**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

**Case number: 14579 / 2020**

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

[redacted] 2022-02-15
SIGNATURE DATE

In the matter between:

**WHAT A FUNCTIONALITY (PTY) LTD** **APPLICANT**

**And**

**eSTUDY (PTY) LTD** **1st RESPONDENT**

**ASSOCIATION OF ARBITRATORS (SOUTHERN AFRICA) NPC** **2ND RESPONDENT**

**MR SHAUN PRESTON HANGONI N.O** **3RD RESPONDENT**

**Delivered: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file**

**of this matter on Caselines. The date for handing down is deemed to be 15 February 2022.**

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**JUDGMENT**

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**PHAHLAMOHLAKA A.J.**

**INTRODUCTION**

[1] The Applicant, What a Functionality (PTY) LTD(WTF), seeks a declaratory order whereby the appointment of the Third Respondent on 12 May 2019 is declared null and void, as well as , that the arbitration proceedings and the subsequent award is declared to be null and void.

[2] On 17 April 2018 the applicant and the first respondent entered into a Service Level Agreement (SLA) in terms of which the applicant would install software, train 'super users' on the software and assist with the report and data set-up. Clause 15 of the SLA providing as follows:

"15 ARBITRATION

*15.1 Save for, as otherwise provided for in this agreement, taking specifically into consideration the contents of clause 15.9 of this agreement, any dispute between the parties with regard to, the interpretation of, the effect respective rights and obligations under, the breach of, and any matter arising out of, this agreement shall be decided by arbitration in the manner set out in this clause.*

*15.2 The arbitration shall be held at (a venue to be decided by arbitrator allocated), and in accordance with the provisions of the Arbitration Act, No 42 of 19965, as amended, within (if reasonably possible) 21 (Twenty-One) days after it has been demanded by either one or* both the parties.

*15.3 The arbitrator allocated, shall be if the question in issue is:*

*15.3.1 .....*

*15.3.2 Primarily a legal matter, a practicing experienced Counsel, agreed upon between the parties.*

*15.4 If the parties cannot agree on a particular arbitrator, in terms of clause 15.3 of this Agreement, within 7 (seven) working days after the arbitration has been demanded by one or both of the parties, the nomination of the*

*arbitrator in terms of Clauses 15.3.1 and 15.3.2 of this agreement, the case may be, shall be made by respectively the Institute of Chartered Accountants of South Africa or by the President of the Law Society of the Northern Provinces, within 7 (seven) days, or as soon as possible thereafter, after the parties have so failed to agree.*

*15.5 The parties irrevocably agree that the Arbitrator's decision in the arbitration proceedings shall be final and binding on them, shall be carried into effect, and may be made an order of Court of competent jurisdiction.*

*15.6 The parties are entitled to be legally represented at the arbitration.*

*15.7 The parties agree to keep the arbitration, including the subject matter of the arbitration and the evidence heard during the arbitration, confidential and* not to disclose it to anyone, expect for purposes of an order to be made pursuant.

15.8 *The parties shall be responsible for their own legal costs for arbitration, irrespective of the outcome of the matter, unless otherwise ordered by a Court Law.*

*15.9 If the Licensee, is however, in default with its payment due, the Supplier shall be entitled to elect to recover the amount due, by making use of the normal court procedure in the appropriate court with jurisdiction, and shall accordingly not be bound by the contents of clauses 15.1 to 15.8 of this agreement"*

[3] A dispute arose between the applicant and the first respondent which prompted the first respondent to refer the dispute for arbitration. The applicant has issues with the addendum/s to the SLA in terms of which the first respondent refereed the dispute to arbitration, hence the current application. The question the court has to grabble with is whether the first respondent correctly referred the dispute to arbitration and whether the third respondent was properly appointed.

[4] It is apposite at this stage to sketch the Chronology of events that led to the present application.

CHRONOLOGY

*4.1 On 17 April 2018, the Applicant and eStudy entered into a service level agreement (SLA) in terms of which the Applicant would install software, train "super users" on the software and assist with the report and data setup.*

*4.2 On 24 October 2018 the Applicant received a letter from the First respondent dated 22 October 2018. Paragraphs 3 and 4 of the letter read that the general specific obligations as stipulated in clauses 7 and 8 of the service level agreement* have

*not been met and that notice was given in terms of clauses 14 of a material breach, and should the breach not be rectified within 10 days, eStudy would proceed to cancel the agreement.*

*4.3 On 12 November 2018 the First Respondent's legal compliance officer addressed a further letter to the Applicant that amongst others reads:*

