IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO 24286/08

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

5-12-2008 DATE | VAN OOSTEN J SIGNATURE

In the matter between

JEREMY EDWARD CLARKE	**FIRST APPLICANT**
MICHAEL WILLIAM WRIGHT NO	**SECOND APPLICANT**
DOREEN VALERIE SALMON NO	**THIRD APPLICANT**
DAVID ROBERT BUYS NO	**FOURTH APPLICANT**
GOLD-ROSE INVESTMENTS (PTY) LTD	**FIFTH APPLICANT**

and

ISHMAEL SEMENYA NO	**FIRST RESPONDENT**
KWEZI GROUP (PTY) LTD	**SECOND RESPONDENT**
KWEZI MINING (PTY) LTD	**THIRD RESPONDENT**

Arbitration – Costs award – Remittal under s 32 (2) of Arbitration Act 42 of 1965 – 'Good cause' requirement – What constitutes – Proper approach of Court on review - Discretion exercised by arbitrator in awarding costs – Nature of - Irregularities by arbitrator - Refusal to make costs award in favour of successful party - Review of – Refusal based on wrong principle resulting in no exercise of discretion – Arbitrator's award of costs – Arbitrator's mistaken interpretation of nature of relief granted in award – Costs award wrongly made – Remittal granted - Remittal order – Powers of Court – Provision made in order for reconsideration upon remittal to be conducted subject to and in the light of findings of Court.

J U D G M E N T

VAN OOSTEN J

[1] This is an application for the review of a costs award by the first respondent as arbitrator (the arbitrator) on 24 June 2008 in arbitration proceedings between the applicants (as respondents) and the second and third respondents (as claimants). In terms of the costs award the second,

third, fourth (the trustees of the Wright Family Trust) and fifth applicants were ordered to pay the costs (including the costs of two counsel) of the arbitration proceedings. The arbitrator did not make an award for the costs of the first applicant, although he found that the second and third respondents (the respondents) had failed to prove their case against him. I will revert to this aspect later in the judgment. It is further common cause between the parties that the arbitrator although asked to do so and having heard full argument on this aspect, omitted to make an award concerning the costs of an urgent application brought in this court by the applicants against the respondents (the urgent application), which was settled on the basis of the disputes between the parties be referred to arbitration, which are the proceedings we are now concerned with.

[2] The arbitrator's award on the merits has not been challenged. The disputes which became the subject matter of the arbitration concerned the shareholding in the third respondent (Kwezi Mining). Amongst the shareholders of Kwezi Mining were the applicants and the second respondent. Their relationship was regulated by a shareholders agreement. Relevant for present purposes are the provisions relating to a forced-sale mechanism to come into effect in the event of a material breach by any shareholder. In the event of such a breach an option to purchase the shareholder's shares was deemed to have come into existence which if duly accepted, resulted in the purchase of the shares. The respondents relied on an irremediable breach of the shareholders agreement and the due acceptance of the resultant deemed offer. When the second respondent attempted to perfect the purchase of the shares an urgent application to forestall the perfection was launched by the applicants in this court which, as I have mentioned, resulted in an agreed reference of the disputes to arbitration. The costs of the urgent application were by agreement reserved for determination by the arbitrator.

[3] Having heard evidence and arguments on behalf of the parties the arbitrator made the following award:

> *(a) It is declared that the Wright Family Trust and the fifth respondent committed a irremediable breach of the shareholders agreement, as contemplated in clause 20 read with 15.1 thereof;*

> *(b) It is declared that the Wright Family Trust and the fifth respondent are deemed to have offered all their shares in Kwezi Mining as contemplated in the agreement, but that the deemed shares offered for sale has lapsed.*
> *(c) The Wright Family Trust and the fifth respondent are ordered to pay the costs of these proceedings, including the costs consequent upon the employment of two counsel.*

The reason for awarding costs in favour of the respondents, the arbitrator held was "that the claimants have been substantially successful in these proceedings and are entitled to the costs of these proceedings". As regards the costs of the first applicant the arbitrator held:

> *The evidence did not establish a breach of the shareholders agreement against the first respondent. The first respondent would ordinarily be entitled to his costs. I am not aware that the costs incurred by the first respondent in these proceedings are severable from those that have been incurred by Wright and Abel (ie the representatives of the trust and the fifth applicant respectively). The three respondents have used one set of attorneys and one legal team.*

To complete the picture on the costs award, the arbitrator as I have mentioned, omitted to make an award on the costs of the urgent application. The reason for the omission has not been disclosed. The parties in any event are agreed that this aspect should be remitted to the arbitrator for his award. A remittal of the matter for this purpose of course was not strictly necessary: surely a simple request to correct the omission would have been sufficient.

[4] In the present application the applicants seek a review by this court of firstly, the arbitrator's costs award in favour of the respondents and secondly, his decision not to make an award as to the first applicant's costs.

