REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2174/2021

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

SIGNATURE DATE 24/12/2021

In the matter between:

VERAISON (PTY) LTD	First applicant
TROPICAL PARADISE TRADING 165 (PTY) LTD	Second applicant
And	
MAZARS CORPORATE FINANCE (PTY) LTD	First respondent
BUSAMED GATEWAY PRIVATE HOSPITAL (PTY) LTD	Second respondent
BUSAMED HEALTHCARE (PTY) LTD	Third respondent
BUSAMED (PTY) LTD	Fourth Respondent

J U D G M E N T

KEIGHTLEY, J:

1. When this matter was originally set down for hearing in my opposed motion court for the week of 4 October 2021, I was faced only with an application by the applicants for an order:

> Directing the First Respondent ("Mazars Corporate Finance (Pty) Ltd") to forthwith deal with the valuation of the Consultancy Services Agreement as ordered in terms of paragraph 133.2 of the arbitration award and provide the parties with the Valuation Report in terms of clause 4.1.2.3.2 of the Settlement Agreement within 10 days of the court order.

2. I will refer to that application as “the main application”. The first respondent (Mazars) was joined as a party, but elected to abide although, as will become apparent, it now seems to have entered the fray from the sidelines, so to speak. The remaining respondents, to whom I shall refer collectively as “the Busamed parties” were also joined. No relief was sought against them, but they opposed the grant of the relief sought.

3. On 17 September 2021, in accordance with the Practice Directive in this Division, the applicants, to whom I will refer collectively as “the Veraison parties”, and the Busamed parties filed a joint chronology and a joint practice note. The practice note gave every indication that the matter was ripe for hearing on the allocated date, being 4 October 2021, and the estimated duration of the hearing was one hour. Most surprisingly, on Sunday 3 October 2021, the Busamed parties uploaded onto Caselines a postponement application. It is not clear when it was served on the Veraison parties, but it only came to my attention at the commencement of my opposed motion court week.

4. Consequently, the matter could not properly proceed on 4 October as scheduled. The Veraison parties had to be given an opportunity to file an answering affidavit,

as they indicated that they would oppose the postponement application. The matter was heard later that week, and I directed counsel that they should address me on both the postponement application and the merits of the main application.

5. This judgment deals, in the first place, with the postponement application and thereafter with the main application.

6. By way of background, the parties have been involved in extensive litigation over the years involving various contractual relationships. What is relevant for present purposes is to note that the litigation included an arbitration before Van der Nest SC (the arbitration); an application to review the arbitration award emanating from the arbitration (the review application); and the main application before me.

7. In addition, and much more recently, the Busamed parties instituted a new application in this court (the new Busamed application). The notice of motion in that application was dated 20 September 2021, which was after the joint practice note in the main application was filed, and some ten days before the postponement application was instituted. As I explain below, the postponement application is predicated on the new Busamed application.

8. The principal dispute that was dealt with in the arbitration was the valuation of a Consultancy Services Agreement (CSA). Arising out of a settlement agreement, the parties agreed to refer for determination by way of arbitration the question of whether the CSA was binding and, if so, for the valuation of the CSA to be referred to Mazars. The settlement agreement, which included all Busamed parties, recorded that: "*the determination of the Arbitrator in relation to the Consultancy Agreement shall be final and binding on the parties*". It further recorded that:

> "4.1.2.3 in the event that the Arbitrator finds that-

4.1.2.3.1 there is no obligation on the part of Gateway Private Hospital to comply with the provisions of the Consultancy Agreement, then there will be no need to refer the matter to Mazars for independent valuation;

4.1.2.3.1 if the Arbitrator finds that Gateway Private Hospital needs to comply with the provisions of the Consultancy Agreement, the Parties shall refer the matter within a period of 10 business days … to Mazars for an independent valuation of the value of the Consultancy Agreement."

9. The arbitrator published his award on 7 August 2019. He held that:

"133.1 The first defendant needs to comply with the CSA.

