REPORTABLE JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO : 7893/2008

In the matter between:

SIHAAM ABRAHAMS	First Applicant
TRANSLOGIC STRATEGIC SYSTEMS (PTY) LTD	Second Applicant

and

R.K. KOMPUTER SDN-BHD	First Respondent
ISMAIL JAMIE SC	Second respondent
ERIC DANE	Third Respondent

Counsel for the APPLICANTS	**:**	Adv A Albertus SC
Instructed by	**:**	Albertus Attorneys, Cape Town
Counsel for the RESPONDENT	**:**	Adv J Josephson
Instructed by	**:**	Norman Sher & Associates
Date of hearing	**:**	4 December 2008
Date of Judgment	**:**	**9 December 2008**

Reportable
Of interest to other judges

1IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No. 7893/2008

In the matter between:

SIHAAM ABRAHAMS First Applicant

TRANSLOGIC STRATEGIC SYSTEMS (PTY) LIMITED Second Applicant

and

R.K. KOMPUTER SDN-BHD First Respondent

ISMAIL JAMIE SC Second Respondent

ERIC DANE Third Respondent

JUDGMENT

4, 9 December 2008

Review of arbitration appeal award - section 33(1) of Arbitration Act, 42 of 1965 – "misconduct" and "gross irregularity" alleged on basis that appeal arbitrator who prepared award "failed to source findings in the evidence", and that findings therefore mala fide or motivated by ulterior or improper purpose - second appeal arbitrator alleged to have followed approach of co-arbitrator "slavishly and uncritically" - whether in any event award vitiated by reasonable perception of bias –waiver of bias - punitive costs order.

GAUNTLETT, AJ:

The arbitral and review proceedings

This is a review under the Arbitration Act, 42 of 1965 ("the Act") of an award by an arbitration appeal tribunal.

The arbitration proceedings arose from a contractual dispute between the first respondent and the first applicant. In July 2005, the first respondent instituted action against the first applicant in this court, claiming payment of the sum of R3 469 527,00 against a tender by the first respondent to the first applicant of shares which the former held in the second applicant. The first applicant triggered an arbitration. She did so by raising a special plea that the matter should have been referred to arbitration. The parties then agreed to do that. In this process, the parties exchanged the names of potential arbitrators for consideration: the first respondent put forward five names, including that of the third respondent. In response the first applicant put forward the name of the second respondent. As a result of their unavailability on the agreed date for the commencement of the arbitration, another senior counsel was selected as the arbitrator at first instance.

He dismissed the first applicant's claims. Thereupon the parties again exchanged names, ultimately agreeing that the second and third respondents should be appeal arbitrators. The second respondent is a senior counsel and the third respondent a junior.

In March this year, the appeal arbitrators handed down an award dismissing the appeal. Unusually it was not presented as a joint award but as an award by the third respondent, the second respondent stating his concurrence. It comprises a detailed analysis of issues, dealing at some length with the applicants' argument, rejecting aspects of the argument for the first respondent, and not upholding the reasoning of the arbitrator at first instance in all respects.

The basis for the review

The review has been instituted by the first applicant (the second applicant has ceased trading). The second and third respondents abide the result, but have filed affidavits responding to the allegations made against them.

In seeking the review of the appeal award, the first applicant relies upon both misconduct and gross irregularity in the conduct of the arbitration proceedings. She invokes in this regard section 33(1)(a) and (b) of the Act, respectively. In argument her counsel (dealing with his reliance on gross irregularity) acknowledged that mistakes of law or fact are not *per se* bases for setting aside an arbitration award.[1] But his argument was that a gross or manifest mistake which establishes *mala fides* or partiality is enough to warrant interference.[2] He explained that the approach that he would adopt, in relation to the facts of this matter, would invoke the

---

1 **Dickinson and Brown v Fisher's Executors 1915 AD 166**; **Total Support Management (Pty) Limited and Another v Diversified Health Systems (SA) (Pty) Limited and Another 2002(4) SA 661 (SCA) at 670H-672H**; **Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA)**; **Lufuno Mphaphuli and Associates (Pty) Limited v Andrews 2008 (2) SA 448 (SCA) at 454E-G.**

