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

REPORTABLE

CASE NO: 3521/14

In the matter between:

MARBLE CLASSIC EXCLUSIVE WAREHOUSE FOR NATURAL STONES CAPE (PTY) LTD	First Applicant
FRANCO D'AGNOLO	Second Applicant
and	
A.R. SHOLTO-DOUGLAS SC	First Respondent
LUDEL PROPERTIES (PTY) LTD	Second Respondent

JUDGMENT: 19 JUNE 2014

GAMBLE, J:

INTRODUCTION

[1] On 15 August 2007 the First Applicant (duly represented by the Second Applicant and hereinafter otherwise collectively referred to as "*the Applicant*") concluded an agreement of lease with the Second Respondent (conveniently hereinafter referred to as "*the Respondent*").

[2] The lease related to the rental of certain commercial premises in Cape Town and was *ex facie* the document to be for a period of five years. The parties agreed in clause 4.5 thereof that the lease was renewable for a further five years:

> "*5….The Tenant shall be entitled to renew this lease for the Rental Period… provided that…*
>
> *5.4 the Tenant gives written notice to the Landlord no later than 6 (six) months prior to the expiry of the Lease Period exercising the right to renew this lease for the Renewal Period."*

[3] On 13 August 2007 the Second Applicant concluded a written deed of suretyship in favour of the Respondent in respect of the First Applicant's obligations to it under the lease.

[4] Notwithstanding the terms of clause 5.4, which suggested a contemplated renewal of the lease at some distant date in the future, the option to renew was in fact exercised by the Applicant on 8 August 2007. The explanation for the apparent anomalies relating to these dates lies in the fact that, while the parties were negotiating the terms of the lease, it became apparent to them that if a lease for an initial period of ten years was concluded, the stamp duty thereon would be

significantly more than in respect of a stamp duty payable for two consecutive periods of five years.

[5] The Respondent's representative, Mr. Luck, took advice from an attorney and was informed that the liability for stamp duties could be significantly minimised if the parties recorded their agreement as they did: an initial five year lease renewable for another five years with the notice of renewal being given immediately.

[6] And so, the parties agreed to arrange their commercial affairs on that basis and the Applicant took occupation of the premises early in 2008. Things appear to have run fairly smoothly until 2012 when the Applicant fell into arrears. Proceedings were initiated in the Regional Court, Cape Town for the recovery of rental and ancillary relief, including an automatic rent interdict. That litigation was settled on 30 August 2013 when the Regional Magistrate made an order recording the party's agreement, *inter alia*, that their dispute be referred to arbitration within ten days.

[7] On 12 September 2013 the parties concluded a pre-arbitration agreement at the chambers of the First Respondent, senior counsel practicing at the Cape Bar, to whom I shall refer hereinafter as "*the Arbitrator*". The arbitration proceedings were thereafter conducted during November and December 2013.

[8] Mr. Luck gave evidence before the Arbitrator and explained the substance of that which is set out above relating to the intended saving of stamp duty.

After the conclusion of his evidence, the Applicant amended its statement of claim and included an allegation that "*Luck drafted [the lease] for the purpose to evade, defeat or frustrate the requirements of the Stamp Duties Act*." Although the parties had up to then been happy to do business with each other under the lease for more than five years, the Applicant, expediently it was suggested by the Respondent, adopted the stance that the lease and the written renewal thereof were void pursuant to the provisions of s14 of the Stamp Duties Act, 77 of 1968. That section provides as follows:

> *"Any contract, agreement or undertaking made for the purpose of evading, defeating or frustrating the requirements of this Act as to the stamping of instruments, or with a view to precluding objection or inquiry relative to the due stamping of any instrument, shall be void: Provided that nothing in this section contained shall prohibit any agreement between the parties as to the distribution between themselves of liability to pay the amount which is payable as duty."*

[9] The Arbitrator delivered his award on 14 February 2014. In paragraph 1 thereof he noted the following:

> *"1. As this is a confidential arbitration and this award is addressed to the parties who were involved in the hearing*

of this matter, I shall not set out in any detail the factual background to the dispute I am called upon to determine."

