**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

23/3/2016

**CASE NO: 3116/2015**

**DATE OF HEARING: November 2015**

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

(1) REPORTABLE: ~~YES~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO
(3) REVISED.

23/3/2016
DATE

SIGNATURE

In the matter between:

**CHEG TRADING (PTY) LTD** First Applicant

**SUK YOUNG KIM** Second Applicant

and

**EMFULENI ESTATE HOME OWNERS ASSOCIATION** First Respondent

**CORNELIUS GERHARDUS STOLP** Second Respondent

---

**J U D G M E N T**

---

**OLIVIER, AJ**

[1] This is an application for the review and setting aside of an arbitration award, and related relief.

[2] The first applicant is Cheg Trading 55 (Pty) Ltd, a private company duly incorporated in terms of the laws of South Africa. The second applicant is Suk Young Kim, the director of the first applicant. The first respondent is the Emfulemi Estate Home Owners Association. The second respondent is Cornelius Gerhardus Stolp, a practising attorney who acted as arbitrator in this matter.

[3] The facts appear from paras 15 to 17 of the Arbitration Award. Essentially, the dispute arose from the decision of the first respondent to stop allocating funds to the first applicant for the maintenance of the golf course and sport facilities on the Emfuleni Estate. The matter was referred to arbitration in terms of the Constitution of the first respondent.

[4] Two matters were essentially before the arbitrator for determination: whether the first applicant was entitled to funds (20% of the levies) to maintain the golf course and sport facilities; and whether the first applicant was liable for payment of the levy on the erf on which the golf course was located.

[5] Clause 36 of the first respondent's constitution gives the authority for the dispute between the first respondent and a member of the first respondent to be resolved by an arbitration tribunal. Clause 36(4) provides that the arbitrator is obliged to have regard to the principles of the HOA constitution and take decisions on a just and equitable basis without necessarily applying the strict rules of law in arriving at his decision. It provides that the arbitration must be conducted in an informal way and shall be held under the provisions of the Arbitration Act 42 of 1965 (save for the provisions of the arbitration clause itself). The arbitrator must be a practising attorney of not less than 15 years'

standing, appointed by agreement between the parties. If there is no agreement within 7 days, the President of the Law Society of the Northern Provinces shall appoint the arbitrator. In this case there was no agreement and the second respondent was appointed by the President of the Law Society.

[6] The arbitration took place over ten days. The record of the arbitration proceedings consists of more than 1200 pages. On 9 December 2014 the second respondent handed down an arbitration award against the first applicant. The arbitrator found that the first applicant had no obligation to maintain the golf course, and that the first applicant was liable to pay the levy in respect of the property on which the golf course is located.

[7] The applicants want this award reviewed and set aside. They also claim additional relief, including that the court vacates and substitutes the decision of the arbitrator with its own determination. I shall deal with the grounds on which the applicants base their review challenge later.

[8] The Promotion of Administrative Justice Act 3 of 2000 is not applicable, as these arbitration proceedings involve the exercise of private power, not public power. The relevant legislation is the Arbitration Act, specifically s 33, the relevant parts of which read as follows:

> (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.

(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.

[9] There are four grounds on which an award can be challenged in terms of the Arbitration Act:

(a) Misconduct in relation to the arbitrator's duties;

(b) Gross irregularity in conducting the proceedings;

(c) The arbitrator exceeding his powers; or

(d) The award was improperly obtained.

[10] The Act does not provide for an appeal on the merits. Section 28 of the Act provides that an award shall be final and not subject to appeal, which each party shall abide by and comply with, unless the parties have agreed otherwise.

[11] Likewise, the HOA's constitution provides that the decision of the arbitrator is final and binding on the parties, shall be given effect to immediately and shall be made an order of any court of competent jurisdiction. The arbitration clause makes reference to the possibility of an appeal but only if the parties agree to an appeal. There was no such agreement in this case.

[12] The purpose of any review is to determine whether the decision was arrived at in an acceptable manner – the correctness of the outcome itself cannot be challenged. For the latter, appeal exists. A court must strongly resist any temptation to delve into the merits of the matter. The court should limit itself to process, not substance. An award cannot be set aside simply because the judge considers it wrong. See ***Telcordia Technologies Inc v Telkom SA Ltd*** 2007 (3) SA 266 (SCA) par 55: "the general principle [is] that when parties select an arbitrator as the judge of fact and law, the award is

final and conclusive, irrespective of how erroneous, factually or legally, the decision was. ..."

