IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case Number : 11876/10

In the matter between:-

UMGENI WATER Applicant

and

NIGEL HOLLIS N.O. First Respondent

SIZA WATER (PTY) LIMITED Second Respondent

JUDGMENT

VAN ZYL, J.:-

1. This is an application aimed at securing the removal from office of the first respondent as an arbitrator in terms of the provisions of section 13(2)(a) of the Arbitration Act, No. 42 of 1965 ("the Act"). The order sought, as per the applicant's notice of motion, is as follows;

"1. The appointment of first respondent as arbitrator in the dispute between applicant and Second respondent be and is hereby set aside.

2. It is declared that first respondent is not entitled to any further remuneration pursuant to his appointment as arbitrator in the dispute between applicant and second respondent.

3. respondents are ordered to pay the costs of this application, such costs consequent (sic) upon the employment of two counsel."

2. The first respondent has opposed the order sought by the applicant, but only insofar as it affects his personal interests. As pointed out by Mr Acker who appeared for him, the applicant sought an order, *inter alia,* as against the first respondent, claiming payment of the legal costs incurred in the course of this application. It is against such order that the first respondent's opposition is directed, whilst he abides the decision of the court regarding the termination of his appointment as arbitrator.

3. The second respondent has also opposed the application, but it did so upon the merits as well. The second respondent contended that the application had no merit at all and should be dismissed, with costs.

4. The dispute between the parties has its origins in a written agreement concluded between the applicant and the fist respondent. The applicant did not attach a complete copy of the agreement to its founding affidavit, but instead contented itself with an extract (annexure "A" to the founding affidavit) essentially containing clause only 12 thereof dealing with the referral of any subsequent disputes between the parties thereto, to arbitration. In such proceedings the second respondent was in the position of the plaintiff and the applicant in the position of the defendant.

5. Clause 12 of annexure "A" reads as follows:-

"*12.1 Any dispute arising between the parties and arising out of this agreement in respect of which a dispute resolution provision has not been specifically provided for in this agreement, shall be submitted and decided by arbitration.*

12.2 Each arbitration shall be held:-

12.2.1 at Durban;

12.2.2. in an informal summary manner without any pleadings or discovery of documents and without it being necessary to observe the strict rules of evidence, or in any such other manner as the arbitrator may in his sole discretion determine to be appropriate in the circumstances;

12.2.3 forthwith with a view to it being completed within two(2) months from the date on which the dispute is referred to the arbitrator;

12.2.4 except where the provisions of this clause 12.2 provide otherwise, under the provisions of the Arbitration Act, No. 42 of 1965, or any superperseding legislation."

12.3 The arbitrator shall be a senior attorney of at least ten(10) years experience or Senior Counsel mutually agreed upon between the parties involved in the dispute and, failing agreement, appointed by the Chairman for the time being of the Natal Society of Advocates.

12.4 The decision of the arbitrator in any arbitration proceedings in terms of this agreement shall be final and binding upon the parties to this agreement."

6. As indicated above, the applicant relies upon the provisions of section 13(2)(a) of the Act for the removal of the first respondent as arbitrator. The relevant portion of the section reads as follows:-

> "*The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office.*"

7. The Act does not define *"good cause"*, but the expression is not foreign to our law. For instance, for condonation, or for rescission to be granted in

terms of rule 31(2)(b) of the Consolidated Rules of Court, the applicant is required to establish "*good cause*". In Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D), Howard J (as he then was) commented at page 613 B-D that;

> " *In terms of Rule 31 (2) (b) the Court has a discretion to set aside a default judgment "upon good cause shown." The Rules contain no definition of "good cause" but the Courts have provided one, in effect, by laying down certain requirements which an applicant must comply with before he can be held to have shown good cause or, what is practically synonymous, "sufficient cause" for various kinds of procedural relief.*"

8. In the earlier and well known decision in Silber v Ozen Wholesalers 1954 (2) SA 345 (AD), Schreiner JA at 352 G-H remarked that –

> *"It seems clear that by introducing the words 'and if good*
> *cause be shown' the regulating authority was imposing upon*
> *the applicant for rescission the burden of actually proving,*
> *as opposed to merely alleging, good cause for rescission,*
> *such good cause including but not being limited to the existence of*
> *a substantial defence ..."*

9. Also in Interaccess (Pty) Ltd v Van Dorsten [1999] 2 All SA 561 (C) Immerman AJ remarked at page 573 that:-

“ The requirements of the concept of “sufficient cause” were considered in Chetty v Law Society Transvaal 1985 (2) SA 756 (A). At page 765A–C Miller JA stated as follows:

‘The term ‘sufficient cause’ (or ‘good cause’) defies precise or comprehensive definition, for many and various factors require to be considered.’

