REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14544/2020

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

2021 /10/20
……..

Date

……...

ML TWALA

In the matter between:

POP-UP TRADING 39 (PTY) LTD **FIRST APPLICANT**

ZUSTONELLI LIMITED BVI **SECOND APPLICANT**

ANTHONY RICHARD PINFOLD **THIRD APPLICANT**

And

SUPER GROUP HOLDINGS (PTY) LIMITED **FIRST RESPONDENT**

KEVIN TRISK SC N.O. (AS ARBITRATOR) **SECOND REPONDENT**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 20th October 2021

JUDGMENT

TWALA J

[1] This is an application for review and setting aside and /or declaring the arbitration award published and as corrected by the second respondent *("the arbitrator")* on the 28th of May 2020 to be invalid and of no force and effect. The application is premised on section 33(1)(b) of the Arbitration Act 42 of 1965 *("the Act")* in that the arbitrator committed a reviewable irregularity and that he had exceeded his powers in the determination of this case.

[2] The first respondent is opposing the application and has filed a counter application in terms of section 31 of the Act seeking an order that the arbitration award be made an order of court. The second respondent is not participating in these proceedings and as such has filed a notice to abide by the decision of this Court. I therefore propose to refer to the first respondent as the respondent and the second respondent as the arbitrator.

[3] At the commencement of the hearing of this case, the first respondent confirmed that it was no longer pursuing the points in limine which were raised in its answering affidavit nor was it persisting with the application to strike out certain paragraphs in the applicants' founding papers. Similarly, the applicants did not object to the late filing of the notice of motion by the first respondent in its application seeking an order that the arbitration award be made an order of court.

[4] This application raises two question: the first is whether the arbitrator had committed an irregularity which is reviewable; and secondly whether the arbitrator has exceeded his powers when he determined the issues in this case.

[5] It is common cause that the dispute between the parties arose from a Sale of Shares Agreement *("the SSA")* concluded on the 26th of March 2014 between the first and second applicants, as the sellers, and the first respondent as the buyer. The sellers sold their shares in Great Wall Motors SA Proprietary Limited *("GWMSA")* to the buyer for the sum of R150.3 million. The purchase price of the shares was subject to an upward or downward adjustment depending on the profitability of GWMSA. The SSA provided for the mechanism of calculating the purchase price and the resolution of the dispute that may arise in relation to the determination of the purchase price. As required and provided for in the SSA, the third applicant concluded a

suretyship agreement in favour of the first respondent binding himself as surety and co-principal debtor in solidum with the sellers for the fulfilment by the sellers of all their obligations to the buyer in terms of the SSA.

[6] The SSA contained an independent arbitration clause which provided that all disputes that may arise between the parties shall be determined by an arbitrator selected by agreement between the parties. Failing such agreement, the arbitrator may be appointed by the Registrar for the time being for the Arbitration Foundation of South Africa *("AFSA")* at the request of any of the parties. This included disputes in the interpretation of the provisions of the SSA, as well as disputes of legal nature. For disputes of legal nature, the arbitration clause provided the qualifications of the individual that should be appointed as arbitrator and the same for disputes of accounting nature. Furthermore, the arbitration clause provided that the award would be final and binding on the parties to the dispute and may be made an order of court at the instance of any of the parties to the dispute.

[7] It is further not in dispute that GWMSA incurred a loss of R112 million in 2015 and the first respondent ceased the operations in GWMSA at the end of 2016 due to non-profitability. The first respondent then instituted the arbitration proceedings demanding that the applicants procure and provide it with the annual financial statements of GWMSA in terms of the provisions of the SSA. And in the alternative, that the applicants pay a sum of R60 million as a refund of the purchase price, being the maximum as provided for in the SSA, for the failure of GWMSA to yield profit or yielding profit which is under R40 million.

