

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2021/26466

(1)	REPORTABLE: <u>No</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>No</u>
(3)	REVISED: <u>No</u>
<u>26/07/24</u> <u>[Signature]</u> DATE SIGNATURE	

In the matter between:

KESEF PROPERTIES (PTY) LIMITED

Applicant

and

STEVE WEINBERG

First Respondent

THE ARBITRATION OF SOUTHERN AFRICA

Second Respondent

ADVOCATE HENK LOUW N.O.

Third Respondent

JUDGMENT

C BESTER AJ:

Introduction

- [1] The first respondent ("**Weinberg**") brought arbitration proceedings under the auspices of the Arbitration Foundation of Southern Africa ("**AFSA**") in two related matters. In the first, he claimed payment of monies lent and advanced to Siyathembana Project Management and Development (Pty) Limited ("**Siyathembana**") and in the second, he sought the payment of monies lent and advanced to the present applicant, Kesef Properties (Pty) Limited ("**Kesef**").
- [2] Kesef and Siyathembana are related entities and in both instances, the submission to arbitration was contained in a written loan agreement. The loan agreement concluded between Weinberg and Kesef was entered into on 3 September 2015 and provided that any dispute or difference between the parties would be referred to arbitration under the auspices of AFSA.
- [3] Following Weinberg having referred the dispute to arbitration on 2 December 2019 as a result of Kesef's failure to honour its payment obligations under the loan agreement, AFSA as the appointing and administering authority contractually agreed upon by the parties, appointed the third respondent, Mr Henk Louw, a practising advocate at the Johannesburg Society of Advocates, as arbitrator on 9 March 2020.
- [4] Kesef brought an application for the learned arbitrator to recuse himself early in the proceedings. On 21 July 2020, he dismissed the application with costs. He reasoned that he lacked jurisdiction to decide the issue and that the grounds in support of his recusal appeared to him to be speculative and without any factual basis.
- [5] The learned arbitrator made his award in favour of Weinberg just over a year later on 20 April 2021 on a default basis following Kesef having chosen to discontinue its participation in the arbitration proceedings. The facts in the lead up to the publication of the award and Kesef's election not to participate in the arbitration proceedings are dealt with more fully below.

- [6] Kesef seeks to have the award set aside in terms of section 33(1) of the Arbitration Act 42 of 1965 ("***the Arbitration Act***") on the basis that the learned arbitrator misconducted himself in the discharge of his duties as arbitrator and committed a gross irregularity in the conduct of the arbitration proceedings.
- [7] Kesef further seeks that the counterapplication brought by Weinberg to enforce the award be stayed pending the finalisation of an action brought by Kesef in terms of section 3(1) of the Arbitration Act to set aside the arbitration proceedings as a consequence of what it considers to have been Weinberg's repudiation of the arbitration agreement ("***the action proceedings***").

The Factual Background

- [8] Following receipt of Weinberg's statement of claim, Kesef delivered a notice to remove cause of complaint on 3 September 2020 which alleged that the statement of claim was excipialbe. Weinberg responded by seeking to amend his statement of claim, to which Kesef objected which resulted in an interlocutory hearing at which the learned arbitrator upheld Kesef's objections in part on 19 November 2020. Weinberg was then afforded an opportunity to amend his statement of claim.
- [9] Weinberg delivered an amended statement of claim on 4 January 2021 which was followed by another exception at the instance of Kesef. On 18 February 2021, the learned arbitrator dismissed the exception and ordered Kesef to deliver its statement of defence within seven days. Kesef did not comply with this directive.
- [10] The learned arbitrator then convened a pre-arbitration meeting on 2 March 2021 for the next day. At 11h45 on 3 March 2021, Mr Garratt, who represented Kesef, advised that he could not attend the meeting because he had secured a consultation for his daughter with a physician. He also said that his client had instructed him to brief counsel and that he was compiling a brief for delivery to counsel that day. He accordingly asked that the pre-arbitration meeting be re-scheduled and was not prepared to proceed with the meeting. The learned arbitrator agreed and concluded the meeting which advocate Meyer attended on

behalf of Weinberg on the basis that “... *in the absence of Mr Garratt and them being here, and it being a procedural issue, we can’t do much today.*”

