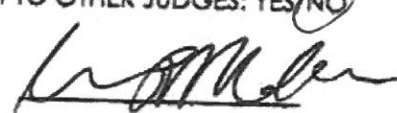


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22728/2011

|        |   |
|--------|---|
| (1)    | REPORTABLE: YES/NO  |
| (2)    | OF INTEREST TO OTHER JUDGES: YES/NO   |
| (3)    | REVISED   |
| S/S/17 |  |
| Date:  | WR MOKHARI  |

In the matter between:

THALES SOUTH AFRICA (PTY) LTD

Applicant

and

AJAY SOOKLEL

Respondent

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JUDGMENT

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Mokhari AJ:

1. The applicant seeks an order from this Court that the arbitration award rendered by the tribunal consisting of the retired Supreme Court of Appeal Judges Brand and Malan and retired High Court Judge Southwood dated 18

November 2015 be made an order of Court. The respondent opposes the application and he has filed a lengthy answering affidavit. Although the basis of the opposition was twofold i.e. that the applicant had allegedly engaged in illegal activities; that the applicant had repudiated the arbitration agreement when the applicant's official gave testimony at the Arms deal Commission of Inquiry chaired by Supreme Court of Appeal Judge Seriti, the latter point was not persisted with nor was it raised in the respondents heads of arguments nor argued. Besides, it was a bad point of law which could not be sustained.

2. The brief history of this matter is that on or about 13 June 2011 the respondent, as plaintiff, issued summons out of this Court against the applicant as defendant in those proceedings. The original particulars of claim have been reproduced in full in the arbitration award sought to be made an order of Court. In paragraph 5 of the particulars of claim the respondent as plaintiff alleged that during September 2003 the respondent and the applicant concluded an oral agreement. In paragraph 7 of the particulars of claim the material express, alternatively tacit, alternatively implied, terms of the agreement were set out in full in paragraphs 7.1 to 7.8. The particulars of claim became a subject of numerous amendments by the respondent. In the amended particulars of claim dated 14 October 2011 reproduced in the award, the respondent alleged in paragraph 4 that at all material times the respondent was a duly qualified attorney, authorized so to act pursuant to the provisions of the Attorneys Act 1979; was engaged as a consultant and in such capacity was not required to be in possession of a fidelity fund certificate. The alleged terms of the agreement are set out in subparagraphs 8.1 to 8.8 of the amended particulars of claim. In

subparagraph 8.1, the respondent alleged that the applicant engaged the services of the respondent on a full-time basis in his capacity as an attorney to represent the applicant and its subsidiary, Thint, in relation to all criminal charges brought against the applicant and/or Thint and ancillary litigation in the Republic of South Africa or outside the Republic until the final conclusion of any trial relating to such charges and other ancillary litigation.

3. The applicant defended the action and filed a plea. One of the defences raised by the applicant was that the respondent was not entitled to any payment of the fees for the alleged services rendered because at the relevant time the respondent did not have a fidelity fund certificate. In the action aforesaid, the respondent was claiming amounts in excess of R50 million. The action was set down for trial but postponed on the trial date. This prompted the parties to enter into an arbitration agreement which was concluded between the parties on 06 November 2012. The parties agreed that the issues that fell for determination by the Court as set out in their respective pleadings be dealt with through private arbitration. Retired Judge Levinsohn was appointed arbitrator. He rendered his award in favour of the respondent on 18 May 2015. In that award, the arbitrator ordered the applicant to pay to the respondent amounts of R37 471 000.00; R399 000.00 (plus Vat) and R3 983 300.00.
4. In terms of the arbitration agreement the parties to the arbitration were entitled to appeal against the award of a single arbitrator to a panel of three arbitrators. The applicant appealed against the award of Judge Levinsohn to a panel of three appeal arbitrators' composed of retired Supreme Court of Appeal judges

Brand and Malan and retired High Court Judge Southwood. The appeal tribunal issued an appeal award on 18 November 2015 in terms whereof the award issued by Judge Levinsohn was overturned, with the appeal upheld and the respondent's claim dismissed with costs. At all relevant times the respondent was a willing participant to both the initial arbitration and the appeal arbitration and was at all relevant times legally represented.

