REPUBLIC OF SOUTH AFRICA

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

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DATE SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2014/14286

In the matter between:

VENMOP 275 (PTY) LTD AND ANOTHER Applicants

and

CLEVERLAD PROJECTS (PTY) LTD AND ANOTHER Respondents

JUDGMENT

PETER AJ

Introduction

[1] The issues, in this application to set aside an arbitration award, are the admissibility of a letter, in respect of which the "without prejudice privilege" or "privilege in aid of settlement" is claimed, the existence of "good cause" as contemplated in section 38 of the Arbitration Act, 1965 ("the Act") for an extension of the time period prescribed in terms of the provisions of section 33(2) of the Act, and in such context, whether or not the applicants perempted their right to apply for the setting aside of the award and whether or not the irregularity complained of is a "gross irregularity" within the meaning of section 33(1)(*b*) of the Act. In addition to these evidentiary and substantive issues, the manner in which the parties conducted this application merits comment on the role and function of affidavits in motion proceedings and how the provisions of rule 53, of the uniform rules of court, are to be applied in review proceedings.

The Facts

[2] In December 2010, Cleverlad Projects (Pty) Ltd ("Cleverlad") commenced action in the High Court against Venmop 275 (Pty) Ltd ("Venmop") to obtain payment in terms of a written acknowledgement of debt. The principal issue in dispute was the authenticity of the signature appearing on behalf of Venmop. On 30 August 2012, and in terms of a written agreement, the High Court action was referred to arbitration to a retired High Court judge to be conducted in accordance with the uniform rules of the High Court. The arbitration trial commenced on 13 November 2012 and proceeded for a total of 16 days, in intermittent periods over the ensuing months, seven days in November 2012, six days in February 2013, two days in July 2013 and culminating on 1 August 2013. On 12 December 2013, the arbitrator published a final award in favour of Cleverlad, finding the signature to be genuine and making an award of payment in terms of the acknowledgement of debt.

[3] On 9 January 2014, Cleverlad's attorneys addressed a letter to Venmop's attorneys demanding payment of the amount in terms of the award. On 13 February 2014, not having received a response to this demand, Cleverlad made application to the High Court for the award to be made an order of court in terms of section 31 of the Act. On 19 February 2014, Venmop's attorneys replied to the letter of demand by way of a letter in which Venmop offered to make immediate payment of the sum of R50 000 with further payments of R10 000 per month and an undertaking to "review the offer every twelve months". Cleverlad did not accept this offer. On 10 March 2014, Cleverlad obtained an urgent interim order in the High Court interdicting the disposal of certain immovable property by Venmop, pending an action to set aside such disposal. The disposal was alleged to be a dissipation of Venmop's assets in order to frustrate the enforcement of the award.

[4] On 16 April 2014, one day shy of 18 weeks after the publication of the award, Venmop and the second applicant, whom I refer to as "the mother", brought the present application to set aside the award on the grounds that the arbitrator had committed a "gross irregularity in the conduct of the proceedings". Three grounds were advanced in the founding affidavit in support of the allegation of gross irregularity. First, that the arbitrator had rejected evidence of a director of Venmop, the daughter of the alleged signatory, that the signature was not in fact her mother's signature. The signatory to the acknowledgement of debt, was also the mother of the director of Cleverlad, and a defendant in the arbitration ("the mother"). Secondly, the arbitrator allegedly committed an irregularity in finding that the evidence of an expert graphologist, which was not adduced, would not have swayed the probabilities of a factual finding on the authenticity of the disputed signature. Rather bizarrely, this graphologist was called by

Venmop to give evidence that, because he had received threats and intimidation, he would not be giving evidence in relation to his opinions on the authenticity of the disputed signature. The third ground was that the arbitrator refused to order production of certain financial documentation, notwithstanding that he had regarded such documentation as relevant. The first two grounds were not pursued in argument, in my view rightly so.

