IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case no: **2023-060488**

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

Signature: ..... **Date: 27 March 2023**

In the matter between:

LEBASHE INVESTMENT GROUP (PTY) LTD	First Applicant
TSHEPO DAUN MAHLOELE	Second Applicant
and	
CORAL LAGOON INVESTMENTS 194 (PTY) LTD	First Respondent
ASHBROOK INVESTMENTS 15 (PTY) LTD	Second Respondent
PHILLIP BORUCHOWITZ N.O.	Third Respondent

REASONS FOR ORDER OF 13 FEBRUARY 2023

These reasons are handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading to Caselines.

MOULTRIE AJ

[1] On 13 February 2023, I handed down an order dismissing with costs Part

A of the application in which the applicants sought the stay of the arbitration proceedings currently pending before the third respondent (the Arbitrator). I indicated that reasons would be furnished in due course. These are those reasons.

[2] On 17 April 2018, the applicants (whom I will refer to as Lebashe), and the first and second respondents (Coral and Ashbrook, which is Coral's sole shareholder) concluded a settlement agreement in relation to a dispute that had arisen between them. The dispute related to Lebashe and Coral's respective interests in certain shares in Capitec Bank Holdings Limited held by Lebashe. Clause 9 of the settlement agreement required that further disputes arising out of or relating to the settlement agreement would be determined in arbitration proceedings held in accordance with the rules of the Arbitration Foundation of South Africa (AFSA).

[3] On 18 November 2019, a provisional restraint order was granted in terms of section 26 of the Prevention of Organised Crime Act, 121 of 1998 (POCA) against all of the property of Messrs M Pillay and L Nyhonyha, as well as Regiments Capital (Pty) Ltd and two other defendants, all of whom have been implicated in criminal activities associated with State capture. Since Pillay, Nyhonyha and Regiments are the ultimate beneficial holders of some (but not all) of the shares in Ashbrook and Coral, those shares were restrained and placed under the control of a curator. The provisional restraint order was however discharged by order of this court in October 2020. It is common cause that the restraint order had no effect until the full bench decision of 3 May 2022 referred to below.

[4] In early 2022, a dispute arose concerning the interpretation of the settlement agreement, and on 18 March 2022 Coral and Ashbrook referred that dispute to arbitration before the Arbitrator, seeking a declaratory award in support of their interpretation of the settlement agreement, and directing Lebashe to transfer some of Lebashe's Capitec shares to Coral, plus payment of related dividends, interest and costs. I refer to these as "Coral's claims".

[5] Approximately six weeks later, on 3 May 2022, a full bench of this court upheld an appeal against the discharge of the provisional restraint order and, although it was largely confirmed, the POCA proceedings against Regiments (in respect of which liquidation proceedings remain pending on appeal) were suspended and the property of Regiments was excluded from its ambit.[1] The restraint order in respect of the property of Pillay and Nyhonyha has not been discharged or suspended and the POCA proceedings remain pending.

[6] At a pre-arbitration meeting held on 6 May 2022, it was agreed that AFSA's Commercial Arbitration Rules would apply to the arbitration proceedings.[2] However, Lebashe raised concerns about the lawfulness of the continuation of the proceedings in view of the full bench's order issued three days previously, and it was recorded in the minute that the delivery of Lebashe's statement of defence would be "*subject to [its] view on the continuation of these proceedings by [Ashbrook and Coral] in light of the preservation order granted in favour of the NPA and appointment of the curator bonis*".[3]

[7] Following various exchanges between the parties pursuant to which Ashbrook and Coral's attorneys furnished certain powers of attorney executed by the curator, Ashbrook and Coral on 24 May 2022, it was agreed at a further pre-arbitration meeting held on 20 June 2022 that the "*jurisdiction issue"* raised by Lebashe regarding the lawfulness of the arbitration proceedings "*will be dealt with by way of a pleaded case*" in the form of a special plea.[4]

[8] On 1 July 2022, Lebashe delivered the special plea seeking an award from

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1 *National Director of Public Prosecutions v Wood and Others* [2022] ZAGPHC 272; [2022] 3 All SA 179 (GJ) paragraph 301.2(b) and (d).

