IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVISIONAL DIVISION)

Case number: 2529/2007
Date: 28 November 2007

UNREPORTABLE

In the matter between:

CHRISTINE WILLIAMS PROPERTIES CC T/A CHRISTINE WILLIAMS PROPERTIES	Applicant
and	
LEON DICKER NO	First Respondent
ANNE PIETERSE	Second Respondent
ANDRè WILHELMUS PIETERSE	Third Respondent

JUDGMENT

PRETORIUS J.

This is a review application in which the applicant is requesting:

"1. *The decision* of *the first respondent, in terms whereof the applicant's preliminary points, that were dismissed by the first respondent, on* 27 *July 2006, be reviewed and set aside;*

2. *The decision* of *the first respondent, in terms whereof the first respondent, found in favour* of *the second and third respondent's, in that the applicant was ordered to pay certain amounts to the second and third respondents, as well as awarding certain ancillary relief to the second and third respondent's, be reviewed and set aside and which award is dated 14 December 2006;*

3. *That the matter is referred back to the Arbitration Foundation of South Africa, for* a *rehearing* of *the matter de novo;"*

The nature of the dispute on arbitration between the parties is not important to adjudicate the present application. It stems from an arbitration based on two written sales associate agreements entered into by the applicant and second and third respondents in March and April 2004. The important applicable clause in these two agreements is clause 14:

"Arbitration

The parties consent to arbitrate any dispute through AFSA whose decision shall be final and binding. The costs of *the*

arbitration are to be borne by the losing party."

Section 33 of the Arbitration Act 42 of 1965 provides:

"33. *Setting aside* of *award.*

(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."*

The agreements were terminated in August 2004 and hence the arbitration

The first issue the applicant is relying on to have the matter reviewed is whether the arbitration agreement as set out in clause 14 of the sale associate agreements had fallen away and whether the pre-arbitration agreement of 30 May 2005 constituted a new agreement. In this pre arbitration agreement the issues in dispute were identified, the rules whereby the arbitration would be conducted and the powers of the arbitrator were agreed upon. On 5 July 2005 the arbitration was postponed, due to various

reasons.

It is important to note that the arbitration agreement which was cancelled was held before the first attempt at arbitration. The pre-arbitration agreement set out the mechanism of the arbitration in front of Adv HPD van Wyk as arbitrator. Adv van Wyk recused himself after an application by the applicant's representative for his recusal.

Adv LP Dicker, the first respondent in the present application, was appointed as arbitrator by AFSA in consultation and by agreement of both parties. A pre arbitration meeting was held on 20 February 2006 where both the applicant and the respondents were represented by counsel. The main complaint regarding the so-called "agreement" of 20 February 2006 is that it was not signed by the parties and is therefore not an agreement.

This contention is strange, as it has been recorded as follows:

> *"After* a *discussion between the parties and the arbitrator, and taking into account the content* of *the "Arbitration Agreement" concluded by the parties in May 2005, the parties agreed* as *follows:"*

This was set out in the minutes of the pre-arbitration meeting of 20 February 2006.

Further pre-arbitration meetings were held on 23 March 2006 and 13 April

2006. At the meeting of 23 March 2006 counsel for the applicant did not indicate that the applicant was not satisfied with the minutes, to the contrary:

> *"Arbitrator: Problems are not regarding accuracy* of *minute?*
>
> *Mr Myburgh: Correct."*

This meeting related to the terms of security that had been agreed on 20 February 2006 and the applicant's counsel requested a stay of the arbitration pending the finalization of a default judgement against a third party. The applicant's counsel was adviced that if such an application is to be brought it must be done by 31 March 2006.

On 13 April 2006 a further meeting was held, where all parties legal representatives were present. The relevant part of the minute of the meeting reads:

> *"Mr Myburgh* : *Dispute that arbitration agreement was reached. Terms as contained in minute not applicable to client. Was authorized to negotiate and agree on behalf* of *client. However, client not prepared to sign agreement; term relating to security not acceptable. Client willing throughout to sign agreement excluding term relating to security."* (my emphasis)

and

> " *.. .As indicated on 23/03/06, it was stated that the respondent unhappy with aspects regarding security.*

So *she did not sign agreement.*

Arbitrator: But that was only aspect she was unhappy with?

