


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO: 30423/2013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	20 March 2014
	DATE
	
	SIGNATURE

In the matter between:

B & B MARKETS ROOFTOP (PTY) LTD

Applicant

and

HYPROP INVESTMENTS LIMITED

Respondent

J U D G M E N T

TSOKA, J:

[1] This is an application in terms of s 31(1) of the Arbitration Act No 42 of 1965 (*"the Act"*) in which the applicant, B & B Markets Rooftop (Pty) Ltd (*"B & B Markets"*), seeks an order that the arbitration award of the Appeal tribunal

(*the Appeal Award*) handed down by retired Judges C T Howie, N V Hurt and E Goldstein on 30 June 2013, be made an order of court.

[2] The application is resisted by the respondent, Hyprop Investments (Pty) Limited (*Hyprop Investments*) on the basis that the appeal award is void as the arbitrators exceeded their powers thereby committing misconduct as provided in s 33(1) of the Act.

[3] To understand the misconduct complained of by Hyprop Investments, it is necessary to set out the background facts in this matter.

[4] On 7 December 1998, B & B Markets and Rosebank Mall (Pty) Limited, the predecessors of Hyprop Investments concluded a written lease agreement for the former to conduct a speciality Sunday market catering for artists, crafters, hobbyists, antique dealers, food and beverage stalls and other quality traders on the designated business days. The market operated for approximately 18 years. The rights and obligations of Rosebank Mall (Pty) Limited were ceded to Hyprop Investments in a deed of cession concluded on 1 January 2003.

[5] At a meeting held between the parties on 11 December 2012, B & B Markets was instructed to relocate the market on or before 26 January 2013 as Rosebank Mall (Pty) Limited intended to commence with building operations to accommodate Woolworths, a new tenant, who required a

substantial space. The building operations would result in taking over the existing space let to B & B Markets in terms of the lease agreement.

[6] Pursuant to a meeting held on 11 December 2012, B & B Markets, received a letter dated 22 December 2012 instructing it to vacate the leased premises by 26 January 2013. Negotiations ensued with a view to resolve the relocation. Nothing was resolved as B & B Markets was of the view that Rosebank Mall (Pty) Limited was not, in terms of the lease agreement, entitled to relocate it from its premises.

[7] As B & B Markets was of the view that the conduct of Rosebank Mall (Pty) Limited was unlawful, on 20 February 2013, on urgent basis, it launched an application against the latter in terms of which application it sought an *'Order that the Respondent be interdicted and restrained from interfering with Applicant's contractual rights to undisturbed possession of the premises leased from the Respondent and to cease construction work on this portion of the premises'*. A further order was sought *'Ordering the Respondent to comply with its obligations under the lease agreement'*.

[8] Hyprop Investments opposed the application. It simultaneously launched a counter-application in terms whereof it sought a declaratory order that the lease agreement between it and B & B Markets had been duly cancelled and that B & B Markets be evicted from the premises.

[9] Instead of proceeding with the application, the parties agreed to refer the application and the counter-application to arbitration to be held on 6 March 2013 at the Bridge Group, Sandton, before retired Judge Meyer Joffe. It was a further agreement of the parties that any party dissatisfied with the finding of the arbitrator, may appeal to the Appeal tribunal headed by three retired Judges. The arbitrator and the Appeal tribunal were '*afforded the powers of a High Court Judge as if the arbitration was an opposed motion*'. Similarly, the Appeal tribunal would determine the procedure of the appeal, if any, and would have '*the same powers enjoyed by an appeal court under the Supreme Court Act and Uniform Rules of Court*'.

[10] On 8 March 2013, Joffe J made the award. In terms of the award, B & B Markets' application was dismissed and the lease agreement between it and Hyprop Investments was declared to have been lawfully cancelled. B & B Markets was ordered to vacate its premises. On 25 April 2013 Judge Joffe made a further award supplementing the earlier award by ordering B & B Markets to pay the costs of the applications which costs were on attorney and client scale inclusive of costs consequent upon the employment of two counsel.

