DA CUNHA DO REGO v BEERWINKEL t/a JC BUILDERS 2012 (2) NR 769 (SC)

Citation 2012 (2) NR 769 (SC)

Case No SA 36/2010

Court Supreme Court

Judge Shivute CJ, Mainga JA and O'Regan AJA

Heard July 5, 2012

Judgment August 22, 2012

Counsel *JAN Strydom* for the appellant.
R Tötemeyer SC for the respondent.

Annotations Link to Case Annotations

Flynote : Sleutelwoorde

Practice — Applications and motions — Application for postponement — Court will not grant postponement merely because legal practitioner not available — Court must protect interests of both parties — This rule also protecting general public — Importance of efficient and speedy litigation. C

Arbitration — The award — Application to have award made order of court — Validity of award — Arbitration in absence of one party — Section 15(2) of Arbitration Act 42 of 1965 making provision for hearing in absence of one party under certain circumstances. D

Headnote : Kopnota

The courts of this country have been unwilling to accept that a litigant is entitled to insist on being represented by a particular counsel. The consequence of this principle is that it will not avail a litigant to explain a delay on the basis that his chosen legal representative was unavailable to assist him. The principle that a litigant is not entitled to delay the process of justice by E insisting on being represented by a particular legal representative is an important one. Underlying it are two concerns. The first is that the convenience of one party cannot be put above the convenience of the other parties. The second concern, as important as the first, if not more important, is the need to protect the general public interest in the timely and efficient administration of justice. The principle that a litigant may not cause delays by insisting on a particular legal representative is one that will F not ordinarily be relaxed simply because there have already been delays in the conduct of a dispute. Nor will it be departed from because the other party is not prejudiced.

The appellant had appealed against the refusal of an application for a postponement, as well as against an arbitrator's award which had been made an order of court. G According to the minute of the meeting with the arbitrator before the hearing, the arbitration was set for 20 November 2008 but the minute also recorded that if either of the parties had a problem with the date, they should contact the arbitrator within seven days, before close of business on Thursday 30 October, and explain why they were unavailable and propose an alternative date within 14 days of the proposed date. The minute also H recorded that if either party failed to be present at the hearing, the

arbitrator would make an award on the available and submitted information. On 17 November 2008 the appellant informed the arbitrator that he was unable to be present. The arbitration proceeded in his absence and an award was made against him.
The court held that there had been no misdirection on the part of the court a quo in refusing the application for a postponement. I
The court held further that the arbitration had been in accordance with the arbitration clause in the contract between the parties and that s 15(2) of the Arbitration Act 42 of 1965 permitted the holding of an arbitration in the absence of one of the parties, under certain circumstances. The court held that there were no irregularities in the arbitration proceedings. Appeal dismissed with costs. J

Cases Considered
A **Annotations:**
Case law
Southern Africa
Aztec Granite (Pty) Ltd v Green and Others 2006 (2) NR 399 (SC): dictum B at 403B applied
Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd 2009 (3) SA 533 (SCA): dictum in para [21] approved
Centirugo AG v Firestone (SA) Ltd 1969 (3) SA 318 (T): applied
Crystal Springs Aerated Water Co v Kan 1902 TH 21: referred to
Ecker v Dean 1939 SWA 22: referred to
C *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) ([2001] 3 All SA 236): dictum in para [28] applied
Myburgh Transport v Botha t/a SA Truck Bodies 1991 NR 170 (SC) (1991 (3) SA 310): approved
D *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (2000 (1) BCLR 39): dictum in para [11] applied
National Police Service Union and Others v Minister of Safety and Security and Others 2000 (4) SA 1110 (CC) (2001 (8) BCLR 775): dictum at 1112C – F applied
United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A): dictum at 720E – G applied
E *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA): referred to.
England
Christopher Brown, Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft mit Beschrankt er Haftung F [1953] 2 All ER 1039 (QB): referred to.

Statutes Considered
Statutes
The Arbitration Act 42 of 1965, s 15(2).

