REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, GRAHAMSTOWN

Case no: 3088/2013
Date heard: 19.9.2013
Date delivered: 20.2.2014

In the matter between:

JANNELIE WOLFAARDT	**Applicant**
vs	
GERBER BOTHA & GOWAR (MIDDELBURG (PTY) LTD)	**First Respondent**
ADV PAUL JOOSTE (in his capacity as Arbitrator)	**Second Respondent**

In re:

Case no: 2328/2012

In the matter between:

GERBER BOTHA & GOWAR (MIDDELBURG (PTY) LTD)	**Plaintiff**
vs	
JANNELIE WOLFAARDT	**Defendant**

JUDGMENT

TSHIKI J:

A) INTRODUCTION

[1] Applicant herein, a chartered accountant, was sued by respondent for breach of contract in terms of which applicant undertook not to render any professional services privately or on behalf of other firms of chartered accountants for the duration of her contract as an accountant of the respondent. In breach of the said contract applicant rendered professional services to a client Fred Roux Investment Holdings (Pty) Ltd for which services she was remunerated in the sum of R150 000.00. Respondent subsequently issued summons against applicant for damages amounting to R150 000.00 in consequence of applicant's breach of the agreement aforesaid.

[2] In consequence of the applicant's plea that the parties had agreed in the contract upon which the first respondent sues, which was to first determine the relevant dispute by way of arbitration, the parties subsequently agreed to refer the matter to arbitration. An arbitrator was appointed and a date on which the matter would proceed was agreed by the parties and was subsequently confirmed by the second respondent which was to commence on 23rd and, if necessary, the 24th September 2013 (a public holiday) at 10h00 in Middelburg. The appointment of the second respondent as the arbitrator was accepted by both parties.

B) APPLICANT'S CASE

[3] On 11th September 2013 applicant filed the present proceedings by way of an urgent application for an order, *inter alia*, in the following terms:

> "3.1 That the arbitration scheduled to commence before the second respondent at Middelburg on 23rd September at 10h00 and set down also for 24th September 2013 be suspended until the High Court action under civil case cover 2328/2012 is suspended by order of the Court or withdrawn by the first respondent.

3.2 In the alternative to prayer 1, that the arbitration scheduled to commence before second respondent on 23rd September 2013 at 10h00 (and set down for 24th September 2013) be postponed to a date to be mutually acceptable to the applicant, first and second respondents, with the direction that the arbitration must be finalised before 30th November 2013.

3.3 That the first respondent pays costs of this application.

3.4 Any further and/or alternative relief."

[4] When the application before this Court was argued Mr Tsangarakis appeared for the applicant and Mr JJ Nepgen represented the respondent. The second respondent did not oppose the application. On the date of the argument of the application, the parties agreed that in view of their own arrangement relative to the date of the arbitration there was no longer a need to treat the application as urgent.

[5] In its answer to the applicant's contentions and requests, respondent denied that the applicant is entitled to any order against the first respondent herein. In particular and most importantly the respondent contends that:

[5.1] The parties have on their own volition, and in consequence of the applicant's special plea of arbitration first, and seeking a stay of the action proceedings, agreed to the stay of the proceedings and therefore, in that case there was no need for a Court order for that purpose.

[5.2] That the parties had agreed that the dispute between them would be determined through arbitration and that the arbitration agreement clearly stipulates that the proceedings will be informal.

[5.3] The parties had also agreed that the arbitration proceedings would be held in Middelburg.

[5.4] The second respondent advised the parties that he was available to hear the arbitration in the week of 23-27 September 2013.

[5.5] That the rules of Court would not be applicable in the arbitration proceedings.

[6] It also transpired later that the applicant had a problem with the hearing date of 23rd September 2013 and attempted to persuade the second respondent that the date be changed. His reasons for this request were thus:

[6.1] That applicant's preferred counsel would not be available on the week on which the arbitration is scheduled to commence and finalised; and in fact for the remainder of the year 2013.

[6.2] The arbitrator was not willing to grant it. In his view the arbitrator intimated that applicant could approach another counsel to proceed on her behalf in the arbitration and on the dates and time scheduled for the hearing of the arbitration. According to the arbitrator, the applicant was not, as of exclusive right, entitled to counsel of her choice. The arbitrator had interpreted the clause in the arbitration agreement to mean that the arbitration must be finalised within one month from date of appointment of the arbitrator.

[6.3] Another reason for the postponement, at the instance of the applicant, was that the arbitrator informed applicant on 3rd September 2013 that he would proceed with the arbitration on the dates set and that the parties were afforded a reasonable time to prepare. There was also an amended statement of claim which applicant sent to the chairman of the Society of Advocates Eastern Cape, prior to the second respondent's appointment which was never served on the applicant.

[7] For the above reasons applicant, on 4 September 2013, was not happy with the way in which the first respondent's conduct of this matter *vis-a-vis* herself and again requested a postponement to 30 November 2013.

