REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28384/14

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

BROOKHAVEN PROJECTS CC Applicant

And

MIKE BUYSKES CONSTRUCTION (PTY) LIMITED First Respondent

DEREK BONHEIM Second Respondent

J U D G M E N T

MAKUME, J:

[1] In this matter the applicant seeks an order reviewing and setting aside awards made by an arbitrator. The review is in terms of section 33(1)(b) of

the Arbitration Act 1965 (the Act) on the basis that the arbitrator committed a gross irregularity in the conduct of the proceedings or exceeded his powers.

[2] The factual situation that led to this application follows hereunder.

BACKGROUND

[3] During or about October 2009 the applicant and the first respondent concluded a subcontractor agreement in terms of which the applicant as a subcontractor to the respondent agreed to supply and install Civil Engineering Services at the Fairways Hotel, Conference Centre and Spa.

[4] The agreed contract price for the services was the sum of R4 586 985.49 payable by the respondents to the applicant. The agreement is governed by the principles as set out in the JBCC Series 2000 Nominated/Selected Subcontract Agreement July 2007 Edition (the agreement).

[5] Clause 40 of the agreement deals with resolution of disputes that may arise between the parties. Clause 40.9 of the agreement is central to the issues in this matter and will be dealt with later.

[6] It is common cause that a dispute subsequently arose between the parties concerning the applicant's claim for acceleration costs in the amount

of R998 445.92. The appointed adjudicator could not resolve the dispute and eventually the parties agreed on arbitration.

[7] At paragraphs 60 to 62 of his statement of claim dated the 26th September 2012 the applicant says the following:

> "*[60] It is common cause that instructions to accelerate the works were in fact issued and that the claimant executed such instructions in order to achieve the practical completion of 14 May 2012. The claimant refers to the Defendant's instructions to accelerate the subcontract works under and contained in paragraphs 25, 28, 43 and 47.*
>
> *[61] The Defendant has as per paragraph 47 admitted liability in principle to the claimant's claim for acceleration costs for the additional resources working hours and additional scope.*
>
> *[62] The claimant accordingly submits that the costs claimed as expenses and loss are directly related to the acceleration measures implemented to achieve the actual practical completion date of 14 May 2010.*"

[8] In reply the respondent filed a special plea and a plea over. In its special plea the respondent raises two issues firstly that a Mr Leader who they described as being the Principal Agents Engineer and who gave instructions for acceleration did so as agent of the employer not as agent for the respondent. At paragraph 4.1 the respondent says:

> "*The Author of the e-mail Mr Geoff Leader is not an employee of the defendant but was employed by Tekciv Services CC which was the appointed Civil Engineer for the external work for the project nor was he authorised or empowered to act for or on behalf of the defendant in matters relating to the selected subcontract with the claimant.*"

[9] Secondly, in paragraph 8 of the special plea the respondent says that if the instructions to accelerate on the contract were oral and not in writing as required by clause 1.8 of the agreement then such instructions are null and void.

[10] In conclusion at paragraph 10 the respondent says that the applicant failed to set out allegations to sustain his cause of action and prays that the claim be dismissed.

[11] In the plea over the respondent largely repeated the issues raised in the special and added amongst others that the agreement between the applicant and the respondent does not provide for acceleration of the works and that in terms of clause 1.8 of the subcontract agreement any changes thereto shall not be effective unless reduced to writing.

[12] On the 8th November 2012 the applicant filed his replication to the special plea and the plea over.

[13] In the replication to the special plea the applicant says that whilst it is correct that Mr Geoff Leader was the agent for the employer throughout the duration of the contract Mr Leader issued instructions on behalf of the respondent with the knowledge and approval of the respondent.

[14] At paragraph 14 of the replication the applicant says that:

> "*The Defendant by relying on Mr Geoff Leader to issue all instructions on its behalf without contradictions or other such action represented to the Claimant through such conduct that Mr Geoff Leader was authorised to represent the Defendant.*"

[15] In further support of his replication the applicant says that during October 2009 he was informed that the contract would be managed by Mr Geoff Leader on behalf of the respondent and that he intends calling Mr Leader to give oral evidence at the hearing regarding the meeting of October 2009.

[16] The above is what the arbitrator Mr H J Savenije had to deal with and make a ruling on. In motivating the special plea the respondent says that the basis for the special plea is that the respondent avers that the issue of fact or law set out in the special plea can properly and conveniently be decided separately or before the other issues relating to the claim are determined.

