IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 1611/2022

In the matter between:

VLEISSENTRAAL BETHLEHEM (PTY) LTD Applicant

and

KONSORTIUM OPERATIONS (PTY) LTD First Respondent
FREDERIK DANIEL JACOBUS BRAND N.O. Second Respondent
LORIMER ERIC LEACH N.O. Third Respondent
EBERHARD BERTELSMAN N.O. Fourth Respondent
BURTON FOURIE N.O. Fifth Respondent

Case number: 1728/2022

In the matter between:

KONSORTIUM OPERATIONS (PTY) LTD Applicant

and

VLEISSENTRAAL BETHLEHEM (PTY) LTD Respondent

CORAM: NAIDOO, J et LOUBSER, J

HEARD ON: 17 OCTOBER 2022

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 31 JANUARY 2023. The date and time for hand-down is deemed to be 31 JANUARY 2023 at 11:00

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[1] In this instance the court is seized with two different applications emanating from the same arbitration proceedings. In the first application (1611/2022) the applicant seeks an order reviewing and correcting or setting aside an arbitration award made by the second respondent against the applicant, as well as an order reviewing and correcting or setting aside the subsequent arbitration appeal award by the third, fourth and fifth respondents confirming the initial award. In a further prayer the applicant seeks an order declaring that the first respondent is not entitled to recover the amount of the award without deduction of the amount it received subsequent to a settlement of its claim in the arbitration against Paul Steyn Boerdery (Pty) Ltd (in liquidation). In the arbitration proceedings itself Konsortium featured as the claimant, while Paul Steyn Boerdery (PSB) was the first defendant, Vleissentraal Bethlehem the second defendant and Standard Bank the third defendant. On the first day of the arbitration proceedings Konsortium entered into a settlement agreement with the liquidators of PSB and with Standard Bank, with the result that the only disputes remaining were between Konsortium and Vleissentraal.

[2] To avoid confusion, and for the sake of convenience, the parties are referred to by name and not as they are cited in the two applications. In the second application (1728/2022) Konsortium seeks an order to the effect that the award made by the arbitrator and the subsequent award by the arbitration appeal panel confirming that award, be made an order of court. It follows that the two applications are inextricably bound since they involve the same legal issues. They were therefore heard together, as separate hearings would lead to a multiplicity of hearings on the same issues, and the possibility of different outcomes by differently constituted

courts. In this judgement, the second application will be referred to as the "enforcement application".

[3] The review application is brought in terms of the provisions of section 33(1) of the Arbitration Act.[1] The section provides as follows:

"33(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".

[4] The circumstances under which an arbitration award may be reviewed and set aside by a court are therefore of a limited nature. In the present case, the applicant in the review application, Vleissentraal, relies on two of the grounds under section 33(1). Firstly, Vleissentraal submits that the arbitration panels exceeded their powers in making determinations on a claim that did not arise under the arbitration agreement. To put it differently, it contends that they acted *ultra vires* or outside the jurisdiction afforded to them by the arbitration agreement. Secondly, Vleissentraal submits that the award was improperly obtained due to the non-disclosure of a material fact by Konsortium, which material fact it was under a duty to disclose.

[5] In order to give perspective to the grounds of review, the following needs to be mentioned: In the arbitration proceedings Konsortium claimed an award declaring that it was the owner of a number of ewes, and payment of the amount of R7 108 376.49 plus interest by the first defendant, namely PSB (in liquidation). In the alternative, and in the event of the arbitrator finding that Konsortium was not the owner of the sheep, Konsortium claimed payment of the amount of R6 773 880.00 from Vleissentraal, who is now the applicant in the review application.

[1] **Act 42 of 1965**

[6] On the first day of the arbitration proceedings, the arbitrator (second respondent) was informed by Konsortium that its claim against PSB and Standard Bank had become settled. The contents and the terms of the settlement agreement were not disclosed to the arbitrator. The arbitrator then proceeded to hear evidence in respect of the alternative claim against Vleissentraal, and he eventually found that Konsortium was not the owner of the ewes. He then made an award directing Vleissentraal to pay to Konsortium the amount of R6 773 880.00 plus interest. It is this award that is now challenged on the basis that the arbitrator had exceeded his powers by considering the claim against the second defendant, which was stated in the alternative. When the claim against PSB became settled, there was nothing left to be considered as an alternative, it is contended by Vleissentraal.

[7] At this point it is perhaps apposite to refer to the facts that gave rise to the arbitration proceedings.

