IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 7893/2008

DATE: 10 February 2009

In the matter between:

SHIHAAM ABRAHAMS & 1 OTHER Plaintiff

and

R K COMPUTER SDN-BHD & 2 OTHERS Defendant

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JUDGMENT

(application for leave to appeal)

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GAUNTLETT, AJ:

This is an application for leave to appeal with a further application seeking condonation for its lateness. Both are opposed.

A first issue however which the respondent has raised is whether the second applicant is properly before court. It has been agreed before me that the review application was indeed instituted and prosecuted by both applicants (an early objection in this regard evidently not being pursued). The respondent however has challenged the first applicant's

standing to proceed in the two applications now before me on behalf of the second applicant.

It is true that the founding affidavit in the condonation application establishes no proper basis for the first applicant to act for the second applicant in respect of either application. It merely asserts that the first applicant is "**deposing to this affidavit on behalf of the second applicant as well ...**". That statement is incompetent for reasons which are both obvious and a matter of well established authority (See now in particular **Ganes v Telecom Namibia Limited 2004(3) SA 615 (SCA) at 624G-H**). But the fact is that both applications have been instituted for the applicants by attorneys and Rule 7 provided the respondent with a prescribed procedure to follow if it wished to challenge that authority (**Eskom v Soweto City Council 1999(2) SA 703 (W) and 705C-J**; **Ganes v Telecom Namibia Limited *supra* at 624I-625A**). They have failed to do so. The objection thus fails too.

I turn now to the application for condonation. Clearly this has to be viewed weighing all the circumstances, avoiding undue technicality, but with fairness to both parties and a regard, too, for the functioning of the court, for which reason time limits are imposed. The discretion it entails is to be exercised judicially, taking into account all relevant considerations

including the degree of non-compliance with the rules, the explanation tendered and the prospects of success in the putative appeal (**United Plant Hire (Pty) Ltd v Hills 1976(1) SA 717 (A) at 720C-F**).

There are, as counsel for the respondent has pointed out in written submissions, a number of facts relating to the explanation tendered which are not satisfactory:

[a] The affidavit in the application does not suggest that the first applicant was not at all material times aware of the prescribed time limits for filing an application for leave to appeal or not. This is clearly material as regards whether the explanation is adequate or whether the failure is to be ascribed to supiness or worse.

[b] It is also not disclosed whether the first applicant's attorney was notified by any of his staff members that the first applicant had indeed, as was suggested, "**called him**" on 17 December 2008.

[c] There is no mention of the precise date or period of hospitalisation of the attorney.

[d] It is not explained why it took 11 days from the date on which the first applicant allegedly instructed her attorney to proceed with the application for leave to appeal on the date on which this application was filed. That is a serious and inexplicable omission.

As against these factors, however, is the consideration that the degree of default, while material, is not gross, and that the default relates at least in some degree to the indisposition of the first applicant's attorney. In short, while the explanation overall in my assessment remains unsatisfactory this is not a case in which it would be appropriate to dismiss the application on that basis, and without regard to the prospects of success. The question is accordingly as to whether that explanation taken with the prospects of success is such as cumulatively to make it appropriate to grant or refuse leave. For that purpose it is necessary now to consider the application for leave to appeal itself.

As is correctly noted by counsel for the applicants in argument, the grounds set out in the application for leave to appeal substantially overlap. They do not benefit from being addressed now separately, without falling into the same pattern of repetition and circularity which characterises the

application for leave to appeal itself. The test to be applied is not whether the matter is fairly arguable, but whether there is a reasonable prospect that another court may come to a different conclusion (**Westinghouse Brake and Equipment (Pty) Limited v Bilger Engineering (Pty) Ltd 1986(2) SA 555 (A) at 560A-E**).

In respect of none of the points advanced in the application, and in written or oral argument in support of it, was it contended that a wrong legal test or principle had been applied. Nor has it been suggested that any novel issue of law arises in this matter. Nor, thirdly, is there any wider consideration of public interest which has been identified. The argument accordingly narrows to the contention on behalf of the applicants that there is a reasonable prospect that another court, applying the same (and unchallenged) legal tests, may find for the applicants on the affidavits filed.

This contention was advanced in essentially three respects, straddling the itemised review grounds, in this order of prominence:

- The allegation of misconduct by the arbitrators in the form of bias or at least the reasonable perception of bias;

- the contention of gross or manifest mistake establishing *male fides* or partiality;
- the costs order made.

