REPUBLIC OF NAMIBIA Reportable

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2020/00137

In the matter between:

HARALD DIETER VAN BILJON **APPLICANT**

and

GEORGE COLEMAN NO **FIRST RESPONDENT**

DANIEL NDJAI GERSON ZAIRE **SECOND RESPONDENT**

Neutral citation: *Van Biljon v Coleman* (HC-MD-CIV-MOT-REV-2020/00137) [2021] NAHCMD 365 (11 August 2021)

Coram: ANGULA DJP
Heard: **24 March 2021**
Delivered: **11 August 2021**

Flynote: Applications and motions – Review of arbitration award – Section 33(1) (*b*) and s 33(4) of the Arbitration Act, 42 of 1965.

Summary: This is an application to review and set aside an arbitrator's award in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965 (the 'Act') on the ground that the arbitrator exceeded his power in that the award made by the arbitrator lacks the attribute of finality and as a result is void or voidable – In addition, the applicant

seeks a consequential order that in terms of s 33(4) of the Act, once the impugned award is set aside that the court refers the dispute to a new arbitration tribunal constituted in the manner directed by the court.

Held; that the arbitrator was mandated to deliver an award which has the attributes of finality. A final award should have either upheld the applicant's claim or dismissed the applicant's claim. The arbitrator did not have the mandate or power to make an award of absolution from the instance which lacked the attribute of finality.

Held; that the submission by counsel for the second respondent during closing argument did not amount to an offer to vary the arbitration agreement and that, the silence by the counsel for the applicant could not be interpreted as acceptance by counsel for the applicant on behalf of his client of such an alleged offer.

In the result, the arbitration award made by the first respondent and dated 9 April 2020 was set aside.

ORDER

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1. The arbitration award made by the first respondent and dated 9 April 2020 is set aside.

2. The dispute between the applicant and the second respondent is referred to a new arbitration tribunal constituting, in the following order of Mr Andrew Corbett SC, failing him Mr Reinhard Tötemeyer SC; failing him Mr Raymond Heathcote SC. In the event that none of nominated counsel is available, the parties are to approach the judge in chambers to nominate other possible arbitrators.

3. The second respondent is to pay the applicant's costs such costs consist of the costs of one instructing counsel and one instructed counsel.

4. The matter is removed from the roll and is considered as finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an opposed application to review and set aside an arbitrator's award in terms of s 33 (1)*(b)* of the Arbitration Act 42 of 1965 (the 'Act') on the ground that the arbitrator exceeded his power in that the award made by the arbitrator lacks the attribute of finality and as a result is void or voidable. In addition, the applicant seeks consequential order that in terms of s 33(4) of the Act, once the impugned award is set aside that the court refers the dispute to a new arbitration tribunal constituted in the manner directed by the court. The application is opposed by the second respondent only. The first respondent did not oppose. I shall refer to the first respondent as 'the arbitrator'.

Brief background facts

[2] On or about March 2009, the applicant and the second respondent entered into a written grazing lease agreement. In terms of that agreement they agreed *inter alia* in the event a dispute arose which they cannot amicably resolve it would be referred to a single arbitrator. They further agreed that the decision of the arbitrator shall, in the absence of a manifest error, be final and binding on them and either party may apply to court to have the award made an order of court.

[3] Subsequent thereto, a dispute arose between the parties concerning an alleged theft of the applicant's cattle by the second respondent. The applicant then instituted action in this court against the second respondent claiming payment of the sum of about N$4.6 million in damages being the value of the cattle allegedly so stolen.

[4] Thereafter, the applicant and the second respondent entered into a written private arbitration agreement submitting their dispute to the arbitrator. Subsequent thereto, the parties signed a joint arbitration agreement which *inter alia* delineated the issues the arbitrator was required to decide. They further agreed that provisions of the Arbitration Act, 1965 applied and that to the extent the provisions of the said Act did not apply they would make use arbitration rules of the United Nations Commission on International Trade Law (the UNCITRAL rules).

