0

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 26933/2014

Date: 1 July 2015

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

1/7/2015 ....
DATE SIGNATURE

In the matter between:

MOOIKLOOF ESTATES (PTY) LTD

APPLICANT

And

O J VAN DER WALT

1ST RESPONDENT

MITHRO CONSTRUCTION MANAGEMENT CC

2ND RESPONDENT

JUDGMENT

PRETORIUS J,

[1] This is an application requesting the court to grant the following relief:

> *"1. Dat die eerste respondent se finale toekenning in die arbitrasie tussen die applikant en die tweede respondent, gedateer 28 Februarie 2014, ingevolge die bepaling van artikel 33(1)(b) van die Wet op Arbitrasie, 42 van 1965, tersyde gestel word omdat die eerste respondent hom aan 'n growwe onreëlmatigheid skuldig gemaak en sy bevoegdhede oorskry het.*
>
> *2. Dat die tweede respondent die koste van die aansoek betaal."*

The purpose of the application was formulated as follows:

> *"4. Die doel van die aansoek is om die arbitrasietoekenning van die eerste respondent, wat hy op 28 Februarie 2014 gemaak het ("die toekenning"), ingevolge die bepalings van artikel 33(1)(b) van die Wet op Arbitrasie tersyde te stel.* ***Die gronde vir tersydestelling is dat die eerste respondent sy bevoegdhede in die arbitrasieverrigtinge oorskry het****."* (Court's emphasis)

[2] The reasons, according to the applicant, why the applicant avers that the arbitrator grossly exceeded his mandate is that he, without hearing evidence, decided that the second respondent could ignore the escalation amount that the second respondent's quantity surveyor had agreed upon as this was done in spite of Mr Godfrey, for the second respondent, reiterating during evidence, that the request not

to render the final account was due to the dispute regarding the escalation of time limits and the fines payable. The second reason was that the arbitrator had found that although none of the payment certificates had provided for escalations, Mr Godfrey, on behalf of the second respondent, never dealt with it in a letter, e-mail or at any meeting, that the second respondent was entitled to escalation. The third reason is that although the applicant succeeded with its counter-claim to the greatest extent, the applicant was ordered to pay the costs of the application.

[3] The first meeting with the arbitrator took place on 26 July 2012 and it was decided that the standard procedure rules would be applicable in the present matter. Rule 14 provides, inter alia, that the statement of case has to contain the averments of the claim, the facts and legal conclusions on which the claim is based.

The relief the application seeks:

[4] The pleadings in the arbitration consisted of the second respondent's statement of case, the applicant's (defendant's) answer, the applicant's counterclaim and the second respondent's plea on the applicant's counterclaim and the applicant's reply.

[5] The arbitrator's final award on 28 February 2014 was:

> *"My award is that defendant pays claimant R3 760 670.31*
>
> *Refer to attached Annexures A, B and C"*

[6] Section 33(1)(b) of the Arbitration Act, 42 of 1965 provides:

> *"(1) Where-*
>
> *(a) ...*

> *(b)* ***an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers****; or*
>
> *(c) ...*
>
> *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."* (Court's emphasis)

[7] This forms the basis of the attack on the award of the first respondent. The dispute between the parties was a building dispute between the second respondent (as contractor) and the applicant (as employer). The arbitration proceedings were instituted pursuant to the provisions of clause 40.1 of the agreement.

[8] A counter-application was launched requesting the following relief:

> *"1. That the applicant's application be dismissed with costs;*
>
> *2. That the award of the first respondent dated 25 February 2014 be made an order of Court in terms of section 31 of the Arbitration Act, Act 42 of 1965;*
>
> *3. That the applicant be ordered to pay the costs of the counter-application."*

<u>Background:</u>

[9] The applicant, as employer, engaged the services of the second respondent, as contractor, to build six office blocks adjacent to the Atterbury Road entrance of the Mooikloof Residential Estate. It was agreed in the agreement that possession of the site was to be given to the contractor on 2 April 2007 and the date of completion would be:

blocks 5 and 6 – 30 October 2007; blocks 3 and 4 – 30 November 2007; blocks 1 and 2 – 30 January 2008. The second respondent took possession of the site on 28 May 2007 and actual practical completion was certified as follows:

"Block 6 – 2 July 2009;

Block 5 – 2 July 2009;

Block 4 – 7 July 2009;

Block 3 – 14 July 2009;

Block 2 – 31 August 2009;

Block 1 – 28 July 2009"

[10] The practical completion dates were extended as follows by the principal agent for the applicant:

"Block 6 – 13 September 2008;

Block 5 – 10 October 2008

Block 4 – 8 October 2008;

Block 3 – 6 November 2008;

Block 2 – 27 November 2008;

Block 1 – 23 November 2008"

This was conveyed to the second respondent in correspondence dated 20 October 2009. In the pleadings at the arbitration the second respondent pleaded that he was entitled to an extension of time until 29 November 2009 for practical completion.

[11] The dispute regarding the final account was referred to arbitration. According to the second respondent these disputes were raised in the documents and were, *inter alia*:

"*8.3 Whether the second respondent was entitled to extensions of time and if so to what extent;*

8.4 Whether the applicant was entitled to levy penalties against the second respondent for late completion, and if so, at what rate and to what extent. Relevant to this dispute was the second respondent's contention that the applicant had waived its right to claim penalties, alternatively, that the penalties could not be levied arbitrio boni viri, alternatively that such penalties contravened the provisions of the Conventional Penalties Act, Act 15 of 1992"

[12] The principal agent in the letter of 20 October 2009 set out the dates which had been used to determine and calculate penalties, totalling R4 809 000.00. On 10 September 2010 the principal agent issued certificate no. 20 as a final payment certificate where it was stated that R4 809 000.00 was levied as penalties, which resulted in a negative value of R1 812 140.24. The correctness of this certificate was disputed by the second respondent, which ultimately led to the arbitration.

[13] Clause 34.1 of the Principal Building Agreement provided:

"*34.1 The contractor shall cooperate with and assist the principal agent in the preparation of the final account by timeously supplying all relevant documents on request. The principal agent shall issue the final account to the contractor within:*

34.1.1 ninety (90) working days of the date of practical completion"

[14] The final account was not rendered as a dispute ensued between the parties regarding the final account, which was referred to arbitration before the first respondent.

[15] According to the second respondent to determine the final account the value of the work to practical completion had to be determined as well as whether the contract value had escalated and if so to what extent. The arbitrator had to decide whether the second respondent was entitled to extend the time in which the project had to be practically completed, and if that was the case, to which extent the value thereof would be considered when delivering the final account. A further issue which had to be decided is whether penalties should be levied for late completion and what the amount of such penalties should be and whether interest were payable on late payments and or retention money withheld by the applicant and what, if so, the amount in each respective instance should be. A last issue was who would be responsible for payment of the arbitrator, according to the second respondent.

[16] In the settlement of claim the second respondent set out that the contract sum was R47 401 607.53. The JBCC 2000 Principal Building Agreement provided that SV Architects were appointed as the principal agent, with Taljaard, Meyer and Storm as the quantity surveyors and agents to the defendant. The site was to be delivered to the second respondent on 2 April 2007. The works were to be

completed in sections, with the first four to be completed on 30 October 2007, 30 November 2007, 30 January 2008 and 28 February 2008, respectively. Penalties for late completion would be R3 000 per day per block. The principal agent would issue monthly payment certificates by the 25th of each month. The relevant certificates from certificate no. 1 to certificate no. 19 were issued. All certificates up to certificate no. 18 were paid by the applicant.

[17] According to the statement of claim no draft or final account was issued, apart from a final payment certificate dated 10 September 2010 which purported to be a final payment certificate. A recovery statement was included in terms of which R4 809 000.00 were levied.

[18] The second respondent objected to the final payment certificate and declared a dispute, hence the arbitration. The second respondent contended that it was entitled to payment of the amount of R10 433 079.52.

[19] According to the second respondent the work alone to date of practical completion amounted to R25 953 366.71 (VAT excluded). The second respondent stated that according to clause 31.5.3 read with clauses 31.4.1 and 31.4.2 and clause 42.4.6 of the agreement, the principal agent was obliged to adjust the value of work done and materials supplied according to the Consumer Price Adjustment Provisions ("CPAC") with base date March 2007. The arbitrator found in favour of the second respondent and awarded an amount of R2 369 680.74, excluding VAT, but this is not the reason for the application by the applicant and I will not deal with it.

