REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 3323/2013
Date heard: 6.3.2014
Date delivered: 7.8.2014

In the matter between:

GYSBERT JACOBUS VAN DEVENTER	**First Applicant / Third Defendant**
ADDO AFRIQUE SAFARI LODGE	**Second Applicant / Fourth Defendant**

vs

ANTHONY LAURISTON BIGGS	**First Respondent / First Plaintiff**
RIDGE FARM CC	**Second Respondent / Second Plaintiff**
ALLAN COUSINS	**Third Respondent / First Defendant**
GERALD WHITEHEAD	**Fourth Respondent / Second Defendant**
ADDO AFRIQUE ESTATE (PTY) LTD	**Fifth Respondent / Fifth Defendant**
ADDO AFRIQUE ESTATE PORTION 21 (PTY) LTD	**Sixth Respondent / Sixth Defendant**
ANTHONY BIGGS N.O.	**Seventh Respondent / Seventh Defendant**
LARA BIGGS N.O.	**Eight Respondent / Eighth Defendant**
MARK ANTHONY BIGGS N.O.	**Ninth Respondent / Ninth Defendant**
ANDRE PRETORIUS N.O.	**Tenth Respondent / Tenth Defendant**

JUDGMENT ON APPLICATION TO SET ASIDE SUMMONS

SUMMARY - In this matter applicants have applied for the setting aside of the respondents' summons on various grounds which are, *inter alia*, the following:

(a) that the settlement agreement embodied in the order of the Court "POC1" binds the parties also in the present litigation and could not be challenged or reviewed;
(b) that the procedure by way of Rule 53 should have been followed to the letter by the respondents;
(c) that the proceedings sought to be set aside by the applicants were arbitration proceedings in respect of which:

(i) the respondents could only attack in terms of section 33 (1) of the Arbitration Act 42 of 1965;
(ii) that in terms of the Arbitration Act respondents were out of time in their attempt to have the proceedings set aside.

The Court held, *inter alia*, that whenever two parties agree to refer a matter to a third party for decision, and further agree that this decision is to be final and binding on them, so long as he or she (arbitrator) arrives at his or her decision honestly and in good faith, the two parties are bound by it. (***Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*** 2008 (2) SA 448 at 455).

TSHIKI J:

A) INTRODUCTION

[1] The parties in these proceedings are engaged in a protracted litigation especially by way of interlocutory applications. Two of those applications have been argued before me and initially I intended to make a combined judgment in respect of the applications argued before me on the 6th March 2014 (the application for setting aside the summons) as well as on the 9th June 2014 in respect of the application for leading further evidence and to amend. I have decided to separate the two applications and to deal with them *seriatim* and in this judgment I will proceed with the application for setting aside of the summons. In the application for setting aside of the summons, the parties are cited as they are reflected in the cover of this judgment.

[2] During argument *Mr KJ Kemp SC* with him *Mr B Pretorius* appeared for the applicants and *Mr A Beyleveld SC* appeared for the respondents.

B) APPLICATION FOR SETTING ASIDE OF THE SUMMONS

[3] Briefly the facts herein are that the first plaintiff and first defendant in the action initially entered into a partnership to develop some land as a game farm and into various lots. They did so through the corporate vehicles including the second plaintiff and the second defendant. The first plaintiff herein is Mr Anthony Lauriston Biggs and the second plaintiff is Ridge Farm CC. Whereas the first and second defendants herein are Mr Gysbert Jacobus van Deventer and his business Addo Afrique Safari Lodge, respectively. A major dispute arose between the parties related to the amounts of their respective loan accounts and how parity should be achieved as well as how to equalise them to give effect to their 50% participation. This dispute led to a Court litigation between them.