[8] Konsortium's claim against PSB was premised on a joint venture agreement it had with PSB. This agreement provided that Konsortium shall deliver sheep to PSB, of which Konsortium shall at all times retain ownership. Konsortium alleged that, for purposes of the agreement, it purchased 2 740 head of sheep for an amount of R6 773 880.00 through its duly authorised livestock agent Vleissentraal, which sheep were delivered to the joint venture, or then to PSB. However, Vleissentraal never informed Konsortium that the sheep were purchased from PSB itself.

[9] Hereafter PSB was wound up and the liquidators took possession of the sheep in question, which were the subject of the joint venture agreement. When Konsortium requested delivery of the sheep on the basis that they were the owners of the sheep, the liquidators refused to give them up, contending that they still belong to PSB. This dispute as to whether ownership of the sheep had passed to Konsortium or not, was eventually referred to the arbitration which now forms the subject matter of the review application. As mentioned earlier, Konsortium's claim against Vleissentraal was in the alternative and in the event that the arbitrator finds that Konsortium was not the owner of the sheep. In such event, according to the statement of claim, Konsortium claimed against Vleissentraal on the basis of a negligent, alternatively fraudulent breach by Vleissentraal of its livestock agency agreement with Konsortium.

[10] Konsortium's alternative claim against Vleissentraal was premised on the allegation that Vleissentraal intentionally, alternatively negligently made a misrepresentation that it had taken possession of the sheep from the seller, and in doing so, transferred ownership of the sheep to Konsortium. Further to this, that it transported the sheep from the seller to PSB and delivered the sheep to PSB, in circumstances where Vleissentraal knew that PSB itself was the seller of the sheep, and that Vleissentraal never effected the transfer of ownership of the sheep to Konsortium by taking possession of the sheep. Vleissentraal also never transported the sheep to PSB and the sheep were never delivered to PSB. After hearing evidence, the arbitrator found in favour of Konsortium on the issue of a misrepresentation by Vleissentraal, and came to the conclusion that Konsortium did therefore not become owner of the ewes.

[11] In his award the arbitrator referred to the fact that the terms of the settlement agreement remained undisclosed. He pointed out that it was argued that because the terms remained undisclosed, it is unknown whether Konsortium received any benefit from the settlement which would obviously reduce its loss. The arbitrator then reasoned as follows: "On the pleadings the claim of Konsortium against PSB is premised exclusively on the basis that Konsortium was the owner of the sheep. It follows that if it was not, it had no claim against PSB. Any benefit it received from the settlement would therefore be *res inter alios acta* as far as Vleissentraal is concerned." Broadly speaking, *res inter alios acta* is a reference to a collateral issue.

[12] It was further pointed out in the award that the claim against Vleissentraal, for the amount of R6 773 880.00, represents the sum that Konsortium had paid for the sheep. The claim of R7 108 376.49 against PSB arose as follows: Because of the dispute regarding the ownership of the sheep, the sheep were sold by agreement, and the proceeds of the sale, namely the amount mentioned, were invested in an interest-bearing trust account pending the outcome of the arbitration.

[13] Earlier in the award, the arbitrator came to the following conclusion in respect of the alternative claim against Vleissentraal: "It is true that the claim against Vleissentraal is premised on the basis that Konsortium did not become owner of the ewes. If I should therefore find, as contended for by Vleissentraal, that

Konsortium in fact became the owner of the ewes, the claim cannot succeed. But if I should come to the opposite conclusion, namely that Konsortium did not become owner, the premise of the claim against Vleissentraal would be established. The fact that PSB is no longer a party would be of no consequence".

[14] 0n behalf of Vleissentraal it was contended before us that, in this respect, the arbitrator exceeded his powers by considering the claim against Vleissentraal and determining the ownership of the sheep in circumstances where Konsortium did not pursue its claim against PSB because of the settlement it had reached with PSB. The result of the settlement was that the determination of ownership in Konsortium's claim against PSB was taken out of the hands of the arbitrator by the settlement agreement, the argument went. This is so, it was submitted, because Konsortium pleaded in respect of its claim against Vleissentraal as follows: "In the alternative, and in the event that the arbitrator finds that Konsortium was not the owner of the sheep, as it is alleged by the liquidators of PSB, then and in that event, Konsortium pleads as follows."

[15] The appeal panel succinctly dealt with this argument by pointing out that Konsortium could at any time have sued Vleissentraal without PSB being a party to the litigation, although it could only succeed on establishing that it had not become the owner of the sheep. The panel further pointed out that the ownership of the sheep was essentially what the arbitrator was called upon to decide in the referral to arbitration and the pleadings subsequently filed.

