

SOUTH AFRICA / JUDGMENT

Mampuru and Others v Bowman and Another (2024/008706) [2025] ZAGPJHC 212 (5 March 2025)

[2025] ZAGPJHC 212

COURT

South Gauteng High Court, Johannesburg

BEFORE

Swanepoel

CASE / FILE NUMBER

2024/008706

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

number: 2024-008706

Date

of hearing: 24 February 2025

Date

delivered: 5 March 2025

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

5/3/25

SIGNATURE:

In

the application of:

MAMPURU,
MOSES SIPHO
First
Applicant
NOKO
INVESTMENTS (PTY) LTD
Second
Applicant
MAMPURU
WASTE MANAGEMENT (PTY) LTD
Third
Applicant
NOKO
PACKAGING (PTY) LTD
Fourth
Applicant
and
BOWMAN,
CRAIG ANDREW
First
Respondent
ADV.
SCHALK AUCAMP N.O.
Second
Respondent

JUDGMENT

SWANEPOEL J:

- [1] This is a review of an arbitration award that was handed down by the second respondent on 18 December 2023. The applicants seek the setting aside of the award, and an order that the matter be referred for adjudication before a different arbitrator.
- [2] The cause of action in the matter is not important to this judgment. It is sufficient to say that the arbitration arose from an agreement between the first applicant and the first respondent in terms of which the first applicant purchased the first applicant's members' interest in two close corporations and the shares in two companies at a purchase price of R 7 350 000. Having concluded the agreement, the first applicant allegedly breached its terms by failing to pay the purchase price. The second to fourth applicants are party to the matter by virtue of having guaranteed the first applicant's performance under the agreement.
- [3] After a brief sojourn in the courts, the first respondent referred the matter to the Arbitration Foundation of Southern Africa ("AFSA") for the appointment of an arbitrator.

- [4] The second respondent was appointed as arbitrator, and after adjudicating an in limine issue against the first applicant, a pre-arbitration meeting was held on 9 August 2023, with the view to preparing for arbitration on the merits. The first applicant had instructed his attorneys not to be present at the meeting. At the said meeting the parties attempted a settlement, which they could not achieve, and a further pre-arbitration meeting was arranged for 16 August 2023. The first applicant was warned explicitly that the first respondent would not countenance any delay in the matter. He undertook to ensure his attorney's presence at the next meeting.
- [5] The first applicant's attorneys were again not present at the meeting on 16 August 2023. He explained that he had appointed new attorneys, and that he would be delivering the case files to them the following day. The pre-arbitration meeting then proceeded, and the following was agreed:
- [5.1] The parties would deliver discovery affidavits by 31 October 2023;
- [5.2] The first respondent would deliver a bundle of documents by 6 November 2023;
- [5.3] Expert notices, if any, would be delivered by the first respondent in terms of Uniform Rule 36 by 17 November 2023, and by the first applicant by 24 November 2023.
- [5.4] The arbitration would commence on 6 December 2023;
- [5.5] The parties would settle the arbitration costs in equal shares before 6 December 2023, and if any party failed to do so, the other party was entitled to pay the fees on its behalf.
- [6] It was recorded that the first applicant's new attorneys could contact the first respondent's attorneys should they require clarity on any part of the procedure.
- [7] The first respondent discovered by 31 October 2023. On the same day the first applicant sent an email that read:
- "Please find the list of my discovered documents. I am busy finalizing an agreement with my attorney of record."*
- [8] The first respondent's attorneys acknowledge receipt of the list, and requested the first applicant to deliver his discovery affidavit and his bundle of documents. On 1 November 2023 the first respondent's attorneys again reminded the first applicant that he had not complied with his obligation to discover.
- [9] On 20 November 2023, three weeks later, the first applicant wrote to the first respondent's attorney saying:
- "I am still waiting for the documents I requested from you as per the attachment on the 31st October 2023. Please advise when I must expect the documents."*

