

SOUTH AFRICA / JUDGMENT

Africa Opportunity Fund LP and Another v Shoprite Holdings Ltd and Another (8543/17) [2018] ZAWCHC 37 (23 March 2018) [2018] ZAWCHC 37

COURT

Western Cape High Court, Cape Town

BEFORE

N P Boqwana

CASE / FILE NUMBER

8543/17

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: 8543/17

Reportable

In

the matter between:

AFRICA

OPPORTUNITY FUND LP

First

Applicant

AFRICA

OPPORTUNITY CAYMAN LTD

Second

Applicant

and

SHOPRITE

HOLDINGS LTD

First

Respondent

LA

ROSE-INNES

N.O.

Second

Respondent

Delivered:23 March 2018

JUDGMENT

BOQWANA, J

Introduction

[1] The applicants brought an application in terms of s 32 (2) of the Arbitration Act 42 of 1965 ('the Act') to remit the

matter to the second respondent ('the arbitrator') for reconsideration and for the making of a further or a fresh award

after hearing or considering new evidence. In terms of s 32 (2) of the Act:

"(2) The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct."

[2] This application is accompanied by an application to extend the time period of six weeks in s 32 (2) of the Act. Section 38 of the Act permits this Court to extend the time period on good cause shown. It states the following:

"38. Extension of periods fixed by or under this Act.-The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not."

[3] The applicants also seek leave to introduce a supplementary affidavit, by Ms Ziyanda Nyanda of its attorney of record.

[4] In essence, three issues stand to be determined by this Court:

4.1 Whether the late filing of this application should be condoned;

4.2 Whether the supplementary affidavit of Ms Nyanda should be allowed; and

4.3 Whether the matter should be remitted back to the arbitrator for reconsideration.

[5] The first respondent, which, for the sake of convenience, I shall refer to as the respondent in this judgment, opposes all these

applications. Before considering these questions, it is important to briefly outline the background facts underpinning the matter before me.

Factual

background

- [6] The first applicant is an exempted limited partnership, formed and registered in the Cayman Islands. The second applicant, on the other hand, is an open-ended investment company also duly registered and incorporated in the Cayman Islands. The applicants were claimants in the arbitration proceedings, conducted during August and September 2016 ('the arbitration'), which are the subject of this application and to which I shall return in more detail later on.
- [7] The respondent is a public company duly incorporated in the Republic of South Africa ('the Republic'). It was also the respondent in the arbitration. Although the respondent has its primary listing on the Johannesburg Stock Exchange ('the JSE'), with its registered address within the jurisdiction of this Court, it is registered as a foreign company in Zambia and has a secondary listing on the Lusaka Stock Exchange ('LuSE').
- [8] Pursuant to the secondary listing on 14 February 2003, Shoprite Checkers (Pty) Ltd ('Shoprite Checkers'), a wholly-owned subsidiary of the respondent, provided and delivered 2 700 000 ordinary shares in the respondent to the Central Share Depository of the LuSE, to facilitate the respondent's listing on the LuSE and to allow the sale of those shares in Zambia to would-be investors.
- [9] According to the respondent, on 13 February 2003 it appointed one Lewis Chisanga Mosho ('Mosho') as its Resident Representative
Zambian Director. Mosho was a partner in a firm known as Lewis Nathan Advocates ('LNA'), at whose chambers he practised as an advocate.
- [10] Mosho was to act as the respondent's representative in Zambia and also to conduct and manage the respondent's affairs in Zambia. On 14 February 2003 the respondent also appointed LNA as its transfer agent in respect of its shares listed on the LuSE.
- [11] During the period of February 2003, 479 103 shares of the respondent were sold on the LuSE pursuant to the company's initial public offering. This left a balance of 2 220 897 shares. These were then held as treasury shares by LNA, as nominee for (on behalf of) Shoprite Checkers.
- [12] According to the respondent, on 2 September 2004 the board of Shoprite Checkers provided LNA with the mandate ('the Mandate') to sell the treasury shares in the following manner:
- 12.1 The treasury shares were to be sold in tranches of approximately 35 000 shares;
- 12.2 The treasury shares were to be sold against payment in full of the purchase price equal to the
Zambian Kwacha equivalent to the ruling market price of the respondent's shares on the JSE;

[13] It became apparent (and confirmed during the arbitration) that Mosho and LNA, respectively, committed various fraudulent breaches of the terms of the engagement, the Mandate and the written instructions. Up until 3 April 2011, Mosho traded the treasury shares on the LuSE without consulting, disclosing or accounting for those shares or transferring the proceeds thereof to Shoprite Checkers. He sold those shares at a deep discount to the daily JSE price.

[14] The respondent instituted proceedings, in the commercial registry in Lusaka, against the registered shareholders who purchased the

treasury shares at a deep discount, for a declaration that no title passed in respect of those shares. The basis of the declaration

was that Stockbrokers Zambia, being the firm of stockbrokers appointed by LNA, was at all times aware of the express terms and

limitations of the Mandate given to LNA, in particular relating to the purchase price and volume of the respondent's shares to be traded.

[15] With the Zambian proceedings still pending, the applicants instituted action proceedings against the respondent in this Court on 16 September 2014. The basis of the action was that the applicants had good title to the shares that they purchased on the LuSE, and by extension therefore they were entitled to dividends. By agreement between the parties, the action proceedings were converted into arbitration proceedings.

