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

Reportable

CASE NO: 7474/2017

In the matter between:

THREE CITIES MANAGEMENT (PTY) LTD Applicant

and

BANTRY BAY MANAGEMENT COMPANY (PTY) LTD First Respondent

JEREMY MULLER SC Second Respondent

JUDGMENT: 22 September 2017

DAVIS J

Introduction

[1] Judge F D J Brand, writing about the judicial review of arbitration awards, has noted: 'the question whether or not the arbitration had strayed beyond the pleadings of a particular case is clearly one to be decided on the facts of that case. But it is clear that in line with their general reluctance to interfere with arbitrator's awards, the courts are prepared to adopt a rather generous approach to pleadings'. FDJ Brand "*Judicial review of Arbitration Awards*" 2014 Stellenbosch Law Review 247 at 255.

[2] This case concerns the extent of the judicial reluctance to interfere with an arbitrator's award, particularly when the argument is raised that the arbitrator exceeded his or her powers.

[3] Applicant has approached this Court in terms of s 33 (1) (b) of the Arbitration Act 42 of 1965 ('the Arbitration Act') for the review and setting aside of the arbitral award of second respondent on the basis that:

(a) He exceeded his jurisdiction and the powers conferred upon him by the arbitration agreement; and

(b) Committed a gross irregularity in the conduct of the proceedings by making a determination on an issue not raised on the pleadings or falling within the ambit of the issue falling to be decided in the arbitration but raised by the arbitrator of his own volition, for the first time, after both parties has closed their respective cases.

[4] To the extent relevant, s 33 (1) (b) of the Arbitration Act provides that:

(i) where ...

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

Factual Background

[5] I now deal with the factual background which leads to applicant's invocation of s 33 (1)(b) of the Arbitration Act. The applicant sued for payment of monies alleged to be owing from respondent arising from services rendered under and damages suffered in consequences of the cancellation of a management and marketing agreement concluded between the parties on 27 March 2013. I should

add that the respondent has, in turn, counterclaimed for payment of monies which it alleged it overpaid to applicant and for damages suffered by reason of breaches by applicant of the management and marketing agreement and/or its repudiation and the subsequent cancellation of the agreement.

[6] Applicant lodged three claims. In terms of its statement of claim, it alleged that respondent was indebted to it in the amount of R 211 471, 68 in respect of management, marketing and other fees set to be due in terms of the management and marketing agreement, all of which related to the period April 2016 to 31 July 2016. Secondly, it claimed an amount of R 147 406, 74 in respect of so called "recharges" for the period 31 May 2016 to 31 July 2016. Finally, it claimed damages in the amount of R 2 823 843.00 on the grounds of respondents alleged repudiation of the management and marketing agreement on 30 June 2016 and the profit which applicant claimed it would have made from the payment of management fees, marketing fees and sale and executive fees for the period 2016 – 2019, but for the repudiation.

[7] The background to the disputed agreement turned on respondent's need to appoint a hotel operator to manage and market the Bantry Bay Hotel ('hotel'). In March 2013 applicant was appointed as the new operator of the hotel with its rights and obligations governed by the relevant marketing agreement. In 2015 shares in the business of applicant were acquired by African Hotels and Adventures a division of Tourvest Holding (Pty) Limited referred to by the parties as AHA. Given a previously unhappy relationship between AHA and respondent, the latter was concerned with this development, given the contractual relationship into which it entered some two years earlier with the applicant.

[8] The agreement contained the following clause:

'TERM OF AGREEMENT

This AGREEMENT shall commence on the EFFECTIVE DATE and endure for the INITIAL PERIOD.

Upon expiry of the INITIAL PERIOD, this AGREEMENT shall automatically continue during the EXTENDED PERIOD, subject only to renegotiation of the Management and Marketing Fee payable in terms of clauses 13 and 15 respectively, which fees shall be established on a fair market-related basis.'

[9] The 'extended period' was defined in the agreement to mean the three year period from the expiration of the initial period. It appears clear that by February 2016, the month in which the first period of the agreement came to an end, the relationship between the hotel management operator and respondent were very strained. No new written agreements were executed after 29 February 2016. However AHA continued to operate the hotel and to raise invoices as it had started doing after its acquisition of applicant. Various discussions took place between the parties about a proposed contract during the subsequent months. On 30 June 2016 respondent addressed a letter to AHA purporting to give it one months' notice, terminating 'the current month – month contract that exist between AHA Hotel and Bantry Bay Manco, as was agreed upon on the expiry of the formal contract with Three Cities on 29 February 2016.' It appears that this letter precipitated the proceedings before second respondent.