2 Minute of 6 May 2022, para 3.1.

3 Id. para 4.2.

4 Minute of 20 June 2022, para 2.1.

the Arbitrator staying the arbitration proceedings pending (a) the conclusion of the POCA proceedings "*against*" Ashbrook and Coral;[5] "*and/or (b)* "*the determination of any dispute by the High Court in relation to the meaning and effect of the restraint order and the questions of whether the pending proceedings are lawful and/or whether the curator has the power or capacity to act therein*".

[9] The pleaded basis for this relief, as set out in paragraphs 8 to 10 of the special plea was that:

(a) Coral's claims constitute realisable property that is subject to the restraint order[6] and Ashbrook and Coral, as well as Lebashe and the Arbitrator himself "*(having knowledge of the restraint order) are prohibited from dealing with [Coral's claims] in [the] arbitral proceedings and cannot lawfully continue with the proceedings*" by section 5 of the order made in terms of section 26(1) of POCA;[7]

(b) the "*curator does not have the power or capacity to represent the [Ashbrook and Coral] in the arbitral proceedings and/or to continue such proceedings*"[8] and the powers of attorney furnished on 24 May 2022 are "*invalid and of no force and effect*";[9] and

(c) the Arbitrator "*does not have the power or jurisdiction to determine any dispute in relation to the meaning and effect of the restraint order and/or the questions of whether the pending proceedings are lawful and/or whether the curator has the power or capacity to act therein*", and "*such disputes and questions must be determined by*

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5 It is common cause that Ashbrook and Coral are not defendants in the POCA proceedings, and that they were cited as respondents because certain of their shares and assets were the subject of the restraint order.

6 Special plea, para 8.1.

7 Special plea, para 8.2.

8 Special plea, para 8.3.

9 Special plea, para 8.4.

the High Court".[10]

[10] Ashbrook and Coral delivered a replication in which they disputed all of these contentions.

[11] Although provision was made in the minute of a further pre-arbitration meeting for the adducing of evidence in the form of witness statements and documentation, the parties agreed that the special plea should be argued and determined solely as a point of law, without the submission of any evidence.

[12] On 14 November 2022, the Arbitrator delivered an interim award dismissing the special plea with costs ("*the interim award*"), thus effectively allowing the arbitration proceedings to continue. The Arbitrator reasoned that:

(a) he was empowered by Article 8 of the AFSA Commercial Rules, and the agreement reached at the pre-arbitration meeting of 20 June 2022 to inquire into the question of whether the restraint order rendered the arbitration proceedings invalid and inoperative, for the purpose of deciding whether to proceed with the arbitration or not, but that the outcome of this inquiry "*would only determine the rights and obligations between the [parties and] would not have any binding effect on [non-parties,] and would not prejudicially affect them*";

(b) even assuming that Coral's claims constituted property (he did not take a view this question), the continuation of the arbitration proceedings would in his view not constitute "*dealing with*" them in breach of paragraph 5 of the restraint order because:

i. the purpose of the prohibition against dealing with restrained property is "*to prevent conduct such as the disposal, removal,*

[10] Special plea, paras 9 & 10.

sale, trading, encumbering, transferring or concealment of the property", whereas the arbitration proceedings would "*simply resolve a dispute between the parties regarding their existing rights*" and "*the preservation of the property will in no way be imperilled by the grant of an arbitration award*";

ii. it is only if Coral should be found to be legally entitled to Lebashe's Capitec shares and the other moneys claimed, that Coral's claims would potentially become "*realisable property*" that would have to be surrendered to the curator; and

iii. in any event, the Arbitrator would have no power to compel Lebashe to comply with such an award, and only a court of competent jurisdiction could do so; and

(c) the powers of attorney are not invalid because even if continuing with the arbitration proceedings would involve dealing with restrained property, the curator was empowered to deal with it in terms of paragraphs 8, 9 and 15 of the restraint order; and under paragraph 17 of the restraint order, he may authorise any person to exercise his power to do so, provided that the expenditure incurred in this regard is subject to the controls set out in Annexure B to the order.

[13] On 29 November 2022, Ashbrook and Coral's attorneys demanded that Lebashe file a statement of defence immediately, but on the same day the Arbitrator proposed a further arbitration meeting to agree on a hearing date and that if the parties did not agree on the timeline, he would issue a directive in this regard. The meeting was set for 7 December 2022.