- [10] I find it inexplicable that the first applicant could somehow interpret his email of 31 October to constitute a request for documents. Nonetheless, the first respondent's attorneys advised him that the documents requested were personal to the first respondent, were irrelevant, and would not be provided.
- [11] The first applicant then did nothing until 6 December 2023 when he appeared, unrepresented, at the arbitration. The first applicant sought a postponement of the proceedings on two grounds: Firstly, that he was unrepresented and had not been able to obtain the services of an attorney, and, secondly, that he had not been provided with the documents that he says he requested on 31 October 2023.
- [12] The arbitrator made the off-the cuff remark that possibly the first applicant could not represent the second to fourth respondents, but he made no finding on the issue.
- [13] The first applicant provided no reason why he had not secured the services of an attorney. As far as the requested documents are concerned, the first applicant was asked what their relevance might be. The first applicant only said that they might become relevant when their contents were scrutinized, and that an attorney might be able to answer the question better. In short, the first applicant could not justify his request for the documents.
- [14] The second respondent considered the request, and then refused a postponement. He enquired from the first applicant how he intended to proceed. The first applicant chose to leave the arbitration proceedings, effectively allowing the arbitration to continue by default. Having heard evidence, the arbitrator then adjourned the case and reserved judgment. He handed down judgment on 18 December 2023.
- [15] The grounds for review are the following:
- [15.1] That there had been no agreement on the rules under which the arbitration would be conducted (the Commercial or Expedited rules of AFSA), and that the second respondent applied different rules to the conduct of the matter;
- [15.2] That the arbitrator had erred in finding that the first applicant could not represent the second to fourth applicants;
- [15.3] That the arbitrator refused a postponement in circumstances where the rules of discovery had not been agreed upon, the first applicant had only become aware shortly before the arbitration that the first respondent did not have the documents that he sought, and that he was unaware of the remedies available to him to obtain the documents;
- [15.4] That the award had been amended improperly subsequent to its publication in order to correct an incorrect date.
- [16] Before I deal with the merits of the application, I point out that the applicants also sought condonation for the late filing of the application, which was not opposed. I shall thus condone the late filing of the application.

[17] The Arbitration Act, 42 of 1965 provides in section 33 (1) for the circumstances under which an award may be set aside. It reads as follows:

“(1) Where-

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained,

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.”

[18] The above provisions are exhaustive of the grounds upon which a private arbitration may be reviewed and set aside. The first applicant relies particularly on section 33 (1) (b), that the second respondent committed a gross irregularity in the proceedings. He argued that although the grounds for review individually may not justify a review, the cumulative effect was that the applicants had not received a fair hearing.

[19] When parties agree to private arbitration, they agree to the expeditious determination of the dispute by way of an agreed and truncated process. In *Telcordia Technologies Inc v Telkom SA Ltd*[1] the court said[2]:

“[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically they agree to waive the right of appeal. Which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

[51] Last, by agreeing to arbitration the parties limit interference by courts to the grounds of procedural irregularities set out in s 33

- (1) of the Act. By necessary implication they waive the right to rely on any further ground of review, ‘common law’ or otherwise.”

[20] The first applicant relies entirely on section 33 (1) (b), that the second respondent allegedly committed a gross irregularity in the matter. In *Bester v Easigas (Pty) Ltd and Another*[3] the Court defined said that a gross irregularity relates to the conduct of the proceedings, and not to the outcome thereof. The

conduct must have been of such a serious nature so as to result in the aggrieved party not having his case fully and fairly determined.

This approach was approved in *Mia v DJL Properties (Waltloo) (Pty) Ltd and Another*[4]

[21] The question is therefore not whether the arbitrator was right or wrong, the question is whether the arbitrator allowed a process by which the aggrieved party was prevented from presenting his case fairly. As it was put in *Rabinowitz v Levy and Others*[5]:

“The ‘gross irregularity’ required by s 33 (1) (b) must relate to the conduct of the proceedings, and not the result or outcome of the proceedings. Thus, if an arbitrator is guilty of conducting an arbitration in some form of high-handed or arbitrary manner, or dishonestly, he or she would be guilty of a gross irregularity. But a bona fide mistake in the merits, no matter how gross, will not suffice. It is furthermore not every irregularity in the conduct of the proceedings that will afford grounds for review; the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.”

