

SOUTH AFRICA / JUDGMENT

Gil v Gil (2022/037219) [2025] ZAGPJHC 29 (20 January 2025) [2025] ZAGPJHC 29

COURT

South Gauteng High Court, Johannesburg

BEFORE

Goedhart AJ

CASE / FILE NUMBER

2022/037219

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case

no: 2022-037219

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

Date:

20 January 2025 Signature:

In

the matter between:

DESIDERIO
GONÇALVES GIL
Applicant
and
LUIZ
ALBERTO GONÇALVES GIL
Respondent
In

re:

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
1[...]-1[...] N[...] 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 for
leave to appeal to the Supreme Court of Appeal on the basis that
there is a reasonable prospect that the
SCA would find that the
arbitration tribunal committed a gross irregularity as contemplated
by section 33(1)(b) of the Arbitration Act 42 of 1965 in that the
arbitration tribunal had relied upon secondary evidence rather than
the best evidence, which was impermissible in the

circumstances. The applicant avers that his right to a fair hearing as contemplated by section 34 of the Constitution was infringed in consequence of the gross irregularity.

JUDGMENT

GOEDHART AJ:

- [1] The applicant, Mr Desiderio Gonçalves Gil, seeks leave to appeal in terms of sections 16(1)(a) (i), 17(1)(a)(i) and 17(2)(a) of the Superior Courts Act, 10 of 2013, against the judgment and order granted on 21 August 2024, in terms of which the applicant's application for condonation for the late filing of his counter-application to have the arbitration award dated 29 March 2022 and published on 11 April 2022 (the Award) set aside in terms of section 33(1) (b) of the Arbitration Act, 42 of 1965 (the Act) was dismissed with costs. The application by Mr Luiz Alberto Gonçalves Gil (Luiz) to have the Award made an order of court in terms of section 31 of the Act was granted.
- [2] The applicant and the respondent, Luiz, are brothers and were once business partners. As appears from the judgment, there is a long and bitter history of litigation between them.
- [3] The relief granted in the Award was, inter alia, that the applicant's membership in Gil's Fresh Meat CC (GFM) and in Erf 1[...] -1[...] N[...] Street CC (Erf) was ordered to cease and terminate, and that the applicant was removed as a member with immediate effect. The applicant was ordered to transfer his 50% membership interest in GFM and in Erf without remuneration and/or consideration to be paid to Luiz, and to sign all documents and to take all steps necessary to effect the transfer of his member's interest in GFM and Erf, failing which the sheriff was authorised to do what is necessary to give effect to the transfer.
- [4] It is common cause that the arbitration, which commenced on 21 March 2022 before Judge M Joffe, Adv JP Vorster SC and Adv P Solomon SC as the arbitrators, was conducted in terms of the Act.
- [5] After the Award was published, Luiz launched an application on 24 October 2022 to have it made an order of court in terms of section 31 of the Act (the main application). The applicant served a notice of intention to oppose on 17 November 2022, but did not serve his answering affidavit timeously. On 1 March 2023, the applicant was ordered to deliver his answering affidavit on or before 31 March

2023. The applicant delivered his answering affidavit as ordered on 31 March 2023. The answering affidavit sets out the defense that the arbitrators had committed a gross irregularity as contemplated by section 33(1)(b) of the Act by accepting secondary evidence. The counter-application was however not delivered simultaneously with the answering affidavit, but was served on 28 July 2023, together with the application for condonation.

[6] The applicant argues that the strong prospects of success should excuse any inadequate explanation for the delay in bringing the counter-application to have the Award set aside. Counsel for the applicant, Mr Maritz, was at pains to point out that the concession that there was an inadequate explanation for the delay, is made only for purposes of the application for leave to appeal. The qualified concession means that the issue of the explanation for the delay, one of the requirements for condonation, need not be dealt with further in this judgment.[1]

[7] The crux of the applicant's case is that he has strong prospects of success that another court, specifically the SCA to which leave to appeal is sought, would come to a different conclusion, because the arbitration tribunal committed a gross

irregularity in allowing secondary evidence as a basis to grant the relief sought, in circumstances where the best evidence was at the disposal of Luiz and thus at the disposal of the experts called on his behalf. The applicant avers that the gross irregularity resulted in the infringement of the applicant's right to a fair hearing as enshrined in section 34 of the Constitution, and was thus a gross irregularity in the conduct of the proceedings as contemplated by section 33(1)(b) of the Act, which would entitle the applicant to have the Award set aside.

