IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 12447/2017

In the matter between

QUALITY PRODUCTS (PTY) LTD **APPLICANT**

and

MAMCSA SECURITY CONSULTANTS CC **RESPONDENT**
ADVOCATE SCHALK AUCAMP NO **SECOND RESPONDENT**

JUDGMENT

(Delivered on 20 May 2020)

Kruger J:

[1] The Applicant seeks an order in terms of Section 32(2) of the Arbitration Act, 42 of 1965. The Arbitrator (Second Respondent), in his award dated 12th September 2017, dismissed a special plea of prescription raised by the Applicant. The main contention is that the Second Respondent failed to properly consider and deal with the submissions of the Applicant.

[2] Section 32(2) of the Arbitration Act, 42 of 1965 provides:

> "(2) The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the Arbitration Tribunal for

> reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct."

[3] It is evident from the aforementioned that a remittal to the Arbitrator must be on "good cause". In **Leadtrain Assessments (Pty) Ltd and others v Leadtrain (Pty) Ltd and others 2013 (5) SA 84 (SCA)**, the Court held, at paragraph [15]:

> "It is not desirable to attempt to circumscribe when "good cause" for remitting a matter will exist. It will exist pre-eminently where the Arbitrator has failed to deal with an issue that was before him or her …… but once an issue has been pertinently addressed and decided there seems to us to be little room for remitting the matter for reconsideration. The guiding principle of consensual arbitration is finality – right or wrong …… However one approaches the question of what is "good cause" it seems to us that it inexorably requires something other than to mere error on the part of the arbitrator."

[4] Examples of factors to be considered in deciding whether a matter should be remitted to an Arbitrator are found in **Basson v Heraman1904 TS 98**. Innes, CJ, held:

> "The court has under our law a wide discretion, and could in my opinion refer the award back to the arbitrator to be rendered final and complete. But it does not follow that the court will always follow that course; It will exercise its discretion. There may be circumstances when the court would not only refuse to make an incomplete award a rule of court but would treat it as null; but it does not follow that it is null unless the court so determines."

[5] This case involved the application to refer an award back to the Arbitrator as it was alleged that it was incomplete.

[6] In **Dutch Reformed Church v Town Council of Cape Town (1898) 15** SC14, Lord de Villiers found that the court had a discretion to remit awards and suggested that remittal of an award would be appropriate to "render certain that portion which is somewhat vague and uncertain". Both the aforementioned cases are quoted with approval in **Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (CPD)**.

[7] In **South African Forestry CO Ltd v York Timbers Ltd 2003 (1) SA 331 (SCA)**, the Court held, at paragraph 14:

> "The court *a quo* expressed the view that a remittal should be permitted only "when there are compelling reasons put forward" and that none had been advanced in the present case …… that is not the test that the court was

> enjoined to apply – an award may be remitted where "good cause" has been shown for doing so and not only where the circumstances are "compelling". "Good cause" is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances."

[8] Mr Boulle, on behalf of the Applicant, has submitted, as I understand his argument, that the application is based on the fact that the Second Respondent did not consider and in certain instances did not read the authorities relied upon in respect of (a) whether a natural person can hold a member's interest as a nominee; (b) If so, does it necessarily follow that a nominee is vested with the rights of the registered member and (c) The costs of the hearing.

[9] In respect of (a) supra, the Arbitrator's award revealed that he considered this aspect and concluded that a natural person can hold a member's interest, in a close corporation, as a nominee. In arriving at this conclusion the Second Respondent appeared to have relied upon and approved of an article by JPG Lessing (1989 SA MERC LJ 242). Professor Lessing concluded by assuming "that nominees representing natural persons are indeed permissible".

[10] Whether the Second Respondent was correct in arriving at this conclusion is not for this Court to decide. In this regard, Brand J (as he then was) in **Kolber and another v Sourcecom Solutions (Pty) Ltd and others 2001 (2) SA 1097 (CPD)** cautioned that "a party to arbitration proceedings should not be allowed to take the arbitrator on appeal under the guise of a remittal in terms of Section 32 (2)." (At paragraph [61]). In the result, I am of the view that in respect of this aspect, the Applicant has failed to show "good cause" for the remittal to the arbitrator.