C) ISSUES

[8] In the first place the issue to be decided is whether the applicant has any legal justification to approach the Court for her relief sought in the notice of motion. Applicant's contention being that the second respondent has refused to allow the postponement of the arbitration. Secondly, that it seems from the applicant's point of view that according to the arbitrator and notwithstanding anything, the arbitration must be concluded within one month otherwise the arbitrator's appointment would lapse. In the view of the applicant, this is an erroneous interpretation of the agreement. Applicant, having tried to seek to remedy the situation *extra curium* without success, she had no choice but to approach the Court for a stay or a postponement of the arbitration of the proceedings.

[9] It is true that a Court does have the power to intervene in arbitration proceedings but will only do so in exceptional circumstances and in accordance with the following principles enunciated by Melament J[1] gathered from other decided cases as follows:

[1] Tuesday Industries v Condor Industries 1978(4) SA 379 (T) at 383 E–H

> "(i) if the (arbitrator's) discretion has been exercised and there was some evidence on which it was exercised, a Court will not interfere if the finding was erroneous or unreasonable.
>
> (ii) once the arbitrator has exercised his or her discretion and there was some evidence on which it was exercised, a Court will not interfere if the ruling was erroneous or unreasonable.
>
> (iii) the Court will only intervene where there has been a gross irregularity or a failure of natural justice, or if the arbitrator had committed a fundamental mistake that would affect all future proceedings to the extent that a miscarriage of justice might result.
>
> (iv) gross unreasonableness will not amount to either of those unless there was no evidence whatsoever to support the finding."

[10] It follows that once the arbitrator has exercised his or her discretion, the Court has no jurisdiction to enquire into the correctness of the conclusion[2].

[11] How the Courts interpret gross irregularity in the conduct of the proceedings is interesting in that the ground of review envisaged by the use of the phrase (**gross irregularity**) relates to the conduct of the proceedings and not the result thereof. This has been explained by Mason J in ***Ellis v Morgan***; ***Ellis v Dessai***[3] as follows:

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

[12] From the authorities that have dealt with the issue of irregularity it is interpreted to mean that not every irregularity will constitute a ground for review and would have to depend on the circumstances of each case. In order to justify a

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[2] Badenhorst –Schnetler v Nel en 'n Ander 2001(3) SA 631 (KPA)

[3] 1909 TS 576 at 581 – quoted from Bester v Easigas (Pty) Ltd and Another 1993(1) SA 30 at 42H-I and 43 A-D. See also R v Zackey 1945 AD 505 at 509

review on the basis of an irregularity, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his or her case fully and fairly determined[4].

[13] In the present case, the complaint of the applicant, as I understand it, is that the arbitrator has already decided on the applicant's request for a postponement. Although it does not appear explicitly from the arbitrator's comments that the arbitrator has closed his chapter on the issue, it does appear from the arbitrator's comments in annexure "K" that he could revisit some of the issues raised herein by the applicant if the latter is able to persuade it on the date of the arbitration. Even if the arbitrator does not want to revisit such issues, it is clear from the record before me that the arbitrator had at that stage, when he communicated to applicant's attorneys, carefully considered the applicant's submissions which have persuaded him to communicate what appears to me to be his *prima facie* view. I say so, because at that stage on 3rd September 2013 it was still early for the applicant to solicit the services of another counsel. In my view, it would therefore depend on the reasons given by the applicant on the date of the hearing or shortly before that why she would not be able to find an alternative legal representative but suggested that applicant should seek the services of another counsel. The wording of the arbitrator does not appear to me to have closed the chapter on the issue of legal representation. Even if one were to argue, as the applicant appears to be, that the arbitrator has already made his final decision and such a decision is, in my view, based on sound reasoning. I say so for the following reasons:

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[4] See Ellis v Morgan, Bester v Easigas (Pty) Ltd and Another *supra* fn3; Coetser v Henning and Ente No 1926 (TPD) 401 at 404; Goldfields Investments Ltd and Another v City Council of Johannesburg and Another 1938 (TPD) 551 at 557

[13.1] Firstly, on the issue of the duration of the appointment of the arbitrator he was given only one month within which to finalise the arbitration. This was in fact the agreement of the parties as they initially seem not to have opposed the time set for that purpose. In view of the stipulated duration of the arbitration period the hands of the arbitrator were tied in this regard.

[13.2] Secondly, on the issue of the amended statement of claim and other related issues which applicant had not had sight of, the arbitrator states clearly in annexure "K" that "in terms of the arbitration agreement your client is not required to file formal pleadings. If she chooses to do so she is however welcome". It, therefore, means that the arbitrator did not close the doors for the applicant to amend her papers. It is clear from the tone of the letter annexure "K" that the applicant would not be prevented from responding to the amended statement of claim which she claims not to have had sight of. The arbitrator's approach in that document is that of being flexible rather than vindictive as the applicant is suggesting.

