REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 44384/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO
21/10/2024
DATE SIGNATURE

In the matter between:

MICROSEP (PTY) LTD	Applicant
And,	
PHILLIP ALAN KOTZE	First Respondent
RIAN LE HANIE	Second Respondent
TERRY MOTAU SC	Third Respondent

JUDGMENT

FISHER J:

Introduction

[1] This is an application relating to an alleged contempt of court and a counter - application to set the court order in issue aside as a nullity.

[2] The applicant, Microsep claims that the respondents are in wilful breach of the order, which restrains them in their ability to trade in competition with Microsep.

[3] Microsoft initially asked for the imposition of a term of imprisonment in consequence of the contempt but in argument Mr McNally SC, who appeared for Microsep, said that his client would relent in regard to this order and would content itself with an order that provided for imprisonment in the event only of further contempt of the court order.

[4] The court order in issue had its genesis as an award of an arbitrator which was made an order court. The respondents seek to review this award.

[5] The arbitration arose from a sale of shares agreement between the parties. The agreement contained a contract in restraint of trade and provided for dispute resolution by means of arbitration.

[6] The subject of the arbitration is the alleged breach of the restraint contract in the sale of shares agreement. The restraint in issue in these proceedings, however, is a different restraint. This new restraint originated as an award given by consent pending the final determination of the arbitration. The award was made an order of court.

[7] The consent award and subsequent order has resulted in the respondents being restrained by a court order from practising their professions for a period which extends beyond the five year restraint which is the subject of the arbitration. This second restraint is set to endure pending the final determination of the arbitration proceedings – including any appeal.

[8] Thus, this court faced with something of a curiosity: the restraint contract which is the subject of the arbitration has expired and been replaced by a court ordered

restraint which bears no relationship to the original purpose for which the arbitration was convened. Thus, on the case of Microsep, the respondents have lawfully been restrained from competing with it for the past nine years - and the restraint continues in force.

[9] Microsep contends that the handing down of the consent award arose from an extension of the powers of the Arbitrator as originally conferred by the arbitration agreement in the shareholders agreement, alternatively his empowerment under a new contract in restraint of trade as evidenced in the award. Whatever the construction of the source of power, the result, it says, is the same – the Arbitrator had jurisdiction in respect of the new restraint.

[10] The respondents' counter- application for the review of the award and the consequent setting aside of the court order in issue, occurred pursuant to me asking that I be addressed as to the jurisdiction of the Arbitrator to make the award in issue.

[11] To understand the power of the Arbitrator in the context of the impugned award it is necessary to examine how it came about and how its terms relate to the original terms of reference, if at all. I thus move to deal with the material facts that led to the impugned order.

The material facts

[12] The respondents, together with their two co- shareholders Messrs Settembrini and Haasbroek, were shareholders in a company, National Separations (pty) Ltd ('NS'), each to the extent of 25%.

[13] NS supplied products and services around bioprocess filtration products (based, for the most part, on membrane filtration technology) and laboratory and water purification products.

[14] Microsep markets and distributes, bioprocess filtration products used inter alia, in the food & beverage and pharmaceutical industries. Its business includes

consultancy and advisory services and maintenance in relation to bioprocess filtration products.

[15] On 7 May 2012 the business of NS was sold to Microsep as a going concern in terms of the sale of business agreement.

[16] The respondents and their co-shareholders entered into a contract in restraint of trade as part of the sale of business agreement. They were restrained in terms thereof from competing with Microsep for a period of five years, such restraint to apply to the whole of Africa.

[17] It is not in dispute that the respondents are skilled and experienced in bioprocess filtration and that their experience, skills and qualifications are relatively unique in the industry. They are both over sixty years of age and it would be difficult, if not impossible, for them to gain the necessary experience and acumen to make a commensurate living in a new industry at this stage of their lives.

[18] Microsep alleged that the respondents breached the restraint of trade contract in the sale of business agreement. As a result, it had resort to the arbitration agreement and in July 2016 it instituted arbitration proceedings against the respondents. In terms thereof, it sought a declaration of breach of the restraint agreement, an interdict, and damages in the amount of R5,100,000. The third respondent was appointed as Arbitrator under the sale of business agreement. The pleadings in the arbitration closed during October 2016

[19] At a hearing of the arbitration on 2 December 2016 the respondents' indicated through their erstwhile counsel, Mr Nelson SC that they would seek a postponement in order to review certain decisions by the Arbitrator ('the threatened review').