[8] In *Ramakatsa and Others v African National Congress and Another*,^[2] the SCA held that the test of reasonable prospects of success postulates a dispassionate decision, based on the facts and the law

that a court of appeal 'could' reasonably arrive at a conclusion different to that of the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. An applicant who applies for leave to appeal must show that there is a sound and rational basis for the conclusion that there are prospects of success.

[9] In *Smith v S*,^[3] *Plasket AJA* (Cloete and Maya JJA concurring), held as follows at para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that the

court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the

appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not

remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[10] In *Mont Chevaux*,

[4] the Land Claims Court held (in an obiter dictum) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. This view has also been endorsed by the SCA in an unreported judgment in *Notshokovu v S*[5] in which the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959.[6]

[11] The phrase “gross irregularity in the proceedings” envisages an irregularity in the conduct of the proceedings and not the result thereof. The irregularity must have been of such a nature that it resulted in the aggrieved party not having his case fully and fairly determined.[7]

[12] The financial statements relative to GFM and Erf were analysed by the experts, Prof Wainer and Mr Passalacqua without recourse to the source documents which inform and underpin the financial statements. It is these source documents which the applicant contends were in Luiz’ possession all along and in respect of which the applicant contends Luiz had perjured himself when giving evidence before the arbitration tribunal. The tribunal had found that Luiz had testified about his efforts to obtain the financial records which would be of assistance to the experts and that the applicant had withheld the records.[8] Luiz’ evidence was not challenged.

[13] The issue of the financial source documents was dealt with in two awards which preceded the Award. The first award was an award by consent between the parties dated 21 October 2020. That award provided, in paragraph 3, that the applicant provide Luiz and his appointed forensic auditor with complete financial records of GFM, which included inter alia the complete source documents underpinning the ledger accounts of GFM from its inception until the date of the award, as well as complete bank statements insofar as he possessed the documents within 14 days of his return to South Africa.[9] The applicant did not return to South Africa as contemplated in the award of 21 October 2020.[10]

[14] On 21 February 2022, Luiz launched an interlocutory application in which he sought an order compelling the applicant to immediately divulge all details of all accounting profiles upon which the accounting records of GFM are captured, including the profile used by the applicant himself, together with all usernames and passwords and/or other security codes in order to gain free and unrestricted access to the accounting software.[11]

[15] The founding affidavit to the interlocutory application set out that the award of 21 October 2020 had not been complied with by the applicant, and that the information was required by Luiz to enable his forensic accountants to determine the value of GFM and Erf in order to

quantify the amount payable to the applicant upon the cessation of his membership in the two closed corporations. The applicant was afforded an opportunity to deliver an answering affidavit on or before 2 March 2022 by email, as he resided in Australia. The interlocutory application was set down for hearing on 11 March 2022.

- [16] The applicant's attorney of record, Mr Shapiro of Fluxmans Inc. withdrew on 23 February 2022.
- [17] On 1 March 2022 the arbitration tribunal inquired from the applicant by email whether he intended participating in the arbitration and if so, whether he would be appointing new attorneys or whether he would be conducting the arbitration in person.[12] He only responded to this inquiry on 18 March 2022.
- [18] On 10 March 2022, the applicant addressed a letter to, among others, each of the arbitrators individually and to Mr Passalacqua in which he averred that all the information regarding GFM was in Luiz' possession at GMF, that it had been backed up electronically and printed and that a hard copy was available at the premises GFM.[13] It is this email upon which the applicant relies in support of the contention that the information sought by Luiz had been in Luiz' possession all along.
- [19] The applicant did not deliver an answering affidavit to the interlocutory application which was heard on 11 March 2022. An invitation had been sent to the applicant to participate on the virtual platform, Microsoft Teams. He did not respond to the invitation.[14]
- [20] The interlocutory award was granted on 11 March 2022 and was not complied with by the applicant.[15] The Award deals with the interlocutory application and sets out that the arbitration tribunal had considered the applicant's email of 10 March 2022, but were persuaded that Luiz had made out a case for the information sought in the interlocutory application.
- [21] On 18 March 2022, the applicant advised that he would not be attending the arbitration, but that Fluxmans Inc held instructions to liquidate GFM.
- [22] On 21 March 2022, the applicant was sent an invitation to participate in the arbitration virtually by way of Microsoft Teams. Despite the invitation, the applicant did not participate.
- [23] In the counter-application which served before me, the applicant does not explain why he consented to the award of 21 October 2020 if his position, as set out in the email of 10 March 2022, was that Luiz was in possession of the financial source documents at GFM all along.
- [24] The applicant has not sought to impugn either the consent award of October 2020 or the interlocutory award of 11 March 2022. Both these awards stand.

