IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 45681/13

DELETE WHICHEVER IS NOT APPLICABLE

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

....
DATE SIGNATURE

In the matter between:

[B…….. A……. C……] **APPLICANT**

And

[B…… J……..] **RESPONDENT**

JUDGMENT

NICHOLLS J:

[1] The applicant, the former husband of the respondent, seeks to set aside the award of an arbitration appeal tribunal in terms of which he was ordered to pay his former wife an amount of R35 739 287. The award arose out of a delictual claim brought by the respondent two years after the conclusion of the divorce on the basis of fraudulent non-disclosure of his assets at the time of the divorce.

[2] The applicant seeks the following relief:

2.1 that the arbitration agreement be set aside, cease to have any effect and the dispute be referred back for hearing and adjudication to the South Gauteng High Court; alternatively

2.2 that the arbitration appeal tribunal award dated 15 October 2013 be set aside and remitted for hearing of further evidence before Justice Harms for fresh consideration and for the making of a fresh award; alternatively

2.3 that the dispute be referred to a new arbitration appeal tribunal using procedures prescribed in the arbitration agreement, or as directed by court; alternatively

2.4 that the award be referred back to the arbitration appeal tribunal to correct the mistakes and/or errors appearing in the appeal award.

[3] Although various defences were raised in the papers, counsel for the applicant confined himself to two points. Firstly, that the dispute referred to arbitration is one that is incidental to the matrimonial cause and therefore prohibited in terms of Section 2 of the Arbitration Act 42 of 1965 (“the Arbitration Act”). Secondly, that the arbitrators

misconceived the nature of the inquiry by assessing the accrual as at the date of divorce rather than at the date of *litis contestatio*.

Background facts

[4] The parties were married to each other on 14 February 1987 out of community of property but subject to the application of the accrual system in terms of section 3 of the Matrimonial Property Act 88 of 1984 ("the MPA") which provides:

> *3. Accrual system*
> *(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual, or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.*
> *(2)Subject to the provisions of section 8(1) a claim in terms of subsection (1) arises at the dissolution of the marriage…*

[5] On 26 November 2006 the respondent sued for divorce and ancillary relief including a claim under section 3. She claimed an amount equal to half of the difference between the accrual of the respective values of their estates, her estate showing no accrual.

[6] The trial was set down for 5 May 2008 but the day before the trial commenced, the parties arrived at a settlement agreement. Consequently the divorce proceeded on an unopposed basis and the settlement agreement was made an order of court. It dealt

with custody of the minor children, maintenance for the respondent and the minor children, as well as the division of the estate.

[7] The applicant's main asset was his 23% shareholding in a private company, Patula Construction (Pty) Ltd ("Patula"). The accrual was resolved on the basis that the respondent was paid R8 007 340 and the amount outstanding in respect of a mortgage bond registered over the matrimonial home situate at 5 Stratton Avenue, Bryanston. The agreement was in full settlement of all claims the respondent may have against the applicant. At the time the applicant represented that his net asset value was R20 712 527.

[8] In July 2008, two months after signing the agreement of settlement, it became public knowledge that a listed construction company, Esor Limited ("Esor"), was interested in acquiring Patula. This culminated in the signing of agreement of sale between the Patula group of companies and Esor on 19 September 2008. The agreement of sale provided for a purchase price of R423 550 000 of which 60% was payable in cash and 40% by the issue of shares in Esor.

[9] On 21 January 2010 the respondent launched an ex parte Anton Piller application out of the South Gauteng High court. An order was granted on 2 February 2010. During the execution of the order, management accounts of Patula for the periods 31 August 2007, 30 November 2007 and 29 February 2008 were obtained. (Insofar as it is relevant there is a dispute as to where the account of 29 February 2008 was obtained). Nonetheless, whatever their origin, these accounts indicated that the net income of Patula had shown a substantial growth from R16.8 million in February 2007 to R60.9 million in February 2008.

[10] On 4 February 2010 the respondent instituted a claim for delictual damages in the sum of R83.9 million on the basis that the applicant falsely or negligently represented that his shares were worth only R20 712 527 and that she would not have settled for R8 007 340 had she known of the true value of the shares. In the alternative, she claimed that the applicant knew the true value of the shares but fraudulently or negligently failed to disclose this information thereby inducing her to settle for R8 007 340.

