

## ARBITRATION SNIPPETS FROM AFSA : ASPECTS OF PRACTICE IN ARBITRATION

**This week's discussion:**

### **ARE ARBITRATORS BOUND BY JUDICIAL DECISIONS?**

Legal systems are based on the concept of judicial precedent. Without precedent, there is no predictability. Hence the principle of *stare decisis*.

In South Africa all Courts are bound by the decisions of the Constitutional Court. So too all Courts, other than the Constitutional Court, are bound by the decisions of the Supreme Court of Appeal. The Full Bench of a Division will bind all judges within that Division and so on down the line.

### **WHERE DOES AN ARBITRATOR FIT INTO THIS HIERARCHY? IS AN ARBITRATOR BOUND BY A DECISION OF A SINGLE JUDGE AND DOES AN ARBITRATOR SITTING IN GAUTENG FIT INTO A DIFFERENT PART OF THIS JUDICIAL HIERARCHY THAN AN ARBITRATOR SITTING IN CAPE TOWN?**

Arbitrators are not part of a judicial hierarchy at all. Their approach to precedent is a different one.

The function of an arbitrator sitting in a domestic arbitration is to identify and apply the relevant principle of South African law to the dispute which he is engaged to resolve.

In trying to ascertain the South African law, the arbitrator will look to decisions of the Court as reliable, but not always infallible, reflections of the South African law. An arbitrator will always accept that a decision of the Constitutional Court or of the Supreme Court of Appeal is definitive of the state of the South African law.

If the judgment in any such case covers the point in issue, then the arbitrator need look no further.

When it comes to the decisions of other Courts, the arbitrator will bear in mind that there are often differing views expressed in the cases and that it is his or her function to follow that decision which most closely reflects the law as it stands. In that regard the arbitrator will also give weight to textbook commentaries and views expressed in scholarly articles. It would not be wrong for an arbitrator, sitting in Sandton, to follow a decision given in the Cape Court in preference to a local decision.

It is always a question of the arbitrator trying, as best he or she can, to find the correct exposition of the law.

**AND WHAT, IN TURN OF AN ARBITRATOR'S AWARD? WHO DOES THAT BIND?**

The answer is simple: only the parties who have asked that arbitrator to resolve their dispute.