

SOUTH AFRICA / JUDGMENT

V and A Placement Agency (Pty) Ltd v Lapan NO and Another (039539/2023) [2024] ZAGPJHC 777 (5 August 2024)

[2024] ZAGPJHC 777**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Nico van der Walt

CASE / FILE NUMBER

039539/2023

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****Case****no: 2023-035959****1.****REPORTABLE:**

Yes

2.

OF

INTEREST TO OTHER JUDGES: Yes

In

the matter between:

V

& A PLACEMENT AGENCY (PTY) LTD

Applicant

and

ARBITRATOR

ANITIA LAPAN N.O.

First

respondent

ZUID-AFRIKAANS

HOSPITAL

Second

respondent

This

judgment was delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 5 August 2024.

JUDGMENT

VAN DER WALT AJ

Introduction

- [1] This is a judgment in respect of an application to review and set aside an arbitration award. The applicant, V & A Placement Agency (Pty) Ltd, also asks for ancillary relief, including orders removing the arbitrator and for this court to substitute its findings for those made by the arbitrator. The first respondent is the arbitrator. The second respondent is Zuid-Afrikaans Hospital (“ZAH” or “the hospital”).

Factual

background

- [2] V & A is a recruitment agency that provides temporary nursing personnel to hospitals. ZAH is a private hospital. In August 2020, the parties concluded an agreement in terms of which V & A would provide temporary nurses to work in the hospital, as and when required. The temporary nursing personnel would be suitably qualified and experienced. V & A warranted as much to ZAH. The agreement commenced on 1 September 2020 and endured for 24 months.
- [3] The agreement includes an arbitration clause. It provides that the parties would refer their disputes to arbitration, that the arbitration would be concluded expeditiously, that the arbitrator’s decisions would be binding and that the parties would give effect to them. The arbitration would be conducted in accordance with the Arbitration Act.[1] Apart from one provision giving the arbitrator the power to give default judgment, the clause is silent on the arbitrator’s

powers with regards to matters of process and the admissibility of evidence.

- [4] On 25 May 2021, the hospital requested V & A to provide it with a temporary nurse to work in its intensive care unit. On 26 May 2021, that nurse, Ms Masilela, reported for duty. She was allocated to a patient in the intensive care unit, Mr Basson. Mr Basson had a central venous pressure line and an arterial line attached to his body. The two lines serve different purposes. The one is not to be used for the object of the other. During Ms Masilela’s shift, she administered medicine to Mr Basson via the wrong line. The hospital claims damages from V & A for the financial losses it alleges to have led as a result.

- [5] The claim was referred to arbitration. The parties agreed to a separation of issues. A hearing would be conducted for the leading of evidence in respect of specifically whether V & A had breached the agreement, and whether V & A and Ms Masilela had been negligent in delict. The hospital called four witnesses, including those that had been responsible for managing the intensive care unit and its nurses at the relevant times, and the doctor who treated Mr Basson. V & A called two witnesses, Ms Masilela and an expert, Dr Scharf.
- [6] The proceedings before arbitrator concluded. She rendered an award. The arbitrator found Ms Masilela's evidence to have been inconsistent, that it did not bear scrutiny and that some of it fell outright to be rejected. She found that even during Ms Masilela's testimony she confused the crucial distinction between the different types of lines attached to patients and showed her lack of relevant experience. Dr Scharf was found to have been evasive at times and at others to have given irrelevant testimony. He conceded under cross-examination that Ms Masilela's conduct in using the wrong line contravened a basic principle of medical practice. The hospital's witnesses' evidence was found to be coherent, consistent and credible. The arbitrator gave an award in favour of the hospital on the questions she was asked to answer.

The Review

- [7] V & A relies exclusively on section 33(1)(b) of the Act in support of the relief it seeks. The section provides for the review and setting aside of an award if an arbitration tribunal has "exceeded its powers" or "committed any gross irregularity in the conduct of the arbitration proceedings". One of V & A's arguments is based on the former ground and nine on the latter.

Did the arbitrator exceed her powers?