[5] The facts giving rise to this third ground was that, on Friday 26 July 2013, Venmop brought an application in terms of the provisions of rule 35(7), for the production of financial documents, which it had demanded on Monday 22 July 2013, in terms of the provisions of rule 35(3). The application was argued on 29 July 2013, the fourteenth day of the trial. On 30 July 2013, the arbitrator dismissed the application. In his reasons the arbitrator acknowledged that the documents were relevant, in that if they contained a reference to the alleged indebtedness in the books of account of Cleverlad, they would support Cleverlad's case and, if they did not, they would be evidence against Cleverlad. Notwithstanding such finding of relevance, the arbitrator refused to order production of the documents by reason of the lateness of the application. Cleverlad had led all its evidence, closed its case and there were no good grounds to recall its witnesses.

[6] Notwithstanding the refusal of the application, Cleverlad made available its 2010 audited financial statements to Venmop. These financial statements showed that the indebtedness was probably not disclosed. This evidence was taken into account and mentioned in the arbitrator's final award which did not accord the documents much weight. It was noted that the financial statements were introduced late in the trial and Cleverlad's main witness was not cross examined on them. It was said that although they did weaken Cleverlad's case they did not disturb the arbitrator's view that Cleverlad's case had been established overwhelmingly on the probabilities. The arbitrator dismissed Cleverlad's claim against the mother and ordered Cleverlad to pay to the mother half the defendants' costs on the High Court scale.

The Affidavits

[7] The efficient conduct of litigation has as its object the judicial resolution of disputes optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost efficient manner is a collaborative effort. The role of witnesses is to testify to relevant facts of which they have personal knowledge. The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive

at a reasoned determination of the issues in dispute, in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy.

[8] In motion proceedings, affidavits serve a dual function of both pleadings and evidence; *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793 D – F**;** *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at 200 para 43, *ABSA Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) at 498 – 499 para 23; *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* 2013 (3) SA 91 (SCA) at 103 para 30. In *Choice Holdings Ltd v Yabeng Inv Holding Co Ltd* 2001 (3) SA 1350 (W) at 1360 para 34, Goldstein J, in a judgment of the full court, summed up the principal thus:

> "In application proceedings the affidavits serve two purposes: first that of pleadings, *ie* delineating the *facta probanda* or essential averments necessary to found a cause of action or defence, and, secondly, the supply of the *facta probantia* or evidence to support a finding of the correctness of the *facta probanda*."

[9] A consideration of these references reveal that the emphasis on the dual function of affidavits in motion proceedings is highlighted where the affidavits contain conclusions or allegations of a depth that is sufficient for a declaration, but are deficient in evidence of the facts upon which those conclusions or allegations are based. Deponents to the affidavits are testifying in the motion proceedings. Save in urgent applications for interim relief to restrain irremediable injury and to keep matters in *status quo*, where otherwise inadmissible hearsay might be permitted, *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T) at 157E – G, there is no authority that the admissibility of the evidence of a witness in motion proceedings is somehow different from that in a trial action.

[10] Inadmissible material falls to be struck out of affidavits, as does matter, in terms of rule 6(15), which is scandalous, vexatious or irrelevant. In the past, observance and enforcement of the rules through strike out applications consumed a great deal of time and resources. These applications lead to an increase in costs and delay in the finalisation of the proceedings – the polar opposites of economy and expedition. Strike out applications were thus discouraged. For the past 50 years, rule 6(15) has required an additional element: that the

court be satisfied that the applicant for the striking out would be prejudiced if an order were not granted. Thus, almost 50 years ago, Margo AJ remarked in *Jones v John Barr & Co (Pty) Ltd and Another* 1967 (3) SA 292 (W) at 296D:

> "In a proceeding before a Judge alone an occasional item of inadmissible evidence ordinarily creates no prejudice, for the Court simply ignores it or gives it no weight."

