THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 866/2017

In the matter between:

AJAY SOOKLAL **APPELLANT**

and

THALES SOUTH AFRICA (PTY) LTD **RESPONDENT**

Neutral Citation: *Sooklal v Thales SA (Pty) Ltd* (866/2017) [2018] ZASCA 130 (27 September 2018)

Coram: Navsa, Tshiqi, Dambuza and Van der Merwe JJA and Nicholls AJA

Heard: 28 August 2018

Delivered: 27 September 2018

Summary: Arbitration award made order of court purportedly in terms of s 31 of the Arbitration Act 42 of 1965 – award denying attorney's claim for fees in execution of a mandate and ordering him to pay costs of the arbitration – opposition to the award being made an order of court based on facts not raised before arbitrator or appeal tribunal – alleged unlawful conduct on the part of client unconnected to the mandate and its execution – award not tainted by untested allegations.

ORDER

On appeal from: The Gauteng Local Division of the High Court, Johannesburg (Mokhari AJ sitting as court of first instance).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Navsa JA (Tshiqi, Dambuza and Van der Merwe JJA and Nicholls AJA concurring):

[1] This appeal by Mr Ajay Sooklal, an attorney, is directed against an order of the Gauteng Local Division of the High Court, Johannesburg (Mokhari AJ), in terms of which, at the instance of the respondent, Thales South Africa (Pty) Ltd (the company), an award by an arbitration appeal tribunal was made an order of court, purportedly in terms of s 31 of the Arbitration Act 42 of 1965.[1] The appellant's case, as will become apparent is, to say the least, an unusual one.

[2] At the outset, for reasons that will become clear, it is necessary to record the following. The company is a subsidiary of the South African arm of a French based company that is involved in the aerospace, space, defence, security, and transportation industries and employs tens of thousands of people. The French company is a recognised major international supplier of armaments. During 1998 the group of which the company formed part, played an important role in the South African Defence Force's arms acquisition process. The arms acquisition process became popularly known as 'the Arms deal'. The group was awarded a contract

[1] Section 31 reads:
'(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.'

worth R2,6 billion by the State. The contract was executed but it has since then been mired in litigation and controversy in the public eye. It was in the midst of investigations into alleged criminal conduct on the part of the company and associated high ranking persons and entities, including its South African subsidiary, Thint (Pty) Ltd, in relation to the arms deal, that Mr Sooklal was engaged as an attorney to represent the company. More particularly, his services were required in relation to an impending prosecution and related litigation within and beyond our borders. According to Mr Sooklal, he was also engaged to market the company's services and products.

[3] During 2011 Mr Sooklal instituted action in the Gauteng Local Division of the High Court, Johannesburg, against the company, claiming professional fees in excess of R50 million in relation to the services referred to in the preceding paragraph. The action was based on an oral agreement concluded between the parties during September 2003, in terms of which Mr Sooklal was required to render the aforementioned services. From time to time Mr Sooklal engaged the services of counsel to perform work on the company's behalf. More, later, about the details concerning the nature and extent of the work claimed to have been done by Mr Sooklal on the company's behalf.

[4] The company defended the action. After the close of pleadings the parties agreed to have the dispute adjudicated by an arbitrator. Arbitration proceedings commenced and were completed before retired Judge Levinsohn.

[5] The arbitrator was impressed by Mr Sooklal's testimony, stating that he had created a 'very favourable impression'. He took the view that Mr Sooklal had a brief from the company, largely in line with his pleadings, and had executed it. The brief was described as having to leave no stone unturned in an endeavour to have criminal charges against the company and related entities withdrawn. Judge Levinsohn also looked favourably on Mr Sooklal's assertion concerning his entitlement to a 'success fee'. He rejected the company's contention that the fees that were the subject of Mr Sooklal's claim were excessive and calculated to overreach.

[6] Judge Levinsohn held that Mr Sooklal was entitled to a daily retainer equivalent to a daily fee charged from time to time by senior counsel in KwaZulu-Natal. The daily fee had, over time, increased from R18 000 to R33 000. The arbitrator held it against the company that it had not called witnesses to rebut Mr Sooklal's version and to support the contentions set out in its plea.

