IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG

CASE NO. AR460/11

In the matter between:

STUART GLEN JENKINS APPELLANT

and

HOWARD ERNEST ORAM RESPONDENT

JUDGMENT

Delivered on: 30 AUGUST 2012

GYANDA J

[1] This is an appeal against the decision of Van Zÿl J, handed down on 7 April 2011, leave to appeal having been granted by the learned trial judge against the said judgment. In that matter, Van Zÿl J, granted an order making an award made by an arbitrator an order of court at the instance of the respondent herein. The appellant now appeals against the grant of that order.

[2] The appellant and the respondent were formerly partners with regard to a certain immovable property which, at all material times hereto was registered in the name of the respondent. The dispute related to the immovable property situate at 12 Northumberland Place, Durban North which, as a result of litigation between the parties under case no. 6245/2006, was determined by order of this court dated 3 November 2006 to be a partnership asset. I do not intend to burden this judgment with all of the details of the disputes and the litigation that ensued between the parties in relation thereto. Suffice to say that the parties had by agreement entered into an agreement of settlement dated 2 October 2007 in terms whereof the respondent agreed to sell to the appellant his half share in and to the said partnership property for an agreed amount of R1 425 000-00 [one million four hundred and twenty five thousand rand] and, to that end the parties agreed that the matter be referred to arbitration before a single arbitrator to determine:-

> "6. As against compliance with Jenkins' (the appellant's) obligations set out hereunder, Oram (the respondent) will do all things necessary to transfer ownership of the immovable property situate at 12 Northumberland Place, Durban North, Durban to Jenkins or his nominee.
>
> As consideration for the foregoing, Jenkins will pay:
>
> 6.1 One half of R1 425 000-00 [ONE MILLION FOUR HUNDRED AND TWENTY FIVE THOUSAND RAND] less the amount referred to in paragraph 6.2 hereunder, to Jenkins' attorney, to be held in trust; and
>
> 6.2 The amount necessary to discharge the home loan obligation to Absa Bank Limited such loan being secured by a registered mortgage bond

which is to be cancelled on registration of transfer of the property to the name of Jenkins or his nominee.

6.3 All costs of transfer, including transfer."

It was agreed in the said arbitration agreement that the terms of reference of the arbitrator were:-

> "9. The arbitrator's terms of reference are limited to the issue of whether or not if at all, either party is obliged to account to the other for expenditure incurred in relation to or associated with, the existence and subsequent dissolution of the partnership, and the property including, but not limited to, payments made by Jenkins in satisfaction of the Mortgage Bond"

[3] In consequence of the aforesaid arbitration the arbitrator found as follows:-

> "29. I calculate the end position to be as follows:-

Agreed value of house on dissolution	R1 425 000-00
Less outstanding bond at dissolution	R87 000-00
Nett amount for distribution	R1 338 000-00
Less total expenses paid by Jenkins	R653 938-55
Profit available for distribution	R684 061-45
Oram's share of profit	R342 030-72

This was upon the basis that the parties had agreed to share the profits 50/50.

[4] Subsequent to the award being made by the arbitrator, the respondent's attorneys wrote to the arbitrator a letter dated 10 February 2009 seeking

clarification of the award in the following terms:-

> "The parties to the arbitration are unsure as to your finding as regards liability for settling the bond over the property prior to transfer being registered in the name of Mr Jenkins.
>
> …It would be appreciated if you could clarify your finding in this regard…"

The arbitrator responded thereto by letter dated 10 February 2009 in the following terms:-

> "I apologise if my award was not as clear as it might have been. I believe it to have been implicit from the manner in which I set out the figures in paragraph 29 that as Mr Jenkins was taking transfer of the property at the agreed valuation of R1 425 000-00, it was he who would discharge the bond at R87 000-00 which effectively left the partnership the nett amount of R1 338 000-00 for distribution between Mr Jenkins and Mr Oram. This, I believe, is demonstrated by the following arithmetical calculation using the same figures.