[14] Shortly before the meeting of 7 December 2022, Lebashe's attorneys indicated that they had been instructed to launch an application to review and set aside the interim award, and in the alternative to seek an order in terms of section 3(2) of the Arbitration Act. They indicated that the application would be launched by 19 December 2023 and proposed that

the arbitration proceedings be stayed pending the adjudication of the application.

[15] This proposal was not accepted, and the Arbitrator issued a procedural directive for the further conduct of the arbitration proceedings. Apart from directing Lebashe to deliver a statement of defence by 15 December 2022, the Arbitrator required (i) both parties to deliver their discovery by 31 January 2023; (ii) that the arbitration bundles be finalised by 20 February 2023; and (iii) that witness statements be delivered by both parties by 28 February 2023. A further arbitration meeting was scheduled for 23 February 2023.

[16] Although Lebashe delivered the statement of defence on 15 December 2022 as required, the present application was served on 17 December 2022. Part A (set down for 31 January 2023) seeks the stay of the arbitration proceedings on an urgent basis pending the determination of Part B, in which orders will be sought:

(a) reviewing and setting aside the interim award in terms of section 33(1)(b) of the Arbitration Act, 42 of 1965 ("*the review relief*"); and

(b) declaring that the arbitration agreement forming part of the Settlement Agreement shall cease to have effect with reference to Coral's claim in terms of section 3(2)(c) of the Arbitration Act ("*the section 3(2) relief*").

URGENCY

[17] The ordinary time periods set out in Rule 6(5)(ii) for the delivery of a notice of intention to oppose and answering affidavits were considerably curtailed in Part A of Lebashe's notice of motion. Taking into account the *dies non* provided for in Rule 6(5)(ii)(aa), the notice of motion afforded the respondents only two court days (until 9 January 2023) to indicate their opposition to Part A of the application, and a further seven court days (until 18 January 2023) within which to file their answering affidavit – though the

answering affidavit was ultimately only delivered on 20 January 2023. Lebashe filed a replying affidavit four court days later, on 26 January 2023, three court days before the matter was to be enrolled on the urgent motion court roll of 31 January 2023.

[18] Despite these tight time periods, I was satisfied that Lebashe had established grounds for an urgent audience pending the determination of the review relief in Part B. Given that significant work relating to discovery and witness statements had to be undertaken as early as February 2023 should the arbitration proceed, I was satisfied that (if the interim relief justified), Lebashe would not be able to obtain substantial redress at a hearing in due course, as contemplated by Rule 6(12)(b).[11] Furthermore, it was only on 7 December 2023, that it had become clear that that the arbitration proceedings were indeed to proceed without delay. The period between the setting of the arbitration timetable on that date and the delivery of the application on 17 December 2022 was not unduly excessive when it is considered that the respondents were afforded about a month (albeit over the *dies non* and holiday period) within which to deliver answering affidavits in relation to issues that had already been extensively canvassed before the Arbitrator.

[19] However, the same does not apply in relation to the section 3(2) relief. An urgent application ought not to be countenanced where the circumstances relied upon by an applicant as the basis for the relief it seeks have been present for a long time and the application could reasonably have been instituted at an earlier stage (and perhaps even in the normal course), with the result that any urgency is self-created.[12] All of the grounds advanced

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[11] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 paras 6 – 7 it was noted that this formulation asks a different question from whether the applicant has demonstrated a reasonable apprehension of irreparable harm for the purposes of an interim interdict (i.e. would irreparable harm be suffered if the interim relief is not granted and the final relief is ultimately granted).

[12] *Schweizer Reneke Vleis Mkpy (Edms) Bpk v Die Minister van Landbou* 1971 (1) PH F11 (T) F11-2; *Freedom Under Law (RF) NPC v National Director of Public Prosecutions* [2015] ZAGPPHC 759 paras 45 – 46, approved by the Constitutional Court in *Black Sash Trust v Minister of Social Dev (Freedom Under Law Intervening)* [2017] ZACC 8; 2017 (3) SA 335

for the section 3(2) relief[13] were present from the time that the restraint order was reinstated by the full bench on 3 May 2022. It is apparent that Lebashe became aware of the full bench's decision very shortly thereafter, as it was referred to at the pre-arbitration meeting held on 6 May 2022. Despite this, Lebashe raised none of these grounds in support of the request (in the form of the special plea) to the Arbitrator to stay the arbitration proceedings. The position is exacerbated by the fact that the respondents were then afforded limited time to respond to and prepare to argue an entirely 'new' case (i.e. one which had not already been ventilated before the Arbitrator). In the circumstances, I decline to entertain Part A insofar as it is premised on the section 3(2) relief.

