Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case numbers: 9995/2014 and 13769/2014

Before: The Hon. Mr Justice Binns-Ward

In the matter in case no. 9995/2014 between:

THE CITY OF CAPE TOWN Applicant

and

THE JOINT VENTURE BETWEEN LITTLE MEAD No. 37 (PTY) LTD AND FIRSTEX ENGINEERING HOLDINGS (PTY) LTD Respondent

and

In the matter in case no. 13769/2014 between:

THE JOINT VENTURE BETWEEN LITTLE MEAD No. 37 (PTY) LTD AND FIRSTEX ENGINEERING HOLDINGS (PTY) LTD Applicant

and

THE CITY OF CAPE TOWN Respondent

JUDGMENT DELIVERED ON 17 DECEMBER 2014

BINNS-WARD J:

[1] On 5 August 2011, Mr W.G. Burger SC, sitting as an arbitrator in a claim by The Joint Venture between Little Mead No 37 (Pty) Ltd t/a Firstex Ikapa and Firstex Engineering Holdings (Pty) Ltd against the City of Cape Town, made an award in the following terms:

BY AGREEMENT BETWEEN THE PARTIES THE FOLLOWING AWARD IS MADE:

1. It is recorded that all of the Claimant's claims are withdrawn.
2. The Claimant is to pay the Respondent's costs on a party and party scale, including the costs of the arbitration proceedings.

[2] The costs thus awarded in favour of the City have not been paid, and the City now applies, in terms of s 31(1) of the Arbitration Act 42 of 1965, in case no. 9995/2014, for the award to be made an order of court. In a separate application, subsequently instituted by Little Mead in the name of the joint venture under case no. 13769/2014, an order is sought providing for a setting aside of the award. The order for the setting aside of the arbitrator's award has been applied for in terms of s 33(1)(c) of the Arbitration Act on the ground that it had been 'improperly obtained'. The two applications first came to hearing together before me on 25 November 2014.

[3] At the hearing on 25 November counsel for Little Mead pointed out that Little Mead had been deregistered as a company on 13 November 2009 and that its nominal co-claimant in the arbitration proceedings, Firstex Engineering Holdings (Pty) Ltd, had been deregistered on 24 February 2011. Thus, when the relevant arbitration agreement had been entered into, on 23 December 2009, Little Mead had ceased to exist as a company and therefore been incapable of concluding the agreement ostensibly made on that date. The registration of Little Mead as a company was administratively reinstated in terms of s 82(4) of the Companies Act 71 of 2008[1] only on 1 August 2014. The company had therefore also not been in existence during the conduct of the arbitration hearing, which commenced on 1 August 2011. The deregistration of Firstex Engineering Holdings had also preceded those proceedings. Firstex has to date not been reinstated on the register of companies. Little Mead's counsel submitted on these facts that the arbitration had been a nullity by virtue of the legal non-existence of the claimant parties.

[4] This point had not been taken on the papers, so the hearing was briefly adjourned to enable the City to consider its position. The City reacted by applying, in terms of s 83(4) of the Companies Act 71 of 2008,[2] for an order declaring that the arbitration proceedings

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[1] Section 82(4) of the Companies Act provides: '*If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company*'.

[2] Section 83(4) of the Companies Act provides:

At any time after a company has been dissolved-

(a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and

conducted during the period that Little Mead had not been registered as a company should be deemed to have been validly and effectively instituted and conducted. The availability of such a remedy was affirmed in comparable circumstances in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic And Others* 2014 (1) SA 381 (WCC).[3] Little Mead's counsel then indicated that he needed time to consider the application and the hearing was consequently postponed to 8 December 2014 on a timetable providing for the exchange of further papers.[4]

[5] The ostensible claimants in the arbitration had ceded their rights in the claims being arbitrated to Nedbank Limited in terms of an agreement purportedly entered into on 23 November 2010. The cession agreement would appear to be a nullity by reason of the non-existence of the cedents. It nevertheless seemed inappropriate in the circumstances to hear and determine an application for the arbitration to be deemed to have been effectively conducted without notice to Nedbank. I raised this with counsel at the commencement of the hearing on 8 December. The City's legal representatives were able to procure a letter advising that the bank did not require to be joined as a party and that it abided the judgment of the court. I should also mention that both sides appeared to have consciously decided not to make anything of the fact that Firstex Engineering Holdings has not been reinstated on the register of companies and joined in any of the applications currently before the court.

