THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case no: 977/2013

In the matter between:

BASIL A HOLFORD	**APPELLANT**
and	
CARLEO ENTERPRISES (PTY) LTD	**FIRST RESPONDENT**
LARIMAR GROUP LTD (formerly PUTCO HOLDINGS LTD)	**SECOND RESPONDENT**
PUTCO LTD	**THIRD RESPONDENT**
P BLIEDEN N.O.	**FOURTH RESPONDENT**
M M JOFFE N.O.	**FIFTH RESPONDENT**
C H J BADENHORST N.O.	**SIXTH RESPONDENT**

Neutral citation: *Holford v Carleo Enterprises* (977/2013) **[**2014] ZASCA 195 (28 November 2014)

Coram: Maya, Shongwe and Saldulker JJA and Mathopo and Gorven AJJA

Heard: **4 November 2014**

Delivered: **28 November 2014**

Summary: Review of award of arbitration appeal panel – whether the appeal panel exceeded its powers – whether the appeal panel committed a gross irregularity – application of requirements for review.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Jansen AJ sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs of two counsel where employed.

2 The order of the North Gauteng High Court is set aside and substituted with the following order:

'The application is dismissed with costs.'

JUDGMENT

Gorven AJA (Maya, Shongwe and Saldulker JJA and Mathopo AJA concurring):

[1] This appeal concerns the approach to be taken in an application which seeks to review and set aside the decision of an arbitrator. Such an application was brought before Jansen AJ in the North Gauteng High Court, Pretoria. In that application, only the limited grounds afforded by s 33(1)(*b*) of the Arbitration Act 42 of 1965 applied. This section reads as follows:

'(1) Where-

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers…

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.'

These are narrow grounds for interference in an arbitral award and must be strictly construed. As was said by O'Regan ADCJ in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & another*:[1]

'Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of s 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.'

[2] The approach of this court to a review of an arbitration award is settled and consistent with this dictum. As was succinctly summarised by Harms DP in *Telcordia Technologies Inc v Telkom SA Ltd*:[2]

'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.

. . . .

Last, by agreeing to arbitration the parties limit interference by courts to the ground 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.'

[3] It is as well to set out the procedural history of the matter. The appellant, who had been in senior management with the third respondent, instituted action in the South Gauteng High Court, Johannesburg against the first respondent.

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[1] *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC) para 235.
[2] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) paras 50 & 51.

The appellant claimed that he had sustained damages from the breach of an agreement he had concluded with the first respondent. The pleadings had closed, further particulars had been sought and supplied by the parties and the matter had been set down for trial. On the appointed day, there was no judge available and the parties concluded a written agreement referring the matter to arbitration. It also contained a provision for an appeal from the decision of the arbitrator. After hearing evidence, the arbitrator granted absolution from the instance on the basis that the appellant had failed to prove the agreement on which he had relied in the pleadings. The appeal tribunal upheld the appeal against this finding and awarded the appellant damages in the sum of R3 848 000 along with interest and costs. The first three respondents then brought an application to review and set aside the award of the appeal tribunal. The court below granted this relief, set aside the award of the appeal tribunal and thereafter granted leave to appeal to this court.

[4] The basis of the judgment was that the appeal tribunal had both exceeded its powers and committed a gross irregularity. It must be said that the judgment, although long, does not clearly set out the issues in question or employ clear reasoning in arriving at these conclusions. The crisp issue on appeal is whether the court below was correct in these findings. The fourth to sixth respondents, who constituted the appeal tribunal, took no part in the matter, either in the court below or in this court. For the sake of convenience, I shall refer to the first three respondents as ‘the respondents’.