[7] In its plea, the company accepted that Mr Sooklal had done work on its behalf. Before the arbitrator, the company contended that much of his evidence in relation thereto was in response to leading questions. That submission was rejected. Judge Levinsohn accepted the activity report presented by Mr Sooklal setting out the work done and containing calculations by his accountant. He accepted that Mr Sooklal, by using the said documentation and relying on his memory, properly reconstructed his activities in relation to the brief by the company. Judge Levinsohn accepted that the daily fee would be applicable, irrespective of the number of hours worked.

[8] In its plea and before the arbitrator, the company had also taken the point that Mr Sooklal was not entitled to any payment because of the provisions of s 41 of the Attorneys Act 53 of 1979 (the Act), which precludes a practising attorney from recovering a 'fee, reward or disbursement while practising on his own account without being in possession of a fidelity fund certificate'. It is common cause that, at all relevant times, Mr Sooklal was not in possession of such a certificate.

[9] Mr Sooklal, in his original particulars of claim, had claimed the fees both in his personal capacity and in his capacity as cessionary of rights by attorney Shaminder Rampersad who, it was stated, had ceded to Mr Sooklal his right to the payment of fees by the company. Somewhat confusingly, the fees were claimed on the basis of Mr Sooklal being the company's attorney, representing it and related persons and entities *and* on the basis of him being a cessionary of rights. In the first amendment to his particulars of claim Mr Sooklal changed tack, in response to the point taken by the company concerning his lack of a fidelity fund certificate, he asserted that he was claiming the fees, not in his capacity as an attorney, but in his personal capacity. He later claimed that at material times he was acting as a consultant to attorney Rampersad, and was thus not required to be in possession of

a fidelity fund certificate. He also alleged that he had a contractual arrangement with Mr Rampersad in terms of which he was personally entitled to the fees earned by him in executing the brief referred to above.

[10] During proceedings before the arbitrator Mr Sooklal delivered yet another amendment to his particulars of claim. This time he stated that his monetary claim included an amount of approximately R8 million, earned while he was a consultant to Karodia attorneys, but serving the company. He went on to state, however, that he had not taken cession of the claim which that firm had against the company and, thus conceded that his overall claim fell to be reduced accordingly.

[11] In dealing with the company's defence that the fees could not be claimed because of the lack of a fidelity fund certificate, Judge Levinsohn held that the words in s 41 of the Act, 'on his own account' meant that the practitioner concerned must have the status of proprietorship of the entity engaged by the client. He found that Mr Sooklal had not practised on his own account and that his claim was thus not obstructed by his lack of a fidelity fund certificate.

[12] In respect of Mr Sooklal's claim for a success fee, Judge Levinsohn found that his version that there had been an agreement in relation thereto was inherently probable, given that the company, in resisting a claim for summary judgment in the court below, had stated that if Mr Sooklal was successful in carrying out his mandate it might have been possible for him to have motivated for a bonus. Counsel on the company's behalf also contended before the arbitrator that the alleged success fee amounted to a contingency fee agreement, which, in terms of the Contingency Fees Act 66 of 1997, was excluded in relation to criminal proceedings. Judge Levinsohn held that Mr Sooklal's mandate extended to ancillary applications and that Mr Sooklal had testified that normal fees would be charged and, in addition, a success fee was agreed which did not fall within the definition of a contingency fee agreement. Judge Levinsohn concluded that the Contingency Fees Act did not apply.

[13] On 18 May 2015 Judge Levinsohn, having reached the aforementioned conclusions, rendered an award in terms of which he directed the company to pay Mr Sooklal:

(1) R37 471 00 in respect of work done as an attorney, R399 000 comprising non-attorney work (plus VAT on both amounts) and R3 983 300 as a success fee;

(2) Interest on those amounts; and

(3) Costs, including the costs of two counsel, the arbitrator's charges, the costs of hiring the arbitration venue, the costs of the transcription of the evidence, and all costs that were reserved or stood over.

[14] The arbitration agreement made provision for an appeal to an appeal tribunal. The company sought to appeal the award by Judge Levinsohn and the parties consequently agreed to an appeal panel of three retired judges, two of the Supreme Court of Appeal, namely Judges Brand and Malan and the third, Judge Southwood of the Gauteng Division of the High Court, Pretoria.

[15] Before the arbitration appeal tribunal Mr Sooklal was less fortunate. The appeal tribunal swiftly disposed of Mr Sooklal's claim for non-attorney work. It took into account that in that regard he had received an amount from the company in excess of the amount claimed. In rejecting this claim and upholding the appeal in relation thereto, the tribunal recorded that counsel on his behalf did not contend it should conclude otherwise.