[20] The postponement was intitially opposed but pursuant to discussions between the parties' legal representatives, the parties ultimately agreed to a postponement by way of a consent award ('the consent award') which reads as follows:

'The following interim award is made an order of the arbitrator, by consent of the parties:

1. Pending the final determination of the review proceedings to be instituted by the defendants in the High Court or until 1 August 2017 (whichever is the sooner):

1.1 the defendants are ordered to cease, and are interdicted from, competing with the claimant and/or using its Trade Secrets, either personally or through any person or entity, until 1 August 2017;

1.2 the defendants are ordered to cease, and are interdicted and prohibited from:

1.2.1 any involvement (of whatever nature and in any capacity) in or related to the bio-process filtration industry, and/or the marketing; sale; supply; support; rendering or receipt of any training; distribution, consultancy; and/or service pertaining to any products or services in the following fields: Lab Filtration, Microbiology, Lab Water Systems and/or Services; and/or Filtration, Fluid Management, Purification and/or Services (collectively, "the prohibited involvement"); and

1.2.2 any involvement (of whatever nature and in any capacity) in any entities which have the prohibited involvement;

1.3 the defendants shall ensure that Nic Alex Holdings (Pty) Ltd, Optisep (Pty) Ltd or any other entities in which the defendants have any interest do not have the prohibited involvement;

1.4 the arbitration is postponed;

1.5 all costs in or related to the arbitration are reserved.

2. The defendants are required to institute the review proceedings within 20 working days of the date of this award. Should review proceedings not be timeously instituted, para 1 of this award shall lapse and paras in 1.1 to 1.3 of this award shall then operate pending the final determination of the arbitration.

3. The defendants agree that none of the relief sought in the arbitration shall be rendered moot or academic by virtue of the above postponement or any delay in the arbitration occasioned by the review proceedings.

4. The defendants agree to this award without:

4.1 any admission that the defendants have in any way acted in breach of clauses 23.2, 23.3, 23.4 or 23.5 of the Sale of Business Agreement (annex "SOC1" to the claimant's statement of claim), or that the claimant is entitled to the relief claimed in prayers 1 to 4 of the Statement of Claim;

4.2 prejudice to the defendants' rights to rely on any of the defences raised in their statements of defence; and to persist in their requests for a special costs order against the claimant in the terms set out in their statements of defence.

5. This award may be made an order of the High Court at the instance of any of the parties at any time, and the parties expressly and irrevocably consent to such order being sought and granted.'

[21] Paragraph 2 of the award, which I have underlined for ease of reference, sought to put in place the new restraint which could be triggered by a failure to institute the threatened review proceedings within 20 days of the order. It is this portion of the award which the respondents seek to impugn and it is this portion that Microsep seeks to rely on for the alleged contempt.

[22] On 12 December 2016, Microsep applied to this court to make the consent award an order of court in terms of section 31 of the Arbitration Act 42 of 19 65 ('the Act'). The application was delivered on 13 December 2016 and was not opposed. The award in any event contained an irrevocable consent to it being made an order of court.

[23] On 4 January 2017 the 20-day period for the filing of the threatened review application in terms of paragraph 2 of the consent award expired without the respondents having instituted the threatened review proceedings. Thus, the new restraint was triggered.

[24] The application to make the consent award an order was granted by Mashile J on 10 January 2017 ('the Mashile J order').

[25] The respondents' legal representatives, for reasons which are not relevant to this judgment, had missed the deadline for the institution of the review by twelve days. On the terms of the consent award the respondents were now subject to the new restraint. By virtue of the Mashile J order this new restraint has force of law until set aside.

[26] In the meantime, the period under the initial five years restraint expired on 1 August 2017.

[27] It appears clear that the respondents did not, at first, understand that the effect of the award and subsequent order of Mashile J would result in an entirely new restraint which had an uncertain period to run. They believed that when the five year restraint in the sale of business agreement expired they would be free to trade as they wished. This was the advice given to them by their legal representatives and it stood to reason from their perspective.

[28] However, it is indeed correct that this somewhat eccentric position of them being re-restrained after the expiry of the original restraint arises under the consent award.

[29] Neither party has progressed the arbitration proceedings with any alacrity. The respondents say this is because they are impecunious and have had to expend all available resources to defend these contempt proceedings. Microsep is presumably in no hurry to bring the arbitration proceedings to a close in that it has the valuable protection of the current restraint until the process ends. This protection endures until the determination of these proceedings. Microsep could not of course progress the arbitration until the threatened review proceedings were determined. I am advised by Mr Meyer who represented the respondents that these review applications have been withdrawn.