- [8] V & A's first argument is that the arbitrator exceeded her powers by interrupting its counsel's cross-examination. The main facts relied upon in this regard are that the arbitrator said to counsel for V & A that a witness did not understand a question and asked him to reformulate it.
- [9] The phrase "exceeding powers", allows a court to set aside an award if an arbitrator exercises a power that she does not have. It does not allow a court to set aside an award if an arbitrator merely erroneously exercises a power properly vested in her.[2] Did the arbitrator purport to exercise a power that she did not have? The parties empowered the arbitrator to resolve their disputes in respect of the hospital's claim. The arbitrator is not alleged to have gone outside that mandate. The argument has no merit.
- [10] Even accepting that this review ground goes to anything other than substantive jurisdiction doesn't assist V & A. The

arbitrator was empowered to make findings of fact. She obviously had to be able to understand witnesses' answers to questions and know that the answers witnesses gave were in reply to questions they understood. If the arbitrator had the circumscribed powers of a judge of the High

Court, she would not only have been well within her powers to interject when she perceived a witness not to understand a question, she would have been dutybound to do so.[3] Arbitrators are generally allowed to ask witnesses questions. Even more so to ask counsel to reformulate a question.

Did the arbitrator commit a gross irregularity in the conduct of the arbitration proceedings?

[11] The remaining nine arguments seek to convince the court that the arbitrator committed a gross irregularity in her conduct of the

arbitration proceedings. The phrase “committed a gross irregularity in the conduct of the arbitration proceedings” and the review ground it gives rise to are to be understood in context, both historical and textual.[4] The ground focuses on something “committed” by the arbitral tribunal, i.e. action or inaction by the arbitrator. The

action or inaction must amount to an irregularity. It is not, however, sufficient to show a mere irregularity, the irregularity

must be “gross”. “Gross”, in this context, does not mean simply obvious or obviously unacceptable. The

irregularity must be of such a nature that the aggrieved party’s case was not fully and fairly determined.[5]

[12] The ground of review renders relevant irregularities in the “conduct” of “proceedings”. “Conduct” is used in the sense of to lead, to guide, to carry out or to direct. “Proceedings” is used in its normal sense of a series of events which involves the following of procedure. In the context of the Act, the relevant proceedings are the proceedings the parties agreed upon. Therefore, any argument based on this ground must have as its primary focus the methods or conduct of the arbitrator in her conduct of the proceedings they agreed upon. The results or outcomes of those proceedings are irrelevant.[6] A “qualification” to this rule is that an irregularity that amounts to a misconception by the arbitrator of her mandate, or her duties in connection with it, also qualifies.[7] Matters which fall outside the conduct of proceedings include an arbitrator’s reasoning[8] and the conclusions she reaches on certain issues in her award.[9] The fact that they may fall foul of the standards of rationality or reasonableness, outcome standards, is irrelevant to this ground of review.[10] Mistakes, factual or legal, also do not amount to irregularities in the conduct of proceedings.[11] Nor do a failure to deal with facts that go to the merits of the case, a failure to appreciate the significance of certain facts,[12] or the failure to deal with a particular factual sub-issue.[13]

Bias

[13] V & A's second argument is that an irregularity occurred in the conduct of proceedings because the arbitrator was biased. She was biased, says V & A, in not "treating" its counsel's "concerns seriously". This is said to have been shown by the arbitrator displaying "some form of reluctant attitude to reprimand" the hospital's legal representative, when requests were made to that effect by counsel for V & A.

[14] The facts relevant to the allegation of bias are as follows. On 1 November 2022, counsel for the hospital interjected while counsel for V & A was busy with his cross-examination. Counsel for V & A asked the arbitrator to inform counsel for the hospital "not to interrupt him while asking a question". The arbitrator explained the position as she saw it to counsel for V & A as follows:

"I hear what you are saying, Mr Sithole. There is a slight difficulty that arises because when the witness starts answering it is not really possible to then object because the witness has understood the question and starts answering and one wants to hear that. So Mr Kruse is objecting to the question and the statement or proposition you are putting. So that is in my view an opportune time to deal with the objection. But this is how I am going to deal with this objection. Put your case to the witness that you are seeking to confirm and allow her to answer and then we take it from there. And if it is unacceptable Mr Kruse is entitled to object again and then we will deal with it again."

When counsel for V & A again asked that counsel for the hospital be told not to interrupt him, the arbitrator said: "I think that is acceptable."

