REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 14430/14

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

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In the matter between:

ESKOM HOLDINGS SOC LIMITED	Applicant
And	
BHP BILLITON ENERGY AND COAL SOUTH AFRICA	
PROPRIETARY LIMITED	First Respondent
BHP BILLITON SA HOLDINGS LIMITED	Second Respondent
BILLITON COAL HOLDINGS SOUTH AFRICA	
PROPRIETARY LIMITED	Third Respondent
L.T.C HARMS N.O	Fourth Respondent
V. MALEKA N.O	Fifth Respondent
J.F MYBURGH N.O	Sixth Respondent

JUDGMENT

WEINER J:

1. The applicant herein applies in terms of Section 33 of the Arbitration Act 42 of 1965 (as amended) ("the Act") to set aside the award of the arbitrators, who are cited in the matter as the fourth, fifth and sixth respondents.

2. The basis of the application is that the arbitrators exceeded their powers, and accordingly the applicants claim that the matter should be referred back to a newly constituted tribunal.

Background

3. The background and facts in the matter will be set out briefly, as they are not strictly relevant to the relief sought in this matter.

4. In 1994 Eskom Holdings Soc Limited ("Eskom") and Douglas Colliery Limited ("Douglas") and Randcoal Limited ("Randcoal") entered into a longterm Coal Supply Agreement ("CSA") in terms of which Douglas undertook to supply coal to Eskom. Randcoal (the holding company of Douglas), guaranteed Douglas' coal delivery obligations. At that time Randcoal had a group structure, which was depicted on Schedule M to the CSA. In terms of the CSA (clause 18.1.7 – 18.1.8) Randcoal would not be entitled to effect any change to its group structure as set out in Schedule M without Eskom's prior

written consent (which was not to be withheld unreasonably); and (in terms of clause 18.1.9) Randcoal, if it wished to change its structure, would notify Eskom in writing of the proposed change.

5. Randcoal effected several changes to its group structure as depicted in Schedule M to the CSA. Randcoal obtained the consent of Eskom to most of these changes. Eskom's complaint which led to the arbitration proceedings, concerned two transactions for which no consent was obtained:-

    5.1. Randcoal disposed of a coal mining subsidiary, Welgedacht Exploration Co Ltd ("Welgedacht"), to a third party some 16 years prior to the arbitration;

    5.2. Douglas' rights and obligations under the CSA were assigned, with Eskom's consent, to the first respondent ("BECSA"), and Randcoal's name was changed to that of the second respondent ("BSAH"). BSAH acquired eight new subsidiaries ("the eight new subsidiaries"), which were not coal mining companies.

6. The facts in 5 above form the basis of claim A.

7. Claim C, as described by Eskom, relates to the disposal by Gengro Limited ("Gengro"), one of the subsidiaries of BSAH, of its interest in Richards Bay Minerals Limited ("the RBM transaction"). Eskom seeks, *inter alia*, an award

declaring that the RBM transaction constitutes a change to the structure of BSAH as contemplated in clauses 18.1.8 and 18.1.9 of the CSA.

8. Several name changes occurred over the years and for the purposes of convenience, the first, second and third respondents will be referred to as BHP herein.

9. Eskom invoked the arbitration provisions of the CSA to pursue three claims in terms of their statement of claim(claim B was not pursued in the arbitration). BHP delivered a statement of defence to the statement of claim.

10. Claims A and C were dismissed with costs by the tribunal and it is this decision which Eskom seeks to set aside.

The tribunal's powers

11. The source of the arbitrators' powers appear from the arbitration agreement between the parties contained in clause 20 of the CSA. Clause 20.1 provides as follows:-

"Arbitration

20.1 Any dispute between the parties in regard to:

20.1.1 the interpretation of;

20.1.2 the effect of;

20.1.3 the parties' respective rights and obligations under;

20.1.4 the breach of;

20.1.5 any matter arising out of;

this agreement; and

20.1.6 any matter requiring the parties mutual agreement and which cannot be reached within 60 days;

shall, save as otherwise provided in this Agreement, be decided by arbitration in the manner set out in this clause."