[5] The respondents relied on a three-pronged attack against the approach of the appeal tribunal. Two were based on the appeal tribunal having exceeded its powers and the third was based on its having committed a latent gross irregularity. The first was to the effect that, because the issues were defined in the arbitration agreement as being those that arise on the pleadings, the appeal

tribunal, in finding that an agreement which was not pleaded in the particulars of claim had been concluded, exceeded its powers. The second was that, sitting as an appeal tribunal, it was bound by factual findings made by the arbitrator unless it could point to a 'demonstrable and material misdirection on fact' by the arbitrator. In disregarding the factual finding to the effect that no oral agreement was concluded, without doing so, the appeal tribunal therefore exceeded its powers. The third was that the appeal tribunal failed to properly deal with a non-disclosure by the appellant in s 311 proceedings, failed to analyse correspondence between August and November 2002 and, finally, failed to deal with the need of the appellant to replicate and prove that increased earnings which he would otherwise not have received should not be taken into account to reduce any damages he may have sustained as a result of the breach. In the result, it was submitted that the appeal tribunal arrived at findings which no reasonable arbitrator could have come to and thus committed a latent gross irregularity.

[6] The appellant's claim was for damages alleged to have been sustained as a consequence of the breach of an agreement whereby he would acquire 3 percent of the shares in the second respondent when it was constituted as an empowerment company. The agreement was pleaded as follows in the particulars of claim:

'4.1 During or about the period June 2002 until June 2005 and at or near Sandton, the plaintiff, acting personally, and the first defendant . . . concluded an oral agreement, the material express, alternatively tacit, further alternatively implied terms of which were as follows:

4.1.1 the shareholding in the third defendant, alternatively in a new entity to be formed, would be structured so as to provide for the participation of:

4.1.1.1 various black economic empowerment role players;

4.1.1.2 the senior management of the third defendant including the plaintiff;

4.1.1.3 the first defendant;

4.1.1.4 and certain of the employees of the third defendant;

4.1.2 the plaintiff would receive 3% of the issued share capital in the third defendant or the new entity so formed;

4.1.3 the plaintiff would be required to pay par value for the plaintiff's shares;

4.1.4 the first defendant, as the majority shareholder, alternatively as the sole shareholder in the third defendant, was obliged to ensure that the plaintiff obtained the plaintiff's shares in the third defendant or the new entity, as the case may be;

4.1.5 the plaintiff would be obliged to sell the plaintiff's shares in such new entity or the third defendant, upon his retirement from the third defendant or the new entity, as the case might be, subject to the pre-emptive rights of the remaining shareholders;

4.1.6 the price for the sale of those shares would be a market related priced between willing buyer and willing seller.'

As I have mentioned, the respondents requested further particulars for trial. In his reply, the appellant set out in detail a series of events, with reference to documents, stretching from 2002 to 2005 which, he said, supported the averment of the pleaded agreement having been concluded during this period.

[7] The first of the two submissions that the appeal panel exceeded its powers is to the following effect. The respondents contended that the arbitrator was limited to the agreement pleaded in the particulars of claim. They submitted that the appeal tribunal impermissibly broadened the pleadings by reference to the further particulars. In this regard, paragraph 8 of the reference to arbitration provides that the dispute referred to arbitration 'shall be as defined by the pleadings in the action.' There is clear law that pleadings exclude further particulars.[3] If nothing further had been said, the matter would have fallen squarely within the dictum in *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd & others*,[4] where Lewis JA held as follows:

[3] *Ruslyn Mining & Plant Hire (Pty) Ltd v Alexkor Ltd* [2012] 1 All SA 317 (SCA) para 18.

[4] *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd & others* 2008 (2) SA 608 (SCA) para 30.

'In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded.'

Where the pleadings in that matter defined the issues to be decided, it was held not permissible to broaden the pleadings as could a court along the lines set out in *Shill v Milner*.[5] In order to be broadened, the pleadings would have to be amended.[6]

[8] The underlying rationale for the dictum in *Hos+Med* is found in the reference to the source of an arbitrator's powers. In an arbitration, the autonomy of the parties is paramount.[7] In *Lufuno*, O'Regan ADCJ held that:

'Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.'[8]

The powers of an arbitrator therefore derive from the arbitration agreement. In the present matter, it is accordingly necessary to construe the arbitration agreement to determine the ambit of the powers accorded to the arbitrator. In particular, it must be determined whether the powers of the arbitrator included the power to determine issues not arising strictly on the pleadings but which, as would be the case with a high court judge, had been broadened by the appropriate ventilation of issues in accordance with the principles set out in *Shill v Milner*.

