IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION - GRAHAMSTOWN)

Case No: 1589/2017

In the matter between:

THE TRUSTEES OF THE MVULA TRUST **Applicant**

and

UWP CONSULTING (PTY) LTD **First Respondent**

M RIVAROLA NO **Second Respondent**

JUDGMENT

MALUSI J:

[1] This is an application to review and set aside an arbitral award of the second respondent and to substitute such award with an order dismissing the first respondent's *(UWP)* claim alternatively granting the applicant *(Mvula)* absolution from the instance. The application is opposed only by the first respondent with the second respondent (the Arbitrator) not participating at all.

[2] For the sake of clarity, it is necessary to provide a brief background to the dispute. Mvula participated in a project known as the Accelerated Schools Infrastructure Delivery Initiative Programme *(ASIDI)* to supply water and sanitation facilities to 221 schools in the Amathole and OR Tambo municipal districts of the Eastern Cape province. The project was funded from a grant by the Department of Basic Education *(DBE).*

[3] On or about 18 January 2013 Mvula concluded a written contract with UWP for the latter to provide the former with professional engineering project management and support in ASIDI.

The fees to be paid for services provided by UWP were set out in an annexure to the agreement. This was a time-based fee structure.

[4] On 30 September 2013 Mvula and UWP varied the contract in that the latter's fees were no longer to be paid on a time-based formula. The parties agreed that the fees will be calculated at three percent (3%) of the final construction value of the project to be claimed on a pro-rata monthly basis. It was further agreed that a balance of five percent (5%) of the fees will only be claimed after the schools in the project have achieved final completion status.

[5] On 31 October 2014 UWP submitted two invoices for water and sanitation projects respectively to Mvula for payment. The total sum claimed in the two invoices was R2 255 783.89 for services rendered by UWP.

[6] On 9 June 2015 Mvula made two payments in the total sum of R563 945.97 to UWP towards the two invoices. The payments were made on a without prejudice basis.

[7] On 28 August 2015 UWP declared a dispute as provided in the contract and demanded the payment of the balance of the two invoices in the sum of R1 691 837.92. Mvula did not pay the sum demanded by UWP. The dispute was referred to arbitration in accordance with the dispute resolution clauses in the contract.

[8] In the arbitration UWP contended in the amended statement of claim that it had complied with its obligations in terms of the contract. It claimed the aforementioned balance after the part-payment by Mvula. It led the evidence of two witnesses in support of its claim.

[9] Mvula raised a number of defences to the claim and also lodged a counterclaim. The defence that the claim was premature and the counterclaim were both abandoned at the start of the arbitration hearing. The defence that UWP breached the contract and was consequently not entitled to payment was not supported by any evidence. Thus it was effectively abandoned. The only remaining defence was that UWP had failed to provide final construction values to Mvula and therefore were not entitled to

payment. Mvula did not call any witnesses to substantiate its defence.

[10] On 21 February 2017 the Arbitrator issued an award. He directed Mvula to pay UWP the amount of R1 691 837.92 with interest and the costs of the arbitration.

[11] On 4 April 2017 Mvula launched the review application. Mvula contends the Arbitrator committed gross irregularities and/or misconduct on the following basis:

"(a) he embarked upon the wrong legal enquiries and thereby reversed the onus of proof;

(b) he considered inadmissible and irrelevant evidence;

(c) he displayed bias in favour of UWP."

It goes without saying that the review will be limited to a determination of the stated grounds.

[12] It is necessary to restate the approach of our Courts to a review of an arbitration award. The Supreme Court of Appeal has espoused a deferential approach to arbitration awards when it stated that:

"A court will, therefore, as far as possible construe an award or determination so that it is valid rather than invalid. It will not be astute to look for defects. . . 'as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavoring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it."[1] (Footnotes omitted)

This approach was later endorsed in the Dexgroup matter.[2]

[13] The deferential approach does not postulate a generous and obsequious acceptance of arbitration awards. It simply eschews an over-keen approach to intervene in arbitration awards which will, as Wallis JA stated, *'entirely diminish or destroy the advantages of*

[1] *SA Breweries Ltd v Shoprite Holdings Ltd* 2008 (1) SA 203 (SCA) at para 22.
[2] *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) at paras 19-20.

arbitration.' That should not be understood to state that Courts will not intervene when it is required.

[14] The review is brought in terms of section 33(1) of the Arbitration Act 42 of 1965. It provides to the extent relevant that:

"33 Setting aside of award – (1) Where –

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

. . .

The court may, on application of any party to the reference after due notice to the other party or parties, make an order setting the award side."

[15] The contention by the applicant that the Arbitrator reversed the onus of proof is pivoted on the following excerpt from the arbitration award:

"It is obvious, if has not been clear, that in my view Mvula have not made, on the balance of probabilities a plausible case for not paying what is

legitimately owed to UWP in terms of the agreement which Mvula themselves have drafted." (sic)

[16] Mr Euijen, who appeared on behalf of Mvula, submitted that the Arbitrator ought to have initially enquired whether or not UWP was claiming in terms of the contract and has performed its obligations as required in the contract. It was argued the Arbitrator failed to conduct this initial enquiry. It was only upon receiving a positive answer to those two questions that the Arbitrator ought to consider Mvula's case and not before then. Mr Euijen embarked on an extensive analysis of the evidence led at the Arbitration hearing to show that UWP had not made-out a case to succeed in its claim and absolution from the instance ought to have been granted by the Arbitrator.

