



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No.: **46321/2021**

(1)	REPORTABLE: YES / ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES / ☒ NO
(3)	REVISED. ☒
<u>13 /09 /2023</u> DATE  SIGNATURE	

In the matter between:

**STEENBOKPAN TRUST HEREIN
REPRESENTED BY: ALBERTUS BENJAMIN
BOOYSEN (JUNIOR) N.O**

First Applicant

**TRUST MART CONSULTING(PTY) LTD
HEREIN REPRESENTED BY:
JOHAN LUTTIG VAN ZYL N.O**

Second Applicant

and
**TROUT TRUST REPRESENTED BY:
SHAUN STANLEY SMITH N.O**

First Respondent

MATTHEW LEE SMITH N.O

Second Respondent

**TRUST MART CONSULTING SERVICES
(PTY) LTD N.O**

Third Respondent

LTC HARMS

Fourth Respondent

JUDGMENT

SARDIWALLA J:

- [1] The Applicants seek to review and set aside the determination of the Fourth Respondent dated 9 July 2021. The application was opposed by the First and Second Respondents.

Background Facts

- [2] The following are the relevant facts:

2.1 The two Trusts were the sole shareholders in a company Hotdog Café (Pty) Ltd, (hereinafter referred to simply as “Hotdog”).

2.2 The First Applicant, Booysen Junior, and the deceased, were, in practice, the individuals and office bearers who made all relevant decisions pertaining to the Trusts and Hotdog.

2.3 Hotdog’s Shareholders Agreement evinced a desire by the shareholders to keep the shareholding in Hotdog within a limited circle of shareholders. This was further advanced in a later agreement between the two Trusts with the title “Buy and Sell Agreement”.

2.4 The limited circle of shareholders consisted, in the first instance, of the existing shareholders. The two aforementioned Agreements, (i.e. the Shareholders Agreement and the Buy and Sell Agreement), provided for situations where either the First Applicant or the deceased might become disabled or die and did so by stipulating that upon the occurrence of one of these fortuitous events a so called “deemed sale” of

shares in Hotdog, (of the disabled or deceased First Applicant or the deceased Mr Smith), would occur in terms of prescribed value determinations.

2.5 The Buy and Sell Agreement was intended to provide for funds to any shareholder constrained to purchase any other shareholder's shares should the last mentioned shareholder be constrained, (by the deeming provision, to “retire” and transfer his shares to the remaining shareholder.

2.6 In the premises disability and life cover on the lives of the First Applicant and the deceased were taken out by them by means of insurance policies. The rights of the Trusts to these policies are the bone of contention in that Steenbokpan contends that the policies taken out in respect of the disability and life of the deceased belonged to Steenbokpan and/or were outright ceded to Steenbokpan. Trout on the other hand, contends that the balance of such policies, above the purchase price of the deceased Mr Smith's shares when he became disabled and/or died, belong to Trout.

2.7 The bone of contention about the status of the policies is also at the heart of Steenbokpan's contention that the Fourth Respondent breached his mandate in deciding the disputes between the two Trusts, acted irregularly in deciding the disputes as he did and consequently his determination falls to be reviewed and set aside.

2.8 On 6 April 2017 the deceased suffered a stroke which disabled him. A disability claim was made in terms of his disability policy but there was a waiting period before payments could occur.

2.9 On 19 June 2018 one of the deceased's insurers, Hollard Insurance, paid an amount of R2 million to Steenbokpan due to the deceased's disability occasioned by the deceased's stroke. In terms of clause 7.1 of the Buy and Sell Agreement a deemed sale of Trout's shares to Steenbokpan thus occurred on 18 June 2018, (as the clause determines that the day before the disability is deemed to be the day of sale).

2.10 On 9 December 2019 the deceased passed away.

2.11 On 3 March 2020 one of the deceased's policies viz an Old Mutual policy paid an amount of R3 million to Steenbokpan due to the deceased's demise.

2.12 On 20 May 2020 a Hollard policy on the deceased's life paid an amount of R2 019 829.68 to Steenbokpan.

2.13 Trout claimed the proceeds of the aforementioned policies on the basis that the deemed sale of shares had to be paid for whilst the balance of the proceeds of the policies above and beyond the value of the shares belonged to Trout. Consequently Trout initiated dispute resolution proceedings before the Fourth Respondent.