Agreed value of house on takeover by Jenkins		R1 425 000-00
Less: discharge bond	R87 000-00	
Less: payment to Oram	R342 032-72	R 429 030-72
Balance remaining		R 995 969-28

The "balance" of the purchase price is then set off against:-

Repayment to Jenkins of his expenses	R653 938-55	
Jenkins half share of the profits	R342 030-72	R995 969-27

Looked at yet another way, the discharge of the bond of R87 000-00 is part of the "payment of the purchase price" of R1 425 000-00 being the sum at which Jenkins is "purchasing" the house from the partnership. That leaves the partnership the net

sum of R1 338 000-00 for distribution which is done as per my figures in paragraph 29 of the award. I hope this clears up the matter."

It is clear from the above that the parties were responsible to pay the outstanding bond in equal shares, that is, each would be liable to pay 50% of the sum of R87 000-00 [eighty seven thousand rand] to discharge the bond liability of the partnership.

[5] Initially the appellants opposed the application of the applicant in the court *a quo* to make the award an order of court on the basis:

a) Firstly, that the award was a nullity in as much as the arbitrator went beyond the terms of reference as contained in the arbitration agreement; and

b) Secondly, the arbitrator in "clarifying" the award as he attempted to do on the unilateral input by the respondents had acted arbitrarily and exceeded the scope of his mandate in terms the arbitration agreement, and accordingly, the award was a nullity.

On these two bases, the appellant argued that the award was a nullity and the court *a quo* could not make the award an order of court.

[6] As regards the argument by the appellant that the award was a nullity on the two bases referred to above, Van Zÿl J, held:-

"it is relevant in my view that the parties in concluding the arbitration agreement, vested the arbitrator with wide discretionary powers and even agreed in clause 11 thereof that, *"no right of appeal shall lie against the arbitrator's decision."*

In *Telecordia Technologies Inc v Telkom SA Ltd*[1] (also reported as 2007(5) BCLR 503 and at [2007] (2) ALL SA 243 Harms, JA (as he then was) at pg 259 G) observed as follows:-

'51. Lastly, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in section 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, "common law" or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court.'

[7] In these circumstances, Van Zÿl J,held further:-

"32. The present matter has much in common with that of the parties in *Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd* 2009(3) SA 533 (SCA) where Ponnan JA remarked as follows at page 541J to 542C:-

'[21] The legal principles applicable to an enquiry of this kind was recently set out by Harms JA on behalf of this court. [*Telecordia Technologies Inc v Telkom Ltd* 2007(3) SA 266 (SCA) 2007(5) BCLR 503; See also *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2008(2) SA 448(SCA)]. It is not necessary to recapitulate those principles. Suffice it to state that once again a litigant has fundamentally misconceived the nature of its relief. The parties here had waived the right to have their dispute relitigated or reconsidered. Given the nature of Bantry's opposition, it was for it to challenge the award by invoking the statutory review provisions of s 33(1) of the Act. It ill-behoved Bantry to adopt the passive attitude that it did. It

1 2007(3) SA 266 (SCA)

> ought instead to have taken the initiative and applied to court to have the award set aside within six weeks of the publication of the award or alternatively to have launched a proper counter-application for such an order. Had that been done then the Arbitrator could have entered the fray and defended himself against the allegations levelled by Bantry, instead of it falling to Raydin to do so on his behalf – a most invidious position for any litigant.
>
> [22] It follows that the learned judge in the court below cannot be faulted and in the result the appeal must fail. It is accordingly dismissed with costs."

Van Zÿl J, accordingly, rejected the appellant's submission in this regard as baseless.

I am in full agreement with the decision of Van Zÿl J, in this regard. However, in the light of the attitude taken by counsel for the appellant on the appeal before us, it is not necessary to delve into this issue any further.

[8] On appeal before us, Stokes SC for the appellant conceded:-

(a) THAT the arbitrator had not exceeded the terms of the arbitration agreement; and

(b) THAT the arbitrator in "clarifying" the terms of his award did no more than that and could not be said to have acted irregularly.

He accordingly conceded that the claims that the award was a nullity on the two bases

raised were clearly wrong in the circumstances.

