OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No.: **7937/2017**

In the matter between:

MR THEODORE CALLIGERIS N.O. First Applicant

MRS HELEN CALLIGERIS N.O. Second Applicant
(*Nomine Officii* in their capacities as the Trustees
for the time being of the HELLAS TRUST No 3514/2010)

and

MR ASHRAF PARKER N.O. First Respondent
(*Nomine Officio* in his capacity as Arbitrator appointed
by the Registrar of Deeds pursuant to the provisions of
Regulation 71 of the Sectional Titles Act 95 of 1986)

TIDES UNIT D (PTY) LTD Second Respondent

JUDGMENT delivered **22 MARCH 2018**

MEER J.

[1] The Applicants apply for an arbitration award, delivered on 27 March 2017, by the First Respondent, as arbitrator in proceedings between the Applicant and the Second Respondent, to be set aside. They do so in terms of Section 33 (1) of the Arbitration Act 42 of 1965 ("the Arbitration Act"), on the grounds of misconduct and gross irregularity on the part of the arbitrator, and furthermore on the grounds of inordinate delay under Section 23 (a) of the Arbitration Act and Management Rule 71 of the Sectional Titles Act 95 of 1986. Alternatively they challenge the award under Section 34 of the Constitution of the Republic of South Africa 108 of 1996, read with the provisions of the Promotion of Administrative Justice Act 3 of 2000, on the basis that they did not receive a fair and impartial hearing.

[2] The Second Respondent opposes the application and in turn applies for the award to be made an order of Court. The First Respondent abides the decision of the Court.

[3] The arbitration award was granted by the First Respondent in a dispute between the Second Respondent, as the Claimant in the arbitration, and the Applicants, who are the trustees of the Hellas Trust, as Respondents therein. For ease of reference I shall refer in this judgment to the Applicants as "the Trustees", the First Respondent as "the Arbitrator" and the Second Respondent as "the Claimant", as it was in the arbitration.

Background Facts

[4] During 2011 and 2012 various disputes arose between the Trustees, the Claimant and the Body Corporate of a sectional title scheme known as 'The Tides', situated at [...] T. Road, Camps Bay, Cape Town. The sectional title scheme consists of two units, Unit No. […] and Unit No. […], owned by the

Trustees and the Claimant respectively. The Trustees' property was contiguous to, and situated immediately above, the Claimant's property.

[5] The disputes which arose may be summarised as follows:

5.1 The Claimant alleged that it had suffered damage as a result of water flowing from the Trustee's property into the Claimants property, and claimed compensation for the damage.

5.2 The Trustees alleged that they had suffered damage as a result of water ingress from the Claimant's property into their property and claimed compensation for such damage.

5.3 The Body Corporate alleged that the Claimant was indebted to it for certain arrear levies and sought payment of such levies.

[6] The Registrar of Deeds appointed the Arbitrator pursuant to Management Rule 71 of the Sectional titles Act 95 of 1986. He is a duly admitted and practising attorney. The disputes, by agreement, were consolidated and heard together and determined in one arbitration.

[7] The Claimant led the evidence of six witnesses, whilst the Trustees called sixteen witnesses in total. The matter was argued on 7 April 2016, with both parties providing heads of argument. The Arbitrator's award was handed down on 27 March 2017, some eleven and a half months later.

[8] The award, as pointed out by the Trustees, is a word for word recitation of the Claimant's heads of argument, and contains no independent consideration or assessment of the Trustees' arguments and defences which were presented to the Arbitrator both in writing and orally.

[9] A cross-referencing exercise by Mr MacWilliam, for the Trustees, between the arbitration award and the Claimant's heads of argument that were submitted to the Arbitrator, does indeed indicate that the award is by and large a reproduction of the Claimant's heads of argument. The cross-referencing shows that there is nothing in the award which departs from the Claimant's heads of argument, save for superficial changes, and, contends Mr MacWilliam, "the very occasional, largely irrelevant typographical modification designed to make the Award look like the work of the arbitrator". As was pointed out also by Mr MacWilliam, there is not one reference in the award to anything that was argued, and the award contains only one reference to the Trustees' heads of argument, being an addition to footnote 20 of the award. There is thus no mention in the award of any argument or defence of the Trustees.

The Stance of the Trustees

[10] The Trustees contend that the award stands to be set aside in terms of Section 33 (1) (a) of the Arbitration Act, on the grounds that the Arbitrator misconducted himself in relation to his duties as Arbitrator, and in terms of Section 33 (1) (b) thereof, on the grounds that, in rendering the award which he did, the Arbitrator committed a gross irregularity in the conduct of the arbitration proceedings. The Arbitrator, they submit, has simply held out the contents of the Claimant's heads of argument as being his own by making superficial amendments thereto, and there was a wholesale failure by the Arbitrator to apply his own mind to the matter, let alone to the Trustees' arguments and defences.