10. It is therefore no coincidence that the Act presently under consideration makes no attempt at defining the concept of “*good cause*” and the remarks made by the courts in relation to rescission applications are also instructive in a wider context.

11. Against that background it becomes necessary to consider the grounds upon which the applicant in the present matter alleges that good or sufficient cause exists for this court, in the exercise of its discretion, to remove the first respondent from his office as arbitrator. It is quite clear from the wording of section 13(2)(a) that the court is vested with a discretionary power which, as is the norm, it has to exercise judicially and with great care.

12. Having concluded the agreement of which clause 12 aforementioned forms part, the applicant and the second respondent indeed subsequently found themselves in a position of dispute. It appears that they were both content that the matter be referred to arbitration and that

the arbitrator favoured by both parties was advocate Lopes SC of Durban. However, when it became known that Adv Lopes was likely to be appointed to the Bench and would therefore not be able to embark upon and discharge his duties as arbitrator in the dispute between the parties before his elevation to the Bench became effective, the need for resort to an alternative arbitrator became apparent.

13. In the end the first respondent accepted appointment as arbitrator and the arbitration process commenced and proceeded before him, until interrupted by the present dispute, culminating in this application for his removal as arbitrator.

14. The applicant alleges that it, in the light of the events and circumstances upon which it relies in support of the position which it has adopted, after much internal discussion resolved to ask the first respondent to step down as arbitrator. It asserts that its decision was motivated by the cumulative effect of the grounds upon which it relies in support of this application and as set out in the present application papers. The application was brought after first respondent refused, when requested to do so at the resumed arbitration hearing, to voluntarily step down as arbitrator.

15. The applicant relies, for purposes of the application, not upon any allegation of actual bias against it on the part of the first respondent, but upon the perception of such bias and went on to explain that by reason

thereof it was not seeking to deprive the first respondent of any remuneration earned in the process of arbitration up to the point where his appointment as such is terminated.

16. The applicant also recognised, in its founding papers, that the Act does not contain any express provision for the voluntary resignation of an arbitrator, once appointed, but relied upon the provisions of section 10(1) which provides for the appointment of a substitute arbitrator, *inter alia*, where an arbitrator refuses to continue acting as such.

17. The first respondent adopted the attitude that he would stand down in the event of both parties, that being the applicant and the second respondent as the parties to the original reference, jointly requesting him to do so. However, since the applicant urged and the second respondent resisted his withdrawal, he did not consider that he was entitled to step down by virtue of the provisions of section 13(1) of the Act.

18. In its founding papers the applicant alleges that such refusal by the first respondent to step down voluntarily both necessitated the present application and justified its claim for costs as against the first respondent.

19. The applicant relies upon the cumulative effect of six distinct grounds of justification, which it set out in its founding papers and which it alleges justifies the perception of bias attributed to the first respondent. It

therefore becomes necessary to consider these in context in order to decide the issue.

20.The applicant has broadly taken the approach and relevant to the perception of bias attributed to the first respondent, that the latter's position to a certain degree equates to that of a judge presiding over a litigious matter. However, so the argument ran, the concept of "*good cause*" in terms of the Act needed to be afforded an even wider meaning because, unlike a judge, an arbitrator is not bound by an oath of office, has a direct pecuniary interest in the continuation of his appointment, has an interest in securing future similar appointments, is chosen to arbitrate by consensus and is not arbitrarily allocated to the matter. Thus a sterner test for the perception of bias needs to be applied to an arbitrator than is applied in a similar situation to an application for the recusal of a judge.

