

SOUTH AFRICA / JUDGMENT

## Van Deventer and Another v Biggs and Others (3323/2013) [2014] ZAECPEHC 48 (7 August 2014)

[2014] ZAECPEHC 48

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

3323/2013

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

Case

no: 3323/2013

Date

heard: 6.3.2014

Date

delivered: 7.8.2014

In

the matter between:

GYSBERT

JACOBUS VAN DEVENTER First

Applicant / Third Defendant

ADDO

AFRIQUE SAFARI LODGE

Second

Applicant / Fourth Defendant

vs

ANTHONY

LAURISTON BIGGS

First Respondent / First Plaintiff

RIDGE

FARM CC

Second

Respondent / Second Plaintiff  
ALLAN  
COUSINS  
Third  
Respondent / First  
Defendant  
GERALD  
WHITEHEAD  
Fourth  
Respondent / Second Defendant  
ADDO  
AFRIQUE ESTATE (PTY) LTD  
Fifth  
Respondent / Fifth Defendant  
ADDO  
AFRIQUE ESTATE PORTION  
Sixth  
Respondent / Sixth Defendant  
21  
(PTY) LTD  
ANTHONY  
BIGGS N.O.  
Seventh Respondent /  
Seventh Defendant  
LARA  
BIGGS N.O.  
Eight  
Respondent / Eighth Defendant  
MARK  
ANTHONY BIGGS N.O.  
Ninth  
Respondent / Ninth  
Defendant  
ANDRE  
PRETORIUS N.O.  
Tenth  
Respondent / Tenth Defendant

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## JUDGMENT

### ON APPLICATION TO SET ASIDE SUMMONS

#### SUMMARY

- In this matter applicants have applied for the setting aside of the respondents' summons on various grounds which are, inter alia, the following:

- (a) that the settlement agreement embodied in the order of the Court “POC1” binds the parties also in the present litigation and could not be challenged or reviewed;
- (b) that the procedure by way of Rule 53 should have been followed to the letter by the respondents;
- (c) that the proceedings sought to be set aside by the applicants were arbitration proceedings in respect of which:
  - (i) the respondents could only attack in terms of section 33 (1) of the Arbitration Act 42 of 1965;
  - (ii) that in terms of the Arbitration Act respondents were out of time in their attempt to have the proceedings set aside.

The Court held, *inter alia*, that whenever two parties agree to refer a matter to a third party for decision, and further agree that this decision is to be final and binding on them, so long as he or she (arbitrator) arrives at his or her decision honestly and in good faith, the two parties are bound by it. (*Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*

[2007] ZASCA 143; 2008 (2) SA 448 at 455).

TSHIKI J:

A)

## INTRODUCTION

- [1] The parties in these proceedings are engaged in a protracted litigation especially by way of interlocutory applications. Two of those applications have been argued before me and initially I intended to make a combined judgment in respect of the applications

argued before me on the 6th March 2014 (the application for setting aside the summons) as well as on the 9th June 2014 in respect of the application for leading further evidence and to amend. I have decided to separate the two applications

and to deal with them *seriatim* and in this judgment I will proceed with the application for setting aside of the summons. In the application for setting aside of the summons, the parties are cited as they are reflected in the cover of this judgment.

- [2] During argument Mr KJ Kemp SC with him Mr B Pretorius appeared for the applicants and Mr A Beyleveld SC appeared for the respondents.

## B) APPLICATION FOR SETTING ASIDE OF THE SUMMONS

- [3] Briefly the facts herein are that the first plaintiff and first defendant in the action initially entered into a partnership to develop some land as a game farm and into various lots. They did so through the corporate vehicles including the second plaintiff and the second defendant. The first plaintiff herein is Mr Anthony Lauriston Biggs and the second plaintiff is Ridge Farm CC. Whereas the first and second defendants herein are Mr Gysbert Jacobus

van Deventer and his business Addo Afrique Safari Lodge, respectively. A major dispute arose between the parties related to the amounts of their respective loan accounts and how parity should be achieved as well as how to equalise them to give effect to their 50% participation. This dispute led to a Court litigation between them.

