IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

11/6/2014 DATE

SIGNATURE

CASE NO: 49962/2013

11/6/2014

IN THE MATTER BETWEEN:

FOURWAYS PRECINCT (PTY) LTD **APPLICANT**

AND

BENTEL ASSOCIATES INTERNATIONAL (PTY) LTD **FIRST RESPONDENT**

VAN DIJKHORST, K **SECOND RESPONDENT**

JUDGMENT

TOLMAY, J:

INTRODUCTION:

[1] This is an application in terms of section 33(1)(b) alternatively section 32(2) of the Arbitration Act 42 of 1965 ("the Act) for review of an award on a special

plea made on 5 July 2013 by the second respondent (the Arbitrator) who has not filed notice of opposition and thus presumably abides by the decision of this court.

[2] The applicant seeks the following relief:

2.1 That the arbitration award issued on 5 July 2013 be set aside in terms of sec 33(1) of the Act;

2.2 Alternatively that the matter be remitted in terms of sec 32(2) of the Act to the second respondent to adjudicate on the claims struck out in his 5 July 2013 award.

[3] It is alleged by applicant (Fourways) that the Arbitrator committed a gross irregularity and/or exceeded his powers in making his award on 5 July 2013 on a second special plea raised by the first respondent (Bentel), where all but 2 claims of Fourways were struck out.

THE BACKGROUND:

[4] Bentel is a company who renders architectural services and who did the design of a shopping mall for Fourways. The parties entered into a written agreement (client/consultant agreement) to this end.

[5] A dispute arose between Fourways and Bentel pertaining to the payment of a portion of Bentel's professional fees in the amount of ± R5 000 000-00. Bentel claimed payment from Fourways for professional fees and that claim was referred to arbitration before the Arbitrator in 2009. Fourways defended this claim and raised a counter-claim (the 2010 claim). The parties settled Bentel's claim on 29 September 2010 and postponed Fourways' counterclaim *sine die*. Further disputes arose and Fourways as a result of this paid Bentel only half of the sum it was obliged to pay under the settlement agreement and did not pursue its 2010 claim. Fourways' failure to make payment in terms of the settlement agreement was again referred to the Arbitrator. Fourways disputed the Arbitrator's jurisdiction and the Arbitrator ruled he had jurisdiction to hear that dispute and found for Bentel pertaining to the payment of the amount outstanding in terms of the settlement agreement. Fourways thereafter filed a number of amendments to its counterclaim, finally culminating in the so-called 2013 claims. These claims were postponed to 1 – 19 July 2013. Bentel raised two special pleas against the claims.

[6] By agreement between the parties, the first week of the hearing in July 2013 was devoted to three preliminary matters, namely, the first special plea, the second special plea and Bentel's claim in respect of rectification. Only the first special plea and the second special plea were ruled upon.

[7] The first special plea raised questioned the jurisdiction of the Arbitrator. It contended that none of Fourway's claims had been referred to the Arbitrator in

accordance with the provisions of clause 18.1 of the client/ consultant agreement and was accordingly not before the Arbitrator.

[8] The Arbitrator, after considering the parties' argument, held that there had been proper compliance with the provisions of the relevant rules and stated as follows: "*[t]he history shows actual conferment of jurisdiction upon myself by both parties in respect of the counterclaim.*" He accordingly dismissed the first special plea.

[9] After handing down his award on the 3rd of July 2013, the parties proceeded to argue the second special plea. There was no indication by any of the parties during argument that evidence was required in order to determine the second special plea. The relevance of this will become apparent later on in the judgment.

[10] The second special plea was raised in the alternative to the second special plea and in the event that it was found that Fourways' claims were competently before the Court. The second special plea contended that certain of the claims were raised outside the liability limitation period agreed upon in clause 7.3 of the client/consultant agreement.

[11] Clause 7.3 of the client/consultant agreement provides as follows:

LIMIT OF CONSULTANT'S LIABILITY

... 7.3 All claims against the consultant (being Bentel) shall lapse after a liability period of five (5) years which period shall commence on the earlier date of

7.3.1 practical or other equivalent completion of the works;

7.3.2 completion by the consultant of his services;

7.3.3 suspension, postponement, expiry, cancellation or termination of all the contracts;

7.3.4 cancellation or termination of this agreement."

[12] Bentel contended that as the certificate for practical completion of the works was issued on 27 June 2007 the five years period stipulated in clause 7.3 of the client/consultant agreement therefore commenced on 27 June 2007 and ended on 26 June 2012.