[5] The main relief sought is for the reviewing and setting aside of the arbitrator's costs award and for the substitution thereof by this court of costs orders in their favour (the main relief). In the alternative the applicants seek a remittal order in terms of s 32(2) of the Arbitration Act 42 of 1965 (the Act). The basis relied upon by the applicants for the relief sought appears in the following passage in the founding affidavit:

> *12. The applicants seek to set aside the costs award on the basis that the award is vitiated by irregularity or misdirection, or is*

> *disquietingly inappropriate, alternatively and additionally that the **Arbitrator** committed a gross irregularity in making the costs award and more particularly in failing to furnish the applicants an opportunity for their case in respect of costs to be fully and fairly determined in circumstances where no submissions were made in relation to such a costs order and where there was no indication that such a costs order was being contemplated and where no such order was sought by any of the parties to the arbitration.*

As for the main relief sought, counsel for the respondents convincingly argued with reliance on the recent judgment of the Supreme Court of Appeal in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), that the grounds relied upon by the applicants are directed at the result of the arbitration proceedings and not the method or conduct thereof and that those grounds accordingly are not substantive grounds for review which the applicants could avail themselves of. It is however no longer necessary to decide this aspect. At the hearing of this application counsel for the applicants disavowed further reliance on the main relief and proceeded to advance arguments in support of the alternative relief. Counsel for the respondents submitted that no case has been made out on the papers for the alternative relief. I am unable to agree. The alternative relief was part of the applicants' case right from the outset. It is quite impracticable as well as unreasonable to expect the applicants to have separated with clinical precision the allegations in support of the main and the alternative relief. The alternative relief at all stages was alive as is quite apparent from the founding affidavit on behalf of the applicants, which ends off with the following conclusion:

> *74. Alternatively, I am advised and respectfully submit, good cause has been shown why the costs order should be set aside and remitted to the Arbitrator for the (sic) reconsideration in terms of section 32 (2) of the Act.*

It is true that the applicants changed their stance only recently. This counsel for the respondents submitted, ought to have a bearing on the costs of this application. I once again do not agree. I do not think that any culpability can be attributed to the applicants that would be worthy of consideration for purposes of determining the costs of this application. The respondents at all times opposed the application as a whole. There is nothing to suggest that an earlier decision by the applicants to pursue only the alternative would in any way have changed the course of these proceedings.

[6] It is convenient to begin with the arbitrator's decision not to make an award of costs in respect of the first applicant. Although he found that no case had been proved against the first applicant, he reasoned that by being represented by the same legal representatives as the other applicants, the first applicant was not entitled to a costs award. This clearly does not constitute a valid reason for disentitling the first applicant from an award of costs. I am not aware of nor has counsel for the respondents been able to refer me to any authority in support of the proposition relied upon by the arbitrator. The arbitrator accordingly exercised his discretion on a wrong principle. I should note that had it been the intention of the arbitrator to disentitle the first applicant of his costs for this reason an opportunity should have been afforded to counsel who appeared for the applicants to deal with it and further, equally importantly, only to have come to such a conclusion on the basis of evidence in support of the notion he relied on, which clearly there was not. The respondents moreover did not in argument before the arbitrator suggest this as a reason for disentitling the first applicant of a costs award. An order for the payment of costs, it finally needs to be mentioned, determines only the liability of the party against whom the order is made for payment of costs unless a proper case is made out for determination of defined aspects thereof. It is for the Taxing Master upon taxation to determine the allowance or disallowance as well as the *quantum* of the items listed in the bill of costs. The first applicant was deprived of his costs capriciously for an invalid reason, and a grave injustice resulted as a consequence of which no discretion at all was exercised by the arbitrator. A robust approach by this court summarily awarding the first applicant his costs of the arbitration thereby reaffirming the well-established reluctance of our courts to prolong proceedings for the sake of costs only, is perhaps called for but regrettably must yield to the overriding consideration that in terms of the alternative relief sought, the arbitrator will in any event have to reconsider the costs award in its entirety. And, in any event, the first applicant remains a party in the further proceedings in respect of the costs of the urgent application.

