



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 9631/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

25.3.15

DATE

[Signature]

SIGNATURE

DATE: 25 / 3 / 2015

IN THE MATTER BETWEEN

SANDRA THOMAS t/a TORGA OPTICAL MOKOPANE

APPLICANT

AND

ADVOCATE MARIUS HEYSTEK N.O

FIRST RESPONDENT

PREFERRED PROVIDER NEGOTIATORS

SECOND RESPONDENT

(PTY) LTD

JUDGMENT

TOLMAY, J:

INTRODUCTION

- [1] This is a review application in terms of sec 33 of the Arbitration Act 42 of 1965 (the Act) of an award given by the first respondent (the arbitrator) in an arbitration instituted by the applicant against the second respondent ("PPN"). The applicant is an optometrist and franchisee of Torga Optical (Pty) Ltd ("Torga Optical"). PPN is a managed Health Care Organization as provided for in the Medical Schemes Act No 131 of 1998, ("the Medical Schemes Act").
- [2] The arbitrator did not oppose the application and I infer from that, that he abides by the Court's decision.
- [3] The applicant brought an application for condonation for the late filing of the review application, this application was not opposed. Therefore the application for condonation is granted.

BACKGROUND

- [4] PPN provides a managed health care service to medical schemes in terms of regulation 15A of the regulations made under the Medical Schemes Act. Acting in this role, PPN makes payments to service providers (such as the applicant) with whom it has agreements. The payments are made in respect of claims by patients who are members of the medical schemes with which PPN has agreements.

[5] The background that led to the dispute between the parties was as follows:

5.1 In 2012, Torga Optical, which is a chain of optometrists that operates on a franchise basis, introduced a special promotion. The PPN agreement with Torga Optical permits Torga Optical service providers (such as the applicant) to charge up to R400 per eye examination, Torga Optical offered eye examinations for R100. In 2013, Torga Optical amended its offer to the public. It raised the price of its promotional eye examinations to R150 each, and introduced certain terms and conditions, ("the 2013 promotion").

5.2 PPN was willing to honor claims made by Torga Optical service providers (such as the applicant) after the 2013 promotion came into effect, only if they were accompanied by a document setting out the details of the patient and indicating whether the 2013 promotion applied. If the 2013 promotion applied, PPN would pay R150 to the optician in question. If the 2013 promotion did not apply, then PPN would pay the full R400 envisaged by the PPN agreement. The purpose of the document was therefore to enable PPN to ascertain whether the 2013 promotion applied.

[6] The issue in the arbitration was whether PPN was contractually entitled to insist on the submission by the applicant of a document ("the disputed document") containing patient and claim details as a prerequisite to the payment by PPN of claims lodged by the applicant.

- [7] The applicant during the arbitration challenged the legality of this practice on several grounds arising from the Participating Service Provider Agreement concluded between the applicant and PPN on 22 March 2009 (“the PPN agreement”).
- [8] The issue at the heart of the arbitration was whether PPN was contractually entitled to require Torga Optical service providers to lodge the disputed document in order to indicate whether or not the 2013 promotion applied. The arbitrator held that PPN was entitled to do so, and consequently dismissed the claim.

THE TEST APPLICABLE TO REVIEWS IN TERMS OF SECTION 33 OF THE ARBITRATION ACT

- [9] The applicant brought this review application in terms of sec 33 of the Act.

Section 33(1) of the Act provides as follows:

“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”.

[10] On a perusal of the papers it becomes clear that the applicant is of the view that due to a variety of reasons, with which I will deal later, the award should be set aside because a gross irregularity occurred as envisaged in sec 33(1)(b) of the Act.

[11] In order to determine the issue at hand and the approach that should be followed the requirements for the setting aside of an award in terms of sec 33(1)(b) of the Act should be considered. In order to do that it must be determined what would constitute a gross irregularity.

[12] When one considers a review application it is appropriate to keep in mind that the parties by agreeing to a private arbitration limits interference by the Court to the ground of procedural irregularities¹. The purpose of a private arbitration is to bring the disputes between the parties to finality and the grounds of review should be construed reasonably strictly so as not to undermine the achievement of the goals of a private arbitration².

[13] As a result of the fact that reviews are limited to procedural irregularities the grounds of review envisaged in section 33(1)(b) of the Act relates to the

¹ Telecordia Technologies Inc V Telkom SA Ltd 2007(3) SA 266 SCA [par 51]; Lufano Mphaphuli & Associates (Pty) Ltd v Andrews & Another 2009(4) SA 529 CC, p599, par 235; Ramsden, South African and International Arbitration, p 201

² Lufano, *supra* p 599, par 235

conduct of the proceedings and not the result thereof³. It is also trite that not every irregularity in proceedings will constitute a ground for review under section 33(1)(b) of the Act. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.⁴

[14] If an arbitrator misdirects himself on the law, it is in itself no reason for the setting aside of the finding⁵. An Arbitrator is always entitled to be wrong on the merits and a wrong interpretation of an agreement will not amount to a misconception of the nature of the enquiry and therefore to an irregularity.⁶ It is stated in **Telecordia Technologies** that:

“[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly, and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a ‘normal’ local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such

³ Bester v Easigas (Pty) Limited and Another 1993 (1) SA 30 (C),

⁴ Ramsden, *supra*, p 203, Bester, *supra*, Patcor Quarries CC v Issroff and Others 1998(4) SA 1069 (SE).

