REPORTABLE
CASE NO: 457/2000

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

TOTAL SUPPORT MANAGEMENT (PTY) LTD **1ST APPELLANT**

G W SLABBERT **2ND APPELLANT**

and

DIVERSIFIED HEALTH SYSTEMS (SOUTH AFRICA) (PTY) LTD **1ST RESPONDENT**

P E B REYNOLDS **2ND RESPONDENT**

CORAM: SMALBERGER ADP, MARAIS, CAMERON, BRAND JJA and LEWIS AJA

DATE OF HEARING: 25 FEBRUARY 2002

DELIVERY DATE: 25 MARCH 2002

Summary: Arbitration - alleged misconduct by arbitrator - principles applicable - s 33(1) of the Constitution has no application - no misconduct established - costs.

JUDGMENT

SMALBERGER ADP:

Introduction

[1] On 25 October 1995 a written agreement ("the agreement") was concluded between Interpharm Integrated Pharmaceutical Benefit Management (Pty) Ltd ("Interpharm") and the first appellant, Mr G W Slabbert ("Slabbert"), as sellers, and the first respondent, Diversified Health Systems (South Africa) (Pty) Ltd ("DHS"), as purchaser, for the sale of the pharmaceutical benefit management business ("the business") owned and conducted jointly by Interpharm and Slabbert. Subsequently Interpharm ceded any claims it might have against DHS arising out of the agreement to the first appellant, Total Support Management (Pty) Ltd ("TSM"). (I shall, where appropriate, refer to TSM and Slabbert jointly as "the appellants".)

[2] Clause 30 of the agreement provided for the resolution of any disputes arising out of or in connection with the agreement by an arbitrator agreed upon by the parties

or, failing consensus, by an arbitrator nominated by the President of the Law Society of the Transvaal. Clause 30.12.3 specifically provided that "unless the terms of submission provide otherwise, the arbitrator's determination shall be final and not subject to appeal. . . .".

[3] A dispute arose concerning TSM's liability for payment of portion of the purchase price and interest, a matter dealt with in more detail below. The dispute was duly referred to arbitration. As the parties could not agree upon an arbitrator the second respondent, Mr P E B Reynolds, a senior attorney of some forty years' standing, was nominated as such.

[4] The arbitration was duly conducted before the second respondent in September 1999. The parties had earlier filed a claim and counterclaim respectively. Five witnesses testified for the appellants; DHS closed its case without leading any evidence. The second respondent delivered his written judgment and award on 21 October 1999. Both the appellants and DHS were unsuccessful in their respective

claims. The dismissal of the claims was accompanied by an adverse order as to costs in each instance.

[5] On 1 December 1999 the appellants launched an application in the Transvaal Provincial Division of the High Court in terms of sec 33(1) of the Arbitration Act 42 of 1965 ("the Act") to set aside the award made by the second respondent. The matter in due course came before Ngoepe JP. The learned judge dismissed the application with costs, but granted the appellants leave to appeal to this Court.

The issues in the arbitration and their determination

[6] In terms of clause 9 of the agreement the purchase price of the business and assets (as defined) was R49 439 500,00 payable, as provided for in clause 10, as follows:

> "10.1 The sum of R2 439 500,00 (Two Million Four Hundred and Thirty Nine Thousand Five Hundred Rand) shall be paid by the PURCHASER in cash on the CLOSING DATE [as defined].
>
> 10.2 The GUARANTEED AMOUNT [the sum of R47 000 000] shall be paid

to the SELLER in the following manner:

10.2.1 The PURCHASER shall pay to the SELLER:

10.2.1.1 The sum of R13 500 000,00 (Thirteen Million Five Hundred Thousand Rand) upon the happening of the earlier of the following events:

10.2.1.1.1 The target of 500 000 (Five Hundred Thousand) individual lives under claims clearing agreements being achieved by IDS; or

10.2.1.1.2 The expiry of a period of 12 (Twelve) months after the CLOSING DATE.

10.2.1.2 A further sum of R13 500 000,00 (Thirteen Million Five Hundred Thousand Rand) once the consolidated net earnings before taxes, exclusive of any royalties or administrative fees, of the TSM GROUP for a period of 12 (Twelve) consecutive months has reached R6 500 000,00 (Six Million Five Hundred Thousand Rand);

provided that should an agreement between IDS on the one hand and Medscheme (Proprietary) Limited or the alliance of Affiliated Medical Administrators on the other be concluded upon mutually acceptable terms and conditions for the processing by IDS of claims for the members of the other contracting party, the

PURCHASER shall ensure that the aggregate of the amounts referred to in clauses 10.2.1.1 and 10.2.1.2 above is paid to the SELLER on the effective date of such agreement.

