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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 15/11/2006
CASE NO: 17641/2006

REPORTABLE

In the matter between:

THEBE YA BOPHELO HEALTHCARE	APPLICANT
And	
P J VAN DER WALT N.O.	1ST RESPONDENT
K VAN DIJKHORST N.O.	2ND RESPONDENT
I W B DE VILLIERS N.O.	3RD RESPONDENT
HOS+MED MEDICAL AID SCHEME	4TH RESPONDENT

JUDGMENT

SERITI, J

1. Introduction

This matter came before court by way of motion.

According to the notice of motion the applicant is approaching the court for an order in the following terms:

(a) Declaring to be nullities and of no force and effect:

(i) that part of the award made by the first, second and third respondents in their capacities as appeal arbitrators, handed down by them on 22 April 2006 which appears in paragraph 1-3 on pages 49 and 50 of annexure "RD11" to the founding affidavit ("the award"); and

(ii) the finding underlying the award, to the effect that the issues were broadened to include the defence of unanimous assent, and that such defence was proven ("the finding");

(iii) alternatively to (i) and (ii), annexure "RDL11" in its entirety;

(b) Alternatively to prayer (a) setting aside in terms of section 33(1)(b) of the Arbitration Act 42 of 1965 (as amended); alternatively, section 8 of the Promotion of Administrative Justice Act 3 of 2000, the award and the finding, further alternatively annexure "RDL11" in its entirety.

(c) Substituting for the award the following:

(i) the appeal is dismissed with costs and the award of the arbitrator VAN SCHALKWYK J is upheld.

(ii) 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 and this appeal.

(iii) the costs referred to above include the costs of the arbitrator, appeal tribunal, the costs of two counsel, the recording, the 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.

(iv) The arbitration is to continue before the arbitrator VAN SCHALKWYK J for arbitration of the issue of

quantification as set out in the separation order agreed to between the parties in December 2005.

(d) Costs of the application.

2. Founding Affidavit

Same was deposed to by Mr R D Laird.

He alleges that he is the Chief Executive Officer of the applicant.

The applicant carries on business *inter alia* as a broker accredited in terms of the Medical Schemes Act, 131 of 1998.

The fourth respondent is duly registered medical scheme. First, second and third respondents are cited in their representative capacities *nomine officio* as the appeal arbitrators in the arbitration proceedings herein in question.

The object of the application is to seek an order reviewing and setting aside the award of the appeal arbitrators handed down on 22 April 2006, substituting the appeal award with an award dismissing the appeal award with costs.

In terms of the appeal award the appeal arbitrators upheld an appeal brought by the scheme after the broker had initially been successful in obtaining an award against the scheme in arbitration proceedings before VAN SCHALKWYK J during December 2005.

The applicant carries on business of rendering services to medical schemes. The nature of the services rendered by it to medical schemes may be conveniently divided into two categories, namely the introduction of new members to the medical scheme in question and the providing of on-going services to existing members of the schemes.

The broker earns a commission for its services, which commission was regulated in terms of Regulations promulgated under the Medical Scheme Act 131 of 1998.

Earning of commission by a broker had to be recorded in a written agreement between a broker and a medical scheme.

A written agreement was entered into between the broker and the scheme on or about 29 November 1999 in terms of which provision was made for broker's commission, for both recruitment of new members and on ongoing services provided to the members of the scheme.

The original regulations were amended on 5 June 2000. The effect of the said amendment was to *inter alia*, delete that paragraph in the original regulations which had as its object commission for ongoing services.

He further alleges that it appears from evidence and evidence lead in the arbitration that certain members of the broker's management interpreted the relevant part of the amendment of the regulations mentioned above to mean that the legislature intended to prohibit the earning of ongoing commission with effect from the introduction of the amendment.

On or about 9 March 2001 certain members of the broker and the scheme's management purported to enter into a variation agreement to delete from the agreement the provision dealing with the earning of a commission by the broker for ongoing services, so

that the broker can earn commission only for the recruitment of new members. This variation agreement consists only one page and simply state that the provision dealing with broker's commission for ongoing services should be deleted from the broker agreement. The said variation agreement was referred to in the arbitration as HM1, being a label conferred on it when it came to be annexed to the scheme's plea.