[11] In *Epstein v Christodoulou and Another* 1982 (3) SA 347 (W) at 347 – 348, Van Reenen J identified the dilemma that arises between the relaxation of rules and their enforcement, when seeking to optimise economy and expedition, with the following observation:

> "Meticulous observance of the Rules applying to each type of pleading was sought by litigants and enforced by our Courts. But for some decades now we have been moving away from this formalism and these technicalities. The pressure on our time and resources has become too great to squander energy in this way.
>
> Litigants were allowed greater freedom in formulating their pleadings and the tendency has been to relax the Rules whenever it seemed expedient to do so. But this tendency has led to another undesirable consequence, namely that the real issues to be decided were no longer clearly formulated at the outset, but were left to emerge and become clarified as the case proceeded. Although this has given litigants greater freedom, it, in its turn, has now tended to overstrain our time and our resources. We must somehow resolve this dilemma with which we are faced."

[12] In *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78G – 80F, Stegmann J decried argumentative matter cluttering up affidavits and called for a return to a more disciplined form of practice in which relevant facts are set out simply, clearly and in a chronological sequence. Disputes of fact ought not to be disguised in a mass of indignant argument, expostulation and other useless verbiage. Where the matter is not prepared in such an orderly way, problems tend to arise and result in substantial delay. Notwithstanding subsequent judicial approval of these observations; *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323D and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 19 para 17, the practice of including voluminous matter of an argumentative and irrelevant nature has continued unabated.

[13] In *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407

(SCA) at 439 para 39, Schutz JA remarked in the context of replying affidavits that they were the longest – and the most valueless and that "being forced to wade through almost endless repetition brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them." A similar sentiment was expressed by Harms ADP, in *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) SA 294 (SCA) at 307 – 8 paras 44 – 46, in the context of an appeal against an order striking out parts of an affidavit The Supreme Court of Appeal stated that instead of wasting judicial time in analysing the affidavit "sentence by sentence and paragraph by paragraph such affidavits should not only give rise to adverse costs orders but should be struck out as a whole" and that the court *a quo* should have taken that route *mero motu*; see too *SA Railways & Harbours v Hermanus Municipality* 1931 CPD 184 and *Wingaardt and Others v Grobler and Another* 2010 (6) SA 148 (ECG) at 152 – 153 paras 17 – 22. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 308 para 81, Harms DP remarked that "instead of having a short and simple case the matter ballooned".

[14] The inclusion of unnecessarily prolix and repetitive material in court papers is not a peculiarly domestic problem. In the context of an appeal against a conviction for tax evasion and whether or not a defence was waived by being buried in a single unreasoned paragraph, the United States Court of Appeals for the Seventh Circuit remarked that "Judges are not like pigs, hunting for truffles buried in briefs"; *US v Dunkel* 927 F.2d 955 (7th Cir 1991). In a recent case, using similes more appropriate to more northerly climes, in the Canadian Federal Court of Appeals in *McKesson Canada Corporation v Canada* 2014 FCA 290, Stratas JA remarked:

> "[23] The difference between what the appellants propose in page length and what I am willing to grant is nine pages. Some might wonder, "What's the big deal about nine pages?"
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> [24] Unnecessarily lengthy, diffuse submissions are like an unpacked, fluffy snowball. Throw it, and the target hardly feels it. On the other hand, short, highly focused submissions are like a snowball packed tightly into an iceball. Throw it, and the target really feels it. Shorter written submissions are better advocacy and, thus, are much more helpful to the Court.
>
> [25] Structures that lead to repetition, over-elaboration of arguments, block quotations, and rhetorical flourishes make submissions diffuse. Simple but strategic structures, arguments presented only once and compactly, tight writing that arranges clinical details in a persuasive way, and short snippets from authorities only where necessary make submissions highly focused. The former dissipates the force of the argument; the latter concentrates it."

[15] The answering affidavit of Cleverlad amounted to 40 pages without annexures. Its contribution to the factual narrative was to introduce, into the chronology, the correspondence concerning the offer to settle the award in instalments, Cleverlad's application to make the award an order of court and interlocutory proceedings to prevent the dissipation of assets. For the rest, the common cause facts are set out in the founding affidavit of Venmop. This amounted to 16 pages and included a repetition, in reported speech, of the contents of the relief sought in the notice of motion, under the guise of an unhelpful explanation of "the purpose of the application", as well as a number of argumentative comments on rule 53 and the case that was being made under the Act. In argument I put to Mr Berlowitz, who appeared for Cleverlad, that stripped of its argumentative matter, the answering affidavit would be reduced to approximately a quarter of its size. Mr Berlowitz conceded the unnecessary expanse but offered his estimate of one third of non-argumentative matter.

