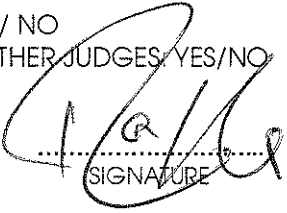


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/37118
REPORTABLE

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
13/7/2012	
DATE	SIGNATURE

In the matter between:

CYCAD PIPELINES (PTY) LIMITED

Applicant

and

**BOYNTON INVESTMENTS (PTY) LTD
BARRICK PLATINUM SA (PTY) LTD
GC PRETORIUS S.C. (ARBITRATOR)**

**First Respondent
Second Respondent
Third Respondent**

J U D G M E N T

MOKGOATLHENG J:

INTRODUCTION

- (1) This is an application pursuant to *section 33(1)(b) of the Arbitration Act No 42 of 1965 [The Act]* in terms whereof the applicant seeks to review and set aside the third respondent's interim award made on 6 August 2010. The application is premised on the ground that the third Respondent (the arbitrator) in making the award exceeded his powers as contemplated in **The Act**.

THE CONTRACTUAL DISPUTE

- (2) On 21 May 2008 the applicant and the first respondent concluded a written agreement for the construction of a cement mortar lined steel pipeline. Pursuant thereto, the applicant purportedly performed work in terms of the contractual scope of work and specifications.
- (3) The work executed was however not reflected in the bill of quantities and neither was a rate of payment contractually in respect thereof provided. Despite the absence of these exigencies, the applicant contended that it was entitled to payment for the work effected at a reasonable or agreed rate.

- (4) Alternatively, the applicant contended that it was an implied term of the contract that it would be compensated for all work performed by it in terms of the scope of work set out in the contract. The first and second respondents disputed the validity of the claim and contended that the applicant's claims were flawed in that:
- (a) firstly, the work for which the applicant sought payment was part of the scope of work it was obliged to perform in terms of the contract;
 - (b) Secondly, as there was no rate of payment for the work the applicant allegedly performed in the bill of quantities, it was not entitled to payment.
- (5) The applicant, the first and second respondents submitted their dispute to adjudication and thereafter for determination by an arbitrator in terms of *clause 58.4.1 of the General Conditions of Contract*.

THE ARBITRATOR'S MANDATE

- (6) *Rule 22 of the Rules Governing Arbitrations* provides:
- "The Arbitrator shall, if both parties so agree, may.... at his own discretion, determine any particular issue of law or fact either separately or before*

other issue are determined. The hearing of the said specified issue shall proceed and be conducted subject to conditions agreed by the parties or prescribed by the Arbitrator.”

THE ISSUE

- (7) Pursuant to *Rule 22 of the Rules for the Conduct of Arbitrations* the applicant, the first and second respondents requested the arbitrator to formulate and define the issues in dispute. The arbitrator identified and formulated three issues. However, the parties agreed to proceed to arbitration in respect of one of the issues defined by the arbitrator as follows:

“Is the claimant precluded from claiming payment for work it alleges was required to be done in terms of the scope of work and specifications, but which was not reflected in the bill of quantities?”

which in their view would be dispositive of their dispute.

THE STATEMENT OF CLAIM

- (8) The dispute between the applicant, the first and second respondents is set out succinctly in the former’s *Statement of Claim* and in the latter’s pleas. The issue for arbitration pertains to *claims 4 to 12* as described in the applicant’s statement of claim. The structure of each claim is similarly formulated, it

contains a description of the work performed and the rate charged. The claims are premised on the allegation that:

- (a) *“the bill of quantities does not provide for a rate of the work executed by the claimant as set out... and*
- (b) *in the absence of a rate in the bill of quantities, the claimant is entitled to payment at a reasonable rate. It was an implied term of the contract that the claimant would be compensated for all work performed by it in terms of the scope of work set out in the contract, as measured, at the claimant’s usual rate, alternatively a reasonable rate, alternatively an agreed rate”.*

THE PLEAS

- (9) The nub of the defense pleaded by the first and second respondents in respect of each claim reads as follows:

“In amplification of the denial but without derogating from its generality;

- (a) the bill of quantities forming part of the tender was provisional, and the claimant was afforded an opportunity to alter the bill of quantities which it failed to do;*

The documents forming the contract are to be taken as mutually explanatory of one another. The bill of quantities forms an integral

part of the contract documents and shall be read in conjunction with the tender data, contract data, scope of work, site information, general and special conditions of contract, the specifications and the drawings.”