12. The parties could not agree on terms of reference for the tribunal. As a result, Eskom delivered a statement of claim and BHP delivered a statement of defence thereto. The parties are *ad idem* that the ambit of the disputes was delineated in the statement of claim and the statement of defence. However the parties differ on precisely which disputes were contained in the statement of claim and the statement of defence.

13. There is some disagreement between the parties in the use of the word "pleadings", but for the purposes of this judgment I will refer to the statement of claim and the statement of defence as "the pleadings".

14. On the 23rd of January 2014 a pre-arbitration meeting was held before the tribunal. The tribunal directed that the pleadings, as exchanged, had closed and the parties agreed that the reference to arbitration would comprise of the pleadings as exchanged. The parties were also entitled to request further particulars and admissions.

Tribunal's interpretation of clauses 18.1.7, 18.1.8 and 18.1.9

15. The tribunal found:-

a. The group structure of Randcoal was the one set out in Schedule M, and no other.
b. In terms of the described group structure, Randcoal consisted of four wholly owned subsidiary companies.
c. Three of those companies, Douglas Colliery, Coregroup (Jupiter) and Welgedacht, between them owned five coal mines (Douglas, Duvha, Khutala, Majuba and Welgedacht) and 60% of Middelburg and 50% of Rietspruit.
d. It is common cause that the actual structure of Randcoal at the time included more companies, one of which was relatively substantial.
e. The guarantee provided by Randcoal in clause 24 was underpinned by the coal mining companies in Schedule M, but was not limited to those companies. Randcoal could call on any of its assets, including assets not contained in Schedule M, to discharge its obligations under clause 24.
f. A distinction was drawn in the agreement between the group structure of Randcoal and the assets of Douglas Colliery. The disposal by Douglas Colliery of its movable and immovable assets for the purposes of operating in the Duvha Colliery was regulated by clause 3.2., whereas any change in the structure of Randcoal was regulated by the provisions of clauses 18.1.8, 18.1.8 and 18.1.9.
g. There is no indication in Schedule M or the provisions of clauses 18.1.7, 18.1.8 or 18.1.9, that the parties intended the Randcoal structure, for the purposes of the CSA, to include non-coal assets.

h. Any change to the Randcoal group structure as reflected in Schedule M was to be notified by Randcoal to Eskom, whether the change was the introduction of new companies, or the reduction in companies, or the substitution of new for old companies, or intra-group transfers, as long as they related to coal assets.

i. In the event that Randcoal wished to change its group structure, it was obliged to notify Eskom in writing of the proposed change (giving full details (i) why it was contended that Randcoal's ability to perform its obligations would not be adversely affected by such change, or (ii) why the additional security would enable Randcoal to perform its obligations) (Clause 18.1.9)

j. Eskom would advise Randcoal in writing within 14 days whether it approved of the proposed change (Clause 18.1.9)

k. Randcoal was not entitled to effect any change to its group structure (including its share capital and share premium) without Eskom's prior written consent which would not be unreasonably withheld (Clause 18.1.8)

l. For the purposes of clause 18.1.8 Eskom's consent would be deemed to have been withheld reasonably if a proposed changed would affect the ability of Randcoal to perform its obligations as guarantor of Douglas Colliery and if Randcoal was unable to furnish Eskom with additional or alternative guarantees for the due and proper performance by Randcoal of its obligations in terms of the CSA (clause 18.1.8).

16. The tribunal also found that a new Schedule (Annexure B to a letter dated 5 June 1995) became the notional Schedule M and replaced same.

17. BHP contends that the relief sought under claim A was for an award directing it to request Eskom's prior written consent to, firstly, the disposition of Welgedacht 16 years ago, and secondly, the acquisition by BHP, of the eight new subsidiaries, which acquisition had also been completed. These were presented as prayers for the contractual remedy of specific performance of the CSA, and in particular, clauses 18.1.8 and 18.1.9. thereof.

