REPORTABLE

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

CASE NO: 828/2012

In the matter between:

OMM DESIGN WORKSHOP CC Applicant

and

STANLEY SEGAL 1st Respondent
DIAMOND IGODA VIEW (PTY) LTD 2nd Respondent

JUDGMENT

GORVEN J

[1] The applicant seeks the following order:

'1.

Reviewing and setting aside an interim award published by the First Respondent on 23 December 2011 in an arbitration between the Applicant and the Second Respondent, in terms of which the Second Respondent was given leave to amend its statement of claim in the said arbitration by the introduction of further claims.

2.

Alternatively to paragraph 1, an order in terms of section 3(2)(c) of the Arbitration Act No 42 of 1965 that an arbitration agreement concluded between the Applicant and the Second Respondent shall cease to have effect with reference to the disputes referred to the First Respondent for arbitration.'

The applicant also seeks a costs order against the second respondent.

[2] The first respondent, who will be referred to as 'the arbitrator', did not oppose the application. The second respondent did oppose and will be referred to as 'the respondent'.

[3] The arbitration arises from a contract for the supply of architectural and related services (the agreement). The applicant was appointed as architect in respect of the construction of a residence in East London at the instance of the respondent. The agreement was concluded in Durban.

[4] Clause 11.2 of the agreement (clause 11.2) reads as follows:

'Should any disagreement arise either party may declare a dispute by notice to the other party. The parties may resolve the dispute by mediation, failing which it shall be referred to arbitration. The architect shall select an arbitrator from a list of 3 persons nominated by the Association of Arbitrators at the request of either party. The arbitration shall be conducted according to the latest edition of the "Rules for the Conduct of Arbitrators" published by the Association of Arbitrators.'

[5] A dispute arose. The respondent, represented by Charles Diamond (Diamond) sent an email to the applicant. This contained the following paragraphs:

'There was no contractual basis for item 8 of Fee account 17 of 29 November 2006 in the sum of R54,493.92.

OMM overcharged on their fees and this has been repaid. This overcharge must similarly be repaid.

Kindly deposit within 7 days to our company account, failing which we intend to refer the matter to Arbitration in terms of the Arbitration clause 11.2 of the Agreement.'

[6] The applicant, having presumably been provided with a list of three arbitrators, sent a letter to the respondent dated 29 August 2008 which contained these comments:

'1 Mr Stanley Harold Segal is our preferred arbitrator

2 The scope of the dispute is to be fully defined by Charles Diamond.

3 Consideration of written submissions as evidence to the arbitration is requested, with no legal representatives.'

The respondent, represented by Diamond, wrote to the arbitrator on the same day requesting his acceptance of appointment and his directives as to a pre-arbitration meeting and further procedural issues. Diamond indicated in this letter that, 'in brief the issues…relates (sic) to the standards of the services rendered by them and their charges. Full details of my claims will be furnished in accordance with a statement of claim in due course.'

[7] On 6 October 2008 the parties signed a document which simply, without more, appointed the arbitrator 'in this matter', having been headed 'In the matter of the dispute between Diamond Igoda View (Pty) Ltd and OMM Design Workshop'. On the same day, a pre-arbitration meeting was held at East London at which the parties agreed that the dispute fell within the ambit of the agreement and was ready for arbitration. Diamond gave a general outline of the issues in dispute. It was agreed that the parties would themselves decide whether or not to make use of legal representatives. Dates were agreed for the exchange of the statement of claim, statement of defence and further 'pleadings'. It was agreed that 'The Standard Procedure Rules (Rule 7) for The Conduct of Arbitrations be used in this arbitration' (the Rules). This was unnecessary since clause 11.2 makes the Rules operative.

[8] A statement of claim was duly delivered and further arbitration 'pleadings' exchanged. These included a conditional counterclaim by the applicant. It is noteworthy that the original claim seven in the statement of claim alleged a fraudulent misrepresentation by the applicant to the respondent that exceptional architects charge a fee of 12% of the cost of

works whereas the appropriate rate was 7%. This misrepresentation, it was claimed, induced the respondent to agree to a rate of 12% whereas, had it known the true facts, it would have contracted for 7%. The claim was for damages calculated as the difference between the two percentages.