Mr Myburgh: Yes

Arbitrator: So *she did not consider herself bound to rest* of *agreement?*

Mr Myburgh: My *submission is that pre-arbitration meeting merely* a *negotiation leading to conclusion* of a *contract. Terms* as *discussed at pre-arbitration was not the terms respondent agreeable to, therefore refused to sign agreement.*

Arbitrator: So *she also does not consider herself bound to fact that arbitration will be conducted on* 22-23 *May 2006?*

Mr Myburgh: No. To qualify that, however, respondent is prepared to attend arbitration on 22-23 *May and to sign agreement on basis that clause re security be deleted."* (my emphasis)

It is clear that the only problem regarding the pre-arbitration meeting of 20 February 2006 was the question of security for costs. The parties agreed to all the other terms and provisions.

An arbitration agreement is defined in The **Law of South Africa, Harms et al Vol1** 2nd **edition** p 407-408 para 555 as:

"An arbitration is a *contract.* "

and

> *"An arbitration agreement is based on consensus between the parties and is* a *selfcontained contract collateral or ancillary to the main agreement in which it may be contained. It remains* in esse *even where the main agreement is terminated. Whatever the true disputes between the parties to an arbitration may be, they are bound by the clause submitting the disputes to arbitration.* "

Clause 14 of the written sales agreement as set out above is such an arbitration agreement. The applicant is under a misapprehension that the agreement of 20 February 2006 is such an agreement and as such replaces the arbitration agreement as set out in clause - 14 of the written sales agreement. The agreement of 20 February 2006 set out the procedures and mechanisms which would be adopted for the arbitration hearing- it has nothing whatsoever to do with the arbitration agreement.

On 13 April 2006 the first respondent considered the terms and conditions as set out in the pre-arbitration minute of 20 February 2006 and found it to be binding on the two parties. The first respondent found the applicant to be in default of certain terms and conditions as set out in the minute of 20 February 2006, but afforded the applicant the chance to rectify her default. Once more the applicant threatened to take the ruling on review, but failed to do so.

The first respondent determined that the arbitration would proceed .9n 27 and 28 July 2006.

On 27 July 2006 the first respondent found that the arbitration agreement could only be cancelled by mutual agreement, although counsel for the applicant still maintained that such an agreement could be unilaterally cancelled. The applicant was still represented by mr Jansen on 27 July 2006 when this point was argued.

When the arbitration continued on 28 July 2006, Mr Jansen for the applicant, raised an informal exception that the respondents statement of claim did not contain sufficient facts to sustain a cause of action as the pleadings failed to allege:

1. That the respondents were estates agents;
2. That they had been mandated by the applicant to find a buyer or seller, which would entitle them to commission;
3. That they had performed in accordance with their mandate; and
4. When payment for commission fell due or when it had to be paid.

It is of utmost importance to note that these objections were now raised for the first time. It was not mentioned in February 2006 at the pre-arbitration meeting, nor was it mentioned in April, Mayor June 2006. On 27 July 2006 the applicant had not raised this question either. .Only on 28 July 2006 did it become an issue according to the applicant.

It is quite clear from the record that this issue was ventilated extensively, before the first respondent made a ruling. The first respondent considered the so-called *"informal exception"* carefully and considered and applied the law regarding exceptions. The first respondent dismissed the *"informal exception"* and ruled that the arbitration should proceed forthwith. Mr Jansen, for the applicant, applied for a postponement, as he had, according to him no instructions to proceed with the matter. Again he threatened to take the ruling on review, which again was not done. The first respondent considered the application for postponement and found this application devoid of any merit, having regard to the prior conduct of the applicant and the history of the matter. Mr Jansen excused himself, due to a lack of instructions and the arbitration piOceeded.