2 **Total Support Management v Diversified Health Systems (SA) (Pty) Limited supra 671 to 672**.

judgment of Ngcobo J in **Sidumo v Rustenberg Platinum Mines Ltd**[3]**.** This (following the distinction indicated by Schreiner J in **Goldfields Investments Limited v City Council of Johannesburg**[4], emphasises that patent irregularities in the conduct of proceedings are to be distinguished from latent irregularities - which are irregularities taking place inside the mind of the adjudicator, and only ascertainable from the reasons given by him or her. That exercise

"**[***w***]***ill inevitably require the reviewing court to examine the reasons given for the award. In doing so the reviewing court must be mindful of the fact that it is examining the reasons not to determine whether the conclusion reached by the commissioner is correct but whether the commissioner has committed a gross irregularity in the conduct of the proceedings"*.[5]

Thus the argument amounts to these successive contentions: the appeal award was vitiated by irregularities; these were latent, not patent; they are to be detected in the reasons given in the award; these reasons are insufficiently supported by the evidence; from this disjunct a gross irregularity is to be construed. That alleged irregularity takes a somewhat different form (as will shortly be considered) in the case of each of the two appeal arbitrators.

---

3 **2008 (2) SA (CC).**

4 **1938 TDP 511.**

5 **Sidumo v Rustenberg Platinum Mines Ltd supra at 112. Put more shortly by Harms JA for the SCA in Telecordia Technologies Inc v Telkom SA Ltd supra, a contended irregularity only amounts to a gross irregularity in the sense contemplated by section 33(1) of the Act where the adjudicator misconceives the whole nature of the inquiry, or his duties in relation to it. Thus the irregularity must go – and go fundamentally – to the conduct of the proceedings, not the merits. The merits are only relevant to the extent that they establish procedural failure.**

The reliance on misconduct, in the alternative to gross irregularity, accepted that for its purposes, too, mistake is not enough. In current South African law,[6] a flawed award constitutes misconduct "***only if the mistake is of so gross and manifest a nature that it demonstrates moral turpitude in the sense of dishonesty, partiality or bad faith***".[7] This, counsel said, was indeed his case.

A third basis of review was advanced: a reasonable perception of bias, in circumstances explained below.

The two contractual claims: gross irregularity or misconduct in their adjudication upon appeal ?

What was at stake in the arbitration proceedings were two claims instituted by the first respondent against the applicants. The first (claim A, as it has been termed throughout) related to the exercise of a "put option", arising from an agreement between the first respondent and first applicant. The second (claim B) related to an agreement involving the redemption by the first respondent of certain redeemable preference shares in the second applicant.

---

6 **The position is different in the English law of arbitration, under section 68(2) of the Arbitration Act, 1996: see particularly Merkin Arbitration Law (2004) 858ff.**

7 **Johan Louw Konstruksie (Edms) Bpk v Mitchell NO 2002 (3) SA 171 (C) at 182H.**

On appeal, the appeal arbitrators were called upon to determine three issues in relation to claim A: whether an alleged breach of an obligation to furnish financial statements constituted a material breach, in the sense that it had an adverse and material impact on the second applicant; whether there was complicity by the first respondent in the alleged breach; and whether the first respondent had waived its right to exercise the "put option" in the light of the agreement relating to the redemption of shares.

On the first aspect, the review attack was two-pronged. As regards the third respondent, it was that he "***failed to source his findings in the evidence [and that] his failure to do so leads to the conclusion that his findings was [sic] 'mala fide' or motivated by an ulterior or improper purpose***". As regards the second respondent, the "***inference is irresistible that [he] uncritically and slavishly went along with the final award...***".