2.14 The dispute resolution process was provided for in the Buy and Sell Agreement, in clause 10 thereof deals with this issue.

2.15 Comprehensive pleadings, even consisting of a reply and a re-joinder, were filed.

2.16 In addition to the foregoing a massive bundle of documents was provided to the Fourth Respondent to prove the factual matrix about the contract in dispute.

2.17 In addition to the foregoing the legal representatives of both Trusts submitted comprehensive written submissions to the Fourth Respondent.

2.18 On 24 June 2021 the Fourth Respondent informed the parties by e-mail that, given the extensive written submissions, he did not see the necessity for *viva voce* argument.

2.19 On 5 July 2021 Trout's attorneys notified the expert that the parties had discussed the question of *viva voce* argument and had arrived at an agreement that oral argument would not be necessary.

2.20 On 9 July 2021 the Fourth Respondent published his determination, upholding Trout's claims.

Grounds of Review

[3] The Applicant's basis of review are that:

3.1 In the first instance the expert's powers were contractual and are to be found in clause 10 of the contract between the two Trusts.

3.2 In the second instance it is to be found in the contract between the disputing parties on the one hand and the expert on the other hand.

3.3 It was a term of the appointment of the expert that he would determine the disputes in a proper manner i.e. a manner which would ensure the legitimate expectations of the parties that the dispute would be met.

3.4 The legitimate expectations consisted of the following:

3.4.1. Evidence referred to as relevant by the parties would be considered by the expert in making his determination.

3.4.2. The modern interpretation to the interpretation of contracts viz taking into consideration the factual matrix would be followed and if the expert intended not to do so he would be obliged to inform the parties of same and invite argument about same.

3.4.3. Had the expert concluded that, *prima facie*, the basis upon which one or both of the parties submitted the determination should be done was not permissible or would not be entertained by the expert he would call for arguments with regards to such *prima facie* view and would not make a determination until this had occurred.

3.4.4. The rules of natural justice pertaining to the foregoing would be followed.

The Applicants submission in support of the relief

- [4] The Applicants contend that despite the contents of the parties' written submissions and the voluminous documentation and references to same in the submissions the expert excluded the factual matrix. By doing so he breached his mandate, did not fulfil the task he was given, and acted irregularly. In the premises no fair hearing and adjudication of the disputes occurred. They further contend that the expert's approach to determining the disputes does not pass constitutional muster as a result of which the determination proceedings should be found to be invalid and stands to be set aside specifically on the manner in which the expert decided to determine the dispute which led to a failure to adjudicate and determine the dispute properly.
- [5] They allege that the failure to allow for *vive voce* argument resulted in incorrect conclusions being made by the expert. The Applicant's submit that although they agreed not to advance oral argument on the experts notion that as there were extensive submissions that oral argument wasn't necessary, this not did mean that the Applicant's agreed that the expert should not take a contextual approach. In support of its argument the Applicants relied on the Constitutional Court case **University of Johannesburg v Auckland Park Theological Seminary and Another**¹ that parties would invariably have to adduce evidence to establish the context and the purpose of the relevant contractual provisions. It was submitted that both parties requested the expert to have regard to the factual matrix and this is the reason the voluminous documentation was provided for in the first place. It is submitted that the approach of the expert in ignoring

¹ (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC) ; 2021 (6) SA 1 (CC) (11 June 2021)

the context on grounds as stated in the Constitutional Court decision prevented both parties from having the disputed fairly determined.

[6] The Applicants argue that the First and Second Respondents submission that the expert had “the right to be wrong” has limitations as this right can never permit a gross irregularity in the proceedings from being reviewed. This is so because the Constitutional Court approved the approach to gross irregularity proceedings in **Toyota SA Motors (Pty) Ltd V CCMA and Others**² and put to bed the issue that the experts’ determination cannot be reviewed simply because he acted *bona fide*. The Applicants submit that the expert committed an error of law which constitutes gross irregularity and therefore is capable of being reviewed and set aside. The issue that the expert had to determine if there were any irregularities has been overruled by the Constitutional court UJ decision.