[13] The issues that stood for determination in respect of the second special plea were the following:

13.1 what the meaning was of the term "claim" as used in clause 7.3 of the client/consultant agreement and whether the meaning contended for by Bentel limited Fourways to claims made and particularised in its 2010 claim; and

13.2 whether the items marked in red in Annexure "**BA3**" to Bentel's plea constituted "new claims" that were time barred.

[14] Fourways contended that the claims were not new claims but merely reformulated the claim already made and that therefore the claims would not fall outside the liability period.

[15] After considering the meaning of the word "lapse" as used in clause 7.3, the Arbitrator held as follows in the Award:

> "15 [...] The important word in clause 7.3 is "lapse". It means in this context: become void, fall away, come to an end, become invalid, in Afrikaans: verval, afloop, verstryk. Compare Shorter Oxford English Dictionary, Collins Cobuild Essential English Dictionary and Bosman van der Merwe Hiemstra Tweetalige Woordeboek. After the liability period all claims become void, fall away. There are no more claims in existence. There is nothing to arbitrate about. Whether the claims have been notified, discussed, debated, put in expert reports or made in whatsoever manner or whether they have not yet been contemplated, it matters not. They fall away.
>
> 16. Strictly speaking that would apply to claims subject to arbitration also. But a distinction has in my view to be drawn. Once the arbitration procedure has been set in motion, a dispute has been declared and the arbitrator appointed is seized with the dispute and the arbitration runs its course as provided for in the Rules and arbitration law. This is not only obvious, it follows also from the power given him in clause 18.10 to "determine all matters in dispute which shall be submitted to him." It cannot have been intended by the parties to the Agreement that clause 7.3 would bring a pending arbitration to an untimely end.

17. It follows that as all claims have fallen away at the end of the liability period, the claims that remain are ringfenced by the reference to arbitration. That is claims which exist before the arbitrator on that date. The arbitrator is not empowered to hear claims that do not exist and claims that are not before him on that date. In our context it means the issues as defined by the pleadings on the 26 June 2012. This does not mean pleadings could not be amended after that date (e.g. to clarify a point) but an extension of the scope of the claim or the insertion of a new claim would be ultra vires his powers.

18. A claim in the context of clause 7.3 is not merely the assertion of a right, it is coupled to a demand for compensation of which details are given. In view of the purpose of clause 7.3 a material variation of the basis of the claim or of the compensation claimed would in my view amount to a new claim."

[16] The Arbitrator proceeded to issue the following award:

"AWARD

1 *Bentel's Second Special Plea is upheld with costs.*

2 *The portions of Fourways' claim as marked in red on Annexure BA3 to the Second Special Plea are struck out.*

3. *The costs are to be taxed on the High Court scale and will include the costs of two counsel. It is recorded that the day of hearing, 3 July 2013, was taken up by argument on this special plea."*

[17] Fourways in the founding affidavit to the review application raised the following objection against the award:

"*The arbitrator's award on the second special plea was given on 5 July 2013. That award in effect reversed his previous decisions in finding that all the struck out claims were not part of the arbitration on 26 June 2012 as they had lapsed. All those claims were then struck out. The effect thereof was that the Arbitrator:*

1. *declined to exercise jurisdiction over all those claims that he had previously accepted as claims properly submitted to him for adjudication;*

2. *unilaterally excluded from his purview the claims submitted to him and on which he was enjoined to adjudicate in fulfilment of his contractual obligations as an arbitrator;*

3. *gave an award on a jurisdictional issue, contrary to his previous determinations and in respect of which he was functus officio; and*

4. *prevented Fourways from having a fair hearing on the struck out claims."*

[18] As a result of the aforementioned Fourways alleged that the Arbitrator committed a gross irregularity and/or exceeded his powers as envisaged in sec 33(1)(b) of the Act.

[19] Fourways' argument pertaining to the alleged reversal of the Arbitrator's decision is that on 3 July 2013 in his ruling on the first special plea the Arbitrator:

19.1 had accepted the disputed claims as having been properly submitted to him for adjudication;

19.2 had accepted that he had jurisdiction over the disputed claims.

[20] Fourways' only contention in respect of the allegation that the Arbitrator exceeded his powers is that by "in effect [reversing] his previous decisions [that he has the requisite jurisdiction]" (own paraphrasing), he exercised powers which he no longer had as he had already ruled on the issue of his jurisdiction.

[21] Fourways alleges that the arbitrator's decision effectively non-suited Fourways and that his mistake negatively affected all future proceedings in the arbitration as Fourways would henceforth not have its struck out claims heard at all. Fourways alleged that the conduct of the Arbitrator excluded the possibility for Fourways to have any hearing on its claims, let alone a fair hearing.

