REPUBLIC OF SOUTH AFRICA

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

CASE NO: 35640/2019

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

..... **9 MARCH 2021**

In the matter between:

ABSA BANK LIMITED **Applicant**

and

JUDGE THOMAS D CLOETE **First Respondent**

MYROOF ASSET DISPOSALS (PTY) LTD **Second Respondent**

Summary: Review under section 33 of the Arbitration Act – gross irregularity in proceedings and exceeding of powers for arbitrator to take into account submissions from the Bar not supported by any evidence at all.

JUDGMENT

KATHREE-SETILOANE J,

[1] This is a review of an arbitration award made by Judge Cloete ("the arbitrator") on 9 April 2019 ("April Award"), sitting as an arbitrator in the arbitration between the applicant, Absa Bank Limited ("Absa") and the second respondent, MyRoof Asset Disposals (Pty) Ltd ("MyRoof").[1]

[2] The April Award concerned an application by Absa, brought on affidavit, to extend certain time periods set out in a previous award made by the arbitrator. Absa and MyRoof are parties to a long-running arbitration before the arbitrator. MyRoof owns and operates a website www.myroof.co.za that lists properties for sale. One of its targets is the property-management division of banks. Absa agreed to list particular categories of properties on the website and to pay MyRoof a commission on the purchase price of sales on the website in terms of the Master Services Agreement ("MSA") which they concluded.

[3] MyRoof alleges, in the arbitration proceedings, that Absa breached the MSA. Only one of the several breaches alleged is directly relevant to this application. It relates to properties that Absa listed on MyRoof's website and sold to third parties, during the contract period, and for which Absa did not pay MyRoof's commission. MyRoof sues for the commission it claims to be entitled to on each sale and related relief. These claims are referred to as claim 6 and claim 7 in the arbitration.

[1] The award was delivered *ex tempore* on 9 April 2019 and was revised on 13 May 2019.

The February 2019 Award

[4] The key issue in relation to the quantification of claims 6 and 7 is calculating how many properties Absa listed on MyRoof's website and sold to third parties during the contract period.

[5] The arbitrator made an award in February 2018 apropos the accounting and debatement process for claims 6 and 7. Absa failed to meet the deadlines to account as specified in the February 2018 award. This resulted in the parties entering into a written contract which put in place a process to determine which properties should count for the quantification of claims 6 and 7. The contract set out Absa's obligations, the deadlines it had to meet and the consequences that would follow should it fail to do so. On 1 February 2019, the arbitrator made the contract an award by consent between the parties ("February 2019 award").

[6] As part of the debatement, under the February 2019 award, MyRoof was required to email a list of properties, to Absa, to be used to quantify claims 6 and 7. Absa could identify points of disagreement with MyRoof's list which would then be put before the arbitrator for resolution. However, if 15 days after receiving MyRoof's list of properties, Absa failed to raise any disagreements with it, Absa would be deemed to agree with the list as the pool of properties for quantification of claims 6 and 7.

[7] Two weeks after the February 2019 award was made, MyRoof emailed its list of 6 877 properties to Absa's then-attorney. It claimed that the list should be used to quantity claims 6 and 7 as the listed properties were on Absa's website and sold to third parties during the contract period. Absa, however, failed to identify points of disagreement" with MyRoof's list within 15 days of receipt thereof, because an employee who was, at that time, overseeing the arbitration, Ms. Merle Naidoo ("Ms. Naidoo"), overlooked

MyRoof's email. This triggered the deeming provision in the February 2019 award – namely, the expressly agreed consequences that would then follow. - which lie at the heart of this review application.

The extension application

[8] In April 2019, Absa brought an application to extend the time periods of the accounting and debatement, as specified in the February 2019 award, by a few weeks. Absa supported its extension application with the affidavit evidence of Ms Naidoo. She explained that she had overlooked MyRoof's e-mail with the list of 6877 accounts and the deeming provision was triggered even though "[Absa] genuinely believed that the accounting process was still underway".