[10] After only a brief summary of the evidence, the Arbitrator dealt with two issues which he considered necessary for determination:

> *"7.1 whether or not the purported renewal of the lease agreement was effective, so that the claimant is bound to the terms of the lease agreement for the renewal period, being a period of five years commencing immediately after the expiration of the lease period on 28 February 2013; and*
>
> *7.2 whether or not, as alleged by the claimant, the lease agreement is void by reason of the fact that the evidence revealed that its terms were agreed in order to minimise liability for stamp duty payable in terms of the Stamp Duties Act No. 77 of 1968."*

[11] In relation to the stamp duty point, the Arbitrator adopted the argument advanced before him by the Respondent's counsel, Mr. Patrick, and upheld the lease:

> *"16. In my view Mr. Patrick's argument has merit. Where parties to a transaction agree to do something for the*

purpose of evading, defeating or frustrating the requirements of the Stamp Duties Act, they are hardly likely to record that agreement in the instrument itself. It is not the instrument that is the subject of s14: it is the agreement to evade, defeat or frustrate the requirements of the Act. Section 12 was, during the currency of the Stamp Duties Act, frequently invoked by litigants or the courts, requiring the stamping of instruments and the payment of penalties and interest, all of which inured to the benefit of the fiscus.

17. In my view, therefore, notwithstanding the evidence that the lease agreement and the option were deliberately drafted to avoid the payment of stamp duty, that does not render the lease agreement void."

[12] On 28 February 2014 the Applicant launched an application, as a matter of urgency, to set aside the Arbitrator's award and to substitute it with an order declaring that the lease, alternatively the renewal thereof, was void. In the alternative, the Applicant sought to set aside the award under s 33(1) of the Arbitration Act, 42 of 1965 ("*the Act*").

[13] The application was opposed by the respondent which filed a counter-application seeking, *inter alia*, to have the award made an order of Court in terms of s31 of the Act.

[14] In the founding affidavit the alleged irregularity on the part of the Arbitrator was formulated thus by the Second Applicant:

> *"13.1 The Arbitrator committed, with respect, a gross irregularity in that he did not apply the provisions of the Stamp Duties Act to the evidence which was given. Having regard to the evidence by Luck, the lease agreement was void, alternatively the notice, annexure "B", was void. On Luck's own evidence, these documents were created and made for the purpose of evading and defeating stamp duty. In failing to apply the law as set out in the Stamp Duties Act, the arbitrator committed a gross irregularity which the above Honourable Court should, with respect, correct.*
>
> *13.2 Applying the provisions of the Stamp Duties Act to the evidence, could, with respect, only have resulted in one finding, and that is that the lease agreement alternatively the notice to renew was void. There is, with respect, no*

other reasonable application of the evidence to provisions (sic) of the Stamp Duties Act.

13.3 It is further a criminal offence to make a contract, an agreement or an undertaking to avoid stamp duty. If the parties are to comply with the lease or the notice as the arbitrator found, it means that the parties have to give effect to a crime that was committed. Such a finding is with respect grossly irregular.

13.4 I am advised that in terms of the common law, the above Honourable Court retains the right to review and set aside a gross irregularity committed by an arbitrator and that in terms of the provisions of the Arbitration Act itself, the Court has jurisdiction to set aside an award made by an arbitrator, committing a gross irregularity.

13.5 I respectfully submit, that having regard to the evidence and the provisions of the Stamp Duties Act, that the arbitrator committed a gross irregularity and that the Court should review and set the award aside and replace the award with a finding that the lease agreement, annexure "A" alternatively, the notice of renewal annexure "B". (sic)"

[15] In his written heads of argument counsel for the Applicant, Mr. Bruwer, submitted that the award fell to be set aside by virtue of the fact that the Arbitrator "*committed a gross misdirection and irregularity by virtue of the fact that the arbitrator failed to apply the South African law as set out in the Stamp Duties Act*."