[13] The parties sacrifice the right to appeal for a quick, final resolution of a matter. ***Benjamin v Sobac South African Building and Construction (Pty) Ltd*** 1989 (4) SA 940 (C) at 967J, 968C-D:

> The rights of a party to an arbitration to have the tribunal's award set aside are and have always been severely limited. ... one of the advantages which people are supposed to get by a reference to arbitration is the finality of the proceeding when the arbitrator has once stated his determination. They sacrifice something for that advantage – they sacrifice the power to appeal. If, in their judgment, the particular judge whom they have selected has gone wrong in point of law or in point of fact, they have no longer the same wide power to appeal which an ordinary citizen prosecuting his remedy in the Courts of law possesses, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law, therefore, that when they have agreed to refer their difficulties to arbitration, as they have here, you cannot set aside the award simply because you think it wrong."

[14] The applicants say that the review cannot be considered without considering the content of the arbitration proceedings. This is true to some extent in that the court needs to be pointed to those parts of the proceedings which the applicants claim are examples of procedural irregularities, misconduct and so on. However, it needs to be stressed that this does not mean that the court can or will reconsider the merits. All that is relevant here is whether, in performing his duties, the arbitrator had misconducted himself, committed a gross irregularity or exceeded his powers.

[15] The applicants base their review on the following grounds, saying that the second respondent had misconducted himself in the following ways:

(a) The Award was materially influenced by an error of law and failure to interpret the Constitution of the First respondent in line with the evidence presented at the hearing.

(b) He failed to take into account relevant considerations when handing down the award.

(c) The award was not rationally connected to the evidence presented at the hearing by the parties.

(d) The award handed down is so unreasonable that no person performing the function of an arbitrator given the evidence presented at the hearing would have handed such an award.

(e)The Arbitrator committed an irregularity by allowing the Second Applicant to continue to answer questions in English when it was clear that the Second Applicant was not able to comprehend and express himself in English properly without the service of an interpreter.

[16] In court the applicants wisely abandoned their reliance on the error of law ground. In ***Telcordia supra*** Harms JA was clear in his rejection of error of law as a ground of review of arbitration proceedings (par 86):

> [I]t is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. 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' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

Parties are therefore bound by the finding even if the arbitrator had erred on the law.

[17] The applicants persisted with the other grounds. It was argued that the Act did not do away with common law grounds. However, case law points to the contrary. The Supreme Court of Appeal has stated definitively that resorting to private arbitration means that the parties waive other grounds of review, including common-law grounds. In ***Telcordia supra*** Harms JA expressed it thus (par 50-51):

> By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. ...
>
> Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot be agreement impose jurisdiction on the court."

See too ***Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*** 2008 (2) SA 448 (SCA) at par 14.

[18] The grounds argued by the applicants cannot stand as separate grounds and must therefore be dismissed. At most, they could potentially be relevant is as indicators of the grounds of review in the Act – but this is not always necessarily so. It depends on the circumstances of the case.

[19] The only ground argued that I consider potentially to be of merit, is that of a possible irregularity in the proceedings created by the alleged inability of the

second applicant to testify in English, and the lapse of the arbitrator to arrange for a translator.

[20] Not every irregularity in the proceedings would result in the setting aside of the award; it must be so serious that it caused the aggrieved party not having its case "fully and fairly determined". See ***LAWSA Vol 1: Arbitration***, par 606. A gross irregularity would occur among others where the arbitrator misconceives the entire nature of the enquiry, i.e. he misunderstands his mandate, or his related duties.

[21] The second applicant argues that the arbitrator had committed an irregularity by allowing him to continue to answer questions in English when it was clear that the second applicant was not able to comprehend and express himself in English properly without the service of an interpreter.

[22] First respondent's counsel calls this claim a "transparent untruth" and contests it on both legal and factual grounds: it is clear from the record that the second applicant had no difficulty understanding English. See record pp 1, 153, 154, 172, 173, 175, 176 and 182. The second applicant deposed to the discovery affidavit in English. The second applicant took the oath and commenced giving evidence in English. The second applicant completed his evidence in chief without complaining that he did not understand English or that he had any difficulty in expressing himself in English.

[23] Furthermore, the second applicant was at all relevant times represented by legal representatives. They, in conjunction with the applicants, elected not to use a translator. The applicants should have arranged for an interpreter if one was required, as they were dominus litis, says the first respondent.

[24] During the early parts of the arbitration, particularly during cross-examination of the second applicant, the first respondent's counsel alluded to the fact that it was the applicants' legal representatives who should arrange for a translator, if required – but "the attorney and counsel for the Applicants 'declined the offer' of seeking the matter to stand down in order to obtain the

services of an interpreter." (First respondent's heads of argument, para 4.24—25.)

[25] The only complaint on the part of the second applicant was that he had difficulty understanding the exact nature of the process, for which patience was sought from the arbitrator and respondent's counsel. (See record, pp 70, 130 and 135.)

[26] The applicants, on the other hand, pointed to several other paragraphs of the record in support of their claim.