⁵ Telecordia *supra*; Ramsden, *supra*, RPM Konstruksie (Edms) Bpk v Robinson & Ander 1979(3) SA 632 (C)

⁶ Telecordia, *supra* p 297, par 67

an error amounted to transgression of his powers it would mean that all errors of law are reviewable, which is absurd⁷.

- [15] In the same matter it was also stated that the Act “*does not allow a review for material error of law*” and “*it is wrong to confuse the reasoning with the conduct of proceedings⁸*” – in other words, unless there was something procedurally wrong, no relief is to be had in terms of section 33(1)(b) of the Act.

- [16] The learned Judge in that matter continued to state:

“Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telecordia posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection herewith⁹.”

- [17] As already stated it is not every irregularity which would justify a review. The court must be satisfied that the irregularity caused a substantial injustice. Only in those cases where it can be said that what happened is so far

⁷ Telecordia, *supra*, p 302, par 86

⁸ Telecordia, *supra*, p 300, par 76

⁹ Telecordia, *supra*, p 297, par 69

removed from what could reasonably be expected of the arbitral process the court would be entitled to intervene.

[18] The ability to set aside an award due to a gross irregularity is designed as a long stop, only available in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls out for it to be corrected.¹⁰

[19] In the light of the aforesaid this court should not ask whether the arbitrator was correct in law or fact or whether he interpreted the agreement correctly, but rather look at the procedure to determine whether any irregularity occurred which would justify an intervention by the court whilst keeping in mind the principles already discussed.

THE APPLICANT'S GROUNDS FOR THE REVIEW

[20] The applicant advances the general proposition that the arbitrator did not issue an award that a reasonable decision maker would have issued with the effect that the applicant did not have a fair trial. It is also submitted that the arbitrator committed a gross irregularity by failing to take account of information relevant to the fairness of the applicant's trial and it is furthermore submitted that the arbitrator committed a gross irregularity when he failed to understand or apply the applicable law relevant to good faith clauses in the contract.

¹⁰

Ramsden *supra* at page 203, footnote 968 and the authorities there cited.

[21] Despite these general propositions the applicants' argument boils down to the following main points which according to her led to her not having a fair trial and which would accordingly constitute a gross irregularity. It is alleged by applicant that the arbitrator erred by:

- (a) finding that PPN was entitled to demand that the applicant forward the disputed document to PPN before the applicant's claims were completed;
- (b) finding that a value such as good faith does not constitute an independent substantive rule that Courts can employ to intervene in contractual relationships. It needs mentioning that the agreement between the parties made provision that the parties to the agreement would display the highest degree of good faith to each other in all matters pertaining to the agreement.
- (c) not allowing cross-examination of the applicant's witness Ms Giulietti pertaining to the fact that she was present whilst all the witnesses testified on behalf of the applicant, in the light of the fact that Mr Sutcliff of the applicant was also present;
- (d) not taking into consideration that Ms Giulietti was a single witness and not even mentioning this fact in his award.

[22] Points (a) and (b) constitute criticism pertaining to the arbitrator's interpretation of the agreement between the parties and his understanding of the facts and the law. In his award he dealt extensively with these issues and motivated his finding in this regard. The legal position as discussed above

makes it clear that these criticisms do not constitute grounds for review and in my view the result is that this Court need not even consider, and actually should not, whether the arbitrator was right or wrong. Consequently no irregularity occurred pertaining to these points.

- [23] This brings me to the fact that Ms Giulietti was present during the testimony of the applicants' case and the fact that the arbitrator stopped the cross-examination about this aspect. In this regard it is important to take note of what happened at the hearing. The record with reference to this reflects that the following occurred, and I quote:

"MR BOTHA: Are you representing PPN here today?

MS GIULIETTI: Yes, I am.

MR BOTHA: Or are you a witness for PPN?

MS GIULIETTI: A witness for PPN.

MR BOTHA: Your colleague here Mr Sutcliffe.

MS GIULIETTI: Mr Sutcliffe ja

MR BOTHA: Is he representing ... [intervenes]

MS GIULIETTI: He is representing PPN.

MR BOTHA: So can I ask you why did you sit in here listening to all the evidence?

MS GIULIETTI: Because I am representing PPN.

MR BOTHA: No, you just said Mr Sutcliffe is representing PPN.

MS GIULIETTI: No, I said I am representing and I am a witness.

