THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO:015/07

In the matter between

HOS+MED MEDICAL AID SCHEME **APPELLANT**

and

THEBE YA BOPHELO HEALTHCARE MARKETING & CONSULTING (PTY) LTD **1ST RESPONDENT**

P J VAN DER WALT NO **2ND RESPONDENT**

K VAN DIJKHORST NO **3RD RESPONDENT**

I W B DE VILLIERS NO **4TH RESPONDENT**

CORAM: HOWIE P, CLOETE and LEWIS JJA, HURT and MHLANTLA AJJA

HEARD: 9 NOVEMBER 2007

DELIVERED: **29 NOVEMBER 2007**

SUMMARY: Order of High Court, Pretoria setting aside an arbitration appeal tribunal's award confirmed on basis that tribunal had exceeded its powers. Dispute referred to new appeal tribunal in terms of s 33(4) of the Arbitration Act 42 of 1965.

Neutral Citation: This judgment may be referred to as Hosmed Medical Aid Scheme v Thebe Ya Bophelo Healthcare [2007] SCA 163(RSA)

LEWIS JA

[1] This is an appeal against an order of the High Court, Pretoria (per Seriti J), setting aside an award made by an arbitration appeal tribunal. The appellant, Hos+Med Medical Aid Scheme ('Hosmed') is, as its name suggests, a medical aid scheme registered in terms of the Medical Schemes Act 131 of 1998. The first respondent, Thebe Ya Bophelo Health Care Marketing and Consulting (Pty) Ltd ('Thebe'), is a company that acts as a broker to Hosmed, and is accredited under the Medical Schemes Act. A dispute between the parties as to fees payable by Hosmed to Thebe was referred to arbitration.

[2] The arbitration agreement provides for an appeal against the award to an arbitration appeal tribunal. Hosmed appealed against the award of the arbitrator, who held that Hosmed was liable to pay the fees claimed. The quantum was to be determined subsequently, the issue of liability having been separated by agreement. Hosmed succeeded in its appeal. Thebe successfully brought an application to have the appeal award set aside. The members of the appeal tribunal, all retired judges, are cited as respondents, but none opposed the application to set aside the award, and they are not party to this appeal. The appeal is with the leave of the high court.

[3] The only issue before the court below, and in this appeal, was whether the appeal tribunal exceeded its powers, or was guilty of gross misconduct, such that a court should set aside its award. There were two issues before the appeal tribunal itself, one of which was decided in favour of Thebe, and the other against it. Hosmed seeks to have the decision of the court below set aside in terms of s 33 of the Arbitration Act 42 of 1965, on the basis that the court erred in finding that the appeal tribunal's award was vitiated, but only in respect of the second issue decided by it. Although the Arbitration Act does not specifically refer to an award of an appeal tribunal, its terms clearly enable an agreement to refer an arbitrator's award to an appeal body, and the provisions of the Act must apply to an appeal tribunal, and its award, in the same way as they do to an arbitration and an arbitral award.

[4] Some background is necessary, but I shall be brief since many of the issues are not relevant to this appeal. In order to facilitate the conduct of the medical aid scheme run by Hosmed, it uses the services of brokers and administrators. In November 1999 Hosmed entered into a contract with Thebe,[1] part of the 'Thebe Group of Companies', engaging Thebe to introduce new members for the scheme, for which an introduction fee was payable, and requiring it to provide ongoing services to members of the scheme, for which another fee was payable.

[5] Both types of fee were regulated by regulations promulgated in 1999 under the Medical Schemes Act and the contract between the parties complied with the regulations. However, in June 2000 the regulations were amended. The parties believed that as a result of the amendment it was no longer permissible for Thebe to charge fees for ongoing services. This was apparently a general perception among people working in the medical aid field.

[6] As a result of that perception the parties concluded an agreement in March 2001 varying the 1999 agreement so as to delete the clause providing for the payment to Thebe for ongoing services. In August of the same year the parties concluded a second amending agreement, which retained much of the first agreement and of the amending agreement concluded in March, but also gave Thebe certain exclusive rights as a broker.

