

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 3431/2018

Date Heard: 02 May 2019

Date Delivered: 14 May 2019

In the matter between:

NETELEK (PTY) LTD

APPLICANT

and

AMAT (PTY) LTD

FIRST RESPONDENT

NCEBA CHRISTOPHER FAKU

SECOND RESPONDENT

JUDGMENT

Mullins AJ

[1] This application arises out of arbitration proceedings initiated by the Applicant against the First Respondent. The background may be summarised as follows:

- (a) On 23 September 2015 the Applicant and the First Respondent concluded a written agreement (“the Agreement”) in terms of which the Applicant was sub-contracted to provide services on behalf of the First Respondent in respect of a contract which it, the First Respondent, had concluded with the Nelson Mandela Bay Municipality;¹
- (b) Alleging that it had not been paid for its services, the Applicant initiated arbitration proceedings, as it was obliged to do in accordance with the Agreement;
- (c) In the circumstances which are dealt with below the arbitrator made a wasted costs order against the First Respondent, which was taxed in the sum of R111 045.00, and an award in favour of the Applicant in the sum of R1 472 133.78;
- (d) The Applicant seeks an order for payment of the wasted costs order and that the award be made an order of court in accordance with section 31(1) of the Arbitration Act, 42 of 1965 (“the Act”);
- (e) In addition, and unrelated to the arbitration proceedings, the Applicant seeks payment from the Second Respondent in his personal capacity in the sum of R455 737.00 in respect of monies allegedly lent and advanced to the Second Respondent.

[2] Both Respondent oppose the relief being sought against them and have filed opposing papers.

¹ The details of this contract and the services to be provided are not relevant to the resolution of this application.

[3] While perusing the papers prior to the hearing of the matter, it became apparent that the Second Respondent was also representing the First Respondent, a company, in his personal capacity. I accordingly drew the parties' attention to the legal position, namely that ordinarily a juristic person may only be represented by a duly qualified legal practitioner and that if the Second Respondent wished to represent the First Respondent he would have to bring an application in order to do so.

[4] On the day of the hearing the Second Respondent brought a properly motivated application. The Applicant, quite correctly, did not oppose the application.

[5] Based on **California Spice and Marinade (Pty) Ltd and Others; in re Bankcorp v California Spice and Marinade (Pty) Ltd and Others; Fair O' Rama Property Investments CC and Others; Tsaparis; and Tsaparis** [1997] All SA 317 (W) and **Manong and Associates (Pty) Ltd v Minister of Public Works and Another** 2010 (2) SA 160 (SCA), I granted the application.

[6] The Applicant filed its replying affidavit two days out of time and applied for condonation, the reason given being that the attorney dealing in the matter was otherwise engaged. Apart from pointing out that the firm of attorneys representing the Applicant is a very large one and that someone else could have attended to the matter, the Second Respondent was unable to advance any cogent reason why condonation should not be granted. Condonation for the late filing of the Applicant's replying affidavit is hereby granted.

[7] Clause 17 of the Agreement provides that, in the event of a dispute arising between the parties thereto, the matter was to be referred to arbitration. The relevant sub-clauses provide as follows:

“17.1 Subject to any provision to the contrary in this Agreement, should any dispute arise from or in connection with this Agreement (whether such dispute arises out of or in connection with the conclusion or existence of this Agreement, the carrying into effect of this Agreement, the interpretation or application of the provisions of this Agreement, the Parties’ representative rights and/or obligations in terms of and/or arising out of this Agreement and/or the validity, enforceability, rectification, termination or cancellation whether in whole or part of this Agreement or from any other dispute which may arise in respect of this Agreement) such dispute shall be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa (“the Rules”).

17.2. There shall be 1 (ONE) arbitrator who shall be a judge, former judge or retired judge of the High Court of South Africa or a senior counsel of at least five years’ standing as such.

17.3. The appointment of the arbitrator shall be agreed between the Parties but failing agreement between them within a period of 14 (FOURTEEN) Days after the arbitration has been demanded any of the Parties shall be entitled to request the chairman at the relevant time of the Pretoria Bar Council or his representative to make such appointment and, in making such appointment, to have regard to the nature of the dispute.”

