REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

23/4/2020 _____
DATE SIGNATURE

Case No.: 0044751/17

In the matter between:

Lubbe Construction (Pty) Ltd **Applicant**

and

Terry Mahon N O **First Respondent**
Matatiele Local Municipality **Second Respondent**

JUDGMENT

Vally J

Introduction and telescopic view of the facts

[1] Relying on s 33 of the Arbitration Act No 42 of 1965 (the Act) the applicant seeks to review and set aside an arbitration award issued by the first respondent. The applicant and the second respondent concluded a construction agreement on 21 August 2014. As so often occurs in the construction industry, problems between the parties surfaced during the construction process. This

resulted in a dispute between them. On 1 July 2016 the second respondent terminated the agreement. On 16 November 2016 the parties agreed to refer their dispute to arbitration. On 23 November 2016 the first respondent was jointly appointed as the arbitrator. On 1 December 2016 the parties agreed that the 6th edition of the Rules of the Association of Arbitrators (the rules) should govern the arbitrator's and their conduct. On 29 December 2016 the applicant unilaterally withdrew from the arbitration. The arbitration proceedings continued, with the hearing taking place on 5 June 2017. The applicant launched an application to interdict the respondents from proceeding with the arbitration. The arbitration proceedings halted while the interdict application was alive. On 31 July 2017 the interdict application was entertained by this Court. On 4 August 2017 this Court, per Trengove AJ, dismissed the application with costs. Soon thereafter the arbitration proceedings continued. On 3 October 2017 the first respondent rendered his award. On 17 November 2017 the applicant launched this application.

[2] That in broad terms constitutes the history of this application. Greater elaboration on these facts will be provided as the application is analysed in detail below.

The applicant's case

[3] The applicant relied on a number of grounds for the relief it sought. Realising that many of these were without merit, its counsel, in his heads of argument, dispensed with most of them and elected to rely only on two. These are:

a. First. The first respondent misconducted himself in proceeding with the arbitration *pendente lite* in the absence of a plea from the applicant, and therefore failed to afford the applicant a hearing in the matter as a whole; and

b. Second. The award was based on a bill of quantities whose accuracy was not proved.

[4] At the hearing the second ground it relied upon was dispensed with as its counsel came to accept that there was no merit in it. Thus, I need concern myself with the only ground it built its case on. It is the applicant's case that the decision of the first respondent to proceed with the arbitration, in spite of its protests against the arbitration continuing, constituted a misconduct as envisaged in s 33(1)(a) of the Act, and/or a gross irregularity as envisaged in s 33(1)(b) of the Act. In either case, the award stands to be reviewed and set aside.

[5] To make sense of this claim, it is necessary to examine microscopically what exactly prevailed between the parties. Special attention would naturally have to be given to the moment immediately preceding the first respondent's decision to proceed with the arbitration despite the protests of the applicant.

A microscopic view of the relevant facts

[6] A pre-arbitration meeting was held on 1 December 2016. The legal representatives of the parties as well as the first respondent were present. At

this meeting, the agreement referring the dispute to arbitration and the appointment of the first respondent as the arbitrator were confirmed. The meeting was in accordance with the rules. The first respondent decided that it was necessary for an inspection *in loco* to be held. The applicant on 29 December 2016 changed its mind and attempted to resile from all of these agreements, especially the agreement to refer the dispute to arbitration. The decision was formally conveyed to the attorney of the second respondent in the following terms:

> "Our client, consequent to a further consideration of its position does not wish to refer the matter to arbitration as earlier indicated."

[7] A clearer statement than this would be difficult to find. The applicant is explicit: firstly, its decision was "*consequent to a further consideration of its position*" and secondly, it did not "*wish to refer the matter to arbitration*". It was a consideration of its own position that gave rise to its change of heart, which led it to "*wish*" it had not agreed to refer the matter to arbitration. There was nothing wrong with the process involved in the matter being referred to arbitration. The second respondent did not do anything legally wrong during the process of the agreement being concluded. The agreement itself was not legally flawed. And, finally, the appointment of the first respondent, which was jointly agreed, was not flawed or irregular in any manner or form.

[8] The letter was sent to the first respondent who responded thereto by email on 3 January 2017 stating, *inter alia*,:

> "The legal representatives of the parties are no doubt aware that an Arbitration Agreement can, in principle, only be terminated with the consent of all the parties to it."

