NOT REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 34055/10

DATE: 10/11/2010

In the matter between:

ENVIRODRUM (PTY) LTD Applicant

and

REPO WILD 23 (PTY) LIMITED t/a ENVIRO TRANSPORT First Respondent

G C PRETORIUS SC (ARBITATOR) Second Respondent

J U D G M E N T

LAMONT, J:

[1] This is an application brought in terms of the provisions of section 33(1) of the Arbitration Act No. 42 of 1965 (the Act) to review and set aside an award made by the second respondent. For the sake of convenience I refer to the first respondent as the respondent. On 4 November 2008 the applicant and respondent entered into an arbitration agreement in terms whereof the parties referred and submitted the disputes between them which were identified in the arbitration agreement to arbitration. The disputes and matters referred to arbitration were "*those as contained in the High Court action under*

Case No. 04/7121 and any subsequent amendments thereof". The arbitrator the second respondent was appointed to act as an arbitrator and determine the said matters and disputes. In the High Court action the respondent as plaintiff claimed payment of damages arising out of an alleged repudiation of an agreement concluded between the parties. I paraphrase the relevant allegations concerning the claim:

1. The parties concluded an agreement. The respondent undertook to transport certain drums for the applicant.

2. The respondent was to pay for the transportation on the basis of the actual number of drums moved alternatively 51 000 drums per month at a particular rate.

3. The contract would endure for a fixed period of 3 years after which there would be a relocation for an indefinite period subject to cancellation on 6 months written notice.

4. The applicant repudiated the contract which came to an end.

5. In consequence the respondent became entitled to payment of loss of profits for the damages suffered for the remaining period of the contract.

[2] The respondent was required to prove at least two things:

1. That it was a term of the agreement that it would endure for a particular period for the guaranteed minimum number of drums (51 000).

2. The difference between the amount which contractually would accrue (number of drums x reward) and actual costs.

[3] The pleadings in an action are designed to identify the legal dispute between the parties. The evidence including documents and the hearing of witnesses is designed to identify the factual issues between the parties. The factual issues are resolved by way of the judge or arbitrator in this case giving judgment. The evidence which is admissible (and accordingly the factual issues which arise) is dependent upon the particular legal issues which exist.

[4] In the present case insofar as the damages suffered by the respondent are concerned the legal issue was whether or not the respondent had suffered damages in the form of loss of profit. The factual issues were those which arose in the course of the respondent proving the issues comprising its case and included whether or not the term guarantee concerning delivery of a set number of drums for a set period was proven, the charge per drum, the expenses of the respondent in procuring the profit. The claim for loss of profits is not a claim for general damages but for special damages. See *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA (AD). A claim for general

damages in the present matter would have involved evidence establishing the increased costs to the respondent arising out of the repudiation.

[5] The applicant properly did not raise questions concerning the ability of the respondent to have reduced overheads and/or to have adjusted its position in consequence of the repudiation to mitigate the loss as those matters were irrelevant to the legal issues determined by the pleadings.

[6] Theoretically if during the course of the arbitration the issues became wider then there may have been scope for submissions concerning the admissibility of evidence to prove the wider issues and the right of the arbitrator to deal with the matter on that basis. It is common cause however that throughout the arbitration the evidence which was led was directed towards proving loss of profits.

[7] The applicant stated this to be the position and it appears from the respondent's heads of argument which were filed in the arbitration that the damages issue was correctly identified as being a loss of profit. At the end of those heads of argument the respondent requested an award to be made as set out in the particulars of claim. Those particulars set out only a claim based on loss of profit.

[8] The unexpired period of the contract referred to as a guarantee by the parties was not proven to exist. Hence the respondent was unable to establish loss of profit.