[8] In the belief that the First Respondent was indebted to it, on 25 January 2018 the Applicant's attorneys sent the First Respondent a letter of demand, paragraph 5 which reads as follows:

"We are instructed to demand payment of the balance of R473 423.67, within 10 (ten) days of receipt hereof, failing which, we call upon you to agree upon the appointment of an arbitrator. Should you fail to agree upon the appointment of the arbitrator within 14 (fourteen) days of receipt hereof, we will have no alternative but to approach the Chairman at the relevant time of the Pretoria Bar Counsel (sic) or his representative to make an appointment and (in) making such appointments (sic) to have regard to the nature of the dispute."

[9] No response was forthcoming, and on 9 February 2018 the Applicant's attorneys sent the First Respondent a further letter to the effect that the matter was being referred to arbitration and the chairperson of the Pretoria Bar Council would be approached to appoint an arbitrator. This it did in accordance with clause 17.3 of the Agreement.

[10] In due course Adv P Ellis SC ("the Arbitrator") was appointed.

[11] A pre-arbitration meeting was arranged for 7 March 2018, but neither the First Respondent nor a legal representative attended. Despite the absence of any representation by the First Respondent, the Arbitrator determined dates for the filing of pleadings and discovery and set the matter down for hearing on 24/25 May 2018. The ruling was brought to the First Respondent's notice by the Arbitrator.

[12] The First Respondent failed to comply with the Arbitrator's ruling in regard to the filing of the further processes and also failed to attend the hearing on 24 May 2018. Instead its attorney telephonically applied for a postponement. The Arbitrator granted the postponement and ordered the First Respondent to pay the wasted costs. The Arbitrator also made a ruling as to the filing by the First Respondent of its statement of defence. The ruling provides as follows:

“Having heard counsel for the claimant and the attorney for the defendant (telephonically) the arbitrator makes the following directive:

- 1. The arbitration hearing is postponed sine die;*
- 2. The defendant is directed to serve its plea and/or counterclaim by close of business on 8 June 2018, together with a discovery affidavit and copies of all documents mentioned therein;*
- 3. The claimant is directed to file any further pleadings by close of business on 14 June 2018;*
- 4. The parties are directed to attend a further pre-arbitration conference with the arbitrator (which may on prior request by any of the parties be conducted by way of teleconference) at 09h00 on 15 June 2018;*
- 5. The defendant is ordered to pay the wasted costs occasioned by the postponement on the scale as between attorney and client, which costs shall include:*
 - a. The arbitrator's fee;*
 - b. The costs of recording of the proceedings;*
 - c. The costs, if any, for the hiring of the venue.*

6. *The costs mentioned in sub-paragraphs 5(a), (b) and (c) supra must be paid by close of business on 14 June 2018, failing which the defendant may be excluded from further participation.”*

[13] The ruling was emailed to the First Respondent's attorney by the Applicant's attorney on 25 May 2018.

[14] The Applicant's attorney thereafter communicated on two occasions with the First Respondent's attorney calling upon the First Respondent to comply with the ruling. There was no response.

[15] On 26 July 2018 the First Respondent's attorneys filed a notice of withdrawal from acting.

[16] I should add that prior to their withdrawal, a notice of set down of the arbitration hearing for 10 August 2018 was served on the First Respondent's attorneys. The return of service is dated 23 July 2018.

[17] Once again the First Respondent did not comply and the matter was duly set down for hearing on 10 August 2018. The First Respondent failed to attend and the Arbitrator, after satisfying himself that the First Respondent had been given reasonable and proper notice of the date of the hearing, proceeded in its absence. After hearing evidence, the Arbitrator made an award in favour of the Applicant, which is dated 16 August 2018. The conclusion reads as follows:

“43. *In the result, I make the following award:*

43.1 *The Defendant (sic) is ordered to pay R1 472 133.78 to the Claimant together with interest thereon at the rate of 10, 25% per annum from 25 January 2018 to date of payment;*

43.2 *The Defendant (sic) is ordered to pay the costs of this arbitration including the costs of the Claimant’s Counsel, the Arbitrator’s fees as well as a transcription service for the hearing of 24 May 2018, including the costs of transcribing these proceedings.”*

[18] On 5 September 2018 the Applicant’s attorneys made demand of the First Respondent, which demand was addressed to the Second Respondent. The demand was repeated on 6 September 2018 by way of service by the Sheriff. Neither demand elicited any response from the First and/or Second Respondents.

[19] In the result, on 12 October 2018, the Applicant launched this application to have the award made an order of court, together with certain additional relief.