[4] The parties to those proceedings subsequently concluded a written Settlement Agreement (a transactio). The said agreement was recorded in those proceedings as annexure “POC1” whose contents were made an order of this Court. The first and second defendants (Allan Cousins and Gerald Whitehead) were appointed as substitute Directors in the fifth defendant. It is common cause that in terms of clause 2(a) of the said agreement “POC1” the purpose of the agreement was to remove the first plaintiff (Biggs) and third defendant (Van Deventer) as Directors and to appoint first and second defendants (Counsins and Whitehead) as substitute Directors. This was done to ensure that the best interests of the company are served. The substitute Directors were then given powers and functions which were recorded in annexure “A”. The substitute Directors, after written representations were made by the parties, made a determination with regards to the loan accounts of the parties. Pursuant to clause 6 of annexure “A” to the agreement the substitute Directors determined the values of the loan accounts as clearly stated in the summons.

[5] One of the settlements deals specifically with the determination of the loan accounts of the parties herein which were to be dealt with without delay and at the earliest convenience. The parties specifically agreed that the decisions reached by the Auditors and or valuers etc (substitute Directors) shall be final and binding on all the parties thereto. The aforesaid loan accounts shall be determined in the sole and absolute discretion of the substitute Directors who shall be guided by generally accepted accounting

principles whose decisions shall be final and binding on the parties concerned.

[6] The fact that the parties had agreed to have the decisions and determinations a final and binding effect shows that their agreement

is a sort of a hybrid arbitration expert determination. The action by Mr Biggs filed on the 14th November 2012 was filed with a view to attack the settlement. The parties herein could not then have the right to have the merits of the dispute reconsidered or re-litigated in any manner unless such interference is permitted on the grounds of procedural irregularities a set out in section 33 (1) of the Arbitration Act 42 of 1965 (the Arbitration Act) which reads:

“(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.”

[7] None of the above requirements have application in the present proceedings and respondents do not rely on the provisions of section 33 (1) of the Arbitration Act either. Therefore, no attack has and can be made by the respondents herein in terms of section 33(1) of the Arbitration Act.

"[18] 'There can be no doubt that every Court is entitled to protect itself and others against an abuse of its process'. (Per Mahomed CJ in *Beinash v Wixley*

[1997] ZASCA 32; 1997 (3) SA 721 (SCA) ([1997] 2 ALL SA 241) at 734D (SA)). Indeed, I have no doubt that the learned Chief Justice had in mind in his use of the phrase 'itself and others' that the Court has a duty to protect litigants against the abuse of its process. I am therefore satisfied that if the issue of the subpoena amounts to an abuse of the process of the Court, the applicant has locus standi to move to set it aside.

[19] An abuse of the process of the Court occurs when 'an attempt [is] made to use for ulterior purposes machinery designed for better administration of justice'. (Per De Villiers JA in *Hudson v Hudson and Another* 1927 (AD) 259 at 268). And as Mahomed CJ said in *Beinash* (supra) at 734 F-G (SA) '(i)t can be said in general terms ... that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.' (See, too, *De Klerk v Scheepers and Others* 2005 (5) SA 244 (T) at 246 C-D)."

[32] I, therefore, agree with Mr Kemp that in the review proceedings the question is not whether the Boshoff valuations are market-related but is in fact whether the

third and fourth respondents acted within their powers to provide the opportunity to make the representations and thereafter to accept the Boshoff valuations.

[33] It has been suggested by the respondents in their particulars of claim that the substitute Directors in determining the allocation

relied exclusively and unreservedly on the valuations of John Boshoff. At all times material herein the substitute Directors

were obliged to discharge their obligations in terms of the settlement agreement "POC1" in a reasonable manner. In doing so, they would have regard to the legitimate representations and factors which would influence any determination

as to the value of the property for the purposes of equalizing the loan accounts. Therefore, the substitute Directors in this regard were obliged to meaningfully engage and confirm on a reasonable basis with the respondent (plaintiff).

[34] It also follows that the substitute Directors were under an obligation to investigate and verify the reasonable values to be

placed on the properties and to ensure that any property allocated to the plaintiff in order to equalise the loan accounts were reasonably and realistically valued.

