

ORIGINAL



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

Appeal case no: AR333/23

Case no: D10584 & D5234/2020

In the matter between:

**BEFULA INVESTMENT (PTY) LTD t/a
ROSSI ENGINEERING**

APPELLANT

(Applicant in Court a quo)

and

TRANSNET LIMITED

RESPONDENT

(Respondent in Court a quo)

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Madonsela AJ sitting as a court of first instance):

The appeal is dismissed with costs, including costs of senior counsel where so employed.

JUDGMENT

Delivered:

Mngadi J (E Bezuidenhout J et Nako AJ concurring)

[1] This is an appeal with the leave of the court a quo against part of the judgment delivered on 26 May 2023. The parties on appeal are Befula Investments (Pty) Ltd (Befula), the appellant, and Transnet Limited (Transnet), the respondent. The parties in the court a quo, before Madonsela AJ, sought orders making arbitration awards orders of court in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Arbitration Act). On appeal the matter concerns an award in favour of Transnet against Befula. Transnet claimed the relief in a conditional counter application. Befula opposed the award being made an order of court claiming that the claims had prescribed. The court a quo rejected Befula's contention, and it granted the order making the award an order of court. Befula now appeals against that decision.

[2] Transnet countered Befula's contention by claiming that the impugned awards were made as interim award during arbitration that had not been finalised. An award on the outstanding claims would be made in due course.

[3] The arbitrator introduced the matter as follows:

'This is an award in an arbitration relating to various disputes that have arisen between the parties relating to the refurbishment of two Noell ship to shore container cranes numbers 509 and 510 that the defendant undertook to perform for the claimant. When I refer to the claimant herein, this is reference to the claimant in the arbitration viz. Transnet Ltd (referred to herein as 'Transnet'). When I refer to the defendant herein, this is reference to the defendant in the arbitration viz. Befula Investments (Pty) Ltd t/a Rossi Engineering (referred to herein as 'Rossi Engineering'). To avoid confusion arising from the reversal of the roles in the adjudication, wherein Rossi Engineering was the claimant and Transnet was the defendant, it will be convenient to refer to the parties respectively as Transnet and as Rossi Engineering when referring to their conduct of the matter before the adjudicator.

The contract was put to tender in 2007 and the defendant was successful tenderer. The parties concluded a written contract on 25 March 2008 relating to the refurbishment of the cranes. Certain further agreements that were concluded thereafter over the course of the period of the execution of the work are also relevant to the dispute between the parties, and these will be referred to later herein.

The main written contract followed the form of the NEC 3 Engineering and Construction Contract (ECC3), with some variations. The contract was a fixed price contract with an activity schedule. The start date of the contract was 25 March 2008. The defendant was given access to the site at the Durban harbour on 4 August 2008.

On 9 May 2009 the left-hand side trim, list and skew mechanism installed by the defendant on crane 510 broke away whilst the crane was engaged in lifting a container. I shall refer to the trim, list and skew mechanism as the 'TLS' herein. The claimant thereafter instructed the defendant to effect repairs to crane 510, and a new TLS was installed as part of the repairs. It also instructed the defendant to effect improvements to the structural integrity of the right-hand side TLS on crane 510 and also on the two TLSs on crane 509 ('the remaining TLSs'). These events led to claims made by the claimant and the defendant respectively against each other, each contending for different causes and responsibility for the left hand side TLS breaking away, and a dispute as to whether the improvements to the structural integrity of the remaining TLSs constituted additional work or work to rectify the work alleged to have been performed defectively by the defendant.

These disputes were referred for adjudication in terms of the contract.'