[6] Little Mead's counsel sought to identify various points of distinction between the current case and *Peninsula Eye Clinic* as a basis to argue against the City's application under the Companies Act. None of them impressed me as being of any relevance to the question of whether it would not be just and equitable to grant the relief sought by the City in terms of s 83(4) of the Companies Act. After all, it is plain that the parties to the arbitration had all conducted the proceedings on the assumption that Little Mead and Firstex Engineering Holdings were extant companies. Mr Shutler, who is the deponent to the affidavits in Little Mead's current application to set aside the arbitration award, was apparently in control of the deregistered companies' *de facto* affairs at the time, just as he appears to be in control of Little Mead's now that its registration has been reinstated. The points of distinction that

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(b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

The sub-section falls to be understood in the context of s 83(1), which provides in relevant part:

A company is dissolved as of the date its name is removed from the companies register….

A company that is administratively deregistered in terms of s 82(3) of the Act is dissolved with effect from the date of its removal from the register of companies by the Companies and Intellectual Property Commission.

[3] An appeal against that judgment is set down for hearing in the Supreme Court of Appeal under SCA case no. 086/2014 on 5 March 2015.

[4] The City's application in terms of s 83(4) was brought ancillary to the proceedings under case no. 13769/2014.

counsel sought to make all related to the conduct of the arbitration and the circumstances in which the award had been taken. Those matters bear more on the question of whether the award could be said to have been improperly obtained than on whether the arbitration should be deemed to have been validly conducted. Indeed, if the relief sought by the City were not to be granted, the application by Little Mead for the setting aside of the arbitral award would have no foundation. It is evident that Little Mead's pending application in terms of s 33(1)(c) of the Arbitration Act is predicated on an acceptance of the effectiveness of the arbitration proceedings. In that context the opposition by Little Mead to the City's application ran into danger of assuming a farcical character. Little Mead's counsel came to that realisation himself in the course of his argument. As I understood him, he ultimately accepted that the grant of the City's application in terms of s 83(4) of the Companies Act would not detract from Little Mead's application in terms of the Arbitration Act. On the contrary, the remedy would be necessary, not only for the viability of the City's application in terms of s 31, but also to give a footing to Little Mead's application in terms of s 33 of the Arbitration Act. I accordingly indicated at that stage of Little Mead's counsel's argument that he might proceed on the assumption that the relief sought by the City in terms of the Companies Act would be granted. The reasons for granting the City relief under s 83(4) are essentially the same as those cited in *Peninsula Eye Clinic* at para 55 in support of the similar order made in that case.[5]

[7] Little Mead, having initially opposed the City's application in terms of s 31 of the Arbitration Act, subsequently indicated by notice dated 21 November 2014 that it was not persisting with such opposition. Its change of stance was no doubt inspired by the appreciation that the City's application would necessarily fall from consideration if Little Mead's application in terms of s 33(1)(c) of the Act were upheld. In the result the only remaining contentious matter for resolution is the application to set the arbitral award aside.

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[5] At para 55 of *Peninsula Eye Clinic*, it was held *'…there is no doubt that it would be just and equitable that the arbitration proceedings should be declared valid. The respondent's directors were in de facto control of the conduct of the proceedings on the respondent's behalf, and the respondent's interests were represented by senior counsel briefed to represent it at the arbitration hearings and in the application to court for the review of the arbitrator at first instance's decision to decline to reopen the arbitration. No doubt both parties incurred considerable expenditure in respect of the arbitration proceedings in the bona fide but mistaken belief that the respondent was legally existent. The only reason of which I am aware for the reinstatement of the respondent's registration was to allow for the current proceedings, which are directly related to the outcome of the arbitration proceedings, to go ahead and be effectively determined. A further consideration in favour of validating the arbitration proceedings between the applicant and the respondent is that the only reason the issue has arisen is because the company was deregistered through the failure of its directors to ensure that its annual returns were duly lodged. While it would be manifestly unjust to the applicant were the arbitration proceedings not rendered effective, deeming them to have been validly conducted would occasion the respondent no cognisable injustice whatsoever*'.

[8] The arbitration claims were founded on the joint venture parties' claims against the City arising out of the execution of a contract for the removal of asbestos from the Athlone power station, which had been decommissioned. Proceedings had commenced by way of two actions instituted in this court in 2007 and 2009, respectively. The actions were consolidated for the purpose of hearing, but before they went to trial it was agreed between the parties that they should be referred to arbitration.

