IN THE HIGH COURT OF SOUTH AFRICA **Not Reportable**

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 2730/14

& 2807/14

Delivered on: 16/07/15

In the matter between:

MDIA'S TRAVEL CC **Applicant**

and

SIYAYA TELEDATA COMM AND

COURIERS CC **Respondent**

JUDGMENT

NHLANGULELA ADJP:

[1] Pursuant to a consent order made on 19 March 2015 consolidating Case No. 2730/14 and Case No. 2807/14, both matters served before me in the opposed court on 23 June 2015 with the applicant asking for an order that an arbitration award made on 21 August 2014 be made an order of this Court in terms of s 31 (1) of the Arbitration Act 42 of 1965.

[2] The issue for determination in both matters is whether the arbitration proceedings held on 15 July 2014 are a nullity to the extent, as contended for on behalf of the respondent, the arbitration process does not comply with the arbitration agreement read with the rules of the Arbitration Foundation Of Southern Africa (AFSA).

[3] In terms of a written agreement concluded by the parties on 20 October 2013 the applicant was employed by the respondent to supply courier services at a fee involving distribution of medical products to the National Health Laboratory Services situate in and for the convenience of various hospitals of the Southern Transkei. The written agreement contains a usual non-variation clause as well as a breach clause to be applied in the event that either party has failed to discharge its obligations. The agreement also contains the arbitration clause, in clause 14, in terms whereof all

disputes arising from a breach of the courier service agreement will be dealt with. Sub-clauses 14.2 and 14.3 contain the arbitration procedure. I quote the provisions of the sub-clauses below:

> "14.2 If either party to this Agreement be dissatisfied with or unwilling to accept mediation or an opinion expressed by the mediator then either party may, by written notice served upon the other, within 2 (two) calendar months of the date of declaring a dispute or of the mediator's decision, require that the dispute or difference arising out of this Agreement shall be referred to arbitration.
>
> 14.3 Such arbitration shall be conducted in accordance with the rules of the Arbitration Foundation of Southern Africa, provided that:
>
> 14.3.1 the arbitration proceedings shall take place within the borders of the Southern Transkei (Canzibe, Cofimvaba, Cala, All Saints, Madwaleni, St Barnabas, St Lucy's Willowvale and Zitulele) Southern Transkei routes.

14.3.2 it shall not be compulsory to apply the requirements of the law of procedure or the usual rules of evidence strictly;

14.3.3 the arbitrator shall be an advocate or attorney with at least 15 (fifteen) years practical experience as appointed by the President of the ________________ Bar Council;

14.3.4 the arbitrator shall be entitled to call for the assistance and/or evidence of specialists and/or professionals as in his opinion may be required in view of the essential nature of the dispute or any particular facet thereof;

14.3.5 the decision of the arbitrator shall be final and binding on both parties and may be made an order of a competent court."

[4] Acting in accordance with the obligations as provided for in the agreement, the applicant commenced with its services in November 2013. However, it was later on compelled to suspend the services due to the

alleged failure by the respondent to pay in full for services discharged in November 2013, December 2013, January 2014 and March 2014. The respondent declared a dispute upon receipt of a letter of demand for payment and proceeded to unilaterally cancel the agreement. The cancellation was not accepted by the applicant. To address this and the claim for non-payment for services rendered it referred the dispute to mediation, which the respondent regarded as flawed. The applicant took further steps to refer the matter to arbitration, which step is regarded by the respondent as a nullity.

[5] The steps taken by the applicant in referring the dispute to arbitration are the following:

(a) Mr Siyakubonga Abrahams, addressed as the "director" in the applicant business, and who deposed to affidavits on behalf of the applicant, advised the respondent by means of a letter dated 17 June 2014 that the applicant intended to refer the dispute to arbitration as the applicant was authorised to do so in terms of the arbitration agreement.

(b) On 08 July 2014 Mr Abrahams delivered a Notice of Set Down Of Arbitration informing the respondent that the arbitration hearing will take place at 7 Miller Street, Mthatha on 23 July 2014 at 11h00 before

Advocate M.M. Matyumza, who is cited in Case No. 2807/14 as the 2nd respondent for the reason that he is the arbitrator.

(c) On 09 July 2014 Mr Abrahams addressed a letter to the respondent informing it that the arbitration pre-hearing will take place on 15 July 2014 at 11h00 in Advocate Matyumza's chambers.

(d) On 19 July 2014 Mr Abrahams sent the statement of facts by email to the respondent which would be used at the hearing on 23 July 2014.

(e) On 21 July 2014 Mr Abrahams drew up a "Notice To Amend Pre-Arbitration Meeting Minute" inviting the respondent to lodge objections to the amendment sought.

(f) Both the preparatory arbitration meeting and the arbitration hearing took place in the absence of the respondent.

(g) Advocate Matyumza presided over the arbitration hearing that culminated in the award in the sum of R1 587 275,00 and costs being made in favour of the applicant.

(h) The applicant has placed the award before the Court so that it may be converted into a judicial order capable of being executed in the normal course.