[4] It is common cause between the parties that the dispute resolution clause of the contract provided for arbitration including a compulsory pre-arbitration adjudication. The adjudication commenced on 11 February 2010 and culminated on 10 November 2010 when the adjudicator handed down his determination. Befula voiced dissatisfaction with the determination. Transnet instituted arbitration proceedings with the first pre-arbitration meeting held on 4 December 2012 and the statement of claim filed on 7 December 2012. On 24 January 2017 the arbitrator delivered an interim award of the penalty claims. Further awards were delivered, with the last award delivered on 7 August 2020. On 12 December 2019 Befula launched an application seeking an order making awards in its favour delivered up to that date made an order of court. Transnet opposed the application contending that since the arbitration had not been concluded the application was premature and filed a conditional counterapplication that if Befula's claim was granted, interim awards in its favour, that is the penalty claims awards, be made an order of court. Before the matter could be heard the arbitrator delivered further awards, including the last award.

Application was launched to make the subsequent awards an order of court. The two applications were consolidated before Madonsela AJ and they were heard together.

[5] The impugned award relates to Transnet's claims for penalties due to the late delivery for the cranes by Befula in that Befula delayed the completion of work on the cranes resulting in the cranes being available for use at a later date than the agreed dates. Transnet, as penalties, claimed R3.96 million for crane 509 and R7.76 million, alternatively, R240 000.00 for crane 510, together with some continuing penalties, alternatively, damages per day until the crane resumed operation.

[6] The arbitrator in dealing with the penalty claims stated that the agreed completion dates were not met and the charging of penalties calculated at a charge for each day of the delay was justified. He stated that Befula conceded liability in relation to crane 510. The arbitrator stated that Befula accepted the adjudicators award in relation to the date of the handover of crane 509. The arbitrator allowed a deduction due to certain circumstances, which Transnet accepted. The arbitrator dealt with all issues relating to the claims for further deductions. He then made his final decision on the penalty awards in the interim award that he delivered. He ordered as follows:

'An award falls to be made in favour of the claimant for the payment of the sum of R240 000.00 together with interest. It claims interest on the sum of R240 000.00 from 10 December 2008. Interest is claimed in terms of the Prescribed Rate of Interest Act, 55 of 1975. At the date that this debt was due the rate of interest was 15.5% p.a , and this is the rate at which the defendant is liable for interest on this amount from 10 December 2008 to date of payment.

I accordingly propose to make an award in favour of the claimant for payment of the sum of R3 640 000.00 in respect of penalties due by the defendant. All of the defendant's claims for extensions of time are dismissed, save for 4 days, which I have allowed for by reducing the number of days for penalties.

The claimant claims interest on the amount awarded in respect of penalties. It is entitled to interest on the sum of R3 640 000.00 from 30 September 2009, which is when the amount was due and owing, at the rate of 15.5% p.a. to date of payment in terms of the Prescribed Rate of Interest Act, 55 of 1975.'

[7] Transnet in opposing the main application contended that the arbitration had not yet been finalised, it would be finalised in due course when the arbitrator hands down the final award on quantum, which was expected to be done at the end of February 2020. It stated that Befula at that stage could not seek to give effect to the awards made in its favour since the arbitration was not finalised

[8] Befula in response to Transnet's above-mentioned contention stated that the arbitrator made various awards. The awards sought to be made an order of court are final awards and are not dependent or contingent on any subsequent awards to be made in respect of other claims. Put differently, Befula submitted that the awards handed down were final in effect.

[9] Befula in opposing the relief sought in the conditional counterapplication stated that the penalty awards made in favour of Transnet could not be made orders of court as they had prescribed in terms of s 11 read with s 13 of the Prescription Act 68 of 1969 (the Prescription Act). Befula explained that the claims that were the subject of the penalty awards became due on or about 10 December 2008 in respect of the award of R240 000.00, and on 30 September 2009 in respect of the amount of R3 640 000.00. Prescription for those debts would have occurred after a period of three years but for the suspension of running of prescription by arbitration, it occurred after the expiry of one year from the date of the delivery of the interim award on 24 January 2017. As a result, prescription took place on 23 January 2018. Alternatively, prescription took place when the remaining period in the running of prescription at the date of the interruption was finalised after 24 January 2017.

