REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

28/01/2014

Case No 27283/2012

In the matter between:

PRIME FUND MANAGERS (PTY) LTD Applicant

and

ROWAN ANGEL (PTY) LTD First Respondent

ADV NIC VAN DER WALT SC N.O. Second Respondent

JUDGMENT

MURPHY J

1. This application raises important issues in relation to the enforcement of arbitration awards made in terms of the Arbitration Act,[1] ("the Act"). The applicant seeks to have an arbitration award of the second respondent, Advocate N van der Walt SC, on 14 February 2012, made an order of court in terms of section 31(1) of the Act. The first respondent, ("the respondent"), objects to the award being made an order of court for various reasons.

2. Section 31(1) of the Act provides:

[1] Act 42 of 1965

"An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court."

An award which has been made an order of court may be enforced in the same way as any judgment or order to the same effect.[2]

3. An unsuccessful party may oppose an application for enforcement in terms of section 31(1) of the Act on the grounds that the award is invalid for some reason. Where the aggrieved party challenges the award on the grounds that the arbitrator was guilty of misconduct, committed a gross irregularity in the conduct of the proceedings, exceeded his powers or that the award was improperly obtained, the award is considered to be valid or voidable until the court sets it aside under a review on these grounds brought in terms of section 33(1) of the Act. When opposing an application in terms of section 31(1) on the grounds that the award is void *ab initio*, the respondent therefore must establish grounds of invalidity different to those mentioned in section 33(1).[3] Grounds of invalidity would include: the arbitrator exceeded his jurisdiction; the arbitrator failed to decide all the matters referred to him; the award was made out of time as contemplated in section 23 of the Act, which requires the award to be made within 4 months of entering upon the reference unless a court extends the period; the award is illegal or contrary to public policy;[4] or there is some other defect in the form or substance of the award which is serious enough to make it incapable of enforcement. The fact that a court may disagree with the arbitrator's findings of law and fact is not sufficient to refuse an application for enforcement.[5] An arbitration award is normally not appealable to court.

4. The respondent's grounds of objection to the making of the award an order of court are: the application is premature as the matter has been referred to further arbitration which is pending; the award is not an award sounding in money and is unenforceable in its terms; there was no proper separation of the issues of merits and quantum before the arbitrator; the award cannot be enforced as the applicant's

[2] Section 31(3) of the Act.
[3] *Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd* 2009 (3) SA 533 (SCA)
[4] *Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa* 1992 (3) SA 880 (E); and *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* [1994] 1 All SA 453 (A) at 462-463.
[5] Butler and Finsen: *Arbitration in South Africa* (Juta 1993) 273-274.

claim for payment has prescribed; the award declares an illegal agreement to pay commission in contravention of section 58(1) and 65 (1) of the Medical Schemes Act[6] ("the MSA") binding on the respondent; and the order sought is contrary to and in conflict with an order which made the award of a prior arbitration between the parties an order of court.

The history of the dispute

5. The nature of the grounds of objection make it necessary to consider the history of the dispute between the parties in some detail. Unfortunately, the papers do not set out the history in a coherent fashion or in chronological order. However, the events seem to be common cause and can been gleaned from an analysis of various agreements and arbitration awards which are annexed somewhat randomly to the papers.

6. The respondent was at all times the administrator of the Spectramed Medical Scheme ("the scheme"). The relationship of the parties goes back to 1999. Originally both parties were close corporations and later became private companies. In 1999 the predecessor of the respondent, Rowan & Angel CC, acting as the administrator of the scheme, entered into an agreement with PFM Medical Scheme Marketing (Pty) Ltd ("PFM Marketing"), a company associated with the applicant, in terms of which PFM Marketing, the "servicing administrator" was given the sole mandate to market the scheme's "Genesis Option" (which later became the Spectra Prime and Spectra Alliance Options). To that end it was obliged to pre-underwrite and check the correctness of each application for membership, and to forward all duly completed and checked applications to the respondent within 5 days of receipt. It also had the responsibility upon acceptance of a member to the scheme to ensure that the relevant stop order was activated with the member's employer and that contributions were paid to the scheme timeously. Fees were payable to PFM Marketing in the amount equal to 2,6% of the premium contributions of the members introduced to the

[6] Act 151 of 1998

scheme by PFM Marketing. Its functions were that of a broker introducing members to the scheme.

7. The contract with PFM Marketing was terminated when an agreement was concluded between the applicant (then Prime Fund Managers CC) and the respondent on 1 March 2001. In terms of this agreement the applicant was appointed as "co-administrator" to administer members of the Genesis Option of the scheme. The functions of the applicant were similar to those performed by PFM Marketing under the 1999 servicing agreement. It had to process applications, arrange stop orders, ensure all applications for membership were completed correctly, service members by responding to any queries or complaints concerning benefit schedules, membership, stop orders or products. Clause 5.1 of the agreement regulated remuneration and provided that the respondent (as administrator) would pay the applicant (as co-administrator) an amount equal to 3% of the premium contributions of the members of the Genesis Option.

8. In January 2003 the respondent and Prime Fund Managers CC concluded a third agreement, stated to be "an agreement for contract services", in terms whereof the respondent appointed the applicant "to perform services as an independent contractor". The services to be provided are described in Annexure A to the agreement as being *inter alia*: the management and implementation of customer service offices; the staffing of the offices with properly trained and skilled staff; the establishment of good relationships with local providers and the resolution of problems experienced by providers in relation to the reimbursement of claims, understanding of benefits, arranged care and the limits; providing member education concerning scheme products and the healthcare market; and the resolution of member queries concerning benefits, claim payment problems and other issues. In addition, the applicant undertook to perform analytical reviews of the administration processes of the respondent, to make recommendations on product design, to design relevant member communications and to recommend information technology improvements. These services differ, at least *prima facie*, from those in the prior agreements.

9. In clause 6.1 of the services agreement the respondent undertook to pay the applicant the remuneration set out in Annexure B of the agreement, "in consideration for the rendering of the services". Annexure B does not expressly include a tariff of fees or disbursements. It provides that unless so negotiated, the applicant shall not be entitled to any remuneration other than the reimbursement of costs and fees and that payment shall be made within 30 days of presentation of the invoice and shall include, *inter alia*, the following charges: branch operating costs; vehicle and travel costs incurred in the provision of services to and education of members and providers; expenses incurred for training of staff; fees for management of branch offices; and fees for consulting services rendered. The agreement does not stipulate any basis for the calculation of fees payable.

