REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: ***NO***
(2)	OF INTEREST TO OTHER JUDGES: ***NO***
(3)	REVISED: ***NO***
Date:	***16 May 2024*** Signature: [redacted]

CASE NO: 2023/084393

In the matter between:

TRANSMED SOUTH AFRICA HOLDINGS (PTY)	Applicant
and	
RONALD PHILLIPE SCHAFFNER	First Respondent
SONYA SCHAFFNER	Second Respondent
CHARLES EDGAR DUFEY'S EXECUTORS	Third Respondent
ANNE BEATRICE DUFEY	Fourth Respondent

RETIRED JUSTICE WALLIS	Fifth Respondent
RETIRED JUSTICE HARMS	Sixth Respondent
RETIRED JUSTICE BRAND	Seven Respondent
RETIRED JUSTICE NUGENT	Eight Respondent

Coram: Dlamini J

Heard: 19 March 2024 (Courtroom 9C)

Delivered: 16 May 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, uploaded to *Case Lines*, and released to SAFLII. The date and time for hand-down is deemed to be 10:30 on 16 May 2024

JUDGMENT

DLAMINI J

Introduction.

[1] This is a review application launched by the applicant in terms of Section 33(1) of the Arbitration Act 42 of 1965 ("the Act"), seeking to set aside the award of the Appeal Arbitrators, the fifth to eight respondents ("the Appeal Arbitrators") handed down on 13 July 2023.

[2] The review concerns a dispute that arose between the applicant and the first to the fourth respondent (the respondents). As a result of this dispute, the

parties agreed to refer the dispute to arbitration. The Arbitrator ruled in favour of the appellants. The respondents launched an appeal against this decision to an appeal tribunal. The appeal tribunal found in favour of the respondents. As a result, the appellants have filed this review application to set aside the appeal tribunal's award.

Background Facts.

[3] It is apposite at this stage to set out a brief narrative of the relevant facts and circumstances that are relevant to the determination of the review.

[4] On 9 November 2021, the applicant as a purchaser and the first to fourth respondents as sellers concluded a written agreement for the sale and purchase in the sum of R104 million (the SPA) of shares in three companies.

[5] This agreement was dependant on the fulfilment of several suspensive conditions, which had to be fulfilled within several days as stipulated in the agreement. It became apparent to the parties that these conditions were not going to be fulfilled timeously, so the parties entered into an addendum on 7 December 2021 extending that date to 31 December 2021. One of the suspensive conditions that remained outstanding was the conclusion by Mr. Schaffner of an employment contract with B & S, one of the companies.

[6] When the parties failed to resolve the dispute around 2022, the dispute was then referred to the Arbitrator in terms of clause 14 of the SPA.

[7] The arbitration was preceded by two pre-arbitration meetings held on 30 September and 2 November 2022.

[8] The issue for determination in the arbitration was formulated in paragraph 18 of the Statement of Claim as follows: "*The Claimant represented by Jacosberg, and the Defendants represented by Fizzioti and/ or Koski in the first week of January 2022 concluded an oral agreement (" the new agreement") on*

the same terms and conditions as the Agreement, as amended on 8 December 2021 by the addition of the Addendum, save that the parties agreed to extend the time periods pertaining to the fulfilment of the suspensive conditions indefinitely, alternatively, the parties as aforesaid, orally reinstated the agreement ("the reinstated agreement") on the same terms and conditions save that the time periods provided for the fulfilment of the suspensive conditions were extended indefinitely.

[9] On 23 December 2022, upon hearing the matter the Arbitrator made an award in favour of the applicant. The Arbitrator in the main concluded that the parties reinstated the Sale of Shares Agreement by a contract concluded partly orally and partly by conduct on or about 7 January 2022.

[10] Feeling aggrieved by this decision, the first to fourth respondent appealed to an Appeal Tribunal made up of the Sixth to Eight respondents. ("the Appeal Arbitrators").

[11] On 13 July the Appeal Arbitrators upheld the appeal and held that the Arbitrator had exceeded his powers. The Appeal Arbitrators concluded that *"the Arbitrator who was otherwise aware that the sole question for decision was whether the parties concluded an oral agreement and by agreement was bound by the pleadings, erred in their judgment by finding a contract concluded partly orally and partly by conduct".*

[12] Not satisfied by this decision, the applicant now seeks to review the appeal tribunal decision in terms of section 31 (1) (b) of the Act, on the basis that the appeal tribunal committed a gross irregularity and exceeded its powers. Another issue that arose for determination in this court was whether the appellant had launched this review timeously in terms of the Act.