Findings

Claim A

18. In regard to the Welgedacht transaction, the tribunal found, firstly, that the claim was "not truly one for specific performance, but rather one for substituted performance, which is not a contractual remedy". The relief claimed would have required BHP to obtain prior written consent to a change which had been effected some 16 years before. This could not be carried out. Eskom was accordingly not claiming specific performance in terms of the CSA, but other relief not arising from the CSA.

19. The tribunal decided that the remedy claimed was not available in a claim based on contract. BHP submits that this is a decision on the merits of the claim and cannot be challenged under Section 33 of the Act. In its founding affidavit, Eskom submits that this finding "went beyond the powers of the

tribunal" because it was not pleaded. BHP argues that Eskom based its case on the CSA and thus it could only seek a remedy which was permissible in law for contractual claims; a claim for substituted performance is not a contractual remedy according to the finding of the tribunal. BHP also argues that Eskom's contention in this regard is incorrect because it was specifically pleaded that Eskom is not entitled to the relief which it sought.

20. Secondly, the tribunal held that, in any event, in the exercise of their discretion, they were not prepared to grant the order claimed.

21. Eskom contends that, an analysis of the agreement to arbitrate (clause 20 of the CSA) and the pleadings (as elaborated on by the request for particulars and admissions and the responses thereto), reveals that it was not an issue before the arbitrators whether, if it was found that BHP had breached the CSA, the arbitrators could decline Eskom's prayers for specific performance. By refusing specific performance, Eskom contends that the arbitrators "arrogated to themselves a power that they did not have and decided an issue that was not before them (thereby exceeding their powers in contravention of Section 33 of the Arbitration Act)".

22. As can be seen from the brief factual summary referred to above, Eskom's claims were based upon the fact that BHP had breached the CSA by failing to obtain the prior written consent of Eskom to certain structural changes to the group structure.

23. In regard to claim A (Welgedacht), the arbitrators found that BHP had in fact breached the agreement, but despite same, refused the order of specific performance, which Eskom had claimed for the two reasons stated above.

24. In regard to claim A (the eight subsidiaries), the tribunal found that the eight companies referred to therein, which were acquired by BHP, were not coal-mining companies and accordingly, they did not fall within the ambit of clause 18.1.9. of the CSA and therefore there was no breach of the agreement.

25. On the interpretation the tribunal has given to the CSA, BHP was not obliged to give Eskom a clause 18.1.9 notice in respect of the acquisition of the eight subsidiaries. It was not within the contemplation of the parties to the CSA that non-coal assets would form part of the group structure. In calling for a clause 18.1.9 notice in respect of the eight subsidiaries Eskom is relying on the CSA for a purpose that was never intended at the time the CSA was concluded.

26. In regard to claim C, the tribunal found that the RBM transaction was effected by Gengro, one of the eight subsidiaries of BHP, in respect of which there was no obligation on the part of BHP to have given a clause 18.1.9 notification. Hence any transaction concluded by Gengro, such as the RBM transaction, did not attract the obligation to give a clause 18.1.9. notification.

Challenges to the tribunal's findings

27. In regard to claim A, Eskom contends that the tribunal erroneously found, beyond its powers, that BHP should not be ordered to give Eskom the information set out in Clause 18.1.9 of the agreement. Eskom's submissions in this regard and in relation to the Welgedacht transaction, are that the tribunal went beyond its powers in finding that:-

    27.1. The remedy sought by Eskom was not truly one for specific performance, but one for substituted performance which is not a contractual remedy;

    27.2. In the exercise of its discretion, it was not prepared to give an order of specific performance since the Welgedacht transaction took place 16 years ago, the rights of a third party, not party to the arbitration might be adversely affected, and there was no reasonable prospect that Eskom would not consent to the change in structure.

28. According to Eskom, both of these findings go beyond the powers of the tribunal as they were not pleaded, and, as the "pleadings" define the issues, this limited the jurisdiction and powers of the arbitrators.