[9] Mr Shutler was the only witness to testify before the arbitrator. His evidence was given over a period of more than three days. An important part of it appears to have been given with reference to a document which Shutler described as his 'workings'. A copy of the document that had been provided to the City's legal representatives and was contained in a trial bundle put together for the purpose of the arbitration hearing was used during Shutler's evidence in chief. For reasons that are not apparent on the papers, senior counsel appearing for the City at the arbitration called for the original document to be provided before the completion of Shutler's evidence. When the original was forthcoming it differed in certain, apparently material, respects from the copy on which Shutler's testimony had been premised.

[10] The City's attorney described the position as follows in the affidavit filed by the City in opposition to Little Mead's application:

> When the document was delivered it was noticed that it did not correspond with the one which had been referred to by Shutler in evidence. The copy which had previously been provided (and on which Shutler had testified) appeared to have been manipulated and differed materially from the original.
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> The view was taken that this document would cause serious problems for the JV in the further conduct of the arbitration as the original in essence destroyed the claims. The JV's representatives discussed settlement and made certain proposals. After taking instructions [senior counsel] and I responded that [the City] would accept the withdrawal of the claims and a tender of costs, including the costs of the arbitration proceedings. After some discussions the JV's legal team agreed to this.
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> An award was drawn up on those terms and made by the arbitrator on 5 August 2011. The award was made by agreement and in the presence of the legal representatives of the parties. I assumed that the agreement was made on the instructions of Shutler and in the light of the document which had been produced which would have caused the JV difficulties due the contents of the document. The conduct of the JV was considered and the advice, which was presumably given to Shutler, was sound in the circumstances.
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> There was certainly nothing improper in the manner in which the award was agreed and made by the arbitrator. The arbitrator signed the award and gave copies of the signed document to the parties that same day.

[11] In his affidavit in support of Little Mead's application, Mr Shutler averred that there had in fact been three sets of 'workings' in the possession of the joint venture's legal team at the arbitration. He said that the claims had been based on the 2007 workings, but that during the hearing the City had referred to the amended 2005 workings. He alleged that the claimants' 'legal team, who obviously forgot about the 2005 workings which they had in their possession were caught off guard and accused me of misleading [them], which was not the case'. He explained the circumstances in which the award was made as follows:

> I was told that the [claimants] would have to withdraw the arbitration proceedings, failing which I will perjure myself under cross-examination and it would become apparent that I had been trying to defraud [the City], which was most definitely not the case.
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> I submit that it was improper for the [claimants'] legal team to advise me as set out hereinabove and as it motivated me to consent to the award attached hereto, as above. The award was improperly obtained and stands to be set aside by this Honourable Court.
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> Due to my mental state of mind, as set out hereinbelow, and the financial crisis [the claimants] and I were experiencing, I buckled under the pressure exerted on me by the [claimants'] legal team and consented to the award being granted by agreement, which I should not have done.
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> It was not explained to me that by consenting to the award [the claimants] would have no further chance to proceed with the arbitration proceedings. I was under the impression that it was merely a question of withdrawing the arbitration proceedings and to fight another day should the [claimants] wish to do so.
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> It was only now that I was in a position to obtain legal opinion on behalf of [Little Mead] that it was explained to me that the arbitrator's award is final, unless this Honourable Court is prepared to set it aside in terms of Section 33 of the Arbitration Act.

[12] Section 33 of the Arbitration Act provides as follows in relevant part:

> **33 Setting aside of award**
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> (1) Where-
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> (a) …; or
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> (b) …; or
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> (c) an award has been improperly obtained,
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> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.
>
> (2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, such application shall be made within six weeks after the discovery of that offence and in any case not later than three years after the date on which the award was so published.
>
> (3) ….

> (4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.

Section 38 of the Act invests the court with the power 'on good cause shown, [to] extend any period of time fixed by or under th[e] Act, whether such period has expired or not'.

