THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 115/2011

In the matter between:

GUTSCHE FAMILY INVESTMENTS (PTY) LTD	**First Appellant**
WENDY HEATHER LYNCH NO	**Second Appellant**
BERNARD JOHN LYNCH NO	**Third Appellant**
PATRICK JOHN VERNON WILSON NO	**Fourth Appellant**

v

METTLE EQUITY GROUP (PTY) LTD	**First Respondent**
MICHAEL DAVID KUPER NO	**Second Respondent**
ARNOLD SUBEL NO	**Third Respondent**
ANDRE ROBERT GAUTSCHI NO	**Fourth Respondent**
ARBITRATION FOUNDATION OF SOUTH AFRICA	**Fifth Respondent**

Neutral citation: *Gutsche Family Investments v Mettle Equity Group* (115/2011) [2012] ZASCA 4 (8 March 2011).

Coram: **Brand, Nugent, Mhlantla JJA and Boruchowitz *et* Petse AJJA**

Heard: **24 February 2012**

Delivered: **8 March 2012**

Summary: Review of award by arbitration appeal tribunal in terms of s 33(1)(*a*) and (*b*) of the Arbitration Act 42 of 1965 – no 'misconduct' on part of tribunal as contemplated in s 33(1)(*a*) – not established that the tribunal committed any 'gross irregularity' or 'exceeded its powers' in terms of s 33(1)(*b*).

ORDER

On appeal from: South Gauteng High Court, Johannesburg.
(Lamont J sitting as court of first instance):

The appeal is dismissed with costs on the attorney and own client scale and including the costs of two counsel.

JUDGMENT

BRAND JA (**NUGENT, MHLANTLA JJA AND BORUCHOWITZ *et* PETSE AJJA:**

[1] This is an appeal against the dismissal of a review application by Lamont J in the South Gauteng High Court, Johannesburg. The application was brought by the appellants in terms of s 33(1) of the Arbitration Act 42 of 1965. It was aimed at an award in favour of the first respondent, Mettle Equity Group (Pty) Ltd (Mettle) by the second, third and fourth respondents, sitting as an arbitral appeal tribunal (the tribunal). The appeal to this court is with the leave of the court a quo. Both the application in the court a quo and the appeal to this court were opposed by Mettle only.

[2] The issues that arose for determination will be best understood against the background that follows. The first appellant is a company, Gutsche Family Investments (Pty) Ltd, while the other appellants are cited as the trustees of the Lynch Trust. I propose to refer to the company and the trust as the appellants. During April 2003, the appellants sold the total shareholding in a company, Formex Industries (Pty) Ltd, which they then held, to Mettle Operations Ltd for a price of R24 million. In terms of the deed of sale R18 million of the purchase price was payable against delivery of certain specified documents and the balance of R6

million by no later than 31 March 2004. Subsequently, Mettle Operations Ltd ceded and assigned its rights and obligations in terms of the sale to Mettle.

[3] At the time of the transaction Formex mainly manufactured body parts for the automotive industry. Mettle took the view that it was not possible to do a technical due diligence and in its stead sought a number of warranties from the appellants. In the event, the deed of sale included no less than 73 separate warranties in favour of Mettle. In terms of clause 8.5 of the deed the appellants jointly and severally indemnified Mettle against any loss or damage which it 'may sustain or incur from the breach of any one or more of the warranties'. These warranties were destined to take centre stage in the dispute that subsequently arose between the parties.

[4] In due course, Mettle paid the initial amount of R18 million in accordance with the deed of sale. But on 31 March 2004 when the R6 million became due and payable, it paid an amount of R1 483 270.11 only. In a letter of that date, which accompanied the payment, Mettle claimed to set off the balance of R4 803 558.89 on the basis that this amount represented the loss it had suffered through the appellants' breach of several warranties. That triggered a dispute between the parties. The deed of sale provided for the referral of the dispute to arbitration in accordance with the rules of the Arbitration Foundation of South Africa (the fifth respondent herein) and by an arbitrator appointed by the Foundation. The parties also agreed to incorporate an appeal provision in the event that either of them was dissatisfied with the arbitrator's award.