[8] Before the arbitration proceedings were commenced, the parties compiled and signed a pre-arbitration minute wherein it was agreed that the pleadings (i.e

statement of case and/or statement of defence) will contain the issues to be determined by the arbitrator. Both parties filed their statements of case and defence and called witnesses to testify before the arbitrator. Mainly the defence of the applicants was about who was responsible for the procurement and preparation of the financial statements to enable the parties to determine and produce the average profit after tax certificate. The applicants raised an issue about the determination of the profit after tax *("PAT")* since there were no annual financial statements procured and produced by the first respondent and/or the applicants.

[9] It is settled that arbitration is the private determination, by agreement between the parties, of a dispute by an independent third party. It is a speedy, cost effective and flexible process selected by the parties to resolve their disputes. The courts have on numerous decisions recognise party autonomy and have shown reluctance to interfere with the decisions of the arbitrator unless of course where it is demonstrable that there were gross irregularities committed by the arbitrator which breached or are contrary to the rules of natural justice.

[10] In *Telcordia Technologies Inc v Telkom SA Limiteda (26/5) [2006]* ZASCA 112; [2006] 139 SCA; 2007 (3) SA 266 (SCA), the Supreme Court of Appeal stated the following:

> *"Paragraph 50 By agreeing to arbitration the 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.*

[11] The court continued to state the following in *Paragraph 51*

> *"By agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court. However, as will become apparent, the common-law ground of review on which Telkom relies is contained – by virtue of judicial interpretation – in the Act, and it is strictly unnecessary to deal with the common law in this regard."*

[12] Recently in *Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and Kec International Limited & Others (Case No 177/2020) [2021] ZASCA 138; (6 October 2021)* the Supreme Court of Appeal reaffirmed the principle of party autonomy and that a court will only be justified to interfere with an arbitration award in terms of s33(1)(b) if the arbitrator has committed a gross irregularity and/or exceeded its powers which resulted or prevented a fair trial of the issues. The admission of evidence which is not strictly necessary or beneficial to the resolution of a dispute detracts from the advantages of speedily, efficiently and flexible resolution of the dispute between the parties. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power is involved since the arbitrator is entitled to make a mistake or to be wrong.

[13] Section 33 of the Act regulates the review of arbitral awards as follows:

> *"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

(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.

[14] To put matters in the proper context, it is apposite at this stage to restate some of the clauses of the SSA which are relevant to the discussion that follows:

"*Clause 1 Interpretations:*

1.2.2.21 Expert – an independent chartered accountant (practising at Ernst & Young or Deloitte & Touche or their successors in title) agreed by the parties within seven business days after any of the parties requires the identity of such chartered accountant to be agreed (and failing agreement as aforesaid during the aforesaid seven business day period, the expert shall be an independent chartered account (practising at Ernst & Young or Deloitte & Touche or their successors in title) nominated by the president of the South African Institute of Chartered Accountants (or its successor) for such purpose);

[15] *Clause 5 Purchase price and Payment*

5.1 The purchase price payable by the purchaser to the sellers for the sale of shares is, subject to adjustment as provided herein, R150 300 000 ("the purchase price").

5.2 notwithstanding anything to the contrary contained in this agreement should the final NAV be less than R295 000 000, then the purchase price shall be reduced by 50,1 cents for each R1 by which the final NAV is less than R295 000 000, and the sellers shall be obliged to pay the purchaser any such reduction in the purchase price together with interest thereon at the prime rate calculated from the closing date until payment forthwith after the final NAV has been determined.

5.3……..

5.4 Should the average PAT –

5.4.1 exceed R70 000 000, then the purchase price shall be increased by an amount calculated in accordance with the following formula, subject to a maximum increase in the purchase price of R200 400 000 –

IP = E x6 x50,1%

Where-

- *IP represents the increase by the price payable to the settlers limited to an amount of R200 400 000;*
- *E represents the excess of the average PAT over R70 000 000;*

5.4.2 be less than R40 000 000, then the purchase price shall be reduced by an amount calculated in accordance with the following formula, subject to a maximum decrease in the purchase price of R60 000 000 –

RP = S x 6 x R50,1%

Where –

- *RP represents the decrease in the price payable by the sellers limited to an amount of R60 000 000;*
- *S represents the amount by which the average PAT is less than R40 000 000.*

5.5 ……

[16] *Clause 12 Accounts*

12.1 ……..

