



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: 17 January 2025

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 judgment of the Supreme Court of Appeal

Kidrogen RF (Pty) Ltd v Andre Jacobus Erasmus and Others (815/2023) [2025] ZASCA 03 (17 January 2025)

Today, the Supreme Court of Appeal (SCA) handed down judgment, where it dismissed an appeal with costs, including the costs of two counsel, against an order of the Western Cape Division of the High Court, Cape Town (the high court). The high court had dismissed an application by Kidrogen RF (Pty) Ltd (Kidrogen) in terms of s 8 of the Arbitration Act 42 of 1965 (the Act) to extend the period which it was obliged to commence an arbitration in terms of two similar arbitration agreements it concluded with the first respondent (Mr Erasmus) and the second respondent (Mr Ncube), respectively.

Kidrogen was incorporated in September 2010 to serve as a collective vehicle on behalf of certain taxi associations operating in Cape Town with the City of Cape Town (the city). Additionally, it would operate the extended public transport system in the Cape Metropolis, particularly the MyCiti bus service. Two shareholders, Mr Erasmus and Mr Ncube, each acquired shares in Kidrogen, but disputes arose regarding a portion of their shareholdings ('the disputed shares'). In 2020, Kidrogen entered into share sale agreements with Mr Erasmus and Mr Ncube to resolve the existing disputes, specifying that the disputes regarding the disputed shares would be resolved through arbitration under the Act. Key provisions in the share sale agreements required Kidrogen to initiate arbitration proceedings within 30 days of signing. And that a failure to do so would be deemed to be a determination in favour of Mr Erasmus and Mr Ncube, entitling them to the payments for their shareholdings that were being held in trust by Kidrogen's attorneys. Kidrogen failed to meet this 30-day deadline and only initiated arbitration months later. Erasmus and Ncube raised a special plea in that regard. The arbitrator issued an award in which he upheld the special plea of Erasmus and Ncube, concluding that the failure to commence the arbitration timeously resulted in the arbitration being determined in their favour as per the share sale agreements.

Following this outcome, Kidrogen applied to the high court for an extension of the 30-day period under s 8 of the Act, which allows courts to extend the time period if failure to do so would result in undue hardship. The high court dismissed Kidrogen's application, holding that s 8 relief applies only to future disputes and cannot be used to overturn a final arbitral award.

It further reasoned that s 28 of the Act, ensures the finality of arbitration awards and only in limited circumstances may such awards be set aside. It also found that, in any event, Kidrogen failed to demonstrate undue hardship as contemplated in s 8. The high court further refused Kidrogen leave to appeal and Kidrogen petitioned this Court for leave, which was granted.

The SCA confirmed that s 8 only empowers courts to extend the time-bar in arbitration agreements in respect of future disputes but emphasised that where the section was applicable the relief must generally be sought before a final arbitration award is issued. The Court held that an extension after a final award would be futile unless the award is first set aside. The SCA reaffirmed the principle that arbitration awards are final unless challenged under specific provisions of the Act. Kidrogen neither sought to review nor set aside the arbitral award.

The SCA agreed with the high court, on the assumption that the section applied to the disputes in the matter, that Kidrogen failed to demonstrate undue hardship justifying an extension under s 8. The Court found that Kidrogen's delays were self-created, as it was aware of the time-bar and had ample opportunity to act before the arbitration proceedings commenced. Additionally, the SCA distinguished between the approaches in earlier cases which took an overly restrictive view of s 8. However, even under a broader interpretation, Kidrogen's claim failed due to its acceptance of the arbitral award's finality.

As a result, the appeal was dismissed with costs, including those of two counsel.

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