Thus the application for review. Mr van Rensburg for the applicant, stated that the court only has to decide the issue of the ruling on the informal exception and should not deal with what had transpired after the first respondent ruled against the applicant regarding the informal exception. It is the only ruling the court has to consider. I find the request strange, to say the least, as the applicant did not take the ruling on review there and then, but only acted at the conclusion of the arbitration.

It is clear from the record that the arbitrator did not dismiss the exception without considering it. The first respondent heard submissions from both sides and considered the relevant case law before making his decision. He was of

the opinion that evidence could be lead regarding the cause of action. It was common cause that the first time the exception was raised, was on 28 July 2006, although the applicant had ample opportunity to raise the exception previously at the pre-arbitration meetings on 30 May 2005, 20 February 2006 and all the following months, but only chose to do so on the second day of the arbitration hearing on 28 July 2006.

The reason for requesting the postponement when the exception was dismissed cannot be entertained - the applicant had known that if the exception is dismissed, the arbitration would proceed. It must also be noted that the applicant did not apply for an immediate review after both the exception and the application for postponement were dismissed, but waited until the ruling on the arbitration was made. it is also noted that the court has been requested not to take any facts into consideration which related to events that took place after the ruling on the exception.

In Benjamin v Sobac South African Building and Construction 1989 (4) SA 940 (CPD) at 967 J Selikowitz J found:

> *"The rights of* a *party to an arbitration to have the tribunal's award set aside are and have always been severely limited.* "

In Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) Harms JA found at p 296:

> *"Apart from the fact that I do not believe that he intended to propound* a *rule applicable to consensual arbitrations, the rule*

would in any *event prevent the review of material errors of law because the arbitrator* was, *subject to the limitations in the Act, intended to have exclusive jurisdiction over questions of fact and law. That follows from the provisions of the Act, which exclude appeals and limit reviews.* "

and:

"A *statutory provision such* as *that contained in s* 28, *that unless the arbitration agreement provides otherwise,* an *award is, subject to the provisions of the Act, final and not subject to appeal, and that each party to the reference must abide by and comply with the award in accordance with its terms, clearly indicates that the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions were submitted to it, including* any *question of law.* "

and at 297 C:

"In any *event, the parties bound themselves to arbitration in terms of the Act and if the Act, properly interpreted, does not allow* a *review for material error of law,* one *cannot imply* a *contrary term. Also, parties cannot by agreement extend the grounds of review* as *contained in the* Act. "

and at *302* F:

"Errors of the kind mentioned have nothing to do with him exceeding his powers; they are *errors committed within the scope of his mandate. To illustrate,* an *arbitrator in* a *'normal'*

cannot interfere as clause 14 provides that the arbitrator's decision shall be final and binding. The arbitration agreement could only be cancelled through mutual consent as provided for in section 3 (1) of the Arbitration Act 42 of 1965.

The following order is made:

The application is dismissed with costs.

In Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others 2007 (5) SA 491 (SCA) Cachalia JA at p 495 found:

"On this matter it is settled law that a High Court order dismissing an exception in the High Court is not appealable to the SCA."

Judge-Pretorius

Case number	25294/2007
Heard on	7 November 2007
For the Applicant / Plaintiff	L Janse van Rensburg
Instructed by	Willie Jansen
For the Respondent	LW De Beer
Instructed by	Barry Kotze
Date of Judgment	28 November 2007

In this instance neither clause 14 nor any pre-arbitration agreements provided for reviews and appeals. The applicant wrongly believed that the pre-arbitration agreements of 16 May 2005 and 20 February 2006 replaced the agreement in terms of clause 14 of the original sales agreement. It is also common cause that the applicant took part in all the proceedings up to 28th July 2006, without raising the exception.

I find that this court cannot set aside the arbitrator's decision where he had given the exception fair consideration, even should the court find that his conclusion is erroneous in law or on the facts, which I incidentally do not find in this case. It is clear from the record that the arbitrator had reached his decision by a *bona fide* consideration of the law and other facts. This court