[5] Subsequent thereto the arbitrator conducted an arbitration hearing. Both parties led evidence after which the arbitrator made an award. He held that on the evidence before him, he could not say that the second respondent stole the applicant's cattle. He accordingly granted an order for absolution from the instance, absolving the second respondent from liability.

Submissions on behalf of the applicant

[6] Mr Steyn assisted by Mr Boonzaier appeared on behalf of the applicant. They filed detailed heads of argument for which the court expresses its appreciation for their assistance. The thrust of their argument is that the first respondent exceeded his mandate in that the award he delivered lacks the attribute of finality. They argued that the award made is not what the arbitrator was mandated by the parties to deliver, namely, a final award. Accordingly, the award made is a nullity and for that reason is liable to be set aside.

Submissions on behalf of the second respondent

[7] Ms Van der Westhuizen appeared alone on behalf of the second respondent. She equally filed comprehensive heads of argument for which the court is likewise grateful. Counsel argued in the main that the first respondent had the jurisdiction or power to deliver an award of an absolution from the instances. That no irregularity took place that led to the finding of absolution from the instance; and that the applicant failed to make out a case that would justify his alleged loss of confidence in the arbitrator. Counsel argued in the alternative that the arbitration agreement was varied by the parties during the arbitration hearing whereby the applicant through his

legal representatives agreed that the arbitrator could make an award of absolution from the instance.

Determination

Whether the award of absolution from the instance lacks finality?

[8] I proceed to consider the question whether the award lacks finality, as alleged by the applicant, as well as the binding nature of the award. In the grazing lease agreement the parties agreed that: 'The decision of the arbitrator shall, in the absence of a manifest error, be final. Thereafter, in their private arbitration agreement the parties reiterated their earlier intention by recording that: 'The arbitrator's award shall be final and binding on the parties.'

[9] It is clear from the two clauses quoted above, that the arbitrator was mandated to deliver an award which was final in nature. From the case law it is clear that an award of absolution from instance is not final. In this regard the court in *Irish & Co. Inc. (Now Irish & Menell Rosenberg Inc v Kritzas)*[1] expounded the legal position as follows:

'It was also the arbitrator's duty to give effect to the agreement between the parties so that his award should be final and decisive between them and that the party in whose favour the award was given would be entitled to proceed upon the basis of the award as being *res judicata. . . .* In *Verhagen v Abramowitz* 1960 (4) SA 947 (C) at 950 Rosenow J said correctly in my respectful view, that "when an award has in fact been made it has been held that such an award is equivalent to *lis finita* and as between the parties the matter is *res judicata*". Thus a judgment of absolution from the instance cannot be final adjudication between the parties since it does not debar the party against whom the award is given from instituting proceedings in the appropriate Court. The award therefore cannot have achieved the finality it was intended to achieve. It was the duty of the arbitrator to see that the award was a final decision on all matters requiring his determination.'

[1] *Irish & Co. Inc. (Now Irish & Menell Rosenberg Inc v Kritzas)* 1992 (2) SA 623 at 633J to 634A-C.

[10] The learned authors *Herbstein and Van Winse*n explain the legal position with regard to absolution as follows[2]:

> 'The position appears to be that if the court has on evidence found against the plaintiff, it is entitled to enter judgment for the defendant rather than grant absolution. It can in such event never be bound to enter a judgment of absolution in preference to one in the defendant's favour, but conversely it may be bound, if the defendant asks for it and the evidence warrants it, to enter a judgment in the defendant's favour.'

[11] In the present matter, the arbitrator heard evidence from both parties. In my view, the arbitrator was bound to make a positive ruling either upholding the applicant's claim or dismissing it. The arbitrator was under an obligation to give effect to the arbitration agreement between the parties to deliver an award which had attributes of finality. An award of absolution meant that no final decision has been made and that some of the issues referred for arbitration remained undecided. The absolution from the instance award is not subject to the principle of *res judicata*. This means that the applicant can institute his claim against the second respondent afresh bolstered by new strong evidence.