What happened in the preparation of the award was less usual in two respects. The first, as already noted, is that instead of the usual joint award for the appeal tribunal, the award was presented as one written by the third respondent and concurred in by the second. The other is that the second respondent attached to his answering affidavit a first draft of the appeal award (of which the first applicant had been unaware at the time she determined to institute this review, and which accordingly is not relied on in her founding affidavit). In handwritten notes on the draft prepared by the third respondent, the second respondent indicated that he disagreed in relation to the question as to whether an adverse effect – the first of the three sub-issues in respect of claim A, described above - was established on the facts. His detailed

note ends thus:

"Sorry my friend but unless we can reach consensus I will have to write a short dissent. Let me have your thoughts. I think the award is well considered and written up to para 41 by the way. Ismail ".

What transpired in preparing and finalising the appeal award is the subject of explanatory affidavits by the two appeal arbitrators. The filing of these affidavits is explicable given the allegations. They record that the third respondent at the end of the hearing had formed no clear view in the matter either way. The second respondent was inclined at that stage to uphold the claim in relation to claim A, but like the third respondent, saw no merit at all in the appeal relating to claim B. The two appeal arbitrators met to discuss their divergent preliminary views, and debated the proposed award. As the second respondent testifies,

"After considering the issues raised by me the third respondent and I met again on at least two occasions in order to discuss the matter. After these meetings I, and I presume he, considered the different portions of the record to which we had referred each other, and which had been raised in our discussions.

I was finally satisfied that the third respondent to claim A, we being in agreement that the appeal in respect of claim B had no merit, was correct and I just signed the appeal award on or about 3 April 2008".

In his own affidavit (which, it is evident, was separately prepared), the third respondent similarly testifies to the fact that the draft rested on his understanding of the evidence and argument; that he considered the initially contradictory views of the second respondent, debated these with him; that it was agreed that the third respondent was, after all, correct, in

his approach.

This explanation was the subject of vigorous attack by the first applicant's counsel. He contended that "***it behoved the second respondent to have indicated in his answering affidavit exactly which parts of the evidence he had been referred to by the third respondent which ultimately satisfied him that the third respondent's findings were indeed sourced in the record***". He similarly castigates the third respondent also for failing to offer chapter and verse to demonstrate that his findings were "***sourced in the evidence***", and contends that "***his failure to do so leads to the conclusion that his findings was [sic] 'mala fide' or motivated by an ulterior or improper purpose***". The second respondent is himself charged with perpetrating a gross irregularity or misconduct on the separate basis that he "***slavishly and uncritically***" followed the third respondent, "***simply abandoning his former appraisal of the question under consideration without any evidential basis***".

I disagree: indeed, the argument disregards the explanations offered under oath by the two appeal arbitrators, summarised above. When this was put to counsel, together with the application of the general rule in motion proceedings the response was that their versions fell to be rejected, on motion, as so "***far-fetched or clearly untenable***" that this could appropriately be done.[8] The submission is insupportable. Whether the award is right or wrong in this respect, it is detailed, considered and reasoned. As regards the attack on the second respondent, his explanation points to the very contrary conclusion: he held an initial contrary view, which is documented and reasoned in his handwritten notes on the draft appeal

award, but was persuaded after debate that the contrary view, also documented and reasoned,

[8] **Cf. Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 635C.**

in the draft award itself, was correct. That approach is hardly to be described as "***slavish and uncritical***". As regards the attack on the third respondent, it is not evident to me that his conclusions are not "***sourced in the evidence***", to the extent they are required to be (in the nature of things, some entail interpretation and other mixed issues of law and fact, others entail mere legal reasoning). In my judgment, the attack is, in truth, obliquely but patently appellate: in substance it amounts to the contention that the award is not in all respects supported by the facts. The artificial bridge then contrived from appeal to review is that the appeal arbitrators did not consider all the facts, because these are not all rigorously iterated in the award. Even as an appeal test, that would have been misguided.[9]

The two appeal arbitrators exercised their jurisdiction: whether they went wrong, or were right, they acted honestly in the scope of their mandate. The attacks in this regard are without merit; they show little regard for first principles.

