

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO: 3905/2021

In the matter between:

GQANGE CONSTRUCTION CC

Applicant

And

TREVOR KAY NO

First Respondent

**CAPE DEPARTMENT OF HUMAN
SETTLEMENT**

Second Respondent

JUDGMENT

NONCEMBU J:

[1] This is an application for the review and setting aside of the arbitration award dated 30 June 2021 by the first respondent, in a matter relating to a principal building contract between the applicant and the second respondent. The applicant also seeks condonation of the late-filing of the review application, as well as the striking out of certain portions of the second respondent's answering affidavit.

[2] Both applications are opposed by the second respondent, whilst the first respondent filed a notice to abide by the decision of the court.

[3] I will deal with both applications simultaneously because in dealing with the condonation application, I will inevitably have to deal with the merits of the review, as the prospects of success thereat play a critical role in the determination. I will thereafter deal with the striking out application, should it still be warranted.

[4] The material facts of the matter are summarised quite succinctly in the applicant's heads of argument. Without necessarily regurgitating, I deem it expedient to simply rehash them as they appear therein. They are –

The applicant and the second respondent entered into an agreement in terms of which the applicant was contracted by the second respondent to construct 32 RDP houses in Louterwater in the Kou-Kama Local Municipality (the contract). The agreement was regulated by the JBCC Principal Building Agreement Series 6.1 (PBA).

[5] Clause 30 of the PBA makes provision for the eventuality of a dispute arising between the parties in relation to the contract. It provides for a resolution of such dispute by way of adjudication, and in the event of either party being dissatisfied with the outcome of the adjudication process, for a referral to arbitration without the option of an appeal.

[6] The applicant commenced work in terms of the contract on or about 18 February 2018.

[7] On 10 September 2019 the second respondent terminated the contract. This gave rise to certain disputes between the parties which related, *inter alia*, to an amount of R1 965 220.48 which was claimed as being due to the applicant in terms of its final account to the second respondent. These disputes were referred to adjudication in terms of the PBA.

[8] At adjudication the applicant was awarded an amount of R291 553.70 by the adjudicator, instead of the R1 965 220.48 it had claimed. Unsurprisingly, the applicant was dissatisfied with this outcome and referred the matter to arbitration.

[9] The first respondent was appointed as arbitrator in the matter. After considering the matter, he caused publication of his award on 30 June 2021 in which he declared, *inter alia*, that:

9.1 the total amount of R507 260.98 Value Added Tax zero rated, was due to the applicant and was to be paid by the second respondent within 14 calendar days of the date of publication of the award, failing which, interest on the outstanding amount would begin to run from the due date at the rate of 7% per annum until payment in full was received by the applicant;¹

9.2 the second respondent was to repay the applicant the sum of R67 447.50 in costs of the arbitration previously paid by the applicant within 14 calendar days of the date of publication of the award, failing which, interest on the outstanding amount would begin to run from the due date at the rate of 7% per annum until payment in full was received by the applicant;² and

9.3 the second respondent was to pay the costs of suite.

[10] This is the award that the applicant now seeks to have reviewed and set aside. The application is premised on section 33(1) of the Arbitration Act.³ The basis of the application is that in arriving at his decision, the first respondent exceeded the bounds of his powers as arbitrator or alternatively, committed a gross irregularity by improperly ascending into the arena.

[11] This is predicated upon a view that at the adjudication proceedings, a submission was made on behalf of the applicant, which submission was never disputed by the second respondent, to the effect that in applying the provisions of clause 26.11 of the PBA, the amount claimed (R1 965 220.48) by the applicant in its final account to the second respondent was never disputed. According to the applicant, as the second respondent did not dispute the amount within 45 days, it followed that it was deemed to have accepted the amount as being fully due and payable to the applicant.

¹ Paragraph 76 of the arbitrator's award (annexure "TWB5" to the founding affidavit).

² Paragraph 85 of the arbitrator's award (annexure "TWB5" to the founding affidavit).