[9] According to Ms Naidoo, the deeming provision, in the February 2019 award, resulted in a "fiction" as Absa was deemed liable to MyRoof on inaccurate invoices involving millions of rands that it seriously disputed. She claimed that a refusal by the arbitrator to grant Absa an extension of the periods to account would cause it real prejudice as, on Absa's calculations, if claims 6 and 7 are quantified according to MyRoof's list, Absa will overpay by at least R81 million. Although MyRoof disputed this figure, in its answering affidavit, it conceded that its list of 6 877 accounts was not accurate as Absa did not owe MyRoof anything for 1 399 of the 6877 accounts on the list.

[10] MyRoof sought an opportunity to file an answering affidavit on the question of whether the extension application should be granted.[2] The arbitrator, however, decided to hear

[2] In response to a query from Absa's then-counsel as to whether MyRoof "wants to answer the application", MyRoof's senior counsel responded that "we must".

Absa's extension application without answering and replying affidavits.[3] In other words, the arbitrator proceeded to hear and decide the extension application without MyRoof putting up any evidence, in answer, at all to dispute Ms Naidoo's evidence or to demonstrate its own prejudice. Its' counsel merely informed the arbitrator from the bar that "the in duplum limit has already been reached in many if not most cases, and that will prejudice [MyRoof]".

The April 2019 Award

[11] The Arbitrator dismissed the extension application in the April 2019 award. In so doing, he reasoned as follows:

> 'I have read the application and heard argument on it. What weighs with me is the history of the matter and the many delays by [Absa] that have been catalogued in detail in the correspondence, in particular in the voluminous file of correspondence that preceded the award made on the 1st of February 2019 and the further correspondence that followed. There are two appendix A's that graphically depict the timeline, and the facts prior to the award as summarized in the letters sent by [MyRoof's] attorneys dated 6 November 2018.
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> Articles 11.1 and 11.2.5 of the AFSA Rules confer on an arbitrator the widest powers to give a decision or ruling that he may consider necessary or desirable for the just, expeditious, economical and final determination of all disputes raised in the proceedings. Insofar as the just element is concerned, [Absa] may pay more than it should, should the relief be refused; but if it is allowed, [MyRoof] has informed me that the *in duplum* limit has already been reached in many if not most cases, and that will prejudice [MyRoof]. In my view, [Absa's] application obviously falls foul of the last three considerations that need to be taken into account for the exercise of the discretion vested in an arbitrator to which I have referred.

[3] The arbitrator stated that MyRoof would answer "*if necessary*".

The matter has been dragging on since mid-2016. [Absa] has had repeated opportunities to protect its position and advance its case. There have been egregious shortcomings in the manner in which it has conducted itself and the explanation in paragraph 16 of the founding affidavit is no exception. If it did seek legal advice before the Monday morning when the arbitration was due to, and did, continue, as I was informed from the Bar, it must take the consequences.'

[12] The arbitrator accordingly made the following order:

8.1 [Absa's] application is dismissed.

8.2 In respect of claims 6 and 7 it is decalred:

8.2.1. [Absa] failed to comply with its obligations with specific reference to [its] accounting obligations in terms of [the February 2018] award and the [February 2019] award relating to claims 6 and 7 published on 1 February 2019;

8.2.2 the accounting process was completed when [MyRoof] provided Absa with the outstanding information as required in clause 2.3 of the [February 2019 award] in [its] email to [Absa] dated 15 February 2019;

8.2.3 In terms of clause 2.5 of the [February 2019] award the debatement of such accounting had to take place within 30 days of such accounting i.e., from 15 February 2019 more specifically on or before 18 March 2019;

8.2.4. In terms of clause 2.5 [Absa] had to submit a list reflecting items of disagreement with reasons not later than 15 calendar days before the envisaged debatement date of 18 March 2019 i.e., at the latest on 3 March 2019;

8.2.5. [Absa's] failure to submit a list reflecting items of disagreement results in the items reflected on [MyRoof's] list supplied on 15 February 2019 being deemed to be "in agreement" in terms of clause 2.5.2 of the further reward;

8.2.6 In terms of clause 2.6 of the [February 2019] award [MyRoof] is accordingly entitled to payment and to invoice [Absa].