[16] In relation to Mr Sooklal's claim for a success fee the appeal tribunal did not consider it necessary to decide conclusively whether the Contingency Fees Act 66 of 1997 applied to an arrangement such as alleged by Mr Sooklal, but stated that if indeed it was so covered it would not be enforceable, because it had not, in terms of that Act, been reduced to writing, containing the detail required in terms of s 3(3)*(b)* thereof.[2] Furthermore, the tribunal, with reference to *Goolam Mahomed v Janion* (1908) 29 NLR

[2] Section 3(1)*(a)* of the Contingency Fees Act 66 of 1997 provides:
'(1)*(a)* A contingency fees agreement shall be in writing and in the form prescribed by the Minister of Justice, which shall be published in the *Gazette*, after consultation with the advocates' and attorneys' professions.'
Section 3(3)*(b)* reads as follows:

304, went on to hold as follows: 'The simple fact is that the agreement is and was unenforceable at common law'. The tribunal stated that the Contingency Fees Act provided the only exception to the common law rule that contingency fee arrangements are unenforceable, regardless of the nature of the work performed and, whether or not they relate to litigation. It upheld the company's appeal in respect of Mr Sooklal's claim.

[17] In relation to Mr Sooklal's main claim for attorney's work done on the company's behalf, en route to a conclusion that the claim was barred in terms of s 41 of the Act for lack of a fidelity fund certificate, the appeal tribunal nevertheless considered it necessary to comment extensively on Mr Sooklal's credibility. The material parts of the comments are set out hereafter.

[18] The tribunal recognised that the company had not adduced evidence challenging Mr Sooklal's testimony, but went on to state that it did not follow that where evidence is un-contradicted it must be accepted. It appreciated that a trial judge has advantages over an appeal tribunal, particularly in relation to observing the demeanour of witnesses and reminded itself of the caution often sounded, that an appeal tribunal should be slow to upset the findings of a trial court, but went on to refer to the following dictum from *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706:

'There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.'

'(3) A contingency fees agreement shall state –

. . .

(b) that, before the agreement was entered into, the client –

(i) was advised of any other ways of financing the litigation and of their respective implications;

(ii) was informed of the normal rule that in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party and party costs of his, her or its opponent in the proceedings;

(iii) was informed that he, she or it will also be liable to pay the success fee in the event of success; and

(iv) understood the meaning and purport of the agreement.'

The tribunal referred further, in the same vein, to the decision of this court in *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5:

'Whilst a Court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong . . . This is especially so where the reasons given for the findings are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of appeal "become illusory" . . . It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration.'

Having cited these authorities the tribunal proceeded to scrutinise the relevant parts of Mr Sooklal's evidence.

[19] The tribunal stated emphatically that it disagreed with the conclusion reached by Judge Levinsohn that Mr Sooklal was a good and credible witness. It considered his evidence on the details of his mandate to be vague and contradictory. It found that material parts of his activity report in relation to his mandate had not been satisfactorily explained. It held it against Mr Sooklal that working papers that were supposed to form the basis of the report had not been produced by him.

[20] A number of 'incorrect statements' in Mr Sooklal's activity report, were referred to by the tribunal which it said did not inspire confidence. It referred to entries in relation to work supposedly done over a number of successive months being in identical terms. The tribunal said the following in relation to statements that work was done every day, including over weekends and public holidays:

'A moment's reflection is sufficient to reject the statement that in the month of December the claimant worked 31 days as set out in the Activity Report. Statements in the Activity Report such as these are simply not credible, and fall short of the detail a client of an attorney is entitled to. Be that as it may, the arbitrator found the claimant to be a good and credible witness. We disagree. The claimant's evidence concerning the terms of his remuneration is not credible and hardly "satisfactory".'

[21] In relation to Mr Sooklal's evidence concerning his rate of remuneration the tribunal was unimpressed by how his particulars of claim had changed after cross-examination. It held that there was no basis to hold, as Judge Levinsohn did, that he had been engaged on a daily retainer. Mr Sooklal was aware, so the tribunal stated,

that senior counsel charged both an hourly and daily fee, yet his claim was based entirely on a daily fee. It was improbable, so the tribunal reasoned, that there would have been an agreement in those terms early on, when Mr Sooklal was first engaged, especially since it was contemplated that he would himself further employ the services of counsel.