[16] While there could be some elements of equivocality in these stances adopted by the Applicant, they strongly suggest that the Arbitrator committed a mistake of law. However, Mr. Bruwer removed any shadow of doubt in argument in open Court when he submitted that his client did not rely on an error of law on the part of the Arbitrator. The failure on the part of the Arbitrator, said counsel, was to properly consider the facts before him in relation to the provisions of s14 of the Stamp Duties Act.

[17] Counsel for the Respondent, Mr. Patrick, was quick to point out that the Applicant's case had undergone a complete metamorphasis from the founding papers through the heads of argument to oral argument. The case as finally presented, he said, appeared then to rely on s33(1)(b) of the Act which is the only subsection in which reference is made to "*gross irregularity*" and which is to the following effect:

> *"33.* ***Setting aside of award***
>
> *(1) Where*
>
> *(a) …*

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

(c)…

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."

[18] It is important to distinguish reviews under the Promotion of Administrative Justice Act, 3 of 2000 in which a review based on a mistake of law is permissible under sec 6(2)(d), and the review of arbitral awards. In the latter instance, the Courts have repeatedly held that the fact that an arbitrator commits a mistake of law and that the award is therefore wrong does not disclose a basis for review under the Act.[1]

[19] No doubt realising the futility of presenting an argument in support of an error of law as a ground of arbitral review in light of these cases, Mr. Bruwer sought

[1] Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others 2001 (2) SA 1097 (C); Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another 2002 (4) SA 661 (SCA); Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA); Road Accident Fund v Cloete N.O. and Others 2010 (6) SA 120 (SCA) and Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others 2014 (1) SA 381 (WCC).

refuge in a review based on an error of fact. But that does not assist the Applicant either. The law is clear on that score too, as the following passages in the judgment of Brand J in Kolber [2] demonstrate:

> *"[39] In order to make an argument in law that gross error or gross carelessness constitutes 'misconduct' within the meaning of s33(1)(a) applicants, in their heads of argument, relied on the following passage from the judgment of Solomon JA in Dickenson and Brown v Fisher's Executors 1915 AD 166 at 176:*
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> *"It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had come to a wrong conclusion on a question of fact or law and in such a case I am not prepared to say that a Court might not properly find that there had been misconduct on his part."*
>
> *[40] This passage, applicants submitted, should be taken to mean that where gross carelessness on the part of an arbitrator is demonstrated, absent any evidence of male fides or partiality, that suffices to show misconduct.*

[2] At 1107B-1108B

[41] *…The thrust of the judgment [of Solomon JA] as a whole is a confirmation of the generally accepted meaning given to the term misconduct: it requires 'some wrongful or improper conduct'; it seems 'impossible to hold that a bona fide mistake either of law or fact made by an arbitrator can be characterised as misconduct'; 'where an arbitrator has given fair consideration to the matter…it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or fact or of fact' (see at pp175-6 of the report.)*

[42] *…*

[43] *…The judgment of Solomon JA has subsequently been interpreted by a number of Courts to mean that even a gross mistake of fact or law does not constitute 'misconduct' as contemplated by s33(1)(a) and that a Court cannot upset an arbitrator's award on the basis of misconduct unless it finds him guilty of 'misconduct' in the sense of moral turpitude or mala fides. Included in this number is a decision by the Supreme Court of Appeal in Amalgamated Clothing and Textile Workers Union v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) at 169C-E (see*

also the decision by a Full Bench of this Division in Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C) at 37H-I).”

Kolber was cited with approval in Total Support which also approved of the approach by Brand J in Bester v Easigas to which reference is made in para 43 of Kolber.