Arbitration proceedings

[16] At the arbitration, the arbitrator considered a number of issues; I will not deal with them all however. The applicants had alleged that the first applicant was the beneficial owner of 679 145 shares and the second applicant of 128 536, together totalling 807 681 shares. As appears from the arbitration award, the respondent, broadly, had mounted a defence that it was not aware of these transactions, that the sale of those shares was in breach of the Mandate and that this breach was within the knowledge of Stockbrokers Zambia and African Alliance in their capacity as the agents of the applicants. The knowledge of Stockbrokers Zambia and African Alliance was said to be imputed to the claimants by operation of law. Therefore, there would not have been transfer of good and legal title, Shoprite Checkers remained the beneficial owner of those shares and consequently neither the applicants, nor Standard Chartered Securities (which held the shares as a nominee on behalf of the applicants), were entitled to dividends. In other words, they were not bona fide purchasers. The shares, to which the claims related, were classified in the award as Class A shares. The second defence was that Mr Francis Daniels (a director of the applicants) ('Daniels'), acting on behalf of the applicants in acquiring shares, had knowledge of the limitations imposed by the Mandate and that the shares were purchased contrary to that Mandate.

[17] The arbitration award was published on 27 January 2017. The arbitrator found that the applicants had been able to show, as

supported by documentary evidence, that they had acquired the shares, but that that conclusion was subject to the findings made in respect of the respondent's defence on the Mandate. He found that the evidence conclusively established that LNA acted in breach of the terms of the Mandate, and that there was undisputed evidence that Stockbroker Zambia and African Alliance had knowledge of the Mandate and the limitations imposed on it. That knowledge, however, was not acquired in their capacity as the applicants' agents, therefore their knowledge of the Mandate could not be imputed to the claimants and that defence was thus rejected. However, as to the second defence relating to Daniels' knowledge, the arbitrator found that Daniels knew that Shoprite Checkers was the biggest seller of the respondent's shares. In fact, it was common knowledge. He further knew that the seller had instructed the shares to be sold at JSE prices.

[18] The arbitrator noted that in about October 2009, Daniels was told in email communications by Ms Sophia Cheelo (a representative of Stockbrokers Zambia, who later moved to African Alliance in

2010) of 'the seller' who wished to offload a large block of 800 000 shares. He was then informed that the seller had 40 000 shares which were already in the market and that there were 2227 additional shares available from other sellers. This led to the first applicant's purchase of 42 227 shares on 19 October 2009. He was advised that the seller had agreed to release a further 40 000 shares. This led to a second purchase of 40 024 shares by the first applicant on 20 October 2010, the balance of 24 shares being from a source other than Shoprite Checkers. The arbitrator found that although the seller was not directly identified by name, Daniels should have understood that the seller was in all probability Shoprite Checkers, as in fact Ms Cheelo had informed him that it was the biggest seller (although it could not be determined with certainty whether this communication from Ms Cheelo to Daniels was made prior to the share acquisitions made by the first applicant on 19 and 20 October 2009). He also knew that Shoprite Checkers had 2.2 million unsold treasury shares and there was a free float of some 500 000 shares sold after the listing.

[19] Whilst the arbitrator found that Daniels must have known, that the seller of large parcels of the respondent's shares would in all probability have been Shoprite Checkers, he could not find that he must have known this prior to the acquisition of the two lots of 40 000 shares purchased on 19 and 20 October 2009, because of the uncertainty as to exactly when Ms Cheelo told him Shoprite Checkers was the biggest seller. It may be that the communication preceded the first sale, in which case he would have been aware, or it may have been after the two transactions. What was clear, the arbitrator found, was that shortly after the two sales, Daniels knew that Shoprite Checkers was the seller. The respondent's defence was based on Daniels' knowledge as of 23 November 2009, and what is clear is that 99 800 shares were acquired on 27 November 2009.

[20] The arbitrator then made the following crucial findings:

“80. Mr Daniels must also have realised in the circumstances that Shoprite Checkers was the seller of other large parcels of shares acquired by the claimants later in 2009 and in the following two years. Large parcels of shares are transactions involving 40,000 or more shares. Mr Daniels appreciated at the time that the sales of large parcels of shares were made by one seller. There are eight sales reflected in schedule FD2 in excess of 40,000 shares, excluding the first two transactions. These are the following:

27/11/2009

99,800

22/02/2010

85,876

26/04/2010

97,852

16/06/2010

104,000

23/06/2010

100,000

27/10/2010

100,000

27/10/2010

50,000

11/07/2011

50,000

687,528

The first seven sales relate to shares acquired by Africa Opportunity Fund totalling 637,528 shares. The eighth transaction consists of shares acquired by Africa Opportunity Cayman.

81. As far as the smaller sales of shares are concerned it cannot be found that Mr Daniels should have realised that Shoprite Checkers was probably the seller. As the biggest seller of shares, holding a large quantity of treasury shares, the expectation would have been that Shoprite Checkers would dispose of the shares in larger rather than smaller parcels.

Sales of smaller quantities of shares could have been understood as having been made by entities other than Shoprite Checkers. We now know that this is in fact the case.

82. It follows therefore that when the claimants purchased the eight large parcels of Shoprite shares totalling 687,528 shares, they knew through Mr Daniels, that Shoprite Checkers was the seller. They were also aware of the instruction given by Shoprite Checkers to their stockbroker that the shares were to be sold at a price equivalent to the JSE ruling price.
83. In the light of this it is necessary to consider, applying English law, whether good title in these shares passed to the claimants or whether Shoprite Checkers retained beneficial ownership thereof.

.....