[10] Applicant's amended statement of claim includes the following critical paragraph:

'Immediately after expiry of the initial period the agreement automatically renewed, subject only to the renegotiation of the Management and Marketing Fee payable in

terms of clauses 13 and 15 thereof, for the further period of 3 (three) years ("the extended period").

[11] To this the respondent set out the following in its statement of defence:

> '1. The allegations contained herein are denied.
>
> 2. In amplification of the aforegoing denial, but without derogating from the generality thereof:
>
> 2.1 the agreement expired on midnight on 29 February 2016,
>
> 2.2 a renewal of the agreement for the extended period was dependent on the renegotiation with claimant, and resulting agreement, of the management and marketing fee for the renewal period;
>
> 2.3 there was no such renegotiation or agreement; and
>
> 2.4 instead there was an express, alternatively tacit, agreement between respondent and AHA in terms of which the latter would manage and market the hotel from 1 March 2016 on a month-to-month basis, subject to the rendering of such management and marketing services to the required standard, and pending the conclusion of a longer-term agreement.'

[12] To the extent that there is any lack of clarity with regard to applicant's contentions, these were set out in a letter of 05 July 2016 by applicant's attorneys to respondent's attorneys. The relevant paragraphs read thus:

> 'Our client denies any entitlement on behalf of Bantry Bay Management Co (Pty) Ltd ("Bantry Bay") to cancel the Management and Marketing Agreement entered into between our client and Bantry Bay on or about 27 March 2013 ("the agreement").

Our client further denies the existence of any "month-to-month" contract with Bantry Bay. Clause 6.2 of the agreement specifically states that the extended period (being a period of three years) would automatically continue after the expiry of the initial period (as defined in the agreement). Accordingly, at the expiry of the initial period, the extended period came into force.

What is more, Bantry Bay has failed to adhere to the express provision of paragraph 9 of the agreement. No formal notice of breach has been received by our client. In addition, you have not afforded our client its contractual entitlement of 45 days within which to remedy a particular breach (which breach is in any event, denied).

Bantry Bay has no lawful entitlement to cancel the agreement and your purported cancellation is nothing more than a clear and unambiguous expression of Bantry Bay's intention to no longer be bound by the provisions of the agreement. Your letter thus constitutes a clear repudiation to the agreement.'

Applicant's case concerning the reasoning adopted in the award

[13] Mr Subel, who appeared on behalf of the applicant, noted that for the first time during the course of legal argument, once all the evidence had been led and the respective cases closed, second respondent asked applicant's counsel at the arbitration hearing whether there existed any contractual impediment to him finding that the agreement had been tacitly cancelled by the parties. Counsel for the applicant responded that the contract did not preclude this approach. Not much was made, according to Mr Subel, of this comment at the time as it was not pleaded by the respondent and no evidence had been led in this regard. There was, in his view no suggestion that neither the parties intended relying on an agreed cancellation of the agreement.

[14] However notwithstanding the manner in which the case had been presented second respondent proceeded to deal with the issues as follows:

> '[i]f, during this period, the management and marketing agreement was no longer in force between the parties, the entire basis for Three Cities' claims falls away. I shall therefore deal with that issue first.'

[15] Second respondent then set out how in 2015 the shares in the hotel management business of applicant were sold and transferred to AHA, which commenced invoicing respondent. In the view of second respondent all three parties concerned appeared to have viewed the conclusion on the initial period of the management and marketing agreement as the appropriate time to formalise this de facto reality. Accordingly second respondent considered that this was the reason why on 26 February 2016 Mr Moore on behalf of AHA had forwarded an addendum to the respondent under cover of an email reading: "please find attached to Bantry Bay Management and Marketing contractual renewal for your perusal and consideration."

[16] The addendum itself recorded in three separate clauses that the management and marketing agreement lapses on 29 February 2016.