[9] A second pre-arbitration conference was held and the arbitration set for 30 November to 3 December 2009. By letter dated 11 November 2009 the respondent's attorneys wrote to those of the applicant, informing them that during consultations other breaches of the agreement had come to light which meant that probable further claims would be added to the statement. The arbitration was adjourned by consent as a result.

[10] On 15 February 2010 the respondent delivered a notice of intention to amend the claim by including what is referred to as 'the new claim eight'. The applicant objected on the basis that it did not fall within the dispute declared by the respondent. The matter was set down for argument on 27 September 2011 and the arbitrator published his interim award on 23 December 2011. He gave the respondent leave to amend its statement of claim as requested. This gave rise to the present application.

[11] The respondent raised a point *in limine* challenging this court's jurisdiction to review and set aside the decision of the arbitrator. It says that the pre-arbitration meetings and the argument on the amendment took place outside the jurisdiction of this court. The arbitrator resides in Gauteng Province. At the commencement of the argument I enquired from the respondent whether it persisted in this point and was informed that nothing further would be made of it than had been set out in the heads of argument. I need deal with it only briefly. As I indicated, the agreement contained clause 11.2. It is this clause which gave rise to the arbitration.

The agreement was concluded in Durban. The arbitration therefore arises from and gives effect to the agreement. The agreement therefore governs the arbitration. The agreement as to the identity of the arbitrator and those arising from the pre-arbitration proceedings do not confer jurisdiction on any other court. Accordingly, since the agreement giving rise to and governing the arbitration was concluded in Durban, this court has jurisdiction to deal with matters arising from the arbitration, including the review of the decisions of the arbitrator. The alternative claim requests this court to declare clause 11.2 in the agreement to be of no force or effect regarding the dispute. This is also clearly a matter over which this court has jurisdiction. The point *in limine* must therefore fail.

[12] The main relief sought is the review and setting aside of the interim award of the arbitrator. Section 33(1) of the Arbitration Act 42 of 1965 (the Act) sets out the grounds upon which the court may review and set aside an arbitration award. It reads as follows:

‘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 or parties, make an order setting the award aside.’

The case for the applicant on review is a simple one. The applicant restricts its reliance to part of s 33(1)(b), namely, that the arbitrator exceeded his powers. This is the sole basis for the review aspect of the application. This goes to the jurisdiction of the arbitrator rather than to the merits of the dispute.[1]

[13] The reasoning of the applicant is as follows. This is a consensual arbitration arising from clause 11.2. Clause 11.2 requires the declaration of a dispute. The declaration of a dispute gives rise to the arbitration proceedings. Those proceedings include only the declared dispute and no other disputes. The only exception is if the parties agree to broaden the arbitration to include a dispute or disputes falling outside the original declaration. If there is no such agreement, any new dispute must be declared in terms of clause 11.2 and a new arbitration held. The new claim eight was not mentioned in the dispute declared by the respondent. The applicant has not consented to the expanding of the declared dispute by the inclusion of this claim. The new claim eight is therefore excluded from the ambit of the present arbitration. The arbitrator was appointed to deal with only the declared dispute (and any others included by agreement). The arbitrator's mandate accordingly does not extend to this dispute. This means that the arbitrator, appointed specifically to deal with the declared dispute (and additional ones consented to) did not have the power to allow an amendment to include the new claim eight.

[14] It must be emphasised that the applicant does not contend that the new claim eight cannot be referred to arbitration. It is accepted that the new claim eight would be governed by clause 11.2 if a dispute were to be declared which includes it. The applicant likewise does not attack the reasoning of the arbitrator as to whether it was appropriate to allow the amendment, if he is found to have had the power.

[1] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 56.

[15] The contention of the respondent is that the new claim eight is covered by the reference to arbitration. It submits the following. Accepting, as does the applicant, that the claim is a dispute as envisaged in clause 11.2, it is a matter which is subject to arbitration. At the time the applicant chose the arbitrator, the issues in dispute had not been defined. The applicant's letter indicating its choice of arbitrator recognised this and said that the scope of the dispute would be fully defined by Diamond. The precise ambit of the issues in dispute was clearly not set out in the declaration of the dispute or else this paragraph of the letter would be meaningless. In any event Rule 17 of the Rules allows for amendments, subject only to their falling within the ambit of the arbitration clause of the agreement, which the new claim eight does. The relevant part of Rule 17.1 reads as follows:

'[E]ither party may amend or supplement its statement of claim or statement of defence, unless the Arbitrator considers it inappropriate to allow such amendment, having regard to the delay in making it or the prejudice to the other party or any other circumstance.'