THE MERITS

The need to establish a *prima facie* right to the required standard

[20] It is common cause that the relief sought by Lebashe in Part A is in the nature of an interim interdict.

[21] It is furthermore trite that the grant of such relief requires the court to consider four factors: (i) a *prima facie* right, though open to some doubt; (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (iii) a balance of convenience in favour of the granting of the interim relief; and (iv) the absence of any other satisfactory remedy.

[22] It is often stated that the proper approach when considering whether an applicant has established a *prima facie* right is to …

> *… to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities,*

(CC) para 35. See also *Lindeque v Hirsch* in Re: *Prepaid24 (Pty) Limited* [2019] ZAGPJHC 122 para 10.

[13] These are set out in paragraph 31 of the founding affidavit.

the applicant [should not could] on those facts, obtain final relief [in Part B]. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be … protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.[14]

[23] Lebashe's counsel sought to persuade me that I should apply:

(a) *Ferreira v Levin* in which it was held that the "*threshold*" to be overcome by the applicant is to show that "*[t]here is a prospect of success in the claim for the principal relief albeit that such prospect may be assessed as weak by the Judge hearing the interim application*";[15] and

(b) the approach of Holmes J (as he then was) in *Olympic Passenger Service* holding that "*where [the applicant's] prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. … In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need*

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[14] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 as qualified in *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688E and approved in *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228G–H.

[15] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1995 (2) SA 813 (W) at 824 – 825 and 832 – 833.

for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him".[16]

[24] In my view, these *dicta* cannot be read as implying that a mere notional possibility of success (i.e. anything more than "*nil*") is sufficient to establish a *prima facie* right though open to some doubt. To do so would be to effectively nullify the 'qualification' of *Webster v Mitchell* in *Gool* requiring applicants – even "*in ordinary interdict applications*" (i.e. where they are not seeking to restrain the exercise of statutory powers) to show that they "*should (not could)*" obtain final relief in due course. As noted above, the *Gool* approach was subsequently approved by the Appellate Division in *Simon*. The reference to *Ferreira* by the Constitutional Court in *SA Informal Traders Forum v City of Jhb*[17] cannot be regarded as approval of the standard proposed by Lebashe – especially since the court concluded (at paragraph 28) that "*[t]he relief sought in the pending review in Part B of the notice of motion is likely to be granted and thus bears prospects of success*".

[25] In other words, the "*threshold*" remains whether the court hearing the application for interim relief is of the view that the applicant should (not merely could) obtain final relief in the main proceedings, and it is only if that threshold is met that it will proceed to undertake the weighing exercise contemplated by Holmes J.[18]

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[16] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D-G. Approved by the Appellate Division in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) at 691F per Holmes JA (as he subsequently became).

[17] *SA Informal Traders Forum v City of Jhb* [2014] ZACC 8; 2014 (4) SA 371 (CC) para 25 fn 24.

[18] I note that there are also circumstances (i.e. where (i) there are no disputes of fact, (ii) the final relief turns purely on questions of law; (iii) which are not novel or overly-complex; and (iv) which have all been fully ventilated in argument; (v) there is sufficient time for the court to duly consider them and reach a definitive decision; and (vi) the court itself has jurisdiction in relation to the final relief) under which it may be appropriate for the court hearing the interim interdict to determine the final relief (*Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 (23 December 2022) per the majority at paras 250 and 251 and the minority at paras 70, 140, 155 and 156. I did not follow that approach in the current matter in view of the facts that (i) Lebashe had not filed a replying affidavit in relation to the

Review under section 33(1)(b) of the Arbitration Act

[26] The basis of Lebashe's contentions before me regarding prospects of success in the review was essentially that the three grounds advanced for the special plea (see paragraph 9 above) also constituted grounds of review under section 33(1)(b) of the Arbitration Act.[19]

[27] Before considering each of these grounds, it is necessary to make some observations about the circumstances under which a court may review and set aside the award of an arbitrator under section 33(1)(b).

