IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

REPORTABLE

CASE NO: 8963/2011

In the matter between:

GLENN ARTHUR HESSE N.O	**First Applicant**
GUY MORTON SHAW SMITH N.O	**Second Applicant**
SYBRAND JOHANNES STRUWIG N.O	**Third Applicant**

and

HLANGANISANI CONSTRUCTION CC	**First Respondent**
T.W BRYANT	**Second Respondent**

JUDGMENT

Delivered on: 20 June 2013

POYO-DLWATI, AJ

[1] By way of Notice of Motion, the Applicants launched these review proceedings on 19 September 2011 and sought an order in the following terms:-

(a) That the Second Respondent be called upon to dispatch to the Registrar of this Court, within 15 days of the receipt of the notice of motion, the completerecord in the arbitration proceedings between the Applicants and the FirstRespondent in which he acted as arbitrator and to provide full and comprehensive reasons for each item and aspect of his arbitration award dated 8 August 2011.

(b) That enforcement of the arbitration award bestayed pending finalization of theapplication.

(c) That a Rule Nisi be issued calling upon the Respondents to show cause why the Second Respondent's arbitration award dated 8 August 2011 should not be reviewed and set aside.

(d) That the First Respondent pay the costs of the application.

[2] On 25th June 2007 the Applicants, representing the Ndlovu Development Trust and the First Respondent (the parties) concluded a JBCC Series 2000 Edition 4.1 Code 2101 March 2005 agreement.The First Respondent, for avaluable consideration, agreed to construct a new residential development at Richards Bay, KwaZulu-Natal. The agreement, in clause 40 thereto, provided for resolution of disputes between the parties by arbitration. A dispute arose between the parties and the President of the South African Institute of Architects appointed the Second Respondent to arbitrate over the dispute.

[3] At a preliminary meeting held on 16 February 2010 the parties agreed that:

(a) The Arbitration would be conducted in terms of the Rules of Conduct of Arbitration as issued by the Association of Arbitrators (Southern Africa).

(b) The Arbitrator would assume an active and inquisitorial role and would usehis own skills in order to be fully appraised of the dispute.

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(c) The proceedings would be recorded by Sneller Recordings and copies of the transcript would be made available to the parties.

(d) The parties agreed that the decision of the Second Respondent would be final and binding between them.

[4] Statements of the claim and the defence were exchanged between the parties. At another preliminary meeting held on 15th June 2010 it was agreed

that a severable issue would be submitted to the Second Respondent for determination.

The issue was whether a certain email of 28th April 2009 addressed by the Applicant's principal agent, Mr Charles Taylor (Taylor), to the FirstRespondent was binding on the Applicants in that it contained two scenariosfor the determination of the date for practical completion, the extension of time permitted and the calculation of the recommended penalty. On 3 February 2011 the Second Respondent determined that the said email was not binding on the Applicants.

The Second Respondent further directed the First Respondent to submit its claim for extension of time and revision of the date for practical completion to enable the Second Respondent to resolve the matter. He further directed that the question of the actual date of practical completion and the amount to be recommended for the penalty to be levied would be advised to the Applicants for his decision on the amount of penalties to be levied.

[5] At a further preliminary meeting held on 22 February 2011, it was agreed that Taylor would send all his documentation regarding the extension oftime claim to Mr Johan Richards (Richards) (he being the representative of the First Respondent) who would also prepare the claim for the First Respondent and after they had discussed the details they would submit it to the Second Respondent for his decision.

The Second Respondent also requested Taylorto set out reasons for his decisionregarding the date of practical completion to Richards and tohim as this date was important to the question of the penalty amount to be levied. The three of them would meet if necessary to try and iron out these issues. It was also agreed that the Second Respondent would determine the claim for latent defects as a separate issue outside the arbitration dispute.

[6] The Second Respondent convened a meeting on 7 July 2011 at Richards Bay which was attended by Taylor, Richards and Mr David Kunneke

(Kunneke),(the member of the First Respondent) to deal with the issues raised in paragraph 4 above. After this meeting in Richards Bay, the Second Respondent believed that matters were thoroughly debated and consensus was achieved in all matters. He delivered his award on 8 August 2011 with a costs order against the Applicants. This application was then launched.

[7] Subsequent to the launching of this application the record was delivered to the Registrar of this Court. The Second Respondent in his affidavit of 17 November 2011 regarded himself as being *functus officio* and contended that where necessary reasons had been furnished in his award and there was no need for further reasons. Affidavits were exchanged between parties and the matter was heard on 18th March 2013. The Second Respondent has since passed away but had indicated that he would abide by the decision of thisCourt.

