THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 11761/2020

In the matter between

GENADESHOOP CC **APPLICANT**

and

ANDREW BROWN NO **FIRST RESPONDENT**

NEXUS AG 41 CC **SECOND RESPONDENT**

Coram: Rogers J

Heard: 25 November 2020

Delivered: 2 December 2020 (by email to the parties and same-day release to SAFLII)

JUDGMENT

Rogers J

[1] The applicant ('Genadeshoop') seeks to have an arbitration award by the first respondent set aside in terms of s 33(1)(*b*) of the Arbitration Act 42 of 1965. That section provides that an arbitration award may be set aside if an arbitration tribunal 'has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers'.

[2] The matter has a tortuous history. In October 2015 the second respondent ('Nexus') issued summons in this court against Genadeshoop claiming R567,131 for agricultural products sold and delivered. Nexus also issued summons against Windheuwel Boerdery CC ('WBCC') in respect of other products sold and delivered. From beginning to end, Nexus' attorney has been Ms Coetzee of Visagie Vos.

[3] Genadeshoop is an empowerment entity, the members of which are farm labourers. The managing member is Mr W D Dirks, also a labourer. Genadeshoop was set up at the initiative of a Mr and Mrs Richter, who own and conduct farming operations on the farm Windheuwel. They were the owners of WBCC.

[4] From the affidavits in the present proceedings, and from the first respondent's award, it appears that Mr Dirks and the other members of Genadeshoop signed a resolution appointing Van der Spuy & Partners ('Van der Spuy') as the corporation's attorneys in the High Court proceedings, and authorised Mr Dirks and the Richters to give instructions to that firm on behalf of Genadeshoop. WBCC likewise appointed Van der Spuy as its attorneys.

[5] In May 2016 Van der Spuy withdrew as attorneys for Genadeshoop and WBCC. Some months later, De Klerk & Van Gend ('DKVG') came on record for them, with De Villiers Van Zyl ('DVVZ') as their local correspondents in Piketberg/Porterville. Mr Albertyn of DKVG and Ms van Zyl of DVVZ dealt with the matter. Genadeshoop did not pass a new resolution appointing DKVG and DVVZ. Mr Dirks was, however, aware of the change, and attended consultations with Mr Albertyn and Ms Van Zyl.

[6] The trial of the case was set down for 30 May 2018 but was postponed by agreement to 29 August 2018. On Friday 24 August and Monday 27 August 2018 the parties discussed and reached agreement to refer the matter to arbitration before Mr Josie Jordaan SC. The arbitration agreement was reduced to writing and signed on 3 September 2018, the signatories being Ms Coetzee for Nexus and Ms van Zyl for Genadeshoop and WBCC.

[7] The arbitration began the next day, 4 September 2018, the parties agreeing that the arbitrator should first decide a separated issue, *viz* whether Nexus was the entity which had contracted with Genadeshoop and WBCC, and thus whether it had standing. On 8 November 2018 the arbitrator issued his award, finding that Nexus was the contracting party. He awarded costs to Nexus.

[8] At some stage WBCC went into liquidation and fell out of the picture. When Genadeshoop failed to pay the awarded costs, Nexus brought an application to have Mr Jordaan's award made an order of court. Genadeshoop opposed the application, its attorneys now being TNK Attorneys ('TNK'). Opposing and replying papers were filed. On 26 November 2019 the application was postponed *sine die*.

[9] The merits of the arbitration were scheduled to resume before Mr Jordaan in January 2020 but Genadeshoop belatedly attacked the validity of the arbitration

agreement, contending that it had been executed without the corporation's authority. The impugned arbitration agreement stipulated that the arbitrator had the power to rule on his own jurisdiction, including on any dispute about the existence or validity of the arbitration agreement. Whether Genadeshoop was bound by this provision is not now relevant, because its new legal representatives were content for the arbitrator to decide whether Genadeshoop was bound by the agreement. The parties also agreed that the first respondent, Mr Andrew Brown, would replace Mr Jordaan as the arbitrator.

[10] Pursuant to this arrangement, Genadeshoop delivered an arbitration application, setting out why the arbitration agreement was not binding on it and seeking a setting aside of the arbitration proceedings (ie those conducted before Mr Jordaan). Opposing and replying affidavits were filed.