[20] Before dealing with the merits of the application to have the Arbitrator’s award made an order of court, it would be apposite to dispose of the relief sought against the Second Respondent. The Applicant alleges that over a period of time it lent sums of money to the Second Respondent totalling R455 737.00. The Second Respondent denies that the Applicant lent him money and alleges that, what he refers to as the “*transaction*” was between the Applicant and an entity known as GG Way General Trading (Pty) Ltd. In reply

the Applicant concedes that the Second Respondent has raised a dispute of fact and submitted that the issue should be referred to oral evidence. I am not inclined to do so. If the Applicant is owed money it should issue summons. Accordingly, I intend to dismiss the claim against the Second Respondent, but because the Applicant could not have anticipated that a dispute of fact would arise, to reserve the costs for determination at the trial in due course. The order appears at the end of the judgment.

[21] I turn now to the First Respondent's opposition to the application. The First Respondent opposes the application on the following grounds:

- (a) That there has been a non-joinder, in that the Arbitrator should have been a party to the proceedings;
- (b) That the appointment of the Arbitrator was not in accordance with the Agreement, in that the Rules of the Arbitration Foundation of South Africa ("the Afsa Rules") were applicable and the arbitrator's appointment was thus *"contractually and procedurally flawed and unlawful"*;
- (c) That the appointment of the Arbitrator was not in accordance with clause 17.3 of the Agreement, in that the Applicant failed to allege that the preliminary steps had been complied with, and further that they were in fact not complied with;
- (d) That clause 19 of the Agreement, which deals with Unforeseen Circumstances, was not complied with. (This point was not pursued in argument, correctly so, and need not be referred to again);

- (e) That there was no arbitral dispute for the Arbitrator to decide;
- (f) That there was a failure of natural justice and a breach of the Constitution, in that the First Respondent was not given an opportunity to address the Arbitrator prior to him making rulings against it;
- (g) That the amount awarded to the Applicant by the Arbitrator was not owed, in that various factors were not taken into account in calculating the figure;
- (h) That the First Respondent has a counterclaim well in excess of the Applicant's claim;
- (i) That the arbitration proceedings stand to be reviewed and set aside.

[22] In the heads of argument the First Respondent raised a new point, namely that sec 23 (a) of the Act had not been complied with.

[23] As this last-mentioned issue is a point of law, I allowed the First Respondent to argue it. I will deal with it first.

Section 23(a) of the Act

[24] The section provides as follows:

"23 Time for making award

The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award –

(a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date;...” (My underlining).

[25] It is the First Respondent’s argument that as the award was handed down on 16 August 2018 it fell outside the four month period provided for in sec 23(a) of the Act and the award was accordingly a nullity.

[26] Not so, argued the Applicant. Section 23(a) specifically provides “... *unless the arbitration agreement otherwise provides...*”. Clause 17.1 of the Agreement makes provision for the applicability of the Afsa Rules. Article 12.1 of the Afsa Rules provides that the final award shall be made not later than 60 calendar days after the completion of the hearing, unless the parties in writing agree otherwise. As the hearing was completed on 10 August 2018 and the award was made on 16 August 2018, the Applicant argues that it was timeously delivered.

[27] I have to agree with the Applicant’s argument. The First Respondent itself argues that the Afsa Rules apply and, accordingly, Article 12.1 governs the manner in which the award was to be delivered.

[28] Even if I am wrong, the effect of non-compliance with sec 23 (a) of the Act is far from clear. See **Ramsden: The Law of Arbitration**; pp 156 – 158. It could never have been the intention of the legislature that arbitration proceedings would simply lapse in the event of an award not being made within four months.

[29] The issue was considered in **Van Zyl v Von Haebler** 1993 (3) SA 654 (SE). The learned judge (Kroon J) held that the phrase “*entered on the reference*” is the date on which the arbitrator commences hearing evidence or entertains submissions from the parties as to the conduct of the matter, other than the mere determination of a date on which the proceedings will commence.

[30] The matter first came before the Arbitrator on 7 March 2017, which was the date of the pre-arbitration meeting. On the date determined for the hearing, namely 24 May 2018, the First Respondent applied for and was granted a postponement. The merits were not entertained. Thereafter the matter was heard on 10 August 2018 in the First Respondent’s absence and the award handed down on 16 August 2018.

[31] There can be no question but that the first date does not apply. It was merely a formal meeting to plot the way forward. I am of the view that the second occasion also does not apply, in that no evidence was led and no submissions in regard to the merits were entertained by the Arbitrator. But even if this date is taken as the date upon which the arbitrator entered on the reference, the award was still handed down within four months thereof.

