

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 5577/18

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
4/6/2019	<i>pp. K. K.</i>
DATE	SIGNATURE

In the matter between:

RED FINCH INVESTMENTS

Applicant

(Registration Number: 2006/026359/23)

and

ELEGANT LINE TRADING 898 CC

1st Respondent

(Registration Number: 2007/088945/23)

JESSIE CONRADIE

2nd Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] The applicant is seeking the review and setting aside of an arbitration award made by the second respondent, Mr Jesse Conradie, published on 18 December 2017.

[2] The second respondent has filed a notice to abide.

[3] In order to have a proper perspective of the dispute between the parties, it is necessary to set out the chronology of events leading to the arbitration being made.

[4] The dispute referred to arbitration concerns issues relating to a construction agreement ("the agreement") concluded by the applicant, Red Finch Investments CC and the first respondent, Elegant Line Trading 898 CC, in August 2016 with regard to the Witfield Ridge Residential Block Project in Boksburg. More specifically the disputes

relates to the validity of payment certificates submitted by the first respondent and signed off for payment by the project manager.

[5] The agreement provided that in the event of a dispute arising concerning the interpretation of the agreement, such dispute would be resolved through a private arbitration in terms of the Arbitration Act¹ ("the Act").

[6] On 20 April 2017, the first respondent declared a dispute and the parties agreed on the appointment of an independent arbitrator. On 1 September 2017 the Master Builders Association appointed the second respondent as arbitrator. Upon his appointment as arbitrator, the second respondent dispatched a letter (dated 29 September 2017) to the parties in which he set out the terms and conditions under which he would conduct the arbitration. Besides confirming his acceptance of his appointment as arbitrator, the letter in part provides that:

"1. ...

(iii) the Rules for the Conduct of Arbitrations, 2013 Edition, published by the Association of Arbitrators (Southern Africa) or any modification thereof shall apply to this arbitration,

¹ Act 42 of 1965.

- (iv) the Parties agree to conduct the proceedings in the most cost efficient and expeditious manner possible, namely on the basis of a 'documents only' arbitration.

...

3. In order to mitigate costs I suggest that we avoid unnecessary preliminary meetings. To this effect, the Arbitrator shall after entering the reference convey in writing the process and procedure including provisional timetable which shall govern this arbitration as far as the modified Rules of Conduct is concerned.
4. The Arbitrator shall consider facilitating a preliminary meeting upon receipt of a well motivated and reasonable request from either Party.
5. The Parties are invited, in their response to this letter, to submit proposals which might facilitate the efficient conduct of their arbitration".

[7] The second respondent also requested the parties to sign the appointment letter, which letter was signed by the applicant's and the first respondent's respective attorneys on 23 October 2017 and 12 September 2017, respectively.

[8] On 23 October 2017 at 12h38, the applicant's attorneys, J H Boshoff, sent the second respondent an email to which they attached a power of attorney, signed tariff fees and proof of payment of the deposit. Further in the same email the attorneys inquired from the second respondent whether a preliminary meeting scheduled for 27 October 2017 at 12h00 would still take place. On the same day the second respondent, without addressing the query about the scheduled preliminary meeting of 27 October

2017, responded to the applicant's email (at 13h27). The response in part reads as follows:

"I take it, by way of your correspondence that you agree with the process, procedure and content of my last letter.

On this basis there will be no need for a preliminary meeting and the submission of pleadings may ensue in accordance with my set procedure.

Trust this clarifies any ambiguity".

[9] On the same day (23 October 2017) the second respondent wrote a letter to the parties in which he indicated, in part, that:

- "1. Furthermore to my letter referenced ELEGANTRED/101817/PREL/05 and dated 10/18/2017 I herewith confirm the following in terms of which the Claimant and Respondent agreed to by way of email confirmation received on 20 October 2017 and 23 October 2017 respectively.
2. Subsequent to being afforded reasonable opportunity to make submissions, the Parties have opted to do away with a preliminary meeting and consequently confirms the following:
3. The Parties agree that an arbitrable dispute exists in terms of the matters initially notified by the Claimant.
4. The provisional timetable dated 18/10/2017 is accepted. Should variation(s) ensue as determined by the Arbitrator for whatever reason, the working days as reflected shall, without reducing, be shifted to accommodate such variation(s).

5. A stay of proceedings shall ensue during the period of 09 December 2017 and 14 January 2018 in the event that the arbitration prolongs past 08 December 2017.

...