[10] The court a quo, in relation to prescription, found in favour of Transnet. The court found that the interim award of the impugned claims was subject to the outcome of the determination of the quantum of other competing claims, which were scheduled for hearing in due course, because it would then be determinable of who owed who in the final account after all the claims had been finalised. It held that the interim award published on 24 January 2017 did not finally dispose of all the issues or disputes between the parties, it was not a final award, and it was still subject to the determination of related issues in the quantum hearing. Therefore, the court held that

for that reason that award did not trigger the time bar provisions of s 13(1)(f) of the Prescription Act.

[11] The Arbitration Act has, *inter alia*, the following provisions. In s 1 of the Arbitration Act, the following definitions are important to note for this judgment:

“arbitration agreement” means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not;

“arbitration proceedings” mean proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement.

“arbitration tribunal” means the arbitrator, arbitrators or umpire acting as such under an arbitration agreement.

“award” includes an interim award’.

Section 23(1) of the Arbitration Act provides for time for making the award, the relevant parts read as follows:

‘The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award-

(a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date’.

Section 24(1) requires that the ‘award shall be in writing and shall be signed by all the members of the arbitration tribunal’. Section 25(1) states that the ‘award shall be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear’. With regard to interim awards, s 26 provides that ‘[u]nless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award’. Furthermore, s 28 states that ‘[u]nless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms’. Section 31(1) of the Arbitration Act reads that an ‘award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court’. The last provision to note from the Arbitration Act is s 38, which states that the ‘court may,

on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not'.

[12] It appears that although the Arbitration Act defines award to include an interim award, an award does not necessarily always include an interim award. As an example, in s 23 even if there is an interim award made within the stipulated period, if a final award cannot be made within the stipulated period, the section provides further that an extension of the period within which to make a final award needs to be granted. Therefore, it needs to be determined for purposes of s 31 whether the section refers to an award, which excludes an interim award, or to both a final award and an interim award equally. Ordinarily, the distinction would not be of any concern but for purposes of the Prescription Act it is critical because an award made an order of court is subject to a different prescription period to an award that has not as yet been made an order of court.

[13] Section 13(1)(f) of the Prescription Act provides that if the 'debt is the object of a dispute subjected to arbitration . . . the period of prescription shall be suspended until a year after completion of the arbitration'. In this case although the penalty claims as part of the dispute had been resolved and an interim award issued, the entire debt, which constituted of various claims, was the object of the arbitration had not resulted in a final award.

[14] Befula contends that the penalty awards were final in relation to both liability and quantum, that the arbitrator ordered that they be paid from a specified date and interest accrued from specified dates, nothing in relation to them was still outstanding, they were not subject or conditional to the determination of quantum or any other claim, and they could never be varied or retracted by the arbitrator who was *functus officio* in respect of those awards. Befula contends that the court a quo erred in finding that the penalty awards were in any way affected by the issues for determination in other awards that had been held over for later determination because those claims were not linked to the penalty claims and the quantum in other claims had nothing to do with the penalty liability and quantum.

[15] The award shows that the arbitrator, in dealing with the penalty claims, stated that the agreed completion dates were not met, and the charging of penalties calculated on a daily rate was agreed to. He stated that Befula conceded liability in relation to crane 510. Befula, in relation to crane 509, accepted the adjudicator's determination. The only issue before the arbitrator related to what deductions Befula was entitled to. The issue was dealt with and finalised by the arbitrator. It was contended that the court a quo erred to hold otherwise.

[16] The court a quo, as contended by Befula in some instances, did not express itself clearly. Befula provided the following as an example, in paragraph 35 the court said:

'The thrust of Befula's contention that Transnet's counter claim for awards in its favour in Award 4 has prescribed is premised on anterior question: that the claim for penalties reflected in Award No.4 was final when the adjudicator decided the claims on 12 November 2010. There is no merit in this argument.'