[13] The current application was instituted by Little Mead on 4 August 2014. The company therefore requires an extension of the six week period within which the application was ordinarily required to be brought. Mr Shutler sought the required extension on the basis that he had been affected by a debilitating psychological condition, which he described as 'major depression'. He stated that he had been hospitalised for this condition in 2008, 2010, 2011 and 2012. He was also in financial difficulties and Nedbank had foreclosed on mortgages over his late life partner's property and that of his late mother. He said that he had lacked the financial resources to approach the court for the relief now sought, or to oppose the measures taken in execution of judgment against him by Nedbank. An affidavit was made by a psychologist confirming that Mr Shutler had been treated for 'severe burnout, severe exhaustion, depression and heightened anxiety' between 2009 and 2012 and that his treatment had included three periods of hospitalisation 'lasting approximately nine weeks in total'. An affidavit by a medical practitioner was included in Little Mead's replying papers. It was to the effect that the doctor had treated Mr Shutler for being severely depressed between September and November 2013. The doctor had first seen Mr Shutler as a patient in September 2013. He stated that Shutler had 'specifically related a severe depressive illness as a consequence of …significant financial loss coupled with the tremendous loss of his life partner, Ilze, during 2012'. The general practitioner described the medication he had prescribed for Shutler and concluded '[t]he turnaround came about in 2014 when Mr Shutler started to appear much improved and with a more stable mood. I can however confirm that Mr Shutler still needs significant ongoing medical management to stay at his present and improved health status. I furthermore confirm that his mood is stable and he is functioning normally'.

[14] The period of six weeks prescribed for the bringing of applications to set aside arbitral awards is a relatively short one. The reason is obvious. It is because of the importance attached as a matter of public and legal policy to finality in litigation ('*interest rei publicae ut sit finis litium*'). Mindful that 'good cause' is 'a phrase of wide import that requires a Court to consider each case on its merits in order to achieve a just and equitable result in the

particular circumstances',[6] it follows nonetheless that the longer the delay beyond the period of six weeks entailed in moving for the setting aside of an award, the more exacting the requirements of showing good cause for any extension of the period become. The context also requires a court seized of an application in terms of s 38 in relation to one in terms of s 33(1) to take into account that it has been held authoritatively that the courts should construe the grounds upon which they may set aside an award in terms of s 33(1) 'reasonably strictly', in other words they should intervene only when a material failure of justice enjoins intervention.[7] The latter consideration bears primarily on the merits of an application in terms of s 33(1), but it will also incidentally colour the approach that a court will adopt to a related application for a relaxation of the applicable time bar. The applicant will have to overcome an initial diffidence by the court. The reasons advanced by Mr Shutler in respect Little Mead's three year delay do not measure up to what is required.

[15] It is quite clear that even accepting that Mr Shutler, who appears to have been the claimant companies' effective *alter ego*, was disabled by depression from taking active steps

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[6] *South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 (SCA) at para 14 (per Nugent JA, treating of the expression in the context of s 32(2) of the Arbitration Act). In *Kalmneft JSC v Glencore International AG* [2001] 2 All ER (Comm) 577 at para 59, Colman J observed of applications in terms of the equivalent to s 38 of Act 42 of 1965 in s 80(5) of the English Arbitration Act 1996 (*c.23*) that *'... although each case turns on its own facts, the following considerations are, in my judgment, likely to be material: (i) the length of the delay; (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances; (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay; (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed; (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have; (vi) the strength of the application; (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined*'. Those observations were endorsed by the Court of Appeal in *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147 at para 38. At para 42 of the latter judgment, Mance LJ emphasised, with regard to the general considerations included in category (vii) of Colman J's list of considerations, that *'..the judge must have had well in mind considerations of overall justice and fairness. They must, however, always be viewed in the particular context that Parliament and the courts have repeatedly emphasised the importance of finality and time limits for any court intervention in the arbitration process*'.

[7] See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) (2009 (6) BCLR 527 at para 235 (per O'Regan ADCJ). The learned Acting Deputy Chief Justice's remarks at the place cited should be read in the context of paragraphs 224-236 of the judgment, which include some discussion of relevant international policy trends in respect of judicial intervention in private arbitral proceedings. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243) in para 4. Compare too Lord Steyn's opinion in *Lesotho Developments v Impregilo SpA* [2006] 1 AC 221 ([2005] 2 All ER (Comm) 265), at para 17 and 18, where he highlights the ethos of the English statute as emphasising respect by the courts for party autonomy in private arbitrations, having been notably influenced in that direction by the UNCITRAL Model Law on International Commercial Arbitration. Lord Steyn emphasised that s 68 of the English statute (the counterpart of s 33 of South Africa's Arbitration Act) was 'really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected' or where the award is obtained in circumstances in which to permit it to stand would result in a serious failure of justice. He stated that 'a high threshold must be satisfied' for judicial interference in an award.