13. The Rules for the Conduct of Arbitrations, 2013 Edition, published by the association of Arbitrators (Southern Africa) as amended by the Arbitrator shall apply to this arbitration. Initial amendments include:

- a. Article 32 – A failure by any party to object promptly to any non-compliance with these Rules as amended or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such objection.

- b. ...

15. Both parties agree that the Arbitrator shall not be obliged to follow the strict rules of law and may determine any question by reference to considerations of general justice and fairness.

16. Both Parties agree that the Arbitrator may depart from any statutory or common law rules of evidence to the extent that it deems reasonable provided that the rules of natural justice shall be observed.

....

19. The arbitrator shall take into account such circumstances as it considers relevant, including the extent to which each Party has conducted the arbitration in an expeditious and cost effective manner”.

[10] The second respondent further detailed the time frames for the submission of the statement of claim (24 October 2017); the statement of defence (2 November 2017) and the claimant’s reply, if any, (9 November 2017).

[11] On 3 November 2017, the applicant’s attorneys wrote to the second respondent that on the basis of advice from counsel, who was briefed for the cancelled preliminary

meeting of 27 October 2017, they were requesting that a preliminary meeting be held in order to discuss and agree on the time-table and procedure. In response and in a letter addressed to both parties (dated 5 November 2017), the second respondent reminded the parties that they had made a choice against holding a preliminary meeting. Further, the second respondent stated that the applicant had failed to submit its statement of defence and that in terms of the rules², he was empowered to continue to consider an award on the basis of only the documents before him. Further, the second respondent informed the parties that the applicant had not shown sufficient cause for a preliminary meeting to be held. In a further communique to the parties on 9 November the second respondent reiterated the contents of his letter of 5 November 2017 and that he will continue with the arbitration proceedings in the absence of the applicant's statement of defence. On the same day Boshoff Attorneys withdrew as the applicant's attorneys.

[12] On 10 November 2017, Booyse Attorneys informed the respondents that it had been appointed as the applicant's new attorneys of record and requested an extension

² Specific reference was made to article 30(1) of the Rules.

in that they were still awaiting the complete record of the proceedings thus far from the applicant.

[13] After being granted an extension and on 12 November 2017, Booyse attorneys again confirmed that it was still not in possession of the required documents and was therefore not in a position to advise the applicant. Further, Booyse Attorneys noted that it was aware that a preliminary meeting had not as yet being held and that it was its understanding that the arbitration was not a 'documents only' process.

[14] After receiving a complaint from the first respondent about the applicant's alleged delaying tactics, on 14 November 2017 the second respondent wrote a letter to the parties' attorneys in which he reiterated that it was his understanding that all preliminary matters were dealt with in terms of his letter dated 23 October 2017. He further reminded the parties that in terms of the rules of the arbitration he was entitled to make an award in the absence of any submission from the applicant as it had been given ample opportunity to provide its submission(s). Furthermore, the second respondent informed the parties that he would consider a preliminary meeting only if this was agreed to by the parties. On 16 November 2017 the mandate of Booyse

Attorneys was terminated and JH Boshoff Attorneys were reinstated as applicant's attorneys.

[15] On 17 November 2017 Boshoff Attorneys wrote an email to the second respondent stating the following:

15.1 that it appears that the second respondent had a mistaken understanding that the applicant had agreed to the procedure suggested by the second respondent;

15.2 that a request was made on 3 November 2017 for the holding of a preliminary meeting where the procedure and the time-table for the arbitration would be agreed upon, which request was rejected by the second respondent;

15.3 that the applicant was of the view that it was being coerced into accepting the procedure suggested by the second respondent and as a result was of the opinion that from the conduct of the second respondent, it perceived that he will be biased in favour of the first respondent and that a fair and impartial arbitration would not be conducted; and

15.4 that in view of their concern pertaining to the second respondent's perceived bias, they requested the second respondent to excuse himself from the arbitration proceedings.

[16] On 18 November 2017 second respondent dismissed the applicant's concerns with regard to the procedure and his perceived bias. However the second respondent did offer the parties a teleconferencing on specific preliminary points raised.

[17] On 1 December 2017 and after the applicant's statement of defence³ and the first respondent's replication, and after the applicant had declined an invitation from the second respondent to replicate, wrote a letter to the second respondent that in light of the documents already submitted, a dispute of fact existed which could be resolved only through oral evidence. The request for oral evidence was rejected and on confirming his view that all preliminary issues had be settled by agreement, he closed the proceedings and informed the parties that he was considering the papers before him and would prepare an award soon.