[17] One of the purposes which a special plea is designed to serve is the convenience to all parties and the court if dealing separately with an issue which if the special is successful will either eliminate or postpone any need to deal with other issues in the case.

[18] Rule 24 of the Standard Procedure Rules in terms of which the arbitration was conducted provides as follows:

> "*The Arbitrator shall if both parties so agree, or may on the application of either party or at his own discretion determine any particular issue of law or fact either separately or before other issues are determined.*"

[19] It was on this basis that Mr Savenije proceeded to hear evidence and argument on the special plea. The respondent held the view that it will be expeditious to the resolution of the dispute if the arbitrator makes a finding on whether there was a need for written instructions for accelerated work and whether Mr Leader had the necessary authority to issue instructions whether verbal or in writing to accelerate on the works.

[20] It is trite that if the arbitrator Mr Savenije had found in favour of the respondent on the special plea as pleaded then it was the end of the claim. Mr Savenije in fact ruled against the respondent and found as follows in paragraph 5.1 of his determination:

> "*Consequently I reject the Defendant's Special Defence that there are no allegations to sustain the cause of action pleaded by the Claimant or because no 'contractors instructions' to accelerate was issued by the Defendant that the Claimant is prevented from pursuing a claim to be compensated for accelerating.*"

[21] It is the determination as set out in paragraphs 5.2 and 5.3 that have led to this application. These determinations read as follows:

> "*5.2 The Principal Agent's letter of 2nd March 2011 effectively created a disagreement between the Defendant and the Claimant as anticipated by 40.9 of the Agreement.*

> *5.3 In terms of 40.9 should any disagreement arise between the contractor and the subcontractor consequent upon a decision, action or inaction of the employer or agent then the contractor shall allow the subcontractor to use the contractor's name to institute proceedings as are provided for in the principal agreement.*"

[22] Shortly after the award was made the applicant's attorneys addressed a letter on the 7th May 2012 to the respondents' attorneys in which letter they raised their concern that paragraphs 5.2 and 5.3 of Savenije's award and determination were destructive and irreconcilable with one another and asked for their consent that a correction be made.

[23] On the 11th June 2013 the respondents' attorneys addressed a letter to the applicant's attorneys. Paragraphs 4, 5 and 6 of that letter are relevant for purposes of this application and I quote same in full:

> "*4. It is our client's contention that the only properly so-called ruling/order/award of significance made by the arbitrator is that contained in paragraphs 5.3 and 6.1 of the interim award.*
>
> *The import of the former is patently that your client becomes entitled to proceed against the principal in terms of clause 40.9 of the written subcontract agreement in our client's name, by instituting proceedings against the principal, claiming whatever your client contends it is entitled to.*
>
> *5. Subject to paragraph 7 our client abides by the arbitrator's ruling however subject to the prescripts of the remainder of the said clause 40.9 inter alia that your client furnishes our client an indemnity and security in respect of all/any liability for the costs or otherwise our client may be liable for as a result of the intended proceedings by our client's name by your client against the principal.*

> 6. *In order to facilitate the institution of the aforementioned intended proceedings our client requires the written indemnification signed by your client together with its members' sureties and an acceptable bank guarantee for the costs. Our estimate for the likely costs of the intended arbitration would be R500 000.00 and until such time that our client receives the said indemnity, sureties and bank guarantee your client shall not be entitled to take any steps to advance your claim against the principal.*"

[24] It is common cause that the applicant on receipt of that letter rejected the contents thereof and insisted that what the arbitrator said in paragraphs 5.2 and 5.3 were *obiter* and had nothing to do with the determination in paragraph 5.1. The applicant invited the respondent to furnish it with three dates for purposes of the continuation of the arbitration.

[25] It was whilst the parties were still exchanging correspondence on this aspect that the arbitrator Mr Savenije passed away. A substitute arbitrator in the person of the second respondent Mr Derek Bonheim was appointed. The second respondent held a preliminary meeting with the parties on the 29th January 2014.

[26] Of importance for purposes of this judgment is what the second respondent recorded in the preliminary meeting as issues raised by the parties at paragraph 13 of the preliminary minutes he records as follows:

> "*13(e) It was the Respondents' view that the evidence led at arbitration must start afresh (de novo) and claimant's view is that the previous Arbitrator's findings on the Special Defence must stand*."