[9] He submitted, however, that the amount of the award was wrong. Working on the agreed valuation of the property at R1 425 000-00 [one million four hundred and twenty five thousand rand], Stokes SC submitted the following calculation on the basis of which he asserted that the amount of the award made by the arbitrator had to be reduced by half or 50% of the amount required to settle the outstanding bond. He accordingly submitted the following calculation:-

Amount payable in terms of clause 6.1		R712 500-00
Less the amount contained in clause 6.2 (i.e the bond)	R87 000-00	R625 500-00
Less 50% of the expenses (653938 ÷ 2)	R326 969-00	
Difference		R298 531-00
Add 50% of the bond obligation	R43 500-00	
Total		R342 031-00

[10] I am in complete agreement with the submission by Stokes SC that the award made by the arbitrator has to be reduced by an obligation on the part of the respondent to pay 50% of the bond obligation as it was common cause throughout the proceedings that the parties would be liable for the expenses on the basis of a 50/50 division. Clause 6.1 of the arbitration and settlement agreement makes that clear.

[11] Accordingly, in as much as the arbitrator deducted the whole of the bond amount in arriving at the amount he determined to be the award to be made in favour

of the respondent, that amount fell to be reduced by the respondent's obligation to pay 50% of the outstanding bond as the arbitrator had already deducted the full amount of the bond obligation of R87 000-00 [eighty seven thousand rand] from the agreed purchase price.

It would, in my view, be unfair in the light of the agreement between the parties to share the expenses equally for the appellant to pay the full amount of the bond when the obligation was upon each party to pay 50% thereof. To that extent the order of the court *a quo* fell to be rectified.

[12] Mr De Beer SC's submission on behalf of the respondent in this regard is, in my view, clearly wrong. Accordingly, I am of the view that the amount of the award to be made an order of court in terms of the application before Van Zÿl J, falls to be reduced by 50% of the amount to be paid in settlement of the outstanding bond on the property. To that extent the appellant is, in my view, successful in the appeal before us. Quite clearly, Van Zÿl J, in the court *a quo,* erred in making the award as he did without taking into account the fact that both parties were equally responsible to pay off the outstanding bond.

Once the arbitrator had deducted the full amount of the bond in determining the nett profits, the court *a quo* was obliged to deduct therefrom the respondent's obligation to pay 50% of the outstanding bond.

[13] There was much argument and debate in the court *a quo* and before us on appeal as to whether the arbitration and settlement agreement entered into between the parties obliged the appellant to pay the respondent the amount of the award in cash, or whether the appellant could do so by supplying a suitable guarantee for the payment thereof. In the court *a quo* it was common cause that:-

a) the respondent's attorney had himself called for payment of the award or, alternatively, the provision of a suitable guarantee in respect thereof on a number of occasions; and

b) the appellant's attorney had furnished such a guarantee in pursuance to such request.

[14] Additionally, Stokes SC argued that the practice and custom had developed that even where a contract of sale of immovable property had provided for payment or guarantees to be supplied "upon demand", this has been held to be subject to the implied term that no demand can be made before the seller is in a position to lodge for the purposes of transfer.

On the strength of *Holtshausen and Another v Gore NO and Others*[2] in which it was held that the fixing of a date for furnishing of guarantees has to be read in context, and

2 2002(2) SA 141 (T) at 151-155

relative to an ability to lodge.

To accommodate the position for the supplying of guarantees, Van Zÿl J, amended the order prayed in paragraph 1 of the respondent's application in the court *a quo* to include, in the alternative, the supply of a suitable guarantee and, in this court both parties indicated that they were satisfied with such an amendment to the order.

[15] A further bone of contention between the parties both in the court *a quo* and on appeal before us was the amount to be paid in respect of transfer duty by the appellant. The respondents via their attorneys had submitted that the transfer duty was payable in the sum of R59 000-00 [fifty nine thousand rand]. The respondent's attorneys, however, did not give a breakdown as to how this amount was made up or calculated. The appellants correctly, in my view, resisted paying this arbitrary amount.