8.2.7 [Absa] is no longer entitled to raise debatement issues.

Gross Irregularity in the Proceedings

[13] Absa contends that the critical problem with the arbitration award is that there was no evidence at all before the arbitrator to support the finding that "the *in duplum* limit has already been reached in many if not most cases" and so granting Absa's extension application would "prejudice [MyRoof]". Absa, accordingly, submits that the award falls to be set aside in terms of section 33(1)(b) of the Arbitration Act[4] on the basis that it involves a gross irregularity in the proceedings or an exceeding of powers. It seeks an order in terms of its amended notice of motion[5] that the dispute between the parties be referred for determination to a new arbitrator in terms of section 33(4) of the Arbitration Act.[6]

[14] Absa furthermore argues that the effect of the April 2019 award is that, for purposes of determining its liability, Absa is deemed to be in agreement with a list of 6877 properties produced by MyRoof which is patently inaccurate. This, so it contends, is because on

[4] Act 42 of 1965.

[5] Amended notice of motion dated 7 July 2020.

[6] Section 33(4) of the Arbitration Act provides as follows:

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

MyRoof's own version, as set out in its answering affidavit, Absa does not owe MyRoof payment for 1399 of the 6877 accounts on the list. Moreover, it points out that by that by that stage only 149 accounts were before the arbitrator of which only 69 had reached *in duplum.* Thus, of the 6877 properties only 1% of the invoices had reached in duplum. It accordingly contends that this is not evidence capable of sustaining the conclusion, arrived at by the arbitrator, that many, if not all, of the invoices had reached *in duplum*.

[15] Absa, furthermore, maintains that on its own version, MyRoof accepted that the number of invoices that had reached *in duplum* "was never quantified during the argument" nor did anyone even "suggest a figure of what the monetary value of this [*in duplum]* prejudice would entail. It also claims that on MyRoof's version, these details were "simply unknown to both parties", hence there was no evidence before the arbitrator in relation to whether many, if not all, of MyRoof's invoices had reached *in duplum*. Absa argues that there was, likewise, no evidence before the arbitrator of the total Rand value of the interest that MyRoof had lost by virtue of *in duplum* having been reached, yet the arbitrator made, and relied on, a finding of *in duplum* prejudice based entirely on a submission made from the Bar by MyRoof's counsel that "many if not all" the invoices had reached in duplum.

[16] Before I deal with the question of whether the arbitrator's decision to dismiss Absa's extension application is reviewable, I intend to dispose, upfront, with a point of law raised by MyRoof that, the February 2019 award was a final award, and the arbitrator could not revisit it by extending the deadlines for the accounting and debatement exercise as sought in Absa's extension application. MyRoof submits that the deadlines for compliance could not be extended, for the further reason that the award was based on the underlying agreement between the parties which was made an award by consent. It, therefore, argues that the arbitrator was not empowered to vary the terms

of the award as that would amount to impermissibly amending the underlying agreement or making a new agreement for the parties.

[17] MyRoof argues that, had the arbitrator granted Absa the relief sought in the extension application, he would have exceeded his powers as he was bound by the agreement between the parties. I disagree for two primary reasons. The first is that the arbitrator made it clear during argument, in the extension application, that the February 2019 award was an interim award that may be revisited by him. This appears from the transcript of that hearing which forms part of the review record. The second, is that once an agreement between parties is made an arbitration award, it is divested of its contractual force and is made subject to the rules and the agreement that govern the arbitration. In this case it is the MSA and Commercial Rules of the Arbitration Foundation of South Africa ("AFSA rules"). Articles 11.1 read with 11.5 of these rules confer on the arbitrator the "widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings including costs. Article 11.2.14 of the AFSA rules, in turn, also confers on the arbitrator the power "to make rulings or give interim awards on any matter of onus, admissibility of evidence, and of procedure, including awards of an interlocutory or interim nature".[7] Rule 11.2.7, in turn, empowers an arbitrator "to extend before or after their expiry, or abbreviate any time limits provided for in these rules or by his rulings or directions". Although this rule makes reference to rulings or directions, this should not be construed restrictively to preclude an arbitrator from extending time-limits in an interim award where a proper case for such extension has been made out.