The nub of the argument this morning is that the second respondent failed sufficiently in his affidavit to explain the *volte face* from his initial view that the third respondent was wrong in material respects in the draft award which the latter had prepared for discussion. The complaint is that the second respondent failed to identify exactly which portions of the record were such as to have occasioned him to reverse the view which he had initially formed. From this failure, it is contended, there is a reasonable prospect that another court would infer *mala fides* or bias or a reasonable apprehension of bias.

I do not believe that it is feasible that another court reading the same affidavits would sustain this attack. Firstly the contention is on analysis appellate and not founded on review, for the reasons analysed at page 9 of the judgment (a passage not attacked in this application). Secondly there is no factual refutation of the evidence that the two appeal arbitrators met more than twice, that they went through the material parts of the evidence and that the second respondent was ultimately persuaded by the correctness of the third respondent's view

after a consideration of what he clearly considered to be the pertinent parts of the evidence. Far from supporting the suggested inferences of bad faith, slavish abdication of judgment, and a failure to consider the evidence in my view these unchallenged facts support the contrary conclusion.

In short, it is not enough that another court might reasonably consider the arbitrators to have been wrong. There must be a reasonable prospect that another court, studying the award and the arbitrators' affidavits explaining, without challenge, what they did in finalising the award, acted honestly and without evident bias. Their award is reasoned and their account satisfactory. There is no reasonable prospect that another court would hold their award not to be wrong, but so egregiously wrong that *mala fide* or bias on their parts are to be inferred.

Viewed from another perspective, why should the fact that the arbitrators, in meeting the allegations against them, not footnote each factual conclusion with each evidential reference give rise to the drastic conclusion of dishonesty on their parts? That was not the case they had to answer. It is a case which the applicants seek to make out from what they say (**cf. Theletsane supra**) without even traversing its essentials.

Counsel for the applicants conceded this morning that the explanation by the arbitrators was indeed not factually traversed. The response however, as I have indicated, was that the respondents were required to specify exactly which portions of evidence had been determinative for the conclusions which they reached in their joint final determination. I do not believe that another court would reasonably hold that it is required of arbitrators in answering charges of this kind to provide a Cook's Tour of the evidence, failing which an inference would be drawn that they are dishonest or partial in the job that they have done.

The applicants contend nonetheless that the second and third respondent's refutations "**only address the issue of actual bias**". A large distinction has been drawn in the argument today between the case of actual bias and the case of apparent bias (to use a convenient abbreviation). This is in my view not an accurate or sensible reading of the affidavits; the second and third respondents patently challenge the basis for any inference of bias. The perception of bias is one which has to be ascertained objectively, which again takes one back to the facts relating to the circumstances in which the determination was made by the arbitrators. If those facts, for the reasons I have given, include unchallenged evidence by arbitrators to the effect that they differed in initially in their

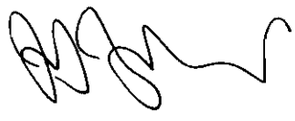
view, that they met on more than two occasions to consider those differences, that clearly the evidence in the arbitration was a matter of debate between them and subsequent consideration by each and that thereafter the one was persuaded by the other, I see no prospect at all for the attempted fall-back now on a major reliance on apparent bias.

The other grounds advanced on the merits substantially repeat the contentions considered in the judgment. I have again considered these, this time however from the specific viewpoint as to whether there is a reasonable prospect that another court may view the papers differently. I do not believe that that prospect reasonably exists. The reliance in particularly on the inquiry as to what might happen if the arbitrators did not agree, and the reliance on the good wishes exchanged at the end of the arbitration, in my view raise no reasonable prospect of another court coming to a different conclusion.

In all the circumstances - the scant prospects of success together with the defective explanation for the default in the respects I have identified - are such as in my assessment to make it appropriate to refuse in my discretion the application for condonation.

The respondent seeks a punitive costs order in relation to the two applications adjudicated today. The principles applicable to such costs order have been outlined in the judgment and I shall not repeat them. I see no proper basis for the request made in relation to the condonation application or the application for leave to appeal, applying those trite principles.

The order I accordingly make is that the APPLICATION FOR CONDONATION and consequentially THE APPLICATION FOR LEAVE TO APPEAL ARE DISMISSED. In respect of each application the applicants are ordered to pay the respondents' costs, jointly and separately, the one paying the other to be absolved.



**GAUNTLETT, AJ**