³ Act 42 of 1965.

[12] It appears that the adjudicator also agreed with this view, although in his final decision he only awarded the applicant an amount of R291 553.70 instead of the full amount claimed.

[13] The arbitrator did not agree with this submission, and the adjudicator's view in this regard, as he believed that the situation in point was one rather closely allied to clauses 26.6, 26.7 and 26.8 of the PBA where, the failure by the Principal Agent (PA) to make a fair assessment of the contractor's claim (applicant) and adjust the contract value within 20 working days, the claim would be deemed to be refused, following which the contractor could give notice of a disagreement where no assessment is received.

[14] In accordance with this view, the arbitrator rejected the above submission by the applicant, and held that the final amount due to the applicant, if any, was yet to be calculated.⁴ He thereafter continued to do the said calculation, after which he concluded that the total amount due to the applicant by the second respondent was the amount of R507 260.98, which amount became the final award excluding costs.⁵

[15] This is the conduct which the applicant alleges to have been beyond the powers of the first respondent as arbitrator, thus committing a reviewable irregularity.

[16] The application *in casu* was launched on 15 December 2021, approximately 4 months and 12 days after the publication of the award. The applicant acknowledges that the review ought to have been launched by no later than 3 August 2021, a period which falls within 6 weeks of the publication of the first respondent's award. To that end it seeks condonation of the late filing of the review application.

[17] Section 33(2) of the Arbitration Act which deals with reviews provides that –
'An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the ground of corruption, such application

⁴ Paragraph 59 of annexure "TWB5" to the founding affidavit.

⁵ Paragraph 76 of annexure "TWB5" to the founding affidavit.

shall be made within six weeks after the discovery of the corruption and in any case no later than three years after the date on which the award was so published.’

[18] The applicant contended that the delay in bringing the application was not due to any negligent, careless or intentional conduct on its part, but rather due to circumstances beyond its control. It further argued that it enjoys good prospects of success in the review. The respondent argued the contrary, submitting that the application ought to be dismissed with costs, on this ground alone. It also raised a number of points *in limine, inter alia*, that the applicant had failed to lodge its application in terms of section 33(1) of the Arbitration Act.

[19] It is a well-established principle that condonation is not to be had for the mere asking, and that good cause must be shown to exist for it to be granted. The defaulting party must set out the full circumstances, showing a reasonable and acceptable explanation for the delay, which covers the entire period of the delay. The standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.

[20] In *Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others*,⁶ the Constitutional Court held that in determining whether condonation may be granted, lateness is not the only consideration. It was said that the test for condonation is whether it is in the interests of justice to grant condonation. Ngcobo CJ,⁷ in *Bernert v Absa Bank Ltd*,⁸ on the question of whether condonation should be granted, stated that factors relevant to a condonation inquiry include, but are not limited to - the extent and the cause of the delay, the prejudice to other litigants, the reasonableness of the explanation for the delay, the importance of the issues to be decided in the intended appeal, and the prospects of success. None of these factors

⁶ 2010 (2) SA 181 (CC).

⁷ As he then was.

⁸ 2011 (3) SA 92 (CC).

is however decisive; the enquiry is one of weighing each against the others and determining what the interests of justice dictate.⁹

[21] On the interests of justice as the standard for consideration for condonation, the Constitutional Court in *Grootboom v National Prosecuting Authority and Another* held:¹⁰

‘...the standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issues to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasize that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those listed above. The particular circumstances of each case will determine which of these factors are relevant.’

[22] The explanation for the delay proffered by the applicant is that the delay was occasioned by a *bona fide* misunderstanding of the purport of the award on its part and its erstwhile representative. The submission is that the applicant’s representative understood the award to have awarded the applicant the full amount of its final account to the second respondent, being R1965 220.70, less the amount of R291 553.70 which was awarded in the adjudication which preceded the arbitration.

