

REPUBLIC OF SOUTH AFRICA



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

Case Number: 25450/2020

Case Number: 13856/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: [REDACTED]
4/01/2024	[REDACTED]
DATE	SIGNATURE

In case number 25450/2020

INSTELEC SERVICES CC

First Applicant

MOONSAMY RAJU NAIDOO

Second Applicant

and

IDEAL ELECTRICAL AND MINING SUPPLIES (PTY) LTD

First Respondent

THE ARBITRATOR P BORUCHOWITZ

Second Respondent

THE ARBITRATION APPEAL PANELLISTS

Third Respondent

In case number:13856/2020

IDEAL ELECTRICAL AND MINING SUPPLIES (PTY) LTD

Applicant

and

INSTELEC SERVICES CC

First Respondent

MOONSAMY RAJU NAIDOO

Second Respondent

ORDER

In case number 25450/2020:

- [1] The application for condonation is dismissed.
- [2] The application is dismissed.
- [3] The applicants are to pay the costs of the applications on the scale as between attorney and client such costs to include the costs of senior counsel where employed and such liability to be joint and several the one paying the other to be absolved.

In case number 13856/2020:

- [1] The arbitrator's interim award dated 18 March 2018 handed down on 19 March 2018 is made an order of court.
- [2] The arbitrator's final award dated 10 February 2020 handed down on 10 February 2020 is made an order of court.
- [3] The appeal panel's award dated 04 June 2020 and handed down on 04 June 2020 is made an order of court.
- [4] The respondents are to pay the costs of the applications on the scale as between attorney and client such costs to include the costs of senior counsel where employed and such liability to be joint and several the one paying the other to be absolved.

JUDGMENT

FISHER, J

Introduction

- [1] This judgment is in respect of two related cases which have been formally consolidated under their respective case numbers.

- [2] The consolidated hearing involves an application for the review of the decision of an arbitrator, retired Judge Philip Boruchowitz (the arbitrator) in response to an application to have the award made an order of court. The review seeks the setting aside of the main arbitral award in which the claimant in the arbitration, Ideal Electric and Mining Supplies (Pty) Ltd (Ideal) succeeded against both defendants in the arbitration, Instelec Services cc (Instelec) and Mr Moonsamy Naidoo (Naidoo) in securing a joint and several order for payment of an amount of R 3.3 million (rounded) as damages arising out of theft and fraud and costs.

- [3] The review is based on the central contention that the arbitrator erred in failing to allow the introduction into evidence of approximately 300 pages of documents relating to the disposal of the stolen items in issue. The documents were sought to be introduced at a stage where the claimant had closed its case and Naidoo was under cross-examination.

- [4] The defendants argue that the arbitrator's failure to allow the introduction of the documents constituted a gross irregularity as contemplated by section 33(1)(b) of the Arbitration Act¹(the Act).

- [5] Initially, the review grounds included allegations relating to bias and the lack of integrity of the arbitrator. These allegations are patently baseless and were wisely not persisted with.

- [6] The review is brought after the expiry of the six-week period prescribed in section 33(2) of the Act. Depending on the dates of the awards and specifically whether the appeal tribunal's formal recordal of the withdrawal of the appeal (4 June 2020) is the date from which the dies run or whether they run from the

¹ Act 42 of 1965

date of the final award (10 February 2020) the review is either two or five months late. On any tally the delay is considerable.

[7] The defendants seek condonation for the late bringing of the review. The claimant opposes the application for condonation as well as the review. The applications for condonation and review are considered together in that the prospects of success in the review informs the consideration of whether condonation should be granted.

[8] I turn to the procedural background.

The procedural background

[9] The claim in the arbitration was based on the allegation that Naidoo, who was a guiding mind behind the business of Instelec, conspired with an employee of Ideal, Mr Brett Naiker (Naiker) to steal electronic parts belonging to Ideal. In essence, it was alleged that Naiker, by abusing his position as employee of the claimant, secured the delivery of goods to Instelec and thus Naidoo without recording the supply of such goods in the records of the claimant thereby committing the theft of the goods. Naidoo was alleged to have facilitated this delivery of goods in the knowledge that the goods were stolen.

[10] The case was initially launched by way of action in June 2016. In November 2017 the parties entered into an arbitration agreement in relation to the hearing of the claim and the arbitrator was appointed.

[11] The pleadings closed in December 2017 and the arbitration commenced on 19 February 2018. Hearings took place at intervals over the course of two years, the last hearing date being 10 February 2020.

[12] As the cross examination of Naidoo was drawing to a close, the defendants sought leave to introduce approximately 300 pages of documents into evidence. The stated intention was to introduce the evidence in reply.

