REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 687/12

In the matter between:

DEXGROUP (PTY) LTD **Appellant**

and

TRUSTCO GROUP INTERNATIONAL (PTY) LTD **FirstRespondent**

TRUSTCO GROUP HOLDINGS LTD **Second Respondent**

TRUSTCO FINANCIAL SERVICES (PTY) LTD **Third Respondent**

D M FINE SC **Fourth Respondent**

Neutral citation: *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*(687/12)[2013] ZASCA 120 (20 September 2013)

Coram: Ponnan, Malan, Majiedt, Wallis andPillay JJA.

Heard: 10 September 2013

Delivered: 20 September 2013

Summary: Arbitration award – review for gross irregularity – s 33(1)*(b)* of Arbitration Act 42 of 1965.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Foulkes-Jones AJ sitting as court of first instance) it is ordered that:

The appeal is dismissed with costs, such costs to include those of the application to lead further evidence on appeal and remit the matter to the arbitrator.

JUDGMENT

WALLIS JA (**PONNAN, MALAN, MAJIEDT** and **PILLAY JJA** concurring)

[1] This case involves a challenge to an arbitration award in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965 (the Act). The fourth respondent, a senior advocate and member of the Johannesburg Bar, made the award. Foulkes-Jones AJ sitting in the South Gauteng High Court, Johannesburg, rejected the challenge and the appeal is with her leave.

[2] The background to the dispute is the following. In terms of an agreement of purchase and sale concluded on 2 November 2007, the first respondent, Trustco Group International (Pty) Ltd (Trustco Group) purchased from the appellant, Dexgroup (Pty) Ltd (Dexgroup), the entire

issued share capital of the third respondent[1] together with certain claims and loan accounts. The purchase price was to be a maximum of R65 million. Of this R20million was payable in cash on the effective date and the balance was to be paid by way of the issue of shares in Trustco Group Holdings Ltd (Trustco Holdings), the second respondent. The number of shares to be issued was to be calculated by determining the net profit after tax achieved annually by a group of companies consisting of the third respondent and four subsidiaries over a period of four years, and dividingthe resultant figure by R3.80 per share. In terms of clause 4 of the agreement the purchase consideration was payable at annual intervals on 31 May 2008, 2009, 2010 and 2011. The total value of the shares to be issued in terms of that provision was not to exceed R45 million. Accordingly, if appropriate profits were earned earlier in the four year cycle, the appellant would become entitled to the issue of the shares at an earlier stage.

[3] On 7 April 2009 Mr Müller, on behalf of Dexgroup wrote to Trustco Group and Trustco Holdings in the following terms:

'On 31 March 2009 the requirement for the profit targets in a cumulative amount of approximately R44 million (FORTY FOUR MILLION RAND) has been reached surpassing the target as outlined specifically in clause 5.

[1] The third respondent was then called Dex Group Financial Services (Pty) Ltd, but it was subsequently renamed and is now called Trustco Financial Services (Pty) Ltd.

The working capital draw-down facility has been settled in the ordinary course of business on 31 March 2009 as required on a perusal of clause 22.2.'

Dexgroup accordingly contended that it was entitled to receive some 3 million shares in Trustco Holdings in settlement of the balance of the payment price.

[4] Trustco Group did not accept that it was obliged to deliver the shares demanded by Dexgroup. It adopted this stance because it contended that, contrary to the statement in Mr Müller's letter, the working capital facility had not been settled in the ordinary course of business on 31 March 2009 and that until it had been settled it was not open to Dexgroup to claim payment of the balance of the purchase price.

[5] Some explanation of the working capital facility is required. In terms of clause 22.1 of the sale agreement Trustco Group undertook to make available to the third respondent 'a banking facility or cash of up to R30 000 000 (Thirty Million Rand) on the effective date'. It was accepted that this facility was necessary to enable the third respondent (and indirectly its subsidiaries) to fund their day to day operations. Although there was originally some dispute over this, it was common cause during the arbitration that Trustco Group had made available such a facility through ABSA Bank. The use of the facility ensured that the third

respondent did not go into overdraft with its own bankers, Standard Bank. Clause 22.2 of the sale agreement provided that:

'By 31 March 2011 or upon the attainment of the profit targets as mentioned in paragraph 5 hereof whichever happens first, the Seller must ensure that the facility in 22.1 is repaid.'

The relevance of the date 31 March 2011 and the profit targets in paragraph 5 of the agreement is that whichever of these came first would determine the date upon which the final payment in respect of the purchase price would be due.

[6] The dispute over the settlement of the facility arose in the following way. One of the third respondent's subsidiaries, Brokernet (Pty) Ltd, collected insurance premiums on behalf of a broking company called Clarendon Transport Underwriters (CTU). Immediately before the letter of 7 April 2009 the outstanding amount of some R19 million in respect of the loan facility with ABSA was settled *inter alia* by way of a transfer of some R17 million from the bank account of Brokernet (Pty) Ltd, thereby reducing the balance in the ABSA account to zero. The ability of Brokernet (Pty) Ltd to make this payment to ABSA arose because it had collected premiums in at least this amount on behalf of CTU. However, Brokernet (Pty) Ltd had to account to CTU for the premiums collected on its behalf, and the third respondent and its subsidiaries still required a

banking facility in order to function. It was accordingly necessary for Trustco Group to reinstate the facility almost immediately after 31 March 2009. In those circumstances Trustco Group contended that Dexgroup had not ensured that the facility was discharged as required by clause 22.2 and accordingly disputed its obligation to deliver the shares representing the balance of the purchase price.

[7] Dexgroup and Trustco Group submitted the dispute over Dexgroup's entitlement to receive payment of the balance of the purchase price of the third respondent to arbitration before the fourth respondent. Having heard evidence and argument he held that discharge of the facility was required before Dexgroup would be entitled to the issue of any shares in respect of the balance of the purchase price and that the facility had not been properly discharged by the means adopted by Mr Müller. He accordingly dismissed Dexgroup's claim and upheld a counterclaim by Trustco Group for declaratory relief.

[8] The arbitration agreement was subject to the provisions of the Act. In terms of s 28 the arbitrator's award was final and binding and not subject to appeal. It could only be challenged on the limited grounds provided in s 33(1) of the Act. The ground on which Dexgroup relies in bringing its application is that the arbitrator committed a gross

irregularity in terms of s 33(1)*(b)* of the Act or exceeded his powers. It complained that it had suffered a substantial injustice in the conduct of the proceedings and explained the basis for this in the following paragraphs of the founding affidavit:

'19.1 The central question for determination by the arbitrator was the correct interpretation to be given to the duty incumbent upon the applicant under clause 22.2 of the sale of shares agreement concluded between the applicant and the respondents …

19.2 The duty in question (in clause 22.2) was to "ensure that the facility in 22.1 is repaid";

19.3 Clause 22.1 provided that the first respondent would "make available to the company [the third respondent] a banking facility or cash […] on the effective date";

19.4 The arbitrator did not properly construe the *ipsissima verba* of the sale of share agreement, but sought to understand the contract within its proper commercial setting.

19.5 The applicant and the respondents put up two diametrically opposed interpretations as to what the meaning of the duty in clause 22.2 entailed;

19.6 Plainly, it fell to the arbitrator to decide which of these two interpretations was borne out by the written agreement;

19.7 As appears from the transcript of the hearing annexed hereto, counsel for the respondents adopted a line of analysis before the arbitral tribunal which characterised the actions of Müller (as executive chairman of the third respondent) in repaying the credit facility of R19 499 883.80 obtained from ABSA on the basis of the R12M cash loan made (as substituted performance in terms of clause 22.1) by the first respondent to Brokernet (a wholly owned subsidiary of the third respondent) as constituting:

19.7.1 a misuse of trust money;

19.7.2 a breach of Müller's fiduciary duties; and, consequently,

19.7.3 theft.

19.8 These allegations were not pleaded by the first to third respondents and were hence not fully and fairly ventilated on behalf of the applicant. …

19.9 These allegations were not based upon any substantial evidence to that effect led before the arbitrator …

19.11 … Advocate Fine SC erroneously and to the severe prejudice of the applicant characterised the applicant's conduct implicitly as illegal in relation to the funds in question. This was a gross irregularity. It formed a foundational pillar of the arbitration award and tainted the entire reasoning of the arbitrator.'

[9] These basic allegations were supplemented by complaints that Mr Müller had been subjected to character assassination; that matters of 'serious import' had not been properly ventilated at the hearing; and, that the arbitrator had failed to carry out his duties in a judicial manner. Not surprisingly Mr Fine reacted to these allegations and, in a memorandum filed in response to the application, described them as unfounded and untrue. In particular he pointed out that he had not made the adverse findings against Mr Müller attributed to him by Dexgroup.

[10] The heads of argument delivered on behalf of Dexgroup ranged far and wide over the terrain covered by the arbitration award and criticised it

in considerable detail, in the process adding fresh complaints to those embodied in the founding affidavit. This was clearly improper and counsel who appeared before us, who had not prepared the heads of argument, confined himself to points made in the founding affidavit. In the result he advanced three contentions. First he said that the pleadings did not cover a complaint that the means adopted by Mr Müller to discharge the overdraft with ABSA involved 'theft, misuse of trust monies or a breach of fiduciary duty' and that cross-examination that suggested this had irretrievably tainted the proceedings. Second he said that the arbitrator's approach to the construction of the agreement and the admissibility of evidence in that process was flawed and resulted in an irregularity. Third he submitted that the approach by the arbitrator improperly extended the scope of the arbitration and went outside its permissible limits. This, so he contended, amounted to the arbitrator exceeding his powers. I deal with each argument in turn.

[11] The arbitration agreement recorded that Dexgroup alleged that it was entitled to the payment of further consideration in respect of the purchase price of the shares in the third respondent. It went on to record that Trustco Group alleged that Dexgroup had failed to fulfil its obligation to repay the banking facility in terms of the sale agreement. From the outset therefore the lines of dispute were clearly demarcated. It

will be recalled that in his letter of 7 April 2009 Mr Müller had stated that the banking facility had been repaid. A clear dispute over this allegation is reflected in the pleadings delivered in the arbitration.

[12] In its statement of claim Dexgroup alleged that it had complied with all its obligations in terms of the sale agreement. The response was an allegation that, in breach of clause 22.2, it had failed to ensure that the overdraft facility had been repaid on the attainment of the profit targets. In further particulars, furnished for the purpose of the arbitration,Dexgroup alleged that one of the obligations that it had fulfilled, entitling it to payment of the balance of the purchase price,was the repayment of the facility 'by means other than payment' by itself. It amplified this by alleging that the facility was paid 'by electronic funds transfer from the banking account of Brokernet (Pty) Ltd' into the ABSA account. In response the counterclaim by the third respondent was amended to say that:

'On 31 March 2009 the Claimant, represented byMüller, purported to repay and terminate the Facility pursuant to clause 22.2, but instead unlawfully and in breach of that clause and of the aforesaid terms of the Agreement, made such payment by diverting funds held and/or controlled by Brokernet totalling R17 million from the Third Respondent and/or its operating subsidiaries.

The Third Respondent was, in consequence, obliged immediately to re-instate the Facility, and in fact did so, to enable the Third Respondent and its subsidiaries to access the funding they required to fund their day-to-day business activities.'

Finally in further particulars this was described as an 'unlawful diversion' of funds.

[13] There can be no doubt in the light of these allegations and counter-allegations that the primary issue in the arbitration would be whether Dexgroup had satisfied its obligations under clause 22.2 in relation to the repayment of the facility. There was no dispute over the manner in which it had purported to do this, but whether that was a permissible way of repaying the facility was squarely in issue. The conduct of Mr Müller in causing it to be discharged from funds held by Brokernet (Pty) Ltd was characterised as an unlawful diversion of funds contrary to the terms of the agreement. Dexgroup could have been under no misapprehension that what Mr Müller had caused to be done in that regard would be attacked as improper and unlawful and in breach of its obligations under the agreement. The suggestions that were made in cross-examination that the impropriety rested in a breach of the relevant provisions of s 45 of the Short-Term Insurance Act[2]and of the agreement with CTU cannot have come as a surprise to Mr Müller and his response to the suggestions did

[2]Act 53 of 1998.

not suggest otherwise. Nor did these suggestions prompt objections from his senior and junior counsel. All that happened is that, in the course of cross-examination, some suggestions were put to the witness who dealt with them, and the case moved on to deal with other points.

[14] In those circumstances there is no merit in the suggestion that the arbitration proceeded on the basis of allegations that had not been pleaded or adequately raised, with the result that Dexgroup and its witness were taken by surprise and thereby deprived of a fair hearing. Nor is there any merit in the suggestion that the arbitrator was, as a result of these suggestions, diverted from the true enquiry before him such as to result in a gross irregularity.[3]In fact the arbitrator accepted the evidence of Mr Müller and at no stage in his award mentioneddishonesty, breach of fiduciary duty or theft, much less made any findings to that effect.

[15] Turning to the second point it had two aspects. First it was said that clause 22.2 was clear in its terms and therefore it was impermissible for the arbitrator to have regard to any extrinsic evidence to provide the context within which it fell to be interpreted. Second it was contended that the arbitrator had allowed inadmissible evidence to be placed before

[3]*Goldfields Investment Co Ltd & another v Johannesburg City Council & another* 1938 TPD 551 at 560-561.

him and made use of such evidence in construing the relevant clause of the agreement.

[16] In regard to the interpretation of the contract it was submitted that the arbitrator was bound by 'the well-established rule that a contract must be interpreted by construing its plain words' and that it is only in cases of ambiguity or uncertainty that an arbitrator can take account of surrounding circumstances 'or its so-called factual matrix'. It is surprising to find such a submission being made in the light of the developments in the interpretation of written documents reflected in *KPMG Chartered Accountants (SA) v Securefin Ltd & another*[4] and*Natal Joint Municipal Pension Fund v Endumeni Municipality*.[5]These cases make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation

[4]*KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) paras 39 and 40

[5]*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18 and 19.

from the outset. The approach of the arbitrator cannot be faulted in this regard.

[17] The second objection related to the alleged inadmissibility of the evidence to which the arbitrator had regard in construing the agreement. Fundamental to this objection was the contention that an arbitrator is obliged to apply the rules of evidence in the same way as a court of law. As authority for that proposition, the heads of argument for Dexgroup cited the statement in *Lawsa*[6] of the traditional view that an arbitral tribunal is obliged to apply the formal rules of evidence. This overlooked the submission in the same paragraph[7] of that volume of *Lawsa*that the rule would more accurately reflect modern arbitral practice if it was restated as saying that, unless the arbitration agreement otherwise provides, the arbitrator is not obliged to follow strict rules of evidence provided the procedure adopted is fair to both parties and conforms to the requirements of natural justice.

[18] In my view the submission by the author of this volume of *Lawsa*is sound. No authority binding on us was cited in support of the so-called traditional view and my research has not revealed any. The nearest one comes to it is a statement in *Dutch Reformed Church v Town Council of*

[6] *Lawsa*Vol 1 (2nd ed) para 586.
[7] Para 586 fn 5.

Cape Town[8]that the court may set aside an award if it is only supported by inadmissible evidence. Apart from that there is an *en passant* remark by Selikowitz Jin *Benjamin v Sobac South African Building & Construction (Pty) Ltd*[9] that where an arbitration is to be conducted informally the arbitrator may have regard to hearsay evidence and occasional undeveloped references in other judgments to inadmissible evidence. Beyond that the question is not one that appears to have arisen in our courts. The Act does not deal with the issue and the references to 'subject to any legal objection', in ss 14(1)*(b)*(iii) and (iv), are directed at issues of the competence and compellability of witnesses and the right to invoke privilege and exclude without prejudice communications and not at importing the formal rules of evidence into arbitration proceedings.

[19] In England the position was formerly that arbitrators were bound to apply the rules regarding admissibility of evidence.[10]However, there were exceptions to the rule that diminished its importance and courts demonstrated an understandable reluctance to set aside awards on this ground where it had no substantial bearing on the outcome of the case. When the Arbitration Act 1996 was passed, after an extensive review of the law relating to arbitrations, all this was swept away. Section 34(2)(f)

[8]*Dutch Reformed Church v Town Council of Cape Town* (1898) 15 SC 14 at 23.
[9]*Benjamin v Sobac South African Building & Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 964J-965A.
[10] Michael J Mustill and Stewart C Boyd *Commercial Arbitration* 2ed(1989) 352-353 under (f).

of that Act now provides that it is for the arbitrator to decide whether to apply the strict rules of evidence or indeed any rules at all in regard to the admissibility, relevance and weight to be attached to evidence. Indeed the section permits the arbitrator to determine in what form evidence, if any, is to be tendered. In other words control over the proceedings is vested in the arbitrator to determine how the arbitration is to be conducted. Provided the parties receive a fair hearing there are no grounds for challenging the arbitrator's decisions in that regard.

