

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 2022/10769

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
	
.....	16.08.2023
SIGNATURE	DATE

In the matter between:

RENICO EARTHWORKS & CIVILS (PTY) LTD

Applicant

And

ELMOFLEX (PTY) LTD

Respondent

Summary: Arbitration – Application to make arbitration award an order of court in terms of section 31 of the Arbitration Act 42 of 1965 – Opposed on the basis that arbitration proceedings were ‘tainted’ and led to an ‘unjust result’ – No facts pleaded to support the defence – Application granted.

ORDER

- 1 The application is granted with costs.
- 2 The arbitration award is made an order of court.

JUDGMENT

WINDELL, J:

Introduction

[1] This is an application to make an arbitration award an order of court in terms of Section 31 of the Arbitration Act 42 of 1965 (“the Arbitration Act”). The award was handed down on 3 February 2022.

[2] The background facts are common cause. The main objection against the application is that the arbitration proceedings were ‘tainted’ and led to an ‘unjust result’ and the award is therefore incapable of enforcement. This is as a result of a letter that was sent by the attorney of the applicant (Mr Bothma) to the respondent’s attorney (Mr Sapire) that was copied to Advocate Garvey (the arbitrator). The letter, in which certain allegations were made against the sole director of the respondent, Mr Moshe Cohen, was sent on 10 February 2021, before the pre-arbitration meeting was held and the arbitration proceedings commenced.

The facts

[3] The applicant was contracted by the respondent to execute certain bulk earthworks and civil services at a property owned by the respondent. The written agreement contained an arbitration clause. A dispute arose between the parties as to the payment of R404 897.58 excluding VAT, and the applicant referred the dispute to AFSA¹ for the appointment of an arbitrator. On 3 February 2021, Advocate Garvey was appointed as the arbitrator.

¹ The Arbitration Foundation of Southern Africa.

[4] The arbitrator accepted the appointment and convened a pre-arbitration meeting that was held on 19 February 2021. Both parties were represented by legal representatives. The applicant was represented by Mr Bothma and the respondent was represented by Mr Sapire. At the pre-arbitration meeting the parties agreed, *inter alia*: (a) that a valid arbitration agreement existed; (b) that there was an arbitral dispute as defined by the Arbitration Act; (c) the period for the filing of pleadings were agreed; and (d) that no appeal would lie against the award. Mr Sapire, on behalf of the respondent, recorded that the arbitration proceedings were 'tainted' and that it would raise a dispute as to the appointment of the arbitrator. He further indicated that he was instructed not to participate in the arbitration and that the 'issues' complained of would be formulated in detail in 'due course'. The respondent also undertook to revert by 24 February 2021 on which rules would be applicable to the arbitration, the way in which discovery should take place and the venue of the arbitration.

[5] The respondent did not revert by 24 February 2021, nor did it file its statement of defence and/or counterclaim. On 14 April 2021 the applicant's attorneys in writing requested that the arbitration proceed. On 15 April 2021 the arbitrator in an e-mail to Mr Sapire requested the respondent to respond to the previous correspondences by no later than 16 April 2021 and informed them that should the respondent persist with its failure to respond, the provisions of Article 30 of the Associations Rules and Section 15 of the Arbitration Act may apply, that is, that the arbitration may proceed in the absence of the respondent. On 15 April 2021 Mr Sapire wrote a letter to the arbitrator recording, *inter alia*, that the proceedings were 'compromised' and was prejudicial to his client, and that any findings against the respondent in its absence would fall to be set aside by the Court. He further informed the arbitrator that he held instructions from the respondent not to proceed with the arbitration.

[6] The arbitration was enrolled for hearing on 22 June 2021. The date was provided to both parties. On 22 June 2021, the arbitration proceeded in the absence of the respondent. The respondent did not launch an application as envisaged by s 13 of the

Arbitration Act to set aside the arbitrator's appointment, nor did it not launch an application to stay the arbitration proceedings.

[7] On 2 February 2022 the arbitrator handed down his award. In terms of the award the respondent had to pay the applicant an amount of R404 897.58 excluding VAT plus interest and costs. An award can be challenged, whether by way of review under s 33 or remittance under s 32 of the Arbitration Act. Such challenge must be made within 6 weeks of the award. The respondent did not utilize any of these remedies.