- [13] The arbitrator heard full argument on the application to adduce further evidence and ultimately handed down an order with reasons refusing the introduction of the further evidence.
- [14] The final award was handed down on 10 February 2020 in favour of the claimant.
- [15] The defendants filed a notice of intention to appeal three days later. An appeal panel was subsequently constituted.
- [16] On 25 May 2020 the defendants withdrew the appeal and the appeal panel formally recorded such withdrawal on 04 June 2020.
- [17] The claimant then brought the application under case number 13850/2020 to make the arbitration award an order of court. The defendants thereafter brought the application under case number 25450/2020 to set aside the interlocutory order refusing the admission of the further evidence and ultimately the final award. These two applications were consolidated by order dated 26 January 2023.
- [18] It is sought also by the defendants that the arbitration agreement be declared to be null and void. This relief was not proceeded with in argument. The remedy sought by the defendants in the review is that the matter be sent back to the arbitrator for reconsideration of the awards.
- [19] The inquiry into the application for condonation entails a determination of whether good cause exists for such condonation. This includes a determination of the prospects of success in the application for review and whether a proper explanation has been given for the delay.
- [20] It is convenient to deal first with the application for condonation.

Application for condonation

- [21] The parties agreed in terms of the arbitration agreement that the uniform rules of court would regulate the procedure to be undertaken in the arbitration. This specifically included interlocutory applications.
- [22] The legal prescripts dealing with the consideration of applications for condonation are well entrenched. In *United Plant Hire (Pty) Ltd*² Holmes JA held that the determination of good cause is a discretionary matter to be exercised having regard to all the circumstances of the case, including the degree of non-compliance, the explanation therefor, the prospects of success, the importance of the case, the interests of finality, convenience of the court and the avoidance of unnecessary delays. These factors inter-relate and must be weighed against each other.
- [23] Naidoo received the award two days after it was handed down. He says he was not satisfied with the outcome. He thus instructed his then attorney Mr Howard Woolf (Woolf) who had represented both defendants in the arbitration “to challenge the award in whatever way legally possible”. An appeal was thus filed two days later by Woolf. It is not clear what the appeal grounds were. The appeal was however ultimately jettisoned. It seems that the defendants accept that it had no prospects of success.
- [24] The documents which were sought to be introduced at the arbitration were invoices sent by a business set up clandestinely by Naiker, BDR to two businesses Boz Auto and African Olive reflecting the sale of the stolen goods.
- [25] It was the version of the defendants that they had no part in the theft of the goods. They alleged that the goods were stolen by Naiker without their knowledge and cooperation and that they were sold by Naiker through BDR to various purchasers at a significantly reduced price. Two main purchasers of these stolen goods by Naiker were alleged to be Boz Auto and African Olive, the former being an automobile concern and the latter a supplier of goods to

² *United Plant Hire (Pty) LTD v Hills* 1976 (1) SA 717 (A) at 720E-G

the mining industry, including a substantial amount of copper tape. Copper tape was one of the items stolen from Ideal.

- [26] That money changed hands between Naidoo and Naiker was not in dispute on the evidence of Naidoo. These transactions were said by Naidoo to be loans which would be repaid when the goods in issue were sold. There were, on Naidoo's evidence, also times when adjustments were done in relation to amounts owed between Instelec and BDR and amounts were set off between the two entities in relation to goods supplied by Instelec to BDR. No VAT was paid on any transactions between Naiker and Naidoo. It was not disputed that there was a very tight relationship between the two men and the entities they controlled.
- [27] This defence of no knowledge and innocent participation was raised on behalf of the defendants from the beginning of the arbitration.
- [28] The existence and whereabouts of the invoices by BDR to African Olive and Boz Auto were known to Naidoo and his legal representatives as early as March 2018.
- [29] To my mind, the existence of proof that stolen items were sold by Naiker to these two businesses has limited probative value and relevance to the pivotal factual issue in the case, being whether Naiker and Naidoo were "in cahoots" in relation to the theft of the items from the warehouse of the claimant. That the goods were stolen by Naiker is not in dispute and neither is it disputed that goods were delivered to Instelec.
- [30] Whether Naidoo provided a fraudulent mechanism for the goods being ordered and delivered is the central question. This was answered by the arbitrator in the affirmative on the probabilities as examined by him in detail. There can be no question, in review, proceedings of the arbitrator being wrong in this determination.
- [31] It emerges from the arbitrator's careful analysis of all the evidence that reference to the invoices of BDS in terms of which it sold the stolen goods would

add little or no value to the discussion. The evidence shows that invoices were manufactured and delivery notes destroyed in accordance with the central fraudulent scheme and on the basis that this served the purposes of both Naiker and Naidoo.