On 27 August 2001 certain members of the broker and scheme's management entered into a further variation agreement which was a multi page document retaining all but a few clauses from the first broker agreement. This second variation agreement came to be referred to in the arbitration as HM2 (being the label conferred on it when it came to be annexed to the scheme's plea). It incorporated the variation that was effected by HM1. In other words in HM2 there was no clause providing for the earning by the broker of commission for ongoing services. The said variation agreement included new clauses conferring certain rights of exclusivity on the broker in regard to the scheme's business.

With effect from 1 January 2003, the regulations were amended again. In this amended regulations there was once again a clause

providing for the earning of commission for ongoing services by a broker.

On 23 August 2003, with effect from 1 May 2003, a second agreement was entered into which provided for the recovery of such commission as was permissible in law.

From the time of the first amendment of the regulations until the institution of the proceeding referred to below the broker did not claim any commission for ongoing services from the scheme.

After he joined the broker's employment in February 2003, the fact of non-recovery of commission for ongoing services came to his attention. He was unaware of the agreements marked HM1 and HM2 referred to above. There seemed to him to have been an oversight on the broker's side by failing to recover the said commission and he caused invoices to be issued to the scheme in respect thereof.

A dispute arose over the said invoices and eventually summons was issued in respect of the said claims.

Initially the broker instituted action against the scheme in the High Court of South Africa (WLD) for payment of sums of money the broker contended were due to it by the scheme in respect of unpaid commissions for the rendering of ongoing broker services to the scheme's members.

The scheme delivered a dilatory plea of arbitration. It alleged *inter alia* that the broker was precluded from proceeding with the High Court action as the agreement upon which the broker based its claim compelled the broker to refer the dispute to be determined by arbitration.

Broker agreed that the matter be referred for arbitration.

Thereafter, the broker as claimant and the scheme as respondent, concluded a written arbitration agreement in terms of which they agreed to refer the various disputes to arbitration and appointed retired Judge R T VAN SCHALKWYK to act as an arbitrator.

A copy of the arbitration agreement was marked "RDL2" and was attached to the papers.

He referred to clause 4 of the arbitration agreement, which provides as follows:

> "4. <u>The issues to be determined by the arbitrator</u>:
>
> The issues to be determined by the arbitrator are the issues contained in the pleadings referred to at clause 8 below."

Clause 8 of the arbitration agreement specifically mentioned which pleadings were contemplated. These included the pleadings filed in the High Court action, each of which was identified (the summons, particulars of claim, plea, counterclaim, plea to the counterclaim and replication. Provision was made in clause 8.3 for the filling of further pleadings by way of e-mail or fax to the parties' respective attorneys.

About two months prior to the arbitration which was to commence in December 2005, there were several amendments to the pleadings, and further pleadings were delivered as provided for in clause 8.3 of the arbitration agreement.

The event that gave rise to the late flurry of further pleadings was the belated discovery and pleading by the scheme of the two variation agreements (HM1 and HM2) that had a material effect on the first and second broker agreements. The scheme alleged that HM1 and HM2 have extinguished the liability to pay commission for ongoing services as stipulated in clause 4.2 of the first broker agreement.

Pursuant to the amendment of the plea, the broker amended its replication to aver that HM1 and HM2 were of no force or effect *inter alia* by reason of their having contravened section 228 of the Companies Act 61 of 1973 as amended.

The broker in its replication to the newly amended plea that annexures HM1 and HM2 were not binding on the broker as they constituted the disposal of the greater part of the assets of the broker and they had not been approved by a general meeting of the broker company.

The scheme duly filed a rejoinder to the broker's replication. In that rejoinder it denied that section 228 had not been complied

with. In the alternative, the scheme relied on the principles of estoppel and Turquand rule.

The issue of whether the asset disposed of constituted the greater part of the broker's assets was later resolved by agreement between the parties on the basis that it could be accepted by the arbitrator that this was so.

By December 2005 the core disputes between the parties on the pleadings were thus as follows:

(a) whether the first amendment to the Regulations to the Act precluded the broker from claiming remuneration for the rendering of ongoing broker services to members; and

(b) whether HM1 and HM2 were deprived of legal effect by operation of section 228 of the Companies Act or whether the scheme could avoid the effect of that section through the application of the principles of estoppel or the Turquand rule.

Quantum of the claim based on the first agreement stood over for determination on a later date.

At the arbitration hearing in December 2005, the broker called Mr Alderslade, the financial director of the broker's holding company and the deponent to the founding affidavit. The scheme called Mr M Brown, one of its trustees.