[9] Paragraph 21 of the arbitration agreement reads as follows:

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[5] *Shill v Milner* 1937 AD 101 at 105. This decision referred with approval to the earlier decisions to similar effect in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198 and *Wynberg Municipality v Dreyer* 1920 AD 439 at 443.
[6] *Hos+Med* para 31, 32.
[7] *Telcordia* para 4.
[8] Paragraph 219.

'The arbitrator shall have such powers as are allowed by law to a High Court of the Republic of South Africa to ensure the just, expeditious, economical and final determination of the dispute and shall have all of the powers afforded to a judge of the High Court of South Africa in terms of the Uniform Rules read with the provisions of the Arbitration Act.'

In the context of how it came about that the matter was referred to arbitration and an overall reading of the agreement, it is clear that the object of the parties was to have the arbitrator determine the matter on the same footing as would a judge have done had one been available in court that morning. Paragraph 21 is entirely consistent with, and clearly gives effect to, that object. It clothed the arbitrator with powers which placed her or him in the same position as a high court judge dealing with a matter in the high court. As was put to counsel during the hearing before us, a construction of the arbitration agreement as a whole, and that paragraph in particular, indicates that what the parties intended was simply a change of venue and presiding officer and nothing more. Since a court would have been entitled to apply the principles set out in *Shill v Milner*, the arbitrator was also entitled to do so. Accordingly, the arbitrator was entitled to allow the issues on the pleadings to be broadened by proper ventilation where no prejudice ensued to either party as a result.

[10] The broadening of the issues in line with the further particulars was foreshadowed in the appellant's opening address. No objection was raised to this approach by the respondents at the time or at any time thereafter. The respondents at no stage contended that they had suffered prejudice as a result of the broadening of the issues. The respondents did not contend that the issues were not fully and properly ventilated. In the result, it cannot be held that the appeal tribunal exceeded its powers in finding that an agreement, not fully pleaded in the particulars of claim, had been concluded.

[11] The second respect in which the respondents submitted that the appeal tribunal exceeded its powers was in its treatment of findings of fact on the part of the arbitrator. It was submitted that the appeal tribunal was only entitled to interfere with factual findings if there was a 'demonstrable and material misdirection on fact' by the tribunal of first instance.[9] The respondents contended that the appeal tribunal interfered with factual findings of the arbitrator without referring to any such misdirections. Special reliance was placed on what was said to be the factual finding that no oral agreement as pleaded had been proved.

[12] In this regard, the crucial part of the award concerns whether agreement had been reached to contract on a certain basis while agreeing to leave outstanding matters to future negotiation or whether the parties contemplated that consensus on the outstanding issues would have to be reached before a binding agreement came into existence.[10] The arbitrator found that the latter position applied saying '[i]t is quite apparent from the earlier correspondence that the parties regarded the manner and circumstances in which the members and management would dispose of their shares as an important feature of their proposed acquisition of the shares'. He further held that it was 'inconceivable that the parties could have intended to conclude an agreement entitling the members of senior management to acquire shares in the proposed company without reaching agreement upon the terms upon which they would acquire, hold and dispose of such shares'. He held, specifically, with reference to the documents and the evidence of the appellant, that the parties, far from reaching agreement on certain terms and leaving others open for negotiation, 'intended that there must be agreement at the very least on the terms upon which the

[9] The submission was couched in these terms, relying on *Fourie v Firstrand Bank Ltd* 2013 (1) SA 204 (SCA) para 14 and other cases.
[10] *GCEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-F.

members of senior management could acquire, hold and dispose of the shares, before a binding contract came into existence.' Since, he said, no such agreement was ever reached, no agreement came into existence.

[13] The appeal tribunal found that the appellant and three other senior managers accepted an offer communicated to them by way of a letter dated 2 August 2002. This letter communicated a resolution taken by the first respondent on 31 July 2002 that 'subject to shareholders approval [it would] sell its Putco shares at not less than R4,00 each to a new limited company not listed to be formed under conditions detailed hereunder . . . .' The conditions were, inter alia, that the shares of ten cents each would be allocated as to 17.5 percent to 'Senior Management comprised of 7 individuals to be nominated at 2.5% each' and that those shareholders wishing to sell must first offer the shares to other existing shareholders. The tribunal disagreed with the finding of the arbitrator that the letter of 2 August 2002 was not an offer made with the intention to contract and that no agreement had been concluded. It found that an agreement that the appellant would obtain a 3 percent shareholding in the 'restructured and empowered entity runs like a golden thread through all the significant documents . . . They straddle the various empowerment models – commencing with the MCI deal, SAFIKA and finally the successful one in terms of which Putco's management and staff would be owning 43% of the company'.