It is common cause that this was never Befula's contention. The misdirection by the court a quo is taken further in paragraph 36 of the judgment:

'As I understand Befula's contention, it is argued that the adjudicator's decision on 12 November 2010 that Befula was liable to Transnet in respect of penalties for delayed refurbishments of both cranes brought about finality of that claim. Therefore, so the argument goes, Transnet's claims qua penalties should have been made within a year from that time'.

It is not clear why the court a quo stated the above, whereas Befula's contention on this point, as set out in its answering affidavit to the counter application, reads as follows:

'The Arbitration proceedings commenced in 2012 and the hearing of evidence commenced on 3rd June 2013.

The Arbitrator's Award is dated 9th January 2017 and was only received on 24th January 2017. It is correct that evidence on quantum indeed commenced in February 2018.

The Awards handed down by the Arbitrator in respect of this Application are final Awards and not dependent or contingent on any subsequent Awards handed down by the Arbitrator. In this regard, the Awards were disposed of piecemeal and when the Arbitrator was able to make Awards on specific claims he did so, as a matter of finality.

The fact that there were still Awards that might be made in respect of other claims does not alter the finality of the Awards that were in fact made by the Arbitrator nor does it alter the fact

that the Arbitration was, in respect of those Awards, concluded at the time of the handing down of those Awards.

There is accordingly no reason why these Awards could not, immediately after they had been handed down, be made Orders of Court since they were final Awards which finally disposed of those aspects of the Arbitration proceedings to which the Awards relate.

The Award that was handed down later in February 2020 dealt with the quantum of damages for the repairs of the crane, corrosion protection and certain other claims where the quantum of such claims was finally determined, which was a different subject and dealt with as a separate Award.'

Later in the papers, Befula contended:

'The Arbitrator handed down Awards in favour of the Respondent as set out in paragraph 30(a) and (b) of the Respondent's Answering Affidavit.

The Respondent is not entitled to have these Awards made Orders of Court as they have prescribed in terms of Section 11 read with Section 13 of the Prescription Act No. 68 of 1969 (the Act).

The material portions of section 13 of the Act (under the heading "Completion of prescription delayed in certain circumstances) read as follows:

"If...

(f) the debt is the subject of a dispute subjected to arbitration

...

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c) (d), (e), (f), (g) or (h) has ceased to exist . . .

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

The Respondent's claim became due on or about 10 December 2008 in respect of the amount referred to in paragraph 30(a) of the Answering Affidavit and on 30 September 2009 in respect of the amount referred to in paragraph 30(b) of its Answering Affidavit.

This appears from the Arbitration Award which reflects that interest was awarded from those dates in favour of the Respondent. This was on the basis that the claims were due on those dates and accordingly interest should be awarded from those dates.

(reference is made to the awards)

The Respondent by these dates knew the identity of the debtor (the Applicant) and the facts from which the debts arose.

Prescription accordingly commenced running from those dates. The prescription period was three years.

The Respondent's claim in respect of the amount referred to in paragraph 30(a) of its Answering Affidavit would have prescribed at midnight on 10 December 2011 and in respect of the amount referred to in paragraph 30(b) would have prescribed at midnight on 30 September 2012, but for the delay in prescription provided for under the Act in respect of Arbitration proceedings.

The Arbitrator handed down his Award in respect of these claims on 24th January 2017, by which time, but for the said delay in prescription the Respondent's claims had already prescribed.

The impediment for the purposes of Section 13(1)(f) ceased to exist on the 24th January 2017, in respect of the Awards in question, which was the date of the Award, and the prescription period was extended for a year, (i.e. until midnight on 23rd January 2018) as provided for in the Act.

The Respondent therefore should have instituted its Conditional Counter Application to make Awards referred to in paragraph 30(a) and (b) of its Answering Affidavit Orders of Court by no later than midnight on 23rd January 2018. It did not do so, and its claims as set out in its Conditional Counter Application have prescribed.'