[11] In illustration of this, the Trustees point out that no mention is made of one of their important defences, arising from the fact that on the Claimant's own case, the leaks of which the Claimant complained, came through the concrete deck which did not form part of the Trust's section and for which it was not

responsible. The concrete deck, they point out, formed part of the common property. Whilst the surface of the concrete deck may have formed part of an exclusive area which the Trust was entitled to use, and also formed part of the roof of the Claimant's section, it was common property. The Sectional Title Act provides that it is the obligation of the Body Corporate of the sectional title scheme, against which the Claimant has made no claim, to maintain or repair that common property. It was not the obligation of the Trust to do so. The Arbitrator, contend the Trustees, simply failed to address this or any other related issue. The Arbitrator, so the argument continues, abrogated his duty to determine the matter fairly and the award must accordingly be set-aside.

[12] The Trustees further argue that the award stands to be set aside due to the excessive delay in delivering the award. Management Rule 71 (6), which they contend applied, prescribes in pre-emptory terms that the Arbitrator "shall make his or her award within 7 days from the date of the completion of the arbitration". If Section 23 (a) of the Arbitration Act were found to be applicable, the Arbitrator was obliged to render his award within 4 months of the date on which he entered on the reference. Good cause, they argue, was not shown for the time period of 4 months to be. Contrary to the aforementioned Rule and Section, the arbitration, they point out, was concluded on 7 April 2016 and the award was made almost a year later on 27 March 2017.

The Stance of the Arbitrator

[13] The Arbitrator abides the decision of the Court. He has filed an affidavit in which he attributes the delay for his award to the sheer volume of the evidence, the technical and complex nature thereof and the piece-meal fashion in which it was led. Given the circumstances, he disagrees that the delay in delivering his award can be regarded as inordinate or unreasonably long. He states that he formed the impression, from his interaction with the parties in

December 2016, that they understood the reasons for the delay, adding that they did not put him under pressure to deliver the award. He denies that he failed to properly apply his mind to the matter, and in particular to the Trustees' case.

[14] He says that while it is indeed so that his award largely reflects the Claimant's arguments as presented in its heads of argument, this is due quite simply to the fact that the Claimant presented a significantly more compelling case. He states further that there is nothing untoward in a presiding officer predominantly relying on one party's heads of argument in preference to another's. This, he contends, is the very purpose of heads of argument, which is to assist a presiding officer in coming to the correct decision.

The Stance of the Claimant

[15] The Claimant's founding affidavit in this application supports the reasons proffered by the Arbitrator for the delay in granting the award, and the Arbitrator's denial that he failed to consider the evidence and arguments presented by the Trustees. The Claimant contends that by their conduct, the Trustees consented to the Arbitrator taking what time he needed to consider the matter and deliver his award, and had waived any right to complain about the delay. It is only because the award was not granted in their favour that they now cynically complain about the delay.

[16] Mr Newdigate, for the Claimant, characterised the Trustees' contention that the Arbitrator substantially reproduced or regurgitated the Claimant's heads of argument, as a gross exaggeration. He submitted that there was nothing untoward in a presiding officer relying on one party's heads of argument in preference to those of another, or in accepting the Claimant's submissions and adopting certain of the language used.

[17] Mr Newdigate submitted that the Arbitrator did in fact take into consideration the Trustees' argument regarding the origin of the ingress of water. In this regard he referred to what is stated at paragraphs 6, 7, 19, 19.4, 19.5, 22, 23, 25 and 31 of the Arbitrator's award.

Discussion

Should the Award be set aside under Section 33 of the Arbitration Act?

[18] The answer to the above question requires me to consider whether the conduct of the Arbitrator constituted misconduct and/or a gross irregularity under Sections 33 (1) (a) and (b) of the Arbitration Act respectively

Section 33 (1) of the Arbitration Act, provides as follows:

> "**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
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> (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,
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> 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."

Section 33 (1) (a) misconduct

[19] Precisely how the Arbitrator used the Claimant's heads of argument, and to what effect, is important in assessing if there was misconduct under Section 33 (1) (a) of the Arbitration Act.

[20] It is not a gross exaggeration to say that the Arbitrator substantially reproduced the Claimant's heads of argument, for that is precisely what he did. The fact is that he reproduced these heads of argument *verbatim* in his award, and in so doing, did not even credit or acknowledge the author of the heads.

There was no evidence of the independent exercise of the Arbitrator's mind in the mere reproduction of the heads.

[21] With regard to the Arbitrator's contention that the Claimant presented the more compelling case, and that for this reason the award reflects the Claimant's heads of argument solely, as is aptly stated by the Trustees, the Arbitrator's role was not simply to pick an argument and reproduce it, as he did. He had to make a reasoned finding, which considered the submissions and evidence of each side, and explain his conclusions by engaging therewith. The Arbitrator failed dismally in this task. His denial that he failed to apply his mind to the Trustees' arguments and defences, is merely a bare denial that is not at all evidenced in the award.