[9] His response recorded that there was a binding contract between the parties to refer the matter to arbitration, which contract compelled him to carry out his duties as an arbitrator. On that logic he ruled that the inspection *in loco* which was scheduled for 12 January 2017 was to continue; advised the parties to attend the inspection, and warned them that any party which failed to attend would be doing so at its own peril. On 9 January 2017 the applicant's attorney wrote to the second respondent's attorney stating that the applicant is of the view that there "*there is no agreement to arbitrate* [sic] *between the parties*" and that "*our client has reconsidered its position and will therefore not participate in this arbitration and shall not be attending the inspection in loco.*" The letter was also sent to the first respondent who responded on 10 January 2017 reiterating his ruling. On the same day, the applicant's attorney wrote to the second respondent's attorney (presumably this was written after receiving the first respondent's response) stating, *inter alia*,:

> *"On the one hand, we note with grave concern that the Arbitrator has elected to make a ruling on the issue of whether there is an arbitration agreement between the parties without any invitation from the parties to do so and having not considered submissions from both parties in this regard."*

[10] The second respondent's attorney responded that the allegation that the first respondent made a ruling without first giving the parties an opportunity to make submissions was factually incorrect.

[11] On 11 January 2017 the attorney for the applicant wrote, once again, to the attorney for the second respondent stating that the applicant remained steadfast in its decision that it would not participate in the arbitration. He

indicated further that it was the applicant's view that the arbitration agreement had lapsed on the basis that it had withdrawn its dispute with the second respondent. As its counsel at the hearing accepted that this contention was wrong, I say no more about it. The applicant's attorney wrote another letter on the same day stating that, as the first and second respondents were determined to proceed with the arbitration, the applicant is "*left with no choice but to approach a court to exercise its rights.*" The applicant, however, took no further steps in the matter. The second respondent proceeded to file its statement of claim of 31 January 2017. The applicant failed to file its response thereto.

[12] The second respondent's attorney wrote two letters to the applicant's attorney asking him to clarify if his client had decided to participate in the arbitration proceedings, or if in intended to approach the court for appropriate relief. The letters were sent on 7, and 17 February 2017. On 22 February 2017 the applicant's attorney responded to the letter of 17 February and placed on record that the applicant would be approaching the court, and that papers in this regard would be served "*in due course*". An application seeking to interdict the first respondent from continuing with the arbitration was finally launched on 7 March 2017. The main relief sought was a declaratory to the effect that the first respondent lacked the jurisdiction to entertain any dispute between the parties. Following from that relief, the applicant sought to interdict the first respondent from proceeding with the arbitration.

[13] The second respondent complained that this would prejudice it as it would effectively put the arbitration on hold until the application was finalised,

which could take months. It invited the applicant to bring the application on an urgent basis. The applicant declined the invitation on the basis that it was of the view that an urgent application would not succeed.

[14] The first respondent was cited in the application and a costs order was sought against him. He responded on 14 March 2017 by way of letter to the attorneys for the applicant. He indicated that he had no personal interest in the matter, and that if no costs order was sought against him he would abide the decision of the court. However, if the costs order was persisted with then he would only oppose that aspect of the application. As regards the issue of the continuation of the arbitration proceedings he had this to say:

> "The current application is likely to take months to be finalised and as there is no interdict in place I consider it my duty as the arbitrator to continue to fulfil my obligations and to bring the arbitration to finality as soon as possible. The [applicant] is again invited to participate in this process."

[15] Despite being informed by the first respondent that he was intent on continuing with the arbitration, the applicant elected not to approach the court on an urgent basis even for interim relief.

[16] Pursuant to his decision that the arbitration proceedings would continue the hearing of the matter was set down for 5 June 2017. The second respondent indicated that it was ready and prepared to proceed with the arbitration hearing. The applicant sent its attorney on a "watching brief" but with instructions that he should make his own recording of the proceedings. He was allowed to do so by the first respondent.

[17] The second respondent led its witnesses, presented documentary evidence and made submissions. The first respondent wrote his award, which is dated 14 July 2017, and signed it, but did not issue it.

[18] The application was served before this Court on 2 August 2017. A judgment was handed down by Trengove AJ on 4 August 2017. The application focussed on whether there was a valid arbitration agreement and if so, whether the decision of the applicant to withdraw its dispute with the second respondent resulted in the termination of the arbitration agreement. Trengove AJ found that there was a valid referral to arbitration and that the "*purported withdrawal of [the applicant's] "dispute" did not detract from the Arbitrator's jurisdiction to determine the [second respondent's] claim.*"[1] Pursuant to this finding, an order dismissing the application in favour of the respondents, together with costs, was issued.

[19] The applicant did not appeal against the order. Having now received judicial pronouncement that the arbitration agreement was valid, and that the first respondent was jurisdictionally empowered to determine the dispute between the parties, the applicant elected to remain docile. It was fully aware that the arbitration proceedings had concluded on 5 July 2017 but that no award was yet rendered. It did not apply to the first respondent to re-convene the proceedings and allow it to participate therein. On 3 October 2017, i.e. two

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[1] *Lubbe Construction v Terry Mahon and Matatiele Local Municipality* - Case No 07717/17, Unreported Judgment at [36]

months after the dismissal of the application by this Court, the first respondent handed down the arbitration award on 3 October 2017.

Is the first respondent's decision to continue with the hearing despite the pending application for a declaratory order susceptible to a review?

