

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022/13538

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
03/11/2023	_____
DATE	SIGNATURE

In the matter between:

KAROSHOEK SOLAR ONE (RF) (PTY) LTD

Applicant

and

DANKOCOM (RF) (PTY) LTD

First Respondent

MOHAMMED ASHRAF EBRAHIM

CHOHAN SC

Second Respondent

LEAVE TO APPEAL JUDGMENT

KEIGHTLEY, J:

1. This is an application for leave to appeal against my judgment dismissing the applicant's (Karoshhoek Solar One (RF) (Pty) Ltd, hereafter 'Karoshhoek')

application under s 33(1) of the Arbitration Act to review and set aside the award of the arbitrator in a dispute referred to him by the parties. The plaintiff in the arbitration, and the respondent in the review application, is Dankocom (RF) (Pty) Ltd (Dankocom). It opposes the application for leave to appeal.

2. The grounds of review are explained in detail in my judgment and there is no need to traverse them again in anything but summary form. In brief, Karoshoek's case was that the arbitrator had exceeded his powers by: (a) granting a rectification of the contract in terms not pleaded in Dankocom's statement of claim, and (b) making a finding in paragraph 70 of the award when he had no power to do so. Karoshoek sought further to review the award on the basis that the arbitrator had committed a gross irregularity in making an interpretational finding in paragraph 70 without having the full contract before him. Karoshoek avers that the arbitrator's conduct in this regard also interfered with its rights to a fair trial, rendering the proceedings grossly unfair.
3. It is worth noting, as I did in my judgment, that save for the first excess of power complaint, Karoshoek's review was directed specifically at paragraph 70 of the arbitrator's reasons for dismissing Dankocom's claim. Karoshoek had no complaint about the fact that Dankocom's claim for declaratory relief was dismissed.
4. I found no merit in any of the grounds of review. Karoshoek seeks leave to appeal against my conclusions in respect of each of the grounds. It identifies nine grounds, each with sub-grounds, of appeal. In substantial part, the detailed grounds are directed at the reasoning reflected in my judgment. Stripped to the core, Karoshoek's case is that there are reasonable prospects that another court would find differently and would uphold all, or at least some, of the grounds of review in an appeal.
5. Under s17(1)(a) of the Superior Courts Act, leave to appeal may only be given where the Judge is of the opinion that the appeal (i) would have a reasonable prospect success or (ii) there is some other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration. The test for granting leave under this section is well settled. The

question is not whether the case is arguable, or another court may come to a different conclusion (*R v Nxumalo* 1939 AD 580 at 588). Further, the use of the word 'would' in s 17(1)(a)(i) imposes a more stringent and vigorous threshold test than that under the previous Supreme Courts Act, 1959. It indicates a measure of certainty that another court will differ (*Mont Cheveaux Trust v Goosen* [20014] SALCC 20 (3 November 2014); *Notshokuvo v S* [2016] ZASCA 112 (7 September 2016)). The *Mont Cheveaux* test was endorsed by a Full Court of this Division in the unreported case of *Zuma & Others v the Democratic Alliance & Others* (Case no: 19577/09, dated 24 June 2016). The Supreme Court of Appeal more recently confirmed that an applicant for leave to appeal must convince a court on proper grounds that there is a reasonable or realistic chance of success: a possibility, an arguable case or one which is not hopeless is not enough (*Ramakatshe and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para 10).

6. I start with the leave to appeal in respect of the excess of power ground of review insofar as this is directed at the rectification granted by the arbitrator. In paragraphs 13 and 14 of my judgment I outline the clauses of the contract relevant to the rectification ground of review, with a brief explanation as to what the issue entailed. The rectification ground of review is dealt with fully in paragraphs 63 to 74 of my judgment. Karoshoek argues that I ought to have found that the parties had agreed, by exchange of email, that Dankocom had abandoned its claim for rectification. Further, and in any event, I erroneously concluded that the arbitrator was acting within his powers by granting the rectification in the terms he did, because the rectification awarded did not align with the rectification claimed in the statement of claim.
7. As to the latter aspect, the only dispute between the parties was whether the arbitrator acted within his powers by rectifying the references to paragraphs '11.6.1 and 11.6.2' in the introductory portion of paragraph 11.7.3 to read '11.7.1 and 11.7.2'. As I noted in my judgment, it was common cause that in its prayer for relief at the conclusion of its statement of claim, as well as in paragraph 18 of the claim, Dankocom limited its rectification to paragraphs 11.7.1 and 11.7.2. In other words,

it did not expressly ask for rectification of 11.7.3. It was this that formed the basis of Karoshoek's review in this respect and of its application for leave to appeal.

