Republic of South Africa

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

Case number: 6476/2021

Before: The Hon. Mr Justice Binns-Ward

Hearing: 9 November 2021
Judgment: 16 November 2021

In the matter between:

ANDRIES STEPHANUS DU TOIT First

Applicant

LIGHTTREE INFORMATION SYSTEMS

TECHNOLOGIES (PTY) LTD Second Applicant

and

ARINA DU TOIT N.O. First

Respondent

MARC DOTAN Second Respondent

JUDGMENT
Delivered by email to the parties and release to SAFLII.

BINNS-WARD J:

[1] The applicants were the first and second defendants respectively in arbitration proceedings before the first respondent in a claim instituted against them by the second respondent. The factual background to the dispute referred to arbitration was an arrangement entered into between the second respondent (Dotan) and the first applicant (Du Toit) for the second applicant (Lighttree) to tender to provide fibre network operator services to the Body Corporate of the Villa Italia sectional title scheme at Century City. Dotan was a member of the board of trustees of the Body Corporate at the time. He deliberately chose not to disclose his interest in the contemplated fibre network services contract to the Body Corporate. Lighttree is a company, of which Du Toit at all material times has been the sole director and shareholder. Dotan and Du Toit decided to use Lighttree as the tenderer to conceal Dotan's undisclosed conflict of interest in respect of the awarding of the contract. The understanding between Du Toit and Dotan was that if the second applicant's tender were successful, Dotan would be paid an amount calculated to correspond to the profit on the installation by Lighttree of the fibre network to Villa Italia as a reward for introducing 'the business opportunity', and he and Du Toit would thereafter share in the profits generated by Lighttree's service agreement with the Body Corporate in respect of the ongoing operation and maintenance of the network.

[2] Dotan's aforesaid conduct was in breach of his fiduciary relationship to the Villa Italia Body Corporate. His actions were in contravention of his obligations in terms of s 8(2) of the Sectional Titles Schemes Management Act 8 of 2011, and in the result rendered him liable, in terms of s 8(3) of that Act, to compensate the Body Corporate for any loss it may have suffered because of his misconduct, and, in any event, to account to it for any economic benefit received by him by reason thereof.

[3] It transpired that the Body Corporate accepted Lighttree's tender, and the aforementioned understanding between Dotan and Du Toit was consequently implemented. Dotan was paid R800 000 for introducing the 'business opportunity' to the enterprise to be conducted using Lighttree. Dotan nominated two corporate entities, Compcons CC and Ultrafast (Pty) Ltd, to receive the payment on his behalf.

[4] The service contract between Lighttree and the Body Corporate, which was for a fixed term, was renewed for an additional period of one year after its initial expiry. The Body Corporate thereafter put the service contract out to tender again. Dotan was by that stage no longer a trustee of the Body Corporate. Lighttree submitted a tender for the new contract in December 2019.

[5] Du Toit understood, and Dotan allowed him to believe, that the submission of the tender was being done on the basis that if Lighttree were awarded the contract the business would continue to be conducted for the common advantage of himself and Dotan, as originally arranged. Unbeknownst to Du Toit, however, Dotan submitted a competing tender for the contract using one of his own companies, the aforementioned Ultrafast (Pty) Ltd.

[6] When Du Toit came by chance to learn of the competing tender, Dotan claimed that he had caused it to be submitted as a 'hedging' strategy. Upon its discovery, however, he withdrew it, and on 9 April 2020 the contract was again awarded to Lighttree. The new contract was referred to in the arbitration as 'the renewed Villa Italia business'. Du Toit regarded Dotan's conduct concerning the competing tender as a material breach of their arrangement and terminated the agreement. Dotan did not accept that the contract had been validly terminated and instituted the arbitration claim.

[7] The relief sought in terms of Dotan's statement of claim was formulated as follows:

a) [That it be declared] that the agreement concluded between the claimant and the first and/or second defendants in respect of the Villa Italia business is a partnership and/ or joint venture;

b) [That it be declared] that the renewed Villa Italia business is an asset of the partnership;

c) That the defendants be ordered to comply with the terms of the partnership agreement, and in particular:

    a. [That they] must account to the Claimant monthly for the income and expenses of the renewed Villa Italia business; and

    b. [That they] must make payment to the Claimant monthly of an equal half share of the profits of the renewed Villa Italia business

d) That the defendants be ordered to pay the costs of the arbitration, including the costs of the arbitrator and the costs of counsel.

[8] The allegations pleaded in the statement of claim in support of the relief sought in prayer (c) of the statement of claim asserted unambiguously that Dotan was seeking specific performance of the alleged partnership agreement. They made it clear that he rejected any idea that the agreement with Du Toit had been effectively terminated, hence his reference in the statement to Du Toit and/or Lighttree having '*purported to terminate the partnership agreement*'. Dotan characterised the 'purported termination' of the agreement as a repudiation or material breach thereof and pleaded that he had nonetheless elected to hold the defendants to the contract.