[16] I respectfully agree with the exposition provided by the appeal panel. By the time the arbitrator proceeded to deal with the claim against Vleissentraal, and the issue of ownership, PSB was no longer involved in the proceedings. That fact could not affect Vleissentraal adversely, because Konsortium could have claimed from it without the presence of PSB as a party to the litigation in any event. Moreover, the pleadings expressly called upon the arbitrator to decide the issue of ownership, albeit in the alternative, by stating that "in the event that the arbitrator finds that Konsortium was not the owner of the sheep … Konsortium pleads as follows". This is exactly what Konsortium could and should have pleaded in a separate action against only Vleissentraal, namely that Konsortium was not the owner of the sheep. The settlement agreement with PSB could therefore never preclude

Konsortium from pursuing its claim against Vleissentraal in the arbitration proceedings, and the arbitrator did not act *ultra vires* by proceeding to determine the issue of ownership.

[17] In this respect it must be emphasized that arbitrators do not have inherent jurisdiction. An arbitrator's powers emanate from the arbitration agreement between the parties, and as such, an arbitrator is confined to the issues as defined and delineated by the parties. In **Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare and others**[2] the Supreme Court of Appeal stated this principle as follows: "In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded."[3] In the present case the arbitration agreement stated that, if Konsortium is unsuccessful in its claim for delivery of the sheep from PSB, and in the event of it being found that Konsortium was not the owner of the sheep, then Konsortium alleges that Vleissentraal breached its mandate of agency to purchase sheep on Konsortium's behalf and/or that Vleissentraal committed a fraud against Konsortium, and is consequently liable to Konsortium. Having regard to the pleadings, it is clear that the arbitrator was therefore vested with the power to determine the ownership of this sheep irrespective of the undisclosed settlement agreement between Konsortium and PSB.

[18] The review application can therefore not succeed on the basis of lack of jurisdiction of the arbitrator. The next question is whether the application should succeed on the basis that the award was improperly obtained by Konsortium due to the non-disclosure of a material fact, which material fact Konsortium was under a duty to disclose. This material fact refers to the contents and terms of the settlement agreement, but more specifically to the amount of compensation, if any, that Konsortium had received in terms of the settlement. Konsortium had a duty to disclose such an amount, because it should have been taken into account

[2] **[2008] 2 All SA 132 (SCA)**
[3] **Ibid at par [31]**

in determining any amount of damages for which Vleissentraal could be held liable, it is contended.

[19] There are a number of difficulties with this contention. Firstly, it appears that it was a term of the settlement agreement that the contents thereof would not be disclosed. The legal representatives of Konsortium were therefore placed in a position where they could not disclose, even if they had a duty to do so. Secondly, the appeal panel referred in its appeal award to **Minister van Veiligheid en Sekuriteit v Japmoco Bpk h/a Status Motors,**[4] where the Supreme Court of Appeal had the following to say:[5] "Waar 'n eiser, soos hier, die omvang van sy skade *prima facie* bewys, berus dit by die verweerder om aan te toon dat daar sekere voordele is wat die eiser toekom en wat na regte van die skadevergoedingsbedrag afgetrek moet word. Word daardie feit deur die verweerder bewys of deur die eiser erken, maar die omvang daarvan is onseker, berus dit by die eiser, …. om dit te kwantifiseer, ten einde te bewys wat die balans is waarop hy teenoor die verweerder op betaling geregtig is."

[20] In view hereof, the appeal panel explained that, to discharge its evidential burden, Vleissentraal would have been entitled to cross-examine the Konsortium witnesses on the issue, to amend its pleadings, to subpoena witnesses and to require the discovery of relevant documentation. "However, it did nothing to discharge its evidential burden and accordingly failed to disturb the *prima facie* proof of the loss suffered by Konsortium, that is the purchase price paid for the ewes," the appeal panel concluded.

[21] In view of what was stated in the **Minister van Veiligheid** case referred to above, these remarks of the appeal panel cannot be faulted. In the result, I am not persuaded that Konsortium conducted itself improperly by the non-disclosure of a material fact. There clearly seems to be other factors present which contributed to the non-disclosure. Consequently, the review application can also not succeed on its second leg.

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[4] **2002 (5) SA 647 (SCA)**
[5] **At par [25]**

[22] However, this finding does not have a bearing on prayer 2 of the Notice of Motion in the review application. In that prayer Vleissentraal seeks an order declaring that Konsortium is not entitled to the recover the amount of the claim referred to in the awards, without deduction of the amount received by Konsortium in terms of the settlement agreement. This issue is obviously closely linked to the relief sought in the enforcement application, namely that the award made against Vleissentraal in the arbitration proceedings be made an order of court. Should the said prayer 2 be granted, then the enforcement application cannot succeed in the form and in the terms sought by Konsortium.

