REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Numbers: 16959/21 and 1829/21

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

4 August 2024

In the matter between:

GOMETIS (PTY) LIMITED Applicant

and

FOUNTAINHEAD PROPERTY TRUST First Respondent

REDEFINE PROPERTIES LIMITED Second Respondent

GOLDSTEIN, EZRA L Third Respondent

JUDGMENT

MODIBA J:

[1] The applicant, Gometis (Pty) Ltd (Gometis) seeks the following orders:

1.1 Condonation for failure to bring this application within the timeframe set out in s33(2) of the Arbitration Act.[1]

1.2 Setting aside the award in the arbitration between Fountainhead Property Trust (Fountainhead) as First Claimant and Redefine Properties Limited (Redefine) as Second Claimant (jointly, opposing respondents), and Gometis (Pty) Limited (Gometis) as Respondent (the award; the arbitration).

1.3 Referring the dispute between Fountainhead and Redefine and Gometis to a new arbitration tribunal established on the terms determined by this Court;

1.4 Staying the enforcement of the award pending this Court's decision.

1.5 Costs against any respondent who opposes the application.

[2] Unless otherwise specified, all references to statutory provisions are to the Arbitration Act. I conveniently refer to this application as the review application. Gometis brings it in terms of Uniform Rule 53. However, it is not calling for the record and reasons for the award as the parties are in possession thereof. It has filed it for the Court's benefit. I have been referred to sections of the record that are relevant to this application.

[3] I refer to Gometis's request for condonation as the condonation application.

[4] The opposing Respondents are opposing the review application. They also apply under case number 21/01829 to have the award made an order of Court. I conveniently refer to this application as the enforcement application. Gometis is opposing the enforcement application and prays that judgment in that application be stayed until judgment is rendered in the review application. Gometis advance no justification for this approach. The respondents have agreed to stay the enforcement of the award pending the judgment in the review application. They contend that the review application and the enforcement application be heard on the same day. I consider both applications. This judgment encompasses both applications.

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[1] No 42 of 1965.

[5] In the event that the award is reviewed and set aside, the enforcement application will become redundant.

[6] I firstly describe the parties. I then briefly outline the background facts. Then I deal with Gometis' application for condonation. I find that Gometis fails to show good cause for the condonation. This would be the end of the matter. The opposing respondents have argued in *limine* that the review application ought to be dismissed because no cause of action is set out in the founding affidavit for a review in terms of s33(1). I consider the review application on the merits for the following reasons: Firstly, no issues of fact arise. Whether Gometis meets the grounds of review in terms of s33(1) is the main issue to be determined. The point in *limine* questions whether Gometis makes out a case for the review in terms of s33. It is a legal question which essentially goes to the merits of the review application. Secondly, the opposing respondents seek a dismissal of the application with punitive costs because it lacks merit and Gometis unduly accuses a retired Judge of this Division of bias. Thirdly, our Superior Courts discourage peace-meal litigation to avoid the prospect of an appeal court considering any issue as the court of first instance in the event of an appeal.[2]

[7] I then consider the enforcement application. Lastly, I determine the issues of costs and costs. An order concludes the judgment.

THE PARTIES

[8] Gometis is a non-trading company incorporated as a limited liability profit company according to the company laws of the Republic of South Africa. Its sole director, Paul Justin-Ben testified during the arbitration. He also deposed to Gometis's affidavits in these proceedings.

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[2] *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) ([2012] 2 All SA 345; 2012 (6) BCLR 613; [2012] ZASCA 15) para 49; *Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd and Others* 2019 (3) SA 97 (SCA) para 33; *Theron and Another NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA) para 26.

[9] Fountainhead is a Property Trust Scheme approved in terms of section 98 of the Collective Investment Schemes Control Act,[3] with full legal capacity to sue and be sued in its own name.

[10] Redefine is a public company with limited liability registered and incorporated in terms of the Companies Act.[4]

[11] The Arbitrator, Ezra L. Goldstein is an adult male of full legal capacity. He is a retired Judge of this Division. He is cited in his capacity as the duly appointed Arbitrator by agreement between the parties. He did not enter the fray.

BACKGROUND FACTS

[12] The dispute between Gometis and the opposing respondents relates to their respective rights and obligations as parties to a partly written and oral agreement dated 12 December 2013 (the agreement). The facts are detailed in the award. I only set them out here briefly to contextualise this judgment.

[13] In terms of the agreement, the opposing respondents appointed Gometis as their alternative income manager to a listed portfolio of buildings for a period of two years starting 1 January 2014. Gometis would be renumerated an amount R240,000 per month. It would earn 17,5% commission on earnings that exceed 27 million in the first year. The income target for the first year was R45 million. Should it not be achieved, the opposing respondents would have the option to cancel the agreement.