[28] An arbitrator "*exceeds his powers*" only by purporting to exercise a power which he did not have: the erroneous exercise of a power that he did have does not involve an excess of power.[20] An error of interpretation does not involve an arbitrator exceeding his powers. As the Supreme Court of Appeal held in *Telcordia*,

> *it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a*

Part B relief; and (ii) did not pursue all of the grounds of review raised in the founding papers in argument before me, and I do not know whether these would be pursued before the court hearing Part B after delivery of replying affidavits.

19 Lebashe's heads of argument, paragraphs 6.5 and 27.1.

20 *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 52.

transgression of his powers it would mean that all errors of law are reviewable, which is absurd.[21]

[29] Where an arbitrator has the power to make a decision, the mistaken exercise of that power ("*irrespective of how erroneous, factually or legally, the decision was*") does not constitute a basis for a court to overturn the award. This was established by the Appellate Division as early as 1915 and it is still the law that such an error is not a "*gross irregularity*" under section 33(1)(b) of the Arbitration Act. A mistake only potentially constitutes a ground of review if it can be shown that it "*was so gross and manifest that it could not have been made without some degree of misconduct or partiality, in which event the award would be set aside not because of the mistake, but because of misconduct*".[22] Thus, an error of law (even a "material" one) is not a ground of review under section 33(1)(b).[23]

[30] The general principle is that a "*gross irregularity*" is limited to an irregularity related to the conduct of the proceedings rather than to the merits of the decision, with the qualification that where an arbitrator misconceives his mandate, or his duties in connection therewith, with the result that a party is denied a fair hearing or a fair trial of the issues, that could constitute a gross irregularity.[24] Lastly, an error of interpretation does not amount to a misconception of the nature of the enquiry and therefore to a gross irregularity.[25]

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[21] Id. para 86.

[22] *Telcordia* (above) para 56 to 67, referring to *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174-6. See also *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd* 2008 (2) SA 608 (SCA) para 35 and *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* ([2018] ZASCA 23; 2018 (5) SA 462 (SCA) paras 7 - 8.

[23] *Telcordia* (above) para 67.

[24] Id. paras 72 – 73; *Palabora* (above) para 8.

[25] Id. para 85.

The Arbitrator's power to interpret the restraint order and make a finding on the lawfulness of the proceedings

[31] Logically, it is appropriate first to consider Lebashe's contention that the Arbitrator's interim award is reviewable because the interpretation, meaning and effect of the restraint order, and in particular the determination of the issues whether the continuation of the arbitration proceedings would constitute "dealing with" Coral's claims in breach of the restraint order and whether the curator has the power or capacity to act therein, were questions that only the High Court is empowered to determine.

[32] While Lebashe did not refer me to any authority for the proposition that the Arbitrator was not empowered to determine these questions, the argument proceeds on the following basis:

(a) The restraint order is an order *in rem* (i.e. one that "*determines the objective status of a person or a thing*"),[26] but it is common cause that the Arbitrator's interpretation thereof is binding only on the parties to the arbitration, not on anybody else bound by the order, nor on a court, which may interpret it differently.

(b) The restraint order can have only one meaning and effect, which "*should*" be determined (for all purposes and as against all people) by the court that made it (and which has the power to vary or rescind it,[27] and which oversees the exercise of the curator's powers).[28]

(c) The Arbitrator's interpretation of the restraint order "*may lead to uncertainty and a lack of finality*", and in particular could lead to a situation in which even if Lebashe is successful in the arbitration proceedings, the National Director of Public Prosecutions "*could still*

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[26] *ACSA v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 2.

[27] POCA, sections 26(10), 28(2) and 28(3).

[28] POCA, sections 28(1)(a).

contend that [the] award is not binding on her and that she is entitled to (re)prosecute the claims against Lebashe herself".

[33] It would appear to be Lebashe's contention that the interim award is reviewable under section 33(1)(b) because the Arbitrator exercised a power that he does not have, or because he misconceived the scope of his mandate.