10.2.2 The PURCHASER shall pay to the SELLER the sum of R20 000 000,00 (Twenty Million Rand) once the volume of claims cleared by IDS has reached an average of 500 000 (Five Hundred Thousand) per month over a period of 3 (Three) consecutive months, provided that such target volume is achieved within 3 (Three) years of the CLOSING DATE, failing which the PURCHASER shall with effect from the third anniversary of the CLOSING DATE have no further obligation to effect payment of the said sum to the SELLER."

In clause 10.2.5 provision was made for the payment of interest.

[7] It is common cause that DHS paid to the appellants:

1) The amount of R2 439 500,00 referred to in clause 10.1;

2) The amount of R13 500 000,00 referred to in clause 10.2.1.1 ("the first payment") on 30 October 1996;

3) The amount of R13 500 000 referred to in clause 10.2.1.2 ("the second payment") on 21 January 1997.

[8] It was also common cause between the parties:

1. That interest as provided for in clause 10.2.5 on the first payment, in an amount of R1 824 238,36, was payable by DHS to the appellants in respect of the period 28 October 1995 to 30 October 1996, and that the appellants were entitled to what is referred to as *mora* interest on that amount from 31 October 1996 to date of payment;

2. That interest as provided for in clause 10.2.5 on the second payment up to 21 January 1997 (if payable) amounted to R2 253 954,45, on which amount alleged *mora* interest would have been payable from 22 January 1997 to date of payment;

3. That DHS refused to make any interest payments to the appellants;

4. That DHS denied liability to pay the amount of R20 000 000,00 referred to in clause 10.2.2 and interest thereon to the appellants.

[9] In their Statement of Claim in the arbitration proceedings the appellants claimed

from DHS the amount of R4 078 192,81 (being the sum of the amounts referred to in [8(1) and (2)] above) together with "*mora* interest" ("the first claim"), and the amount of R20 000 000,00 referred to in clause 10.2.2 ("the second claim").

[10] In its Plea and Counterclaim DHS, in response:

1. Admitted making the second payment to the appellants but claimed that it was paid in the *bona fide* and reasonable but mistaken belief that it was due when it was not;

2. Admitted that interest was payable on the first payment in the sum of R1 824 238,36;

3. Claimed set-off of the second payment against the amount of interest payable, leaving a balance overpaid of R11 675 761,64;

4. Claimed repayment of that amount on the basis of the *condictio indebiti*;

5. Denied liability for any other amounts.

[11] The second respondent made the following award:

1. He dismissed the appellants' first claim with costs. The underlying reasoning was: the appellants failed to establish that any of the pre-conditions for liability to make the second payment had been fulfilled; accordingly DHS was not under a legal liability to make the second payment when it did so on 21 January 1997; the second payment was made by mistake; liability for such payment was an essential prerequisite for the interest claimed in respect of the second payment; the appellants claim for accrued interest on the second payment thus failed; the interest admittedly due in respect of the first payment had to be set off against the natural obligation owing by the appellants to DHS as a result of the latter having mistakenly made the second payment.

2. He dismissed the appellants' second claim with costs. It is not necessary to dwell on his reasons for doing so as the appellants did not seek to attack the award in this respect.

3. He dismissed DHS's counterclaim with costs, on the grounds that DHS had not established the essential requirements of a claim under the *condictio indebiti* and was therefore not entitled to repayment of the balance of the second payment after deduction of the interest due by it in respect of the first payment. DHS has never sought to challenge this finding.

The issues arising from the arbitration

[12] In their application to review and set aside the second respondent's award the appellants only attacked that part of the award dismissing their first claim. The gravamen of their initial complaint, as set out in Slabbert's founding affidavit, was that the second respondent

> "made a mistake so gross and so manifest and was so grossly careless in ignoring facts that were common cause between the parties and evidence that was not disputed in cross-examination that an inference of misconduct as envisaged by section 33 (1) (a) of the Arbitration Act, 1965 on the part of second respondent can be made."

