IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 22213/15

In the matter between:

CIB INSURANCE ADMINISTRATORS (PTY) LTD Applicant

And

SOUTH AFRICAN RUGBY UNION ("SARU") 1st Respondent

A R SHOLTO-DOUGLAS SC 2nd Respondent

Coram: Yekiso J
Dates of Hearing: 2 August 2016
Judgment Date: 22 November 2016

JUDGMENT

YEKISO, J

[1] The applicant in these proceedings, C I B Insurance Administrators (Pty) Ltd, a company with limited liability incorporated in accordance with the laws of the Republic of South Africa, is the defendant in the arbitration proceedings which currently serve before the second respondent. The dispute arises out of a written memorandum of

agreement concluded between the applicant and the first respondent on 4 November 2011. It relates to the sponsorship by the applicant of the Vodacom Super Rugby Competition for the 2012, 2013 and 2014 seasons. That agreement was subsequently varied and supplemented in writing on or about 16 December 2011 when the parties concluded a supplementary agreement to the one concluded on 4 November 2011.

[2] The first respondent is the South African Rugby Union ("SARU") and the claimant in the arbitration proceedings referred to in the preceding paragraphs. It is an incorporated association of persons with perpetual succession and juristic personality with its head offices at SARU House, Tygerberg Park, 162 Hendrik Verwoerd Drive (now renamed Uys Krige Drive), Plattekloof, Cape Town, in the province of the Western Cape.

[3] The second respondent is A R Sholto-Douglas SC N.O., an adult male senior advocate cited in these proceedings in his official capacity. He is the duly appointed arbitrator having been appointed by the parties to adjudicate their dispute arising from the agreement referred to in paragraph [1] of this judgment. He has his place of practice at Huguenot Chambers, 40 Queen Victoria Street, Cape Town, in the province of the Western Cape.

[4] The material and/or express terms of the agreement between the parties are fully set out in the pleadings exchanged between the parties. The "rights" which the applicant alleges it had acquired in exchange for payment by the applicant to the first respondent, are fully set out in Schedule 1 of the 4 November 2011 agreement and are summarised in paragraph 8.3 of the applicant's founding affidavit. These rights, in

exchange for payment of consideration included, amongst others, the right exclusively to advertise the applicant's products, these being, the business of short term insurance, including insurer, broker, administration, underwriting manager, aggreator or any other business in any way associated with short term insurance in South Africa as defined in the Short Term Insurance Act on the A- perimeter and B- perimeter of a match venue; the right to use the title "Associate Sponsor of Vodacom Super Rugby" in association with the Competition in a variety of forms of advertising; the right to a 6 minute advertising exposure on a digital adscroll on the eastern perimeter of a stadium, alternatively, on a perimeter board if no adscroll is available at a match venue; the right to advertise on 1 "wedge" on each side of the field used for a match behind the poles; and the right to 5,30 second video board advertising spots at all matches where a video board is present.

[5] A dispute arose regarding a provision of the "Rights" by the first respondent to the applicant under the agreement and, subsequent thereto, also, relating to the subsequent cancellation of the agreement by the applicant on 8 March 2013 and/or 16 May 2013. The parties attempted to negotiate a settlement and, when that failed, the matter was referred to arbitration.

[6] The following issues were referred to arbitration before the second respondent, namely: whether the applicant validly cancelled the agreement on 8 March 2013 and/or 16 May 2013; whether the applicant is indebted to the first respondent in the amounts reflected in its invoices; and whether the applicant is indebted to the first respondent in respect of damages and, if so, in what amount.

[7] A pre-arbitration meeting was held on 30 April 2015. At that meeting it was agreed that the basis on which the arbitration was to be held was to be in terms of clause 12 of the memorandum of agreement; that the Uniform Rules of High Court would apply to the arbitration, subject to the parties' entitlement to arrange time periods by agreement. The parties also agreed that disputes existed between the parties which were ready for arbitration. The parties further agreed on the time frames within which to file and serve pleadings relating to a statement of claim; statement of defence; replication; discovery; request for further particulars; reply to request for further particulars; and expert notices and reports. These agreements were recorded in a pre-arbitration minute signed by both parties.

[8] In terms of paragraph 9 of the pre-arbitration minute and under the heading "other issues" the parties further agreed that the question of the onus and the duty to begin would stand over to be dealt with at a subsequent pre-arbitration meeting. In paragraph 9.2 of the pre-arbitration minute the following is recorded with regards to the question as to whether the applicant, as the defendant in the arbitration proceedings, would file a counterclaim:

> "9.2 At this stage and as currently instructed, defendant does not anticipate a counterclaim. However, this position may alter after having sight of the statement of claim or in preparation of the statement of defence."