10. Clause 11 of the services agreement comprises an agreement providing for the reference to arbitration of any disputes regarding the interpretation, effect or rectification of the agreement, or in regard to the respective rights and obligations under the agreement. It is accordingly "an arbitration agreement" as defined in section 1 of the Act. Clause 11.12 provides:

> "The arbitrator shall decide the matter as submitted to him according to what he considers just and equitable in the circumstances and, therefore, the strict rules of law need not be observed or be taken into account by him in arriving at his decision".

11. In February 2008, following a purported termination of the agreement with effect from 31 December 2007, by a notice of cancellation dated 28 September 2007 addressed to the applicant by the entity responsible for marketing services of the respondent, "Contact SPI", the applicant referred a dispute with the respondent to arbitration ("the first arbitration"). The proceedings were conducted before Advocate JP Coetzee SC ('the first arbitrator").

12. The statement of claim filed by the applicant in the first arbitration sets out the history of the parties' relationship and refers to the three written agreements. In paragraph 5.4 of the statement of claim, the applicant alleged that the terms of the contract services agreement included a term that the respondent would make

payment to the applicant "in the amount equal to 3% (incl. VAT) of the premium contributions of the PFM members to the Scheme each month". The PFM members are defined in paragraph 3.3.1 of the statement of claim to be the members introduced to the scheme by the applicant. In paragraph 6 of the statement of claim the applicant pleaded that it had complied with its obligations and that it had been paid the 3%.

13. The applicant pleaded that Contact SPI was not a party to the services agreement and accordingly that the notice of cancellation did not constitute a valid notice of termination in terms of clause 8.1 of the contract. The primary issue referred for determination by the arbitrator was thus whether the notice did indeed constitute a valid termination. The applicant sought a declaratory order that the contract services agreement had not been validly terminated, and, in terms of paragraph 10.3 of the statement of claim, an order of specific performance in the following terms:

> "That the Defendant (the respondent) be ordered to make payment to the Claimant (the applicant) in an amount equal to 3% (incl.VAT) of the premium contributions of the PFM members to the Scheme each month, from 1 January 2008 until the agreement is validly terminated in terms of clause 8.1 thereof"

14. The respondent admitted that the notice of cancellation by Contact SPI was not a valid cancellation but pleaded that the contract services agreement was terminated on conclusion of a new arrangement in 2004 between the respondent, the applicant and Contact SPI. In terms of that arrangement, the respondent contended, the respondent paid Contact SPI "a marketing customer appreciation fee" of 3,1% (incl. VAT) of the premium contributions of the PFM members to the scheme each month and that the applicant agreed to provide services to Contact SPI in exchange for 2,9% of the contributions.

15. In his award dated 7 April 2008, the first arbitrator found (on the basis of the admission made by the respondent) that the letter of 28 September 2007 from Contact SPI did not validly terminate the contract and also that it was not consensually terminated by means of the alleged arrangement of 2004. He found though that the contract had in fact been terminated with effect from 30 June 2008

by a notice of cancellation dated 28 March 2008. Moreover, on the basis of the evidence regarding the practice of payment of 3% or 2,9% (the latter being accepted under protest by the applicant), the first arbitrator concluded that there was a tacit term to pay 3% as remuneration (presumably for costs and fees). He accordingly declined to grant the declaratory order but awarded specific performance in the following terms:

> "14.1 I order Rowan Angel (Pty)Limited to pay to Prime Fund Managers (Pty) Limited an amount equal to 3% (including VAT) of the monthly premium contributions received during the period from 1 January 2008 until 30 June 2008 from those members of the Spectramed Medical Scheme who were introduced thereto by Prime Fund Managers (Pty) Limited"; and
>
> 14.2 I order Rowan Angel (Pty) Limited to pay the costs of Prime Fund Managers (Pty) Limited."

16. In the course of his award, the first arbitrator mentioned the possibility that the agreement might have contravened the provisions of the MSA. However, because the issue had not been pleaded or canvassed during evidence, he declined to deny relief on the grounds of illegality.

17. After the arbitration award was handed down, the applicant claimed payment of the amount of R7 751 786,34, together with interest and costs. I assume the amount claimed was based on past payments made prior to the termination of the agreement. The respondent disputed the amount owing on the ground that it was not established in the arbitration proceedings with reference to the members introduced, the contributions paid etc. More significantly, the award only provided for payment to the applicant in respect of members introduced by it to the scheme. The applicant did not introduce any members to the scheme. The members were in fact introduced by the broker, PFM Marketing, which was not party to the arbitration proceedings.

18. The applicant accordingly sought amendment of the first award in terms of section 30 of the Act, which application was refused by the first arbitrator.

19. The applicant managed to obtain a writ of execution without the award being made an order of court. When the applicant sought to execute the writ, the respondent brought an application for a stay of execution pending an application to set aside the writ, which application was granted on 10 November 2008. The applicant then launched proceedings to have the award made an order of court and for payment. It obtained judgement against the respondent by default on 20 January 2009 for payment of the amount it had calculated as owing in terms of the award. This prompted an application for rescission of the judgment which was granted by this court on 13 February 2009. The award of the first arbitrator was eventually made an order of court on 3 December 2009.

20. In seeking to enforce the order, the applicant found itself unable to prove any members introduced by it because it did not itself introduce any members. As mentioned, all the members had been introduced to the scheme by PFM Marketing. The applicant accordingly decided to re-submit the matter to fresh arbitration ("the second arbitration").

21. During March 2010 the attorneys of the applicant, acting in terms of Clause 11 of the contract services agreement, wrote to the Chairman of the Johannesburg Bar Council requesting the appointment of an arbitrator "to decide another issue". On 21 April 2010, the respondent's attorney addressed a letter to the applicant's attorney objecting to the arbitration, on the grounds, *inter alia,* that the dispute between the parties had been dealt with in the first arbitration and was thus *res judicata*. Some months later, on 6 August 2010, the applicant's attorney addressed a letter to the respondent demanding payment of the amount contemplated in the arbitration award of the first arbitrator, but modifying its terms to be 3% of the contributions of those members in respect of whom the contract services agreement found application. The attorneys contended that the issue of payment to the applicant based on the premium contributions of the members in respect of whom the agreement found application (as opposed to members who were introduced to the scheme by the applicant) had not been laid to rest by the award in the first arbitration and consequently that the same thing was not being claimed by way of the second arbitration. They thus gave notice of their intention to again request the Chairman of

the Johannesburg Bar Council to appoint Advocate N van der Walt SC as arbitrator. Advocate van der Walt SC, the second respondent, ('the second arbitrator") was appointed as arbitrator to determine the dispute on 18 August 2010.