at certain stages, there were nevertheless times when he was able to act assertively. This is demonstrated, for example, by the fact on 12 March 2014 he was able to write a lengthy letter to the City expressing his determination to pursue the companies' claims and requesting a 'high-level meeting'. He was advised in reply in an email from the deputy executive mayor, dated 17 March 2014, that the City had legal advice that the claims had been finally determined in terms of the award and that a meeting would serve no purpose. He responded to the email in a further lengthy letter, dated 17 April 2014, in which, amongst other matters, he recorded 'we have on hand the **TOP** Advocate in this country skilled and experienced in these matters, willing to work on a no win, no pay basis and this indicates how confident he is on the merits of our case'. The delay in instituting the application after 17 March 2014 is not adequately explained. Indeed, I have the impression that it was only after the institution of the City's application in terms of s 31 of the Arbitration Act on 5 June 2014 that Mr Shutler bestirred himself towards the eventual institution of the application in terms of s 33(1)(c) and attended to the prerequisite measure of procuring the administrative reinstatement of Little Mead's registration as a company.

[16] It is also apparent that during 2012 Mr Shutler was involved in interpleader proceedings arising out of the attachment of certain goods by Nedbank in execution of judgment. He drew the affidavits and pleadings in the matter himself, and successfully conducted the subsequent trial of the interpleader action in person before Schippers J. He also deposed to a lengthy affidavit on 1 February 2013 in support of an application for condonation for the late filing of an application for leave to appeal against a summary judgment granted against Firstex Engineering Holdings and himself in 2010. In that affidavit he referred to the arbitration proceedings, stating 'For various reasons I did not understand at the time, and still do not, the arbitration has been terminated, and I am currently in the process of taking advice in respect of how to deal with the matter against the City of Cape Town on the strength of the original summons'.

[17] There is no explanation offered by Mr Shutler as to why, if he could have been active and effective on a number of other fronts during the period from 2012 to earlier in 2014, he could not have caused Little Mead to bring its application much earlier. In *Coetzee v Paltex 1995 (Pty) Ltd* 2003 (1) SA 78 (C), at 92J-93A, Davis J held that a failure by the applicant to give 'a complete account' as to the delay was good reason to withhold condonation. I regard the inadequacy of the explanation offered as a factor to be weighed with all the other features of the case. It is, however, a very material factor.

[18] Furthermore, it is evident that Shutler procured the issue of summons on 4 August 2014 by Little Mead against the arbitration claimants' legal team. It is apparent from the particulars of claim in that action, a copy of which was annexed to the City's opposing affidavit, that Little Mead is claiming damages from its erstwhile legal representatives in the amount of R19,5 million arising out of the withdrawal of the arbitration claims. The amount of the claim is computed as the sum of the claims in the 2007 and 2009 actions that had been referred to arbitration, together with interest thereon, and R2 million in legal costs (presumably those incurred in the litigation that went to arbitration). The particulars of claim include allegations that 'Acting on the [defendants'] advice, the Plaintiff agreed to withdraw the arbitration proceedings against the City of Cape Town. As a result of the [defendants'] incorrect and negligent advice, the plaintiff suffered damages in the amount of R19 508 310,88.' The institution of proceedings against its former legal representatives points to an acknowledgment by Mr Shutler that Little Mead has a discrete remedy to that of setting aside the award and commencing the arbitration afresh before a different tribunal. Having regard to the interest that the City obviously has in the finality of the arbitration process, that Little Mead is availing of the discrete remedy is a relevant factor to consider in determining whether condonation for the late bringing of the application in terms of s 33(1)(c) should be granted. The purpose of the current application would be to enable the arbitration to be recommenced; see s 33(4) of the Arbitration Act. There seems little point in that if there is merit in the pending action against the legal practitioners upon whose advice Little Mead the arbitration was settled. At the same time, if there is no merit in the action, there can also be no merit in Mr Shutler's complaint that the arbitration award should be set aside because his consent to it had been predicated on bad legal advice. Indeed, in the overall conspectus of the alleged facts, redress pursuant to the action would seem to offer a fairer result than a resumption of arbitration proceedings against the City; for it has not been suggested that the City's representatives had been in any way to blame for the joint venture claimants' decision to settle the arbitration. It has also not been suggested that the action by Little Mead against its former legal representatives is likely to be fruitless if the company succeeds in obtaining judgment.