[9] The parties subsequently filed their pleadings. On 21 January 2015 the first respondent filed a notice of its intention to amend its statement of claim. The statement of claim, in its amended form, included an amended paragraph 6.8 and a new

alternative prayer. The first respondent intended to insert the following words immediately prior to the parenthesis in paragraph 6.8 as it then read:

> "and the arbitrator is in such arbitration entitled to, inter alia, investigate or cause to be investigated any matter, fact or thing which he considers necessary or desirable in connection with the dispute, to decide the dispute according to what he considers just and equitable in the circumstances, and to make such award as he in his discretion may deem fit and appropriate."

[10] The insertion of the new prayer constituted a prayer in the alternative in terms of which the first respondent sought payment, as damages, such amount as the arbitrator considers just and equitable in the circumstances. It thus constituted a prayer in the alternative to the amounts which the first respondent contended was entitled to claim in terms of the provisions of the agreement. There was no objection to the amendment sought and the amended pages were subsequently filed.

THE APPLICANT'S CONSEQUENTIAL AMENDMENT

[11] Subsequent to the amendment of the first respondent's statement of claim, the applicant consequentially amended its plea on 24 February 2015 and, in the process, introduced a conditional counterclaim. The first respondent did not object to the applicant's amendment of its plea. However, and on 10 March 2015, the first respondent delivered a notice in terms of Rule 30 in terms of which the first respondent objected to the introduction of the applicant's conditional counterclaim. The first respondent objected to the inclusion of a conditional counterclaim on the basis that what the applicant sought to introduce was not a "dispute" which, by agreement between the parties, was referred to the arbitrator for a decision.

[12] In response to the objection raised by the first respondent, the applicant stated in its answering affidavit that the inclusion of the counterclaim ought to be allowed as a consequence of the wording of the agreement and, particularly, the arbitration clause; that it ought to be allowed because of the nature of the arbitration proceedings; the fact that it would be just and equitable and convenient to do so; and that the inclusion of a counterclaim was envisaged or contemplated as the record of the pre-arbitration minute clearly shows.

[13] On 15 April 2015 the first respondent launched an application in terms of Rule 30. In that application the first respondent requested an award setting aside of the applicant's conditional counterclaim as an irregular step. The grounds for the application for the setting aside of the conditional counterclaim were two-fold, these having been: in the first instance, that the dispute raised by the counterclaim had not been the subject of the mandatory negotiation in terms of clause 12.1 of the contract. In the second instance, that there was, in any event, no dispute about any obligation of the first respondent to compensate the applicant for diminished value of benefits, losses, damages and prejudice suffered by the applicant which had been referred to arbitration for adjudication by the arbitrator.

[14] In opposing the relief sought for the setting aside of the conditional counterclaim, the applicant stated in its answering affidavit that paragraph 6.8 of the first respondent's statement of claim, in its amended form, as well as an alternative prayer, constitute an entirely new dispute and a new cause of action which give rise to a new relief and a new alternative prayer. Thus, so the applicant contended in opposing the

new relief sought, the new cause of action and relief sought in the alternative, were not dealt with nor anticipated in the correspondence which passed between the parties; were not dealt with in the statements and pleadings which passed between the parties during the course of the arbitration process; nor were those disputes dealt with at the meetings held between the parties in the furtherance of the arbitration. Consequently, so the applicant stated in its answering affidavit, the dispute, factual context and matrix of circumstances and by necessity the evidence, which was originally required to fairly adjudicate the dispute, has been greatly expanded. This is so despite the fact that the correspondence, negotiations, meetings, arbitration agreement, preliminary arbitration meeting timelines, statements and pleadings, did not anticipate such an expansion or enlargement of the issues, the facts and circumstances or the nature of the relief. In essence, the applicant contended in its answering affidavit that the first respondent's amendment of its statement of claim somehow rendered the applicant's counterclaim arbitrable in the arbitration before the arbitrator. The applicant concludes, in its opposition for the setting aside of the conditional counterclaim, that it was, in any event, convenient that the applicant's counterclaim be adjudicated by the arbitrator.

THE AWARD

[15] The Rule 30 application for the setting aside of the conditional counterclaim was argued before the arbitrator on 1 July 2015. On 9 October 2015 the arbitrator delivered the award. The arbitrator made an interim award setting aside the counterclaim as an irregular step, as prayed for by the first respondent. In his award, the arbitrator observed that the applicant did not seriously dispute the fact that the counterclaim does not fall squarely within the arbitration referral. This being so the arbitrator reasoned that there was no power vested in him by the contract to determine anything other than the

dispute referred to him. The arbitrator held that he could not assume jurisdiction to determine the counterclaim simply because it might be practical, convenient or equitable to do so.