[20] The main attack on the arbitrator's award is his finding on the revision of the dates for practical completion. Clause 29.1 of the JBCC Practical Building Agreement provides *inter alia*:

> *"29.1 The circumstances for which the contractor is entitled to a revision of the date for practical completion and for which revision the principal agent shall not adjust the contract value in terms of 32.12 are delays to practical completion caused by:*
>
> *29.1.1 Inclement weather.*
>
> *29.1.2 …*
>
> *29.1.3 Making good physical loss and repairing damage to the works in terms of 8.0 where the contractor is at risk*
>
> *29.1.4…*
>
> *29.1.5…*
>
> *29.1.6 Default by a nominated subcontractor where the contractor has taken all practical steps to avoid or reduce such delay"*

And 29.2 provides:

> *"29.2 The circumstances for which the contractor is entitled to a revision of the date for practical completion and for which revision the principal agent shall adjust the contract value in terms of 32.12 are delays to practical completion caused by:*
>
> *29.2.1 Failure to give possession of the site to the contractor in*

terms of 15.2.1

29.2.2 Making good physical loss and repairing damage to the works in terms of 8.0 where the contractor is not at risk

29.2.3 Contract instructions not occasioned by default by the contractor"

[21] These clauses provided for the circumstances for which a revision would be granted for which the employer carried the financial risk of the extension. It was common cause during the arbitration that the principal agent had on 10 October 2009 granted the following revisions for the date of practical completion:

"Block 6 – 13 September 2008

Block 5 – 10 October 2008

Block 4 – 8 October 2008

Block 3 – 6 November 2008

Block 2 – 27 November 2008

Block 1 – 23 November 2008"

[22] The second respondent, during the arbitration contended that these delays were overshadowed by four delays:

"7.5.1 The late commencement delay

7.5.2 The piling delay

7.5.3 The sewerage delay – up to 23 November 2009

7.5.4 The electrical delay – up to 18 September 2009"

[23] The first two delays became a non-issue during the arbitration as it turned out that the late commencement was already factored by the

principal agent into the fifth extension, as well as the rain delays, on 20 October 2009.

[24] The remaining delays as set out by the second respondent was the sewerage delay and the electrical delay. The arbitrator found that the second respondent was not entitled to claim for such revisions of the date of practical completion. The result was that the arbitrator accepted the correctness of the lesser extensions of time granted by the principal agent on 20 October 2009.

[25] The second respondent claimed:

> *"1. Payment of R16 279 990.89*
>
> *2. Interest thereon, at the rate of 12% per annum, compounded monthly, from 1 July 2012 to date of payment;*
>
> *3. Costs of suit"*

[26] At all times the applicant's defence was based on the four grounds of delay set out by the second respondent. In the counter application it was set out that the dates of practical completion corresponded with the dates that the second respondent had claimed in the letter dated 20 September 2007 which the principal agent acceded to.

[27] According to the second respondent the issues set out in the pleadings were that the second respondent had always been entitled to the extensions of time as set out in the letter of 20 October 2009 by the architect, namely Buildings 5 and 6 – 10 October 2008; Buildings 3 and 4 – 6 November 2008 and Buildings 1 and 2 – 27 November 2008, as well as the further extensions Buildings 1 to 6 until 23

November 2009 and 18 September 2009 as set out in the statement of case.

[28] The second respondent, in the statement of claim, pleaded:

"A dispute arose between the parties regarding the final account under the following circumstances:

9.1 Practical completion was achieved as follows:

9.1.1 Block 1 – 28 July 2009

9.1.2 Block 2 – 31 August 2009

9.1.3 Block 3 – 14 July 2009

9.1.4 Block 4 – 7 July 2009

9.1.5 Block 5 – 2 July 2009

9.1.6 Block 6 – 2 July 2009

Copies of the certificates of practical completion are attached hereto as annexures C1 to C6.

9.2 In terms of clause 34.1.1 the principal agent was obliged to issue the final account to the claimant within ninety days of the date of practical completion.