[14] The opposing respondents' cause of action in the arbitration is Gometis's failure to pay R1,228,952.35 and R41,530.71 due to Fountain Head and Redefine respectively, in terms of the agreement. They claimed repayment of these amounts in the arbitration. During the arbitration, Gometis admitted the terms of the agreement as pleaded by the opposing respondents. Mr Ben-Israel conceded that

[3] No 45 of 2002.
[4] No. 71 of 2008.

Gometis appropriated these amounts for the payment of Gometis's operating costs. Consequently, the facts that sustained the opposing respondents' claim became common cause between the parties.

[15] However, as a defence to the opposing respondent claim, Gometis alleged an amendment to the agreement, concluded on 27 March 2014, adding to the portfolio of properties managed by Gometis all shopping centres and commercial buildings in the opposing respondents' portfolio of properties. Sources of income for Gometis were amended so that signage and promotional income on the rooftops of the shopping centres, commercial buildings, and cellular masts, telephone advertising and wi-fi related income would be managed by Gometis High Site Management Company (Pty) Ltd (Gometis High Site) with whom a separate agreement was concluded, thus limiting the alternative income Gometis managed in terms of the primary agreement. Consequently, the income target for 2014 was reduced to R33 million. The amount on which Gometis would earn Commission was reduced to R15 million. Gometis further alleged that because of the alleged amendment, the opposing respondents were indebted to it in the amount more than R52 million. It counterclaimed for this amount.

[16] The opposing respondents placed the alleged amendment in dispute. When the arbitration commenced, it became necessary for the Arbitrator to rule on two interlocutory questions; the duty to begin and onus. He ruled that Gometis had the duty to begin adducing evidence and bears the onus to prove that the amendment was concluded.

[17] Gometis contends that the Arbitrator's ruling in respect of the duty to begin and onus ruling is legally wrong as it is contrary to the authority in *Topaz Kitchens (PTY) LTD v Naboom SPA (EDMS) BPK* (*Topaz Kitchens*),[5] that where a party to a partly oral and partly written contract (Gometis) admits the terms of the agreement alleged by the claimant (opposing respondents) but alleges other

[5] *Topaz Kitchens (PTY) LTD v Naboom SPA (EDMS) BPK* 1976 (3) SA 470 (A).

terms, the latter allegation constitutes a denial of the terms of the agreement as alleged by the claimant. Therefore, the onus rests on the claimant to prove their alleged terms of the agreement.

[18] At the end of the arbitration, the Arbitrator rejected Gometis's version as testified by Mr Ben-Israel in respect of the alleged amendment and found that he failed to prove that it was concluded. This ruling effectively non-suited Gometis in respect of its counterclaim. The Arbitrator accordingly dismissed it. A monetary order was entered in respect of the opposing respondents' claims against Gometis.

CONDONATION

[19] In terms of s33(2), an application to set aside an arbitrary award ought to be brought within six weeks of the award being made. S38 provides that the Court may, on good cause shown, extend any period fixed by or under this Act, whether such period has expired or not. The Arbitrator made the award on 7 December 2020. Gometis brought this application on 7 April 2021, approximately 11 weeks out of time.

[20] The principle that apply to a condonation application are trite. The applicant must set out a full explanation for the delay in brining the application. He must establish good cause. Ultimately, he must show that granting condonation will serve the interests of justice. Gometis fails on all these requirements.

[21] Mr Ben-Israel blames the delay in bringing the application on his enduring psychiatric illness, diagnosed in 2010. As a result of a relapse in his psychiatric condition, when the award was published, he could not study it immediately to give his attorney legal instructions. He was only able start studying it at the end of January 2021. It took him three weeks. The application was instituted seven weeks thereafter.

[22] Gometis advanced no explanation and justification for this further delay in launching this application. For reasons set out in this judgment, Gometis's request lacks prospects of success. Gometis have set out no basis on which condonation stands to be granted in the interests of justice.

[23] Therefore, its request for condonation stands to be refused.

GROUNDS OF REVIEW

[24] Gometis grounds the review on the allegation that the Arbitrator committed misconduct in terms of s33(1)(a) and gross irregularity in terms of s33(1)(b). It also alleges that the Arbitrator was biased.

[25] Gometis contends that:

25.1 In direct contravention of the applicable legal principles, the Arbitrator based his award on the versions of the respondents' witnesses, which were not put to Mr Ben-Israel while he was cross-examined. Without those versions, the Arbitrator could not have reached the conclusion which he did. The Arbitrator based the award on the legal premise that Gometis as defendant bore the onus of proving the amendments to the original agreement dated 12 December 2013 contended for by it, whereas the settled law in this regard is that, the onus was on the respondents as claimants to prove, on a balance of probabilities that the amendments contended for by Gometis did not form part of the agreement.