12.5 should any dispute arise in respect of the effective date accounts, the NAV statement, the 2014 accounts, the 2015 accounts, the 2016 accounts, the 2017 accounts and or the average PAT certificate (and should such dispute not be resolved between the sellers and the purchaser, within seven business days after any party requires such dispute to be resolved), then such dispute shall be referred to the expert who shall determine such dispute acting as an expert and not as an arbitrator, and whose decision shall save for any manifest error be final and binding on the parties. The parties shall use their best endeavours to procure that the exert resolves any dispute within a period of thirty days after such dispute has been referred to the expert. The costs incurred with the expert shall be borne by the sellers on the one hand and the purchaser on the other hand in equal shares."

[17] *Clause 23 General*

23.1 This document constitutes the sole record of the agreement between the parties in relation to the subject matter hereof.

23.2 No party shall be bound by any representation, warranty, promise or the like not recorded herein.

23.3 No addition to, variation, or agreed cancellation of this agreement shall be of any force or effect unless in writing and signed by or on behalf of the parties.

23.4 No indulgence which any party ("the grantor") may grant to any other ("the grantee") shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from exercising any rights against the grantee which may have arisen in the past or which might arise in the future.

23.5 ……

[18] The tests laid down in the authorities quoted above for the review of the arbitration award under s33(1)(b) require the applicant not only to allege that the arbitrator's decision was legally wrong but it must demonstrate that no reasonable arbitrator could have made that decision on the material placed before the tribunal. Put differently, the mistake of the arbitrator in arriving at the decision must be so gross or manifest to evidence misconduct on the part of the arbitrator to warrant the review of the arbitration award.

[19] Furthermore, it is salutary to remember that parties are to observe and perform in terms of their agreement and should only be allowed to deviate therefrom if it can be demonstrated that a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy. It is a trite principle of our law that the privity and sanctity of a contract should prevail and should be enforced by the courts.

[20] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017)* the Supreme Court of

Appeal reaffirmed the principle of the privity and sanctity of the contract and stated the following:

> *"paragraph 23 The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.*"

[21] The Court continued and quoted with approval a paragraph in *Wells v South African Alumenite Company 1927 AD 69 at 73* wherein the Court held as follows:

> *"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."*

[22] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others CCT 109/19 [2020] ZACC 13* also had an opportunity to emphasizd the principle of pacta sunt servanda and stated the following:

> *"paragraph 84 Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very*

motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

Paragraph 85 The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda."

[23] In the present case, the parties concluded the SSA and in anticipation that a dispute may arise with regard to the calculation of the average PAT and the production of the average PAT certificate which is determinant of the purchase price, clause 12.5 was included which specifically provided that such a dispute shall be referred to an expert who shall determine the dispute acting as an expert and not as an arbitrator. The applicants disputed the computation of the R60 million claw back amount claimed in the alternative by the respondent. This is clearly captured by the arbitrator in paragraph 94.3 of the award, quoting from the heads of argument of the applicants, that the relief sought in the alternative was premature and does not accord with the contract, which envisages a process whereby an expert decides not as an arbitrator. It is my respectful view that there was a dispute with regard to the calculation of the R60 million claw back amount which required the process as provided for in clause 5 of the SSA to be invoked.

[24] It is necessary to mention certain paragraphs of the arbitration award wherein the arbitrator's reasons for the award are espoused which are as follows:

"paragraph 102

The testimony of Mountford, Watson, Le Roux and Pinfold was such as to justify the inference that the full amount contemplated by the 'çlaw-back' provisions of the SSA, subject to such other considerations as are pertinent to the issue and which are dealt with herein, at least notionally, is claimable by Super Group."