133.2 The matter is referred to Mazars under clause 4.1.2.3.2 of the Settlement Agreement."

10. The first defendant was Gateway Busamed Private Hospital (Gateway). It is common cause that Veraison and Gateway both submitted themselves to the valuation process. By 22 August 2019, each party had signed an engagement letter with Mazars and they had both made submissions to the latter regarding the valuation. Mazars raised a question for clarification relating to Gateway's submission that the Management Services Agreement (MSA), and hence the CSA agreement had been terminated. A clarification meeting was held between Mazars and the parties on 5 September 2019. However, on 9 September 2019, the Busamed parties' attorneys wrote to Mazars indicating that they were instructed to terminate Gateway's participation in the valuation process. They stated that: "*For the avoidance of any doubt, our client is no longer going to comply with the Arbitration Award and hereby withdraws all its submissions made to your offices for purposes of the valuation of the Consultancy Services Agreement*."

11. At the same time, the letter from the attorneys advised that they had been instructed to bring an application for an order, among other things, that the two agreements,

being the MSA and the CSA, were terminated in May 2018, and to review and set aside the arbitration award.

12. The Busamed parties instituted their application (the review application) on 2 October 2019. It sought an order:

12.1. reviewing and setting aside the arbitration award;

12.2. declaring that the MSA was terminated with effect from 29 May 2018;

12.3. declaring that the CSA automatically terminated when the MSA terminated;

12.4. directing that for purposes of the valuation of the value of the CSA in terms of the settlement agreement, Mazars shall take into account the fact that the MSA and the CSA were terminated with effect from 29 May 2018.

13. In the event that the arbitration award was not reviewed and set aside, the Busamed parties sought alternative relief in the form of an order:

13.1. declaring that Busamed (Pty) Ltd and Busamed Healthcare were not bound by the arbitration award insofar as it relates to: the valuation of the value of the CSA; the factors which Mazars shall take into account for purposes of that valuation; the binding effect of the MSA and the CSA; and the payment of the valuation amount determined by Mazars.

13.2. declaring that the two Busamed parties identified above shall not be bound by Mazar's determination of the value of the CSA;

13.3. declaring that there was no valid referral of "the matter" to Mazars as required by the settlement agreement and that Mazars is not duly empowered to conduct the valuation.

14. The Varaison parties opposed the review application, and counter-applied for a declarator that "*the valuation process currently pending before Mazars Corporate Finance (Pty) Ltd was properly referred and validly instituted and Mazars Corporate Finance (Pty) Ltd is hereby authorised and directed to finalise the valuation and provide the parties with the value of the Consultancy Services agreement.*" They also sought an order that: "*The Arbitration Award …. is made an Order of the … Court in terms of section 31 of the Arbitration Act No. 42 of 1965*.".

15. The High Court ordered that the Busamed parties application was dismissed, and that: "*The Arbitration Award by the Arbitrator is made an order of the court as applied for*.". It dismissed a leave to appeal on 31 August 2020. The Busamed parties petitioned the Supreme Court of Appeal but that application was dismissed by the SCA on 8 December 2020.

16. It is common cause that the valuation process has been on hold since the review application was brought. After the SCA had dismissed the application for leave to appeal, the Veraison parties instituted the main application on 21 January 2021. The next day, the Busamed parties applied to the Constitutional Court for leave to appeal. This was dismissed on 4 August 2021.

17. Consequently, by the time the main application was scheduled to be heard by me there was no longer a procedural impediment to Mazar's resumption of the valuation process directed under the arbitration award. In their answering affidavits opposing the main application, the Busamed parties noted that they were seeking leave from the Constitutional Court to appeal the dismissal of their review application. They confirmed that the review application was based on Gateway's submission to Mazars, namely that as a matter of fact the MSA and CSA had been terminated. They said in this regard that: "*A genuine dispute arose between the parties relating*

to whether the termination of the (MSA) and the (CSA) should be taken into account in the valuation of the consultancy services agreement. When the parties did not reach an agreement on this issue, it became necessary for the Busamed Companies to approach the Court for relief … ." Further, that they were: "*… continu(ing) to challenge the High Court judgment and have now applied for leave to appeal to the Constitutional Court.*"

18. It is plain from this that the defence raised by the Busamed parties in the main application was a dilatory one, based on their pending application to the Constitutional Court for leave to appeal their unsuccessful challenge to the High Court order dismissing the relief they had sought in the review application. The difficulty for the Busamed parties, of course, is that the Constitutional Court dismissed their application. It can reasonably be inferred that it was this development that ultimately led to the new Busamed application, and the subsequent application for the postponement.