The Application Is Out of time.

[12] The issue for determination in this regard is whether the applicant has filed this application within the prescribed time limits of launching the review application. The award was published on 13 July 2023.In terms of section 33 (2) of the Act, the application ought to have been launched within 6 weeks of the date of publication of the award, that is by 23 August 2023. The application was launched one day later 24 August 2023. In terms of section 38, the court may, on good cause shown, extend any period fixed by or under the Act, whether such period has expired or not.

[13] The case made by the respondent is that this application is filed out of time and is made outside the time allowed in s 33(2) of the Act.

[14] The applicant contends that if condonation is required, that is if the application is brought outside of the six weeks period, it is brought a day late and there is no prejudice to the respondents.

[15] According to the papers before me, the award was published on 13 July 2023. This means that the period of weeks, according to the civilian method of calculation expired on 24 August 2023, which is one day later than the prescribed time limit.

[16] In my view, the reasons for the delay are justified and are reasonable. In all the circumstances of this matter, I am satisfied that it is in the interest of justice that condonation be granted.

Legal Principles.

[17] Before I deal with the issues that stand to be determined in this matter, I propose to deal first with legal principles that will assist with the determination of these issues.

[18] The review application is brought in terms of section 33(1) of the Act. The section gives powers to the court hearing the review to set aside an arbitration award in instances where; *"An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers".*

[19] The principle of our is law is that in arbitration proceedings the issue of whether there was gross irregularity in the proceeding relates to the way the proceedings were conducted and not the conclusion reached by the arbitrator. This principle was eloquently set out by the court in ***Ellis v Morgan***[1] at 581 where the court guided follows"... *an irregularity in proceedings does not mean an incorrect judgment; it refers not to the results, but to the methods of a trial, such as, for example, some high- handedness or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined*".

[20] This principle has been endorsed by the SCA in ***Telcordia Technologies Inc v Telkom SA Ltd***[2] as follows; "*The law, as stated in Ellis v Morgan (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description.*

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[1] 1909 TS 576

[2] 2007 (3) SA 266 (SCA)

The crucial question is whether it prevented a fair trial of issues. If it prevented a fair trial of the issues, then it will amount to a gross irregularity".

[21] It is now an established principle of our law that parties to arbitration are required to raise their substantive dispute in the pleadings. in ***Close-Up Mining (Pty) Ltd and Others v The Arbitrator,*** and ***Another,***[3] this principle was captured thus "*In sum, the competence of an arbitrator to decide matters is determined by the agreement. The arbitration agreement may confine the submission to the issues that have been pleaded. But there is no rule of law that requires the parties to confine their agreement this way. The arbitration agreement can therefore confer competence upon the arbitrator to decide matters upon an exercise of a discretion of the kind recognised in Shil v Milner. All depends upon what the parties have agreed, and the proper interpretation of the agreement".*

[22] Below, I deal with the issues raised *in seriatim.*

Issues For Determination.

[23] Before this court, the question that falls to be determined is whether the appeal tribunal was wrong to hold that the arbitrator was incorrect in his finding. Whether the appeal tribunal failed to consider, or disregarded evidence placed before the tribunal and finally whether the appeal tribunal committed both a gross irregularity and exceeded its own jurisdiction in finding that the arbitrator exceeded his own jurisdiction.

[24] The applicant contends in the review application that the appeal arbitrator's award should be reviewed and set aside because the appeal arbitrators committed various irregularities. More specifically, the applicants contend that the arbitrators made findings on issues which, firstly were not

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[3] *(286/2022) [2023] ZASCA 43 (31 March 2023)*

pleaded, no evidence was led to support that finding, and finally that the issues fell outside the scope of the pleaded issues.

Finding the arbitrator exceeded his jurisdiction.

[25] The applicant contends that the Appeal Arbitrators in making their award disregarded all the documentary evidence and all the *viva voce* evidence that was placed before the Arbitrator during the arbitration. That the Arbitrator was fully conversant with the precise terms of the issue that was placed before him as a result insists the applicant that Appeal Arbitrators committed a gross irregularity in holding that the Arbitrator exceeded his jurisdiction.