[17] The court a quo in paragraph 43 of the judgment seems to address the crux of Befula's above-mentioned contention. It said:

'For the other part, Befula further contends that Transnet's claims prescribed by reason of Transnet's failure to make the awards an order of court by 23rd January 20218 within one year after arbitrator published Award No.4 on 24 January 2017. This contention too is unavailing, Paragraphs 7, 8 and 12 of the Award No.4 determined the merits of Transnet's penalty claims. However, that claim was subject to the outcome of determination of quantum of other competing claims. The quantum claims were separated and scheduled for hearing in due course'.

Befula, in my view, is correct. The penalty claims were clearly not interlinked or dependent on or conditional to any other claim or issue that still had to be determined. There was, as far as penalty claims, no separation of issues. The penalty claims were certainly not subject to the outcome of the determination of quantum of other competing claims.

[18] The court a quo stated:

'Later in the Award, the arbitrator noted that the issue as to whether the defendant's claims are indeed owing and would be extinguished by the claimant's claim for damages in terms of the contract, it is tied up with issues relating to the proper interpretation of the contract. On

these bases then the arbitrator invoked the provisions of Rule 22(4) which, the parties had agreed to make applicable to the arbitration proceedings and ordered that Befula's and Transnet's claims could not finally be determined before quantum hearing was finalised.' Neither the court a quo nor the arbitrator referred to any provision of the contract that suspended payment of the penalty claims or that linked or tied up the penalty claims in any way to the other claims or issues. Rule 22(4) refers to postponement of giving judgment on a claim that might be extinguished by judgment given on another claim. The arbitrator did not postpone giving judgment on penalty claims. Rule 22(4), in my view, had nothing to do with whether the penalty awards could be made an order of court or not. I agree with Befula that the penalty awards were not dependent on or conditional to or linked or tied up with any other claim or issue still to be determined by the arbitrator. In their terms they were due, owing and payable.

[19] Transnet, before the court a quo and before this court, raised two secondary conditional contentions. The first is founded on s 13(2) of the Prescription Act and the second is based on set-off. Section 13(2) provides:

'A debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.'

The mere fact that different debts arise out of the same contract and each party is indebted in some way to the other is not enough, 'a far closer, and more immediate correlation than that is required'.¹ Transnet contends that in this case the reciprocal debt was to complete the work timeously. This contention, in my view, has no merit. The section to be invoked requires that there be reciprocal debts. It was never the contention of Befula that it could not complete the work on agreed dates because of Transnet's failure to do anything that would have enabled Befula to complete the work by the agreed dates. I am also in agreement with Befula's contention that Transnet needed to plead the facts on which it based this secondary contention, and it failed to do so. Befula is faced with a contention that was not pleaded and is argued on an unknown factual basis. This is not permitted by the courts, as it would have been

¹ *Minister of Public Works and Land Affairs and another v Group Five Building Ltd* 1996 (4) SA 280 (A) at 288E-F.

difficult for Befula to fully prepare for the hearing, as not all the evidence has been canvased in the papers.²

[20] The second secondary contention is set-off. The essence of the contention is that the debt claimed to have prescribed has been extinguished by set-off. A debt that has been extinguished cannot prescribe. It is argued that set-off takes place automatically. It takes place without any notice by operation of law. It is a unilateral act by one party. Befula was not at any stage informed that the debt owed to it by Transnet has been set-off against the debt it owed Transnet. It is not known which debts were set-off against which debts and on what dates. The set-off was not pleaded as required.³ Befula without knowing about the alleged set-off was not alerted to the case it had to meet and could not place relevant facts before court on the issue. In my view, this contention is an afterthought based on an unknown factual basis, and it need not be considered.