[4] The parties to those proceedings subsequently concluded a written Settlement Agreement (a transactio). The said agreement was recorded in those proceedings as annexure “POC1” whose contents were made an order of this Court. The first and second defendants (Allan Cousins and Gerald Whitehead) were appointed as substitute Directors in the fifth defendant. It is common cause that in terms of clause 2(a) of the said agreement “POC1” the purpose of the agreement was to remove the first plaintiff (Biggs) and third defendant (Van Deventer) as Directors and to appoint first and second defendants (Counsins and Whitehead) as substitute Directors. This was done to ensure that the best interests of the company are served. The substitute Directors were then given powers and functions which were recorded in annexure “A”. The substitute Directors, after written representations were made by the parties, made a determination with regards to the loan accounts of the parties. Pursuant to clause 6 of annexure “A” to the agreement

the substitute Directors determined the values of the loan accounts as clearly stated in the summons.

[5] One of the settlements deals specifically with the determination of the loan accounts of the parties herein which were to be dealt with without delay and at the earliest convenience. The parties specifically agreed that the decisions reached by the Auditors and or valuers etc (substitute Directors) shall be final and binding on all the parties thereto. The aforesaid loan accounts shall be determined in the sole and absolute discretion of the substitute Directors who shall be guided by generally accepted accounting principles whose decisions shall be final and binding on the parties concerned.

[6] The fact that the parties had agreed to have the decisions and determinations a final and binding effect shows that their agreement is a sort of a hybrid arbitration expert determination. The action by Mr Biggs filed on the 14th November 2012 was filed with a view to attack the settlement. The parties herein could not then have the right to have the merits of the dispute reconsidered or re-litigated in any manner unless such interference is permitted on the grounds of procedural irregularities a set out in section 33 (1) of the Arbitration Act 42 of 1965 (the Arbitration Act) which reads:

> "(1) Where-
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> (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,

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."

[7] None of the above requirements have application in the present proceedings and respondents do not rely on the provisions of section 33 (1) of the Arbitration Act either. Therefore, no attack has and can be made by the respondents herein in terms of section 33(1) of the Arbitration Act.

[8] In their application herein the applicants contend that this Court should, in addition to other reliefs sought, grant a declaratory order that the determination by the substitute Directors (third and fourth respondents – Allan Cousins and Gerald Whitehead) made on the 22nd April 2013 is lawful, final and binding on applicants and on one to tenth respondents and that the loan accounts referred to therein are by virtue of the land allocation therein equalised. That an order be granted authorising the substitute Directors forthwith in terms of paragraphs 2(b), 15 and 16 of annexure "POC1" to engage and negotiate a settlement with the South African National Parks on terms acceptable to them and in terms of the aforementioned order without undue delay and in the best interests of fifth and sixth respondents. And that the provisions of paragraph 20 of "POC1'" be implemented and that first applicant and first to tenth respondents be ordered to comply with the Court order without delay. Costs were requested on an attorney and client scale.

[9] First, second and seventh to tenth respondents have opposed the application on the grounds, *inter alia*, that:

[9.1] The Boshoff valuation of the property was fictitious and as such unrealistic and not market related and that the only valuation by Boshoff was accepted without

having regard to other valuations notwithstanding that the valuation was ridiculously low and unrealistic and that such valuations do not compete with the valuations of the neighbouring properties of the same nature and size.

[9.2] The subdivision and rezoning were done illegally and unlawfully and doing so utilizing the provisions of section 10(3) of the land Reform: Provision of Land and Assistance Act 126 of 1993. Therefore, in terms of section 10(3) of that Act the provisions of the Subdivision of the Agricultural Land Act are not applicable.

[9.3] Respondents' objections are to set aside the determination in order to have a fair valuation done for the plots to be correctly determined in the equalisation.

[9.4] The action proceedings are in any event appropriate herein and not review proceedings in terms of Rule 53 nor review in terms of Promotion of Administrative Justice Act 3 of 2000 (PAJA). This is so especially that significant factual disputes between all parties is self-evident and such can only be resolved by way of oral evidence.

[9.5] The substitute Directors themselves, despite having taken a position that their determination of the 22nd April 2012 is binding, they confirmed in a letter that they would review the Boshoff valuations if the deponent herein disproved same. According to respondents the substitute Directors themselves had also purported to reconsider their determination and furnished such substituted determination on the 8th May 2013 (annexure "POC3").

