REPUBLIC OF SOUTH AFRICA

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

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

12 November 2014 — DATE
R M Robinson — SIGNATURE

CASE NO: 21360/2013

EDWARD MARTIN KEYROUZ — Applicant

And

ROBIN WHITEHORN — First Respondent

ADV G W GIRDWOOD — Second Respondent

BCA CIVIL ENGINEERING CO (PTY) LIMITED — Third Respondent

JUDGMENT

ROBINSON AJ:

[1] This is an application to review and set aside an Arbitration Award published by the second respondent on 25 April 2013. The review is brought in terms of sections 33(1)(b) of the Arbitration Act, 42 of 1965 ("the Act").

[2] In his answering affidavit the first respondent adopted the stance that, by section 33(2) of the Act, the application for review was required to be brought within a period of six weeks from the date of publication of the award, being 25 April 2013. That meant that the application for review ought to have been brought by 6 June 2013, meaning that the application for review, which was launched during the fourth quarter of August 2013 and served on 22 August 2013, was around 11 weeks out of time.

[3] Section 33 of the Act reads 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."*

[4] The applicant admits that it launched the application for review in response to an application brought by the first respondent during the first week of July 2013 to make the Arbitration Award an Order of Court. The applicant

admits further that he held back the review application until such time as the application to make the award an Order of Court had been issued.

[5] On 15 November 2013, the applicant delivered an application seeking condonation for the delay in bringing the review application.

[6] The first issue to be considered, accordingly, is whether the application for condonation should be granted. Section 38 determines that *"the court may, on good cause shown, extend any period of time fixed by or under this Act or whether such period has expired or not."* The extension of the period of time contemplated in section 33 accordingly requires that good cause be shown therefor.

[7] Whilst the applicant bases his application for review and setting aside thereon that the second respondent exceeded his powers and/or committed a gross irregularity, he also contends that his rights in terms of section 34 of the Constitution to a fair trial were denied as a result of the basis upon which the arbitration was conducted and the summary procedural rules which were made applicable to the hearing. The applicant submits that clause 46 of the summary procedure rules are unconstitutional and/or in conflict with clause 45.1.1 of the summary procedure rules. The applicant states that he does not require condonation in regard to those grounds embodied in relation to section 34 of the Constitution nor in relation to the constitutionality of clause 46 of the summary procedure rules.

[8] The determination of good cause is a matter that rests in the judicial discretion of the court, a discretion which is to be exercised having regard to

all the circumstances of the case. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interests in the finality of his judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. It has been said that *"these factors are not individually decisive but are inter-related and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate the prospects of success which are not strong."* See Holmes JA in *United Plant Hire & Others* 1976 (1) SA 717 (A) at 720 E-G.

[9] The applicant argues that condonation is only required in terms of section 33(2) in relation to the question whether the arbitrator exceeded his powers by enquiring himself into what was in effect his own jurisdiction. The questions revolving around the validity of the arbitration agreement, whether an arbitration agreement was entered into, the application of the constitutionality of the summary procedural rules and whether or not the applicant had a fair trial do not require condonation, so the applicant argues.

The applicant's explanation for the delay in bringing the application

[10] The applicant attributes the delay in bringing the review application to a mistaken understanding of the law by his attorney, Mr Weinstein. Mr Weinstein, so the applicant says, did not consider the provisions of section 33(1)(b) of the Act but considered that rule 53 of the Uniform Rules of Court could be relied upon as a basis of challenge of the Arbitration Award. He

took the view that it would be appropriate to await the first respondent to approach the High Court to make the award an Order of Court before launching the review proceedings.

[11] It was only after this application to make the award an Order of Court was served during the first week of July 2013 that Mr Weinstein requested the applicant to obtain sufficient cover to brief counsel to prepare an answering affidavit to the founding affidavit and to bring a counter-application to set aside the award. The application to set aside the Arbitration Award was, as stated above, only launched on 23 August 2013.

[12] The first respondent adopts the view that the ignorance of Mr Weinstein and the failure of Mr Weinstein and the applicant to take action after 25 April 2013 evidence a lack of diligence and a degree of carelessness that should not be condoned.

