REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 32492/2021

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

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DATE
SIGNATURE

In the matter between:

JMH-DOCTORS SPV (RF) (PTY) LTD Applicant

And,

3 HEALTH HOLDCO MAURITIUS LTD First Respondent

ANDRE R GAUTSCHI SC Second Respondent

MICHAEL VAN DER NEST SC Third Respondent

JENNIFER CANE SC Fourth Respondent

JUDGMENT

FISHER J:

Introduction

[1] This is an application to review an order amending the pleadings in an arbitration at the appeal stage.

[2] The appeal Tribunal, during oral argument in the appeal, raised that the relevant terms in issue in a Shareholders Agreement (SHA) which forms the basis of the case, may mean something other than the meaning assumed by the parties when they prepared for and ran the arbitration a quo.

[3] Thus the Tribunal raised what I will call a 'new defence'.

[4] This led to the Tribunal allowing the parties the opportunity to make supplementary written submissions as to this new defence.

[5] The first respondent (the defendant in the arbitration) in the wake of the Tribunal's raising of this new defence sought to amend its pleaded defence in the arbitration to specifically plead this new defence.

[6] The amendment was granted by the Tribunal.

[7] The applicant (the claimant in the arbitration) who was the victor in the arbitration seeks to review the granting of the amendment.

Procedural background and material facts

[8] The main issue before the Arbitrator was the validity of the first respondent's acceptance of a deemed offer made under the SHA. Both parties approached the issue on the understanding that the SHA provided that the acceptance of a deemed

offer could be made subject to conditions precedent imposed by the applicant (as offeree).

[9] The question as to whether this understanding was a proper interpretation of the SHA was raised by the Tribunal itself during the course of oral argument. Consequently, the Tribunal invited the first respondent to reconsider its concession as to the meaning of the SHA.

[10] The parties were given the opportunity to make written supplementary submissions relating to this newly raised interpretation of the SHA.

[11] The notice of amendment in issue was filed together with the first respondent's supplementary submissions. The proposed amendment sought to plead the new defence specifically although the first respondent says this was done out of abundant caution in that the pleadings as they stood already allowed for the new defence to be argued . The notice was framed in the form of rule 28 of the uniform rules and thus allowed for objection to be made by the applicant.

[12] The applicant ignored the notice. Instead in its supplementary submissions it submitted that the Tribunal did not have jurisdiction to entertain the new defence. It framed the objection as follows:

‘The failure of the [first respondent] to have raised the contentions that it now belatedly seeks to argue in its statement of defence precluded the arbitrator from dealing with these contentions. The issue was simply not raised, permissibly, on the pleadings, or at all. The arbitrator would not have had jurisdiction to entertain these contentions. Similarly, this tribunal has no jurisdiction to entertain the issue. Any attempt to do so would constitute a reviewable irregularity.’

[13] After receipt of the supplementary submissions of both parties and the notice of intention to amend, the Tribunal wrote to the parties stating the following:

‘we are minded to grant the defendant leave to effect the amendment proposed in its Notice of Amendment of 24 February 2021. However, prior to granting such leave, we would like to

hear the parties orally on the further conduct of the matter in the event that we allow the proposed amendment'.

[14] The Tribunal thus invited the parties to indicate their availability for a short hearing for this stated purpose. The applicant did not accept the Tribunal's invitation. Instead, on 28 April 2021 it sent the following response:

'It is apparent that the Tribunal has indeed resolved to grant the defendant leave to amend, notwithstanding our client's protestations and objections, and notwithstanding that no jurisdictional fact exists for the Tribunal to exercise its discretion in favour of the defendant. The invitation by the Tribunal to make oral representations is confined to "the further conduct of the matter", following the granting of the amendment. Our client is unable to make meaningful submissions to the tribunal as regards "the further conduct of the matter" until it has received the Tribunal's reasoned award granting the defendant leave to amend.'

[15] The Tribunal then considered the amendment in the absence of further objection by the applicant. It ruled that the amendment was granted subject to the right of the applicant to plead consequentially and lead further evidence should it see fit to do so.

[16] I turn now to the review.

The review

[17] In its founding papers, the applicant sought to base the review on section 33(1)(b) of the Arbitration Act[1] being that the 'arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers.'

[18] The first respondent pointed out in answer that the arbitration was not based on the Arbitration Act but on the International Arbitration Act[2] (IAA).

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[1] 42 of 1965.
[2] 15 of 2017

[19] The applicant concedes the error, but argues that, on the facts set out in the founding affidavit, the applicant is able to establish review grounds under the IAA.