107. It must have been obvious to Mr Daniels, in these circumstances that it was questionable whether these sales at those prices were authorised. The natural and most logical thing for Mr Daniels to have done would have been for him to query this with Ms Cheelo and Mr Du Preez. He had already been in regular communication with them regarding the purchase of Shoprite shares. A simple telephone call or email would have allowed Mr Daniels to establish the true position. Instead he made no enquiry. He probably did not want the answer. He shut his eyes to the fact that these sales may very well have been unauthorised.”
- [21] Based on the above, the applicants were partially successful. The arbitrator found that good title had passed in respect of 120 153 shares (i.e. 807 681 less 687 528 – shares he considered as large shares, i.e. in excess of 40 000). He ordered the respondent to pay the first applicant dividends in respect of 41 617 of its ordinary shares (out of the 679 145 shares in terms of which dividends were claimed) and to the second applicant, to pay dividends in respect of 78 536 of its ordinary shares (out of the 128 536 shares in terms of which dividends were claimed).
- [22] Not satisfied with this decision, the applicants filed a notice of appeal against the arbitration award on 17 February 2017 and the respondent filed its notice of cross-appeal on 3 March 2017. On 7 April 2017, the appeal panel was constituted and on 9 April 2017 members of the panel agreed to stay the proceedings pending the result of this application.

The applicants’ contentions regarding the new evidence sought to be introduced

- [23] The applicants wish to lead further evidence relating to the identity of the seller in two share transactions on the LuSE. In

particular, they wish to show that Shoprite Checkers was not the seller in two of the eight transactions identified by the arbitrator

as the large parcels of shares (i.e. those of over 40 000 shares), regarding which the arbitrator had held that the applicants

did not hold good title. These are:

- (a) the first applicant’s purchase of 100 000 respondent shares on 23 June 2010 (‘June 2010 Trade’); and

(b) the second applicant's purchase of 50 000 respondent shares on 11 July 2011 ('July 2011 Trade')

[24] The applicants contend that the new evidence will prove that they do have good title to the 150 000 shares which they purchased on the LuSE and, by extension, are entitled to the dividends claimed, which during the period of September 2011 to March 2016 alone exceeded R 2.5 million before interest.

[25] This is on the basis of the arbitrator having found that they had no valid ownership of the shares purchased in the large transactions, since they ought to have known, through their representative, Daniels, that Shoprite Checkers was the seller and that the Mandate regarding the sale of shares had been exceeded. If it is proved that Shoprite Checkers was not the seller of the two sets of shares totalling 150 000, which is what the new evidence in their view will show, then those would not have been affected by the Mandate as they would have been acquired from someone else.

[26] They contend that this issue, concerning the identity of the seller, had been taken to be common cause at the arbitration because the respondent had made a positive averment in its plea that Shoprite Checkers was the seller in respect in the affected shares. Whilst the applicants denied that Shoprite Checkers was the seller, they had no evidence to the contrary at the time and so it was taken as common cause that Shoprite Checkers was the seller.

[27] Based on the arbitrator's finding, that the conclusion that the applicants have beneficial ownership was subject to the findings made in regard to the respondent's mandate defence, it followed, from the applicants' point of view, that, if the respondent's

defence did not hold, the applicants had good title.

[28] According to the applicants, the arbitrator's finding presupposed that Shoprite Checkers was the seller in all eight transactions, which the respondent had pleaded that it was. The unavoidable consequence of proving that Shoprite Checkers was not the seller in the two affected trades, so contend the applicants, was that the 150 000 shares will move, if regard is had to the arbitrator's

reasoning, from the category of shares affected by the Mandate and therefore without good title, to the 'remainder' category to which the applicants have been found to have good title.

[29] The import of the new evidence is that the 150 000 shares were incorrectly classified. They ought to have been part of the

'remainder' category to which the applicants were found to have had good title. It therefore follows that they are entitled to the outstanding dividends on those shares. The new evidence sought to be introduced fundamentally challenges the arbitrator's finding regarding the applicants' knowledge (or imputed knowledge) that Shoprite Checkers was the seller.

The new evidence

[30] Daniels, who deposed to the founding affidavit, alleges that on 31 March 2017 the applicants obtained a letter from LuSE, in which LuSE confirmed in writing that Shoprite Checkers was not the seller in the June 2010 trade and the July 2011 trade ('the LuSE confirmation'). A letter from Ms Miria Mazyambe, Legal and Compliance Officer of LuSE, recorded the following:

" ...

Dear Sir

SHOPRITE SHARES HELD BY AFRICA OPPORTUNITY LP AND AFRICA OPPORTUNITY CAYMAN LIMITED

Reference is made to the above captioned matter and to your letter dated 31 March 2017.

We have noted the contents therein and wish to confirm as follows:

- a) That Shoprite was not the seller of the 100,000 Shoprite shares purchased by AOF [first applicant] on 23rd June 2010, which trade settled on 29 June 2010;
- b) That Shoprite was not the seller of the 50,000 shares purchased by AOCL [second applicant] on 11th July 2011, which trade was settled 14th July 2011.

Yours sincerely

Miria Mazyambe

LEGAL AND COMPLIANCE OFFICER"

[31] He further alleges that subsequent attempts were made to obtain further corroborating evidence. These attempts remained ongoing. He contends that the applicants' efforts must be understood in the context of the difficulties presented by the following factors:

"(a) The stock exchange confidentiality rules which prohibit the disclosure of identities of counterparties, in this case the disclosure of the sellers' identities to the applicants as purchasers;

- (b) The evidence and potential witnesses all being in Zambia and not subject to South African law; and
- (c) The unique and privileged position of Shoprite who, as issuer of the Shoprite shares, does have access to the identities of the sellers. Shoprite is thus in a position to easily and objectively verify the veracity of the applicants' new evidence."

