

SOUTH AFRICA / JUDGMENT

Desiderio v Joffe and Others (37219/2022) [2024] ZAGPJHC 785 (21 August 2024)

[2024] ZAGPJHC 785**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Goedhart

CASE / FILE NUMBER

37219/2022

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG****1. REPORTABLE: NO****2.OF INTEREST TO OTHER****JUDGES: NO****21 August 2024****In**

the matter between:

CASE

NR: 37219/2022

DESIDERIO

GONÇALVES GIL

Applicant

And

THE

ARBITRATOR, JUDGE M M JOFFE

First

Respondent

The

ARBITRATOR, ADV P SOLOMON SC

Second

Respondent

THE

ARBITRATOR, ADV JP VORSTER SC

Third

Respondent

LUIZ

ALBERTO GONÇALVES GIL

Fourth
Respondent
First
Matter
LUIZ
ALBERTO GONÇALVES GIL
Applicant
And
DESIDERIO
GONÇALVES GIL
First Respondent
GIL'S
FRESH MEAT CC
(Registration Number:
1998/20994/23)
Second Respondent
ERF
1812-1813 NOORD STREET CC
(Registration
Number: 1996/023007/23)
Third Respondent
NEDBANK
LIMITED
(Registration Number
1951/000009/06)
Fourth Respondent
THE
REGISTRAR OF CLOSE CORPORATIONS
("the Forensic
Application")
AND
Fifth Respondent
Second

Matter:

In the matter between: CASE
NO: 17/22864
PALM
ISLAND INVESTMENTS 68 CC
Plaintiff
And
LUIZ
ALBERTO GONÇALVES GIL
("the Palm
Islands matter")
Defendant
AND
Third

Matter:

In the matter between: CASE
NO: 17/4898
GIL'S
FRESH MEAT CC
Plaintiff
and
LUIZ
ALBERTO GONÇALVES GIL
("the GG Trading
matter")
Defendant
Summary: Application to
have arbitration award made an order of court in terms of section 31
of the Arbitration Act 42 of 1965 (the
Act); Counter-application for
condonation in terms of section 38 of the Act and to have arbitration
award set aside in terms of
section 33(1)(b) of the Act on the basis
that arbitral panel committed gross irregularity by failing to
correctly apply the best
evidence rule.

JUDGMENT**GOEDHART AJ:**

- [1] This is an application by Luiz Alberto Gonçalves Gil (Luiz)[1] to have the arbitration award dated 29 March 2022 (the Award) made an order of court in terms of section 31[2] of the Arbitration Act, 42 of 1965 (the Act), and an application by Desiderio Gonçalves Gil (Des), for condonation in terms of section 38 of the Act, for the late filing of the counter-application to have the arbitration award set aside in terms of section 33(1)(b) of the Act.
- [2] The application to have the Award made an order if court is referred to as "the main application".
- [3] Luiz and Des are brothers and held equal members' interest in the various corporate entities described in the header. Des emigrated to Australia in 2002/2003. Once successful business partners, the brothers have been embroiled in acrimonious litigation and arbitration proceedings for a protracted period of time.
- [4] The application for condonation falls to be dealt with first. To this end, it is apposite to commence with the chronology of the proceedings between the parties.

RELEVANT CHRONOLOGY

- [5] During January 2020, the parties agreed to have various disputes that were pending in court at the time referred to arbitration. The disputes are referred to as the first, second and third matter in the heading.
- [6] On 21 October 2020, an award was granted by consent in the arbitration in terms of which Des was required to provide specified financial information to Luiz. The consent award was not complied with.
- [7] On 26 July 2021 a pre-arbitration minute was signed. It is common cause between the parties that the signed pre-arbitration minute constitutes a written arbitration agreement as contemplated by the Act.
- [8] On 23 February 2022, Fluxmans Inc, Des' previous attorneys of record withdrew.
- [9] On 11 March 2022, an interlocutory award was granted against Des to provide financials.
- [10] On 21 March 2022, the arbitration hearing was due to commence and was initially allocated for a period of 10 days. The arbitral panel comprised retired judge MM Joffe, P Solomon SC and JP Vorster SC. Des absented himself from the arbitral proceedings.
- [11] On 11 April 2022, the arbitral panel published the Award.
- [12] On 24 October 2022, Luiz launched the main application. Personal service was effected on Des on 25 October 2022.
- [13] On 17 November 2022, Des filed a notice of intention to oppose.
- [14] On 21 November 2022, Des engaged the services of VFV attorneys, his current attorneys of record.
- [15] On 1 December 2022, Des was ordered to file an answering affidavit to the main application on/or before 31 January 2023.
- [16] On 1 March 2023, the matter was re-enrolled on the unopposed roll and the court ordered Des to file an opposing affidavit on/or before 31 March 2023.
- [17] On 6 March 2023, the audio version of the arbitration proceedings was furnished to Des.
- [18] On 27 March 2023, Luiz' attorneys of record, Van Wyk Inc, furnished an explanation as to what is described as "the missing part" of the audio record.
- [19] On 31 March 2023, Des filed an answering affidavit. In the answering affidavit, the issue of setting aside the Award was raised on the basis that the arbitrators committed a gross irregularity as contemplated by section 33(1)(b) of the Act in allowing secondary evidence as a basis to grant the relief sought by Luiz. The defense was raised in the answering affidavit without a simultaneous