[20] In Kolber the Court considered the reviewability of the arbitration award before it under sec 33(1)(a) since the applicant in that case had alleged that the relevant “*misconduct*” on the part of the Arbitrator resorted under that section. The finding of Brand J was that neither mistakes of fact nor law constituted “*misconduct”* under that section of the Act.

[21] In Total Support the applicant for review relied on both secs 33(1)(a) for a review based on “*misconduct*”, and sec 33(1)(b) for a review based on “*gross irregularity”*. Smalberger ADP considered the impugned conduct of the arbitrator in relation to sec 33(1)(a) and came to the following conclusion at 677D-F

“[36] Misconduct in the required sense will in any event not likely or readily be inferred on the part of an arbitrator who is a professional man of considerable experience in his field with a reputation to uphold, solely on the strength of errors made in his judgment, especially where, as in the present instance, such errors could never be described as

gross. In my view, it is, as a matter of inference, more likely that any errors made by the second respondent were bona fide mistakes made by him in the course of a difficult adjudication. In the result there is no room for a finding of misconduct on his part. It follows that the first round of review cannot succeed."

[22] The learned Judge of Appeal then went on to consider the ground of review raised under sec 33(1)(b) in the context where it was alleged that the award had been prepared by the arbitrator's assistant without material input from the arbitrator. This did not involve any allegation of error of law or fact on the part of the arbitrator, but the alleged activity was nevertheless assailed as an irregularity. The finding of the Court on this score was as follows at 680F:

"[47] In the result the appellants have failed to establish that the second appellant committed any irregularity, let alone a gross irregularity, in the conduct of the arbitration proceedings. Nor, in utilising Milo's services to the extent that he did, could there have been any misconduct on his part. The requirements of s33(1)(a) and (b) of the Act have not been satisfied. It follows that the second ground of review cannot succeed either."

[23] In Telcordia Harms JA was required to consider a common law review based on alleged material errors of law on the part of the arbitrator, as well as "*gross irregularity*" under sec 33(1)(b). The learned Judge of Appeal found on the basis of, *inter alia,* Dickenson & Brown and Total Support that in consenting to arbitration under the Act, a party was not entitled to rely on the common law powers of Courts to review errors of law.

[24] In considering the extent of a "*gross irregularity*" under sec 33(1)(b), Harms JA observed, firstly, that it was necessary to take care in not confusing an arbitrator's reasoning with the conduct of the proceedings themselves. In such circumstances said the learned Judge of Appeal, one had to consider what the nature of the enquiry was and what the arbitrator's duties and powers were. He found as follows at 301H *et seq*:

> *"[83] In short, the arbitrator had to: (i) interpret the agreement; (ii) by applying South African law; (iii) in the light of its terms; and (iv) all the admissible evidence.*
>
> *[84] In addition, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue*

by way of a partial, interim or final award, as he deemed appropriate.

[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the enquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the enquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the enquiry. To adapt the quoted words of Hoexter JA [Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk 1955 (1) SA 557 (A)]: it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation

of the Integrated Agreement could not afford any ground for review by a court.

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers: they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd."

[25] As the authorities I have referred to demonstrate, the provisions of s33(1)(b) of the Act require an applicant for review to establish a gross irregularity in the proceedings themselves. This requires the reviewable error to be established in the context of procedural misconduct blighted by *mala fides* or moral turpitude. It

does not permit an applicant, as here, to rely on either an error of fact or law. The Applicant has failed to discharge the onus in that regard and the application for review of the award must accordingly fail.

