REPUBLIC OF SOUTH AFRICA

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

CASE NO: 30169/2018

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

23 JANUARY 2019 **JUDGE L.T. MODIBA J**

In the matter between:

KHUM MK INVESTMENTS AND
BIE JOINT VENTURE (PTY) LIMITED Applicant

And

ESKOM HOLDINGS SOC First Respondent

JUDGE LI GOLDBLATT Second Respondent

J U D G M E N T

MODIBA J

[1] The question to be resolved in this application is whether when he upheld a plea of prescription for the reasons that he did, the arbitrator committed an error of fact and law, resulting in gross irregularities in the conduct of the proceedings and/ or exceeded his powers as envisaged in section 33(1) (b)[1] of the Arbitration Act ("the Act").[2] Unless otherwise specified, all references to statutory provisions are to this Act.

[2] The applicant, Khum MK Investments and BIE Joint Venture (Pty) Ltd ("Khum Investments") contends that he did, hence it seeks to review and set aside what I refer to in this judgment as the second arbitral award in which the arbitrator upheld the first respondent's special plea of prescription.

[3] The first respondent, Eskom SOC Limited ("Eskom"), opposes the application. The Second Respondent Judge LI Goldblatt, cited in his capacity as the arbitrator ("the arbitrator"), did not enter the fray.

[4] The present application arises out of a somewhat elaborate litigation history between the parties.

[5] On 16 April 2009, Eskom and a joint venture entered into a professional services contract ("the contract"), in terms of which the joint venture would render to Eskom safety, health, environmental and quality inspection services

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[1] This section provides:

Setting aside of award

(1) Where-

(a) …

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers;

[2] 43 of 1965

("SHEQ services") on an *ad hoc* basis as and when Eskom required them. The joint venture would provide the SHEQ services at construction and installation sites mainly were Eskom undertook generation and/ or transmission projects. It started doing so on 27 May 2010.

[6] Subsequently, the members of the joint venture purchased a shelf company and changed its name to Khum MK Investments and BIE Joint Venture (Pty) Ltd. The two joint venture members became the only equal shareholders in Khum Investments. Khum Investments performed SHEQ services under the contract and rendered invoices under its name, which Eskom honoured.

[7] In 2013, the contract became litigious due to a dispute regarding payments allegedly due to Khum Investments under the contract. As a result, Khum Investments brought urgent proceedings in this court ("the urgent application") for the payment of an amount of R121, 007,097.08, set down for hearing on 24 October 2013. On that day, the parties did not proceed to argue the urgent application. Rather, they entered into a written settlement agreement ("the settlement agreement") in terms of which:

[7.1] Eskom would pay all approved invoices;

[7.2] Eskom is entitled to withhold payment in respect of the disputed amounts;

[7.3] the remaining disputes in relation to the disputed invoices, as well as any other disputes arising after 30 October 2013, are referred to

arbitration in terms of article 23 of the Rules of Commercial Arbitrations of the Arbitration Foundation of South Africa ("AFSA").

[8] Pursuant to the settlement agreement, Eskom paid Khum Investments R96 million on 25 October 2013.

[9] Khum Investments duly referred the remaining disputes to AFSA. It did not attach its referral letter to this application. It attached AFSA's reply, dated 4 November 2013, *inter alia* informing the parties of the arbitrator's appointment. Subsequently, the arbitrator addressed a letter to the parties *inter alia*, inviting them to a pre-arbitration meeting to be held on 13 November 2013 at AFSA offices. The meeting took place as scheduled. There, the parties agreed that the dispute would be set out in pleadings to be delivered on agreed dates. In compliance with this agreement, Khum Investments delivered a statement of claim ("SOC") on 13 December 2013 and Eskom a statement of defence ("SOD") on 27 January 2014. Subsequently, Khum Investments delivered a replication and Eskom a rejoinder.

[10] It is common cause that on 14 November 2013, Eskom served Khum Investments with a 30 day notice to terminate the contract, effective 13 December 2013. Khum Investments continued to provide SHEQ services to Eskom under the contract until the termination date.

