REPUBLIC OF SOUTH AFRICA

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

CASE NO: 07717/17

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

4.8.17
DATE

SIGNATURE

In the matter between:

LUBBE CONSTRUCTION Applicant

and

TERRY MAHON First Respondent

MATATIELE LOCAL MUNICIPALITY Second Respondent

J U D G M E N T

TRENGOVE, AJ:

THE ESSENCE OF THIS CASE

1. The second respondent, the Matatiele Local Municipality, employed the applicant, Lubbe Construction, in terms of a building contract dated 1

July 2014. The Municipality was unhappy with Lubbe's performance. It cancelled the contract on 29 June 2016. Lubbe disputed the validity of the cancellation, demanded that the Municipality withdraw it and threatened to claim damages if it did not do so. The Municipality refused to withdraw its cancellation and reserved its right to claim damages.

2. The parties agreed to refer the matter to arbitration. They appointed the first respondent, Mr Mahon, as arbitrator. They held a pre-arbitration meeting on 1 December 2016 and agreed on the process going forward.

3. Lubbe, however, had second thoughts. Its attorney, Mr Thaanyane, notified the Municipality and the Arbitrator on 29 December 2016 that "*our client, consequent to a further consideration of its position, does not wish to refer the matter to arbitration as earlier indicated*".

4. The Arbitrator made the point on 3 January 2017 that an arbitration agreement can only be terminated with the consent of all the parties. The Municipality's attorney, Mr Du Preez, made the same point on 8 January 2017.

5. Mr Thaanyane took issue with them in an email of 9 January 2017 because, he said, "*there is no agreement to arbitrate between the parties*".

6. Mr Du Preez challenged this contention later the same day. He said that the parties had agreed to arbitration by the correspondence exchanged between them in October and November 2017.

7. The Arbitrator added, in a letter the next day, that, in his view, the exchanges between the parties "*constitute an unconditional and unqualified agreement by the parties to submit their disputes to arbitration*".

8. Mr Thaanyane explained his client's position more fully in a letter of 10 January 2017 as follows:

> "*3.1 The Matatiele Local Municipality ("MLC") concluded a construction agreement with our client in which our client was to construct Municipal Offices and Council Chambers. This agreement was terminated by the MLC in June 2016.*
> *3.2 Our client disputed the legality of the said termination of the agreement between it and the MLC in terms of a letter of demand dated 10 October 2016. On 20 October 2016, your offices, on behalf of the MLC responded to our letter and placed yourselves on record. In this letter you also informed us that you reserved your client's rights to claim any damages against our client.*
> *3.3 It is on record that the said dispute raised by our client, the claimant, is the only dispute between the parties in these proceedings.*
> *3.4 The dispute that our client agreed to refer to arbitration, in terms of the correspondence between the parties, relates to the alleged unlawful termination of the construction agreement at the instance of your client.*
> *3.5 Consequently, our client cannot be held to an arbitration process, in circumstances, where it withdraws its dispute with your client as it hereby formally does. As a result of the withdrawal of the dispute, there is no dispute before the Arbitrator and nothing to arbitrate.*"

9. Mr Thaanyane elaborated as follows in a follow-up letter of 11 January 2017:

"3 We wish to reiterate that there is no dispute before the Arbitrator. The only dispute that was before the Arbitrator was that of our client.
4 The Arbitrator has no jurisdiction in the matter as the dispute has been withdrawn. Thus, any further conduct of the Arbitrator in this matter including attending to an inspection in loco would be irregular."

10. That was where the parties deadlocked. The Arbitrator and the Municipality proceeded with the arbitration but Lubbe refused to participate in it.

11. The Municipality filed its claim in the arbitration on 31 January 2017. It is a claim for damages. The Municipality's cause of action is that it duly cancelled the contract on the grounds of Lubbe's material breaches. The arbitration has since then proceeded without Lubbe. I was informed from the bar that a hearing has been held and that the Arbitrator has prepared, but not yet issued, his award.

12. Lubbe launched this application on 2 March 2017 to stop the arbitration. Its main prayers are for an order declaring that the Arbitrator lacks jurisdiction to entertain any dispute between the parties and an interdict preventing him from proceeding with the arbitration.

13. The essence of Lubbe's cause of action, captured in paragraphs 11 to 21 of its founding affidavit, may be summarised as follows:

13.1. The Municipality cancelled the contract on 29 June 2016.

13.2. Lubbe instructed its attorney "*to refer the only dispute, being the dispute of unilateral termination of the agreement between the parties, to arbitration*". Pursuant to that instruction, the parties engaged in correspondence with one another in October and November 2016. Lubbe says that the effect of the correspondence was that "*the only dispute referred to the arbitrator is that of the Applicant*". It was thus the claimant in the arbitration. At no stage did the Municipality "*file a notice of any dispute with the Applicant*".

13.3. The parties and the Arbitrator held a pre-arbitration meeting on 1 December 2016. The Arbitrator produced a minute of this meeting.