[12] The parties' intention as set out in the arbitration agreement was to have their dispute resolved once and for all. I therefore hold that the award made by the arbitrator lacks the attribute of finality and for this reason alone, the award is liable to be set aside. I move to consider whether the arbitration agreement was varied during closing arguments as contented by the second respondent.

Whether the arbitration agreement precludes the arbitrator from making award of absolution from the instance

[13] The second respondent alleges, in the first place, that the arbitration agreement does not preclude the arbitrator from rendering an award of absolution from the instance. Secondly, that the arbitration agreement was varied either impliedly or tacitly so as to bestow jurisdiction upon the arbitrator to make an award

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[2] *Herbstein & Van Winsten. The Civil Practice of the Supreme Court of South Africa*. 4th edition (1997) p 684-5.

of absolution from the instance. It is further alleged in this connection that such variation happened when counsel for the second respondent, during closing arguments, suggested to the arbitrator to make an award of absolution from the instance and counsel for the applicant did not object to the suggestion and thereby acquiesced himself with the suggestion by counsel for the second respondent.

[14] As regards the first defence, I have already found that the arbitrator was mandated to deliver an award which has the attributes of finality. He failed to do so. This award is flawed. In my view, just because the arbitration agreement did not specifically exclude an award of absolution from the instance does not mean it is included. Clause 8.2 of the arbitration agreement specifically states in part: 'The arbitrator's award shall be final and binding on the parties….'Finality' and 'absolution' are poles apart in the sense that finality in this context means end of the dispute, *res judicata* – the matter is adjudged. Absolution on the other hand means the defendant/respondent is released from liability for the time being but the plaintiff/applicant may institute fresh proceedings against the defendant/respondent based on the same cause of action supported by additional evidence.

[15] In my view, by necessary implication an award of absolution from the instance was excluded. The facts of the present matter properly considered clearly demonstrate that it was in the contemplation of the parties that they wanted to put an end to their dispute. They abandoned the High Court proceedings, where at the end of such proceedings each would have had an opportunity to appeal. They decided and agreed to go for arbitration in order to obtain an award that would be final that would disposed the dispute between them once and for all.

[16] In addition the arbitration agreement states that each party shall be entitled to have the award made an order of court by a court with competent jurisdiction. In this regard, the court *in Irish & Co (supra)* dismissed an application to have an award of absolution made an order of court holding that an award of absolution from the instance is not a proper award to be made an order of court for the reason that it lacks finality. For all those reasons, the second respondent's argument in this respect thus fails.

Whether the arbitration agreement was impliedly or tacitly varied?

[17] I turn to consider the second respondent's argument that the arbitration agreement was impliedly or tacitly varied during closing submissions, thereby vesting the arbitrator with the power to make an award of absolution from the instance.

[18] Mr Steyn for the applicant submitted that no reasonable person in the position counsel for the applicant would have thought that counsel for the second respondent there and then offered to vary the arbitration agreement during closing arguments. It is to be recalled that the second respondent's contention in this regard is that just because counsel for the applicant did not object to the suggestion he thereby impliedly of tacitly agreed to the varying of the arbitration agreement on behalf of his client.

[19] Counsel opposing arguments in this regard bring in focus the relationship between a client and his or her legal representative. The applicable principle was discussed in *Belete Worku v Equity Aviation (Pty) Ltd* where the Supreme Court had to say at para [27]:

> '[27] The lawyer and client relationship is no more than that of principal and agent. As such it is trite that when an agent acts within his apparent or ostensible authority, the principal is bound thereby even if he or she has given private or secret instructions to the agent limiting the authority. It is equally trite that the authority of the agent is generally construed in such a way as to include not only the powers expressly conferred upon him or her, but also such powers as are necessarily incidental or ancillary to the performance of his mandate. In order to escape liability it would be necessary for the principal to give notice to those who are likely to interact with the agent, *qua* agent, of the limitations imposed by him or her upon the agent's apparent authority.'[3]

[20] In view of the above, strong evidence would be required to hold that it is within the incidental or ancillary powers of counsel to impliedly vary a written agreement by not objecting to a suggestion by counsel from the opposite side. In my judgement,

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[3] *Belete Worku v Equity Aviation (Pty) Ltd* (SA 2/2007) (7 July 2009).

the adage silence means consent would not apply. In this connection, I respectfully associate myself with what was said by the court in *Standard Bank of SA Ltd v Minister of Bantu Education*[4].