Case Information
Appeal from a decision in the high court (Henning AJ). The facts G appear from the judgment of O'Regan AJA.
JAN Strydom for the appellant.
R Tötemeyer SC for the respondent.
Cur adv vult.
H *Postea* (August 22).

Judgment
O'Regan AJA (Shivute CJ and Mainga JA concurring):
[1] This matter arises from a building contract entered into in 1999 by I the appellant, Dr Anibal Da Cunha do Rego, and the respondent, JC Beerwinkel trading as JC Builders. A dispute arose between these parties as to monies allegedly owed by the appellant to the respondent and that dispute was submitted to arbitration. Mr Beerwinkel successfully applied to court to have the resultant arbitration award made an order of court. Dr Do Rego now appeals against the whole of the J judgment and order made in the high court.

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Facts A

[2] In May 1999, the parties entered into a building contract for the construction of a residential dwelling for the appellant in Auasblick, Windhoek. Clause 26 of the contract provided for disputes between the parties to be determined by arbitration. Towards the end of the building B works, a dispute arose between the parties concerning, amongst other things, defects in the building work alleged by the appellant, additional building work done by the respondent and the question of monies owed by the appellant to the respondent.

[3] Some two years later, the parties agreed to refer the dispute between them to arbitration and agreed that Mr Philip Main would be the C arbitrator. The parties exchanged pleadings in the form of a statement of claim, as well as a plea and claim in reconvention. However, the arbitration did not proceed as the parties terminated the services of Mr Main. Some years later, in 2006, the parties agreed to appoint Mr Eyvind Finsen as arbitrator in the dispute, but again the arbitration did not happen as Mr Finsen died in early 2008. D

[4] On 25 July 2008, the legal practitioners for Mr Beerwinkel wrote to the president of the Namibia Institute of Architects, in terms of clause 26 of the building contract, requesting him to nominate three persons in good standing with the Namibian Council of Architects and Quantity E Surveyors who would be suitable to conduct the arbitration. A copy of this letter was sent to Dr Do Rego. The president of the institute replied to this letter on 14 August and provided the names of three people who were willing to accept nomination to act as arbitrator in the dispute. On 16 October 2008, Mr Beerwinkel selected Mr Wouter van Zijl to serve as arbitrator and again notified Dr Do Rego of this decision. F

[5] On the same date, Mr Beerwinkel's legal practitioners informed Dr Do Rego that a meeting would be held with the arbitrator on 22 October in Windhoek. On the morning of 16 October, the appellant contacted the arbitrator, Mr Van Zijl, and informed him that he was unable to attend the meeting. The meeting proceeded in his absence. G A minute of the meeting was prepared and faxed to Dr Do Rego. The minute recorded that the *Summary Procedure Rules of the Association of Arbitrators (Southern Africa)* 5th ed (2005), would apply to the arbitration. It also recorded the arbitrator's fee, as well as the date and place of the hearing. The arbitration was set for 20 November but the minute H also recorded that if either of the parties had a problem with the date, they should contact the arbitrator within seven days, before close of business on Thursday 30 October, and explain why they were unavailable and propose an alternative date within 14 days of the proposed date. The minute also recorded that if either party failed to be present at the hearing, the arbitrator would make an award on the available and I submitted information.

[6] On 17 November, Dr Do Rego sent an email to the arbitrator in which he stated that he would not be available on 20 November and that 'this matter has long expired'. Dr Do Rego also stated that the arbitrator had 'shown prejudice' in the way he would be handling the matter. J

O'Regan AJA (Shivute CJ and Mainga JA concurring)

A [7] On 20 November, the arbitration proceeded in the absence of the appellant and on 8 December, the arbitrator handed down his award upholding the respondent's claim and dismissing the counterclaim lodged by the appellant.

B Proceedings in the high court

[8] Mr Beerwinkel then launched proceedings in the high court for the arbitrator's award to be made an order of court in terms of s 31 of the Arbitration Act 42 of 1965, on 13 August 2009. Dr Do Rego lodged a notice of intention to oppose on 21 August as well as a rule 35(12) notice C calling for Mr Beerwinkel to produce certain documents for inspection. Mr Beerwinkel complied with the rule 35 notice on 21 October 2009. Dr Do Rego then requested an extension of time for the filing of his answering affidavit until the end of December. The respondent acquiesced.