[11] In Nexus' opposing affidavit, Ms Coetzee alleged that Genadeshoop had expressly or tacitly authorised Ms Van Zyl to sign the arbitration agreement. In the alternative, she alleged that Genadeshoop was estopped from denying such authority. The allegations in support of estoppel were (a) that Genadeshoop had agreed to or been aware of, and had participated in, the arbitration; (b) that by such conduct, Genadeshoop had negligently represented to Nexus that it was bound by the agreement or consented to or acquiesced in the arbitration; (c) that Nexus had accepted the representation as correct and acted to its detriment on the strength thereof. The alleged detriment was that Nexus had relinquished the opportunity to have its claim tried by the High Court on the scheduled trial date of 30 May 2018, and that Nexus had participated in the arbitration proceedings and incurred legal expenses of about R600,000.

[12] There being a factual dispute, the arbitrator heard oral evidence on two days in February and March 2020. The witnesses were Mr Dirks and Mr

Ntshingana (Genadeshoop's new attorney) for Genadeshoop, and Ms Van Zyl and Mr Richter for Nexus. Written submissions took the place of oral argument.

[13] The arbitrator issued his award on 30 June 2020, ruling that the arbitration agreement was binding on Genadeshoop. He found that Ms Van Zyl did not have actual authority to conclude it, and rejected the contrary evidence of Ms Van Zyl and Mr Richter. After referring to the distinction drawn in the majority judgment in *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) between ostensible authority and estoppel, he found that Ms Van Zyl had had ostensible authority to conclude the arbitration agreement. He found it unnecessary to decide whether Genadeshoop was in any event estopped from denying that Ms van Zyl had actual authority, but from his award it appears that his only uncertainty on that score was whether, in law, fault (negligence) was a requirement and, if so, whether Mr Dirks on behalf of Genadeshoop was at fault for not speaking out.

[14] On 25 August 2020 Genadeshoop launched the present application, seeking to have Mr Brown's award set aside. Mr Dirks' founding affidavit in support of this relief was skeletal, to say the least. He stated that the witness bundle and transcript of the proceedings before Mr Brown would be made available to the court hearing the application as exhibits 'GH01' and 'GH02'. The impugned arbitration agreement did not form part of the founding papers, Mr Dirks contenting himself with the statement that it would be contained in 'GH01'. Not even Mr Brown's award was attached to the founding affidavit.

[15] The complaint of gross irregularity was that the arbitrator had 'misconceived the nature of the enquiry or his or her duties in connection with the enquiry' and that 'there did not exist material that would serve to justify' his conclusion on ostensible authority. The allegations in support of this complaint were: (a) that Nexus led no evidence on the issue of ostensible authority and could

thus not point to any representation made by Mr Dirks or Genadeshoop to Nexus; (b) that the arbitrator had disregarded the fact that Mr Dirks' presence at the arbitration proceedings did not constitute a representation; and (c) that there was no evidence as to what impression Mr Dirks' conduct had supposedly created in Nexus' mind.

[16] The arbitrator's reasoning on ostensible authority can be summarised thus:

(a) Van der Spuy, Genadeshoop's initial attorneys, were duly authorised to represent the corporation.

(b) When DKVG and DVVZ came on record in February 2017, Nexus and Ms Coetzee – faced with the substitution of attorneys – did not query the authority of the new attorneys 'and accepted their authority, as they were entitled to do'. Mr Dirks was aware of the change in legal representation and attended consultations with Mr Albertyn and Ms van Zyl, and did not raise any query.

(c) When discussions started on Friday 24 August 2018 about arbitration, Ms Coetzee would have had no reason to believe that the attorneys and counsel purporting to act for Genadeshoop and WBCC were not authorised to do so or to challenge their apparent authority.

(d) During the course of that Friday, Ms Coetzee drafted and furnished to the defendants' lawyers a draft arbitration agreement. She would have had no way of knowing whether, over the weekend, there were consultations with Mr Dirks and other members of Genadeshoop. She was entitled to assume, however, that the legal team would have properly consulted with Genadeshoop's members.

(e) Ms van Zyl signed the arbitration agreement on 3 September 2018. The arbitration began the next day, and Mr Dirks was present when the same legal team continued to purport to represent Genadeshoop. These events would have reinforced Nexus' view that Ms van Zyl had been authorised to sign the arbitration agreement.

(f) In the arbitrator's opinion, the only conclusion Nexus could have reached at the time was that Mr Albertyn and Ms van Zyl were Genadeshoop's duly authorised attorneys. Nexus' attorney, Ms Coetzee, could not have been expected to challenge Genadeshoop's internal workings and its relationship with Ms van Zyl. Ms Coetzee was entitled to assume that the necessary requirements had been internally fulfilled. There was nothing to have put Nexus on its guard.