[7] Rule 11.2.14 of the AFSA rules.

[18] Thus provided that an award is interim in nature – which the February 2019 award is - an arbitration may revisit or vary the award on application by one of the parties.[8] To suggest that the arbitrator is bound by the agreement that underlies the particular award, would negate the wide discretionary powers that are conferred on the arbitrator in terms of the AFSA rules. The deadlines in the February 2019 award were not set in stone. Like any other time-limit in an arbitration award or court order, the arbitration had the power to extend it.

[19] Concerning the question of whether the arbitrator had committed a gross irregularity in the proceedings, section 33(1)(b) of the Arbitration Act empowers a court to set aside an arbitration award where an arbitrator has committed any gross irregularity in the conduct of the arbitration proceedings. A gross irregularity is a "methodological error which prevents a fair hearing".[9] A decision will be grossly irregular if there is a mistaken action which prevents the aggrieved party from having its case fully and fairly determined.[10] It is only where the mistake is of such a serious nature that it results in the aggrieved party not having its case fully and fairly determined, that a review will be justified on the basis of a gross irregularity.[11]

[20] What is the gross irregularity in the April 2019 award? As alluded to, Absa contends that the arbitrator made a finding about MyRoof's in *duplum* prejudice in the absence of evidence to support that finding. MyRoof argues, to the contrary, that the statement in the award that "the claimants have informed me that the in duplum limit has already

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[8] Compare: *Brian Belcher Projects CC v Vencor Capital (Pty) Limited* 2012 (JDR) 1925 (GSJ) paras 22 to 25.

[9] *Venmop 275 (Pty) Ltd v Cleveland Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at para 28.

[10] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 72 (citing *Ellis v Morgan; Ellis v Dessai* 1909 TS 576).

[11] *Bester v Easigas (Pty) Ltd* 1993 (1) SA 30 (C) at 43B-D.

been reached in many if not most cases, and that will prejudice [MyRoof]", is not a finding, in the legal sense of the word, but is merely an observation.

[21] It is immaterial, in my view, whether this statement is understood to be a finding of fact or an observation because what matters, is that it is a factor which the arbitrator took into account in dismissing Absa's extension application. In other words, the arbitrator relied on statements made from the Bar by my MyRoof's counsel that "the *in duplum* limit has already been reached in many if not most cases and that will prejudice [MyRoof]" in the absence of any supporting affidavit evidence from MyRoof. This mistaken action prevented Absa from having its extension application fully and fairly determined. Simply put, the arbitrator made a methodological or procedural error that prevented a fair hearing of the application, by denying Absa (and MyRoof included) the opportunity to present evidence on affidavit on the question of whether MyRoof would suffer *in duplum* prejudice. This is a grave methodological or procedural mistake (and not a mere technicality) as it imperiled the arbitrator's duty to act fairly in the arbitration proceedings before him.

[22] MyRoof contends, in relation to the duty to act fairly, that the principles which apply to administrative law reviews have no place in arbitration proceedings. MyRoof's contention is misplaced as the Constitutional Court has held in *Lufuno Mphaphuli* that arbitrators have a general duty to act fairly because when parties submit to arbitration, they submit to a process that they intend to be fair. Fairness implies that each party shall be given a reasonable opportunity to present its case and deal with that of its opponent.[12]

[12] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) at paras 221-222.

[23] More recently, this court in *Zamani Marketing and Management Consultants (Pty) Ltd and Another v HCI Invest 15 Holdco (Pty) Ltd and Others*[13] described a review of an arbitration award under section 33 of the Arbitration Act as "a review proceeding by which a court applies legislative and hence public standards to a tribunal that adjudicates a dispute." It held that although "an arbitration tribunal does not exercise public powers", it is "nevertheless held to public standards." And [i]t is the adherence to these standards (required by law) that a court is required to determine" in a review under section 33 of the Arbitration Act.[14] A significant public standard against which a review court assesses the conduct of an arbitration tribunal, is its adherence to the fairness standard in discharging its quasi-judicial functions and duties. The duty to act fairly is thus the cornerstone of arbitration proceedings.

