceedings, neither party (except in very limited instances) will be allowed to appeal or litigate the matter again (Wasco, 2009). The finality principle is enshrined in the legislation provision across numerous jurisdictions. In South Africa, the finality principle is enshrined in Section 28 of The Arbitration Act 42 of 1965[8]. The notion of "*…the finality of the arbitrator's award"*[9] implies that arbitration generally excludes rights of appeal in order to ensure that its awards are *'final'*[10]*, 'conclusive'*[11] and *'binding'*[12]*.* Effectively, this principle espouses that, once arbitration proceedings have concluded and an award has been pronounced and issued, disputing parties should not be able to bring another dispute or litigation before any appellate forum on the same matters that were core to a previous concluded arbitration proceeding (Leasure, 2016). The finality principle has been addressed in not only historical South African case law[13] but also in more recent case law, including case law of the Supreme Court of Appeal[14] and, most importantly, in the case law of

[7] Zhongji Construction v Kamoto Copper Company (421/13) [2014] ZASCA 160 (1 October 2014) [at 36]

[8] Section 28, The Arbitration Act 42 of 1965 states that "*Award to be binding…Unless the arbitration agreement provides otherwise*". This implies that finality in arbitration is qualified.

[9] Kollberg v Cape Town Municipality 1967 (3) SA 472 (A) at 481F; Patcor Quarries CC v Issroff and Others 1998 (4) SA 1069 (SE)

[10] Section 28 of the Arbitration Act 42 of 1965 ('Arbitration Act'); Section 58 (1) of the Arbitration Act 1996 (United Kingdom); Shell Egypt West Manzala GmbH and anor v Dana Gas Egypt Ltd [2009] EWHC 2097 (Comm).

[11] Shell Egypt West Manzala GmbH and anor v Dana Gas Egypt Ltd [2009] EWHC 2097 (Comm) [at 4]

[12] Shell Egypt West Manzala GmbH and anor v Dana Gas Egypt Ltd [2009] EWHC 2097 (Comm) [at 4].

[13] Dickenson & Brown v Fisher's Executors 1915 AD 166 [at 174]; Donner v Ehrlich 1928 WLD 159 [at 160]; Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976(2) SA 1 (A) [at 22]

[14] Telcordia Technologies Inc v Telkom SA Ltd [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006) [at 65 and 154]; Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013)

the Constitutional Court of South Africa[15]. The Constitutional Court is the apex court on all matters of law in South Africa (Bhana, 2018). In fact, as observed in *Dutch Reformed Church v Town Council of Cape Town*[16]*,* despite Roman-Dutch law making provisions for appeals in arbitration under the principle of '*reductie'*, there is no evidence of such appeals ever being considered in South Africa.

In modern South African jurisprudence, the finality principle is not absolute. This means that the law makes provisions to appeal an arbitration award. However, this is only possible as an exception if such an appeal was expressed and stipulated within the original agreement to arbitrate. More specifically, Section 28 of The Arbitration Act 42 of 1965 qualifies the binding nature of awards by a provision that "…*unless the arbitration agreement provides otherwise…*". Furthermore, Section 33 of The Arbitration Act 42 of 1965 provides grounds for the vacation of arbitration awards (arbitration *vacatur*). As relates to the other arbitration legislation, Section 13 (5) of the Protection of Investment Act 22 of 2015 contemplates international arbitration on investment matters where domestic remedies have not been satisfactory. Similarly, Chapter 7 (Article 34) of the International Arbitration Act 15 of 2017 deals with the mechanisms by which the courts may set aside awards obtained via this legislation.

The main philosophy underlying the finality principle is arguably twofold. *First*, the finality principle ensures that disputes are not subject to never-ending litigation, which, if unchecked, are likely to lead to increases in the likelihood that commercial entities incur further transaction costs. Furthermore, these entities become less certain of whether contractual rights and obligations will be subject to constant interference and challenge (Bromley, 2018). *Second,* the finality principle seeks to ensure that the arbitral process does not end up serving as a precursor to litigation with the courts re-hearing the same dispute and re-examining the same subject matter of a previous arbitrator or arbitral tribunal (Leasure, 2016)[17].

