Busamed Health Care (Pty) Ltd v Du Plessis Van Der Nest SC NO.
2020 JDR 1331 (GP)

Citation	2020 JDR 1331 (GP)
Court	Gauteng Division, Pretoria
Case no	72746/2019
Judge	VRSN Nkosi AJ
Heard	May 25, 2020
Judgment	June 26, 2020
Appellant/ Plaintiff	Busamed Health Care (Pty) Ltd & 2 Others
Respondent/ Defendant	M Du Plessis Van Der Nest SC NO. & 7 Others

Summary

Arbitration — Award — Application to review — Alleged gross irregularities by arbitrator — Arbitration Act 42 of 1965, s 33(1)*(b)*.

Judgment

Nkosi AJ:

1. This is an application by the Second Applicant to review and set aside the Arbitration Award by the 1st Respondent following a hearing involving the first, second and third Applicants with the 2nd Respondent to the 8th Respondent.

2. The Applicant was part of the arbitration proceedings where the 1st Respondent subsequent to such arbitration ordered compliance as to all participants had to abide.
3. It is common cause that there was a settlement agreement which guided the implementation of the arbitration award as ordered by the 1st Respondent.
4. One should note that subsequent to the aforesaid arbitration award the Applicant participated (partially) to the Arbitration award like all other parties to it:
   (a) The order at the end of the Arbitration award made by the First Respondent "the Arbitration" on 7 August 2019 "Arbitration Award" stated that:
      (i) the 1st Defendant **(GPH)** needs to comply with the consultancy services agreement between **GPH**, **Veraison**, **Tropical Paradise, Amoricare** and **Dingaan** (the CSA),
      (ii) the matter is referred to the Second Respondent **"Mazaars"** under clause 4.1.2.3.2 on the settlement concluded on the 13 December 2017 between inter alia the 1st Applicant **"Busamed Health care"**, the 3rd Applicant **"Busamed"** and **GPH**, as well as **Tropical Paradise**, **Veraison**, **Amoricare** and **Dingaan** (the settlement agreement) and,
      (iii) GPH must pay the cost of the Arbitration.
5. The Applicants instituted an application set to challenge the arbitration award by review to set it aside and to declare:
   (a) The management services agreement between **GPH** and **JT Ross** (Pty) Ltd (**JT Ross**) "the MSA" was terminated with effect from 29 May 2018,

   (b) The CSA automatically terminated when the **MSA** was terminated, and
   (c) For the purpose of valuation of the **CA** in terms of the settlement Agreement, **Mazaars** "shall take into account the fact that the management services agreement and the consultancy services agreement were terminated with effect from 29 May 2018.
6. In the alternative of the relief at the notice of motion if the Arbitration Award is not reviewed and set aside, various additional declaratory prayers are sought that:
   - **Busamed** and **Busamed Healthcare** are not bound by the Arbitration Award in certain respects
   - **Busamed** and **Busamed Healthcare** would also not be "bound by Mazaars" determination of the value of the consultancy services agreement pursuant to the arbitration award and
   - "there was no valid referral of "the natter" to **Mazaars** as required by clause 4.1.2.3.2 of the settlement agreement and that Mazaars is not duly empowered to conduct the valuation of the consultancy services agreement"
7. The Applicants base their challenge to the Arbitration Award under subsection 33(1)(b) of the Arbitration Act which provides that an award may be set aside where "an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings of has exceeded its powers" and this could only be done within a period of 6 weeks before the expiry of three years, after the publication of the award.
8. The prescribed period in terms of Section 33(2) of the Arbitration Act states that "shall be made within six weeks after the publication of the award to the parties. In this matter the arbitration award was handed down on the 7th of August 2019 and the six week period expired on 17 September 2019. It was time barred.

9. Any challenge or application to set the arbitration award had to be accompanied by application on good cause. This is a further prescribed procedure in terms of Section 33 of the Arbitration Act after due notice to the other party or parties. It must clearly spelt out that Busamed Healthcare and Busamed were not parties to the arbitration proceedings and that they lacked legal standing to challenge the arbitration award.
10. In the present case, the Applicants contends that the Arbitrator allegedly committed "gross irregularities" by making "findings" which were prejudicial to **Busamed** and **Busamed Healthcare** without being parties to the arbitration

proceedings or being afforded an opportunity to make representations. No suggestion was made that they were deprived an opportunity to present their case.