- [32] Documents brought into existence by fraudsters often suffer from a lack of probative value or relevance in that they are contrived for the purposes of obfuscation. That is the case here. It seems to me that this was the real reason why there was no effort made by Naidoo's legal team to obtain these documents in the first place.
- [33] The whereabouts of the documents throughout the arbitration is important. They were, to the knowledge of Naidoo and his legal representatives, seized from the home of Naiker by the SAPS and were in the possession of the claimant's attorneys by at least March 2018.
- [34] A pivotal aspect raised by the arbitrator in considering whether to admit the documents was the reason why the documents were not sourced earlier using the rules of court which expressly applied to the arbitration proceedings. The defendants produced no feasible explanation for this failure at the arbitration and now latterly seek to attempt to blame the failure to source the documents on the incompetence of their attorney and counsel. I might mention that both are experienced senior practitioners.
- [35] Furthermore, the explanations for the delay in bringing the review application also bear little scrutiny. Naidoo, in support of the application for condonation, states that he could not get hold of his attorney, Woolf as Woolf was allegedly ill. There are no emails or other proof of these alleged attempts at making contact. Furthermore, no detail is provided as to when the defendants ultimately instructed their new attorney.
- [36] The explanation for the delay is vague, lacking in important detail and is, in its essential parts, unimpressive.

- [37] The conduct of Naidoo in the aftermath of the final award is telling. There was no apparent basis for an appeal. Naidoo's instruction to Woolf was that he cast about to find any conceivable basis for appeal. That the appeal was subsequently jettisoned suggests that it was instituted vexatiously.
- [38] The manner in which the review application was ultimately framed is also an indication of a vexatious approach. The fact that all of the grounds for the review, save the attack on the refusal to admit the documents were ultimately abandoned is, again, indicative of a lack of a substantive basis for the review.
- [39] To my mind, the defendants have made out no case for condonation and the application for condonation falls to be dismissed.
- [40] I am, in any event, of the view that the review must fail on its merits. I move to consider the review.

The review

- [41] The arbitration agreement provided for the rules of court to apply. The parties thus clothed the arbitrator with the discretion to decide interlocutory matters.
- [42] The review is brought in terms of section 33(1)(b) of the Act. The defendants must show that the refusal to allow the documents to be admitted constituted a gross irregularity.
- [43] It was not disputed that the defendants and their legal representatives had the knowledge of the existence and whereabouts of the documents approximately two years before the application to admit the documents was made.
- [44] The arbitrator was troubled by the fact that no attempt was made to use the formal mechanisms available under the applicable rules of court to obtain their discovery. He was doubly troubled by the fact that there was no feasible explanation given for this failure to obtain the documents before the hearing.

[45] As I have set out above, the relevance and probative force of the documents is questionable. Notwithstanding that the defendants were represented by experienced senior counsel; these documents did not form the focal point of the case. To my mind, they were brought up in reply as an afterthought.

[46] The refusal to admit of the documents does not emerge as having been regarded by the defendants as a calamity at first. It was only hit upon by the defendant's new attorney as a possible ground of appeal together with a compendium of other misguided grounds.

[47] In my view the arbitrator exercised his discretion properly.

[48] In the circumstances, even if I had granted the condonation, I would have dismissed the review application and the other relief claimed by the defendants under case number 25450/2020.

[49] In case number 13856/2020 the applicant has made out a case for the relief sought.

Costs

[50] The approach taken by the defendants since the final award was handed down has been characterised by a vexation. They have cast about for any reason to avoid liability under the award. None of the bases conjured up by them have had any cogency.

[51] In the circumstances this is a proper matter for punitive costs to be paid by the defendants. I might add that this is not the first time that costs on a punitive scale have been awarded against the defendants in light of their conduct of the case.

[52] The claimants have made out a case for the relief sought by them.

Order

[53] In the circumstances I make the following order:

In case number 25450/2020:

- [1] The application for condonation is dismissed.
- [2] The application is dismissed.
- [3] The applicants are to pay the costs of the applications on the scale as between attorney and client such costs to include the costs of senior counsel where employed and such liability to be joint and several the one paying the other to be absolved.

In case number 13856/2020:

- [1] The arbitrator's interim award dated 18 March 2018 handed down on 19 March 2018 is made an order of court.
- [2] The arbitrator's final award dated 10 February 2020 handed down on 10 February 2020 is made an order of court.
- [3] The appeal panel's award dated 04 June 2020 and handed down on 04 June 2020 is made an order of court.
- [4] The respondents are to pay the costs of the applications on the scale as between attorney and client such costs to include the costs of senior counsel where employed and such liability to be joint and several the one paying the other to be absolved.



D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 04 January 2024.

Heard: 19 October 2023

Delivered: 04 January 2024

APPEARANCES:

For the Applicants: S.S.Cohen

Instructed by: Thomson Wilks Attorneys

For the Respondents: J.M. Heher

Instructed by: Fluxmans Inc.