

REPUBLIC OF SOUTH AFRICA



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

Case Number: 22984/202

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

5 August 2024

In the matter between:

**SIYATHEMBA PROJECT MANAGEMENT
AND DEVELOPMENT (PTY) LTD**

Appellant

and

STEVEN WEINBERG

Respondent

JUDGMENT

GREEN AJ

- 1 On 19 April 2024 I handed down the judgement in this matter in which I ordered that an arbitration award be made an order of court and dismissed the counterapplication. What served before me on 30 July 2024 was an application by the Respondent¹ for leave to appeal against my judgement.
- 2 When the matter was argued Mr Venter, who appeared for the Respondent, raised four points. I will deal with each of the points in turn.
- 3 The first point was that my judgement was incorrect in that I had failed to recognise that the Respondent's case relating to repudiation was one which involved the repudiation of the "*arbitration agreement*" and not the repudiation of the Agreement.² The Respondent's argument is that whilst the arbitration agreement was rendered inoperative by the repudiation the Agreement remained extant.
- 4 When parties enter into agreements they must seriously intend to enforce all of the terms of the agreement. If one term of the agreement is not complied with then the innocent party is entitled to exercise its remedies flowing from that non-compliance. Repudiation is founded in conduct by a party which manifests an intention not to be bound by the agreement. When that occurs the innocent party is entitled to exercise an election. The nature of repudiation does not go to particular clauses of an agreement, instead it goes to the entire agreement.

¹ I will refer to the parties as they are referred to in the main application.

² "Agreement" as defined in paragraph 2 of the main judgment.

- 5 There is therefore, in my view, a fundamental flaw in suggesting that it is only the arbitration clause or, as the Respondent termed it, “*the arbitration agreement*”, that is repudiated.
- 6 I therefore find that there is no reasonable prospect that another court would come to a different decision based on the first point raised by the Respondent.
- 7 The second point raised by the Respondent deals with the dispute about the facts that underpin the alleged repudiation. This point is linked to the first point of repudiation in that it goes to the assessment of the facts relied on by the Respondent to found its repudiation.
- 8 When pressing the second point the respondent’s counsel made the point that the repudiation was raised as a defence to the Applicant’s claim, and for this reason I ought not to have applied the Plascon Evans rule against the Respondent. My assessment of the papers in this matter, and particularly the raising of the facts upon which the repudiation is based, is that those facts are raised in support of the Respondent’s counterapplication. It is on the basis of the repudiation of the “*arbitration agreement*” that the Respondent sought the relief set out in its notice of motion in the counterapplication. Having raised the facts upon which the repudiation is based in the context of the counterapplication, my view is that the Plascon Evans Rule does operate against the Respondent when it comes to issues of factual disputes.

- 9 Linked to the point about the application of the Plascon Evans Rule, the respondent's counsel urged that what I ought to have done is to have found that there was a dispute of fact that could not be resolved on the papers and I ought to have referred the matter to trial or for the hearing of oral evidence on that issue. I was pointed to paragraphs in the heads of argument filed by the Respondent where this point was made.
- 10 The difficulty with both legs of the second point i.e. whether the Plascon Evans Rule applied, and whether the matter ought to have been referred to trial or for the hearing of oral evidence, is that both of these points are subsidiary to the repudiation issue which was the first point raised. If, for the purpose of argument, one accepts the correctness of the two issues raised as the second point, the Respondent would still be met with the difficulty that arises from the first point that it has raised. Because I have found that the first point raised by the Respondent is one where another court would not reasonably come to a different decision, that finding, in my view, answers the second point.
- 11 The third point raised by the respondent deals with actual as opposed to perceived bias. I found that the Respondent had relied on actual bias of the Arbitrator and that having made that election the Respondent could not, as it were side step that, and seek to rely on perceived bias.
- 12 When the application for leave to appeal was argued the respondent's counsel made the point that whether a party could rely on perceived bias, having pleaded actual bias, was a matter on which there was no case law

as yet, and that it was therefore a matter of law which ought to enjoy the attention of a higher court.