*"We **are of the opinion that such breach has not be rectified and you and your company are now in breach of contract.***

***Please be advised that we now in consultation with our attorney seeking legal advice on the way forward in order to procced with the legal action against yourself and your company for specific non-performance and or damages in terms of the contact signed between the parties on 23 April 2018".***

4.4 On 31 January 2019 the Applicant was requested by eStudy/the First Respondent to sign an addendum agreement to the SLA. The letter amongst others reads:

***"Please be advised that eStudy are demanding Arbitration in terms of clause 15 of the signed agreement between the parties. eStudy will proceed to request a list of Arbitrators from the Association of Arbitration of Southern Africa (AASA) to fulfil the terms as set out in clause 15.3.2 of the signed agreement.***

***Once we have received the list same will be forwarded to yourself and your company for consideration and mutual consent for the appointment of an Arbitrator.***

***Kindly find attached hereto an addendum to the Service Level Agreement where the parties agreed to appoint the AASA in this matter as the Arbitration Clause in the signed agreement does not make provision for the matter as the Arbitration referred to any arbitration body.***

***Kindly sign such addendum and return in order for us to proceed with the request and appointment of the AASA."***

***4.5 The proposed addendum to the Service Level Agreement reads:-***

***"This addendum is entered into between What The Functionality (Supplier) and eStudy (Pty) Ltd (Licensee").***

***The supplier is providing a service as per Service Level Agreement into between the parties duly signed on 23 April 2018 ("the Agreement").***

***Effective from 31 January 2019, this addendum is incorporated into the Agreement.***

***IN CONSIDERATION FOR THE MUTUAL PROMISES, THE PARTIES AGREE AS FOLLOWS:***

- *Any* ***dispute arising from or in connection with this agreement may be referred to the Association of the Arbitrators of Southern Africa for the appointment of an Arbitrator and such Arbitrator may regulate any disputes that arise out of this agreement."***

(Hereinafter referred to as "the Addendum Agreement")

4.6 On 11 February 2019, Mr le Roux of the Applicant, signed the addendum Agreement and sent it to eStudy's legal compliance office.

4.7 On 27 March 2019, Mr le Roux on behalf of the Applicant, enquired whether the Applicant could demonstrate a version 2 upgrade of extreme. The First Respondent did not object in principle, but recorded the following on the same day:

"***We would like to place on record that by allowing this demonstration that WHAT THE FUNCTIONALITY we are in no way waiving any of our right to Arbitration. The arbitration process has already been implemented and consent to by both parties involved and we retain all our rights related thereto."***

4.8 On 08 April 2019 the Applicants received an email from eStudy/the First Respondent that reads: *"Please find attached hereto our application being submitted to AASA."* Only a copy of the application for the appointment of an arbitrator was attached and the first addendum agreement was not enclosed.

4.9 On 09 April 2019 the Applicant received a reminder to acknowledge receipt of the application so that the First Respondent may proceed with the process and on the same day the Applicant's Mr le Roux acknowledged receipt.

4.10 On 09 April 2019 Mr Happy Mthembu in the employ of the Second Respondent and of the Nominations Section, requested a copy of Clause 15 of the SLA from eStudy /First Respondent and it was forwarded to him same day.

4.11 On 11 April 2019 Mr Happy Mthembu advised:

***"According to your application we not the nominating body, the nominating body is the Institute of Chartered Accountants of South Africa or by the President of the Law Society of Northern Provinces.***

***Kindly be advised that, if the Society is not the appointing body as per the dispute resolution clause in the applicable contract, we require a written agreement signed by all disputing parties wherein the Association of Arbitrators (Southern Africa) NPC is nominated as the appointing body for your dispute."***

4.12 On 12 April 2019 eStudy Legal reverted to Mr Mthembu:

***"Please advise if this was not addressed in the addendum that was signed between the parties and sent to your offices?"***

4.13 On the same day, 12 April 2019, the legal department of the First Respondent reverted and confirmed a scheduled meeting for Monday, 15 April 2019. The following was amongst others recorded:

***"We would like to place the following on record: (1) Legal proceedings has been instituted against WTF since September 2018; (2) In no way does granting this meeting to ourself imply that we are waiving any of our rights in terms of the legislation or the signed agreement; (3) There is no termination or holdoff of any legal proceedings already".***

4.14 On 10 May 2019 the First Respondent's Legal Compliance Officer reverted to the Applicant with the following request:-