[7] The regulations under the Medical Schemes Act were amended again with effect from 1 January 2003. The amended regulations made provision for brokers to charge fees for ongoing services. Accordingly, yet another agreement was concluded by the parties in August 2003, again making provision for Thebe to charge fees for ongoing services to Hosmed members. Between March 2001 and August 2003 Thebe claimed no fees for such services, presumably having forgone them in the 2001 amendments to their original agreement.

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[1] Thebe underwent several name changes, and changes of shareholders and directors over the years, but none is of any significance in this appeal.

[8] In February 2003 Mr R D Laird became the chief executive officer of Thebe: he was unaware of the existence of the amending agreements of 2001, and, on discovering that no fees had been paid for ongoing services between 2001 and 2003, sent invoices to Hosmed claiming a substantial sum of money. Hosmed denied liability for payment and Thebe sued in the Johannesburg High Court. Hosmed pleaded that the agreement provided for the resolution of disputes by arbitration. The parties accordingly concluded a written arbitration agreement and appointed Mr R T van Schalkwyk as the arbitrator. The terms of the arbitration agreement are significant to the issue on appeal.

[9] These are the most important:

'4 The issues to be determined by the arbitrator are the issues contained in the pleadings referred to at clause 8 below.'

'7.1 The arbitration shall be conducted in accordance with the rules of the High Court, subject to any specific directions that the arbitrator may give in regard to the conduct of the arbitration;

7.2 The arbitrator shall have full powers in connection with the arbitration, and in particular, without limitation, the arbitrator:

7.2.1 Shall have the power set forth in the Arbitration Act, as amended, or any replacement Act;

7.2.2 May make such award or awards, whether interim, provisional or final, as he may consider appropriate.'

8.1 The parties have agreed that the pleadings filed in the High Court action . . . will serve as the pleadings in this matter; . . .'

The clause then sets out, for the sake of clarity, which pleadings had been filed and what their status in the arbitration would be, and continued:

'8.3 All further pleadings and notices may be exchanged between the parties on their due dates by E-mail (confirmed by telefax) or by telefax . . . .'

[10] In so far as the right of appeal is concerned, the agreement provides:

'16 The award made by the arbitrator shall be final and binding on the parties, subject to the right of appeal contained at clause 17 below.'

'17.1 The final award made by the arbitrator shall be subject to a right of appeal;

. . .

17.4 Such appeal shall be heard by a panel as agreed to within ten court days [after notices of appeal and cross appeal had been lodged] failing which three arbitrators shall be nominated and appointed by the Arbitration Foundation of South Africa. . . .'

[11] The pleadings were indeed amended: the existence of the amending agreements of 2001 to the broking contract were introduced in an amendment to Hosmed's plea, and Thebe responded, in a replication, by averring that these agreements were void because they were in contravention of s 228 of the Companies Act 61 of 1973. The basis of this defence was that the amending agreements, by which Thebe gave up its right to claim fees for ongoing services to Hosmed's members, constituted a disposal of the greater part of Thebe's assets, yet had not been approved by a general meeting of Thebe's shareholders.

[12] Section 228 provides that:

'(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company, to dispose of –

(a) the whole or substantially the whole of the undertaking of the company; or

(b) the whole or the greater part of the assets of the company.

(2) No resolution of the company approving any such disposal shall have effect unless it authorizes or ratifies in terms the specific transaction.'

[13] Hosmed's rejoinder denied that s 228 had not been complied with, and relied in the alternative on estoppel or the Turquand rule. In essence, Hosmed alleged that Thebe had represented that its managing director, Mr Frank Bartlett, had authority to conclude the amending agreements, and that Hosmed had relied on such representations; and that, further, it had entered into the amending agreements in good faith and on the assumption that the internal requirements of Thebe had been complied with – the Turquand defence.[2]

[2] The 'rule' takes its name from *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886, and is to the effect that a person entering into a contract is not required to ascertain whether the company's internal requirements have been met.

[14] The parties agreed that the arbitrator should assume that Thebe's agreement not to claim fees for ongoing services did constitute a disposal of the greater part of its assets. Thus, when the arbitration commenced, the disputes to be determined were whether the amendment to the regulations in 2001 precluded Thebe from claiming fees for ongoing services, and whether the amendments to the parties' agreement in 2001 were in contravention of s 228 of the Companies Act. This entailed also a determination of the defences based on estoppel and the Turquand rule. It was agreed that the quantum of Thebe's claim would be determined after these issues had been decided.

