THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable
Case No: 570/2020

In the matter between:

GERMA BEUKES **APPELLANT**

and

TEN FOUR CONSULTING (PTY) LTD **FIRST RESPONDENT**

FOURTH DIMENSION FINANCIAL SERVICES (PTY) LTD **SECOND RESPONDENT**

THE HON JUSTICE BAREND RUDOLF DU PLESSIS **THIRD RESPONDENT**

Neutral citation: *Beukes v Ten Four Consulting and Others* (570/2020) [2021] ZASCA 83 (17 June 2021)

Coram: PONNAN, SALDULKER, MOCUMIE AND SCHIPPERS JJA AND EKSTEEN AJA

Heard: 20 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 17 June 2021.

Summary: Arbitration – review of award – Arbitration Act 42 of 1965, s 33(1)*(a)* and *(b)* – misconduct of arbitrator – gross irregularity in the conduct of

proceedings – misconceiving nature of the enquiry – exceeding powers – not established – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Sardiwalla J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

Schippers JA (Ponnan, Saldulker and Mocumie JJA and Eksteen AJA concurring):

[1] The appellant and the first and second respondents (the respondents) concluded a restraint of trade agreement in 2008. In May 2017 the respondents commenced arbitration proceedings against the appellant based on an alleged breach of that agreement. The third respondent, a retired Judge of the High Court (the arbitrator), presided over those proceedings. The issue in this appeal, which is with the leave of the Gauteng Division of the High Court, Pretoria (the high court), is whether the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings or exceeded his powers as contemplated in s 33(1)*(a)* and *(b)* of the Arbitration Act 42 of 1965 (the Act).

[2] The basic facts can be shortly stated. The appellant was a director of and employed as a compliance officer by the first respondent. In February 2018 she resigned from those positions. In their statement of claim the respondents alleged that the appellant had breached the restraint agreement by approaching the first

respondent's clients, as a result of which those clients terminated their business relationship with it. The respondents claimed payment of R1 145 409.60, representing 40% of the first respondent's turnover in the previous 12 months, in terms of a penalty clause in the restraint agreement;[1] and damages in the sum of R3 129 078, together with interest and costs.

[3] The appellant, in her statement of defence, denied any breach of the restraint agreement and raised a number of defences, including a plea that the provisions of s 2(1) of the Conventional Penalties Act 15 of 1962 precluded the respondents from claiming damages in addition to the penalty, or in lieu thereof (the preliminary point).[2] As stated, the respondents claimed an amount under the penalty clause as well as damages, and could do so only if the restraint agreement expressly provided for this. It did not.

[4] The parties were represented by senior counsel in the arbitration, scheduled for 22 January 2019. The day before, Mr Daniël Preis, the appellant's counsel, notified his opponent, Mr Barend Stoop, that he intended to argue the preliminary point at the outset of the proceedings. The next day, Mr Preis and his instructing attorney arrived at the arbitration venue before the respondents' legal representatives. Mr Preis exchanged pleasantries with the arbitrator and informed

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[1] Clause 7.3.3 of the restraint agreement provides:
'If the company [first respondent] proves that:
- the executive is involved with the business that is in competition with the company . . . ; and . . .
- that the client has been approached by that competitor, . . .
then the executive shall become liable to pay to the company an amount equal to 40% of the turnover generated by the company doing business with the client in the last 12 months that they did business, should the client transfer any of its business to the competitor.'
Clause 7.3.4 states:
'The arrangement in 7.3.3 is in addition to and does not in any way diminish or restrict the remedies that the company may have against the executive stemming from this agreement in law.'

[2] Section 2(1) of the Conventional Penalties Act provides:
'Prohibition on cumulation of remedies and limitation of recovery of penalties in respect of defects or delay. –
(1) A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a guilty stipulation, both the penalty and damages, or except with the relevant contract expressly so provides, to recover damages in lieu of the penalty.'

him that he and Mr Stoop had agreed that the preliminary point would be argued first.

[5] What happened at the inception of the arbitration appears from the following excerpt from the record:

'ARBITRATOR: Yes, who will begin?
STOOP: Judge, Yes. I was told by Mr Preis for the defendant that there is a point *in limine*.
ARBITRATOR: He told me about that. About the, about the penalty clause, not so?
STOOP: Yes.
ARBITRATOR: Preis told me.
STOOP: I have no objection if this aspect is dealt with and finalised first. It may, it may have an influence on the manner in which evidence will be presented and also on the quantum of the plaintiff's claim and it is a point raised by the defendant and I assume the defendant will
ARBITRATOR: will begin.
STOOP: Have the floor.'[3]

[6] The preliminary point was then comprehensively argued by counsel on both sides and the matter was postponed for the arbitrator's ruling. On 28 January 2019 the arbitrator made an interim award in terms of which the first respondent's claim for damages in the sum of R3 129 078 was dismissed, and the question of costs reserved.