[11] On 26 March 2010 the respondent obtained default judgment against the applicant. He apparently first became aware of the judgment against him when the Sheriff came to attach his household furniture on 22 April 2010. He applied for rescission of judgment which was finally granted by consent on 28 June 2011.

[12] The trial was to proceed in August 2012 but on 14 August 2012 the parties entered into an arbitration agreement referring “the dispute... in the action” to arbitration on an urgent basis.

[13] The arbitration proceeded before retired Deputy President of the Supreme Court of Appeal, Judge Harms from 20 August 2012 to 21 November 2012. He made his award on 26 November 2012 and held that misrepresentation had not been established. The arbitrator did however find that the applicant failed, at least negligently, to disclose his greatly increased loan account. He awarded the respondent R3 900 000 with interest as from date of summons being 14 February 2010, plus costs. On 7 November 2012 the respondent served a notice of appeal against the Harms’ award. The applicant cross-appealed.

[14] On 5 October 2013 the hearing of the arbitration appeal took place before an appeal tribunal comprised of retired judges Howie and Streicher and Advocate van der

Linde SC. The appeal tribunal signed their award on15 October 2013. The appeal of the respondent succeeded and the Harms award was set aside. The applicant was ordered to pay the respondent R35 739 287 minus the maintenance which was payable to her. The applicant's cross-appeal was dismissed.

[15] The appeal tribunal found that misrepresentation had not been established but that non-disclosure, in circumstances where the applicant had a duty to disclose, had been established. It found that the requirements for delictual liability had been proved as well as factual and legal causation. It found that the non-disclosure was deliberate and intended to induce the respondent into agreeing to an accrual value of the applicant's estate that was materially understated. The damages awarded to her was the difference between the amount she was awarded taking into consideration the true value of the estate and the amount she agreed to in the settlement agreement.

[16] In December 2013 this application was launched to set aside the arbitration appeal award.

Is referral to arbitration prohibited?

[17] The applicant's first argument is that the parties referred the dispute, which is incidental to their matrimonial cause in that it dealt with the proprietary consequences of their marriage, to arbitration in circumstances where this is expressly prohibited by the Act in terms of section 2. Therefore the arbitration agreement, the arbitration and the arbitration appeal are void ab initio.

[18] Section 2 of the Arbitration Act 42 of 1965 ("the Act") provides that:

2. A reference to arbitration shall not be permissible in respect of-

(a) Any matrimonial cause or matter incidental to such cause……"

[19] In support of his argument that the dispute is incidental to a matrimonial cause, the applicant points to the pleadings, which indicate that the determination of the accrual of the respective estates forms a material part of the dispute. Moreover the arbitrator's award and the appeal tribunal's award make frequent reference to "the accrual", "the accrual system" and to the applicable sections in the Matrimonial Property Act.

[20] In essence the applicant argues that the finding of the appeal tribunal was that as a result of the breach of the duty to disclose in terms of section 7 of the MPA, the respondent did not get what she was entitled to in terms of section 3 of the MPA. Section 7 obliges a spouse to furnish full particulars of the value of his or her estate within a reasonable time for the purposes of determining the accrual.

[21] Furthermore, the arbitration appeal tribunal held at paragraph 51 of the arbitration appeal award that:

> *"The appellant's accrual claim against the respondent was once-off and unique, statutorily created and circumscribed. The appellant's delictual damages claim is aimed at recovering loss suffered as a result of a wrong committed in the context of that claim, and is therefore also unique and circumscribed".*

[22] All the above, the applicant submits, is indicative of a dispute falling squarely within the realm of a matrimonial cause or a claim incidental to the matrimonial claim. It is therefore void *ab initio.*

[23] The respondent on the other hand contends that the phrase *"any matrimonial cause"* means a cause of action arising from a marriage but must refer to a live cause - one that is either pending or in the process of being instituted.

[24] *"A matter incidental to such cause"* must also refer to a matter which is incidental to a live matrimonial cause. The respondent concedes that the value of the applicant's accrual as an issue in a divorce action could not have been referred to arbitration. However, if the accrual is quantified for a different purpose such as for a business venture (the parties not contemplating divorce at all) it cannot be said that the accrual was incidental to a matrimonial cause. Similarly, to quantify an accrual for the purposes of a delictual claim once the marriage has already been dissolved, cannot be incidental to a matrimonial action.