[30] The respondents allege that it is because they are prevented from carrying out their profession by the Mashile J order that they have become impecunious. They say that this has affected their ability to properly litigate against Microsep. It is for this reason, they contend, that there has been a delay in these proceedings as well as the arbitration proceedings. There are disputes in this regard and I do not propose determining them here. It is not, however, in dispute that the respondents are currently precluded from carrying on the profession for which they are trained and experienced.

[31] The respondents have thus for more than nine years been in a predicament where they cannot carry out their profession.

[32] As I have said, the respondents allege that they initially the believed that they were free to trade after the expiry of the five year restraint period. They were however to be disabused of this belief. After the exchange of correspondence between the respective attorneys in which Microsep made it clear that it would enforce the new restraint through the Mashile order and on 3 November 2017 the applicant launched this contempt application. It complains that the respondents had visited one of its competitors, Aspen Pharmaceuticals on 11 October 2017 in breach of the Mashile J order.

[33] The contempt application was opposed and the respondents have continued to oppose it. The contempt application was set down for hearing on 28 November 2017 before Berger AJ and was postponed by agreement on the basis that the terms of the Mashile J order would continue to apply pending the determination of the contempt application.

[34] The matter first came before me in August 2019. As I have said, I then expressed that prima facie I had some concerns as to the jurisdiction of the Arbitrator in granting the award. This prompted the counter-application to review the consent award and set aside the Mashile J order.

Issues for determination

[35] Microsep argues that the respondents are lawfully subject to the new restraint which arises out of the consent award. It contends that this is so because the consent award constitutes an extension of the Arbitrator's powers, alternatively a new arbitration agreement which has the same effect. In this regard it argues that in terms of section 3(1) of the Act, the parties define the powers of adjudication of the arbitrator, and that they are free to modify that power at any time by way of further agreement.

[36] The respondents argue that, whilst they did consent to the terms of the award, this could not lawfully have extended the power of the Arbitrator to make an award which led to them being restrained beyond the terms of the original restraint. They

thus seek to have the award reviewed and set aside in terms of section 33(1) of the Act for being *ultra vires*. Following on this they seek the rescission of the Mashile J order.

[37] The respondents argue furthermore that the restraint is unconstitutional and that it should not be enforced for being contrary to public policy. Microsep submits on this point that it is not competent to argue that a court order not be enforced. It argues further that there is no case made out on the basis of the Constitution, inter alia in that such a constitutional challenge has not been properly noted.

[38] Microsep argues further that, in any event, the application challenging the Arbitrator's jurisdiction is brought outside of the six week period allowed for by section 33(1) of the Act and that the application should be dismissed for that reason alone. The respondents seek that I condone the non-compliance and extend the period allowed for the institution of the review proceedings. Microsep resisits such relief.

[39] On the terms of the award which reflect agreement that the award may be made an order of court, on the basis of the Mashile J order being taken unopposed; on the basis of the order of Berger AJ; and on the basis of the long delay in bringing the review and setting aside application Microsep argues that the respondents have peremepted their right to set the Mashile J order aside.

[40] I now move to deal in turn with the section 33 review; the rescission of the Mashile J order; and the issues of condonation and peremption.

Rule 33 (1) review - did the arbitrator exceed his powers?

[41] The central question to be determined under this head is whether the parties lawfully extended the original powers of the Arbitrator, alternatively created new powers, under the consent award.

[42] The consent award, comprises an agreement to the effect that the arbitration be postponed on agreed terms including that if the threatened review proceedings are

not brought within a specified period this would trigger the new restraint in issue. No dispute emerges from these terms and none is contended for.

[43] The existence of a dispute lies at the heart of any adjudication process. This stands to reason. Without a dispute there is no reason for and nor can there be the performance of a judicial or quasi-judicial function.

[44] When court proceedings are settled, this generally occurs in terms of a written settlement agreement. Where the agreement has the effect of disposing of the disputes which inform the legal proceedings it would generally constitute a compromise.[1]

[45] If, however, there is no litigation between the parties relating to the disputes in issue, then it is not competent for parties to approach the court for its imprimatur in the form of that court's order. For a court to make an agreement an order of court the agreement must relate directly or indirectly, to an issue between the parties that is before that court. Put differently, if the court would have the necessary jurisdiction to decide the matter in the absence of the settlement, then it has the jurisdiction to make the settlement agreement an order of court.[2]

[46] In the same vein, a dispute must exist for an arbitrator to have jurisdicition over that dispute.[3] In *Telecall (Pty) Ltd v Logan*[4] Plewman JA reiterated that general principle in these terms:

'I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there can

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[1] This is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, -for eg see *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others* 1978(1) SA 914 (A) at 92.