25.2 The above ruling directly affected the process by which the arbitration was conducted, as it led directly to the respondents' versions being concealed from Gometis until after its witness and been cross examined. If the respondents' (as claimants) witnesses had testified first as the law requires, they would have had to testify to their versions which Gometis's witness would then have dealt therewith and shown the respondents' versions not to be true. The Arbitrator based his ruling on the fact Gometis admitted the amount claimed by the respondents and raised the amendments to the agreement as its defence. He accepted the respondents'

argument that where a special defence is raised, the duty to begin rests on the party which raised it. But, whilst this may be the general rule, it yields to the special rule laid down by the Appellate Division in the case of *Topaz Kitchens,* that in such a case the duty to begin rests on the respondents as plaintiffs/claimants to establish that the amendments to the original contract as pleaded by Gometis were not concluded.

25.3 By making a self-contradictory award in holding that, Gometis had not discharged the onus of proving the amendments contended for by it (notwithstanding that he flouted the settled law on onus) and then holding that, in a material respect the agreement had been amended as contended for Gometis. The respondents' constant refrain under cross-examination was that there was no amendment yet, its witnesses testified that there was. The chief operating officer and a mainboard director of the respondents who was at the meeting on 27 March 2014 when the amendments contended for by Gometis were agreed to and it was common cause had the authority to agree to amendments, testified that he had no recollection of what transpired, but repeatedly denied that any amendments were agreed to. The respondents' main witness was not at the meeting on 27 March 2014 and said during his testimony that the agreement was amended. The third respondents' witness admitted to certain limited amendments. Therefore, his evidence regarding the main thrust of the Arbitrator's finding is demonstrably not true.

25.4 Throughout his award, the Arbitrator downplayed any objective fact which advanced Gometis's case, and in most if not all cases turned that objective fact against Gometis, to the benefit of the opposing respondents.

25.5 Each of the above grounds and all of them cumulatively resulted in Gometis as defendant not receiving a fair hearing in contravention of section 34 of the Constitution. Having regard to the fact that the Arbitrator is a retired Judge of the High Court of South Africa who should have been well-versed in the law, a reasonable interpretation of the award by a reasonable person is that of bias in favour of the respondents.

[26] The opposing respondents contend that the review application lacks merit. The grounds of review Gometis rely on do not constitute grounds of review in terms of s33. Further, s34 of the Constitution does not find application in a private arbitration.

THE APPLICABLE LEGAL PRINCIPLES

[27] S33 provides as follows:

> *"33 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.*
> *(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.*
> *(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.*
> *(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court."*

[28] The only grounds on which an arbitral award may be reviewed are those set out in s33(1)(a)-(c). An error of law is not reviewable in terms of s33(1). An error of law may lead to misconduct or gross irregularity as foreshadowed in s33(1)(a) and s33(1)(b). When it does, the error of law remains unreviewable in terms of s33(1)(a) and s33(1)(b). What is reviewable is the resultant misconduct or irregularity. Irregularity relates to the methods of the enquiry or arbitration, such as, for example, refusal to hear a party, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.[6]

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[6] *Telcordia Technologies Inc V Telkom SA Ltd* 2007 (3) SA 266 (SCA) at paragraphs 52 to 79 and the cases considered there.

[29] Just administrative action and s34 of the Constitution do not apply to private arbitrations.[7] At paragraph 50, the Supreme Court of Appeal in Telcordia specifically stated as follows:

> "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. F 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."

[30] Here too, like in *Telcordia,* the fairness of the arbitration will be determined by the provisions of the Act and nothing else. *Roux v University of Stellenbosch and Others and a Related Matter*[8] on which Gometis belatedly tried to rely does not assist it. It represents no departure from the above principles.

ANALYSIS

[31] I consider Gometis's review grounds against the above principles and the opposing respondents' grounds of opposition.

[32] The Arbitrator had to determine the dispute between the parties based on the alleged terms of the agreement, pleadings, the applicable law, and evidence. On the authority in *Telcordia*, he is entitled to be wrong on the law.[9]

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[7] *Telcordia* at paragraph 45 to 48, *Total Support Management (Pty) Ltd v Diversified Health Systems SA (Pty) Limited* 2002 (4) SA 661 (SCA) and *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) 529 (CC) at paragraphs 195 to 236.

[8] [2023] 3 All SA 248 (WCC).

[9] See also *Khum MK Investments and BIE Joint venture (Pty) Ltd v Eskom Holdings SOC and Another* (30169/2018) [2020] ZAGPJHC 7 (23 January 2020).

