juta

SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

VOLUME 6, ISSUE 1, 2023

10 YEARS
2011 - 2021

SAJEI South African Judicial Education Institute
Enhancing Judicial Excellence

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

VOLUME 6, ISSUE 1, 2023

SAJEI
South African Judicial Education Institute

Enhancing Judicial Excellence

This journal is published under the auspices
of the South African Judicial Education Institute.

Published: July 2025

ISSN: 2616-7999

TRIBUTE TO AKHO NTANJANA

Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton and continue on your well-defined route.

Thank you for being our guiding light.

CONTENTS

ARTICLES

CASE NOTES

Enhancing Judicial Excellence

188 14th Road, Noordwyk, Midrand, 1687

Private Bag X10, Marshalltown, 2000

The *South African Judicial Education Journal* is published by the South African Judicial Education Institute (SAJEI), Office of the Chief Justice. The mandate of SAJEI is to provide judicial education to aspiring and serving Judicial Officers in order to enhance judicial accountability and transformation of the Judiciary.

The journal is intended to consist of contributions, articles, case notes and book reviews. The views expressed by the authors or contributors do not reflect the views of SAJEI and Editorial Board.

The Editorial Board invites unsolicited articles on topical issues relating to judicial education and the Judiciary. It may, in its discretion, accept articles that do not strictly deal with judicial education. The Editorial Board reserves the right to edit articles and circulate for double-blind peer review.

This journal is accredited by the Department of Higher Education and Training.

Currently, the journal is not for sale. Requests for PDF electronic copies should be sent to SAJEJ@judiciary.org.za.

Labour Litigation and Dispute Resolution
by John Grogan
Fourth Edition. Juta. 2023

Introduction

Labour Litigation and Dispute Resolution now in its 4th edition by Dr John Grogan provides an overview of the 'practice in South African Labour tribunals'.[1] The textbook is to be considered as a specialist guide aimed at practitioners, academics, Judges and the like to navigate the complex decision that is to be made in terms of whether to utilise the available mechanism to allow disputes to be resolved through labour law forum(s) or through private arbitration(s). The review of the book will be limited to Chapters 8 and 15 which address private arbitrations as well as the review thereof.

Analysis of Chapters 8 and 15

In Chapter 8, the author highlights that it is possible for parties to refer a dispute for determination by a private arbitrator instead of pursuing their labour dispute using the available statutory mechanisms. Should this be the case, the dispute is to be resolved because of the parties' consent to this process. This is one of the bases of private arbitration, that it is conducted based on consent by the parties. This was confirmed by the court in *Lufuno.*[2] The court further confirmed that the state is not involved in such a process.[3] Accepting that parties have opted to resolve their dispute through private arbitration, the author highlights the differences between private and statutory arbitration as well as the advantages and disadvantages thereof. With private arbitration, the parties have an opportunity to select their referee as well as the terms of reference for such a referee.[4] With private arbitrations, except for matters in connection with status as well as matrimonial cause or any matter incidental to matrimonial cause,[5] any dispute can be resolved under private arbitration.[6] The author highlights that the arbitration agreement serves as the base for private arbitration. This arbitration agreement is to be in writing (if not in writing, the common law will apply),[7] consensus is to be reached by the parties

1 J Grogan, *Labour Litigation and Dispute Resolution* (2023) 2.
2 *Lufuno Mphaphuli v Andrews* 2009 (6) BCLR 527 (CC).
3 Lufuno (note 2 above) para 198.
4 Grogan (note 1 above) 238–239.
5 Section 2 of the Arbitration Act 42 of 1965.
6 Grogan (note 1 above) 239.
7 LAWSA ,Volume 2 (3ed). The arbitration agreement.

