

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

DATE

SIGNATURE

CASE NO: 15440/2018

In the matter between:

GENESIS ON FAIRMOUNT JOINT VENTURE

APPLICANT

And

KNS CONSTRUCTION (PTY) LTD (In liquidation)

RESPONDENT

JUDGMENT

TSOKA J

- [1] This is an application in terms of s31 of the Arbitration Act 42 of 1965 (the Act) to make an arbitral award an order of court.
- [2] Briefly, the facts giving rise to this application are the following. During November 2006, the applicant, Genesis on Fairmount Joint Venture, (Genesis) employed the respondents, KNS Construction (Pty) Ltd (In liquidation) (KNS) to construct a building for it. KNS proceeded with its mandate which was, however, during September 2008 cancelled by Genesis on the basis of malperformance by KNS. The latter viewed Genesis' cancellation of the contract as repudiation of the contract. It accepted the said repudiation and it also cancelled the contract on the basis of repudiation. On the version of each of the parties, it is evident that the contract came to an end.
- [3] Pursuant to the cancellation of the contract, the principal agent appointed by the parties in terms of the contract prepared a final account for payment by KNS. The latter disputed the account and Genesis' allegations that the contract was indeed cancelled entitling Genesis to payment.
- [4] In terms of the contract the dispute between the parties was referred to arbitration. On 26 October 2011 a pre-arbitration meeting was held between the parties. Retired Justice JH Conradie of the Supreme Court of Appeal was

appointed as the arbitrator. Certain procedural issues regarding the arbitration, which are not relevant in the present matter, were agreed upon.

- [5] On 17 November 2014, Justice Conradie issued a Directive in terms of which the issue to be determined was the correctness of the final account issued by the principal agent. It being agreed that Justice Conradie was only to determine the issue of liability while the issue of quantification of the final account was to be held over for later determination.
- [6] Justice Conradie became unavailable with the result that the matter proceeded before PJ Pretorius SC. On 27 January 2016 Pretorius SC handed down his award. In terms of the award, KNS' relief, which was for a declarator, was rejected and Genesis' cancellation of the contract upheld. Notwithstanding Genesis' success in the arbitration, the arbitrator only awarded Genesis 50% of the costs of the arbitration hearing.
- [7] As at the pre-arbitration meeting, the parties agreed on an appeal procedure. KNS delivered a notice of appeal while Genesis noted a cross-appeal in particular with regard to the awarding of only 50% of the costs of the arbitration hearing. In due course, KNS withdrew its appeal. Genesis did not withdraw its cross-appeal.

- [8] Later, KNS approached this court (Van Oosten J) to make the arbitrator's award an order of court. The approach to this court was made notwithstanding Genesis' pending cross-appeal. KNS' application was dismissed by Van Oosten J as the cross-appeal was still pending and had not yet been disposed of.
- [9] On 10 March 2017, Genesis' cross-appeal served before JF Myburgh SC, PA Solomon SC and AE Franklin SC who upheld the cross-appeal by inter-alia directing KNS to pay Genesis' 100% costs of the arbitration. The Appeal Tribunal ordered KNS to pay the costs of the appeal as well.
- [10] The award of the appeal tribunal is the subject matter of the present application which Genesis seeks to make an order of court. The application is opposed by KNS who in the main contends that Genesis lacks the legal capacity to make the appeal tribunal award an order an order of court. It being contended that as Genesis is a partnership and the said partnership was dissolved, it has no legal capacity to enforce the award. Genesis on the other hand insists that the partnership still exists and that it has the legal capacity to enforce the appeal tribunal's award.
- [11] Before dealing with the issue of Genesis' legal capacity, I must first deal with KNS's application for leave to file a further supplementary affidavit.

[12] The supplementary affidavit, although served and filed, its admission into record is strongly resisted by Genesis.

[13] In the main, the purpose of the supplementary affidavit is directed at challenging the authority of Genesis to make the appeal tribunal's award an order of court.

[14] The conduct of KNS is telling as to whether the supplementary affidavit sought to be admitted, is bona fide or not.

[15] At no stage during the arbitration, the appeal and when the matter served before Van Oosten J, was Genesis' lack of legal capacity ever raised. The issue was only raised for the first time late in December 2018. Although KNS sought the admission of the same supplementary affidavit before Vally J in October 2018, the application was dismissed on 31 October 2018 by the learned Judge. Before me KNS still seeks the same order for admission of the supplementary affidavit. This is in spite of Vally J's order and the remarks he made that the Master of the High Court must investigate the conduct of the liquidator. The learned Judge was probably concerned about the conduct of the liquidator representing KNS as to whether the said liquidator acts in the interests of the general body of creditors of KNS. I share the same concern. It would be interesting to know whether the Master of the High Court followed up the concern raised and what the outcome is.

