

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Not Reportable

CASE NO: 2009/19132

DATE: 09/09/2010

In the matter between:

BAIN VAAL (PTY) LIMITED

Applicant

and

DUPROJEKTE (PTY) LIMITED

First Respondent

HARDING, R LEE

Second Respondent

In re:

BAIN VAAL (PTY) LTD

Claimant

and

DUPROJEKTE (PTY) LTD

Defendant

J U D G M E N T

LAMONT, J:

[1] This is an application to review a decision of an arbitrator, the second respondent. The applicant and first respondent (to whom I shall refer as the respondent) concluded a building contract. That contract provided for payment for work as certificated from time to time. The parties suspended the operation of that particular term of the contract as the applicant was unable to meet its financial obligations to the respondent from time to time. In the course of that suspension the services of the certifying person, the principal agent, were dispensed with. At a point in time during March 2006 the respondent wished to continue with the terms of the contract as had originally been agreed. The respondent wished no longer to be bound by the contract suspending the operation of those terms relating to the principal agent certification and payment.

[2] In consequence the respondent sent a letter to the applicant requiring the applicant to remedy a breach of the contract. This letter dated 23 March 2006 gave the applicant notice in terms of sections 38.1.1, 38.1.4, 38.1.5, 38.1.6 and 38.1.7 of the contract and advised that if the default was not rectified it was the intention of the respondent to cancel the contract in terms of section 38.0. The notice was delivered on 25 March 2006. The applicant's response to the notice is to be found in a letter dated 4 April 2006 written by the applicant's attorneys. In that letter the following is stated:

“Ons verwys na bostaande en bevestig hiermee dat ons aanstel met onmiddellike effek, Mnr Kevin Jackson van Vanderbijlpark ... as hoofagent of ‘principal agent’.

Let daarop dat u in terme van die bestaande kontrak, vyf (5) dae het om enige redelike beswaar wat u mag hê teen die aanstelling van bogemelde persoon as ‘principal agent’ aan ons oor te dra.”

That letter was preceded by a letter dated 3 April 2006 from the applicant to the respondent in which the following is stated:

“I confirm receipt of your letter dated 23 March 2006 and wish to inform you that in terms of the JBCC contract clause 5.4 that a principal agent will be appointed shortly of which appointment you will be notified in writing, please note that you have 5 working days within which to lodge a reasonable objection against such appointment should you have any.”

On 10 April 2006 the respondent wrote to the applicant as follows:

“In both the abovementioned [letters] certain of the issues upon which we rely for cancellation of the building agreement inter alia, the forthcoming appointment of the principal agent and issue of a payment certificate. We would like to record the payment of outstanding amounts due for building work done up to date is not explicitly mentioned. As you well know failure to effect payment of the contract is a material breach of the contract. We believe that a proper evaluation of your client’s efforts to rectify his default should be done:

- 1. ... We maintain therefore that your appointment of Kevin Jackson cannot be construed as the employer’s compliance with clause 5.3 and therefore the breach of contract still exists.”*

The respondent also contended in the letter that the appointment of Mr Jackson had been made by the attorneys and not by the applicant and that for that reason Mr Jackson was in the employment of the attorneys and not of the applicant. The respondent stated accordingly that although it objected to the

appointment in terms of clause 5 it believed that the person appointed did not have the relevant building experience. However, as no appointment had been appointed no appointment had been made it could not object. This peculiar paragraph reads as follows:

“Although we hereby object to his appointment in terms of clause 5 of the JBCC principal building agreement, as we do not believe that he has the proper experience of the JBCC principal building agreement, which is a complex building contract and which requires strict compliance, we are of the opinion that there actually is no agent as yet to which we could object. However, should you disagree we herewith place on record our formal objections.”

[3] The letter further states that no certificate had been issued and no payment tendered and that accordingly the applicant's breach of contract remained. The respondent then cancelled the contract.

[4] The applicant alleged in its statement of claim that:

4.1 Building work had been done.

4.2 On 10 April 2006 the respondent purported to cancel the contract; that at the time the purported cancellation took place the applicant was not in breach and that accordingly the cancellation was in conflict with the terms of the building contract.