[15] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007) [at 245]; Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6 [at 235]; Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014) [at 56]

[16] Dutch Reformed Church v Town Council of Cape Town 15 SC 14

[17] Hall Street Associates L.L.C. v Mattel, Inc 550 U.S. 576 (2008) heard in the Supreme Court of the United States [See majority judgement at 588].

Modern domestic arbitration law in South Africa

The Arbitration Act 42 of 1965

As mentioned above, in South Africa, national arbitration legislation is encompassed in three distinct, but complementary, pieces of legislation: The Arbitration Act 42 of 1965, The Protection of Investment Act 22 of 2015, and The International Arbitration Act 15 of 2017. The Constitution of the Republic of South Africa also serves as a key source of national arbitration law in the country. However, the primary legislative framework for domestic arbitration in South Africa is The Arbitration Act 42 of 1965 which was brought into force in 1965 to replace earlier colonial-era arbitration laws – namely, the Arbitration Act of 1889 (United Kingdom), the Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope, the Arbitration Act 24 of 1898 (Natal), and the Transvaal Ordinance Act 24 of 1904.

The Arbitration Act 42 of 1965 contains 43 sections and commences (Section 1) with definitions. Section 2 addresses arbitrability while Section 20 makes provision for arbitrators/arbitral panels to refer points of law that arise during their proceedings to court. Section 33 refers to the grounds for *Setting aside of award*[18]. The Arbitration Act 42 of 1965 does not make provisions for appeals[19]. Instead, its focus is on *vacatur*[20].

There are three bases as stipulated within Section 33 (1) of The Arbitration Act 42 of 1965 upon which (i) the courts may interfere with the finality principle in arbitration and (ii) set aside a domestic arbitration award. *First* is where there is evidence of misconduct by an arbitrator or members of an arbitration panel (Section 33 (1) (a)). *Second* is where the arbitral proceedings have been found to be conducted in a manner considered grossly irregular (Section 33 (1) (b)). *Third* is where it is found that an arbitral award has not been properly obtained (Section 33 (1) (c)).

The Constitution of the Republic of South Africa

[18] Section 33, The Arbitration Act 42 of 1965.

[19] Section 28, The Arbitration Act 42 of 1965 states that *"Award to be binding…Unless the arbitration agreement provides otherwise*." This implies that finality in arbitration is qualified.

[20] Section 33, The Arbitration Act 42 of 1965.

The Constitution of the Republic of South Africa serves as supreme law in South Africa[21]. South Africa's current constitution was adopted by the country's democratically elected Constitutional Assembly on 8 May 1996. The South African constitution consists of two hundred and forty-three (243) sections, sub-divided across fourteen chapters, six schedules, and four annexures. Section 165 vests the courts with judicial authority. The core element of the South African constitution is the 'Bill of Rights' (Sections 7 to 39), which is contained in its second chapter. The focus of the 'Bill of Rights' is to "…*preserve and protect the rights of all people living in the country (not only citizens) based on notion of 'dignity, equality and freedom*". Most importantly the 'Bill of Rights' articulated seven core rights which are deemed '*Non-Derogable Rights'*. These are rights that the government cannot suspend even on a temporal basis, even during times of national emergency.

Two provisions of The Constitution – specifically, Section 33 (which addresses the extent to which domestic private arbitration is an administrative process), and Section 34 (which addresses the question of whether disputants in a private commercial arbitration proceeding have waived their rights to a hearing that was both fair and impartial) – are of paramount relevance to arbitration.

4.2.1 Section 33 of The Constitution

Section 33 of The Constitution is grounded on the notion of administrative justice. Administrative justice in this context focuses on the need for good governance and the protection of individuals from any abuse by the power of the state. More specifically, Section 33 (1) states that:

> "*Everyone has the right to administrative action that is lawful, reasonable and procedurally fair*".