Both the broker's and the scheme's legal representatives filed comprehensive heads of argument which they referred to during argument before the arbitrator.

He further alleges that it is important to note that nowhere in the pleadings filled by the scheme was it alleged that:

(i) all the broker's shareholders had knowledge of and consented to HM1 and/or HM2.

(ii) by reason of such knowledge and consent and by operation of the principle of unanimous assent, the non-compliance with section 228 was not destructive of the legally binding force of HM1 and/or HM2, and that accordingly these

documents thus nonetheless constituted valid and binding agreements.

As far as the allegations of the broker relating to section 228 of the Companies Act, the denial of the scheme of the said allegations, conveyed that the scheme's case was that:

(a) the asset disposed of by means of the agreement did not constitute the greater part of the assets of the broker; and

(b) the transaction had been approved by a general meeting of the broker.

There was no evidence adduced in the arbitration of the transaction having been approved by a general meeting of the broker and everyone accepted that fact. Both the arbitrator and the appeal arbitrators' awards make it clear that there had been no general meeting to approve HM1 and/or HM2.

What is obviously absent from the pleadings are any averments that would cause the facts or operation of the principle of unanimous assent to be an issue in the arbitration.

On 19 December 2005 the arbitrator handed down his award which was in favour of the broker.

After the arbitrator has made an award, the scheme invoked the appeal procedure referred to in clause 17 of the arbitration agreement and the appeal arbitrators were appointed.

In the notice of appeal, for the first time, it was mentioned that reliance would be placed on "unanimous assent" of the broker's members in an attempt to defeat the destructive effect on HM1 and HM2 of section 228 of the Companies Act. This came as a surprise to the broker's legal representatives for the following reasons:

(i) nowhere in the extended sequence of pleadings had the principle of unanimous assent ever been raised by the scheme.

(ii) where the scheme has had the opportunity (in the alternative to its broad denial) to confess and avoid the effect of the non-compliance with section 228 of the Companies Act, the

scheme had been very clear about the defences which it wished to raise, pleading estoppel and reliance on the Turquand rule in clear and most explicit terms.

(iii) the arbitration agreement defined the issues for arbitration to be those in the pleadings, so in the absence of any reference to the principle of unanimous assent in the pleadings, it could never be a legitimate issue for adjudication by the arbitrator.

(iv) no allegation of unanimous assent had been put to Alderslade nor to him in cross-examination.

(v) no evidence was led by the scheme of unanimous assent.

(vi) no reference whatsoever was made to unanimous assent in the scheme's heads of argument before the arbitrator.

(vii) whilst the scheme's counsel contends that the issue was raised in oral argument, the broker's legal representatives have no clear recollection of that. If it was raised it must

have been raised faintly (and this in any event was no basis for making it an issue in the arbitration proceedings).

Speculative averments pertaining to the knowledge of the directors of the broker of a meeting in February 2001 were put to me in cross-examination at the stage when I was recalled (after oral argument was well under way) to testify on the absence of documentation evidencing a resolution of a general meeting and he strongly disputed that that could have amounted to an allegation and comprehensive debate in the proceedings of the principle of unanimous assent in relation to the agreements, HM1 and HM2. Even if the cross-examination could be construed as raising the issue of unanimous assent (which he disputes) that could never have formed a legitimate basis for making it an issue in the arbitration. Yet it was on this flimsy basis that both the scheme in its argument and the appeal arbitrators in their award found that:

(a) unanimous assent was an issue in the arbitration;

(b) all of the broker's shareholders had knowledge of and consented to HM1 and HM2;

(c) by reason of such knowledge and consent and by operation of the principle of unanimous assent, the non-compliance with section 228 of the Companies Act was not destructive of the legally binding force of HM1 and/or HM2, and thus these documents thus nonetheless constituted valid and binding agreements.

The appeal was argued before the appeal arbitrators on 31 March 2006 and a large portion of the argument was devoted to section 228 of the Companies Act.

On 22 April 2006 the appeal arbitrators handed down their award, upholding the scheme's appeal.

In coming to a finding in favour of the scheme, the appeal arbitrators relied on the principle of unanimous assent and asserted that the issues had been enlarged in evidence to enable them to do so. They made reference to his cross-examination by the scheme's counsel regarding the February meeting when he was recalled to deal with his search of the documentation.