[22] In para 38 of the tribunal's award the following appears:

'As we have already pointed out, the claimant's Activity Report is based entirely on a daily fee. He claimed for thousands of days' work, regardless of the fact that he did not always work a full day. His contention was that the said rate had been agreed upon in September 2003 and again in March 2004. The claimant amended his particulars of claim in January 2015 to allege that he was entitled to the daily and/or hourly rate charged by senior counsel . . . But his evidence was that he was entitled to a daily rate: "Mr Moynot and I had an agreement that this work demanded a daily rate and he and I agreed on our daily rate and I did work on a daily rate as my evidence in chief would testify". The hourly rate became irrelevant. The claimant had to concede that his pleaded case was in conflict with his evidence. The claimant was adjusting his evidence, as counsel suggested, fluctuating between counsels' fees and a daily rate, and when this was put to him he answered that he had been guided by counsel in relation to his pleadings.'

[23] The criticism did not end there. The tribunal went on to state the following, at para 39 of its award:

'The claimant did not on any of his invoices including the final one charge fees on any of the alleged or pleaded bases. He claimed an amount per day, even in respect of days where he worked only for 1 hour on a particular day, not on the basis on which senior counsel charged. He even claimed the daily fee of a senior counsel when he was on holiday. To suggest that he could go on all-expenses paid holiday cruises, with wife and family, and still be paid a daily rate is absurd. No such agreement was ever pleaded. Nor did Moynot, even on the claimant's version, agree to remunerate him during these holidays. The pleaded case was that he worked for each of the days set out in the Activity Report. This is clearly untrue and cannot be accepted. If his fees were based on senior counsel's fees, his pleaded case, he had to prove how many hours he worked on each of the days in question. The final statement that his fees were in the nature of a retainer was not pleaded and emerged only belatedly under cross-examination. It is significant that this was not stated in any correspondence prior to the institution of the action in the High Court when the quantum of

the fees was in contention. At that stage the claimant had not even attempted to quantify his claim.'

[24] Three more paragraphs of criticisms followed in relation to Mr Sooklal's evidence concerning his remuneration, before the tribunal turned its attention to his assertion that he had been acting as a consultant to attorney Rampersad and was therefore not barred from claiming fees due to the lack of a fidelity fund certificate. The tribunal took into account that at no stage, between 2001 and the middle of 2005, which formed part of the period during which Mr Sooklal claimed to have done work for the company, did he act in any way on behalf of or in the name of Mr Rampersad. The tribunal noted that the first invoices sent to the company were in the name of the Sooklal Trust. The tribunal had regard to the fact that it was only when litigation was imminent, in 2004, that Mr Sooklal required the infrastructure of an attorney's office in Durban. He first chose attorney Karodia, whose offices he used for the delivery of documents and whose letterhead he utilised. There was no evidence that he had informed the company that he was a consultant with that attorney. There was no explanation by him of what the concept meant, or why there were fees due to that firm. The tribunal considered that he continued to bill the company for services rendered in the name of the Sooklal Trust. No mention was ever made, up to November 2005, of attorney Rampersad.

[25] Even as late as May 2008 he continued to invoice the company in the name of the Sooklal Trust and received monies into his own bank account. After evidence had been led before Judge Levinsohn, Mr Sooklal amended his particulars of claim, inserting attorney Karodia into the narrative. At the end of para 44 of the tribunal's award the following appears:

'But, more importantly, the claimant never established the contractual basis for the defendant's liability, first, to Rampersad, then to Karodia and then again to Rampersad.'

[26] At para 46 of the award the tribunal said the following:

'The defence concerning the claimant's lack of standing is that the agreements with the defendant were concluded with the claimant personally, and not with Rampersad. It follows, if this contention is correct that Shaminder Rampersad had nothing to cede to the claimant. In advancing the argument the defendant relied heavily on the formulation of the claims by

the claimant in his different sets of particulars of claim as well as on his evidence where he referred to himself rather than to Rampersad as the contracting party.'

