IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: 432/2020
Matter heard on: 11/03/2021
Judgment delivered on: 22/04/2021

In the matter between:

VINCENT THOMPSON	**First Applicant**
DANIEL JANSE VAN RENSBURG	**Second Applicant**

and

LAWRENCE JAMES	**First Respondent**
RICHARD KEITH JARDINE	**Second Respondent**

JUDGMENT

SMITH J:

[1] The applicants seek an order in terms of Section 33 of the Arbitration Act, No. 42 of 1965, reviewing and setting aside the second respondent's award, issued on 12 February 2020, and declaring the first respondent's objection to an amendment of their claim as an irregular step and setting it aside.

[2] During December 2016, the applicants and the first respondent agreed to refer for arbitration a dispute regarding the purchase by the first respondent of the applicants' member's interest in two close corporations. The applicants alleged that the first respondent remained indebted to them in the sum of R1, 524 173, while the first respondent alleged that he had

paid the purchase price in full, had in fact overpaid and was thus entitled to counter-claim.

[3] The written arbitration agreement concluded by the parties provided, inter alia, that:

(a) Mr Richard Jardine, a local attorney, would be appointed as arbitrator;

(b) the issues referred for arbitration were: whether the applicants' claim has prescribed; if not, whether the first respondent is indebted to the applicants, and if so, the amount owing by him; and if the first respondent has overpaid, the amount owed to him by the applicants;

(c) the award of the arbitrator shall be final and binding; and

(d) the parties waived any rights they might have had to pursue any dispute which is the subject of the arbitration, in any manner or forum other than as provided for in the agreement.

[4] On 29 March 2019 the parties conducted a pre-trial conference at which the following agreements were reached;

(a) the parties were of the view that apart from the possible need to lead expert evidence, no further evidence will be required in the matter;

(b) the parties have agreed that they will appoint accountants to represent each of them, and that the accountants will be asked to liaise with each other as part of the debatement of account;

(c) in the event of the accountants not being able to reach agreement, the matter will be removed from the roll, by notice to the arbitrator, with the costs, if any, to be in the cause;

(d) if the accountants were unable to reach agreement, the parties will call expert evidence. In that event the necessary expert notices in terms of Rule 36 (9) of the rules of the High Court must be filed by the parties on or before 19 of April 2019; and

(e) the first respondent bore the onus in respect of his counter-claim.

[5] It is common cause that the parties also agreed that the arbitration proceedings would be conducted in terms of the Uniform Rules of Court.

[6] On 17 April 2019, the applicants delivered a notice in terms of Uniform Court Rule 28 (1), giving notice of intention to amend their pleadings. When the first respondent did not object to the proposed amendment as contemplated by Rule 28 (5), the applicants purportedly perfected the proposed amendment by delivering the pleading in its amended form on 7 May 2019. On 25 September 2019, they delivered a further notice of intention to amend their pleadings.

[7] Thereafter on 8 October 2019, the first respondent delivered a notice objecting to both amendments on the grounds that they were "in direct breach and contradiction" of the express written agreement reached between the parties on 29 March 2019; that the first notice of intention to amend purports to withdraw multiple admissions in the pleadings; and the second notice of intention to amend impermissibly seeks to raise a plea of prescription. That notice stated furthermore that the first respondent would seek condonation for its late filing, if necessary, and stated that the arbitrator would be asked to rule that the said notices to amend are void, *pro non scripto*, and should be disregarded entirely.

[8] The applicants thereafter filed a notice asserting that the first respondent's objection was irregular in that it was filed more than four months outside the time period allowed for such an objection in terms of Rule 28, without any explanation or application for condonation for such late delivery having been tendered or granted by the arbitrator in terms of Rule 27. They asserted furthermore that, in any event, the amendment of 17 April 2019 had been procedurally and lawfully perfected. They also

emphasised that first respondent did not file an application challenging the lawfulness of the effected amendment, neither has there been any formal pronouncement to the effect that the amendment is unlawful or a nullity. The applicants accordingly gave the first respondent 10 days within which to remove the cause of complaint. When the first respondent failed to comply, they filed an application to have the objection struck out as irregular.

[9] The parties argued the matter before the second respondent on 27 January 2020, and on 27 February 2020 the latter issued a ruling in terms of which he ordered that: the application in terms of Rule 30 was dismissed; the applicants' irregular step of amending their plea to the second respondent's counter-claim was set aside; the applicants were directed to file a substantive application seeking leave to resile from the agreements reached on 29 March 2019, before taking any further steps in the matter; alternatively, that they file a notice confirming that they stand by the aforesaid agreements, before taking any further steps in the matter; and each party must bear his or her own costs.

