IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO.1249/2018

In the matter between:-

SWAZILAND MEDICAL AID FUND **Applicant**

and

MEDSCHEME ADMINISTRATORS SWAZILAND (PTY) LIMITED **First Respondent**

JUDGE PHILLIP LEVINSOHN N.O. **Second Respondent**

Neutral Citation: *SwaziMed Medical Aid Fund v Medscheme Administrators and Another (1249/2018)[2018] SZHC 33(05 March 2020).*

CORAM : MAMBA, MAPHANGA et TSHABALALA JJ

HEARD : OCTOBER 2019

DELIVERED: 05 March 2020

[1] *Constitutional Law – Supervisory Jurisdiction of the Court per S 152 of the Constitution – may be invoked where lower Court or Tribunal exceeds its jurisdiction.*

[2] *Civil Law – Review of Arbitration Award. Where Arbitrator draws an inference from the facts before him, e.g tacid term or agreement, such is not reviewable.*

[157] I have had the advantage of reading in draft the very comprehensive judgment by my Learned Colleague Maphanga J. I am unable to agree with the conclusion therein that the learned Arbitrator exceeded his jurisdiction and consequently that the award by the arbitrator must be set aside.

[158] Before embarking on the merits of the application, I think certain legal principles regarding the role and powers of the court pertaining to arbitration proceedings must be restated and these have been, in the main, eloquently stated in the majority judgment and these are as follows:-

[158.1] In determining whether an arbitrator has exceeded his or her powers, the court may admit extrinsic evidence and is not solely confined to the record of the proceedings and where the agreement either expressly or by necessary implication places the determination of the scope of the dispute within the powers of the arbitrator, then, in the absence of fraud or some other unlawful act on the part of the arbitrator, or some patent error on the part of the arbitrator regarding his interpretation of his mandate or jurisdiction, the parties are legally bound by his identification of the issues under consideration or in dispute. (See

Kroon Meule cc v Wittstock t/a JD Distributors 1999 (3) SA866 (E)).

[158.2] Where an arbitrator strays beyond the terms of the submission, the award would be set aside by the court on review, as being ultra vires or ineffectual. Again, *Vide Cone Textile (PVT) Ltd v Ayres & Another* 1980 (4) SA 728 (ZA).

[158.3] A court will not generally interfere with an arbitrator's award where the arbitrator has made an error or mistake of law or drawn a wrong inference from the evidence before him. (See *Clark v African Guarantee & Indemnity Co. Ltd* 1915 CPD 68).

These are the powers of the court as enshrined under the common law and may not necessarily be applicable where the court exercises its Supervisory powers over lower courts and tribunals as pleaded by the applicant in the instant case. It is, however, noted or observed that Counsel for the applicant did rely on the issue of excess of jurisdiction or ultra vires as one of the

applicant's grounds in this application and indeed it is upon this ground that the majority judgment finds in favour of the applicant.

[159] The Supervisory powers of this court as stipulated in section 152 of the Constitution were broadly stated by the Supreme Court in *Director of Public Prosecutions v Sipho Shongwe* (12/2018)[2018] SZSC 23 (22 August 2018). There, the Court stated that "there should be set out clear grounds for the application, spelling out the nature and gravity of the [act] complained of and the specific remedy required" and the issue complained of must be 'fundamental, substantial, material, grave or so serious as to go to the roots of the matter, or, in other words, the error must be extant on the face of the record, that is, it must be *prima facie*, to import the supervisory jurisdiction of the court" (Per para 44 & 45). In *Carillion Irishenco Formerly Known as Irishenco Construction v Dublin City Council & John Higgins* [2009] IEH, a case cited to us by Counsel for the Applicant, the court held that an arbitration award will only be set aside if the act or conduct complained of is so fundamental 'that it cannot be allowed to stand or remain unchallenged' or if 'it smacks of injustice or unfairness' (per paragraph 112).

[160] Although obiter the court in *Sipho Shongwe* (Supra) stated that the issue of excess of jurisdiction or ultra vires may be a ground for invoking the Court's supervisory powers (para 43 – 45). See also *Tlhabologang Molatlhegi v Col. R.Z. Christmas and Ano. Botswana Court of Appeal CACLB-020-10 para 8-9.* It is observed herein that although the Supreme Court in *Sipho Shongwe* (supra) was not pointedly dealing with the Supervisory powers of this court over lower courts and tribunals but its own powers, the court was magnanimous or generous to point out that its Supervisory powers in terms of Section 148(1) of the Constitution were similar in nature and scope to those of this court as provided under section 152 of the constitution, (per para 40). The court further pointed out that this power or jurisdiction must be sparingly and cautiously exercised, 'to avoid it having a chilling effect on the lower courts or tribunals and the appearance of undue interference'. This jurisdiction must in my view, be invoked and exercised in clear or obvious cases and where for instance, an ordinary appeal or review would not be appropriate or available to the litigants.