[20] The applicant takes the view that the first respondent should have suspended the hearing pending the outcome of the application. It contends that his failure to do so constituted a misconduct on his part, or constituted a gross irregularity in the arbitration proceedings. That these contentions must be scrutinised in the context of the facts set out above is obvious. But they must also be viewed in the light of the powers and duties imposed on the first respondent by the statutory and common law.

[21] Section 15(2) of the Act provides:

> " If any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.

[22] There can, therefore, be little doubt that the first respondent was legally empowered to proceed with the hearing despite the stated intention of the applicant to effectively boycott it. After noting the applicant's intention to boycott the hearing, the first respondent urged it to reconsider its decision, but made it absolutely clear that he would continue should it not do so. The Act certainly empowered him to continue.

[23] The common law requires that he conducts the hearing in a manner that is procedurally and substantively fair. At core, he is required to ensure that all affected parties are allowed to present any relevant evidence, and to make whatever appropriate submissions they wish to before rendering his decision.

[24] The applicant, we know, decided not to bring an urgent application to interdict the hearing from proceeding. This was so, even after the second respondent indicated that it would welcome an urgent application. It would make common cause with the applicant that the matter was worthy of the urgent attention of this Court, given the first respondent's unambiguous indication that he intended to proceed with the hearing unless an interdict was secured. The applicant, in my view, ought to have brought the urgent application. The consequence of failing to do so must be one it should bear. It was wrong to expect the first respondent to revoke his decision to continue with the hearing despite the applicant's failure to bring the interdict application. Instead, the applicant would be satisfied if it succeeded with its other prayer – one that asked the Court to declare that the first respondent lacked the jurisdiction to arbitrate the dispute. The continuation of the hearing would be of no moment, for once it secured the declaratory order the award would automatically have no legal force. The risk it took by adopting this approach was that if it failed to secure the declaratory order the award would have to hold. The problem it now faces is a consequence of its own conduct, not that of the first respondent. Its own actions or omissions can never be a misconduct on the part of the first respondent.

[25] The first respondent, we know, took the view that he was jurisdictionally empowered to continue with the hearing. He informed the parties of his view. He set out his reasoning for holding that view. He finally stated that unless an interdict from this Court was secured he would proceed with the hearing because he believed that it was his legal duty to complete the mandate conferred upon him. Further, we know that s 15 of the Act allowed him to continue with the hearing despite the boycott by the applicant. He therefore acted within the parameters set by the law. At best, for the applicant, the reasoning underlying his decision to continue could have been wrong, but that does not make the action to continue a misconduct on his part.[2] Nor does it taint the hearing with a gross irregularity. It could hardly be a misconduct if he was acting within the parameters of the law. And, for it to be found that the hearing was grossly irregular, it has to be established that he failed to perform his duties as an arbitrator in a manner consistent with the requirements of holding a fair and impartial hearing.[3] There are no facts to support this. In fact he conducted the hearing in a fair and impartial manner. That only one party partook in the hearing does not mean that the hearing was unfair or impartial. He allowed evidence to be led, he accepted submissions and he did not prevent anyone with an interest from attending and presenting any evidence or submissions. He thus complied with his duty to see that justice was done. That the applicant failed to present its case to him is a matter that falls exclusively within the

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[2] *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176; *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169C-E; *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at 672G

[3] *Ellis v Morgan; Ellis v Desai* 1909 TS 576 at 581; Telcordia Technologies Inc v Telcom SA Ltd 2007 (3) SA 266 (SCA) at [72] – [73]

purview of the applicant's own decisions and conduct. It alone was the author of its own misfortune.

[26] The test for reviewability of his award, either on the grounds that he misconducted himself or that the proceedings were contaminated by an irregularity, does not allow for an examination of whether the decision was correct or not. However, it is necessary to say that in my view his decision to continue with the hearing was correct. Applying the law to the facts he was confronted with lead to a single conclusion that - unless an interdict preventing him from continuing with the hearing was in place - the hearing had to proceed in the interest of finality[4], which is a sub-set of the interests of justice. After all, one of the advantages of a reference to arbitration rests in finalising the proceedings with resolute speed.[5]

[27] Under these circumstances, the applicant's contentions must fail.

Order

[28] The following order is made:

1. The application to review the award of the first respondent is dismissed.
2. The applicant is to pay the costs of the application.

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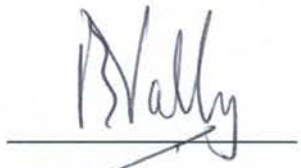
[4] The principle of finality in litigation as expressed in the latin phrase as "*interest rei publicae ut sit finis litium*", has long been part of our law. See: *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 309A

[5] *Sysphus and Others v Schoeman* 1923 CPD 113 at 116; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) at [20]



Vally J

Dates of hearing:	4 February2020
Date of judgment:	23 April 2020
For the Applicant:	Adv P Ellis SC
Instructed by:	Roelf Nel Inc
For the Second Respondent:	Adv S I Vobi
Instructed by:	Tiefenthaler Attorneys Inc