[15] The evidence of two witnesses was led for Thebe at the arbitration hearing: Mr J Alderslade, the financial director of Thebe's holding company, and Laird, the chief executive officer of Thebe, referred to earlier. A director of Thebe, Mr P McCulloch, who was involved in the negotiations with Hosmed, did not testify. Hosmed called the evidence of Mr M Brown. The evidence of Thebe's witnesses was of limited value since they had not participated in the negotiations leading to any of the agreements. Indeed, Laird had joined Thebe only in 2003, two years after the broking agreement had been amended by the parties.

[16] When the arbitration was adjourned for the arbitrator to consider his award, Thebe realized that it had not led evidence to substantiate its contention that the amending agreements had not been authorized as contemplated in s 228 of the Companies Act. It was granted leave to recall Laird. Laird testified that he could not find in Thebe's documents any record of a resolution of the company's members authorizing the disposal of a major part of its assets or undertaking. He was cross-examined by Hosmed's counsel on the existence of such a document. The evidence adduced, according to Hosmed, was designed to show that Thebe's sole shareholder, the Thebe Hosken Group (Pty) Ltd, of which McCulloch was a director, as well as being a director of Thebe, had agreed to the disposal of Thebe's right to fees for ongoing services to Hosmed's members. There was thus, it was argued before the appeal tribunal, unanimous assent to the disposal and no

contravention of s 228. The principle of unanimous assent is that where all the shareholders of a company agree on a matter that ordinarily requires a resolution of a general meeting of the company, the need for the formal resolution falls away.

[17] Much store is placed by Hosmed on Laird's evidence when he was recalled. Counsel argued before us that his questioning was directed to the issue of unanimous assent, even though it had not been pleaded. The gist of Laird's evidence on recall was that, despite a careful search, he could not find any resolution authorizing the amendments of the broking agreement and thus no evidence that the disposal was authorized under s 228. He testified that the Thebe Hosken Group was indeed the only shareholder in Thebe and confirmed that McCulloch had been a member of the boards of both Thebe and the Thebe Hosken Group.

[18] In support of the contention that there was unanimous assent, and that this was raised as an issue in the arbitration, Hosmed points to the following passage:

'Mr Swart [counsel for Hosmed]: . . . I put it to you the shareholder must have been aware of this [the disposal] through Mr McCulloch.

Mr Laird: If Mr McCulloch disclosed it. But as I've said to you, I've looked through all of the minutes, etcetera, and I haven't found anything in there that would say that this is what happened.

Mr Swart: But we've already agreed that there was only one shareholder. It would be senseless to have a formal meeting with yourself. Not so?

Mr Laird: Well, I think something as important as this I think it would have been important for it to have been documented and I found no documentation whatsoever.

. . . .

Mr Swart: . . . And I put it to you that on a reading of this the only inference to be drawn is that the shareholder, through McCulloch, was aware of this and consented to it.'

[19] No objection was made to these questions and submissions and Thebe did not re-examine Laird. Counsel for Hosmed contends both in his heads of argument and before this court that it was clear that he was placing before the

arbitrator the issue of unanimous assent. He also asserts that he argued the point before the arbitrator, and there was no objection to his argument. Counsel for Hosmed have no recollection of this aspect of the argument before the arbitrator, and indeed it does not appear from the written heads of argument submitted to the arbitrator and which form part of the appeal record. The arbitrator did not deal with the issue of unanimous assent in making his award which was that portion of Thebe's claim, plus interest, and costs was payable by Hosmed (the balance having prescribed). The arbitration was postponed sine die to deal with the quantification of the claim.

[20] Hosmed appealed against the award to the appeal tribunal constituted in accordance with the arbitration agreement. The issues on appeal were whether Thebe could, despite the amendment to the regulation in 2000, claim for fees for ongoing services between 2001 and 2003 when the regulations were again amended; and whether Thebe had complied with s 228 of the Companies Act. The appeal tribunal found that Thebe was entitled to claim the fees in issue (there was in fact no legal impediment to doing so, despite the perception about the effect of the 2000 amendment), thus confirming the arbitrator's award in this respect. But it also considered that the amendments to the original agreements, which had the effect (assumed for the purpose of the question of liability) of disposing of its business within the meaning of s 228 of the Companies Act, were valid. It held that there was unanimous assent to the disposal, and that the amending agreements were thus enforceable. Accordingly Thebe had disposed of its right to claim fees for ongoing services.