[161] In exercising its power of review of arbitration awards or proceedings, a court would generally be very slow to interfere with such awards. In *Three Cities*

Management (Pty)Ltd v Bantry Bay Management Company (Pty) Ltd, case 7474/2017 the court stated as follows:-

'[1] Judge F D J Brand, writing about the judicial review of arbitration awards, has noted: 'the question whether or not the arbitration had strayed beyond the pleadings of a particular case is clearly one to be decided on the facts of that case. But it is clear that in line with their general reluctance to interfere with arbitrator's awards, the courts are prepared to adopt a rather generous approach to pleadings'. FDJ Brand "Judicial review of Arbitration Awards" 2014 Stellenbosch Law Review 247 at 255.'

Again, in *Amalgamated Clothing & Textile Workers Union v Veldspun (Pty) Ltd* 1994(1) SA 162(A) at 169, Goldstone JA stated that:

'when parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the Supreme Court under section 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such course, and especially so in the labour field where it is

frequently advantageous to all the parties and in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion, the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith.'

[162] In the instant application, it is argued that the arbitrator exceeded his jurisdiction by holding that there existed a tacit agreement between the parties. The applicant and the majority decision holds the view that the arbitrator had no power to make such a conclusion inasmuch as the issue of a tacit term or agreement was never raised in the pleadings before the arbitrator. As stated by Maphanga J, *'... the nub of the complaint lies in the allegation that the tacit agreement construct or inference relied on by the arbitrator in his interpretation was not canvassed by the pleadings.'*

[163] Whilst I accept that there was indeed no use of the phrase or term 'tacit agreement' in the pleadings, viewed holistically and in a common-sense-like manner or approach, there was nothing in the pleadings that prevented the arbitrator from reaching the conclusion he reached, namely that at one point

or stage, the relationship between the parties was governed by a tacit agreement or term. In law, a tacit agreement or term is by its very nature not an expressed term. It is inferred from the proven or established conduct of the parties. It must be the only reasonable inference to be drawn under the circumstances and it was such an inference in this case. See *Swaziland National Provident Fund Board v Kenneth Van Zyl* (512/2017) [2017] SZHC 15 (14 February 2020). But more importantly in this case, whether the arbitrator has reached or drawn a wrong inference on the evidence, his decision is not reviewable on this ground (*See Clark (*supra).

[164] It is fair to say that the whole dispute between the parties, and consequently the arbitration proceedings centred around an alleged breach of the contract by the applicant. The applicant denied that it had breached the agreement. As of necessity and logic or common sense, the arbitrator was called upon to interpret the management agreement. This was the only way, I dare say, he would have been able to determine whether there had been a breach or not.

[165] In his award, the Learned arbitrator expressed himself as follows regarding the tacit agreement, namely:-

'The fundamental controversy in this case is the commencement date of the 2012 automatic renewal period. Swazimed contends that this date is 1st January 2012 while Medscheme argues that it is 1st January 2013. If Swazimed's submission is correct, the first five year period in terms of 5.1 would be truncated by at least four months when the automatic renewal is triggered. On Medscheme's case, the next fixed period of five years would commence on the 1st day of January of the following year.

It seems to me that the parties intended to lay emphasis on the 'further fixed period of 5 years'. In other words, that duration should not be less than five years. Swazimed's approach in terms of which the five year period is shortened undermines this intention.

We are enjoined by the Learned judges in the cases cited above to have regard not only to the words used in the particular provision but also to the context. A sensible and business-like meaning is to be given to it and it must ultimately achieve what the parties intended to achieve.

Here, as mentioned, it is clear that the fixed period of 5 years was emphasized in 5.2. It is unlikely that the parties in stipulating that the renewal is to take

place with effect from January of each year intended to shorten the said fixed period. On the other hand, Medscheme's interpretation results in an extension of the first year period (April 2007 to April 2012) to January of the following year. In my view, that latter situation is the inevitable outcome of the parties expressly inserting the 'January of each year' provision in 5.2 and as it were, notwithstanding the date of signature of the agreement, projecting the commencement date of the renewal to that month. I agree with Counsel for Medscheme's submission that the parties continued with their contractual relationship during the intervening period and that can be categorized as a tacit agreement, until the renewal took effect.