[16] Genesis insists that the partnership consisting of three parties still exists and has not been dissolved. Although there is no objective and conclusive proof that the partnership has been dissolved, KNS is adamant that the partnership has been dissolved. In spite of the fact that there is no discernable prejudice to be suffered by the latter if the appeal tribunal award is made an order of court, KNS persists in its opposition to the application being made an order of court. That the opposition is mala fide, frivolous and vexatious, is beyond question.

[17] On 16 December 2018, pursuant to KNS' notice in terms of Rule 14, Genesis filed a reply in terms of Rule 14(5). In terms of that reply, Genesis pointed out that the existing parties are Itumeleng Trust; Vestacor (Pty) Ltd and Wild Break 1323 (Pty) Ltd (formerly Wild Break 1323 CC). Still KNS is of a different view. It persists that the partnership is no more and that it lacks the legal capacity to approach this court in terms of s31 of the Act.

[18] Alan Bernard Witt (Witt), the deponent to Genesis' founding affidavit, in support of this application signed on 17 April 2018, clearly states that 'I am duly authorized to depose to this affidavit on behalf of the applicant.' In spite of Witt's authority to act on behalf of Genesis, again KNS insists that Genesis has no legal capacity to seek an order making the appeal tribunal award an order of court.

[19] During September 2016, Van Oosten J heard an application by KNS to make Pretorius SC's award an order of court. In that hearing, although the partnership had already been dissolved, according to KNS, no word is said about the dissolution of the partnership. In fact KNS sought an application to make the award of Pretorius SC, an order of court against the very dissolved partnership.

[20] The conclusion reached is that KNS' attempt to file the supplementary affidavit is nothing but a ruse to disentitle Genesis to what it is rightfully entitled. The application is frivolous and mala fide. It serves no purpose other than to frustrate the interest of justice and to deny Genesis its entrenched right to access to court. Accordingly the application to file the supplementary affidavit is dismissed with costs. Genesis is in terms of the Act, entitled to an order making the appeal tribunal award an order of court.

[21] A lot has been said about Genesis' lack of legal capacity in excluding the admission of the supplementary affidavit. Nothing further need be said with regard to the contended lack of authority.

[22] In opposing Genesis' application, KNS contends further that the former is not entitled to an order for costs as clause 10 of Justice Conradie's Directive reads –

'10. Until the conclusion of the arbitration, each party is to bear its own costs and one half of the costs of the arbitrator.'

[23] Clause 10 of the Directive must be read in context. It was issued after the issue of liability was separated from the issue of quantification of the final account rendered by the principal agent.

[24] The sensible and businesslike meaning to be attributed to the clause is the following. Prior to the finalization of the issue of liability by the arbitrator, each party was to bear its own costs. The costs of the arbitrator were however to be shared equally between the parties. To read the clause as KNS wishes this court to do, will not only be unbusinesslike but will also bind the arbitrator before whom the issue of liability would serve. That this could not have been the intention of the arbitrator, is clear and obvious. In any event Pretorius SC, and KNS itself understood the Directive as understood by Genesis. That at the conclusion of the determination of liability, the issue of costs would follow the result.

[25] In any event, if KNS understood the clause differently why did it prepare a bill of costs which was taxed and allowed in the amount of R299 888.19? The drafting and taxation of KNS' bill of costs reveals that KNS understood the clause clearly. It seems to me that KNS would stop at nothing to prevent Genesis from getting the remedy it is factually and legally entitled to.

[26] Having regard to the aforesaid, the following order is granted –

26.1 The arbitration award handed down on 10 March 2017 by the arbitration tribunal consisting of JF Myburgh SC, PA Solomon SC and AE Franklin SC is made an order of court;

26.2 In terms of s35(4) of the Act, the costs referred to in the arbitration tribunal's award are to be taxed by the Taxing Master of the High Court of South Africa, Gauteng Local Division, Johannesburg on the High Court scale on a party and party scale.

26.3 KNS is ordered to pay the costs of this application.

M TSOKA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the applicant:

Adv A O Cook, SC

Instructed by:

Norton Rose Fulbright

For the respondent:

Adv M v R Potgieter, SC

Instructed by:

Senekal Simmonds Inc

Heard:

30 January 2019

Judgment handed down:

1 February 2019