[23] It is contended that, labouring under the above impression, and having received payment of only R510 665.88 from the second respondent, and believing the second respondent to have been badly in default of the award, the applicant first sought to enforce the award as it believed it stood. It was only after extensive consultation with its attorneys that it became evident on or about 28 October 2021

⁹ At para [14].

¹⁰ (CCT 08/13) [2013] ZACC; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); 2014 35 ILJ 121 (CC) (21 October 2013) par 22.

that its understanding of the award was incorrect, and only at that point was it decided to seek a review of the award instead.

[24] Having decided on the review approach as indicated above, the applicant, it is alleged, was only able to consult and give instructions to its attorneys on the new mandate between 8 and 10 December 2021 because its attorneys were fully booked with other cases for the month of November and the first week of December. It is further submitted that given the volume of papers in the matter, it would have been very costly for the applicant to instruct other attorneys to launch the review application.

[25] I have gone through the award by the arbitrator¹¹ and I find myself quite perplexed as to the ambiguity referred to in the applicant's papers, which led to the confusion regarding the award, and the ultimate delay in the launching of the review application.

[26] The applicant, through its representative, Mr Gcora, in a much belated letter¹², even sought some clarification on the award from the arbitrator. This appears to me to have been more of an attempt to have the arbitrator review his decision than any clarity seeking exercise. From line 4, the letter reads as follows:

'The claimant was however prevented from noticing a potential ambiguity in the award by the manner in which the award was published. In its current form as published, paragraphs 57 to 63 do not form part of the arbitrator's decision, they form part of the reasons for the award. **To the extent that paragraphs 57 to 63 form part of the decision, not the reasons, these paragraphs would be inconsistent with how the arbitrator dealt with a matter where no notice of dissatisfaction has been filed if the arbitrator has regards to paragraph 24 of the award.**' (emphasis intended)

[27] This is perplexing on a number of levels. In the first instance, from paragraph 56 of the award it is captioned "**ARBITRATOR'S DECISIONS.**" It is therefore beyond me to understand how one can conclude that these are not decisions but reasons,

¹¹ Annexure "TWB5" to the founding affidavit.

¹² Dated 28 October 2021.

when the award itself identifies them as decisions. Furthermore, in the same paragraph, the very next sentence states that to the extent that these are actually decisions and not reasons, they are inconsistent with how the arbitrator dealt with the matter at paragraph 24. At this juncture, perhaps a closer look at paragraph 24 might be opportune.

[28] The relevant portion of paragraph 24 reads as follows:

‘...The Arbitrator thus deems that the Respondent was either satisfied with the Determination or made a decision not to give a notice of dissatisfaction. In either event, no notice of dissatisfaction was received and thus the Respondent is now precluded from raising any dissatisfaction during these Arbitration proceedings. The Respondent is required to defend against or answer the Claimant’s Statement of Claim. Furthermore, the Arbitrator is not required to make an Award on the unlawfulness or otherwise of the termination.’

It is not clear to me from the above where the alleged inconsistency arises.

[29] The entire challenge of the arbitrator’s award centres around the submission made by the applicant regarding its final account, which submission was never disputed by the second respondent, and which appears to have been accepted by the adjudicator. In my view, the applicant in this regard seems to conflate submissions with evidence, where undisputed evidence has to be accepted as the only evidence on a particular issue and the issue decided solely based on that evidence.

[30] Submissions on the other hand pertain to a view of a party on a particular subject matter or one’s argument to support their case. Whether or not contrary submissions are made, a presiding officer still has to assess and weigh the submissions made and to make a determination on their validity or acceptance. She or he cannot be said to be bound thereby simply because there were no contrary submissions made. This being the crux in the present matter, it follows that the entire case for the applicant is fatally flawed.