The Constitutional Court has observed that the meaning of Section 33 (1) of the Constitution is that public power can only be legally exercised if it was undertaken in a manner that was consistent with the constitution[22]. South African domestic case law does not, however, consider

[21] See Section 2, Constitution of the Republic of South Africa

[22] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14 November 2017)

private commercial arbitrations as 'administrative' for the purpose of Section 33[23]. The courts appear to have formed the view that private commercial arbitration proceedings are not a form of administrative action because they arise out of individuals exercising their private rights to contract and not from the powers of the state or other form of mandate.

For action to be deemed 'administrative', South African courts have opined that such arbitration proceedings will have to arise through actions of the state. Examples of administrative action are, for example, statutory arbitration that takes place under the auspices of the Labour Relations Act, 66 of 1995[24] and compulsory arbitration undertaken via the Commission for Conciliation, Mediation and Arbitration (CCMA)[25]. The main contention is that since domestic private commercial arbitration in South Africa is not deemed as a form of '*administrative action'*, disputants cannot call upon constitutional rights articulated in Section 33 (2) of The Constitution which provides that: "*Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons*".

4.2.2 Section 34 of The Constitution

Section 34 of The Constitution focuses on the rights of individuals to a fair hearing and access to the courts. More specifically, Section 34 states as follows:

> "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*".

[23] Patcor Quarries CC v Issroff and Others 1998 (4) SA 1069 (SE) [at 4]; Total Support Management (Pty) Ltd and Another v Diversified Health Systems (South Africa) (Pty) Ltd and Another (457/2000) [2002] ZASCA 14 (25 March 2002) [at 24 and 25]

[24] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007)

[25] See Section 112 and also Section 136 of the Labour Relations Act, 66 of 1995

While South African case law does not designate private commercial arbitration as 'administrative' for the purpose of Section 33[26], it has resolved that, because arbitration awards are not enforced by arbitrators but by the state, awards obtained from arbitration proceedings, whether private or state mandated, must be obtained in a manner which is procedurally fair. More specifically, as the case law opines that although private commercial arbitration is 'administrative' for the purpose of Section 33, disputing parties who engage in private arbitration while not deemed to be enjoying rights conferred by section 34 of The South African Constitution are regarded as having only elected not to exercise those rights rather than having waived the aforementioned rights[27].

Drawing upon its historical evolution and referring to relevant domestic case law and legislation, this study explores the finality principle within South African arbitration jurisprudence. To achieve this aim, an analysis of two seminal construction dispute cases settled in The Constitutional Court of South Africa was conducted.

Methodology

The use of case review is a well-recognised method of undertaking research in legal studies (Argyrou, 2017). More specifically, case reviews represent an important form of qualitative empirical research in the law (Stępień, 2019). Case-based research is widely popular because it allows for scholars to "…*investigate [a] contemporary phenomenon in-depth within its real-life context, especially when the boundaries between the phenomenon and the context are not clearly evident*" (Yin, 2014). In doing so, case studies allow for researchers to "…*use facts we know to learn-about facts we do not know" (*Epstein and King, 2002*)* and, also, to conduct a very detailed critique of not only the account of the dispute but also the legal principles under examination. Argyrou (2017) notes that another advantage in using case studies in legal research is that it allows for more granular understanding of how the law operates. Thus, through case studies, scholars are able to "…*cultivate the development of professional tools and knowledge within their*

[26] Patcor Quarries CC v Issroff and Others 1998 (4) SA 1069 (SE) [at 4]; Total Support Management (Pty) Ltd and Another v Diversified Health Systems (South Africa) (Pty) Ltd and Another (457/2000) [2002] ZASCA 14 (25 March 2002) [at 24 and 25]

[27] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6

appropriate context" (Redmount, 1972). This is the method adopted in this study. This case study employs the the '*Issue'*, '*Rule'*, '*Analysis'*, and '*Conclusion'* (IRAC) analytical framework. *'IRAC'* is a popular and well-recognised legal assessment rubric employed in legal analysis (Bittner, 1990; Burton, 2017). The rubric requires users to adopt a specific legal reasoning fact pattern that entails (i) *Issue* – establishing what the legal issue under exploration is, (ii) *Rule* - examining the present state of the law that impacts upon the specific legal issue, (iii) *Analysis* – undertaking a detailed examination of the legal issues surrounding the case by applying t not only the relevant law but also legal principles to the facts in order to determine its essential features, and (iv) *Conclusion* – articulating the reasoning and relevant lessons behind the court's judgement.