[2] *Hodd v Hodd; D' Aubrey v D' Aubrey* supra at 207; *Van Schalkwyk v Van Schalkwyk* supra at 96, 98; *Mansell v Mansell* 1953(3) SA 716 (N) at 721H and *Claassens v Claassens* 1981(1) SA 360 (N) at 364C – D.
Ex parte Le Grange and Another; Le Grange v Le Grange (984/2011) [2013] ZAECGHC 75; [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) (1 August 2013); *Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited and Another* (18/38649) [2019] ZAGPJHC 72; 2019 (4) SA 541 (GJ) (4 March 2019).

[3] *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 302 at p 304 E-G.

[4] 2000 (2) SA 782 (SCA).

not be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute.'[5]

[47] Thus whilst the Arbitrator might have been empowered to make an agreement an award to the extent that it related directly or indirectly to an issue in the arbitration under the sale of shares agreement, he was not empowered to make an award concerning the new restraint. Such new restraint was triggered by consent. There was simply no dispute to decide. The Arbitrator did not have any input into the consent award and no adjudicative processes were brought to bear thereon. Neither was it intended by the parties that there be any adjudication.

[48] Thus the contention that the consent order serves to achieve a modification or extension of the original referral so as to impose the new restriant is not sustainable.

[49] In sum, an arbitrator does not have the general authority to make an agreement an award just as a court will not make a settlement agreement an order of court if it does not relate to litigation with which it is seized.

The rescission of the Court orders

[50] A court's jurisdiction to make an award of an arbitrator an order of court is founded on statute and specifically section 31 of the Act.

[51] This jurisdiction proceeds from the premise that a dispute between the parties has been properly determined by arbitration . The court making the order may not go beyond the award save to correct clerical or patent errors[6]. The order is thus granted on the premises that a (i)dispute existed; (ii) the parties agreed that the arbitrator could determine this dispute; and (iii) this dispute was determined on the terms of the award.

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[5] Ibid at para 12.

[6] Section 31(2) of the Act.

[52] If there is no dispute, these premises fails and the court has no basis for the making of the order. The orders of Mashile J and Berger J relied on by Microsep based, as they are, on a nullity are also void *ab origine*.

[53] They thus fall to be set aside.

[54] On Microsep's case the operation of the scheme comprising the consent award and subsequent court order, has the effect that an onerous restraint of trade could lawfully be triggered by a time clause, without more. This would mean that the respondents would have agreed to forfeit the right to rely on the legal defences relating to the validity and enforceability of restraints.

[55] Once the Mashile J order is set aside and the restraint is viewed from the perspective that it is merely a contract between the parties and not a court order, it may, to my mind, be difficult to discern a protectable interest. Clearly the validity of the agreement would depend upon whether it would be contrary to public policy to enforce it a restraint that has endured for more than nine years.[7]

[56] The case as to the enforceability or otherwise of the new restraint agreement is not however before me. It may or may not be for the determination by another court depending whether Microsep believes that it is worth seeking to enforce the restraint agreement on its own terms absent the current enforcement machinery to which it is not entitled.

Condonation

[57] There is some complexity and obvious confusion wrought by the terms of the award. It is clear to me from the respective arguments that both Microsep and the respondents must have proceeded from a misunderstanding of the correct legal position in that everyone approached the matter on the basis that the Arbitrator had

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[7] See for eg *Sunshine Records (Pty) Ltd v Frohling* and *Others 1990 (4) SA 782 (A) at 794C-D.*

jurisdiction in relation to the new restraint award. The more cynical approach proposed by the respondents is that they have fallen victim a specious strategem which has ultimately been shown to bear no scrutiny.

[58] I prefer to accept that the legal representatives on both sides have proceeded all along on the bona fide but mistaken understanding that the Arbitrator had the requisite jurisdiction.

[59] As the facts of this matter show, this mistake has been integral to the taking of the Mashile J order and central to the delays experienced in the bringing of the review application.

[60] It was only after the first hearing of the contempt application that the possibility of a lack of jurisdiction was raised by this this Court. This led to the counter-application from which it emerges clearly that the respondents now, correctly, take issue with the validity of the award. Microsep, however, has continued to rely on the order.