- [25] The arbitration tribunal had afforded the applicant an opportunity to participate in the interlocutory application on 11 March 2022 and also in the arbitration proceedings which commenced on 21 March 2022. Further, on 23 March 2022, the arbitration panel had directed that the applicant be informed that Mr Parfitt would be testifying and that his recent valuation of Erf be provided to the applicant which was done.[16] This notification also did not cause the applicant to participate in the arbitration.
- [26] The arbitration panel recognised that the experts were hamstrung in formulating their opinions by the paucity of the relevant information and by the failure of the applicant to give evidence to explain his transactions and by failing to subject himself to cross-examination in regard to the transactions.[17] Thus, the arbitrators found that the difficulty experienced by the experts in formulating their opinions was not solely attributable to the paucity of relevant information, but was also due to the failure on the part of the applicant to participate in the arbitration
- proceedings by giving evidence and subjecting himself to cross-examination, despite having been afforded the opportunity to do
- so.
- [27] The primary question in determining whether the applicant has reasonable prospects of success in demonstrating that there had been a gross irregularity in the conduct of the proceedings is whether the applicant had a fair trial.
- [18] In *Goldfields* the court explained that the crucial question is whether the irregularity complained of prevented a fair trial on the issues.[19]
- [28] In *Dexgroup (Pty) Ltd v Trustco Group International and others*[20] the appellant sought to challenge the arbitration award in terms of section 33(1)(b) of the Act inter alia on the basis that the arbitrator had regard to inadmissible evidence in construing the agreement in issue. The Supreme Court of Appeal considered the position in England and held that, provided the parties receive a fair hearing, there are no grounds for challenging the arbitrator's decisions in regard to the admissibility of evidence.[21] Unless the arbitration agreement provides otherwise, the arbitrator is not obliged to follow the strict rules of evidence, provided the procedure adopted is fair to both parties and conforms with the requirements of natural justice.[22] Further, that arbitrators should be free to adopt such procedures as they deem appropriate to ensure the just and expeditious determination of disputes and to determine the admissibility of evidence without being shackled by the formal rules of evidence.[23]
- [29] In this case, the experts conducted their investigations based on the financial information provided by the applicant. Luiz could not be non-suited because the experts could not place reliance on exact figures. The arbitration tribunal had to assess such evidence as had been placed before it.[24] The arbitration tribunal was satisfied that Luiz had placed the evidence available to him before it. The applicant, who had been responsible for the financial and

accounting duties whilst the parties had shared interests in their various businesses, failed to comply with two awards dealing with the source documents which he now asserts was not considered. He also failed to provide an explanation for the transactions in which he was directly involved.

[30] The applicant had agreed to the consent award of 21 October 2020. The consent order stands. The applicant failed to oppose the interlocutory proceedings. After having sent his email of 10 March 2022, he was sent an invitation to participate in the interlocutory

proceedings, but failed to do so. He has not sought to set aside the interlocutory award. He failed to participate in the arbitration

proceedings despite having been invited to do so. He now avers that the arbitration tribunal had failed to have regard to the best

evidence which, he had stated in the email of 10 March 2022, had been in Luiz' possession all along.

[31] It is apparent from the Award that the arbitration tribunal did have regard to the email of 10 March 2022, but that they were nonetheless persuaded that Luiz had made out a case for the interlocutory order sought.