21.In Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) the Constitutional Court was called upon to consider whether the provisions of section 34 of the Constitution relevant to access to the courts also applied to private arbitrations. The majority of the Court held (per O'Regan ADCJ) that arbitration proceedings are regulated by the law and the Constitution in that they must be fair, but that those proceedings nevertheless differ from proceedings before a court, or a statutory tribunal or forum. A party which opts for arbitration will have chosen these consequences. Thus, in the context of fairness

O'Regan ADCJ remarked at page 594 in paragraph 223 that:-

> "*[223] Of course, as this court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative, and may dispense with pleadings, with oral evidence, and even oral argument.*"

22. In that matter the Constitutional Court was further tasked to consider the circumstances under which a court should set aside an arbitration award in terms of section 33(1) of the Act. In this context O'Regan ADCJ at page 599 in paragraph 236 observed that:-

> "*[236] The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the*

manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated."

In my respectful view these observations also find application to proceedings under section 13(2) of the Act.

23. The grounds for the alleged perception of bias relied upon by the applicant require more detailed consideration. The first of these relate to the events giving rise to the appointment of the first respondent. The applicant claims that at the outset it had reservations about the appointment of the first respondent but in the end acquiesced therein and embarked upon the process of arbitration by the first respondent. It seems to me that once it has done so, the complaint loses its force.

24. The second cause of complaint relates to an aspect of the second respondent's pleadings which the applicant considered to be vague and

embarrassing and to which it sought to except in the course of the arbitration proceedings. The exception was dismissed and the applicant is critical of this decision because it alleges the reasons given were confusing. It nevertheless contends that such dismissal gives rise to a perception of bias on the part of the first respondent. I have difficulty in finding justification for this conclusion in the circumstances of the matter. As conceded by the applicant, adverse interlocutory rulings in matters of this nature are commonplace.

25. The applicant's third ground of complaint also relates to a procedural matter. Here it relies upon the first respondent's alleged tolerance of attempts by the second respondent to introduce evidence regarding an earlier (1998) agreement concerning the maintenance of levels at a water reservoir. It alleged that on a proper interpretation of the arbitration pleadings reference to this earlier agreement was irrelevant and it accordingly wished to resist any references thereto.

26. Underlying this complaint is that the first respondent had earlier during the hearing indicated that the proceeding before him should be guided by the Rules of Court and consequently the applicant took the view that any latitude or deviation from the strict application of the Rules of Court amounted to an irregularity in the proceedings and/or favouritism towards the second respondent. The difficulty I have in this regard is that clause 12.2.2 of the arbitration agreement set out above clearly envisages that there will be no need for strict rules of evidence and that pleadings

may be dispensed with.

27.The applicant suggests that procedurally the first respondent should have excluded any reference to the earlier agreement, but that he did not do so, that his reasoning in this regard was confusing and technically incorrect, that it had the effect of favouring the position of the second respondent and that, therefore, the perception of bias in favour of the second respondent arose. The mere fact that the ruling went against cannot in my view be elevated to creating a perception of bias.

28.The fourth ground of complaint concerns the first respondent's refusal to entertain an application for a costs order adverse to the second respondent and in favour of the applicant. This incident occurred the day following the day when the arbitration was side-tracked into the dispute about the exception and the prospective amendment of the second respondent's claim which, in the end, was not pursued. Counsel for the applicant wished to advance argument for such an order and the first respondent cut him short and indicated that he proposed reserving the decision on such costs until the conclusion of the arbitration proceedings. There is nothing in the exchange relied upon by the applicant which I find either remarkable, or indicative of bias. A ruling to reserve costs is not only discretionary, but commonplace in materially similar circumstances in our courts.

29.The fifth complaint was that first respondent, whilst trying to expedite proceedings, was less tolerant towards the applicant than towards the second respondent. At the root of this complaint is who was primarily responsible for the delays in proceedings which had occurred as a result of the squabbling about the attempted introduction by the second respondent of evidence concerning the earlier agreement. The applicant favours the view that the second respondent was at fault by attempting to do so, but considers that the first respondent gave the impression that the delays arose from the applicant's procedurally motivated opposition thereto. The applicant draws attention to selective excerpts from the record in order to support the "*impressions*" allegedly created by the exchanges, but even taken at face value these do not to my mind support the objective inference of bias on the part of the first respondent. It may of course be that by then elements of exasperation had crept in, but that does not summarily translate into bias.

30. The sixth and final complaint is associated with the fourth complaint referred to above and where the first respondent summarily evinced an intention to reserve the costs order relevant to the proceedings of the previous day. Having done so the applicant's counsel asked for the matter to stand down and it was then that applicant alleges the decision was taken to request the first respondent to relinquish his appointment as arbitrator.