'Whatever may be the position concerning counsel's authority to bind his client by admission formally made and recorded in a civil case, it seems undesirable that counsel's opening of a case should be accorded decisive effect in regard of proof of facts necessary to a party's case or defence. Opening remarks are, in common with counsel's closing argument, usually not recorded. If such matters are to be used in coming to a conclusion in a judgment, they must be set out therein and used, in the ordinary course of events, with circumspection.'

[21] It is generally accepted that context matters. In order to appreciate the parties' respective arguments, it is necessary to provide the context by referring to the relevant parts of the transcribed record of the proceedings so as to understand what transpired when the alleged variation of the arbitration agreement took place.

[22] Counsel for the second respondent at page 871 of record line 20:

'Now that Mr Chairperson, will be then the ground for what I have not set out in my heads of argument namely this call for absolution from the instance.'

Later on at page 872, line 15:

'Now there is a second ground Mr Chairman if you are not happy with that ground and we are saying that is a competent valid ground [for] absolution from (indistinct). And that relates (to) quantum. Even if it was accepted that cattle was stolen, we say not by the respondent or lost by the respondent…. There is a requirement that in order for adjudicatory process in respect of quantum is to be made, quantum must be proven with certainty.'

And later on at page 879, line 2:

'The aspect of a written agreement, Mr Chairman, as opposed to absolution is one that renders this claim entirely dismissible with costs.'

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[4] *Standard Bank of SA Ltd v Minister of Bantu Education* 1966 (1) SA 229 (N) at 242H-243G.

At line 14-19:

'Chairperson: Are you saying on this basis it could be justified to dismiss the claim or is it apart of the absolution?

Counsel for the second respondent: No. This is a standalone basis for dismissal.'

Reply by counsel for the claimant

[23] At page 891 at line 14-20:

'The issue of the quantum briefly, I mean the claimant permits [persists] with his claim for the two hundred and ninety (290) cattle. We have addressed the issue of damage in paragraph 2.4.9 of our heads.'

And at page 892, line 1-9:

'And we are saying the damages are normally market value of the plaintiff property by the defendant and we also referred to the case law involved in that. So we persist with that as set out in our particular of claim specifically 2.1'. [That prayer reads: '2.1 Payment of N$4 164 400 (four million one hundred and sixty thousand Namibian Dollars in respect of damages suffered'.'

And still same page at line 20:

'And then obviously in our pleadings which we have set down that was one of the specific issues that we requested to be determined so we did not have to ask for a prayer in that regard.'

[24] Then the arbitrator delivered his ruling wherein he stated *inter alia*:

'I am unable on the evidence before me to infer that Respondent stole Claimant's cattle. Mr Shikongo suggested absolution from the instance. I agree with him. In addition, the fact that the criminal investigations have not been concluded leave the stock theft in the air. Once concluded it may shed light on this. In addition, am not satisfied that Claimant's quantum as set out by Mr Steenkamp is reliable since his calculation is based on 428 cattle.'

[25] As stated earlier, I reproduce the above excerpts from the dialogue or submissions by counsel and their interaction with the arbitrator with an aim to provide context for the contentions made and the arbitrator's resultant finding.

[26] First of all, it is to be noted from the submissions by counsel for the second respondent with regard to the award of absolution that it was suggested to the arbitrator *in tandem* with award dismissing the applicant's claim. In other words, counsel for the second respondent was not emphatic about the award of absolution. He contended for either dismissal or absolution. In reading his submission, I gained the impression that he put emphasis on the dismissal for two reasons: one that *quantum* had not been proved; and second some alleged 'defects' with regard to 'written agreement'. I could not properly grasp the second reason.