THE INTERIM AWARD

- (10) After hearing argument the arbitrator made the following interim award:

“77.1 The claimant is precluded from claiming for payment for work it alleges was required to be done in terms of the scope of work and specifications, but which was not reflected in the bill of quantities unless such claims are in (sic) brought in terms of clause 3 of the general conditions of contract.”

THE ARBITRATOR’S ALLEGED IRREGULARITY

- (11) The applicant contends that it is apparent from the proviso of the award,

“...unless such claims are brought in terms of clause 3 of the general conditions of contract,” that;

- (a) the arbitrator’s award goes beyond the scope and ambit of the issue he had to determine;

- (b) the award as formulated, materially impacts and finally decides any possible future amendment or reformulation of *claims 4 to 12* in the applicant's *Statement of Claim*; and
- (c) the award obliges the applicant to submit its claim in terms of *clause 3 of the General Conditions of the Contract*, consequently, the applicant is precluded from formulating any claim for payment in respect of work performed, but not provided for in the bill of quantities.

THE APPLICANT'S ALLEGED PREJUDICE

(12) The applicant contends that:

- (a) the impact of the award as formulated is manifestly unfair and fundamentally prejudicial to its interests insofar as the formulation of the its claims are concerned, and in the further conduct of the arbitration;
- (b) the arbitrator did not hear evidence and did not receive documentation regarding the construction of the work which could have provided him with insight and proof of

the applicant's performance in complying with its contractual obligations in respect of *claims 4 to 12*;

- (c) by virtue of finality of the award, the applicant is precluded from claiming payment for work performed in respect of *claims 4 to 12 of the Statement of Claim*, or in terms of any of the other clauses in the *General Conditions of Contract*;
- (d) as a result of the award, the applicant is precluded from relying on *clauses 36, 45, or 46 of the General conditions of Contract* in enforcing its rights to payment; and
- (e) *claims 8, 10 and 12* are for work performed outside of the scope of work, consequently were not included in the bill of quantities at tender stage, accordingly a claim in respect thereof in terms of *clause 3 of the General Conditions of Contract* is not competent.

- (13) The first and second respondents deny that the arbitrator exceeded his powers or committed a gross irregularity as contemplated in *section 33 (1) (b) of the Act*. The first and second respondents' reasons in support of the

legal justifiability of the arbitrator's award are addressed later in this judgment.

THE APPLICABLE LEGAL PRINCIPLES

(14) *Section 33(1) (b) of the Act* provides:

“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

(c) an award has been improperly obtained, the court may, on the application of any party... after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties;

(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(4) *If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.”*

(15) In enunciating the applicable legal principles I can do no better than paraphrase Harms (JA) in *Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA)* when he remarked:

“[4] High Courts in setting aside arbitral awards should not disregard the principle of party autonomy and should give due deference... to arbitral awards...this approach dictates a high degree of deference for decisions...and awards of consensual arbitration tribunals...in particular to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention...when reviewing arbitral awards.

[47]...‘[T]he Constitution.....permit(s) individuals the dignity and autonomy of regulating their own lives.....It is also recognizes that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties’ individual arrangements.’

[48] The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.

[51]...by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in section 33(1) of The Act.

[52]The term 'exceeding its powers' and 'gross irregularity' requires little by way of elucidation and this statement by Lord Steyn in: *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 in para [24]. Cf *Bull HN Information Systems Inc v Hutson* 229 F 3d (1st Cir 2000) 321 at 330: says it all: "To determine whether an arbitrator has exceeded his authority...courts "do not sit to hear claims of factual or legal error..."...and "(e)ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration award"...'.