[20] It would appear that the applicant relies on a combination of:

Articles 34(2)(b)(ii) and 34(5)(a), where the ruling 'is in conflict with the public policy of the Republic of South Africa';
Articles 34(2)(a)(ii), where the wronged party 'was otherwise unable to present (its] case';
Article 34(2)(a)(iii), where the Tribunal determined a dispute 'not falling within the terms of the submission to arbitration' or the determination contains decisions on 'matters beyond the scope of the submission to arbitration'

[21] Mr Luderitz SC for the applicant agreed that the fact that the new defence had not been raised before the Arbitrator was not, in itself, a bar to the raising it afresh on appeal. It seems that the real complaint is that the new defence was raised in a manner which was procedurally unfair.

[22] The first respondent argues in relation to this complaint: first that, because it is merely against a ruling relating to procedure, it is not reviewable under the IAA and; second, that even if it were reviewable, no unfairness has been shown.

I will deal with each of these arguments in turn.

Is the ruling reviewable?

[23] According to South African law, in ordinary court proceedings, a ruling that is not dispositive of the dispute between the parties is neither appealable nor reviewable.

[24] The policy considerations that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by

allowing appeals against interim orders that have no final effect. Also, allowing appeals at an interlocutory stage, could lead to piecemeal adjudication and delay the final determination of disputes.[3]

[25] The first respondent argues that only 'awards' as contemplated in the IAA and Schedule 1 to the IAA: the UNCITRAL Model Law on International Commercial Arbitration (the 'Model Law') are reviewable and that the ruling in issue is a procedural directive and not subject to appeal or review.

[26] The Model Law is silent on the distinction between an award and a ruling or order.

[27] Comparatively to the Model Law, the English Arbitration Act also does not provide for a definition of 'award'. It does however provide some formal requirements of an award. Accordingly, the English courts have sought, through a series of judgments, to set down certain factors which are relevant to a determination of whether a decision by an arbitral tribunal is an award and thus subject to appeal or review.

[28] A comprehensive set of factors was laid down by the English High Court in *ZCCM*[4] The Court held the following to be determinative of whether a decision amounts to an award[5]:

- the court will give real weight to the substance, and not merely the form, of the decision;
- a decision is more likely to be an award if it finally disposes of the matters submitted to arbitration, rendering the tribunal *functus officio* either entirely, or in relation to the particular issue or claim;
- the nature of the issues considered in the decision is significant, as substantive rights and liabilities of parties are likely to be dealt with in the form of an award.

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[3] See: *International Trade Administration Commission v SCAW South Africa (Pty) Ltd and others* 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) para 50.
[4] *ZCCM Investment Holdings PLC v Kansansbi Holdings 8 Anor PLC* [2019[EWI4C 1285 (Comm) Ibid at paragraph 40.
[5] Ibid at para 40.

- A decision dealing purely with procedural issues is less likely to be an award;
- the tribunal's description of the decision is relevant — but is not conclusive;
- the perception of a reasonable recipient of the tribunal's decision is relevant;
- that reasonable recipient is likely to take into account the objective attributes of the decision, including the tribunal's own description of the decision, the formality of the language and the level of detail in the reasoning and whether the decision complies with the formal requirements for an award under any applicable rules; and
- the reasonable recipient must be considered to have all the information the parties and tribunal would have had when the decision was made, including the background and context of the proceedings. This may include whether the tribunal intended to make an award.

[29] As I have said the Tribunal describes the decision as a 'ruling'. In paragraph 58 of the ruling the Tribunal says the following:

"We consider that leave to effect the amendments introduced by the defendant's notice of amendment should be granted. We do not consider that the appropriate route is to set aside the Arbitrator's award and refer the matter back to him for the hearing, if any, of further evidence. The new issue arises out of an interchange that took place in the appeal hearing and led to the defendant's Notice of Amendment. The parties have agreed that the conduct of the proceedings is to be determined by us and we consider that the most expeditious and cost-effective route to follow is that we should deal with the claimant's further pleadings and hear further evidence —if any. This is within our powers as an appointed appeal tribunal given the powers of judges sitting as Supreme Court of Appeal judges, who are entitled to hear new evidence on appeal." (Emphasis added.)

[30] Thus, the decision to allow the amendment is not dispositive of any issue before the Tribunal. The parties may make consequential amendments and may lead further evidence which is necessary as a result of the amendment.