[25] In paragraph 105 the arbitrator found that the argument by the applicants that there was non-compliance with the provisions of the SSA and that the alternative is premature cannot be countenanced. The arbitrator based his reasoning on the evidence and figures presented by Le Roux and stated the following:

"Paragraph 105

Furthermore, the defendant's argument to the effect that the relief sought in paragraph 22.2 of Super Group's SOC is premature and '... does not accord with the contract', in the circumstances prevailing, cannot be countenanced. The contractual relationship which subsisted between the parties, it was common cause, came to a financially unsatisfactory conclusion. The parties' relationship did not endure for as long as the parties obviously anticipated it would do and came to an end at a point in time when the business of GWM SA was wracked by financial adversity. There was, it would seem, effectively nothing left which could or would have occupied the time or acumen of an expert. The evidence of Le Roux adequately and satisfactorily establishes this.

Paragraph 124

> *The figures furnished by Le Roux (which, as previously indicated herein, were never challenged) led to the conclusion that 'the Sellers could never achieve the average PAT warranty because GWM SA missed the PAT amounts by so much in the first measurement period that it would never be able to meet the average PAT over the full warranty measurement period.*

Paragraph 132

> *The largely uncontested evidence of Le Roux, I repeat, was to the effect that the 'sellers' as defined in the SSA '... could never achieve the average PAT warranty because GWM SA missed the PAT amounts by so much in the first measurement period that it would never be able to meet with average PAT over the full warranty measurement period'. The situation in which GWM SA found itself, in short, rendered the employment of an expert seized with the task of assessing one party's entitlement as against another, for all intents and purposes, superfluous and unnecessary.*

[26] I am unable to agree that the evidence of Le Roux was uncontroverted. The applicants' contentions from the outset were that the provisions of the SSA should be implemented in determining the average PAT. Besides, if Le Roux was in a position to produce figures which were by and large acceptable to the arbitrator, it does not make sense to say that there was effectively nothing left which required the involvement of and or to occupy the acumen of an expert. The oral evidence of both Mr Pinfold and Ms Le Roux cannot be accepted as amending the terms of the SSA especially clause 12.5 which provides for the dispute in the determination of the average PAT to be referred to an expert and not an arbitrator.

[27] I am unable to disagree with the submission by the applicants that, although the parties agreed in a pre-arbitration minute that the pleadings will form the basis of the issues to be determined by the arbitrator, they did not abandon their rights of the process under clause 5 of the SSA. Furthermore, the SSA provided for non-variation of the SSA under clause 23 unless such variation is agreed upon by the parties and is reduced in writing. In my judgment, the pre arbitration minute and the pleadings themselves cannot be said to be an amendment of the SSA nor do they expressly purport to do so. The admission of the oral testimony of Le Roux, Mountford, Watson and Pinfold was unnecessary and did not benefit or contribute to the speedy resolution of the dispute between the parties since they are not experts as defined in clause 12.5 of the SSA.

[28] In *Premier Attraction 300 CC t/a Premier Security v City of Cape Town, (592/2017) [2018] ZASCA 69 (29 May 2018)* the Supreme Court of Appeal stated the following:

> *"paragraph 14 An intention to waive must be inferred reasonably; no one can be presumed to have waived rights without clear proof. The test for such intention is objective. Some outward manifestation in the form of words or conduct is required; silence and inaction will do when a positive duty to act or speak arises. Mental reservations not communicated have no legal effect."*

[29] In casu, there was no express intention by the applicants to waive its rights in terms of the SSA nor can it be reasonably inferred from the circumstances of this case. The applicants did not waive their rights for they clearly denied the correctness of the sum of R60 million and its computation in their statement of defence. Furthermore, the applicants emphatically submitted in their heads

of argument that they are not abandoning their rights in terms of the provisions of the SSA. It is my considered view therefore that there was no waiver of rights by the applicants in this case.