[5] In their statement of claim the appellants essentially claimed the outstanding balance of the purchase price as due and payable in terms of the agreement of sale. In answer, Mettle filed both a statement of defence and a claim in reconvention. In its statement of defence it did not deny that the part of the purchase price claimed by the appellants remained unpaid. It pleaded, however, that it had suffered a loss through the appellants' breach of warranties which

exceeded the amount claimed by the appellants and that their claim had thus been extinguished by set-off. It therefore prayed that the appellants' claim 'be dismissed with costs, alternatively that an award is stayed pending the determination of [Mettle's] claim in reconvention'. The claim in reconvention relied on the same breach of warranties by the appellants as a result of which Mettle allegedly suffered a loss. Apart from interest and costs of suit, Mettle therefore claimed the amount of its alleged loss.

[6] Central to the appellants' answer to both the defence of set-off and the claim in reconvention raised by Mettle, stood their reliance on clause 22 of the deed of sale. It provided:

'Breach

If either the Sellers or the Purchasers (hereinafter in this clause 22 "the Defaulting Party") shall be in breach of any one or more of their obligations in terms of this Agreement including a Warranty referred to in clauses 8 and 9 and shall fail to remedy such breach within 30 (thirty) days of receipt of written notice from the other Party (hereinafter in this clause 22 "the Aggrieved Party"), the Aggrieved Party shall have the right to seek specific performance of all the Defaulting Party's obligations then due, or the right to cancel this Agreement and to seek restitution, in either instance without prejudice to the right of the Aggrieved Party to claim such damages as it may have suffered by reason of such failure and further without prejudice to the right of the Aggrieved Party to seek an appropriate order in terms of the provisions of Rule 22 (4) of the Rules of the High Court of South Africa.'

[7] Relying on the provisions of clause 22 the appellants took exception to Mettle's claims on the basis that they were premature in that Mettle had failed to give them notice to remedy their alleged breaches of warranty within 30 days. The arbitrator dismissed the exception. His reasons, in broad outline, were that he agreed with the appellants that in terms of clause 22, notice to remedy their alleged breaches of warranty within 30 days was an essential prerequisite to Mettle's claim. He held, however, that at the exception stage Mettle's letter of 31 March 2004 – which accompanied payment of the reduced amount – should be

accepted as proper notice in terms of clause 22. The appellants successfully appealed this dismissal of their exception to a single appeal arbitrator. Mettle thereupon applied to the South Gauteng High Court for the setting aside of the appeal arbitrator's decision, essentially on the basis that the dismissal of the exception was not appealable since it did not constitute a final award. The application succeeded in the High Court. The appellants in turn appealed against that decision to this court which dismissed the appeal in a judgment since reported as *Gutsche Family Investments (Pty) Ltd v Mettle Equity Group (Pty) Ltd* 2007 (5) SA 491 (SCA).

[8] Four years after its initial start, the matter therefore returned to the arbitrator for the hearing of oral evidence on the merits. Consistent with his earlier ruling that Mettle's letter of 31 March 2004 constituted the requisite notice in terms of clause 22, the arbitrator held at the outset that Mettle was debarred from relying on two of its claims that were not mentioned in that letter at all. In consequence Mettle was precluded from leading any evidence in support of these claims. For present purposes I need say no more about these two claims than that they were formulated in paragraphs 3.7 and 3.8 of Mettle's statement of defence under the headings 'tool rework' and 'obsolete stock', respectively.

[9] At the end of the hearing the arbitrator again considered the appellants' reliance on clause 22. At that stage he confirmed that, on his interpretation of the clause, it imposed a duty upon Mettle to notify the appellants in writing of any breaches of the agreement and to afford them the opportunity to remedy such breach within 30 days. Only if the appellants then failed to remedy the breach would a claim lie against them. In addition, it is clear from the arbitrator's reasoning that, in his view, it mattered not whether the claim was for cancellation, specific performance or damages. Whatever the claim, so he concluded, clause 22 imposed prior notice as an absolute prerequisite for any claim based on breach of warranty.

