IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 7496/2020

In the matter between:

BIKE MOB (PTY) LTD First

Applicant

SEAN PATRICK STACK Second

Applicant

NEVILLE SHANE CRAGG Third

Applicant

v

THE ARBITRATOR First

Respondent

CAPITALGRO (PTY) LTD Second

Respondent

Coram: Justice J Cloete

Heard: 7 June 2021

Delivered electronically: 21 June 2021

JUDGMENT

CLOETE J:

Introduction

[1] This is an application for the review and setting aside of an interim arbitration award/ruling and the arbitrator's removal from office. The second respondent (for convenience "the respondent") opposes the relief sought. The arbitrator ("X") has filed an explanatory affidavit and abides the decision of the court.

[2] The award/ruling was made on 28 April 2020 and provides that (a) the parties (i.e. the respondent as claimant in the arbitration and the applicants as defendants) shall each be liable for 50% of his fees and charges (including those already incurred); and (b) should it become necessary X will be entitled to demand security from the parties for his further fees and charges *'within such time and in such amount and manner as may be deemed appropriate'.* The applicants were also directed to pay the costs of the interim award/ruling.

Background

[3] During October 2016 the first applicant (as lessee) and respondent (as lessor) concluded a written lease in respect of certain commercial premises in Westlake. The second and third applicants bound themselves as sureties for the first applicant's obligations under the lease. Unless otherwise indicated I will refer to the first to third applicants as "the applicants" since at all material times they participated collectively in the arbitration.

[4] In August 2019 a dispute arose in relation to the lease. The applicants have since vacated the premises. The dispute is the subject matter of the arbitration. It is common cause that the parties are contractually bound by the lease itself to have their dispute determined by arbitration, and that sub-clauses 29.4.4 to 29.4.9 thereof set out the powers afforded to the arbitrator. These will be considered below.

[5] The parties were unable to agree on an arbitrator and X was subsequently appointed by the chairperson of the Cape Bar Council in terms of clause 29.4 of the lease on 4 October 2019.

[6] A pre-arbitration meeting, attended also by the parties' respective attorneys, took place on 15 October 2019. Some of what transpired at that meeting is in dispute. However what is not in dispute is that no agreement could be reached about X's fees and charges; X undertook to provide a memorandum setting out his views on the liability of the parties for the payment of his fees during the arbitration prior to making the final award; but X – it would seem due to a bona fide oversight – failed to do so.

[7] The arbitration thus proceeded without any agreement regarding payment of X's fees during the arbitration. Pleadings were exchanged and evidence was led on 24 and 31 January 2020 and 9 March 2020. Accordingly all that remained at that stage for the arbitration to be concluded were argument (whether written, oral or both) and the making of the final award.

[8] On 20 March 2020 X despatched his invoice separately to the parties' respective attorneys for work done to that date, in terms of which each firm of attorneys was reflected as owing 50% thereof to X. The applicants' attorney objected on the basis that no agreement had been reached concerning payment of X's fees during the arbitration, and informed X that the applicants would not be paying any part of his invoice. X was further informed that the applicants *'were in no position to pay'*.

[9] On 31 March 2020 X responded by letter to the parties' respective attorneys in which he advised *inter alia* that he had, from the outset, considered himself to be on brief from them; that the respondent had since paid its 50% share of the invoice; and that the respondent's attorney shared the view of the applicants' attorney that X had not been briefed by his firm either.

[10] In the same letter X stated:

> *'2.6 Please clarify your respective positions. If you, as the attorneys, are not prepared to guarantee my fees as arbitrator, please then advise whether you agree or disagree with the following:*
>
> *2.6.1 As arbitrator, I would be entitled, regard being had to the provisions of clause 29.4.4 of the lease agreement, which provides that* "The arbitrator shall have the fullest and freest discretion with regard to the proceedings and his award…"*, to make a ruling in regard to payment of my fees during the course of the arbitration, and*

2.6.2 regard being had to the same clause, I would also be entitled to order the parties to pay a deposit in respect of my further fees foreseen in the arbitration.

3. It seems to me that fairness requires that the parties must each pay half of the arbitration costs (which would include my fees as arbitrator), until such time as the merits of the dispute have been determined, when a final award will be made which will include a decision as to the final liability for costs.

4. If either party disagrees with these contentions, please provide reasons.'

[11] The respective attorneys duly made written submissions. The respondent's attorney took a different view to the applicant's attorney, and proceeded to request X to make an interim award/ruling on the issue, to which X acceded. The applicants launched the current proceedings on 19 June 2020 and, at their request (which was opposed by the respondent), X apparently issued a ruling suspending the arbitration pending the outcome hereof.