(I shall refer to this as the first ground of review.)

[13] The appellants subsequently filed a supplementary founding affidavit after their attorney had received schedules from the second respondent detailing his attendances and fees, and those of his assistant, Mr D Milo ("Milo"), relating to the arbitration. I shall deal more fully below with how Milo came to be involved in the matter. The gist of the appellants' allegations in their supplementary and later replying affidavits was that the final judgment and award handed down in the arbitration represented the findings and award not of the second respondent, but of Milo. The appellants accordingly submitted that the second respondent's conduct relating to the role played by Milo amounted to misconduct on his part, alternatively, to a gross irregularity in the conduct of the proceedings as envisaged by sec 33(1)(a) and (b) respectively of the Act (the second ground of review).

The applicable legal principles

[14] Section 33(1) of the Act provides:

"(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 its 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."

[15] In *Dickenson & Brown v Fisher's Executors* 1915 AD 166 this Court considered the provisions of sec 18 of Natal Act 24 of 1898 which provided for the setting aside of an arbitral award where, *inter alia*, "an arbitrator or umpire has misconducted himself". In the course of his judgment (concurred in by all the other members of the court) Solomon JA stated (at 176) that there could not be misconduct, if the word was used in its ordinary sense, "unless there has been some wrongful or improper conduct on the part of the person whose behaviour is in question" and rejected the notion "that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterised as misconduct. . . ." He went on to hold (also at 176) that "in ordinary circumstances

where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact".

[16] Earlier in his judgment (at 174) Solomon JA referred to the case of *Dutch Reformed Church v Town Council of Cape Town* 15 SC 14 where De Villiers CJ had occasion to examine the Roman-Dutch law of awards, and where it was pointed out that under that system a practice had been introduced called "reductie" which was to all intents and purposes an appeal against the award. De Villiers CJ remarked that no case could be found in the Cape Colony in which the process of "reductie" had been resorted to and added that

> "[c]ertainly since the appointment of English and Scotch Judges in 1828 the principle of the finality of awards became firmly established in our Courts."

Solomon JA went on to observe

> "That was so before any legislation had been introduced on the subject, and since that time the question is placed beyond doubt."

In the light of the authorities referred to below this remains the position in our law today.

[17] In *Donner v Ehrlich* 1928 WLD 159 Solomon J considered the effect of sec 16(2) of Ordinance 24 of 1904 (T), the wording of which was virtually identical to that of sec 18 of Natal Act 24 of 1898. He stated (at 160):

> "As I read *Dickenson and Brown v Fisher's Executors* (1915, A.D. p. 166), the misconduct which entitles a Court to set aside the award of an arbitrator must amount to dishonesty. I think that is the true reading of the judgment."

He went on to hold (at 161) that even a gross mistake, unless it establishes *mala fides* or partiality, would be insufficient to warrant interference.

[18] Later cases, some of which are referred to in *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992(1) SA 89 (W) ("the *Hyperchemicals* case") at 97-8 followed the same line. That was the

position which existed in 1965 when the Act came into operation. In the *Hyperchemical's* case Preiss J came to the conclusion that the Legislature intended the words of the Act to bear the meaning which had been judicially determined in similarly worded pre - 1965 statutes (at 98 E - F). This led him to reject the argument that "misconduct" as envisaged in s 33(1)(a) of the Act embraced the notion of what was referred to as "legal misconduct" - conduct calling for the application of a less stringent test for interference than laid down in the authorities referred to.

[19] Preiss J also rejected an alternative argument that the pre - 1965 decisions represented an old approach which had been implicitly overruled by a new extended criterion which resulted in complaints falling short of imputations of dishonesty being brought within the ambit of s 33(1)(a) of the Act. This argument was based in the main upon the analysis of certain sections of the Act undertaken by Jansen JA in *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976(2) SA 1 (A) at 22 (which included a reference to the decision in *Dutch*

Reformed Church v Town Council of Cape Town, *supra*). Preiss J concluded (at 99 H - I):

> "I certainly do not read into this analysis any indication that the field of review has been extended or altered beyond the field so positively laid down in *Dickenson & Brown v Fisher's Executors* (*supra*) and its successors. It says no more than that some remnants of judicial interference derived from the common law persist in this statute."