[27] Taking the foregoing into account, I am not persuaded that the submission by counsel for the second respondent amounted to an offer to vary the arbitration agreement. It would be unduly straining the principle of 'impliedly or tacitly' based on what happened as evidenced by the excerpts referred to above. It is clear from reading the record that when counsel for the second respondent made the suggestion, it was not made with a serious intention to vary the arbitration agreement neither was it directed to his opponent. In my view, the argument that the suggestion was made with the intention to vary the agreement is an afterthought. It also does not appear that the arbitrator was aware that the suggestion for him to make the award of absolution had the effect of varying the arbitration agreement.

[28] I say this for the reason that the arbitrator did not request counsel for the applicant to address him on the suggestion of him making an award of absolution. In my opinion, it was incumbent upon the arbitrator to afford an opportunity to counsel for the applicant to address him on the issue of the possibility of him making an order for absolution from the instance, particularly if the intention was that such suggestion or submission would have the effect of varying the arbitration agreement.

[29] There is a further reason which militates against the argument that counsel for the applicant impliedly or tacitly agreed to the variation of the arbitration agreement.

It is to be noted in this regard that when counsel for the applicant made his submission in reply, he disputed the second respondent's contention that *quantum* had not been proved. He pointed out that the applicant persisted with his claim for payment of 290 cattle at market value. That approach or argument, objectively viewed, is in conflict with the state of mind of a person who just accepted a variation of the arbitration agreement. What is more is that counsel could not accept the variation because it was against the interest of his client.

[30] It is to be noted further from the arbitrator's statement that he opted to grant absolution because 'Mr Shikongo (counsel for the second respondent) suggested absolution from the instance and not for the reason that the parties have agreed to vary the agreement so as to give him the power to make an award of absolution. The suggestion was made by one party to the agreement. It has been held in this connection that: '[a]n arbitrator is not competent to determine his own jurisdiction that means only that he has no power to fix the scope of his jurisdiction. The scope of his jurisdiction is fixed by his terms of reference and he has no power to alter its scope by his own decision (in the absence of agreement to the contrary)'.[5]

[31] I therefore conclude for all those reasons that the second respondent's defence that the arbitration agreement was impliedly, alternatively tacitly, vesting the arbitrator with the jurisdiction to make an award of absolution from the instance, fails.

Did the arbitrator commit an irregularity or fail to execute and/or exceeded his mandate or exceeded his power?

[32] It is the applicant's case that since the award lacks the attribute of finality it thus follows that the arbitrator 'failed to execute and/or exceeded his mandate pursuant to the provisions of s 33(1)*(b)* of the Arbitration Act 42 of 1965. The said section provides that:

'Where an arbitration tribunal has committed any gross irregularity in the conduct of the proceedings or has exceeded its power, the court may on application of any of the parties to

[5] *Radon Projects v NV Properties* 2013 (6) SA 345 para. 28 (SCA).

the defence after due notice to the other party or parties, make an order setting the award aside.'

[33] Ms Van der Westhuizen for the second respondent submits in her heads of argument that the applicant's case of the arbitrator's 'failure to execute the mandate' does not fall within provisions of s 33(1)*(b)* of the Act, namely an arbitrator 'exceeded his powers'.

[34] In countering this argument Mr Steyn for the applicant referred to a number of cases and text books for stressing that the scope of 'exceeded the powers' in s 33(1) *(b)* should not be construed as limiting the scope of the court's powers to set aside the award of an arbitrator who exceeded his powers.

[35] The meaning of s 33(1)*(b)* 'gross irregularity' and 'exceeding powers' were elucidated by South African Supreme Court of in *Telcordia Technologies Inc. v Telecom SA*[6]*.* Since in the present matter we are only concerned with the meaning of 'exceeding powers', I will only concentrate on that meaning as expounded by that court-

'[52] The term 'exceeding its powers' requires little by way of elucidation and this statement by Lord Steyn says it all:

> "But the issue was whether the tribunal 'exceeded its powers' within the meaning of section 68(2)*(b)* [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. *If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved*. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under section 48(4). The jurisdictional challenge must therefore fail." (*Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 para 24.