29. Eskom's grounds for review on claim C appears to be limited to the tribunal's interpretation of the agreement that it distinguished between the non-coal assets and the coal assets. Eskom states that this distinction was not pleaded by BHP, nor relied upon in the statement of defence. Accordingly, Eskom

submits that the interpretation that the tribunal placed on the agreement was not one pleaded by BHP and it was an issue, beyond the tribunal's powers, to decide what constituted a coal asset and what constituted a non-coal asset.

30. Eskom contends that:-

    30.1. The fact that the relief of specific performance was claimed permitted the tribunal to grant such relief, but not to refuse same. The reasoning in this regard is that Eskom was entitled to such relief as a matter of course, unless BHP pleaded and proved that specific performance should be refused. Eskom submits that there was no issue contained in the pleadings that gave the tribunal the power to determine that they should not award specific performance in respect of the Welgedacht transaction. BHP did not set out, in the statement of defence, factors which the tribunal would have been entitled to have regard to, in refusing specific performance.

    30.2. The defences raised by BHP in the statement of defence (and in the list of admissions and inquiries), related to the assets which appeared on Schedule M and the proper construction of the agreement, in relation to the limitation on Randcoal changing its structure. According to Eskom, BHP did not raise impossibility, or any other recognised ground for refusing specific performance in the statement of defence.

31. In terms of Section 27 of the Act, the tribunal enjoys an automatic right to order specific performance of any contract, but only in circumstances in which

a court would have the power to do so, unless there is an agreement between the parties to exclude the right. It must be noted that Section 27 of the Act states that the tribunal "*may* order specific performance...". According to Eskom, courts only refuse an order for specific performance, where it would operate unreasonably harshly on the defendant; or where the agreement giving rise to the claim is unreasonable; or if it would be inequitable under all the circumstances; or compliance with the order would be impossible. Eskom states that the onus of proving these circumstances is on BHP, and that none of these defences were pleaded and proved by BHP.

32. The first question is whether the tribunal had the power to refuse specific performance at all, if this relief was not specifically opposed by BHP.

33. On the first finding of the tribunal, the issue of Eskom seeking substituted performance was an issue which was debated within the tribunal and argued by both parties. In any event, even without argument, it was an issue on the pleadings in that Eskom had to show why its claim for specific performance should succeed. The tribunal found that it did not succeed as the relief was not for specific performance.

34. Secondly, is it necessary for a defendant to specifically set out why specific performance should be refused. In ***Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd*** 1982 (1) SA 398 (A) it was held that a contracting party who does not specifically perform, is the party who can be expected to know why he did or could not specifically perform, and therefore is the party who can be expected to plead the grounds why specific performance should not be ordered.

35. Miller AJ at 443B rejected the argument in the ***Tamarillo*** case that the party raising grounds against the grant of specific performance bears the onus of proving those grounds. He need only adduce some evidence on which the court can exercise its discretion.

36. BHP contends that the disputes were delineated in the statement of claim and the statement of defence. BHP claimed that, in order to succeed on claim A, Eskom had to persuade the tribunal, firstly that there was a breach of the CSA, and secondly, that it should grant specific performance of an obligation that BHP request the prior written consent of Eskom to a proposed change to the structure of Randcoal.

37. BHP submitted that in applying the law further, in regard to contractual claims for specific performance, the court/tribunal always has a discretion to grant or refuse such remedy and that the tribunal's refusal would not be one which exceeded the powers that it had.

38. In addition BHP claims that the relevant facts were pleaded and admitted. The tribunal found that it was impossible, 16 years after the sale, to reverse the Welgedacht transaction, or to order specific performance. Same would, according to the tribunal, have been pointless and impossible.