[33] The fact that the Arbitrator wrongly applied the ratio in *Topatz Kitchens* leading to a wrong ruling on the duty to begin an onus is not reviewable in terms of s33(1) because it constitutes an error or law. Gometis's complaint that this error of law resulted in a procedural irregularity, rendering the trial unfair lacks merit. The Arbitrator was duly exercising his duties as an Arbitrator when he ruled on the question of onus and duty to begin. If he incorrectly applied the ratio in *Topaz Kitchens,* he was entitled to err in this regard.

[34] It is not Gometis's case that the Arbitrator flouted the *audi alteram partem* principle. Gometis's complaint that the versions of the respondents' witnesses were not put to Gometis's witness, and the Arbitrator should not have accepted them because they had not been tested, imply that the Arbitrator based the award on inadmissible evidence. The admissibility of evidence is a question of law and not a matter of procedure. Therefore, the alleged misapplication of the ratio on *Topatz Kitchens* did not result in a gross irregularity. It resulted in the admissibility of inadmissible evidence. It does not constitute a procedural irregularity but an error of law which is not reviewable in terms of s33(1).

[35] The alleged error of law also not sustain a finding that the Arbitrator misconducted himself. There is no basis on which to find that the Arbitrator misconstrued the nature of the enquiry. Wrongly applying the law or admitting inadmissible evidence simply means that he erred in the performance of his duties.

[36] In *Hyperchemicals International (Pty) Ltd*, it was held that wrongful, unlawful and dishonest conduct characterise misconduct in terms of s33(1).[10] Bias is not a ground of review in terms of s33(1). If an Arbitrator is shown to be biased, it could lead to a finding that he misconducted himself in terms of s33(1) as he would have acted wrongfully and unlawfully. Gometis allege that throughout the arbitration, the Arbitrator downplayed any objective fact which advanced Gometis's case and in

[10] *Hyperchemicals International (Pty) Ltd and Another V Maybaker Agrichem (PTY) LTD and Another* 1992 (1) SA 89 (W).

most of not all cases turned that objective fact against Gometis to the benefit of the opposing respondents. This allegation is vaguely made. Gometis's failure to particularise its contention that the Arbitrator downplayed its case and turned it to the opposing respondents' benefit is fatal to its reliance on s33(1)(a).

[37] I have already found that the purported error of law committed by the Arbitrator did not lead to an irregularity. Therefore, there is no basis on which to find that Gometis's right to a fair hearing was breached.

[38] In any event, the parties regulated how the arbitration would be conducted, thus waiving their rights in terms of s34 of the Constitution. Of relevance to this application is that they limited their right to review the award in terms of s33(1). They also waived their right to an appeal. Having found that Gometis has not established any basis on which to review the award in terms of s33(1), it has not made out a case for any further relief in terms of s34 of the Constitution.

ENFORCEMENT APPLICATION

[39] Gometis effectively does not oppose the enforcement application. It only sought it stayed pending the determination of the review application. With the review application standing to be dismissed, nothing stands in the way of granting the enforcement application. The opposing respondents have made out a proper case for the order sought. In terms of clause 12 of the arbitration agreement, the award is final and not subject to appeal. In terms of clause 13, the opposing respondents are entitled to bring the enforcement application on notice to Gometis.

[40] I am satisfied that the opposing respondents have made out a proper case for an order to be granted in terms of the notice of motion dated 13 January 2021.

COSTS

[41] Notwithstanding that due to Gometis's impecunious state, the prospects of recovery are bleak, the opposing respondents seek punitive costs against it. They rely on several factors. It is litigating in luxury because it is impecunious. It has abused this court's process because it failed to cite grounds of review in terms of s33(1). Its accusation that the Arbitrator is biased is not only unsubstantiated, but also an insult to a reputable retired Judge of this Division of 20 years standing. These factors justify an exercise of discretion to grant punitive costs against Gometis.[11]

[42] In the premises, the following order is made:

ORDER

1. The application brought by Gometis (Pty) Ltd (Gometis) to review and set aside the award of the third respondent dated 27 November 2020 published on 7 December 2020 in the arbitration between Fountainhead Property Trust and Redefine Properties Ltd (the award; opposing respondents) is dismissed.

2. The award is made an order of this Court.

3. Gometis shall pay the opposing respondents' costs on the attorney and client scale.

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[11] See Erasmus RS 20, 2022, D5-24A and the cases cited there.

L.T. MODIBA J (She)
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

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For the 3rd Respondent:
No appearance

Date of hearing: 17 July 2023

Date of judgment: 4 August 2023

Mode of delivery:

This judgment was handed down electronically by circulation to the parties' representatives by email, uploading to Caselines and release to SAFLII. The date and time for hand-down is deemed to be 10H00 am on 04 August 2023.