[6] *Telcordia Technologies Inc. v Telecom SA* [2006] 139 SCA (RSA) at para 52-79.

And further at para 55 and 56

> [55] The review of an award based on a wrong construction of a deed of partnership was the subject of *Dickenson & Brown*. This Court held that a review on this basis was impermissible on two grounds. The first was the general principle that when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was. Second, the colonial laws (in that case the one of Natal) did not change the position. Such an error, he held, could not amount to misconduct unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct or partiality, in which event the award would be set aside not because of the mistake, but because of misconduct.
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> [56] Solomon JA recognised that it would have been a valid ground for setting aside the award if an arbitrator had 'exceeded his powers': to exceed one's powers does not go to merit but to jurisdiction. He also held that there is no distinction between a mistake on the face of the award and one not appearing on the face of it, a rule abolished in England only in 1969. Furthermore, he held that the English rule, which permitted courts to set aside awards on the ground of mistakes of law, was not part of our law 'The court further pointed out that in *Dickenson & Brown v Fisher's Executors 1915 AD 166 at 174* the court held that:
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> "[T]here was no common law review under arbitration law. I addition, I have already expressed the view that a party to a consensual arbitration under the Act is not entitled to rely on an administrative common-law review ground." '

[36] This is the legal position we inherited at independence in 1990 and has since not been changed. The applicant's review ground in the present matter is based on the Act. Furthermore, the applicant is not seeking to set aside the award on the ground of mistake of law but on the ground that the arbitrator exceeded his mandate. I turn to consider the parties' respective submissions.

[37] As regards Ms Van der Westhuizen's submission that 'failure to execute the mandate[7]' does not fall within the meaning of 'exceeded his power[8]', I am satisfied to hold for the purpose and in the context of the present matter that the two terms are identical in determining the meaning and import of s 33(1)*(b)*. I should mention that counsel did not advance reasons for her proposition as to why the two concepts cannot be considered to convey the same meaning. I am therefore aligning myself with the argument that the scope and meaning of 'exceeded his powers' in s 33(1)*(b)* should not be construed as limiting the scope of the court's powers to set aside an award of an arbitrator who exceeded his or her powers. The question that arises is: In what manner did the arbitrator exceed his powers in the present matter?

[38] It is trite law that the power of an arbitrator is derived from the arbitration agreement between the parties who submitted their dispute to the arbitrator. It is therefore necessary to have regard to the relevant provisions of the referral to determine whether the arbitrator did indeed exceed his powers. It has been held that if the award goes beyond the terms of reference, in that case the arbitrator exceeds his or her powers and the award is liable to be set aside.[9]

[39] It is common cause that the arbitrator was mandated or briefed to decide four issues specified in the brief and make a final award. The first issue: whether the applicant is the owner of the cattle; second issue: whether the second respondent had stolen the applicant's cattle and was thus liable for the loss of such cattle; third issue: whether the defence and denial or liability raised by the second respondent constituted a valid defence; and the fourth issue: in the event the second respondent was found to be liable, what amount of *quantum* should be awarded to the applicant.

[40] In my view, a final award should have either upheld the applicant's claim or dismissed the applicant's claim. It is common cause that the arbitrator did not make either of those two awards.

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[7] Mandate is defined as 'an official order or authorization [underlined for emphasis]' in the *Oxford Dictionary Thesaurus & Wordpower Guide*. 2001, Oxford University Press, p. 789.

[8] Power is defined as 'a right or authority given or delegated to a person or body [underlined for emphasis]' in the *Oxford Dictionary Thesaurus & Wordpower Guide*. 2001, Oxford University Press, p.1002.

[9] *Allied Mineral Development Corporation ((Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7.

