REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/27920

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

SNEECH, BARRY HYLTON	APPLICANT
and	
RN GRIFFIN INVESTMENTS (PTY) LTD	FIRST RESPONDENT
NOBRE, RUI MIGUEL RODRIGUES	SECOND RESPONDENT
HOWIE, CT	THIRD RESPONDENT
KRIEGLER, JC	FOURTH RESPONDENT
FRANKLIN, AE	FIFTH RESPONDENT

JUDGMENT

SUTHERLAND, J:

[1] This application seeks to review the decision of an arbitration appeal tribunal. The arbitration appeal tribunal dismissed the applicant's appeal against an arbitration award. That award rejected his claim against the first and second respondents.

[2] The applicant (Sneech), *qua* claimant, sued the first respondent (Nobre) and the second respondent (Griffin), a company controlled by Nobre. After close of pleadings, the matter was in terms of an arbitration agreement referred to Adv MD Kuper SC to arbitrate. The arbitrator held that Nobre and Griffin were not liable to the claimant. Sneech appealed in terms of the arbitration agreement to a triumvirate composed of the third, fourth and fifth respondents (the appeal tribunal). It dismissed the appeal. That tribunal's conduct is the subject matter of the review.

[3] What is it exactly that the appeal tribunal did that is alleged to constitute an irregularity? The applicant relies on s 33 of the Arbitration Act of 1965 and alleges that the appeal tribunal exceeded its powers under the arbitration agreement. It did so by endorsing a finding by the arbitrator, which was itself made by allegedly exceeding the powers vested in him. The exact transgression was that each arbitration forum decided the dispute on terms that were extraneous to the pleadings. As such, they were in breach of their respective mandates, in the terms of the arbitration agreement, to address: "*... all issues arising from the pleadings...*"

[4] To grasp the gravamen of the point advanced by the applicant a traverse of some detail is necessary.

[5] Sneech and Nobre each owned a quarter of the shares in Blue Dot (Pty) Ltd (Blue Dot), whose sole asset was a commercial property leased to Midas, a large well known company. Their shares were held at one remove through companies they controlled. Hannington was Sneech's vehicle and Griffin was that of Nobre. The distinct identities of these companies may be ignored for the purposes of this judgment.

[6] Nobre offered to buy Sneech's shares. Discussion about such a sale commenced as early as February or March 2003. A signed agreement was concluded on 12 December 2003. Before the sale agreement was signed, Nobre and Midas engaged one another about a new lease arrangement that promised financial advantages to both. This new deal was formally concluded in 2004. It is alleged by Sneech that these dealings enhanced the true value of the property and that Nobre ought to have informed Sneech of the prospects, because had Sneech known of the enhanced value he would not have sold his shares at the agreed price.

[7] In the pleadings, Sneech alleged that Nobre was under a duty to disclose to him information about these dealings with the tenant, Midas. The rationale for the existence of this duty was stated to be one or more of the following:

7.1 Arising from a relationship of partnership, a duty of good faith existed which obliged Nobre to disclose the information to Sneech.

7.2 Arising from their co-shareholding Nobre had a fiduciary duty to disclose the information to Sneech.

7.3 Arising from Nobre's role as a director of Blue Dot, Nobre had a fiduciary duty to disclose the information to Sneech.

[8] Axiomatically, an onus rested on Sneech to prove these averments.

[9] Nobre pleaded that no duty ever existed as alleged above. Furthermore, he pleaded an agreement of sale of the shares was concluded in March 2003. Both parties approached the matter on the footing that once the shares had been sold no duty, if any ever existed, could further exist.

[10] Nobre's case that no duty ever existed was rejected by the arbitrator. Furthermore, Nobre's case that the shares were sold in March 2003 was rejected. The only sale found to have been concluded was that of 12 December 2003.

[11] However, the arbitrator found that the duty of disclosure did not exist from at least as early as 8 June 2003, the date of an email by Sneech to a friend, revealing that he was about to sign the sale agreement with Nobre, but had delayed in so doing. Thus, it was held that Nobre did not have to share with Sneech information about the dealings which occurred after June.

[12] Sneech is aggrieved by this outcome in two related respects:

12.1 First, the crucial finding was not what Nobre had pleaded; *ie* that the March agreement rescued Nobre from liability. Sneech maintains that Nobre's case stood or fell by a finding that in March 2003 any duty that existed was extinguished by a sale of the shares. It is emphasised that Nobre never put up the case that the duty expired from June 2003. Therefore, so it is alleged, it was irregular to make a finding on a point not pleaded.

12.2 Secondly, to exacerbate the irregularity, the notion of the duty expiring by June 2003 was not put to Sneech in cross-examination. That, it is alleged, made the hearing unfair.

[13] Both of these issues were the subject matter of the appeal.

[14] The proposition that an arbitration forum may not exceed the powers vested in it by the arbitration agreement is not controversial. Do the facts adduced here show that the appeal tribunal did so in this matter?

[15] The controversy is wholly to do with the interpretation of the text of the arbitration agreement and of the pleadings. What is an arbitration forum empowered to do when reading pleadings? In my view, the mandate as articulated and cited above

means, unequivocally, that the arbitration forum must interpret the pleadings. That is to say, it is authorised to pronounce upon what the pleadings mean. That, in turn, must mean that in any controversy about whether or not an issue, howsoever articulated, falls within the compass of the rubric 'issues arising from the pleadings' is safely within the power of the forum to decide if it is in or out.