***"Please sign the attached as the arbitration committee was not happy with the wording in the previous document."***

Attached to the email was a proposed addendum to the Service Level Agreement that reads:

"*Arbitration Agreement:*

***This agreement is entered into between What The Functionality (supplier) and eStudy (Pty) Ltd ("licensee").***

***The supplier is providing s service as per Service Level Agreement entered into between the parties duly signed 23 April 2018 ("the Agreement").***

- ***A dispute has arisen from the agreement and the parties agree that such dispute may dealt with by the Association of Arbitration of Southern Africa.***

- ***Any time lines within the signed agreement is hereby revoked and this matter may proceed."***

4.15 On 12 May 2019 the Second Respondent reverted and informed that it has appointed Mr SP Hangone as the arbitrator.

4.16 On 13 May 2019 the Third Respondent came on record and his email amongst others reads:-

***"On 12 May 2019, the Association has appointed writer as arbitrator and I have duly accepted the appointment.***

***In order to proceed with the arbitration we will need to convene a pre-arbitration meeting. At the proposed meeting we shall inter alia confirm my appointment sign arbitration fee agreement to the procedure to settle the dispute i.e time periods etcetera. ...."***

4.17 On 20 may 2019, the Third Respondent sent a proposed agenda for the pre-arbitration meeting; a fee agreement and a confirmation of appointment of the arbitrator agreement. Clauses 4 and 8 of the appointment agreement now provides that the nominator, the Second Respondent, shall be entitled to a fee payable by the arbitrator:

***"4. Association of Arbitrators Southern Africa (AoA) shall be entitled to 5% of the arbitrators, total fee. This fee will be paid by the arbitrator to AoA.***

***8. The arbitrator shall pay AoA the levy within 5 (five) days of receipt of the dull arbitrator's fees and that after the deduction of the said 5%."***

(The SLA provides that if the parties fail to agree on an arbitrator, that an independent and impartial person namely the President of the Law Society of the Northern Provinces would appoint an arbitrator. The nominator, Third Respondent, now has a financial interest in its own nomination)

4.18 On 07 June 2019 the Applicant sent an email to the First Respondent's Legal Compliance Office. In the email the Applicant contends that the addendum agreement never came into existence and that the SLA agreement remains in place. It is clearly recorded that the Applicant had not consented to the Arbitration Foundation/the Second Respondent as the nominating party; neither to the Arbitrator not been an experienced practicing counsel, i.e. an advocate practicing at the Bar.

4.19 On the same day, 07 June 2019, an email was addressed to the Third Respondent and the aforesaid email addressed to the First Respondent wherein the Third Respondent was informed that the original contract (the SLA) provided for the appointment of an arbitrator by a party other than the Arbitration Foundation of South Africa; that the entire process should have been concluded within 21 days after an arbitration had been demanded by a party. The email also reads:

*"We will therefore not be signing any contract for your appointment and the payment of your fees and will not be present on the 13th of June unless a compelling case can be presented to us by you or eStudy as to why your appointment is proper and binding on us and why there is still a despite to be arbitrated given the aflixion of time since the demand of arbitration was made originally in November 2018."*

4.20 On 10 June 2019 the Applicant addressed an email to the Third Respondent. It amongst others reads:

***"We do not recognise as you as the arbitrator, I address this letter merely to provide you with more information in order for you to make your own mind about the issue."***

The email raise various concerns:

3.21.1 Mrs Koekemoer, the First Respondent's legal Compliance officer and a qualified attorney communicated in private with the Second Respondent;

3.21.2 The Applicant was unaware of the existence of the "Arbitration Committee" and how it functions and why the arbitration committee would ask Mr le Roux on behalf of the Applicant to waive time periods;

3.21.3 That the "arbitration committee" apparently advised eStudy/the Second Respondent that the time periods are problematic;

3.21.4 The Arbitrator should be practicing as experienced counsel;

3.21.5 The addendum agreement never came into existence,

The email concluded: ***"therefore quite clearly there can be no arbitration option that is still open.'***

4.21 On 11 June 2019, eStudy/the First Respondent reverted to the Third Respondent/the arbitrator. Paragraphs 5 and 6 of the email reads:

***"5. Between 14 February and 09 April WFT has approached eStudy in order to do a demonstration of the Version 2of the Software. We "halted" the arbitration process to see if we could proceed with the services in terms of the contract and if WTF has rectified their breach as mentioned in the letter referred to in point 1 in October 2019 was scheduled but on the date that the demonstration was supposed to take place (04 April 2019) the meeting was cancelled on the morning of the meeting.***

6. ***All documents were sent to the AASA on 09 April 20189. Between 11 April 2019 and 24 April 2019 we sent follow up emails to the AASA requesting feedback of the appointment as we submitted all documents."***

4.22 On 12 June 20189 the Third Respondent ruled on the Applicant's objections. He ruled that:

3.23.1 Clause 15.3 referred to "legal counsel" and that the dictionary meaning of "counsel" includes a lawyer; barrister counsel and legal practitioner.