- [32] Since the filing of the founding affidavit, Daniels alleges in the replying affidavit, that on 14 July 2017, they received a letter from Mr Chanda Mutoni of Stockbrokers Zambia, who confirmed that: “Shoprite Holdings Limited, Shoprite Checkers (Pty) Ltd, Lewis Nathan Advocates and/or Mr. Lewis Chisanga Mosho was not the counter party to the abovementioned trade which was purchased on 23 June 2010 and settled on 29 June 2010 by Africa Opportunity Fund”.
- [33] A letter dated 14 July 2017 from Fumanikile Bbuku, Manager – Trading at Autus Securities Limited (‘Autus’), sent to the applicants’ attorneys, records that as a firm, Autus acted on behalf of both the seller and the buyer in the 11 July 2011 trade of the 50 000 respondent’s shares, purchased on behalf of the second applicant. It further stated that “Shoprite was not the seller in the above trade”.
- [34] The applicants continued to seek for more information. On 5 July 2017 a Zambian firm of advocates and notaries, Musa Dudhla & Co, wrote a letter to LuSE requesting confirmation that none of the respondent’s relevant companies and representatives were counter party to the two affected trades. On 17 July 2017, LuSE responded as follows: “Please be advised that the LuSE is only able to provide the information requested to and upon the request of the issuer [the respondent].”
- [35] The applicants allege that the respondent is in a unique and privileged position because, as the issuer of shares, it does have access to the identities of the sellers. It is thus in a position to easily and objectively verify the veracity of the applicants’ new evidence. To this, the respondent alleges that it “only has direct knowledge of its registered shareholders, as reflected on the share register of the exchange” and that it has “no further knowledge of the trades which may have occurred in its shares by independent buyers and sellers”. According to the applicants, the respondent is able to access its shareholder records from the days immediately before and after the trades, which it can obtain from LuSE. The respondent’s contention, that it had no direct contract with Stockbrokers Zambia and the selling broker, does not assist the respondent, in that it has not made any enquiries whatsoever. The applicants

themselves had no contractual relationship with LuSE either, but they nonetheless made enquiries with LuSE to understand which information it could provide. LuSE stated that the information was accessible only to the respondent, issued upon request.

- [36] The respondent’s response to this, is that it has no procedural duty to ask LuSE for the information. Its stance is that it has an arbitration award in its favour, which it has a right to defend. According to the applicants, an inference must be drawn that the respondent does not want it to be found that it was not the seller of the affected trades. By doing so it is either dishonest, by attempting to hide behind this fiction whilst it perpetually benefits from the share ownership in the affected trades and dividends arising therefrom, in the name of finality, or if it had mistakenly included the two trades in its amended schedule to the plea it could simply clarify that. If the inclusion was intentional, it could provide evidence contrary

to the applicants' alleged new evidence.

Respondent's

submissions

- [37] The respondent opposes this application on the basis that the issue whether good title passed in respect of those shares was raised and decided in the arbitration and it cannot now be reopened. The point of departure being that arbitration proceedings are final and it is not permitted for an unsuccessful party to go on a fishing expedition for further evidence after the publication of the award as, according to the respondent, the applicants have done.
- [38] According to the respondent, the theme of the applicants' case at the arbitration, through its sole factual witness Daniels, was that the identity of a seller of shares, and any mandate given by a seller to its stockbroker, was irrelevant to the question whether title in such shares had passed to the purchaser. This, in the context of shares traded on an electronic exchange, with notional anonymity between buyer and seller. It contends that the applicants deliberately refrained from leading any evidence relating to the identity of the sellers in the trades in terms of which they alleged themselves to have acquired a beneficial interest in an aggregate of 807 681 of the respondent's shares. In the absence of any such, the respondent submits that the arbitrator was justified in making certain factual findings, and drawing certain inferences.
- [39] The respondent further contends that this alleged new evidence did not emerge independently, but was actively solicited by Daniels. The applicants, however, have elected not to place any of the correspondence in terms of which this evidence was solicited before the Court, either in the founding or replying papers.
- [40] The respondent further submits that it was the successful respondent in the arbitration and it was under no procedural duty to re-open a case against itself. Its unwillingness to do so can hardly be construed as 'snatch[ing] at a bargain' as the applicants have suggested.
- [41] According to the respondent, the applicants have failed to discharge the burden of satisfying the Court that it was not due to any remissness on their part that they failed to adduce the evidence in question before the arbitrator. It was incumbent upon them to do so, and their failure means that the Court ought to deny them, as a matter of discretion, the indulgence which they seek. In this regard reference is made to, amongst others, the decision of *Simpson v Selfmed Medical Scheme and Another*.^[1]
- [42] A further point raised by the respondent is that in terms of a principle raised in *Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others*^[2], which I come to later, the Court in the first instance has no jurisdictional basis for the remittal because the applicants cannot be permitted to side-step the strict requirements for the setting aside of an award in s 33 (1) by resorting to s 32 (2) of the Act. It submits that the case for remittal falls under s 33 (1) (c) of the Act on the grounds that '(c) an award has been improperly

obtained'. Counsel for the respondent submit that under this heading the applicants would have failed, because they would have had to show that the successful party had fraudulently concealed evidence which would have been detrimental to its case.

The supplementary affidavit

[43] I first deal with the supplementary affidavit by Ms Nyanda, which was filed on 31 January 2018, and which the applicants seek to introduce. It is alleged that the purpose of this affidavit was to put a letter from Autus, alleged to be the selling broker in the second affected transaction of 50 000 of the respondent's shares on 11 July 2011, before this Court. The applicants seek condonation for the late filing of this letter, which they say they only obtained on 30 January 2018. It is apparent therein, that this letter was sent in response to a letter that they only sent on the same day (i.e. 30 January 2018). The applicants failed to attach their own letter requesting the alleged information. I agree with the respondent's counsel, Mr Kuschke SC, who appeared with Mr Wagener, that the lateness in filing the further affidavit was self-created. Mr Van der Berg SC, who appeared with Ms Drake, for the applicants, had to concede that this letter added nothing of material importance warranting its reception. He agreed that it merely repeated what had already been stated by Autus and its content did not take matters further. The affidavit is therefore not allowed.