(g) In summary, Nexus was entitled to rely on Ms van Zyl's appearance of authority and on the basis of ostensible authority Nexus was entitled to succeed. Although Nexus had not in terms pleaded ostensible authority as distinct from estoppel, the allegations made in support of estoppel were sufficiently wide to include the concept of ostensible authority.

[17] Before me, the crux of Genadeshoop's counsel's argument was the arbitrator's statements about what Nexus had supposedly accepted and assumed. The arbitrator, counsel urged, was not entitled to make these findings in the absence of evidence from Nexus. Accepting that Nexus at the relevant time was represented by Ms Coetzee, the latter had not testified. Genadeshoop's counsel had thus been deprived of the opportunity of probing whether Ms Coetzee had in truth had the state of mind which the arbitrator took for granted.

[18] Counsel also submitted that it was procedurally unfair for the arbitrator to make a finding of ostensible authority when this had not been pleaded. If the arbitrator had foreshadowed such a finding during argument, counsel would have had the opportunity of trying to persuade him that the evidence did not support it. Whether counsel would have succeeded in persuading the arbitrator was, he submitted, irrelevant. It was fundamentally objectionable that counsel had not been given the opportunity.

[19] It is fair to say that until the judgment of the Constitutional Court in *Makate*, the prevailing view, based on judgments of the Supreme Court of Appeal, was that ostensible authority was simply another name for a particular kind of estoppel. The majority judgment in *Makate* held this view to be misconceived. However, the majority did hold (in a passage quoted by the arbitrator) that ostensible authority and estoppel had this in common, *viz* that both depended on a representation of authority by the principal.

[20] The distinction between ostensible authority and estoppel was important in *Makate* because the relevant facts had been pleaded in the plaintiff's particulars of claim as 'ostensible authority' rather than in a replication to ward off a denial of actual authority, as would be proper for estoppel. The majority found that it had not been necessary for the plaintiff to file a replication in order to rely on ostensible authority as distinct from estoppel.

[21] It is apparent, I think, from the majority judgment in *Makate* that in many cases the circumstances which would justify a successful replication based on estoppel would also justify a successful allegation in particulars of claim of ostensible authority. If anything, the requirements for ostensible authority are less exacting. Ostensible authority, very simply stated, is the power to act as an agent indicated by the circumstances, even if the agent may not truly have been given the power (*Makate* para 75). The principal's representation in such a case is in essence allowing this appearance of authority to prevail.

[22] In the present case, there is no contentious issue as to the pleading in which ostensible authority or estoppel should have been alleged. This is because, unlike the usual case (where the initiating party is a claimant who seeks to hold the other party bound by a contract), the initiating party here (Genadeshoop) was seeking a declaration that it was <u>not</u> bound by a contract. In response, Nexus

pleaded actual authority, alternatively estoppel. I think we may accept that Ms Coetzee, who deposed to the opposing affidavit, was not alive to the distinction drawn in *Makate* between ostensible authority and estoppel. However, in pleading estoppel she alleged a representation by Genadeshoop and Nexus' reliance thereon. In context, these were allegations as to how, with Genadeshoop's acquiescence, matters were made to appear to Nexus.

[23] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd & others* [2013] ZASCA 120; 2013 (6) SA 520 (SCA) Wallis JA spoke (in para 20) of the reasons why arbitration has gained popularity worldwide. These advantages pertain in particular to the expeditious and inexpensive resolution of disputes. These advantages are diminished if arbitrators 'are confined to a straitjacket of legal formalism'. They must be free to adopt procedures they regard as appropriate for the resolution of the dispute before them, unless the arbitration agreement precludes them from doing so.

[24] The arbitration agreement in the present case accorded with, rather than detracted from, the above considerations. Clause 13 provided that the arbitrator was to 'ensure the just, expeditious, economical and final determination of all the disputes raised in the proceedings'. In terms of clause 14.3 he was entitled to conduct such enquiries as appeared to him to be necessary or expedient, 'including whether and to what extent [he] should himself take the initiative in identifying the issues and ascertaining the relevant facts and the rules of law…'.