[6] It is common cause that the respondent took a decision to stay away from the arbitration process pursuant to the attitude it had adopted that the process was not the one as contemplated in clauses 14.2 and 14.3 of the arbitration agreement. This legal objection seems to have been raised against the applicant by means of a letter dated 15 July 2014. Applicant's reply to this objection is that the provisions of clause 14 of the agreement do not support the respondent's case.

[7] The statements by Mr Plaatjie made on affidavit have relevance to the point of procedural objections raised on behalf of the respondent. He said:

> "8.1 In terms of the Rules of the Arbitration of Southern Africa, it is the Foundation itself which:
>
> 8.1.1 register's a claimant's claim;
>
> 8.1.2 embarks on preparatory steps antecedent to the hearing of the claim;
>
> 8.1.3 issues notices;
>
> 8.1.4 appoints the arbitrator; and generally ;
>
> 8.1.5 conducts the arbitration proceedings to finality."

[8] To the statements as aforementioned Mr Abrahams stated on affidavit that clause 14 of the agreement provides that arbitration will be concluded in accordance with the rules of AFSA, not that the arbitration must be referred to and/or conducted by AFSA.

[9] Further issues emerged during argument. *Mr Zilwa*, for the applicant, submitted that the resolution of the respondent did not authorise the deponent, Mr Plaatjie, to represent the respondent in Court. On the other side, *Mr Jozana*, for the respondent, submitted that the arbitrator had no jurisdiction to preside over the arbitration proceedings because he was neither appointed in terms of AFSA rules nor the agreement of the parties. On this point counsel referred to the case of *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) at 207, paragraph 14, contending that the absence of jurisdiction alone must yield to a nullity of arbitration proceedings. *Mr Jozana* submitted further that the notices issued by Mr Abrahams to convene the arbitration tribunal, in so far as they were issued in accordance with AFSA rules, fell foul to the legal principle stated in the case of *Minister of Law And Order And Another v Dempsey* 1988 (3) SA 19 (A) at 38 B-C that where the law provides that a state of affairs must exist for a

conduct to be valid (the jurisdictional factor) the absence of that state of affairs renders the conduct invalid.

[10] The objection that Mr Plaatjie lacks *locus standi* to champion the cause of the respondent in this Court is not supported by the resolution, annexure "JP 10", read as a whole. It must be dismissed.

[11] In my view the decision of the issues of jurisdiction of the tribunal and the manner of convening of the tribunal by notices are inextricably linked to the broad issue of whether the arbitration process was the one as contemplated in clause 14 of the agreement as read with the Rules of AFSA. In dealing with this broad issue the starting point is to look at the meaning of the words used in clause 14 to establish what exactly the parties intended the arbitration process to be. That is, did they intend that the AFSA arbitration rules/procedures be included or excluded in their agreement regarding the setting up of the arbitration tribunal. In other words, is the arbitration that was convened by Mr Abrahams acting on behalf of the applicant the one that both parties had intended to address their contractual disputes?

[12] It is a well-known fact that it is never possible to read the mind of the parties to a contract. As a result the tools of interpretation as developed in the case of *Coopers and Lybrant v Bryant* 1995 (3) SA 761 (A) at 767E – 768E must be used. Briefly stated, not only should the Court interprete the words used in a contract in a vacuum but the Court is enjoined to have regard to the contract as a whole to find the context in which the words or phrase is used. If necessary, the Court will also have to look at the background and the surrounding circumstances which gave rise to the making of the contract. It is against these principles of law that the words in clause 14: "in accordance with the rules of the Arbitration Foundation Of Southern Africa" and the *proviso* thereto must be interpreted. It is imperative that the true meaning of these words/phrases must be ascertained because each party interpretes them differently. On the one hand *Mr Zilwa* interpretes the arbitration clause to mean that the parties embraced the arbitration regime of the AFSA in such a way that the AFSA rules will apply but on condition that or subject to (provided) the appointment of the arbitrator is left to the President or Chairman of the Bar. He went further to contend that AFSA rule 3.3 referred to by *Mr Jozana* means that AFSA rules can supplement the provisions of clause 14 only in the event that the agreement is silent on the matter of the appointment of the arbitrator.

[13] *Mr Jozana's* main argument, based on paragraph 8 of Mr Plaatjies's affidavit, is that by agreeing in clause 14.2 to make the AFSA rules applicable to the parties (by choosing the words: "the dispute or difference arising out of this Agreement shall be referred to arbitration") the parties bound themselves to seek registration of the applicant's claim with AFSA's Secretariat who should appoint an arbitrator, arrange a venue where the arbitration proceedings will take place, issue notices and collect fees for such administrative services. He argued that it is in accordance with these strictures that the arbitration must have been conducted. He contended further that the phrase: "provided that" means that the arbitration process in this case would have been valid only if the AFSA had itself appointed the arbitrator in terms of its own criteria.

[14] The question arising is whether the arbitration process that was initiated by the applicant was authorised by Clause 14 of the agreement. I answer this question below.