31. Nevertheless what applicant did when the proceedings resumed was to give notice, firstly that it reserved its rights to bring a formal application

for the first respondents recusal and secondly to renew its application for a ruling that the second respondent was not at liberty to relay upon or refer in evidence to the earlier (1998 reservoir) agreement. In effect it was trying to overturn the earlier ruling, which forms the basis for the second ground for recusal dealt with above, by seeking a formal ruling against the second respondent. The first respondent is criticised for being "*reluctant*" to make such an order. However, on the applicant's own version, no ruling was given, the matter stood down and was then overtaken by the demands made by the applicant that the first respondent voluntarily stand down and later, when he finally refused to do so, the present application resulted.

32. The second respondent, in opposing this ground of alleged bias, not only disputes that the first respondent gave any evidence of bias, but suggests that the application for a formal ruling by first respondent adverse to the second respondent was a stratagem to force the first respondent either to acquiesce to its demand, or to force him into a position where he would feel obliged or have to recuse himself. There would appear to be some force in the argument, especially since by applicant's own admission it would appear that the decision to ask the first applicant to step down had already been taken and thereafter the application for a ruling excluding reference to the earlier (1998) agreement was made, but prefaced with a reservation of rights regarding an application for the first respondent's recusal.

33. However, since the applicant did not pursue the matter to its logical conclusion, but opted to proceed with the present application before the first respondent was required to formally rule on the application, I have difficulty in identifying how the attitude attributed by the applicant to the first respondent gives rise to any reasonably objective inference of bias.

34. In Ndlovu v Minister of Home Affairs 2011 (2) SA 621 (KZD) at page 631, paragraphs 20 to 21 Wallis J (as he then was) gave an instructive summary of the law relevant to the recusal of Judges of the High Court and stated that:-

"*In* ***The law***

[20] The law in regard to applications for recusal is now well settled, as a result of a trilogy of cases in the Constitutional Court. What follows is a distillation of the law, as laid down in those judgments. It is largely expressed in the language used by the Constitutional Court.

[21] The correct approach to an application for a recusal is objective, and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. Two factors are of fundamental importance in this regard. The first is the presumption of impartiality, arising from the judge's oath

of office, requiring him or her to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law, and judges' ability, by virtue of their training and experience, to put on one side any irrelevant matter or predisposition that they may have in regard to a case. The second is the double requirement of reasonableness, in that both the person who apprehends bias and the apprehension itself must be reasonable."

35. Whilst the position of Judges and arbitrators differ in some respects there are also areas of great similarity in their respective positions. And all the more so here where the applicant limits the attack upon the position of the first respondent to the perception of bias, as opposed to actual bias. The first respondent is a practising advocate and a senior counsel to boot. Like judges, advocates also, upon their admission as advocates, take an oath to behave honestly and faithfully in the course of their professional careers. Also advocates, as referral practitioners and by virtue of their training, have greater scope for impartiality when sitting as an arbitrator than say a lay person. In the present instance the original agreement of the applicant and the second respondent clearly envisaged the appointment of a senior legally trained arbitrator. That is, either an attorney with at least ten(10) years' experience, or an advocate with Senior status.

36. On behalf of the applicant the proposition was advanced that, because judges do not choose their cases and litigants not their judges, a less

stringent application of the rules relating to a perception of bias should be applied to them than to arbitrators. But there is some significance of its own in the fact that an arbitrator is appointed by consensus. Not only do the parties in dispute have to reach agreement as to the arbitrator's appointment, but the latter also has to agree to assume the responsibilities which flow from such appointment. The foundation for the arbitrator's powers and functions are to be found in such tri-parte agreement.

37. Barring any term in such agreement which entitles the arbitrator at will to resign his position, he becomes upon appointment obliged to perform the duties which he so assumed. It is no doubt for this reason that section 13(1) of the Act provides for the voluntary termination of an arbitrator's appointment effectively only where the parties to the reference consent thereto. It is common cause that the second respondent refused to agree to the release of the first respondent from his duties as arbitrator.

38. In my view it is correct, as was submitted in argument on behalf of the first respondent, that were the first respondent to refuse to continue with his functions as arbitrator despite the lack of consensus in this regard as between the applicant and the second respondent as the parties to the reference, then he would be exposing himself to potential claims for damages for breach of the duties which he assumed upon accepting appointment as arbitrator.