[9.6] There is a need for Mr Boshoff to explain to the trial Court how he arrived at his valuation which increased a R3 million valuation overnight to a R50 million value.

[9.7] The application has been brought in the normal course on standard limits in terms of Rule 6 in terms of which the practice is to have dates allocated after all the

set of papers have been filed. Therefore, the allocation of a date for hearing prior to the filing of the papers is irregular.

[9.8] That as the applicants have alleged in the founding affidavit that the relief sought is based upon an alleged abusive Court process, irregular and excipiable proceedings, therefore, an exception and not an application is applicable in the circumstances.

[9.9] That the question of whether or not the substitute Directors' determination of 22 April 2013 is reasonable is *lis pendens*. It, therefore, is not open to the applicants to try at this stage to non-suit deponent (first respondent) or attempts to set aside the substitute Directors' determination.

[9.10] First respondent's objections are to set aside the determination in order to have a fair valuation done for the plots to be correctly determined in the loan equalisation. And that it is beyond doubt that Boshoff had valued plot 40 on the basis of business rights and that the substitute Directors were aware thereof, but knew full well that there was no possibility of plot 40 ever obtaining business rights.

[9.11] As far as the utilisation of action proceedings are concerned, legal argument will be presented at the hearing of the application, that action proceedings are appropriate and this is not a review in terms of Rule 53, nor in terms of PAJA, as contended by applicant. It is more than an attack on a contractual determination done by the substitute Directors.

[9.12] There is also no wisdom to proceed in terms of Rule 53 in the face of a factual dispute.

[9.13] As for the complaint against the substitute Directors, it was implied that they would act reasonably and take into account all relevant factors in executing their mandate in terms of the Settlement Agreement. He did not anticipate that they

would act irregularly or take into account irrelevant considerations. Deponent contends that he is not satisfied with the determination as a result he has been arbitrarily awarded property worth a couple of thousand rand to offset a disparity in the loan account of R3.7 million.

[9.14] The sole purpose of the action proceedings is to set aside the determination. He offered arbitration as an alternative to expedite the resolution, but it was refused. The very issue to be determined by the Court in the action proceedings relates to the lawfulness and reasonableness of the determination which the applicant now seeks to pre-empt.

[10] It should be noted from the contents of the first respondent's answer in paragraph 10 that the latter alleges that the substitute Directors were aware of the fact that the so-called Boshoff valuations were fictitious and unrealistic and not market related yet they preferred to rely on such valuations. In paragraph 34.10 of the answering (opposing) affidavit first respondent states that the so-called Crous valuation "was not forthcoming in [the] before the determination." On page 416 to 419 of the record annexure "POC2" it is stated that the Boshoff valuations were done in June 2010 by John Boshoff "and it has been ascertained that he appears to have had extensive experience in this nature of work." On page 419 first paragraph it is stated as follows:

> "We as substitute directors, are still extremely puzzled by the fact that the Boshoff valuations were never requested by either party until a month ago. In fact there were clear acceptance by both parties and in this regard as late as 5 March 2013. We refer to annexure "M" and "N" and "O"."

[11] It also appears from the contents of annexure "POC2" that the first respondent had in fact agreed that the Boshoff valuations be used by the substitute

Directors for purposes of the determination. It was only at the latter stage that the first respondent changed his stance and decided to dispute the Boshoff valuations.

C) REASONS FOR JUDGMENT IN RESPECT OF APPLICATION FOR SETTING ASIDE OF PROCEEDINGS

[12] *Mr Kemp* has submitted that the settlement as embodied in the order of Court ("POC1") binds the parties also in this litigation. He referred this Court to various decided cases which I intend to deal with in due course.