[32] In any event, it is also relevant that the delay in the finalisation of the arbitration was occasioned by the First Respondent's total lack of co-operation. Furthermore, the First Respondent has not alleged that it suffered any prejudice as a result of the award allegedly having been made more than four months after the Arbitrator's appointment, if it was, and, insofar as it may be necessary, the failure to comply with sec 23 (a) of the Act is hereby condoned.

[33] I accordingly find that this point must fail.

Non-joinder of the Arbitrator

[34] The application is for the award to be made an order of court, together with certain additional relief. The joinder of the Arbitrator is not necessary. Having handed down the award the Arbitrator is *functus officio* and he has no legal interest in the further steps the parties may wish to take.

[35] Ironically, as the First Respondent seeks to review the Arbitrator's conduct of the matter it should have joined him.

[36] This point has no merit.

The Arbitrator's appointment was irregular

[37] Although the Agreement makes provision for the application of the Afsa Rules, it does not provide that the Arbitration Foundation of South Africa was to manage the arbitration and, *inter alia*, be responsible for the appointment of the arbitrator. Clauses 17.2 and 17.3 of the Agreement, which the First Respondent was a party to, explicitly provides for the manner in which an arbitrator is to be appointed. Despite initially being represented, the First Respondent did not, until the filing of its answering affidavit in this application, object to the manner in which the Arbitrator had been appointed. It could and should have objected at the first available opportunity and only has itself to blame if the appointment was irregular which, in my view, it was not.

[38] Ironically, to compound the First Respondent's difficulties, it complains that the Applicant did not allege in its founding affidavit that it had complied with the procedural steps set out in clauses 17.2 and 17.3 of the Agreement. Understandably, not anticipating this to be an issue, the Applicant did not deal therewith in its founding affidavit, but does so in reply. The Applicant followed the said clauses to the letter. In its letter of demand, dated 25 January 2018, it called upon the First Respondent to make payment, failing which it (the First Respondent) agree to the appointment of an arbitrator. Furthermore should agreement not be reached within 14 days it (the Applicant) intended approaching the chairperson of the Pretoria Bar Council. When it did not hear from the First Respondent, on 9 February 2018 it did precisely that.

[39] Likewise, this point has no merit.

No arbitral dispute

[40] It is the First Respondent's argument that its failure to pay what the Applicant alleges was due to it was a contractual dispute and not a dispute covered by clause 17.1 of the Agreement.

[41] It is common cause of the Applicant's demand for payment was met with no response whatsoever. If I understand the First Respondent's argument correctly, in the absence of a denial that the First Respondent was indebted to the Applicant, no dispute arose. At least, no arbitral dispute.

[42] What amounts to an arbitral dispute is a vexed question. The issue was dealt with comprehensively by Eksteen J in **Umami Properties (Pty) Ltd v Knight Street Properties and Another** (Case No 3028/2016; ECP; delivered on 13 December 2016). With reference to English authorities and in particular **Amec Civil Engineering Ltd v Secretary of State for Transport** [2005] 1 WLR 2339 CA, which is quoted with approval in **Ramsden** supra at pp 48 – 52, the following is stated:

- “(a) *The word “dispute” which occurs in many arbitration clauses should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers. Despite the simple meaning of the word “dispute”, there has been much litigation over the years as to whether or not disputes existed in a particular situation or not.*
- (b) *The mere fact that one party notifies the other party of claim does not automatically and immediately give rise to a dispute. It is clear, both as a*

matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

- (c) *The circumstances from which it may emerge that the claim is not admitted are protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The defendant may prevaricate, thus giving rise to the inference that he does not admit the claim. The defendant may simply remain silent for a period of time, thus giving rise to the same inference.*

(My underlining)

[43] The present matter fits into the underlined portions of paragraph (c) above. Despite a detailed demand the First Respondent chose to remain silent. In the circumstances it was not unreasonable for the Applicant to draw the conclusion that its claim was disputed. The First Respondent had numerous opportunities thereafter to challenge the existence of an arbitral dispute, but did not do so. At the first date for the hearing (24 May 2018) it was represented by an attorney (albeit telephonically) and time limits for the further conduct of the matter were agreed upon. In my view it is opportunistic for the First Respondent to, at this stage, deny the existence of an arbitral dispute.

[44] At para [17] of the **Ummi** judgment Eksteen J held that the existence of the dispute was confirmed *ex post facto* when the respondent filed its statement of defence. In the present matter the existence of the dispute is confirmed, albeit *ex post facto*, in the First Respondent's answering affidavit in which it denies its liability to the Applicant and even alleges a counterclaim.