[16] The species of complaint is therefore of the kind that Lord Parker addressed in *Produce Brokers Company Ltd v Olympia Oil and Cake Company Ltd* [1916] 1 AC 314 at 327:

> "The binding force of an award must depend in every case on the submission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission the award is a nullity. The arbitrator cannot make his award binding contrary to the true facts that the question which he effects to determine is within the submission."

[17] The Arbitrator, after concluding that the evidence demonstrated that a duty could not have existed after June 2003, held in his award (at [123]):

> "I am aware that my reasoning differs in some respects from the submissions made in argument and that I have not endorsed the central proposition in the plea that there was already a binding contract with Hannington in March. The latter allegation is in my view something of a *plus petitio* and the conclusions I have reached are not extraneous to the plea or to the defence as presented in this case."

[18] The Appeal Tribunal addressed this finding and itself held (at [17]):

> "Sneech complains that this finding is extraneous to the pleadings and exceeds the arbitrator's jurisdiction. There is no merit in this argument. The arbitrator was not engaged in a historical or chronological exercise to determine the date on which the contract was concluded or to determine whether the date on which Nobre says it was concluded was or was not correct. *The arbitrator had to consider whether a duty of disclosure rested on Nobre at the time of the Midas negotiations, not whether a valid and enforceable agreement had been concluded at that time.* Continuance of the duty does not depend solely on whether a binding sale of shares agreement was concluded. The duty arises (or does not) and terminates (if once it existed), *depending upon the relationship between the parties at the time of the sale.* The arbitrator was perfectly entitled to find that the duty had terminated even though he did not also find the conclusion of the agreement as pleaded by the defendant." (Emphasis supplied)

[19] Even if I was persuaded that these findings were wrong, they could not amount to an irregularity stemming from an act that exceeded their powers. No reviewable irregularity is shown to exist.

[20] It is conceivable that an arbitrator's comprehension of the pleadings could be so outlandish to found the inference that he could not have understood the pleadings and in pursuance of such error thought it was in order to decide the matter on an issue not covered by the pleadings; *ie* on a cause of action not pleaded. The example given in *Hos+ Med Medical Scheme v Thebe Ya Bophelo Healthcare* 2008 (2) SA 608 (SCA) at esp [30]–[31] illustrates the failure by a respondent to allege a defence of unanimous assent. That failure meant that the defence could not be considered even though the evidence traversed the subject matter. The case illustrates starkly an

important distinction between the powers of a court and of an arbitration forum; the arbitrator is strictly restricted to the terms of the mandate.

[21] But that is not the position here. The appeal tribunal was within the scope of its powers to conclude that the true issue being tried was the existence of a duty to disclose in relation to the events that occurred after June 2003. It cannot be argued that either party did not mandate the arbitration fora to decide whether or not a duty to disclose existed in respect of the dealings between Nobre and Midas. The appeal tribunal did no more than that. Indeed, it was invited on appeal to consider the very point. It cannot be said to have assumed a power it did not have, as in the example of *Hos+Med.*

[22] I am of the view that it is wrong to suppose that in the drawing up of pleadings the litigants can bind one another to the rationale upon which the case may be decided for or against them simply because they choose to frame the claim or the defence in a particular way. An arbitrator who rejects all or parts of both cases is not expanding his jurisdiction by making findings premised on the issues that truly arise. Were it otherwise, we would be engaged in the re-introduction of the special pleading techniques discredited in England two centuries ago.

[23] In this matter there is no basis to conclude that the appeal tribunal was deprived of the power to endorse the finding of the arbitrator that the duty of disclosure, the very *font et origo* of the dispute, no longer existed when Nobre dealt with Midas about a new lease scheme.

[24] These dicta in *Telcordia Technologies Inc v Telkom Ltd* 2007 (3) SA 266 (SCA) are apposite:

> "[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry - they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.
>
> [86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd."

THE COSTS QUESTION

[25] An issue arose from the content of the founding affidavit. It was prolix, irreverent towards the arbitrators and traversed many issues unsuitable for a review application. It was not drawn by counsel who appeared. The affidavit bears the hallmarks of a non-lawyer draftsman who is bent on venting his indignation rather than assembling a set of facts and propositions pertinent to the presentation of an argument.

[26] I suppose that there is a limit to which an attorney can protect his client when composing an affidavit of which the client is the notional author, as distinct to what is stated in a pleading, the contents of which are the responsibility of the pleader and not the client. However, if a litigant insists on putting up irrelevant material and thereby compelling the opponent to deal with it for the sake of prudence, then a price must be paid for the trouble to which the opponent is unnecessarily put.

[27] In my view the costs of preparation of the respondents' answering affidavit should attract a costs award on the attorney and client scale, which should include not only the costs of preparing the affidavit itself but also the consultations, if any, with counsel to take instructions, and of counsels' costs to settle.

/THE ORDER ...

THE ORDER

[28] I make an order as follows:

28.1 The application is dismissed.

28.2 The applicant will bear the costs of the respondents, including the costs of two counsel; and, further, the costs of preparation of the respondents' answering affidavit, including any consultations with counsel to take instructions and to settle shall be borne on the attorney and client scale.

ROLAND SUTHERLAND
Judge of the South Gauteng High Court, Johannesburg
6 June 2012

Hearing	:	4 June 2012
Judgment delivered	:	14 June 2012
For the Applicant	:	Adv S Van Niewenhuizen SC, with Adv E Theron
Instructed by	:	Melamed & Hurwitz
Reference	:	SC E Hurwitz
For the Respondent	:	Adv A Gautschi SC, with R Willis
Instructed by	:	Andrew De Jongh Attorneys
Reference	:	Mr De Jongh