[13] The first and second applicants and others were affected by the predicament of the first two respondents and have decided to agree to a settlement annexure "POC1" which was made an order of the Court. In the process they agreed to the removal of both the applicants in these proceedings (Gysbert Jacobus van Deventer and Addo Afrique Safari Lodge) as directors and did so forthwith until reinstated by the below substituted Directors in their absolute discretion. Therefore, Allan Cousins and Gerald Whitehead of Allan Cousins Business Trust and its successors in title were then appointed as substitute Directors. It is specifically stated in paragraph 2(a) of annexure "POC1" that the parties agreed that the purposes of this order of removing the current directors and appointed the named substitutes was to ensure that the best interests of AAE are served by ensuring that independent and impartial decisions are made without the decision making directors of AAE and AAE21 having any conflicting interests with those interests of AAE or AAE21. It is also recorded that any party hereto requiring his or her loan account determined shall submit his or its respective loan accounts and representations justifying them to the substitute Directors and copy same to other parties thereto in the manner prescribed in the agreement "POC1".

[14] It is clear from the contents of "POC1" that the first two respondents and others had agreed to deal with the activities of their business in terms of the contents of annexure "POC1". The parties' major disputes related to the amounts of their respective loan accounts and how parity should be achieved were to be referred to the newly appointed substitute Directors. For the purpose of properly executing their functions as substitute Directors all parties hereto were to fully indemnify both substitute Directors referred to in the agreement. This is so, in respect of all decisions made in the execution of their duties and in respect of which no action for damages shall lie.

[15] The aforesaid Directors would determine the extent of the loan accounts and determine how equalization contemplated by property transfers would have to be done after the basic process being agreed to.

[16] It is clear from the nature of the agreement that the mandate given to the Directors was akin to that of an arbitrator. This in fact has been conceded to by the first respondent herein in his answering affidavit. Therefore, it seems to me that the respondents, by their summons, seek to challenge their own agreement ("POC1").

[17] For that reason, and in my view, the respondents cannot eat their cake and still have it. They cannot agree to a binding agreement giving rise to the consequences of an arbitration and thereafter seek to resile from the consequences of such agreement. This is more so, when the respondents have not even challenged the contents of the agreement "POC1" in any manner whatsoever,

instead they have agreed to and signed it as binding them in all respects. ‘Arbitration does not fall within the purview of administrative action. It arises through the exercise of private rather than public powers. This follows from arbitration’s distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed. See *Mustill and Boyd Commecial Arbieration* 2nd ed (1989) at 41’. (***Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another*** 2002 (4) SA 661 at 673 para [24]).

[18] *Mr Beyleveld* sought to convince the Court that the Directors referred to in the present case cannot be referred to as arbitrators. He also submitted that the proceedings instituted by the respondents is not a review in terms of Rule 53. He conceded though that the action that has been instituted by respondents was not intended to be a review and certainly it is not such proceeding. For those reasons he submitted that the suggestions that the plaintiffs are trying to review a decision is not correct. According to him "It is what it intends what it does and what it intended to do, is to set aside a valuation by the, let’s call them valuers".

[19] Where there is a tribunal which the plaintiff (or any other party to those proceedings) has accepted as the final judgment of the matter he or she brings before Court, the Court cannot deal with it, it belongs to another place. The plaintiffs herein have not even alleged dishonesty or bad faith on the part of the substitute Directors. In any event, they are the very parties who also selected and appointed the directors aforementioned. In ***Telcordia Technologies Inc v Telkom SA Ltd*** 2007 (3) SA 266 (SCA) para [50-51] Harms JA, in similar circumstances as *in casu*, stated:

> "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. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case. Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in section 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 by agreement impose jurisdiction on the court ..."

[20] For the respondents (plaintiffs) to challenge the proceedings and decision or determination of the arbitrator they can only do so in terms of section 33(1) of the Arbitration Act which is that the arbitrator(s) acted with "gross irregularity" and had exceeded their powers. To do so, the tribunal must have purported to exercise a power which it did not have or had erroneously exercised a power it did not have. No such allegations have been suggested in this case. In the present case, the attack on the determination is based on inadequacies, material errors of fact and/or law. Such grounds would not suffice to set aside an arbitral award let alone a

mandated determination as the one in this case (***Dumani v Nair and Another*** 2013 (2) SA 274 (SCA) at para [29-33]).