[9] However, Dr Do Rego did not lodge his answering affidavit by the D end of December 2009. In fact, it was not filed until 24 September 2010. By then, the

application had been set down on the unopposed roll for hearing in the week of 11 October 2010. The respondent filed a rule 30 notice on 6 October seeking for the answering affidavit to be set aside as an irregular step. On 7 October the appellant lodged an E application seeking condonation for the late filing of his answering affidavit, as well as the postponement of the hearing of the application. The application was heard by Henning AJ in the high court on 11 October.

[10] On 19 October, judgment was handed down dismissing both the F application for condonation of the late filing of the answering affidavit, and the application for the postponement. The judgment also granted the relief sought by the respondent in his notice of motion. It is against this judgment that the appellant now appeals.

Issues for determination in this court

G [11] Three issues fall for determination in this appeal. The first is whether the high court erred in refusing the appellant's application for condonation for the late filing of his answering affidavit, and the second is whether the high court erred in refusing the appellant's application for a postponement. These two issues are related and will be dealt with H together below. The third is whether the high court erred in granting the substantive relief sought by the respondent. I will deal with this issue separately.

[12] Before turning to these issues, there is one preliminary matter that needs consideration. The appellant's heads of argument were filed five I court days late. The appellant lodged an application for condonation for the late filing of the heads. At the commencement of the appeal hearing, counsel for the appellant moved the application and the court granted it orally. The reasons for that order are the following.

[13] The appellant explained that the heads were filed late because the appellant's legal representative had mistakenly thought that he had J prepared written heads in the high court, and therefore only reserved one

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O'Regan AJA (Shivute CJ and Mainga JA concurring)

day to work on the heads for the appeal. He only realised his error shortly A before the heads were due, which resulted in the heads being late. The respondent did not oppose the application for the grant of condonation. Given that the period for which condonation is sought is only five days, that the reason tendered for the delay is a bona fide mistake, that the respondent did not suggest that he had been prejudiced by the delay, and B that the court itself was not prejudiced by the delay, the court granted the application for condonation at the hearing of this matter.

The refusal of the applications for condonation of the late filing of the answering affidavit and for the postponement of the hearing in the high court C

[14] Both the decision to refuse condonation for the late filing of an answering affidavit and the decision to refuse a postponement are based on the exercise of discretion. The approach to be followed by an appeal court in considering appeals against such decisions was clearly set out by Mahomed AJA (as he then was) sitting in this court in D *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 NR 170 (SC) (1991 (3) SA 310) at 174E – F (SA at 314F – G), which concerned an appeal against the refusal of an application for a postponement:

> 'An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion E merely on the ground that if the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.
>
> An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a F postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.'

[15] The question thus arises whether the high court in refusing these G applications did not exercise its discretion judicially, or was influenced by wrong principles or a misdirection of the facts, or that it was a decision that no court could reasonably have made.

[16] In relation to the refusal to condone the late filing of the opposing affidavit, it is common cause that the affidavit was only served and filed H some 20 calendar days before the hearing of the matter, more than nine months after it was due. Despite this extreme delay, the affidavit was not accompanied by an application for condonation of the late filing of the

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A affidavit. Indeed, an application for condonation was only filed once the respondent lodged a rule 30 notice some five days before the hearing. An application for condonation was then lodged the day after the service of the rule 30 notice.
[17] In his affidavit in support of the condonation application, the B appellant pointed to the respondent's delay in proceeding with the arbitration and suggested that his delay in filing his opposing affidavit should be viewed in the context of the respondent's delay in prosecuting the arbitration. The appellant also explained that his delay had arisen because his legal representative was engaged in other work and unable to C find time to prepare the opposing affidavit.
[18] On behalf of the appellant, it was argued that this court should interfere with the decisions of the high court to refuse condonation of the late filing of the opposing affidavit and a postponement of the hearing. The basis upon which this court should interfere with the decisions of D the high court was that the high court judge erred in law or on the facts *(a)* by focusing on the manner in which the appellant had approached the matter, and not on the delays that the respondent had occasioned in pursuing the arbitration and *(b)* by failing to consider the issue of good cause 'in its entirety' as the determining factor, which should have E included a consideration of the prejudice occasioned by the late filing of the opposing affidavit.
[19] In determining the condonation application, the high court judge focused on the reason given by the appellant for the delay in lodging the answering affidavit. As mentioned above, that reason was that appellant's F legal representative was unable to prepare the opposing affidavit due to pressure of work. The high court judge, quite correctly, noted that at least since the reported decision of *Ecker v Dean* 1939 SWA 22, the courts of this country have been unwilling to accept that a litigant is entitled to insist on being represented by a particular counsel. The consequence of this principle is that it will not avail a litigant to explain G a delay on the basis that his chosen legal representative was unavailable to assist him. The views expressed in *Ecker*'s case have been endorsed by other courts both here and in South Africa, including by this court in *Aztec Granite (Pty) Ltd v Green and Others* 2006 (2) NR 399 (SC) at 403B where this court reasoned:

> H 'It is trite law that a court will be extremely reluctant to grant a postponement of an appeal, when the sole reason is that an applicant and/or the applicant's instructing legal practitioners have a preference for a particular legal representative and that particular counsel is not available.'

I [20] The principle that a litigant is not entitled to delay the process of justice by insisting on being represented by a particular legal representative, is an important one. Underlying it are two concerns. The first is

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that the convenience of one party cannot be put above the convenience A of the other parties. The second concern, as important as the first, if not more important, is the need to protect the general public interest in the timely and efficient administration of justice. The principle that a litigant may not cause delays by insisting on a particular legal representative is one that will not ordinarily be relaxed simply because there have B already been delays in the conduct of a dispute. Nor will it be departed from because the other party is not prejudiced. For the principle protects not only the interests of the other parties to the litigation but also the public interest in the efficient administration of justice.
[21] Accordingly, the appellant's argument that the high court judge C erred in applying the rule that a litigant may not delay the administration of justice by insisting on chosen counsel without regard to the broader context of the dispute between the parties and, in particular, the delays that had beleaguered the arbitration, cannot be upheld. Whatever the earlier delays, the high court judge cannot be said to have applied a D wrong legal principle in concluding that the appellant's material delay in filing his opposing affidavit, for the reason that his chosen legal representative was not available to draft it earlier, had not established the good cause required to be afforded condonation. Similarly, the high court judge cannot be faulted for failing to consider whether the respondent E had been prejudiced by the inordinate delay caused as a

result of the non-availability of appellant's chosen counsel. For even if there was no prejudice, something the respondent disputes, that would not have been determinative. For even if the respondent was not prejudiced, there is a broader interest at stake, the public interest in the speedy administration of justice. F
[22] The application for a postponement was made from the bar on the morning of the hearing. It may be true, as appellant's counsel argued in the appeal hearing, that one of the reasons for the application may have been to afford the respondent an opportunity to deal with the material in G the appellant's opposing affidavit. Once, however, the opposing affidavit was not admitted, that reason fell away. In any event, an application for a postponement will only be granted if an applicant can show that it is in the interests of justice to grant the application. In determining this question, important considerations include that the application for a postponement be timeously made, that it be made in good faith, and H that the party seeking the postponement provide a full explanation of the