22. The applicant filed its statement of claim in the second arbitration on 30 September 2010. The factual averments in the statement are virtually identical to those made in the statement of claim filed in the first arbitration except that in paragraph 7.1 the applicant averred that the respondent terminated the contract services agreement with effect from 30 June 2008 by giving three months' notice of termination in terms of clause 8.1 of the agreement. The relief sought was different to that sought in the first arbitration. In paragraph 8 of the statement of claim the applicant sought an order in the following terms:

> "That it be declared that the defendant (respondent) is liable to make payment to the claimant (applicant) in an amount equal to 3% (incl. VAT) of the premium contributions paid each month by the members in respect of whom the contract services agreement found application to the Spectramed Medical Scheme during the period 1 January 2008 until 30 June 2008."

The relief sought differs from that sought in the first arbitration in three apparent respects. Firstly, the applicant did not ask for specific performance, but merely a declaratory order; secondly, the claim is expressed not as a percentage of contributions paid by members introduced by the applicant but as a percentage of the contributions paid by members to whom the contract services agreement applied, being those in the options known as Genesis, Spectra Prime and Spectra Alliance; and lastly, the period to which the claim related was not open-ended, as in the first statement of claim, but was limited to the 6 month period from 1 January 2008 until 30 June 2008.

23. The respondent filed two special pleas, including one of *res judicata*, a plea over and a counterclaim. On 26 November 2010 the applicant and the respondent entered into a supplementary arbitration agreement regarding the reference to the second arbitrator. In clause 3 of that agreement they agreed that the second arbitrator would first determine whether the claim was *res judicata* as pleaded in the

respondent's first special plea. They agreed further in clause 4, for the purposes of determining this issue, that the second arbitrator would decide the matter according to what he considered just and equitable, and was not obliged follow the strict rules of law. In other words, the second arbitrator was at large to decide the *res judicata* issue as an *amiable compositeur* or *ex aequo et bono*. This clause permitted the second arbitrator to depart from the strict rules of law if their application would produce a substantial injustice, but only to the extent necessary to achieve justice between the parties, provided the result was not illegal or contrary to public policy.[7]

24. The hearing for the purpose of determining the plea of *res judicata* was held on 30 November 2010. The second arbitrator handed down his award dismissing the special plea with costs on 18 January 2011. His reasons for dismissing the plea were essentially that the applicant sought different relief and relied on a different tacit term to that asserted in the first arbitration. He did not agree with the respondent's submission that the applicant was seeking essentially the same relief as in the first arbitration. Moreover, in the second arbitrator's opinion, the first arbitrator had not been asked to grapple with the description of the members in respect of whom a percentage of their contributions would be payable monthly to the applicant. Nor, I would add, had he been asked to make a declaratory order in that regard. And finally, perhaps *ex abundanti cautela*, relying on his authority to decide as *amiable compositeur,* the second arbitrator held that it would not be just and equitable in the circumstances of the case to uphold the plea and deny the applicant the opportunity to establish the correct interpretation of the category of members from which it was entitled to earn income.

25. The respondent did not seek a review in terms of section 33 of the Act of the ruling of the second arbitrator on the issue of *res judicata.*

26. Clause 9 of the arbitration agreement of 26 November 2010 provided that after the outcome of the hearing of 30 November 2010 the parties would meet "to agree or have determined by the arbitrator the future conduct of this matter." The second arbitration to deal with the remaining issues was eventually held on 24 January 2012

[7] Butler and Finsen: *Arbitration in South Africa* (Juta 1993) 253-255.

and the second arbitrator handed down his award on 14 February 2012. Attempts to set the arbitration down earlier were frustrated by various events.

27. It appears from the reasons for the award that the second special plea was abandoned by the respondent. The second arbitrator dismissed the respondent's counterclaim for R2,6 million, found that the contract services agreement was not concluded in *fraudem legis*, and rejected the plea that the agreement and claims for payment were in contravention of section 58(1) or section 65(1) of the MSA. It is the latter finding which is of most importance in determining the present application. I shall return to the second arbitrator's reasoning in relation to this issue when I consider the respondent's objection to the award being made an order of court. The second arbitrator made an award in the following terms:

> "A. It is declared that the defendant (respondent) is liable to make payment to the claimant (applicant) in an amount of 3% (incl. VAT) of the premium contributions paid each month by their members in respect of whom the contract services agreement found application to the Spectramed Medical Scheme during the period 1 January 2008 until 30 June 2008;
>
> B. The members of Spectramed Medical Scheme in respect of whom the contract services agreement found application are those members of Spectramed Medical Scheme in respect of whom PFM Medical Scheme Marketing (Pty) Limited was the broker;
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> C. Costs of the arbitration to be paid by the defendant;
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> D. The counterclaim is dismissed with costs."

28. It is notable that in the second arbitration the applicant only sought and was granted declaratory relief on the basis of a tacit term that remuneration was payable in terms of the contract services agreement in the amount of 3% of members contributions of those members in respect of which the contract services found application, being the members of Spectramed of whom PFM Marketing was the broker. The applicant did not seek payment of any amount and made no attempt to

quantify its claim in the arbitration proceedings. It led no evidence identifying the members of whom PFM Marketing was the broker, nor of the contributions paid by each of such members, which would vary from member to member depending upon various factors, such as the number of dependants per member. The issue of payment remains an arbitral issue in dispute which, as the respondent pointed out in paragraph 9 of its answering affidavit, has been referred back to arbitration to determine quantum. I was informed from the bar during argument that the pleadings have closed and a third arbitration is now pending. A central issue arising from those pleadings is a special plea raised by the respondent that the applicant's claim for payment has prescribed.