[22] Bentel contends that no gross irregularity was committed which could result in a setting aside of the award by this court. It was also argued by Bentel's counsel that a remittal in terms of sec 32 was inappropriate. Bentel furthermore alleged that the matter was settled after the award was made and

that there is nothing to review. This settlement, what it meant and what the consequences entail are heavily disputed between the parties. However due to the conclusion that I arrived at, it is in my view not necessary for me to determine this issue.

THE APPROACH IN LAW AND PPLICATION OF THE LAW OF THE FACTS:

[23] In order to determine the issues at hand and the approach that should be followed, the requirements for the setting aside of an award in terms of sec 33(1) of the Act should be considered. In this regard the question of what would constitute a gross irregularity and what would be required to find that the Arbitrator exceeded his powers need to be determined. Secondly sec 32(2), of the Act must be considered which allows for a remittal. In this regard what would constitute good cause to allow for a remittal needs to be determined.

[24] Section 33(1)(b) of the Act provides, in relevant part, as follows:

"33 Setting aside of award

(1) Where –

(a) [...]

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) [...]

(d) the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

(e)

[25] When one considers a review application it is appropriate to keep in mind that the parties by agreeing to a private arbitration limits interference by the Court to the ground of procedural irregularities[1]. The purpose of a private arbitration to bring the disputes between the parties to finality is also of importance and the grounds of review should be construed reasonably strictly so as not to undermine the achievements of the goals of a private arbitration[2].

[26] As a result of the fact that reviews are limited to procedural irregularities the ground of review envisaged in section 33(1)(b) of the Act relates to the conduct of the proceedings and not the result thereof[3]. It is also trite that not every irregularity in proceedings will constitute a ground for review under section 33(1)(b) of the Act. In order to justify review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.[4]

[27] If an arbitrator misdirects himself on the law, it is in itself no reason for the setting aside of the finding[5]. An Arbitrator is always entitled to be wrong on the merits and a wrong interpretation of an agreement will not amount to a

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[1] Telecordia Technologies Inc V Telkom SA Ltd 2007(3) SA 266 SCA [par 51]; Lufano Mphaphuli & Associates (Pty) ltd v Andrews & Another 2009(4) SA 529 CC, p599, par 235; Ramsden, South African and International Arbitration, p 201

[2] Lufano, *supra* p 599, par 235

3 Bester v Easigas (Pty) Limited and Another 1993 (1) SA 30 (C),

[4] Ramsden, *supra, p 203*, Bester, *supra*, Patcor Quarries CC v Issroff and Others1998(4) SA 1069 (SE).

[5] Telecordia *supra;* Ramsden, *supra,* RPM Konstruksie (Edms) Bpk v Robinson & Ander 1979(3) SA 632 (C)

misconception of the nature of the enquiry and therefore to an irregularity.[6] It is also stated that:

"[86] Likewise, 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 transgression of his powers it would mean that all errors of law are reviewable, which is absurd[7]".

[28] In **Telecordia Technologies** it was also stated that the Act "*does not allow a review for material error of law*" and "*it is wrong to confuse the reasoning with the conduct of proceedings*[8]" – in other words, unless there was something procedurally wrong, no relief is to be had in terms of section 33(1)(b) of the Act.

[29] The following which was stated is also of importance:

"Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telecordia posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable

6 Telecordia, *supra* p 297, par 67

7 Telecordia, *supra*, p 302, par 86

8 Telecordia, supra, p 300, par 76

irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith[9]*."*

[30] In the light of the aforesaid this court should not ask whether the arbitrator was correct in law or fact or whether he interpreted the agreement correctly, but rather look at the procedure to determine whether any irregularity occurred which would justify an intervention by the court whilst keeping in mind the principles already discussed.

[31] As already stated it is not every irregularity which would justify a review. The court must be satisfied that the irregularity caused a substantial injustice. Only in those cases where it can be said that what happened is so far removed from what could reasonably be expected of the arbitral process that one would expect the court to take action.

[32] As far as the term "exceeding its powers" is concerned in **Telecordia**[10] the following was said:

"[52] The term exceeding its powers requires little by way of elucidation and this statement by Lord Steyn says it all.