[21] The application by Thebe for the setting aside of the award is based on the appeal tribunal's finding on unanimous assent since, it argued, it had not been pleaded, nor canvassed in evidence. The arbitration appeal tribunal, Thebe contended, had thus both exceeded its powers and committed a gross irregularity in terms of s 33 of the Arbitration Act , in not observing the audi alteram partem rule .

[22] The appeal tribunal accepted Hosmed's argument that although unanimous assent had not been pleaded – despite the numerous amendments to the pleadings by both parties, including an amendment made during the course of the appeal proceedings – the 'issues were . . . substantially broadened during the hearing before the arbitrator (cf *Shill v Milner* 1937 AD 101 at 105) to include a defence of unanimous assent.' It analysed the evidence of Hosmed's witness, Brown, to the effect that no payments had been made to Thebe for ongoing services after the amending agreements were concluded, and no claims had been made. The arbitrator had found that there was no evidence of an agreement, alleged by Hosmed, that this loss of income would be made up by increased administrative charges levied by Thebe.

[23] The appeal tribunal adopted a different approach. It said:

'In terms of s 228 the directors of a company have no power to dispose of the greater part of the assets of a company without the approval of a general meeting of the company. On a proper interpretation of s 228, it matters not whether the company is getting something in return for such disposal or not. Even if the company were to receive the market value of the assets disposed of in return for the disposal, the directors would not have the power to dispose of such assets without the approval of the general meeting of the company. In our view it is, therefore, irrelevant whether there was a "credible or enforceable contract" in terms of which the claimant was entitled to be remunerated for the ongoing services it was providing to the respondent. On the assumption that the claimant [Thebe] disposed of the greater part of its assets . . . [by virtue of the amending agreements] s 228 would in principle be applicable.'

[24] The appeal tribunal considered that the lack of a formal resolution was no bar to the disposal if there were unanimous assent, which could be inferred from the circumstances.[3] The appeal tribunal had regard to a number of factors in concluding that it was a probable inference that 'all the directors' of the sole shareholder in Thebe, the Thebe Hosken Group, assented to the disposal of the right to claim fees for ongoing services. These included the

[3] It referred in this regard, inter alia, to *Gohlke & Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A) and *De Villiers NO v BOE Bank Ltd* 2004 (3) SA 1 SCA para 52.

fact that prior to the amendments Thebe had claimed fees for ongoing services, and Hosmed had paid, whereas no claims were made or paid after the amendments; the view of the medical aid industry that such fees were contrary to the amended regulations; amendments to the original broking agreement had been discussed at a meeting of the board of trustees of Hosmed; and the directors of Thebe were aware of the new regulations and the problems that they apparently posed to claiming fees for ongoing services. Since there was only one shareholder in Thebe, the assent of the directors of the holding company would be the assent of the holding company itself and a formal meeting would be redundant. The disposal was thus with the unanimous assent of the shareholder in the company, and Thebe's claim had to be dismissed.

[25] I shall set out the award in full since, although setting aside the award, the court below substituted its own order for that of the appeal tribunal.

'1 The appeal is upheld with costs and the award of the arbitrator is set aside.

2 The following award is substituted therefor:

2.1 The claimant's first claim is dismissed.

2.2 The claimant is ordered to pay Hosmed's costs pertaining to this part of the arbitration, which costs are to include the costs consequent upon the employment of two counsel.

2.3 The arbitration is postponed *sine die* in respect of the issue of quantification as set out in the separation order.

3 The costs referred to above include the costs of the arbitrator/appeal tribunal, the costs of two counsel, the recording and record, the venue, witnesses and all ancillary costs. In the absence of agreement between the parties these costs will be taxed on the High Court scale by the Taxing Master of the High Court, Johannesburg.'

[26] The Pretoria High Court, as I have said, set aside the appeal tribunal's award in terms of s 33 of the Arbitration Act 42 of 1965, apparently on the basis that the tribunal exceeded its powers. I shall revert to the order made by the court.