[12] The grounds advanced for the setting aside of the interim award/ruling were that X committed a gross irregularity or exceeded his powers in making it. However during argument the applicants' reliance on a *'gross irregularity'* was abandoned and this leg of the dispute was thus limited to whether or not X exceeded his powers.

[13] The grounds advanced for X's removal as arbitrator were both actual and perceived bias, allegedly because of the stance taken by him in making the interim award/ruling, and that it was made pursuant to a request by the

respondent's attorney. The applicants alleged that they believe they will not have a fair hearing *'from an arbitrator who is persisting with a claim against them personally in respect of [which] they have a* bona fide *and arguable defence (to put it at its weakest)'.* However in both heads of argument and during the hearing submissions by counsel for the applicants were restricted to perceived bias only.

[14] Relevant to the latter issue and what was not disclosed in the founding affidavit, is that after the interim award/ruling was made the arbitration proceeded from 6 May 2020 until 10 June 2020. During this time X issued directives pertaining to the applicants' opposed application to amend their statement of defence, considered the parties' respective submissions thereon, and issued a ruling granting that application (on 3 June 2020). Not a murmur was made by the applicants during this period that in adjudicating the amendment application, and issuing various directives, X was not impartial.

[15] The various interlocutory skirmishes in the application before me quickly fizzled out at the commencement of the hearing. Counsel for the parties were also *ad idem* that despite the length of the papers, which were regrettably peppered with legal argument and *ad hominem* attacks (and here I specifically exclude X), all that this court is required to determine is whether (a) sub-clauses 29.4.4 to 29.4.9 of the lease, properly interpreted, permitted X to make the interim award/ruling; and (b) whether there is any substance in the applicants' allegation of perceived bias.

The interpretation of the relevant sub-clauses

[16] Sub-clauses 29.4.4 to 29.4.9 read as follows:

> *'29.4.4 The arbitrator shall have the fullest and freest discretion with regard to the proceedings and his award shall (unless appealed as contemplated in clause 29.5) be final and binding on the Parties to the dispute. Furthermore, the arbitrator:*
>
> *29.4.5 may dispense wholly, or in part, with formal submissions or pleadings;*
>
> *29.4.6 shall determine the applicable procedure;*
>
> *29.4.7 shall not be bound by strict rules or evidence;*
>
> *29.4.8 shall take into account the practicality or otherwise of ordering the continuance of [an] illegal relationship between the Parties, and*
>
> *29.4.9 shall include such order as to costs as he deems just and the Parties shall be entitled to have the award made an order of any court of competent jurisdiction.'*

[17] The settled principles pertaining to the interpretation of documents[1] are in essence as follows. The starting point is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to its preparation and production. It is an objective process and while a sensible meaning is to be preferred, courts must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

[18] On its plain language the arbitrator is given *'the fullest and freest discretion with regard to the proceedings'* and *'furthermore'* – i.e. in addition – he or she is at liberty to determine procedural matters, amongst others.

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[1] *Natal Joint Municipal Pension Fund v Ndumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

[19] This lends itself to an interpretation that the discretion conferred contractually by the parties upon the arbitrator is not limited to those matters in sub-clauses 29.4.5 to 29.4.9 (which include procedural matters) but is instead the widest discretion possible in order to advance the arbitration to its conclusion. If this were not the case it is difficult to discern why the parties themselves were content with the inclusion of the word *'furthermore'* in sub-clause 29.4.4.

[20] Accordingly, on a plain reading of the sub-clauses in question the arbitrator is not limited, by agreement between the parties, to making procedural rulings only. He or she is empowered to make any ruling with regard to any aspect of the proceedings themselves, which in the absence of agreement would logically include payment of his fees and charges, since it would be insensible for the parties to have contemplated that he would work for free.

[21] This interpretation is supported by the purpose of the arbitration clause which is to be invoked (as set out in clause 29.1) *'should any dispute, question or difference arise between [the parties]… in the widest sense'* as well as sub-clause 29.4.3 which provides that:

> *'This clause 29 shall constitute each Party's irrevocable consent to the arbitration proceedings, and no Party shall be entitled to withdraw herefrom or to claim at such arbitration proceedings that it is not bound by this clause 29.'*

[22] To my mind the interim award/ruling made by X thus falls within the powers conferred upon him by the parties themselves. On this interpretation it makes no difference that X failed to secure agreement upfront about the parties'

respective liability for his fees and charges during the course of the arbitration. Nor does it matter that s 14 of the Arbitration Act[2] empowers an arbitrator to give procedural directions[3] since, as is apparent from the aforementioned section, this is always subject to the arbitration agreement itself providing otherwise, or in this case, conferring additional powers on the arbitrator.