"But the issue was whether the tribunal "exceeded its powers" within the meaning of s 68(2)(b) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power

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[9] Telecordia, *supra*, p 297, par 69
[10] Telecordia, *supra*, par 52

which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under s 48(4). The jurisdictional challenge must therefore fall"

Apart from the proper application of the test nothing more was made in argument of the meaning of the term. The argument focused on the meaning of 'gross irregularity in the conduct of the arbitration proceedings'.

[33] The ability to set aside an award due to a gross irregularity is designed as a long stop, only available in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls out for it to be corrected.[11]

[34] In the light of the applicable principles I will now proceed to apply it to the facts in this case.

[35] When one looks at the procedural aspects one needs to consider what actually occurred at the hearing pertaining to the second special plea. After the dismissal of the first special plea the arbitrator proceeded to deal with the second special plea. The parties filed heads of argument and the Arbitrator considered lengthy arguments before he came to his conclusion. Although the point was raised that he should have referred the matter to evidence, nobody at any point during the proceedings argued that the matter should be so referred. The question that was considered was a question on the interpretation of a contract,

[11] Ramsden *supra* at page 203, footnote 968 and the authorities there cited.

which could, unless circumstances indicate otherwise, be determined without hearing evidence. It would have been different if the Arbitrator refused to hear evidence, such a refusal could have amounted to an irregularity. In this context it is also important to note that a party can waive any objection he may have in regards to an alleged irregularity in the proceedings through his conduct[12]. The parties themselves could also determine the procedures and may *inter alia* dispense of the necessity to lead oral evidence[13]. The fact that Fourways never indicated that evidence was required to determine the issues before the arbitrator is in my way indicative of such a waiver or an agreement that it was not necessary to lead evidence. Therefore one must conclude that Fourways was of the view that the issue could be determine on argument only, and can't be seen to argue at this point that a procedural irregularity occurred because of the lack of evidence.

[36] I now proceed with the argument that the Arbitrator actually reversed his previous decision. This argument, in my view can't be correct. If one looks at the two special pleas the following become apparent. The first special plea's dismissal confirmed the arbitrator's jurisdiction to hear the rest of the matter including the second special plea. The second special plea dealt with the interpretation of the contract. Once the second special plea was upheld the merits of the struck out claims became irrelevant. This could be compared with the situation where a plea for prescription is upheld, which would then exclude the possibility to go into the merits, however good they may be. There were totally different issues to be determined in these two pleas.

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[12] Ramsden, *supra*, p 203
[13] Lufano, *supra*, p 544, par 223

[37] The contention of Fourways that the arbitrator reversed his decision is based on a false premise, namely that the second special plea concerned a reconsideration of issues ruled upon by him in respect of the first special plea. This was not the case nor was it at any time argued by either party that there was such an overlap. In point of fact the applicant's deponent, Koupis expressly states that the second special plea concerned the question of whether Fourways' claims were time-barred or not. If Fourways' argument is correct the contention that there was an overlap would have the absurd consequence that a ruling in respect of the first special plea automatically also renders Bentel's second special plea nugatory before it was even argued, which is clearly incorrect. The arbitrator did not revisit any of the issues decided upon in the first special plea when he considered the second special plea. Nor can it be said that he declined to exercise jurisdiction over these claims.

[38] Fourways take issue as set out below with the following which was said in the award:

"On Friday morning 5 July 2013 in ruling on the 2nd special plea he declined to exercise jurisdiction over all those claims (totalling some 29.9 million – the "disputed claims"). This finding was that *"whether I have jurisdiction or not have to rule that the claims which are not part of the arbitration on 26 June 2012 have lapsed and that they cannot be introduced by amendment."*

[39] The paraphrasing of the arbitrator must be seen in context of the wording of the whole award and does not in my view constitute a reversal of his previous decision nor a contradictory finding. The arbitrator did not decline to exercise

jurisdiction over the 2013 claims, he considered the argument and found that the claims have lapsed and that as a result they should be struck out.

[40] As far as the argument pertaining to a fair hearing is concerned and if I understand applicant's argument correctly, it is that due to the fact that the arbitrator upheld the second special plea Fourways was deprived of the opportunity to have the merits pertaining to the struck out claims ventilated. I am of the view that it is consequence of the fact that the plea was upheld and does not impact on the procedure as such. It is the result which aggrieved Fourways and that is not reviewable[14].

[41] I consequently come to the conclusion that no gross irregularity was committed nor did the arbitrator exceeded his powers that would justify a setting side of the award.