[27] Section 33 of the Arbitration Act provides for the setting aside of an arbitration award (and this applies also to an appeal tribunal's award) –

(1) Where-

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

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

(c) an award has been improperly obtained,

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.'

[28] Thebe argues that the appeal tribunal both exceeded its powers and was guilty of a gross irregularity. The same conduct, however, was relied on as giving rise to both grounds for the setting aside of the award. The gravamen of the complaint is that the issues before the arbitrator, and thus before the appeal tribunal, were defined by the pleadings. The arbitration agreement said so expressly. The agreement also made provision for amendments, and both parties amended and added to their pleadings during the course of the proceedings. Hosmed even introduced an amendment at the stage of appeal. The arbitration appeal tribunal could not, it was argued, go beyond the pleadings and decide an issue not pleaded. Unlike a court, which has the inherent jurisdiction to decide a matter even where it has not been pleaded, an arbitrator has no such power. It was common cause that the issue of unanimous assent was not pleaded at any stage.

[29] Hosmed, on the other hand, argues that the arbitration agreement expressly confers on the arbitrator, and therefore also on the appeal tribunal, the powers of a high court and of the Supreme Court of Appeal, respectively. Thebe's response is that these are procedural powers and do not confer jurisdiction to determine matters on which the parties have not agreed.

[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.[4]

[4] See LAWSA 2 ed vol 1 para 607 and the authorities there cited.

Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded.[5] Hosmed's rejoinder[6] put in issue Thebe's allegation that there had been compliance with s 228. Had Hosmed intended to rely on the principle of unanimous assent it would have had to plead it specifically because it amounts to a classic confession and avoidance. There is a fundamental difference between a denial (where allegations of the other party are put in issue) and a confession and avoidance where an allegation is accepted, but the other party makes an allegation which neutralises its effect – which is what the raising of unanimous assent would seek to achieve.[7] It is of course possible for parties in an arbitration to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct, but no such agreement that the pleadings were not the only basis of the submission can be found in the record in this case, and Thebe strenuously denied any agreement to depart from the pleadings.

[31] The appeal tribunal held, however, that it was entitled to go beyond the pleadings where the issue had been traversed in evidence. It relied, as I have said, on *Shill v Milner*[8] where De Villiers JA said:

'The importance of pleadings should not be unduly magnified. "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been." *Robinson v Randfontein Estates GM Co Ltd* (1925 AD 198).'

Relying on these dicta in *Shill v Milner* and in *Robinson v Randfontein Estates* the appeal tribunal held, as mentiond in para 22, that the issues were

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[5] The arbitration agreement in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), on which Hosmed relied, was completely different in its ambit.
[6] Referred to in para 13 above.
[7] The Uniform Rules of Court make this plain: Rule 18(4) provides that 'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or *answer* to any pleading . . . with sufficient particularity to enable the opposite party to reply thereto' (my emphasis).
[8] 1937 AD 101 at 105.

‘substantially broadened during the hearing before the arbitrator . . . to include a defence of unanimous assent’.

[32] I have already said that the appeal tribunal was not entitled to take this approach: its powers were conferred by the arbitration agreement and it did not have the power to go beyond that. But even if, for the sake of argument, it were accepted that the appeal tribunal did have jurisdiction, it can hardly be contended that the question whether there was unanimous assent was properly canvassed before the arbitrator. Counsel for Hosmed said that that was the issue on his mind when he cross-examined Laird on recall. But he conceded that he did not communicate this expressly to the witness or to Thebe’s counsel. I have set out the relevant evidence above. It is far from clear that what counsel was attempting to elicit from Laird was whether the sole shareholder in Thebe had assented to the disposal of the right to claim fees for ongoing services. At its highest, Laird conceded that it would have been pointless for McCulloch to call a meeting with himself to pass a resolution. But Laird could not testify on what had in fact happened since he had not been part of Thebe when the amending agreements were concluded.

[33] Hosmed contends that Thebe did not object to the questions asked of Laird. It is not clear why they should have done so: it was not obvious that a new issue was being raised, and even if counsel for Thebe had realized what was on Hosmed’s counsel’s mind, he was entitled to remain silent knowing that the issue had not been pleaded. But there is no point in examining this issue further. On any basis, the question whether there had been unanimous assent, obviating the need for a meeting and a special resolution, was not really, let alone fully, canvassed in the evidence. It was first raised in the oral argument before the arbitrator, and did not feature even in counsel’s heads of argument which form part of the record.