As regards the complicity issue – the second sub-issue in relation to claim A - this turns on the construction of a resolution adopted at a shareholder's meeting. The founding affidavit contends that the plain wording of the resolution "***screamed for a finding***" in her favour – to which the appeal arbitrators unfortunately were deaf, as before them the arbitrator at first instance had been. The argument advanced on behalf of the first applicant in this regard, at considerable length, is - down to the dictionary definitions essayed – indeed exactly that

which was advanced first before the arbitrator then before the appeal arbitrators and again in the founding affidavit in this application. How untenable it is as a review ground is

[9] **R v Dhlumayo 1948 (2) SA 647 (A) at 676.**

exemplified by the submission in argument on behalf of the first applicant that

"[i]nstead of seeking by linguistic treatment to construe the said resolution, the third respondent slavishly and uncritically regurgitated the arbitrator's finding .... Had the third respondent independently attempted to construe the resolution [he would have come to a different conclusion]..... Given the fact that the third respondent was aware that the construction of the resolution....was an issue which had to be addressed by him, his failure to do so amounted to a gross irregularity, alternatively misconduct....alternatively, to denial of a fair hearing in terms of section 34 of the Constitution".

The argument again disregards the most basic principle and the clearest authority. The construction of written instruments of this kind is fundamental to commercial arbitration. The attack is once more transparently appellate. A sense of certainty, or moral indignation, felt in relation to the need for the resolution in question to be interpreted "linguistically" has been stretched to an egregious allegation of gross irregularity or misconduct. From the contended wrongness is inferred *mala fides* - as counsel was prepared to paraphrase this, a deliberately wrong interpretation - as being the basis for the review sought. There is no basis for this contention.

As regards claim B, the appeal arbitrators were, as has been noted, *ad idem* with the arbitrator that this had no merit. The refrain again is that the third respondent did not "***source his findings in the evidence***". His conclusion moreover is attacked in one respect as "***factually incorrect***" and in another, as "***[ignoring] the evidence***". Again the second respondent is

attacked for "***slavish***" adherence. For the reasons already given, these attacks are fundamentally misconceived: the facts belie them, and the threshold tests for neither gross

irregularity nor misconduct are met.

Bias

Counsel for the first applicant contended lastly for bias, or a reasonable perception of bias, on three bases: an "***apparent friendship***" between the third respondent and the first respondent's counsel; a question put by the third respondent in the course of the proceedings to the first respondent's counsel as to what he submitted should be done if the appeal arbitrators could not agree on the fate of the appeal; and his treatment of the issues on appeal in the respects already identified.

The test for a reasonable perception of bias requires to be more closely considered than the manner in which it was advanced on behalf of the first applicant. The authorities in English law have been aptly described by Lord Goff of Chieveley as "***not only large in number but bewildering in their effect*** ".[10] South African case-law has aimed at greater consistency and simplicity.[11] In the formulation by the Constitutional Court (cited with approval by the Court

of Appeal in England[12] and, among fellow SADC members, the Courts of Appeal of

---

[10] **R v Gough [1993] 2 All ER (HL) at 827c.**

[11] **See especially BTR Industries (Pty) Ltd v Metal and Allied Workers' Union 1992 (3) SA 673 (A) at 693I-J; Moch v Nedtravel (Pty) Ltd 1996 (3) SA 1 (A) at 8I; S v Shackell 2001 (4) SA 1 (SCA) at 9.**

[12] **Locabail (UK) Ltd v Baysfield Properties Ltd [2000] 1 All ER 65 (CA) at 76.**

Swaziland[13] and Lesotho,[14]

"[t]he question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case….".[15]

In the **SARFU** case the court dismissed claims of reasonable perceptions of bias based *inter alia* on contacts of various kinds in the past between members of the Bench and the appellant, then President N.R. Mandela: had any reasonable person known the accepted facts, these could not form the basis of a reasonable apprehension of bias. The standard of what has aptly been termed "***double-reasonableness***" patently would not be met. Similarly where an adjudicator had not spoken for a period of some eight years to a principal witness with whom he had social connections, the Privy Council held that a perception of bias could not arise.[16]

I turn now to apply this test to the three factual components of the alleged bias.