Objection on the grounds that the application is premature, involves declaratory relief and the award is not final

29. The respondent maintains that the award of the second arbitrator should not be made an order of court because the application is premature in that the quantification of the claim has been referred to arbitration which is pending. The applicant has agreed to refer the matter to arbitration and it is submitted should therefore not be allowed in the circumstances to persist in the current application until the arbitration is finalised. The application, in the opinion of the respondent, is a wasteful utilisation of the court's time and resources. It also argued that the court should not grant declaratory relief in that any order made will be academic as the order cannot be enforced in its current terms and can serve no more than to declare that the first respondent is liable in terms of the contract services agreement. The amount of such liability has not been established. There is no purpose or advantage to be gained by the applicant in the award being made an order of court at this stage, the respondent submitted, as it cannot be executed against to enforce payment of an undefined quantum. Execution will be possible only if the applicant is successful in the pending arbitration and obtains an award for payment.

30. The respondent's submissions are without merit. Before a court can refuse to make an arbitration award an order of court there must be substantive grounds of

invalidity justifying the refusal. That the relief granted by the second arbitrator was of a declaratory nature, and the fact that consequential quantification relief is pending arbitration, are not defects in the form or substance of the award making it incapable of enforcement. In terms of clause 11 of the contract services agreement "any dispute" regarding the respective rights and obligations of the parties may be referred to arbitration and the arbitrator may make an order which is just and equitable, which would include a declaratory order. The respondent did not complain at the arbitration that the dispute was outside the ambit of the arbitration agreement. Likewise, the referral to arbitration of the quantification of the applicant's claim is in accordance with the terms of the agreement between the parties and does not constitute any bar to making the award an order of court. There is no reason in law why the award cannot be made an order of court and the quantification of the applicant's claim be duly dealt with in the pending arbitration.

31. Insofar as the respondent's contention implies that the award is not final and thus invalid, such too is incorrect. The requirement that an arbitration award must be final means that the award should deal with all the matters submitted to the arbitrator and leave no matter unsettled; it must be complete.[8] The arbitrator in this instance dealt precisely with what was submitted to him in the statement of claim. His terms of reference required him to grant declaratory relief and he completed his task by doing that. The arbitrator was empowered by the arbitration agreement to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that the claimant could not immediately execute for relief consequential upon the determination. Courts often make such orders. Though, it is important to note, the applicant does not seek declaratory relief from this court but only to make the award an order of court in accordance with the provisions of section 31(1). The relief sought is to make an un-executable award an order of court with the advantages such may entail.

32. Furthermore, the award brought finality to the issues raised by the respondent in the second arbitration. It has been determined that the respondent is indebted to the applicant for a percentage of contributions paid by a distinctly identified category of

[8] Butler and Finsen: *Arbitration in South Africa* (Juta 1993) 262

members for a clearly defined period. The remaining issues pertaining to whether the applicant is entitled to quantify its claim, the manner and method of such quantification and whether such quantification is correct are all issues that will be dealt with in the pending arbitration. As will become evident presently, the most obvious advantage to the applicant of the court making the award an order of court is that the indebtedness arising from the award by virtue of it becoming a judgment debt will prescribe only after 30 years from the date of the court order.

33. In variants of the preceding arguments, the respondent argued further that the applicant was barred from now seeking to quantify its claim because the doctrine of *res judicata* requires parties to claim all the relief they are entitled to in one action. It also reproached the applicant for not making a formal application to the second arbitrator to separate merits and quantum. With regard to the first contention, whether or not the matter of quantification is *res judicata* is properly a question for the arbitrator in the pending arbitration and has no bearing upon whether the award declaring the indebtedness should be made an order of court. I assume the matter in any event may be *lis pendens*. As for the second submission, the arbitration agreement does not require a formal application for separation of quantum and merits. Clause 11.7 of the contract services agreement provides that in the referral to arbitration it shall not be necessary to observe or carry out the usual formality or procedures relating to pleadings, discovery or the strict rules of evidence. More importantly, the issue of quantum, or relief in the form of specific performance, did not form part of the terms of reference and the second arbitrator would have exceeded his powers had he determined the issue and granted relief. The arbitration agreement imposed no express obligation on the applicant to follow the once and for all rule in this context or to seek leave to separate the issues.

34. There was furthermore no obligation on the applicant, as the respondent maintains, to apply to court for the matter to be remitted to the arbitrator in terms of section 32 of the Act for the purpose of determining quantum. In terms of that provision the court may, on the application of any party to the reference after due notice to the other party, on good cause shown, remit *any matter which was referred to arbitration* to the arbitrator for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct. The matter

of quantification was never referred to arbitration and the court would not have had jurisdiction to remit it had the applicant applied for relief in terms of that provision. And accordingly the assumed existence of such a remedy could not constitute a valid bar to making the award an order of court in this instance.

35. Finally, there is no legal basis or principle supporting the respondent's argument that the court should not make the award an order of court as "it does not sound in money" – in the sense that payment is not ordered. The jurisdictional preconditions of section 31(1) of the Act require only the existence of an award, which is not defined in section 1 to exclude awards not sounding in money. In any event the second arbitrator's costs award against the respondent is one sounding in money (in the sense that payment is ordered) which can be enforced; but the applicant requires a court order to do so.

Conflicting orders of court and the issue of *res judicata*

36. The next ground of objection raised by the respondent is that if the award is made an order of court it will give rise to two conflicting orders of court containing two contradictory and mutually exclusive findings of fact. In the first arbitration, the first arbitrator found that the contract services agreement contained a tacit term that the respondent would make payment to the applicant in an amount of 3% (incl. VAT) of the PFM members to the scheme each month; the "PFM members" having been defined as the members introduced to the scheme by the applicant. As explained earlier, the award, even though it was made an order of court, was a hollow victory as no members had been introduced to the scheme by the applicant, but were in fact introduced to the scheme by PFM Marketing and no monies, apart from costs, were due to the applicant in terms of the award. The applicant thereafter launched the second arbitration, again relying on the contract services agreement but asserted the existence of a different tacit term, namely that the respondent was obliged to pay the applicant an amount equal to 3% (incl. VAT) of the premium contributions paid by members in respect of whom the agreement found application to the scheme each month. The second arbitrator's award declared the respondent to be liable to the

applicant in terms of that tacit term and declared the members concerned to be the members introduced by PFM Marketing and not the applicant.

37. The respondent submitted that the problem arose because the issue was in fact *res judicata* as a consequence of the first award. Should the award of the second arbitration also be made an order of court, there will be conflicting orders (both potentially capable of being executed against once quantified) purporting to declare the same agreement enforceable but on the basis of conflicting tacit terms. The principle behind a plea of *res judicata*, the respondent argued, is to avoid precisely this sort of difficulty and not to permit the same thing to be demanded more than once. Accordingly, notwithstanding the ruling of the second arbitrator that the dispute before him was not *res judicata*, it remained an issue that the court must consider should it wish to ensure that it does not make a conflicting judgment against the same party in favour of the applicant on essentially the same subject matter. In other words, the respondent contended that the second arbitrator's ruling on the *res judicata* issue was wrong.