Late filing of this application

[44] Turning to the condonation application for the late filing of the remittal application. The six weeks within which to file the application in terms of s 32 (2) of the Act, expired on 10 March 2017. The application was only lodged on 16 May 2017, nine weeks later.

[45] The explanation for the delay, given by Daniels, is that after the arbitration award was handed down on 27 January 2017, by 4 February 2017, he had noticed a discrepancy between the schedules of trades in the respondent's shares used by the respondent in the arbitration and the schedules of shares which it used in separate legal proceedings in Zambia. The schedule used by the respondent in the arbitration included the two affected trades while the schedule used in its Zambian litigation did not.

[46] This triggered further investigation which was complicated by, inter alia, the confidentiality restrictions applicable to trading on a stock exchange, and geography. He first engaged with Mr Mutoni

regarding whether he had been the selling broker of the two affected trades. Mr Mutoni confirmed on 17 February 2017 that

Stockbrokers Zambia had been the selling broker in respect of only the first affected trade, on 23 June 2010. On 10 March 2017 Mr Mutoni confirmed this message via teleconference. It proved difficult to obtain a corroborating affidavit from Mr Mutoni and other role players based in Zambia. On 30 March 2017 Daniels established that African Alliance had been the selling broker in respect of the second affected trade, on 11 July 2011. On that day (30 March 2017) a call was arranged with Autus, who confirmed telephonically that Shoprite Checkers had not been the

selling principal in respect of the second affected trade. He took steps with his legal team to obtain written confirmation from Autus. On 31 March 2017, the applicants' Zambian attorneys engaged with LuSE to confirm that Shoprite Checkers was not the selling principal in respect of both trades and LuSE confirmed as much in a letter the same day.

- [47] After the new evidence was obtained on 31 March 2017, steps were taken to obtain further legal advice and inform the respondent of the developments. On 11 April 2017, the applicants' attorneys wrote a letter to the respondent's attorneys presenting them with several proposals. After a number of follow ups, the respondent responded on 2 May 2017, in which it rejected any proposed course of action. On 5 May 2017, Daniels met with the applicants' attorneys and counsel and an application was drafted a few days later.
- [48] Mr Kabelo Mashigo, of the applicants' attorneys, deposed to a supporting affidavit outlining that he had experienced difficulties in reaching Mr Mutoni telephonically from 27 February to date, and experienced the same with getting hold of Ms Bbuku. On 8 May 2017 he informed the arbitration appeal panel of the intention to institute the application and requested the appeal to be stayed. On 9 May 2017 he received a response from Judge Howie, for the panel, agreeing to stay the appeal proceedings.
- [49] The respondent queried, in its answering affidavit, that Daniels had failed to give an explanation as to why he failed to act before the expiry date of 10 March 2017. This went unanswered by the applicants in their replying affidavit. Mr Mashigo in his supporting affidavit to the founding affidavit had stated that the documents supporting the applicants' explanation for the time period, are largely contained in privileged correspondence and as privilege had not been waived, it limited the degree to which a full explanation could be provided. This assertion was challenged by the respondent in the answering affidavit which required the applicants to give a full account for the delay. Neither Daniels nor Mashigo responded to this in reply.
- [50] The applicants submit good cause has been shown for the delay. It is trite that an applicant for condonation must set out fully the explanation for the delay, which must cover the entire period of delay and must be reasonable.[3]
- [51] According to the respondent, the applicants have failed to provide full explanation and take the Court into its confidence in seeking the indulgence. I return to the issue of whether good cause has been shown in this respect given that the explanation given for the late filing of this application is intertwined with the explanation given on the question of whether good cause has been shown for the purposes of s 32 (2) of the Act. It is further trite that the prospects of success on the merits of the case play an important role in considering whether good cause has been shown to condone non-compliance.

Has a case for remittal been made out?

[52] In terms s 32 (2) 'good cause' must be shown by the applicants for the matter to be remitted to arbitration. In *South African Forestry Co Ltd v York Timbers Ltd*[4] the Court observed that the requirement that remittal should only be permitted "when there are compelling reasons put forward" was not the test a court was enjoined to apply – "an award may be remitted where 'good cause' has been shown for doing so and not only where the circumstances are 'compelling'".

'Good cause' is a phrase of wide import that requires a court to consider each case on its merits in order to

achieve a just and equitable result in the particular circumstances....Undoubtedly the principle of finality will weigh heavily with a court that is charged with considering an application to remit (*Benjamin v SOBAC South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 963I – 964D) but against that must be weighed other relevant factors and in particular the relative prejudice that will be caused to the parties if the matter is or is not remitted."

[53] The point to be emphasised here is that good cause depends on the circumstances of the case. In *Leadtrain* supra at para 14, whilst the Court recognised that the import of the term 'good cause' was wide as stated in *York Timbers*[5], it observed that it must, nonetheless, be applied "in the context in which it is used. That context in this case is the Arbitration Act, which is directed at the finality of arbitration awards".