He continued:

"***Logic dictates that such appointment would necessary be of an attorney, as the Law Society as it was then known, was the regulator of the sidebar i.e. the attorney's profession. It follows that the allegation that clause 15.3 when it refers to counsel exclusively means an advocate is not sustainable."***

4.23.2 The arbitration is not time-barred: he referred to the reference to the Arbitration act in clause 150.2 of the Service Level Agreement. He ruled that the Act requires that an arbitration entitles the Third Respondent to proceed with the arbitration.

4.23.3 He found that the conduct of the arbitration committee is irrelevant for purposes of determining his jurisdiction.

4.23.4 In respect of the validity of the agreement, he ruled:

"**18.** ***The conclusion of the main agreement and its subsequent amendment is not disputed. The Association is nominated as the appointing authority of the arbitrator in the present agreement as amended. In keeping with the addendum, the Association has made the necessary appointment of the arbitrator.***

**19.** ***In the circumstances the objection to my jurisdiction based on the purported conduct of the appointing authority regarding the conclusion of the addendum is in my view an irrelevant consideration, when determining if I have the necessary jurisdiction to arbitrate the dispute."***

4.23 On 26 July 2019, the Applicant received an interim order. The interim order recorded directives that were made on 02 July 2019 at the second pre-arbitration meeting.

4.24 On 01 August 2019, the Second Respondent addressed a letter to the Applicant and noted that:

***"…. The arbitration has continued in default as provided for in the rules of the Association of Arbitrators ("Rules"). It is unclear form your email under reply whether What The Functionality's is now prepared to acknowledge my appointment and participate in the arbitration? In the event that my appointment is acknowledged then I will provide a further direction regarding the filing of a Statement of Defence as prescribed by Article 21 of the Rules. Be advise that in terms of Articles 23 of the Rules. "Please as to Jurisdiction of the Arbitral Tribunal" a challenge to my jurisdiction can be raised in a Statement of Defence. As such you acknowledging my appointment as arbitrator, by signing and returning the fee agreement, does not by necessary implication amount to consent to my jurisdiction…. In the event that a fee agreement is not signed and returned, I shall continue on the basis that What The Functionality remains in default and I shall make an award on the basis of the documents submitted by eStudy."***

4.25 On August the Third Respondent transmitted an email to both the Applicant and the First Respondent with two invoices attached for his arbitration fees. One made out to the First Respondent for 50% of his total fees and the other made out for the 50% balance to the Applicant.

4.26 On 15 August 2019 Mr le Roux on behalf of the Applicant addressed a lengthy email to the Third Respondent and amongst others recorded:

*"…. In our absence, and in the absence of any agreement between the parties to amend the arbitration agreement in that respect you unilaterally by degree imposed that 2018 version of the rules of AASA and have ever since conducted the matter in accordance thereof. …."*

[5] The Applicant thus clearly intimated that the arbitration has now no contractual basis. The arbitration and the decrees and/or orders and award will have no contractual basis.

[6] It is common cause that eStudy provided a further addendum for consideration by WTF, but this further addendum was not accepted, let alone signed by WTF (Applicant). The applicant intimated that the arbitration had no contractual basis and therefore, the applicant contends, the arbitration and the decrees and/or orders and award will have no contractual basis.

[7] The applicant further contends that by proposing the second addendum the first respondent revoked the first addendum because the first respondent did not even furnish the applicant with the copy of the first addendum which was signed by both parties. The applicant argues that it signed the first addendum but the first

respondent never furnished the applicant with proof that the first respondent signed and therefore, according to the applicant, the first addendum was not agreed to between them. In the circumstances I am of the view that the first addendum has been validly concluded. Having found that it was validly concluded by both the Applicant and the First Respondent, it follows that it is enforceable between the parties.

[8] It is indeed true that as a general rule, where the dispute between the parties relates to a question as to whether a contract embodying an arbitration clause has been validly entered into at all, such dispute cannot be submitted to the arbitration. The applicant in *casu* denies the existence of the contract between the applicant and the first respondent

[9] Clause 21.9 of the Service Level Agreement provides: "the amendment, variation or cancellation hereof will be binding unless in contingent signed by both parties.