[17] For this reason, second respondent found thus:

> 'By the end of the initial period, *de facto* Three Cities had entirely ceased managing Bantry Bay Hotel. AHA had taken over this function. Indeed, Three Cities no longer owned a business with which to render management services. In addition, all three parties concerned – BBM, Three Cities and AHA – treated the management and marketing agreement as having come to an end on 29 February 2016, by which

date BBM and AHA had already commenced discussions aimed at the conclusion of a 3-year contract between BBM and AHA.

It is unnecessary for present purposes to consider whether a month-to-month contract between BBM and AHA came into being with effect from 1 March 2016. Since it is not inconceivable that there may be other proceedings between AHA and BBM on this score, it would be unwise for me gratuitously to express a view on this issue. In am satisfied, however, that by their conduct, Three Cities and BBM agreed that the management and marketing agreement would terminate with effect from 29 February 2016.

In arriving at the conclusion I am mindful of the fact that BBM's statement of defence does not explicitly plead his conclusion, despite the fact that when this point was debated in argument Mr Anderson did not submit that it was not open to me for this reason to hold that the management and marketing agreement had terminated by mutual agreement.

Three Cities' allegation that the management and marketing agreement was automatically renewed after expiry of the initial period is however denied in BBM's statement of defence. In addition, BBM pleaded that the management and marketing agreement "expired" in 29 February 2016 and that there was an express, alternatively a tacit, agreement between BBM and AHA, in terms of which the latter would manage and market the hotel from 1 March 2016. Given the relationship between AHA and Three Cities, the reliance on such an express or tacit agreement between BBM and AHA necessarily implies the consent of Three Cities to such an agreement, and in turn to the consequent termination of the management and marketing agreement.'

[18] Mr Subel submitted that second respondent was not entitled to determine any issue relating to a tacit cancellation, especially in light of the fact that this point had not even been raised in the proceedings and a version advanced by the

respondent in the alternative was in fact mutually destructive of this finding. Had the respondent intended to rely on an agreed or tacit cancellation, it would have had to, at least, plead this and put this to the only duly authorised representatives of applicant who testified, namely Mr Neil Renwick. However, nowhere in any of the pleadings did respondent even suggest a consensual cancellation of the agreement. It consistently maintained the position that the agreements lapsed at midnight on 29 February 2016. This was its pleaded case as well as the version put to all the witnesses.

[19] Mr Subel submitted further that this conduct on the part of second respondent constituted a gross irregularity, in that the applicant was prevented from having its case fully and fairly determined. Had the respondent advanced such an argument evidence would have been led by the applicant to counter the argument. In particular Mr Subel relied heavily on the decision *Hos + Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd* 2008 (2) SA 608 (SCA).

Hos + Med Medical Aid Scheme, supra

[20] It is therefore necessary to deal with this case in some detail.

[21] Respondent brought an applicant for the review and setting aside of the decision of an arbitration appeal tribunal on the ground that it exceeded its powers and committed a gross irregularity in terms of s 33 of the Arbitration Act by making a finding on an issue which had not been pleaded. The tribunal held that, notwithstanding that the issue had not been pleaded, it was entitled to go beyond the pleadings as the issue had been traversed in evidence. Briefly the facts, to the

extent that they are relevant to the present dispute, were as follows: In order to facilitate the conduct of a medical aid scheme run by Hosmed, it used the services of brokers and facilitators. To this end, it entered into a contract with Thebe engaging it to introduce new members for the scheme for which an introduction fee was payable and requiring it to provide on going services to members of the scheme for which another fee was payable. As a result of certain amendments to regulations under the Medical Schemes Act, the parties considered that it was no longer permissible for Thebe to charge a fee for on going services. The agreement was then entered into which varied the initial agreement so as to delete this clause which had provided for the payment of Thebe for on going services.

[22] The regulations under the Medical Schemes Act were again amended which made provision for brokers to charge fees for on going services. A further agreement was then concluded, making provision for Thebe to be able to charge fees for its on going services to Hosmed members. For a time Thebe made no such claims because it presumably thought that it was not able to do so pursuant to the earlier amendments. Later it sent invoices to Hosmed claiming a substantial sum of money. Hosmed denied liability for payment thereof and eventually the matter went to arbitration.

[23] The defence raised was that the amending agreements by which Thebe gave up its right to claim fees for on going services to Hosmed members constituted a disposal of the greater part of Thebe's assets but had not been approved by a general meeting of Thebe's shareholders, pursuant to s 228 of the Companies Act 61 of 1973. Hosmed therefore alleged that Thebe had represented that its managing director had authority to conclude the amending agreements, that

Hosmed had relied on such representations and further had entered into the amending agreements in good faith on the assumption that the internal requirements of Thebe had been complied with (the so called Turquand defence).