[21] Transnet argues that the provision in the Prescription Act is not subject to the definition of 'award' in the Arbitration Act. It argues that a 'debt' as used in the Prescription Act differs from 'a relief to make an award an order of court', and in substantiation of this contention, it referred to *Makate v Vodacom (Pty) Ltd*,⁴ *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock*,⁵ and *Brompton Court Body Corporate v Khumalo*.⁶ Transnet points out that in *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd*,⁷ the court made remarks to the effect that an interim award is not a final award in that a final award achieves finality and certainty in all issues submitted for resolution. Therefore, Transnet submitted, what is required from the arbitrator is that all issues must be resolved by him in a manner that achieves finality and certainty, until that happened, the debt was still the object of a dispute subject to arbitration. Transnet concludes that certainty in the affairs of Befula and Transnet would only be achieved when all of the disputes had been dealt with, it is only at that

² *National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W) paras 36-37.

³ F Du Bois (ed) *Wille's Principles of South Africa Law* 9ed (2007) at 832.

⁴ *Makate v Vodacom* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC).

⁵ *Off-Beat Holiday Club and another v Sanbonani Holiday Spa Shareblock Ltd and others* [2017] ZACC 15; 2017 (5) SA 9 (CC); 2017 (7) BCLR 916 (CC).

⁶ *Brompton Court Body Corporate SS119/2006 v Khumalo* [2018] ZASCA 27; 2018 (3) SA 347 (SCA) (Brompton Court).

⁷ *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and others* [2019] ZASCA 109; 2020 (2) SA 295 (SCA) para 13.

time when the respective claims and counterclaims had been dealt with that the parties knew finally who owed what to whom.

[22] The weakness in Transnet's contention, in my view, is that it is common cause that the various debts between Transnet and Befula, which constitute the dispute, were subject to prescription differently based on the date on which the specific debt arose. The dispute did not change or affect the character of a debt. The fact that a debt was the subject of a claim subjected to arbitration, did not necessarily result in any uncertainty because there were other debts being considered in the same arbitration proceedings.

[23] The question is whether, generally, the delivery of an interim award has the effect of terminating the arbitration in respect of the claims covered by the interim award, which results in the cessation of an impediment to the running of prescription as envisaged in s 13(1)(f) of the Prescription Act. The question was not raised and debated before the court a quo. Before us it was raised, debated and the parties were invited to file supplementary heads of argument to deal with the question as to whether there is case authority to support the proposition that Transnet was obliged to bring an application to make the interim award an order of court pursuant to s 31 of the Arbitration Act if it wished to avoid its penalty claim prescribing on 23 January 2018.

[24] Befula, in its supplementary heads of argument, relied, *inter alia*, on *Krohne (Pty) Ltd v Strategic Fuel Fund Association*⁸ and submitted that Transnet was indeed obliged to bring its application prior to 23 January 2018, if it wished to avoid prescription of the interim award. It was submitted that in *Krohne*, the Supreme Court of Appeal confirmed the enforceability of interim arbitration awards by holding that an interim arbitration award issued by an arbitrator following a settlement agreement can be enforced. The following was held:⁹

'An agreed award thus has the status and effect of any other award on the merits. Accordingly, an agreed award is enforceable even though the arbitrator has not actually made a decision but simply recorded the agreed terms.' (footnote omitted)

⁸ *Krohne (Pty) Ltd v Strategic Fuel Fund Association* [2024] ZASCA 99 (*Krohne*).

⁹ *Ibid* para 21, quoting from *Bidoli v Bidoli and another* [2011] ZASCA 82; 2011 (5) SA 247 (SCA) para 8.

It was contended that 'the obvious conclusion' is that if an award is enforceable, then the prescription clock starts ticking again and steps must be taken to enforce the award and failure to do so will be visited with the pain of prescription.