[54] Importantly, the Court in *Leadtrain* went on to state the following:

"[15] It is not desirable to attempt to circumscribe when 'good cause' for remitting a matter

will exist. It will exist pre-eminently where the arbitrator has failed to deal with an issue that was before him or her – which was what occurred in York Timbers – but once an issue has been pertinently addressed and decided there seems to us to be little room for remitting the matter for reconsideration. The guiding principle of consensual arbitration is finality – right or wrong – and we see no reason why an award of costs is to be treated differently to any other aspect of an award. It would be extraordinary if the conduct of an arbitrator that falls short of the strict constraints of s 33(1) were nonetheless to be capable of being set aside and remitted for reconsideration under s 32(2). As pointed out in Benjamin v Sobac South African Building and Construction (Pty) Ltd, correctly, the effect of so holding would be to emasculate the provisions of s 33(1). However one approaches the question what is 'good cause' it seems to us that it inexorably requires something other than to mere error on the part of the arbitrator." (Footnotes omitted) – (Own emphasis)

[55] A few principles arise from this passage. The first one being that 'good cause' is necessarily case based, it cannot be circumscribed. The Court does however give some guidelines as to what could be considered to constitute 'good cause' and that would be principally when the arbitrator fails to deal with an issue before him or her; but when an issue has been pertinently addressed and decided there will be little room to remit for reconsideration. Secondly, the guiding principle of finality built into arbitrations must be observed. The

Court also expresses an anomaly that would arise, if conduct that fell short on the strict requirements of s 33

- (1) (that deals with the review and setting aside of the arbitrator's decision) would in the same breath be capable of being set aside under s 32 (2). This is the jurisdictional point that the respondent raises.

[56] In the instant case, the applicants seek to introduce new evidence before the arbitrator, as the basis of the remittal. The

question that must be asked is what attitude or principles have the courts adopted in relation to the admission of new evidence. Whilst good cause is an elastic term, the reasons underlying the request for a remittal, in a particular case, are important. In some cases the issue requiring a remittal might be ancillary, or of such a nature that it will not lead to the re-opening of the issues that had already been thrashed out in arbitration, as was the case in *York Timbers*.^[6] In that case I would agree with the applicants that the court is as likely to grant a remittal. Having regard to the principles laid down by the courts, an order for remittal cannot just be for the taking. Due to the guiding principle of finality that parties consent to when referring a matter to arbitration, the threshold for remittal cannot be too low.

[57] In *Colman v Dunbar*^[7] the Court adopted certain guiding principles upon which such applications may be granted, as follows:

"1. It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances..."

2. The party who makes the application "must show that the fact that he had not brought it forward was not owing to any remissness on his part...He must satisfy the Court that he could not have got this evidence if he had used reasonable diligence."...
3. The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality. It is not enough that the fresh evidence merely corroborates evidence which has been investigated and rejected. It must go further. In the words of VAUGHAN WILLIAMS, J. in *Warham v Selfridge & Co.* (30 T.L.R. 344,345), 'in order to justify the granting of a new trial on the ground that fresh evidence has been discovered, this evidence must be of such character as to justify one in saying that the verdict could not in the interest of justice be relied on because it was based on mistake, surprise or fraud'....
4. If the conditions have so changed that the fresh evidence will prejudice the opposite party, the Court will not grant the application..." (Own emphasis)

[58] Although the guidelines in Colman were developed in an application to lead evidence in court proceedings, they also find application in an application seeking the re-opening of arbitration proceedings in order to lead new evidence.[8]

[59] The Court in Benjamin added the following:

“The guidelines referred to all assume that the further evidence is evidence properly so-called and that it is admissible. If the evidence tendered would be inadmissible or the witness not competent or compellable, the Court would consider the application no further. It is in this regard that I earlier said that the rules for Court proceedings might need to be adapted when applied to arbitrations. It is to be borne in mind that the ‘new evidence’ here in issue is intended to be placed before the arbitration tribunal and not before a Court. It is therefore necessary to have regard to the admissibility of the evidence before the arbitrator. In other words, in each case the evidence must be tested for admissibility in the light of the rules which govern

the admissibility before the particular arbitration tribunal. If that tribunal is not bound by the rules of evidence as applied in Court proceedings, then evidence which is inadmissible in a Court of law cannot on that basis be rejected.” [9] (Own emphasis)

[60] In that case the Court could not reject as hearsay evidence in newspaper extracts annexed to the applicant’s supplementary affidavit, because the arbitrator was enjoined in the agreement between the parties, known as the Mannheim agreement, to conduct the arbitration ‘informally’.[10] Mindful of those guidelines, I now return to the facts of this case.

Was the fact that evidence was not led not due to the applicants’ remissness?

[61] It is incumbent upon the applicants to show that the fact that the new evidence was not brought forward (at the arbitration) was not due to their remissness. In other words even if they had acted with reasonable diligence they would not have gotten this new evidence. It is instructive that Daniels does not explain exactly at what point before 4 February 2017 he noticed the discrepancies between schedules. He simply states that he, by 4 February 2017, had noted discrepancies. The two affected trades were among those in issue at the arbitration. On their own version, the applicants allege that these shares were initially not included in the schedule to the plea, but later placed in the amended plea. It is not explained how that would not give rise to questions, requiring scrutiny.

[62] Secondly, the Zambian proceedings were instituted before the action proceedings in this Court, which were converted to arbitration proceedings. It is significant that the applicants do not deal with the issue raised in the answering affidavit by the respondent that this discrepancy could have been picked up earlier; they simply put blame on the respondent for supplying an incorrect schedule. The applicants had made a formal discovery of the schedule used in the Zambian proceedings as far back as 3 July 2015. In that regard, had Daniels acted with reasonable diligence, he would have compared the schedules used in the different proceedings and noted the discrepancies before the commencement or the

conclusion of the arbitration.