'But the issue was whether the tribunal "exceeded its powers" within the meaning of s 68(2)(b) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of

power vesting in the tribunal no excess of power under s 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under s 48(4). The jurisdictional challenge must therefore fail.'

[55] The review of an award based on a wrong construction of a deed of partnership was the subject of **Dickenson & Brown v Fishers Executor's** 1915 AD 166 at 174. This Court held that a review on this basis was impermissible on two grounds. The first was the general principle that when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally the decision was.

[85] The fact that the arbitrator may have either misinterpreted the agreement, and had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence

but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA in *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk 1955 (1) SA 557 (A)*: it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. (My emphasis)

See also *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC)

THE ANALYSIS AND EVALUATION OF EVIDENCE

- (16) In paraphrasing Harms (JA) in *Telcordia Technologies (supra)* it is trite that: “[99]...It is not this court’s obligation to interpret the agreement afresh, and come to a different conclusion about its meaning; and then to conclude that as a result of the difference the arbitrator did not apply his mind thereto in a proper manner, [and] that he misconceived the whole nature of the inquiry and his duties therewith’ and that he simultaneously exceeded the bounds of his powers. Nor is it the court’s duty to reinterpret the contract. The court’s function is to determine whether the gross irregularities alleged have been committed. By reinterpreting the contract this court would be dealing with the matter as an appeal, reasoning in effect that because the arbitrator was wrong it had to follow that he had committed an irregularity. The failure to apply the applicable principles of interpretation or to come to a wrong conclusion does not amount to a ‘gross irregularity neither does it show that the arbitrator exceeded the bounds of his power’” (my emphasis)

- (17) The arbitrator was given the power to interpret the contract, and to decide the defined issue on the basis of his interpretation thereof. It was common cause between the parties that the arbitrator did not require oral evidence in order to interpret the contract.

The only question for determination is whether the arbitrator determined the defined issue within the purview of his power and jurisdictional mandate on the pleadings as they stood.

- (18) In essence the arbitrator was requested to determine whether the applicant was entitled to claim payment for work that it purportedly performed, but which was not reflected in, and in respect of which there was no rate in the bill of quantities.

- (19) In interpreting the contract, the arbitrator concluded that:

- “(a) in re-measurable contracts with Bills of Quantities, the notion that the price tendered will be for the performance of the entire scope of the work, is not correct, this depends on the terms of the contract; and*
- (b) in all cases, the particular terms of the contract and its interpretation are paramount.”*

(20) *Clause 3 of the General Conditions of Contract* provides for “*ambiguity in documents*”:

- (a) *if an ambiguity or discrepancy between the documents is found, the engineer shall issue any necessary clarification or instruction.*
- (b) *if compliance with any such instruction shall involve the contractor in any delay or additional cost, which by reason of any such ambiguity or discrepancy the contractor did not and had good reason not to anticipate, he shall be entitled to make the claim in accordance with clause 48.”*

(21) The arbitrator in interpreting the contract determined that;

- (a) *Clause 3 of the General Conditions of the Contract* dealt with variations to the contract of work performed but which was not reflected in the scope of work and in respect of which there was no rate specified in the bill of quantities;
- (b) the claims for payment pleaded in *claim 8, 10 and 12* of the *Statement of Claim*, are for work performed outside

of the scope of work and for that reason could not be included in the bill of quantities, and

- (c) there were discrepancies between the bills of quantities and the scope of work, consequently, *clause 3 of the General Conditions of Contract* was applicable.

THE AMBIGUITY IN DOCUMENTS AND CLAIMS PROCEDURE

- (22) The arbitrator in interpreting the contract found that the applicant was precluded from claiming payment for work it alleges effected and was required to be executed in terms of the scope of work and specifications, but which was not reflected in the bill of quantities, unless such claim was brought in terms of *clause 3 of the General Conditions of Contract*.
- (23) The applicant's submission that the arbitrator by finding in effect that it is precluded from lodging any claim for work performed but which is not reflected in the bill of quantities unless it was not brought within the ambit of *clause 3 of the general conditions of contract* exceeded his mandate and committed a gross irregularity has no merit.