13.4. On 10 January 2017, the applicant "*formally withdrew the dispute it filed with (the Muncipality)*".

14. Lubbe again encapsulated its cause of action in its heads of argument as follows:

> "*15 It is important to respectfully point out to this Honourable Court that the only dispute referred by the parties was that raised by the applicant, the claimant in the arbitration proceedings.*
> *16 The (Muncipality) avers that there were other disputes before the Arbitrator without providing any proof of any notice of a dispute it served on the applicant.*"

15. It is thus common cause that there was a valid referral to arbitration. The only question relates to the scope of the referral:

15.1. Lubbe says that the only matter, referred to arbitration, was its dispute of the validity of the Municipality's cancellation of the contract. It was entitled unilaterally to withdraw the dispute. Having done so, there is nothing left before the Arbitrator upon which to arbitrate.

15.2. The Municipality's position, on the other hand, is that the matter referred to arbitration was the dispute about the validity of the Municipality's cancellation of the contract and the parties' remedies flowing from it. The Municipality's claim for damages flowing from the cancellation of the contract was thus within the scope of the referral.

16. It is not clear to me what it is, Lubbe says, it withdrew. Did it withdraw its challenge to the validity of the Municipality's cancellation of the contract? Did it in other words admit that the cancellation was valid? Or did it persist with its challenge to the validity of the cancellation of the contract and merely withdraw its referral of that issue to arbitration? I asked counsel for Lubbe for clarification of this question but it seems to have been overlooked because I did not receive any. I shall accordingly allow for the possibility that Lubbe might advance either of the two contentions.

17. I thus turn to a consideration of the scope of the referral to determine whether or not it was wide enough to accommodate the Municipality's claim for damages.

THE CONTRACT

18. Clause 40 of the contract provides for the determination of disputes by arbitration. Counsel for the Municipality however pointed out that, whereas the standard form contract provides for arbitration in clause 40, clause 41 prescribes a number of amendments to the standard form clauses whenever the employer is an organ of state, as it is in this case. One of the changes made by clause 41, is to delete the arbitration clause from the contract. It follows that the contract between the parties did not provide for arbitration at all.

THE PARTIES' AGREEMENT TO GO TO ARBITRATION

19. The manner in which the parties agreed to a referral to arbitration, is largely common cause. Where there are differences between the parties, the evidence of the Municipality must be accepted in accordance with the Plascon-Evans rule.

20. It is common cause between the parties that they agreed to go to arbitration. They differ only on the scope of their agreement. It is thus

necessary to consider the exchanges by which they made their agreement to determine its scope.

21. The Municipality cancelled the contract on 29 June 2016. Its letter added that the Municipality intended to call up Lubbe's performance guarantee.

22. The Municipality demanded, in a letter dated 1 July 2016, that Lubbe vacate the building site.

23. Mr Thaanyane responded on behalf of Lubbe in a letter dated 10 October 2016. He said that his client disputed the validity of the cancellation, demanded that the Municipality withdraw the cancellation and added that he was instructed to institute a claim for damages on its behalf.

24. Mr Du Preez replied on behalf of the Municipality on 28 October 2016. He said that the Municipality stood by the cancellation of the contract and reserved the right "*to claim any and all forms of damages*".

25. The Municipality called up Lubbe's performance guarantee on 15 November 2016. It demanded an amount of R5,8m from the guarantor.

26. Mr Du Preez and Mr Thaanyane discussed the possibility of referring the matter to arbitration. Pursuant to their discussion, Mr Thaanyane sent

Mr Du Preez a text message on 16 November 2016 that he had discussed the matter with his client who "*accepts that the matter can be arbitrated*".

27. Mr Du Preez also confirmed the telephone conversation in a letter dated 16 November 2016. He confirmed that "*the parties have agreed to refer the disputes to arbitration*". He added that they had agreed to have a further discussion of the matter the following day. He attached a proposed agenda for their discussion. It proposed that the parties agree that the arbitration be governed by the Rules for the Conduct of Arbitrations, 6th edition, of the Association of Arbitrators (*the Arbitration Rules*). He attached a copy of the Arbitration Rules to the agenda.

28. During the telephone conversation on 17 November 2016, the parties agreed that the Arbitration Rules would apply to their arbitration. They also discussed the choice of arbitrator.

29. Mr Thaanyane sent a text message to Mr Du Preez the following day saying that his client was "*leaning towards Mr Mahon as the Arbitrator*" but that he would come back with a definite response the following Monday. He confirmed on 23 November 2016 that Lubbe agreed to Mr Mahon's appointment as Arbitrator.

30. Mr Du Preez confirmed the Arbitrator's appointment in a letter of 24 November 2016 sent to the Arbitrator and copied to Mr Thaanyane.

31. In an email dated 29 November 2016, addressed to the Arbitrator and copied to Mr Thaanyane, Mr Du Preez's associate confirmed that the parties had agreed to refer "*this matter*" to arbitration subject to the Arbitration Rules.