[7] On 5 March 2019 the respondents launched an application in the high court to review and set aside the interim award of 28 January 2019, and for the dispute

[3] My translation. The arbitration record reads:
'ARBITER: Ja, wie gaan begin?
STOOP: Regter, ja. Ek is gister in kennis gestel deur Mnr Preis vir die Verweerder dat daar 'n punt *in limine* is.
ARBITER: Hy het my gesé daarvan. Oor die, oor die strafbedinge ne?
STOOP: Ja.
ARBITER: Preis het vir my gese.
STOOP: Ek het geen beswaar as hierdie aspek eers hanteer en afgehandel word nie. Dit mag, dit mag 'n invloed hé op die wyse waarop die getuienis aangebied gaan word en dan ook die kwantum van die Eiser se eis en dit is die Verweerder se punt en dit is die Verweerder se punt en ek aanvaar die Verweerder sal
ARBITER: Sal begin.
STOOP: die vloer hé.'

forming the subject of the arbitration to be submitted to a new arbitrator agreed upon by the parties. The review grounds, in summary, were these. The arbitrator allowed the proceedings to commence in the absence of the respondents. He 'failed to formulate the point *in limine*' and did not grant them an opportunity to be heard on the question whether their claim for damages should be dismissed. This, the respondents alleged, constituted misconduct in relation to his duties as arbitrator, alternatively, a gross irregularity in the conduct of the proceedings. The arbitrator misconstrued his powers: he should not have dismissed the claim for damages by upholding the preliminary point; and unfairly deprived the respondents of the opportunity 'to present evidence' that the Conventional Penalties Act did not apply, and 'to rectify the Restraint Agreement'. In dismissing the respondents claim for damages, the arbitrator misconceived the nature of the enquiry by ignoring the import and effect of decisions which were binding on him.

[8] The appellant opposed the application. Included in the answering papers was an affidavit by Mr Preis, who had been practising since July 1984. He stated that it was unacceptable that Mr Stoop had drafted 'a misleading and incorrect founding affidavit' in the review application. He went on to say that it is a basic principle that the merits of a case are never discussed with a judge or arbitrator in the absence of one's opponent. He denied that the arbitration had commenced in the absence of the respondents, or that he had conveyed anything else to the arbitrator, save that an agreement had been reached that the preliminary point would be argued first. This was confirmed in an affidavit by Mr Preis' instructing attorney.

[9] The arbitrator did not oppose the application and abided by the decision of the court. However, he filed an affidavit in response to certain allegations in

the founding affidavit that were incorrect. He confirmed that Mr Preis had told him that the parties were going to argue the preliminary point. He stated that it was possible that he had been told that the point related to the Conventional Penalties Act, but equally possible that he inferred that the preliminary point related to the defence pleaded by the appellant based on that Act. Then the arbitrator said this:

'5.8 I can unequivocally state that Mr Preis and I did not in any way enter into a discussion on the point *in limine* or the case in general. I have 48 years' experience in legal practice. For 23 of those years, I was a Judge of the High Court. For the last almost 7 years I have regularly been asked to act as an arbitrator. I know better than to discuss an upcoming case with either party, and will never do so.

5.9 The applicants' contention (in paragraph 36 of the founding affidavit) that counsel for the second respondent *"gave what must be an opening address to the Arbitrator"* while the applicants were not present, is not correct.

5.10 Similarly, the applicants' contention (in paragraph 37 of the founding affidavit) that I "commenced with the arbitration process in the absence of the Applicants" is not correct.'

[10] Mr Stoop, who had been in practice since 1998, as part of the replying papers, filed an affidavit in response to the allegation by Mr Preis that he had drafted a misleading founding affidavit. Mr Stoop confirmed that he had drafted that affidavit and said that he had attempted to state the facts 'in an objective manner and as accurately as [he] possibly could'. He denied that he was aware or had contemplated that the respondents' claim would be dismissed if the preliminary point were upheld. He said that he had approached the matter on the basis of an exception, so that if the preliminary point was upheld, the respondents would be given an opportunity to amend their statement of claim.