[19] For all these reasons, and also the fact, that, as I shall explain presently, I do not have a positive view of the merits of the application, I have not been persuaded that Little Mead has shown good cause, as required in terms of s 38 of the Arbitration Act, for an extension of the period within which it was required to institute the application to set the award aside.

[20] It bears mentioning that Little Mead's counsel ventured that the effect of the grant of the City's application in terms of s 83(4) of the Companies Act at this stage means that condonation in terms of s 38 of the Arbitration Act is not required because prior to the granting of the relief no legally effective award had existed. There is no merit in that contention. Granting the remedy sought by the City under the Companies Act would not somehow transmute the date of the publication of the award from 5 August 2011 to the date of the order deeming the arbitration to have been validly conducted. As mentioned, s 33 of the Arbitration Act requires any application to set aside an award to be made within six weeks of the publication of the award. The provision speaks to the fact of the publication of the award, not its legal validity.

[21] It might be that in an appropriate case a party could seek condonation in terms of s 38 of the Arbitration Act for the late bringing of an application in terms of s 33(1) on the grounds that it had been entitled, prior to grant of an order in terms of s 83(4) of the Companies Act deeming arbitration proceedings purportedly conducted by a deregistered company to have been validly conducted, to have regarded the award as legally ineffectual. What would constitute such an appropriate case need not be considered, for the current matter certainly does not qualify as such. The delay by Little Mead in instituting its application in terms of s 33 had nothing to do with any perception by its director that proceedings to set aside the award were not necessary by reason of the arbitration having been conducted at a time when the company had been deregistered.

[22] These conclusions are sufficient to impel the dismissal of Little Mead's application without any necessity to determine its case on the merits. I shall nevertheless deal with the matter on its merits in case Little Mead should be permitted to take the application further. As mentioned, my view on them was in any event a consideration that was weighed in concluding that good cause for condonation in terms of s 38 had not been shown.

[23] Counsel were not able to find any judgment in which the import of s 33(1)(c) of the Arbitration Act has been specifically considered. According to the tenor of its language, resort may be had to the provision when an impropriety has affected the *obtaining* of the award. An application in terms of s 33(1)(c) would rarely be brought by a successful party in an arbitration. There would usually be no need for a successful party to have an award in its favour set aside; it would simply abandon the award. The only circumstance in which I can conceive of a successful party wanting to set the award aside in terms of the provision would be if it had, by reason of some impropriety, obtained an award that gave it less than it might

otherwise have been awarded. These considerations suggest that the impropriety must lie in the conduct of the party to the arbitration who has benefitted thereby. An obvious example of relevant impropriety would be fraud.[8] Other forms of dishonesty, such as the deliberate concealment of documents that a party was bound to disclose, would also qualify. It goes almost without saying that a causal connection between the impropriety and the obtaining of the award has to be demonstrated. Thus, if a party to the arbitration were shown to have obtained the award by means of himself giving perjurious evidence or by procuring the giving of such evidence, the award would be susceptible to being set aside. It is not obvious, however, that the same result would follow upon a subsequent discovery that a witness who was not a party to the proceedings had given untruthful evidence of his own accord and not at the behest, or to the knowledge at the time, of the party who obtained the award. The distinction falls to be drawn on the basis that the conduct in the first of the postulated examples is directed at obtaining an award, whereas the actor in the second example does not obtain an award, or act as the agent of the party that obtains it.

[24] I have found some support for my construction of the language of s 33(1)(c) in the treatment by the English courts of the equivalent provision in the Arbitration Act, 1996 (*c.23*), where the language is '*the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy*'.[9] In my view the words '*improperly obtained*' in s 33(1)(c) of Act 42 of 1965 broadly denote the type of impropriety which the equivalent English legislative provision covers using the expressions 'fraud' or 'procured contrary to public policy'. The subject is discussed as follows in Sutton et al., *Russell on Arbitration* 23rd ed (2007) at 8-099:

> This [category of serious] irregularity contemplates a situation where either the award was obtained by fraud or the way it was procured was contrary to public policy. Although the second part of the sub-section, "an award procured contrary to public policy" is wider on its face than the first part, "an award obtained by fraud", the courts have in fact interpreted the twin concepts consistently. ….The award must be obtained by the fraud of a party to the arbitration or those privy to that party, not for example by the fraud of third party witnesses. The term "public policy" is capable of covering a wide variety of

[8] Indeed, in the equivalent provision of the English Arbitration Act, 1996 (c.23), the position is articulated expressly with reference to fraud and public policy thus in s 68(2)(g) as a type of 'serious irregularity' upon which a court may set aside an award:

> *Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant–*
> *…*
> *(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.*

[9] See note 8, above.

