THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 621/10

In the matter between:

NEIL HARVEY & ASSOCIATES (PTY) LTD	Appellant
and	
MEDSCHEME HOLDINGS (PTY) LTD	First Respondent
ANDRE MEYER	Second Respondent
KEVIN WRIGHT	Third Respondent
JOHAN SWARTS	Fourth Respondent
THE ARBITRATOR N.O.	Abiding

Neutral citation: *Neil Harvey & Associates (Pty) Ltd v Medscheme Holdings (Pty) Ltd* (621/10) [2011] ZASCA 75 (26 May 2011).

Coram: HARMS DP, CLOETE, PONNAN and MALAN JJA and PLASKET AJA

Heard: **3 May 2011**

Delivered: **26 May 2011**

Summary: Arbitration Act 42 of 1965: removal of arbitrator in terms of s 13(2)(a): proceedings in the absence of a party; reasonable perception of bias on the part of the arbitrator.

ORDER

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

The appeal is allowed with costs, including the costs of two counsel. The order of the court a quo is set aside and the following order substituted:
'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

CLOETE JA (HARMS DP, PONNAN and MALAN JJA and PLASKET AJA concurring):

[1] The appellant, Neil Harvey & Associates (Pty) Ltd ('NHA'), is the claimant in arbitration proceedings ('the Medscheme Arbitration') against Medscheme Holdings (Pty) Ltd and its chief executive officer, chief information officer and a general manager ('the respondents'). The arbitrator is Adv T W Beckerling who practises as senior counsel at the Johannesburg Bar. On appeal, as in the court below, the arbitrator abides the decision of the court.

[2] The respondents, as applicants, brought proceedings in the South Gauteng High Court (Johannesburg) in terms of a notice of motion dated 14 April 2009 for the removal of the arbitrator in terms of s 13(2)(a) of the Arbitration Act 42 of 1965. The section, read with s 1, provides (to the extent relevant) that a high court having jurisdiction may at any time on the application of any party to the reference, on good cause shown, remove an arbitrator from office. The court a quo (Makgoka J) granted the relief sought. NHA obtained the leave of that court to appeal to the full court of the North Gauteng High Court (Pretoria), but that direction was, at the suit of NHA, set

aside in terms of ss 20(2)(b) and (c) of the Supreme Court Act 59 of 1959 and substituted with a direction that the appeal be heard by this court.

[3] The Medscheme arbitration agreement was concluded on 23 October 2007. Relevant clauses of the agreement read with the definitions clause are the following:

'4. Powers of arbitrator

4.1 In the conduct of the arbitration the arbitrator will have the powers of a Judge of the [Witwatersrand Local Division of the High Court] as well as all such powers as are conferred by the [Arbitration Act] and the [Uniform Rules of Court] and the common law, and as provided for in this agreement . . .

7. Pleadings

The parties will file and serve pleadings in accordance with the [Uniform Rules of Court] . . .

12. Communication

If the legal representative of any of the parties to the disputes wish[es] to communicate with the arbitrator by fax or letter, such fax or letter will first be sent to the legal representative of the other party not less than 24 hours before it is forwarded to the arbitrator, except in situations of urgency.

Any telephonic communication with, or personal attendance upon, the arbitrator will, save as otherwise agreed, be done on the basis that the other party will be informed in advance of the communication or proposed personal attendance and will be entitled to participate in such telephonic communication by conference call or be present at the proposed personal attendance.'

[4] In about November/December 2008 and by an exchange of correspondence between the attorneys, the parties concluded what has come to be termed the 'Inspection Agreement'. In essence, that agreement provides for access to all of Medscheme's documents (even if they are irrelevant) by NHA's team of experts. These experts are required to identify the documents which they consider to be relevant, followed by scrutiny by Medscheme and ultimately, if necessary, a hearing before and determination by the arbitrator of relevance in disputed cases.