[20] In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994(1) SA 162 (A) ("the *Veldspun* case") this Court (at 169 C - E) confirmed the legal position as laid down in *Dickenson & Brown v Fisher's Executors* and *Donner v Ehrlich*. See also *Bester v Easigas (Pty) Ltd and Another* 1993(1) SA 30 (C) and *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others* 2001(2) SA 1097 (C) at 1106 J to 1108 D.

[21] Because the submission to arbitration did not provide otherwise, the parties were precluded by the provisions of clause 30.12.3 of the agreement from appealing against the decision of the second respondent. The appellants can challenge the

second respondent's award only by invoking the statutory review provisions of sec 33(1)(a) and (b) of the Act. Proof that the second respondent misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for setting aside the award. The onus rests upon the appellants in this regard. As appears from the authorities to which I have referred, the basis on which an award will be set aside on the grounds of misconduct is a very narrow one. A gross or manifest mistake is not *per se* misconduct. At best it provides evidence of misconduct (*Dickenson & Brown v Fisher's Executors*, *supra*, at 176) which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what has variously been described as "wrongful and improper conduct" (*Dickenson & Brown v Fisher's Executors*, *supra*, at 176), "dishonesty" and "*mala fides* or partiality" (*Donner v Ehrlich*, *supra*, at 160 - 1) and "moral turpitude" (*Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others*, *supra*, at 1108 A).

The Constitution

[22] The above principles are well established and firmly entrenched in our law. They govern the present appeal unless there are provisions in the Bill of Rights in the Constitution of the Republic of South Africa, 1996 ("the Constitution") that require their re-assessment and re-evaluation. That follows from the fact that all statutes must be interpreted through the prism of the Bill of Rights (*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others:* in re *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001(1) SA 545 (CC) at 558 E - F (para [21]). We raised with counsel the question of what, if any, the implications of sec 33(1) of the Constitution were in relation to the appeal. The answer, for reasons that follow, is that it has no relevance.

[23] Section 33(1) of the Constitution provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

It is only administrative action which is subject to the administrative justice right in sec 33(1). Generally speaking administrative action is conduct of an administrative nature performed by a functionary in the exercise of a public power or the performance of a public function. Compare in this regard the definition of "administrative action" in sec 1 of the Promotion of Administrative Justice Act 3 of 2000. The focus of the enquiry as to whether conduct is "administrative action" is not on the position which the functionary occupies, but on the nature of the power he or she is exercising. "What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not" (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000(1) SA 1 (CC) at 67 B (para [141]).

[24] Arbitration does not fall within the purview of "administrative action". It arises through the exercise of private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First,

arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed. See *Mustill and Boyd, Commercial Arbitration*, 2nd Ed (1989) at 41.

[25] The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. This is reflected in sec 3(1) of the Act. As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature. This accords with the conclusion reached by Mpati J in *Patcor*

Quarries CC v Issroff and Others 1998(4) SA 1069 (SECLD) at 1082 G. Decisions made in the exercise of judicial functions do not amount to administrative action (cf *Nel v Le Roux NO and Others* 1996(3) SA 562 (CC) at 576 C (para [24]), and compare also the exclusionary provision to be found in (b) (ee) of the definition of "administrative action" in sec 1 of the Promotion of Administrative Justice Act). It follows in my view that a consensual arbitration is not a species of administrative action and sec 33(1) of the Constitution has no application to a matter such as the present.

[26] The position may be different in the case of statutorily imposed arbitrations (cf *Carephone (Pty) Ltd v Marcus NO and Others* 1999(3) SA 304 (LAC)). In the light of the administrative justice provisions of sec 33(1) of the Constitution the decision in the *Veldspun* case may merit reconsideration in the context of compulsory as opposed to consensual arbitrations. The principles laid down in that case still hold good in the latter type of matter.