that a dispute will be referred to private arbitration, such dispute must either be one that exists or will exist in the future and that the intention of the parties should be to refer the dispute to an arbitrator.[8] The author also highlights that once an arbitration agreement has been reached (unless the agreement specifies otherwise), parties to the agreement cannot unilaterally cancel such agreement.[9] For an arbitrator to arbitrate a dispute, the terms of reference are the main item to consider.[10] The manner in which a dispute is referred is also considered by the author.[11] With private arbitration, the parties to the dispute are permitted to select any person to arbitrate their dispute. This is one of the benefits of private arbitration, in that parties can effectively choose a person (individual), such as an engineer, lawyer or accountant, to assist in the resolution of their dispute.[12] The arbitrator's fees, confidentiality, the powers and duties of arbitrators are also addressed in the chapter.[13] The hearing, the award, costs, legal consequences of awards, variation, enforcement, remittal, appeal and review are also covered in the chapter.[14] An award is the decision of the arbitrator and such decision is said to be final and binding on the parties. It is said that the rationale behind this is because the parties have consented to this. With private arbitration, it is important to note that arbitration awards are capable of review.[15] When an arbitration award is reviewed, section 33(1) of the Arbitration Act 42 of 1965 sets out the grounds of review.

Chapter 15 of the book addresses the review of arbitration awards and the instances under which an award can be reviewed are discussed.

In Chapter 15, the author provides an overview of which court can be approached in connection with the review of private arbitrations. The object of the review is then considered where the author sets out that a review in terms of private arbitration is meant to set aside the award (with the exception that the court is permitted to intervene in the proceedings and the time limits

---

8 Grogan (note 1 above) 241–248. See also P Ramsden *The Law of Arbitration; South African & International Arbitration* (2018) 61–77; DW Butler & E Finsen *Arbitration in South Africa; Law & Practice* (1993) 40–41.

9 Grogan (note 1 above) 248–249. See also s 3(1) of the Arbitration Act 42 of 1965 which provides that 'Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by the consent of the all the parties thereto'.

10 Grogan (note 1 above) 250–251.

11 Grogan (note 1 above) 251.

12 Grogan (note 1 above) 251–252. See *Lufuno Mphaphuli v Andrews* 2009 (6) BCLR 527 (CC) at para 2 where the arbitrator, Mr Nigel Andrews, was (is) a quantity surveyor and project manager.

13 Grogan (note 1 above) 253–256.

14 Grogan (note 1 above) 256–261.

15 Grogan (note 1 above) 261.

are also provided).[16] The grounds of review are then considered and section 33 of the Arbitration Act 42 of 1965 is considered.[17] Section 33(1) of the Act provides that an award can be set aside due to the 'misconduct of a member of the arbitral tribunal in connection with their duties as an arbitrator or umpire, the arbitration tribunal has committed a gross irregularity in the conduct of the arbitration proceedings or their powers were exceeded or where the award was improperly obtained.'[18] The impact of the Constitution on the review of private arbitrations is also considered, the review of the cost orders of an arbitrator, a review of appeal tribunals as well as the effect of an application for review is also reflected on.[19]

Evaluation

The author should be commended for drawing attention to the fact that any dispute (save for specific exceptions)[20] is capable of resolution in terms of the Arbitration Act. The context of the author's discussion is that of labour law. Should this be the case, the author is essentially requiring those who are faced with this undertaking to consider that the approach to the dispute will be different. The difference being that the dispute falls for consideration in terms of the Arbitration Act. It is also important for those who choose to refer a dispute for arbitration in terms of the Arbitration Act to understand that the drafting of the relevant documentation (such as the arbitration agreement) should be concise to ensure that the intention of the parties is given effect to.

The author does note that there are other dispute resolution processes that can assist in the resolution of a dispute that does not qualify as arbitration.[21] A review of the footnotes reveals that relevant resources were considered. However, the one resource that could have been considered is the *Law of South Africa (LAWSA) Arbitration*, (Volume 2, third edition).[22] Within this resource, the author would have encountered that the author therein has provided that arbitration should be distinguished from valuations, certifications, mediation,[23]

---

16 Grogan (note 1 above) 466–467.

17 Grogan (note 1 above) 467–463.

18 Section 33(1)(1)–*(b)* of the Arbitration Act 42 of 1965.

19 Grogan (note 1 above) 473–475.

20 See section 2 of the Arbitration Act 42 of 1965. Additionally, see the case of *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* (specifically para 25) in connection with s 2 of the Arbitration Act 42 of 1965.