Research results

Lufuno Mphaphuli v Bopanang Construction

The issue

The main parties in the dispute were Lufuno Mphaphuli & Associates ('Lufuno') and Bopanang Construction ('Bopanang'). The parties had entered into contract around 16 May 2002 with Lufuno sub-contracting a rural electrification infrastructure project that it had successfully tendered from Eskom (South Africa's state-owned electricity supplier) to Bopanang. Inevitably, as in the case of many construction projects, a dispute arose between the two parties over the performance of the project and the making of a number of associated payments. This led to Bopanang leaving site on 16 January 2003 as a result of which Lufuno contracted another firm, AA Electrical ('AA'), not only to complete the outstanding work but also to undertake remedial work on certain elements of work previously undertaken by Bopanang. When a dispute now arose between Lufuno and Bopanang on which party had repudiated the contract and who was liable to the other for payment, Bopanang filed claims in the High Court (in April 2003) against Mphaphuli for payment in lieu of work undertaken and an injunction against Eskom to prevent further payments to Mphaphuli until the payments it claimed were owed were settled[28]. In July 2003, both parties agreed to settle their dispute via private arbitration. The main essence of the

[28] Bopanang Construction CC v Lufuno Mphaphuli and Associates (Pty) Ltd, Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another (27225/04, 33188/2004) [2006] ZAGPHC 131 (22 February 2006)

arbitration (as set out in the terms of reference) was for the arbitrator to establish whether payment was due between parties – taking into consideration the scope of works articulated in the agreement, the amount due, and the nature of the purported remedial work.

On 23 August 2004, the arbitrator informed the parties of his award, summarily finding for Bopanang against Mphaphuli. Not satisfied with the outcome of the arbitrator's award, Mphaphuli failed to satisfy the arbitration award. Thus, on 18 December 2004, Bopanang applied to the High Court for the arbitrator's award to be made an order of the court as provided for in Section 31(1) of the Arbitration Act 42 of 1965. This was opposed by Mphaphuli which filed a counter-suit seeking to review and vacate the arbitrator's award based on Section 32(2) of the Arbitration Act 42 of 1965. Mphaphuli based their Section 32 (2) application on the (i) failure of the arbitrator to perform their duty as mandated, (ii) manifest errors on the part of the arbitrator, and (iii) purported bias against Mphaphuli.

The rule

The consolidated case was heard by the High Court with judgement pronounced on 22 February 2006[29]. In summary, the High Court ruled against Mphaphuli, citing a number of reasons informing this decision. Most importantly, the High Court opined that Mphaphuli had misconstrued the role of the court as being to serve as an avenue of appeal against the arbitrator's award. Other allegations by Mphaphuli levelled against the arbitrator were dismissed.

Mphaphuli then appealed to the Supreme Court of Appeal (having obtained leave to appeal from the High Court). At the Supreme Court of Appeal, the matter was heard on 5 November 2007 with judgement delivered on 22 November 2007. As above, the Supreme Court of Appeal dismissed Mphaphuli's appeal against the earlier judgement of the High Court. Among other considerations, the Supreme Court of Appeal focused its attention on the claim by Mphaphuli that the arbitrator was in fact simply a valuer and not an arbitrator in the sense that his 'award' was not final, the Supreme Court of Appeal noted [at 22] that:

[29] Bopanang Construction CC v Lufuno Mphaphuli and Associates (Pty) Ltd, Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another (27225/04, 33188/2004) [2006] ZAGPHC 131 (22 February 2006)

> "*Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it*".

Not satisfied with the judgement of the Supreme Court of Appeal, Mphaphuli sought leave to appeal the judgement of the Supreme Court of Appeal in the Constitutional Court (which was granted). Oral arguments before the Constitutional Court were heard on 13 May 2008 with judgement delivered on 20 March 2009[30].