8. In my judgment I found that the arbitrator's rectification correctly reflected what the parties intended. The reference to '11.6.1 and 11.6.2' was a patent error if one read the relevant paragraphs together. I found that the rectification pleaded simply overlooked that the additional change, to paragraph 11.7.3, also had to be included in the prayer for rectification, and that the arbitrator had acted within his powers in granting it.
9. The record of decision which was before me at the time underscores my conclusion. In paragraph 17 of the statement of claim, Dankocom expressly pleaded that 'the cross-referencing to paragraph 11.6 and its sub-paragraphs (in paragraph 11.7) ought to be 11.7 and its sub-paragraphs'. This would include the references to 11.6 in paragraph 11.7.3. Inexplicably, however, in its actual rectification award sought, it did not expressly seek rectification of 11.7.3. I say inexplicably because the obvious error in the cross-referencing was foreshadowed in paragraph 17 of the statement of claim.
10. There is further evidence from the record that the parties were ad idem that the references to paragraphs 11.6.1 and 11.6.2 in paragraph 11.7.3 should correctly be read as '1.7.1 and 11.7.2'. Both counsel for their respective parties proceeded on the common understanding that this is how paragraph 11.7.3 must be read.
11. In addressing the arbitrator on clause 11.7, Mr Le Grange, for Dankocom, said:

'It (paragraph 11.7) reads if there is any deviation from the reference data referred to in paragraphs and we are now agreed it is 11.6.1 to 11.6.6 as stated in paragraph 11.6 all the results of the facility power model must be correct according to the principles described in paragraphs, we now agree 11.7.3.1, 11.7.3.2 and 11.7.3.3. (Paragraph) 11.7.2 records paragraphs we now agreed it should read 11.6.3,11.6.4,11.6.5 and 11.6.6 apply irrespective of whether the operator and the contractor are affiliated. But then importantly 11.7.3.1 for the avoidance of doubt, regardless of who the operator is referenced, data referred to it should read paragraphs 11.7.1 and 11.7.2 must in all cases be corrected for the long-term performance test according to the following principles.' (Emphasis added)

12. But it was not only Dankocom's counsel who expressed this common understanding before the arbitrator, Mr Kriegler, for Karoshoek did so too. In addressing the arbitrator, he also referred to how paragraph 11.7.3 should be read:

'There are circumstances when what the operator does is properly allowed for or accommodated within specifically adjustments to guarantees and the determination of liability and there are circumstances where that is not the case, quite specifically under the contract but then we go to 11.7.3 So for the avoidance of doubt, regardless of who the operator is, so now we know that for this particular purpose, the identity of the operator; we will come back to what that probably means; which is whether it is affiliated or not affiliated, this is a set of provisions and principles if you will, that have general application, but they have qualifications, and they say for the avoidance of doubt, regardless of who the operator is, the reference data referred to in paragraphs 11.7.1 and 11.7.2, so just to read it Mr Arbitrator, those are the immediately preceding subparagraphs but they of course again refer to 11.6. So you are following the structure and the syntax here ... must in all cases be corrected for the long term performance test according to the following principles.' (Emphasis added)

And, during the examination of Mr Chetty by Mr Russell, Mr Kriegler (for Karoshoek) interjected with the following clarification:

'My apologies Mr Arbitrator, Mr Russel, I think it is, if we are going to ask the witness about what the contract says, reading to the witness what the contract says and asking questions about what the contract says, I think it is correct that Mr Russell point out to the witness that the reference in 11.7.3 to 11.6.1 and 11.6.2, we have agreed should be read as 11.7.1 and 11.7.2, not 6. So 6 should be considered deleted.' (Emphasis added)