The applicant's opposition to the Award

[13] The applicant argues in the first instance that he concluded no arbitration agreement. Therefore, so it is argued, the arbitrator had no jurisdiction to hear the arbitration or to make the award. The applicant claims that he signed the agreement to the appointment of arbitrator in a representative capacity on behalf of the third respondent. Therefore, so it is claimed, *"by even beginning, conducting and finalising the arbitration the Second Respondent exceeded his powers*". The applicant is of the view that the second respondent should have enquired at the outset of the arbitration proceedings whether there was any referral to arbitration by the applicant

and stated that the second respondent failed to consider whether the applicant had consented to arbitration. The second respondent, so it is alleged, merely assumed that all three parties, namely the applicant, first respondent and third respondent were before him.

[14] As regards the reference to arbitration, the evidence is as follows:

[14.1] On 18 July 2002, the first respondent addressed a letter to the Nominations Committee of the Association of Arbitrators. The particulars of the defendant are given in that document as Edward Martin Keyrouz, namely the applicant in this application.

[14.2] Previously and on 4 July 2012, the applicant signed a document submitted to him by the first respondent. Because of the importance of this document, I quote it in full :

> *"AGREEMENT TO THE APPOINTMENT OF AN ARBITRATOR CONSTRUCTION OF DWELLING STAND 350 EAGLE CANYON GOLF ESTATE*
>
> *We the undersigned*
>
> *Robin Whitehorn (claimant) and*
>
> *Edward Martin Keyrouz (defendant)*
> *in his personal capacity and/or as a director of BCA Civil Engineering Co (Pty) Ltd and/or the sole trader of BK trading as BCA.*
>
> *Hereby agree to request the Association of Arbitrators to appoint an arbitrator to arbitrate and resole all disputes relating to a building contract in respect of the dwelling referred to above".*

[15] As is clear from the document, the applicant expressly signed it in his personal capacity and/or as a director of BCA Civil Engineering Co (Pty) Limited and/or the sole trader of BK trading as BCA. Upon signature the applicant signed above his name and the words "*Who warrants that he is*

duly authorised".

[16] Nevertheless, the applicant claims that he signed this document in a representative capacity on behalf of BCA Civil. He states *"when I signed the document, there was no doubt in my mind whatsoever that I was signing as a director on behalf of BCA Civil and was fortified in this view by the appendage underneath my name 'who warrants that he is duly authorised'."*

[17] The Association of Arbitrators in a letter of 2 August 2002 advised the first respondent of the *"APPOINTMENT OF AN ARBITRATOR IN THE DISPUTE BETWEEN ROBIN WHITEHORN / EDWARD MARTIN KEYROUZ"*.

[18] The minute of the preliminary meeting before the second respondent records the applicant, namely Mr Keyrouz, as the second defendant, BCA Civil Engineering Co (Pty) Limited as the second defendant and Edward Martin Keyrouz t/a BCA as the third defendant. Paragraph 3 of those minutes reads as follows:

> *"The parties confirm having entered into a written agreement dated 3 July 2002 in terms whereof the parties agree to refer all disputes relating to a building contract in respect of the dwelling Stand 350 Eagle Canyon Golf Estate, to arbitration."*

[19] In his founding affidavit, the applicant claims that he does not know why the second respondent came to cite him as the first defendant, BCA Civil as the second defendant and the applicant t/a BCA as the third defendant.

[20] Nevertheless, and as is apparent from the answering affidavit, the applicant sent an email to the first respondent on 3 July 2012 in which he states as

follows:

> *"I confirm that **I** agreed to the appointment of an arbitrator...".* (own emphasis)

No reference is made to a company on whose behalf the applicant would have agreed to an arbitrator.

[21] On 19 July 2012, the first respondent sent a copy of the application for the appointment of an arbitrator to the applicant. As was mentioned, the defendant's name is given as that of the applicant.

[22] The first respondent testifies in his answering affidavit that, at the first administrative meeting of 21 August 2012, the applicant was legally assisted by a Mr Schutte. The first respondent points out that the applicant did not dispute the recordal at any time prior to the launching of the application of Mr Schutte as representing the defendants. With the entry of Mr Weinstein, the attorney for the applicant, by way of a letter dated 11 October 2012, an intimation was given of a dispute being raised to the arbitration agreement. As a result of submissions made by Mr Weinstein, a second administrative meeting was held on 31 October 2012. The preliminary issues raised by the applicant and in particular those as to whether the agreement signed by the applicant constituted an arbitration agreement, were heard on 6 November 2012. The Arbitrator's Award relating to the preliminary issues published on 7 November 2012.