[27] With this background the second respondent called for amendments to the pleadings and on the 13th June 2014 a hearing was held and the parties asked the second respondent to make a ruling on the interpretation of the interim award made by Mr Suvenije the first arbitrator.

[28] The second respondent made his ruling on the 23rd June 2014 and made two findings. The first finding he dismissed the respondents' special plea in other words he agreed with the first arbitrator that the applicant's statement of claim does disclose sufficient cause of action. Secondly, he ruled that the applicant's claim should be pursued against the Principal Agent and not against the first respondent.

[29] Before I deal with the two findings especially the finding that the applicant's claim lies against the Principal Agent I deem it necessary to first deal with a point *in limine* as raised by the respondents.

[30] The first respondent argues that the application to review the first award by Mr Savenije was launched out of time and that there is no case made for extension of time or condonation. The first respondent argues further that it was only when the second respondent's interpretation of the first award did not find favour with the applicant that applicant cried foul and resorted to the review of both the first and second awards.

[31] Section 33(2) of the Arbitration Act reads as follows:

> "*An application pursuant to this section shall be made within six weeks after the publication of the award to the parties.*"

The Act does make provision in section 38 for extension of periods fixed by the Act on good cause shown.

[32] In my view it is only paragraphs 5.2 and 5.3 of the first award that created a problem. The applicant and the respondents could not agree on the exact meaning of the award as set out in the two paragraphs hence the second respondent was specifically requested to interpret the award. There was no problem with the finding in paragraph 5.1 hence the second respondent dismissed it like the first arbitrator did. I am persuaded that a review of paragraphs 5.2 and 5.3 could not be applied for until the parties received a ruling by the second respondent. This application for review was accordingly brought within the period of six weeks from the time of the ruling.

[33] Even if I may be held to be wrong in holding that view I am satisfied that the applicant has shown good cause as required in section 38. In the matter of *South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 (SCA) at page 338 paragraph [14] the court in dealing with the phrase "*good cause*" said the following:

> "*Good cause is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances. As pointed out by Innes CJ in Cohen Brothers v Samuels 1906 TS 221 at 224 in relation to the meaning of that phrase albeit in another context:*

> *'No general rule which the wit of man could devise would be likely to cover all the varying circumstances which arise in applications of this nature. We can only deal with each application on its merits and decide in each case whether good cause has been shown.'*"

[34] I now turn to deal with whether the arbitrator in their awards committed gross irregularity in the conduct of the arbitration proceedings or have exceeded their powers. In determining this aspect I deem it necessary to deal with clause 40.9 of the agreement.

[35] Clause 40.9 reads as follows:

> "*Should any disagreement arise between the contractor and the subcontractor consequent upon a decision, action or inaction of the employer or agent, then the contractor shall allows the subcontractor to use the contractor's name to institute proceedings as are provided for in the principal agreement. Further the contractor may elect to join the subcontractor in instituting such proceedings. Should the subcontractor elects to proceed, the subcontractor shall:*
>
> *40.9.1* *Provide the contractor with an indemnity and security as reasonably required by the contractor.*
>
> *40.9.2* *Certify that the outcome of such proceedings shall be binding on him.*
>
> *40.9.3* *Initiate the proceedings as provided for in the principal agreement.*"

[36] In my view the first question to be answered is whether or not a disagreement did arise between the contractor and the subcontractor. Both arbitrators say the disagreement arose when the Principal Agent suddenly changed his mind and addressed a letter to claimant in the following words:

> "*In terms of the JBCC Series 2000 Nominated/Selected Subcontract Agreement no reference is made to acceleration and as no instruction was given to accelerate the works no adjustments will be made to the contract value. Your claims for acceleration due to inclement weather and additional work are therefore not accepted.*"

[37] Clause 40.9 must be read with clauses 40.1, 40.2, 40.2.1 and 40.2.2 in order to decide if indeed a disagreement did arise between the contractor and the subcontractor. The clauses read as follows:

> "*SETTLEMENT OF DISPUTES*
>
> *40.1 Should any disagreement arise between the contractor and the subcontractor arising out of or concerning this n/s agreement or its termination, either party may give notice to the other to resolve such disagreement.*
>
> *40.2 Where such disagreement is not resolved within ten (10) working days of receipt of such notice it shall be deemed to be a dispute and shall be referred to by the party which gave such notice to either:*
>
> *40.2.1 Adjudication* [40.3] *where the adjudication shall be conducted in terms of the edition of the JBCC Rules for adjudication current at the time when the dispute was declared or*
>
> *40.2.2 Arbitration 40.4 where the arbitrator is to be appointed by the body selected by the parties* [41.3] *whose rules shall apply.*"