[10] It is contended by the First Applicant that when the First Applicant signed the first addendum, it made an offer to the First Respondent and the First Respondent failed to convey its acceptance of the offer to the Applicant. Instead it approached the Applicant to sign a new and different addendum to the Service Level Agreement.

[11] If the First Respondent were to rely on the first addendum, why initiate a second addendum. It could have seen some loopholes that it wanted to close. If the second addendum was to be signed by both parties does it mean the first addendum, if it was properly signed by both parties, would have been varied?

[12] Section 14(1) (b) (v) of the Arbitration Act[1]; provides that evidence can only be received by affidavit with consent of the parties or an order of Court. Therefore, in the absence of an agreement to adopt the rules, the statutory provision take precedence.

[13] Clause 23 of the AASA rules reads:

> "*23.1 The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration clause that .... Part of the contract shall be treated as an agreement independent of the other terms of the consent. A decision by the Arbitral Tribunal that the consent is a .... Shall not automatically invalidate the arbitration clause."*

[14] I am persuaded by the argument that the arbitration agreement does not empower the Arbitrator to determine the validity of the Arbitration Agreement. Arbitration proceedings are in their nature by agreement between the parties to a dispute. This is so because the courts are not loathed on interfering with the arbitration

[1] 42 of 1965

awards except in limited circumstances set out in the Arbitration Act. In order for the court to interfere with the arbitration award the court must be satisfied that the arbitrator committed an error of fact and law resulting in gross irregularities in the conduct of the proceedings and/or exceeded his powers. See Khum MK Investments and **Bie Joint Venture (PTY) LTD v Eskom Holdings SOC and another**[2]

[15] The Applicant contends that the Arbitrator has exceeded his powers. If this is correct then the arbitrator's award should be reviewed and set aside.t is true that the arbitration proceedings are consensual in nature.

[16] Section 2 of the Arbitration Act provides that:

*"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."*

[17] Counsel for the Applicant argued that if the Arbitration makes an award outside his term of reference such as an award is a nullity and void *ab initio*. He reiterated that the Arbitration proceedings are consensual in nature and if you decide on what has not been agreed upon than the award is void. Reference was made to **Wilton v Body Corporate 1994 (4) SA 160 (WPD) at D – F.** I was also referred to **Vidavsky v Body Corporate of Sunhill Vilas (227 of 2004) [2005] ZASCA 53 (31 May 2005) paragraph 14 – 17** where Heher JA said the following: "An arbitration is, of course, a *quasi-judicial* proceedings...."

[18] The Applicant further contents that it did not sign the "Fee Agreement" in respect of the Arbitration and therefore, according to the Applicant:

18.1 The appointment of the Arbitrator was null and avoid;

18.2 A wrong category of a persons was appointed (the Applicant contents that the appointing body was supposed to be either the Institute of Chatterd Accountants of SA or the Law Society of the Northern Provinces and not the second respondent as per the original service Level Agreement);

18.3 The Arbitrator adopted its own rules;

18.4 The arbitrator made an order without evidence. The Applicant contends there was no agreement that the arbitrator could make an order without evidence.

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[2] 930169) [2020] ZAGPJHC at PARAGRAPH 35 7(23 January 2020)

[19] The first respondent argued that this application is without merit because and it was out of time and therefor time-barred in terms of section 32 of the Arbitration Act[3] . The applicant only lodged this application after the first respondent approached the court for the enforcement of the arbitration award.

[20] On the validity of the addendum dated 11 February 2019 the first respondent argued that the unsigned addendum was duly sent to Mr Le Roux for signature, who at no stage raised any issues therewith nor raised any objection to the content contained therein. The addendum was then duly signed and transmitted to the first respondent who then countersigned the document. The first respondent contends that it is not the applicant who made the offer and therefore cannot revoke the offer it did not make.

[21] It is common cause between the parties that the second addendum was not signed by either of the parties. On this aspect, the first respondent argued that because of the experience of the Compliance officer of the first respondent, who was tasked to submit the application for arbitration, it cannot be said that transmitting of the further and/or second agreement, which was ultimately not necessary, which was merely sent as an over precaution thereby revoked the initial addendum.

[22] This application relates to the interpretation of a clause in an agreement. The court is called upon to determine whether the addendum to the Service Level Agreement was properly agreed to between the parties.