[16] A statement appeared in the introductory paragraphs of the answering affidavit made by Cleverlad's director that where he made legal submissions, he did so on the strength of legal advice having been obtained by him on behalf of Cleverlad from its legal representatives in the application. A statement of such nature in motion proceedings has become increasingly popular in practice in the last few years. Its apparent purpose is to disclaim responsibility of the deponent for later argumentative matter which serves to inflate the papers and of which the deponent has no comprehension. However impressive this might be to a lay client in justifying a legal representative's fee for voluminous affidavits, I find this practice disturbing in at least four respects. First, by their very nature these submissions have neither evidential content nor probative value; as argumentative matter they have no place in affidavits. It is not for nothing that rule 6(1) of the uniform rules of court provides for an application to be supported by an affidavit "as to the facts". Secondly, the argumentative submissions that follow are expressly admitted hearsay and, as such, inadmissible. Thirdly, the submissions amount to legal opinions on matters upon which the court is required to decide. Even expert legal opinion on matters of domestic law is neither necessary nor admissible; *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 237 C – F and *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at 188 para 43. Lastly, there is the aspect of professional legal privilege. It is well established that a communication made in confidence between a client, or an agent for that purpose, and a legal professional, in such professional capacity, for the giving or receiving of legal advice, attracts the professional legal privilege unless the purpose of the advice is to facilitate the commission of a crime or fraud; see generally *Three Rivers District Council & Others v Bank of England (No 6)* [2005] 1 AC 610; [2005] 4 All ER 948 (HL); [2004] 3 WLR 1274 [2004] UKHL 48 and *Thint (Pty) Ltd v NDPP; Zuma v NDPP* 2009 (1) SA 1 (CC) at 78 – 79 paras 183 – 185. However, the privilege may be waived.

In this sense, it is not only a waiver in the contractual sense of a decision to abandon a right with full knowledge thereof; *Laws v Rutherfurd* 1924 AD 261 at 263. It is rather an imputed waiver by implication; one which arises from the element of publication of the privileged content, or part thereof, which can serve as a ground for the inference of an intention no longer to keep the content secret; *Ex parte Minister of Justice: In re S v Wagner* 1965 (4) SA 507 (A) at 514D. A waiver by implication, is concerned not so much with an ascertainment of the subjective implied intention of the party relinquishing the privilege, but fairness and consistency. It is where the conduct in disclosing part of a confidential communication touches a point that fairness and consistency require disclosure of the whole, irrespective of whether or not there was an intention to have this result; Wigmore *On Evidence* 3rd ed volume 8, para 2327; *Kommisaris van Binnelandse Inkomste v Van den Heever* 1999 (3) SA 1051 (SCA) at 1061B – C. This test of imputed or implied waiver is well illustrated in the context of the litigation privilege in *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) at 549 – 550 paras 33 – 34 and 551 para 37. Although the mere disclosure of the fact of a privileged communication, or its existence, is not sufficient to justify an imputed waiver of its contents, where its substance is disclosed to secure an advantage in proceedings, the High Court of Australia has found that this will reach the point that fairness and consistency requires disclosure of the whole of the communication and a concomitant loss of privilege; *Mann v Carnell* (2000) 201 CLR 1; *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275. Where parties in motion proceedings disclose the substance of otherwise privileged legal advice from their legal representatives, in the form of submissions to advance their case, it is difficult to comprehend that fairness and consistency would not permit them to "cherry pick" those parts of the advice that they received without being required to disclose the whole of the advice.