[38] If indeed a disagreement arose between the contractor in this case the respondent and the subcontractor in this case the applicant when the Principal Agent addressed the letter dated the 2nd March 2011 to the applicant then such disagreement as contained in that letter should have been

subjected to a dispute resolution as is required by clauses 40.1 to 40.2.2. This did not happen instead what was referred to the arbitrator to decide is whether the applicant had pleaded sufficient cause to sustain a cause of action.

[39] In the same manner that clause 40.9 should not be read in isolation so is the letter dated the 2nd March 2011 the letter that the arbitrator say created a disagreement. That letter was preceded by a series of correspondence exchanged between the applicant, the Principal Agent and the respondents and in a letter dated the 20th October 2010 the respondents told the applicant how it had come to a valuation of the accelerated work. Paragraphs (v) and (vi) of that letter read as follows:

> "*(v) Seeing the acceleration is not defined in JBCC Series 2000 Agreements we have added an additional 30% to your preliminary time related costs to allow for overtime worked etc. This the basis that we are using for all acceleration claims.*
>
> *(vi) In terms of the foregoing we advise that we have awarded you the following (see attached adjustment breakdown):*
>
> *(a) R32 580.69 for the increase in value related preliminaries.*
>
> *(b) R73 848.89 for the increase in time related preliminaries due to the increase in scope of works and delays (from 26 March 2010 to 14 May 2010).*
>
> *(c) R105 799.84 for the increase in time related preliminaries (acceleration) from 7 July 2010 back to 14 May 2010).*"

[40] On the 30th November 2010 the Principal Agent sent an email to the applicant in which email a final statement of account as prepared by the

Principal Agent. The account included amounts due for acceleration. However for some inexplicable reason some four months after the dispatch of this letter the Principal Agent repudiated the claim.

[41] The repudiation of the applicant's claim was not because of the fact that the applicant was claiming payment from a wrongful party it was because the respondents told the applicant that there was no acceleration clause in the agreement and also that the person who gave the applicant written or oral instructions to accelerate did not have the authority.

[42] In my view when the first arbitrator made a determination on clause 40.9 he exceeded his duties as it is not what he was asked to rule on and accordingly his finding or determination as contained in paragraphs 5.2 and 5.3 stands to be reviewed and set aside.

[43] The second respondent Mr Derek Bonheim also did not confine himself to the mandate of dealing with the determination in 5.1 only but wrongly extended his findings to deal with 5.2 and 5.3 when he should have refrained from doing so. In my view his determination also falls to be reviewed and be set aside.

[44] In the matter of *Stocks Civic Engineering (Pty) Ltd v Rip NO and Another* [2002] ILJ 358 LC it was held as follows:

> "*It is equally explicit in the agreement under which an arbitrator is appointed that he is fully cognisant with the extent of a limit to any discretion or powers he may have. If he is not and some ignorance impact upon his award he has not functioned properly and his award will be reviewable.*"

[45] The issues that the first arbitrator Mr Savenije was called upon to arbitrate on were defined in the Special Plea. He had no discretion to extend his mandate to deal with the effect of clause 40.9 and accordingly exceeded his powers and authority.

[46] The manner in which the second respondent defined the issues he was called upon to interpret indicates that he was not fully cognisant with the extent of his mandate. This had direct effect or his misinterpreting the first award and this constituted a gross irregularity and rendered the award reviewable.

[47] In the premises I make the following order:

(i) Paragraphs 5.2 and 5.3 of the arbitration award issued on the 15th March 2013 is hereby set aside in terms of section 33(1)(b) of the Arbitration Act 1965.

(ii) The arbitration award issued on the 23rd June 2014 is hereby set aside in terms of section 33(1)(b) of the Act.

(iii) The dispute between the parties shall be submitted to a new arbitration tribunal constituted by Association of Arbitrators in terms of its current rules in terms of section 33(4) of the Act.

(iv) The first respondent is directed to pay the costs of this application.

DATED at JOHANNESBURG on this 17th day of APRIL 2015.

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

TRIAL HEARD ON	13 FEBRUARY 2015
JUDGMENT DELIVERED ON	17th APRIL 2015
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