[26] According to the respondents, the Appeal Arbitrators did not find the arbitrator exceeded his jurisdiction, they submit that the appeal award makes it clear that in the appeal tribunal's judgment, the Arbitrator erred by finding a partly written and partly oral agreement. Further, that even if the appeal tribunal's finding were incorrect, such error does not amount to gross irregularity nor is it a basis to find that the tribunal exceeded its own jurisdiction. I agree with the respondent's submission in this regard and will expand on my reasons below.

[27] In my view the appellant's submission that the appeal tribunal exceeded its powers by finding that the Arbitrator has exceeded his powers is meriteless. This is because, first on the facts, pleadings, and the issue that stood to be determined before the Arbitrator in my view, the Arbitrator erred in making a finding that was based not on the pleaded case before the Arbitrator. The Arbitrator's decision in this regard amounted to a gross irregularity as defined *Morgan v Ellis*. Therefore, I am satisfied the Appeal Tribunal made a correct finding in this regard. In any event, the appeal tribunal's finding does not amount to a gross irregularity on the basis that its decision was wrong. Our case law as stipulated above confirms that being wrong does not amount to a gross irregularity. Consequently, the appellant's submission stands to be dismissed.

Failed to consider or disregarded evidence.

[28] The applicants aver that the Appeal Arbitrators in misinterpreting the findings of the Arbitrator excluded all the oral and documentary evidence presented by Mr. Fizzotti and Mr. Jacosberg as well as the discussions and communication during 2021 and January 2022. Further that the appeal tribunal disregarded all the evidence of correspondence and discussions between Mr. Fizzotti and Mr. Jacosberg from 2 January 2022 to 15 March 2022.

[29] The case made by the applicant is that under the principle of "*party autonomy*," the parties were at liberty to confer upon an Arbitrator the competence to decide matters that have not been pleaded as recognise in ***Shill v Milner***.[4] According to the applicants the Appeal Arbitrators had the inherent jurisdiction to have decided matters not pleaded which have been conferred to them by virtue of the provisions of article 22.8 of the Rules. The applicant contends that even if the Appeal Arbitrators concluded that the Arbitrator had made a finding on an issue not pleaded, that the Appeal Arbitrators themselves had the inherent discretion to have decided the conclusion of the oral reinstatement of the SPA both orally and by conduct and should have done so.

[30] The respondents are adamant that the appeal tribunal looked at all the evidence presented during the proceedings. That the appeal tribunal conducted its own evaluation of the evidence and concluded different from the Arbitrator.

[31] The applicant's complaint in this regard is meritless. This is because first, in my view the alleged failure by the appeal tribunal to consider the entire evidence does not amount to a gross irregularity necessitating this court to set aside the award. In any event, having regard to all the pleadings, the record, and both the arbitration awards, I am satisfied that the appeal tribunal assessed all the evidence that was placed before the tribunal. The appeal tribunal dealt with these issues in paragraphs 23 and 24 of the appeal award. This court can't make

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[4] 1937 AD 101

a ruling and determine *ex post facto* what evidence the tribunal should or should not have taken into consideration in making their decision. The appeal tribunal is legally entitled to make its own assessment and evaluation of the facts and the evidence that was placed before it. Accordingly, the appellant's submission in this regard is dismissed.

The Counter Application

[32] In addition to opposing this review application, the first to fourth respondents seek to have the appeal award and paragraph 1 of the arbitral award made an order of the court.

[33] I have already made a finding and have dismissed the review application It must follow therefore as it should, that the counter application is granted.

[34] In all the circumstances set out above, it is my view that the review application is meritless and must fail. There is no reason why the costs should not follow the result, which costs include the costs incurred for the employment of two counsels. Given the issues involved herein, this is warranted.

Order

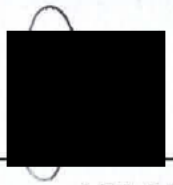
In the result, the following order is made: -

1. The Applicant's application for an extension of time under section 38 of the Arbitration Act, 1965 under notice of motion dated 6 March 2024 is granted.

2. The Applicant's application under notice of motion dated 23 August 2023 is dismissed with costs, including the costs of two counsels.

3. The award of the Sixth, Seventh, and Eighth Respondents, dated 13 July 2023, annexure IJ5 to the founding affidavit of Ian Ronald Elias Jacosberg, be and is hereby made an order of court.

4. The Applicant is to pay the First to Fourth respondent's costs of the counterapplication, including the costs of two counsel.



J DLAMINI

Judge of the High Court

Gauteng Division, Johannesburg

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