[23] In adjudicating the merits of prayer 2, this court finds itself in a much better position than the arbitrators when the matter came before them. This is so, because merely a week before the matter was heard by this court, Konsortium produced the previously undisclosed settlement agreement in response to a notice in terms of rule 35(12) served upon it by Vleissentraal. In terms of the settlement agreement, PSB agreed to pay an amount of R2 500 000.00 to Konsortium in full and final settlement of all and any claims that the parties have against each other.

[24] Should this amount now be deducted from the amount of R6 773 880.00 awarded to Konsortium by the arbitrator, which award was subsequently endorsed by the appeal panel? On behalf of Konsortium it was maintained before us that the amount should not be deducted, since the payment thereof still remains an issue which is *res inter alios acta* to Konsortium's claim against Vleissentraal, as it was held by the arbitrator.

[25] I am unable to agree with this submission. In my view, considerations of fairness and public policy must certainly override the sentiments expressed by counsel appearing for Konsortium. If the amount in question is not deducted, it would result in double compensation for Konsortium, which would be unfair. This is a reality that cannot be denied. The claim of Konsortium against Vleissentraal was for damages suffered, and where damages are involved, any benefit received by a plaintiff which reduced his loss becomes relevant. But benefits would only be deductible if they are not collateral benefits. According to **Visser and Potgieter**[6] it now seems to be generally accepted that there is no single test to determine

[6] **Law of Damages, 2nd edition, page 204, footnote 5 and authorities referred to.**

which benefits are collateral and which are deductible. “Both in our country and in England it is acknowledged that policy considerations of fairness ultimately play a determinative role”, the learned authors state.

[26] In the appeal award the following is stated: “It is trite that Konsortium bears the onus to prove the damage it has suffered, i.e. a diminution in its universitas by virtue of the payment made for the sheep. This diminution occurred upon it paying the purchase price. That constitutes *prima facie* proof of the damage it had suffered and it was then up to Vleissentraal to show that Konsortium had derived some benefit from the settlement which should properly be deducted from Konsortium’s loss. Put differently, Vleissentraal had the evidential burden to show what amount, if any, had to be deducted from Konsortium’s *prima facie* loss to avoid double compensation being awarded for the same loss.”[7]

[27] It has now been shown what amount has to be deducted to avoid double compensation. On the basis of public policy and fairness, prayer 2 of the review application must therefore be granted in amended form, while the enforcement application must accordingly succeed only to the extent of the amended form of prayer 2 of the review application. The respective applicants in both the applications before us are therefore only partially successful, and this should be reflected in the orders of costs.

[28] The following orders are made:

Case no 1611/2022 (the review application)

1. The application for the review and setting aside of the arbitration award of the second respondent dated 22 May 2021, and of the arbitration appeal award of the third, fourth and fifth respondents dated 25 February 2022, is dismissed.

2. The application for the review and correcting of the arbitration award of the arbitrator dated 22 May 2021, and of the arbitration appeal award of the third, fourth and fifth respondents dated 25 February 2022, is granted.

[7] **Par 56 of the appeal award**

3. It is declared that Konsortium is not entitled to recover the amount of the claim referred to in the awards, without deduction of the amount of R2 500 000.00 received by it in settlement of its claim in the abovementioned arbitration proceedings against Paul Steyn Boerdery (Pty) Limited (in liquidation).

4. Konsortium is ordered to pay 50% of Vleissentraal's costs in the application.

Case number 1728/2022 (the enforcement application)

1. The arbitration award of the arbitrator dated 22 May 2021 is made an order of court in the following amended terms:

1.1 Vleissentraal is ordered to pay to Konsortium an amount of R4 273 880.00, plus interest on such amount calculated at 10.25% per annum from 6 October 2017 until date of payment.

1.2 Vleissentraal is ordered to pay the costs of the arbitration, including the costs of the arbitrator and the costs of the two counsel where so employed.

2. The dismissal of Vleissentraal's appeal against the arbitrator's award and the subsequent award by the arbitration appeal panel is made an order of court in the following terms:

2.1 Vleissentraal's appeal is dismissed with costs on a High Court scale, such costs to include the costs of 2 counsel, the fees of the appeal arbitrators, the charges of preparing the record of the arbitration *a quo* and the costs, if any, of the appeal venue.

3. Vleissentraal is ordered to pay 50% of Konsortium's costs in this application.

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P. J. LOUBSER, J

I agree:

_____
S. NAIDOO, J

For the applicant in Case No 1611/2022 and respondent in Case No 1728/2022:

Adv. C. Watt-Pringle SC

Instructed by: Coetzee-Engelbrecht Inc., Harrismith
c/o Phatshoane Henney Inc., Bloemfontein

For the applicant in Case No 1728/2022 and the first respondent in Case No 1611/2022:

Adv. P.J.J. Zietsman SC

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