21 Grogan (note 1 above) 245–248.

22 This resource is available via Lexis Nexis.

23 The author does however provide for a difference between the process of mediation as compared to arbitration, Grogan (note 1 above) 247–248.

expert determination and adjudication.[24] These processes may be similar to arbitration in that specific elements (such as finality as well as the indication that the dispute is to be referred to an expert) may be considered as arbitration but that is not the case. The author therein highlights that the 'intention of the parties when determining which category an agreement falls under', is key.[25] This inclusion would have further strengthened the specific chapter for those engaging with the textbook as the Arbitration Act does not define what arbitration is.[26] This would require those considering arbitration as an ADR mechanism to pay attention to different aspects where the intention is to pursue arbitration.

Additionally, in connection with the review of arbitration awards (Chapter 15), the court in *Lufuno*,[27] (majority judgement penned by Justice O' Regan) provided key characteristics in connection with private arbitration such as it is a non-state process and that it is based on consent.[28] The court further mentioned that when considering the review of private arbitration, the courts should not enhance their powers.[29] The court further noted that the manner within which private arbitration is to be conducted is to be established from the arbitration agreement.[30] This entails that should the parties set out in their arbitration agreement that an arbitrator is permitted to make a decision based on documents as submitted only, or that the arbitrator is permitted to undertake inspections *in loco* in addition to the submission of documentation, this is the process that should be pursued which the courts ought to respect.[31] The *Lufuno* case is probably one of the most important cases when considering the review of private arbitration awards. The author could have also considered the *De Lange* case.[32] This case confirmed the position as set out in the *Lufuno* case in that the courts should be slow to

---

[24] LAWSA, (85 & 86), 'Arbitration distinguished from valuation, certification, mediation, expert determination & adjudication'.

[25] LAWSA. (85 & 86), 'Arbitration distinguished from valuation, certification, mediation, expert determination & adjudication'. Cases such as *Perdikis v Jamieson* 2002 6 SA 356 (W) in connection with whether an expert is said to be an arbitrator would have added to the textbook in line with the resource of LAWSA. The author does however include the case of *Schuldes v Compressor Valves Pension Fund* 1980 4 SA 576 (W) where the court indicated that there are several instances where decisions are said to be final but whether it can be said that it is arbitration is a different case.

[26] See the definition section (s 1) of the Arbitration Act 42 of 1965.

[27] 2009 (6) BCLR 527 (CC).

[28] Para 198.

[29] Paras 224–235.

[30] Para 236.

[31] Para 236.

[32] [2015] ZACC 35.

interfere in private arbitrations.[33] However, in as much as this is the case, the Arbitration Act does provide for instances when the court is permitted to engage (interfere) in private arbitration and section 3(2) of the Arbitration Act is one of those instances. In terms of the specific provision, the court is permitted to, at any time, based on good cause as shown, to set aside the arbitration agreement, order that a dispute referred to in the agreement is not to be referred to arbitration or that the arbitration agreement will have no effect in connection with any dispute as referred.[34] The inclusion of the words 'good cause' in the section is however not defined in the Arbitration Act.[35] This entails that other resources would need to be considered to establish what the court(s) regard as 'good cause'.[36]

Conclusion

Labour Litigation and Dispute Resolution provides an important overview of how to approach a labour dispute where the parties have opted to allow for the Arbitration Act to be applicable to their matter. When this is the case, it is important to approach the dispute with the understanding that different rules apply in the resolution of the matter.

MS KATLEGO MMAKOSHA MTHELEBOFU
University of Stellenbosch

33 Para 37.
34 See s 3(2) of the Arbitration Act 42 of 1965.
35 See the definition section (s 1) in the Arbitration Act 42 of 1965.
36 Para 36.