counter-application having been delivered.

[20] On 3 July 2023, Luiz filed his heads of argument in the main application.

[21] The application to compel Des' heads of argument was enrolled for hearing on 1 August 2023.

[22] On 28 July 2023, Des filed the counter-application which included the application for condonation for the late-filing of the counter-application to have the Award set aside in terms of section 33(1)(b) of the Act.

APPLICATION FOR CONDONATION

[23] The relevant Section 33 of the Act provides:

“33 Setting aside of award

(1) Where –

(a) ...

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings...

(c) ...

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within 6 weeks after the publication of the award to the parties ...”

[24] Section 38 of the Act provides that “[T]he court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not.”

[25] An application for condonation for the non-observance of the rules of court is not a mere formality.[3]

[26] Whilst “good cause” is not strictly defined it comprises at least two principal requirements. The first is that there must be a reasonable explanation for the delay and the second is that the applicant for condonation must have a bona fide case on the merits with some prospects of success.[4]

[27] In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curae) (Van Wyk)*[5] the Constitutional Court pointed out that:

“(a) An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.” [6]

[28] Further, the application for condonation should be lodged without delay, as soon as it is realised that there has been non-compliance with the time period.[7]

[29] A delay in applying for condonation may, in itself, be sufficient reason to deny the request. [8]

[30] In *MM Fernandes (Pty) Ltd v Mohammed*[9] Zulman AJ (as he then was) held:

“In terms of s33(2) of the Act, an application to set aside the award “shall be made within six weeks after publication of the award to the parties”. The award in the instant matter was published to the applicant on 4 March 1985 and to the respondent on 28 March 1985. The respondent took no steps whatsoever to set the award aside but merely contented himself with resisting the claims made by the applicant in its notice of motion. The answering affidavit of the respondent was deposed to in the application on 29 April 1985 and no application was made to set aside the award...I am accordingly of the view that it is not permissible for a respondent, faced with an award with which he is not satisfied by reason of alleged misconduct on the part of an arbitrator, not to apply to set aside the award but merely seek to raise such alleged misconduct without joining the architect when an attempt is made to enforce the award.”[10]

[31] A party who wishes to file a counter-application to an application is to do so together with the answering affidavit. In *Good Hope Plasterers CC t/a Good Hope Construction v E-Junction Property Developers (Pty) Ltd and Others*[11] the court stated the position as follows:

“[48] Rule 6(7) must be read with Rule 24, which deals with counterclaims and requires that a defendant who counterclaims, shall deliver a claim in reconvention together with his plea. This also applies to motion proceedings, in that a counter-application must be filed together with the respondent’s answering affidavit. My reading of Rule 6(7)(a) & (b) supports this supposition, but in addition, it is well established that suggested procedures for actions also applies to motions when it is “convenient and sensible.”

[32] As set out above, Des’ answering affidavit to the main application was delivered on 31 March 2023, but did not include the counter-application. The counter-application, delivered on 28 July 2023, is therefore well out of time, by close to four months.

[33] Des’ explanation for not filing the counter-application with the answering affidavit on 31 March 2023 is that:

- (i) he was unrepresented when the main application was served; (ii) he had to comply with the order of Vally J of 1 March 2023 by delivering his answering affidavit on 31 March 2023; and (iii) and he had only received the transcriber’s certificate on 24 July 2023, whereafter he filed the counter-application on 28 July 2023.