Analysis

In particular, the Constitutional Court was asked [at 23] to clarify two key constitutional questions that touched upon domestic arbitration. *First*, the court was asked to clarify to what level South African courts were required to regulate arbitration awards prior to making such awards orders of the court. *Second*, the Constitutional Court was asked whether it was permissible that arbitration impugned the right to a fair trial as provided for under Section 34 of South Africa's Constitution. Section 34 of The Constitution of the Republic of South Africa guarantees a right of access to the courts.

Briefly stated, the Constitutional Court responded as follows. *First*, as relates to the question of at what level South African courts were required to regulate arbitration awards prior to making such awards orders of the court, the Constitutional Court ruled that it was incumbent on courts to assure themselves that arbitration awards being made orders of the court do (i) meet standards that are in the interest of justice [at 27], (ii) do adhere to the principles of party autonomy [at 28], and (iii) are procedurally fair [at 28]. *Second*, on the question of whether it was permissible that arbitration impugned the right to a fair trial as provided for under Section 34 of South Africa's Constitution and the question of the precise operation of Section 33 (1) of the Arbitration Act 42 of 1965 and its relationship to the right to a fair trial articulated under Section

[30] Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (20 March 2009)

34 of South Africa's Constitution, the Constitutional Court noted [at 74] that: "…*there is no reason why the fairness requirement of section 34 of the Constitution cannot co-exist with the requirements imported by the provisions of section 33(1) of the Arbitration Act*". It then went on to rule that, when properly construed, the provisions of Section 34 of South Africa's Constitution which addresses the right of access to the courts does not directly apply to private arbitration proceedings. However, on the fairness requirement provided for within Section 33 of the Constitution, the Constitutional Court noted that this still applied indirectly because arbitration as an institution emphasised the fairness requirement.

Hubbard v Cool Ideas

The issue

The dispute between Anne Hubbard and Cool Ideas emanated from a residential home construction project commissioned in February 2006 by Anne Hubbard to be built by Cool Ideas, a property developer. The contract included an arbitration clause which specifically cited the final and binding nature of any arbitration award on the contracting parties.

On being awarded the contract by Hubbard, Cool Ideas then sub-contracted the actual carrying out of the building works to Velvori Construction (a building contractor). However, while Velvori was duly registered as a home builder with the National Home Builders Registration Council as the law required (in terms of the Housing Consumers Protection Measures Act (No. 95 of 1998)), at the time of both entering into contract with Anne Hubbard and the commencement of construction, Cool Ideas was not registered with the National Home Builders Registration Council as a home builder as the aforementioned law required.

The project commenced shortly after the contract was signed between Hubbard and Cool Ideas. The contract was also registered with the National Home Builders Registration Council as set out in section 14 of the Housing Consumers Protection Measures Act (No. 95 of 1998). However, inevitably, as in the case of many construction projects, a dispute arose between the two parties over the performance of the project on 'completion' in October 2008. Citing her non-satisfaction with the quality of the work at the point of commissioning and handover, Hubbard refused to settle her account with Cool Ideas. At that point, as stipulated within the contract, the

dispute was referred to arbitration. In October 2010 the arbitrator informed the parties of his award – in summary, finding for Cool Ideas against Hubbard.

Not satisfied with the outcome of the arbitrator's award, Hubbard refused to fulfil the arbitration award. In response, Cool Ideas filed a motion with the High Court with prayers for the arbitrator's award to be made an order of the court as provided for in Section 31 (1) of the Arbitration Act 42 of 1965. The application to the High Court by Cool Ideas to enforce the arbitration award was opposed by Hubbard on the basis that (i) at the time of the contract being entered into and construction work commencing, Cool Ideas was not registered by law as a home builder as stipulated by the Housing Consumers Protection Measures Act (No. 95 of 1998), (ii) that, in lieu of Cool Ideas not being a registered builder, it was therefore unlawful for Cool Ideas to actually to enter contract to do such work, and (iii) enforcing the arbitrator's award will lead to the courts being asked to enforce the performance of an act, which is unlawful. The main basis of Hubbard's argument was based on South African case law which opines that registration of home builders as stipulated by section 10 of the Housing Consumers Protection Measures Act (No. 95 of 1998) could not be derogated from.