³ Applicant's statement of defence was submitted on 17 November 2017.

[18] The second respondent issued his award on 18 December, 2017.

[19] It is the applicant's contention that the second respondent misconducted himself in that he did not conduct himself in an impartial manner with regard to the arbitration. In particular, the applicant's complaint is that the second respondent was unfair in that he did not give the parties an equal opportunity to present their case. It is the applicant's contention that the main dispute between the parties related to the validity of certain payment certificates submitted by the first respondent which was accepted and signed off by the project manager. It was submitted on behalf of the applicant that at no stage did the applicant agree to a document only arbitration. In this regard Counsel for the applicant argued that 4th respondents were aware by 17 November 2017 that the applicant informed them of its position with regard to the process followed in the arbitration. Further that on 01 December 2017 the second respondent was informed that it was the applicant's view that a dispute of fact existed and that a 'documents only' approach was not appropriate.

[20] Furthermore that the applicant had suggested that there was a need for oral evidence to be led in light of the evidence submitted to the second respondent from

which issues in dispute arose. It is the applicant's contention that it was not provided with the opportunity to present its case or to deal with the factual disputes existing. It is further submitted that the evidence which form the basis for the award was obtained in an improper manner. Further, it is the applicant's contention that it was under the impression that a preliminary meeting which had been scheduled and later cancelled would be re-scheduled where issues pertaining to the time schedules, further documents as well as the procedure to be followed in the conduct of the arbitration would be discussed. It is the applicant's contention that the haste in which the arbitrator conducted the arbitration prevented it to deal with a bundle of documents as listed in annexure "A4" to the founding affidavit. From the founding affidavit it appears that the said documents related to, amongst others, the status of the project manager who authorized certificates which are being disputed. According to the applicant the dispute which exists between the parties cannot be properly dealt with on the basis of a 'documents only' the process. Applicant complains that it was denied the opportunity to call witnesses and to cross-examine. In its founding affidavit, the applicant avers that the award was based on documents it did not consent to.

[21] Whilst conceding that the second respondent had suggested that a preliminary meeting should be held in a letter dated 18 October 2017, it was submitted on behalf of the first respondent that the decision to proceed with the documents only process was as a result of the failure of the applicant to submit the necessary documentation on time. It was furthermore submitted that a preliminary meeting could not be held as the applicant had failed to give a well-motivated and reasonable request for such meeting. Further that even though the second respondent had stated that there was agreement between the parties on a 'documents only' process the applicant did not object to the process adopted by the second respondent and thereby acquiesced thereto. On behalf of the first respondent, it was incorrectly submitted on behalf of that the applicant had for the first time on 03 of November 2017 requested a preliminary meeting to be held. According to the first respondent timetable and the procedure for the arbitration were agreed upon already when the applicant's attorneys requested the preliminary meeting. According to the first respondent timetable and the procedure for the arbitration were agreed upon already when the applicant's attorneys requested the preliminary meeting. According to the first respondent the timetable and the procedure for the arbitration were agreed upon already when the applicant's attorneys requested

the preliminary meeting. However, note is taken of the fact that already on 23 October 2017, the applicant's attorneys had inquired from the second respondent as to when the cancelled preliminary meeting scheduled for 27 October, 2017 would be held. The first respondent disputes the allegation that the applicant was denied the opportunity to fully present its case in that in the letter from the second respondent dated 18 November, 2017, the second respondent had invited the applicant to submit its preliminary issues, together with a proposal as to how the dispute pertaining to the preliminary matters, could be resolved. It is the first respondent's contention that the request for a preliminary meeting was merely a delaying tactic on the part of the applicant. It was submitted on behalf of the first respondent that the applicant failed to timeously make a well-motivated request for a preliminary meeting to be held, hence the conclusion that was drawn that the parties had agreed on a 'documents only' procedure would be adopted. Further Counsel for the first respondent urged this Court to dismiss the application on the basis also that from the applicant founding affidavit it is not clear on which of the three grounds set out in s 33(1) of the Act is the applicant relying on for the review of an award.

[22] Section 33(1) of the Act reads as follows:

"33. Setting aside an 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 make an order setting the award aside."

[23] The applicant seeks the review and setting aside of the award on the ground that the process followed by the arbitrator in the arbitration was inappropriate and as a result the award was also inappropriate.

[24] When parties refer a dispute to arbitration, the arbitrator is confined to the terms of reference agreed upon between the parties.