[10] The next step for the arbitrator was to reconsider whether, in the light of all the evidence he had heard since the exception, Mettle had indeed given the required notice. After consideration he concluded that it had not. In consequence he held that none of Mettle's claims could therefore succeed; neither by way of a defence reliant on set-off, nor by way of a counterclaim. In consequence he made an award in favour of the appellants for the full outstanding balance of the purchase price together with capitalised interest – which at that stage amounted to R8 434 579.17 – as well as further interest on that amount, from date of his award and costs.

[11] Despite this decision, the arbitrator acceded to a request by Mettle that he should deal with the merits of its claims. By then it was virtually common cause that the appellants had breached some of the warranties and that Mettle had established losses in the amount of R1 047 150.50 as a result of those breaches. The arbitrator further held that, apart from these, Mettle had proved additional losses in an amount of R1 852 975 as a result of other breaches of warranty that were denied by the appellants. The residual claims by Mettle, which pertained to so-called press control panels, he found not to have been established.

[12] It is against that award that Mettle noted an appeal to the tribunal. Since part of the notice of appeal found its way into the tribunal's award, which is challenged in these proceedings, I recite that part verbatim. It reads:

'. . . [Mettle] hereby notes an appeal against those portions of the arbitrator's decision dated 28 May 2008 in which he held that:

1. [Mettle] was obliged to give notice to [the appellants] in terms of clause 22 of the sale agreement in order to found its defence of set off and its counter-claim against [the appellants];

2. insofar as [Mettle] was obliged to give notice to [the appellants] in terms of clause 22 of the sale agreement, it did not give such notice in respect of any of its claims;

3. insofar as [Mettle] was obliged to give notice to [the appellants] in terms of clause 22 of the sale agreement, [the appellants] did not waive their right to be given notice in respect of all its claims;

4. [Mettle] did not prove its claim in relation to the press control panels;

5. [Mettle] was not entitled to proceed with its claims as set out in paragraphs 3.7 and 3.8 of the statement of defence;

as well as the order of costs.'

[13] The appellants, in turn, filed a conditional cross-appeal. In broad outline they contended that if the appeal were to succeed on any aspect, the arbitrator had erred in the findings on the merits that he made in favour of Mettle. Eventually, the tribunal split two to one on the interpretation of clause 22. The minority agreed with the arbitrator's interpretation. The majority, on the other hand, found that his interpretation was erroneous. On a proper interpretation of the clause, so the majority held, the notice requirement only pertained to claims for specific performance and cancellation. It required no notice if the aggrieved party claimed damages. Since Mettle's claim was essentially one for damages resulting from the appellants' breach of warranties, so the majority held, its claim was not precluded by lack of notice.

[14] In addition, the tribunal unanimously held that the arbitrator had erred in his determination of the losses that Mettle had established. According to the findings of the tribunal Mettle had succeeded in establishing losses of R3 974 750.42. As to Mettle's claim in paragraphs 3.7 and 3.8 of its statement of defence for 'tool rework' and 'obsolete stock' the majority held that the arbitrator had erred in preventing Mettle from leading evidence in support of these claims on the basis that they were barred by lack of notice under clause 22. In consequence they decided that these two claims should be remitted to the arbitrator for adjudication. In this light the majority of the tribunal upheld the appeal against the arbitrator's award with costs.