- [11] The pre-arbitration meeting was then scheduled for 4 March 2021 when Mr Garratt appeared for Kesef. Weinberg was represented by advocate Meyer. After some exchange on the likely duration of the arbitration proceedings, the learned arbitrator proposed hearing dates of 20 to 24 April 2021 but the meeting stood down to get the input of Mr Venter who had been appointed counsel for Kesef on the previous day with a view to determine his availability. In paragraph 3.3.2 of the minute it was specifically recorded that “*20 to 23 April 2021 was proposed by the parties with the input of adv Venter being required on or before 10 March 2021*”.

- [12] On 10 March 2021, Mr Garratt sent a letter to the learned arbitrator notifying him that Mr Venter was not available on the proposed dates.

- [13] 10 March 2021 was significant for another reason. On this date, Kesef delivered its statement of defence and as appears therefrom, Kesef raised a series of special pleas, including prescription and that Weinberg had repudiated the arbitration agreement between 1 June 2020 and 30 June 2020. It was alleged that Weinberg, or persons acting under his command and/or authority: i) physically assaulted Mr Stephen Zagey, a director of Kesef; ii) demanded payment from him of the sum claimed in the arbitration, failing which Zagey and his wife would be murdered; iii) complained that the arbitration proceedings were a waste of Weinberg’s time.

- [14] Kesef further pleaded that it dispatched a letter to Weinberg’s attorneys on 3 July 2020 recording that the conduct of Weinberg constituted an unequivocal intention to no longer be bound by the arbitration agreement which Kesef accepted on the same day, resulting in the termination of the arbitration agreement. In an attempt to have the issue litigated before this Court, Kesef issued a summons out of this Court on 11 January 2021 (“***the action proceedings***”) to have the arbitration agreement set aside on the basis of what it considered to have been a repudiation of the arbitration agreement as a result of the conduct described in paragraph 13 above.

- [15] On 20 March 2021, advocate Venter, who appeared for Kesef, advised the learned arbitrator that he was not available on 20 to 23 April 2021.
- [16] The learned arbitrator then scheduled a further pre-arbitration meeting to be conducted virtually for 25 March 2021 which was held from 17h00 until 17h58. The minute of this meeting recorded that Mr Garratt and advocate Venter elected to leave the meeting after having made an express election not to participate therein following a disagreement with Weinberg's team on the issue of discovery. From the minutes it also emerges that Kesef remained in default of its obligations to make payment of its contribution to AFSA of the arbitrator's fees. The meeting was adjourned until the next day.
- [17] The pre-arbitration meeting of 26 March 2021 lasted from 14h00 to 14h31. Mr Garratt and Mr Kaplan from his office attended the meeting together with advocate Venter on behalf of Kesef. Weinberg was represented on both days by advocate Meyer and his instructing attorney.
- [18] The issue of Kesef's non-payment again featured prominently as appears from the minutes of the meeting. The learned arbitrator advised that he had followed up with the AFSA who confirmed that while Kesef had made some payments, certain fees due to AFSA remained outstanding.
- [19] Mr Garratt was invited to respond and indicated the following:
- a. his client reserved its rights due to what it considered to be the repudiation of the arbitration agreement but would continue to participate in the arbitration proceedings to avoid a default award but would not pay the AFSA fees because of "the client being pulled into proceedings in which the Claimant had repudiated the arbitration agreement leaving the Defendant no choice but to defend itself in the arbitration proceedings...";
 - b. the action proceedings were pending before the High Court with reference to Weinberg's repudiation of the arbitration agreement and required a Court's decision.