[5] The pleadings in the arbitration currently run to well over 1000 pages. Put simply, the principal dispute between NHA and the respondents is that NHA alleges, and the respondents deny, that whilst Medscheme had access to NHA's software, the respondents, in breach of agreements between NHA and Medscheme and in unfair and unlawful competition with NHA, copied source code and misappropriated NHA's confidential information in order to develop software for Medscheme. NHA also alleges that Medscheme, in breach of its obligation (which Medscheme denies) to transfer all schemes under its administration onto NHA's software, administered schemes using its own software, adapted and enhanced by incorporating features of NHA's software (which Medscheme also denies).

[6] There appear to be two legs to the respondents' case, based on good cause, which involve a consideration of substantially the same facts. The first is that a gross irregularity took place and the second, that there is a reasonable suspicion that the arbitrator is biased.

[7] On 30 July 2008, in preparation for the arbitration, which was due to commence on 24 September 2008, NHA caused subpoenas duces tecum to be served on persons employed by Simeka Business Group Ltd and its indirectly held subsidiary, ITQ Business Solutions (Pty) Ltd. (For the sake of convenience, and taking my cue from the parties, I shall refer to these companies jointly as 'ITQ'.) ITQ was the main developer of the software for Medscheme, which is the crux of the dispute between the parties. In doing so it acted principally through its chief executive officer, Mr Marc Schrader, and a director, Ms Petro Bogatie. The respondents were fully aware of the subpoenas and their attorney, whilst advising ITQ that it would not be proper for him to represent it, advised it to co-operate with NHA.

[8] The chief legal officer of ITQ, Mr Alexander Evan, explained in an affidavit annexed to the respondents' replying affidavit that the subpoenas presented a practical problem, namely: How should ITQ make available a vast quantity of emails when many were bound to be irrelevant and some were potentially confidential to ITQ? Negotiations ensued between Evan and NHA's

attorney, which culminated on 12 October 2008 in the signature of a contract styled 'Confidentiality Agreement'. In terms of that agreement ITQ undertook, in response to the subpoenas, to disclose all documents and confidential information in its possession to NHA's legal team and four named independent IT experts; NHA was authorised, subject to control mechanisms agreed with ITQ, to use what was disclosed for the purposes of the Medscheme arbitration; and the parties to the agreement consented to Adv Beckerling having jurisdiction 'to settle any disputes which may arise out of or in connection with' the agreement. Most of the documents subpoenaed were on the Medscheme server and compliance by ITQ with the subpoenas would facilitate the identification of documents as required by the first stage of the Inspection Agreement between NHA and Medscheme.

[9] On 20 February 2009 NHA's attorney sent an email to Adv Beckerling informing him of the conclusion of the Confidentiality Agreement, stating that a dispute had arisen between NHA and ITQ regarding the latter's compliance with the subpoenas and requesting a meeting in order to 'ventilate and resolve' the dispute. That email and subsequent emails addressed to the arbitrator and ITQ were not copied by NHA to the respondents' attorney (although the contents of some were, by ITQ). The meeting was held six days later on 26 February. Present were members of NHA's legal team and an expert retained by it, and Evan, Schrader and Ms Bogatie of ITQ. There is a dispute about when and how Medscheme and its attorney came to know about the details of the meeting and its purpose, which is relevant to the argument on behalf of NHA that the complete answer to the respondents' application for the removal of the arbitrator is that they were aware of, and acquiesced in, the meeting taking place. I find it unnecessary to resolve the dispute or to deal with the argument.

[10] What transpired at the meeting of 26 February was placed on record by the arbitrator, with the aid of contemporaneous notes, at a meeting convened by him pursuant to a request by the respondents on 9 March 2009, at which the legal representatives of both NHA and the respondents were present. Leading counsel representing NHA confirmed what the arbitrator had said,

subject to minor amendments not relevant for present purposes. This recordal was accepted by the respondents in their application for the arbitrator's removal from office and its accuracy is common cause. It amounts to this:

(a) Lead counsel for NHA informed the arbitrator that the issues before the meeting were entirely separate from, and had nothing to do with, the issues in the Medscheme arbitration.