11. The applicants alleges in certain instances that the Arbitrator did not have powers to make a finding or order that he did record on pages 35-36 and page 102 paragraph 133.2 of the award. This allegation was not substantiated at all.
12. The complaint that the Arbitrator found or assumed, that the MSA was still in force as the GPH Applicant did not plead in the arbitration that MSA was no longer in for (or enduring) and it was argued that it was never required of the Arbitrator to consider any argument or allegation that the MSA had terminated. He was alleged to have went beyond his mandate.
13. It was denied that there were "gross irregularities" arising from non-participation of Busamed and Busamed Healthcare in the arbitration or the findings made by the Arbitrator in those proceedings which could have a bearing on those companies:
    - The establishing of **Mazaars** valuation process and the legitimacy of its referral. The court accept this submission.

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14. The Applicant's main complaint is an allegation that the Arbitrator purportedly exceeded his powers when - after finding that GPH needs to comply with the **CSA** -he stated that "the matter is referred to Mazaars under clause 4.1.2.3.2 of the Settlement Agreement.
15. The Applicant's complain that the Arbitrator himself referred the matter to **Mazaars** when it was supposedly the parties' prerogative to do so.

    "That the valuation process had to be initiated by a referral from all "the parties (as defined in the Settlement Agreement and that **Busamed** and **Busamed Healthcare** should therefore have been party to the referral, but were not".
16. The Respondents argued that these were not a basis for a review and setting aside of an award. The court accepted this response as the parties had to conclude the process without further delay.
17. The arbitrator had made an order in paragraph 133.1 that "**GPH** needs to comply with the **CSA**" and further stated in paragraph 133.2, that "the matter is referred to **Mazaars** under clause 4.1.3.2 of the Settlement Agreement. This was the reflection of the parties Settlement Agreement.
18. The parties, on 22 August 2019, signed an engagement letter appointing **Mazaars** to perform an independent valuation for the purposes of Settlement Agreement. This constituted the formal referral to the matter to **Mazaars** for its independent valuation of the **CSA**.

    The above negates the assertion that the Arbitrator referred the matter himself. The question of gross irregularity could not be taken any further.
19. What is noted is that the Applicant's prayer 1.4 sought are at variance with the agreed process in the Settlement Agreement. The Applicants therefore cannot both seek to set aside the Arbitration Award as claimed in prayers 1.1 of the Notice of Motion and seek to direct what should be

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taken into account in **Mazaars**' evaluation of the value of the **CSA** in prayer 1.4

20. The subsequent declaratory reliefs sought have no basis when considering the basis of Applicant's participation in accordance with the **CSA** and ultimately claim a justification on basis of the doctrine of peremption. **At Common Law**, the doctrine of peremption states that a party must make-up its mind: it cannot equivocate by acquiescing in a judgment or decision in a judgment and later on appeal.
21. Applicant bears the responsibility to persuade the court into accepting the challenge on a balance of probability and for the court to dismiss Respondent's submission. The court could not be persuaded by the Applicant.
22. The relief sought in paragraph 1.5.3 of the Notice of Motion (that "there was no valid referral of the matter" to **Mazaars** as stated in clause 4.1.2.3.2 of the settlement agreement on their contention that the referral purportedly had to be made all parties to the Settlement Agreement did not occur.
23. In the case of **Venmop 275 (Pty) Ltd & Another vs Cleveland Projects (Pty) Ltd and Another (reportable) 20104/14286**, Venmop had to make a good cause for an application to set aside an arbitration award outside the six weeks period prescribed by the **Arbitration Act, No 42 of 1965** where the Arbitration Respondent offered to settle in accordance with the award:

The requirements	(i) show a good cause for the delay
	(ii) show prospect of success

    Acquiescence of the award is an indication allowing the Arbitration Respondent to reserve his right to challenge the effects of the award at the right time. This court had to be fully persuaded into accepting a clear submission that Applicant was unduly prejudiced by the Arbitration award. The court must weigh all options and consider the process of

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finality and the speedy process. The unreported case of **Hartely Roegshaan & Hartely Safiya vs First National Bank & Mantsobane Maroka case no: 27612/2010** is a case in print where a Respondent challenges a default judgment where itself failed to file a plea after it had served a Notice to Defend being aware of the process which unfolded after the Notice to Defend. The court dismissed a subsequent argument of an irregular service for the purpose of a rescission application. It was opposed on the basis that it had no **bona fide merits of success**.