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A reason why the postponement is necessary. In this case, the appellant met none of these requirements.
[23] In refusing the application for a postponement, the high court judge noted the appellant's complete failure to comply with the rules and with Practice Directive 26(1), which stipulates that there should be five days' B notice between the filing of an interlocutory application and the scheduled hearing. The high court judge concluded that, given the appellant's flagrant non-compliance with the rules, it was an appropriate case to refuse the application for a postponement as well as the application for condonation, without a consideration of the prospects of success.
C [24] Given the circumstances of the application for the postponement, the appellant has not established that the high court judge erred either on the law or the facts in refusing the application.
The grant of substantive relief by the high court
D [25] Given the conclusion that the high court's decision to refuse the applications for condonation and a postponement should not be interfered with on appeal, the remaining issue is whether the high court was correct in granting the relief sought by the respondent, who was the applicant there. The relief sought was that the award made by the arbitrator be made an order of court. Again, given that the opposing E affidavit was never admitted, this question must be determined on the basis of the founding papers lodged by the respondent in the high court.
[26] For the first time in oral argument before this court on appeal, the appellant argued that the high court erred in making the arbitration F award an order of court, because on the record the arbitrator was not properly appointed in terms of the building contract and accordingly was not authorised to conduct the arbitration.
[27] Clause 26 of the building contract between the parties provided for arbitration in the event of disputes arising. Clause 26 reads as follows:

> G 'If any dispute or difference shall arise between the Employer or the Architect on his behalf, and the Contractor, either during the progress or after the completion of the works or after the determination of the employment of the Contractor under this contract, abandonment or breach of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder, or as to the withholding by the H Architect of any certificate to which the Contractor may claim to be entitled, then the Architect shall determine such dispute or difference by a written decision given to the contractor. The said decision shall be final and binding on the parties, unless the Contractor within fourteen days of the receipt thereof by written notice of the Architect disputes the same, in which case or in case the Architect for fourteen days after I a written request to him by the Employer or the Contractor fails to give a decision as aforesaid, such dispute or difference shall be and is hereby referred to the arbitration and final decision of the person named in the attached schedule or, in the event of his death or unwillingness or inability to act, or if no person is named therein, an arbitrator selected

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> by the Contractor from two persons nominated on the request of either A party by the President for the time being of the Namibian Council of Architects and Quantity Surveyors, and the award of such arbitrator shall be final and binding on the parties.'

[28] Counsel for the appellant submitted at the appeal hearing that the conditions precedent to the appointment of an arbitrator stipulated in B clause 26 of the building contract had not been met, and that therefore the appointment of Mr Van Zijl as arbitrator was invalid. Counsel further argued that before the arbitration award could be made an order of court, the court had to be satisfied that the arbitrator had been properly appointed. Counsel referred us in this regard to *Christopher Brown, Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte* C *Genossenschaft mit Beschrankter Haftung* [1953] 2 All ER 1039 (QB) in which Devlin J held that in order for a plaintiff to have an arbitration award made an order of the court, the plaintiff must establish five things: the conclusion of an arbitration agreement; the dispute fell within the terms of the arbitration agreement; the arbitrators were appointed in terms of the agreement; the award was made by the D arbitrators; and the awarded amount has not been paid.

[29] Section 31 of the Arbitration Act 42 of 1965 provides that an arbitration award may be made an order of court on application by any party to the agreement referring the dispute to arbitration after due E notice to the other party. Before a court will make an order, however, it must be satisfied that the arbitration took place in terms of a valid arbitration agreement, that the arbitrator made the award and that the award has not been met. It may be that a court will refuse to make the award an order of court if on the record it is clear that the award for some reason is vitiated by illegality. F

[30] The appellant's argument is that the arbitrator could not have been validly appointed under clause 26 of the building contract because the conditions precedent set out in that clause had not been met, and that the arbitrator was not appointed under any other arbitration agreement. 'Arbitration agreement' is defined in the Arbitration Act as follows — G

> 'a written agreement providing for the reference to arbitration of an existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not . . .'.

[31] Clause 26 clearly constitutes an arbitration agreement as contemplated H in the Act in that it evinces the parties' agreement to refer disputes

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A that may arise between them arising out of the subject matter of the building contract to arbitration. The question then is whether the appellant is correct to assert that, on the record before this court, the respondent has failed to show that the arbitrator was appointed in terms of clause 26. In support of this argument, counsel for the appellant B asserted that clause 26 had not been relied upon by the parties as the basis of an agreement to arbitrate until the respondent's representatives wrote to the president of the Namibian Council of Architects and Quantity Surveyors in July 2008. These are questions of fact that require us to peruse the record carefully.