(b) The arbitrator was requested to resolve the issues between NHA and ITQ that had arisen pursuant to the Confidentiality Agreement. The arbitrator was under the impression that the respondents knew about the Confidentiality Agreement and the fact that he had been requested (as he put it) 'to chair the meeting to resolve the impasse' between NHA and ITQ.

(c) NHA contended that it was being prejudiced in the Medscheme arbitration because ITQ was not complying with its obligation to produce documents under the Confidentiality Agreement. The ITQ representatives confirmed their intention to abide by that agreement, but contended that the time frames set by NHA for compliance were unreasonable and that a large number of emails that were being sought by NHA were irrelevant. This latter contention was placed in dispute by NHA.

(d) The arbitrator expressly declined to consider questions of relevance as it seemed to him that the difference between the parties before him was a practical one, limited to the implementation of the Confidentiality Agreement that both were willing and able to perform, given some guidance. He formed the view that NHA's request was overly broad and that its complaint was unreasonable, and said so. NHA's lead counsel then asked for the meeting to stand down so that he could take instructions.

(e) When the meeting resumed, lead counsel for NHA said that the problem could be resolved between the attorneys, if it remained alive after his attorney had had regard to a folder of emails prepared by Ms Bogatie. Provisional arrangements for times and other practicalities were discussed for the implementation of the agreement. The arbitrator was not asked to, nor did he, give any directions in this regard.

(f) Lead counsel for NHA then indicated to the arbitrator either that he had an instruction, or that he wanted to take an instruction (there is no clarity in this regard), to ask that Ms Bogatie be directed, pursuant to the subpoenas, to

deliver to NHA emails that were on her laptop computer. The arbitrator's reaction (in his own words) was:

'I indicated that I would be extremely reluctant even to entertain any suggestion of such an application and expressed the view that it was something that directly affected the existing quarantine arrangements in the main arbitration about which Medscheme undoubtedly had to be heard. ['Quarantine arrangements' was presumably a reference to the Inspection Agreement or the agreement in terms of which NHA and Medscheme had each deposited in escrow copies of relevant software and manuals with a neutral firm of attorneys with a view to the items being inspected at a later date.]

I made it clear that I was accordingly unable to entertain such an application without Medscheme being heard. [Lead counsel for NHA] fully accepted and I thought agreed with this view and nothing more was said about it.'

(g) The meeting adjourned shortly thereafter on the basis that the parties would meet informally in the absence of the arbitrator immediately after the conclusion of the meeting, in order to resolve issues concerning the relevance or otherwise of a small number of emails that ITQ had objected to making available.

(h) During the course of the meeting the arbitrator made no rulings and gave no directives.

[11] NHA submitted that it was perfectly entitled to conduct an arbitration separate from the Medscheme arbitration but before the same arbitrator, in respect of the issues that had arisen between it and ITQ, and from which the respondents could be excluded. I cannot agree with this argument, for reasons I shall give presently.

[12] The respondents' argument was that the arbitrator's appointment and involvement in what they term 'the ITQ arbitration', which they categorise as 'parallel (and related) arbitration proceedings' between NHA and key witnesses in the Medscheme arbitration, to the exclusion of the respondents, constitutes good cause for the removal of the arbitrator. The respondents made the following submissions in this regard:

(a) The arbitrator was appointed in the Medscheme arbitration to resolve several material issues between NHA and the respondents.

(b) Clause 12 of the Medscheme arbitration agreement (quoted above) provides a specific procedure for the appropriate mode of communication with the arbitrator.

(c) In terms of s 15 of the Act: 'An arbitration tribunal shall give to every party to the reference, written notice of the time when and place where the arbitration proceedings will be held, and every such party shall be entitled to be present personally or by representative and to be heard at such proceedings.'

(d) Clause 12 of the Medscheme arbitration agreement and s 15 of the Act embody the elementary rule which applies in an adverserial process, namely that an arbitrator should have no communication whatever with either party in a case before him except in the presence of the other, and an arbitrator should have no communication with any witness (or potential witness) except in the presence of both parties. Nothing may be done *inaudita altera parte*.

