REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: 2023-035959

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

25·07·07
DATE

[redacted]
SIGNATURE

In the matter between:

V & A PLACEMENT AGENCY (PTY) LTD Applicant

and

ARBITRATOR ANITIA LAPAN N.O. First respondent

ZUID-AFRIKAANS HOSPITAL Second respondent

These reasons were delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 7 January 2025.

REASONS FOR DECISION

VAN DER WALT AJ

Introduction

[1] On 24 November 2024 I dismissed, with costs on scale C, an application for leave to appeal in this matter. The applicant sought reasons for the dismissal. These are the reasons.

The application a quo

[2] The initial application was in terms of section 33(1)(b) of the Arbitration Act.[1] In the main it sought to set aside an arbitrator's award (an interim award dealing only with breach of contract and negligence). It did so by asserting ten grounds of review. These ten grounds of review and the facts alleged in support of them also formed the basis for further ancillary relief sought, namely that the arbitrator be removed and for the court to substitute its findings for those made by the arbitrator.

[3] Briefly, the first ground of review was that the arbitrator exceeded her powers by asking counsel for the applicant to reformulate a question and said that the witness did not understand a question. The second ground alleged bias on the part of the arbitrator. The third ground was based on the arbitrator's disallowance of evidence that was never put to the second respondent's witnesses. The fourth ground was based on the submission that the arbitrator "failed to properly or reasonably assess the evidence properly before her".

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1 42 of 1965.

The fifth ground included the assertions that the arbitrator made a finding she could not make, did not "consider evidence that ought to have been considered" and made a finding that was "highly flawed". The sixth ground asserted that the arbitrator "incorrectly" stated that certain evidence had not been challenged, that she "failed to identify" inconsistencies in the evidence, that she "got it wrong" by saying evidence was not challenged or disputed, and that all this led to a finding that was "highly incorrect". The seventh ground asserted that the arbitrator "incorrectly assessed the evidence". What resulted was called a "false finding". The eighth ground asserted that the arbitrator "got it wrong" where she found that "the applicant had led any evidence proving" one of her conclusions on the facts. The ninth ground took aim at what the arbitrator "incorrectly states" in her award. It was said that "[t]his is incorrect, the arbitrator has clearly incorrectly analysed evidence incorrectly by creating testimonies that does not exist." The tenth ground related to findings about the applicant's expert's testimony. It included the assertion that the arbitrator "failed to consider" this evidence and reached a decision a "reasonable decision-maker" could not have reached.

The judgment

[4] The judgment held that the first to third grounds properly fall within the remit of section 33(1)(b) of the Act. Their merits were considered. They were found to have none. The fourth to tenth grounds were found not to fall within section 33(1)(b)'s remit. The judgment further held that, in addition to there being no basis in fact for such a step, the court did not have the power to substitute its findings for those of the arbitrator. Lastly, as it had been had held that the large majority of the case as made out in the founding affidavit was entirely irrelevant to the relief sought, looking to make out a case under section 33(1)(b) as it did, and that the rest of the applicant's case had no merit, no good cause had been shown for the removal of the arbitrator. That is, even if one were to overlook the applicant's failure to place any reliance on section 13 of the Act.

The application for leave to appeal

[5] The application for leave to appeal addresses only, what the applicant argues are, errors in the judgment. I will assume in the applicant's favour that this, without more, is sufficient to satisfy the requirement for leave to appeal in section 17(1)(a)(i) of the Superior Courts Act,[2] which provides that leave to appeal "may only be given where the judge or judges concerned are of the opinion that — (a)(i) the appeal would have a reasonable prospect of success". The applicant placed no reliance on section 17(1)(a)(ii), (b) or (c). The second respondent did not take issue with the appealability of the order. Subject to what I find in respect of the applicant's arguments on prospects of success on appeal, I could not and cannot see how the interests of justice could ever assist the applicant. It brought a meritless review; it reviewed a merely interim arbitral award; the award issued in an arbitration it agreed to partake in; and the award was made by an arbitrator to whose appointment it agreed. The interests of justice seem to dictate that the applicant now abides the arbitration agreement it concluded, to have the disputes between it and the second respondent resolved as expeditiously as possible.

The first ground for leave to appeal

[6] The first ground for leave is difficult to understand. It consists of a number of disjointed phrases and is based on a misreading of the judgment. These difficulties were not resolved during argument. Be that as it may, I will try to do justice to the gripe underlying the ground of appeal.

[7] According to the applicant, the court erred in analysing the applicant's case with reference to arbitrator's powers to ask questions during a hearing and holding that arbitrators have the power to ask counsel to reformulate a question. In amplification of this point, it is said that the court erred in failing to consider the applicant's case, which was that the arbitrator exceeded her

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[2] 10 of 2013.

powers. The court, it is said, was mistaken in its understanding of this review ground. It was not whether arbitrators could ask questions of witnesses, it was rather focused on the arbitrator's comments on a question to a witness in circumstances where the arbitrator "assumed that the witness was not sure what was being asked". The court therefore erred in holding that an arbitrator would be duty-bound to interject when she perceived a witness as not able to understand a question. The applicant, it is said, had clearly argued that it is not for the arbitrator to intervene when she perceived a witness as not understanding a question, in circumstances where neither the witness nor counsel for the second respondent had objected.