[23] The Award notes that the second respondent, the arbitrator, convened a preliminary meeting on 21 August 2012 and that he on that day handed to

the parties an agenda, having identified the parties to the arbitration proceedings in the same manner as are identified in the template of this ruling. Apart from the first respondent, identified as the claimant, the applicant in this matter is identified as such. BCA Civil Engineering Co (Pty) Limited is identified as the second defendant and Edward Martin Keyrouz t/a BCA as the third defendant. The arbitrator notes that the first three items listed on the agenda were confirmation of an arbitral dispute and the arbitrator's jurisdiction; confirmation of the parties thereto and confirmation of the appointment of the arbitrator.

[24] The arbitrator notes further that in paragraph 3 of the minute of the said preliminary meeting, he recorded the parties' confirmation of having entered into a written agreement dated 3 July 2012 in terms whereof the parties agreed to refer all disputes relating to a building contract in respect of the dwelling Stand 350 Eagle Canyon Golf Estate to arbitration. His appointment as the arbitrator was also confirmed. The parties to the arbitration were as set out in the template of the agenda. He points out that what was recorded in his minute had not been challenged.

[25] No evidence was led at the special hearing to determine the jurisdictional issues. The arbitrator, in interpreting the arbitration agreement, came to the conclusion that it was a written agreement providing for the reference to arbitration of all disputes relating to the subject matter identified, being a building contract in respect of specified dwelling units. In any event and in the event of him being wrong on that score, the arbitrator found that he was properly seized of a common law arbitration on the basis of the parties'

conduct and their submission to an arbitration, as recorded in his minute of 21 August 2012.

[26] In these circumstances he resolved the challenge that no arbitration agreement had been entered into and that the proceedings were fatally defective against the applicant. I mention that the second respondent permitted Mr Weinstein to represent the defendants (including the applicant in this application) at the hearing of 6 November 2012.

[27] The arbitrator issued a directive that the third administrative meeting would be held on 15 November 2012. Mr Weinstein requested a 15 day postponement of the third administrative meeting to enable the applicant to bring an application for the review of the preliminary issues to the above Honourable Court. His letter of 15 November 2012 includes the following paragraph:

> *"My client will be approaching the High Court for immediate relief prior to the arbitration proceedings proceeding any further, and in the circumstances you are requested to postpone this meeting for 15 days, being a reasonable period required by my client within which he is to institute such proceedings."*

[28] This proved to be the first of a number of threats to proceed to litigation to set aside the decision of 7 November 2012.

[29] In response, the arbitrator postponed the preliminary meeting pending the final determination of the application proposed to be instituted by the applicant and directed that, should such application not be launched, the preliminary meeting would proceed on Monday 26 November 2012. The application was not launched and at the preliminary meeting held on 26

November 2012 the arbitrator made a directive that the arbitration hearing would commence on 24 January 2013.

[30] In a letter of 18 January 2013, Mr Weinstein recorded a number of objections to the second respondent's conduct, including calling upon him to recuse himself. He also referred to proceedings being prepared and to be instituted shortly for the setting aside of the arbitration proceedings.

[31] On 5 February 2013, the arbitrator handed down a finding that the agreements alleged by the claimant in his statement of claim have been proved with a small exception.

[32] The applicant thereafter withdrew from the proceedings and claimed that he did not recognise the jurisdiction of the second respondent.

[33] The applicant claims that the question as to whether there was an agreement of submission to arbitration and, if so, which parties submitted to arbitration, as well as which party contracted with the first respondent, required proper legal representation.

[34] The applicant raises as a further cause of complaint the fact that, at the first preliminary hearing, the second respondent furnished the sixth edition of the Rules for the Conduct of Arbitrations to the first respondent and applicant as well as a copy of the summary procedural rules. He advised the parties that they would be better off adopting the summary procedural rules. These rules exclude legal representation. He afforded the parties until Friday 24 August 2012 to state whether they agreed to adopt the summary procedural

rules. The applicant's claims that he did not have legal representation, do not explain the presence of Mr Schutte. He further claims that he did not consult an attorney, regarding the choice of his rules, but does not explain why he did not do so.