The letter

[8] It is necessary to refer to the contents of the contentious letter and the context in which it was written in some detail. On 4 February 2021, Mr Sapire addressed a letter to Mr Bothma in which the respondent alleged that Mr Bothma had a conflict of interest as he previously acted as attorney for the respondent in litigation against a certain Mr Malebe. Mr Sapire stated that:

'My client has also discussed certain other matters with you including the current matter against Renico Earthworks. It appears that your firm has a conflict of interest in this matter and I have been instructed to convey my client's objection to your acting against him and his company. Should you persist to act on behalf of Renico Earthworks either directly or indirectly, my client will have no choice but to make a formal objection.'

[9] Mr Bothma stated that in anticipation of the alleged conflict of interest issue being raised at the pre-arbitration meeting, he addressed a letter to Mr Sapire on 10 February 2021, in which the arbitrator was copied. In the letter Mr Bothma denied any conflict of interest and accused Mr Cohen of an ulterior motive in orchestrating a meeting between them a few days before. Mr Bothma alleged that during this meeting Mr Cohen wanted him to convince the applicant to withdraw its claim against the respondent in return for an instruction to attend to the transfer of an immovable property and earning Mr Bothma a transfer fee. The relevant part of the letter read as follows:

'5. Having regard to the aforesaid, it is evident that Mr Cohen's hands are not clean. Mr Cohen clearly had an ulterior motive when insisting to meet with the writer to execute his attempted

coercion, well knowing that the writer will not accede to this conspiracy. It is interesting that this conduct of Mr Cohen is not raised in your letter under reply.

6. Mr Cohen, it seems, will not hesitate to employ whatever means in an attempt to better his position.

7. However, and as alluded to above, his attempts are totally misplaced and your Mr Sapire, as a senior attorney, should have identified and recognised that there was no merit in the allegations made by Mr Cohen.'

[10] The arbitrator acknowledged receipt of the correspondence of 4 February 2021 and 10 February 2021. He did not address the contents of the letters. He merely stated that a pre-arbitration meeting was to be held via MS-Teams and that the parties had to advise of a suitable date and provide their email addresses for the purpose of convening such meeting.

[11] A day before the pre-arbitration meeting was to be held, Mr Sapire addressed a letter to the arbitrator in which he said the following:

'I refer to the above matter and to previous correspondence and with particular reference to the letter of Mr Bothma and my response attached hereto. It is clear from the correspondence that the character of Mr Cohen, the sole director and shareholder of the Respondent company has been impugned and put into question before yourself, before the proceedings have even commenced. In the circumstances, should you continue as arbitrator, notwithstanding your undoubted professionalism, there is no way in which justice can be done and be seen to be done. Please would you let me have your views with regard to the above as my instructions are to protect my client's rights in this regard. Until this issue is determined, there seems to be no point in proceeding with the proposed preliminary meeting tomorrow as it may be rendered unnecessary. We look forward to hearing from you.'

[12] Mr Bothma responded that the correspondence was, in his view, 'once again, a delaying tactic'. The arbitrator also responded by referring to the 'email correspondence exchanged' and stated that the pre-arbitration meeting was to proceed the following day. It was at this pre-arbitration meeting that the Mr Sapire indicated that he was instructed not to participate in the arbitration proceedings and that he would set out the 'issues in detail' in due course.

[13] The minutes of the meeting, produced by the arbitrator was attached to the founding affidavit. The respondent in answer stated that the minutes have not been accepted by Mr Cohen or by Mr Sapire as correct, and that they do not properly cover the discussions raised by Mr Sapire regarding the respondent's objections to the procedure. The respondent did not, however, respond at the time of the receipt of the minutes nor was it suggested what needed to be included in the minutes.

The complaint

[14] During the hearing of this application the respondent did not pursue the conflict of interest issue raised in correspondence, but limited its opposition to the argument that the arbitration proceedings were 'tainted' by the letter of 12 February 2021.