[34] I do not think that this ground of review applies in the current circumstances, where the parties have expressly agreed (by means of the arbitration clause in the settlement agreement[29] together with the minutes of the pre-arbitration meetings recording the parties' agreements that AFSA's commercial rules would apply) that the Arbitrator would deal with the jurisdiction issue raised by Lebashe.

[35] Although an arbitrator does not have the power to "*fix"* or alter the scope of his jurisdiction,[30] the SCA has recently confirmed that the "*parties may agree that disputes arising as to the validity or enforceability of an agreement must be determined by way of arbitration and not before the courts"* and that where this is the case, an arbitrator's "*exercise of this competence is precisely what the parties intended.*[31] The SCA also observed that AFSA's commercial rules: "*grant a wide power to the arbitrator to rule on questions of jurisdiction*".[32]

[36] Furthermore, I do not think that the interim award trenches upon the *in rem* character of the restraint order:

(a) In the first place, the restraint order is *in rem* only to the extent that it "*determines the objective status*" of certain property as restrained

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[29] Especially clause 9.7.10.

[30] *Radon Projects (Ply) Limited v NV Properties (Pty) Ltd and Another* 2013 (6) SA 345 (SCA) para 28.

[31] *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh* NO 2022 (4) SA 420 (SCA) paras 28 and 29.

[32] Id. para 26.

property, not because it imposes limitations on whether and in what manner that property may be dealt with and by whom. The *in rem* character of the restraint order does not extend to those issues. In making the interim award, the Arbitrator respected the *in rem* character of the order (or at least Lebashe's interpretation thereof) by assuming that Coral's claims have the objective status of restrained property, and only decided that the continuation of the arbitration proceedings did not involve dealing with Coral's claims contrary to the terms of the restraint order.

(b) Secondly, this is demonstrated by the very fact that Lebashe concedes that the Arbitrator's interpretation of the restraint order would only determine rights and obligations as between the parties to the arbitration, and would not have precedential or binding effect on parties that are not party to the arbitration.

[37] In the circumstances, I conclude that the Arbitrator (i) was expressly given the power to determine Lebashe's challenge to his jurisdiction; (ii) was entitled (and indeed required) to interpret and apply the restraint order in doing so; and (iii) did not misconceive his mandate, or his duties in connection therewith (and there is no suggestion that Lebashe was denied a fair hearing or a fair trial of the issues).

[38] Neither the fact that the Arbitrator determined the question of his own jurisdiction in circumstances where his power to do so was not an exclusive or final one; nor the fact that he may have done so incorrectly; nor the fact that that may be expected lead to uncertainty or inefficiency due to a potential need to relitigate the same issues in a different forum if a court reaches a different conclusion in due course constitutes an excess of powers or a gross irregularity under section 33(1)(b).

<u>The power and capacity of the curator to represent Ashbrook and Coral and/or to continue the arbitration proceedings</u>

[39] With regard to Lebashe's contention that the curator does not have the

power or capacity to represent Ashbrook and Coral in the arbitration proceedings and/or to continue them himself and that the powers of attorney furnished on 24 May 2022 are invalid and of no force and effect, I do not think that this gives rise to any ground of review.

[40] Nothing in the Arbitrator's interim award has the effect of allowing the curator to continue the arbitration proceedings himself (i.e. in his own right). The powers of attorney submitted to the Arbitrator were executed by the curator (together with the directors of Ashbrook and Coral) and purport to appoint attorneys to act on behalf of Coral and Ashbrook (not on behalf of the curator in his own right) in pursuance of Coral's claims in the arbitration.

