REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/53147

(1) REPORTABLE: YES / [redacted]
(2) OF INTEREST TO OTHER JUDGES: YES/[redacted]
(3) REVISED.

29/08/2012
DATE

SIGNATURE

In the matter between:

ROLAND GUY WALKER	First Appellant
PIETRO LUIGI GUISEPPE CORRARA	Second Appellant

and

CLIFFORD MOSDEL	First Respondent
REWARD VENTURES 01 CC	Second Respondent

J U D G M E N T

KATHREE-SETILOANE, J:

[1] This is an appeal against the dismissal by Tsoka J, on 29 October 2010, of an application for review, in terms of s 33 of the Arbitration Act 42 of 1965 ("the Arbitration Act"), and the setting aside of an arbitration award,

which was made by the Arbitrator, Mr Clifford Mosdell ("the Arbitrator") in an arbitration between the second respondent, Reward Ventures 01 CC and the first and second appellants, Mr RG Walker and Mr PLG Corrara ("the appellants"), respectively.

[2] The appeal is with leave of Tsoka J, who granted leave to appeal on the following limited issues:

(i) whether the Arbitrator had made a finding in respect of the counterclaims which were brought by the appellants?

(ii) whether the award made by the Arbitrator was final ?

(iii) whether the Arbitrator, in making the award as he did, committed an irregularity as contemplated in s 33(1) of the Arbitration Act?

Leave to appeal on the basis that the Arbitrator had committed an irregularity, on the grounds of bias, a failure to exercise his duties and various other misdirections, was refused.

[3] The dispute before the Arbitrator arose from the sale of a restaurant in Knysna called Paquita, which the appellants had purchased from the second respondent. The appellants and the second respondent entered into a written agreement ("the agreement") on 4 June 2008. The appellants alleged, during June 2008, that the agreement had, prior to signature, been altered to include value added tax ("VAT") to the purchase price. They furthermore alleged that the inclusion of VAT to the purchase price had not been agreed upon by the parties, and nor had it appeared in the prior cancelled agreement or any of the draft agreements exchanged between them. The appellants, therefore, refused to pay the VAT portion of the purchase price to the second respondent. By January 2009, it became clear to the parties that they were unable to resolve the dispute, and the second respondent commenced arbitration proceedings against the appellants for payment of an amount of R369 600.00 in respect of the VAT portion of the purchase price. The second respondent applied set off of an amount R123 5128.43, which it claimed was owing to it, in terms of the accounting provisions contained in the agreement, resulting in a claim of R246 081.57.

[4] The appellants filed a counterclaim in terms of which they sought:

(i) rectification of clause 4 of the agreement by deletion of the words *"(plus Value Added Tax)"*; and

(ii) a statement and debatement of the detailed account of all Paquita's transactions for the period 14 April 2008 to 15 July 2008, and the calculation of profit for that period.

[5] The Arbitrator heard extensive evidence on both the rectification and the statement and debatement of account. Both parties were represented by counsel at the proceedings, who submitted written argument which dealt primarily with the issues raised in the counterclaims. Thereafter, the Arbitrator, without providing reasons, made an award in the following terms:

> *"5.1 The respondents are to pay the claimant the amount of R246 081.57 together with interest thereon at the rate of 15,5% per annum from 19 June 2008 to date of final payment.*
>
> *5.2 Subject to the interim award which I made on 20 May 2009, the respondents are to pay the costs of the arbitration, which costs include the costs payable to the Arbitrator."*

[6] The appellant's primary ground of review, in the court *a quo*, was that the Arbitrator had failed to determine its counterclaims. However, the learned Judge, in the court *a quo,* dismissed the application for review by holding that:

(i) the Arbitrator by implication dismissed the counterclaim for rectification; and

(ii) the effect of the award is that the counterclaims had no merit and that to conclude otherwise would be *"illogical"*.

The Arbitrator did not oppose the application to review and set aside his award.

[7] The appellant contends for the setting aside of the award of the Arbitrator on the grounds that the Arbitrator committed a gross irregularity in

the conduct of the proceedings, as contemplated in s 33(1)(b) of the Arbitration Act, by failing to determine the appellants' counterclaims. Section 33(1) of the Arbitration Act provides:

"(1) Where —

(a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

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

(c) An award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) ...

(3) ...

(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court."