The Application and Use of Rule 53

[17] Rule 53 of the uniform rules of court provides a mechanism for an applicant, in review proceedings, to obtain a record of the proceedings and to facilitate the presentation of the applicant's case in the review. Rule 53(1) provides for the notice of motion to call for the dispatch of the record of such proceedings to the registrar. Rule 53(4) provides the applicant with an opportunity, after having inspected the record, to vary the terms of the notice of motion and supplement the supporting affidavit. The provisions of rule 53(3) are quite clear. They require the applicant to "cause copies of such portions of the record as may be necessary for the purpose of the review" to be made. The purpose of the rule is equally clear. It is to provide an aggrieved applicant, who might not necessarily have all the evidence at his or her disposal, the opportunity to supplement the case made in the application by providing potential evidence

in the full record of the review proceedings. Having been given such opportunity, it is the duty of the applicant to select what is relevant from the record to serve as evidence for the purpose of the review application. It is only what is selected by the applicant in terms of rule 53(3) that serves as evidence. Should there be documents forming part of the record omitted, which in the view of the respondent are relevant, these can be introduced into evidence as annexures to the answering affidavit. Any other part of the record omitted which is necessary to rebut what is said in answer might similarly be introduced as an annexure to the replying affidavit.

[18] The provisions of rule 53(3) are almost universally ignored in practice and were ignored in this case. What occurred in this application is that a written transcript of the proceedings was provided, numbering almost 2 400 pages, together with pleadings and documentary exhibits of over 500 pages. These documents are included in the court file as part of the "evidence" to be considered by the court. There was no attempt by the applicant to discriminate between what was considered to be relevant and not relevant for the purposes of the review. Furthermore, Venmop did not supplement its notice of motion or deliver a supplementary affidavit. In argument, all that I was referred to in the "record" that had been filed, was four pages of the transcript; pages 2198 – 2201 which contained the arbitrator's reasons for dismissing the application. None of the parties had seen fit to include these pages in the annexures to their affidavits.

[19] The idea that more is better and that it is wiser "to put everything before the judge" belongs to the lazy and the insecure. It ignores the sentiment expressed in *Phambili, Van Zyl, Zuma, Dunkel* and *McKesson*. Litigants who deluge a court with a welter of irrelevant and unnecessary material, which hides and confuses what is relevant, ought not to be heard to complain about the quality of the judicial determination they receive. When representing applicants utilising the provisions of rule 53, practitioners ought to take heed of the provisions of rule 53(3) and apply their minds to what is relevant.

The Admissibility of the Letter Dated 19 February 2013

[20] In argument, both counsel accepted as correct the formulation in *The South African Law of Evidence* (2nd ed 2010 at 703) that a statement which forms part of genuine negotiations for the compromise of a dispute is inadmissible as privileged. This is so, irrespective of whether or not the words "without prejudice" have been used. There are two essential requirements. First is the existence of the dispute. Secondly, is that the statement is part of negotiations for the settlement or compromise of such dispute; *Millward v Glaser* 1950 (3) SA 547 (W) at 554; *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914E; *Jili v SA Eagle Ins Co Ltd*

1995 (3) SA 269 (N) at 275B; *Lynn & Main Inc v Naidoo and Another* 2006 (1) SA 59 (N) at 65 para 22.

[21] The letter was written in response to a demand for payment of the amount of the award, at a time when an application had been launched for the enforcement of the award and there existed no challenge to the award. Other than the dispute as to the authenticity of the signature, which had been resolved by the arbitrator's award, there was no dispute in existence. The letter could not be said to be a statement in negotiations to settle a dispute. In its terms, the letter merely attempted to obtain an extended time period by offering to satisfy the amount of the award in instalments. By reason of the foregoing, the requirements for the privilege have not been satisfied; the letter is admissible and the application, to strike out the letter, accordingly fails.

Good Cause

[22] Section 33(2) of the Act prescribes that an application for the setting aside of an award, in terms of section 33, shall be made within six weeks after publication of the award. This section is subject to certain exceptions in relation to offences in the Prevention and Combating of Corrupt Activities Act, 2004, which are not presently relevant. Section 38 of the Act provides that the court may, on good cause shown, extend any period of time fixed by or under the Act, whether such period expired or not. As the application was made almost 12 weeks after the expiry of the six-week period, it is incumbent upon Venmop to show good cause for an extension of time.

[23] Although "good cause" defies precise or comprehensive definition, in this context it is a well-known expression that has two principal requirements. First is a reasonable explanation for the delay and, secondly, a *bona fide* case on the merits with some prospect of success; *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765; *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) at 334 para 25 and 350 paras 85 and 86.