[15] Since a proper understanding of the appellants' challenge against the majority award requires reference to its exact terms, a rather lengthy quotation of those terms seems unavoidable. They read:

'In view of our findings, [Mettle's] appeal is to be upheld and [the appellants'] cross-appeal

fails. We accordingly make the following award:

(a) [Mettle's] appeal is upheld in respect of those portions of the Arbitrator's decision dated 28 May 2008 as are identified in paragraphs 1, 2, 4 and 5 of the appellant's notice of appeal . . . (subject to a reduction in the claim relating to control panels by an amount of R130 202.82). The final amount for which [the appellants] are liable to [Mettle] is to be calculated after the determination of [Mettle's] claim referred to in (d) below;

(b) [the appellants] are to pay the costs of [Mettle's] appeal, including the costs consequent upon the employment of two counsel;

(c) [the appellants'] cross-appeal is dismissed with costs, including the costs consequent upon the employment of two counsel;

(d) [Mettle's] claim as set out in paragraphs 3.7 and 3.8 of its statement of defence in respect of tool rework and obsolete stock is remitted to the Arbitrator for adjudication.

(e) The Arbitrator's cost award is set aside and the question of costs, other than those which have been determined in this appeal, is remitted to the Arbitrator for a decision once all issues have been determined by him.'

[16] As I have indicated by way of introduction, the appellants' challenge against that award rests on the provisions of s 33(1) of the Arbitration Act 42 of 1965. That section provides:

'(1) Where–

(*a*) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator . . . ; 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 . . . make an order setting the award aside.'

[17] In its application papers the appellants relied on both sections 33(1)(*a*) and 33(1)(*b*). But the reliance on s 33(1)(*a*) appears to have been jettisoned at an earlier stage and I believe rightly so. The 'misconduct' contemplated in s 33(1)(*a*) has been held to denote some element of moral turpitude or *male fides* on the part of the arbitrator (see eg *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at

176; *Bester v Easigas (Pty) Ltd* 1993 (1) SA 30 (C) at 36-37; *Amalgamated Clothing & Textile Workers' Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169C-D). A mere mistake cannot be said to constitute 'misconduct'. Since there was never any suggestion of *male fides* or moral turpitude on the part of the tribunal, any reliance on s 33(1)(*a*) was doomed to fail.

[18] What therefore remained was the appellants' challenge on the basis of s 33(1)(*b*), that the majority of the tribunal not only exceeded its powers, but also committed a gross irregularity in the conduct of the proceedings. Both these concepts recently enjoyed full consideration and discussion by this court (see eg *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) paras 52 *et seq*; *Hos & Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd* 2008 (2) SA 608 (SCA) paras 28 *et seq*; *Road Accident Fund v Cloete NO* 2010 (6) SA 120 (SCA) para 36). As I see it, further elaboration can therefore serve no useful purpose. Suffice it therefore to distil the following three principles from these decisions that are relevant for present purposes.

(a) Errors of law or fact committed by an arbitrator do not in themselves constitute grounds for review by a court under s 33(1)(*b*). Whether or not we agree with the conclusions arrived at by the majority of the tribunal on the various disputes between the parties, is therefore of no consequence.

(b) In order to justify a review on the basis of 'gross irregularity' the irregularity contended for must have been of such a serious nature that it resulted in the aggrieved party not having his or her case fully and fairly determined.

(c) Arbitrators, including arbitral appeal tribunals, are bound by the pleadings. The only difference between the two in this regard, as I see it, is that on appeal the pleadings also include notices of appeal and cross-appeal. Unlike a court, arbitrators therefore have no inherent power to determine issues or to grant relief outside the pleadings. Arbitrators who stray beyond the pleadings therefore exceed their powers as contemplated by s 33(1)(*b*).

[19] Departing from these principles, the appellants' objections against the

challenged award were essentially twofold. Firstly, that the tribunal exceeded its powers by ignoring the dispute on the pleadings and the relief claimed in the notice of appeal. Secondly, that this resulted in an award which entirely negated their main claim against Mettle and thus deprived them of the opportunity to enforce that claim.

[20] In developing these objections, the appellants pointed out that their claim in convention, for the balance of the purchase price of the shares, was never disputed by Mettle, neither in its pleadings nor in its notice of appeal. The relief sought in the latter was that the arbitrator's award be set aside and substituted with an award upholding the plea of set-off and awarding the appellants the difference between some R8 million (representing the outstanding balance of the purchase price together with the capitalised interest) and some R4 million (representing the sum total of the losses it claimed). In the alternative the notice of appeal sought an award upholding both the appellants' claim and Mettle's counterclaim with the implied corollary that set-off be applied thereafter.