[8] At issue to be determined by me is whether the arbitration award should be set aside on the basis of gross irregularity in the conduct of the proceedings on the part of the Second Respondent, i.e:-

(a) Whether the Second Respondent exceeded his mandate in that he decided issues which fell outside the limited mandate agreed upon between the parties on 22 February 2011 especially the First Respondent's claim for preliminaries and generals and default interest (first ground).

(b) Whether Kunneke, on behalf of the First Respondent, participated in the 'thorough' debate in the meeting of 7 July 2011and whether such participation in that meeting tainted the proceedings and whether such participation prejudiced the Applicants in that they were not afforded a proper opportunity to present their case regarding the preliminaries and generals and default interest (second ground).

(c) Whether the Second Respondent failed to exercise his judicial discretion uponaconsideration of all the relevant facts and in accordance with recognised principles pertaining, specifically, to the costs incurred in theproceedings during 27 to 29 October 2010 when the separate issue was dealt with and determined in the applicants' favour (third ground).

[9] It is trite in our country that an arbitration award may be set aside 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 his powers; or

c) an award has been improperly attained,See Section 33(1) of the Arbitration Act42of 1965.Levinsohn J's view in ***Steeledale Cladding (Pty) Ltd v Parsons NO and another*** **2000 JOL 7608 (D)**was that the foregoing grounds codify the law both statutory and in decided cases as it existed prior to the coming into operation of the statute. In ***Dickenson & Brown v Fisher's Executors*** **1914 AD 166 at 174** Solomon JA said the following:

> *'Now it is not, I think, open to question that as a general rule where parties have referred their disputes to an arbitrator, his award is final and conclusive and no appeal lies from his decision'.*

Against thisbackground, I now deal with the first ground of review.

[10] It is the Applicant's case that the Second Respondent had no mandate to deal with the claim for preliminaries and generals and default interest.If the SecondRespondent dealt with these then the Applicant, as was argued should havebeen allowed to present its case fairly to the Respondent. The Applicantargued that their absence in the Richards Bay meeting on 7 July

2011 was grossly irregular and unfair as they were not able to present their case with regards to preliminaries and generals and default interest. In fact the contention of the Applicants is that the preliminaries and generals and defaultinterest were not part of the mandate in the first place.

On the other hand it was argued on behalf of the First Respondent that the preliminaries and generals and default interest were a direct consequence once the date for practical completion and the extension of time claim had been dealt with. The argument went further and suggested that it therefore had to be inferred that thepreliminaries and generals and default interest would be the resultant costs once the extension of time and practical completion claim had been dealt with. However, according to annexure G H 5 of the founding papers, being the minutes of the meeting of 3 February 2011, the Second Respondent determined that

> *'theclaimant (being the First Respondent) is required to submit his claim for extension of time and revision of thedatefor practical completion to me and to the Defendant (being the Applicants) so that I can resolve the matter. The question of the actual date of practical completion and the amount to be recommended for the penalty (my emphasis) to be levied will be advised to the Employer for his decision on the amount of penaltiesto be levied'(see paragraph numbered 2 of page 10).*

No mention is made in that paragraph of a claim for preliminaries and generals and default interest.The determination above refers to penalties and not to interest.

[11] Interest is defined as the bank rate that is applicable from time to time to registered banks when borrowing money from the Central or Reserve Bank of the country named in the schedule (see JBCC agreement). Penalty on the other hand is defined as penalty as stated in the schedule. The schedule prescribes the penalty as R8000.00 per day. In my view penalty would have been levied once after practical completion and extension of time has been dealt with as this has an effect on when thework was to be completed and the

defaulting party would be subject to penalties. Interest on the other hand would be levied where a particular amount was payable but for one or other reason was not paid on the due date. Perhaps this would be payable on the preliminaries and generals.

In my view,theSecondRespondents' determination dealt with penalties and not interest. It was suggested on behalf of the First Respondent that the issue of preliminaries and generals had always been a contentiousissue between the parties and had to be dealt with. Whilst this could have been so it was not part of what was determined by the Second Respondent on 3 February 2011 as being part of his adjudication once he had dealt with the severable issue. It seems to me that it was never agreed upon between the parties that the Second Respondent would adjudicate on that issue.