[16] The appellants attorneys, on the other hand, in communication with the Department of Revenue had ascertained that the full amount of the transfer duty payable in respect of the transaction was the sum of R39 768-33 [thirty nine thousasnd seven hundred and sixty eight rand and thirty three cents]. Inasmuch therefore, as the figures supplied by the respondent's attorneys do not appear to be substantiated by a proper calculation, no reliance can be placed thereon in determining the amount of the transfer duty payable. The figures provided by the appellant's attorneys are, in my view, properly substantiated and can then be accepted as the transfer duty payable in

respect of the transaction.

However, and in the event of the amount of the transfer duty fluctuating for any reason whatsoever, the rider can be added to this part of the order to accommodate such fluctuation or change.

I should add that the parties were satisfied in the event of such a rider being added to the amount so determined. That amount, doing the arithmetic as contended for by the appellants, is the sum of R55 526-33 [fifty five thousand five hundred and twenty six rand and thirty three cents].

[17] A final bone of contention between the parties related to the payment of the costs of the cancellation of the bond. It was argued on behalf of the respondent that such costs ought to be included as being within the terms of the "costs of transfer" and therefore be paid by the appellant. This, in my view, appeared to be a sensible suggestion in the circumstances and counsel for the appellant did not oppose the grant of this order inasmuch as the amount, it was agreed, was quite negligible, regard being had to the other amounts payable in the transaction. In any event, the cancellation of the bond is a precondition for the transfer to be effected and should, in the present case, be deemed to be part of the costs of transfer which the appellant is obliged to bear.

[18] That leaves the question of the costs payable on appeal. Both parties had argued that costs ought to follow the result, it being submitted on behalf of both parties that it ought to be the successful party. It was common cause between the parties that in the event of an order for costs being made in their favour, that as the services of senior counsel were employed by both parties, such costs should include the costs of senior counsel.

[19] I am accordingly of the view that to the extent I have indicated above in respect the amount of the award payable to the respondent and the amount of the transfer duty payable, the appellant has been substantially successful and to that extend the appeal ought to be upheld. I accordingly make the following order:-

[1] The appeal is upheld with costs, such costs to include the costs consequent upon the employment of senior counsel;

[2] The order of the court *a quo* is replaced with the following order:-

a) THAT the first respondent is directed to pay the sum of

b) R342 030-72 [three hundred and forty two thousand and thirty rand and seventy two cents], less 50% of the bond obligation in respect of the property sold, into the applicant's attorney's trust account (particulars whereof are set forth in clause 12 of

annexure "PLI" annexed to the founding affidavit), to be retained in trust and not to be released to or on behalf of the respondent until registration of transfer of the property situated at 12 Northumberland Place, Durban North has been effected into the name of the first respondent or his nominee, save that the applicant's attorney, as conveyancer for the purposes of such transfer, may in his discretion accept a guarantee in a form satisfactory to him in lieu of such payment;

c) THAT the first respondent is directed to provide guarantees for the payment of the bond in favour of ABSA BANK LIMITED together with the costs of cancellation of the said bond as set forth in the letter from BURNE AND BURNE dated 23 January 2009;

d) THAT the first respondent is directed to pay the costs of transfer to the applicant's attorney as set forth in the pro forma account dated 12 January 2009 in the sum of R55 526-00 [fifty five thousand five hundred and twenty six rand together with any additional amount that is required by the South African Revenue Services;

e) THAT the payments to be made and guarantees to be furnished in terms of this order shall be effected within 5 (five) days of the date of this order;

f) THAT the applicant is directed to pay the costs of the application, such costs to include all costs previously reserved, and those consequent upon the employment of senior counsel.

_____ IT IS SO ORDERED
GYANDA J

_____
MOKGOHLOA J I AGREE

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LOPES J I AGREE

APPEARANCES

DATE OF HEARING: 8 July 2012

DATE OF JUDGMENT: 30 August 2012

COUNSEL FOR APPELLANTS:	Mr A. Stokes SC instructed by Stirling Attorneys c/o redfern & Findlay attorneys (ref: COD/cr/02/T008/004)
COUNSEL FOR RESPONDENT:	Mr H. A. De Beer SC instructed by Patrick Lander Attorneys c/o Tatham Wilkes Attorneys (ref: N R Tatham/Michelle/06G0558/12)