[22] It was put eloquently in *Telcordia*, that an arbitrator “has the right to be wrong on the merits”. The arbitrator is granted the right to apply the law as he believes to be correct, and an error in such application does not constitute a gross irregularity.

[23] The applicants, firstly, allege that the arbitrator applied the incorrect rules, by applying the AFSA expedited rules, and that it had not been agreed that those rules applied to the arbitration. The first respondent has stated in the answering affidavit that, notwithstanding that the pre-arbitration minutes do not say so, it had been agreed that the expedited rules would apply. On the *Plascon-Evans* rule[6] I must accept the first respondent’s version unless it is clearly untenable. The facts support the first respondent’s version.

[24] In any event, what, if any, effect did the application of the rules have on the manner in which the proceedings were conducted? In my view, none. The first applicant knew exactly what was expected of him as far as discovery was concerned. He failed to comply with the arbitrator’s directive that he should discover by 31 October

2023. He then sent an email that cannot under any circumstances be interpreted as a request for documents, and he sat back and did nothing to engage with the arbitrator regarding better discovery until he appeared at the arbitration. The first applicant neglected to have his attorneys present at the arbitration. Neither the nature of the rules applied, nor the manner of their application caused the first applicant any prejudice.

[25] The arbitrator has the right to adopt whatever procedure he believes to be appropriate for the resolution of the dispute, unless the arbitral agreement precludes such procedure.[7] In this case the arbitrator decided to adopt the procedures in rule 35, which the first applicant was welcome to follow if he wished to do so. The first ground of review has no merit.

[26] The first applicant also alleged that the second respondent ruled that he could not represent the second to fourth applicants. That is not correct. The second respondent specifically did not make a ruling on this issue. On the contrary, having refused a postponement, he invited the first applicant to continue with the proceedings, at which point the first applicant left the proceedings of his own volition. He is, in my view, the author of his own misfortune.

- [27] The first applicant also contends that the second respondent committed a gross irregularity by refusing a postponement. If regard is had to the above discussion on 'gross irregularities', it is immediately clear that refusing a postponement is not a gross irregularity. The arbitrator exercised a discretion, and even if he did so erroneously, which I do not believe is the case, then he had the right to be wrong. This is not a ground for review.
- [28] The final aspect was the allegation that the award was subsequently corrected in an irregular manner. Counsel for the applicants did not pursue this submission, wisely so, and the less said on this topic the better.
- [29] Counsel for the applicants argued that individually the grounds for review might not justify the setting aside of the award, but that they collectively led to the applicants not receiving a fair hearing. I disagree. The first applicant brought the result upon himself by his dilatory conduct, and by his decision to leave the arbitration. In the circumstances he received a fair hearing.
- [30] The agreement for the sale of provides for the granting of attorney/client costs, and I shall make such an order.
- [31] It follows, therefore that the application must fail, and I make the following order:
- [31.1] The late filing of the application is condoned.
- [31.2] The application is dismissed.
- [31.3] The respondents shall pay the costs on the attorney/client scale, jointly and severally, the one paying the other to be absolved.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

Counsel for the applicants:

Adv P Kok

Instructed by:

Langham-Love Galbraith-Van Reenen Inc

Counsel for the first respondent: Adv B van der Merwe

Instructed by:

Malherbe Rigg and Ranwell Inc

Date heard:

24 February 2025

Date handed down:

5 March 2025

- [1] Telcordia Technologies Inc v Telkom SA Ltd [2006] ZASCA 112; 2007 (3) SA 266 (SCA);
[2007] 2 ALL SA 243 (SCA)
- [2] At paras [50] to [51]
- [3] Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C) at 42 G to 43 D
- [4] Mia v DJL Properties (Waltloo) (Pty) Ltd and Another 2000 (4) SA 220 (T)
- [5] Rabinowitz v Levy and Others 2024 JDR 0220 (SCA); [2024] ZASCA 8 (26 January 2024), at para [15]
- [6] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 620 (A)
- [7] Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd 2013 (6) SA 520 (SCA) at paras 19 to 20

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