4.3 That the respondent's purported cancellation instituted a repudiation which was accepted on 20 April 2006.

[5] The respondent in its plea admitted the contract had been concluded denied that the cancellation was a purported cancellation and for that reason denied that the repudiation had come into being for the applicant to accept. The respondent instituted a counterclaim claiming *inter alia* that the absence of a principal agent entered in the respondent writing the letter placing the applicant on terms to remedy the following breaches:

1. Failing to appoint a principal agent.
2. Failing to issue payment certificates.
3. Failing to issue statements.
4. Failing to certify amounts as required.
5. The respondent further alleged that the applicant did not remedy the breaches and had only directed a letter to the respondent informing the respondent that the applicant did not regard itself in breach and claiming that the respondent was in breach in terms of clause 15.1.2 and 15.3 of the building contract which allegation it denied. The respondent further alleged that it had cancelled the contract on 10 April 2006 in terms of the letter of cancellation and was entitled to payment of various amounts.

[6] When the matter came for hearing before the arbitrator the parties agreed that certain issues would be separated and submitted for determination as preliminary points. The preliminary issues included:

1. Whether the respondent was in terms of the contract entitled to

issue the letter of demand dated 23 March 2006 as it did (the first preliminary issue).

2. If it was so entitled did the claimant timeously remedy the breach which formed the subject of the demand (the second preliminary issue).
3. Was the respondent entitled to cancel the contract as it purported to do in terms of the letter dated 10 April 2006 (the third preliminary issue).
4. If not was the respondent's purported cancellation on 10 April 2006 a repudiation of the contract (the fourth preliminary issue).
5. If so was the claimant entitled to accept the repudiation and cancel the contract (the fifth preliminary issue).

[7] The arbitrator heard the matter and made rulings on the issues.

[8] There is no attack on the arbitrator's finding that the respondent was entitled to issue the letter of demand dated 23 March 2006.

[9] I have referred to this document as the notice letter.

[10] The arbitrator considered the second preliminary issue (whether or not the claimant timeously remedied the breach forming the subject-matter of the demand) and in the course of making that determination made findings which are under attack.

[11] If the arbitrator's award on this point could be set aside then the entire award falls to be set aside. It is fundamental to the claim that the applicant did not remedy the breaches in respect of which complaint was made and notice given. If it did not remedy the breaches then the conduct of the respondent was lawful. If it did remedy the breaches the conduct of the respondent was not lawful.

[12] In the course of making a ruling on the second preliminary issue the arbitrator considered the letter written by the applicant on 4 April 2006 (in which Mr Jackson was appointed as "*principal agent*"). The arbitrator considered clause 5.3 of the contract (a standard JBCC contract). The clause reads as follows:

"5.3 Should the principal agent or any agent be unable to act or cease to be an agent, the employer shall notify the contractor of the new principal agent or agent to be appointed. The employer shall not appoint such principal or agent against whom the contractor makes a reasonable objection in writing within five (5) working days of receipt of such notice failing which the employer shall forthwith make such appointment and notify the contractor accordingly."

[13] The arbitrator construed the clause as meaning that if there were no principal agent (as was the case) the applicant was entitled to notify the respondent of a new principal agent to be appointed in the future. The clause did not entitle the applicant according to the arbitrator, to appoint the principal agent against whom a reasonable objection was made within 5 days of receipt of the notice. He construed the clause as meaning that the employer could not appoint the agent until the time period for the contractor to make reasonable

objection had lapsed.

[14] Having made that finding the arbitrator then found that the purported appointment constituted non-compliance with the terms of the demand letter as the applicant had appointed Jackson with immediate effect instead of tendering Jackson as a person who could be appointed if there was no objection. Accordingly the arbitrator found that the applicant did not remedy its breach.

[15] It was submitted that the arbitrator in approaching the matter in this way had acted capriciously in that this issue was never before him, was never raised during the hearing and formed no part of the arbitration proceedings. The evidence before the arbitrator was that the applicant had “*inderdaad binne die tyd ‘n persoon aangestel of ten minste genomineer*” (page 286). The applicant relied upon this evidence as founding a claim that the appointment had been lawfully made and that the evidence accordingly disclosed that the issue was not before the arbitrator.