- [20] The learned arbitrator referred to certain provisions of the AFSA Rules and authorities that he considered pertinent for Kesef to consider and which in the main, supported the proposition that it was not open to Kesef to simply “opt out” of the arbitration proceedings. He also requested the parties to address him on the proposed hearing dates which the minutes of the 4 March 2021 pre-arbitration meeting recorded in paragraph 3.3.2 as 20 to 23 April 2021. Mr Garratt and Mr Kaplan again elected to leave the meeting after having expressed an election to do so. Advocate Venter remained in the meeting until its adjournment at 14h31, but not before he advised the learned arbitrator that he was not available on the proposed dates. It is not clear from the record why Kesef could not engage new counsel, particularly as advocate Venter had not yet been steeped in the matter, having only been recently appointed.
- [21] The learned arbitrator issues a directive in terms of which he fixed the hearing dates as 20 to 23 April 2021 and directed that all expert summaries be filed by no later than 12 April 2021 with an expert meeting to be held on or before 15 April 2021 followed by the delivery of a joint expert minute no later than the close of business on 16 April 2021.
- [22] On 15 April 2021, Kesef’s legal representatives notified the learned arbitrator that their client would not participate in the arbitration proceedings with Kesef having instructed Mr Garratt’s firm to withdraw from the arbitration proceedings which they did.
- [23] The arbitration hearing commenced on 20 April 2021 with neither Kesef nor its legal representatives requesting access to the hearing on the MS Teams platform, this despite the fact that the learned arbitrator extended an invitation to them.
- [24] The hearing proceeded in the absence of Kesef and after having heard counsel on behalf of Weinberg and his evidence, the learned arbitrator made an award in terms of which he ordered Kesef to make payment to Weinberg in the sum of R751 118.00 with interest at the rate of 18.75% per annum calculated from 17 November 2019 to date of full payment and costs which included the costs occasioned by the arbitration proceedings.

Discussion and Analysis

[25] Kesef roots its cause of action in section 33(1)(a) and (b) of the Arbitration Act on the basis that the learned arbitrator is said to have displayed irregular and biased conduct to the prejudice of Kesef and which resulted in the learned arbitrator committing several gross irregularities in conducting the arbitration proceedings.

[26] The crux of the complaint is that the learned arbitrator:

“showed partiality to the first respondent and his legal representatives to the detriment of the applicant and its legal representatives.”¹

[27] With reference to the facts, Kesef says in its head of argument that the learned arbitrator’s conduct:

“in selecting a date for the hearing that was favourable to him and Weinberg only is evidence in itself that he was being unfair to the one of the parties — the applicant. It was this very decision to conduct the arbitration on a date not suitable to one of the parties that resulted in the default judgment which is the subject matter of this review.”²

[28] Reliance was specifically placed on section 34 of the Constitution on the basis that the right to be heard by an independent and impartial court or tribunal, as guaranteed by section 34, extends further than just the ordinary courts and includes arbitral tribunals. The submission is wrong in law as it is settled law that section 34 does not have direct application to private arbitration disputes.³

[29] While the Constitutional Court in **Lufuno** left the door open to the indirect application of section 34 through the prism of section 39(2) which requires courts when interpreting statutes or developing the common law or customary law to promote the “spirit, purport and objects” of the Constitution, no argument was presented to suggest that section 33 of the Arbitration Act required a particular

¹ Kesef’s Heads of Argument, para 59.

² Kesef’s Heads of Argument, para 68.

³ **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another** 2009 (4) SA 529 (CC) at para 215.

interpretation to give effect to section 39(2) read with section 34 that would yield a different outcome in favour of Kesef.

- [30] Section 33(1)(a) is concerned with arbitral misconduct, and it is has been consistently held by our Courts that even a gross mistake of fact or law on the part of the arbitrator is not misconduct as required in terms of section 33(1)(a) with a Court not entitled to disturb an arbitral award unless it finds the misconduct to have amounted to something more in the form of moral turpitude or *mala fides*.⁴ As Retired Justice of Appeal Fritz Brand points out in his seminal article on the topic, the threshold is a high one and it is not any kind of misstep that will trigger the application of section 33(1)(a):

“The bottom line is therefore that the arbitrator must be guilty of some form of deliberate dishonesty and that a *bona fide* mistake, no matter how gross, will not suffice. Since reprehensible conduct of this kind on the part of arbitrators is, fortunately, an incident of rare occurrence, reliance on section 31(1)(a) of the Act has become exceptional in practice.”⁵ (emphasis added)