The High Court, however, rejected Hubbard's argument, finding in favour of Cool Ideas. The High Court's decision was primarily based on the facts that (i) at the time the arbitrator had made his award, Cool Ideas had been registered as a home builder as provided for by the Housing Consumers Protection Measures Act (No. 95 of 1998), (ii) it was contemplated under the aforementioned legislation that a home builder's registration could be late, and (iii) the actual work was undertaken by Velvori who was a duly registered home builder with the National Home Builders Registration Council as the law required (in terms of the aforementioned legislation).

Unsatisfied with the High Court judgement, Hubbard then sought to appeal the judgement. Following refusal of the High Court for permission to appeal, Hubbard then filed a petition directly to the Supreme Court of Appeal. The matter before the Supreme Court of Appeal was heard in *Cool Ideas 1*[31]on 10 May 2013 with judgement delivered on 28 May 2013.

The rule

[31] Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013)

Effectively, the Supreme Court of Appeal overruled the High Court, finding that [at 9] the foundation upon which the High Court had arrived at its judgement was flawed. It observed that enforcing the arbitration award – despite being mindful of the need to ensure that arbitral awards were '*final', 'conclusive'* and *'binding'* – would lead the court to disregard a clear legal principle that the court cannot make a ruling that can be construed to support any form of illegality. The approach that the Supreme Court of Appeal adopted in *Cool Ideas 1*[32] was to highlight that the case was not actually a case of arbitration *vacatur*. Instead, the Supreme Court of Appeal [at 15] observed that the case before it was more or less focused on whether – in line with Section 31 (1) of the Arbitration Act 42 of 1965 – the arbitrator's award could be made an order of the court. In effect, the Supreme Court of Appeal opined that the case was not necessarily an application for *vacatur* in line with Section 33 of the Arbitration Act 42 of 1965. On this basis, the court opined that [at 15] "…*it can hardly be expected of a court to show deference to an arbitration award in circumstances where for it to do so would result in it lending its imprimatur to an illegality*". That is, the Supreme Court of Appeal found that it was not tenable from a point of law to make an arbitration award an order of court where doing so will result in the sanctioning of a clear breach of legislation.

Analysis

The appeal by Cool Ideas to the Constitutional Court to overrule the Supreme Court of Appeal was dismissed in *Cool Ideas 2*[33]*.* In reiterating the earlier views expressed by the Supreme Court of Appeal, the Constitutional Court held that making the arbitration award an order of the court will lead to the court lending credence to an illegality. As The Constitutional Court observed [at 56], it was mindful of refusing to enforce the arbitration award because, "*If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual…that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute*". However, this concern did not prevent the court from refusing to enforce the arbitration award where, as it noted [at 57], it will be "…*contrary to public policy for a court to*

[32] Hubbard v Cool Ideas 1186 CC (580/12) [2013] ZASCA 71 (28 May 2013)
[33] Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014)

enforce an arbitral award that is at odds with a statutory prohibition". On the argument by Cool Ideas that the refusal of the Supreme Court of Appeal to make the arbitration award an order of court (in terms of Section 31 of the Arbitration Act 42 of 1965) infringed Cool Ideas' right of access to courts in terms of Section 34 of the Constitution, The Constitutional Court [at 62] opined that such an argument was incorrect because its access to the courts was never denied since it had been afforded a full opportunity at the hearing to state its case.

Discussion (Reasoning and relevant lessons)

The right to appeal in matters before the courts is generally recognised in numerous countries and enshrined in various legislation, constitutions[34], and case law (Poland, 2016). Appeal serves as a means of ensuring not only accountability, but also allows for the courts to further clarify the law (Djukic, 2018). Where necessary, appeals provide a litigant with the opportunity to have a decision reconsidered with a view to having it corrected and overturned where and when necessary.