19. It is well settled that an applicant for a postponement seeks an indulgence from the court. They must show good and strong reasons for that indulgence. This requires the applicant to furnish a full and satisfactory explanation for the circumstances giving rise to the application.[1] The application must be made timeously, as soon as the circumstances justifying the application become known.[2] The application must also be *bona fide* and not simply a tactical manoeuvre for purposes of obtaining an advantage to which the applicant is not legitimately entitled.[3]

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[1] *National Police Service Union and Others v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112C-F
[2] *Shilubana v Nwamitwa (National Movement of Rural Women and Commissioner for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) at 624B
[3] *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NMS) at 315E

20. The grant or refusal of an application for postponement depends on an exercise of a discretion by the court, which discretion must not be exercised capriciously or on the wrong principle. It must be exercised for substantial reasons.[4] The dominant consideration for the exercise of the court's discretion will ordinarily be that of prejudice.[5] The balance of convenience to both parties must be considered and the court must weigh the prejudice that will be caused if the postponement is not granted.[6]

21. As I recorded earlier, the main application was set down while the decision of the Constitutional Court in the Basamed parties' application for leave to appeal was pending. The Constitutional Court refused that application on 4 August 2021. The Busamed parties did not take any steps to delay the scheduled hearing despite this. They agreed in the joint practice note on 17 September 2021 that the matter was ripe for hearing. They then instituted the new Busamed application, which was the precursor to the postponement application, on 20 September 2021, being some six weeks after the Constitutional Court's refusal. And there was yet a further delay: the postponement application was launched on the eve of the hearing of the main application.

22. The Busamed parties do not explain these delays. They have known since early August 2021 that the basis for their opposition to the main application had fallen away. They do not say why they waited six weeks to file their new application, nor do they explain why they did not apply for the postponement timeously. They were challenged in the Veraison parties' answering affidavit in the postponement application on this score, yet still provided no explanation. There is neither a full nor

[4] *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) at 509E
[5] *Myburgh Transport*, at 315F
[6] *Shilubana*, at 624B-C

a satisfactory explanation given by the Busamed parties of the circumstances giving rise to their application for a postponement at such a late stage.

23. It is pertinent in this regard to record that there is a history of delay on the part of the Busamed parties in the litigation. Their review application was filed out of time. They failed to file their heads of argument timeously in the review proceedings and had to be compelled to do so. Their failure to act timeously is not new. This is a relevant factor for me to consider. It goes to the issue of whether the postponement application is *bona fide* and not an attempt to gain a tactical advantage by delaying, even further, a valuation process that commenced in 2019.

24. The Busamed parties place reliance on a letter that was sent by Mazars to the court on 17 September 2021. In that letter, Mazars records that it has no objection to completing its mandate. In fact, it says that its work is "*substantially complete*". However, it says that its position has been complicated by the parties being at odds as to the termination date of the CSA. Rather surprisingly, given that it filed a notice to abide the decision of the court in the main application, which notice has not been withdrawn, Mazars requested that I "*direct the date on which (it) must assume the CSA terminated, if (the court) is inclined to grant the relief the (Veraison parties) seek*."

25. The Busamed parties state that the Mazars' letter was not the reason they launched their new application. However, they say that Mazars' concerns justify those raised in that application. On this basis they say that the new Busamed application is not an attempt to delay the valuation process but is, instead, a genuine attempt to gain necessary clarity as to the basis on which the valuation must be made, particularly as regards the termination date of the CSA. It says that the postponement application is an attempt to remove the impediments to the valuation process.

26. The core of the Busamed parties' case in this regard is that although the arbitration award directed that Gateway must comply with the CSA, and a valuation must be placed on the CSA, as a matter of fact, the CSA had terminated in 2018. This was the sticking point raised by Gateway when it made its submissions to Mazars as part of the valuation process in August 2019. The Veraison parties contend that it was when Mazars indicated that it was not persuaded by Gateway's submission that Gateway withdrew from the valuation process. The Busamed parties proceeded in the review application to seek to obtain judicial confirmation of their contention that the MSA and the CSA were terminated in May 2018. They sought prayers to this effect in the review application. They also sought a prayer directing Mazars to take the alleged terminations into account in carrying out its valuation mandate.