- [31] I can find no evidence to show that the learned arbitrator misconducted himself. The record does not begin to hint at it. The learned arbitrator appeared to be mindful of the attempts of Kesef to derail the arbitration proceedings and did no more than what he was entitled to in terms of Article 11 of the AFSA Rules, namely, to exercise the wide discretion entrusted to him to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings.
- [32] He was therefore free to approach the matter as he deemed fit to ensure the expeditious resolution of the dispute before him with the parties in electing to resolve their dispute by way of arbitration, having chosen to forgo the strict formalism routinely association with High Court litigation.⁶
- [33] He may have appeared robust, but the papers do not suggest that he denied Kesef any procedural or other advantage that it was entitled to. The fact that

⁴ *Kolber v Sourcecom Solutions (Pty) Limited, Sourcecom Technology Solutions (Pty) Limited v Kolber* 2001 2 SA 1097 at para 43; see also *Amalgamated Clothing and Textile Workers Union v Veldspun (Pty) Limited* 1994 1 SA 162 (A) at 169C-E.

⁵ FDJ Brand *Judicial Review of Arbitration Awards* 2014 25 Stell LR 247 at 252.

⁶ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) at paras 19 to 20.

advocate Venter may not have been available for the arbitration did not preclude Kesef from securing the services of another counsel. No explanation was proffered for why he was not briefed earlier, and if not available, why the services of another advocate were not secured. There is no evidence that such an attempt was made with Kesef having instead adopted the approach as early as 11 January 2021 that it was not going to participate in the arbitration proceedings when it commenced with the action proceedings.

- [34] Section 33(1)(b) is concerned with the commission of a gross irregularity in the conduct of the arbitration proceedings or where the learned arbitrator has exceeded his powers. The latter does not arise in the instant proceedings which are instead confined to whether the learned arbitrator committed a gross irregularity. Yet again, the threshold is not a light one and to fall within the scope of the sub-section, the irregularity complained of must have been of such a serious nature that it denied the aggrieved party the right to have its case fully and fairly determined.⁷
- [35] Examples include a misunderstanding of the *audi* principle or where the arbitrator declines to hear one party, but as was noted in **Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd** 2018 (5) SA 462 (SCA) at paragraph 8, the party alleging a gross irregularity must establish it on the facts with the threshold not met if the arbitrator simply errs on the facts or the law. Arbitral bias is one instance that falls within the province of section 33(1)(b).
- [36] Kesef relies on three instances of bias. These are: i) the learned arbitrator's failure to recuse himself after having also been appointed and heard the Siyathembana arbitration proceedings in terms of which he published his award on 18 August 2020; ii) his handling of the 3 April 2021 pre-arbitration meeting and; iii) the learned arbitrator's scheduling of the dates.
- [37] The first bias complaint was developed on the basis that by sitting as arbitrator for the Kesef arbitration after making findings in the Siyathembana arbitration, the learned arbitrator would have already heard, if not ruled upon, the

⁷ **Bester v Easigas (Pty) Limited** 1993 1 SA 30 (C) at 42J-43D.

Siyathembana arbitration and therein determined where the facts may lie and formed views on issues that were germane to the arbitration between Kesef and Weinberg.

- [38] The point was decisively addressed by Green AJ in **Weinberg v Siyathembana Projects Management and Development (Pty) Limited** (Case No. 22984/2020 19 April 2024) in the context of an application to make the learned arbitrator's award in the Siyathembana matter an order of this Court and which resulted in Siyathembana launching a counterapplication to review the award on the basis that the learned arbitrator was allegedly biased:

"The general bias and recusal points have their basis in another arbitration between the Applicant another company called Kesef. From the papers it appears as though the Kesef arbitration too relates to money that is alleged to be payable and where the same arbitrator had been appointed. There are common personalities between the Respondent and Kesef. The recusal point is built on the arbitrator having to make assessments of credibility and truthfulness of the witness in the Kesef matter, and then having to do the same in the arbitration against the Respondent. In this context the Respondent suggests that the arbitrator ought to have recused himself.