[32] In my view, in light of the undisputed facts set out above, the applicant has failed to demonstrate that the acceptance by the arbitration tribunal of Luiz' unchallenged evidence and the evidence of the experts was an error of law which constituted a gross irregularity as required by section 33(1)(b) of the Act or that the secondary evidence was inadmissible. I am also not persuaded that it has been demonstrated that reliance on the secondary evidence resulted in an infringement of the applicant's right to a fair hearing because there was an irregularity in the method of the trial, or because it prevented the applicant from having his case fully and fairly determined.[25] The applicant was not prevented from providing the information sought in the consent award or in the interlocutory award of 11 March 2022. He was not prevented from contesting these awards. The applicant was not prevented from presenting his case in the arbitration proceedings.[26] He elected, with full knowledge of the arbitration proceedings, not to participate, despite having been given more than one opportunity to do so.

[33] One of the grounds of appeal is that I had applied the incorrect test in assessing the applicant's application for condonation, with reference to paragraph 47 of the judgment.[27] I disagree. That paragraph deals with what is required if an arbitration award is sought to be set aside on the basis of misconduct, and it concludes that there is no suggestion of misconduct in this case. It does not suggest that the applicant brought his application in terms of section 33(1)(a) of the Act. The whole of the judgment deals with section 33(1)(b) of the Act, and the paragraph must be read within the context of the judgment as a whole. Even if the applicant read the paragraph as applying the incorrect test as is being contended, an appeal lies against the order, not the reasons for the judgment.[28]

[34] The applicant sought leave to appeal to the Supreme Court of Appeal, but the requirements of section 17(6)(a)(i) and (ii) of the Superior Courts Act, 2013 have not been met.

[35] I therefore find that the applicant has not demonstrated that there is a reasonable prospect that another court would come to a different

conclusion.

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

36.1. The application for leave to appeal is dismissed with costs.

GOEDHART AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 16 January 2025

Date of judgment: 20 January 2025

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

For the Applicant: Instructed by: Adv N C Maritz VFV Attorneys For the Respondent: Instructed by: Adv J C Viljoen Marius van Wyk Inc

[1] Application for Leave to Appeal, paras 7, 8 and 9 deal with the issue of delay.

[2] (724/2019)

[2021] ZASCA 31 (31 March 2021) at para 10.

[3] 2012

(1) SACR 567 (SCA); [2011] ZASCA 15 (15 March 2011).

[4] The Mont Chevaux Trust v Tina Goosen & 18 others 2014 JDR 2335 (LCC) (Mont Chevaux) at para 6.

[5] (157/15)

[2016] ZASCA 112 (7 September 2016) at para 2.

[6] See also Manaka v University of Witwatersrand (021837-2023) [2024] ZAGPJHC 179 (29 February 2024) at para 7.

[7] Bester v Easygas (Pty) Ltd 1993 (1) SA 30 (C) at 42G-43C citing Ellis v Morgan; Ellis v Desai 1909 TS 576 at 581.

[8] Award, para 23.

[9] Annexure RA4.1.

- [10] Award, para 13.
- [11] Annexure RA4.2 as read with the Award at para 12.
- [12] Award, para 17.
- [13] Annexure DG1.
- [14] Award, para 18.
- [15] Award, para 19.
- [16] Award, para 24.
- [17] Award, para 29.
- [18] Goldfields Investment Ltd v City Council of Johannesburg (Goldfields) 1938 TPD 551 at 560.
- [19] Ibid.
- [20] 2013
- (6) SA 520 (SCA).
- [21] Ibid, para 19.
- [22] Ibid, para 17.
- [23] Ibid, paras 20 and 21.
- [24] Hersman v Shapiro & Co 1926 TPD 367 at 379; Arendse v Maher 1936 TPD 162 at 165; Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 at 968H-969H.
- [25] Goldfields Investment Ltd v City Council of Johannesburg 1938 TPD 551 at 560-561.
- [26] Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and another 2023 JDR 1421 (GJ) at paras 18 and 19.
- [27] Application for leave to appeal, paragraphs 3 and 4.
- [28] Western Johannesburg Rent Board and another v Ursula Mansions (Pty) Ltd 1948
- (3) SA 353 (A) at 355; Tavakoli and another v Bantry Hills (Pty) Ltd 2019 (3) SA 163 (SCA) at para 3.

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