27. As we know, they did not succeed in obtaining this relief as the High Court dismissed their application. Neither the SCA nor the Constitutional Court came to the Busamed parties' assistance by granting them leave to appeal. The Busamed parties' quest for an order confirming that the MSA and CSA were terminated in May 2018 for purposes of the valuation process is at an end. Despite this, they seek to persuade this court that there remains a *bona fide* dispute that requires clarification, and that the new Busamed application will provide it. This, they say, is why the postponement application must be granted.

28. At the hearing of the matter, I heard submissions from both parties on the question of whether or not the relief the Busamed parties seek in the new Busamed application is *res judicata*. The Busamed parties submitted that not all the relief sought in their new application overlapped with the relief that was sought and refused in the review application. This is because the relief in the new application is directed at Mazars, which was not the case in the review application, and new declaratory relief is sought as to what Mazars is bound by in the valuation process.

29. For purposes of determining whether a good case has been made out to grant the postponement, I do not have to decide whether or not the new relief is *res judicata*. That is an issue that may face the court hearing the new Busamed application. However, the strength or weakness of the new Busamed application is a relevant factor for the exercise of my discretion in the postponement application. It is relevant to the question of whether the application is *bona fide*, and it is relevant to the question of prejudice, and the balance of convenience.

30. It seems to me, *prima facie*, that there is much to be said for the Veraison parties' submission that the new Busamed application is an attempt to gain access through the back door to substantially the same relief that already has been finally refused. The aim of the new application, it seems to me, is to attempt once again to obtain judicial confirmation of Gateway's submissions made to Mazars in August 2019, namely, that Mazars must treat the CSA as having been terminated. The Busamed parties did not succeed in obtaining this relief in the review application. In my view, their prospects of obtaining substantially the same relief in their new application, albeit in a different format, are not highly favourable. On the facts presented in this case, it is difficult to avoid the inference that the eleventh-hour institution of the new Busamed application, and the even further delayed postponement application, are indeed attempts to delay the valuation process directed in the arbitration award.

31. It is important to appreciate that the situation the parties now find themselves in arose out of a settlement agreement between them. They resolved to settle their existing disputes in the settlement agreement that ultimately led to the arbitration award. It is a fundamental principle of the rule of law that parties should be held bound to their agreements. They cannot resile from their undertakings if they find the outcome undesirable. The Busamed parties were unhappy with the arbitrator's award. They were entitled to challenge it by way of their review application.

However, they did not succeed in their challenge or in obtaining the further relief they sought. Furthermore, the arbitration award is now an order of court. There is finality on this, as all attempts at an appeal have failed.

32. Plainly, it is in the interests of justice that there should be no further delay in giving effect to that order of court. The Veraison parties will suffer undue prejudice if the main application is postponed in order to provide the Busamed parties with yet another opportunity to attempt to achieve what thus far they have been denied.

33. The Busamed parties submitted that if I refused the postponement application, I would be giving effect to an unenforceable order, which is constitutionally impermissible.[7] This submission is based on their contention that the CSA has terminated. Consequently, they say, it is not clear to anyone, including Mazars, on which basis the valuation should proceed. Further, Mazars has indicated it intends to withdraw from its mandate, and Gateway has withdrawn from the valuation process.

34. The difficulty with this submission is that it is based on a premise that was finally rejected in the review application. The arbitration award is now an order of court. Mazars and Gateway are bound under that order to proceed with the valuation process. The parties must make their submissions to Mazars, which must carry out its mandate. It is not open to Mazars or to Gateway to simply resile from the process.

35. In summary, the Busamed parties have failed to provide a full and satisfactory explanation for the circumstances giving rise to the postponement application. They have not explained the delay in instituting their new application or the delay in filing

[7] *Eke v Parsons* 2016 (3) SA 37 (CC)

their postponement application at the proverbial door of the court. The facts of the case give rise to a reasonable inference that they are seeking a further delay of the valuation process directed under the arbitration award, which is now an order of court. In my view, the new Busamed application does not have sufficient favourable prospects of success to outweigh the prejudice to the applicants in the main application if the valuation process is further delayed. In addition, it is in the interests of justice that the matter proceed to finalisation without further delay.