39. I do not agree that the applicant can legitimately invite the first respondent to refuse to continue with his arbitration duties and then reproach him for failing to accept such invitation. Even less so does the first respondent's refusal to abandon his duties entitle the applicant to a costs order as against him.

40. Once an arbitrator has accepted his appointment and has embarked upon his duties arising therefrom, he is both morally and legally bound to discharge his duties to the best of his ability. In this regard the arbitrator has much in common with a judge, in respect of whose position Wallis J (as he then was) in the Ndlovu matter (supra) at pages 631-2 in paragraph 22 remarked as follows:-

> "*[22] A judge confronted with an application for his or her recusal must bear in mind that he or she has a duty to sit in all cases in which they are not disqualified from sitting. Litigants must not be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide it in their favour.*"

41. In regard to voluntary arbitrations it should be emphasised, as was done by O'Regan ADCJ in the Lufuno Mphaphuli matter (supra) at page 599 in paragraph 236, relevant to the third requirement of fairness in arbitration proceedings, that courts should be respectful of the intentions

of the parties and should bear in mind the purposes of private arbitration. These include cost-effective resolution of disputes and if courts were too quick to fault the manner in which an arbitration has been conducted and are too willing to conclude that a faulty procedure is unfair, or constitutes a gross irregularity, then the objects of private arbitration may well be defeated. Those sentiments, whilst expressed in relation to the setting aside of arbitration awards in terms of section 33(1) of the Act also in my view apply to considerations of good or sufficient cause under section 13(2).

42. There needs to be a certain tolerance for the hurly burly to be found in the course of litigation and trial hearings. Where they are arbitration proceedings and the foundational agreement, as here, by prior agreement between the parties require expedition at the expense of procedural precision, then the ultimate question is not whether one agrees with every unguarded utterance by the arbitrator, or every ruling he made in the course of the proceedings. It is rather whether the proceedings, viewed holistically, may be considered substantially fair.

43. In the context of the present matter the further question arising is whether, again viewed holistically, the applicant upon whom the burden of proof rests, has objectively demonstrated on a preponderance of probabilities that the proceedings gave rise to the perception of bias. In other words whether a reasonable, objectively informed person would, on the facts demonstrated and relied upon by the applicant, reasonably

apprehend that the first respondent has not brought, or will not bring, an unbiased mind to bear upon the adjudication of the arbitration. Put differently, that he is not likely to approach such proceedings with a mind open to persuasion by the facts and submissions to be placed before him in due course.

44. As pointed out by Wallis J in the Ndlovu matter (supra) in paragraph 21, there are further factors also of importance in the circumstances. These include the so-called double requirement of reasonableness. Not only does the applicant need to demonstrate that it reasonably apprehends bias on the part of the first respondent, but it also needs to show that such apprehension itself is reasonable.

45. Having considered at some length the grounds for the apprehension of bias relied upon by the applicant, I remain unpersuaded that the grounds for criticism advanced, either individually or cumulatively, meet the tests as discussed above. Even allowing for the fact that some of the rulings, expressions or conduct of the first respondent may be open to criticism, it does not follow that a reasonable, objective and informed person would on those facts reasonably apprehend that the first respondent has not and will not bring, an unbiased mind to bear upon the arbitration.

46. It follows that the application must fail. I see no reason why costs should not follow the result. Such a costs order is also permissible in terms of

the provisions of section 36 of the Act.

47. In the result the application is dismissed, with costs, such costs to include those consequent upon the employment of Senior Counsel, where actually so employed.

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VAN ZYL , J.

APPEARANCES:

For Applicant	:	Adv O A Moosa SC and Adv A J Boulle Instructed by Venn Nemeth & Hart Inc c/o Audi Botha & Edy, Dbn. (Ref: Mr Edy/V0194)
For First Respondent	:	Adv B A Acker SC Instructed by Neerajh Ghazi Attorneys, Durban (Ref: NG/TG/SHA 36).
For Second Respondent	:	Adv D Gordon SC Instructed by Shepstone & Wylie, Umhlanga Rocks (Ref: Mr Chetwynd-Palmer/Siza9732.10).
Date written argued	:	21 June 2011
Judgment delivered	:	8 March 2012