[24] An arbitrator has a margin of appreciation and "the right to be wrong" on the admissibility and weighing up of evidence and these decisions are not reviewable under section 33 of the Arbitration Act. It is quite another matter, however, where an arbitrator makes a decision without any evidence to support the decision. This is a reviewable irregularity as it fatally undermines the fairness of the proceedings by denying the other side the opportunity to interrogate and challenge the facts concerned. Giving judgment against a litigant without any evidence against him or her ignores the very object of the rules of evidence".[15]

[25] The April 2019 award is premised on the fact that the extension of the time periods as specified in the February 2019 would prejudice MyRoof and that this prejudice, in

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[13] *Zamani Marketing and Management Consultants (Pty) Ltd and Another v HCI Invest 15 Holdco (Pty) Ltd and Others* [2020] ZAGPJHC 5 at para 18 (*"Zamani"*).

[14] *Zamani* at para 18.

[15] *Mpemvu v Nqasala* (1909) 26 SC 531 at 534.

essence, outweighed Absa's overpayment prejudice. The arbitrator made this observation not on evidence, but on what MyRoof's counsel informed him from the Bar. He then considered it as a factor in dismissing Absa's extension application. This was patently unfair as it is impermissible for a court to rely on evidence or statements from the bar as a basis for its conclusions.[16] The review record reveals that during the extension application no evidence was presented by MyRoof to establish the existence of its *in duplum* prejudice as it was denied the opportunity to file an answering affidavit. This notwithstanding, the arbitrator relied on the existence of MyRoof's *in duplum* prejudice. In doing so, he denied Absa the opportunity to present evidence to counter the arbitrator's reliance on MyRoof's *in duplum* prejudice, thus denying it a fair hearing. This constitutes a gross irregularity in the conduct of the proceedings which provides sufficient grounds for setting aside the award.

[26] During argument, MyRoof criticised Absa's founding affidavit, in the review application, as containing a bald allegation that "there was no evidence whatsoever of any *in duplum* prejudice". It contends that this is demonstrably wrong and in conflict with a substantial body of evidence before the Arbitrator which inter alia included: (a) an express concession made by Absa's counsel on the first day of the hearing, in the extension application, that *in duplum* interest was in play and that all the cases where excessive interest is claimed (which was a clear reference to *in duplum* having been reached) will be pointed out in a "bundle" prepared by Absa; (c) Absa's own founding affidavit, as read with the "bundle" which was handed up and which conveyed that *in duplum* had

[16] *Resnick v Government of the Republic of South Africa* 2014 (2) SA 337 (WCC) at 342F-G; *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para 96.

been reached in respect of 69 of the 149 invoices which made up the first batch of invoices.

[27] MyRoof accordingly contends that as a result of this evidence and the concessions made by Absa's then-counsel, Absa's entire predicate that there was no evidence tendered about *in duplum* was mistaken. It advances the contention that, provided there was some evidence before the arbitrator that the accounts or invoices had reached in duplum, a finding by the arbitrator could not in law constitute an irregularity, even if it was wrong. MyRoof accordingly contends that Absa's review is impermissible as it is directed at the substance of the award (i.e. that it was wrong), rather than that there was a procedural or methodological defect in the proceedings or that the arbitrator exceeded his powers.

[28] MyRoof has, in my view, completely misinterpreted Absa's pleaded case in the review application. A closer look at the averments in Absa's founding affidavit (referenced below) make it abundantly clear that Absa's pleaded case is not that there was no evidence whatsoever of any *in duplum* prejudice":

> 'Judge Cloete simply assumed that most of MyRoof's invoices had reached *in duplum*, and assumed the amount of interest lost by virtue of in duplum was close to Absa's prejudice (of R81million)… .
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> 'In assessing MyRoof's prejudice, Judge Cloete considered and relied on statements from the Bar about the impact of the *in duplum* rule on MyRoof's claims. Judge Cloete relied on these statements to entirely discount the obvious overpayment prejudice caused to Absa. But there was no evidence before Judge Cloete to show the effect and extent of the in duplum rule on MyRoof's claims.'