In arbitration (as against litigation), the notion of 'finality' – in other words, that the proceedings and the award/s that flow from those proceedings should represent the '*final'*[35]*, 'conclusive'*[36] and *'binding'*[37] settlement of the dispute – has been a cornerstone of arbitration, allowing arbitration practice to develop in a manner which is largely independent and self-contained.

In South Africa, parties to a domestic arbitration proceeding who are dissatisfied with its outcome generally have two options; either (i) to accept the finality of the award or (ii) to seek relief through the courts. If they choose to seek relief, there are generally two avenues open to them (Gurian, 2016 - 2017). *First*, they can seek to *appeal* the arbitral award through Section 28 of the Arbitration Act 42 of 1965. Alternatively, because arbitration awards in general are not

[34] Section 34 of The Constitution of the Republic of South Africa.
[35] Section 28 of the Arbitration Act 42 of 1965 ('Arbitration Act'); Section 58 (1) of the Arbitration Act 1996 (United Kingdom); Shell Egypt West Manzala GmbH and anor v Dana Gas Egypt Ltd [2009] EWHC 2097 (Comm).
[36] Shell Egypt West Manzala GmbH and anor v Dana Gas Egypt Ltd [2009] EWHC 2097 (Comm) [at 4]
[37] Ibid.

subject to appeal[38], they may seek to set the arbitration award aside or 'vacate' the award. Here, vacate implies cancelling and replacing the award based on its factual and/or legal merits (Gurian, 2016-2017). The courts under Section 165 of The Constitution of South Africa are vested with judicial authority. Furthermore, Section 173 of The Constitution accords the courts with the power to develop the common law. Thus, where necessary, through their oversight, review and supervisory powers, the courts are able to review the merits of an arbitral proceeding (and the awards that flow from them) and, if deemed necessary, annul and set aside such awards.

As shown in both cases reviewed herein, the courts will rarely seek to re-examine the details of the arbitrator's award and how such an award was realised unless there is a danger that specific legal principles could be impeached. Apart from the danger of arbitration becoming a precursor to litigation it is very likely that, during such litigation, disputing parties may present previous arguments earlier made on matters of both law and facts in a new or different way. Essentially, there is a danger that such ensuing litigation will not be argued on the same points of law or facts as was the case when it was arbitrated upon.

Finality in arbitration is arguably dependent on the courts' willingness to enforce the award. The study argues that finality is also dependent on long-held views by construction industry stakeholders that seeking judicial intervention or oversight of arbitration will threaten the very essence and attraction of arbitration as a dispute resolution mechanism. In particular, the danger is that such intervention may erode commonly held understanding within the construction industry that a dispute brought before arbitration should end with the award made by an arbitrator. Finality represents a key attraction of arbitration, particularly from the points of certainty, time, and costs.

There is an emerging body of literature which attests to increasing attempts by disputants to seek to vacate arbitration awards on non-statutory bases. These non-statutory bases include (i) '*violation of essence of contract'* (Gentry, 2018), (ii) '*manifest disregard of the law*' (Yates, 2018), (iii) '*illegality'* (Polkinghorne and Volkmer, 2017), (iv) '*arbitrary and capricious*' (Hayford,

[38] In South Africa, see Section 28 of the Arbitration Act 42 of 1965 ('Arbitration Act') and also case law, Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6; Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014); International comparative law, see Section 58 (1) of the Arbitration Act 1996 (United Kingdom) and international comparative case law, Shell Egypt West Manzala GmbH and anor v Dana Gas Egypt Ltd [2009] EWHC 2097 (Comm).

1996), (v) '*complete irrationality'* (Hayford, 1996; Hayford, 1998a; 1998b), and (vi) '*when the award or procedure is contrary to public policy or public order'* (Badah, 2016). Despite evidence of the operation of such non-statutory grounds for vacating arbitration awards in other jurisdictions such as the United States[39], as demonstrated in the two case studies, South African courts have so far resisted attempts by disputing parties to rely on any other ground for setting aside domestic commercial arbitration awards not explicitly incorporated within Section 33 of the Arbitration Act 42 of 1965[40]. A major reason for such resistance is due to the likelihood of inconsistency in application of these individual non-statutory grounds and perhaps unintentional consequences.