[17] Mr Dugmore, who appeared on behalf of UWP, submitted that the pleadings in the arbitration had framed the dispute differently to what Mvula now contends in the review. He argued that the sole issue in dispute in the arbitration was whether or not the calculation of fees due to UWP was in accordance with the final construction values. He contended that issue is completely different to the

assertion on review by Mvula that essentially there was no evidence in the arbitration that the work had been done by UWP.

[18] I find merit in the submissions by Mr Dugmore. The context in the arbitration hearing was delineated by the pleadings and the evidence tendered. In the statement of claim UWP alleged that it performed its obligations in terms of the contract. In the statement of response Mvula did not allege that UWP had not provided professional services as required by the contract. Mvula cited eight (8) areas of non-performance which are not relevant for present purposes.

[19] In the arbitration hearing UWP tendered the evidence of two witnesses who asserted that it had fulfilled its contractual obligations and the payment claimed was due to it. Mvula did not lead any evidence even on the alleged eight areas of non-performance. On the facts of this case it is not permissible to conduct an appraisal of whether or not an absolution from the instance ought to have been granted in Mvula's favour by the Arbitrator. That would stray into the realm of an appeal. This would give expression to the grave unease I

have that this ground is merely an attempted appeal under the guise of review.

[20] Crucially, Mr Euijen who also appeared for Mvula in the arbitration, framed the issue in dispute as follows in the arbitration:

"As I understand it the essential point, the issue on which the arbitrator is required to make a finding, is that when the contract says final construction value we say it means what is says, you say no it means the tender amount…"

That was the context in which the Arbitrator had made the statement in the excerpt. In my view it is also significant that the Arbitrator made the statement after evaluating, in his own way as a layperson, the pleadings and the evidence before him. Thereafter, he reached the conclusion in the excerpt.

[21] In my view it is misplaced to contend in these circumstances that the Arbitrator had embarked upon the wrong enquiry. The issue for decision is determined by the pleadings of the parties. I find no merit in this ground of review.

[22] The contention that the Arbitrator admitted inadmissible evidence is based on the following passage in the award:

". . .Mvula [who] either did not perform their side of the contractual bargain or continued stalling the pre-arbitral process by reneging on what seemed to be agreed terms for settlement of this dispute, notwithstanding that meetings were held without prejudice, and likewise agreements were struck without prejudice. Whilst the contents of the agreements are privileged and of no weight I do however consider the discussions were held and agreements struck, albeit without prejudice, which one party decided not to honour whilst at the same time attempting to apportion blame onto the other for its own actions and failure."

[23] Mvula asserts that this finding by the Arbitrator is based on a *'without prejudice'* settlement meeting which evidence was abandoned by UWP after Mr Euijen objected to it. It was stated notwithstanding the inadmissible nature of the evidence, the Arbitrator still dealt with it.

[24] Mr Euijen submitted that it was not a point the Arbitrator needed to decide at all. He pointed out that the Arbitrator made negative findings against Mvula.

[25] Mr Dugmore submitted, correctly in my view, that Mvula had pleaded in its response that it made payments on a *'without prejudice'* basis related to *'an agreement'* or *'condition'.* Mvula itself pleaded the facts now forming the basis of the objection but also did not object to the inclusion of these facts in the amended statement of claim or apply for them to be struck-out.

[26] It was further argued that at the conclusion of the hearing Mvula's defence depended on the special interpretation of the varied contract. The Arbitrator considered all the pleadings and the evidence and made a determination on the correct interpretation. The determination was not based on the matter to which Mvula now raises an objection. I find merit in the argument.

[27] Mvula asserted that the Arbitrator was biased. This was based on the assertion that he admitted inadmissible evidence and made

negative findings about Mvula on issues not material to the resolution of the pleaded dispute between the parties.

[28] Mr Euijen in argument sought to rely on a reasonable apprehension of bias not actual bias as he conceded the latter has not been proved.

[29] Mr Dugmore submitted that actual bias means approaching *'the issues . . . with a mind which was prejudiced and not open to conviction."*[3] This occurs when *'the decision maker has prejudiced the case so as to be unable or unwilling to decide it impartially."*[4]

[30] In my view there is absolutely no basis for a reasonable apprehension of bias by Mvula, let alone actual bias. A reading of the transcript of the arbitration hearing and the award does not support the allegations of bias by Mvula. The rationale for the allegation is incomprehensible. Even if Mvula believed the Arbitrator erred on the facts and law that is no basis to level such a serious allegation against him. Mvula is warned that imputing such a baseless

[3] *S v Shackell* 2001 (4) SA 1 (SCA) at para 26.
[4] *Gamaethige v Minister for Immigration & Multicultural Affairs (*2001) 183 ALR 59 (FCA) at para 79.

allegation against a presiding officer may invite an adverse costs order in future.

[31] Mr Dugmore submitted that this is an appropriate matter for costs of two counsel to be allowed to the extent that they were employed. Mr Euijen submitted that employment of two counsel was not necessary.

[32] In my view the case did not present considerable difficulties in fact or in law which would require the employment of two counsel. Mr Euijen submitted correctly that the record was not unduly lengthy. The employment of two counsel by UWP was not a wise precaution in the circumstances. Consequently only the costs of a single counsel will be allowed.

[33] In the result the following order will issue:

33.1 The application is dismissed with costs.

_____

T MALUSI

JUDGE OF THE HIGH COURT

***Appearances*:**

For the Applicant:	Adv Euijen *instructed by* Whitesides Attorneys 53 African Street **GRAHAMSTOWN**
For the First Respondent:	Adv Dugmore *instructed* by McCallum Attorneys 87 High Street **GRAHAMSTOWN**
Heard on:	12 October 2017
Judgment delivered:	14 June 2018