[8] The use of the phrase *"gross irregularity in the conduct of the proceedings"* in s 33(1)(b) of the Arbitration Act relates to the conduct of the proceedings, and not its result. Not every irregularity in the proceedings will constitute a ground for review under s 33(1)(b) of the Arbitration Act. For a review to be justified on this basis, the irregularity must be of such a serious nature that it results in the aggrieved party not having his or her case fully and fairly determined (*Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C); Patcor Quarries CC v Issrof and Others 1998 (4) SA 1069 (SE)).*

[9] It is apparent *ex facie* the award, that the Arbitrator did not expressly make a determination on the appellants' counterclaims. The second respondent contends that because the award was made in its favour, it can be inferred from the award that the counterclaims relating to rectification of the agreement and a statement and debatement account had been dealt with, and dismissed by the court *a quo.* I am of the view that this contention is without merit. The learned Judge made a finding that because "the Arbitrator had found that VAT was payable by the appellants' on the purchase price, it is

apparent from the reading of the record that the Arbitrator, by implication, dismissed the appellant's counterclaims". I do not agree with this finding.

[10] Section 28 of the Arbitration Act provides for an award to be final and not subject to appeal. It provides:

"28 Award to be binding
Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms."

An important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end as the arbitrator's decision is final, and there is no appeal to the courts. An award would be invalid if an arbitrator fails to decide each and every one of the several matters referred to him or her (*Harlin Properties Ltd v Rush & Tomkins SA Pty Ltd* 1963 (1) SA 187 (D). The award must, therefore, resolve all the issues submitted in a manner that achieves finality and certainty (Peter Ramsden, *The Law of Arbitration, South African and International Arbitration*, 2011 at 163). Only the matters submitted must be determined by the arbitrator, and no more (*Harlin* (above); *SA Breweries Ltd v Shoprite Holdings Ltd* 2008 (1) SA 203 (SCA)).

[11] In the absence of agreement between the parties, an arbitrator is *functus officio* when he publishes an award that is incomplete, not certain and final (*Ramsden*, at 165).The principle of finality of awards is firmly established in our law (*Dickinson and Brown v Fishers Executors* 1915 AD 166 at 174; *Delport v Kopjes Irrigation Settlement Management Board* 1948 (1) SA 258 (OPD); *RPM Konstruksie (Edms) Bpk v Robinson en 'n Ander* 1979 (3) SA 632 (C) at 636; *Blaas v Athanassiou* 1991 (1) SA 723 (W) at 724). When an award is made by an arbitrator, the matter is *res judicata* (already finally adjudged). The award must, therefore, be a full and final decision. The consequence of an award that is not final, is that a party would be entitled to raise the same issues again, in whatever forum might be open to him or her. The arbitration would, in the circumstances, not have achieved its purpose of

finally and decisively disposing of the dispute, so that the party in whose favour the award has been made, would be entitled to proceed on the basis of the award being *res judicata.*

[12] An arbitrator is, accordingly, under a duty to ensure that his or her award is a final decision on all matters requiring determination. An arbitrator must, in this regard, leave no matter unsettled. In making an award, such that he did, the Arbitrator, in the arbitration in question, left issues relating to the appellants' counterclaims open for interpretation, speculation, and inference. I am of the view that it is inappropriate for a court, such as is required in this case, to infer the implications of an arbitrator's award, which does not deal expressly with all the issues that required determination. A full and final arbitration award should, in my view, require no inferences to be drawn. An award, such as this, which requires a court to infer, from the evidence presented in the arbitration, that the arbitrator had determined the counterclaims, is not a full and final award. Moreover, drawing such an inference, from an award where no reasons are provided by the arbitrator — such as in this case — is not an exercise that should easily be embarked upon by a court. Nor should a court embark upon the exercise of interpreting an arbitration award as having dealt with all of the issues raised, where such an outcome is not apparent *ex facie* the award.

[13] The second respondent submits that it is necessary, in order to properly understand the award, and conclude that the counterclaims were dismissed, to consider the evidence which was placed before the Arbitrator. Such an exercise, in my view, to discern and understand the meaning of an award, militates against the conclusion that the award is final and certain.