[30] The ineluctable conclusion therefore is that the arbitrator erred in simply ignoring the terms agreed upon between the parties in the determination of the average PAT certificate and accepting the oral evidence of Ms Le Roux and Mr Pinfold who are both not experts as defined in clause 1.2.2.21 of the SSA. I hold the view therefore that the arbitrator has committed an error which amounts to a gross irregularity in that it deprived the applicants a fair hearing since the claw-back amount of R60 million was not properly calculating by following the process agreed upon between the parties. It is for the expert, as defined in the SSA, to testify as to what the correct figure by which the purchase price is to be reduced under the circumstances based on the information placed before him or her.

[31] Moreover, the respondent submitted that the average PAT would not have exceeded R20 million due to the initial losses incurred by GWMSA and the applicants' contention was that the average PAT would have been more that R20 million. Faced with these contrasting versions or the speculative evidence from either side, and the parties having agreed to a mechanism of resolving such a dispute, it is grossly irregular for the arbitrator not to employ the mechanism provided for by agreement between the parties which irregularity caused prejudice to the one party for it denied it the right to be heard or present its case to the expert.

[32] Nothing turned on the evidence of Mr Pinfold when he testified that the calculation of the average PAT under the circumstances was an exercise in futility. Although Le Roux was an employee of the respondent, she presented

figures which the arbitrator indicated that they were never challenged and demonstrated that the sellers could never achieve the average PAT warranty, she is not an expert as defined by the SSA and her evidence and that of Pinfold was therefore unnecessary and irrelevant in the determination of the average PAT, by extension, the purchase price. The alternative claim of the respondents which was awarded by the arbitrator was somewhat based on the provisions of the SSA but without following those provisions to the letter.

[33] In *Tshwane City v Blair Atholl Homeowners Association 2019 (3) SA 398 (SCA)* the Supreme Court of Appeal stated the following:

> *"Para 61 It is fair to say that this Court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This court, in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] All SA 262; [2012] ZSCA 13), stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an unbusinesslike result. These factors have to be considered holistically, akin to the unitary approach.*

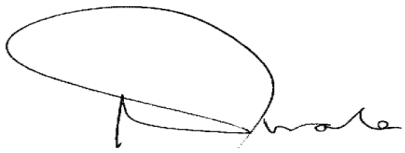
[34] The language used in the SSA is clear, plane and unambiguous. Once there is a dispute between the parties with regard to the calculation of the PAT, then clause 12.5 is triggered. Clause 12.5 states clearly that such a dispute shall be determined by an expert and not an arbitrator. I hold the view therefore that the conduct of the arbitrator under the circumstances was grossly irregular in

that it compromised the rules of natural justice. Therefore, the inescapable conclusion is that the arbitration award published and as corrected on the 28th May 2020 falls to be reviewed and set aside.

[35] Having found in favour of the applicants in this case, I agree with the submissions of the parties that the counter application should be dismissed since the arbitration award has been reviewed and set aside.

[36] In the circumstances, I make the following order:

1. The arbitration award published and as corrected on the 28th of May 2020 is reviewed and set aside;
2. The counter application of the first respondent is dismissed;
3. The first respondent is liable to pay the costs of the applicants on both applications on the scale as between attorney and client including the costs occasioned by the employment of two counsel.



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: **4th October 2021**

Date of Judgment: **20th October 2021**

For the Applicants: **Advocate G. Marcus SC**
Advocate C. McConnachie
Instructed by: **Cox Yaets Attoneys**
Tel: 010- 015 5800
gpritchard@coxyeats.co.za

For the first Respondent: **Advocate I. Miltz SC**
Advocate W.H. Pocock

Instructed by: **Fluxmans Inc**
Tel: 011 328 1820
jlevitz@fluxmans.co.za

For second Respondent: **Kevin Trisk SC N.O (As Arbitrator)**
Tel: 011 535 0800
trisk@law.co.za