[27] The further question that arises is whether the fairness requirements of sec 34 of the Constitution apply to consensual or private arbitrations. While at first blush it may seem that they do, closer analysis may lead to a different conclusion. The section provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

It is a moot point whether the words "another independent and impartial tribunal or forum" in their contextual setting apply to private proceedings before an arbitrator or whether they must be restricted to statutorily established adjudicatory institutions. The word "fair" qualifies "public hearing" and the phrase "fair public hearing" relates not only to proceedings before a court but also before "another independent and impartial tribunal or forum". In a private arbitration the parties may by agreement exclude any form of public hearing - the need for anonymity or secrecy may well underlie the decision to resort to arbitration. The proper interpretation of sec 34 may

also involve the vexed question whether there may be a waiver of a constitutional right.

[28] The ambit and application of sec 34 was not fully argued before us and its proper interpretation must be left open. It may well not be of application. Even if the fairness requirement of sec 34 applies to private arbitrations there is nothing which precludes the parties themselves from defining what is fair. In my view the fairness requirement is satisfied where parties who resort to arbitration agree to forego a right of appeal and accept that the well-known and well-established principles governing arbitration will apply. Consequently, viewing the Act through the prism of the Bill of Rights does not in my view justify any departure from those principles.

The first ground of review

[29] The appellants rely upon the following main considerations to justify an inference of misconduct on the part of the second respondent:

1. He ignored the fact that the onus to prove set-off, and what this entailed, rested

on DHS.

2. He held that the second payment had been made by mistake without any evidence or facts to support such a finding.

3. He found, contrary to the tenor of cross-examination by the appellants' counsel, and contrary to what was submitted in argument, that neither the appellants nor DHS relied on the first condition stipulated for in clause 10.2.1.2 of the agreement.

4. He ignored the fact that there is a presumption against payment by a person of money not owing, and that this created a *prima facie* case that the second payment was due and payable when it was made.

5. Certain factual and credibility findings made by him were not justified.

[30] In terms of clause 10.2.1.2 of the agreement DHS was liable to make the second payment on fulfillment of any one of three conditions - (1) the attainment by the TSM group of certain specified target earnings, (2) the conclusion of an agreement between IDS (Interpharm Data Systems (Pty) Ltd) and Medscheme (Pty) Ltd, or (3) the

conclusion of an agreement between IDS and the alliance of Affiliated Medical Administrators ("AMA"), in both instances (2) and (3) upon mutually acceptable terms and conditions for the processing of claims by IDS. It is clear from the evidence of Slabbert that the appellants claimed the second R13.5 million from DHS because they believed that condition (3) had been fulfilled; and it was on the strength of this claim that DHS made the second payment. The appellants' claim for interest on this amount was predicated on the second payment having been due and payable. Interest being ancillary to a principal debt, without a valid debt that is enforceable a party cannot be held liable for interest (*Commissioner for Inland Revenue v First National Industrial Bank Limited* 1990(3) SA 641 (A) at 652 H - J). The appellants set out to prove that condition (3) had been fulfilled, but the second respondent held, after a comprehensive review of the relevant evidence, that they had failed to do so. Consequently they were not entitled to any interest on the second payment.

[31] That left the question whether DHS was entitled to set off the interest

admittedly due by it in respect of the first payment against the second payment, which it claimed to have made by mistake. In his judgment the second respondent stated that "he was prepared to find that the second payment of R13.5 million was made by the defendant [DHS] in the mistaken belief that it was due". DHS not having called any witnesses in this regard, there was no evidence to justify such a finding. In any event, the onus was on DHS to prove that the second payment was not due and payable and, if it succeeded in so doing, that it mistakenly believed that it was. This involved proof, in the first instance, that none of the three pre-conditions for payment had been fulfilled. Failing that set-off could not operate.

[32] At no stage of the hearing did the appellants concede that condition (1) (the attainment of the specified target earnings) had not been fulfilled. It was therefore incumbent on DHS to prove this. It is common cause that in their heads of argument, which were read out to the second respondent, the appellants specifically made the point that DHS had failed to prove that the specified target earnings had not been

achieved. The second respondent therefore erred in holding that "it is common cause that neither the plaintiffs [appellants] nor the defendant [DHS] rely on the first condition stipulated for in clause 10.2.1.2 of the agreement, namely whether the target earnings had been reached. . . ." Had he not erred in this regard the second respondent would presumably have concluded that DHS failed to establish that it was entitled to set off the interest it admittedly owed the appellants in respect of the first payment against the second payment, for want of proof that the latter was due and payable.