38. There are two difficulties with these submissions. The first is that the previous court order is of no consequence and cannot be executed upon to obtain payment. It is common cause that the applicant did not introduce any members to the scheme. Therefore the order, should there ever be an attempt to quantify it, will be worth nothing. Except for the award of costs, it is an inconsequential order. Secondly, and more importantly, the respondent is in effect seeking to appeal the second arbitrator's ruling on the *res judicata* issue. In clause 11.9 of the contract services agreement the parties agreed that any arbitration would be held under the provisions of the Act. Section 28 of the Act provides:

> "Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms"

There is no provision made in clause 11 of the contract services agreement for an appeal against any arbitration award. Likewise, the arbitration agreement of 26

November 2010 referring the *res judicata* issue to arbitration makes no provision for an appeal of that award either.

39. In consequence, the appropriate remedy available to the respondent, if it objected to the *res judicata* ruling, was to bring a review, within 6 weeks after publication of the award, on one or more of the grounds set out in section 33 of the Act, namely the arbitrator misconducted himself, committed a gross irregularity in the proceedings or exceeded his powers; or the award was improperly obtained.

40. It is at least arguable depending on the circumstances, that an incorrect ruling on the question of *res judicata* might amount to the arbitrator committing an irregularity or exceeding his powers if it results in a party not having its case fully or fairly determined. However, as is well known, the grounds of review under section 33 of the Act are narrow. It is one of the incidents of arbitration that the parties may be compelled to abide by decisions which err on the law or the facts. Misconduct by an arbitrator does not encompass errors of law and fact, unless they are so gross as to be symptomatic of grave irregularity. There is likewise no assumption that an arbitrator knows and applies the principles of law. Accordingly, if an arbitrator misdirects himself on the law, that in itself is no reason for setting aside the award; the parties are bound by the arbitrator's finding even if he errs on the facts or the law. Likewise, gross irregularity in the conduct of arbitration proceedings ordinarily relates to procedural irregularities, such as conducting a material part of the arbitration in the absence of one party. The irregularity only attains the level of "gross" when it results in the aggrieved party not having his case fully and fairly determined.[9] And "exceeding powers" in the context of an arbitration usually refers to a situation where the arbitrator acts beyond the powers conferred upon him or her under the terms of reference.

41. By the same token, it cannot be said that any error of fact or law in the ruling on *res judicata*, if any such did indeed occur, would be sufficient to invalidate the award thereby disallowing it from being made an order of court in terms of section 31 of the

[9] *Ellis v Morgan; Ellis v Desai* 1909 TS 576

Act. Such errors would not amount to defects in form or substance serious enough to make the award incapable of enforcement. The fact that the court may disagree with the conclusion reached by the arbitrator on the law or the facts is not in itself a ground for refusing to enforce the award.[10] If the respondent believed the ruling on *res judicata* led to it not having its case fully and fairly determined, as I have said, it was for it to challenge the award by invoking the statutory review provisions of section 33(1) of the Act rather than to adopt the passive attitude that it did.[11]

Prescription

42. The respondent submitted that the award should not be made an order of court because the underlying claim for payment has prescribed. The applicant's claim for payment was originally based upon the amount owing in terms of the contract services agreement for the period 1 January 2008 until lawful termination of the contract, determined by the first arbitrator to be 30 June 2008. In terms of the agreement, payment was due within 30 days of presentation of invoices which were rendered on the last day of every month and accordingly fell due 30 days thereafter. In the premises, according to the respondent, the claims upon which the current dispute (being the referral of the quantification issue) are based would normally have prescribed on 29 February 2011, 29 March 2011, 29 April 2011, 29 May 2011; 29 June 2011 and 29 July 2011, respectively, alternatively by no later than 29 July 2011. The current dispute was only referred to the third arbitration on 17 May 2013 after the 3-year prescription period as contemplated in section 11(d) of the Prescription Act[12] in respect of each of the claims had elapsed. The dispute, however, was referred to the second arbitration in early 2010. The second arbitration was finalised on 15 February 2012, on which date the impediment delaying prescription in terms of section 13 of the Prescription Act ceased to exist. In terms of section 13 (1)(f) of the Prescription Act, read with section 13(1)(i), if the debt is the object of a dispute subjected to arbitration ("the impediment') and the relevant period of prescription of that debt would be completed before or on, or within one year after,

[10] *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176
[11] *Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd* 2009 (3) SA 533 (SCA) at 541-542
[12] Act 68 of 1969

the day on which the impediment has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the impediment ceased to exist. This means that where the debt is the object of a dispute referred to arbitration and the debt but for the referral to arbitration would already have prescribed, or prescription has less than a year to run, the prescription period of the debt is extended for a year from the date the debt is no longer an object of dispute in arbitration. In the present case, accepting the date of the debt's prescription to have been 29 July 2011 or before, and the ceasing of the existence of the impediment to be 15 February 2012, the period of prescription of the debt would have been extended by one year and prescription was completed on 15 February 2013.

43. The respondent believes its plea of prescription will succeed before the arbitrator in the pending arbitration proceedings. In such circumstances, it was submitted, the court should not make the award an order of court.

44. The respondent's arguments miss the mark and misconstrue the correct legal position, in my judgement, in their failure to recognise that the award of the arbitrator created new rights and obligations between the parties. Clause 11 of the contract services agreement provides that the parties irrevocably agree that the decision of the arbitrator made at an arbitration shall be binding on each of them. In addition, section 28 of the Act provides that each party to the reference shall abide by and comply with the award in accordance with its terms. A new debt accordingly arises when a binding award is made. The party wishing to enforce the award will sue on the award and not on the original contract from which the dispute arose. The impediment arising by the debt being the object of a dispute subjected to arbitration is an impediment delaying the prescription of the original debt. That impediment may cease to exist in a variety of ways: the arbitration may be abandoned; the arbitrator may refuse jurisdiction; the arbitrator may become incapacitated; the arbitrator may make a ruling creating no new rights or obligations; and so on. But where, as in this case, the arbitrator declares the existence of a disputed debt and defines the basis of its calculation, new rights are created and a fresh prescription period commences, as with a judgment debt, because the debt is only due or immediately claimable from the date of the award. Only then does the creditor acquire a right to enforce the award, the terms of which were contingent or uncertain before the arbitration was

finalised, but which right accrues and is binding on the debtor, by reason of the arbitration agreement and the Act, once it is made certain by the award. Although the debt arising from the award in this case may not be payable until quantification, that does not mean that there is no new right or debt due. A debt under the Prescription Act is a right of which the converse is a liability.[13] The quantification of that liability is not necessary before a debt can be said to exist or be due.