C [32] The record makes clear that when the dispute arose between the parties as to the amount of money owing to the contractor, the parties referred the dispute to arbitration. The arbitrator was to be Mr Main. From the documents attached to the founding affidavit, there appears to have been a firm agreement between the parties that their dispute should D be resolved by arbitration, although no further written arbitration agreement appears to have been signed. These documents include the respondent's statement of claim in the arbitration as well as the appellant's reply and counterclaim. According to the founding affidavit, the arbitration did not proceed before Mr Main for various reasons, E including a dispute about fees.

[33] Thereafter Mr Finsen was appointed as arbitrator. Again minutes of a meeting with Mr Finsen attended by both the appellant and the respondent are annexed to the founding affidavit. These minutes evince a clear agreement to have the dispute between the parties determined by reference to arbitration. Again no formal written arbitration agreement F appears to have been signed.

[34] There were delays in proceeding with the arbitration before Mr Finsen and then unfortunately Mr Finsen died unexpectedly at the beginning of 2008. Some time later, the respondent's legal representatives, relying on clause 26 of the building contract, wrote to the president of G the Namibian Council of Architects and Quantity Surveyors

asking him to nominate some names to serve as arbitrator. Names were duly furnished and the respondent selected Mr WH Van Zijl to act as arbitrator. This correspondence was copied to the appellant.
[35] The appellant was also informed of the preliminary meeting before H the arbitrator and he contacted the arbitrator shortly before the meeting to say that he would not be able to attend. Minutes of that meeting were forwarded to the appellant. Those minutes made plain that the date for the arbitration had been set for 20 November 2008 and that if he could not make that meeting he should inform the arbitrator within seven days. On 17 November, the appellant sent an email to the arbitrator that he I would not be attending the arbitration on 20 November, that 'this matter has long expired' and that 'in your minutes you have shown prejudice in the way you would be handling the matter'.
[36] What appears plain from the founding affidavit and the documents annexed to the founding affidavit is that once the dispute between the J parties had arisen, they had mutually agreed that it would be determined

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by arbitration. That the appellant had consented to arbitration as a A means of determining this dispute, appears from his statement of defence and counterclaim in the proceedings before Mr Main, as well as in the minutes of the meeting before Mr Finsen. In neither of these documents is there any suggestion that the appellant disputes that the matter has been properly referred to arbitration. Nor is there any suggestion from any of these documents that the parties were pursuing B an arbitration agreement other than the agreement expressed in clause 26 of the building contract.
[37] On the record before us, therefore, the appellant at least until November 2008 acted consistently with an understanding that the C dispute between him and the respondent would be resolved by arbitration. Nothing on the record suggests that that arbitration would take place other than in accordance with clause 26 of the building contract. Nor is there any suggestion that the appellant ever asserted that the arbitration could not proceed because the conditions precedent in D clause 26 had not been met. Given the conduct of the appellant up till November 2008, there is no suggestion on the record that the parties considered that the arbitration could not proceed because the conditions precedent in clause 26 had not been met. In the circumstances, the respondent has established on a balance of probabilities that the arbitration followed from clause 26 of the building agreement. E
[38] The record therefore establishes on a balance of probabilities that the parties had entered into a valid arbitration agreement; that the subject matter of the dispute between them fell within the scope of that agreement; that the arbitrator was selected in terms of the agreement; the F arbitrator has made an award and the appellant has failed to pay the amount ordered in the award. The appellant's argument that the arbitration could not be conducted because the conditions precedent set out in clause 26 of the building contract had not been met, cannot be sustained. G
[39] One final issue needs to be considered. In the written heads, though not in oral argument, counsel for the appellant contended that the arbitrator had misdirected himself in proceeding in the absence of the appellant. As set out above, the appellant was given notice of the arbitration. Section 15(2) of the Arbitration Act provides that an H arbitrator may proceed in the absence of a party if that party fails to appear 'after having received reasonable notice of the time when and place where the arbitration proceeding will be held' without having shown good cause for the failure to appear. There is no suggestion on the record that once the appellant obtained notice of the arbitration, he made any serious effort to be present or to be legally represented. In the I circumstances, it cannot be said that the decision by the arbitrator to proceed on 20 November constitutes a material irregularity such as to vitiate the award.