[22] The contents of the paragraphs referred to by Mr Newdigate as showing that the Arbitrator considered the Trustees' argument, are no more than a replication, word for word, of the contents of the Claimant's heads of argument. They do not show that the Arbitrator applied his mind to the Trustees' argument regarding the origin of the ingress of water or the Trustees' liability therefor.

[23] The Constitutional Court, in *Stuttafords Stores (Pty) Ltd & others v Salt of the Earth Creations (Pty) Ltd* [2010] JOL 25995 (CC), had occasion to comment on a judgment, which, apart from 32 lines of the judge's original writing, replicated the Respondent's counsel's heads of argument. There too, there was no independent reference to the Applicant's heads of argument, except for references carried over from the Respondent's heads of argument. The Court, at paragraph 11, said:

> "[11] While some reliance on and invocation of counsel's heads of argument may not be improper, it would have been better if the judgment had been in the judge's own words:

> ‘The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn . . . are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel’s argument is as well founded as it appeared to be at the hearing (or the converse); and so on.
>
> …
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> The very act of having to summarize in one's own words what a witness has said, or what is stated in an affidavit or what a document says or provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case.’
>
> [12] These remarks were made by a former Chief Justice, Corbett CJ, in an address at the first orientation course for new judges under the new constitutional dispensation. We have deliberately refrained from dealing with case law on the issue whether the extensive use of counsel’s heads could lead to a perception of bias, because it is not a question we need to decide here. Suffice to state, however, that if these wise words are heeded by judges the necessity of deciding the issue in the future should not arise.” (Footnotes omitted)

[24] The question whether the extensive use of counsel’s heads of argument could lead to a perception of, and was in fact an act of bias, however looms large in this case, given the perception of the Trustees and their challenges to the conduct of the Arbitrator in terms of Section 33 of the Arbitration Act and the right to a fair hearing under Section 34 of the Constitution. It is moreover a question that cannot but be answered with a resounding yes, in the light of the Arbitrator’s conduct in replicating the Claimant’s heads of argument, and not even mentioning those of the Trustees, in his award. As is stated by Butler in LAWSA (3rd Edition, Volume 2) at paragraph141:

> "An arbitrator must dispense justice equally and impartially between the parties, and failure to do so may result in the award being set aside on the basis of misconduct."

I am of the view that this is precisely so with regard to the award of the Arbitrator. It did not illustrate an equal and impartial dispensing of justice by the Arbitrator. It was partial to the Claimant and, in my view, showed "wrongful or improper conduct" on the part of the Arbitrator, a requirement for misconduct as stated by Solomon JA, in the leading case on review of arbitrations, *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 175-176:

> "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 on the part of the person whose behaviour is in question."

The award thus falls within the purview of Section 33 (1) (a) of the Act, on the basis of misconduct on the part of the arbitrator. It stands to be set aside for this reason alone.

Section 33 (1) (b) gross irregularity

[25] In *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) the Court had occasion, at paragraph 72, to consider the concept of gross irregularity. It quoted from *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581, where Mason J laid down the basic principle in the following terms:

> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of the trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."

At paragraph 73 of *Telcordia*, Harms JA (as he then was) went on to quote from *Goldfield Investment and Another v City Council of Johannesburg* 1938 TPD 551, at pages 560 – 561, 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. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section. That being so, there was a gross irregularity, and the proceedings should be set aside."

[26] In *Total Support Management (Pty) Ltd and another v Diversified Health Systems (SA) (Pty) Ltd and another* 2002 (4) SA 661 (SCA), at para 41, Smalberger ADP had these apposite words to say about the conduct of an arbitrator:

"[41] When selecting an arbitrator the parties to the arbitration agree to someone in whom, by dint of his (or her) experience and ability, they can repose the necessary

> confidence and trust to determine their dispute. What they seek is a judgment from the person chosen. An arbitrator is not entitled to delegate this function. He alone must perform the duties he has undertaken and with which he has been entrusted, unless the parties agree otherwise. Because of the essentially personal nature of his appointment he should be circumspect about utilising the services of an assistant. Making use of an assistant is not *per se* objectionable. Where the parties agree to an arbitrator doing so, care should be taken to reach consensus on what precise functions the assistant may perform, to obviate any later dispute in this regard. Failing agreement, an assistant should not be allowed to perform tasks that may encroach on what would be regarded as the normal functions of an arbitrator. In no circumstances may the assistant be allowed to usurp the decision-making function of the arbitrator or act in a manner subversive of his independence. Ultimately the question to be asked, and answered, is whether the arbitrator exercised his own judgment in deciding the issues. This will depend upon the facts of each particular case."