[25] What the respondent argues is that at the time of issuing the divorce summons the claim for decree of divorce (the matrimonial cause), the claims for custody of the children and maintenance for a share of the accrual were all matters incidental to a matrimonial cause. However, once the settlement agreement became an order of court on 5 May 2008, the matrimonial cause, and all matters incidental thereto, including the claim for half of the accrual, were no longer alive. The matrimonial cause had come to its natural conclusion.

[26] The applicant relied on *Taylor v Kurtsag NO* 2005 (1) SA 362 (W) 394-395 as authority for the proposition that proprietary consequences of the marriage were excluded from arbitration. In that matter disputes regarding custody, maintenance and the proprietary consequences of the marriage were referred to an ad hoc Beth Din for binding determination ''according to the arbitration laws of the Republic". The award of the Beth Din was declared invalid in terms of section 2 of the Arbitration Act.

[27] I am not convinced that *Taylor* is helpful to the applicant. In the present matter no proprietary consequences of the marriage were referred to arbitration. These had been finalised on the date of dissolution of the marriage. Insofar as the court held that: *"The legislature has thus decreed 'to reserve jealously for the Court, control of this and the right to determine what was good and what was not good for a child in a matrimonial dispute, whether the dispute was before or after the divorce' (Ressell v Ressell 1976(1) SA 289 (W) at 292A and cf Pitt v Pitt 1991 (3) SA 863 (D))',* this statement relates to children, and is accordingly distinguishable. *Ressell v Ressell* 1976(1) SA 289 (W) also dealt with children and is distinguishable for this reason.

[28] In *Pitt v Pitt* 1991 (3) SA 863 (D) before signing an agreement of settlement in a divorce matter, the parties concluded a separate oral agreement that the distribution of certain furniture between the parties should be referred to an arbitrator *"who should go into the proprietary rights in relation to that property and that the decision should be final".* A statement of the court that the appointment of arbitrator to determine property rights of spouses falls foul of section 2 of the Arbitration Act is obiter. The real issue was held to be whether the agreement constitutes impermissible parole evidence. There can be no doubt that the agreement in *Pitt* clearly referred to arbitration of a marital cause, alternatively a matter incidental to a live matrimonial cause. In the present case the proprietary consequences of the marriage with regard to accrual were not determined in the arbitration as they had already been disposed of.

[29] At first blush therefore the applicant's argument is compelling but a careful analysis of section 3 of the MPA and the applicable case law leads one to a different conclusion. It seems to me that when the respondent issued summons for misrepresentation and fraudulent or negligent non-disclosure, this was a delictual action based not on the marriage, but which had its roots in delict. It is correct that the duty to disclose the accrual was a statutory duty arising out of section 7 of the MPA. However,

the delictual claim was not for payment of the accrual in terms of section 3 of the MPA but for payment of damages suffered as a result of fraudulent or negligent misrepresentation, alternatively non-disclosure with regard to the true amount of the accrual. Therefore the amount of the accrual was not incidental to a divorce action (a matrimonial cause) but rather incidental to a delictual action.

[30] The determination of the accrual was relevant for the purposes of determining wrongfulness and the quantum of damages rather than for a claim in terms of section 3 of the MPA. The amount of accrual can only be a matter incidental to a matrimonial cause if it is determined for the purpose of a claim in terms of section 3. A matrimonial action must be alive for the matter to be incidental thereto. This one was concluded in May 2008 when the settlement agreement was made an order of court.

[31] The submission that the dispute was referred to arbitration in circumstances expressly prohibited by the Arbitration Act is misplaced. The dispute arises from a civil claim for damages flowing from the law of delict. Even if it is true that the present proceedings arise out of a settlement agreement in a divorce matter, this, in my view, does not make the dispute one incidental to a matrimonial cause. The dispute that was referred to arbitration was fraud.

Was the nature of the enquiry misconceived?