MR BOTHA: You said you are a witness for PPN and Mr Sutcliffe is representing that is what you said.

MS GIULIETTI: No, I think your initial question was am I representing PPN and I said yes.

MR BOTHA: Yes and then I said are you a witness you said yes.

MS GIULIETTI: Yes.

MR BOTHA: Then you said Mr Sutcliffe is representing PPN but my question is why did you sit here listening to all the evidence, full well knowing that you are going to testify? Now you have the advantage or the benefit of listening to all the evidence. Why did you do that?

MR MARIAS: Mr Arbitrator, can I just say that she is the representative and the co-manager and they were two and we decided that we are going to use her as representative and witness.

MR BOTHA: Can I continue Mr Arbitrator?

ARBITRATOR: Yes, no, you can continue.

MR BOTHA: I want you to answer the question.

ARBITRATOR: Sorry, can I just clarify one aspect. Yes, I also wanted to ask that you said that you are the manager, are either of you directors of PPN?

MS GIULIETTI: No.

MR BOTHA: You are not a director?

MS GIULIETTI: I am not a director of PPN, no.

ARBITRATOR: All right. Mr Botha, I do not think you should continue with that line of questioning. It is so that she was present.

MR BOTHA: Yes.

ARBITRATOR: Obviously her lawyer allowed her to be preset.

MR BOTHA: Yes.

*ARBITRATOR: I do not think it is fair to the witness to put it to her ...
[intervenes]*

MR BOTHA: I will leave that for argument.

ARBITRATOR: That she has been sitting in any why she has been sitting in.

MR BOTHA: Right.

ARBOTRATOR: I do not think it is fair to the witness.

MR BOTHA: I will just well I wanted to have it on record of course”.

[24] From the above Mr Botha took issue with Ms Giulietti's presence during the applicant's witness' evidence. According to the evidence both she and Mr Sutcliffe represented PPN. It was apparently decided by the legal representatives that she would be the representative and witness of PPN during the arbitration. The arbitrator apparently found the question unfair due to the fact that the legal representatives obviously made the decision to let her sit in and as a lay person she would not have any understanding of what the legal consequences of the decision could be and would not be in a position to justify or explain her presence. I am of the view that the arbitrator was correct in finding that the line of questioning was unfair under these circumstances.

[25] From the above it is also clear that Mr Botha, when the arbitrator refused further questions abided by the decision and stated that he only wanted to put it on record. There is no indication that the applicant may have suffered any prejudice as a result of the refusal to allow the further questioning, or that it impacted on the fairness of the trial.

[26] In any event, and as far as it may be relevant Ms Giulietti was the only witness called by PPN. The purpose of letting witnesses wait outside court is to ensure that witnesses do not adjust their version to support one another. Ms Giulietti was a representative and the only witness for PPN. As such she was entitled to be present as she had to know what case PPN had to meet. There existed no possibility that her evidence could be tainted as a result of her presence during the hearing, and in my view there was nothing untoward about her presence during the trial. Therefore no procedural irregularity occurred.

[27] Much was also made of the fact that Ms Giulietti was a single witness. The arbitrator was criticized for not referring to this in his award. In my view this could never constitute an irregularity by the arbitrator as envisaged in sec 33 of the Act. The single witness rule is a rule that arose mainly in the context of criminal proceedings. The purpose of the rule is rather the common sense approach that the evidence of a single witness may, depending on the context, not be wholly reliable¹¹. In this case most of the evidence was common cause and the dispute between the parties depended on the question of the interpretation of the contract. The facts were to a large extent common cause. Credibility of the witnesses or their different versions was not central to the issue in dispute. Consequently, for as far as it is relevant, the fact that PPN had a single witness did not play any significant role. It is trite that a judgment or for that matter an award needs not deal with each and

¹¹ Zeffert et al The South African Law of Evidence (2003) at 799 - 801

every issue raised and the fact that the arbitrator did not deal with this aspect does not take the matter any further.

[28] In the light of all the circumstances no case was made out that a gross irregularity occurred which could result in the award being set aside.

[29] PPN seeks a punitive costs order as it was alleged that the applicant was forewarned about the futility of the application. In a letter PPN's attorney referred to the relevant authorities, to which I have also referred in my judgment. Despite this the applicant persisted in the application. The question now arises whether the insistence to proceed with the application under these circumstances would justify the court exercising its discretion to grant a punitive cost order. It is true that the application was ill-conceived but I am not of the view that a punitive cost order should follow. The applicant has a right to approach the Court even in the light of the fact that the case law is against him and in my view there is nothing ontoward in the decision to proceed with the application. Consequently a punitive cost order is not appropriate under the circumstances.

[30] I make the following order:

The application for review is dismissed with costs, which include the costs of two counsel.

A handwritten signature in black ink, appearing to read 'R G Tolmay', written over a horizontal line.

R G TOLMAY
JUDGE OF THE HIGH COURT