He further alleges that the arbitration appeal tribunal exceeded its powers. It dealt with the operation of the principle of unanimous assent which was never pleaded, and that amounted to a unilateral extension of their jurisdiction. Their jurisdiction is confined to the four corners of the arbitration agreement and the issues which an arbitrator is to decide are those placed before him or her by the parties in the arbitration agreement, not those issues which the arbitrator considers the evidence to have canvassed.

The error in the approach of the arbitration appeal panel is apparent from the judgment upon which they relied, namely *Shill v Milner* mentioned above.

The cross-examination on which the appeal arbitrators based their finding that the principle had, by implication been fully raised and debated, took place after both parties had closed their cases and the broker's case had been reopened solely for the purpose of canvassing his search of the documents.

At the time when counsel for the broker cross-examined Brown, the principle of unanimous assent did not form part of the scheme's case.

If it is found that the principle of unanimous assent falls outside the jurisdiction of the appeal tribunal, then, it means that the scheme's appeal before the arbitration appeal tribunal should have failed.

3. Fourth Respondent's Answering Affidavit

Same was deposed to by Mr D M Maja. He alleges that he is the chairman of the board of trustees of the fourth respondent. He intends demonstrating in this affidavit that the evidence adduced in the arbitration hearing indicated that the applicant, at all relevant times had only one shareholder, who was aware of the conclusion of the agreement referred to as annexure "HM1" in the arbitration hearing and who had assented to its conclusion.

As a result of the evidence referred to above, the fourth respondent wanted to raise a legal argument, namely unanimous assent, with reference to that evidence. The fourth respondent's intentions in this regard were clearly and unequivocally raised during the further cross-examination of the deponent to the founding affidavit in order to alert the applicant that the fourth respondent was relying on unanimous assent.

The fourth respondent's counsel thereafter, argued before the arbitrator *a quo* that section 228 of the Companies Act was not contravened, as a result of the applicant's only shareholder's assent to the conclusion of the agreement.

The applicant's legal representatives, after it had come to their knowledge that the issue was being raised, made no attempts, either at the hearing or at appeal stage to apply for a reopening of the applicant's case in order to deal with the issue.

The applicant's legal representatives adduced argument on appeal in respect of the merits of unanimous assent and, only after the appeal tribunal had ruled against the applicant in this regard, raised the accusation of an arbitration by ambush.

He detailed background information about business of the fourth respondent, signing of HM1 agreement, the signing of the second written broker agreement, the conclusion of a third broker agreement on 23 August 2003. He further deals with the issuing of invoices for ongoing services by the applicant on 5 February 2004 after it ceased to do so almost four years prior to the said date.

On 15 March 2004 the applicant issued summons for the payment of the amounts reflected in the invoices. This action was later converted into an arbitration by agreement between the parties in terms of an arbitration agreement which was annexed to the papers. The history of the pleadings was dealt with and he also referred to clause 7 of the arbitration agreement which deals with the rules of arbitration and powers of the arbitrator.

He referred to the applicant's replication wherein, it is alleged, *inter alia* that the agreements referred to as HM1 and HM2 introduced by the respondent in its amended plea contravenes section 228 of the Companies Act in that the effect thereof is the disposal of the whole or substantially the whole of the undertaking of the applicant or the whole or the greater part of the assets of the applicant without the approval of a general meeting of the applicant nor a meeting properly called of the directors to conclude the said agreements. The respondent reacted by serving a rejoinder wherein it stated that "The allegations contained herein are denied".

He further alleges that it appears that each and every allegation in the applicant's replication pertaining to section 228 were denied, including the following:

(i) the allegation that the agreements annexed as "HM1" and "HM2" were concluded in contravention of section 228 of the Companies Act and that they were accordingly void;

(ii) the allegation that no general meeting was held as envisaged by section 228 and/or that no resolution was taken at such meeting authorising the directors of the applicant to conclude the said agreements.

The applicant did not request any particulars in respect of the fourth respondent's denial of its allegation in respect of section 228.

At the arbitration hearing, the applicant adduced the evidence of Messrs Alderslade and Laird. Mr Alderslade only became involved with the Thebe Group in April 2001 and accordingly had no personal knowledge of the events which transpired before that date, specifically the conclusion of the agreement marked "HM1".

Mr Laird's relationship with the applicant only commenced in 2002.