[27] It seems to me that the arbitrator had no difficulty understanding the testimony of the second applicant and that he therefore did not see the need to appoint a translator. And any difficulty on the part of the second applicant to answer certain questions without the assistance of a lawyer as he was not a trained lawyer himself is an altogether different matter than an inability to understand English, or to express himself properly in that language. It seems to me that to the extent that the language in which the proceedings was conducted, including the language in which the second applicant testified, was potentially a problem, it should have been raised by applicants' legal representative. In my view, therefore, there was no irregularity in the proceedings.

[28] I now turn to the other possible grounds. Did the arbitrator commit misconduct? The case of ***Dickenson & Brown v Fisher's Executors*** at 175-6, referred to with approval in ***Benjamin v Sobac*** (at 970F), offered the following explanation of misconduct:

> "Now I do not propose to attempt to give any definition of the word 'misconduct', for it is a word which explains itself. And, if it is used in its ordinary sense, I fail to see how there can be any misconduct unless there has been some wrongful or improper conduct of the person whose behaviour is in question

And later in ***Benjamin*** (at 970J-971A):

> "In ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or fact."

[29] It seems to me that if misconduct is given its ordinary meaning, the arbitrator should have engaged in some sort of wrongful or improper conduct for it to be challenged. Moral turpitude or mala fides should be established. A bona fide mistake cannot be misconduct. The applicants allege that in his failure to consider the evidence of the parties the arbitrator committed misconduct. Although an arbitrator is under no obligation to observe the strict rules of evidence and procedure that would ordinarily apply in a court of law, he must at least ensure that the parties are given a fair and just hearing, informed by the principles of natural justice. He must discharge his duties impartially and honestly. The arbitrator has the discretion to decide the relative weight to attach to evidence and argument before him.

[30] In my view the arbitrator did not conduct himself in any way that could be described as wrongful or improper. Again, the fact that a losing party may disagree with the outcome of the arbitration or how the arbitrator interpreted law or considered evidence does not mean that the arbitrator had misconducted himself.

[31] An arbitrator's award cannot go beyond the terms of reference. He must decide what the parties have referred to him for resolution. The applicants contend that the arbitrator had exceeded his powers and mandate by determining whether or not the developer had assigned its obligations in respect of the maintenance of the golf course to the First Applicant. This relates to the interpretation of clause 15.1.2 of the constitution. The first respondent contends that this is an issue of law, not fact.

[32] Did the second respondent exceed his authority? In ***Telcordia*** the court referred with approval to the decision of the House of Lords in ***Lesotho Highlands Development Authority v Impregilo SpA*** [2005] UKHL 43, para 24, where Lord Steyn distinguished between the erroneous exercise of a power which the arbitrator did have, and the exercise of a power which he did not have. "If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power ... is involved." So, provided the arbitrator had the particular power, its incorrect exercise would not qualify as an overstepping for purposes of this ground of review.

[33] The applicants contend that the arbitrator should have based his finding on the evidence of the parties, not necessarily an interpretation of the Constitution. And that in so doing, he had acted outside the scope of his powers and committed misconduct. I cannot see how in interpreting the constitution the arbitrator could have exceeded his powers or committed misconduct. In my opinion it would not have been possible for the arbitrator to resolve the dispute without interpretation the constitution. It is a power which was his to exercise.

[34] The applicants say that the arbitration should have been more flexible, as the proceedings more resembled a court of law. The fact is that the parties employed the services of lawyers, which would clearly invite a more formal approach to proceedings.

[35] Much of the argument of the applicants seems to me to concern itself with merits and with how the arbitrator interpreted the law and the evidence given by witnesses. For example, as referred to earlier, they take issue with the application of principles of law by the second respondent, alleging that the second respondent had acted wrongfully by applying strict rules of law. In respect of the evidence, they offer their own conclusions. The interpretation of a contract too is a matter of law and not fact. The court listens to evidence and then on that basis decides.

[36] The applicants may very well think that the arbitrator got the outcome wrong, but as explained earlier they have nothing available to them to challenge the merits.

[37] To sum up, in my opinion the arbitrator did not misconstrue or misunderstand the nature of the arbitration, or his duties – and he also did not exceed the limits of his powers, or misconducted himself. I also find that there was no gross irregularity. As a result, the application must fail.

[38] Considering this finding, there is no need for me to deal with the substitution of the award or other relief sought by the applicants.

**COSTS**

[39] The first respondent seeks a costs order on an attorney-client scale, including the costs of senior counsel, against the applicants. I was referred to ***In re Alluvial Creek Ltd*** 1929 CPD 532 at 535, recently referred to by the SCA in ***Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd*** 2015 (5) SA 38 (SCA), where the court said the following about a punitive cost order:

> "Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

[40] A punitive cost order should be the exception – not the rule. I do not consider attorney-client costs to be justified in this case. In my view the proceedings were not vexatious.

[41] I think the matter justified the use of senior counsel.

**ORDER**

[42] The application is dismissed with costs, including the costs associated with the employment of senior counsel.

**OLIVIER, AJ**

**ACTING JUDGE OF THE HIGH COURT**