The point of recusal is, in my view, misplaced. The arbitrator assumes his position by virtue of a contractual appointment and it is not for him to recuse himself in the conventional sense. Instead, if a party is of the view that an arbitrator is unable to properly discharge his functions, that party ought to approach the court for an order removing the arbitrator in terms of section 13(2) of the Arbitration Act. That was not done by the Respondent. What the Respondent did in the Kesef matter was to apply to the arbitrator for him to recuse himself and he declined to do so. But no recusal application was brought in the arbitration against the Respondent.

Absent more, there is no reason to doubt that the arbitrator acted impartially and independent in the arbitration against the Respondent and in the Kesef arbitration." ⁸

- [39] I respectfully associate myself with these remarks.

- [40] The failure to recuse himself did not suggest bias and the learned arbitrator carefully considered his position and reasoned that he did not have the power to do so. The fact that he was also the appointed arbitrator in the Siyathembana matter was known to the parties and the obvious remedy was for Kesef to launch

⁸ At paragraphs 27 to 29.

an application under section 13(2)(a) of the Arbitration Act to set aside his appointment in the Kesef matter if there were genuine misgivings.

- [41] Not only was there disclosure of the fact that he was the appointed arbitrator in the Siyathembana matter, but the facts do not suggest a display of any conduct that could not be described as impartial and independent. The learned arbitrator is a practising advocate and like a judge, he would have taken an oath to behave honestly and faithfully in the course of his professional careers.
- [42] By virtue of his training, there is little doubt that there would have been greater scope for impartiality when sitting as an arbitrator than say a lay person. I find no reason to doubt that he was able to set on one side any irrelevant matter or pre-disposition that he may have had by virtue of having conducted the arbitration in the Siyathembana-matter. There certainly was nothing before the Court that suggested a lack of impartiality.
- [43] As a second arrow to its bow, Kesef made much of the interaction between the learned arbitrator and advocate Meyer at the meeting of 3 April 2021, but it is clear from the transcript that the learned arbitrator was not willing to continue in the absence of Mr Garratt and his team. He was careful in not treating the absence of Kesef's lawyers as an event of default and said that he needed to give Kesef notice and only if Kesef did not appear at the following meeting, could advocate Meyer proceed on the basis that Kesef was in default.
- [44] This suggests a cautious approach that excludes any reasonable apprehension of bias. On the contrary, it shows that the learned arbitrator was mindful of protecting the procedural rights of the absent party in the face of Mr Meyer's attempts to steam ahead with the process.
- [45] With reference to the allocation of dates for the hearing, the learned arbitrator proposed 20 to 24 April 2021 at the meeting of 4 March 2021. Mr Garratt knew as early as 10 March 2021 that Mr Venter was not available on these dates and advised the learned arbitrator. Mr Venter then also saw fit to write to the learned arbitrator on 21 March 2021 confirming his lack of availability and then quite unusually, for reasons that are not explained, requested the learned arbitrator to recuse himself.

- [46] At the next pre-arbitration meeting of 25 March 2021, the learned arbitrator confirmed that there had been no directive yet in respect of the date for the hearing. Mr Venter confirmed that had been briefed on 3 March, but given his lack of availability, it begs the question why Kesef did not take steps to notify the learned arbitrator and Weinberg of this fact as early as 5 March 2021. It could easily have instructed alternative counsel from 5 March 2021 onwards. The meeting of 25 March 2021 was adjourned until the next day, when Mr Venter made submissions on the date for the hearing whereafter the learned arbitrator ruled that the arbitration would take place from 20 to 23 April 2021.
- [47] Kesef therefore had almost a month to prepare for the arbitration and during this time could have secured the services of new counsel, particularly as it must have known from as early as 3 March 2021 when advocate Venter says he was briefed that he would not be available.
- [48] The reasons for its failure to do so were not explained, but when assessed in the context of the election to leave the pre-arbitration meetings of 25 and 26 March 2021 coupled with the failure to appear at the arbitration hearing to state its case, the only reasonable conclusion that one can come to is that Kesef had no desire to participate in the arbitration proceedings which is best illustrated by the launch of the action proceedings.
- [49] The allocation of the dates for the hearing was therefore not a manifestation of bias by any means, but a function of the learned arbitrator ensuring that the arbitration was not derailed by a litigant desirous of frustrating the finalisation of the dispute. Mr Venter correctly conceded in my view that the learned arbitrator had a discretion under the AFSA Rules to set the matter down in April 2021.
- [50] But there is more, since even where the fine dividing line between managing the proceedings efficiently and descending into the arena are occasionally overstepped, which certainly was not the case here, it does not mean that a recusal is justified.⁹

⁹ *Take and Save Trading CC and Others v Standard Bank of SA Ltd* 2004 4 SA 1 (SCA) at para 4.