[16] With regards to paragraph 9.2 of the pre-arbitration minute, it would appear that the pre-arbitration meeting of 30 April 2015 was held before the arbitrator in his chambers. At that meeting it was submitted on behalf of the first respondent that the mere mention by one party, at a pre-arbitration meeting, of a possible claim, which had not even previously been a dispute raised with the other party, does not constitute an agreement to refer a dispute to arbitration for adjudication by the arbitrator and that, in any event, no such agreement had been concluded at that pre-arbitration meeting. In accepting the first respondent's contention, the arbitrator reasoned that if it must be accepted that the parties had agreed to the counterclaim being submitted to arbitration, the amendment to introduce the counterclaim should be allowed, but by the same token, if no such agreement is shown to have been reached, he had no jurisdiction to allow the counterclaim to be determined in the arbitration process. Thus, the arbitrator set aside the counterclaim and, in so doing, concluded that the parties have not agreed to the counterclaim being submitted to him to arbitrate.

[17] In handing down the award the arbitrator also accepted that the amendment to the statement of claim had the potential of widening the scope of the arbitration, but that the alternative relief sought arising from the amendment of the statement of claim was covered by the scope of the arbitration agreement. The rationale of the decision to set aside the conditional counterclaim was that that dispute had not been referred to the

arbitrator for adjudication by agreement between the parties and that, therefore, the arbitrator had no jurisdiction to adjudicate on the conditional counterclaim.

APPLICATION FOR REMITTAL

[18] On 17 November 2015 the applicant launched these proceedings out of this court, on notice of motion, seeking an order for the remittal of the interim award of 9 October 2015 to the second respondent for reconsideration in terms of section 32(2) of the Arbitration Act, 42 of 1965. The applicant seeks the remittal of the award to the second respondent on the basis that the award confuses the concept "dispute", on the one hand, and the concept "issue", on the other hand. The applicant further contends that in the award there is also confusion between the concept "dispute" on the one hand, and the concept "relief" on the other hand. The further basis on which the applicant seeks to have the award remitted is based thereon that the arbitrator failed to take into account the agreement between the parties.

[19] The applicant contends that there is a distinction in the arbitration agreement between the concept "dispute" on the one hand, and the concept "issue" on the other hand. In advancing this contention the applicant relies on paragraph 6.8 of the first respondent's amended statement of claim, cited by the arbitrator in paragraph 6 of the 9 October 2015 interim award. Paragraph 6.8 of the first respondent's statement of claim, in its amended form, reads as follows:

> "Any dispute or claim which could not be settled by negotiation, could be submitted to final and binding arbitration; and the arbitrator is in such arbitration entitled to, inter alia, investigate or cause to be investigated any matter, fact or thing which he considers necessary or desirable in connection with the dispute, to decide the dispute

according to what he considers just and equitable in the circumstances, and to make such award as he, in his discretion, may deem fit and appropriate."

[20] Based on paragraph 6.8 of the amended statement of claim, the applicant contends that the relief, which a party seeks, is the award which it seeks the arbitrator to make, and is not to be confused with the "dispute" or even the "issues". The applicant, in its submissions, goes further to make a fine distinction of the concepts "dispute"; "issue"; and "dispute" and "relief" and in the process criticises the arbitrator for failing to distinguish between these concepts. It is on the basis of failure by the arbitrator to make the distinction complained about that the applicant, in the first instance, seeks the remittal of the award to the arbitrator for reconsideration.

[21] In support of the relief it seeks, the applicant relies on the authority of *South African Forestry Company Limited v York Timbers Limited* 2003 (1) SA 331 (SCA) where the court observed, in paragraph [14] of that authority, that good cause, which is the basis on which the award could be remitted for reconsideration, is a phrase of wide import that requires a court to consider each case on its merits in order to achieve the just and equitable results in the particular circumstances. Based on this authority the applicant appears to contend that "good cause" contemplated in section 32(2) is wide to encompass "the confusion" and "failure to make a distinction"; which is what the applicant complains about.