- [34] The fact that Des was not represented at the time the main application was served on him, presents no excuse. He was represented as from 21 November 2022 when he engaged his current attorneys of record. The first court order required of him to deliver his answering affidavit by 31 January 2023, which date was then extended to 31 March 2023, and therefore compliance with the court order does not constitute an excuse for the failure to simultaneously serve the counter-application.
- [35] Turning to the third explanation set out in paragraph 33 above, the answering affidavit to the main application contains large tracts of quotations from the record in support of the contention that the arbitrators committed a gross irregularity in failing to properly apply the best evidence rule.
- [36] The certified transcript of the arbitration proceedings is identical to that which is quoted in the answering affidavit to the main application, and the extracts relied upon from the arbitration record is identical to the extracts relied upon in the counter-application to support the relief sought in terms of section 33(1)(b) of the Act. In as much as the audio record, made available on 6 March 2023, was sufficient to enable Des to deliver his answering affidavit, it would have been similarly sufficient for purposes of formulating a timeous counter-application.
- [37] The absence of a certified transcript was thus not an impediment to finalising a simultaneous counter-application.
- [38] Luiz contends that the late filing of the counter-application on 28 July 2023 was directed at sabotaging the hearing of the application to compel Des' heads of argument which was due to be heard on 1 August 2023, in keeping with a general disdainful approach to the proceedings between the parties.
- [39] The history of the proceedings between the parties does reflect that Des was a less-than-compliant participant in the proceedings.
- [40] Contrary to what is required in Van Wyk, there is no explanation in the counter-application as to the steps taken to obtain a certification of the record between 6 March 2023 when the record was first provided to Des (through his attorneys) and 24 July 2023, when the certified transcript was obtained.
- [41] Des' explanation for the delay of approximately four months falls woefully short of the requirement that the entire period of delay should be fully explained. He was represented by his current attorneys of record by the time of his return to Australia in April 2022, and therefore his absence from South Africa presents no excuse in and of itself for the delay.
- [42] The second requirement is whether there is a bona fide defence which has reasonable prospects of success. In this case, whether there are reasonable prospects of demonstrating that the arbitral panel committed a gross irregularity as contemplated by section 33(1)(b) of the Act, by incorrectly applying the best evidence rule.

[43] It is well-established that, by agreeing to arbitration, parties limit interference by courts to the grounds of procedural irregularities

set out in section 33(1) of the Act.[12] Courts are required to construct the grounds set out in section 33(1) strictly in relation to private arbitrations.[13]

[44] The phrase “gross irregularity in the proceedings” envisages an irregularity in the conduct of the proceedings and not the result thereof. Further, the irregularity must have been of such a nature that it resulted in the aggrieved party not having his case fully and fairly determined.[14]

[45] The court will not remit the award where:

45.1. some material point has allegedly been overlooked; or

45.2. where the arbitrators have erred on a point of law or fact;[15] or

45.3. done some act which the court considers wrong.[16]

[46] In *Telcordia Technologies Inc. v Telkom*, Harms JA held:

“[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator “has the right to be wrong” on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry - they may be misconceptions about meaning, law or the admissibility of evidence, but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. ...”

[47] It is necessary to establish mala fides or moral turpitude before an award can be set aside on the basis of misconduct”.[17] The notion that “misconduct” should be given an extended meaning to include “legal misconduct” not involving moral turpitude has been firmly rejected by our Courts.[18] There is no suggestion of misconduct here.

[48] The arbitral tribunal was satisfied that Luiz did everything within his power to search for and try and obtain relevant information and that he had placed the best evidence at his disposal before the arbitral tribunal. Whether this finding is correct or not is, on the applicable authorities, irrelevant and presents no basis to interfere with the Award on the grounds put forward in the counter-application.

[49] The financial and accounting duties were Des’ responsibility whilst the parties shared a joint interest in their various business endeavours. It is not irrelevant to the overall consideration of the prospects of success that Des had disregarded two orders compelling him to provide the relevant financial information; the absence of which he now relies upon for the assertion that the arbitral panel committed a gross irregularity by failing to consider the best evidence in respect of the accounting records of Gil’s Fresh Meat CC, and that the information had been in Luiz’ possession “all along”. He relies in the counter-application on an email which he penned on 10 March 2022 which he states was not taken into account.