45. Accordingly, the right to have an arbitration award made an order of court and to enforce it prescribes, in terms of section 11(d) of the Prescription Act, 3 years after the award is made.[14] Once the award is made an order of court it will become a judgment debt in respect of which the period of prescription will be 30 years; a consequence of some benefit to the applicant in the further conduct of proceedings in relation to the dispute. The award, as said, was made on 15 February 2012. Hence the right to enforce it will only prescribe in early 2015, unless the running of prescription has been interrupted or delayed in terms of the Prescription Act, in which event the period will be longer. Prescription thus poses no obstacle to making the award an order of court.

Illegality

46. The respondent has objected to the award being made an order of court on the ground that the award orders it to do that which is illegal by requiring it to pay the applicant for administrative and broker services, and excessive broker commission, when the applicant was not accredited as an administrator or broker in terms of section 58 and section 65 of the MSA. The effect of making the award an order of court, the respondent argued, would be to declare it bound by an illegal agreement.

47. Where a party is of the view that an award is invalid it is entitled to adopt a passive approach and wait until the successful party applies to court to enforce the award and then raise the defence that the award is void on grounds of illegality as a

[13] *Duet and Magnum Financial Services v Koster* [2010] 4 All SA 154 (SCA) at para 24
[14] *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C); *Primavera Construction SA v Government, North-West Province* 2003 (3) SA 579 (B); and *Police and Prisons Civil Rights Union obo Sifuba v Commissioner of the SA Police Service* (2009) 30 ILJ 1309 (LC).

reason for the court to refuse enforcement.[15] There is no need to seek to review and set aside the award under section 33 of the Act. A court will not enforce an arbitration award where the required action is illegal or contrary to public policy, as when the award directs a party to perform an act prohibited by legislation.[16] The approach adopted by courts was described in the English case of *Soleimany v Soleimany*[17] as follows:

> "The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none... In such a case there is a tension between the public interest that arbitrator's awards should be respected, so that there is an end to law suits, and the public interest that illegal contracts should not be enforced. ...In our view an enforcement judge, if there is *prima facie* evidence that from one side that the award is based on an illegal contract, should enquire further to some extent...But, in an appropriate case [the court] may inquire... into an issue of illegality even if the arbitrator had jurisdiction and has found that there is no illegality..."

The finding as to the legality of the agreement by the second arbitrator, if incorrect, cannot bind this court. This is particularly so where the mischief the legislature has sought to avoid in the MSA is the charging of broker commission in excess of the prescribed limit or fees for administrative and broker services where the person rendering them is not accredited by the regulator.

48. Section 58 of the MSA provides:

> "No person shall administer a medical scheme as an intermediary unless the Council has, in a particular case or in general, granted accreditation to such person."

In order to appreciate the significance of the word "*intermediary*", it is necessary to have regard to the definition of "administrator" which means:

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[15] Butler and Finsen: *Arbitration in South Africa* (Juta 1993) 273

[16] *Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa* 1992 (3) SA 880 (E); and *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* [1994] 1 All SA 453 (A) at 462-463.

[17] [1999] 3 All ER 847

"any person who has been accredited by the Council in terms of section 58, and shall, where any obligation has been placed on a medical scheme in terms of this Act, also means a medical scheme".

Thus where the medical scheme itself undertakes to deal with its members directly it is an administrator; where it appoints a third party to deal with its members that person, of necessity, acts as an intermediary between the scheme and the members.

49. The relevant subsections of section 65 of the MSA read as follows:

(1) No person may act or offer to act as a broker unless the Council has granted accreditation to such a person on payment of such fees as may be prescribed.

(2) The Minister may prescribe the amount of the compensation which, the category of brokers to whom, the conditions upon which, and any other circumstances under which, a medical scheme may compensate any broker.

(3) No broker shall be compensated for providing broker services unless the Council has granted accreditation to such broker in terms of subsection (1).

(4) ...

(5) A medical scheme may not directly or indirectly compensate a broker other than in terms of this section.

(6) A broker may not be directly or indirectly compensated for providing broker services by any person other than—

(a) a medical scheme;

(b) a member or prospective member, or the employer of such member or prospective member, in respect of whom such broker services are provided; or

(c) a broker employing such broker."

50. A broker is defined to mean any person whose business or part thereof entails providing broker services which are defined to mean:

(a) the provision of services or advice in respect of the introduction or admission of members to a medical scheme; or

(b) the on-going provision of service or advice in respect of access to, or benefits or services, offered by a medical scheme.

51. In terms of section 66(1)(a) of then MSA, a person who contravenes any provision of the Act or fails to comply therewith is guilty of an offence.

52. In terms of section 67 of the MSA, the Minister may, after consultation with the Council, make regulations relating to various matters stipulated in section 67(1)(a) to (q). Regulations were promulgated in terms of GNR. 1262 of 20 October 1999, and have been amended from time to time thereafter. The compensation of brokers is regulated by regulation 28(2), which provides:

> (2) Subject to subregulation (3), the maximum amount payable to a broker by a medical scheme in respect of the introduction of a member to a medical scheme by that broker and the provision of ongoing service or advice to that member, shall not exceed—
>
> > (a) R50, plus value added tax (VAT), per month, or such other monthly amount as the Minister shall determine annually in the Government Gazette, taking into consideration the rate of normal inflation; or
> >
> > (b) 3% plus value added tax (VAT) of the contributions payable in respect of that member, whichever is the lesser.

53. It is common cause that the applicant is not an accredited broker or administrator, but that PFM Marketing is.

54. A contractual arrangement in contravention of a statutory prohibition will normally (but not always) be void and unenforceable by a court. In *Standard Bank v Estate Van Rhyn*,[18] Solomon JA said:

> "The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature

[18] 1925 AD 266 at 274-275

did not intend to render the act invalid, we should not be justified in holding that it was. As *Voet* (1.13.16) puts it – 'but that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it.' Then after giving some instances in illustration of this principle, he proceeds: 'The reason for all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law.' These remarks are peculiarly applicable to the present case, and I find it difficult to conceive that the Legislature had any intention in enacting the directions referred to in sec. 116(1) other than that of punishing the executor who did not comply with them."