[22] The first respondent opposes the relief sought on the basis that the applicant has failed to show good cause for the remittal of the interim award to the arbitrator. This is so, so it is contended on behalf of the first respondent, because the arbitrator has

already determined the issue, the issue being whether the introduction of a conditional counterclaim falls squarely within the arbitration referral and, if not, whether the conditional counterclaim constitutes an irregular step. The relief sought is further opposed on the basis that the first respondent's amendment of its statement of claim did not introduce a new claim or cause of action as the applicant seeks to contend; that the arbitrator's powers are circumscribed by the dispute which the parties agreed to refer to him; that the dispute about the applicant's alleged counterclaim was not referred to the arbitrator and, consequently, the arbitrator does not have the jurisdiction to determine it; that the arbitrator took into account that the dispute raised in the counterclaim had not been referred to him for resolution by agreement; and that what the applicant seeks to do is, in effect, impermissibly to appeal the interim award on the basis that the arbitrator erred by failing properly to distinguish between the concepts dispute, issue and relief.

GROUNDS FOR REMITTAL IN TERMS OF SECTION 32(2)

[23] Section 32(2) of the Arbitration Act provides as follows:

> "2. The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for making of a further award or a fresh award or for such other purpose as the court may direct."

[24] To complete the picture, it might be prudent to set out the provisions of section 33(1) of the Arbitration Act which provides as follows:

> "33(1) Where—

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

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

(c) an award has been improperly obtained,

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."

[25] The interpretation of, and the application of both the provisions of sections 32 and 33 of the Arbitration Act has received our courts' attention in several authorities. In *Sourcecom Technology Solutions (Pty) Ltd v Colburn & another* 2001 (2) 1097 (C) 57 at 1111B this court expressly refrained from circumscribing the sort of factors which will disclose "good cause" for remittal in terms of section 32(2), for the reason that it is not desirable to do so. This is because "good cause" confers a wide discretion to be exercised judicially in every case on the facts and circumstances of each case, but it must be interpreted in the context in which it is used. That context is the Arbitration Act, which is directed at the finality of arbitration awards.

[26] Gardiner J in *Clark v African Guarantee & Indemnity Company Limited* 1915 CPD 68 at 77, cited by Brand J, as he then was, in *Sourcecom Technology,* supra, made the following observation at p77 of that authority:

"The court will always be most reluctant to interfere with the award of an arbitrator. The parties have chosen to go to arbitration instead of resorting to the courts of the land, they have specially selected the personnel of the tribunal, and they have agreed that the award of that tribunal shall be final and binding."

[27] *Lufuno Mphaphuli & Assocates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC) at 235 is authority for the proposition that since the advent of the Constitution of the Republic of South Africa, 1996 the court's power to set aside arbitration awards under section 33 of the Arbitration Act have become more circumscribed and not enhanced. The Constitution requires a court to construe the provisions of the Arbitration Act on which an arbitration award can be set aside to be strictly construed. Constitutional values require courts to respect the parties' right to have their dispute resolved expeditiously in proceedings outside the formal court structures.

[28] The considerations set out in the authority cited in the preceding paragraphs ought to apply in matters such as the one before me relating, as it is, to an application for remittal in terms of section 32(2) of the Arbitration Act. As correctly pointed out by *Mr Muller* SC, for the first respondent, this is because there are few policy differences between sections 32 and 33. A more guiding principle of consensual arbitration is finality – right or wrong. In electing to arbitrate, without an arbitration appeal, such as in the case in the matter before me, the parties sacrifice the power to appeal. A party should therefore not be permitted to take an arbitrator on appeal "under the guise of remittal in terms of section 32(2) of the Arbitration Act". Something more than "mere error on the part of the arbitrator" is required.

[29] In its first ground of remittal the applicant alleges that the arbitrator confuses a distinction between the concepts "dispute" and "issue", on the one hand, and the concept "dispute" and "relief", on the other hand. It is on this ground for remittal that the applicant seeks to make fine distinctions between these concepts and, in doing so, criticising the arbitrator for failing to distinguish between the concepts "dispute" and

"issue", on the one hand, and "issue" and "relief", on the other hand. In my view, these contentions are no more than an allegation that the arbitrator, in making his award, erred in doing so. An error on the part of the arbitrator does not suffice as a cause for remittal.

[30] The issue which the arbitrator had to determine in the Rule 30 application was whether or not the applicant's conditional counterclaim fell within the arbitration referral. The arbitrator determined it did not. In doing so, the arbitrator, in no doubt, should have considered and taken into account the recordal in paragraph 9.2 of the 30 April 2014 pre-arbitration minute. This is because that recordal is the basis on which the applicant seeks to have its conditional counterclaim adjudicated. In making that determination the arbitrator had the benefit of the parties' submissions and argument arising therefrom. The basis for making that determination was the very agreement between the parties, which makes provision for referral to arbitration in the event of a dispute, which he obviously took into account in making that determination. How a confusion could arise in the process of making such determination between the concept "dispute" and the concept "issue"; and the concept "dispute" and "relief", is difficult to fathom.