As regards the contended "***apparent friendship***", this arises from the fact that the third respondent asked the first respondent's counsel to send his regards to the first respondent's

children. This took place at the end of the entire appeal hearing. The pleasantries were heard by the first applicant, but not by her legal team. The first applicant suggests that this indicates

---

13 **Minister of Justice v Sapire (civ. app. 49/01, 10.06.02 (unrep.) 9).**

14 **Sole v Cullinan 2003 (8) BCLR 935 (LesCA) at 942D-G.**

15 **President of the RSA v SARFU 1999 (4) SA 147 (CC) at 177B-E.**

16 **Man O'War Station Ltd v Auckland City Council [2002] UKPC 28. See too Merkin op cit 381-2.**

a close connection between the two, which had not been disclosed.

In my view, there are two answers which are dispositive of this attack.

The first is that the facts are that there is no close friendship between the two at all. The first respondent's counsel and the third respondent had, by happenstance, been tenants in the same corridor in chambers in Johannesburg for a period of four years - ending 29 years ago. They have not seen each other for a period of nearly ten years, save for a brief meeting by chance at an airport about six years ago.

In my view, these facts, which - applying the test for a reasonable perception of bias - are to be taken to be known, form no basis for the contended perception at all. As the first respondent's answering affidavit notes, counsel for the first applicant and the arbitrator of first instance (nominated by the first applicant as arbitrator) are colleagues of long-standing and practise on the same floor in chambers. Plainly those facts would have founded no reasonable apprehension of bias on the part of the first respondent (which did not object at the time to the nomination by the first respondent). The same applies to the professional acquaintance of the third respondent and the first respondent's counsel.

The second answer is that the first applicant testifies that, while concerned at the time by the pleasantries, she "***did not think it appropriate at that stage to mention any of this to my counsel or instructing attorney***". It was only when she received the appeal award that she did

so. This is unacceptable. Either in truth the first applicant thought too little of the exchange of pleasantries at the time even to mention these to her counsel and attorney, or she formed the perception she suggests but elected not immediately to raise the alarm. If, as her affidavit would have it, it is the latter, it does not avail her now – disgruntled by the result – 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[17] 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".[18]

This is exactly what the first applicant did. The law cannot permit her, on the facts of the case, that tactic.

As regards the second aspect, it was argued that the asking of the question "***assumes a rather sinister light***", because the first respondent's attorney testifies that he himself had previously posed the question to his counsel as to what would happen if the two-man tribunal were to disagree. "***The question then arises***", it was argued for the first applicant, "***whether the***

---

17 **Council of Review, SADF v Monnig 1992 (3) SA 482 (A) at 495A-D.**

18 **Locabail (UK) Ltd v Bayfield Properties Ltd supra at 76.**
Woolf, Jowell and Le Seur De Smith's Judicial Review (6th ed 2007) 10-055 note that "[o]bjection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practical opportunity". Cf. Craig Administrative Law (2008) 425-6.

third respondent in posing the question as he did had done so purely fortuitously or after a discussion with either of the first respondent's legal representatives".

The submission has no factual grounding in either the founding or replying affidavit. Had the allegation been made pertinently, it would no doubt have been answered pertinently. The suggestion - entailing as it does, profound professional misconduct - required to be made expressly. The principle and the authorities in this regard are, it might be thought, clear.[19]

To be treated similarly is an allegation in reply - fastening on a statement by the third respondent in his affidavit that for a number of years he had not seen or spoken to the first respondent's counsel "***other than relating to this matter***". This (counsel for the first respondent argued in reply) supports the assertion now made in the replying affidavit "***that they may have discussed the merits of the matter***". The attempt to "***piece that case together out of statements in the…answering affidavit***"[20] is objectionable and is in any event again contrived. The context of the third respondent's answer is clear: an emphatic repudiation of any inappropriate contact or communication. His answer is hardly to be interpreted as a tacit confirmation of the contrary.