[45] Likewise, this point has no merit.

Failure of natural justice/failure to comply with the Constitution

[46] The First Respondent complains that it was not given a fair hearing. The First Respondent was given every opportunity to take part in the arbitration proceedings. It was represented by a firm of attorneys which subsequently withdrew, but not before the First Respondent was made aware of precisely what it had to do, and when, in order to oppose the Applicant's claim. There is no acceptable explanation on the papers as to why the First Respondent did not file a statement of defence, nor appear before the Arbitrator on 10 August 2018 and it must accept the consequences of its actions, or lack thereof.

[47] Section 15(2) of the Act provides as follows:

"If any party to the reference at any time fails, after having received reasonable notice of the time when and the place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party."

[48] The circumstances of the present matter fit squarely into the provisions of section 15(2) of the Act.

[49] It is unclear from the First Respondent's answering affidavit what constitutional rights were denied.

[50] Likewise, this point has no merit.

Challenge as to the amount awarded

[51] The First Respondent denies being indebted to the Applicant and sets out its reasons for this denial in its answering affidavit.

[52] Whatever the merits of the First Respondent's case may be, this is an application to have the award made an order of court. If the First Respondent had a valid defence to the Applicant's claim it could and should have presented it at the arbitration proceedings. Unless there is a glaring error in the award or a patent miscarriage of justice evident in the manner in which the proceedings were conducted the Court cannot, at this stage, revisit the merits of the matter.

[53] With reference to the Arbitrator's award, it is clear that he did not simply grant default judgment, but considered the affidavit evidence of a number of witnesses. One of these affidavits makes reference to a letter from the Second Respondent in which the claim is disputed. The Arbitrator deals therewith and finds the "defence" to have had no merit.

[54] Likewise, this point has no merit.

The First Respondent's counterclaim

[55] For the same reasons advanced above, this Court cannot go into the merits of the First Respondent's alleged counterclaim. It could and should have raised it at the arbitration proceedings.

[56] Likewise, this point has no merit.

The review

[57] The setting aside of an arbitration award is governed by section 33 of the Act. It provides as follows:

“33 *Setting aside of award*

(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.”

[58] Sub-section 33(2) provides that the application shall be made within six weeks after the publication of the award.

[59] The First Respondent makes out no case whatsoever that the Arbitrator misconducted himself and/or committed a gross irregularity and/or that the award was improperly obtained by the Applicant. The challenge to the arbitration proceedings, such as it is, is also hopelessly out of time and there is no application for condonation. In addition, as stated above, the First Respondent failed to join the Arbitrator.

[60] I have studied the Arbitrator’s written award very carefully and can find absolutely no evidence of misconduct or gross irregularity. Nor was the award improperly obtained. Granted, the award was made in the absence of the First Respondent, but that was through no fault of the Arbitrator and/or the Applicant.

[61] Any unhappiness that the First Respondent may have as to the outcome of the arbitration proceedings can be laid at its own door. For reasons which are never properly explained it failed to enter the fray and it only has itself to blame for the fact that an award was made in its absence.

[62] In the result, the “review” has no merit.

[63] In conclusion, I find that the Applicant has made out a case for the Arbitrator's award to be made an order of court in accordance with sec 31 of the Act. Insofar as the costs of this application are concerned, there is no reason why the costs should not follow the result. In the circumstances I make the following order:

1. Leave is hereby granted for the Second Respondent to represent the First Respondent in these proceedings.
2. The claim against the Second Respondent is dismissed. The costs are to be reserved for determination at an action to be instituted. In the event of the Applicant failing to institute an action within 20 days of this Order, the Applicant is ordered to pay the Second Respondent's costs, if any.
3. There will be judgement against the First Respondent in the sum of R113 045.00 as and for the wasted costs order in the arbitration proceedings dated 24/25 May 2018.
4. In terms of section 31 of the Arbitration Act, 42 of 1965 the arbitration award made by the arbitrator, Adv P Ellis, on 16 August 2018 in the sum of R1 472 133.78 (which appears at paragraph 43 of the award) is hereby made an Order of Court.
5. The First Respondent is ordered to pay the costs of this application.

N.J. MULLINS

ACTING JUDGE OF THE HIGH COURT

Obo the Applicant:

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PORT ELIZABETH

Obo the First Respondent:

Represented by the Second

Respondent

Obo the Second Respondent:

In person