[33] The second respondent's error was a cardinal one with potentially unfortunate financial implications for the appellants. It is an error which is perhaps more readily discernible with hindsight. It is common cause that no evidence was led with regard to the fulfillment or otherwise of condition 1. All the evidence was concentrated on the fulfillment of condition 3. Whether or not the target earnings had been reached would have been a matter largely within the knowledge of the appellants. One would have expected them to have relied on condition 1 if there was a case to be made out

for its fulfillment. These considerations together with no more than a relatively fleeting reference to condition 1 in the appellants' heads of argument may have induced the mistaken belief on the part of the second respondent that when all was said and done the non-fulfillment of condition 1 was never really in issue. The second respondent concerned himself only with condition 3. His finding that, irrespective of whom the onus was on, he was satisfied that no agreement had been concluded between IDS and AMA would have justified the conclusion he came to on set-off if only condition 3 had been in issue. I do not wish to be thought to be making excuses for second respondent's error. I mention these factors because, at the end of the day, I do not believe that the second respondent's error can be described as gross.

[34] I do not propose to consider the remaining complaints in detail. For their contention that there is a presumption against payment by a person of money not owing, and that this created a *prima* facie case that the second payment was due and payable when it was made, the appellants relied upon the decision in *Recsey v Reiche*

1927 AD 554 at 556. Even if there is a legal presumption to that effect, and it applies in a matter such as the present, all of which is open to doubt, it would be of no real significance, first, because it would have been rebutted by the positive finding by the second respondent that condition 3 had not been fulfilled and, second, in the light of my conclusion that set-off was not established because DHS failed to discharge the onus resting on it. The second respondent's finding that condition 3 had not been fulfilled was based on his assessment of the relevant evidence and the credibility of the witnesses who testified. I am not convinced that the second respondent erred in any respect in arriving at such finding. Even if he did, it would make no difference to the ultimate conclusion I have came to on an overall conspectus of the matter.

[35] The question arises whether the appellants have succeeded in making out a case of misconduct, as envisaged by sec 33(1)(a) of the Act, against the second respondent - given that he erred in regard to set-off and even accepting that he may have erred in other respects. Mr *Delport*, for the appellants, conceded that if the principles laid

down in *Dickenson & Brown v Fisher's Executors*, *supra*, and later decisions applied, as I have held to be the case, then an error of fact or law, or both, even gross error, would not *per se* justify the setting aside of the second respondent's award. Accepting that he would have to go further than that, he contended that the most probable inference to be drawn from the second respondent's collective mistakes was that he was guilty of deliberate partiality or conscious bias in favour of DHS, a clear imputation of impropriety and *mala fides*, amounting to dishonesty, on the part of the second respondent. This despite the fact (1) that no allegations were made in the founding affidavit to that effect (as one would have expected) and the second respondent was not afforded an opportunity to deal with them (as he should have been); (2) that DHS's counterclaim, which was substantially in excess of the appellants' claims for interest, was dismissed by the second respondent; and (3) that no other considerations indicative of bias or *mala fides* on his part were relied upon. In the circumstances the inference contended for lacks conviction and probability.

[36] Misconduct in the required sense will in any event not lightly or readily be inferred on the part of an arbitrator who is a professional man of considerable experience in his field with a reputation to uphold, solely on the strength of errors made in his judgment, especially where, as in the present instance, such errors could never be described as gross. In my view it is, as a matter of inference, more likely that any errors made by the second respondent were *bona fide* mistakes made by him in the course of a difficult adjudication. In the result there is no room for a finding of misconduct on his part. It follows that the first ground of review cannot succeed.

The second ground of review

[37] This ground focuses on the extent of Milo's involvement in the arbitration and his participation in the preparation of the judgment and award. The crux of the appellants' argument is that the judgment was in fact that of Milo, having been prepared by him without material input from the second respondent, and that in abdicating his responsibilities in this regard the second respondent misconducted

himself or was guilty of a gross irregularity. (As to the meaning of an irregularity in this context see *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576 at 581.) For this allegation the appellants rely primarily, if not solely, on inferences they seek to draw from details appearing in the schedules of fees delivered by the second respondent on behalf of himself and Milo after the conclusion of the arbitration. A related argument is that the functions entrusted to Milo by the second respondent went beyond those expressly or impliedly agreed upon between the parties and that this constituted a gross irregularity.