[21] The plaintiffs herein have also sought to suggest directly or indirectly that there is a *bona fide* dispute of fact which in any event has not been characterized or explained in clear exactitude. Even if this refers to bad mistake or error of judgment, this cannot assist the respondents for the reason that it cannot assist them to make such allegations. This is so, because the Arbitration Act provides that the arbitrator's decision can only be challenged within six (6) weeks after it has been awarded. It is one of the risks one takes by contractually expose himself or herself in contracting for a final and binding arbitral and more so expert determination.

[22] It has also been suggested by *Mr Beyleveld* that the substitute Directors could not have been characterized as Arbitrators when in fact they are valuers. Therefore, their mandate could not have been that of an Arbitrator in terms of the Arbitration Act. It seems to me that the parties herein had agreed to and contracted for a final and binding resolution of the loan account disputes by the newly agreed Directors who were auditors/accountants in a more open ended process than arbitration. The Directors would determine the extent of the loan accounts and determine how equalization would have to be done. It was in fact the intention of the parties that the outcome of the decision by the Directors would bind the parties and such decision would be final.

[23] It does not appear to me that such proceedings have any other name other than arbitration proceedings in respect of which the provisions of the Arbitration Act

apply. This has also been the case in ***Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*** 2008 (2) SA 448 at 455 para 22 where Ponnan JA remarked as follows:

> "It seems to me that the parties intended the Arbitration Act to apply to their dispute, within the limits of their agreement. A finding that Andrews was a valuer would not assist Lufuno and does not require a decision. Unlike an arbitrator, a valuer does not perform a *quasi*-judicial function but reaches his decision based on his own knowledge, independently or supplemented if he thinks fit by material (which need not conform to the rules of evidence) placed before him by either party. **Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it**. It has not been suggested that Andrew's decision was not arrived at honestly and in good faith. Nor was such a case made out on the papers. Here as well therefore, Lufuno must fail." (My emphasis). See also ***SA Breweries Ltd v Shoprite Holdings Ltd*** 2008 (1) SA 203 (SCA).

[24] It follows from the contents of the above passage that the similar submissions by *Mr Beyleveld* must fail for the reason that even in the present case the same *modus operandi* was applied. The decision was therefore arrived at honestly and in good faith. At least, in my view, there is no suggestion to the contrary.

[25] The fact that the contents of "POC1" which bind the parties have not been challenged by the respondents means that they cannot at this stage successfully challenge the applicants' contentions.

[26] This now leads me to the issue whether or not the application has not been filed out of time as would have been expected of proceedings for review brought by way of Rule 53 application. *Mr Beyleveld* has also submitted that this Court should

condone the applicant's failure to use Rule 53 proceedings. Therefore, according to respondent, the present proceedings can be condoned. I do not agree. The wording of Rule 53 reviews provides:

> "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial*, quasi* judicial or administrate functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the Court, tribunal or board or to the officer, as the case may be, and to all other parties affected -
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> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
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> (b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so
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[27] It seems to me that no Court should promote the flagrant disregard of the rules of the Court for doing so will lead to chaos and disregard of the purpose for which the Rules were formulated. This is so, for the reason, *inter alia*, that the Rule 53 procedure was formulated for the benefit and assistance of a litigant who feels aggrieved by a decision of a presiding officer, as it is in this case, which he or she seeks to set aside. (***Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd*** 1991

(2) SA 366 (C) at 368G; ***Jockey Club of South Africa v Forbes*** 1993 (1) SA 649 (A) at 661).