55. Nonetheless, where a statute prohibits an act or conduct in order to protect the public from specified undesirable trade practices, a contract requiring the performance of such act or obliging conduct in contravention of the prohibition ordinarily will be unenforceable in addition to inviting the statutory penalty, especially where trade licences or professional accreditation are involved.[19] To permit an unlicensed trader or unaccredited professional to make valid contracts and carry on business facing only the risk of the prescribed penalty would in most cases defeat the intention of the legislature to offer consumer or public protection against undesirable practices. As Fagan JA put it in *Pottie v Kotze* [20]:

"The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."

56. The intention of the legislature in enacting the accreditation requirements in the MSA was not only to penalise contraventions but to hold the prohibited acts to be invalid. Section 65(3) is explicit in prohibiting compensation to unaccredited brokers, but the necessary implication of section 58 also is that invalidity would attend any conduct in contravention. To hold otherwise would give legal sanction to what the MSA wishes to prevent. Consequently, should it be established that the award has sanctioned a contract or payments in contravention of section 58 or section 65 of the MSA, that contract would be unenforceable and the second arbitrator's award will be invalid on grounds of illegality.

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[19] *Delport v Viljoen* 1953 (2) SA 511 (T) 516–517
[20] 1954 3 SA 719 (A) 726–727

57. The second arbitrator found that the applicant did not contravene section 58 of the MSA when rendering the services in Annexure A of the contract services agreement of 2003. With reference to the language of the provision, he held that the requirement of accreditation applied only to administrators acting as intermediaries between the scheme and the members; and that it was permissible for an accredited administrator, like the respondent, to sub-contract services to an unaccredited sub-contractor, such as the applicant. There was no nexus between the applicant and the scheme, meaning that accreditation was not required. In reaching his conclusion, the second arbitrator attached weight to a policy statement of the Council for Medical Schemes included in correspondence which makes it plain that sub-contracting of administration services is permissible. The document in question, referred to as Exhibit A in the award, apparently dealt with the functions performed specifically by the applicant under the agreement. It is quoted as saying:

> "Note that the ultimate responsibility for the performance of administration functions vests with the administrator which contracts with the scheme concerned. Accordingly, the administrator is liable towards the scheme being administered for the actions of the sub-contractor."

From this the second arbitrator inferred that there was no obligation on the applicant to obtain accreditation to perform its functions under the contract. After analysing the document further, and taking account of the evidence of Mr Mashele, (the CEO of the applicant and the only witness to testify in the proceedings) regarding the functions performed under the contract, he held that there was no illegality or contravention of section 58 of the MSA.

58. The document in question, Exhibit A, does not form part of the record of this application. Nor does the record include a transcript of Mr Mashele's evidence. And the award offers no detailed analysis of it. Absent that evidence it is difficult to reach a conclusive finding on whether or not accreditation was required and if the second arbitrator erred in his determination. As a general proposition, the administration contract should be presumed to be valid, but in terms of the MSA it will be of no force or effect if the administrator lacks accreditation, when and if such is in fact required. The onus is therefore on the respondent relying on statutory illegality as a defence to

prove that accreditation was required in relation to this contract. In my opinion it has not discharged that onus.

59. The respondent dealt with the question of illegality in paragraphs 40-44 of the answering affidavit. In those paragraphs it failed to take issue with the second arbitrator's reasoning or the basis of his finding. It maintained rather that the applicant rendered no services to it, but did so to Contact SPI, something denied by the applicant and found to be false by the first arbitrator. In paragraph 44 it in fact averred that the purpose of the 2003 contract services agreement was to ensure compliance with the law. The parties agreed, in a contract drafted by the respondent, and in response to changing legislative policy, to re-define the contractual duties of the applicant in order to avoid the prescribed limits on broker remuneration. The intention was to offer compensation to the applicant over and above that paid to its associated broker company, PFM Marketing. The second arbitrator found the arrangement was legitimate and not *in fraudem legis*, which finding has not been challenged on review. But, whatever the nature and character of the schemes the parties may have engaged in to arrange their affairs, the evidence contained in the answering affidavit is simply not sufficient to conclude that the agreement violated section 58 of the MSA and that the second arbitrator erred in that regard. Nor does it appear *ex facie* the contract that it is illegal. The services identified in Annexure A to the contract are of a varied nature. If they are of the kind normally done by an administrator they have evidently been sub-contacted to the applicant, but no case is made out that the sub-contacting violated the prohibition.

60. The courts should be careful not to discourage parties from resorting to arbitration by undermining its purpose and finding fault with awards too easily, even where the arbitrator has entered upon the topic of illegality. They should expect parties to honour their commitment to implement the decision of the arbitrator in good faith. When an unsuccessful party to arbitration alleges that the award is invalid it must make out a proper case with appropriate and sufficient evidence. After all, in this case, it was the respondent who drafted the contract services agreement. On the limited evidence placed before me, and on a proper interpretation of section 58 of the MSA, whether the contract was in contravention of section 58 ultimately remains indeterminate as a matter of certainty. On the basis of the arbitrator's unchallenged

reasoning it seems unlikely or improbable that it was. The respondent accordingly has failed to establish good cause for refusing to make the award an order of court on this account.

61. The respondent's claim that the agreement contravened section 65 of the MSA is predicated on two contentions: the applicant acted as a broker when it was not accredited to do so; and the applicant received compensation in excess of that permitted to be paid to brokers in terms of the Act. In order to sustain those allegations the respondent must establish that the applicant was a "broker" as defined in section 1 of the MSA. If the applicant did not act as a broker under the agreement, the regulatory requirements do not apply to it.

62. No witness gave evidence on behalf of the respondent at the arbitration. However, the submissions made on behalf of the respondent at the arbitration have been repeated in paragraphs 40-44 of the answering affidavit and in the heads of argument filed on its behalf. The respondent alleged that the applicant was in fact acting as a broker in rendering the services in Annexure A of the agreement and that the fees were disguised broker commission in contravention of the MSA. It is common cause that PFM Marketing earned commission for the broking services rendered by it and that both companies are controlled by the same person, Mr Mashele. The contract services agreement, according to the respondent, was in reality a disguised agreement for additional brokerage commission beyond the 3% stipulated statutory maximum. The applicant denied that it acted as a broker. The second arbitrator found that the duties circumscribed in the 2003 agreement do not constitute broker services and the applicant did not act as a broker.