- (24) *Clause 3* expressly provides for the very factual basis upon which *claims 4 to 12* are premised, namely a discrepancy in the scope of work in the contract documents, and the bill of quantities and stipulates a mechanism which has to be followed if the applicant wished to be paid for *claims 4 to 12*.
- (25) The arbitrator was empowered to determine the existence of the applicant's right to be paid in circumstances where a discrepancy existed. The invocation and applicability of the tacit term had a material bearing on the arbitrator's interpretation of the contract and the interim award he issued because the tacit term formed the basis of the applicant's alleged entitlement to be paid for the work set out in *claims 4 to 12*.
- (26) The arbitrator in interpreting the contract determined that the applicant's alleged tacit term could not be inferred because it conflicted with the express terms of *claims 4 to 12*. It is apparent that the arbitrator regarded *clause 3 of the General Conditions of Contract* as negating the tacit term contended for by the applicant.

- (27) The rates in the bill of quantities are intended to cover all the work, except where *clause 3* is applicable. Consequently, *claim 4 to 12* as a presently pleaded, cannot succeed. *Clause 3* deals with the discrepancies regarding the scope of work and the contract documents consequently, the proviso in the arbitrator's interim award cannot be said to have merely addressed an incidental issue, it addressed the essence of the defined issue regarding whether despite the work alleged to have been performed by the applicant and the rates applicable in respect thereof not reflected in the bill of quantities, the applicant was still entitled to be paid.
- (28) The submission that the issue which was before the arbitrator was not whether a claim for work done in terms of the scope of work which was not reflected in the bill of quantities, could only be brought in terms of *clause 3* or that it cannot amend or reformulate a possible future claim in light of the award has no merit.
- (29) Work performed outside of the scope of work is not affected by the award, the arbitrator's award does not affect the factual basis of any of the contractual provisions the applicant allegedly wishes to rely upon in either reformulating or amending its claim.

- (30) There is no merit in the submission that the arbitrator was not empowered to determine the nature of any possible future formulation or amendment to its claim. Although the formulation of the applicant's claims was not part of the defined issue before the arbitrator, the impugned proviso was a *sine qua non* of the arbitrator's interpretation of the contract and is part of the award which has an incidental impact on the future conduct of the proceedings, and falls within the purview of the power of the arbitrator's mandate.
- (31) In any event, if the applicant cannot amend its claims in light of the award, it is because the arbitrator in interpretation thereof found that the applicant pursuant to the defined issue does not have a claim except in terms of *clause 3*. The arbitrator was pertinently called upon to determine that very issue, consequently the applicant cannot cogently argue that the arbitrator in so doing exceeded his powers.
- (32) The applicant's contention that as a result of the award it is unduly limited in the future formulation of its claims, and cannot advance such claims in terms of either *clauses 36, 45 or 46 of the contract* has no merit, because these

clauses are not applicable to the factual basis of *claims 4 to 12* which are the only claims in its Statement of Claim.

- (33) In any event, the applicant contrary to what it claims, *claims 8, 10 and 12* are predicted upon the work “*performed outside of the scope of work*”. The award does not affect these claims, as it only applies only to work performed as part of the applicant’s scope of work. In any event, the interim award does not preclude the applicant from amending the claims falling outside the purview of *clause 3 of the General Conditions of Contract*.
- (34) There is no merit in the applicant’s contention that the arbitrator exceeded his powers in making the award but only insofar as the award included the proviso. Had the arbitrator not included the proviso at the end of his interim award, the effect would have been that the applicant would have been denied the right to claim payment for work not falling within the purview of *clause 3*.
- (35) In the absence of a right to claim payment of such said work, the applicant would also not have had a right to amend its claim in respect thereof. Ironically, the proviso against which the applicant objects as impinging on

its right of amendment actually gives the applicant a right of amendment which it otherwise would not have had.