[9] During argument before the arbitrator the question of whether or not the respondent was entitled to claim its proven expenses when its claim was for loss of profit arose. The arbitrator accepted that that was an issue which he should decide. The arbitrator decided the issue in the following terms:

> "*102. Envirodrum argued that I cannot award damages on the basis of expenses as the claim was formulated as a loss of profit claim. I do not agree. Apart from the fact that the proof of expenses forms an integral part of a loss of profit claim, no objection was raised against any of the evidence led in this regard and Envirodrum cannot claim any prejudice. In fact as will appear from my award, I base it mainly on Mr Erasmus' evidence. Lastly and to the extent that it may be necessary I regard this as a case where the principle of Shill v Milner should be applied.*"

[10] No objection could be raised against the evidence concerning proof of expenses as same was as the arbitrator correctly pointed out relevant to the loss of profit claim. Whether or not the applicant was entitled to claim prejudice is dependent upon the manner in which the proof of expenses was dealt with and what the wider issue may have been had this claim been pleaded. From the applicants' point of view the more the expenses were the less the loss of profit would be. It's approached would have been totally different were the claim for damages as the applicant would then approach the matter on the basis of seeking to reduce the expenses as much as possible. Wider issues which could have been raised in pleading included matters as for example that respondent could have mitigated damage. These matters were neither pleaded nor canvassed at the hearing.

[11] The approach of the applicant to the evidence would be totally different depending upon the claim which it has to meet. To the extent that the award was based upon the evidence of Mr Erasmus, the applicant's expert, it needs to be noted that the applicant is not bound by the evidence of Erasmus. Erasmus is a witness who gives such evidence as Erasmus believes to be proper and correct. Erasmus calculation of the total damages suffered by the respondent calculated on costs was some R223 824,57 namely the amount the arbitrator awarded. The relevance and hence admissibility of the evidence is a matter for the arbitrator.

[12] The second respondent patently failed to have regard to the legal issue which served before him namely whether or not the loss of profits had been established.

[13] His ruling that he was entitled to decide the matter and award damages as he did on the basis that the expert had found same to have been suffered is one which he was not in my view entitled to make.

[14] The question is whether or not a review lies to deal with the natter.

[15] Under and in terms of section 33 of the Act if an arbitration tribunal commits a gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers or an award has been improperly obtained the court may make an order setting the order aside. The Constitution requires a court to construe these grounds reasonably strictly in relation to arbitrations of this

nature. See *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 592 (CC) para [235]. The procedure is determined primarily from the terms of the arbitration agreement itself. Questions of fairness do not dictate that particular procedures need to be followed. See *Lufuno (supra)* at para [236].

[16] A wrong interpretation of the arbitration agreement does not mean necessarily that the arbitrator has exceeded his powers. He has powers to interpret the agreement, determine the applicable law and determine the admissible evidence. See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at paras [71] to [73]. In the present matter in the conduct of the proceedings the arbitrator, on the basis of the reasoning set out above, determined a legal issue which was not before him. In consequence of that determination he accepted as evidence properly admissible and submitted to him evidence which he should not have received. The respondent in the arbitration was prejudiced in that had the legal issue considered by the arbitrator been an issue in the process he may have raised other legal issues and may have furnished in consequence other evidence to support the contentions. In addition the respondent's approach to the case would have been different.

[17] The arbitrator's approach did not result in him merely finding wrong law to be of application it affected the entirety of the proceedings. In these circumstances in my view the approach of the arbitrator to the matter and the rulings he made resulted in a gross irregularity occurring. It was submitted

that the facts in *Hos + Med Aid Scheme v Thebe Ya Bophelo Health Care Marketing and Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA) were distinguishable. The distinction was, so it was submitted, that an entire defence was found to exist which had not been raised. Here the characterisation by the arbitrator of the issue before him resulted in an entire claim which did not exist being created. In my view the application for review should succeed and the award made by the arbitrator set aside.

[18] Subsequent to making the initial order the arbitrator amended the costs order. To the extent that that order may be seen to be a separate order rather than an order comprising part of the original order that order too is set aside in this order.

[19] The parties agreed that an application for remittal be postponed sine die costs of the application in this matter.

[20] I would make the following order:

1. The award of the second respondent dated 2 March 2010 (including the award made on 20 July 2010) is reviewed and set aside.

2. The first respondent is to pay the costs of this application.

3. The matter 2010/33176 is postponed sine die costs of the application to be in the cause in this matter.

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C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG