IN THE SOUTH GAUTENG HIGH COURT,

JOHANNESBURG

CASE NO: 2012/47836

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

JACOBUS NICOLAAS HUMAN Applicant

and

KELLY JADE BERGER First Respondent

ROBERT KROMBEIN NO Second Respondent

INTRODUCTION

1. Applicant ("the tenant") seeks to review and set aside an order made by an arbitrator that *"in the interim, pending the final outcome of the present arbitration ....the parties ought to bear their own legal costs of the present arbitration and ought to share equally the costs in connection with the reference and the award".* First respondent ("the landlord") opposes this application for review.

2. The tenant and landlord concluded a lease agreement in respect of residential property. Various disputes arose concerning alleged damage to and defects in the property as well as payment of municipal accounts for electricity and water. The tenant continued to occupy the property but withheld the rental payable.

3. The lease agreement requires that *"any dispute or difference"* between the parties *"shall on written demand by either Party be submitted to arbitration".*[1] The landlord delivered a statement of claim to the tenant demanding payment of arrear rental and payment of utilities in the amount of R 171, 632.26. This statement of claim of 20th April 2012 is not attached to the papers but it appears to be common cause that this constituted a referral to arbitration by the landlord and that an arbitrator was appointed.

4. A pre-arbitration meeting was held on 4th October 2012. The landlord was represented by an attorney and the tenant represented himself. There was disagreement on responsibility for costs of the arbitration. A further pre-arbitration meeting was arranged for 26th October 2012 at which the tenant was now represented by his attorney and senior counsel. It is common cause that no evidence, including affidavits, was led before the arbitrator at this meeting. The arbitrator heard argument from both the landlord's and tenant's legal representatives on interpretation of clause 20.5 of the lease which deals with costs in arbitration. The arbitrator rendered his interim award on this issue of costs on 13th November 2012.

5. The tenant complains of a number of gross irregularities on the part of the arbitrator and says that if there is no stay of the arbitration pending the outcome of this review application "I will be required to share the costs of the arbitration proceedings and bear my own costs"[2].

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[1] Clause 20.1

[22] Paragraph 8 of the applicants founding affidavit.

THE INTERIM AWARD

6. The arbitrator defined his role to *"determine the issue of the proper interpretation of clause 20.5 of the lease agreement concluded between the parties"*.

7. Clause 20.5 of the lease agreement provides:

> "Unless otherwise determined by the arbitrator, the Party who demanded the arbitration shall be liable for the costs of the arbitration including the other Party's legal costs on an attorney and own client scale".

8. The arbitrator also had regard to clause s 23.1 which provides that "the agreement will in all respects be governed by and construed under the laws of the Republic of South Africa" and clause 25 which provides "Except as otherwise specifically provided herein, each Party will bear and pay its own legal costs and expenses of an incidental to the negotiation, drafting, preparation and implementation of this Agreement" . In addition, the arbitrator referred to Section 35 of the Arbitration Act, 42 of 1965, which in subsection (1) provides, inter alia, that " Unless the arbitration agreement otherwise provides, the award of costs in connection with the reference and award shall be in the discretion of the arbitration tribunal....." and in subsection (6) provides that " Any provision contained in an arbitration agreement to refer future disputes to arbitration to the effect that any party or the parties thereto shall in any event pay his or their own costs or any part thereof, shall be void."

9. The arbitration award may be summarized as follows: The starting point is clause 25 of the agreement because the present arbitration is a contractually agreed mechanism whereby the parties implement the lease agreement.(my underlining). Accordingly, the parties are required, in terms of clause 25, to bear and pay for their own legal costs and expenses of the present arbitration. Clause 20.5 does not represent a departure from the default position in clause 25 because the costs referred to in clause 20.5 are the ultimate costs of the arbitration [whereas the present determination concerns only the interim position in advance of commencement of the arbitration on the actual merits] (my interpolation).) Section 35 is opined by the SA Law Council to protect 'the interests of the financially weaker party who may be deterred by such an agreement from pursuing a good claim'. Section 35 is recognition by the legislature of the potential prejudice and obstruction of justice that may arise from clauses that seek to allocate costs before any dispute has arisen. Fairness to both sides dictates that, pending the

final outcome of the arbitration, the parties ought to bear their own costs and share equally the costs in connection with the reference and award.

THE REVIEW APPLICATION

10. A number of grounds of review are set out, all encompassed by the averment that the arbitrator misconceived his duties and committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers.

11. The first ground of review is that the arbitrator prejudged the issue as to costs when he made certain suggestions at the first pre-arbitration meeting of 4th October. Of course, there is no official record of those proceedings. Nor had the dispute fully emerged at that time. Nor had the arbitrator had the benefit of legal argument. If there was any doubt about the bona fides or open mind of the arbitrator, then it would have been appropriate to have taken up this issue and demanded his recusal prior to the pre-arbitration hearing of 26th October. In any event, such comment is not an unreasonable one to make when attending to 'housekeeping' in advance of emergence of an actual dispute.