The respondent contends that the new claim eight was an amendment to or supplementation of the statement of claim. Because the parties had agreed that the Rules would apply to the arbitration, it was accordingly competent for the arbitrator to allow the respondent to amend and he did not act beyond his powers in doing so.

[16] An issue raised by the applicant, but not the underlying rationale for its launch of the application, is that the new claim eight amounts to an amalgamation of numerous claims totalling R4 436 013.35. It contends that these claims have no bearing on those which have been referred for arbitration. It says that the amendment proposes the inclusion of numerous new issues concerning the non provision of drawings, schedules, details

and specifications by the applicant timeously, the incorrect location of the buildings, the lack of timeous provision of instructions, drawings and the like to contractors, the unauthorised instruction of the demolition of windows and their relocation, the provision of inadequate drawings and specifications to the quantity surveyor which gave rise to an underestimate of costs, the alteration of the design without approval, a variation of specifications and appointment of a tile manufacturer who lacked capacity, certifying payment costs which should not have been certified, failure to disclose certain facts, failure on the applicant's part to claim penalties against the contractor for late completion and the failure to ensure timeous completion of the building project.

[17] There is no doubt that the new claim eight is extensive, both as to ambit and as to the total claimed. The crisp issue, however, is whether it falls outside the ambit of the arbitration set in motion when the dispute was declared, as contended for by the applicant. A dispute was declared. At the time the matter was referred to arbitration, the ambit of the dispute was not defined. The applicant stipulated that Diamond, who all along has represented the respondent, would define the precise ambit. This can only be because it was recognised that, until then, the dispute had not been clearly defined. No time limit was set and neither was it said that, after the statement of claim was delivered, no further definition could take place. The respondent, as represented by Diamond, has now defined the ambit of the dispute to include the new claim eight. The Rules apply. The supplementation of the statement of claim is the means by which the respondent seeks to more clearly define what is in dispute. This is allowed by Rule 17. I see no reason why the new claim does not fall within the declared dispute since the ambit has been defined by Diamond. This means that the arbitrator had the power to consider and grant an amendment

which would result in the inclusion of the new claim eight. The arbitrator did not act beyond his powers in allowing the amendment.

[18] Even if I am wrong that the applicant has agreed to the definition of the dispute by the respondent, it is my view that the applicant's interpretation of clause 11.2 is incorrect. The appropriate interpretation of the clause therefore arises. The approach to interpreting documents has received recent attention where Wallis JA said the following: [2]

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence…A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

At para 19 the learned judge continued:

'. . . from the outset one considers the context and the language together, with neither predominating over the other.'

[19] Clause 11.2 envisages that 'any disagreement' which arises between the parties provides the basis for a party to declare a dispute. Failing referral to, or resolution by, mediation '[the dispute] shall be referred to arbitration'. The applicant appears to contend for a narrow, strictly grammatical approach. The main feature of the applicant's approach is the declaration of what clause 11.2 refers to as 'a dispute'. In other words, a single dispute. Each dispute must be separately declared. If the declaration identifies more than one dispute, these can be referred to arbitration together. Once a particular dispute has, or disputes have, been formulated and declared, the arbitration can deal with nothing else unless

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

the other party consents to this being done. The applicant says that none of the items in the new claim eight were referred to in, or covered by, the declaration of the dispute. If the respondent wishes to have the new claim eight arbitrated, it must declare a fresh dispute or disputes. This will require a fresh arbitration or arbitrations before a different arbitrator because the applicant has not agreed to its inclusion in the present arbitration.

[20] Assuming, for the moment, that the words ‘a dispute’ support this narrow grammatical construction, the context of clause 11.2 must be considered. Clause 11.2 came into existence because it was recognised that disputes might arise from the agreement. The Rules are made to apply. A flexible, nuanced approach to disputes is therefore envisaged where an appropriate procedure can be applied. This allows certain disputes to be informally arbitrated and others to be dealt with by a formal approach. Some might be resolved by the arbitrator functioning as an expert. Some might require ‘pleadings’ and others not. Not all would require formal evidence. Not all would require, or even allow, legal representation. All should be dealt with expeditiously. If, therefore, a dispute is declared by a person who is not legally trained in terms that the other party does not understand what is actually at issue, the Rules allow for more precise definition in due course, including by way of a statement of claim. The apparent purpose of the clause is to have all disputes between the parties which arise from the agreement arbitrated. A further purpose is to allow for appropriate procedures to deal with, and even define, disputes. The purpose is clearly to have disputes resolved without recourse to the courts.