There is however no explanation for the failure to comply with two compelling orders, one of which was obtained by consent, to provide the required financial information. The arbitrators found that the paucity of relevant information must be laid solely at Des' door. Viewed in context, the contention that the arbitral panel failed to correctly apply the best evidence rule strikes as self-made and self-serving.

[50] It follows that the contention that the Award stands to be set aside on the basis that the arbitral panel committed a gross irregularity by failing to correctly apply the best evidence rule as contemplated by section 33(1)(b) of the Act is not a bona fide defence and has no prospects of success.

[51] In the result, the requirements for demonstrating good cause as required by section 38 of the Act have not been established, and the application for condonation for the late filing of the counter-application stands to be dismissed.

THE MAIN APPLICATION

[52] Section 31(1) of the Act provides:

‘(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.’

[53] In order to succeed with the application to have the Award made an order of court, the applicant has to demonstrate that there was:

53.1. a valid arbitration agreement covering the dispute;

53.2. the arbitrators were duly appointed;

53.3. there was a valid award in terms of the reference.[19]

[54] There is no dispute that these requirements have been met in the present case. There was further no dispute that, should Des fail in the application for condonation and in the counter-application, Luiz would be entitled to the relief sought in the main application.

[55] Consequently, the relief sought in the main application stands to be granted.

ORDER

[1] In the result, I make the following order:

1.1. The application for condonation for the late filing of the counter-application is dismissed with the costs to be paid by the applicant in the counter-application to the fourth respondent.

1.2. The award dated 29 March 2022 and published on 11 April 2022 is made an order of court.

GOEDHART AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 22 July 2024

Date of judgment: 21 August 2024

(This judgment was handed down electronically by circulation to the parties' representatives via email.)

For the Applicant in the Main Application (Fourth Respondent in the counter-application): Adv J C Viljoen Instructed by: Marius van Wyk Inc For the Applicant in the Counter-Application: Adv N C Maritz Instructed by: VFV Attorneys

[1] The parties are referred to by their first names for ease of identification.

[2] Section 31 provides: (1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the

other party or parties, be made an order of court. (2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.'

[3] Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd 2012 (2) SA 637 (CC), paragraph 16.

[4] Venmop 275 (Pty) Ltd and another v Cleverlad Projects (Pty) Ltd and another 2016

(1) SA 78 (GJ) at para 23 and the cases there cited.

[5] 2008 (2) SA 472 (CC).

[6] Ibid at paragraph 22.

[7] Minister of Agriculture and Land Affairs v CJ Rance 2010 (4) SA 109 SCA at 118A-B; Beira v Raphaely Weiner and Others

[1997] ZASCA 59; 1997 (4) SA 332 (SCA) at 337D.

[8] Madinda v Minister of Safety and Security, Republic of South Africa

[2008] ZASCA 34; 2008 (4) SA 312 (SCA) at 323E to F.

[9] 1986

(4) SA 383 (W).

[10] Ibid at 388I-389C.

[11] (9671/2020) [2020] ZAWCHC 162 (19 November 2020).

[12] Telcordia Technologies Inc v Telkom SA Ltd

[2006] ZASCA 112; 2007 (3) SA 266 (SCA) (Telcordia) at paragraph 51.

[13] Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another 2009 (4) SA 529 (CC) at para 235.

- [14] Bester v Easygas (Pty) Ltd 1993 (1) SA 30 (C) (Bester) at 42G-43D;
- [15] Telcordia, fn 9 above, paras 67 and 69; Gutsche Family Investments (Pty) Ltd & others v Mettle Equity Group (Pty) Ltd & others
- [2012] ZASCA 4; [2012] JOL 28579 (SCA) (Gutsche) at para 18.
- [16] Gutsche, Ibid.
- [17] Bester at 37H-I; Kolber v Sourcecom Solutions (Pty) Ltd, Sourcecom Technology Solutions (Pty) Ltd v Kolber 2001
- (2) SA 1097 (C) 1108A-B.
- [18] Bester, Ibid at 361I-J; Hyperchemicals International (Pty) Ltd v May Baker Agrichem (Pty) Ltd 1992 (1) SA 89 (W) 96I-100B.
- [19] Arbitration in South Africa, Law and Practice, Butler & Finsen (1993), p273 quoted with approval in Bidoli v Bidoli (2892/08) [2010] ZAWCHC 39 (15 March 2010) at para 14.

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