[32] The second leg of the applicant's argument is that the assessment date used to establish the accrual was the incorrect one. In consequence thereof the arbitrator and the arbitration appeal tribunal misconceived the whole nature of the enquiry in the arbitration thereby rendering the entire process procedurally unfair. The applicant accordingly seeks an order that the arbitration appeal award be set aside and the dispute be referred back to Harms for the hearing of further evidence and for reconsideration.

[33] The applicant filed a supplementary affidavit shortly before the hearing setting out that during the course of preparation his counsel established that the operative moment when the values of the respective estates had to be assessed is at the date of *litis contestatio* and not at the time that the divorce order was granted.

[34] The applicant contended that as a result of this error the arbitrator and the arbitration appeal tribunal misconceived the entire nature of the inquiry and their duties associated therewith. They failed to direct their minds to the causes of action in respect of the assessment date, being the date on which the values of the estates had to be determined. This is so important that the whole enquiry is fundamentally affected thereby. The correct assessment date is crucial to every element of each cause of action of the respondent and is an essential inquiry in the determination of damages. Instead the arbitrator and the appeal tribunal assumed that the assessment date was the date of divorce rather than the date of *litis contestatio* being 4 April 2007 when pleadings closed.

[35] In failing to even consider the correct assessment date, the arbitrator and the arbitration appeal tribunal prevented themselves from applying their minds to the question that ought to have been considered. This date is the essential enquiry into the determination of the damage; the duty to disclose is dependent on the assessment date; fault and wrongfulness cannot be determined without reference to this date. This, so the argument goes, prevented a fair arbitration and a fair trial of the issues. In essence it is argued that the arbitrators asked themselves the wrong question.

[36] For the submission that the correct date of the assessment is the date of *litis contestatio* when pleadings closed on 4 April 2007, the applicant relies on the judgment

of Brassey AJ in *MB v NB* 2010 (3) SA 220 (GSJ). Here it was held that although the date of dissolution of the marriage was the date upon which the one spouse had a legally enforceable entitlement to claim half of the net accrual of the other spouse's estate[1], the date when the respective estates had to be assessed was at *litis contestatio*.

[37] The judgment acknowledged that while section 3 of the MPA makes it clear that the contingent right may be perfected only on dissolution of the marriage, it does not establish the moment that the respective estates must be assessed. Brassey AJ pointed out that it was a problem of procedure rather than substance as litigation takes time to complete. He went on to find that this moment is, according to established principle, at *litis contestatio* when the pleadings close. This was the date on which the dispute crystallised. The court held that all transactions subsequent to that date were irrelevant to the assessment of the accrual. The use of the date of *litis contestatio* was a response to the malicious dissipation of assets during the period between the break-up of the marriage and the actual dissolution of the marriage. The reasoning of Brassey AJ was followed in *MB v DB* 2013 (6) SA 86 KZD by the High Court in Kwa-Zulu Natal.

[38] On this scenario using *litis contestatio* as the date on which the respective estates had to be quantified, namely 4 April 2007, there was no question of the sale of the Patula shares to Esor and the settlement figure of R8 000 000 would be correct.

[39] In another case of this division *J Allan v DM Allan*[2], Sutherland J dealt at length with the date of the assessment of the respective estates of spouses for the purposes of accrual and came to a different conclusion. He found *litis contestatio* to be a *"an archaic label for a banal event"* and the fact that it was purely procedural was the very

[1] *Reeder v Softline Ltd and Another* 2001 (2) SA 844 (W)
[2] Case 2007/27065 judgment delivered on 4 June 2013

reason it could not have any bearing on when, by operation of law, a certain right comes into existence. When a claim is based on the existence of a right and the claim is for a performance measured by value, it is not possible to calculate that value before the right itself comes into existence.[3]

[40] Sutherland J concluded that albeit an attempt to prevent dissipation of assets, it was not acceptable to find a solution which was irreconcilable with the legislation. Section 3(2) specifically provides that a claim for accrual arises at the date of dissolution of the marriage. To take *litis contestatio* as the date when the value of the estates was to be assessed, would compromise the integrity of the provisions of the statute. Insofar as he disagreed with Brassey AJ on this aspect he found it was obiter because no decision was made pursuant thereto.

[41] I am in agreement with Sutherland J. The MPA is clear that the claim for accrual arises on dissolution of the marriage. It makes no sense, either practically or conceptually, to make the day on which pleadings close the date on which the assessment of the values of the accrual must take place.