[11] The high court (Sardiwalla J) stated that the crucial question for decision was 'whether the behaviour of the arbitrator prevented a fair trial'. In answering this question affirmatively, the judge said:

'I agree that the manner in which the arbitrator abrogated his duty to the Second Respondent [Ms Germa Beukes] to identify the issues to be determined, and his failure to address the parties on this at the outset of the hearing, prevented a fair trial of the issues. In confirming that the Second Respondent informed him of the point *in limine* to be argued prior to the hearing, the Arbitrator clearly did not exercise his own judgment in deciding the issues. The First Respondent [the arbitrator] despite being informed by the Second Respondent that the point *in limine* was to be argued first, failed to address both parties on this aspect nor did he seek guidance on what award would be issued in the event that the point *in limine* was upheld . . . The First Respondent merely states that the second respondent informed him of the point *in limine* without alluding further to the issue to be determined or the award that may follow as a result. The Arbitrator's actions clearly prevented the Applicants from having [their] case fully and fairly determined and thus falls under the purview of gross irregularity . . . His actions also permitted his decision-making function to be usurped by the Second Respondent in a manner subversive of his independence and prevented the exercise of his own judgment in deciding the issues. This is the very conduct to be avoided by arbitrators . . . The award qualifies to be set aside for gross irregularity in terms of Section 33(1)(b).'

[12] The high court erred. These conclusions are unsustainable on the evidence. The starting point is the founding affidavit where an applicant is required to make out its case.[4] It contains no challenge to the arbitrator's decision on the ground that he had 'abrogated his decision' to the appellant to 'identify the issues to be determined', or had committed a reviewable irregularity by failing to address the parties on those issues at the outset of the hearing. As to the way in which the arbitration commenced and how it came about that the preliminary point was argued at its inception, the record speaks for itself.

[13] As already stated, the attack on the arbitrator's decision is founded on s 33(1)*(a)* and *(b)* of the Act. These provisions read:

'(1) Where–

[4] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636D.

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

(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.'

[14] The principle of finality of an arbitration award is well-settled in our law. When an arbitrator has given fair consideration to a matter submitted to him or her for decision, unless there has been some wrongful or improper conduct on the part of the arbitrator, a bona fide mistake either of law or fact made by the arbitrator does not constitute misconduct or a gross irregularity as envisaged in s 33(1)*(a)* or *(b)* of the Act.[5] In *Telcordia*,[6] this Court affirmed the *Doyle v Shenker* principle,[7] namely that where a legal issue is left for the decision of a functionary – as in this case – any complaint about how he reached his decision must be directed at the method or conduct of the proceedings, not the result.

[15] The respondents simply failed to establish their first review ground: that there was a gross irregularity in the conduct of the proceedings because the arbitrator had 'commenced with the arbitration' in their absence. This most serious allegation was recklessly made – it was based on an 'impression' formed by the respondents' director and main deponent, Mr Theunis Ebersohn, that the appellant's legal representatives and the arbitrator 'were in deep conversation' when he entered the venue. The facts giving rise to this impression, and the content of the conversation, were not stated. Mr Ebersohn then went on to say: 'As will appear from what I will state below, this impression was indeed correct'.

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[5] *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) paras 15 and 16.
[6] *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 75.
[7] *Doyle v Shenker & Co Ltd* 1915 AD 233.

[16] But what was stated further in the affidavit placed it beyond question that Mr Ebersohn's impression was groundless. His claims that the arbitrator had commenced the arbitration in the absence of the respondents and 'deprived [them] of the opportunity to be heard', were mere assumptions that lacked any factual foundation. He said:

'36 The applicants were not present when counsel for the second respondent *(*and *I assume it was counsel who did that) gave what must have been an opening address* to the arbitrator.

37 As a result, the first respondent commenced with the arbitration process in the absence of the applicants and in so doing, deprived the applicants of the opportunity to be heard at that stage.' (Emphasis added.)

[17] This was pure speculation. The respondents did not even begin to make out a case of gross irregularity in the conduct of the arbitration proceedings. In any event, as the respondents' counsel rightly conceded, on the basis of the rule in *Plascon-Evans*,[8] any dispute of fact in relation to the review grounds effectively had to be determined on the appellant's version.[9] Counsel for the respondents however sought refuge in a statement by the arbitrator before argument on the preliminary point, that Mr Preis had informed him that his argument would be that the respondents could not proceed with a damages claim if they waived the penalty clause. This, so it was contended, showed that there had been an improper discussion between Mr Preis and the arbitrator.