[14] I am of the view that the learned Judge erred in considering the merits of the dispute before him. It is inappropriate, in this regard, for a court in an application for review, in terms of s 33(1)(b) of the Arbitration Act, to have regard to the evidence on the merits of the dispute before an arbitrator. Significantly, the failure by the Arbitrator to deal with all the issues before him, relates to the conduct of the proceedings — and not to the merits of the

dispute. The essential question in review proceedings, in terms of s 33(1)(b) of the Arbitration Act, relates to the decision-making process and hence the validity of the award, and not to the correctness of the decision (on the merits) under review (*Computer Investors Group Inc v Minister of Finance* 1979 (1) SA 879 (T) at 890C-D; *Anchor Publishing Co (Pty) Ltd v Publications Appeal Board 1987* (4) SA 708 (N) at 728D-E). A review is, therefore, different to an appeal, which relates to the correctness of an adjudicator's decision (*Khader v Chairman, Town Planning Appeals Board* [1998] 4 All SA 201 (N) at 207). It is thus not the function of a court, in an application for a review, in terms of s33(1)(b) of the Arbitration Act, to determine whether the award of an arbitrator is right or wrong on the merits. However, the court *a quo* did exactly that in the current matter.

[15] In dismissing the review, on the grounds *inter alia* that the Arbitrator had by implication dealt with the appellants' counterclaims in his award, the learned Judge enquired into the merits of the dispute between the parties, and in so doing, conflated his powers of review with his powers of appeal. This much is evident from the following extract in the judgment:

"In the award the first respondent does not specifically deal with this issue. However, it is common cause that the second respondent was furnished with the report and Ms Buchan testified in the proceedings. Her difficulties in compiling a detailed statement of account are on record. It is on the basis of Ms Buchan's opinion that the first respondent credited the applicant's account with the amount of R126 518.43. Having dealt with the issue of accounting in this way, there was no further reason why the first respondent in the award, must expressly deal with this issue. The effect of the award is that the counterclaims had no merit. To conclude otherwise would be illogical.

...

...The applicants' contentions appear to be directed, in the main, on the merits of the award rather than the behaviour of the first respondent and the way the proceedings were conducted.

The way the proceedings were conducted must be viewed in terms of the mandate given by the parties to the first respondent. In terms of his mandate, the first respondent was granted a wider discretion. In exercising his discretion, he relied on

the heads of argument submitted and made an award in favour of the second respondent. In making the award, the first respondent considered the evidence before him and made the award. I find no moral turpitude on the part of the first respondent. There is no evidence presented in this matter that reveals that the first respondent exercised his discretion wrongly."

[16] I am of the view that the learned Judge erred by treating the review before him as an appeal, and enquiring into the merits of the dispute between the parties. As alluded to earlier, the legal consequence of a valid arbitration award is that it brings the dispute between the parties to an irrevocable end, as the arbitrator's award is final and there is no appeal to the courts.

[17] A further consequence of an incomplete arbitration award is that it can never be made an order of court in terms of s 31 of the Arbitration Act. It is settled law, in this regard, that an arbitration award cannot be made an order of court, in terms of s 31 of the Arbitration Act, until the award is final. There is no room in law for a hybrid order, which is partially a finding made by an arbitrator and partially a finding made by a court of law (*Britstown Municipality v Beunderman (Pty) Ltd* 1966 (2) SA 243 (C); *Britstown Municipality v Beunderman (Pty) Ltd* 1967 (3) SA 154 (C)). It will, therefore, serve no purpose for the second respondent to apply to court to have the Arbitrator's award (as it currently stands) made an order of court, as the court would be required, prior to making the award an order of court, to first determine the appellants' counterclaims — resulting in a hybrid order, which is simply not countenanced in our law.

[18] I find that the award of the Arbitrator is not a full and final decision, as it does not deal expressly with the appellants' counterclaims. I am of the view, in this regard, that the Arbitrator's failure to deal with the appellants' counterclaims in his award is of such a serious nature, that it has resulted in the appellants not having had their dispute fully and fairly determined in the arbitration. Accordingly, the Arbitrator's failure to deal with the appellants' counterclaims in his arbitration award constitutes a gross irregularity, as contemplated in s 33(1)(b) of the Arbitration Act, and it falls to be set aside.

[19] In the result I make the following order:

(1) The appeal is upheld.

(2) The judgment of the court *a quo* is set aside and substituted by an order in the following terms:

(a) The application for the review and setting aside of the arbitration award of the Arbitrator is upheld; and

(b) The second respondent is ordered to pay the costs of the application.

(3) The second respondent is ordered to pay the costs of the appeal.

F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

DSS MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

TM MAKGOKA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for the Appellants:	**Mr JP Daniels SC**
Attorneys for the Appellants:	**Thomas Wilkins Inc**
Counsel for the Second Respondent:	**Mr A Beyleveld SC**
Attorneys for the Second Respondent:	**Tarica Inc**
Date of Hearing:	**17 May 2012**
Date of Judgment:	**29 August 2012**