

DIFFERENCE BETWEEN ARBITRATOR AND REFEREE

From about the turn of the 20th century, and principally in order to obtain a speedy resolution to disputes and to avoid or reduce the costs of litigation, parties in dispute with one another have gone to an arbitrator, who functions in a quasi-judicial manner and makes a decision called an award, which can be made an order of court.

In more recent years, it has become the fashion for parties to contract for a decision or ruling about a matter in dispute from an expert in the field in question. This might arise, as is often the case, when the value or price of shares in a company, or the value of a property, or the satisfactory completion of building or engineering works, is placed in issue. The expert, as distinct from the arbitrator, is not a quasi-judicial functionary. He does not (except where he calls for it) hear evidence from either party and reaches his decision solely by the application of his knowledge and expertise in the field in question. That is precisely what the parties contracted for and want him to do, because it saves them not only the costs of litigation, but also arbitration.

There are cases, however, where the distinction between the functions of an “expert” and an arbitrator can become blurred; for example, although the parties may mention reference to expert determination, the agreement under consideration was, in substance, an agreement to arbitrate. This happened in a recent Australian case of -

Old Age Builders (Pty) Ltd v Swintons (Pty) Ltd.

In this case, the parties referred certain disputes to what they called “expert determination”, but the court found that the agreement, whatever the terminology used, was in fact an agreement to arbitrate. In so doing, the court listed essential characteristics of the functions of arbitrators and experts as follows :

- 1 if the enquiry concerns a dispute of fact to be determined according to law, this amounted to the judicial function of an arbitrator and not the decision of an expert.
- 2 the agreement placed upon the “expert” an obligation to adopt procedural fairness, which suggested that a judicial enquiry was taking place.
- 3 it is possible that reference to an expert determination in an agreement is in reality an arbitration, if -
 - 3.1 it requires a judicial enquiry;

- 3.2 allows a right to be heard; and
- 3.3 requires a determination of the dispute in accordance with law.

However convenient, speedy and efficacious the use of an expert as opposed to an arbitrator may be, parties to agreements appointing “experts” should exercise caution in their choice of whom they appoint.

In :

Civair Helicopters CC v Executive Turbine CC and Another 2003 (3) SA 475 (W)

the court made the following observations :

- 4 An expert, once appointed, unlike an arbitrator, is not obliged to hear the representations of the parties, unless he calls for same. He can decide his own procedure. So, however strongly a party may feel about his case, and however much he may wish to carry conviction to the expert, the expert is not obliged to hear him.
- 5 Once the expert issues his decision, he is *functus officio* and the matter is, so to speak, “finished and klaar” unless he has been capricious, fraudulent or collusive, or has made “patent mistakes”. Even the correction of “patent mistakes” which was allowed by a majority decision in :

Perdikis v Jamieson 2002 (6) SA 356 (W)

ought not, in the opinion of the court in **Civair Helicopters**, be allowed. It seems to us that this is correct and in line with previous authority and that even if an expert makes a patent error, the parties will have to live with it, as it cannot be amended other than by mutual agreement.

The moral of the story is that if you decide to appoint an “expert”, be he an accountant, engineer, architect or whatever, make sure that he really is an “expert”.

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