[21] But, so the appellants' argument continued, the tribunal ignored the relief claimed in the notice of appeal and chose rather to uphold the grounds of appeal in paragraphs 1, 2, 3 and 5 of that notice. Without any reference to their claim in convention, the award then provides that the final amount for which the appellants are liable to Mettle is to be calculated after determination of the outstanding claims in paragraphs 3.7 and 3.8 of Mettle's statement of defence. Since the arbitrator is *functus officio*, save to the extent he has been empowered by the terms of the appeal award, so the appellants' argument concluded, they have been deprived of their claim in convention in its entirety. All that the arbitrator is allowed to do in terms of the tribunal's award, so the appellants contended, is to determine the amount for which they are liable to Mettle without any regard to the main claim which by all accounts exceeded Mettle's counterclaim by a substantial margin.

[22] It should be apparent that the appellants' objection is exclusively based on

their interpretation of the majority award. But I do not agree with that interpretation. That, in my view, renders the objection inherently flawed. As the appellants correctly pointed out, it is clear from the notice of appeal that the appellants' claim in convention was never in dispute. The arbitrator awarded the full amount of that claim to the appellants. In the notice of appeal Mettle sought the setting aside of that award for one reason only, namely that it took no account of the counterclaim. The main claim was therefore never challenged before the tribunal.

[23] As to Mettle's counterclaim, it is further pointed out by the appellants, again correctly, that even before the commencement of the proceedings before the tribunal, it was clear that Mettle's reliance on set-off could not succeed. Its claims were patently not liquidated. Before the tribunal both parties therefore approached the matter on the basis that all outstanding issues presented for determination related to Mettle's counterclaim and that any award in its favour on the counterclaim would lead to a deduction of the amount awarded from the appellants' undisputed main claim. The tribunal simply adopted the same approach.

[24] Following that approach, the tribunal first decided that the arbitrator was wrong in excluding Mettle's counterclaim in its entirety on the basis of clause 22 of the deed of sale. It then proceeded to deal with the counterclaim on its merits. It did so with reference to the issues raised in both the notice of appeal and the conditional cross-appeal. It decided those of the issues thus raised that were capable of determination on the available evidence and remitted the outstanding two claims to the arbitrator for his adjudication. In conclusion the tribunal held that the amount for which the appellants would be liable to Mettle could only be calculated after determination of the outstanding two claims. Although the tribunal did not expressly say so, its reference to 'the amount for which the appellants are liable to Mettle' can only refer to the counterclaim. That is the only claim the tribunal was asked to determine. Thus understood the award does not affect the arbitrator's award under the main claim at all. What remains to be done after final

determination of the counterclaim is for the amount so determined to be deducted from the amount previously awarded by the arbitrator under the main claim.

[25] Once the award is understood in its proper context, the conclusion is inevitable that the tribunal did not fail to decide an issue that was before it and that it granted the very relief sought from it on appeal. What becomes equally apparent is that the appellants' fears of being deprived of their claim against Mettle were completely unwarranted. It follows that the court a quo was correct in its finding that the tribunal committed no gross irregularity nor had it exceeded its powers as contemplated in s 33(1)(*b*).

[26] Mettle asked for attorney and own client costs, both in the court a quo and on appeal. It relies on a provision to that effect in the share sale agreement. According to established authority, a court will give effect to an agreement relating to costs, unless good grounds exist for following a different route (see eg *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) para 26). Since it is common cause between the parties that no such grounds exist in this case, the court a quo rightly awarded costs in favour of Mettle on the agreed scale. As I see it, this court should follow the same course with regard to the costs on appeal.

[27] In the result the appeal is dismissed with costs on the attorney and own client scale and including the costs of two counsel.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	R G Buchanan SC
	E A S Ford SC
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