[35] The applicant's case as regards the adoption of the summary procedural rules is that he "*followed the advice of the Second Respondent that the proceedings are a 'simple matter' and that the summary procedural rules were more appropriate in the circumstances".* He claims that, without having properly understood and properly read the summary procedural rules or having considered them, he sent an email to the second respondent's secretary, confirming that he accepted those rules.

[36] The applicant's case appears to be that the second respondent ought not to have expressed any kind of view about which set of rules would be appropriate.

Findings of this Court

(i) Condonation: the Merits

[37] For a number of reasons I conclude that the arbitrator's finding that an arbitration agreement had been concluded and that the applicant was a party thereto is correct.

[37.1] The wording of the arbitration agreement is simple and unambiguous. It leaves no room for a mistaken belief that it binds only the company.

[37.2] The applicant has made no attempt to explain why he did not understand the words "*Edward Martin Keyrouz (defendant) in his **personal capacity** and/or as a director of BCA Civil Engineering Co (Pty) Ltd and/or the sole trader BK trading as BCA*", to mean exactly what they say. His bald allegation in paragraph 44 of the answering affidavit that he signed the agreement doing so in a representative capacity with no doubt in his mind that he was signing as a director on behalf of BCA Civil is not explained, save by an allegation that his views were *"fortified"* by the appendage underneath his name who warrants that he is duly authorised. When asked by the arbitrator why he signed the agreement, he answered, variously, that:

[37.2.1] he had no intent;

[37.2.2] he does not know why he signed the document;

[37.2.3] he just signed the document;

[37.2.4] he should not have signed the document;

[37.2.5] it was not his intention to sign the document at that stage;

[37.2.6] he was not thinking clearly.

[37.3] Significantly, the applicant does not claim that he did not understand the words in the document to mean anything other than what they clearly mean. There is no suggestion that he battles with

English.

[37.4] The allegation that he signed in a representative capacity is incompatible with the reference to arbitration that refers to the defendant by name. No reference is made to any corporate entity in that reference.

[37.5] A further indicator is that the minutes of the preliminary meeting held on 21 August 2002 record the parties' confirmation of having entered into a written agreement. Those parties include three defendants, two of whom are the applicant in his personal capacity and in a trading capacity as third defendant and then the second defendant, being the corporate entity. The applicant had several days to consider those minutes as well as the rules provided by the arbitrator and lodged no objection to his citation in his personal capacity as a defendant.

[38] The submission that the arbitrator exceeded his powers by giving any advice to the first respondent or the applicant to adopt the summary procedure rules is easily disposed of. The question whether the arbitrator exceeded his powers requires an investigation into the question whether he *"purported to exercise a power which [he] did not have or whether [he] erroneously exercised a power that [he] did have*". See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 at [52]. In expressing his views about the form of rules most suitable to the arbitration, the arbitrator did not exercise a power. He made no finding. Had the parties not accepted his recommendation, the ordinary rules would have applied.

[39] It was not clear to me from the argument presented on behalf of the applicant why section 46 of the summary procedural rules would be unconstitutional. If the submission is that its unconstitutionality lies in the deprivation of the right to legal representation, then the answer must surely be that that situation was arrived at by agreement between the parties. As Harms JA said in *Telcordia*,

> *"... there is nothing to prevent parties from defining (at least in private consensual disputes) what is fair for purposes of their dispute."*[1]

[40] Parties to arbitration typically waive a number of rights to which they would otherwise be entitled, such as, for example, the right to appeal and even to have independent tribunals.[2]

[41] In any event, section 34 does not directly apply to private arbitrations. The Constitutional Court pronounced on these matters in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*[3] as follows:

> *[188] First, in my view, section 34 of the Constitution does not apply to private arbitration although I do hold that it is an implied term of every arbitration agreement that it be procedurally fair. Secondly, it is my view that the arbitration agreement at issue in this case, properly construed, required the arbitrator to adopt an informal, investigative method of proceeding and not a formal, adversarial one.*
>
> *[195] In approaching these questions, it is important to start with an understanding of the nature of private arbitration. Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. It was aptly described by Smalberger ADP in Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another as follows:*
>
> *"The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the*

---

1 At para 47 of the Judgment.

2 See *Telcordia* at paras 47 - 50

3 (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC)

powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement."