[35] In their allegation the first and second respondents contended that third and fourth respondents failed to verify and/or determine the correctness or otherwise of the essential facts with reference to valuation of the properties. They, therefore, based their valuation on facts and/or information which was clearly wrong. The only factual allegations by first and second respondents by which they rely in their application to set aside the determination of third and fourth respondents relates to the Boshoff Valuation and the manner in which it was accepted by third and fourth respondents.

[36] As already stated, the full record of the proceedings was not annexed to their particulars of claim. For instance, the first and second applicants and first and second respondents' representations were not annexed to the particulars of claim. This also includes the representations made by first and second applicants as well as first and second respondents' queries from the third and fourth respondents as well as the parties' replies annexed as "GVD2" to "GVD7" to the founding affidavit. The only valuations annexed by the first and second respondents before the third and fourth respondents were the Boshoff valuations and nothing more.

[37] The above criticism by the respondents against the applicants does not justify the Court's granting of a declaratory order as prayed for in prayer 4 of the Notice of Motion in their action proceedings. As already alluded to above it is trite law that the grounds upon which the determination of the third and fourth respondents can be attacked and taken on review are extremely limited especially in a case where the parties had agreed that the determination shall be final and binding on all parties. In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* [1993] ZASCA 158; 1994

(1) SA 162 (AD) at 169A-E the Court per Goldstone JA emphasized that the Arbitration Act provides that an arbitration award shall "be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms".

[38] It is only in those cases which fall within the provisions of section 33 (1) of the Arbitration Act that a Court is empowered to intervene. If an arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under section 33 (1)(b). As to misconduct, it is clear that the wording does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award: *Dickenson & Brown v Fisher's Executors* 1915 (AD) 166 at 174-8. It was held in *Donner v Ehrlich* 1928 (WLD) 159 at 161 that even gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference.

[39] The failure by the respondent to proceed by way of Rule 53 has deprived the Court of the opportunity to hear the full record. Had the full record been placed before Court reviewing the determination, that Court would, with reference to the record, decide on all the issues and allegations referred to in the Particulars of Claim. In any event, there is no justification for the respondents to have the determinations reviewed in the circumstances because, in my view, there are no grounds upon which the determinations can be reviewed. It follows, therefore, that the applicants succeed in their application. It also follows that by reason of having proceeded in terms of Rule 53 whose requirements have not been followed by the plaintiffs the whole proceedings were a nullity and therefore, no amendment of such proceedings could have been granted.

[40] The applicant's prayer for joining Addo Afrique Estate Portion 21 (Pty) Ltd as the sixth respondent has not been opposed and it is hereby granted.

#### D) COSTS

[41] The applicants herein have asked for costs on the scale as between attorney and client. An award of attorney and client costs will not be lightly granted, as the Courts look upon such orders with disfavour and are loath to penalise a litigant who has exercised his or her right to obtain a judicial decision on any complaint he may have. (Erasmus – Superior Court Practice – revision service 44).

[42] In my view, punitive costs such as those normally referred to as attorney and client costs should be reserved for litigants who are guilty of dishonesty or fraud. This can also be the case with regard to litigants who are reckless, vexatious and malicious or frivolous.

[43] In the present case, the respondents have been assisted by their legal representatives in the conduct of their case who must have advised their clients to proceed with the case on the understanding that they have a good or arguable case. I do not think that the nature of respondents' case warrants an order of costs on a punitive scale. The history of the matter also does not suggest that their litigation has been based on ulterior or improper motives or that the respondents have acted unreasonably in the conduct of their case. Therefore, I decline to grant an order of costs on the scale as between attorney and client.

[44] In the result, I grant an order in the following terms:

[44.1] I therefore grant an order in terms of prayers 3-8 of the Notice of Motion.

[44.2] The first and second respondents are ordered to pay costs of this application, such costs to include costs occasioned by the employment of two counsel which costs are to be paid jointly and severally, the one paying the other to be absolved.

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P.W. TSHIKI

JUDGE OF THE HIGH COURT

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