[20] The advantages of arbitration over litigation, particularly in regard to the expeditious and inexpensive resolution of disputes, are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined in a straitjacket of legal formalism that the parties to the arbitration have sought to escape. Arbitrators should be free to adopt such procedures as they regard as appropriate for the resolution of the dispute before them, unless the arbitral agreement precludes them from doing so. They may therefore receive evidence in such form and subject to such restrictions as they may think appropriate to ensure, as the arbitrator in this case was required to do, the 'just, expeditious, economical and final' determination of the dispute. That accords entirely with what Gardiner J said, nearly a century

ago, in *Clark v African Guarantee and Indemnity Co Ltd*[11]that, whilst arbitrators must carry out their duties in a judicial manner, that does not mean that they must observe the precision and forms of courts of law.

[21] I am aware that in *Crollqq Kerr v Brehm*[12]Cloete J said that arbitrators should follow the 'broad rules for judicial investigation',but that was said in the context of part of the proceedings being conducted in the absence of one of the parties, and not in relation to the application of formal rules of evidence. In my view the modern demands of arbitration dictate that arbitrators should be free, in the absence of anything in the arbitration agreement to the contrary, to determine the admissibility of evidence without being shackled by formal rules of evidence. The correct approach is that arbitrators may follow such procedures in regard to the admissibility of evidence as they deem appropriate, provided always that the parties are afforded a fair hearing.

[22] It follows that even if some of the evidence placed before and considered by the arbitrator in this case, in accordance with the strict rules of evidence,would have been inadmissible its admission would not have constituted an irregularity or an act in excess of the arbitrator's powers. That avoids the necessity to identify the evidence that Dexgroup

[11]*Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77.
[12]*Crollqq Kerr v Brehm*2 Searle 227 at 229.

contends fell in this category. Its submissions in that regard were closely tied to its erroneous contentions in regard to the construction of the agreement and it may be that on closer examination its complaints about the admissibility of evidence would have evaporated. However, as those complaints raised a point of general principle in regard to the conduct of arbitrations they are better disposed of on that ground.

[23] The last point argued on behalf of Dexgroup flowed from its contention that the cross-examination had strayed into territory not covered by the pleadings in the respects already mentioned in para 10 above. As I have already held this contention to be unsound it is unnecessary to discuss it further.

[24] For those reasons the court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that Dexgroup enjoyed reasonable prospects of success. Clearly it did not.Although points of some interest in arbitration law have been canvassed in this judgment they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. The need to obtain leave to appeal is a valuable

tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal.

[25] Two other matters need to be dealt with before I conclude. The first is that, in correspondence addressed to the Deputy President of the Court prior to the hearing, it was brought to his notice that in 2009 my colleague, Malan JA, then sitting in the high court in Johannesburg, presided over a dispute between the same parties in which the sale of shares agreement that fell to be interpreted in the arbitration figured in some way. The letter did not say what the Deputy President should do with this information so it was raised at the outset of the hearing by the presiding judge. Counsel's response was that no application for Malan JA's recusal was being made and that it was not contended that he should *meromotu* consider recusing himself, but that the information had been conveyed to the Deputy President *ex abundantecautela*. Nothing more needs to be said about this.

[26] The other matter relates to an application filed on behalf of Dexgroup that was conditional upon its being unsuccessful in the appeal. In that event leave was sought to adduce further evidence and to refer another issue between the parties, not the subject of their arbitration

agreement, back to the arbitrator. The application was opposed and not persisted with in argument. The only remaining issue in that respect is costs and Dexgroup must clearly bear those costs.

[27] In the result the appeal is dismissed with costs, such costs to includethose of the application to lead further evidence on appeal and remit the matter to the arbitrator.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	E J FERREIRA (with him J J MEIRING) the heads of argument having been prepared by STEPHAN DU TOIT SC and J J MEIRING. Instructed by: Bouwer Cardona Attorneys, Johannesburg; Honey Attorneys, Bloemfontein
For respondent:	C M ELOFF SC Instructed by: Eversheds, Johannesburg Lovius Block Attorneys, Bloemfontein.