[21] In this context and in the light of the grammar and syntax used, I do not consider it sensible or businesslike to interpret clause 11.2 to require a

clear and precise formulation of what is in dispute at the time a dispute is declared to the exclusion of all other disputes not mentioned at the time. Such an approach would, for example, exclude a counterclaim if the claimant who has declared a dispute refuses to agree to its inclusion in the arbitration arising from that declaration. Even if both parties have declared disputes by the time of reference to arbitration, the applicant's approach allows one of the parties to insist on two arbitrations. This is because any arbitration can deal only with 'a dispute' absent agreement by the parties to include any others. This cannot be the correct interpretation of the clause. The fact that the Rules allow for counterclaims is a further indication that this is not what clause 11.2 envisages. The applicant's approach also means that, as a party becomes aware of instances of breaches of the agreement by the other party, a fresh dispute must be declared and a fresh reference to arbitration is necessary. The applicant says that a fresh dispute must be declared even if a party becomes aware for the first time during the process of preparation for the arbitration of further claims against the other party through documents, consultation, reflection or advice. I cannot conceive that clause 11.2 envisages a multiplicity of arbitrations in circumstances where the other party does not agree to include a new claim such as this. The fact that the Rules allow for the amendment or supplementation of a statement of claim is a further indication that clause 11.2 should not be interpreted in the way contended for by the applicant. In my view the correct interpretation of clause 11.2 is that, once a dispute has been declared, all claims between the parties arising from the agreement can be dealt with in the resultant arbitration, subject, of course, to the discretion given to the arbitrator in Rule 17.1.

[22] This means that the arbitrator did not exceed his powers when he allowed the amendment. Since there is no other basis on which it is sought

to review that decision, the application for a review and setting aside of the interim award must fail.

[23] If it is found that the amendment was properly allowed, the applicant claims, as an alternative, an order that the agreement should cease to have effect with reference to the dispute referred. The applicant says, in essence, that the arbitrator, who is an architect, is not properly equipped to deal with the new claim eight. This part of the application is based on s 3(2)(c) of the Act which provides as follows:

'The court may at any time on the application of any party to an arbitration agreement, on good cause shown –

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.'

[24] For arbitrations under the common law the point of departure was clearly set out in the following terms by Dove-Wilson JP in *Walters v Allison*:[3]

'I think I have cited sufficient authority to show that it is settled law in South Africa that an absolute agreement to refer matters in dispute to arbitration is a condition precedent to litigation in the Law Courts, and that either party to such an agreement may be compelled by the other to have resort to arbitration in the first instance.'

This is why the courts, in approaching applications under s 3(2) of the Act, have almost all referred to the dictum of Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*,[4] where he commented on good cause under that section as follows:

'Such an *onus* is not easily discharged. There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. In *Rhodesian Railways* v *Mackintosh*, 1932

[3] 1922 NPD 238 at 245.
[4] 1971 (2) SA 388 (W) at 391E-G.

AD 359, Wessels, ACJ (as he then was), held that the discretion of the Court to refuse arbitration under a submission was to be exercised judicially, and only when a "very strong case" for its exercise had been made out (see p.375). The Court was there acting under a different statute from the one before me. But the observation of Wessels, ACJ is none the less apposite here, because it was based upon general principles.'

[25] This means that the applicant bears an onus and, in discharging it, must make out a 'very strong case' that I should exercise my discretion in its favour. The applicant makes six submissions in support of the alternative claim in its heads of argument. First, it says that the new claim eight in essence accuses the applicant of fraud. Secondly, it says that the applicant's hard won good reputation is at stake. Thirdly, it says that a court is better equipped to adjudicate on matters of credibility. Fourthly, it says that the arbitrator is not equipped to deal with the applicant's prescription defence to the new claim eight since this is mainly a legal question. Fifthly, it says that the arbitrator is not equipped to deal with the causation and quantum of damages arising in the claim. Sixthly, it says that there is no provision for an appeal.