[11] B & B Markets exercised its right to appeal the two awards in terms of the arbitration agreement between the parties. On 30 June 2013 the appeal tribunal made its award. The appeal was allowed with costs. The award of the arbitrator was set aside. In terms of the award, the appeal tribunal declared that the purported cancellation of the lease agreement by Hyprop

Investments on 28 February 2013 was of no force or effect. Hyprop Investments was ordered to pay the costs of the arbitration such costs to include the costs of employment of two counsel.

[12] It is the contention of Hyprop Investments that the appeal tribunal's award is invalid in that the tribunal exceeded their jurisdiction and powers. The contention is premised on the fact that, in its application B & B Markets sought the restoration of its premises without seeking an order that the purported cancellation of the lease agreement by Hyprop Investments was invalid. According to Hyprop Investments, this prayer, without a prayer for a declaratory order by B & B Markets that the purported cancellation of the lease was invalid, particularly in view of the abandonment of B & B Markets' notice of amendment amending its notice of motion to include such a declaratory order, was meaningless. According to Hyprop Investments, once the notice of intention to amend was abandoned, which fact is confirmed by the arbitrator, it was incompetent for the appeal tribunal to grant an order that B & B Markets did not pray for. This is the contention by the respondent that the appeal tribunal went beyond what was agreed to between the parties thereby exceeding their jurisdiction and powers.

[13] This contention is, in my view, simplistic and unhelpful. In my view, the real issue was the interpretation of the lease agreement and in particular clause 22 thereof as to whether '*encroachment*' includes relocation of B & B Markets from its occupied premises consequent upon the purported cancellation of the lease agreement by Hyprop Investments.

[14] The notice of motion in itself was not the issue referred to arbitration and later became the subject of appeal to the tribunal. The real issue for determination was cancellation of the lease agreement. The notice of motion was the means to an end not the end in itself. This view is fortified by Hyprop Investments in referring its counter-application that sought cancellation of the lease agreement as forceful and effectual. The converse of the counter-application, in my view, is the declaration that the purported cancellation of the lease agreement was invalid and ineffectual. This is the real issue. Having identified the real issue, the appeal tribunal dealt with it. In my view this was within their jurisdiction and powers. Consequently, it cannot therefore be said that the appeal tribunal went beyond their jurisdiction and powers resulting in an invalid award.

[15] In any event, the appeal tribunal's powers, by agreement between the parties, were to be equated with that of an appeal court. In terms of s 22 of the Supreme Court Act No 59 of 1959, in particular subsection (2), the tribunal's powers, just like an appeal court, is wider. The section reads –

"22. The appellate division or a provincial division or a local division having appeal jurisdiction, shall have power –

(a) ...

(b) to confirm, amend or set aside the judgment or order which is the subject of appeal and give any judgment or make any order which the circumstances may require."
(emphasis added)

[16] The appeal tribunal's award in upholding the appeal awarded in favour of B & B Markets and declaring Hyprop Investments' cancellation of the lease agreement on 28 February 2013 to be of no force and effect made an '*order which the circumstances required*'. The circumstance required that the purported cancellation of the lease agreement be declared null and void. This is what the parties agreed on. This pronouncement falls squarely within their jurisdiction, mandate and powers as the appeal tribunal.

[17] This view is fortified by Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, Fifth Edition, Volume 2, who, at 1250, say the following –

"Even when a formal amendment of pleadings is not applied for and granted (as is the case in this matter though B & B Markets contends otherwise), the Court of Appeal may grant a judgment or uphold a judgment granted by the court of first instance (such is the case in the present), on a basis not pleaded, where it is satisfied that the matter was fully canvassed." (emphasis added)

[18] With regard to alteration of a judgment appealed against, the authors, at the same page at 1250, state –

"The ordinary course followed when the Court of Appeal holds that a wrong order has been granted (a fortiori wrong or incompetent prayer was sought) is for that court to make a proper order itself." (emphasis added)

[19] Consequently, there is no basis to contend and to find that the appeal tribunal exceeded their jurisdiction and powers resulting in an invalid appeal award.

[20] There being no contravention of the provisions of s 33(1) of the Act, the tribunal's appeal award is made an order of court. It is further ordered that Hyprop Investments pays the costs of the application which costs should include the costs consequent upon employment of two counsel.



M TSOKA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG.

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Date of hearing:	17 February 2014
Date of judgment:	20 March 2014