[13.3] On the question of refusal to postpone the arbitration proceedings for reasons of applicant not securing legal counsel of her choice, the arbitrator is of the view that applicant had, from the 3rd September 2013, enough time to get an alternative legal representation. It was premature for the applicant to throw the towel and stop seeking alternative legal representation. It should be noted that the terms of the arbitration agreement were formulated and agreed to by the parties. Therefore, the parties were bound by the terms of that agreement. The arbitrator was therefore bound to work and make decisions based on the consideration of the terms of the agreement. One of those would be the one month duration of the arbitration within which to finalise it. On page 190 of the record the arbitrator's letter therein from the second sentence to the last paragraph reads:

> "An arbitration clause in an agreement forms a contract between the parties. I have now become a party to this contract through my appointment. I can only operate in terms of the terms of the agreement and part of the mandate includes a time constraint. The arbitration is to be conducted and brought to finality within 1 month and it is not a question of forcing the matter to ripeness.
>
> I have no power whatsoever to vary the arbitration clause between the parties. Both parties are equally affected by the time constraints.
>
> You give no detail on what basis it is suggested that the procedure currently being adopted is not what she had consented to. If she had agreed to a different arbitration mechanism may I please have a copy of same.
>
> The arbitration in this matter is a contractually agreed dispute resolution mechanism. As I have been appointed in terms of the contract I have a responsibility to both parties to ensure that the dispute is resolved as per the agreement. It is ultimately the resolution of the dispute in a speedy manner is supposed to be in the best interests of both parties. I simply lack the capacity or competence to extend the agreement beyond the time period the parties have agreed to. In order for me to comply with my contractual obligation. I have to resolve the dispute within 1 month. I do not intend being in breach of the agreement."

[14] In my view, the arbitrator's conduct did not amount to gross irregularity when he considered all the concerns and requests of the applicant. I say so because he furnished reasons to the applicant for suggesting to the applicant to seek the services of an alternative legal representation. This being mainly the time set for the arbitration to be commenced and finalised. Secondly, applicant having been given the opportunity to seek alternative counsel, it seems to me that according to the arbitrator there was no reason why the arbitration proceedings could not take place on dates commencing on 23rd September 2013 to the final day of the duration of the arbitration. In terms of the arbitration agreement the parties were not required to file

formal pleadings as the applicant insists. And that the arbitrator in terms of the agreement intended to follow an informal procedure at the arbitration tribunal.

[15] During argument of the application, Mr Tsangarakis relied on the decision of this division in ***Nick's Fishmonger Holdings (Pty) Ltd v De Sousa***[5] (***Nick's*** case) in his application to have the date of the arbitration proceedings postponed by reason of the fact that there is no order of the Court staying the proceedings in the High Court.

[16] In my view, the facts of the current case are distinguishable from those of ***Nick's*** case *supra*. In that case it was held that a defendant who wished to invoke an arbitration clause could secure a stay of proceedings either by bringing an application in terms of the provision of the Arbitration Act[6] or by filing a special plea requesting a stay under the common law. In the present case the issue is a review of the conduct of the second respondent refusing to grant the postponement of the arbitration proceedings. In our case, there could have been no reason for an application for a stay of execution because the parties had already agreed to refer the matter to arbitration and this needed no Court order for doing so. In the present application, in my view, the main purpose of the application for the postponement of the arbitration is to allow the applicant to secure the services of counsel of her choice. After all, by the 3rd September 2013 when the letter was written by the arbitrator to communicate to applicant the former's refusal of legal representation, the applicant still had sufficient time to seek the Court order to stay the proceedings

[5] 2003(2) SA 278 (SECLD)
[6] Section 6 of the Arbitration Act 42 of 1965

in the High Court. For that purpose she did not need to get an order of this Court and by way of urgency.

[17] The reasoning for the Courts, in interpreting the Arbitration Act, to be loath to interfere with the discretion of the arbitrator's decision is, in my view, *inter alia*, that:

[17.1] The referral of their dispute to an arbitrator would have been the choice of the parties.

[17.2] The parties would have the liberty directly or indirectly to appoint a person of their choice who would arbitrate their dispute. It is unlike a situation where the matter goes to Court and the Court itself appoints the adjudicator in the form of a Judge or Magistrate.

[17.3] The proceedings in the arbitration are always on the terms of the parties and no one else interferes unlike in a Court where the rules are imposed by the Court and not by the parties.

[17.4] There is also the only protection against an irregularity or illegality which is by way of review of the proceedings albeit on rather exceptional grounds stated by the authorities quoted *supra*.

[18] It, therefore, follows from the authorities cited above, that once the arbitrator has exercised its discretion as envisaged in the cases quoted *supra*[7] and that there was some evidence on which such discretion was exercised, a Court will not interfere even if the ruling was erroneous or unreasonable. In the result in this case there is sufficient evidence for the arbitrator to justify his finding.

[7] Tuesday Industries v Condor Industries and Another *supra* (and other judgments)

[19] For the above reasons, I have no grounds to interfere with the decision made by the second respondent.

[20] In the result, I make the following order:

[20.1] The application is dismissed with costs.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant	**:**	**Adv Tsangarakis**
Instructed by	**:**	**Neville Borman & Botha** **GRAHAMSTOWN** **(Ref: Mr Powers / Rene)**
Counsel for the first respondent	**:**	**Adv JJ Nepgen**
Instructed by	**:**	**Nolte Smit Attorneys** **GRAHAMSTOWN** **(Ref: SA/NOL14/0076)**