[16] The submission was made that the approach of the arbitrator to the preliminary issue was not covered by the delineation of the disputes between the parties and warranted the conclusion that the applicant had been deprived of a fair hearing and also the inference that the arbitrator had misinterpreted the dispute he was to determine. Reliance was placed upon the authority of *Lufuno Mhaphuli and Associates (Pty) Ltd v Andres* 2009 (4) SA 529 (CC) at 593 (A) para [221]; *Steeledale Cladding (Pty) Ltd v Parsons NO and Another*

2001 (2) SA 663 (D&CLD)

[17] It was common cause between the parties that a *bona fide* mistake as to the relevant facts or applicable law did not found any misconduct unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct on partiality on the part of the arbitrator. See *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO and Another* 2002 (3) SA 171 (C) at 181 paras [42] and [43]. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at 302 paras [86] and following and para [122].

[18] It is not for me to decide that the arbitrator is wrong or right. The question is whether or not the issue was raised and was one which the parties required him to determine. The issue is not a legal issue raised by the pleadings. The issue is a factual issue. The question is whether the legal issue raised in the pleadings encompasses the factual issue or not. Pleadings are designed to determine legal and not factual issues.

[19] It is apparent from the way the applicant pleaded its case that it is dependent upon the allegation that it had remedied the breach in respect of which complaint was made. The submission was made that the factual issue underpinning that allegation was to be found by looking at the letters which had been written. In the letter which had been written by the respondent subsequent to the alleged remedy by the applicant the respondent raises on this point the right of the attorney to appoint the principal agent. The letter

does not raise the question of whether or not the fact that the appointment had been made with immediate effect constituted an improper remedy of the breach.

[20] The applicant assumed that that factual issue was the issue with which it was to deal. The applicant did not consider the issue considered by the arbitrator. This failure of the applicant to consider the issue raised by the arbitrator in my view does not necessarily mean that the issue was not properly raised and in need of a decision. The pleadings do not define the factual issue. The pleadings indicate that the applicant raised an issue which it was not obliged to raise (that it had remedied a breach). All the applicant needed to raise was that the respondent had evidenced a fixed and settled intention not to be bound by the contract by issuing the notice of cancellation. The respondent would then have been obliged to have pleaded that it was entitled to issue the notice of cancellation as it had placed the applicant on terms and as the applicant had not remedied the breach. This in the ordinary course of pleading would have led to the applicant asking the respondent to identify the respects in which it alleged the breach had not been remedied. The respondent would have been obliged to furnish the respects which presumably would have included the matters raised by the arbitrator.

[21] It is in consequence of the manner in which the pleadings are drawn and the applicant's assumption that it had remedied the breach and that the respondent's complaint was limited to the complaint raised in its letter of objection and cancellation that led to the state of affairs.

[22] The parties simply failed in the pleadings to identify the respects in which the applicant had or had not remedied the breach. This does not mean however that the factual issue was not an issue to be dealt with or which the respondent was precluded from raising.

[23] In my view in these circumstances the arbitrator was entitled to approach the matter as if the issue was one to be decided before him. Insofar as the evidence is concerned the evidence concerning the appointment was never led in the context of dealing with the formulation of the problem as formulated by the arbitrator namely an entitlement of the applicant to appoint immediately versus an entitlement to only appoint once a condition had been met (the lapse of the time period and non-objection by the respondent).

[24] In these circumstances the arbitrator was entitled to give consideration to the issues.

[25] It is common cause that whether the arbitrator was right or wrong is a matter of no moment in the application. If the arbitration was entitled to consider the issue then the review application must fail.

[26] I find that the arbitrator was so entitled and accordingly that the review application fails. I would accordingly dismiss the application with costs.

**JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

Counsel for the Applicant	:	Adv. J.G. Wasserman SC
Attorneys for the Applicant	:	Wandrag & Marias Inc
Counsel for First Respondent	:	Adv. P. Ellis SC Adv. J. Vlok
Attorneys for First Respondent	:	Booyse Attorneys
Date of hearing	:	1 September 2010
Date of Judgment	:	9 September 2010