*9.3 The principal agent did not comply with the aforesaid obligation in that he did not issue any final or draft final account to the claimant, **but on 10 September 2010 purported to issue a final payment certificate to the defendant together with a recovery statement in terms of which penalties of R4 809 000.00 were levied**. A copy of the aforesaid purported final payment certificate and recovery statement are attached hereto as* *annexures D1 and D2 respectively.*

9.4 The claimant objected to the purported final payment certificate and declared a dispute which forms the basis of these proceedings.

9.5 The claimant contends that it is entitled to the amount of R10 433 079.52 made up as per annexure E hereto.

9.6 The various amounts making up the aforesaid final account will be motivated by the claimant in more detail below." (Court's emphasis)

[29] The arbitration was thus based on the fact that the arbitrator had to determine the correct amount payable in terms of the final account. According to the second respondent that is exactly what the arbitrator did in deciding the matter.

[30] The applicant contends that it had not had a fair and just trial; as the second respondent relied on four grounds of delay and extension of time and was only entitled to be heard on the four grounds and not on any other basis.

[31] The reason for the review is for the court to decide whether the arbitrator's award should be reviewed and set aside because of gross irregularity in the conduct of the proceedings and whether the arbitrator had exceeded his powers in relation to his award relating to the extension of time claims.

[32] The arbitrator found that the second respondent was entitled to certain extensions of time, granted by the principal agent of the applicant, in terms of a letter dated 20 October 2009. The second

respondent's claim of extensions of time beyond those granted by the principal agent was dismissed. It was conceded by the applicant that the second respondent was entitled to the extensions of time that related to the late start of the projects and the issue of piling. The arbitrator granted fourteen days for the electricity delay and dismissed the sewerage delay.

[33] The contents of the letter of 20 October 2009 referred to the final payment certificate no. 20, which resulted in the dispute being declared. It is however clear that it was not contested by the applicant that the extensions of time granted by the principal agent were incorrect.

[34] It was common cause during the arbitration that the applicant was bound by the determinations of its principal agent as conceded by all witnesses who testified on behalf of the applicant and conceded by applicant's counsel.

[35] The arbiter granted the full extensions of time for the claim relating to piling and fourteen days rain delay. The arbitrator found against the second respondent in the claims for further extensions of time for the electricity delay and the sewer delay.

[36] The arbitrator in his award was mindful that he had to deal with the issues in the pleadings by stating:

> *"What must be revised dates of practical completion be: Those granted by the PA to the defendant as reflected in the calculation of penalties for the recovery statement in the final payment certificate, or those claimed by the claimant or those in*

the defendant's counter claim, or some other dates as determined by the arbitrator, ***but bearing in mind that the only factors for extension of time to be considered in this arbitration are those submitted by the parties to arbitration in the pleadings****."* (Court's emphasis)

[37] It is clear that the arbitrator knew that he was bound to only make findings pertaining to the issues as set out in the pleadings. At no stage did the applicant indicate that there was a dispute between the applicant and its principal agent as to the extensions of time granted by the principal agent due to the principal agent not being authorised to extend the times of completion. If such a dispute existed, it had no impact on the arbitration proceedings as it was never raised as an issue. There was no dispute between the principal agent and the applicant referred to arbitration.

[38] The second respondent concedes, correctly, that the arbitrator incorrectly held that the applicant was entitled to levy penalties for late completion in the amount of R3 000 per building, but his mistake does not render the decision reviewable.

[39] During much of the arbitration evidence and argument centred around the entitlement by the applicant to levy penalties. The arbitrator found against the second respondent and accepted that the amount of penalties levied should be R4 809 000.00 as included in the final payment certificate by the principal agent. This amount was reduced by R720 000.00. The arbitrator dealt with the issue whether the penalties claimed were out of proportion to the actual loss

suffered by the defendant.