[15] I start with interpreting clause 14 by scrutinizing the grammatical meaning of the words used therein. Clauses 14.2 and 14.3 read that either party dissatisfied with the results of mediation may refer the dispute to

arbitration in accordance with the AFSA rules. The respondent is aggrieved by the fact that the applicant did not cause the dispute to be registered with AFSA. The reason why the applicant did not do so lies in the *proviso* to clause 14.3 and read with clause 14.3.3 which provide that the arbitration shall be conducted by an advocate with 15 years practical experience as appointed by the Bar Council. Whereas the main provisions of clause 14.3 provide for arbitration process that is set in motion by AFSA in terms of AFSA rules, the *proviso* to clause 14.3 provide for a process which is initiated by the parties themselves. This distinction is borne out of the meaning of the term "*proviso*, which is defined by Claasen in the "Dictionary of Legal Words and Phrases", Volume 3, Second Edition as follows:

> "A stipulation introduced into a section of a statute, or into a clause of an agreement, providing that the preceding part of the section or clause is subject to the provisions of the stipulation. See: *Reloomal v R* of *R Potchefstroom* 1927 AD 401, as a safeguarding clause having an em-powering effect. Sometimes 'provided' is equivalent to 'if' or on condition that' (*Walker v Standard Bank of SA Ltd* 1923 AD 440). As compared with brackets in the interpretation of statutes, see Brackets. The true function of a *proviso* was explained in *Mphosi v Central Board for Co-operative Insurance Ltd* 1974

> (4) SA 634 (A) 645. See Exception, Exemption, Proviso Excuse or Qualification; Provided."

[16] In Shorter: Oxford English Dictionary the term "*proviso*" is defined as follows:

> "A clause in a legal or formal document, making some condition, stipulation, exception, or limitation, or on the observance of which the operation or validity of the instrument depends; *gen.* a condition, a qualification, a stipulation, a provision."

[17] It appears from the definition of the term "*proviso*" as aforementioned that the parties retained the power to appoint the arbitrator. That being the case, the parties had, by implication, left it to themselves to issue notices of a hearing exactly as Mr Abrahams did. In the circumstances the supplementation of the arbitration agreement of the parties by application of AFSA rules as referred to in Article 3.3 does not kick-in. It must follow that it was not intended by the parties that AFSA would be responsible to issue arbitration notices for a hearing that would not be conducted by it. The cases of *Vidavsky and Dempsey, supra,* do not find application to this case in my view.

[18] The answer to the question raised in paragraph 14 above is that the arbitration process that was initiated by Mr Abrahams at the behest of the applicant was duly authorised by clause 14 of the arbitration agreement of the parties. Further, therefore, the arbitrator did have jurisdiction to preside over the matter on 23 July 2014.

[19] I next deal with the merits of the dispute between the parties. The Court must take into account the fact that the respondent was in wilful default of attending the arbitration hearing. The technical objection based on the provisions of clause 14 of the arbitration agreement is, in my view, not a good reason for the failure to attend the hearing and place its defence on the merits before the arbitrator for determination together with the technical objections. In any event in this Court the arguments on the merits of the case were not addressed on behalf of the respondent. Nothing of it came up even in the heads of argument. Consequently, the findings already made on the issue of non-compliance with the arbitration agreement are dispositive of both applications. In the event the relief sought by the applicant in Case No. 2730/14 falls to be granted. The relief sought by the respondent in Case No. 2807/14 must be dismissed.

[20] On costs, I take into account that the respondent's alleged obfuscatory tactics are more apparent than real. The applicant had rights in terms of the arbitration agreement which it duly exercised. It got the desired results in the arbitration tribunal. The same may be said in the present matter. In the circumstances, the equitable approach dictates that the Court must be mindful of not putting the respondent in double jeopardy, more particularly in that the arbitrator has already make an award of costs against the respondent. All that remains for this Court to do is to fix costs that are relevant for the present consolidated applications, taking into account that the determination of both matters swung on a single point of non-compliance with the provisions of clause 14. Again it must be said that the respondent's objections were raised in annexure "SP 10", the letter dated as far back as 15 July 2014. Preparations on the issue of non-compliance with clause 14 would have started well before the arbitration proceedings and carried over with relatives ease into the present matter. Such a technical point is in my view miniscule and, therefore, less burdensome to prepare for and present before the Court.

[21] Whilst it might have been necessary for the applicant to engage the services of Senior Counsel, I struggle to find the justification for the

engagement of two counsel. For these reasons an award of the ordinary scale of costs and the costs of one Counsel is appropriate.

[22] In the result the following order shall issue:

1. **The arbitration award delivered on 21 August 2014 by the Arbitrator in the Arbitration hearing between the applicant and the respondent attached to the papers as annexure "A" be and is hereby made an order of this Court.**

2. **The application under Case No. 2807/14 be and is hereby dismissed.**

3. **Siyaya Teledata Comm and Couriers CC to pay costs incurred in both matters, including costs of Senior Counsel only.**

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Z. M. NHLANGULELA

ACTING DEPUTY JUDGE PRESIDENT

Counsel for the applicant	:	Adv. P.H.S. Zilwa S.C.
		appearing with
		Adv. L. Sambudla
Instructed by	:	X M Petse Inc
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Counsel for the respondent	:	Adv. A.N. Jozana
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