[9] The first respondent held in her reasoned award that the arrangement between Dotan and Du Toit constituted a partnership agreement between Dotan and Lighttree (not Du Toit). The

arbitrator also upheld Du Toit and Lighttree's pleaded contention that the partnership agreement (if such it was) had been cancelled as a result of Dotan's material breach thereof. It was common cause in the proceedings before this court that the cancellation occurred on 12 April 2020.

[10] The relief granted to Dotan was formulated as follows in paragraph 66 of the arbitrator's award:

1. It is declared that the agreement concluded between Mr Dotan and Lighttree in respect of the Villa Italia business is a partnership;
2. It is declared that the renewed Villa Italia business, entered into on 9 April 2020, is an asset of the partnership;
3. Lighttree is ordered to:
    3.1 Account to Mr Dotan monthly for the income and expenses of the renewed Villa Italia business, entered into on 9 April 2020;
    3.2 Pay to Mr Dotan monthly an equal half share of the net profits of the renewed Villa Italia business, entered into on 9 April 2020;
4. The claim against Mr Du Toit is dismissed;
5. Mr Dotan is to pay Mr Du Toit's costs of the arbitration, as taxed or agreed on the High Court scale, including the costs of the arbitration venue, the recording and transcription of the proceedings, and the costs of the arbitrator;
6. Lighttree is to pay Mr Dotan's costs of the arbitration, as taxed or agreed on the High Court scale, including the costs of the arbitration venue, the recording and transcription of the proceedings, and the costs of the arbitrator.

[11] It is accordingly plain that, notwithstanding the arbitrator's finding that the partnership agreement had been terminated, the award directs Lightree to render specific performance of it. It was common ground between counsel before me that that provision of the award was patently erroneous and legally unsustainable.

[12] Du Toit and Lighttree have applied in the current proceedings, in terms of s 33 of the Arbitration Act 42 of 1965, for an order setting the award aside. Section 33(1) provides that the court may on application by any party to the reference set aside an arbitral award 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 (c) an award has been improperly obtained. It is well established that the courts construe s 33 of the Arbitration Act restrictively so as to hold true to judicial policy that marked deference to party autonomy should be shown when litigants have agreed to the adjudication of their disputes by arbitration rather than through the courts; cf. e.g. *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) and *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC), 2009 (6) BCLR 527, at para 224-236.

[13] Du Toit and Lighttree allege that the arbitrator committed a gross irregularity in the conduct of the arbitration and exceeded her powers in making the award. As to the first of the aforementioned grounds, it was alleged that the first respondent had made an award outside the scope of the relief prayed for in the pleadings. A further ground of complaint was that the relief granted was '*irreconcilable with the factual and legal conclusions she made in her award*' and '*ultimately incompetent*'. It was consequently contended that the arbitrator had '*failed to properly perform her mandate ... in accordance with the terms of reference of the arbitration*'. The essence of the applicants' dissatisfaction with the arbitrator's award was their complaint that

it acceded to Dotan's claim for specific performance of the contract, notwithstanding the arbitrator's finding in her reasons for the award that the partnership had been terminated consequent upon the cancellation of the agreement by Du Toit or Lighttree by reason of Dotan's material breach of the contract.

[14] I am not persuaded that the arbitrator went outside the pleadings in her determination of the dispute referred to arbitration. She was, however, in obvious error to have ordered specific performance of a cancelled contract, which is the effect of the formulation of the award. In fairness to her, I doubt that is what she intended. It seems to me probable that the arbitrator had in mind that the executory contract between Lighttree and the Villa Italia Body Corporate was, until such time as the partnership was liquidated, something in respect of which the partners remained accountable to each other notwithstanding the termination of the partnership agreement. If I am right, it is unfortunate that the wording of paragraph 66.3 of the award did not articulate that and gave rise instead to an in part self-contradictory and legally nonsensical award.

[15] It is well-established that a factual or legal error by an arbitrator does not, of itself, constitute misconduct or a gross irregularity. I am unwilling in the circumstances, having regard to the principles discussed in the authorities cited earlier, to set the award aside in terms of s 33 of the Arbitration Act. In the peculiar circumstances of the current case the possibility of any resultant injustice to Du Toit and Lighttree will be avoided by virtue of the treatment of Dotan's counter-application, to which I now turn.