Mr McCulloch was at all relevant times a director of the applicant, as well as a director of its only shareholder, Thebe Hosken Group (Pty) Ltd. He was intimately involved as representative of the applicant in the brokerage relationship which existed between the applicant and the fourth respondent. Notwithstanding the applicant's recorded intention that it will call him as a witness, he was never called to testify.

The fourth respondent was not privy to the facts pertaining to the structuring of the Thebe Group. These facts only became apparent during the proceedings at the arbitration hearing, specifically the fact that, at the relevant time, the applicant had only one shareholder, Thebe Hosken Group (Pty) Ltd, as well as the fact that Mr McCulloch was a director of the applicant as well as its only shareholder. It furthermore appeared form the documentation referred to in evidence that the applicant's only shareholder was aware of the conclusion of the agreement marked annexure "HM1". These facts provided the basis for a legal argument based on unanimous assent.

The applicant's legal representatives, however, failed to lead any evidence in substantiation of the allegation in the applicant's replication that no general meeting of the applicant was held as envisaged by section 228 of the Companies Act. As the applicant failed to prove its case in respect of section 228, there was no need for the fourth respondent to raise unanimous assent defence.

After the arbitration hearing the legal representatives were requested to prepare and submit heads of argument. The applicant's failure to deal in evidence with section 228 was pertinently raised in the fourth respondent's heads of argument.

During argument at the arbitration hearing, applicant applied for reopening of the claimant's case in order to deal with the question of a general meeting as envisaged by section 228. The request was granted and Mr Laird was recalled. In his supplementary evidence, Mr Laird testified that he could not find any section 228 resolution of the members of the applicant dealing with the agreements which formed the subject matter of the arbitration.

He further alleges that during the cross-examination of Mr Laird, it was clearly and unequivocally put to Mr Laird, with reference to evidence already on record that the applicant's only shareholder, through Mr McCulloch had knowledge of the agreement marked annexure "HM1" and consented to it.

Counsel for the applicant did not re-examine Mr Laird on any of the aforesaid issues.

During argument it was pertinently argued that as a result of the operation of the principle of unanimous assent section 228 was not contravened and that the agreements annexures "HM1" and "HM2" were accordingly valid.

In the fourth respondent's notice of appeal against the award of the arbitrator, it was submitted that the arbitrator *a quo* "erred in not finding that the agreements 'HM1' and 'HM2' could ensue and be enforced by the respondent on the basis of the principle of unanimous assent".

The fourth respondent having denied in its rejoinder that section 228 was contravened the fourth respondent was perfectly

entitled to raise unanimous assent in argument in substantiation of its denial, with reference to the evidence already on record. By referring to this evidence during Mr Laird's further cross-examination, the applicant was alerted to the fourth respondent's intention to raise unanimous assent during argument.

Even if the applicant's legal representatives were not aware that unanimous assent was alluded to during Mr Laird's further cross-examination, they became aware of same during argument before the arbitrator.

It is correct that no allegation of unanimous assent had been put in cross-examination of Alderslade. This was not necessary as Alderslade did not adduce any evidence in substantiation of the applicant's case in respect of section 228 during his examination in chief.

The allegation that no allegation of unanimous assent was put to Mr Laird in cross-examination is incorrect. After having been referred to evidence already on record, it was put to Laird that "the only inference to be drawn" from this evidence is that the

applicant's only shareholder, "through McCulloch, was aware of this (annexure 'HM1') and consented to it".

At the arbitration appeal hearing both counsel dealt extensively with unanimous assent.

Central to this review is the fact that the applicant, after it had at the latest become aware during argument before the arbitrator *a quo* that the fourth respondent relied on unanimous assent, elected not to request the opportunity to adduce evidence in respect of this issue which warrants the inference that it had no evidence which it could adduce in respect of this issue.

The fourth respondent, having denied that section 228 was contravened was fully entitled to argue, with reference to the evidence on record, that the assent of the applicant's shareholder to the agreement resulted in section 228 not being contravened.

Even if unanimous assent should have been pleaded, the fact is that it was pertinently raised during Laird's further cross-examination without any objection from the applicant, and thereafter to the

knowledge of the applicant's legal representative, during argument before the arbitrator *a quo*.

The issue in the arbitration was whether the agreements, annexures "HM1" and "HM2" were void as a result of a contravention of section 228 of the Companies Act. If there was unanimous assent, as found by the appeal arbitrators, section 228 would not have been contravened and the agreements would be valid.