[31] The inconsistency alluded to between paragraph 24 and the decisions from paragraph 56 is purely fictional. The arbitrator dealt with the applicant's claim as was presented before him, and in his reasoning, stated quite clearly what the crux of the matter was, which he summed up to be what the applicant was entitled to in terms of the agreement. With the applicant having been dissatisfied with the outcome of the adjudication, which was an award of R291 553.70, and hence took the matter to arbitration, I do not see how the arbitrator's reasoning can be faulted in this regard.

[32] In his award, the arbitrator considered the applicant's statement of claim which raised certain points in issue, *inter alia*; the failure by the PA to issue recovery statements for interest on late payments, and **failure by the PA to adjust the contract value**. (emphasis intended) To do the necessary determinations in this regard therefore, he had to consider the PBA in terms of which the agreement between the parties was regulated. To then turn and say that by him doing so he had impermissibly entered into the arena I find to be quite fallacious on the part of the applicant.

[33] Section 33(1) of the Arbitration Act provides as follows:

‘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 application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.’

[34] A party challenging an award must establish, not only that there is no evidence on which a reasonable man would have made it, but also that the lack of evidence is so glaring that misconduct on the part of the arbitrator can be inferred.¹³

¹³ *Mc Kenzie v Basha* 1951 (3) SA 783 (NPD at 786).

The term 'misconduct' refers to mala fides or moral turpitude and not to legal misconduct which does not involve moral turpitude. And gross irregularity relates to the conduct of the arbitration proceedings, and not the result thereof. The irregularity must have been so serious that it resulted in the aggrieved party not having his case heard.¹⁴

[35] The conduct of the arbitrator can in no way be equated to the one referred to above. In fact, even the applicant itself does not allege in its papers that the arbitrator misconducted himself or acted moral turpitude.

[36] Pertaining to the explanation for the delay, specifically the confusion or ambiguity in the award leading to a different course of action before the review application was launched, I am not at all persuaded. As stated earlier in this judgment, it seems to me that that there was merely an attempt, albeit very belatedly so, to have the arbitrator review his award, rather than seeking any clarity on the award, which I find to have been as clear as the day.

[37] The award is self-explanatory and patently clear, both under the title 'Arbitrator's Decisions' from paragraphs 56 to 74; as well as the 'Arbitrator's Final Account Summary' at paragraph 75, where a unit by unit breakdown of the amounts, up to how the total amount was reached is given; and finally paragraph 76 where the 'Final Award Except Costs' is given. Throughout the award, at no point is there any reference to the applicant being entitled to the entire amount of its claim. I therefore find it quite farcical for the applicant to claim that it was under the impression that the award was for the entire amount of its claim.

[38] As for the explanation that between October and December the applicant could not give instructions to its attorney who was busy with other matters, nor could it instruct another attorney, I find to be so unreasonable that it amounts to no explanation at all. The explanation given by the applicant for the delay in launching the review therefore falls far short of it being said to be an acceptable explanation.

¹⁴ Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C).

[39] Having gone through the award and the conduct of the arbitrator in coming to same in the present matter, I can find no evidence to infer that he misconducted himself in any manner, or committed a gross irregularity, or that the award was improperly obtained. Given all these factors, it follows that there are no reasonable prospects of success in the review.

[40] Given that the applicant has failed to give a reasonable explanation for the delay in launching the review application, which was launched more than 4 months after the award was published, coupled with the fact that there are clearly no reasonable prospects of success in the review, it follows that the interests of justice do not permit the granting of condonation in this matter. The applicant has failed to establish good cause for condonation to be granted. Consequently, the application must fail.

[41] The failure of the condonation application becomes dispositive of the entire matter, and as such dispenses with the need to deal with the striking application and the other issues raised.

ORDER

[42] In the premises, the following order is made:

THE APPLICATION IS DISMISSED WITH COSTS.

V P NONCEMBU

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicant : N/A

Instructed by : Ms Olowookorun

Counsel for the 2nd Respondent : *S J Swartbooi SC*

Instructed by :	M Botha Office of the State Attorney
Date of hearing:	08 September 2022
Date judgment delivered:	13 December 2022