32. The parties and the Arbitrator held a pre-arbitration meeting on 1 December 2016. The Arbitrator invited the parties to describe their claims. Mr Du Preez said that the Municipality would be the claimant in the arbitration and would claim damages for Lubbe's breach of contract. Mr Thaanyane said that he still had to get clarity from his client about the precise nature of its claim.

33. The parties then confirmed and fleshed-out their arbitration agreement. The Arbitrator minuted the matters on which they agreed. The Arbitrator and the Municipality say that the minute is an accurate reflection of the agreements reached at the meeting. Lubbe does not gainsay it. In its founding affidavit, supported by Mr Thaanyane, who represented it at the meeting, Lubbe referred to and annexed the Arbitrator's minute without comment. In reply, Mr Lubbe, who had not been at the meeting, said merely that the minute did not support the contentions the Municipality and the Arbitrator based on it. But he again did not challenge the accuracy of the minute itself. The undisputed evidence is thus that the minute is an accurate reflection of the agreements reached at the

meeting. It must in any event be accepted as accurate under the Plascon-Evans rule.

34. The agreements minuted included the following:

34.1. The minute designated the Municipality as the claimant and Lubbe as the respondent in the arbitration.

34.2. The parties agreed that the written correspondence between their lawyers *"agreeing to arbitration"* constituted their written referral to arbitration.

34.3. They agreed that the arbitration would be subject to the Arbitration Rules.

34.4. They agreed that the Arbitrator *"has the discretion to determine his own jurisdiction in regard to the Claimant's claim"*, that is, in regard to the Municipality's claim. They did not extend this agreement to Lubbe's counterclaim because it was as yet unknown.

34.5. The parties agreed on a timetable going forward. It stipulated deadlines for the delivery of the Municipality's claim and Lubbe's plea and counterclaim.

35. The history of the exchanges between the parties culminating in their pre-arbitration agreement may thus be summarised as follows. The Municipality cancelled the contract, called up Lubbe's performance guarantee and reserved its right to claim damages. Lubbe disputed the validity of the cancellation, called on the Municipality to implement the contract and threatened to claim damages. The parties then agreed to refer their dispute to arbitration. The main issue in dispute was whether the Municipality's cancellation of the contract was valid. The ancillary issues in dispute were the parties' remedies flowing from the determination of the main dispute. Those remedies included claims for damages which both of them had mooted. That was why they agreed at the pre-arbitration meeting that the Municipality would institute its claim for damages as claimant in the arbitration and that Lubbe would then be entitled to bring a counterclaim.

36. I conclude that the parties agreed to refer their dispute to arbitration and that the Municipality's claim for damages for breach of contract fell within the scope of their agreement. Lubbe's purported withdrawal of its "*dispute*" did not detract from the Arbitrator's jurisdiction to determine the Municipality's claim.

THE VALIDITY OF THE AGREEMENT

37. Lubbe suggested that the parties' arbitration agreement was invalid because it was in conflict with a "*non-variation*" clause in the contract. Clause 1.8 provides that,

> "*No agreement or addendum varying, adding to, deleting or cancelling this agreement shall be effective unless reduced to writing and signed by the parties.*"

38. But the arbitration agreement did not do any of those things. It was a new self-standing agreement on the procedure the parties adopted for the resolution of their dispute. It left their contract intact and went beyond it without varying, adding to, deleting or cancelling any part of it.

39. The arbitration agreement was thus a valid new agreement. It was a written agreement and thus qualified as an "*arbitration agreement*" subject to the Arbitration Act 42 of 1965.

COSTS

40. I conclude that this application must fail. There is no reason for the costs of the arbitration not to follow this result.

41. The Arbitrator asks for his costs on the punitive scale because, he says, Lubbe had maligned him without justification. Lubbe accused the Arbitrator of misconduct mostly because the Arbitrator entered the debate between the parties and issued unsolicited views and rulings

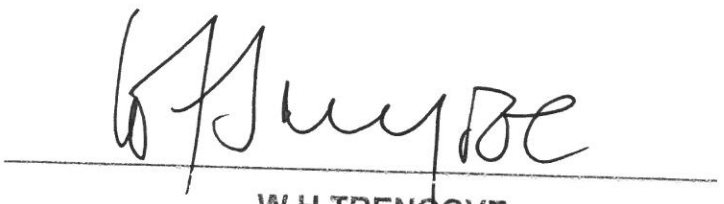
favourable to the Municipality and without affording Lubbe a proper hearing. I do not propose to adjudicate on the Arbitrator's conduct save to say that his interventions on 3, 9 and 10 January 2017 may have descended into the arena further than was necessary. While I do not uphold Lubbe's criticism, it was understandable in the circumstances. I accordingly do not deem it appropriate to make a punitive order for costs in the Arbitrator's favour.

42. I do not think that the order for costs should include the costs of more than one counsel.

43. I accordingly make the following order:

43.1. The application is dismissed.

43.2. The applicant is ordered to pay the respondents' costs.



W H TRENGOVE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	02 AUGUST 2017
DATE OF JUDGMENT	04 AUGUST 2017