ALLEGED FAILURE TO TAKE INTO ACCOUNT AN AGREEMENT BETWEEN THE PARTIES

[31] In its submissions the applicant makes a point that during argument in the Rule 30 proceedings it was pointed out to the arbitrator by its counsel that in the pre-arbitration meeting of the 30 April 2014, the parties agreed that "At this stage and as currently instructed, the defendant does not anticipate a counterclaim. However, this position may alter after having sight of the statement of claim or in preparation of a statement of

defence." As has already been pointed out in this judgment this was recorded in paragraph 9.2 of the minute and signed by the parties.

[32] Based on the recordal in paragraph 9.2 of the pre-arbitration minute it is contended on behalf of the applicant that the parties in fact agreed that once the applicant would have had sight of the statement of claim, the applicant would be entitled to file a counterclaim. The contention goes further to suggest that when the first respondent amended its statement of claim in July 2015, it effectively introduced an alternative claim, and once the applicant had had sight of the alternative claim, contained as it is in the amended statement of claim, the applicant decided to introduce a counterclaim which, so the submission goes, accords entirely with the approach set out in paragraph 9.2 of the pre-arbitration minute.

[33] The argument that the parties would have agreed to have the applicant's claim, as set out in its conditional counterclaim, adjudicated by the arbitrator was raised before the arbitrator. The arbitrator found that the parties had not so agreed. To the extent that there appears to be a dispute on the papers as to whether paragraph 9.2 of the pre-arbitration minute records an agreement between the applicant and the first respondent that the applicant could file a counterclaim in the event of the first respondent amending its statement of claim, that dispute should be resolved in favour of the first respondent on the basis of the application of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). The way I look at it, and it does not seem to me, that paragraph 9.2 of the pre-arbitration minute purports to record an agreement of any kind. That recordal does no more than record an observation made by one of the parties at that meeting.

[34] I am thus not persuaded by the applicant's submissions that the arbitrator, in making his determination, should have found that an agreement had been reached between the parties, based on the recordal in paragraph 9.2 of the pre-arbitration minute, that the applicant could institute a counterclaim, nor can it be said that it was anticipated at that stage that a counterclaim was a possibility and that that possibility formed part of the arbitration referral.

PREJUDICE

[35] The applicant makes a point in its submission that in deciding whether or not to remit the matter as contemplated in section 32(2) of the Arbitration Act, the court ought to consider the prejudice that will be caused to the applicant if the matter is not remitted, the applicant relying on *South Africa Forestry Company Limited v York Timbers Limited*, supra, at 339 for this contention. But on the basis of the same authority prejudice *per se* cannot constitute good cause for remittal. At best, it may be a factor to be weighed against other relevant factors.

[36] The only prejudice which the applicant potentially could suffer in not having the matter remitted is the inconvenience of not being able to prosecute its alleged counterclaim in the same arbitration proceedings before the same arbitrator. The arbitrator's decision does not preclude the applicant from asserting its claim in separate arbitration proceedings.

[37] The submission that the applicant's counterclaim will cover the same facts, matter and circumstances as would be canvassed in the arbitration following the

amendment of the first respondent's statement of claim is, in my view, not correct. The way I look at it, the first respondent's claims are for payment of its full contractual consideration, alternatively, for a reduced contract consideration. On the other hand, the conditional counterclaim seeks to introduce a claim against the first respondent for damages allegedly suffered. The nature of the dispute reflected in the counterclaim, and the evidence which will be required to determine it, will be very different from that required to decide the issues currently before the arbitrator and based on the arbitration referral. While there may to some degree be an overlap, the issues are not the same, and the evidence will in no doubt be different.

CONCLUSION

[38] It therefore follows, in my view, that none of the grounds relied on by the applicant disclose or constitute good cause for remittal. Thus, the application for the relief sought ought to fail. In the result, the following order is made:

(1) The application is dismissed.

(2) The applicant is ordered to pay the first respondent's costs, on a party and party scale, duly taxed or as agreed, such costs to include costs consequent upon employment of two counsel.

N J Yekiso
Judge of the High Court

Counsel for Applicant:	Adv P Carstenson (JHB)
Attorneys for Applicant:	ENS Sandton
Counsel for Respondent	Adv Jeremy Muller SC Adv R Patrick
Attorney for Respondent:	De Klerk & Van Gend