[10] The applicants rely on the following review grounds;

(a) the second respondent did not bring an open and impartial mind to bear when adjudicating the matter. During argument he had remarked that he was "gobsmacked" when applicants' notice of intended amendment was received during 2019. It was thus manifest that he had already taken a view on the matter during 2019, in

circumstances where the defendant had not yet objected to the amendment;

(b) the second respondent failed to appreciate the nature of the inquiry that he was supposed to deal with. What was before him was an application in terms of Rule 30 to declare a belated objection to an amendment which had already been perfected, as an irregular step and to set it aside. In addition, the second respondent dismissed the application by importing into the proceedings a supposed application by the defendant in terms of Rule 30, which had never existed. The first respondent was enjoined to bring such an application in terms of Rule 6 of the High Court Rules, on notice of motion supported by an affidavit setting out the relief sought;

(c) the second respondent appeared to have laboured under the misapprehension that he had an unfettered discretion in respect of the requirement for good cause to be shown. He was, however, enjoined to exercise his discretion judicially on a conspectus of all the facts placed before him. He was not in a position to do so because there was no application before him, nor was there any evidence presented to enable him to assess the relevant requirements; and

(d) the second respondent's ruling effectively meant that he has held that the applicants have waived their rights to amend and that the issues which fell for arbitration could not be expanded or adjusted by using Rule 28 without it being viewed through the prism of the pre-trial minute. They assert that a pre-trial agreement can never

preclude a party from pleading another claim or raising a further defence by way of amendment, unless there is an express and unequivocal waiver and abandonment of a right to amend. This was not present in this case and the second respondent has accordingly committed misconduct, exceeded his powers and committed gross irregularities during the process which resulted in his award.

[11] Section 33 of the Act provides that the court may, on the application of any party, make an order setting aside an arbitration award if;

(a) any member of the tribunal has misconducted him or herself in relation to the duties of an arbitrator or umpire;

(b) an arbitration tribunal has committed any gross irregularity in the conduct of arbitration proceedings or has exceeded its powers; or

(c) an award was improperly obtained.

[12] Before dealing with the contentions advanced by Mr Schultz, on behalf of the applicants and by Mr Cole, on behalf of the first respondent, it is perhaps instructive to set out the applicable legal principle. I have summarised them as follows in *Eastern Cape Department of Human Affairs vs Quithing Construction and Developers CC Grahamstown*, Case no 3045/2017 (delivered on 15 February 2018) ;

(a) the grounds upon which courts may interfere with arbitration awards in terms of section 33(1) are interpreted reasonably strictly (*City of Cape Town*, para.14 (supra));

(b) courts must be mindful of the purpose of arbitrations, namely the fast and cost effective resolution of disputes (*Lufundo Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC));

(c) regarding the approach courts must adopt when dealing with applications to set aside arbitration awards in terms of section 33(1) of the Act, the following guidelines have been stated by the Constitutional Court in *Lufundo Mphapuli and Associates* (supra): (i) courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently; (ii) the Constitution requires courts to construe the grounds for setting aside an award reasonably strictly; and (iii) if courts are too quick to find fault with the manner in which the arbitration has been conducted and too willing to conclude that the faulty procedure is unfair and constitutes a gross irregularity within the meaning of section 33(1) of the Act, the goals of private arbitration may well be defeated;

(d) a party challenging an award must establish, not only that there is no evidence on which a reasonable man would have made it,

but also that the lack of evidence is so glaring that misconduct on the part of the arbitrator can be inferred (*McKenzie NO v Basha* 1951 (3) SA 783 (NPD) at 786H);

(e) the term "misconduct" refers to *mala fides* or moral turpitude and not to legal misconduct which does not involve moral turpitude. And gross irregularity relate to the conduct of the arbitration proceedings, and not the result of thereof. The irregularity must have been so serious that it resulted in the aggrieved party not having his case heard. (*Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C));

(f) legal misconduct is therefore not a ground for review and a *bona fide* mistake of fact or law cannot be characterised as misconduct. (*Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) and Another* 1993 (1) SA 89 at 100 (C)); and

(g) by agreeing to arbitration the parties have limited the grounds of interference in their contract by the courts to the procedural irregularities set out in 33(1) of the Act. By necessary implication, they have waived the right to rely on any further grounds of review, whether in terms of the common law or otherwise (*Telecordia Technologies Inc. v Telkom SA Ltd* 2007 (3) SA 266 (SCA)).

[13] It is evident from the second respondent's award that he fully appreciated the issues which fell for determination and had dealt pertinently with arguments advanced by counsel on behalf of the parties. He made specific reference to Mr Cole's argument to the effect that the objection raised by the defendant was not an objection envisaged in terms of Rule 28, but rather an objection to the applicants acting in breach of the agreement of the 29 of March 2019. Mr Cole had submitted that the notices of intention to amend should be regarded as *pro non scripto* and fell to be set aside. His argument was predicated on the assertion that it was not open to the applicants to resile from the agreement recorded in the pre-trial minute and the admissions contained therein, by filing a notice to amend their pleading. The second respondent was also cognisant of Mr Schultz's argument to the effect that the notice to object was irregular and should be set aside.