[26] Turning to the counter application, Mr. Bruwer referred the Court to the second decision in this Court in Peninsula Eye Clinic [3] in which Binns-Ward J outlined the approach to applications in terms of s31 of the Act:

> *"[9] A party to an arbitration which makes application in terms of s31(1) for an award in its favour by the arbitrator to be made an order of court, 'accepts an onus to prove that [it] is in possession of an award that can properly form the subject of an order of court' (Vidavski v Body Corporate of Sunhill Villas 2005 (5) SA 200 (SCA) in para 17). Thus if it were to be apparent ex facie the award, or the reasons given for it, that it could not properly form the subject of an order of court, the application would be refused. A respondent in an application in terms of the sub-section is entitled to oppose the application on the ground that the award is not amenable to properly being made an order of court; it is not obliged to be pro-active and take steps, in terms of s33 of the Arbitration Act, to have the award set aside.*

[3] 2014 (1) SA 381 (WCC) at 386E; 387 (C)

[10] …

[11] In considering an application in terms of s31(1) of the Arbitration Act a court will not concern itself with possible errors of fact or law by the arbitrator in making the award, but only with the propriety of lending the award the force of an order of the court. This approach reflects the policy of the courts, not only in this country, but also internationally, to strike the balance between party autonomy and judicial control (or curial intervention) in a way that attaches considerable weight to party autonomy…"

[27] Whatever the merits or demerits of the review under sec 33(1) may be, said Mr. Bruwer, this Court should be loathe to grant its *imprimatur* under sec 31(1) to an award that effectively endorsed the commission of a crime under s14 of the Stamp Duty Act.

[28] A similar argument was advanced in Peninsula Eye Clinic [4] where it was contended that the transaction which underpinned the subject of the arbitration award fell foul of sec 38 of the Companies Act, 61 of 1973 [5]. After a detailed examination of the facts before him, Binns-Ward J found that the impugned transaction did not give rise to a contravention of the said sec 38 and that nothing therefore stood in the way of the Court granting relief under sec 31 of the Act.

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[4] At 384G

[5] The section in question prohibited a company from giving financial assistance to any purchaser of its shares.

[29] Mr. Patrick argued in reply, firstly, that it was only a criminal court that was permitted to enquire into and assess whether sec 26(c) (read with s14) of the Stamp Duty Act had been contravened. That had not occurred *in casu* and so there was nothing which stood in the way of this Court granting the order sought. Secondly, said Mr. Patrick, the provisions of sec 14 were essentially revenue provisions and there was a long line of cases to the effect that contracts which contravened such statutes were not automatically null and void. [6] On this basis, it was argued that the Court was not precluded from making an appropriate order under sec 33 of the Act.

[30] In my view, the second argument does not find application here. The section in question has as its express object, a declaration of invalidity of a contract which seeks to achieve the objects set out in that section.

[31] As to the first argument, I am guided by the approach of Brand J in Kolber. In that matter the court found that once the award was not reviewable it followed, perhaps as day does night, that the court should grant its *imprimatur* under sec 31. For, otherwise, the consequences would be to create a state of deadlock between the parties, effectively rendering the award unenforceable.

[32] In addition, I would add that to pronounce on the validity or not of the scheme to avoid payment of stamp duty, this Court would be required to enter into an

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[6] See for example McLoughlin, N.O. v Turner 1921 AD 537; Standard Bank v Estate Van Rhyn 1925 AD 266.

assessment of the merits of the dispute between the parties, thereby turning the review into an appeal. In my view that is not permissible in proceedings such as these.

[33] Finally, as Mr. Patrick pointed out, perhaps the most trenchant example that this case is in truth no more than an appeal dressed up as a review, lies in the relief sought in prayer 3 of the notice of motion in which the correct interpretation of the evidence is sought by way of declaratory relief.

ORDER OF COURT

[34] In the circumstances the following order is made:

A. The application to review the award of the First Respondent in the arbitration proceedings between the First and Second Applicants and the Second Respondent dated 14 February 2014 is dismissed.

B. The award of the First Respondent in the arbitration proceedings between the First and Second Applicants and the Second Respondent dated 14 February 2014 is made an order of Court.

C. The First and Second Applicants are to bear the Second Respondent's costs of suit in both the review application

and the counter application jointly and severally, the one paying the other to be absolved.

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GAMBLE, J