[34] The facts on which the *Shill v Milner* principle can be applied, even if it had been open to the appeal tribunal to rely on it, were not traversed in evidence. There was thus no basis for the appeal tribunal to find that there

was unanimous assent to the disposal of the right to claim fees for ongoing services.

[35] In the circumstances the appeal tribunal exceeded its powers: it went beyond the terms of the arbitration agreement. This is a clear case where the arbitration appeal tribunal exercised a power that it did not have. This court recently referred with approval[9] to the decision of the House of Lords in *Lesotho Highlands Development Authority v Impreglio SpA*[10] where Lord Steyn distinguished between cases where a tribunal mistakenly exercises a power that it does have, and those where a tribunal exercises a power that it does not have. In the latter type of case the tribunal exceeds its power, and, under our Arbitration Act, that warrants the setting aside of the order. This is the position stated earlier in *Dickenson & Brown v Fisher's Executors*[11] applied by the court in *Telcordia*.[12] The judgment of Harms JA in *Telcordia* embodies a comprehensive account of the bases on which an arbitrator's award may be set aside and there is no need to repeat what is said in that case.

[36] In view of the finding that I make that the appeal tribunal exceeded its powers, it is not necessary to consider whether its decision on unanimous assent constituted a gross irregularity.

[37] The appeal against the decision of the court below to set aside the award in terms of s 33(1)(b) must accordingly be dismissed. It remains to determine what consequences follow. Hosmed has argued that the matter should be remitted to the appeal tribunal so that it can apply to reopen its case and amend its pleadings so as to include the issue of unanimous assent. Thebe's response is, naturally, that it had had that opportunity when the appeal tribunal hearing commenced, and declined to take it. Seriti J in the court below refused to remit the matter on the basis that Hosmed should have sought to reopen its case when the appeal tribunal was convened. The

[9] *Telcordia Technologies Inc* above para 52.
[10] [2005] UKHL 43 para 24.
[11] 1915 AD 166.
[12] Above paras 56ff.

learned judge considered that he should substitute the court's order for that of the appeal tribunal.

[38] The order reads:

'(1) The award or order of the arbitration appeal tribunal is set aside and is substituted by the following:

"(a) The appeal is dismissed with costs and the award of the arbitrator [Mr] Van Schalkwyk is upheld.

(b) Hosmed is ordered to pay the claimant's costs pertaining to this part of the arbitration, which costs are to include the costs consequent upon the employment of two counsel in the appeal proceedings.

(c) The costs referred to above include the costs of the arbitrator, appeal tribunal, the costs of two counsel, the recording and record, the venue, witnesses and all ancillary costs. In the absence of agreement between the parties these costs will be taxed on the High Court scale by the Taxing Master of the High Court, Johannesburg.

(d) The arbitration is to continue before the arbitrator [Mr] Van Schalkwyk for arbitration of the issue of quantification as set out in the separation order agreed to between the parties in December 2005."

(2) The fourth respondent [Hosmed] is ordered to pay the costs of the applicant on a party and party scale, which costs will include costs consequent upon the employment of two counsel.'

[39] Hosmed contends that it was not open to the court to substitute its own order for that of the appeal tribunal. This court, it argues, should remit the dispute to an appeal tribunal to consider the matter having regard to this court's finding, and to give Hosmed the opportunity to apply to reopen its case and to amend its pleadings.

[40] Counsel for Thebe, on the other hand, argues that if the court has the power to remit a matter to an arbitrator it must also have the power to substitute its own order. But even if that is not the case, Thebe argues, the order of the arbitrator should stand, and that takes care of the costs and other orders made by the court below. There is no purpose served in remitting the matter to the appeal tribunal, it argues, since it could make no award other

than to refuse or allow Hosmed to reopen its case and amend its pleadings. If an appeal tribunal refused Hosmed's application, that in turn would require remittal by the appeal tribunal to the arbitrator to deal with the quantification of Thebe's claim. If, on the other hand, Hosmed can show that there had been unanimous assent, then the arbitrator will have to determine whether the amending agreements did have the effect of disposing of Thebe's assets as contemplated in s 228 of the Companies Act. Either way, Thebe contends, the arbitrator will be required to consider the dispute again: it should thus be remitted directly to the arbitrator if the appeal is not simply dismissed.