[7] The contention that the application for review was out of time, the First and Second Respondent’s concede that the Arbitration Act does not apply to this matter and therefore in terms of what is deemed reasonable to bring this application, the Applicants submit that 9 weeks is reasonable and in any event there is no prejudice that has been advanced by the First and Second Respondents. Lastly that the issue that the Applicants have not paid for insisted upon the transfer of the shares in terms of the sale is irrelevant to the review application.

² [2015] ZACC decided on 15 December 2015

The First and Second Respondent's opposition

[8] The First and Second Respondents contend that there is nothing to suggest that the expert did not understand the distinction between admissible evidence of context and purpose and inadmissible parole evidence. That if there is any criticism then it is that he treated evidence of context and purpose as inadmissible parole evidence. They allege that the Applicants have not identified the evidence which the expert disregarded. They aver that the question is not whether the expert's treatment of evidence was flawed or not but whether the parties are bound by the decision. That the parties agreed to be bound by the decision and therefore interpretation does not justify the interference of this Court.

[9] In regards to the late filing of the review and the issue of prejudice the First and Second Respondents aver that simply because there is no prejudice is not dispositive of the matter. They aver that the delay resulted in a delay of the enforcement of their contractual rights and the withholding of payment of R2,1 million. The Second Respondent has suffered further costs of an enforcement application and that the Applicants had not given any indication that they were dissatisfied with the expert's determination and intended to apply for a review. Had the application been brought within a reasonable time then costs of the enforcement application could have been avoided and the Applicants have offered no reason why the application was brought 9 weeks later.

[10] The First and Second Respondents relied on a number of decisions and in particular that of the English decision of the Supreme Court of Appeal in **Arenson v Arenson**³

³ [1973] 2 WLR 553

which was used in **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another**⁴in stating that expert valuations and determinations can only be set aside on the basis of fraud, bad faith or collusion which has not been alleged by the Applicants. In this matter the expert was not required to determine the purchase price of the agreement between the parties, but what he was required to do was to determine the agreement by the parties and what the words used by them meant to convey. They submit that the experts functions were quasi-judicial and similar to that of an arbitrator. Further that gross irregularity is a ground of review of arbitration awards and not a ground on which expert determinations can be impeached. They submit that if mistakes of law are categorized as procedural errors with a view of to support a finding of gross irregularity then this would place private arbitrations in a precarious position as contracting parties would have no faith in this dispute resolution mechanism. The First and Second Respondents seek a special costs order against the Applicants and specifically against the First Applicant in his personal capacity on an attorney and client scale by the fact that the Applicants had the record of the proceedings and the expert determination when the application was brought yet still endeavoured to follow the procedures in Rule 53(1) and (4) of the Uniform Rules of Court for no reason alternatively the Applicants in the event that they succeed should be deprived of costs.

Law and analysis

Gross irregularity

[11] In **Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA)** the Court had occasion, at paragraph 72, to consider the concept of gross irregularity. It quoted

⁴ 2008 (2) SA 448 (SCA)

from **Ellis v Morgan; Ellis v Dessai 1909 TS 576 at 581**, where Mason J laid down the basic principle in the following terms:

“But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of the trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”

[12] At paragraph 73 of **Telcordia**, Harms JA (as he then was) went on to quote from **Goldfield Investment and Another v City Council of Johannesburg 1938 TPD 551**, at pages 560 – 561, as follows:

“The law, as stated in Ellis v Morgan supra has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate’s reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court’s not merely missing or

misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section. That being so, there was a gross irregularity, and the proceedings should be set aside.”

The right of review or appeal

[13] At paragraph 50 of **Telcordia** the court went on to say:

“By agreeing to arbitration the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.”

[14] The court continued to state the following in *Paragraph 51*:

“By agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 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. However, as will become apparent, the common-law ground of review on which Telkom relies is contained – by virtue of judicial interpretation – in the Act, and it is strictly unnecessary to deal with the common law in this regard.”

[15] Recently in **Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and Kec International Limited & Others** the Supreme Court of Appeal reaffirmed the principle of party autonomy and that a court will only be justified to interfere with an arbitration award in terms of s33(1)(b) if the arbitrator has committed a gross irregularity and/or exceeded its powers which resulted or prevented a fair trial of the issues. It also stated that the admission of evidence which is not strictly necessary or beneficial to the resolution of a dispute then makes the entire reliance on such process of dispute resolution by parties becomes obsolete.