- (36) Because of the factual premise on which the applicant's *claims 4 to 12* were formulated, the arbitrator was alive to the fact that the applicant may possibly intend to amend same consequently, an award simply dismissing the claims would have had the effect of finally determining these claims, and depriving the applicant of further right to reformulate or amend its claims, consequently, the arbitrator avoided making such a final dispositive award.
- (37) Rather than dismissing *claims 4 to 12* the arbitrator's interpretation of the defined issue accorded the applicant in terms of *clause 3* the mechanism through which payment could be claimed. Based on the arbitrator's interpretation of the contract, *clause 3* is the only contractual mechanism available to the applicant where there is a discrepancy between the bill of quantities and the scope of work.
- (38) The applicant's objection to the award is not that the arbitrator did not make a finding in regard to the primary defined issue, it consequently follows that the applicant is content with the arbitrator's finding that the applicant is

precluded from claiming for payment for work executed in terms of the scope of work which is not reflected in the bill of quantities.

- (39) If the applicant's objection is primarily against the portion of the award which starts from the word "*unless*", there is no logical or legal sense in setting aside the entire award simply because the applicant's complaint is directed to what is refers to as the objectionable proviso.
- (40) Taken to its logical conclusion, the applicant's contention is that the arbitrator should have decided the defined issue on an affirmative or negative basis without substantiating his decision at all. In terms of ***Rule 35.2 of The Rules Governing Arbitrations***, the arbitrator is obliged to.... "*Provide the reasons for his award simultaneously with publication unless the parties otherwise agree.....*". If the answer is in the negative, then, on the basis of the issue before the arbitrator, it was open to the claimant to formulate its claim in any other suitable manner, and to have that issue pleaded to and determined in the arbitration by the arbitrator.
- (41) The applicant's complaint is that its right to amend had been curtailed. The right to amend is a procedural right, it is not a substantive right. The

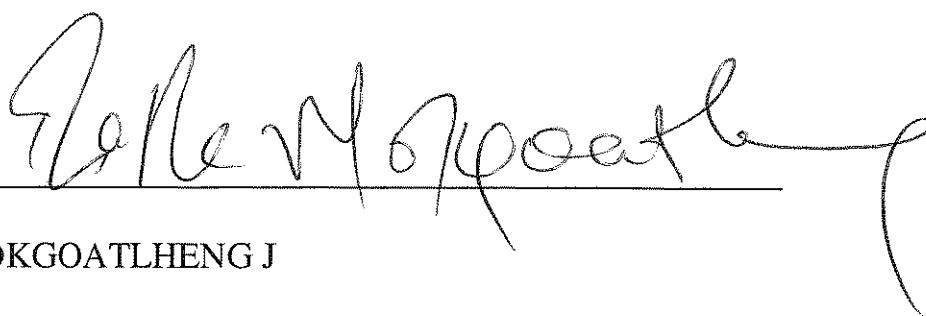
procedural right was curtailed not because the arbitrator exceeded his powers, but because he found that the applicant did not have a valid claim, consequently, if the applicant is at all restricted in the formulation of any contemplated amendment, it is only as a consequence by virtue of the proper interpretation of the contract, which the arbitrator was expressly empowered to construe.

- (42) The fact is that the arbitrator in the interpretation of the contract and in determining the defined issue *vis-a-vis* the scope of work, did not exercise power he did not have, neither did he erroneously exercise such power. The arbitrator had the power and jurisdiction to interpret the contract without such construction, the defined issue could not be determined.

THE ORDER

- (43) In the premises the following order is made:
- (a) the application is dismissed with costs.

Dated the 13th day of July 2012 at Johannesburg.



MOKGOATLHENG J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE OF HEARING:

DATE OF JUDGMENT: 13 JULY 2012

ON BEHALF OF THE APPLICANT: J P DANIELS S.C.

INSTRUCTED BY: DU TOIT McDONALD INC

TELEPHONE NUMBER: (011) 447-2533/2534

ON BEHALF OF THE 1ST AND 2ND RESPONDENTS: C J McASLIN

INSTRUCTED BY: AJH ATTORNEYS

TELEPHONE NUMBER: (011) 463-6368