[14] He accordingly correctly identified the issues which fell for decision, namely: "Were the Claimants entitled to resile from the prehearing agreement?" and "Was the Defendant entitled to ignore the amendment?"

[15] The basis for the second respondent's reasoning upon which his findings lean is encapsulated in the following comment (at paragraph 4.15):

> "It seems apparent from the agreement of the 29th of March 2019 that the parties had narrowed down the issues. The Claimants disregard for that agreement requires an explanation. If the Claimants wish to depart from the agreement they needed to have filed an appropriate application."

[16] Mr Cole has raised a point *in limine* to the effect that the parties had agreed that the arbitrator's award shall be final and binding and had waived any rights they might have had to pursue any dispute which had been referred for arbitration in any manner or forum other than as provided for in the agreement. He argued that, on a contextual construction of this clause, the parties had abandoned any right to pursue any of the disputes which are the subject matter of the arbitration, in any manner before any other forum. The clause accordingly ousts the jurisdiction of this court, or so he argued.

[17] However, I prefer not to decide the matter on this basis. As I have mentioned above, it is established law that a court will interfere with arbitration awards on very circumscribed grounds. These are limited to cases where the arbitrator is guilty of misconduct which relate to moral turpitude; gross irregularity in the conduct of the arbitration proceedings; and where an award had been improperly obtained. I did not understand Mr Cole seriously to contend that an agreement to oust the jurisdiction of the court would hold in cases where any of these grounds are present.

[18] Thus by way of example: it would be unthinkable that a party, having improperly obtained an award, would be entitled to raise as a defence an agreement that the award would be final and binding, and to then maintain that the court's jurisdiction had thus been ousted. In the event, for reasons which will become apparent below, I do not think it is necessary for me to pronounce on arguments advanced in respect of this question.

[19] The question then arises as to whether the applicants have been able to establish any of the grounds for review mentioned in section 33 of the Arbitration Act. In my view they failed to do so.

[20] First, in respect of the ground relating to misconduct by the arbitrator, the applicants have proffered rather half-heartedly the incident where the second respondent has expressed that he was "gobsmacked" when he received the notices to amend. They attempted to found upon this comment an assertion that the second respondent therefore did not bring an open mind to bear and had already adopted a position on an issue which was still to be argued before him. In my view there is no merit in this submission. It was clear from his reasoning that the second respondent was of the view that the applicants were not entitled to withdraw admissions made or agreements reached in the pre-trial minute by way of amendments to their pleadings. It was thus not irregular or out of place for him to comment on that issue when it became clear that such an attempt has been made.

[21] Second, the gross irregularity which is asserted by the applicants do not appear to relate to the conduct of the arbitration proceeding, but rather to the arbitrator's interpretation of the law. Mr Schultz's arguments in this regard concentrated on the fact that the second respondent dismissed the applicants' contention that the objection raised by the first respondent was not done in accordance with the rules and accordingly amounted to an irregular step. While criticising the second respondent's reasoning, he could not point to any irregularity regarding the process adopted by the first respondent.

[22] In my view it is manifest from his award that the first respondent was fully cognisant of the issues that fell for decision, appeared to have correctly summarised arguments presented to him, and has made a decision based on a rational discourse.

[23] The gravamen of his reasoning (based on the ratio enunciated in *Filta-Matix (Pty Ltd v Freudenburg & others* 1998 (1) 606 (SCA)) was that the admissions made and agreements concluded by parties during pre-trial hearings, and which had been duly recorded in a pre-trial minute and signed by both parties, are binding. He was of the view that a party is only allowed to resile from such agreements if he or she can show that there are special circumstances allowing him or her to do so. He reasoned furthermore that it is not open to a party to circumvent that requirement by simply amending his or her pleadings. Apart from the fact that the second respondent's reasoning, in my view, correctly reflects the state of the law regarding this issue, the possibility of another court or tribunal disagreeing with his reasoning and findings does not provide a basis for the court judicially to interfere with his award.

[24] I am accordingly of the view that in respect of this ground also, the applicants have failed to show that the second respondent has committed any gross irregularity in the conduct of the proceedings or that he has exceeded his powers.

[25] Regarding the third and final ground mentioned in section 31 of the Act, namely that the award had been improperly obtained, no such contention was advanced on behalf of the applicants and it is accordingly not necessary for me to reach this issue.

[26] I am accordingly of the view that the applicants have failed to establish any of the grounds for the review of the first respondent's award in terms of section 33 of the Act.

[27] In the result the application is dismissed, with costs.

J.E. SMITH

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS	:	Adv. N. Schultz
ATTORNEYS FOR APPLICANTS	:	Bax Kaplan Russel Inc. Cleveland House 2 Cleveveland Road Selborne East London

COUNSEL FOR 1st RESPONDENT	:	Adv. S. Cole
ATTORNEYS FOR 1st RESPONDENT:		Monaghan Attorneys C/o Clark-Laing Inc 58 Jarvis Road East London