[25] Befula also referred to *WK Construction SA (Pty) Ltd v Transnet SOC Ltd*,¹⁰ where an interim order was made an order of court. In its judgment, the court referred to *Prime Fund Managers (Pty) Ltd v Rowan Angel (Pty) Ltd and another*,¹¹ where the court held that the interim award brought finality to the issues raised by the respondents and the fact that there were other issues in the arbitration which were still subject to pending decisions did not constitute a bar to making the interim award an order of court.

[26] In conclusion, it was contended that Transnet, if it wished to avoid prescription, was obliged to have delivered an application to make the interim award an order of court under s 31 of the Arbitration Act before the expiry of the one-year period.

[27] Transnet, in its supplementary heads of argument, responded to the submissions made and cases relied upon by Befula. It was submitted that the question to be answered depends on an interpretation of s 13(1)(f) of the Prescription Act. It was contended that the Supreme Court of Appeal did not consider the question of prescription in *Krohne*. The issue in that case was whether a decision by a third party, acting as a referee, to whom the parties submitted an issue, was binding on the parties. The issue in the appeal was whether the decision by the expert constituted a valid cause of action. The Supreme Court of Appeal decided that the parties had agreed that the expert's report would be final and binding on the parties. It constituted a cause of action and the court *a quo* had erred by upholding a point *in limine* to the contrary. The matter was referred back to the court *a quo* to deal with the merits. It was submitted that the judgment did not give rise to the conclusion arrived at by Befula in its heads of argument, which submission is well made.

¹⁰ *WK Construction SA (Pty) Ltd v Transnet SOC Ltd* [2021] ZAGPJHC 34 (*WK Construction*).

¹¹ *Prime Fund Managers (Pty) Ltd v Rowan Angel (Pty) Ltd and another* [2014] 2 All SA 227 (GNP) (*Rowan*) para 32.

[28] As far as Befula's reliance on *WK Construction* is concerned, it was submitted that this decision likewise does not assist Befula. The court was not called upon to make a decision about prescription. It was pointed out that in *WK Construction*, both an *interim* arbitration award made on 1 May 2017 and an award made on 14 February 2020 (subsequently corrected in an award made on 9 March 2020) were made orders of court in the same application to court. It was submitted that there was no suggestion in the judgment that prescription had extinguished the former and that it could not be made an order of court, as Befula is contending in this appeal.

[29] In response to Befula's reference to *Rowan*, it was submitted that although prescription was addressed by the court, the decision is of no assistance, as the court erroneously concluded (based on earlier authorities) that the award of the arbitrator created new rights and obligations between the parties and that a new debt arose when an arbitration award was made. The court held that the party wishing to enforce the award will be entitled to sue on the award and not on the original contract from which the dispute arose, which claim would prescribe, in terms of s 11(d) of the Prescription Act, three years after the award is made.

[30] It was pointed out that in *Brompton Court*,¹² the Supreme Court of Appeal dismissed the notion that an arbitration award creates a new debt and that a claim to make an arbitration award an order of court is a debt that prescribes. It was further held 'the "impediment" of pending arbitration proceedings will cease to exist on affirmation of an existing debt by an arbitration award'.¹³ It was submitted that the Supreme Court of Appeal was not called upon to decide the issue of prescription in circumstances such as the present case, where the arbitrator was effectively deciding individual claims as part of the final account in terms of the construction contract.

[31] Reliance was finally placed on *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality*.¹⁴ This case will be discussed below. Transnet concluded its submissions by contending that with regard to the purpose of the Prescription Act, the

¹² *Brompton Court* paras 6 and 11. The Supreme Court of Appeal in *Brompton Court* ultimately overruled *Rowan*.

¹³ *Ibid* para 8.

¹⁴ *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) (*Murray*).

court should, in the interpretation of s 13(1)(f), take into account that Transnet was the party who moved to achieve certainty by persisting with the arbitration while Befula was idle.

[32] The parties are thanked for their additional input.