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A [40] It is clear, as counsel for the respondent argued, that the appellant took no steps to have the award set aside in terms of s 33(1) of the Arbitration Act. That section permits a party to apply to court to have an arbitration award set aside where

the party considers that an arbitrator has misconducted himself or herself, or committed a gross irregularity in B the course of the arbitration. It is not necessary to decide now whether a party is obliged to pursue the remedy provided by s 33 if he or she considers there to have been a gross irregularity in the arbitration and not permitted to raise it only as a defence in proceedings to have the award made an order of court under s 31, as recently the Supreme Court of C Appeal in South Africa held. Given that the appellant has not established that the arbitration was tainted by a material irregularity, this question can stand over for decision on another day.

[41] For the above reasons, the appeal must fail.

Costs

D [42] Given that the appeal fails, the ordinary rule as to costs should apply. The appellant must be ordered to pay the costs of the respondent, such costs to include the costs of one instructed and one instructing counsel. The court's attention was drawn to the fact that the respondent was represented in the appeal with the assistance of the Legal Aid Directorate. In terms of s 17(2) of the Legal Aid Act 29 of 1990, the E costs awarded to the respondent shall be paid to the Director of Legal Aid.

Order

[43] The following order is made:

F 1. The application for condonation of the late filing of appellant's heads of argument on appeal is granted.

2. The appeal is dismissed.

3. The appellant is ordered to pay the costs of the respondent in opposing the appeal, such costs to include the costs attendant upon the employment of one instructed and one instructing G counsel.

Appellant's Legal Practitioners: *GF Köpplinger Legal Practitioners*.

H Respondent's Legal Practitioners: *Dr Weder, Kauta & Hoveka Inc*.

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1 See *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E – G.

2*Myburgh Transport v Botha t/a SA Truck Bodies* 1991 NR 170 (SC) (1991 (3) SA 310) at 174D – E (SA at 314F – G).

3 Id at 174F – H (314G – 315B). See also *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (2000 (1) BCLR 39) at para 11.

4 See, for example, *Centirugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T).

5 At 403A – B.

6 See the similar point made by the South African Supreme Court of Appeal in *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) ([2001] 3 All SA 236) at para 28.

7 See *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC) (2001 (8) BCLR 775) at 1112C – F.

8 See *Myburgh Transport v Botha t/a SA Truck Bodies* above n 2 at 175A – B (SA at 315C – D).

9 Id at 175C (SA at 315E).

10 Id at 174I – 175A (SA at 315B).

11 1953 (2) All ER 1039 (QB) at 1040D – E.

12 Id. See, in this regard as well, *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) at para 17; Butler & Finsen *Arbitration in South Africa* at 273 and Ramsden *The Law of Arbitration: South African and International Arbitration* (Juta, 2009) at 189. See also *Crystal Springs Aerated Water Co v Kan* 1902 TH 21 at 26 where the court stated that a court may refuse to make an award an order of court 'if it were clearly made to appear that the award was illegal'.

13 See *Crystal Springs Aerated Water Co* id.

14 See *Crystal Springs Aerated Water Co* cited above n12.

15 See *Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd* 2009 (3) SA 533 (SCA) at para 21. See also Butler & Finsen *Arbitration in South Africa: Law and Practice* para 7.10. For a possibly contrasting approach, see *Vidavsky v Body Corporate of Sunhill Villas* cited above n12 at para 16, a case in which an arbitrator proceeded

where the appellant had not received notice of the arbitration proceedings before they were held. The SCA held this to be a material irregularity vitiating the arbitration proceedings and accordingly that the award was null and void and could not be made an order of court.