[28] Even though the Rule 53 procedure was formulated for the benefit and assistance of a litigant feeling aggrieved by a decision of a presiding officer, such a person may waive the right afforded to him or her by the rule. Be that as it may, the Court may condone a failure by a litigant to follow and apply Rule 53 in review proceedings in circumstances where this would result in impinging upon the procedural rights of a respondent (***SAFA v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons*** 2003 (3) SA 313 (SCA) at 319 para [5]). In the present case where the proceedings were dealt with by an arbitrator, as I have found, the respondent herein should have followed the wording of paragraphs (a) and (b) of Rule 53 contents of which clearly indicate that they should be followed in such proceedings. Respondents have failed to do so.

[29] It follows from the aforegoing that at this level of litigation where the respondent has in no way made any attempt to proceed in terms of Rule 53, in circumstances where the Rule should have been followed, no Court can condone the form of proceedings used by the respondent herein. It follows that what the applicants suggest, that the proceedings are an unsustainable abuse of civil process of the High Court is correct. This type of proceedings deserve a severe censure which it now receives and for obvious reasons I need not say more about it until at the end of this judgment.

[30] I must conclude by saying that I have made a finding that the proceedings by which the substitute Directors sought to determine the property valuations was done in the process of arbitration. For that reason the respondents have not complied with section 33 (1) and (2) of the Arbitration Act in that in terms of section (2) thereof an application for setting aside of the arbitration award shall be made within six weeks after the publication of the award to the parties. Therefore, for that reason the respondents' summons, even if it was to be accepted as the correct proceeding, is defective in that there has been no compliance with section 33 (2) of the Arbitration Act.

[31] Respondents do not seem to have responded to a notice to them in terms of Rule 32(b) for them to remove the summons as an irregular step. Indeed it is not the first irregular step proceeded with by the respondent. In a similar case in ***SA Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd and Others*** 2007 (6) SA 628 (D) paras [18-19] Magid J remarked as follows:

> "[18] 'There can be no doubt that every Court is entitled to protect itself and others against an abuse of its process'. (*Per* Mahomed CJ in *Beinash v Wixley* 1997 (3) SA 721 (SCA) ([1997] 2 ALL SA 241) at 734D (SA)). Indeed, I have no doubt that the learned Chief Justice had in mind in his use of the phrase 'itself and others' that the Court has a duty to protect litigants against the abuse of its process. I am therefore satisfied that if the issue of the subpoena amounts to an abuse of the process of the Court, the applicant has *locus standi* to move to set it aside.
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> [19] An abuse of the process of the Court occurs when 'an attempt [is] made to use for ulterior purposes machinery designed for better administration of justice'. (*Per* De Villiers JA in *Hudson v Hudson and Another* 1927 (AD) 259 at 268). And as Mahomed CJ said in *Beinash* (*supra)* at 734 F-G (SA) '(i)t can be said in general terms … that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used

for a purpose extraneous to that objective.' (See, too, *De Klerk v Scheepers and Others* 2005 (5) SA 244 (T) at 246 C-D)."

[32] I, therefore, agree with *Mr Kemp* that in the review proceedings the question is not whether the Boshoff valuations are market-related but is in fact whether the third and fourth respondents acted within their powers to provide the opportunity to make the representations and thereafter to accept the Boshoff valuations.

[33] It has been suggested by the respondents in their particulars of claim that the substitute Directors in determining the allocation relied exclusively and unreservedly on the valuations of John Boshoff. At all times material herein the substitute Directors were obliged to discharge their obligations in terms of the settlement agreement "POC1" in a reasonable manner. In doing so, they would have regard to the legitimate representations and factors which would influence any determination as to the value of the property for the purposes of equalizing the loan accounts. Therefore, the substitute Directors in this regard were obliged to meaningfully engage and confirm on a reasonable basis with the respondent (plaintiff).

[34] It also follows that the substitute Directors were under an obligation to investigate and verify the reasonable values to be placed on the properties and to ensure that any property allocated to the plaintiff in order to equalise the loan accounts were reasonably and realistically valued.