39. Eskom, on the other hand, argues that BHP was required to specifically plead and set out facts why specific performance should not be granted. In

Tamarillo's case *(supra)* reference was made to the judgment of De Villiers JA in ***Shill v Milner*** 1937 AD 101 at 106 where it was argued that an order for specific performance ought not to have been granted against the defendant, because performance was impossible:-

> *"Shill nowhere deposes that it was impossible for him to [perform] and if this was his defence he should have raised it in his plea, and the onus would lie on him to prove impossibility".*

40. Miller JA in ***Tamarillo*** *(supra)* at 443B held:-

> *"It may be that in certain cases evidence falling short of proof of impossibility might nevertheless justify a Court in refusing to decree specific performance. In Van Rooyen v Baumer Investments (Pty) Ltd, supra, ETTLINGER, AJ, at pp 120 - 1 after referring to Shill v Milner, expressed the view that "where the ability of the debtor to perform is raised (by the debtor) and left in doubt", specific performance should be refused. In a case in which the defendant requires the consent of a third party to enable him to perform effectively, and at the end of the case, the defence of impossibility having been raised and canvassed, the probabilities in regard to that issue appear to be evenly balanced, the Court, it appears to me, might justifiably take the view that refusal of specific performance was preferable to the grant of an order which as likely as not would prove to be ineffectual. A rule that a defendant pleading impossibility as answer to a claim for specific performance must necessarily discharge the onus of proving it if he is to avoid such a decree might hamper and inhibit the Court in the exercise of its discretion. As the extract quoted earlier herein from the judgment of this Court in Haynes v Kingwilliamstown Municipality shows, the Court's discretion is not "circumscribed by rigid rules". The second element of the dictum in Shill v Milner might well have been too generally and positively stated."*

41. It was held in ***Tamarillo*** that the defendant did not raise the defence of impossibility of performance and that issue could therefore not be canvassed.

42. BHP in the present case states that it pleaded/raised in its statement of defence, the following:-

    42.1. That the Welgedacht transaction took place 16 years ago;

    42.2. The transaction had been fully implemented;

    42.3. The rights of a third party who was not a party to the arbitration might be adversely affected;

    42.4. There is no reasonable prospect that Eskom would not consent to the change in group structure.

43. It is contended that the factual elements relating to these grounds were specifically pleaded and evidence was led thereon. Eskom submits that counsel for neither party addressed the question of an exercise of a discretion to refuse specific performance in their heads of argument and the tribunal was not asked to exercise such a discretion by counsel for either party. BHP state that this is factually incorrect. Copies of Billiton's heads of argument, as well as Eskom's submissions, were handed in to this court. BHP refer to their heads of argument in which they raised the grounds upon which the relief should not be granted:-

    43.1. Firstly, that Eskom was claiming substituted performance, which was impermissible and thus Eskom had failed to show why its relief for specific performance should be granted; and

    43.2. Specific reference was made to ***Benson v SA Mutual Life Assurance Society*** 1986 (1) 776 AD and argument was set out as to why the tribunal ought not to grant the claim for specific performance.

43.3. Further, the respondent specifically relied on the exercise of a discretion by the tribunal by stating “in any event, even if it were only a matter of discretion, the specific performance claimed in Claim A should be refused”.

44. BHP further contends that, in the oral evidence of Bierman, and in oral argument, there were numerous references to the impossibility of undoing the Welgedacht sale and it was argued that this was a ground upon which specific performance should be refused.

45. Eskom’s counsel in fact argued that the tribunal had a discretion to grant or refuse specific performance and that it should be exercised in favour of Eskom. [There is some dispute as to whether this was argued only on the basis that BHP had not pleaded grounds for refusing specific performance or whether Eskom accepted, for the purposes of the argument, that the tribunal did have the discretion to refuse specific performance. For this reason, I do not intend to rely on this prior argument of Eskom, in my decision.]

46. Finally, BHP claimed that the grant or refusal of the remedy of specific performance is, as a matter of law, discretionary, unless an arbitration agreement makes the grant of specific performance mandatory if the claimant succeeds on proving the breach. There was no such term in the present arbitration agreement.

Issues to be determined

47. In respect of claim A (Welgedacht), it seems to me that the argument boils down to three issues:-

    47.1. Whether the relief claimed by the applicant is in fact for specific performance.

    47.2. Whether or not, when specific performance is claimed, the tribunal would have the discretion to either grant or refuse specific performance;

    47.3. If that discretion exists, whether it has to be specifically pleaded and proved by the defendant that specific performance was inappropriate for whatever reason.