[7] I turn now to the application for remittal of the costs award for reconsideration by the arbitrator. Section 32 of the Act allows for an award to be remitted for reconsideration. Sub-section (2) provides as follows:

> *The court may, on application of any party to the reference and after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of such a further award or a fresh award or for such other purpose as the court may direct.*

'Good cause' Nugent JA held in *South African Forestry Co Ltd v York Timbers* 2003 (1) SA 331 (SCA) para [14]:

> *…is a phrase of wide import that requires the Court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.*

The wide discretion the court is enjoined to exercise it has been held is subject to some limitations, the exact nature of which for present purposes need not be dealt with. I do however derive some assistance as to the grounds upon which such the discretion should be exercised from the English Court of Appeal judgment in *Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia: The Montan* [1985] 1 ALL ER 520 (CA) at 660j (quoted in *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others* 2001 (2) SA 1097 (C) para [65] - [66]) where the Master of the Rolls held:

> *In my judgment the rescission jurisdiction extends…to any cases where, notwithstanding that the arbitrators have acted with complete propriety, due to mishap or misunderstanding some aspect of the dispute which has been the subject of the reference has not been considered and adjudicated upon as fully as or in a manner which the parties were entitled to expect and it would be inequitable to allow any award to take effect without some further consideration by the arbitrator.*

(Cf *Benjamin v Sobac South African Building & Construction* 1989 (4) SA 940 (C)).

[8] The arbitrator in awarding costs exercises a discretion which in *Kathrada v Arbitration Tribunal and Another* 1975 (2) SA 673 (A) 680 H-681B, in relation to s 45(3) of Act 3 of 1966, was held, is:

> *…a discretion which must be exercised judicially upon consideration of all the relevant facts and in accordance with recognised principles. As between the parties it is in essence a matter of fairness to both sides. Where there has therefore been an*

> *improper exercise of that discretion, ie where the award as to costs is vitiated by irregularity or misdirection, or is disquietingly inappropriate, a Court of law will on review set aside the order... Failure to consider all the relevant facts or failure to act in accordance with the settled practice and principles upon which costs are generally awarded, is such vitiating irregularity or misdirection…*

The statutory provision the court dealt with in *Kathrada* does not contain the same provisions equivalent to the costs provisions provided for in s 35(1) of the Act. Such differences as there may be however, are of no moment: the same approach as in *Kathrada* was adopted in matters similar to this case (*Joubert t/a Wilcon v Beacham and Another* 1996 (1) SA 500 (C) at 502 E-F; *Benab Properties CC and Another v Sportshoe (Pty) Ltd and Another* 1998 (2) SA 1045 (C) at 1049 and the cases there referred to). I therefore propose to apply the same principles in the present matter.

[9] The underlying, and so it seems, sole reason, for the arbitrator's costs award in favour of the respondents was the substantial success he found the respondents had achieved in the arbitration proceedings. The general principle of awarding a party having achieved substantial success, its costs is well-established (See *Kathrada* at p 680B and *Joubert t/a Wilcon* at p 502E). The arbitrator although alive to the consideration of substantial success in awarding costs, in my view misdirected himself in finding that the respondents had in fact achieved substantial success. It appears that the declarators in favour of the respondents embodied in paragraphs (a) and (b) of the award, were considered by the arbitrator to have resulted in them achieving substantial success.

[10] The declarators are based on the relief sought by the respondents in their statement of claim in the arbitration proceedings, in the following terms:

1. *That it be declared that the First Respondent and the Wright Family Trust and the Fifth Respondent committed an irremediable breach of the shareholders agreement as contemplated in clause 20 read with clause 15.1 thereof.*
2. *That the Respondents are deemed to have offered for sale all of their shares in the Second Claimant as contemplated in clause 15.1 of the shareholders agreement.*

3. *That the First Claimant has duly purchased all the shares in terms of the deemed offers as contemplated in clause 15 read with clause 11.3 of the shareholders agreement.*

The arbitrator's understanding of nature of the relief sought appears from his summary thereof, as follows:

> *The relief that the claimants sought in these proceedings was, amongst others, a declarator that the first respondent and the Wright Family Trust and the fifth respondent committed an irremediable breach of the shareholders agreement as contemplated in clause 20 read with clause 15.1 thereof. The other relief was that the respondents are deemed to have offered for sale all of their shares in the second claimant as contemplated in clause 15.1 of the shareholders agreement. [Underlining added]*

The underlined parts of the summary make it clear that the arbitrator materially misconceived the nature of the relief sought. The orders were sought within the framework of the statement of claim and for no other undisclosed hypothetical purpose. They were derived from the shareholders agreement and accordingly were interrelated and inseparable. The granting of separate orders was neither sought nor appropriate. In seeking the orders the respondents' sole purpose was to arrive at the end result which was the second respondent's entitlement to the applicants' shareholding. In order to succeed the respondents were required to prove firstly, an irremediable breach (para 1) which automatically would have triggered the deemed offer (para 2) and secondly, that the shares were duly purchased in terms of the deemed offer (para 3). The irremediable breach (par (a) of the award) and the resultant deemed offer (para 2) were found to have been proved. The second respondent's claim to entitlement of the applicants' shares however failed because the arbitrator found that the deemed offer had lapsed (para 3) and therefore was no longer open for acceptance. On these findings the respondents he held were substantially successful and therefore entitled to their costs.