[42] In any event I am not convinced that even if the arbitration appeal tribunal were wrong in their quantification of the operative moment when the values of the respective estates of the spouses in divorce proceedings has to be assessed, that this means that they have misconceived the whole nature of the arbitration.

[43] An arbitration award may be set aside in terms of section 33(1) of the Arbitration Act which provides:

"Where-

[3] Case 2007/27065 judgment delivered on 4 June 2013, paragraph 17

(a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as an 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 application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[44] The general principle that our courts have frequently re-iterated is that an irregularity in the proceedings does not mean an incorrect judgment or an incorrect result but is a reference to the method of the proceedings.[4] The question to be asked in an arbitration is whether the procedure followed afforded both parties a fair opportunity to present their case[5]. The Arbitration Act does not allow for a review of a material error of law.[6]

[45] The applicant in submitting that the nature of the enquiry was misconceived by the appeal tribunal placed reliance on *Goldfields Investments Ltd and Another v City Council of Johannesburg* 1938 TPD 551. *Goldfields* provided a qualification to the general rule that an arbitration could be set aside only as a result of a procedural irregularity. A further ground was included and this was where a decision maker misconceived the whole nature of the inquiry. Goldfields dealt with an instance where an ordinance entitled an aggrieved person to a rehearing with the leading of evidence. The magistrate, apparently in good faith, refused to conduct a rehearing.

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[4] *Ellis v Morgan; Ellis v Desai* 1909 TS 576; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 54

[5] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) 221; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 265;

[6] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 67.

[46] It was held that the magistrate had misconceived his mandate in that he had asked himself the wrong question, a question other than that which the relevant act directed him to ask. Although it could be said that he decided the case fairly but was wrong on the law, the court found that he had misconceived the nature of the inquiry in that he never dealt with the matter in a manner as contemplated by the section, For this reason the court found that there was a gross irregularity and the proceedings should be set aside.

[47] The *Goldfields* qualification was dealt with by Harms JA, as he was then, in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). It was held that first the arbitrator has to determine the nature of the inquiry and the arbitrator's duties. (In *Telcordia* the arbitrator had to interpret the agreement by applying South African law). Then he has to decide further issues of law or facts which he deemed necessary or appropriate in any manner which he deemed necessary or appropriate. The fact that the arbitrator 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 merely means that the arbitrator erred in the performance of his duties. He has the 'right to be wrong'.[7]

[48] In this case, even if it is accepted that the incorrect date was used at which to assess the value of the applicant's estate for the purposes of the accrual, this does not mean that the appeal tribunal misconceived the nature of their inquiry. It merely means that they erred. This is insufficient ground for setting aside an arbitration award in terms of section 33 of the Arbitration Act. Brand J, as he was then, cautioned against parties trying to take the arbitrator on appeal under the guise of remittal.[8] In my view this is no more than an attempt to appeal the ward of the arbitration appeal tribunal.

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[7] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 83- 85

[8] *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others* 2001 (2) SA 1097 (C)

[49] Accordingly the applicant must fail on this ground as well.

Patent error

[50] It is common cause that the arbitration appeal award contains an error. At paragraph 87 of the award it is stated that: *"At the time of the settlement agreement the parties were in agreement that the value of the respondent's accrued estate excluding shares and loan accounts in companies was R19 295 281.00"*. In fact this figure should have been R7 489 431.00.

[51] The respondent agrees that this aspect should be referred back to the appeal tribunal for the correction thereof. Counsel for the applicant has agreed that there will be no cost implication for the respondent should this occur.

In the result I make the following order:

1. The application is dismissed with costs
2. Paragraph 87 of the award of the arbitration appeal tribunal is referred back to the arbitration appeal tribunal for correction.

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C. H. NICHOLLS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Appearances

Counsel for the applicants	:	Adv. W Trengove SC Adv. K W Lüderitz SC Adv. C Woodrow
Instructing Attorneys	:	Thomson Wilks Inc
Counsel for the respondent	:	Adv. M Smit
Instructing Attorneys	:	David C Feldman Attorneys
Date of hearing	:	16 September 2014
Date of judgment	:	25 September 2014