[61] As I have said, the respondents explain that the court's orders have meant that they have been unable to work which led to them having difficulty in paying their attorneys and counsel. Their original attorney eventually withdrew. Thereafter difficulties were experienced with funding and the obtaining of the files from the erstwhile attorney. Their attorney who assisted after the withdrawal of the first attorney emigrated and this led to the current attorneys, Fluxmans stepping in to assist. These changes in legal representatives have inevitably led to upheaval in the conduct of the application.

[62] To my mind, it stands to reason that the inability of the respondents to work and thus earn an income has resulted in them being unable to properly prosecute the review and rescission applications. The mistake of both parties which has formed the basis for the rescission has exacerbated the delays in that it has led to the parties having difficulty in formulating a proper way forward in the arbitration and in the applications before me.

[63] This is not the usual rescission application which requires a weighing up of the explanation for the delay and the prospects of success in the rescission application. It

follows automatically from the success of the review application that the Mashile J order must be set aside. To refuse relief because of a poor explanation for delay would, in the circumstances, be an extraordinary step.

[64] In my view, the circumstances under which this matter has unfolded are such that good cause exists for the delays to be condoned and the six-week time period in the Act to be extended in terms of section 38 of the Act.

[65] I must also make it plain that, were it not for the application for rescission, I would have set aside the orders of Mashile J and Berger AJ *mero motu* in terms of rule 42 (1)(c) on the basis that the parties were, on the facts, mistaken in seeking the orders relied on.

Peremption

[66] Only the defence of peremtion is left. Microsep contends that the respondents perempted their right to challenge the Mashile J order when they (i) irrevocably consented to the granting of the interim award; (ii) consented in the interim award irrevocably to such award being made an order of court; (iii) failed to oppose the Mashile J order; (iv) failed to apply for the rescission of the Mashile J order until nearly 3 years after it had been granted; and (v) agreed to the Berger AJ order.

[67] The test for peremption is whether the unequivocal conduct of a litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the order. The the onus of establishing that position is upon Microsep.[8]

[68] The argument of Microsep appears to be that the respondents perempted their right to challenge the Mashile J order even before it took effect. On this argment, the consent award contains within it an automatic peremption. This is an untenable proposition. Clearly, it was only when the true sting of the impugned order was realised by the respondents - being that they were put out of work indefinitely - that it became clear to them that the order was unlawful. From that time onward they have been

[8] See *Dabner v South African Railways and Harbours* 1920 AD 563 at 594.

consistent in their attacks on the order although some may have been misguided. The delay in seeking the rescission of the order has been dealt with in relation to the condonation point. The consent order granted by Berger AJ, far from evidencing a lack of intention to attack the judgment, was handed down in furtherance of the process and on the basis that it would be continued with.

Conclusion

[69] The order of Mashile J in terms of which the award was made an order was handed down, as all such orders are, on the basis that the Court accepted that there was a dispute which the Arbitrator had determined.

[70] The parties proceeded to take the order on the common but mistaken understanding that the award was indeed valid.

[71] As it was a nullity the order of Mashile J and the proceedings which have flowed from such order, including the order of Berger AJ, fall to be set aside.

[72] On the basis that the order is a nullity *ex tunc*, there could be no contempt thereof. It is thus unnecessary that I deal with the competing versions as to the alleged contempt.

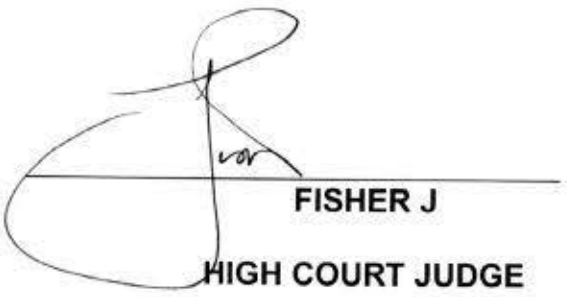
Costs

[73] There is no reason why the costs should not follow the result in this matter. There are previous reserved costs of the 22 August 2019 hearing were reserved for future determination. To my mind, these reserved costs should follow also follow the result.

Order

[74] I make an order which reads as follows:

1. The orders of Mashile J and Berger JA are set aside on the basis that they are null and void.
2. The application for contempt of court is dismissed.
3. The applicant is to pay the costs of the application and the counter -application including the costs of two counsel where employed such costs to include the reserved costs of the hearing of 22 August 2019.



FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 13 September 2021.

Judgment Delivered: 21 October 2021.

APPEARANCES:

For the Applicant	: Adv P MacNally SC
	Adv T Motloenya.
Instructed by	: Webber Wentzel Attorneys.
For the first and 2nd Respondents	: Adv G Meyer.
Instructed by	: Fluxmans Inc