I find it difficult to reconcile the latter portion of the reasoning with the former portion. It seems to me that if one accepts that parties to an arbitration have waived their rights under section 34 in such a manner that the fairness of the hearing will be determined only by reference to the Arbitration Act, and that interference by courts with arbitration shall be limited to the irregularities spelt out in section 33(1) of the Arbitration Act, it cannot be said that section 34 has any direct application to private arbitration at all. The thrust of the reasoning seems to me to be that when parties enter a private arbitration agreement, as long as that agreement is not contra bonos mores, they waive the rights that they would otherwise enjoy under section 34. However, we still need to consider whether section 34 does indeed apply directly to private arbitration.

[211] As it is clear that a private arbitrator is not a court, the question posed by Smalberger ADP in Total Support Management remains. When section 34 refers to another independent and impartial tribunal, does it include private arbitration? If it does not, then section 34 can have no application to private arbitration. In answering this question, one needs to read section 34 closely to see if its structure and purpose extend to private arbitration. It is clear that the section provides a right to have disputes resolved (a) by the application of law in (b) a fair (c) public hearing before (d) a court or (e) where appropriate an independent and impartial tribunal. Properly read, an independent and impartial tribunal (if appropriate) must hold fair, public hearings when it resolves disputes by the application of law. It is not possible textually to detach the requirement of fairness from the requirement of being in public: both requirements apply to proceedings before courts and independent and impartial tribunals.

[212] Underlying this right, as this Court has held, is the rule of law and the positive obligation upon the state to provide courts and, where appropriate, other fora for the resolution of disputes. Private arbitrators are, of course, not provided by the state but are private agents employed by parties for the resolution of disputes.

[213] In considering whether private arbitration fits into the framework of section 34, we have to acknowledge that private arbitration, as conventionally understood, is ordinarily not held in public. It is, as its name implies, a private process. Nor can it ordinarily be said that arbitrators have to be independent in the full sense that courts and tribunals must be. As the Suovaniemi case suggests, parties can knowingly consent to an arbitrator who may not be entirely independent. Accordingly, it is not clear that arbitrators can accurately be described as "independent . . . tribunals". As private arbitration proceedings do not, and, if international practice is to be accepted, should not require public hearings, and similarly if private arbitrators need not, as long as parties knowingly accept this, always be "independent", then the language of section 34 does not seem to fit our conception of private arbitration.

[214] The only strong reason to read private arbitration to fall within the meaning of section 34 is the requirement imposed by that section that the hearing be "fair" and, indeed, it seems to be on that basis that Kroon AJ concludes that section 34 does apply to private arbitration. However, I am not

persuaded that it is appropriate to understand the section to relate to private arbitration, which otherwise does not fit the language of the section, simply because it might be seen to be desirable to require arbitration proceedings to be fair. The section must be interpreted on its own language and with integrity, and I cannot conclude, given the general lack of fit between private arbitration and the language of the section, that the section has direct application to private arbitration.

In concluding that section 34 does not have direct application to private arbitration, I do not finally consider what indirect application it may have, if any. Indirect application of rights in the Bill of Rights operates generally through section 39(2) of the Constitution which requires courts when interpreting statutes or developing the common law or customary law to promote the "spirit, purport and objects" of the Constitution. No argument was addressed to us on this issue but, mindful of the role courts have in giving effect to arbitration agreements, it seems to me that section 34 may have some relevance to the interpretation of legislation or the development of the common law.

[216] If we understand section 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right under section 34. I do not think, therefore, that the language of waiver used by both the European Court of Human Rights in Suovaniemi and by the Supreme Court of Appeal in Telcordia is apt. Indeed, it may not be apt in relation to constitutional rights at all, but that is a topic for another day.