[41] Instead he made an award absolving the second respondent from the instance. The arbitrator did not have the mandate to make an award of absolution for the instance. I have already found that that the award of absolution lacks the attribute of finality. It follows therefore for those reasons that the arbitrator failed to execute his mandate or exceeded his power within the meaning of s 33(1)*(b)* entitling this court to set aside the said award.

Appointment of a new arbitrator

[41] What remains is to determine the way forward given the fact that the award stands to be set aside. In this regard s 33(4) of the Arbitration Act provides that if the award is set aside, the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court. The applicant in this matter is requesting that this court refers dispute to a new arbitration tribunal.

[42] Ms Van der Westhuizen requested that the dispute be referred back to the first respondent because the parties decided upon him in the arbitration agreement. Mr Steyn on the other hand points out that it is the applicants' case that he has lost confidence in the competence of the arbitrator in light of his award which stands to be set aside. In the founding affidavit, the applicant put forward the names of some South African senior counsel, one of them to be appointed as arbitrator. The second respondent objected thereto pointing out that the applicant is not entitled to have an arbitrator of his sole preference. In his replying affidavit, the applicant suggests a name of a local senior counsel who has consented in writing to being appointed as an arbitrator.

[43] In order for the court not be seen to side with one of the parties in the appointment of the new arbitrator, I decline the parties' suggestions. Section 33(4) vest the court with the power and discretion to constitute a new arbitration tribunal in the event the award is set aside. In terms of section 33(4) of the Arbitration Act, the dispute between the applicant and the second respondent is here submitted to a new panel, constituting a single arbitrator. The court is hereby appointing a new arbitrator from amongst the following local senior counsel; Mr Andrew Corbett SC, failing him Mr Reinhard Tötemeyer SC, failing him, Mr Raymond Heathcote SC, in that order.

Should none of the nominated counsel be available for whatever reason, the parties shall approach the court in chambers to nominate and appoint names of other possible arbitrators.

[44] The arbitration proceedings must take place in accordance with the arbitration agreement which was previously submitted to the arbitrator whose award stands to be set aside. The arbitrator shall have the discretion for his award to either rely on the evidence on record of the previous proceedings or commence arbitration proceedings afresh. The arbitration proceedings shall commence as soon as possible. The arbitrator shall publish his award within 14 days of the conclusion of the arbitration hearings.

Costs

[45] The normal rule regarding costs shall apply, namely the costs follows the cause. The applicant employed the service of two counsel whereas the second respondent employed the services of a single counsel. Counsel for the applicant asked the court to grant costs occasioned by the instruction of two counsel.

[46] In my view, the issues at play in this matter did not deserve the employment of two counsel. The facts are not complicated and are almost common cause and compressed. Neither can it be seriously contended that the issues involved in this matter are novel or complicated. The applicable law is well settled as demonstrated by counsel for the applicant's reference to case law and literature. In my view, either of the two counsel experienced, as they are in arbitration disputes, could single handedly and easily conduct the matter. In the exercise of my discretion, I decline to allow the costs of two instructed counsel and allow costs of one instructed counsel only.

Order

[47] In the result, I make the following order:

1. The arbitration award made by the first respondent and dated 9 April 2020 is set aside.

2. The dispute between the applicant and the second respondent is referred to a new arbitration tribunal constituting, in the following order of Mr Andrew Corbett SC, failing him Mr Reinhard Tötemeyer SC; failing him Mr Raymond Heathcote SC. In the event that none of nominated counsel is available, the parties are to approach the judge in chambers to nominate other possible arbitrators.

3. The second respondent is to pay the applicant's costs such costs consist of the costs of one instructing counsel and one instructed counsel.

4. The matter is removed from the roll and is considered as finalized.

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H Angula

Deputy Judge-President

APPEARANCES:

APPLICANT:	H STEYN (with him M BOONZAIER) Instructed by Theunissen, Louw & Partners, Windhoek
SECOND RESPONDENT:	C E VAN DER WESTHUIZEN Instructed by Shikongo Law Chambers, Windhoek