Lastly, the first applicant calls in aid the third respondent's "***treatment of the issues on appeal***" - the arguments which I have already addressed regarding the consideration of claims A and B. For the reasons I have already indicated, there is in my view no merit in those

---

[19] **Government of the Province of Kwazulu-Natal v Ngubane 1996 (4) SA 943 (A); Naude v Fraser 1998 (4) SA 539 at 563-4. So are the requirements for drawing an inference in civil proceedings: Govan v Skidmore 1952 (1) SA 732 (N), approved and applied *inter alia* in Smit v Arthur 1976 (3) SA 378 (A) at 386. The argument fails this hurdle too.**

[20] **Administrator, Transvaal v Theletsane 1991 (2) SA 192 (A) at 195-7.**

arguments - and they gain nothing by being recycled under the rubric of a reasonable perception of bias. If the arguments are (as I have indicated them to be) not good in their own right, then – applying the "***double-reasonableness***" test outlined above - no reasonable perception can be held that they are a basis for the perception of bias.

Costs

The first respondent's counsel sought, in the event of the review application being dismissed, an order of costs *de bonis propriis* and on the attorney and client scale.

There does not seem to me to be a proper basis to order costs to be paid personally by the first applicant's legal representatives. They have not made themselves personally guilty of such actions or statements in the course of the review proceedings such as would warrant such an order to be made personally against them.

As regards the request that a punitive costs order should be made, the appropriate considerations seem to me to be these. In the first place, such an order of costs should require exceptional circumstances. Simply because a party makes allegations (in a context such as the present) of inferred misconduct or irregularity would in my view not ordinarily make such

an order appropriate, even if the allegations are rejected.

But in the present case, the position is different. The first applicant has repeatedly alleged in

her affidavits dishonesty on the part of the third respondent. Thus she alleges that his approach entailed "***not a bona fide mistake, but rather a deliberate attempt to obfuscate and avoid the issue at hand***"; she describes his reasoning as entailing "***disingenuously linking***" matters, "***contrived and disingenuous….he certainly could not have had an honest belief in his said findings***"; and, in reply, she reiterates that he "***is not being entirely frank with this court***"; she strives to infer (through, as indicated above, the most gossamer speculation) that the third respondent and first respondent's counsel "***may have discussed the merits of the matter***"; and she alleges that he "***deliberately ignored***" a particular matter. As I have indicated, her counsel (in her presence) continued to press these conclusions in oral argument on her behalf to the very end.

I believe that the court in these circumstances is required to mark its particular disfavour towards an approach which impugns in this way the personal and professional integrity of practitioners selected by the parties to arbitrate their dispute. The accusations are far worse than those in **Hyperchemicals International v Maybaker Agrichem**,[21] where at least imputations of dishonesty against a particularly distinguished arbitrator were expressly disavowed.[22] Here the allegations were roundly and repeatedly made.

Whether these strident and multiple allegations were made tactically, to avoid the danger of dismissal of the review on the basis that so-called "***legal misconduct***" does not suffice,[23] or

---

21 **1992 (1) SA 89 (W).**

22 **At 94F, 101C.**

23 **Hyperchemicals International v Maybaker Agrichem supra at 100B-D; Johan Louw Konstruksie (Edms) Bpk v Mitchell NO supra at 180-3.**

"***with the most upright purpose and a firm belief in the justice of [the] cause***",[24] or simply vindictively, does not avail the first applicant: the allegations are vexatious, and for that reason call for a special order as to costs.

The application is dismissed. The first applicant is ordered to pay the first respondent's costs on the attorney and client scale.

_____

GAUNTLETT AJ

For the first applicant: A. Albertus SC

Instructed by: Albertus Attorneys, Cape Town

For the first respondent: J. Josephson

Instructed by: Norman Scher & Associates

No appearances for the second applicant and second and third respondents

[24] **In re Alluvial Creek Ltd 1929 CPD 532 at 535, per Gardiner, JP.**