[26] The applicant relies on the case of *Sera v de Wet*[5] where the court made an order in terms of s 3(2)(c) of the Act. Here an architect had been appointed arbitrator pursuant to a clause in a building contract. The court held that, since serious allegations had been made against the architect involving honesty and integrity, and issues of credibility would need to be decided, a court of law was better equipped than was the architect. Further, the main issue between the parties was a predominantly legal one.

[5] 1974 (2) SA 645 (T).

[27] As regards fraud and credibility, what is alleged in the new claim eight is that, in breach of the agreement or as a negligent failure to use the required and professional skill and diligence, the applicant failed to disclose to the respondent that the applicant was itself responsible for additional, wasted and unnecessary costs when it was under a duty to do so. That is as far as the averment goes. This is an almost exclusively factual issue. In any event, the initial statement of claim included the old claim 7 (which has now been abandoned). This was based on clear allegations of fraud which would, if denied, have required credibility findings relating to whether or not representations were made by the applicant. The applicant did not object to the arbitrator dealing with that dispute.

[28] The applicant does not elaborate how the new claim eight affects the reputation of the applicant in a way that the originally declared dispute, including those in the original statement of claim did not. All that is said is that its 'reputation may be severely damaged by findings which the [arbitrator] should not be required to make because he is not the appropriate person to make such findings (*inter alia*, in relation to alleged non-disclosure and misrepresentation and credibility).' The non-disclosure and misrepresentation referred to by the applicant concern the alleged failure to inform the respondent that the applicant was itself responsible for wasted expenditure and the like mentioned above.

[29] The applicant says that it will raise prescription of the new claim eight. It was anticipated that legal questions might arise. In this regard, it was agreed, in the first pre-arbitration conference, that 'where reference is made to case law by either party, the party is to provide the Arbitrator with details thereof'. This is a clear indication that argument concerning legal

principles was anticipated. Although the issue of prescription had not been raised in the first pre-arbitration meeting, it was conceivable that it might emerge once the 'pleadings' had been exchanged. There is, in addition, no evidence that the arbitrator does not have the skills to deal with prescription which largely requires findings of fact. A number of cases have held that the fact that the main dispute primarily involves a legal issue does not in itself afford grounds for avoiding the arbitration agreement.[6] As regards the question of the causation and quantum of damages, an architect would be well qualified to deal with these in relation to a construction agreement. The facts alleged in this matter differ materially from those in *Sera* and do not, in my view, require that a court adjudicate them.

[30] The simplest answer to the alternative claim is that the case which the applicant attempts to make out is based squarely on an objection to the qualifications of the arbitrator and not to arbitration *per se*. A case has not been made out that arbitration is not appropriate. A strong case to that effect has certainly not been made out. The applicant submitted in argument that the arbitrator was chosen by it because of the nature of the declared dispute. This is not factually accurate. The arbitrator was chosen and appointed before the dispute had been defined. As is clear from the applicant's letter exercising the choice of arbitrator, the definition of the scope of the dispute was not clear and was left to Diamond. The Rules provide a mechanism for the removal of arbitrators. If the applicant feels that the arbitrator is not qualified, it can invoke these. This is irrelevant to the enquiry as to whether arbitration proceedings should not apply to the dispute in terms of s 3(2)(c) of the Act. The applicant has not made out a case for the relief sought. The alternative claim must therefore also fail.

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[6] See, e.g., *Elebelle (Pty) Ltd v Szynkarski* 1966 (1) SA 592 (W); *East Rand Proprietary Mines Ltd v Cinderella Consolidated Gold Mines, Ltd* 1922 WLD 122.

[31] The applicant submitted that, if it was not successful, the costs of two counsel should not be allowed. I do not agree. The two counsel who prepared the heads of argument and appeared before me also represented the respondent at the application before the arbitrator for the amendment of the claim. The application itself raises matters of some complexity and substance. It is clearly a matter of importance to both parties and it is my view that the employment of two counsel was warranted where this took place.

[32] In the result the application is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel where this was done.

DATE OF HEARING:	13 November 2012
DATE OF JUDGMENT:	29 November 2012
FOR THE PLAINTIFF:	V Voormolen, instructed by Thorpe & Hands Inc.
FOR THE SECOND RESPONDENT:	E A S Ford S C and D H De La Harpe, instructed by Bax Kaplan Attorneys, locally represented by Cox Yeats.