Privity and sanctity

[16] In **Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd**⁵ the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of the contract and stated the following:

“paragraph 23 The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.”

[17] The Court continued and quoted with approval a paragraph in **Wells v South African Alumenite Company 1927 AD 69 at 73** wherein the Court held as follows:

“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.”

⁵ (183/17) [2017] ZASCA 176 (1 December 2017)

The buy and sell agreement

[18] Clause 10 of the agreement between the parties sets out the procedure to be followed in the event of any dispute between the parties and reads as follows:

“10 DISPUTES

10.1 Any dispute, other than where an interdict is sought, and otherwise than where specifically provided herein, arising out of or pursuant to this agreement including, but not limited to, any dispute or difficulty arising in connection with the interpretation, application, and/or effect of any of the terms, conditions or restrictions imposed or any procedure to be followed under this agreement and/or arising out of the termination, cancellation or alleged invalidity of this agreement or any provision thereof shall be referred to such person as may be agreed upon between the parties to the dispute or, failing such agreement within 14 (fourteen) days after the occurrences of such dispute, nominated by the Chairman for the time being of the Pretoria Bar Council.

10.2 Any person agreed upon or nominated as aforesaid (“the expert”) shall in all respects act as an expert and not as an arbitrator.

10.3 The expert shall not be bound to follow strict principles of law in arriving at his decision but shall be vested with entire discretion as for the procedure and manner to be followed in arriving at his decision.

10.4 The parties shall use their best endeavours to procure that the decision of the expert shall be given within 21 (twenty-one) days or so soon thereafter as possible after it has been demanded.

10.5 The expert's decision shall be final and binding upon all parties affected thereby, shall be carried into effect and may be made an order of any competent court at the instance of any of the parties.

10.6 Upon giving his award, the expert shall deliver to the parties to the dispute 2 written statement setting out -

10.6.1 the findings of fact determined by him and forming the basis of his award; and

10.6.2 full reasons justifying his award.

10.7 This clause constitutes an irrevocable consent by each of the parties to any proceedings in terms thereof and none of the parties shall be entitled to withdraw there from or claim at any such proceedings that it is not bound by this clause.

10.8 This clause is severable from the rest of this agreement and shall remain in effect even if this agreement is terminated for any reason.”

[19] Firstly this Court is cognisant that the Agreement states that the expert acts as an expert and not an Arbitrator therefore the Arbitration Act does not apply. I am inclined to agree with the Applicants’ that the expert's powers were contractual and are to be found in clause 10 of the contract between the two Trusts. However, I am not inclined to agree with the Applicants that the term of appointment of the expert was to deal with the dispute in a manner that included ensuring the legitimate expectations of the parties where considered in doing so. On the reading of clause 10.3 the intention of the parties with regards to the experts powers were clear that the expert shall not be bound to follow strict principles of law (this includes the principles of natural justice) in arriving at his decision but shall be vested with *entire discretion* as to the procedure and manner to be followed in arriving at his decision. Clause 10.5 also makes it clear that the decision of the expert would be binding on the parties and clause 10.7 that the parties consented to the proceedings being dealt with in this way and are prevented from claiming that they are not bound by this clause. Further that in terms of 16 of the agreement that no amendments were binding unless by written agreement between all the parties.

[20] The expert is his reasoning stated at paragraph 2 that the only expertise that was required was that of the “field of interpretation”. He went on further to consider the

evidence advanced by both parties and even considered the issue of background and context in referring to the case law at paragraph 3 by stating the following:

“It might be useful to quote from the Financial Conduct Authority v Arch Insurance and Others [2020] EWHC 2448 (Comm) at paras 64 and 65, which is in conformity with the approach of our courts since at least Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at pp 465-466, and says it all:

The unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, but as Lord Neuberger said in Arnold v Britton at [19]-[20], commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. Where the parties have used unambiguous language, the court should apply it: Rainy Sky at [23].