[25] If an arbitrator makes an error of law in his award, such award does not necessarily amount to a gross irregularity unless the applicant can show that the arbitrator's mistake is so gross and manifest in nature that it imputes moral turpitude

or bad faith on the part of the arbitrator. Mistakes in law or fact are not per se bases for setting aside an arbitration award. In *Total Support Management (Pty) and another v Diversified Health Systems (SA) (Pty) Ltd and Another*⁴.

[26] In *Telcordia Technologies Inc v Telkom SA Ltd*⁵ the court stated that:

"[72] It is useful to begin the oft quoted statement from *Ellis v Morgar*⁶ where Mason J laid down the basic principle in these terms:

'But an irregularity in proceedings does not mean an incorrect judgment, it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined'.

[73] The *Goldfields Investment* qualification to this general principle dealt with two situations. The one is where the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry the hearing cannot in principle be fair because the body fails to perform its mandate. *Goldfields Investment* provides a good example. According to the applicable Rating Ordinance any aggrieved person was entitled to appeal to the magistrates' court against the value put on property for rating purposes by the local authority. The appeal was not an ordinary appeal but involved, in terms of the Ordinance, a rehearing with evidence. The magistrate refused to conduct a rehearing and limited the inquiry to a determination of the question whether the valuation had been 'manifestly untenable'. This meant that the appellant did not have an appeal hearing (to which he was entitled) at all because the magistrate had failed to consider the issue prescribed by statute. The magistrate had asked himself the wrong question, that is, a question other than that which the Act

⁴ 2002 (4) SA 661 (SCA) at 670H-672H).

⁵ 2007 (3) SA 266 (SCA).

⁶ 1909 TS 576 at 581.

directed him to ask. In this sense the hearing was unfair. Against that setting the words of Schreiner J should be understood.

'The law, as stated in *Ellis v Morgan* (*supra*) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect".

[27] The question to be determined is whether the second respondent had denied the applicant the opportunity of a preliminary meeting and for oral evidence to be led.

[28] From the chronology as set out above, it is clear that the applicant's attorneys had raised the issue of preliminary meeting on 23 October 2017. It appears to be common cause that such a meeting had been scheduled for 27 October, 2017. In all the correspondence to the parties by the second respondent, there is nowhere where the second respondent categorically addresses the issue of the cancelled preliminary meeting. It appears that the second respondent based his conclusion that there was agreement on the timetable and the procedure to be followed on the fact that the applicant's attorneys had forwarded to him a power of attorney, signed tariff fees and proof of payment of a deposit. However, in the same letter to which the above-mentioned documents were attached, the applicant's attorneys did the reverse the issue of the preliminary meeting. It cannot therefore be said that the attachment of the said documents trumped the issue of the about the preliminary meeting.

[29] The applicant is entitled to a fair hearing and to be given the opportunity to present its case. It was incumbent on the second respondent, on receiving the query about the cancelled meeting, to pursue the issue so that there is no misunderstanding about the procedure to be followed. To brush off the concerns of the applicant amounts to an irregularity in the conduct of the proceedings in that the second respondent failed to address the applicant's concerns with regard to the holding of a preliminary meeting. There is no explanation as to why it became unnecessary to hold a scheduled preliminary meeting which appears to have been agreed upon.

[30] On the issue of the existence of a dispute of fact, it appears that this issue came up after the parties had submitted their statements of claim and difference the defence. At this stage, it was again incumbent on the second respondent to interrogate and deal with the claim of the existence of a dispute of fact before proceeding to deal with the merits of the arbitration. Nothing turns on the fact that the applicant refused to respond to the first respondent's application. By that stage, the perception on the part of the applicant was that the second respondent was not impartial.

[31] I am of the view that, despite the second respondent professing that the arbitration will be conducted taking into account the rules of natural justice, that by failing to address the issue of a preliminary meeting, particularly as one had already been scheduled, and was cancelled and the refusal to consider the complaint that there is a dispute of fact, merely on the basis that there was agreement that the arbitration was a documents only process. The prejudice to the applicant in the failure by the

second respondent to consider holding a preliminary meeting vitiated the fairness of the arbitration proceedings.

[32] In the result, the following order is made:

1. That the arbitration award published by the second respondent on 18 December 2017 is set aside.
2. The first respondent to pay the costs of this application on a party and party scale.



NP MNGQIBISA-THUSI

Judge of the Gauteng High Court Division

For the applicant, Adv L K Van der Merwe (instructed by Attie Schlechter Inc) and for the first respondent, Adv E Van As (instructed by Hills Inc)