CASE SUMMARY - CASE NO: 2014/14286

VENMOP 275 (PTY) LTD AND ANOTHER Applicants

and

CLEVERLAD PROJECTS (PTY) LTD AND ANOTHER Respondents

On 16 April 2014, the applicants brought an application to set aside the award of an arbitrator published on 12 December 2013 on the grounds of a "gross irregularity" in terms section 33(1)(b) of the Arbitration Act, 1965. The alleged "gross irregularity" was the refusal of the arbitrator to order production of documents, in terms of rule 35(7) of the uniform rules of court, which governed the procedure of the arbitration. Although the arbitrator found the documents to be relevant, he refused to order their production because the request was made at an advanced stage of the trial shortly before the conclusion of evidence. The documents were thereafter voluntarily produced and used by the respondents. On 9 January 2014, prior to bringing the application and after receipt of the award, the first applicant made an offer, by way of a letter from its attorneys, to discharge the award in monthly payments.

Because the application was brought outside the 6 week period prescribed in section 33(2) of the Act, the applicants had to make out a case for good cause in terms of section 38 of the Act. As a preliminary issue the applicants sought to strike out the letter of 9 January 2014 on the basis that it was inadmissible on the grounds that it was an offer "without prejudice" made to compromise a dispute.

The role of affidavits in motion proceedings was highlighted. Affidavits constitute both the pleadings and evidence in motion proceedings. As such they should not include argumentative matter nor inadmissible hearsay. Affidavits should set out the relevant facts simply, clearly and in a chronological sequence avoiding repetition. Deponents to affidavits are witnesses testifying to evidence. As such the admissibility of their evidence is the same as in trial actions. The inclusion of argumentative and an inadmissible material increases costs and delays the proceedings. Applications to strike out such material also increases costs and delays the proceedings. Where affidavits contain much inadmissible material instead of wasting judicial time in analysing the affidavits 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 which a court *could do mero motu*.

A statement in the introductory paragraphs of an affidavit that where the deponent made legal submissions, he did so on the strength of legal advice having been obtained by him from legal representatives has become increasingly popular in practice in the last few years. This practice is disturbing in at least four respects. First, the submissions have neither evidential content nor probative value; as argumentative matter they have no place in affidavits. 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. Lastly, there such a statement may amount to a waiver of the professional legal privilege.

The provisions of rule 53(3) 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. 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. A written transcript of the proceedings was

provided, numbering almost 2 400 pages, together with pleadings and documentary exhibits of over 500 pages. These were 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. In argument only four pages of the record was referred to. None of the parties had annexed them to the affidavits. The applicants had not complied with rule 53(3).

The letter was found to be admissible as the legal requirements for the privilege were not met.

The application was dismissed as the requirements for good cause were not met in a number of respects. The explanation for the delay was not adequate, the doctrine of peremption was held to apply to the review of an arbitrator's award and by sending the letter dated 9 January 2014 the applicants had perempted their right of review, the arbitrator had committed no irregularity as the provisions of rule 35(7) embodied a discretion in respect of which there was no misdirection and lastly even if the arbitrator's refusal to order production of the documents amounted to an irregularity, it was not "gross" within the meaning of section 33(1)(b) as the applicants received and used the documents.

An attorney client costs order was made against the applicants on the grounds that the application was vexatious. The costs order disallowed the costs of the answering affidavit, the majority of which comprised argumentative and inadmissible matter.