'… Judge Cloete simply assumed that most of MyRoof's invoices had reached in duplum, and assumed the amount of interest lost by virtue of in duplum was close to Absa's prejudice (of R81 million) … .'

'… Judge Cloete assumed that in duplum applied and assumed that a rough and-ready equivalence between MyRoof's (unspecified) in duplum prejudice and Absa's (specified) overpayment prejudice… ."

'Judge Cloete ultimately chose an irregular and procedurally unfair hybrid: dispense with answering and replying affidavits, and decided against Absa based on, in substantial part, statements from the Bar with no evidentiary support. As result of this procedure, Absa did not have its extension application fully and fairly determined. The adoption of this procedure resulted in an unfair hearing and a breach of Absa's procedural rights… .'

[29] What Absa's pleaded case makes clear is that there was no evidence before the arbitrator that *in duplum* was reached "in most if not all" of the invoices and that the arbitrator made certain assumptions, based on MyRoof's submissions from the bar that many if not most of MyRoof's invoices had reached *in duplum* and that the amount of interest lost by virtue of *in duplum* was close to Absa's prejudice (of R81million).

[30] MyRoof also misconstrues the so called "concessions" made by Absa's counsel at the hearing of the extension application. As I see it, it was not a concession but rather a statement in Absa's interest that only 69 of 149 invoices had reached in duplum for purposes of Absa's liability. Even if construed to be a concession, this statement does not constitute an admission that "many, if not most" of the invoices reached *in duplum*.

[31] Lastly, Absa's challenge to the April 2019 award is not directed at the substance of the award but at the procedure. As already alluded to, the arbitrator dispensed with answering and replying affidavits, and decided against Absa based on, in substantial part, statements from the Bar with no evidentiary support. As a result of the adoption of this grossly irregular procedure, Absa's extension application was not fully and fairly determined, thus giving rise to an unfair hearing and a breach of Absa's procedural rights. There is accordingly no merit to MyRoof's contentions to the contrary.

[32] In order to counter Absa's case as properly pleaded, MyRoof strategically changed tack, during argument, to contend that there is an evidentiary basis

for the statement of the arbitrator that "many, if not most" of the 6877 invoices had reached *in duplum.* It sought to use a three-step analysis to demonstrate this by: (a) firstly, counting which of the 149 invoices in the Bundle had reached *in duplum* – producing a result of 69 out of 149; (b) secondly, subtracting the 58 "invoices of antiquity" so that one ends up with 69 out of 91; and (c) thirdly, extrapolating the 69 out of 91 to the 6877 accounts and concluding that a minimum of 3185 invoices had reached *in duplum*.

[33] I have difficulty accepting MyRoof's analysis for the simple reason that the evidence in respect of a handful of invoices is not evidence that "many if not most" of the 6877 invoices had reached *in duplum*. To the extent that it seeks to extrapolate from a small set of invoices to a larger set, it had to at least put up an affidavit explaining why this is justified. No such affidavit has been deposed to. It is simply impermissible to do this analysis from the bar, as MyRoof has sought to do.

[34] More critically, this analysis was not presented, on affidavit, to the arbitrator in the extension application – not even from the bar. It is clear from the transcript of the proceedings in the extension application, that the arbitrator was not taken to a single one of the 149 invoices by MyRoof during argument in the extension application. The arbitrator was also not told by MyRoof that 69 of the 149 had reached in duplum. Indeed, on MyRoof's own version (in its answering affidavit) it accepts that "the number of cases of *in duplum* was never quantified in argument.".