[31] In conclusion on this point, it is my view that the first respondent's contention that the ruling is not reviewable is sound, however, even if the ruling were an award as contemplated in the IAA, a properly articulated case falling under one or other of

the specific review grounds under the IAA, would need to be presented and proved in order for the review to succeed.

I now proceed to examine if any such review ground has been established.

Are there any grounds for review established?

[32] The main complaint by the applicant is that the Tribunal entertained and decided the amendment notwithstanding the absence of a substantive application for amendment. This complaint is based on Rule 28 of the Uniform Rules of Court which requires notice to be given of an intended amendment and a substantive application to be made if the amendment is opposed.

[33] This complaint overlooks trite law that, save where an arbitration agreement provides otherwise, an arbitrator is not obliged to follow strict rules of procedure as long as the procedure adopted is fair to both parties and conforms to the requirements of natural justice.

[34] The test in the South African courts for determining whether to grant an amendment is whether the interests of justice permit the granting of such an amendment.[6]

[35] In deciding whether to grant or refuse applications for amendment, courts lean in favour of granting them in order to ensure that justice is done between the parties by deciding the real issue between them. An application for amendment will thus always be allowed unless it is made mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement.[7]

[6] *Stainbank v South African Apartheid Museum at Freedom Park 8 another* [2011] JOL 27343 (CC) para 23.
[7] *Imperial Bank Limited v Bernard No and others [*2013] JOL 30943 (SCA) para 8; *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 9.

[36] Under their terms of reference and agreed powers, the Arbitrator and the Tribunal were given an overriding discretion to follow whatever procedure they thought fit in the circumstances.

[37] In the pre-arbitration minute which defined the scope of powers it was recorded that 'in relation to the regulation of procedural or evidential matters, the Arbitrator shall have the same powers, discretions and authority of the Parties as a Judge of the High Court of South Africa.' The minute goes further — 'In addition to the powers referred to in clauses 3.1 and 3.2 above, the Arbitrator shall in his sole discretion be empowered to make such directives (e.g. time periods and manner of or procedure for determination) as he deems fit for the adjudication of all interlocutory applications.' To leave no doubt, it was recorded that the application of the High Court Rules to the arbitration was 'subject to the Arbitrator's overriding discretion to make such rulings as he deems necessary to ensure that the process is dealt with properly and expeditiously'.

[38] These powers accord with the approach in the IAA which provides in Article 23(3) that 'Unless otherwise agreed by the parties, either party may amend or supplement his or her claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.'

[39] As set out above the Tribunal stated that it was 'of a mind' to grant the amendment, but it made provision for a further hearing on the matter prior to the granting of the ruling. The applicant argues that there was no real basis for the proposed hearing, as the amendment had, in effect, been granted and all that it was asked to comment on was the way forward in the arbitration.

[40] To my mind, the contention of the applicant that it was unable to launch an objection to the amendment must be rejected. The Tribunal made it clear that the amendment had not been granted, that it had formed a preliminary view, and that it was inviting argument on the granting of the amendment in this context.

[41] In *Lufuno* the court asked rhetorically –

‘Can it be said that it is unfair to one party for an arbitrator to obtain information, to form a preliminary view on the basis of that information and then to give both sides an opportunity to rebut that preliminary view? I do not think so.’[8]

[42] It is important that this invitation to make submissions on this new defence was also not the first opportunity provided to the applicant. As I have said, the notice of intention to amend was delivered together with the supplementary submissions, addressing, inter alia, the very defence in issue.

[43] The applicant filed its replying supplementary submissions without specifically engaging with the notice of intention to amend. Nor was a formal objection thereto delivered.

[44] It seems to me that the failure to engage with the proposed amendment was not as a result of the applicant not being given a sufficient opportunity to do so but rather it was part of a tactical decision which has resulted in the bringing of this review.

[45] In light of this failure to make objection at the appropriate intervals available to it, one must examine whether there were legally sustainable objections to be made in any event. I turn to this question.

Are there legally sustainable objections available to the applicant?

[46] As I have said, it is trite that an amendment will generally be granted to enable the real issues to be ventilated. In other words, a litigant will not be put out of court simply because a late point has dawned on it or pleadings need correction; provided that the amendment will not prejudice the other party in relation to its ability to engage with the merits of the case.

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[8] *Lufuno Mphaphuli and Associates (Pt)r) Ltd v Andrews and Another* 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) para 259.