5. In his opposing affidavit, the respondent alleges that the award sought to be made an order of Court is an illegal award which cannot be made an order of Court, as to do so would be contrary to public policy. The basis of the illegality is that the applicant was engaged in illegal activities. In the heads of argument as well as in oral argument it was submitted on behalf of the respondent that a defence of illegality of the award can be raised at any stage of the proceedings including it being raised mero motu by the Court and that an illegal award cannot be made an order of Court. I agree with this submission that this is a point of law which can be raised at any stage of the proceedings. However, the determination of this law point cannot be determined in the abstract, but must be determined with reference to the facts of the case. The respondent's allegations in the opposing affidavit is that the applicant was engaged in illegal activities and was determined to do anything possible even if it was illegal to get the criminal charges against the applicant withdrawn including attempts to bribe senior government officials, Ministers and the President (who at the time was the Deputy President). What the respondent does not say in the answering affidavit is that he was involved in the illegal activities himself and that the agreement he concluded with the applicant was an offshoot of corruption or

other illegal acts. What the respondent understood to be the terms of the agreement he concluded with the applicant has been pleaded in detail by the respondent in the particulars of claim and there is simply nothing illegal about what he alleged to be the terms of the agreement as set out in the particulars of claim.

6. According to the respondent, he was engaged by the applicant in order to represent the applicant in his capacity as attorney and consultant in order to assist the applicant to have criminal charges withdrawn against the applicant. There is nothing illegal about an attorney taking instructions to represent an accused person even if the evidence against the accused is overwhelmingly against the accused. In fact, the duty of a lawyer is to represent anybody who require the services of a lawyer and to do so without fear, favour or prejudice. The respondent's counsel referred me to authorities in the heads of argument and other authorities not cited in the heads of argument. My attention was particularly drawn to the Constitutional Court judgment of *Cool Ideas 1186 CC vs Hubbard and another 2014 (4) SA 474 (CC)*. In *Cool Ideas supra*, the Court was confronted with a contract between a consumer (home buyer) and unregistered builder contrary to the provisions of the Housing Consumer Protection Measures Act 95 of 1998 which requires that home builders must be registered. The National Home Builders Registration Council is responsible for the registration of homebuilders and to monitor their performance in terms of the structural integrity of the houses they build. The Housing Consumer Protection Measures Act prohibits any payment to an unregistered home builder. An award which was issued in favour of an unregistered home builder

against a consumer was illegal as it was in contravention of the Housing Consumers Protection Measures Act and therefore contrary to public policy. The Constitutional Court dismissed the appeal and declined to make the award which was illegal an order of Court because it would have been contrary to public policy.

7. None of the authorities referred to me by the respondent is of assistance to the respondent. In fact *Cool Ideas supra* is at opposite poles with the facts of this case because in this matter the agreement that is alleged by the respondent to have been entered into between the respondent and the applicant was for the respondent to render professional legal services in his capacity as an attorney and consultant and to assist the applicant to get the charges withdrawn. There is nothing illegal about such an instruction because any litigant who engages the services of a lawyer would want his or her lawyer to represent him or her successfully including if it is a criminal matter to get the charges withdrawn, or that he or she be acquitted at the end of the trial.
8. The *Cool Ideas supra* dealt with a statutory prohibition whereas in this case there is no statutory prohibition. In this case, the award issued by the single arbitrator in favour of the respondent was overturned by the appeal panel of arbitrators which found that the respondent was not entitled to the fees he was claiming from the applicant because he did not have a fidelity fund certificate at the relevant time. There is nothing illegal about an award of this nature.

9. The respondent's defences fall to be rejected. The requirements of section 31 of the Arbitration Act 42 of 1965 have been met. The award should be made an order of Court as prayed for.

10. As a result, I make the following order:

10.1 The arbitration award rendered by the tribunal consisting of the retired Supreme Court of Appeal Judges Brand and Malan and retired High Court Judge Southwood dated 18 November 2015 is made an order of Court.

10.2 The respondent is ordered to pay the costs of this application and such costs to include the costs consequent upon the employment of two counsel.



**W R MOKHARI**  
**ACTING JUDGE OF THE HIGH COURT**

**On behalf of the applicant:**

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with  
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**On behalf of the respondent:**

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                          with  
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