12. Three further grounds of review concern the procedure adopted at this pre-arbitration hearing. First, no substantive application on affidavit was made in accordance with the uniform rules of court. But , at this stage the arbitration had not commenced. This was a pre-arbitration hearing. Second, no evidence was placed before the arbitrator. No indication is set out in the application as to the nature or the content of the evidence which might have been, but was not, sought to be placed before the arbitrator – on affidavit or otherwise. Third, the arbitrator had no authority , in terms of either the Act or the lease agreement, to make a determination as to the parties future liability for costs. Since the arbitrator specifically declined to make an order in terms of clause 20.5 of the lease agreement dealing with the costs which may or may not be incurred in the future in the course of the arbitration hearing, he cannot be criticized for acting contrary to section 35(6) of the Act. The arbitrator has made it clear that he will make a final determination at the end of the arbitration, once he has taken into account all relevant facts, circumstances and arguments on costs. That will be a retrospective not a future award.

13. Two grounds of review complain about invocation by the arbitrator of clause 25 of the lease agreement. First, it is argued that interpretation of clause 25 was not argued at

the proceedings and that the arbitrator misinterpreted same. Clause 25 is part of the very agreement within which clause 20.5 is embedded. How can anyone 'interpret' the meaning and import of clause 20.5 without regard to the rest of the agreement. Indeed, the tenant's founding affidavit indicates that his counsel referred the arbitrator to at least one other clause in the agreement (clause 15.2) for interpretation purposes. This is not comparable to the facts in Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others 2008(2) SA 608 SCA where an entirely new issue, neither identified on the pleadings nor canvassed in argument, was relied upon by the arbitrator. The second argument is that the arbitrator took into account 'irrelevant' and disregarded 'relevant' considerations when relying upon clause 25. No indication is given of these relevant or irrelevant considerations other than that the purport of clause 25 itself was not argued and therefore there was a failure to comply with the audi alteram partem principle. If the arbitrator was wrong in his understanding of clause 25, then he was wrong. It seems to me this is no more than attempting to clothe an appeal in the raiment of a review.

14. The consideration given by the arbitrator to section 35(6) of the Act is argued to be irrelevant. However, the comment by the arbitrator on this section seems to me to be entirely relevant when one has regard to the authority to which he has referred – Kathrada v Arbitration Tribunal and Another 1975(2) SA 673 A. The issue of costs certainly involves questions of fairness.

15. In the present instance, the arbitrator has a discretion to determine costs – vide clause 20.5. This arbitrator may not necessarily be correct that clause 20.5 refers only to costs at the end of the arbitration process once he has had regard to all evidence and argument and the final award itself. To my mind, it is entirely conceivable that clause 20.5 permits the arbitrator to make an interim award, in advance of the actual arbitration hearings, based upon the very considerations of fairness he had in mind when commenting on section 35 of the Act. After all, just as the tenant complains that he is, in terms of the interim award, obliged to pay his own legal costs and half of the arbitration costs pending the outcome of the entire arbitration process, so too, can the landlord complain that she too is so obligated.

16. The arbitration process is not voluntary. In terms of the lease agreement the parties "shall" refer their disputes to arbitration. Is it fair that the landlord who seeks to resolve the dispute by pursuing the only avenue available to her i.e. arbitration must pay all legal costs of the arbitration, her own legal costs and the tenants legal costs in

anticipation of and during the arbitration process? It might well be that, fairness requires an interim award, in terms of clause 20.5, that both parties shall pay their own costs and half the arbitration costs until such time as the merits of the dispute have been determined and then a final award is made which includes a decision as to final liability for costs.

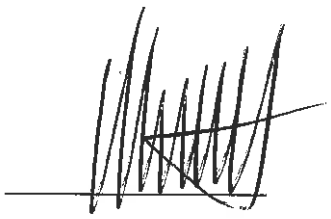
17. I am not persuaded that there has been any 'gross irregularity' as discussed and exemplified in Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA). I cannot find that the arbitrator misconceived the nature of the enquiry or his duties. The reasoning by which he arrived at his decision may be open to question but he has 'the right to be wrong' on the merits. The arbitrator was required to interpret the costs provisions of the lease agreement. He did so interpret. That the outcome is not the one desired by the tenant does not afford ground for review.

18. I note that the landlord's father has commented that the actions of the tenant are part of a process of delay, that he seeks to avoid any determination that he is indeed liable for unpaid rental for his accommodation and unpaid electricity and water expenses associated therewith. The tenant should bear in mind that this is only an interim award. Once the arbitration on the merits commences he may be more fortunate and succeed in persuading the arbitrator that he is neither liable for unpaid rentals and utilities nor for payment of either his own costs or those of the arbitration.

19. I must thank both counsel who appeared in this matter. This application was referred to me as senior judge by another judge in the course of the opposed motion court roll. The application was 'squeezed in' amongst other matters. The hearing was disjointed. I was certainly not prepared. I had some difficulty in fully grasping the issues at the time of argument. Both counsel were very patient and I trust that they both felt that they were given sufficient opportunity to take me through the papers and the issues. I thank them for their patience and their repeated bobbing up and down to resolve my various difficulties.

20. ORDER

1. The application for review and setting aside is dismissed.
2. The applicant is directed to pay the first respondents costs of the application on the party- party scale including the costs of senior counsel.



K. SATCHWELL

Counsel for the Applicant: Adv. W. Luderitz SC

Attorneys for the Applicant: Edward Nathan Sonnenberg

Counsel for the First Respondent: Adv. H. van Eeden SC

Attorneys for the First Respondent: Routledge Modise Inc practicing as Eversheds

Date of hearing: 11th April 2013

Date of Judgement: 7th May 2013