[25] Part of the arbitrator's function was to determine the scope of the pleadings. The fact that I might have read them differently (though it so happens that I agree with the arbitrator's approach) is irrelevant. If it is clear that the pleadings do not cover a particular point, an arbitrator would exceed his powers by deciding the case on that point (*Hos+Med Medical Aid Scheme v Thebe ya*

Pelo Healthcare & others [2007] ZASCA 163; 2008 (2) SA 608 (SCA) paras 30-35). However, in the present case the pleadings can fairly be said to cover a case of ostensible authority.

[26] In the circumstances, I do not consider that there was any procedural unfairness, from a pleading point of view. If there was evidence which the arbitrator could properly have relied on for a finding that Ms Van Zyl had ostensible authority to sign the arbitration agreement, he committed no gross irregularity by holding Genadeshoop bound on this basis.

[27] On the substantive question, Genadeshoop's counsel's argument focused on the absence of evidence from Ms Coetzee or any other Nexus representative. This is not entirely correct, because there was Ms Coetzee's affidavit. But accepting, for the moment, that her affidavit could not be relied upon once the matter became the subject of oral evidence, it does not follow that there was not an evidential foundation for the arbitrator to reach conclusions about how matters appeared to Nexus.

[28] The matter is almost *res ipsa loquitur*. With the trial due to start in the High Court within a matter of days, the legal teams began to discuss arbitration as an alternative. It is inconceivable that Nexus (represented by its legal team) would have abandoned the trial date, and thereafter expended money on pursuing the arbitration, unless it believed that the other side had agreed to it. When attorneys deal with each other, they almost always do take it for granted that their counterparts are acting on a mandate. Where an attorney has reason to doubt the authority of his or her counterpart, rule 7 is the method by which the challenge is raised.

[29] The arbitrator had evidence that Mr Dirks, as the managing member of Genadeshoop, had consulted with Mr Albertyn and Ms Van Zyl. He raised no

objection, and knew that they were representing the corporation. There was thus evidence that Genadeshoop had allowed Ms van Zyl to act as if she were Genadeshoop's attorney. This state of affairs continued when the arbitration began before Mr Jordaan in Mr Dirks' presence. In oral argument before me, Genadeshoop's counsel realistically acknowledged that he could not argue that Nexus would have been under any other impression than that Genadeshoop had agreed to the arbitration. I reject as wholly fanciful the notion that if Genadeshoop's counsel had had an opportunity to cross-examine Ms Coetzee, he might have elicited from her that she did not think that Ms van Zyl was authorised to sign the arbitration agreement.

[30] In the course of his reasoning on ostensible (apparent) authority, the arbitrator referred to *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga & another* [2010] ZASCA 58; 2010 (4) SA 122 (SCA), where an attorney appointed to conduct the defence of a case was held to have had apparent authority to compromise it, even though he had no actual authority to do so and even though the compromise was contrary to the client's express instructions. In that case the concepts of apparent authority and estoppel were used interchangeably, but for present purposes the important point is the apparent authority which was said to be created when one appoints an attorney. There the claimants' attorney would have had no reason to doubt the authority of the opposing attorney to make the compromise. An agreement to divert civil proceedings to arbitration is an *a fortiori* case, because the client's case is not thereby compromised; there is simply a different, and perfectly respectable, method for adjudicating it.

[31] The transcript of the evidence adduced before the arbitrator has not been placed before me with a view to demonstrating that his conclusions were in any way inconsistent with such evidence. Similarly, the written argument submitted to

the arbitrator is not before me. However, since estoppel was pleaded, one must assume that the argument covered the question whether it had been proved that Genadeshoop made a representation of authority and that Nexus had relied on such representation. These were the very questions at the heart of ostensible authority. The fact that no representative of Nexus testified was something which Genadeshoop was able to deploy in argument, and for all I know Genadeshoop's counsel did so. The absence of evidence from such a representative might or might not have supported an adverse inference. Ultimately, however, all of this was a matter of assessing the adequacy of the evidence, and that was the arbitrator's function.

[32] Whether I agree with the arbitrator's factual conclusions on ostensible authority is irrelevant, just as it is irrelevant whether I agree with his factual conclusions on the absence of actual authority. While I do not say that he was wrong on either of these questions, the parties chose him to determine the dispute, and he was – as it is sometimes put – entitled to be wrong (*Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 85).

[33] Genadeshoop has thus failed to make out a case for the setting aside of Mr Brown's award. I make the following order:

The application is dismissed with costs.

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O L Rogers

Judge of the High Court

Western Cape Division

APPEARANCES

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