[27] I am inclined to agree with Mr MacWilliam that in the present case the crucial question posed in *Goldfield,* namely whether the behaviour of the arbitrator prevented a fair trial, has to be answered in the affirmative. I agree that the manner in which the arbitrator abrogated his duty to write his own award, and his failure to address the Trustees' arguments and defences, prevented a fair trial of the issues. In replicating the heads of argument as his award, the Arbitrator did not exercise his own judgment in deciding the issues. The Arbitrator's actions clearly prevented the Trustees from having its case fully and fairly determined and thus falls under the purview of gross irregularity as enunciated in *Goldfield* at paragraph 73 *supra*. His actions also permitted his decision-making function to be usurped by the Claimant's heads of argument in a manner subversive of his independence, and prevented the exercise of his own judgment in deciding the issues. This is the very conduct to be avoided by arbitrators, referred to in *Total Support supra*. The award qualifies to be set aside for gross irregularity in terms of Section 33 (1) (b) also.

Section 34 of the Constitution

[28] The Arbitrator's conduct was also in violation of the right to a fair public hearing before an impartial tribunal or forum, enshrined at Section 34 of the Bill of Rights. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC), at paragraph 176, Kroon AJ in considering the fairness of an arbitration in the context of Section 34 of the Bill of Rights, endorsed what Schreiner J had to say in *Goldfield supra*, namely that the crucial question was whether the behaviour of the arbitrator prevented a fair trial. I have already answered that question in the affirmative.

[29] For all of the above reasons I am of the view that the arbitration award stands to be set aside in terms of Section 33 (1) (a) and (b) of the Arbitration Act and in terms of Section 34 of the Constitution

The delay in delivering the award

[30] The Trustees' contention that the Arbitration was governed by Management Rule 71 and that the time frame of 7 days as prescribed in Management Rule 71 (6) applied, was disputed by Mr Newdigate. He submitted the Rule did not apply because the Claimant and Trustee had agreed to the Arbitrator's appointment in respect of their dispute after the Arbitrator's initial appointment under the Management Rule. The factual background, however, shows that the arbitration was governed by the Management Rule. A Notice in terms of Management Rule 71 (2) was sent by the Claimant to the Trustees declaring a dispute. The fact that the parties also agreed to the Arbitrator who had initially been appointed by the Registrar of Deeds pursuant to Management Rule 71, does not detract from his appointment under that Rule. The arbitration award itself refers to it being an award under Management Rule 71. I agree with Mr MacWilliam that the effect of the proviso in Section 40 of the Arbitration Act was that the time frame at Management Rule 71 (6) was

applicable and the award had to be made 7 days after the conclusion of the Arbitration. Given that most of the award would have emanated from the cutting and pasting of the Claimant's heads of argument this could easily have been achieved. It was not, and the award stands to be set aside for this reason also.

[31] I note, however, that even if the time limit specified at Section 23 (a) of the Arbitration Act had applied, good cause for the delay, as is provided for at Section 38 of the Arbitration Act, has not been shown. I am not satisfied that the reasons for the delay, as provided by the Arbitrator, justified the delay of almost a year from the date when argument concluded on 7 April 2016 until the award was granted on 27 March 2017.

[32] The volume of the evidence and the technical and complex nature thereof, alluded to by the Arbitrator, does not explain away or justify the long delay in delivering the award. Judicial notice can be taken of the fact that judicial officers and arbitrators with heavy work-loads routinely deal with similar cases and volumes of evidence, and frequently deliver reasoned judgments which engage with the arguments, within prescribed time periods. In any event, the content of the award, in reproducing the Claimant's heads, neither engages with nor assesses the volume of the evidence or the technical and complex nature of the issues, the very aspects relied upon by the Arbitrator for the delay. Here too, given, as aforementioned, that most of the award would have emanated from the cutting and pasting of the Claimant's heads of argument, the award could have been ready within a few days of the completion of the arbitration.

[33] Nor does the piece-meal fashion in which the evidence was led explain the excessive delay. This may, as contended by the Trustees, well explain the delay until the completion of the argument, but not the delay in the award being

produced. Finally, the fact that the parties may have conveyed the impression to the Arbitrator, in December 2016, that they understood the delay and accordingly did not put him under pressure, does not in any way excuse his inordinate delay.

[34] In view of the above, I do not accept that the Arbitrator has displayed good cause for the inordinate delay of eleven and a half months in producing the award, a delay which was in violation of both Management Rule 71 (6) and Section 23 (a) of the Arbitration Act.

[35] For all of the above reasons, the application must succeed with costs. I grant the following order:

1. The Arbitration Award is set aside.
2. The application for the Arbitration Award to be made an order of Court is refused.
3. The Second Respondent shall bear the costs of the application.

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Y S MEER

Judge of the High Court