There may be certain cases, however, where the background and context drive a court to the conclusion that “something must have gone wrong with the language”: Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 at [14] (Lord Hoffmann); Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 913 (Lord Hoffmann). A “strong case” is required because courts do not easily accept that people have made linguistic mistakes in formal documents (Chartbrook at [15]). But if it is clear that something has gone wrong with the language, the court can interpret the agreement in context to “get as close as possible” to the meaning which the parties intended: Chartbrook at [23], citing KPMG LLP v Network Rail Infrastructure Ltd [2007] EWCA Civ 363, [2007] Bus LR 1336 at 1351 (Carnwath LJ). This is part of the construction exercise, as opposed to a separate process of correcting mistakes, or a summary version of rectification.

Nonetheless, there are certain limits to the exercise. First, there must be a clear mistake in the language or syntax in the contract, as distinct from the bargain itself: Honda Motor Europe Ltd v Powell [2014] EWCA Civ 437 at [37] (Lewison LJ). Second, the court can only adopt this approach if it is clear what correction should be made: Arnold v Britton at [78] (Lord Hodge).”

[21] He went on at paragraph 24 to state that he considered evidence which was probably inadmissible but went on to say that this evidence presented by the Applicants contradicted their version. He went on further at paragraph at 41:

“First, it is Steenbokpan’s case that one must look at the Agreement to determine the intention of the parties relating to the cession – which I have done”.

[22] On the Applicants submissions to the expert they avers that the Agreement must be used to determine the dispute and therefore this would lead one such as the expert to the notion that extrinsic evidence (the factual matrix) need not be considered but only due regard had be given to the Agreement itself. The Agreement is also includes clause 10 which gives the expert the power to deal with the dispute in the manner he deems necessary. I am of the view that the Applicant should have been fully aware of this clause and the powers afforded to the expert and considering that the Applicants agreed not to lead oral evidence, it should have in consideration of clause 10 understood the consequence of agreeing to same. It therefore is difficult to understand the reasoning behind this application when on its version before the expert only the Agreement was required to be considered and not the factual matrix to determine the intention of the parties and in this application the Applicants who concur that the experts contractual obligations are found in clause 10 which gives it the discretion to deal with the procedure and manner to be followed and clearly states that he does not have to follow strict principles of law, then state that he failed to consider the factual matrix and therefore is a gross irregularity.

[23] I am of the view that the experts understanding of the principles and treatment was not flawed in fact to the contrary he made mention in his determination to evidence

submitted by the Applicants and stated why this evidence was contradictory but also did state that same was probably inadmissible. Nevertheless he made reference to the evidence. I am therefore uncertain what evidence he failed to consider regarding the factual matrix and this is not offered by the Applicants.

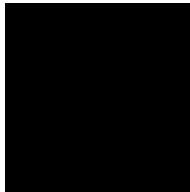
[24] In terms of what was said in *Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and Kec International Limited & Others* in terms of the principles of privity and sanctity *supra* I cannot find that the expert committed gross irregularity in not hearing *vive voce* evidence especially where the Applicants agreed not to lead oral argument and are clearly aware of the powers of the expert in terms of clause when making that election and therefore the consequence of same. The Applicants only allege that the factual matrix was not considered but as I stated above the submission to the expert was that only the Agreement was to be used to determine the intention of the parties. The Applicants in the dispute stated that the Agreement was all that needed to be considered, therefore the allegation in this application that the modern approach to interpretation which included context and background which gave rise to the agreement should have been followed and therefore resulted in gross irregularity cannot be sustained. I cannot find that the expert misunderstood the enquiry or failed to apply his mind in fact as stated above in paragraph 2 of his determination he makes it plain that his enquiry is purely that of legal interpretation.

[25] This Court must respect the privity and sanctity of parties to contracts unless there is gross irregularity that led to the dispute not being determined fairly. I cannot find any such gross irregularity to justify disrespecting the privity and sanctity as stated above. The Applicants are clearly bound by clause 10 and cannot on the predication of a

broadly based gross irregularity attempt to escape the Agreement and its contractual obligations to be bound by same. The expert in not hearing *vive voce* evidence was well within his powers in terms of the Agreement to do so and in terms of the agreement by both parties not to lead oral argument.

[26] I see no reason why the costs should not follow the result. I grant the following order:

The application is dismissed with costs on an attorney and client scale.



SARDIWALLA J

Judge of the High Court

Appearances:
For the Applicants:

T.A.L.L Potgeiter SC
Marais Muller Hendricks Inc

For the First and Second Respondents:
Instructed by:

JA Van der Westhuizen
Weavind and Weavind Inc