[15] On 2 November 2022, during her evidence in chief, Ms Masilela was asked questions about Mr Basson's hospital chart. The testimony she sought to make, contradicted the evidence given by the hospital's witnesses. It is common cause that these aspects of Ms Masilela's testimony were not foreshadowed by V & A's pleadings and not put to the hospital's witnesses during their cross-examination. The hospital objected and the arbitrator upheld the objection. Subsequently, the arbitrator adjourned the proceedings to enable a discussion between her and the parties' legal representatives. V & A requested that the proceedings adjourn for the day as it intended to bring application for the arbitrator's recusal. It, however, never did and elected to proceed with the hearing before the arbitrator. Counsel for V & A explained during the review hearing that the recusal application has not been persisted in because his client decided to, for all intents and purposes, see how it goes.

[16] In the review application, the events of 1 November form the basis of the argument about bias. It is bad for more than one reason. Firstly, it is not open to a litigant to await the outcome of proceedings before pursuing a complaint of bias. The complaint must be raised at the earliest possible stage of proceedings. Not having done so puts a question mark not only over the reasonableness of the apprehension of bias, but also whether any apprehension of impartiality was ever honestly held. It also gives rise to extra costs, delay and inconvenience to wait until the proceedings have run their course and the arbitrator has written her reward, to only then properly assert bias.[14] It is not in the interests of justice to allow especially a party to arbitration, a speedy and efficient process of resolving disputes,

to conduct itself in this manner.[15] As the Constitutional Court has held: “The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her.”[16]

- [17] Secondly, the assertion of bias in these proceedings in any event has no merit and never had any prospects of success. While V & A’s founding affidavit is by no means clear on the point, the impression one is left with, is that the arbitrator eventually agreed with counsel for V & A that he is not to be interrupted during his cross-examination. This happened in the presence of the hospital’s legal representative. The arbitrator’s only “failure” was therefore not to directly reprimand the legal representative of the hospital. Can this failure be grounds for an assertion of bias? The test for bias is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the arbitrator has not or will not bring an impartial mind to bear on the adjudication of the case.[17] To put it at its very lowest, a reasonable, objective and informed person would not think that an arbitrator is obliged to satisfy the specifics of counsel’s every request. Nor would they have perceived the arbitrator as having been unable to bring an impartial mind to bear on the adjudication of their case because she did not do so. The ground for review and allegations made against the arbitrator are utterly devoid of merit.

Evidence not put to ZAH’s witnesses

- [18] V & A’s third argument relates to Ms Masilela’s testimony on the 2nd of November. Specifically, she sought to testify that different sets of ink had been used on Mr Basson’s hospital chart and that “Mr Basson’s details” were only captured well into her shift. The hospital’s legal representative objected on the basis that the testimony sought to be given, amounts to a version or a case neither pleaded nor put to the hospital’s witnesses. During the arbitration hearing counsel for V & A answered by saying that this version could not have been put, because Ms Masilela was the only witness capable of testifying about her own handwriting. In its founding affidavit V & A adds that the document was discovered by the hospital only after the filing of its plea, that the document was not referenced in the statement of claim, and that the hospital would in any event have been able to cross-examine Ms Masilela. Denying them the opportunity to lead this evidence, says V & A, constituted a gross irregularity.
- [19] During the adjournment on 2 November, the plea was amended. What was previously a bare denial, became material facts about the defence. It is common cause that the case the disallowed evidence sought to make out, was not put to the hospital’s witnesses and would contradict what they said. In these circumstances, did the arbitrator’s conduct in disallowing the evidence give rise to an irregularity? Was it contrary to the normal or established practice of the proceedings the parties agreed upon?
- [20] The proceedings were those used for litigation in the High Court. They were conducted by an advocate of the High Court. The parties delivered pleadings. There was discovery. The hospital, being the claimant, would lead its evidence first, followed by V & A, the

respondent. The papers make no mention of witness statements. Evidence would be lead orally, in the normal course, by way of evidence in chief, cross-examination and an opportunity for reply. The hospital's opportunity to lead evidence had therefore come and gone. There is also no indication on the papers of V & A making application for the hospital's witnesses to be recalled or anything to that effect.

- [21] In this context, the arbitrator found that Ms Masilela could not give the challenged testimony. She gave reasons for her ruling in her award, relying on *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*[18] for the rule that it is only if an issue has been fully canvassed by both sides at a hearing that a party is allowed to rely on it when it is not covered by the pleadings. She also relied on the rule confirmed in *President of the Republic of South Africa & Others v SARFU*[19] to the effect that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to

assume that the unchallenged witness's testimony is accepted as correct. She found V & A's explanation, that the witnesses'

testimony could not be put to the hospital's witnesses as she was testifying for the first time and that she was the one who had to provide the testimony personally, flawed and not in accordance with the rules of practice.