Limitations and future studies

This study is not without some limitations. *First*, the study is based on an in-depth analysis of two cases. *Second*, although the historical context of South African arbitration law was highlighted, its detailed examination was deemed beyond the scope of the current study and, therefore, not explored in any great detail. *Third*, although the finality of arbitration was acknowledged as dependent on a number of interrelated factors including historical legal traditions, judicial attitudes towards the finality principle, and the operation of national legislative frameworks and constitutional provisions, the precise nature of this interrelationship was not examined. However, it is opined that, irrespective of these limitations, the findings of the study do provide a relatively comprehensive overview of the complexities of *the finality of arbitration landscape* within South African jurisprudence.

Future studies may therefore progress in three directions. First, future studies could empirically (for example, questionnaire surveys) examine practitioner opinions and perspectives of the constitutional considerations and factors at play when considering the finality of arbitration. A second area of study could elaborate on the finality principle by focusing on the historical context of South African arbitration law. A third opportunity for future studies will be to examine quantitatively the interrelationship between the various factors impacting on the

[39] Wilko v Swan, 346 U.S. 427 (1953)

[40] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6 [at 235]; Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014) [at 224]

finality principle within South African domestic commercial arbitration. Such insights will provide arbitration practitioners with a practical roadmap on how to balance various considerations impacting upon the finality principle.

Conclusions

In exploring the finality principle in construction arbitration, the scene has been set for continued dialogue of a scholarly nature on the interface between the arbitration, the law, and the settlement of disputes within the construction industry. Contextualised within South Africa's historical and judicial attitudes towards arbitration in general and the finality principle in particular, two seminal construction disputes, *Lufuno Mphaphuli v Bopanang Construction*[41] and *Cool Ideas 2*[42] decided by The Constitutional Court of South Africa are used to show how the courts engage in both major and delicate balancing of constitutional considerations when considering the finality of arbitration. In *Lufuno Mphaphuli v Bopanang Construction*[43], the legal principle was that private dispute resolution mechanisms that were dependent on the state for their enforcement still had to be conducted in a manner which espoused fairness. In *Cool Ideas 2*[44], the relevant legal principle was that a court ruling could not be sought to serve as a conduit to perpetuate illegality (*Ex turpi causa non oritur actio*). Despite the danger that the finality principle could be impeached, the court opined that constitutional considerations trumped the finality principle.

While this study was specifically set within a South African context, there are substantial opportunities to generalise its findings. *First*, this study brings to the fore the need for construction lawyers and indeed all stakeholders involved in construction arbitration (including arbitrators, construction and project management practitioners, commentators, and scholars) to be extremely mindful of constitutional provisions. This has serious implications for arbitrators, particularly those engaged to arbitrate disputes in South Africa, who may be less conversant with

[41] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6
[42] Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014)
[43] Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews and Bopanang Construction CC CCT 97107 [2009] ZACC 6
[44] Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16 (5 June 2014)

South African judicial attitudes towards the finality principle. *Second*, the study makes specific theoretical contributions in that it has further primed open discourse relating to the relationship between arbitration principles and the operation of constitutional provisions. More specifically, the intention was to provide an understanding of how the finality principle in South African arbitration which is enshrined in Section 33 of The Arbitration Act 42 of 1965 interacts with key South African constitutional provisions set out in Section 33 (fairness) and Section 34 (right of access to the courts) of The South African Constitution. *Third*, the study also makes specific practical contributions in terms of its relevance to arbitrators practicing in other jurisdictions who may be seeking or have already been contracted to arbitrate construction disputes in South Africa. Particularly, the findings highlight the reality that there may be considerable inter-jurisdictional differences between South Africa and other common-law countries. Thus, it is advised that the selection of international arbitrators to hear disputes within South Africa should be particularly mindful of not only South African domestic arbitration law but also South Africa's historical legal traditions, judicial attitudes towards the finality principle, and the operation of national legislative frameworks and constitutional provisions.

Data Availability Statement

No data, models, or codes were generated or used during the study.

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