[11] The second issue flows from the first. Having arrived at the conclusion that a natural person can hold a member's interest as a nominee, the Second Respondent concluded that as a consequence, the nominee "had all powers associated with membership". This meant that the nominee had the authority to act on behalf of the First Respondent in referring the dispute to arbitration.

[12] It is unclear how the Second Respondent arrived at this conclusion. The arguments advanced on behalf of the Applicant appear not to have been considered. Indeed no reference has been made to same. The Second Respondent also seems

to have ignored the qualification referred to by Professor Lessing where he states that the nominee "acts on instructions and does not take independent decisions".

[13] The argument advanced by the Applicant before the Second Respondent, was that Evans was only entitled to the beneficial rights of ownership of the member's interest in and to the First Respondent. He had no right to represent and bind the First Respondent. The Applicant also sought to distinguish a nominee and an agent. In support its submissions, the Applicant had relied on *inter alia* the case of **Dadabhay v Dadabhay and another 1981 (3) SA 1039 (AD)**. The Second Respondent made reference to the case of Dadabhay but sadly relied upon and quoted that part of the law report which contained the submissions of counsel and not the relevant aspects of the judgment.

[14] Mr Veerasamy, on behalf of the First Respondent (relying on the heads of argument prepared by Mr Tucker), submitted that the record of the Second Respondent's award reveals that he considered the Applicant's submissions. A careful reading of the award however does not confirm this. According to Mr Verasamy's submission, the Second Respondent "expressly recorded" the Applicant's argument in paragraph 7 of the award. This is correct. Paragraph 7 of the award merely summarises the Applicant's grounds/basis of prescription. It does not contain any discussion of same. Mr Veerasamy has also relied in paragraphs 15 and 16 of the award which, he submits, evidences that the Second Respondent considered the submissions of the Applicant. Paragraphs 15 and 16 merely reflect that after arriving at the conclusion that a natural person may be a nominee, then automatically that person has the authority to bind the close corporation. (This has already been dealt with *supra*).

[15] I am accordingly of the view that the Second Respondent did not consider the issue before him and in particular, consider the Applicant's argument and the cases relied upon in support thereof. This, in my view, would constitute good cause for a remittal in terms of the Act.

[16] Finally, it has been submitted that the Second Respondent did not consider and deal with the submission of both counsel in respect of costs. Both counsel were ad *idem* that in the event of the special plea being dismissed, that the costs should

be reserved. A perusal of the Second Respondent's award, at paragraph 21, reveals that the Second Respondent approached and considered the question of costs on an incorrect basis. The starting point of his consideration of costs was not the submission of the Appellant (Defendant) as recorded in the said paragraph 21. Mr Veerasamy has conceded that the Second Respondent erred in this regard.

[17] As regards the costs of this application, the parties are in agreement that the general rule should apply and that costs should follow the result.

[18] I accordingly make the following order:

1. In terms of Section 32 of the Arbitration Act, 1965, the special plea of prescription, raised by Quality Products (Pty) Ltd, which special plea was dismissed with costs by the Second Respondent, is remitted to the Second Respondent for reconsideration and the making of a further award or fresh award.
2. The Second Respondent is directed to reconsider the special plea of prescription in light of the contents of the founding affidavit in this application, along with any further affidavits filed in the matter and any judgment of this Court.

3. The First Respondent is directed to pay the costs of this application

DATE OF HEARING:	15 MAY 2020
DATE RESERVED:	15 MAY 2020
DATE DELIVERED:	20 MAY 2020
FOR THE APPLICANT:	A J Boulle
INSTRUCTED BY:	Zayeed Paruk Inc.
FOR THE R ESPONSDENT:	I Veerasamy
INSTRUCTED BY:	de Wet Leitch Hands Inc