If follows, in the result, that I uphold Medscheme's interpretation which in my view presents as a business-like one. I find therefore that the commencement of the '2017' automatic renewal was on the 1st January 2013 and the agreement was to endure until 31st December 2017.

Given the finding that the agreement would terminate on 31st December 2017, Swazimed's May 2016 letter [purporting to terminate the agreement] was premature and constituted a breach of the agreement. It follows that Medscheme is entitled to damages. The amount of damages awarded is

designed to place Medscheme in the financial position it would have been in had the agreement run its full course to December 2017."

[166] I cannot find any fault with this reasoning by the arbitrator. He did nothing more than what he was entitled or had jurisdiction to do. That is, interpreting the management agreement. It was this agreement that governed the parties and it was this agreement that had been allegedly breached by the applicant. To argue that he could not interpret the agreement the way he did is in effect to assert that he was expected to interpret it in a particular way and not use his own independent knowledge, expertise and judgment. That is totally illogical and untenable in my view. It is tantamount to saying he had no mandate or jurisdiction to interpret the agreement at all, which in turn amounts to saying he had no jurisdiction to determine whether there had been a breach or not. That, in my humble view, is absurd in the circumstances. Ultimately, it was a matter of construction or interpretation of the terms of the management agreement, nothing more. Whether his interpretation of the said agreement was correct or not is a matter, entirely different. For it to be a ground warranting intervention by this court, it must fall under one or all of the grounds already listed above; or more specifically, it must have been outside his jurisdiction in terms of the pleadings or submission.

[167] The application or challenge to the arbitration award in *Three Cities* (supra) was substantially based on the judgment in Hos+*Med Medical Aid Scheme v Thebe ya Bophelo Healthcare Marketing and Consulting (Pty)Ltd* [2007] ZASCA 163; 2008 (2) SA 608(SCA) to which the majority judgment also relies. The court summarized the facts in *Hos+Med* as follows:-

> '[21] Respondent brought an application for the review and setting aside of the decision of an arbitration appeal tribunal on the ground that it exceeded its powers and committed gross irregularity in terms of Section 33 of the Arbitration Act by making a finding on an issue which had not been pleaded. The tribunal held that, notwithstanding that the issue had not been pleaded, it was entitled to go beyond the pleadings as the issue had been traversed in evidence. Briefly the facts, to the extent that they are relevant to the present dispute, were as follows: In order to facilitate the conduct of a medical aid scheme run by Hosmed, it used the services of brokers and facilitators. To this end, it entered into a contract with Thebe engaging it to introduce new members to the scheme for which an introduction fee was payable and requiring it to provide on-going services to members

of the scheme for which another was payable. As a result of certain amendments to regulations under the Medical Schemes Act, the parties considered that it was no longer permissible for Thebe to charge a fee for on-going services. The agreement was then entered into which varied the initial agreement so as to delete this clause which had provided for the payment of Thebe for on-going services.

[22] The regulations under the Medical Schemes Act were again amended which made provisions for brokers to charge fees for on-going services. A further agreement was then concluded, making provision for Thebe to be able to charge fees for its on-going services to *Hos+med* Members. For a time Thebe made no such claims because it presumably thought that it was not able to do so pursuant to the earlier amendments. Later it sent invoices to *Hos+med* claiming a substantial sum of money. *Hos+med* denied liability for payment thereof and eventually the matter went to arbitration.

[23] The defence raised was that the amending agreements by which Thebe gave up its right to claim fees for on-going services to Hosmed members constituted a disposal of a greater part of

Thebe's assets but had not been approved by a general meeting of Thebe's shareholders, pursuant to Section 228 of the Companies Act 61 of 1973. *Hos+med* therefore alleged that Thebe has represented that its managing director had authority to conclude the amending agreements, that *Hos+med* had relied on such representations and further had entered into the amending agreements in good faith on the assumption that the internal requirements of Thebe had been complied with (the so called Turquand Defence).

[24] When the arbitration commenced, the disputes to be determined were whether the amendment to the regulations in 2001 precluded Thebe from claiming fees for on going services and whether the amendments to the parties' agreements in 2001 were in contravention of Section 228 of the Companies Act.