36. For these reasons, the application for a postponement is refused.

37. As to the main application, as I noted earlier, the defence raised by the Busamed parties was that they hoped for a favourable outcome of their application for leave appeal to the Constitutional Court against the dismissal of the review application. No other defence was raised in the answering affidavit. However, in their practice note and heads of argument, the Busamed parties asserted that the Veraison parties are not entitled to seek the same relief that they sought from, but was not granted by, the High Court in the review application.

38. The submission is made on the basis of prayer for declaratory relief included in the Veraison parties' counter application in the review application.

39. It seems that what the Busamed companies contend is that the High Court did not grant an order authorising and directing Mazar's to finalise the valuation process and, accordingly, that the Veraison parties cannot try to obtain the same relief again in the main application. I am not persuaded by this contention.

40. The High Court plainly made the arbitration award an order of court. A party who has a court order in its favour may seek to ensure that it is carried into effect. It may do so through a variety of mechanisms, one of which is an order to compel

compliance. In their founding affidavit in the main application the Veraison parties aver that the arbitration award is an order of court; it is not suspended by any process; and Mazars are obliged, as a matter of the rule of law, to comply with that Order. It is on this basis that they seek an order directing Mazars to deal with the valuation of the CSA. In substance, what the Veraison parties seek in the main application is an order to compel Mazars to comply with the arbitration award, which is now an order of court. It follows from the order that was granted by the High Court and is consistent with it.

41. As all legal avenues to appeal the High Court order in the review application have been exhausted, that order is of final effect. This means the arbitration award is a final order of this court. There is thus no legal impediment to the relief sought by the Veraison parties being granted.

42. Under the arbitration award the valuation was referred to Mazars in terms of the settlement agreement reached by the parties. The arbitration award also dismissed the defence raised by Gateway that the Veraison parties had to prove that the CSA was still valid and binding. It found that Gateway must comply with the CSA.

43. Mazars has repeatedly stated, until the hearing of the matter, that it is willing to fulfil its mandate under the terms of the engagement flowing from the arbitration award. It has stated that it is close to finalising its valuation. It does not oppose the relief sought in the main application but has, through correspondence and submissions to the court, indicated that it has been placed in a difficult position by the dispute between the parties as to how the valuation should proceed.

44. As I noted earlier, the Busamed parties' attempts, through the review application and the subsequent appeals, to breathe life into its contention that the MSA and CSA were terminated in May 2018 have failed. The application for a postponement

to resurrect substantially the same contention has also failed. In these circumstances, there is no reason why the valuation process cannot be completed as agreed by the parties in their settlement agreement and directed by the arbitrator.

45. In the circumstances, I am satisfied that the Veraison parties are entitled to the relief they seek in the main application. They ask for an order of costs in the postponement application against the Busamed parties on a punitive basis. In my view, such costs are warranted. The Busamed parties offered no explanation as to why they sought a postponement at the door of the court. It was not only the Veraison parties who were inconvenienced by this conduct, but indeed the court itself.

46. I make the following order:

> 1. The application by the second to fourth respondents (the respondents) for a postponement, with ancillary relief, of the main application is dismissed with costs on an attorney and client scale
>
> 2. The First Respondent ("Mazars Corporate Finance (Pty) Ltd") is directed to forthwith deal with the valuation of the Consultancy Services Agreement as ordered in terms of paragraph 133.2 of the arbitration award and provide the parties with the Valuation Report in terms of clause 4.1.2.3.2 of the Settlement Agreement within 10 days of the court order.
>
> 3. The respondents, as defined in paragraph 1 above, are directed to pay the costs of the main application on a party and party scale.

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 December 2021.

R KEIGHTLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date Heard (Microsoft Teams): 07 October 2021

Date of Judgment: 24 December 2021

On behalf of the Applicant: AG South SC

Instructed by: ENS AFRICA INC.

On behalf of the First Respondents: A Morrissey

Instructed by: CLIFFE DEKKER HOFMEYR INC.

On behalf of the Second to Fourth Respondent: K Tsatsawawane

Instructed by: WEBBER WENTZEL