[47] The question to be asked by a judicial officer in the deciding whether to allow an amendment of not is whether there is prejudice that cannot be cured by a postponement and/or a costs award.[9]

[48] Although the applicant formally raised no prejudice in objection to the proposed amendment, the Tribunal nonetheless dealt with the issue of prejudice at length with reference to the supplementary submissions filed by the parties in relation to the new defence. It accepted under the rubric ' the amelioration of claimant's prejudice' that the claimant may have conducted its case differently but for the acceptance of the incorrect interpretation of the SHA.

[49] The Tribunal specifically considered the best route to be adopted to assuage this potential prejudice and held as follows in relation to the notice of amendment: 'The parties have agreed that the conduct of the proceedings is to be determined by us and we consider that the most expeditious and cost-effective route to follow is that we should deal with the claimant's further pleadings and hear further evidence —if any.'

[50] Thus the Tribunal has made plain that, notwithstanding that the applicant did not deal advisedly with the issues of prejudice in the context of the application for amendment, the process will unfold further in a way that prejudice can and will be dealt with on the basis that consequential pleadings and further evidence will be allowed.

[51] There is no doubt that the Tribunal's invitation allowing the parties to deal with the approach that would be taken were the amendment granted was made precisely for the purposes of dealing with these matters with the applicant's input.

[52] A further facet of the argument as to procedural unfairness is that because the amendment entailed a withdrawal of an admission the applicant was entitled to the process which applies in such circumstances and which requires the respondent under oath to set out the reason for the withdrawal of the admission and an explanation of any delay. So the argument goes, the applicant was deprived of the

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[9] See for eg *Ergo Mining (Ptyl Limited v Ekurhuleni Metropolitan Municipality and another* [2020] 3 All SA 445 (G 3) 8.

opportunity to engage with these aspects and thus the Tribunal was not able to make a proper assessment of the amendment and without consideration of these features the Tribunal was not empowered to make the amendment.

[53] The applicant relies, inter alia, on *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare*[10] in arguing that the such a process must be applied to a withdrawal of a concession. However, the authorities relied on by the applicant including *Hos+ Med* in relation to this procedure relate to factual concessions and not legal ones.

[54] A court accepts without deciding, factual concessions made by the parties because the effect thereof is that the conceded issue is no longer placed in dispute. It thus stands to reason that a court would wish to interrogate the reason for a *volte face* as to a fact. But a court is not bound by a legal concession which it considers to be wrong in law. This stands to reason. It would be an untenable situation for a court to be bound by a mistake of law on the part of a litigant.[11]

[55] This case proceeded from a particular construction of the SHA. But the Tribunal has raised that this is not the correct construction. The Tribunal is not bound slavishly to follow the originally pursued construction if it believes that it is wrong.

[56] The applicant says that this approach loses sight of the fact that the interpretative process can involve a consideration of context and/or background facts.

[57] Whilst this may be so, the amendment does not suggest an interpretation which is fact dependant. It relies on the letter of the agreement. And the approach which the Tribunal has taken to the alleviation of prejudice is that, should the applicant wish to claim rectification or estoppel or any other viable rejoinder to the new defence, it will not be deprived of pleading these issues and leading evidence accordingly.

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[10] 2008 (2) SA 608 (SCA)

[11] See *Kruger v The President of the Republic of South Africa and Others* 2009 (3) BCLR 268 (CC) par. 103.

[58] Thus, in sum, there is no withdrawal of an admission of a fact and thus no need for the respondent to explain why it conceded a factual position which it now wishes to argue is inaccurate or false.

[59] In any event, to the extent that an explanation of the withdrawal of the concession of what the SHA means were required this emerges as axiomatic from the process which unfolded before the Tribunal: The Tribunal's raising of a different construction of the SHA was the reason for the raising of the point by way of the amendment.

Conclusion

[60] In the circumstances I find that the ruling of the Tribunal is not subject to review under the IAA because it is not a final award, but that even if it were, the application has made out no case that the procedure adopted by the Tribunal was unfair.

Costs

[61] There is no reason why the costs should not follow the result.

order

[62] I thus make an order which reads as follows:

1. The application is dismissed.
2. The applicant is to pay the costs of the application, such costs to include the costs of two counsel where employed.

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FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 12 April 2022.

Judgment Delivered: April 2022.

APPEARANCES:

For the Applicant : Adv KW Luderitz SC.

Adv I Kentridge.

Instructed by **:** Cliffe Dekker Hofmeyr Inc.

For the 1ST Respondent **:** Adv A Franklin SC.

Adv N Luthuli.

Instructed by **:** Webber Wentzel Attorneys.