- [51] I am therefore not convinced that Kesef would have been denied the right to have its case fully and fairly determined had it elected to participate in the arbitration proceedings. It chose not to do so in the furtherance of its strategy to extricate itself from the arbitration proceedings first implemented when it issued summons against Weinberg on 11 January 2021. It must have appreciated the risks associated with that election.
- [52] It is not for me to express any views on the merits of the summons in the action proceedings, but insofar as Kesef seeks a stay of the arbitration proceedings pending the outcome of the action, the argument raised by Kesef was that the enforcement of the award could not take place in isolation without assessing Weinberg's repudiation of the arbitration agreement which is a triable issue in the action proceedings. It relied on **Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh NO 2022 (4) SA 420 (SCA)** in support of the proposition that a challenge to the arbitration agreement itself required the Court to deal therewith.
- [53] The judgment is of no assistance to Kesef as it can be distinguished on the facts in **Canton** which concerned a case where the appellant denied the existence of an agreement under which it could be compelled to participate in an arbitration.
- [54] There is no dispute that the parties entered into a valid arbitration agreement, which I might add, renders subject to arbitration under the auspices of AFSA any dispute between the parties relating to or arising out of the agreement including its validity, implementation, execution, interpretation, rectification, termination or cancelation (see clause 11.1 of the loan agreement).
- [55] Whether Weinberg repudiated the arbitration agreement was therefore an issue within the remit of the learned arbitrator's jurisdiction and it was not open to Kesef to simply "opt out" of the process.
- [56] Lord Hoffmann's well-known *dictum* from his speech in the House of Lords in **Fiona Trust & Holding Corp and Others v Privalov and Others** [2007] 4 All ER 951 (HL) ([2007] UKHL 40), has been cited with approval in South Africa and justifies repetition:

“In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.” (emphasis added)¹⁰

[57] Clause 11.1 of the loan agreement between Kesef and Weinberg must be construed in a manner consistent with this presumption and leaves no room for any suggestion that the parties intended to permit a bifurcated approach whereby some elements of their dispute would be referred to arbitration and others to the High Court. The argument also loses sight of the binding nature of an arbitration agreement as recognised in section 3(1) of the Arbitration Act.

[58] The issue has in any event already been decided.

[59] Kesef expressly pleaded its case on repudiation in its statement of defence. It was accordingly before the learned arbitrator when he issued the award. At the meeting on 26 March 2023, Mr Garratt acknowledged that the learned arbitrator had the power to make the determination and it was incumbent on Kesef to prove a repudiation and its subsequent cancellation of the loan agreement before the learned arbitrator. It failed to do so and by making an award in favour of Weinberg, he by implication dismissed any defence based on an alleged repudiation by Weinberg.

[60] For this reason no basis exists to stay the enforcement of the award. There is in the circumstances no reason why the award should not be made an order of this Court in terms of section 31(1) of the Arbitration Act.

Conclusion

[61] While the allegations of bias levelled against the learned arbitrator were unfortunate, and lacked substance, I am not convinced that costs on a punitive scale are warranted.

¹⁰ See *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co Sarl* 2015 (1) SA 345 (SCA) at para 13; *Remo Ventures Pty Ltd v Cecile Van Zyl and Others* (1262/2022) [2024] ZASCA 9 (26 January 2024) at para 18.

[62] I accordingly make an order in the following terms:

- [1] The application is dismissed.
- [2] The arbitration award delivered by the third respondent on 21 April 2021 and annexed hereto marked "X" is made an order of Court in terms of section 31(1) of the Arbitration Act 42 of 1965.
- [3] The applicant is ordered to pay the first respondent's costs of the application and the counterapplication including the costs of two counsel where employed.