63. The respondent averred that the illegality of the contract services agreement can be ascertained merely by having regard to the nature of the services to be provided as set out in Annexure A and the content of the alleged tacit term that despite the provisions in the agreement with regard to remuneration, the amount payable was 3% of the contributions of members introduced to the scheme by PFM Marketing, which itself earned 3% commission in respect of these self-same members for broker services.

64. The starting point is to determine if the applicant acted as a broker, defined, it will be recalled, as any person whose business or part thereof entails providing broker services, being: (a) the provision of service or advice in respect of the introduction or admission of members to a medical scheme; or (b) the on-going provision of service or advice in respect of access to benefits or services offered by a medical scheme. Neither the affidavits nor the award provides a description or details of any services in fact rendered by the applicant in terms of the agreement. Which of the services in Annexure A of the contract were actually performed, is by no means self-evident. In order to be a broker, the applicant would have had to provided service or advice in respect of the introduction or admission of members to Spectramed. There is no evidence that it did so. In fact, it is common cause that the applicant did not introduce members to the scheme, which is the reason the second arbitration became necessary. It seems unlikely therefore that it provided any service in that regard and there is no evidence that it gave any advice on that score. Paragraph (b) of the definition of "broker services" brings the "on-going provision" of services or advice in relation to the benefits and services of the scheme into the ambit of the definition. The intention there, it would seem to me, is to include within the definition the continuing servicing of members by the person or entity who introduced them to the scheme. If that is correct, which I believe it is, then the applicant did not act as a broker in respect of the members who were introduced by PFM Marketing. Accordingly, it did not require accreditation as a broker to perform the services in Annexure A of the agreement, and the remuneration to which it is entitled is not subject to regulation 28(2).

65. But even if I am mistaken in my interpretation of the definition of "broker services", the services listed in Annexure A for the most part do not resemble those typically performed by a broker. They do not relate to the introduction of members or their on-going servicing. They include the establishment, management and staffing of customer service offices (a network of more than 40 offices was set up); managing service providers; providing member education; analytical reviews; product design etc. The fact that remuneration was paid at a rate of 3% of contributions paid by the members introduced by PFM Marketing does indeed give the appearance of a commission arrangement normally applicable to brokers and may have been

indicative of a brokerage contract if supported by evidence. But without evidence explaining the arrangement one is left to speculate. As the second arbitrator found, that fact standing on its own does not support an inference of a broker relationship. One might speculate equally that the parties found it easier for the remuneration to be a percentage rather than for the applicant to invoice as the agreement initially provided. But the method of remuneration is not decisive. The primary determinants are the services rendered. And the limited evidence presented does not establish that what the applicant did or was obligated to do under the contract services agreement amounted to rendering broker services.

66. In the result, I am unable to find on the evidence that the agreement contravened section 65 of the MSA, or that the award of the second arbitrator is invalid for compelling the respondent to comply with an illegal agreement.

Section 23 of the Arbitration Act: extending the time for making the award

67. Unless the arbitration agreement provides otherwise, in terms of section 23 of the Act, the arbitrator is generally required to make his award within four months of entering on the reference. In its answering affidavit the respondent took the point that the award was out of time. The applicant has not denied that the award should have been made on 30 March 2011 but was in fact made almost a year late on 14 February 2012. The respondent initially submitted that the award was a nullity for this reason.

68. The applicant in the replying affidavit set out a detailed history of the arbitration and submitted that most of the delays were caused by the reluctance of the respondent to proceed with the second arbitration. The proviso to section 23 of the Act provides that the court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not. The applicant has applied for the time to be extended and has made out a cogent case that good cause exists to do so. During argument the respondent indicated that it did not oppose the

application. Accordingly, I propose to make an order retroactively extending the time for the making of the award to 15 February 2012.

Costs

69. In the notice of motion in the main application filed on 8 June 2012 the applicant (or his erstwhile attorney) neglected to include a prayer for costs. On 27 September 2013, the applicant, then represented by his present attorneys, filed an amended notice of motion including a prayer for costs supported by an affidavit explaining that it had always been its intention to seek costs.

70. The respondent did not object to the proposed amendment and did not file any opposing papers. In argument though, it submitted that there were no grounds for condoning the belated prayer for costs.

71. A court may grant leave to amend the notice of motion by the insertion of a prayer for costs.[21] The general approach to an amendment of a notice of motion is the same as to a summons or pleading in an action.[22] Absent an objection to a proposed amendment the amendment should ordinarily be allowed. It was incumbent on the respondent to take issue with the amendment by filing a notice of opposition, which it failed to do. Once the amendment is allowed the ordinary principles of cost will apply. But even absent an amended prayer, the award of costs is always in the court's discretion to be exercised judicially upon consideration of the facts in each case. The decision is in essence a matter of fairness to both sides.[23] It was nowhere stated in the respondent's answering affidavit that it opposed the application on the basis that the applicant was not seeking an adverse costs order. It cannot be said that the respondent was not alive to the risk of an adverse cost order, which is borne out by its failure to object to the proposed amendment at the time it was made.

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[21] *Jacobs v Joyce & McGregor* 1937 CPD 468 at 470; and *Adamson v Vorster* 1956 (4) SA 803 (O) at 805H-806A;
[22] *Devonia Shipping Ltd v MV Luis (Yeoman Shipping CO Ltd Intervening)* 1994 (2) SA 363 (C) at 369
[23] *Fripp v Gibbon & Co* 1913 AD 354

72. In the premises, I am satisfied that the amendment should be allowed and that costs should follow the result.

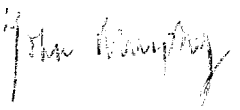
Order

73. For the aforesaid reasons, I make the following orders:

i) In terms of the proviso to section 23 of the Arbitration Act 42 of 1965 the time for the making of the award by the second respondent is extended to 15 February 2012.

ii) The award of the second respondent dated 14 February 2012 is hereby made an order of this court in terms of section 31(1) of the Arbitration Act 42 of 1965.

iii) The first respondent is ordered to pay the costs of this application.



JR MURPHY
JUDGE OF THE HIGH COURT
NORTH GAUTENG

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