> matters, other than fraud…..Bribery or some other form of corruption would offend public policy, and so may unconscionable conduct in certain circumstances. The fact that witnesses can be shown to have lied when giving evidence does not of itself mean that any award subsequently produced by a tribunal will trigger this ground. It will need to be shown that the defendant[10] can fairly be blamed for the adducing of the evidence and the deception of the tribunal and that the evidence of deception, which could not have been produced at trial with reasonable diligence, could be expected to be decisive at a re-hearing.

[25] In *Elektrim SA v Vivendi Universal SA & Ors Rev 1* [2007] EWHC 11 (Comm), [2007] 1 Lloyd's Rep 693, which the City's counsel, Mr *van Reenen*, brought to my notice, Aikens J approached the construction of s 68(2)(g) of the 1996 Arbitration Act (*c.23*) as follows, at para 79-80:

> 79. I next consider the question: what actions or inactions are within the ambit of the phrase "obtained by fraud" in the context of the facts in this case? Neither side drew my attention to any cases where the English courts have considered the ambit of the phrase "..the award being obtained by fraud" in section 68(2)(g). Therefore I have to consider the phraseology in principle and attempt to construe it in accordance with section 1 of the Act. I agree with Moore-Bick J (as he then was) who stated in *Profilati Italia SRL v Paine Webber Inc* [2001] 1 All ER (Comm) 1065 ([2001] 1 Lloyd's Rep 715) at paragraph 17, that it would be unwise to attempt to define all the circumstances when an award is "obtained by fraud" or "procured contrary to public policy" within section 68(2)(g). However, I note that section 68(2)(g) does not refer to the fraud of a party to the arbitration. On the face of the wording it would seem that the "fraud" referred to in the paragraph can be committed by anyone who is connected with the arbitration process. If this were right, then (for example) if it were proved that a witness for one side or another has committed perjury when giving evidence before the tribunal, that would be a "fraud" within paragraph (g). If so then, if it were also proved that the perjured evidence resulted in the award being in favour of that party then, logically, the award would have been "obtained by fraud".
>
> 80. But I have concluded that this is not the correct construction of the words "obtained by fraud". It is a party to an arbitration that obtains an award in its favour or has one made against it. The words "obtained by fraud" must refer to an award being obtained by the fraud of a party to the arbitration or by the fraud of another to which a party to the arbitration was privy. This fits in with the general ethos of the Act, which is to give the courts as little chance to interfere with arbitrations as possible. If this wording referred to the fraud of anyone that was involved in the arbitral process, whether or not the fraud was committed with the knowledge of the relevant party to the arbitration, then that would give unsuccessful parties carte blanche to apply to the court to set aside or remit an award. The unsuccessful party need only assert (for example) that a witness of the successful party had committed perjury (even without the knowledge of

[10] [?party who benefitted from the impropriety].

> the successful party) and the award had as a result been in the favour of that party. It could then be asserted that the award had been "obtained by fraud", resulting in "substantial injustice"; therefore the award must be set aside or remitted.[11]

In response to an argument that if a document were wrongfully withheld as a result of either negligence or an error of judgment, and it was demonstrated that the award would have been different in consequence, then the award had been '*procured contrary to public policy*' within s 68(2)(g), Aikens J held as follows at para 86-87:

> 86. Moore-Bick J did not accept this argument. He concluded that, in the context of disclosure, documents had to be deliberately withheld to the knowledge of a party to the arbitration (or its solicitors), before it could be said that the award had been procured contrary to public policy. He said that normally it would have to be shown that there had been some "*reprehensible or unconscionable conduct"* by the party concerned, that had contributed in a substantial way to obtaining an award in that party's favour: *see para 17.*
>
> 87. I respectfully agree with that analysis. Thus, at least in the context of allegations of perjury and deliberate concealment of relevant documents, the phrase "*an award procured contrary to public policy"* goes no wider than the phrase "*an award obtained by fraud"* for the purposes of section 68(2)(g).