[35] What is more, is that MyRoof made no reference at all, during argument before the arbitrator, to the 58 "invoices of antiquity" and how they had to be deducted. Lastly, there was no attempt at all by MyRoof to argue before the arbitrator, that a ratio of 69 out of 91 (or even 69 out of 149) had to be extrapolated to the 6877 accounts. The figure of 3185 invoices was never even mentioned and does not appear from any document. Instead, all that was said by counsel for MyRoof from the Bar was that:

> '…In respect of claim 6 and 7 invoicing has already occurred partially. That's also evident from the bundle. The rest of the invoices will simply be finalised. Most of those invoices are already at the in duplum stage as far as interest is concerned or very close thereto… .'
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> and
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> "… The prejudice is self-evident, on almost all of the invoices in duplum has already been reached which means no further interest will accrue to these invoices… .'

[36] As persuasively contended for by Absa, it is plainly these vague statements from the Bar, with no reference to any evidence, that led to the arbitrator stating that "*in duplum* limit has already been reached in many if not most cases, and that will prejudice [MyRoof]". Since the three-step analysis was not placed before the arbitrator at all, it could not, possibly, have been the basis for his award which was delivered 45 minutes after the conclusion of argument by the parties.

[37] MyRoof's three-step analysis was also not referred to in in MyRoof's answering affidavit in the review application. Although MyRoof's answering affidavit refers to the "bundle" it states merely that "it was evident from the bundle that …. in duplum had been reached in respect of some of the 149 invoices". The answering affidavit does not, however, quantify the number of invoices where in duplum was reached as 69 out of 149. That was done for the first time in MyRoof's heads of argument in the review application.

[38] In respect of the second step: the MyRoof's answering affidavit does not make any reference to the 58 invoices "of antiquity". It also does not say that they have to be deducted so that one ends up with 69 of 91. Similarly, in respect of the third step, MyRoof's answering affidavit does not make any reference to how in duplum over the 69 invoices can be extrapolated to the 6877 invoices. On the contrary, the MyRoof answering affidavit refers to the 149 invoices as "*an unrepresentative sample*" of the 6877 accounts. MyRoof's answering affidavit furthermore omits any reference to the figure relied on, in argument, of 3185 invoices. This is fatal to the case advanced by MyRoof, during argument, as it was not properly made out in its answering affidavit in the review application.[17]

[39] Accordingly, MyRoof's new case as advanced from the Bar during argument is completely lacking in foundation, notably because there has never been any answer from the arbitrator to gainsay Absa's avermnents that he simply

[17] *Genesis Medical Scheme v Registrar of Medical Schemes and Another* 2017 (6) SA 1 (CC) at para 171.

accepted MyRoof's say-so from the Bar regarding "many if not most" of the 6877 invoices that had reached *in duplum* and had no evidence before him in this regard. What is worse, is that there is not even a proper answer on the affidavits from MyRoof to gainsay Absa's allegations that the Arbitrator simply accepted MyRoof's say-so from the Bar that "many if not most" of the 6877 invoices had reached *in duplum*.The most that appears is the vague reference to the fact that "*it was evident from the bundle that …. in duplum had been reached in respect of some of the 149 invoices.*"

[40] This plainly does not establish that there was evidence before the Arbitrator that "many if not most" of the 6877 invoices had reached *in duplum* or evidence regarding the extent of in duplum prejudice. This is especially so where it is common cause that 98% of the invoices had not even been issued yet. Not surprisingly, MyRoof's own affidavit confirms this fact:

> "The number of cases in duplum was never quantified during the argument nor did anyone suggest a figure of what the monetary value of this prejudice would entail. It was simply unknown to both parties."

[41] A further argument advanced by MyRoof is that the arbitrator, in dismissing the extension application, considered other factors in addition to the in duplum prejudice such as the delays since 2016 and Absa's egregious shortcomings in the manner in which it conducted itself, hence the purported denial of a fair hearing made no difference to the outcome of the application. This submission lacks substance for the simple reason that the no

difference principle is not part of our law.[18] This means that when considering whether to set aside any decision, a court does not ask whether the denial of a fair hearing made any difference to the outcome. A right to a fair hearing does not simply dissipate when it is not likely to affect the outcome of a dispute.[19] Even in open and shut cases, an affected party must be provided with the opportunity to meet the case advanced by an adversary. An unfair process can never be countenanced even if a decision-maker might appear to have arrived at the right result.