As a consequent of clause 17.10 of the arbitration agreement the appeal arbitrators had the powers of a judge sitting in the Supreme Court of Appeal of South Africa.

4. Applicant's Replying Affidavit

Same was deposed to by Mr Laird. In the said affidavit he alleges, *inter alia*, that after the parties closed their cases, during argument, the applicant's counsel decided to make an application to reopen his case in order to deal with the question whether there was a general meeting of the applicant to consider agreements in dispute.

When called to testify only on the narrow issue mentioned above, he was cross-examined by fourth respondent's counsel to a limited

extent in oblique terms that the fourth respondent now contends that the issue have been broadened by evidence to include unanimous assent.

The putting by the fourth respondent's counsel of a proposition that obliquely refers to the operation of the principle of unanimous assent does not constitute a full canvassing in evidence. He did not agree that there had been unanimous assent of the applicant's shareholders to the transactions in issue.

Mr Alderslade, who was appointed to the board of directors of the applicant's shareholder shortly after the conclusion of annexure "HM1" and was on the board of directors of the applicant's shareholder at the time of the conclusion of annexure "HM2" testified expressly that he had no knowledge of annexures "HM1" and "HM2". He first got sight of them during preparation of the case in October 2005.

It was never put to Mr Alderslade that the shareholder of the applicant (in respect of whom Mr Aldersdale was still a director at the time he was testifying) had assented to the agreements marked "HM1" and "HM2".

The fourth respondent's pleadings set out defence based on the operation of the Turquand rule and the principle of estoppel. There is no mention of the unanimous assent doctrine.

5. Applicable Law

Rule 22(2) of the Uniform Rules of Court reads as follows:

> "The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies."

In *Wildner v Compressed Yeast Ltd* 1929 TPD 166 at 170 TINDALL J said the following:

> "A plea ought to state expressly the defences which the defendant relies on, but it may happen to be so drafted that it indicates impliedly that the defendant intends to rely upon a certain defence. And if the terms of the plea do indicate, by implication, that the defendant intends to rely upon a certain

> defence, then I think it is the duty of the defendant to state clearly and concisely the material facts on which that defence is based."

Rule 18(4) of the Uniform Rules contains provisions almost similar to the provisions of Rule 22(2) mentioned above.

In *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (AD) 107C-E the following is stated:

> "At the outset it need hardly be stressed that:
>
> > 'The whole purpose of pleading is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed ...'"

In *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D & CLD) 182A, MILNE J said:

> "The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial

> attempt to canvass another. Cf *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) 279B."

Section 33(1) of the Arbitration Act 42 of 1965 provides, *inter alia*, that where 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 after due notice to the other party, make an order setting the award aside.

In *Amalgamated Clothing and Textile Workers Union v Veldspun Ltd* 1994 1 SA 162 (A) 169C, GOLDSTONE JA said the following:

> "It is only in those cases which falls within the provisions of section 33(1) of the Arbitration Act that a court is empowered to intervene. If any arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under section 33(1)(b)."

In *Benjamin v Sobac South Africa and Construction* 1989 4 SA 940 (CPD) 964A-D, SELOKOWITZ J said the following:

> "In *Colman v Dunbar* 1933 AD 141, where the question of further evidence was considered, WESSELS CJ quoted with approval the words of INNES CJ in *Shein v Exess Insurance Co Ltd* 1912 AD 418 at 428:
>
> > "It is clear that the Court should be very chary of admitting fresh evidence after a case has been tried, more especially upon which points which have been contested and decided at the trial. The danger of sanctioning such a course save under exceptional circumstances is manifest.'
>
> WESSELS CJ then proceeded to list guiding principles upon which further evidence may be allowed. The first guideline is the necessity for finality and its corollary that issues raised and decided should not normally be reopened. Secondly, the applicant must show that he could not by reasonable diligence have adduced the evidence in time. Thirdly the evidence must be weighty and material ... Finally the

prejudice to the opponent must be considered. In my view the guidelines in *Colman's* case are of full application where it is sought to reopen an arbitration matter for the purpose of producing further evidence."

See also *MFV Kapitan Solyanik* 1999 2 SA 926 (NMHC) 932B-F; *Rex v Carr* 1949 2 SA 693 (AD) 699.

6. Findings

It seems to be common cause between the parties that the defence of unanimous assent was not specifically pleaded by the respondent.