48. In deciding the first point, the tribunal was quite correct in finding that it was not specific performance that was being sought, but substituted performance, and that same was not based on a contractual remedy. Therefore the tribunal was fully entitled to refuse specific performance on the ground that Eskom had failed to plead and prove that it had a contractual claim for specific performance.

49. That decision should be dispositive of the matter in relation to the Welgedacht transaction. However, I will deal, in addition, with the other issues referred to in paragraph 47 above.

50. In regard to 47.2., in my view, if the tribunal has the power to grant specific performance, it must follow that it has the power to refuse it, either on the grounds that an applicant has not made out a case for specific performance or because, in its discretion, it refuses same.

51. In reference to 47.3., is clear from the pleadings, being the statement of claim and the statement of defence, that BHP not only denied that it had breached the agreement, but in several instances, pleaded that Eskom was not entitled to the remedy which it claimed. As BHP contends, this was a dispute between the parties which appeared from the pleadings, and the tribunal was entitled to decide that particular dispute, in terms of Clause 20 of the CSA.

52. Secondly, BHP distinguishes the case of ***Hosmed Medical Aid Scheme v Thebe Ya Bophelo Healthcare*** 2008 (2) SA 608 (SCA), upon which Eskom relies, as the parties in the present matter did not enter into any agreement. There was accordingly no agreement that the specific issues contained in the pleadings would be the issues upon which the arbitrators would decide. In this case, Eskom unilaterally set out its contentions in its statement of claim, and BHP Billiton set out its contentions in the statement of defence. According to BHP, the differences in those two documents delineated the disputes which the tribunal had to decide, one of which was whether or not to grant the relief sought by the applicant, being specific performance. BHP contends that, having pleaded the facts of the Welgedacht transaction, it appeared clear from the pleadings that the transaction could not be reversed 16 years after

such sale, in order to retrospectively comply with the clause 18.1.7. to obtain the prior written consent to this transaction.

53. This issue was clearly delineated in the pleadings and the tribunal was entitled to exercise its discretion to refuse specific performance on the ground of impossibility.

54. In regard to claim A (the eight subsidiaries) the grounds for refusing the claim for specific performance was different from that in respect of the Welgedacht transaction. The interpretation placed on the agreement by Eskom was that the restrictions in clause 18.1.8. compelled BHP to give notice of each and all changes to its group structure (that Randcoal wished to make) depicted on Schedule M. The tribunal rejected this interpretation and held that the provisions of 18.1.7. to 18.1.9. of the CSA only applied to changes in Randcoal's structure, as long as they related to "coal assets".

55. BHP contends that this is a finding on the merits of the dispute and this cannot be challenged under Section 33 of the Act. Eskom's contention that its suggested interpretation of Clauses 18.1.7. to 18.1.9 of the CSA was not in dispute is in fact incorrect. BHP Billiton denied the interpretation placed on the CSA by Eskom and therefore placed it in dispute.

56. In regard to claim C, in argument, counsel for Eskom submitted that if claim A was to be reviewed and the order set aside, claim C should follow suit as they

both relate to the subsidiaries referred to in Claim A. The same principles as set out in 54 above apply in this regard.

57. The interpretation of the CSA was a matter of law (and this is conceded by Eskom) and the tribunal accordingly had the power to interpret same. If they incorrectly interpreted it, either because of a factual error or a legal error, this is not a ground for an application under Section 33 of the Act. Eskom failed to persuade the tribunal that, on its interpretation, the clauses applied to the eight subsidiary companies which were non-coal assets.

Accordingly, and for the above reasons, the application is dismissed with costs, including the costs consequent upon the employment of two counsel.

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WEINER J

Counsel for the Applicant: Adv Morison SC & Adv G Ngcanngisa

Applicant's Attorneys: Webber Wentzel

Counsel for the Respondent: Adv F Cilliers SC & Adv D Turner

Respondent's Attorneys: Edward Nathan Sonnenbergs

Date of Hearing:14 October 2014

Date of Judgment:4 November 2014