[23] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*[4]. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a documents, be it legislation, some other statutory instrument, or contract, having regards to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used which provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to,

[3] Act 42 of 1965

[4] (207/07) [2008]ZASCA 70

sensible or business-like for the words actually used. To do so in regard to a stature or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', reads in context and having regards to the purpose of the provision and the background to the preparation and production of the documents.

[24] If I find that the third respondent was not properly appointed then it is correct that the process that followed his appointment was void and therefore there was no arbitration. The original SLA provided for the appointment of an arbitrator by the Council of Chattered Accountants or the Law Society of the Northern Provinces. It must be stressed that this appointment had to be agreed to by the applicant and the first respondent. However, the first respondent introduced an addendum which was signed on behalf of the applicant. The applicant contends that it was never furnished with a copy of the said addendum which was signed on behalf of the first respondent. Instead, the first respondent sent a proposed second addendum. This was never disputed by the respondent. It would not be illogical therefore if the applicant is of the view that by sending another addendum the first respondent the first respondent was retracting the first addendum.

[25] The first addendum reads, in part, as follows:

"*Any dispute arising from or in connection with the agreement may be referred to the Association of Arbitrators of Southern Africa for the appointment of an arbitrator and such arbitrator to regulate any disputes that arise out of the Agreement.*

[26] From the reading of this addendum it does not appear to amend the original SLA, especially clause 15 thereof which makes provision for the appointment of a Chartered Accountant or an Advocate or Attorney. The addendum, if anything, provides for a wider pool or more options in respect of the categories of professionals that could be appointed as arbitrators. Nowhere in the addendum is there a provision authoring the first respondent to unilaterally appoint the arbitrator. Even if I were to accept that the first addendum was properly signed by the applicant and the first respondent this does not amend the original SLA in terms of the appointment.

[27] Clause 15 of the SLA makes it peremptory for the parties thereto to refer a dispute to arbitration and for the appointment of the arbitrator to be made by "respectively the Institute of Chartered Accountants of South Africa or by the President of the Law Society of The Northern Provinces."

[28] I am of the view that the third respondent was not appointed according to the SLA signed on behalf of the applicant and the first respondent and, therefore the third respondent's appointment as void. Having said that, it follows that the award made by the third respondent cannot stand.

[29] The applicant in its notice of motion also prays that I declare that the arbitration agreement shall cease to have any effect. I am of the view that the applicant has not presented a compelling case for this prayer. The applicant is a signatory to an SLA and this court cannot interfere with that.

[30] I am satisfied that the applicant had made out a case for the relief sought. I agree that this review is on legality and not in terms of PAJA because the appointment of the third respondent was not done in terms of the SLA.

[31] This brings me to the issue of costs. It is a well-established principle of our law that costs should follow the result and thus there is no reason why the respondents should not be ordered to pay costs. The applicant is seeking a cost order on a punitive scale. I am not satisfied that the applicant is entitled to costs on a punitive scale because the first respondent was well within its rights to oppose the application.

[32] However, there are costs that were reserved on 17 May 2021 and the parties failed to reach a settlement in that regard despite having tried to do so. The applicant says it received notice of the date of hearing on Tuesday 4 May 2021, without prior indication that it has been applied for. The applicant's attorney loaded this matter o case lines but says in retrospect it appears that the uploading of the record was not shared with the Registrar and/or the Court. It is common cause that as a result of the applicant's actions or inaction by *inter alia* filing Heads of argument late this matter could not proceed on 17 May 2020.

[33] Therefore, the respondent should not be prejudiced because of the applicant's failure to comply with the court rules and directives. I am of the view that costs reserved on 17May 2021 should be borne by the applicant.

[34] In the result I make the following order:

34.1 The decision of the second respondent on 12 May 2019 to appoint the third respondent as an arbitrator in the dispute between the applicant and the first respondent is hereby reviewed and set aside.

34.2 The third respondent's award dated 19 August 2019 is reviewed and set aside.

34.3 The arbitration proceedings and the award the arbitrator, the third respondent, is null and void.

34.4 The first respondent to pay costs

K F PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

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| JUDGMENT RESERVED ON | : 12 AUGUST 2021 |
| DELIVERED ON | : 15 FEBRUARY 2022 |
| COUNSEL FOR THE APPLICANT | : HJ DE WET SC |
| INSTRUCTED BY | : JACO LOOTS ATTORNEYS |
| COUNSEL FOR THE RESPONDENT | : ADV ELLIS |
| INSTRUCTED BY | : DJ STEYN ATTORNEYS INC. |