[35] In their allegation the first and second respondents contended that third and fourth respondents failed to verify and/or determine the correctness or otherwise of the essential facts with reference to valuation of the properties. They, therefore,

based their valuation on facts and/or information which was clearly wrong. The only factual allegations by first and second respondents by which they rely in their application to set aside the determination of third and fourth respondents relates to the Boshoff Valuation and the manner in which it was accepted by third and fourth respondents.

[36] As already stated, the full record of the proceedings was not annexed to their particulars of claim. For instance, the first and second applicants and first and second respondents' representations were not annexed to the particulars of claim. This also includes the representations made by first and second applicants as well as first and second respondents' queries from the third and fourth respondents as well as the parties' replies annexed as "GVD2" to "GVD7" to the founding affidavit. The only valuations annexed by the first and second respondents before the third and fourth respondents were the Boshoff valuations and nothing more.

[37] The above criticism by the respondents against the applicants does not justify the Court's granting of a declaratory order as prayed for in prayer 4 of the Notice of Motion in their action proceedings. As already alluded to above it is trite law that the grounds upon which the determination of the third and fourth respondents can be attacked and taken on review are extremely limited especially in a case where the parties had agreed that the determination shall be final and binding on all parties. In ***Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd*** 1994 (1) SA 162 (AD) at 169A-E the Court per Goldstone JA emphasized that the Arbitration Act provides that an arbitration award shall "be final and not subject

to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms".

[38] It is only in those cases which fall within the provisions of section 33 (1) of the Arbitration Act that a Court is empowered to intervene. If an arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under section 33 (1)(b). As to misconduct, it is clear that the wording does not extend to *bona fide* mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award: ***Dickenson & Brown v Fisher's Executors*** 1915 (AD) 166 at 174-8. It was held in ***Donner v Ehrlich*** 1928 (WLD) 159 at 161 that even gross mistake, unless it establishes *mala fides or partiality, would be insufficient to warrant interference*.

[39] The failure by the respondent to proceed by way of Rule 53 has deprived the Court of the opportunity to hear the full record. Had the full record been placed before Court reviewing the determination, that Court would, with reference to the record, decide on all the issues and allegations referred to in the Particulars of Claim. In any event, there is no justification for the respondents to have the determinations reviewed in the circumstances because, in my view, there are no grounds upon which the determinations can be reviewed. It follows, therefore, that the applicants succeed in their application. It also follows that by reason of having proceeded in terms of Rule 53 whose requirements have not been followed by the plaintiffs the whole proceedings were a nullity and therefore, no amendment of such proceedings could have been granted.

[40] The applicant's prayer for joining Addo Afrique Estate Portion 21 (Pty) Ltd as the sixth respondent has not been opposed and it is hereby granted.

D) COSTS

[41] The applicants herein have asked for costs on the scale as between attorney and client. An award of attorney and client costs will not be lightly granted, as the Courts look upon such orders with disfavour and are loath to penalise a litigant who has exercised his or her right to obtain a judicial decision on any complaint he may have. (*Erasmus – Superior Court Practice* – revision service 44).

[42] In my view, punitive costs such as those normally referred to as attorney and client costs should be reserved for litigants who are guilty of dishonesty or fraud. This can also be the case with regard to litigants who are reckless, vexatious and malicious or frivolous.

[43] In the present case, the respondents have been assisted by their legal representatives in the conduct of their case who must have advised their clients to proceed with the case on the understanding that they have a good or arguable case. I do not think that the nature of respondents' case warrants an order of costs on a punitive scale. The history of the matter also does not suggest that their litigation has been based on ulterior or improper motives or that the respondents have acted unreasonably in the conduct of their case. Therefore, I decline to grant an order of costs on the scale as between attorney and client.

[44] In the result, I grant an order in the following terms:

[44.1] **I therefore grant an order in terms of prayers 3-8 of the Notice of Motion.**

[44.2] **The first and second respondents are ordered to pay costs of this application, such costs to include costs occasioned by the employment of two counsel which costs are to be paid jointly and severally, the one paying the other to be absolved.**

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

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