[14] It is so that the appeal tribunal was limited to the powers of an appeal court. In general terms, an appeal court is bound by factual findings of a trial court. However, various factors militate against an inflexible approach in this respect. In *President of the Republic of South Africa v South African Rugby*

Football Union,[11] this issue was ventilated and the following principles emerged:

a) A distinction must be drawn between the 'subjective manner in which a witness testifies orally, as opposed to the objective content of the evidence so given.'[12]

b) If a finding is based on the demeanour of the witness (the subjective manner mentioned above), this is a 'tricky horse to ride'[13] and not determinative without regard to other factors, including the probabilities.[14]

c) There may be a misdirection of fact by the trial judge where his or her reasons are unsatisfactory or the record shows that he or she overlooked other facts or probabilities.[15]

[15] In the first instance, the appeal tribunal found the arbitrator's answer to a key question demonstrably wrong where he held that the letter of 2 August 2002 was 'simply a notification to senior management of a resolution' taken by the company. This flies in the face of direct, unchallenged and uncontradicted evidence of the appellant that, when the letter was given to the senior management at a meeting by Mr Carleo, the senior management indicated that they accepted the offer contained in that letter. There was no evidence that, when they did so, Mr Carleo demurred on the basis that what they purported to accept was not an offer made with the requisite intention to contract.

[16] In addition, the finding of the arbitrator that there was only a series of proposals without any firm agreement flies in the face of the acceptance of the proposal of senior management dated 21 October 2002 by the resolution of

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[11] *President of the Republic of South Africa v South African Rugby Football Union & others* 2000 (1) SA 1 (CC).
[12] Paragraph 77.
[13] Paragraph 78, quoting *S v Kelley* 1980 (3) SA 301 (A) at 308B-D.
[14] Paragraph 79.
[15] Paragraph 80, quoting *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706.

11 November 2002 of the Board of the first respondent. This proposal allocated 3 percent of the shareholding to 4 members of the executive management group, including the appellant, and 2 percent of the shareholding to 3 members of the executive management group. It also dealt with other material aspects, including how any sale of the shareholding to be thus acquired would take place. The Board resolved '[t]hat the letter of the Putco Senior Management with regard to the Empowerment Project dated 21 October 2002, be approved in its entirety.' It cannot be communicated more clearly that this was intended to give rise to an enforceable agreement.

[17] In the third place, the arbitrator himself indicated that his findings were based on an analysis of the documents and not on the subjective way in which the witnesses testified. He held that, '[i]n my view, the issue of whether or not a contract was concluded can be decided based upon the contents of these documents and the evidence of the plaintiff.' In such circumstances, the appeal tribunal was in as good a position as was the arbitrator and it was not necessary to find that he had committed a material misdirection before it could draw its own conclusions.

[18] The net result of these three factors is that it was not shown that the appeal tribunal was not entitled to interfere with the factual findings of the arbitrator and, accordingly, it was not shown that the tribunal had exceeded its powers in this respect. As Harms DP explained:

'[I]t is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.'[16]

[16] *Telcordia* para 86.

The second ground of attack was therefore without merit and should have been rejected by the court below.

[19] As regards the question of a latent gross irregularity, the respondents submitted that the appeal tribunal misconceived the nature of its enquiry. It also failed to deal properly with the omission of the appellant, in the s 311 proceedings, to mention the existence of the agreement. In essence, they submitted and the court below found, that the findings of the appeal tribunal were incorrect in so many respects that the only reasonable inference to draw was that it had committed a latent gross irregularity. The court below held that the factual and legal findings of the appeal tribunal were 'erroneous in a number respects.' It went on to hold that:

'[G]iven all the factual and legal errors made by the Appeal Panel which the applicants highlighted in argument - cannot it be said that the Appeal Panel misconstrued the entire nature of the enquiry and did not fully understand the reasoning of the arbitrator? Can it not be said that the cumulative effect of errors is so drastic that the Appeal Panel's award falls foul of the provisions of section 33 of the Arbitration Act relied upon by the applicants?'