24. In this matter parties had presented their respective cases. Applicant partially participated in the decision of the arbitrator with the acquiescence reserving its rights:

The Doctrine of Peremption:

According to Common Law a party who acquiesces to a judgment cannot subsequently seek to challenge the judgment which he has acquiesced or to blow hot and cold. The old case of **Sendral Kooparative Graanmaantskooper vs Shiften & Others & Taxing Master 1964(1) SA 162 (0)** and the case of **<u>Hlatshwayo vs Mare & Dees</u>** [1912 AD 242] where Lord De Villiers held that "where a man has two courses of action open to him and he unequivocally takes one he cannot afterwards turn back and take the other".

Similarly in **Donbunet vs South Africa Railways & Harbours Innes CJ 1920 AD 583 at 594-5 stated**:

> "The rule with regard to peremption is well settled, and has been enunciated on several occasions in the Appellate Division. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment (the award in this case in point), he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver must be held non-proven".

- Coming back to this matter and applying the same doctrine of peremption to the facts of this case, it is incontrovertible that the Applicant by his own conduct acquiesced to the Arbitration Award obtained against him by partial participation with the award/order. It is therefore on this ground that the court accepts that acquiescence will be fatal to any attempt to set the award aside.
- I therefore accept this view objectively analysed. Applicant disputed that it acted with approbate and reprobate in this kind of a situation and stated that he merely sounded a warning to test the waters. Having weighed the submissions taking into account the relevant principle the Applicant's case stands to fall.
- By partially participating to the dictates of the award can only be accepted as compliance and acceptance by acquiescence. The period of having to be quiet for more than 6 (six) weeks is clear for this court that Appellant accepted the Arbitration Award and therefore cannot u-turn now to the contrary.

25. It is my view that the Applicant did not succeed to making an answer to its partial participation to the decision of the Arbitrator. However the second hurdle to pass was to make out a case against its opponents. This could not succeed and therefore the court came to the conclusion that Applicant's Notice of Motion and its prayers could also not stand.
26. The court will not come to the rescue of a party who initially participated in terms of the award by showing an intention to abide by the original finding of the arbitrator and suddenly changes its mind. A party must make up its mind whether it was to abide or appeal. It all has to be done within a prescribed period as stipulated in the Arbitration Act unless a good cause is shown to the court hearing the application for condonation.
27. The court compared with the approbate and reprobate principle which almost confuses the doctrine of acquiescence or presumption. The fact

that the prospects of success are in favour of the Applicant unless the court is satisfied that this will be the finality of the dispute. The Applicant should have appealed within the correct period on receipt of the Arbitration Award and therefore my view is that there are no merits in the challenge of the Arbitration Award.

28. The purpose of the Arbitration was meant to allow the parties to participate in a forum chosen by them and to abide by its decision:
    - 28.1 This court could not find that the arbitrator had acted irregularly or in conflict with this principle when this award was made;
    - 28.2 **Section 32(2)** of the **Arbitration Act** applied where the award made required reconsideration in which the award was said to be deficient;
    - 28.3 The Applicant had not made a case for extending the period of time referred to in **Section 32(2)** because it had not put forward "compelling reasons" that the court had to consider as good cause shown to allow the Award to be not binding and effective to all parties to the Arbitration process; and
    - 28.4. This court, having listened to all parties and considered all the submissions and looked at the relative prejudice that will be caused if this matter is not concluded at this level the court finds that the Applicant's challenge have no merit and stands to be dismissed.

29. (1) Consequently the court concludes that Applicant's case is dismissed

(2) The Arbitration Award by the Arbitrator is made an order of the court as applied for

(3) Applicant to pay the costs involving two counsel

VRSN NKOSI (AJ)

ACTING JUDGE OF THE

OF SOUTH AFRICA, GAUTENG

DIVISION

Heard on:	25 May 2020
Judgment delivered:	26 June 2020
Appearances:	
For the Applicants:	Adv K Tsatsawane SC
Instructed by:	Cliffe Dekker Hofmeyr Inc
For the Respondents:	Adv A G South SC
	Adv T Pillay
Instructed by:	Edward Nathan Sonnenbergs Inc