[24] Venmop's explanation for its delay is that its present attorneys who were involved in the disposition of the property, referred to above, had not represented it in the arbitration. They only became aware of the arbitration on or about 19 February 2014 in the context of an earlier abortive application to prevent the disposition of the property referred to above. They required "considerable time to familiarise themselves with the relevant facts and evidence" giving rise to the application. The letter dated 19 February 2014 was written by the attorneys who

represented Venmop in the arbitration and were fully familiar with everything that had transpired prior thereto. It appears that the previous attorneys who represented Venmop in the arbitration did not conceive of any possible ground to set aside the award, as opposed to the new attorneys who presently represent Venmop in the application. To me this is an unimpressive explanation of the delay particularly viewed in the light of the chronology sketched above. The application was brought almost two months after the new attorneys became aware of the arbitration award and almost five weeks after an order was made preventing the disposition of the property. Such a thin explanation might be acceptable when accompanied by powerful prospects of success under the second requirement of good cause, which is to be considered.

Peremption

[25] The first consideration of the prospects of success is whether or not Venmop has perempted its right to set aside the award. An unsuccessful litigant who has acquiesced in a judgment cannot appeal against it. The onus of proof rests on the person alleging acquiescence and in doubtful cases it must be held not to be proven. Although peremption has its origin in policy considerations similar to those of waiver and estoppel, the question of acquiescence does not involve an enquiry into the subject of state of mind of the person alleged to have acquiesced in the judgment. Rather it involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom; *Dabner v South African Railways and Harbours* 1920 AD 583 at 594; *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A – D; *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 443F – G; *Samancor Group Pension Fund v Samancor Chrome and Others* 2010 (4) SA 540 (SCA) at 546 para 25 and *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) at 318.

[26] Although the doctrine of peremption has its genesis in relation to appeals, it has been extended to applications for rescission of default judgment *Hlatshwayo v Mare & Deas*, 1912 AD 232; *Sparks v David Polliack & Co (Pty) Ltd* 1963 (2) SA 491 (T) at 496 D – F and *Nkata v Firstrand Bank Ltd and Others* 2014 (2) SA 412 (WCC) at 421, and to the common law right of judicial review in respect of the exercise of statutory authority *Liberty Life Association of Africa v Kachelhoffer NO and Others* 2001 (3) SA 1094 (C). Although there appears to be no precedent for peremption in the context of an application to set aside an arbitration award, there appears to be no reason, either in policy or principal, not to apply the doctrine of peremption to such a right.

[27] At the time the letter was written, the award had not been made an order of court and there was no writ capable of execution. The writing of the letter and the offer to satisfy the award, albeit on terms more favourable to Venmop, was not something Venmop was required or compelled to do. In my view, the only reasonable inference and conclusion to be drawn from the dispatch of such a letter, is that Venmop had acquiesced in the award and perempted any right to set the award aside.

Gross Irregularity

[28] In terms of section 33(1)(*b*) of the Act, where an arbitration tribunal has committed a "gross irregularity" in the proceedings, an application may be made to set the award aside. The concept of "gross irregularity", in relation to legal proceedings, is a methodological error which prevents a fair hearing; it is comprised of two aspects. First, there must be an irregularity and secondly it must be "gross". An irregularity is high-handed or mistaken action; it is "gross" when it is calculated to cause the consequence that it prevents the case of the aggrieved party from being fully and fairly determined; *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581; *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551 at 560 – 561 and *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at 298 – 299.

[29] The irregularity complained of is that the arbitrator, having found the documents to be relevant, mistakenly refused to order their production under the provisions of rule 35(7). Rule 35(7) provides *"If any party fails to give discovery as aforesaid . . . the party desiring discovery or inspection may apply to a court, which may order compliance with this rule . . . ."*. The wording of the rule has a long genealogy which clearly imparts a discretion whether or not to order compliance and production of the documents; *Rainsford v African Banking Corporation Ltd* 1912 CPD 729; *Bothma v Protea Furnishers (Pty) Ltd* 1970 (3) SA 180 (O) and *Continental Ore Construction v Highveld Steel & Vanadium Corp Ltd* 1971 (4) SA 589 (W) at 594 – 595.