[13] For the proposition that 'nothing' may be done without the other party being heard, the respondents rely on the following dictum in the majority judgment of O'Regan ADCJ in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC) para 259:

'Kroon AJ [who wrote the minority judgment] relies on *Lazarus v Goldberg & Another*[1] which cites Cloete J in *Croll qq Kerr v Brehm*[2] to state that "no rule is more clear than that they [arbitrators] should not proceed to examine parties or witnesses in the presence only of one party, that nothing may be done "*inaudita altera parte*". This rule is clearly correct in the context of an adversarial process.'

The passage quoted from the judgment of Sir Henry Cloete continues with the words '— so as to give the opposite party the opportunity of answering or rebutting such evidence'. That judgment is not authority for the more general proposition advanced by the respondents that 'nothing' must be done in the absence of any of the parties to the arbitration. Nor do the dicta in, and facts of, the cases on which Kroon AJ relied provide such authority. Those cases

[1] 1920 CPD 154.
[2] 2 Searle 227 at 229

are confined to situations where evidence (oral[3] or documentary[4]) was produced, or proceedings took place where the merits were considered,[5] in the presence of one party, but the absence of the other.

[14] For these reasons, the approval of the truncated quotation from the judgment of Sir Henry Cloete in *Croll's* case by O'Regan ADCJ in the context of adversarial arbitration proceedings should not be interpreted as having the wide meaning for which the respondents contend. The underlying purpose of the rule is to allow a party to an arbitration to assert its rights and protect its interests. But when neither can have been affected, no irregularity takes place. The question is therefore whether there is a realistic possibility that the rights or interests of the respondents were adversely affected at the hearing on 26 February.

[15] The argument on behalf of the respondent was that NHA was not entitled to engage the same arbitrator, appointed in the Medscheme arbitration, to preside over the ITQ arbitration, and the arbitrator was not entitled to accept the appointment, where the ITQ arbitration involved:

(a) Questions of relevance of documents in the Medscheme arbitration, in relation to which the parties had expressly agreed on a procedure to be followed (the Inspection Agreement) for resolution of disputes before the arbitrator;

(b) the degree of cooperation of key witnesses in the Medscheme arbitration (ie the ITQ employees) in responding to subpoenas duces tecum issued by NHA in that arbitration;

(c) those witnesses making documents available to NHA for use in the Medscheme arbitration; and

(d) the credibility of those witnesses.

[16] The hearing on 26 February had the potential for all of these questions to be canvassed. For that very reason, NHA should not have stipulated or

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[3] Eg *Naidoo v Estate Mahomed & others* 1951 (1) SA 915 (N) at 920D-F referring to *Grant Brothers v Harsant* 1931 NPD 477 and *Burns & Co v Burne* 1922 NPD 461.
[4] Eg *Sapiero & another v Lipschitz & others* 1920 CPD 483.
[5] *Croll qq Kerr v Brehm* 2 Searle 227 at 229.

agreed to a procedure whereby disputes between it and ITQ under the Confidentiality Agreement would be referred for determination by the arbitrator in the Medscheme arbitration, in the absence of the other parties to that arbitration, ie the respondents. It is understandable how this came about: Adv Beckerling was steeped in the matter and ITQ was concerned about the confidentiality of its own information, not only vis-à-vis NHA but (according to NHA, whose version must be accepted as these are motion proceedings) also vis-à-vis Medscheme. Furthermore there cannot be, nor was there, any suggestion that NHA was attempting to obtain any improper advantage because it is common cause that all documents produced by ITQ in the possession of Medscheme, whether relevant or irrelevant, would, in terms of the Inspection Agreement, either have to be approved by Medscheme, or a directive obtained from the arbitrator, before they could be used in the Medscheme arbitration. But what should have happened is that NHA should have requested the arbitrator to convene a hearing on notice to the respondents to determine the alleged non-compliance by ITQ with the Confidentiality Agreement and notified the respondents of their intention to request the arbitrator to do so. It would then have been for the arbitrator, having heard all parties, to determine questions of confidentiality of ITQ's information vis-à-vis NHA and the respondents and to give any directions with a view to ensuring compliance by ITQ with its undertaking to provide documents to NHA relevant to the Medscheme arbitration. The issues which could have arisen at the hearing on 26 February, identified by the respondents and set out in para 15 above, were so closely related to that arbitration that they could not properly have been determined by the arbitrator in the absence of the respondents.