[41] The difficulty with Thebe's approach is that it is the award of the appeal tribunal, and not the arbitrator, that is to be set aside. What power does this court have to remit the matter directly to the arbitrator? If such a course were open to us it would no doubt obviate the time and expense entailed in referring the matter back to the appeal tribunal, when it is likely that it would have still to go back to the arbitrator irrespective of the appeal tribunal's conclusion. It is important to note, however, that the award of the appeal tribunal is not a foregone conclusion.

[42] It is not apparent that the court below was referred to s 33(4) of the Arbitration Act or that either party requested submission to a new appeal tribunal. In any event, in my view it is not possible to refer the matter directly to the arbitrator. It is the appeal tribunal's award that has been set aside, and s 33(4) of the Arbitration Act requires that 'If the award is set aside the dispute *shall, at the request of either party*, be submitted to a new arbitration tribunal constituted in the manner directed by the court' (my emphasis). The section, which is peremptory, must refer also to an appeal tribunal's award.

[43] Where neither party requests that the matter be referred back to the arbitrator, or appeal tribunal, then an award made in excess of its powers should simply be set aside by the court in terms of s 33 of the Arbitration Act. And, presumably, if both parties wished to refer the matter back to the same arbitrator or appeal tribunal, the court would be entitled to make such an

order.[13] Hosmed submitted that it had no difficulty with a reference back to the same appeal tribunal. But Thebe asserted that it had lost confidence in the appeal tribunal. Irrespective of Hosmed's views, however, the section is clear: if either party requests it the dispute must be referred to a new tribunal. The court is not, in my view, given a discretion in this regard.[14] Equally, because of the peremptory wording of s 33(4), a court does not have the discretion to substitute its own order for that of the appeal tribunal.

[44] I consider that the only order appropriate is to refer the matter to a new arbitration appeal tribunal, to be constituted in accordance with clause 17.4 of the arbitration agreement between the parties (cited above), save that the composition of the tribunal should be agreed within ten court days of the date of the handing down of this judgment, failing which a new tribunal should be constituted in terms of the arbitration agreement.[15]

[45] Thebe has been substantially successful in this appeal in having prevailed on the primary issue: that the appeal tribunal exceeded its powers, with the consequence that its order must be set aside. Hosmed, on the other hand, is successful in so far as the dispute has to be remitted, and the order of the court below set aside. Hosmed has not succeeded, however, in its request for the dispute to be referred back to the same appeal tribunal. And if the new appeal tribunal refuses Hosmed the opportunity to reopen its case and amend its pleadings, then its success in this court may turn out to be hollow. But it does gain the opportunity to canvas the merits in the new appeal tribunal, and that, in my view, also constitutes substantial success. In the circumstances I conclude that there should be no order as to costs.

[46]

(a) The appeal succeeds in part and fails in part.

(b) The order of the court below is set aside.

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[13] Contrast s 32(2) of the Arbitration Act which permits a referral back within six weeks of the publication of the award only on 'good cause shown'.

[14] See *Benjamin v Sobac South African Building & Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 961J-962B and *Steeledale Cladding (Pty) Ltd v Parsons NO* 2001 (2) SA 663 (D) at 674A.

[15] The arbitration agreement remains binding on the parties unless they agree to terminate it or it is set aside by an order of court: s 3 of the Arbitration Act.

(c) The order of the court below is replaced with:

'1 The application succeeds with costs including those occasioned by the employment of two counsel.

2 The award of the arbitration appeal tribunal is set aside.

3 The dispute between the parties is referred to a new arbitration appeal tribunal to be constituted in terms of clause 17.4 of the arbitration agreement between the parties.

4 The appeal procedures shall be those prescribed in clause 17 of the agreement, save that the parties must agree the composition of the arbitration appeal tribunal within ten court days of this order, failing which they shall request the Arbitration Foundation of South Africa to nominate three arbitrators, as envisaged in terms of clause 17.4 of the arbitration agreement.'

(d) No order is made as to costs.

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C H Lewis

Judge of Appeal

Concur:

Howie P

Cloete JA

Hurt AJA

Mthlantla AJA