[40] Mr Malan, for the applicant, testified that the loss was R80 000 per block per month, while the penalties amounted to R93 000.00 per block per month. The arbitrator dealt with the issues of penalties at length in his judgment and set out in para 9.5:

> *"The industry will also expect from an arbitrator to interpret and decide on issues* ***in terms of the agreement in a fair and equitable manner, especially where there are different interpretations of the agreement****. A fair and equitable interpretation of the working of the agreement is especially necessary where the interpretation of its terms may result in an unfair treatment of one of the parties.* ***It is against the background of this fairness to both parties that the legal principles and terms of the agreement must be judged****."* (Court's emphasis)

[41] He found that the applicant had acted unreasonably in the exercise of his discretion whether or not to levy penalties. He comes to the conclusion:

> ***"I am consequently convinced that the claimant is financially in a worse position than what he would have been in, had the PA addressed the issue of penalties from approximately 31 March 2008 (7 April for the certificate) onwards. This must be set right so that he only carries the responsibility of his poor and late performance, but nothing in excess thereto****. The employer on the other hand must be*

> *entitled to the contractual penalty as per the PBA for the late completion by the contractor, in so far he and his agents acted in accordance with the contract* ***and what the building industry would regard as fair in this regard****."* (Court's emphasis)

[42] It is clear that he had considered the issue carefully when reducing the penalties with R720 000.00 and he motivated his reason for doing so adequately.

[43] In **Telcordia Technologies Inc v Telkom SA Ltd 2007(3) SA 266 (SCA)** Harms JA held at para 72:

> *"It is useful to begin with the oft quoted statement from Ellis v Morgan 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****.'"* (Court's emphasis)

[44] The court was referred to the dictum in **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009(4) SA 529 CC** where the correct approach was set out to the grounds of review set out in section 33 of the **Arbitration Act, 42 of 1965**.

[45] O'Regan held in para 221:

> *"At Roman-Dutch law, it was always accepted that a*

submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly or, as it is sometimes described, according to law and justice. The recognition of such an implied condition fits snugly with modern constitutional values. In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair. Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by s 33 of the Constitution; on courts by ss 34 and 35 of the Constitution; in respect of labour practices by s 23 of the Constitution; and in relation to discrimination by s 9 of the Constitution. ***The arbitration agreement should thus be interpreted, unless its terms expressly suggest otherwise, on the basis that the parties intended the arbitration proceedings to be conducted fairly. Indeed, it may well be that an arbitration agreement that provides expressly for a procedure that is unfair will be contra bonos mores****."* (Court's emphasis)

And in para 235 courts were warned:

"The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award:

misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. ***In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration****."* (Court's emphasis)

And finally in para 236:

"The final question that arises is what the approach of a court should be to the question of fairness. ***First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts****. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes.* ***If courts are too quick to find fault with the manner in which an arbitration has been***

***conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated.*"** (Court's emphasis)

[46] It is thus clear that the arbitrator conducted the arbitration in a fair and reasonable manner and that he gave well-considered reasons for all his findings. He did not act in an unfair manner.

[47] I have considered all the arguments, read all the pleadings and the relevant record of proceedings in the arbitration, as well as the arbitrator's findings and final award. The arbitrator dealt in great detail with all the facts and the application of the law to the facts. He took great care to motivate his findings, both on the facts and the law. He had considered all the dates before coming to a conclusion on the revision of the dates for practical completion, which he had motivated in a reasoned manner dealing with both the facts and the law.

[48] I cannot find that the arbitrator had acted in an unfair manner towards any of the parties and that there was gross irregularity in the conduct of the proceedings nor that the award has been improperly obtained. There is no evidence that the arbitrator had exceeded his authority. The court has to be careful not to undermine the purpose of arbitration and has to construe the grounds set out in section 33(1) *"reasonably strictly"* as found in the Lufuno case (*supra*).

[49] In these circumstances and due to my findings above I make the following order:

1. The applicant's application is dismissed with costs;

2. That the award of the first respondent dated 25 February 2014 be made an order of Court in terms of section 31 of the Arbitration Act, Act 42 of 1965;

3. That the applicant be ordered to pay the costs of the counter-application.

Judge C Pretorius

Case number	: 26933/2014
Appeal heard on	: 2 June 2015
For the Applicant	: Adv. GC Pretorius SC
Instructed by	: Hendrik Malan Prokureurs
For the Second Respondent	: Adv. P Ellis SC
Instructed by	: Weavind & Weavind Attorneys
Date of Judgment	: 1 July 2015