[33] The answer lies in the interpretation of the relevant provisions of the Prescription Act and the Arbitration Act. Prescription restricts a person's right to recover a debt after the effluxion of time, which requires that the provisions relating thereto, as far as possible, be interpreted strictly, but s 13(1)(f) seeks to ameliorate the harshness of prescription by delaying or suspending the running of prescription during arbitration.¹⁵ In *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁶ the court held:

'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. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (footnotes omitted)

¹⁵ *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) paras 25-26.

¹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA) para 18.

[34] Section 10(1) of the Prescription Act provides that a 'debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt'. In the present case it is common cause that the relevant period was three years¹⁷ and that prescription commenced to run as soon as the debt was due.¹⁸ In *Murray*¹⁹ it was held that the arbitration does not result in an award creating a debt, it delays the running of prescription of an existing debt. In fact, it is common cause between the parties that the debt relating to the penalty claims arose on 10 December 2008 and 30 September 2009, respectively. Since these debts arose prior to arbitration it is irrelevant how one defines the penalty claim awards, whether they were final or not, for purposes of the Prescription Act because they were so determined when they arose and they could not have subsequently changed their character.

[35] In *Murray*²⁰ the court held that in certain circumstances it would be unfair to require of a creditor that he institutes proceedings within the time normally allowed. This unfairness, as held by the court, arises in the main where it is impossible or difficult for a creditor to enforce his rights within the time limit, and that s 13(1)(f) of the Prescription Act is the provision which gives effect to this principle, as it so provides that if the debt is the object of a dispute subjected to arbitration, the running of prescription is suspended. The court held:²¹

'An arbitration agreement is therefore in a sense an impediment to the recovery of a debt by means of legal proceedings, but it is one because it provides an alternative means of resolving disputes which carries the approval of the law. This applies *a fortiori* where a dispute has actually been subjected to arbitration. The creditor is protected against the running of prescription because there exists an impediment to his approaching the ordinary courts, and the impediment exists because he is taking appropriate alternative steps to recover his debt.'

[36] The contract between the parties provided for arbitration to resolve disputes arising from the contractual relationship. The parties were bound by the decision of the arbitrator, which was final. The parties during the course of the arbitration could

¹⁷ Section 11(d) of the Prescription Act 68 of 1969.

¹⁸ Section 12(1) of the Prescription Act.

¹⁹ *Murray* at 579.

²⁰ *Murray* at 579A-B.

²¹ *Murray* at 580A-B.

not pursue disputes subject to arbitration through a court process. There is no provision in the contract that once an interim award has been issued in relation to a particular debt that the creditor was entitled to enforce payment through a court process although the arbitration in question had not been finalised.

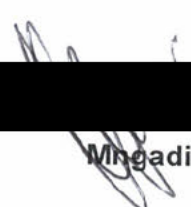
[37] Section 13(1)(f) of the Prescription Act provides that it is *the dispute* (my emphasis) that is subjected to arbitration. The dispute may relate to various debts and other issues. The arbitration, although the arbitrator may deliver interim awards during the course of the arbitration, is a single process and the Arbitration Act regards it as a single process. Section 13(1)(i) of the Prescription Act provides that the 'relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment . . . has ceased to exist the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to has ceased to exist'

It must be accepted that the impediment is the arbitration that commenced. It matters not that during the course of the arbitration, in respect of certain claims, interim awards were delivered. As long as the arbitration process has not been finalised, the impediment remained in place. This interpretation encourages arbitration. It avoids inconsistency in having arbitration affecting interruption of prescription differently for claims in the same dispute. It is, in my view, in line with the contractual clause providing for binding arbitration to resolve disputes arising in a contractual relationship.

[38] In the result, although for incorrect reasons, the court a quo came to the correct conclusion. The appeal falls to be dismissed with costs.

[39] It is ordered as follows:

The appeal is dismissed with costs including costs of senior counsel where so employed.



Mngadi J



E Bezuidenhout J



Nako AJ