[41] Assuming (without deciding) that Coral's claims are restrained property and that they are indeed being "*dealt with*" in the arbitration, the curator's appointment of attorneys to act on behalf of Ashbrook and Coral is perfectly appropriate under POCA and the terms of the restraint order, and gives rise to no exceeding of powers or commission of a gross irregularity by the Arbitrator. Ashbrook and Coral are parties "*against whom the restraint order has been made*" as contemplated in section 28(1)(a) of POCA. This section empowers a High Court making a restraint order to confer a range of powers upon a *curator* to perform acts "*on behalf of*" such parties, including "*to perform any particular act in respect of any of or all the property to which the restraint order relates*" and "*to administer the … property*". The restraint order in turn expressly confers powers on the curator to "*act in any capacity required to … administer*" the restrained property.[33]

[42] Furthermore paragraph 17 of the restraint order provides that "*the curator bonis may, where it is expedient for the effective execution of this order, authorise in writing any person who, in his view, is capable of acting on his behalf, to exercise on his behalf any of the powers, duty and authority*

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[33] Restraint order, para 8 and 13.

conferred on him, and may engage such agents… or service providers as he deems necessary", provided that the controls set out in Annexure B are complied with in relation to any expenditure.[34]

[43] Thus, even if Lebashe is correct that the court granting the restraint order had no power to permit the curator to "*deal with all the property as if he himself were its owner or holder*",[35] and even if this portion of the order may simply be ignored as Lebashe contends (matters on which I decline to take a view), I have little doubt that the curator's powers include the power to deal with Coral's claims in the arbitration on behalf of Ashbrook and Coral, and to appoint Ashbrook and Coral's attorneys to do so.

[44] In the circumstances, to the extent that the Arbitrator's interim award had the effect of allowing the curator to deal with Coral's claims in the arbitration on behalf of Ashbrook and Coral, I find that it did not constitute an excess of power or a gross irregularity that would entitle Lebashe to the review relief sought in Part B.

Would the conduct of the arbitration involve "*dealing with*" Coral's claims?

[45] That leaves the question whether Lebashe established a *prima facie* right to the review relief on the basis that the Arbitrator committed a gross irregularity when he found as a matter of law that the conduct of the arbitration proceedings did not constitute "*dealing with*" Coral's claims in breach of paragraph 5 of the restraint order or section 26 of POCA.

[46] Having concluded that the Arbitrator had the power to make this finding one way or another, however, it would be irrelevant to investigate the question whether the Arbitrator's finding was correct or not for the purposes of determining whether Lebashe has made out a *prima facie* right to the review relief.

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[34] Restraint order, para 17. There is no suggestion before me that these controls have not been complied with.

[35] Restraint order, para 15.

[47] As noted above, an error of interpretation, even one that may involve a material error of law, does not involve the Arbitrator exceeding his powers or committing a gross irregularity.

Conclusion: *Prima facie* right

[48] In the circumstances, I am of the view that Lebashe did not establish that it "*should (not could)*" be granted the review relief sought in Part B on the grounds advanced for that relief (at least before me). As such, Lebashe failed to demonstrate the existence a *prima facie* right open to no more than merely "*some doubt*".

The other factors

[49] With the prospects of success not having been established to the required standard, the other factors are irrelevant.

[50] But even if the relevant threshold had been reached and this was an appropriate case in which to undertake the 'weighing' exercise contemplated in *Olympic Passenger Services* and *Eriksen Motors*, Lebashe's prospects of success in relation to the review relief could, at very best, be described as weak, for the same reasons set out above.

[51] On that approach, I do not think that the remaining factors militate in favour of the grant of the interim interdict. In particular, Lebashe has not established a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted. Even if I assume (as I am required to do for the purposes of this enquiry) that the final review relief will ultimately be granted and the Arbitrator's interim award will be set aside, that will not have the effect of interrupting the arbitration proceedings. The harm that Lebashe alleges to be suffering (i.e. having to take part in an unlawful process under potential penalty of criminal sanction) will simply not be addressed by the grant of the review relief in Part B.

CONCLUSION

[52] In summary, therefore, the reasons for the order that I gave on 13 February 2023 were as follows:

(a) any urgency that may have attached to the application on the basis of the section 3(2) relief was self-created;

(b) Lebashe failed to establish the existence of a *prima facie* right to the required standard, namely that it should obtain final review relief in Part B, (and in any event the prospects of success in relation to the review relief were weak, and the remaining factors did not favour the grant of the interim relief).

[53] As to costs, I saw no reason to depart from the usual principle that the successful party should be awarded its costs. I do not consider that the application constituted an abuse of process as Ashbrook and Coral sought to contend.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD:	1 February 2023
ORDER:	13 February 2023
REASONS:	27 March 2023

APPEARANCES

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