[27] The tribunal went on to examine the provisions of s 41 of the Attorneys Act 53 of 1979, which read as follows:

'Possession of fidelity fund certificates by practitioners practising on own account or in partnership –

(1) A practitioner shall not practise or act as a practitioner on his or her own account or in partnership unless he or she is in possession of a fidelity fund certificate.

(2) A practitioner who practises or acts in contravention of subsection (1) shall not be entitled to any fee, reward or disbursement in respect of anything done by him or her while so practising or acting.'

Against these provisions the tribunal carefully considered Mr Sooklal's particulars of claim, where he stated that he was a qualified attorney who acted as a consultant to the two attorneys referred to above and that in that capacity he was not required to be in possession of a fidelity fund certificate. It disagreed with the conclusion by Judge Levinsohn that the requirement of a fidelity fund certificate extended only to a practitioner who has the status of 'ownership or proprietorship of an entity'. It said the following:

'We do not agree with the arbitrator's construction of the words "not practise or act as a practitioner on his own account or in partnership". A "practitioner" is "any attorney, notary or conveyancer" and "practise" means "practise as an attorney or a notary or conveyancer" and "practice" has a corresponding meaning (s 1). Section 41(1) does not require the practitioner to have the status of ownership of any entity. The prohibition is directed at the *conduct* of the practitioner in the defined circumstances. He may not *practise* or *act* as a practitioner on *his own account* or in partnership without being in possession of a fidelity fund certificate.' (Emphasis in original.)

It went on to state the following:

'The term "consultant" is not defined in the Attorneys Act, nor in the applicable rules of the KZN Law Society. Nevertheless, a consultant cannot, by relying on some or other consultancy agreement avoid the requirement that he must hold a fidelity fund certificate when practising on own account. If he desires to practise on his own account he must comply with all the applicable legislative and professional requirements. He cannot escape the requirements of the Act by practising under the "umbrella of another firm", as counsel for the defendant put it, using its infrastructure, letterheads, address for service etc, but still

debit his own fees and incur his own expenditure. This, we will show, is what happened in this case.'

[28] The tribunal took into account that none of the expenses incurred by Mr Sooklal had passed through the books of attorney Rampersad. On his own version of events, Mr Sooklal had therefore not been in compliance with the provisions of the Act or the Rules of the Law Society. Furthermore, he had not accounted to either attorney Karodia or Rampersad for moneys received from the company. The tribunal held that the fact that Mr Sooklal practised for his own account in terms of an arrangement with attorney Rampersad did not preclude a finding that he had acted in contravention of s 41. On this aspect, the tribunal ultimately concluded as follows:

'We find that he was practising or acting as a practitioner on his own account without being in possession of a fidelity fund certificate. As such he is not entitled to any fee, reward or disbursement in respect of anything he had done while so practising or acting (s 41(2) of the Attorneys Act). It follows that the appeal must succeed on this ground as well.'

[29] After scrutinising Mr Sooklal's particulars of claim and referring to material parts of his evidence and the related documentation, the tribunal held that it was clear that Mr Sooklal had rendered services to the company for his own benefit and account. At paragraph 59 it said the following:

'To practise on one's own account would therefore mean to practise on one's own responsibility and, in the context of the legislation, as a principal, for one's own financial benefit.'

[30] The appeal tribunal published its award on 18 November 2015, upholding the company's appeal, which resulted in Mr Sooklal's claim being dismissed with costs.

[31] The company subsequently, as it was entitled to, applied in the Gauteng Local Division of the High Court, Johannesburg, for the award to be made an order of court.

[32] In resisting the application in the court below Mr Sooklal did not challenge any of the tribunal's findings of fact or conclusions on points of law. Mr Sooklal, for

the first time, contended that the award sought to be made an order of court, was one tainted by illegality, and it was thus against public policy for the court to do so.

[33] In opposing the company's application to have the tribunal's award made an order of court, Mr Sooklal, in vague and generalised terms referred to his testimony before Judge Levinsohn, concerning corruption on a grand scale involving the company and a former President of the Republic and other high-ranking government officials as well as prominent members of the ruling party. In his affidavit, Mr Sooklal for the first time accused the company of 'resorting' to arbitration proceedings 'to throw a cloak of anonymity' over its illegal activities.

[34] Mr Sooklal also referred in his affidavit to his extensive interaction with officers of the company and government officials. He alluded to 'various investigations related to the arms procurement process' and a report of the standing committee on public accounts in which there were serious allegations of corruption on the part of the company in relation to that process, pointing to them as corroboration for his accusations of corruption on a grand scale, which he said the company and associated entities were involved in.