[217] Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and, as I shall discuss in a moment, by the Constitution. Those proceedings, however, will differ from proceedings before a court, statutory tribunal or forum. The first difference is that the process must be consensual – no party may be compelled into private arbitration. The second is that the proceedings need not be in public at all. The third is that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties. The party who opts for arbitration will have chosen these consequences.

[218] In the light of the foregoing, on a proper construction of section 34 it should be understood not to apply directly to private arbitrations. I differ in this respect, therefore, from the conclusion of Kroon AJ. This conclusion, however, does not mean that the Constitution will have no relevance to private arbitration, as I shall now discuss.

The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.

[220] However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent

(and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance. As stated above, it is not necessary to determine what role section 34 might play in this analysis.

[42] Thus, section 34 is not directly applicable to arbitrations and the right of parties to contract out of their section 34 rights is acknowledged. It was not argued that the agreement to forego the right to legal representation at the hearing was *contra bonos mores*. In any event, no facts have been advanced why it should be so.

Condonation: the delay

[43] I do not agree that the "constitutional" grounds need not have been raised within the 6 week period contemplated in section 33. A party to arbitration proceedings can hardly be said to have all of infinity within which to raise objections to an arbitration award, even be they based on constitutional grounds. The section is quite clear that application to set aside an award must be made within 6 weeks of the date of the award. The nature of the ground of objection does not alter that fact.

[44] The applicant permitted the arbitration proceedings to continue, despite continued threats to bring court applications to review the finding by the second respondent on 7 November 2012 that a valid arbitration agreement had been concluded and that the applicant in his personal capacity was a party to such agreement.

[45] The applicant failed to act after the finding of the arbitrator on 7 November 2012. In the first instance I consider that the award handed down on 7

November 2012 constituted an award as contemplated in section 33(1) of the Act. The six week period to set that aside commenced running with the making of that order. No explanation was provided for the failure to act within 6 weeks of the award. In addition, the explanation for the failure to act after the publication of the final award is not strong enough to offset the weak merits in this case.

[46] In any event, the delay in applying to set aside the order is inexcusable. All the facts giving rise to the complaints on which this application is based had arisen by then. Despite the numerous threats of applications to set the finding aside, no such steps were taken. In my view it was not permissible for the applicant simply to have taken no further steps and await the outcome of the arbitration. In the event of his attack on the arbitration agreement succeeding, the remainder of the arbitration proceedings would have been irrelevant and would have put an end to the arbitration proceedings. The question was considered by Gauntlett AJ in *Abrahams & Ano v RK Komputer SDN BHD & Others* 2009 (4) SA 201 (C). In non-suiting the applicant in an attack on the arbitrator for perceived bias the court held that she should not be permitted :

> *"... to fossick in the procedural ashes of the proceedings and to disinter her perception when it suits. An attack based on bias – with its devastating legal consequences of nullity – is not to be banked and drawn upon later by tactical choice. As the Court of Appeal in England has put it,*
>
> > *'It is not open to [the litigant] to wait and see how her claims … turned out before pursuing her complaint of bias … [she] wanted to have the best of both worlds. The law will not allow her to do so.'"*
>
> *This is exactly what the applicant did. The law cannot permit her,*

on the facts of the case, that tactic."[4]

(iii) Condonation: Conclusion

[47] In these circumstances, having found that the arbitration agreement is valid and that section 34 is not applicable to the arbitration, the applicant has not shown good cause on the merits of the matter to justify condonation. The prospects of success on the merits are so slim as not to justify condonation.[5] When the long period of delay from 7 November 2013 is added into the mix before the application to set aside was launched, the application for condonation must be refused. Should I be wrong on that then, in any event, I consider that no case to set aside the award has been made and that the application should also be refused on its merits.

[48] The following order is made:

The application is dismissed with costs.

R M Robinson AJ

Heard : 13 October 2014
Judgment delivered: 12 November 2014
For the applicant: Adv S Cohen instructed by Louis Weinstein
For the first respondent: Adv Marais SC instructed by McCarthy Cruywagen

---

[4] See also De Smith's *Judicial Review* 6th Ed, 2007 at fn18 where it is stated as follows:

> "… (o)bjection is generally deemed to have been waived if a party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practical opportunity."

[5] *United Plant Hire* supra at p720H