[16] In the counter-application, Dotan seeks (i) an order in terms of s 31 of the Arbitration Act making the arbitrator's award an order of court, (ii) the appointment of a liquidator to wind up the partnership and (iii) an order directing a statement and debatement of account in respect of

the renewed Villa Italia business. By the time the matter came to hearing, as indicated during argument by their counsel, Ms *McChesney,* Du Toit and Lighttree did not object to the terms of the award (with the exclusion of paragraph 66.3) being made an order of court. They also had no objection to the appointment of Mr Thomas van Zyl as liquidator to wind up the partnership, on the basis that the latter's fees and disbursements would be expenses in the partnership. Mr *Whitaker*, who appeared for Dotan, for his part sensibly accepted that in the context of the appointment of a liquidator it would not be appropriate to order a court-directed statement and debatement of the partnership accounts. The combined effect of making most of the arbitral award an order of court and appointing a liquidator to wind up the partnership is that the erstwhile partners will be required to account to the liquidator to enable him to discharge his function and that the contract with Villa Italia will be treated by all concerned as an asset of the partnership in the liquidation account.

[17] I do not intend to make an elaborate order concerning the liquidator's powers and duties. He must obviously do what is necessary, which ordinarily entails realising the partnership's assets, collecting the debts due to it, settling its liabilities, and preparing and giving effect to a final account between the partners. As Macauley J observed in *Brighton v Clift* (2) 1971 (2) SA 191 (R), [1971] 2 All SA 417, at 193 (SA), '*it is not* [the] *Court's function to act as a liquidator and anticipate problems which may present themselves to the liquidator at a later stage. Doubtless, these will arise in any liquidation, but they are matters for the liquidator to decide and, in doing so, he may seek the parties' concurrence in any course he takes. Failing their agreement, his decisions are open to objection by either party with recourse to the Courts*'. In the current matter it is eminently foreseeable that a special approach will need to be taken with regard to the disposal of the renewed Villa Italia business; cf. LAWSA vol 19 (Second Edition

Replacement) s.v. *Partnership* at para 322, with reference to *Robson v Theron* 1978 (1) SA 841 (A), [1978] 2 All SA 264 (A) at 858 (SA), but that is an issue for the future.

[18] Mr *Whitaker* also accepted, advisedly in my judgment, that the principle that a court seized of an application in terms of s 31(1) of the Arbitration Act will not decline to make an award an order merely because it disagrees with the award or is of the view that the arbitrator erred on the facts or a point of law does not imply that a court will nevertheless integrate an award that is patently flawed - in this case, legally nonsensical and self-contradictory – into an order of court. It was for that reason that he too accepted that paragraph 66.3 of the award should be excised from the provisions to be made exigible by an order in terms of s 31(1) of the Act.

[19] A further practical effect of the formulation of the relief which both sides were ultimately prepared to accept in the application and counter-application is that it has become unnecessary to remit any part of the subject matter of the award for reconsideration by the first respondent or an alternative tribunal consequent upon this court declining to make paragraph 66.3 of the award an order of court.

[20] Both sides obtained some success in the proceedings. Mr *Whitfield* argued that as Dotan was substantially successful in resisting the application by Du Toit and Lighttree for relief in terms of s 33 and the greater part of the award will be made an order of court pursuant to his counter-application in terms of s 31(1), Dotan should be awarded his costs. Whilst in other circumstances I might have found some merit in that argument, the unethical conduct that characterised the inception of the partnership and later brought about its termination has led to me to conclude that it would be just for the parties to be left to bear their own costs. The refusal of the application in terms of s 33 was, moreover, to some extent influenced by the consideration

that in the peculiar circumstances the injustice that might have followed upon the award of a direction for specific performance could be addressed by excising that part of it from the terms of the award to be made an order in terms of s 31(1). Accordingly, to some extent the application and the counter-application played off against each other. I shall therefore make no order as to costs.

[21] An order will issue in the following terms:

1. Save for subparagraph 3 thereof, paragraph 66 of the award dated 5 March 2021 made by the first respondent (the arbitrator) is hereby made an order of court in terms of section 31(1) of the Arbitration Act 42 of 1965.
2. Mr Thomas van Zyl is hereby appointed as liquidator for the purpose of winding up the partnership declared by the arbitrator to have existed between Marc Dotan and Lighttree Information Systems Technologies (Pty) Ltd (Lighttree), which was terminated on 12 April 2020.
3. The liquidator shall have all the powers necessary to discharge his function of winding up the partnership, including, but without derogation from the generality of the aforegoing, the power to require a substantiated accounting from either or both of the partners and to determine the present value as at the date of the termination of the partnership of the renewed Villa Italia business.
4. To the extent inconsistent with the terms of paragraphs 1 - 3 above, the relief sought in the application and the counter-application is refused.
5. There shall be no order as to costs.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicants' counsel:	**M.A. McChesney**
Applicants' attorneys:	**Potgieter and Associates** **Bellville**
	FA Hanekom Attorneys **Cape Town**
Second respondent's counsel:	**Joseph Whitaker**
Second respondent's attorneys:	**Hofmeyr and Haude Inc** **Kenilworth, Cape Town**