- [63] Thirdly, the applicants' case at the arbitration was premised on the fact that the identity of the seller, as well as any given Mandate, was irrelevant to the question whether the title had passed to them as purchasers. This in the context that shares were traded on an electronic exchange with notional anonymity between buyer and seller. The applicants failed to lead any evidence with regard to the identity of the seller. Their case was that they had acquired beneficial ownership of the shares and were able to prove that by means of documentary evidence. Because the arbitrator made factual findings, that Daniels knew that Shoprite Checkers was the biggest seller and in all probability the seller of the large parcels of shares, the applicants wish to now lead new evidence, essentially to disprove the arbitrator's findings, which would make the identity of the seller relevant. I agree with the respondent's counsel that this is essentially presentation of a new case. This view is supported by Daniels' assertions in the replying affidavit where he states that the applicants are "entitled to present an alternative case in light of new evidence having come to light and based on the Arbitrator's reasoning in the award". The purpose of the s 32 (2) remittal is not to afford a dissatisfied litigant an opportunity to advance a new case. As was stated in *Saamwerk Soutwerke*[11], to avoid tailoring of evidence and prejudice to the other party, the power to remit should be exercised sparingly and only in exceptional circumstances.
- [64] Fourthly, it is clear that it was the findings of the arbitrator or the arbitration award that gave rise to the investigations by Daniels. It is therefore not correct to submit that the applicants were not aware that the parties could provide this evidence during the arbitration proceedings. That evidence would not have been their focus. They were minded to show that the identity of the seller and the attached Mandate was irrelevant. In other words, whether Shoprite Checkers was the seller was not an issue upon which they based their case. Daniels went to look for evidence in order to challenge some of the findings of the arbitrator, inter alia, that he must have known that Shoprite Checkers was in all probability the seller of all large parcels of shares.
- [65] Fifthly, Daniels had existing relationships with the individuals or entities that he requested information from. Had he acted with reasonable diligence, he would have requested verification from Mr Mutoni when he was called as an expert witness at the arbitration proceedings.
- [66] Similarly, enquiries could have been made from LuSE representatives a lot earlier. Daniels had had interactions with them as early as 4 March 2016. Had he acted reasonably he would have established the position as to the identity of the seller(s) in each of the trades then. Furthermore, the queries raised in the answering affidavit regarding lack of detail in the explanation and correspondence were not addressed in the replying affidavit.
- [67] I agree with the respondent's counsel, the enquiries were insufficient and woefully out of time. This issue also becomes relevant to the determination of the condonation application.

[68] Referring to the *Barclays Western Bank Ltd v Gunas and Another*[12] decision, Mr Van der Berg submitted that the issue of lack of reasonable diligence is not decisive on the question of whether good cause has been shown. There, the Court held that “the modern view is that applicant’s failure to show that he exercised due diligence is not decisive of the application”. While that may be so, it must be borne in mind that in *Barclays* the application to lead further evidence was made after the parties had closed their case but before judgment. The Court in *Barclays* noted the distinction between that scenario and an application to lead evidence on appeal. Referring to authorities on this point[13], it recognised that “...in an application to lead fresh evidence on appeal, the onus is upon the applicant to show that he has used proper diligence, reasonable

diligence in not presenting evidence at the trial that with due diligence might have been available. That case can be distinguished

as it was an application to lead evidence on appeal. In *Du Plessis v Ackermann* 1932 EDL 139 a distinction was drawn between the stages at which the application is made. That was an application to call further evidence after both sides had closed their cases and during the course of argument.”[14]

[69] Also, the case of *Mkhwanazi v Van der Merwe and Another*[15] which the applicants also rely on, dealt with the discretion to permit leading of further evidence in a situation where judgment had not yet been made. Holmes JA stated at 616 E-F that:

“...decisions of this Court dealing with the exceptional situation of leading further evidence on appeal after judgment (such as Colman v. Dunbar, 1933 A.D. 141 at pp. 160-161 are of scant assistance, if any at all, in the present case. In those cases the element of the public interest in the finality of judgments is a most cogent factor weighing against the applicant, who is therefore required to show special circumstances. Aliter in the present case. (Own emphasis)

[70] Therefore, the attitude of the courts in applications to re-open cases when judgment had already been given has not been as accommodating as the applicants would seek to suggest. The element of finality requires of an applicant to show special circumstances, which would demand of it to demonstrate that failure to present the evidence at the trial was not due to the remissness on their part, that they acted with reasonable diligence, but even having done so, they would not have been able to bring the new evidence forward at that stage. I have found that the applicants in this case fell short on this score.

Admissibility of evidence

[71] Moving to the question of admissibility of evidence, which is a crucial consideration referred to in *Benjamin supra*[16], which I have already quoted above. While I hear the applicants’ counsel that the new evidence is material and weighty and could indeed result in a different outcome in respect of the two affected shares, the evidence is not accompanied by any confirmatory

affidavits. Besides that, there is no indication that if the matter were to be remitted, the authors of the letters would be available to testify at the hearing. In fact, Daniels himself stated that he could not get Mr Mutoni to confirm the content of the letter on affidavit. Secondly, he confirmed the difficulty of getting the individuals involved to the hearing as witnesses by stating that: “The evidence and potential witnesses all being in Zambia and not subject to South African law” and that “[t]he LuSE is a regulatory agency in Zambia. It cannot be subpoenaed or otherwise compelled to cooperate and provide information.” The applicants also say that: “As Mr Mutoni, the LuSE and other roleplayers are based in Zambia, it is no simple matter to obtain evidence from them and they cannot be compelled to participate.”

[72] It is therefore not clear who would be called by the applicants to prove the assertions made in the letters in relation to the two affected trades. The applicants’ potential witnesses, on their own version, are not compellable.