[24] When the arbitration commenced, the disputes to be determined were whether the amendment to the regulations in 2001 precluded Thebe from claiming fees for on going services and whether the amendments to the parties' agreements in 2001 were in contravention of s 228 of the Companies Act.

[25] The matter was finally determined by the appeal tribunal which found that Thebe was entitled to claim the fees initially on the basis that there had been unanimous consent to the disposal and that the amending agreements were thus enforceable; that is it was a case where all the shareholders of the company had agreed on the matter which ordinarily would require resolution of a general meeting of the company. Given unanimous consent the need for the formal resolution had fallen away. According to Thebe the arbitration appeal tribunal had exceeded its powers and committed a gross irregularity in terms of s 33 of the Arbitration Act.

[26] In assessing this argument, Lewis JA said at para 30:

> 'In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded. Hosmed's rejoinder put in issue Thebe's allegation that there had been compliance with s 228. Had Hosmed intended to rely on the principle of unanimous assent it would have had to plead it specifically because it amounts to a classic confession and avoidance. There is a fundamental difference between a denial (where allegations

of the other party are put in issue) and a confession and voidance where an allegation is accepted, but the other party makes an allegation which neutralises its effect – which is what the raising of unanimous assent would seek to achieve. It is of course possible for parties in an arbitration to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct, but no such agreement that the pleadings were not the only basis of the submission can be found in the record in this case, and Thebe strenuously denied any agreement to depart from the pleadings.'

[27] According to Mr Subel, second respondent had done exactly the same in the present case, namely strayed beyond the expressly defined and limited issues which had been the subject of the dispute which had been referred to arbitration.

Respondent's case

[28] Mr Dickerson who appeared together for the respondent with Ms Reynolds, submitted that what distinguished the Hosmed finding was that in the latter case, the parties expressly agreed that the issues to be determined were the issues contained in the High Court pleadings which had been filed. In the present case according to Mr Dickerson, nothing limited the scope of the dispute referred to arbitration simply to the pleadings. The pleadings were exchanged, after the referral, and served the purposes of elaborating on pre-existing disputes which the parties had already referred to the arbitrator. Accordingly, the pleadings were not constitutive or definitive of the disputes referred to arbitration and the scope of the referral was not as narrowly defined as had been the case at Hosmed.

[29] In the present case, Mr Dickerson submitted that the central and basic dispute between the parties was whether, immediately on the expiry of the initial period of the management and marketing agreement, it had been renewed or had

been terminated. Applicant had pleaded that the agreements 'had automatically renewed subject to the renegotiation of the Management and Marketing Fee.' Respondent denied this allegation: 'the allegations contained herein are denied'.

[30] In Mr Dickerson's view, the question of whether or not the agreement had been renewed encompassed within it an inevitable corollary, namely the question of whether the agreement had terminated. Accordingly, second respondent was entitled to make a finding on this question. It was clearly amongst 'the disputes raised in the proceedings, as contemplated in rule 6.5 of the AFSA rules, which governed this arbitration. In any event, applicant had replicated to respondent's plea as follows:

> 'The Claimant further avers that the parties reached consensus on the management and marketing fee and such consensus was confirmed in an addendum detailing the escalation of rates. At all material times after 29 February 2016, the Respondent certified payments to the claimant based on the escalated rates stated in the addendum'

These parties were applicant and respondent and, on this basis, Mr Dickerson submitted that applicant, in its own pleadings, had relied on a consensus that the original agreement had lapsed and had been replaced with a three year agreement involving AHA. In further support of this argument, Mr Dickerson referred to evidence which had been led before the second respondent and, in particular, the cross examination of Mr Moore who had been called to testify on behalf of applicant. With reference to the management agreement which ended on 29 February 2016, Mr Dickerson cross examined Mr Moore as follows:

'MR DICKERSON: And this document clearly records that that agreement lapsed at the end of February, not so?

MR MOORE: Correct.

MR DICKERSON: And as you have told us this document as you understand it reflects consensus between the parties described in the document, not so?

ARBITRATOR: Mr Moore you must just answer audibly so that it records.

MR MOORE: Sure correct.