[15] The respondent argues that the letter vilified the director and principal witness for the respondent (Mr Cohen), to such a degree that it is believed that a fair hearing could not take place and 'justice could not be done and be seen to be done'. It is alleged that Mr Bothma deliberately published the misleading information to the arbitrator to present a view of Mr Cohen as 'unscrupulous with a view to gaining an unfair advantage in the arbitration.'

[16] Mr Cohen stated that he believed that the best way forward was for the respondent not to participate in the proceedings and to rely on the court in the current application to protect the rights of the respondent. He believed at the time that Mr Bothma and the arbitrator would see that the proceedings were tainted and that it would not be necessary for the matter to go to court.

[17] Firstly, it is trite that the basis upon which a court will set aside an arbitrator's award is a very narrow one. Although this is not an application to set aside or review an arbitration order, the cases dealing with those remedies are instructive. I will refer to only two such cases. In *Amalgamated Clothing and Textile Workers of South Africa v*

*Veldspun*², Goldstone JA held 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 s 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'. In dealing with the binding nature of an arbitral award he held:³

'It is only in those cases which fall within the provisions of section 33(1) of the arbitration act that a court is empowered to intervene. If an arbitrator exceeds his powers by making a determination outside of the terms of the submissions that would be a case falling under section 33(1)(b). As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make whether as to law or fact. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a court might be moved to vacate an award.'

[18] Secondly, in *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*,⁴ Wallis JA held that '[i]t suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of issues that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If the parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards'.⁵

[19] Thirdly, in the matter of *Sasol South Africa (Pty) Ltd v Murray & Roberts Limited*,⁶ a matter dealing with an adjudicator's decision, Zondi JA referred and relied on the judgment in *Carillion Construction v Devonport Royal Dockyard Ltd* [220] EWCA Civ 1358, in which the court endorsed the correctness of the following principle: 'where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of

² 1994 (1) SA 162 (A)

³ At 169 C

⁴ *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* [2018] ZASCA 23; [2018] (5) SA 462 (SCA).

⁵ *Ibid* para 8.

⁶ (Case no 425/2020) [2021] ZASCA 94 (28 June 2021).

natural justice, the court will not enforce his decision'. In establishing whether the adjudicator, in fact, acted in such a manner, the Court proceeded to analyse the proceedings before the adjudicator. However, in doing so, the Court did not entertain the merits of the dispute or made any pronouncement on whether the adjudicator's decision was right or wrong.

[20] The opposition to the current application was not based on bias or perceived bias on the side of the arbitrator. This is not surprising. It would have been a difficult hurdle for the respondent to overcome. The respondent, however, decided to base its opposition to this application on one ground only, namely, 'justice was not seen to be done'. But, except for the bald allegations that the proceedings were 'tainted', no actual facts were pleaded to support the respondent's argument. In fact, the respondent was unable to identify any irregularity during the arbitration proceedings and the finding of the arbitrator was not attacked by the respondent as being wrong.

[21] It is disingenuous of the respondent to now complain about a breach of the rules of natural justice when it elected not to participate in the arbitration proceedings and failed to bring an application for the removal of the arbitrator. When it elected not to attend the arbitration proceedings and formally raise its complaint there, it did so at its own peril. Moreover, after the award was delivered, the respondent did not avail itself of any of the remedies available to it in ss 32 and 33 of the Arbitration Act, but decided to rather oppose the application to make the award an order of court. Again, it is the prerogative of the respondent to do so. However, to successfully oppose the application it had to establish a factual basis that there was a breach of the rules of natural justice or a gross irregularity committed by the arbitrator. It failed to do so.

[22] Section 28 of the Arbitration Act stipulates that, 'unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this act, be final and not be subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms'. In perusing the award, and the arbitrator's summary

and evaluation of the evidence led, I am satisfied that there was no gross irregularity committed by the arbitrator. Neither was there a breach of the rules of natural justice.

[23] In the result the following order is made:

- 1 The application is granted with costs.
- 2 The arbitration award is made an order of court.



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 March 2023.

APPEARANCES

Counsel for the applicant:	Adv. W.F. Wannenburg
Attorney for the applicant:	CR Bothma & Jooste Attorneys
Counsel for the respondent:	Adv. R. Goslett
Attorney for the respondent:	Peter Sapire Attorneys
Date of hearing:	7 February 2023
Date of judgment:	16 March 2023