13. There can be no doubt that the parties conducted the arbitration on the common understanding, together with the arbitrator, that paragraph 11.7.3 had to be read with the cross-reference to 11.7. 1 and 11.7.2 and not 11.6.1 and 11.6.2. This was expressly foreshadowed in the statement of claim. The only shortfall was that it was not expressly included in the actual rectification sought. That this was nothing more than an oversight is plain. What the arbitrator did was simply to correct the record by formally granting a rectification that chimed with the basis on which the case had been presented to him by both parties.

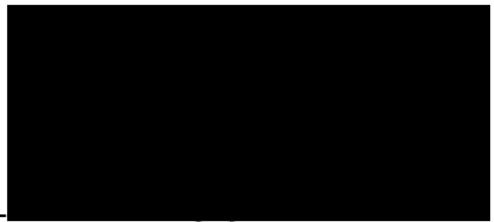
14. I am accordingly not persuaded that there are reasonable prospects that another court would find differently. Nor am I persuaded of this as regards the contention that I ought to have found that the parties had agreed to abandon the rectification. Why they would have done so in light of the basis upon which both approached the case before the arbitrator, with a common understanding of how clause 11.7.3 should read, is not clear to me. Insofar as Karoshoek argued that I misapplied the

Plascon-Evans rule in paragraph 66 of my judgment, it is clear from the judgment as a whole that the application of the rule, rightly or wrongly, was not material to my ultimate finding. It was an additional point I made, as referenced clearly in the preface to the one sentence in which the rule is referred to: ‘(i)n any event”.

15. The remaining grounds of review focus largely on paragraph 70 of the arbitrator’s award. I deal fully with the gross irregularity ground of review in respect of paragraph 70 in paragraphs 40 to 52, and with the alleged unfairness of the arbitrator in proceeding to interpret the contract without the FPM before him in paragraphs 53 to 55 of my judgment. I note there that an important feature of this case was the arbitrator’s prior disclosure award, which precluded the FPM being introduced into evidence. Karoshoek did not seek to review that award, even at the stage when it instituted the review against the arbitrator’s main award. While it was the main award that was on review, the binding nature of the disclosure award had obvious consequences for the review, and it thus formed part of the matrix of my judgment. I have given full reasons in my judgment for my conclusions that neither of the grounds of review had merit. The grounds for leave to appeal are in substance a repetition of the submissions that were made to me when I heard the review. They do not add anything new, nor do they persuade me that another court would decide the matter differently.
16. The same goes for the final ground of review, namely the complaint that I ought to have found that the arbitrator exceeded his power by making the finding he did in paragraph 70 of his award. I deal with this ground of review in paragraphs 56 to 62 of my judgment, although the interpretation of the award, in the earlier paragraphs of the judgment are also relevant. The gist of Karoshoek’s case in this regard is that paragraph 70 was a self-standing award in its own right and was not simply part of the arbitrator’s reasoning as to why he concluded that Dankocom should be denied the declarator it sought. As the ‘award’ in paragraph 70 was not included in the relief sought by Dankocom, I ought to have found that the arbitrator did not have to power to make it. The same submissions were made by Karoshoek when the review was argued. My judgment explains fully the basis for their rejection. I am not persuaded that another court would find differently.

17. I make the following order:

‘The application for leave to appeal is dismissed with costs.’



R M Keightley
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment 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 Court Online/Case Lines. The date for hand-down is deemed to be 03 November 2023.

Date of Hearing: 08 September 2023

Date of Judgment: 03 November 2023

APPEARANCES

For the Applicant: Adv. M Kriegler SC and Adv. M Schafer

Instructed by: Norton Rose Fulbright South Africa

For the First Respondent: Adv. W La Grange SC and Adv. A Russell

Instructed by: Pinsent Masons South Africa

For the Second Respondent: Notice to Abide
Instructed by: Dockrat Attorneys Inc.