[12] In ***Total Support Management (Pty) Ltd & another v Diversified Health Systems (SA) (Pty) Ltd & another*** **2002 (4) SA 661 (SCA) at 673H,** the court held that the hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. The Second Respondent had made it clear on 3rd February 2011 what he was going to determine and this was agreed to by the parties and it was definitely not the claim for preliminaries and generals but the claim for date for practical completion and penalties.

In my view there was no agreement by the parties that the claim for preliminaries and general would be determined by the Second Respondent. It was further argued on behalf ofthe First Respondent that clause 29 of the JBCC contract is headed 'Revision of date for practical completion' and clearly regards a 'revision of the date for practical completion as going hand in hand with an adjustment of the contractvalue' (29.2). Clause 29.2 reads:

> '*The circumstances for which the contractor is entitled to a revision of the date for practical completion and for which revisionthe principal agent shall adjust*

the contract value in terms of 32.12 are delays to practical completion caused by……'

It goes on to list the circumstances. I agree the date for practical completion is linked with contract value but not with preliminaries and generals and default interest because these could be catered for elsewhere.

[13] As I have alluded to above, in my view the Second Respondent was not mandated to deal with preliminaries and generals and default interest but to dealwith extension of time and date for practical completion and penalties. (See***Dickenson & Brown v Fisher's Executors*** **supra at 175-176**.)In fact, the impression created on the determination of 3 February 2011 is that the Second Respondent was to deal and resolve the claim for extension of time and revision of the date for practical completion and the amount to be recommended for the penalty to be levied would be advised to the employer for his decision on the amount of penalties to be levied (my emphasis).

On the arbitration record this is clear in that the Second Respondent said, once you determine the date for practical completion, then you can deal with preliminaries and generals. It seems to me that the Second Respondent formed a certain view about Taylor and thereafter decided to deal with all of these issues. In Volume 11 of the arbitration proceedings on page 61, being page 897 of the indexed papers under paragraph 9 the Arbitrator viewed Taylor as lacking knowledgeof the agreement and this, in my view, led him to deal with all issues even those outside his mandate and thereby exceeding his powers as envisaged in terms of Section 33(1)(b) of the Arbitration Act No.42 of 1965. It follows therefore that the Applicant should succeed on this ground.

[14] The second grounddeals with the meeting of 7 July 2011 in Richards Bay. It is commoncause that Taylor, Richards, Kunneke and the Second Respondent were inattendance at the meeting in Richards Bay. It is also common cause that contrary to the procedure laiddown in February 2011, the meeting in Richards Bay was not recorded (see para 3(c) above). There is therefore no

independent minutes of that meeting. The Applicants allege that they (Hesse) were denied permission to attend the meeting by the Second Respondent.We do not know how it came about that Kunneke was at the meeting. Kunneke in his replying affidavit avers that he only participated or dealt with the issue relating to latent defects. However, page 7 and the last line of paragraph 3 thereto of the Second Respondent's award reads as follows *'no decisions were made but sufficient progress was achieved to enable the three of us to meet together at RichardsBay.'*This would have been a meeting between the three prior to the meeting in Richards Bay. Paragraph 4 thereto reads as follows:

'The meeting at Richards Baydealt withthe revision of the date for practical completion on the various sections of the work, as well as the actual date of practical completion. From this information it is a simple matter to calculate the penalties that could be levied against the claimant. The question of latent defects was also dealt with. Matters were thoroughly debated and consensus was achieved in all matters. The decisions are recorded below'.

[15] It is clear from the above that it was always the intention of the parties as it was agreed that Taylor, Richards and the Second Respondent would try and resolve the remaining issues. Kunneke was never supposed to be part of the three mentioned above. If the Second Respondent did not know that Kunneke was going to attend the meeting in Richards Bay, then once he found him at the meeting, he should have checked with the First Applicant if he had any issue with his presence at the meeting.

[16] From what I have quoted above we now know what was discussed at the meeting according to the Second Respondent. Taylor and Kunneke do not agree that there was consensus. This obviously is the undesirable consequences of the failure to record the proceedings or even the Second Respondent making available his notes pertaining to the meeting. I agree with the First Applicant that the conduct and the results of the meeting in Richards Bay taint the entire award. The Applicants were denied the same opportunity that was afforded to the First Respondent. In my view, whether Taylor objected or not is of no moment.The fact is that they were not equally

represented so as to be able to deal with the issues that were dealt with at the meeting.