MR DICKERSON: And in fact if there was any doubt about what was being done here it is resolved in clause 2.2 which reads and I quote:

"This addendum now seeks to renew and extend the agreement which lapses on 29 February 2016 by extending the agreement for a further three year period until the termination date."

Again that indicates quite clearly that in your mind and the mind of the people you were representing the agreement which had previously existed was about to lapse and would lapse on the 29th.

MR MOORE: Correct,

MR DICKERSON: That had been an agreement between Three Cities and Bantry Bay Management whereas this addendum envisaged a new agreement between AHA and Bantry Bay Management Company, correct?

MR MOORE: Correct.

MR DICKERSON: And Three Cities would fall out of the picture.

MR MOORE: Correct.' (my emphasis)

Evaluation

[31] As indicated in the introduction to this judgment, great care must be exercised in respect of a case brought to the effect that an arbitrator has exceeded his or her powers in terms of s 33 (1) (b) of the Arbitration Act. The reason therefor is due to the fundamental principle that only narrow grounds for review of an arbitrator's award are recognised, in order to permit what would effectively be an appeal against the award which, in turn, would subvert the entire purpose thereof.

[32] As Wallis JA said in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) at paras 19-20:

> 'Provided the parties receive a fair hearing there are no grounds for challenging the arbitration's decision in that regard. The advantages of arbitration over litigation particularly in regard to the expeditious and inexpensive resolution of dispute are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined in a straightjacket of legal formalism that the parties to the arbitration have sought to escape. Arbitrators should be free to adopt such procedures as they regard as appropriate for the resolution of the dispute before them unless the arbitral agreement precludes them from doing so. They may therefore receive evidence in such form and subject to such restrictions as they may think appropriate to ensure, as the arbitrator in this case was required to do, 'just, expedition, economical and final' determination of the dispute.'

[33] With this deferential approach to arbitration awards in mind, it appears to me that the facts of Hos-med are distinguishable from the present case. In that case, an entirely different doctrine was invoked by the arbitration tribunal to that which had been the focus of the dispute between the parties and to that which had been argued before the arbitrator.

[34] In the present case, the dispute was whether, after the initial period, the agreement was automatically renewed. This was denied and respondent's case was that the agreement had expired on 29 February 2016. Second respondent was required to determine whether the agreement continued and thus the defence had no justification. On the basis of evidence presented to second respondent, it was clear that AHA had taken over the management function after the initial period, and further, that respondent had put up the case that the management and marketing agreement had not been automatically renewed because some form of agreement of a tacit nature had been concluded between respondent and AHA. This evidence clearly raised an implication: the implication that if a tacit agreement was found to exist, it had to imply somehow that applicant had consented thereto and that there had effectively been a termination of the initial agreement as at 29 February 2016 as pleaded.

[35] This was no new point. It cannot be equated to an entirely different doctrine such as the implied consent which had been invoked *mero motu* by an arbitrator. In the present case, the finding flowed directly from the evidence which had been presented by the parties, as was made clear not only in the statement of case and defence but in the correspondence which was part of the proceedings and in the evidence of Mr Moore, to which I have made reference. What in effect the applicant has done in this case is to seek the interference of this court because it is dissatisfied with the result. It cannot appeal and, now, by way of an innovative argument, it contends that second respondent has exceeded his powers. To accept this argument is to find in direct opposition to the fundamental principles of arbitration as laid out by the courts and set out in judgments cited herein as well as

the narrow approach that must be adopted with regard to the argument that an arbitrator has exceeded his or her powers.

The notice of motion of the respondent

[36] Respondent has applied for an order that the arbitration award be made an order of court in terms of s 31 (1) of the Arbitration Act. It is clear that, once the application by the applicant for the setting aside of the award fails, there can be no possible justification for not granting the application brought by the respondent.

[37] Accordingly, the following order is made:

37.1 The application that the award of Advocate Jeremy Muller SC date 13 March 2007 in the arbitration between the applicant and the first respondent be set aside is dismissed with costs, including the costs of two counsel.

37.2 The arbitration award of Advocate Jeremy Muller SC of 13 March 2017 (Annexure FA 4 to the founding affidavit) is made an order of court in terms of s 31 (1) of the Arbitration Act 42 of 1965.

37.3 Respondent is ordered to pay the costs of this application,

DAVIS J