[35] It was alleged by Mr Sooklal that at the time that he was executing his mandate he was required to play a role in getting the company closer to high-ranking persons within the ruling party and, in particular, the Minister of Defence. He described how he had interacted with officials and members of the ruling party to that end. He was also aware of representations that resulted in the withdrawal of charges against the company.

[36] In his affidavit, Mr Sooklal made reference to the judgment of this court in *S v Shaik & others* 2007 (1) SA 240 (SCA) where certain payments made by the company were referred to. Mr Sooklal contended that there could have been no lawful basis for the payments referred to in that case, suggesting that they could only have been made with a corrupt motive.

[37] Mr Sooklal also referred to what he regarded as an associated case, involving government corruption, in relation to a contract for the issuing of drivers' licences.

Furthermore, he also referred to several payments made by or on behalf of the company to a former President of this country which, he said, were part of the company's corrupt activities. He suggested that government officials had been bribed by officials of the company.

[38] In his opposition to the arbitration award being made an order of court, Mr Sooklal rejected claims by the company that he had breached the confidentiality of the arbitration agreement by leaking parts of his testimony before Judge Levinsohn to the media. He charged the company with such a breach, on the basis that an officer of the company had testified before the Arms Procurement Commission relating to his (Mr Sooklal's) testimony before Judge Levinsohn in breach of the confidentiality agreement.

[39] The affidavit went on to complain that he had been refused an opportunity to testify before the Arms Procurement Commission and to state that he had instituted proceedings in the high court to have the Commission re-opened to hear his testimony. Mr Sooklal's affidavit also referred to the seizure of documents in Mauritius and other parts of the world that he said implicated the company and associated entities in corruption.

[40] Mr Sooklal's affidavit, when viewed as a whole, is not entirely coherent. As best as can be discerned, Mr Sooklal's opposition to the award being made an order of court was based mostly on generalised statements and sometimes vague averments. Much of what others and the company were accused of, was gleaned from reports and court cases. Mr Sooklal, for obvious reasons, stopped well short of alleging that in rendering services to the company in execution of his mandate, he was party to any of the unlawful conduct he had accused the company of.

[41] In the court below it was submitted on behalf of Mr Sooklal, that even though the submission concerning corruption, which he claimed had an effect on the validity of the arbitration award had not been raised before, it was nonetheless properly resorted to, in that it was a point of law that could be raised even at that late stage. Mokhari AJ dealt with that submission as follows:

‘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, Minister 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.’

[42] The court below went on to state the following:

‘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 v 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.’

[43] As to Mr Sooklal's reliance on *Cool Ideas*, Mokhari AJ said the following:

'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.

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.'

[44] The court below concluded that Mr Sooklal's defence to the company's application to have the award made an order of court was without merit and that the requirements of s 31 of the Arbitration Act 42 of 1965 had been met. It made the following order:

'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.

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.'

It is against that order and the conclusions on which it was based that the present appeal, with the leave of the court below, is directed.

[45] There was never any question before the arbitrator, the appeal tribunal or, indeed, in the pleadings in the court below where the claim was first instituted, that the arbitration agreement related to Mr Sooklal's mandate was tainted, either because of the nature of the services rendered by Mr Sooklal or in any other manner. This is why there was no reference thereto by either the arbitrator or the tribunal in their awards. Mr Sooklal's case, in all of the above fora, simply put, was

that he had performed in terms of his mandate and his claim was one of enforcement of its terms.

[46] The application in the court a quo entailed the enforcement of the arbitration agreement. That agreement was not tainted with illegality in any respect. The arbitration agreement was not one unilaterally imposed by the company, nor could it have been. Aided by legal representatives, including senior counsel, the parties agreed in writing to have the pleaded issues determined by arbitration. They agreed that either party would be entitled to make the award an order of a competent court. They agreed on the arbitrator and later on the composition of the appeal tribunal. Mr Sooklal did not complain when the arbitrator ruled in his favour. Counsel on his behalf conceded that, had there not been an appeal to the tribunal, his client would have been content to accept the benefit of the ruling in his favour by the arbitrator.