[23] Moreover:

> *'It would appear that the most satisfactory explanation of the relationship between the arbitrator and the parties is that it is one* sui generis *involving elements of both status and contracts. This gives the parties and the arbitrator the freedom to use the consensual basis of arbitration to regulate their relationship as they think fit, subject to peremptory provisions of the Act and public policy.*[4]

[24] Also relevant are s 26 and s 34 of the Arbitration Act. Section 26 provides that:

> *'Unless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award.'*

[25] In the present matter there is nothing in the arbitration agreement which *'provides otherwise'* so as to preclude X from having made an interim award/ruling. It is also not in dispute that the interim award/ruling was made

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2 42 of 1965.
3 *Hyde Construction CC v Deuchar Family Trust and Another* 2015 (5) SA 388 (WCC) at para [58].
4 Butler and Finsen: Arbitration in South Africa 1ed at 95 fn 131.

within the period allowed. No complaint has been made by the parties that X's fees are excessive as the basis for refusing to pay.

[26] In any event s 34 reads in relevant part as follows:

> *'(1) Where the fees of the arbitrator… have not been fixed by an agreement between him… and the parties to the reference, any party to the reference may, notwithstanding that such fees may already have been paid by the parties, or any of them, require such fees to be taxed, and thereupon such fees shall be taxed by the taxing master of the court.*
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> *(2) Any taxation of fees under this section may be reviewed by the court in the same manner as a taxation of costs…*
>
> *(4) The arbitrator… may withhold his… award pending payment of his… fees and of any expenses incurred by him… in connection with the arbitration with the consent of the parties, or pending the giving of security for the payment thereof.'*

[27] Section 34 thus expressly contemplates a situation where the fees of an arbitrator have not been fixed by agreement. In such a case, if either party complains that they are excessive, the fees are then subject to taxation and, if required, review by a court. Although s 34(4) entitles an arbitrator to withhold an award pending payment of his or her fees as set out therein, there is nothing to suggest, on a reading of the subsection, that an arbitrator is therefore precluded by the Act itself from making an interim award/ruling, in circumstances such as those in the present matter.

[28] The applicants contend that their refusal to pay an equitable share of the costs pending finalisation of the arbitration will not hamper its conclusion, since it is open to the respondent to pay the full amount (i.e. their 50% share) to the arbitrator in the interim at its election. The short answer to this, in my view, is that there is no reason why the respondent should be compelled to do so in circumstances where the parties themselves elected to be bound contractually to the terms of an arbitration agreement which, on my interpretation, permits an arbitrator to make the very type of award which he has. Moreover the applicants can hardly suggest with any conviction that requiring each part to pay 50% is unreasonable.

[29] I am thus persuaded that there is no merit in the applicants' complaint that X exceeded his powers in making the interim award/ruling.

Perceived bias

[30] This is easily disposed of. If the applicants genuinely held a reasonable apprehension of bias on the part of X they would not have been content for X to proceed with the arbitration after making his interim award/ruling. Moreover he ruled in their favour not once, but seemingly twice, after making that award/ruling.

[31] The only reasonable inference to be drawn from these facts is that the so-called perception of bias was a contrived afterthought to put pressure on X by

painting him in a poor light for purposes of this application. This complaint too has no merit and the relief sought for X's removal must fail.

Costs

[32] The respondent has been successful and in the ordinary course costs would follow the result. However what should have been approached by the respondent as two crisp issues for determination was dealt with instead by an answering affidavit of 123 pages (including annexures) replete with irrelevant and argumentative material, and which resulted in the papers ultimately, and quite unnecessarily, totalling 276 pages. In addition, the respondent opposed whatever the applicants sought to introduce (including a well-founded amendment to their notice of motion) which caused increased costs.

[33] **The following order is made:**

1. **The application is dismissed; and**
2. **Each party shall pay their own costs.**

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J I CLOETE

Cape Town Monday 7 June 2021

Coram: **CLOETE J**

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THE ARBITRATOR First

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CAPITALGRO (PTY) LTD Second

Respondent

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