[20] The starting point in determining whether a gross irregularity has been committed is set out in *Ellis v Morgan*[17] where Mason J laid down the basic principle:

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

The real question concerning a gross irregularity is to determine whether there was a flaw in the conduct of the proceedings rather than only a flaw in the reasoning of the appeal tribunal.[18]

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[17] *Ellis v Morgan; Ellis v Desai* 1909 TS 576 at 581.
[18] *Sidumo & another v Rustenberg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC) para 264.

[21] The respondents contended for a latent gross irregularity. As has been said by this court:[19]

'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[22] The respondent relied mainly on the appeal tribunal having ignored the probabilities concerning the section 311 proceedings and its failure to analyse correspondence between August and November 2002. In addition, it was submitted that, since the respondents had pleaded that the appellant had benefitted from an improved package as a result of the alleged breach, he was obliged to replicate facts by which the additional income said to arise from the breach should not be applied in reduction of his damages. Because he had not done so, it was submitted, the appeal tribunal committed a latent gross irregularity in awarding him the damages which it did.

[23] It was correctly submitted that a latent gross irregularity involves the 'failure by the arbitrator to take into account a material fact' and 'includes the converse situation of taking into account a materially irrelevant fact.'[20] Otherwise, the decision must be 'substantively unreasonable in the sense that no reasonable commissioner, acting reasonably, could have reached the decision on the evidence and the inferences drawn from it.'[21]

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[19] *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* 2013 (6) SA 224 (SCA) para 25. The notion of a latent irregularity was first introduced by Schreiner J in *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551.
[20] *Herholdt* para 16.
[21] *Herholdt* para 26, quoting the court below in that matter.

[24] The approach to the section 311 proceedings does not meet that test. The appeal tribunal, having expressed disquiet at the appellant's conduct, quite correctly held that the failure of the appellant to mention the agreement in those proceedings did not impact on the veracity of his uncontested and unchallenged evidence that the senior management had accepted the proposal of 2 August 2002 or on the objective evidence in terms of which the company, in its resolution of 11 November 2002, accepted the proposal of senior management of 31 October 2002. As regards the analysis of the correspondence, this was specifically referred to by the appeal tribunal in its award, albeit in summarised form containing a reference to the relevant documents in a footnote. The analysis of the correspondence gave rise to the conclusion of the panel of the 'golden thread' referred to in its award. The appeal tribunal also dealt with the point taken by the respondent that the appellant had received funds which he would not have received but for the breach. It held that factually he did not become a party to the third respondent's executive compensation scheme. Any additional income was derived from and incentive scheme. The funds received therefore did not result from the breach. None of these amounted to a failure to take into account a material fact or its converse.

[25] In addition, taken as a whole, the appeal tribunal's decision cannot be said to have been substantively unreasonable. It cannot be said that no arbitrator, acting reasonably, could have reached the decision reached by the appeal tribunal. It clearly understood the nature of the enquiry and cannot be said to have undertaken it in the wrong manner. The result was not unreasonable. No gross irregularity on the part of the appeal tribunal, whether latent or otherwise, was therefore demonstrated.

[26] It was not shown that the appeal tribunal exceeded its powers in either of the respects contended for by the respondents. Nor was it shown that the appeal

tribunal committed a gross irregularity. Accordingly, no basis was laid under s 33(1)(*b*) of the Arbitration Act for reviewing and setting aside the award of the appeal tribunal. It follows that the court below erred in doing so.

[27] In the result, the following order is granted:

1 The appeal is upheld with costs, such costs to include the costs of two counsel where employed.

2 The order of the North Gauteng High Court is set aside and substituted with the following order:

'The application is dismissed with costs.'

T R Gorven

Acting Judge of Appeal

Appearances

For Appellant:	A Subel SC (with him A C Botha) Instructed by: Louis Gishen & Associates, Sandton Lovius Block Attorneys, Bloemfontein
For Respondent:	P N Levenberg SC (with him A Lapan) Instructed by: Werksmans Incorporated, Sandown Matsepes Inc., Bloemfontein