[42] This applies with considerable force to the present matter where the arbitrator took into account certain factors regarding *in duplum* prejudice based on a statement from the bar and without giving the parties an opportunity to file answering and replying affidavits. MyRoof's contention lacks merit for the further reason that in law, if a decision-maker takes into account any reason for the decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.[20] In the circumstances, it is simply irrelevant that the outcome of the April 2019 award can be justified by the fact that the arbitrator considered factors in addition to MyRoof's *in duplum* prejudice.

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[18] *Van der Walt v S* 2020 (2) SACR 371 (CC) at paras 28-30; *Psychological Society of South Africa v Qwelane* 2017 (8) BCLR 1039 (CC) at paras 32-35 ("*Qwelane*").

[19] *Qwelane* at para 35.

[20] *Patel v Witbank Town Council* 1931 TPD 284-290; *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd* 2017 (6) SA 621 (CC).

[43] MyRoof has filed a lengthy affidavit in this application describing Absa's purported misconduct in relation to the dispute. None of these allegations, in my view, are relevant or sustainable because Absa, like all parties, was entitled to a fair hearing which it was not given, as the arbitrator took into account factors that was not supported by any affidavit evidence at all. Accordingly, MyRoof's criticism of Absa's misconduct during the contract period and the arbitration are irrelevant.

Exceeding his powers

[44] The Arbitrator also exceeded his powers. Since this was an evidence-based arbitration, he was bound by the requirements of clause 15.3 of the AFSA rules which provide:

> "The arbitrator shall apply the South African law of evidence; provided that he may allow a party to present evidence in written form, either as signed statements or in affidavit form , in which event any other party may require the deponent to attend the proceedings for oral examination and cross examination, and if the deponent fails to attend and submit to be examined and cross examined, the arbitrator may exclude such evidence in written form altogether or may attached such weight to it as he thinks fit."

[45] This prescript is peremptory. It did not entitle the arbitrator to take into account submissions from the Bar that was not supported by any evidence. That the parties agreed, at a pre-arbitration meeting, in so far as interlocutory proceedings are concerned, "that an informal procedure shall be adopted where possible and the applicant shall set out the relief sought

in a letter transmitted to the arbitrator and the other party", does not detract from the fact that the extension application was an evidence-based application, as Absa brought it on affidavit and not by way of a letter as contemplated in the parties' pre-arbitration agreement.

[46] This notwithstanding, the arbitrator made a decision based on information from the Bar for which no evidence had been tendered at all by MyRoof. In doing so, he exceeded his powers.

[47] For all these reasons, paragraphs 8.1 to 8.7 of the award falls to be set aside in terms of section 33(1) of the Arbitration Act.

The Appropriate Remedy

[48] Section 33(4) of the Arbitration Act provides that if the award is set aside, the dispute shall at the request of either party, be submitted to a new arbitration tribunal. As a court sitting in review of the April 2019 award, I do not have a discretion to refuse Absa's request under section 33(4) of the Arbitration Act.[21] Absa is accordingly entitled to the relief sought in its amended notice of motion that the dispute be referred to a new arbitrator.

Costs

[49] I see no reason why costs should not follow the result.

[21] *Palaborwa Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd* 2018 (5) SA 462 (SCA) at para 52.

Order

[50] In the result, I make the following order:

1. Paragraphs 8.1 to 8.7 of the award granted by the first respondent on 9 April 2019 in the arbitration between the applicant and the second respondent under the Arbitration Foundation of South Africa's reference number M.192 are reviewed and set aside.

2. The dispute under Arbitration Foundation of South Africa's reference number M.192 is submitted to a new arbitrator to be decided by the parties.

3. The second respondent is ordered to pay the costs of the application which costs are to include the costs of two counsel.

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

Counsel for the applicant: S. Budlender SC with J Mitchell

Instructed by: Webber Wentzel

Counsel for the second respondent: MC Maritz SC with MG Maritz

Instructed by: Tiaan Smuts Attorneys

Date of hearing 5 - 6 December 2020

Date of Judgment: 9 March 2021

(Handed down electronically by email to the parties' legal representative and by being uploaded to *CaseLines*).