- 13 I do not agree with the characterisation of the actual versus perceived bias point as a point of law. In my view it is a point of pleading and not a point of law. In motion proceedings a party is required to set out its case, and the facts on which it relies in its affidavits. The opposing party is then entitled to accept that the pleaded case is the case that it has to meet. In this case the Respondent set out in its affidavits that it relied on actual bias. Having pleaded that case it was not open to the Respondent to then alter its case and rely on perceived bias.
- 14 A shifting of the Respondent's case from actual to perceived bias is, in the context of this case, perhaps more relevant because the Arbitrator had not been cited as a party, but had indicated that he did not intend to oppose the matter. It is a matter of speculation what the Arbitrator would have done had he been aware that the case against him was not one of actual bias but one of perceived bias, but he ought to have been made aware of what allegations were being levelled against him.
- 15 Because this is a motion matter it is not one where there is an argument to be made that the issue of perceived bias was fully ventilated in the evidence presented to the court.
- 16 I therefore find that the third point raised by the respondent is not one on which another court would reasonably come to a different decision.

17 The fourth point raised by the respondent goes to the instances of bias relied on by the Respondent. In argument the respondent raised two specific issues in respect of the Arbitrator's bias.

17.1 The first issue relates to the Arbitrator having issued directives dealing with witness statements and the preparation of bundles, and then changing his mind when that was not done by either party. The respondent, correctly in my view, accepted that the Arbitrator was entitled to change his mind, but made the point that this conduct by the Arbitrator *"tells the Respondent that the Arbitrator was biased against it"*.³

17.2 The second issue raised by the respondent dealt with the Arbitrator's fees, and the Arbitrator's decision to reduce his fees when the Respondent did not pay its contribution to AFSA. The respondent said that this *"indicates the Arbitrator wants to get at [the Respondent]"*.⁴

18 The respondent's counsel correctly accepted that the Arbitrator was entitled to change his mind in respect of the need for witness statements and bundles, and was entitled to reduce his fees. Both of those actions are not, on their own, or viewed collectively, demonstrative of bias. They are demonstrative of an Arbitrator who wishes to ensure that the dispute before

³ This is my note of the submission that was made.

⁴ This is my note of the submission that was made.

him is finally determined. That is afterall the Arbitrator's contractual obligation.

- 19 I have again considered all of the issues raised by the Respondent as manifesting bias on the part of the Arbitrator. For the reasons set out in the main judgment I remain of the view that they do not manifest bias.
- 20 I therefore find that the fourth point raised by the respondent is not one on which another court would reasonably come to a different decision.
- 21 Another point that was raised in seeking leave to appeal, but which was not identified as a distinct point, relates to the Virtual Hearing Award published by the arbitrator. The respondent argued that I had erred in the main judgment in stating in paragraph 5 that there had been an application for the Virtual Hearing Order. The respondent argued that this was wrong, and that there had been a "*discussion*". I must confess that I do not see the point that was made in drawing this distinction. It is clear that the arbitrator did not issue the Virtual Hearing Award of his own accord without recourse to the parties. What is also clear is that the parties took up opposing positions. There is in my view no moment in suggesting that my characterisation of the events as an "*application*" was wrong; there was a discussion on the issue with opposing views being taken up by the parties.
- 22 Linked to the Virtual Hearing Award point is the further point that the arbitrator issued a cost order. I understood the point to be that this too is a manifestation of the arbitrator's bias. The respondent accepted that the arbitrator had the power to issue the cost order but argued that because

costs were not addressed there was bias. I do not agree. Costs orders are ubiquitous and the parties must have known that where opposing positions are adopted and an arbitrator is required to decide an issue a cost order is likely to follow. The mere granting of a cost order, even when costs are not specifically addressed, does not manifest bias.

- 23 Mr Venter who appeared for the respondent made it clear that the arguments that he made during this hearing were made in the basis of the instructions provided to him. Given the nature of the submissions that he was required to make to advance his client's case it was proper for him to underscore this.
- 24 Mr Vivien SC, who appeared for the Applicant, urged that the application should be dismissed with costs, with counsel's fees to be on scale C. Mr Vivien SC appeared alone in the application for leave to appeal because his junior was unavailable and therefore the costs of counsel would only be his costs. Ordering costs on scale C is, in my view, appropriate.
- 25 For the reasons set out above, I make the following order:
- A. The application for leave to appeal is dismissed.
- B. The Respondent is to pay the costs of the application for leave to appeal, with counsel's fees to be taxed on scale C.


GREEN AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG, JOHANNESBURG**

Delivered: *This judgement was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10:00 on 5 August 2024.*

HEARD ON: 30 July 2024
DATE OF JUDGEMENT: 5 August 2024

APPEARANCES:

For the Applicant: AJ Venter

ajventer@law.co.za

Instructed by: Trevor Swartz

trevor@trevorswartz.co.za

For the Respondent: Stephen Vivian SC

mail@viviansc.co.za

Instructed by: Grayman SM Attorneys

graymans@corpdial.co.za