[8] Much could be said about the faulty premises underlying this ground for leave. It will suffice to say the following: The arbitrator's main mandate included a power to make factual findings. That is what the hearing of evidence by her was about: to enable her to make factual findings. The arbitrator obviously had to understand the witness's answers to questions. She obviously also had to be sure that the answers witnesses gave, were answers to questions they understood. That holds true irrespective of whether a legal representative raises an objection or whether the witness herself says she does not understand a question. The arbitrator had to write the award. Her observations perceptions matter. Counsel's affront at the arbitrator daring to make a limited interjection during his cross-examination less so.

[9] This ground of appeal has no prospects of success on appeal, even when one reads it in the most favourable of lights. If anything, it underscores the lack of merit in the review ground as it was pleaded.

The second ground for leave to appeal

[10] The second ground for leave to appeal takes issue with the court's findings regarding the disallowance of evidence by (or questions asked of) one of the

applicant's witnesses. It is said that the court failed to consider the applicant's arguments about why the disallowance was a gross irregularity (or amounted to the arbitrator exceeding her powers). The applicant disagrees with the arbitrator and the court's exposition of the law on parties' obligations to put their cases to opposing witnesses. There was a clear irregularity in the proceedings, says the applicant, by disallowing the evidence on the basis that it was not put to the second respondent's witnesses, because the second respondent would have been given an opportunity to cross-examine the relevant witness after she had led the evidence that had not been put to the second respondent's witnesses.

[11] This, however, again, misses the point. The second respondent's witnesses, as the version was not put to them during their cross-examination, was not given the opportunity to give evidence about it. This cannot be rectified by a cross-examination of the applicant's witnesses. Therefore, the arbitrator, in applying trite, elementary and standard rules of procedure, cannot be faulted for disallowing the questions counsel for the applicant sought to ask.

[12] This ground of appeal has no prospects of success on appeal.

The third ground for leave to appeal

[13] The third ground for leave to appeal is that the court erred in holding that no good cause had been shown for the removal of the arbitrator and providing no ratio for this decision.

[14] As it has been said, the court did provide reasons for its decision. It found that most of the case as made out in the applicant's founding affidavit was entirely irrelevant to the relief sought, looking to make out a case under section 33(1)(b) as it did, and that the rest of the applicant's case had no

merit. It means that no case was made out for the wrongs the arbitrator were accused of, to wit committing gross irregularities in the proceedings or exceeding her powers. For that reason no good cause was shown for the removal of the arbitrator. That is, even if one were to overlook the applicant's failure to place any reliance on section 13 of the Act.

[15] This ground of review has no prospects of success on appeal.

The fourth ground for leave to appeal

[16] The applicant asserts that the court erred in making a punitive costs order. More specifically, it is said that the court erred in awarding punitive costs "only" because the deponent for the applicant used the words "incorrect", "completely wrong" and "incorrectly decided upon".

[17] This ground for leave is most difficult to understand. It is based, at best, on a selective reading of the judgment. The judgment provides the reasons for the punitive costs order in two paragraphs. They read as follows:

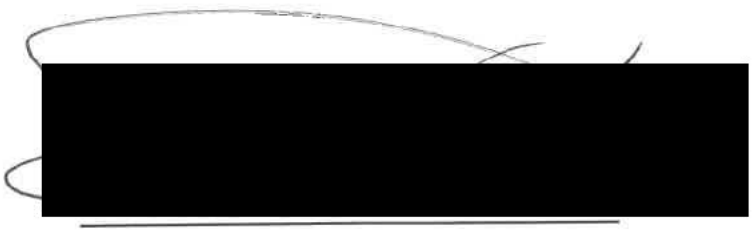
> 'In the introductory part of its founding affidavit, V & A promised that it will ultimately submit that the arbitrator's award was "incorrectly decided upon". Similarly, in attacking the arbitrator's findings of fact, the affidavit is replete with words and phrases such as "incorrect", "highly incorrect", "got it wrong" and "completely wrong". This of course ignores the nature of a review in terms of section 33(1)(b).
>
> V & A's deponent also went further. The arbitrator is said to have made a "false" finding and that she created "testimonies that do not exist". These assertions impugn the arbitrator's honesty. I can see no reason why that was necessary. In addition, the allegations of bias against the arbitrator were not only completely devoid of merit, V & A's approach in making them was reprehensible. If this application is indicative of anyone who "got it completely wrong" it seems to me to have been V & A for failing properly to prepare its own case, causing it not to be able to put its case to that of the hospital's witnesses. Yet it had no difficulty in accusing the arbitrator of bias on the most frivolous of grounds, attacking her award on

entirely irrelevant bases and, worst of all, impugning her integrity. For these reasons, a punitive costs order will follow.'

[18] This ground of appeal has no prospects of success, not only because it is based on a misreading of the judgment, but also because costs is a matter within the discretion of the judge.

Costs

[19] The second respondent again sought a punitive costs order against the applicant. I do not deem it appropriate to make a further punitive costs order in dismissing the application for leave to appeal. The original order was directed mainly at what was said by the deponent for the applicant in its founding affidavit. While the approach taken and assertions made by the applicant were defended and reasserted by its counsel during the hearing of the application for leave, I am reluctant again to penalise the applicant for the same conduct. No other grounds disclose conduct sufficiently serious to justify such an order.



Nico van der Walt

Acting Judge, Gauteng Division,
Johannesburg.

Appearances:

For the applicant

Adv W.M. Sithole

Instructed by Rahman & Rahman Inc.

For the second respondent:

Adv J. De Beer SC

Instructed by Kruse Attorneys Inc.