In**Benjamin v South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C) at 971** the learned Judge said the following:

> '*Where misconduct of the arbitration proceedings is the ground for the setting aside of an award under the provincial legislation the element of good faith was replaced by an objective test to ascertain whether or not the conduct of the proceedings was such as to be likely to amount to a miscarriage of justice. Misconduct in relation to the conduct of proceedings as a ground for setting aside an award includes a bona fide error in the procedure adopted where the effect has been to deny a party a fair and complete hearing'*

[17] We know that the meeting never dealt with latent defects only. There are also no minutes that reflect that oncethe issues of revision of the date for practical completion and penalties were dealt with,Kunneke was excused from the meeting. Having carefully considered these aspects I find that the revised date for practical completion was dealt with at the Richards Bay meeting. I agree therefore with the argument presented on behalf of the First Respondent that that meeting also dealt with preliminaries and generals. In my view the presence of Kunnekein that meeting tainted the proceedings. I find it difficult to understand why the Second Respondent deemed it necessary to conduct meetings separately and individually with the parties. This, in my view, is a very undesirable situation that cannot be said to be transparent nor fair. In any event this approach by the Second Respondent was found at in **LufunoMphaphuli and Associates (Pty) Ltd v Andrews and Another 2009 (4)SA529 (CC) at 552C**wherethe court held that were an arbitratorto discuss the merits of the matter with one of the parties to the exclusion of the other that, ordinarily at any rate, would constitute a serious irregularity which may without more warrant the award being set aside.

(See also***Naidoov Estate Mahomed and others*** **1951(1) SA 915 (N) at 920**.)I view, the meeting at Richards Bay, as grossly irregular as the parties were not given an equal opportunity to present their case ontheissues

discussed in that meeting especially taking into account the Second Respondent's view on Taylor. It seems the Second Respondent was guilty of deliberate partiality against Taylor and therefore Applicants. The Applicant should also succeedon this ground.

[18] The third ground relates to the costs awarded in favour of the First Respondent by the Second Respondent. In view of the conclusion I cameto in paragraphs 13 and 17above, I do not deem it necessary for me to deal with this issue but I will. The Applicant's complaint is that the Second Respondent applied the general rule that costs follow the result without takingthe special circumstances of the finding he made in relation to the hearing of 27, 28 and 29 October 2011 into account. On the other hand the First Respondent believes that this is tantamount to the appeal of the Second Respondent's decision and believes it is not permissible in terms of the Arbitration Act.The Applicant has not advanced any reasons as to why it believes this is a gross irregularity save to say the Second Respondent did not exercise his judicial discretion in considering the costs of October 2011.

It seems to me that both Applicant and First Respondent made submissions, with regards to the costs before the Second Respondent made his award. These submissions, in my view, dealt at length with the costs of October 2011. In his award, the Second Respondent has dealt with all these costs and came to his conclusion. I agree with the First Respondent that his complaint on costs is tantamount to the appeal of the Second Respondent's decision and is wrong. I do not find any basis upon which the arbitrator's decision in this regard may now be revised.

[19] Finally it was argued on behalf of the First Respondent that in the event I find that the Second Respondent was not mandated to deal with the claim for preliminaries and generals, then the portion dealing with the date for practical completion should be allowed to stand and only set aside the portion dealing with preliminaries and generals and the levying of default interest to be determined by another arbitrator to be appointed by the parties. I have considered this submission but in the light of my conclusions in paragraphs 13

and 17 above and generally the proceedings in this arbitration I do not agree with Counsel's submission.

In the result I make the following order:

1. The arbitration award made by the Second Respondent between the Applicant and the First Respondent is hereby set aside.

2. It is directed that the dispute between the Applicant and the First Respondent be referred to hearing afresh before a newly constituted arbitration tribunal, appointed preferably by the President of Kwazulu-Natal Law Society or the Chairperson of the General Council of the Bar in Kwazulu-Natal.

3. The First Respondent is directed to pay the costs of this application.

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AJ POYO-DLWATI

Appearances

Case Number	: 8963/2011
For The Applicant	: MR R.M ROOYEN
Instructed by	: VENN NEMETH & HART 281 PIETERMARITZ STREET PIETERMARITZBURG TELEPHONE: 033 355 3106 REF: GENEVIEVE/32N0233410
For the 1st Respondent	: MR M.M SWAIN
Instructed by	: NORTON ROSE SOUTH ARICA C/O TATHAM WILKES ATTORNEYS 200 HOOSEN HAFFEJEE STREET PIETERMARITZBURG REF: MR NIGEL TATHAM
For the 2nd Respondent	: NO APPEARANCE
Instructed by	:JOHNSTON& PARTNERS 251 CLARIBEL ROAD WINDERMERE DURBAN REF: L LUNDE/CCB/09B150023