C BESTER AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: 26 July 2024

For the Applicant:

AJ Venter

Andrew Garratt Inc

For the First Respondent

S Vivian SC

R Schorn

Grayman SM Attorneys

ARBITRATION

ARBITRATION FOUNDATION OF SOUTHERN AFRICA

Reference: W.92

In the matter between:

STEVE WEINBERG

Claimant

And

KESEF PROPERTIES (PTY) LIMITED

Defendant / Excipient

ARBITRAL AWARD

RECORDAL

After hearing Counsel on behalf of the Claimant and the evidence of the Claimant the following is recorded, and the Award is granted as a consequence of default of appearance by the Defendant:

1. The hearing dates were agreed to between the Parties with the Arbitrator at a Pre-Arbitration Meeting on 4 March 2021 with the hearing of the matter to take place from 20 until 23 April 2021. In addition, the input of Adv Venter, then on brief to act on behalf of the Defendant was to be obtained. Notwithstanding his non-availability on the agreed to dates, he was instructed to attend to the matter as counsel of choice.
2. On 26 March 2021 a Ruling was made that the hearing of the matter would proceed on the agreed dates, 20 until 23 April 2021. The Defendant by way of correspondence unsuccessfully sought the Arbitrator to pend the hearing of the matter as a consequence of a High Court application it wished to launch in terms of the provisions of Section 13(2) of the Arbitration Act.

3. On 15 April 2021 the Defendant's representatives addressed correspondence to the Arbitrator confirming that the Defendant instructed that it was no longer willing to participate in the Arbitration Proceedings, further instructing its representatives, Andrew Garratt Incorporated to withdraw from the Arbitration Proceedings, which it did.
4. On 20 April 2021 the Arbitration Proceedings commenced with neither the Defendant nor its representatives requesting access to the hearing of the matter on the MS Teams platform notwithstanding attendance invitations being sent to them with a tentative acceptance by Mr Garratt and an acceptance by Mr Kaplan (to email addresses andrew@garrathinc.com, jonathan@garrattinc.com and stevez@corlett170.co.za) and a Notice of Hearing being addressed to the parties on 9 April 2021 to the same email addresses, the email address stevez@corlett170.co.za being an accepted Domicilia and Notice address in terms of Clause 10 of the Loan Agreement.
5. Consequently, the hearing of the matter commenced on 20 April 2021 at approximately 10:15 in the elected absence of the Defendant with the Claimant testifying in the matter.

THE AWARD:

The following Award is made:

1. The Defendant is to pay the Claimant the amount of R 751,118.00;
2. The Defendant is to pay the Claimant interest on the aforesaid amount at a rate of 18,75% per annum, calculated from 17 November 2019 to date of full payment;
3. The Defendant is to pay the costs of the Arbitration as follows:

- 3.1. The costs of the Arbitration Foundation of Southern Africa (AFSA) as the Administrative Authority ") in respect of the administrative charges in accordance with the costs invoiced to the parties;
- 3.2. The costs of the Arbitrator associated with the arbitration including the costs of the hearing of the matter for the agreed to reserved days, 20 until 23 April 2021 as invoiced to the parties by AFSA;
- 3.3. The costs of the Secure Witness Venue for 20 April 2021 which forms part of the costs of the Arbitration;
- 3.4. The costs of the Claimant in the cause of the Arbitral Proceedings including the Claimants costs on the scale as between attorney and own client, to be taxed by the Taxing Master of the High Court of South Africa (South Gauteng Division), or in the event of the refusal by the Taxing Master to do so, the costs are to be taxed by a Taxing Cost Consultant appointed by the Claimant.

Dated at Sandton on this the 20th day of April 2021.

(Adv H Louw – Electronically Signed)
Communications and Transactions Act¹

H Louw
Arbitrator

F A Arb (Southern Africa)
F C I Arb (UK)

Claimant Representatives:
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¹ Act 25 of 2002

Defendant:
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