[17] As a matter of fact, however, these issues did not arise and there is no realistic possibility that the respondents were prejudiced by what happened at the meeting. Nothing was done, said or decided that could have affected their rights or interests. The arbitrator made no rulings or findings of fact whatever. He did not receive evidence or conduct a hearing in any way relevant to the issues in the Medscheme arbitration. Nor did he consider the relevance to the Medscheme arbitration of any documents sought by NHA. All he did was to

facilitate the performance by the ITQ witnesses of their obligations under the subpoenas ─ in respect of which, as I have said, the respondents' attorney had already advised them to co-operate. And I repeat that performance of those obligations would not have entitled NHA to use the documents produced, because of the Inspection Agreement. In these circumstances, a finding that there had been an irregularity warranting the removal of the arbitrator is not warranted. As O'Regan ADCJ said in the *Lufuno Mphaphuli & Associates* case[6] in the context of s 33(1) of the Arbitration Act (and these remarks are equally apposite in an application such as the present):

'If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated.'

[18] I turn to consider the question of a reasonable apprehension of bias on the part of the arbitrator. The applicable test in this regard is set out by the Constitutional Court in the following passage in *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 48:

'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not [brought] or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.'

On the facts, the respondents rely on what happened before the meeting of 26 February and also what happened at the meeting. On the law, the respondents emphasised passages in two textbooks. The first is in *Russell on Arbitration*:[7]

'Whilst there is no absolute rule against the arbitrator having unilateral discussions with one party only, the practice is . . . generally to be deprecated and can certainly lead to removal under this head [viz "Unilateral Communications"] or for a reasonable apprehension of bias, especially if discussions are intentional or frequent, go beyond administrative matters or are not promptly disclosed to the other party.'

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[6] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) para 236.
[7] 23 ed (2007) by D St J Sutton para 7-118.

The second is in *Law and Practice of International Commercial Arbitration* by A Redfern and M Hunter:[8]

'The requirement of disclosure is a continuing duty that continues throughout the arbitration. If new circumstances arise that might give rise to doubt as to an arbitrator's independence and/or impartiality, they should be disclosed immediately to the parties . . .'

and

'An independent and impartial arbitrator must not engage in any *ex parte* communications with the parties regarding the merits of the case during the course of the proceedings.'

[19] I have already dealt with what happened ─ and, more importantly, with what did not happen ─ at the meeting of 26 February. In the present context, the following dictum in the *SARFU* case[9] requires emphasis:

'The apprehension of the reasonable person must be assessed in the light of the true facts as they emerged at the hearing of the application.'

This passage in the judgment of the Constitutional Court makes it clear that the test is to be applied ex post facto and with the benefit of hindsight. The respondents may well have been able to satisfy a court, in an urgent application for an interdict before the meeting of 26 February, that they had a reasonable apprehension of harm consisting in the possibility that what might happen at the meeting would oblige them to ask for the arbitrator to be removed, with concomitant delays in the arbitration process and a waste of the (obviously considerable) expenses incurred in the proceedings which had already taken place before him. But after the meeting, in an application for the removal of the arbitrator, the true facts must be examined. With reference to the four points raised by the respondents set out in para 15 above, the following is apparent:

(a) The arbitrator refused to consider questions of relevance.

(b) The ITQ witnesses said that they were prepared to co-operate and the arbitrator accepted this. Of course there were allegations made by NHA (and denied by ITQ) that the witnesses were not co-operating, but the arbitrator

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[8] 4 ed (2004) para 4-61 and para 4-66.