- [22] She is, with respect, and in as far as it is relevant, no doubt correct in her reasoning. I would only add that it is "elementary and standard" practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness.[20] If need be, an opposing witness is also to be given notice that other witnesses will contradict him, so as to give him fair warning, and an opportunity of explaining the contradiction and defending his character. The rule the arbitrator enforced itself aims at ensuring a fair hearing, not for one of the parties only, but for both of them. The arbitrator's conduct in enforcing this rule cannot be faulted and did not give rise to an irregularity. This review ground, therefore, also has no merit.

The balance of V & A's arguments

- [23] V & A's fourth to tenth arguments impugn the arbitrator's findings of fact, including her assessment of the evidence that had been lead before her, her resolutions of dispute of fact, the weight she gave to some of the testimony before her and the reasonability of some of her findings. They also more generally attack the reasoning she gave in support of her award, including remarks she made about lacunae in V & A's case. These arguments are irrelevant to this review ground, capable of impugning only the conduct of the arbitration proceedings as it is.

Further relief sought

- [24] As it has been said, V & A based its application on section 33(1)(b) of the Act. It asked that the arbitrator's award be reviewed and set aside. It also asked that the arbitrator be removed to enable the parties to agree to the appointment of a new arbitrator, and that the court

substitute its findings for that of the arbitrator. V & A relies solely on the case it sought to make out for the purposes of the review for all the other relief it asks. That case has no merit. It follows that, even if the applicant's failure to place any reliance on section 13 of the Act is overlooked, no good cause has been shown for the removal of the arbitrator. Lastly, the Act does not empower a court to substitute its findings for that of the arbitrator.

Costs

[25] In the introductory part of its founding affidavit, V & A promised that it will ultimately submit that the arbitrator's

award was "incorrectly decided upon". Similarly, in attacking the arbitrator's findings of fact, the affidavit is replete with words and phrases such as "incorrect", "highly incorrect", "got it wrong" and

"completely wrong". This of course ignores the nature of a review in terms of section 33(1)(b).

[26] V & A's deponent also went further. The arbitrator is said to have made a "false" finding and that she created "testimonies that do not exist". These assertions impugn the arbitrator's honesty. I can see no reason why that was necessary. In addition, the allegations of bias against the arbitrator were not only completely devoid of merit, V & A's approach in making them was reprehensible. If this application is indicative of anyone who "got it completely wrong" it seems to me to have been V & A for failing properly to prepare its own case, causing it not to be able to put its case to that of the hospital's witnesses. Yet it had no difficulty in accusing the arbitrator of bias on the most frivolous of grounds, attacking her award on entirely irrelevant bases and, worst of all, impugning her integrity. For these reasons, a punitive costs order will follow.

[27] The application is dismissed with costs on the attorney and client scale.

Nico van der Walt

Acting Judge, Gauteng Division, Johannesburg.

Heard: 25 April 2024

Judgment:

5 August 2024

Appearances:

For the applicant

Adv W.M. Sithole

Instructed by Rahman & Rahman Inc.

For the second respondent:

Adv J. De Beer SC

Instructed by Kruse Attorneys Inc.

[1] 42 of 1965.

[2] Telcordia Technologies Inc v Telkom SA Ltd

[2006] ZASCA 112; 2007 (3) SA 266 (SCA) (Telcordia) 288E.

[3] Cf. Bagley v Cole Ltd 1915 CPD 776.

[4] Telcordia 292G.

[5] Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another 2016 (1) SA 78 GJ par. 28; Bester v Easigas 1993 (1) SA 30 (C) 43A – E.

[6] Telcordia 300A; Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C).

[7] Cf. Telcordia 298I – 299D.

[8] Telcordia 300B.

[9] Telcordia 312F.

[10] Telcordia 288H.

[11] Telcordia 293 et seq.

[12] Telcordia 312C.

[13] Telcordia 312G.

[14] Bernert v ABSA Ltd 2011 (3) SA 92 (CC) (Bernert) par. 71.

[15] Bernert par. 75.

[16] Bernert par. 35.

[17] President of the Republic of South Africa and Others v South African Rugby Football Union & Others

[1999] ZACC 9; 1999 (4) SA 147 (CC) par. 11.

[18] 1976 (1) SA 708 (A) 714G

[19] 2000 (1) SA 1 (CC) pars. 61 to 63.

[20] Small v Smith 1954 (3) SA 434 (SWA) 438E – H.

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