[73] Because of these difficulties, Mr Van der Berg submitted the case should be determined on the basis of the hearsay evidence they have. He submits that it must be left to the arbitrator to decide whether to admit this evidence. According to him, they were able to prove ownership of the shares based on documentary evidence, which was not disputed and was accepted by the arbitrator. Similarly, he argues, the applicants would be able to do the same in this instance too. He submits that the respondent has not denied the allegations in the letters and has put no version in relation thereto. He contends further, that it is the respondent that could shed light on this issue by admitting or denying that Shoprite Checkers was the seller or by requesting LuSE to give them (as they are the issuer) information as to who the seller was.

[74] The problem with this proposition is that if the Court finds the evidence to be inadmissible or the witness not competent or compellable, it need not consider the application any further.[17] There is no point in remitting the matter to the arbitrator when the evidence intended to be placed there is inadmissible. The

parties in this case agreed in clause 4.3 of their arbitration agreement that ordinary rules and laws of evidence shall apply to the arbitration. They also agreed in clause 4.1 that “[i]n relation to the Disputes, the Arbitrator shall to the fullest extent possible have the same powers as if he were a Judge of the of the High Court including the power to make such directions as he deems necessary for the just and expeditious conduct of the proceedings subject to the provisions of the Act and the Uniform Rules of Court.”

[75] It is not helpful to suggest that the respondent should have obtained the information itself. I agree with Mr Kuschke, the respondent has no procedural duty to re-open proceedings to prove a case against itself. It was successful in the arbitration and cannot be said to be dishonest by being unwilling to do what the applicants suggest it should do.

Is the evidence weighty and material?

- [76] In view of my findings above, I need not deal with the weight and materiality of this new evidence in any great detail. It will be recalled that one of the guidelines referred to in Colman *supra* was that evidence to be tendered must be weighty and material and presumably to be believed, and must be such that it would practically be conclusive.
- [77] It may be argued that the letter from Ms Mazyambe referred to earlier, sought to be presented as new evidence, raises questions which may need to be verified by the witness. For instance she refers to 'Shoprite' as not being the seller of the affected trades, when it is common cause that Shoprite Checkers and not the respondent was the beneficial owner of the treasury shares. It is alleged by the respondent that only LNA would have reflected as the seller of treasury shares, being the registered holder (nominee), not the respondent or Shoprite Checkers. In the replying affidavit, the applicants try to overcome this by referring to a letter from Mr Mutoni mentioning LNA as not being the seller, as well. Even so I am not persuaded that the letters by themselves remain conclusive without the need for the witnesses to testify.
- [78] There is also doubt as regards Mr Mutoni's independence as a witness, given Stockbrokers Zambia's alleged role in the events leading to the dispute which was the subject matter of the arbitration proceedings. The respondent pointed out that given Stockbrokers Zambia being cited as the defendant in the Zambian proceedings, Mr Mutoni as a managing director may not give an unbiased opinion, which is all the more the reason why reliance could not be placed on Mr Mutoni's 'say-so'. The applicants do not counter the allegations regarding Mr Mutoni's lack of independence as a witness.
- [79] In light of all this it cannot be said that the evidence sought to be introduced passes the test for weightiness.

Prejudice

- [80] Then comes the question of prejudice. Prejudice is inherent in matters where parties had agreed that the arbitration award would be final and binding, but that does not entail that a matter can never be re-opened if circumstances call for that to happen. I am alive to the applicants' submission regarding the amount of money that is at stake should the matter not be remitted; however, the element of finality, viewed in the context of my findings in this case, is a factor that must weigh against the applicants.
- [81] Furthermore, the kind of prejudice to be suffered by the respondent is not that which could be dealt by an appropriate cost order. This matter differs from a case like *York Timbers supra* where the issue to be remitted was narrow and ancillary and would not require a rehashing of issues already thrashed out.
- [82] Mr Van der Berg conceded that all the applicants have are the letters, which constitute hearsay evidence and submitted that the matter should be resolved on that basis. As things stand, the respondent would be deprived of an opportunity of testing this alleged

evidence.

Extension of time period

[83] Returning to the condonation application the applicants fell short on showing good cause, not only by virtue of inadequate explanation but also due to the failure of their case on the merits. The application to extend the time period, therefore, cannot succeed.

Conclusion

[84] In view of my findings on the remittal in terms of s 32 (2), I do not need to deal with the question of whether the applicants side-stepped

the strict requirements of s 33 (1) of the Act by resorting to s 32 (2), as well as the alleged incoherent nature of the relief sought.

[85] For those reasons, I make the following order:

1. Condonation application is refused.
2. Application to file applicants' further affidavit is refused.
3. The application is dismissed with costs, including the costs of two counsel.

N P BOQWANA

Judge of the High Court

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APPEARANCES

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[1] 1995 (3) SA 816 (A) at 824I-J

[2] 2013 (5) SA 84 (SCA)

[3] Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd [2010] 3 All SA 537 (SCA) at para 35

[4] 2003 (1) SA 331 (SCA) at para 14

[5] South African Forestry Co Ltd v York Timbers Ltd supra at para 14

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- [6] See South African Forestry Co Ltd v York Timbers Ltd supra at para 15
- [7] 1933 AD 141 at 161-162
- [8] Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C) at 964D
- [9] Benjamin supra at 964 G-I
- [10] Benjamin supra at 964 J-965 A
- [11] Saamwerk Soutwerke (Pty) Ltd v Minister of Mineral Resources and Another (1098/2015, 206/2016) [2017] ZASCA 56 (19 May 2017) at para 33
- [12] 1981 (3) 91 (D) at 95 C- D
- [13] Referring to Deintje v Gratus & Gratus 1929 AD 1
- [14] Barclays supra at 94 B-D
- [15] 1970 (1) SA 609 (A) at 626 E-H
- [16] Benjamin supra at 964 G-I
- [17] See Benjamin supra at 964 G
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