[38] At the pre-arbitration conference it was agreed that the second respondent would have an assistant working with him throughout the arbitration, and that the assistant's fee would be included within the second respondent's fee. On 4 May 1999 the second respondent wrote a letter to the attorneys for the parties in which he stated, *inter alia*, that "upon reflection I consider that there should be a charge for my assistant's time in view of the apparent complexity of this matter". He suggested that

his assistant be paid R700 a day for the arbitration and R300 per hour "for ancillary related work outside the arbitration proceedings". This was agreed to. During the course of the arbitration the parties further agreed to increase the assistant's remuneration to a flat rate of R300 per hour, including the arbitration proceedings.

[39] No agreement was reached as to the precise nature and scope of the services to be rendered by the assistant (Milo). The appellants accept that he would have been required to do research on behalf of the second respondent. For the rest they claim their understanding to have been that Milo would do the equivalent of the work they allege is normally done by the registrar of a judge of the High Court, i e attendances at court, general secretarial work and related matters. They claim that at no time did it enter their minds "that the second respondent would discuss the merits of the disputes between the parties with his assistant or would require [as they allege] the assistant to write the judgment and award for him. . .".

[40] It is common cause that the services eventually rendered by Milo included (1)

assisting with the arrangements for the pre-arbitration meeting; (2) being involved in correspondence and discussions with the parties' attorneys; (3) taking down detailed notes during the arbitration; (4) participating in discussions regarding the merits of the dispute with the second respondent; (5) doing research; (6) preparing the first draft of the award; and (7) subsequently effecting changes to the initial draft. What is in issue is whether he acted beyond the functions agreed upon by the parties, expressly or impliedly, and whether his conduct amounted to a usurpation of the second respondent's duties.

[41] When selecting an arbitrator the parties to the arbitration agree to someone in whom, by dint of his (or her) experience and ability, they can repose the necessary confidence and trust to determine their dispute. What they seek is a judgment from the person chosen. An arbitrator is not entitled to delegate this function. He alone must perform the duties he has undertaken and with which he has been entrusted, unless the parties agree otherwise. Because of the essentially personal nature of his

appointment he should be circumspect about utilising the services of an assistant. Making use of an assistant is not *per se* objectionable. Where the parties agree to an arbitrator doing so, care should be taken to reach consensus on what precise functions the assistant may perform, to obviate any later dispute in this regard. Failing agreement, an assistant should not be allowed to perform tasks that may encroach on what would be regarded as the normal functions of an arbitrator. In no circumstances may the assistant be allowed to usurp the decision-making function of the arbitrator or act in a manner subversive of his independence. Ultimately the question to be asked, and answered, is whether the arbitrator exercised his own judgment in deciding the issues. This will depend upon the facts of each particular case.

[42] There is no justification for the appellants' purported belief that Milo would only play a formal or secretarial role in the arbitration. The reference in the letter of 4 May 1999 to the "apparent complexity of this matter" coupled with the reasonably substantial fees it was suggested should be paid to the assistant, *inter alia*, "for

ancillary related work outside the arbitration proceedings" clearly signalled the second respondent's intention to involve Milo to a greater extent than that. If, as the appellants have conceded, Milo was to undertake research, he would have had to be sufficiently acquainted with the issues and those aspects on which the second respondent required the benefit of research. He would have needed to understand what the second respondent wanted done for his consideration in that regard. To render the research effective discussion of the merits with the second respondent would have been not only unavoidable but also desirable to provide the necessary guidance. The results of the research and discussion could reasonably and logically have led to the preparation by Milo of a document constituting a draft award for the second respondent's consideration. There could be no breach of the second respondent's duty as an arbitrator if he availed himself of assistance expressly or impliedly agreed upon.

[43] Despite their protestations to the contrary, it must have been reasonably obvious

to the appellants, having regard to what was agreed upon and anticipated, that Milo would be closely involved in the arbitration. There can be no objection in principle to that, provided always, in keeping with what has been said above, that the second respondent did not abdicate his responsibilities in favour of Milo and, in effect, allow him to decide the dispute. The second respondent has made it clear, however, that this was not the case. He admitted that he discussed the matter, including the merits, with Milo throughout. He wanted him to be conversant with all aspects of the dispute. In his answering affidavit the second respondent further states:

> "[W]e also discussed the manner in which I would structure my award when the time came, and I advised my assistant of my views on the various issues as it proceeded and, at the end of the proceedings, my views as to the result and award I had in mind and intended. He also gave me the benefit of his own research and answers to my comments, and prepared memoranda for me, which we then also discussed."