[26] It is apparent from the summary of the factual allegations given at the outset of this judgment that Little Mead is relying on the allegedly unfounded advice given to its director, Mr Shutler, by its own legal representatives as the relevant impropriety for the purpose of its application in terms of s 33(1)(c) of the Arbitration Act. Mr Shutler is in effect contending that the arbitration award should be set aside because he allowed himself to consent to it on bad advice. The negligent conduct of the case by one of the parties' legal representatives is a matter which might very conceivably result unhappily in an adverse award for the party concerned, whether upon settlement of the matter or otherwise. The causal effect of such negligence on the outcome of the arbitration does not mean, however, that the award was improperly obtained. The award in the current case was obtained because Mr Shutler, purporting at the time to represent the legally non-existent Little Mead and Firstex Engineering Holdings, consented to it. If one thinks away the legal non-existence of the companies at the time, his consent was competently given and there was thus nothing improper about its intended consequence being realised by the making of the award. It was the claimants' consent that caused the City to obtain the award, not the advice given to Mr Shutler that preceded such consent. If the consent was ill advised, that is a matter to be

[11] The approach stated by Aikens J was subsequently endorsed by Blair J in *Double K Oil Products 1996 Ltd v Neste Oil Oyj* [2009] EWHC 3380 (Comm), [2010] 1 Lloyd's Rep 141, at para 35.

resolved between the claimants and the persons on whose advice they acted in agreeing to the award.

[27] The award was obtained pursuant to a settlement agreement between the parties to the arbitration. The lack of any impropriety in the obtaining of it can be illustrated by considering the situation in its contractual context. Whether the terms of the agreement compromised the claims might be open to debate, but it is certain that they provided for the consensual termination of the arbitration on the terms reflected in the award. In that context, Little Mead's position in now seeking to have the award set aside because of the effect of advice given to it in confidence in its counsel's chambers is indistinguishable from that of a party seeking to escape a contract on the basis of a mental reservation, or a lack of real consensus in contradiction of the objectively discernible manifestations of its outward conduct in appearing to conclude the contract. It is trite that such a party is held bound to the contract because it would be unreasonable to the other party, in the context of an objective assessment of the first party's conduct, to hold that there was no contract. Little Mead is in precisely such a position *vis à vis* the City in its attempt to escape the award to which it had agreed.

[28] In the result the following orders are made:

1. **In case no. 13769/2014:**

   (a) It is declared, in terms of s 83(4) of the Companies Act 71 of 2008, *vis à vis* Little Mead No. 37 (Pty) Ltd, that the arbitration proceedings between The Joint Venture between Little Mead No. 37 (Pty) Ltd t/a Firstex Ikapa and Firstex Engineering Holdings (Pty) Ltd, of the one party, and the City of Cape Town, of the other party, before Mr W.G. Burger SC shall be deemed to have been validly and effectively instituted and conducted.

   (b) The application by Little Mead No. 37 (Pty) Ltd in terms of s 33(1)(c) read with s 38 of the Arbitration Act 42 of 1965 to set aside the arbitral award made by agreement between the parties to the arbitration on 5 August 2011 is dismissed.

   (c) Little Mead No. 37 (Pty) Ltd is ordered to pay the costs incurred by the City of Cape Town in the application in terms of s 83(4) of the Companies Act and in the application in terms of s 33(1) of the Arbitration Act.

2. In case no. 9995/2014:

(a) The 'Arbitrator's Award' made by Mr W.G. Burger SC on 5 August 2011 is made an order of court in terms of s 31(1) of the Arbitration Act 42 of 1965.

(b) The costs incurred by the City of Cape Town arising out of the opposition to the application by Little Mead No. 37 (Pty) Ltd up to the date of the delivery of notice by the latter of its withdrawal of opposition to the application shall be paid by Little Mead No. 37 (Pty) Ltd.

A.G. BINNS-WARD
Judge of the High Court

Before:	**Binns-Ward J**
Dates of hearing:	**25 November and 8 December 2014**
Judgment delivered:	**17 December 2014**
Counsel for Little Mead no.37 (Pty) Ltd:	**A. M. Heunis**
Counsel for the City of Cape Town	**D. Van Reenen**
Attorneys for Little Mead no.37 (Pty) Ltd:	**JP Joubert Attorneys, Somerset West**
Attorneys for the City of Cape Town	**EN Bester & Associates, Hout Bay**