[30] Mr Segal, who appeared for Venmop, submitted that where the documents are relevant there is no longer a discretion to order compliance with the rule; an order of compliance ought to follow as a matter of course. The import of such submission is that where the documents are not relevant, the court retains a discretion to order compliance with the rule on discovery. I cannot agree with the submission on three bases. First, the case authority referred to above suggests the discretion to refuse discovery of documents notwithstanding that they are relevant. Secondly, rule 35 requires a party to make discovery of relevant documents. Compliance with the rule requires the discovery of relevant documents. Where the documents are not relevant,

ordering a party to make discovery or produce such documents cannot be said to be ordering compliance with rule 35 in circumstances where there has been a failure to give discovery in terms of the provisions of sub-rules 35(1) to 35(6). Thirdly, it is difficult to conceive of a situation where the discretion would be exercised to order a party to give discovery of irrelevant documents. In my view the discretion in rule 35(7) is predicated on the documents, in respect of which discovery is sought, being relevant.

[31] The reasons for the arbitrator's refusal to order the production of the documents reflect a carefully measured consideration of the facts and circumstances in which the application was brought as well as the considered exercise of a discretion. That being so, the arbitrator neither misconstrued the nature of his power nor committed any methodological error. There cannot be said to be any irregularity. Furthermore when regard is had to the fact that Cleverlad produced its audited financial statements, which Venmop introduced into evidence, there was simply no basis for Venmop to allege that the arbitrator's failure, to order production of the documents sought, resulted in Venmop being prevented from having its case fully and fairly determined. The arbitrator's conduct complained of was neither irregular nor gross.

[32] The explanation for the delay impresses me as neither reasonable nor satisfactory. The conduct of Venmop in response to a demand for payment leads to the conclusion that it acquiesced in the award. The conduct of the arbitrator upon which the application was pursued, was neither irregular nor prevented Venmop from having its case fully and fairly determined. The case to set aside the award is so thoroughly devoid of merit, that no good cause has been shown, as contemplated by section 38 of the Act, for an extension of the period of six weeks prescribed in section 33(2).

Costs

[33] Venmop sought the costs of the application on the attorney-client scale, Mr Berlowitz submitted that the application was not brought *bona fide* but was brought with the intention of delaying the enforcement of the arbitration award. Mr Segal submitted that there was no dishonesty involved and no intention merely to delay, but that Cleverlad had prosecuted a claim in good faith. Although there might well be substance in Mr Berlowitz's contentions, it is not necessary for me to find dishonesty or a vexatious intention. Even with the most upright and most firm belief in the justice of its cause, a litigant can be vexatious by putting the other side to unnecessary trouble and expense, which it ought not to bear; *In re Alluvial Creek Ltd* 1929 CPD 532; *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and*

Another 1997 (1) SA 157 (A) at 177D – F; *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at 474 – 475 para 11, and *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at 71 para 76. Taking into account the fact that Venmop abandoned the first two grounds of its application before argument, the delay in the enforcement of the award that this application has caused, and, in respect of the last ground together with the aspects of peremption, delay and good cause, the application was so lacking in arguable merit, I am of the view that an attorney-client costs order is merited. However, notwithstanding their conduct in this application, the applicants ought not to be held responsible for the manner in which the answering affidavit was presented.

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

1 The application is dismissed.

2 Subject to 3 below, the applicants are ordered and directed to pay the respondents' costs, jointly and severally, the one paying the other to be absolved, on the attorney-client scale.

3 No costs shall be allowed on taxation in respect of the drafting and settling of the answering affidavit.

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J R PETER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearance for applicants:
Mr M M Segal, instructed by Schoonees Belling & Georgiev, Edenvale

Appearance for the second respondent:
Mr J K Berlowitz, instructed by Paul Friedman & Associates Inc, Johannesburg

Date of hearing:
3 February 2015

Date of judgment:
3 August 2015