[25] The matter was finally determined by the appeal tribunal which found that Thebe was entitled to claim the fees initially on the basis that there had been unanimous consent to the disposal and that the amending agreement were thus enforceable; that is it was the case where all the shareholders of the company had agreed on the matter which ordinarily would require resolution of a

general meeting of the company. Given unanimous consent the need for the formal resolution had fallen away. According to Thebe the arbitration appeal tribunal had exceeded its powers and committed a gross irregularity in terms of Section 33 of the Arbitration Act.'

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[168] From the above facts, it is plain to me that the judgment in *Hos+Med* turned around the doctrine of unanimous consent as applied in company law, which had not been raised in the pleadings (see para 21-28). It was raised by the arbitrator *mero motu* in his award and it did not flow directly as part of the interpretation of the agreement in question. Furthermore, the parties did not have the opportunity to address the Tribunal thereon. In the present case, as appears from the arbitrator's excerpt above, the parties had their own say on the issue - in the interpretation of the contract or agreement. The facts in *Hos+med* are therefore distinguishable from the facts in the case under consideration.

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[169] In dismissing the challenge in *Three Cities* (Supra) the Court had this to say:

'[31] As indicated in the introduction to this judgment, great care must be exercised in respect of a case brought to the effect that an arbitrator has exceeded his or her powers in terms of Section 33 (1) (b) of the Arbitration Act. The reason therefor is due to the fundamental principle that only narrow grounds for review of an arbitrator's award are recognised, in order to permit what would effectively be an appeal against the award which, in turn, would subvert the entire purpose thereof.

[32] As Wallis JA said in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) at paras 19 – 20:

'Provided the parties receive a fair hearing there are no grounds for challenging the arbitration's decision in that regard. The advantages of arbitration over litigation particularly in regard to the expeditious and inexpensive resolution of dispute are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined in a straightjacket of

legal formalism that the parties to the arbitration have sought to escape. Arbitrators should be free to adopt such procedures as they regard as appropriate for the resolution of the dispute before them unless the arbitral agreement precludes them from doing so. They may therefore receive evidence in such form and subject to such restrictions as they may think appropriate to ensure, as the arbitrator in this case was required to do so, 'just, [expeditious], economical and final, determination of the dispute.

[33] With this deferential approach to arbitration awards in mind, it appears to me that the facts of Hos+med are distinguishable from the present case. In that case, an entirely different doctrine was invoked by the arbitration tribunal to that which had been the focus of the dispute between the parties and to that which had been argued before the arbitrator.'

[170] From the above analysis of the facts and applicable law, the suggestion by the applicant that the arbitrator created a new contract for the parties, is rejected. There is no merit whatsoever in this submission. Similarly, the suggestion that the award means that the management agreement lapsed and later on renewed itself is baseless and unwarranted. The truth of the matter is that the parties to the agreement decided when the agreement would commence; the duration thereof, and when it would be automatically renewed. This is expressly contained in the agreement and was not created or invented by the arbitrator. This, in my Judgment is too plain for argument.

[171] The pleadings and in particular the issue regarding the renewal inevitably brought into sharp focus the debate about the existence or otherwise of the contract between the parties and the duration thereof. The relevant period was May 2016, when the Applicant purported to terminate the management agreement. As to when the agreement was automatically renewed was again subject to the expiration of the initial agreement for 5 years. The automatic renewal, it was common cause, had to take effect of 1st January. The parties, during argument, were in disagreement regarding the year of renewal. This was the issue in dispute and which the arbitrator had to resolve. The arbitrator

rejected the contention by the applicant that the automatic renewal came into effect on 1st January, 2012 because the initial agreement would have been shortened by a few months whilst the parties had expressly agreed on a full 5 year term. There is, in my Judgment, nothing inconsistent with the management contract in this construction or interpretation. Therefore, because the automatic renewal took effect on 1st January 2013, it was the intervening period between May 2012 and December 2012 that the Learned arbitrator 'categorized' or labelled as a tacit or implied agreement. This was the case because the parties continued working together in terms of the contract. To say he had no jurisdiction to make this pronouncement, is, in my view, incorrect. Such pronouncement flowed directly from a businesslike interpretation of the contract. Afterall this was a business or commercial contract.

[172] In the result, I, for my part, would dismiss the application with costs.

MAMBA J.

FOR THE APPLICANT: MR M. MAGAGULA

FOR THE FIRST RESPONDENT: ADV. P. KENNEDY, S C (with him MR C. BESTER)