[18] The contention has no merit. There are three short answers to it. First, it has no factual foundation – it is an inference based on speculation on the part of Mr Ebersohn. Second, the statement relied upon was never raised in the founding affidavit and the arbitrator, Mr Preis and his instructing attorney had no

[8] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

[9] The rule was crisply formulated by Schutz JA in *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2002] ZASCA 141; [2001-2002] CPLR 13; [2003] 1 All SA 82 (SCA) para 10, as follows: '[T]he decision must be based on those facts averred by the applicant which are admitted by the respondent, together with the facts averred by the respondent.'

opportunity to deal with it. And third, it cannot be suggested that the facts stated by the arbitrator and the appellant's legal representatives concerning the so-called hearing in the absence of the respondents, are palpably implausible, far-fetched or clearly untenable, that they fall to be rejected merely on the papers.[10]

[19] The second and third grounds of review, namely that the arbitrator failed to afford the respondents an opportunity to be heard on the question whether their damages claim should be dismissed and that he misconstrued his powers, are equally without merit. At the outset, it must be emphasised that there was no doubt as to the nature and ambit of the preliminary point, and the consequences that would follow upon its determination. Mr Ebersohn's statement that the arbitrator had misconstrued his powers because he 'failed to formulate the point *in limine* and allowed the matter to be argued under circumstances where the parties appear to have been completely at cross-purposes', is simply wrong.

[20] The preliminary point was squarely raised in the amended statement of defence in these terms:

'12.2 The defendant further pleads that the provisions of section 2(1) of the Conventional Penalties Act 15 of 1962 prohibits the claimant from claiming damages in addition to the penalty, or in lieu thereof.'

[21] Nothing could be clearer. Indeed, during an exchange with the arbitrator before the point was argued, Mr Stoop conceded that the respondents 'were not entitled to claim the penalty and damages';[11] and that the respondents' position was that 'what was contained in the plea, was a good point'.[12] What is more, Mr Stoop said that during preparation for the arbitration, he had already considered

[10] *Plascon-Evans* fn 8 at 635B-C.
[11] '. . . die Eiser [is] nie geregtig . . . om albei strafbeding en ook die skade te eis nie.'
[12] '. . . die Eiser se standpunt is dat dit wat in die pleit gevat word, is 'n goeie punt.'

paragraph 12.2 of the statement of defence, and he confirmed that when Mr Preis had informed him that it would be dealt with as a preliminary point, he raised no objection.

[22] Both counsel (and the parties whom they represented) were thus aware that the preliminary point related to the interpretation and application of s 2(1) of the Conventional Penalties Act, and that it would be argued and decided first. Unsurprisingly, they had prepared on the point and as is evidenced by the record, it was comprehensively argued with reference to authority. And if the point was good – as conceded by the respondent's counsel – then it would lead to the dismissal of the respondents' damages claim as a matter of law. In this regard Mr Stoop said to the arbitrator:

'I have no objection if this aspect is dealt with and finalised first. It may . . . have an influence on the manner in which evidence will be presented and then also [on] the quantum of the plaintiff's claim.'[13]

[23] Logic dictates that upholding the preliminary point would have affected the quantum of the respondent's claim, only if their claim for damages was dismissed. And the fact that the parties appreciated that the upholding of the preliminary point would result in the dismissal of the damages claim, is buttressed by the respondents' stance that they were entitled to proceed with their claim based on the penalty clause. The arbitration was accordingly postponed to July 2019.

[24] It follows that Mr Ebersohn's claim that the preliminary point 'was not clearly formulated and, under the circumstances where no evidence was led,

[13] My translation. The record reads:
'Ek het geen beswaar as hierdie aspek eers hanteer en afhandel (sic) word nie. Dit mag . . . 'n invloed hê op die wyse waarop die getuienis aangebied gaan word en dan ook die kwantum van die Eiser se eis . . .'

could not have been decided separately', is likewise wrong. Contrary to his assertion, it was never intended that evidence would be adduced 'to demonstrate that the penalty clause did not find application and that Section 2(1) of the Act did not apply'; or that the respondents would rectify the restraint agreement. Had this been the intention, I have no doubt that the respondents' senior counsel would never have agreed to the preliminary point being argued and finalised. And predictably, in the arbitration record there is not a hint of adducing evidence concerning the preliminary point, or rectification of the restraint agreement. Mr Ebersohn's assertion plainly is inconsistent with the facts, opportunistic and an afterthought.

[25] The remaining review ground that the arbitrator misconceived the nature of the enquiry by ignoring the effect of binding case law and restricting the grammatical meaning of the words in clause 7.3.4 of the restraint agreement, can be disposed of summarily. The following dictum by Harms JA in *Telcordia*,[14] provides a complete answer:

'The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator "has the right to be wrong" on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of *the nature of the inquiry* – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry.'

[26] In the result I make the following order:

1 The appeal is upheld with costs.

[14] *Telcordia* fn 6 para 85. Emphasis in the original.

2 The order of the court below is set aside and replaced with the following order:

‘The application is dismissed with costs.’

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A SCHIPPERS

JUDGE OF APPEAL

APPEARANCES

For appellant:	A G South SC
Instructed by:	Macrobert Inc Attorneys, Pretoria
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