[42] In the alternative Fourways requests that the matter be remitted to another arbitrator. Section 32(2) provides, in relevant part, as follows:

"*The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.*"

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[14] Telecordia, supra, p 298, par 72

[43] The correlation between sections 33 and 32(2) of the Act was taken under consideration by Selikowitz J in the matter of **Benjamin v Sobac South African Building and Construction (Pty) Limited**[15] The following observations of relevance were *inter alia* made:

"I do not agree that when s 32(2) is applied in relation to allegations which fall to be considered under s 33(1) that "good cause" is anything less than that required for an order pursuant to the terms of s 33(1). To hold otherwise would be to all but emasculate s 33(1). It would result in an applicant who has complaints of the nature referred to in s 33 being able to select whether to apply for the setting aside of the award subject to the measure of proof as is required to have an award set aside or to take the easier route of applying for remittal in terms of s 32(2). In fact, the only reason for utilising s 33(1) would then be to ensure that a new tribunal heard the matter. In all other cases an applicant would make his claim for a "remittal of the entire matter" in terms of s 32(2)[16]*."*

furthermore:

"The Act cannot be interpreted to permit an applicant to avoid the stringent test contemplated by s 33(1) so as to achieve the same result by clothing his application as one to remit[17]*"*

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[15] 1989(4) SA 940 (C)
[16] *Supra*, p 960J-961B
[17] Benjamin, *supra*, 961D

[44] This aspect was also considered in the judgment of the Supreme Court of Appeal in **Leadtrain Assessments (Pty) Limited and Others**[18] where Nugent JA and Tshiqi JA stated the following

"It is not desirable to attempt to circumscribe when "good cause" for remitting a matter will exist. It will exist pre-eminently where the arbitrator has failed to deal with an issue that was before him or her – which was what occurred in York Timbers – but once an issue has been pertinently addressed and decided there seems to have to be little room for remitting the matter for reconsideration. The guiding principles of consensual arbitration are finality – right or wrong – and we see no reason why an award of costs is to be treated differently to any other aspect of an award. It would be extra-ordinary if the conduct of an arbitrator that falls short of the strict constraints of section 33(1) were nonetheless to be capable of being set aside and remitted for reconsideration under section 32(2). As was pointed out in Benjamin v Sobac South African Building and Construction (Pty) Limited, correctly, the effect of so holding would be to emasculate the provisions of section 33(1). However one approaches the question of what is good cause, it seems to us that it inexorably requires something other than mere error on the part of the arbitrator".[19]

[45] I agree that to allow for an interpretation of good cause to mean that a lower bar is set for remittal under circumstances like these will indeed mean that the

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[18] 2013(5) SA 84 (SCA), p 50, par 15

[19] Leadtrain *supra* at para [15].

requirements provided for in sec 33 are emasculated. In the light of the facts it can also not be said that the arbitrator failed to deal with any of the issues before him. If I find that no gross irregularity was committed it is inconceivable on the facts of this case that there would be good cause to remit the matter in terms of sec 32(2). As a result I am of the view that the matter does not meet the necessary requirements to be remitted in terms of sec 32(2) of the Act.

[46] In *casu* it is clear that the arbitrator followed appropriate procedures and applied his mind and that he dealt with the issues before him. The question whether the arbitrator was right or wrong is irrelevant for purposes hereof. The fact that Fourways as a result will not get an opportunity to ventilate the struck out claims, did not prevent them from having a fair trial, it is the unfortunate result of the second plea being upheld.

CONCLUSION

[47] Fourways has failed to show that the Arbitrator has committed any gross irregularity that justifies setting aside the Award in terms of section 33(1)(b) of the Act. Similarly, Fourways has also failed to meet the threshold for the remittal of the Award in terms of section 32(2) of the Act. For the aforementioned reasons the application must fail.

[48] In its answering affidavit, Bentel contends that the review application constitutes an abuse of the process of court and gives notice of its intention to seek a special costs order against Fourways on the scale as between attorney this aspect was not argued before me but I am in any event of the view that no grounds exist for such an order.

ORDER:

[49] **1. The application is dismissed.**

2. The applicant is to pay the costs of the application, which costs will include the costs of two counsel.

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:	26 MAY 2014
DATE OF JUDGMENT:	11 JUNE 2014
PARTIES:	FOURWAYS PRECINCT v BENTEL ASS INT
CASE NO:	49962/13
FOR APPLICANT:	JVK ATTORNEYS
COUNSEL FOR APPLICANT:	ADV JR GAUTCHI (SC); ADV S TSANGARAKIS; ADV N JELE
FOR RESPONDENT:	FLUXMANS INC
COUNSEL FOR RESPONDENT:	ADV I ZEIDEL (SC); ADV D VAN ZYL