[47] Even though skirting close to his own involvement in the nefarious conduct attributed to the company, Mr Sooklal studiously avoided incriminating himself in relation thereto. The reason is fairly obvious. If he had done otherwise his claim would have been obstructed by the *par delictum rule*. In *Afrisure CC & another v Watson NO & another* 2009 (2) SA 127 (SCA) para 39, Brand JA explained, in clear terms, the rule of our law encompassed by the maxim taken from Roman law and Roman-Dutch law *pari delicto potior est conditio defendentis*, which was popularly abbreviated to the '*par delictum rule*':

'The principle underlying the *par delictum* rule is that, because the law should discourage illegality, it would be contrary to public policy to render assistance to those who defy the law.'

In *Afrisure*, this court referred to the seminal judgment in *Jajbhay v Cassim* 1939 AD 537, in which the court, while affirming the considerations of public policy underlying the rule, decided that it could in appropriate circumstances be relaxed in order to do 'simple justice between man and man'. In the present case, having regard to the degree and extent of criminal conduct in relation to the State, one can rightly imagine the difficulties that Mr Sooklal would face to persuade a court to relax the rule in his favour.

[48] When what is set out at the end of the preceding paragraph was put to counsel representing Mr Sooklal, he rightly recognised the difficulty, but, incredulously, postulated that his client, faced with the costs order awarded by the tribunal, had no other choice but to resort to the accusations of unlawful conduct on the part of the company. That submission is indicative of the desperation of the defence latterly raised by Mr Sooklal.

[49] *Cool Ideas* is of no assistance to Mr Sooklal. That case dealt with the statutory prohibition which prevented a building contractor from claiming any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, registered as a home builder. The Constitutional Court, having regard to the scheme of the Housing Consumers Protection Measures Act 95 of 1998 and, more specifically, s 10(1)*(b)* thereof, held that the contractor was barred from receiving payment and that having regard to the purpose of the Act, the question of fairness did not intrude. In regard to the arbitration award there concerned, it held that the arbitral award, which had found in favour of the building contractor had wrongly subverted the purpose of that Act and was unenforceable. In that case, the arbitration award had violated a statutory prohibition backed by a criminal sanction and was therefore contrary to public policy and unenforceable. In the present case, as stated above, Mr Sooklal's claim was in respect of work he had performed as an attorney, ostensibly within the parameters of what an attorney could lawfully do in representing a client's interests.

[50] In the present case, the arbitration mandate was limited to an enquiry as to whether Mr Sooklal was entitled, within a professional regulatory framework, to the fees he had claimed in relation thereto. The arbitration was conducted and decided within the parameters of the pleadings as amended. I agree with the conclusions reached by the court below, that *Cool Ideas* is of no assistance to Mr Sooklal.

[51] In *Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC* 2006 (6) SA 91 (C), the court, having regard to s 31 of the Arbitration Act, and with reference to D Butler and E Finsen *Arbitration in South Africa: Law and Practice* (1993) 1 ed at 273, said the following about what an applicant for an order in terms of that section has to show.

'The applicant . . . must prove that there was a valid arbitration agreement covering the award, that the arbitrator was duly appointed and that there was a valid award in terms of the reference.'

In the present case, the company met the criteria.

[52] On the other hand, the challenge by Mr Sooklal to the award being made an order of court was severely lacking in substance. Much of what was stated in Mr Sooklal's affidavit were conclusions drawn from court cases and reports. An opportunity was not afforded to the range of parties accused of unlawful conduct to contest his averments. The generalised *and* specific averments made by Mr Sooklal were untested and unconnected to his claim for fees and were not issues that the court a quo in which his claim first served, or the arbitrator, or the tribunal, were asked to adjudicate. As stated at the commencement of this judgment, the appellant's case is unusual. It is also contrived, opportunistic and entirely without merit.

[53] On the admissible and acceptable evidence I can see no reason why the company was not entitled to have the award of the tribunal made an order of court. In essence, the ultimate conclusion of the court below cannot be faulted.

[54] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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M S Navsa

Judge of Appeal

Appearances:

For the Appellant:	R S Willis (with him E H Tugh)
	Instructed by:
	Dev Maharaj & Associates Inc., Bryanston
	Honey Attorneys Inc., Bloemfontein
For the Respondent	C M Eloff SC (with him H A van der Merwe)
	Instructed by:
	Fluxmans Attorneys, Johannesburg
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