[9] *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 45.

could without question be relied upon to distinguish between allegations and facts; and the veracity of the allegations was not considered by him.

(c) It is common cause that because of the Inspection Agreement documents which could have been produced by the ITQ witnesses could not have been used by NHA in the Medscheme arbitration without the consent of the respondents, or a directive by the arbitrator; and the arbitrator refused to entertain an application for the production of documents on Ms Bogatie's computer precisely because the respondents were not present.

(d) No question of credibility of the ITQ witnesses arose.

[20] I have no hesitation in concluding that the facts of what transpired at the meeting of 26 February do not begin to provide a basis for a finding that there is a reasonable suspicion that the arbitrator is biased. On the contrary: the arbitrator was at pains to protect the interests of the respondents in their absence; and he was bona fide under the impression that they knew of the meeting and the function he was to perform at it.

[21] Finally, I shall deal briefly with the events prior to the meeting of 26 February. As I have said, the meeting was arranged by exchanges of emails not copied by NHA to the respondents' attorney. But the arbitrator did not know that the respondents had not been informed of the meeting by NHA. As I have now said repeatedly, he was under a contrary impression. It was submitted that the mere fact that the arbitrator accepted the appointment to arbitrate disputes between NHA and ITQ, is sufficient to disqualify him from continuing as the arbitrator in the Medscheme arbitration. That cannot be so. It would mean that if on 26 February the legal representatives of NHA and ITQ had arrived at the arbitrator's chambers and told him that they had resolved their differences, he could still be removed from office even though he had acted in complete good faith ─ an obviously untenable proposition.

[22] There are three issues in relation to costs.

(a) First, three counsel represented NHA in the appeal and the costs of three counsel were sought. Whilst I appreciate that the employment of three counsel might well be justified for purposes of the arbitration, only two counsel

were employed in the court a quo and I agree with the submission on behalf of the respondents that neither the volume of the record nor the issues on appeal required three counsel.

(b) Second, NHA asked for an order that the costs in the court a quo be paid by the respondents on the scale as between attorney and client. The submission was that the respondents and their attorney had attempted to mislead the court as to the extent of their knowledge as to what would happen at the meeting of 26 February before it took place. It seems plain that the respondents and their attorney were not as frank and forthcoming as they could have been, and that a higher degree of co-operation, which would probably have obviated these proceedings, could legitimately have been expected of them; but I am not satisfied that a finding of deliberate misconduct justifying a punitive costs order can be made in the absence of oral evidence. Indeed, in the court a quo, and on appeal, the respondents asked that the deponents to their affidavits be given an opportunity to testify if it was considered necessary to decide the matter based on criticism of those deponents. It is not desirable for a court to allow further costs of this nature to be incurred in order to decide questions of costs and a court should do the best it can on the information before it: cf *Jenkins v SA Boiler Makers, Iron & Steel Workers & Mining Builders Society* 1946 WLD 15 at 17-18.

(c) Third, NHA delivered voluminous heads of argument running to over 180 pages that did not comply with rule 10(3)(g) of this court (inserted on 19 November 2010) which reads:

'The heads of argument of any appellant or respondent should not exceed 40 pages, unless a judge, on request, otherwise orders.'

Amended heads of argument complying with the rule were subsequently delivered on the instructions of the presiding judge. The respondents sought an order excluding the costs of the first set of heads of argument from the costs order in favour of NHA, should the appeal succeed. But the taxing master of this court does not allow a separate fee for heads of argument.

[23] The appeal is allowed with costs, including the costs of two counsel. The order of the court a quo is set aside and the following order substituted:

'The application is dismissed with costs, including the costs of two counsel.'

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	J Gautschi SC (with him S Kirk-Cohen SC and A Bruce-Brand) Instructed by Eversheds, Johannesburg Honey Attorneys, Bloemfontein
RESPONDENTS:	C H J Badenhorst SC (with him K Spottiswoode) Instructed by Werksmans, Johannesburg Matsepes, Bloemfontein