[44] It was Milo who, after the conclusion of the arbitration proceedings, suggested that he should prepare a rough draft of the award while the second respondent was

temporarily absent in Cape Town. The second respondent agreed to this, according to him,

> "subject to my direction, following my views (of which he was fully aware as we had discussed them), and also the manner in which I had told him I required the draft to be prepared. My assistant was also aware of my views in general as to what my award would be, as I had told him. Accordingly, it was clear to us that the draft was subject to my overall supervision and prior direction."

[45] The second respondent went on to explain that the draft presented to him by Milo contained matters with which he did not agree or which required change to reflect more accurately his emphasis and views; its structure was not what he wanted; he devoted 15 hours to a consideration of the draft, its re-drafting and discussing aspects of it with Milo; he applied his mind to the relevant authorities, memoranda prepared by Milo and the heads of argument; what was reflected in his schedule of fees as proof-reading actually amounted to a substantial re-drafting of the draft to reflect his own views and conclusions. The schedule of fees bears out the second respondent's claim to have devoted considerable time to the draft.

[46] No contrary facts were advanced by the appellants. There is thus nothing to refute what was said by the second respondent. Nor is there any reason why his word should not be accepted, particularly having regard to the principles that apply in motion proceedings. The suggestion in the court below that the matter be referred to evidence was never strenuously pursued. Based on what appeared in his answering affidavit it is apparent that the award was the product of the second respondent's own, independent view. There is nothing to suggest that he was influenced, consciously or unconsciously, by Milo to an extent where the latter's view became his. There is no substance in the appellants' contentions to the contrary which are based on unfounded speculation and unwarranted inferences flowing from the schedules of fees viewed in isolation without proper regard to their contextual and factual setting. There is no basis for a finding that the appellants did not have the issues fully and fairly determined by the second respondent himself.

[47] In the result the appellants have failed to establish that the second appellant

committed any irregularity, let alone a gross irregularity, in the conduct of the arbitration proceedings. Nor, in utilising Milo's services to the extent that he did, could there have been any misconduct on his part. The requirements of sec 33(1)(a) and (b) of the Act have not been satisfied. It follows that the second ground of review cannot succeed either.

Costs

[48] Two issues arise under this head. Mr *Delport* asked that, whatever the outcome of the appeal, a special costs order should be made in respect of the costs attendant upon the procurement and introduction of numerous affidavits and annexures relating to the duties and functions of judges' clerks or registrars elsewhere, notably the United States of America, in terms of a notice of motion dated 5 May 2000 filed by the respondents jointly. The affidavits and foreign material ultimately served no purpose in the determination of the issues on appeal. They were introduced because of the appellants' objection to certain allegations made by the respondents regarding the

functions of judges' clerks or registrars elsewhere as hearsay. While the respondents went to unnecessary lengths in this regard their conduct did not exceed the bounds of reasonableness to such an extent as to warrant a departure from the normal rule that the costs incurred should follow the result.

[49] Mr *Kuper*, for the second respondent, asked for a punitive order if the appellants persisted in their allegations of personal impropriety. I have referred to those allegations, which impute grave impropriety to the second appellant, in para [35]. Mr *Delport* was not prepared to forego his reliance on them even though he sought to distance himself from any imputation of dishonesty. The appellants' continued reliance on impropriety, however, inevitably means that they persist in their unwarranted attack on the second respondent's integrity. There is no justification for such a spurious attack. It was ill-conceived and groundless. To mark our displeasure the appellants will be ordered to pay the second respondent's costs of the hearing before us on an attorney and client scale.

Order

The appeal is dismissed with costs including, in respect of both respondents, the costs of two counsel. In addition the appellants are ordered to pay the second respondent's costs of the hearing on 25 February 2002 on an attorney and client scale.

J W SMALBERGER
ACTING DEPUTY PRESIDENT

MARAIS JA)Concur
CAMERON JA)
BRAND JA)
LEWIS AJA)