[11] Paragraphs (a) and (b) of the arbitrator's award were couched in the form of declarators. Those would only have been necessary and therefore relevant if the final relief had been granted. The failure of the final relief resulted in the precursors thereto becoming redundant. Counsel for the respondents when confronted with this difficulty suggested some

hypothetical reasons for their relevance: he submitted that the declarators would serve not only as some deterrent to the applicants and those shareholders who are like minded from breaching the shareholders agreement in the manner the second to fifth applicants have done but also as a stern reminder of sorts in maintaining and regulating a proper relationship in future between shareholders of Kwezi Mining. There is no merit in the argument. The mere mention thereof warrants its outright rejection.

[12] In its proper context the arbitrator in paragraphs (a) and (b) of the award, merely made findings on the relief sought in paragraphs (1) and (2) of the statement of claim. The findings were not determinative of the respondents' rights (*Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at para [24]) and therefore are without legal force or validity. I am mindful of the possibility of the arbitrator in embodying the declarators in his award, perhaps merely intending to articulate the conclusions already reached by him. Militating against the assumption however is his finding of substantial success, which as I have alluded to, could only have been with reference to the declarators.

[13] The sole purpose of the respondents in submitting the disputes to arbitration, as I have mentioned, was for the second respondent to acquire the applicants' shareholding in Kwezi Mining. That they failed to achieve. No success could therefore be attributed to them: they were not successful at all, let alone substantially successful. Any number of findings in their favour did not result in any form of success. The converse rather is true: the applicants were indeed on the findings of the arbitrator, substantially successful. They were therefore in the absence of special circumstances (*Benab Properties* p 1050-1051), entitled to a costs award in their favour. For these reasons the inevitable conclusion is that the arbitrator did not properly apply his mind to the question of costs and that the award accordingly is vitiated by irregularity and falls to be set aside (*Kathrada* p 681A-B).

[14] I come now to the terms of the order I propose to make. Some restrictions in my view should apply to properly limit and define the ambit of the disputes the arbitrator will be required to reconsider upon remittal. The aspects I have dealt with in this judgment have all been fully thrashed out in argument before me. To traverse these arguments again before the arbitrator, in the light of the general purpose of referring disputes for arbitration which is the speedy resolution of the real disputes between the parties, is seemingly counter productive and therefore unnecessary. This can best be achieved by incorporating into the order I propose to make that the costs award be reconsidered by the arbitrator in the light of and subject to the findings I have made in this judgment (See *John Sisk & Son (SA) v Urban Foundation and Another* 1985 (4) SA 349 (N) 359E-H). Counsel for the respondents has given me a pre-view as to the nature of the arguments the respondents propose to rely on at the reconsideration hearing. They are best left for the arbitrator to consider although I am constrained to remark (without deciding) that they appear anything but persuasive.

[15] It remains to consider the costs of this application. The applicants have achieved substantial success in this application and they are accordingly to those costs. The employment of two counsel was clearly warranted and the parties agreed that those costs ought to be allowed.

[16] In the result I make the following order:

1. Par (c) of the award of the first respondent made on 24 June 2008 in the arbitration proceedings between the second and third respondents (as claimants) and the applicants (as respondents) is set aside.

2. In terms of s 32 (2) of the Arbitration Act, 1965, the matter is referred back to the first respondent for the reconsideration of:

2.1 The award of costs in respect of the arbitration proceedings on the basis and in the light of the following considerations as found by this court:

2.1.1 That the applicants were the successful parties in the arbitration proceedings.

2.1.2 That the declarators embodied in para (a) and (b) of the award are within the framework of the statement of claim, not to be considered as substantial success having been achieved by the respondents.

2.1.3 Such further considerations (excluding the leading of any evidence by any of the parties) the parties may advance in argument.

2.2 Depending on the award made pursuant to the order in para 2.1 above, the making of an award in respect of the costs of the arbitration proceedings to the first applicant on the basis of his entitlement to costs, notwithstanding the first applicant having been represented by the same legal representatives as the other applicants, on the basis that the second and third respondents have failed to prove a case against him.

2.3 the award of the costs of the urgent application launched by the applicants against the second and third respondents out of this Court on 30 May 2007 under Case No 12368/07.

3. The second and third respondents, jointly and severally the one paying the other to be absolved, are ordered to pay the costs of this application, such costs to include the costs consequent upon the employment of two counsel.

_____

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS	***ADV PJ VAN BLERK SC***
	ADV BM GILBERT
APPLICANTS' ATTORNEYS	***BRIAN KHAN INC***
COUNSEL FOR 2ND AND 3RD RESPONDENTS	***ADV N SINGH SC***
	ADV M NAIDOO
2ND AND 3RD RESPONDENTS' ATTORNEYS	***MKHABELA HUNTLEY ADEKEYE INC***
DATE OF HEARING	***20 NOVEMBER 2008***
DATE OF JUDGMENT	***5 DECEMBER 2008***