The arbitration agreement, in clause 4 thereof, provides that the issues to be determined by the arbitrator are the issues contained in the pleadings. This clause deals with what issues are to be referred to arbitration.

The defence of unanimous assent was not raised in the pleadings as required by rule 18(4) of the Uniform Rules of Court read in conjunction with rule 22(2).

In the pleadings, besides a bare denial the respondent referred to estoppel and the Turquand rule.

The respondent's counsel, in his heads of argument submitted that even if the defence of unanimous assent was not raised in the pleadings, the arbitration tribunal and the arbitration appeal tribunal were entitled to deal with the said defence. In support of the said submission, counsel referred to *Shill v Milner* 1937 (AD) 101 at 105; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 433 and *Middelton v Carr* 1949 2 SA 374 (A) 385-386.

The cases referred to by respondent's counsel mentioned above, basically state that a court has a discretion to deal with an issue even if same was not mentioned in the pleadings if:

(1) No prejudice would be caused to any of the parties.

(2) There has been a full investigation of the matter or issue.

In the case before me, at best for the respondent, the issue of unanimous assent was raised, after both parties had closed their cases and Mr Laird was recalled to testify. The manner in which

same was raised with Mr Laird, it cannot be said that the issue was fully canvassed.

Mr Alderslade was never cross-examined about the facts which might establish unanimous assent. The said defence was never canvassed with him.

Mr Brown, who testified on behalf of the respondent also did not make any mention of facts that could possibly establish the defence of unanimous assent.

The fact that the defence of unanimous assent was not pleaded and that same was raised at a very late stage of the proceedings, invites an inescapable inference that same came to the mind of the respondent, not at time of drafting of the pleadings but only when Mr Liard was cross-examined after he was recalled.

My view is that the applicant was not given an opportunity to properly prepare for the hearing and to call necessary witnesses to deal with the said defence.

If the respondent had raised the defence in its plea, the applicant would not have found itself in the uncomfortable position in which it was when the said defence was first raised.

The submission by respondent's counsel that the arbitration and the arbitration appeal tribunal were entitled to deal with the defence of unanimous assent cannot be sustained.

If said defence, which was introduced very late in the proceedings is considered, the applicant would obviously be prejudiced.

The conditions that must exist, as stated in the cases referred to by respondent's counsel, prior to the court dealing with an issue not raised in the pleadings, are lacking in the present case.

The arbitration appeal tribunal, in my view, erred by dealing with the defence of unanimous assent, and consequently committed an irregularity or it exceeded its powers. The pleadings did not allow the arbitrator nor the arbitration appeal tribunal to deal with the defence of unanimous assent.

As stated in *Amalgamated Clothing and Textile Workers Union v Veldspun Ltd supra*, this court is entitled to intervene.

In the papers, it is stated that with the exception of the defence of unanimous assent, on appeal, the arbitration appeal tribunal found in favour of the applicant on all issues that were raised on appeal.

In his oral argument, the respondent's counsel submitted that, if the court finds against his client, the award of the appeal tribunal should be set aside and that the matter should be referred back to the arbitrator to allow the respondent to deal with the defence of unanimous assent.

The said submission cannot be upheld or acceded to. If the respondent wanted to rely on the defence of unanimous assent, should have amended its pleadings accordingly at the appropriate moment so that the issue can be fully ventilated. Instead, the respondent chose to raise the issue in the manner in which it did. There is no reasonable explanation why the respondent did not deal with the said defence timeously and in an appropriate manner. In any litigation there is a need for finality.

Because of the findings of the arbitration appeal tribunal on other issue debated on appeal, (except the unanimous assent defence) my view is that it will be appropriate for this court to substitute its decision for that of the arbitration appeal tribunal.

7. Conclusion

The court therefore makes the following order:

(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 VAN SCHALKWYK J 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 VAN SCHALKWYK J 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 is ordered to pay the costs of this applicant on a party and party scale, which costs will include costs consequent upon the employment of two counsel.

W L SERITI
JUDGE OF THE HIGH COURT

17641/2006

Heard on:	2 November 2006
For the Appellant:	Adv A R Gautschi SC, L J Morison & P Strathern
Instructed by:	Brian Kahn Inc, Pretoria
For the Respondents:	Adv B Swart Sc & S Farrel
Instructed by:	Macroberts Inc, Pretoria
Date of Judgment:	15 November 2006