[11] The SOC sets out 15 claims, which Eskom defended on legal and/or factual grounds. Subsequently, the parties agreed to a separation of two dispositive issues, namely, the *locus standi* special plea and the contracting

party defence. For brevity, I refer to the arbitration in respect of these issues as the first arbitration.

[12] The basis for special plea and the contracting party defence is the same. It arises from what I have already revealed, that Khum Investments is not party to the professional services agreement and that a joint venture is. For that reason, Eskom contended that Khum Investments had no right to join the arbitration. It also contended that it had no right to pursue the claims further. In its replication, Khum Investments contended that Eskom acquiesced and/ or ratified its substitution of the joint venture, alternatively, represented to that effect by conduct and therefore was estopped from denying that Khum Investments is a party. In its rejoinder, Eskom denied knowledge of and consenting to the substitution and for that reason, contended that it cannot be estopped from denying the substitution. It also contended that to uphold the estoppel would invalidate an illegal act as Khum Investments was not subject to its peremptory procurement processes.

[13] In an arbitral award published on 14 April 2014 ("the first arbitral award"), the arbitrator dismissed Eskom's *locus standi* special plea and contracting party defence and upheld Khum Investment's acceptance or ratification argument and estoppel plea.

[14] In a judgment by my brother Moshidi J, handed down on 4 June 2015, Eskom was unsuccessful in reviewing the first arbitral award ("the first review"). It brought the review in terms of section 33(1) (a) and (b), on the basis that the arbitrator committed a misconduct or gross irregularity. Eskom successfully

petitioned the Supreme Court of Appeal ("SCA"), which granted leave to appeal to the Full Court of this division. On 24 February 2017, the Full Court dismissed the appeal with costs. On 23 March 2017, Eskom applied to the SCA for special leave to appeal the Full Court decision. The SCA dismissed that application on 22 May 2017. Eskom did not appeal further.

[15] The arbitration in respect of Khum Investments' remaining claims would then continue at an arbitration hearing scheduled for 9 to 13 ("the first period") and 30 October to 10 November 2017 ("the second period"). On 14 September 2017, Khum Investments delivered a notice to amend its SOC, by either increasing or decreasing some of the claims. Eskom initially objected to the amendment on the basis that it sought to introduce new claims that were not part of Khum Investments' original claims as filed on 13 December 2013 for example claim 15, originally for an amount of R1,849,354.60 to be increased to R69,437,994.76 as a result of the amendment.

[16] By agreement between the parties, the arbitration did not proceed during the first period to allow the parties to study the spreadsheets filed in support of the amendment, in order to assist Eskom to understand the basis for the proposed amendment. Subsequently, Eskom consented to the amendment but reserved its right to raise the special plea of prescription in relation to some of the claims. It filed its amended SOD on 27 October 2017, raising the special plea of prescription. Khum Investments replicated to the special plea, denying that the relevant claims have prescribed.

[17] The parties then agreed to a list of issues, which they submitted to the arbitrator to be dealt with separately during the second period ("the second arbitration"). Included in this list is the legal question whether the new amounts introduced by the amendment had prescribed. The separated issues where dealt with during the second period. The arbitrator upheld Eskom's special plea of prescription ("the second arbitral award"). It is this arbitral award that Khum Investments seeks to review in these proceedings.

[18] One preliminary issue arose.

[19] Eskom complained that in terms of section 32[3], Khum Investments ought to have brought this application within six weeks of the publication of the second arbitral award. The second arbitral award is dated 22 January 2018. It was delivered to the parties on 24 January 2018. Khum Investments had to bring the review by 7 March 2018. It only did so on 22 August 2018, approximately five and half months later. To justify the delay, Khum Investments relied on an alleged agreement between the parties' attorneys of record to suspend the six weeks period while *inter alia*, the parties were attempting to settle the entire dispute.

[20] Eskom initially disputed the parties' competency to suspend a statutory time frame by agreement, alternatively, that its attorney of record agreed to an indefinite suspension of the period within which Khum Investments had to bring

[3] This section provides:
Section 32(2)
"*An application pursuant to this section shall be made within six weeks after the publication of the award to the parties*…"

the review. It contended that such an agreement, if found to have been concluded, would have lapsed after the 20 March 2018 meeting at which the parties failed to reach settlement.

[21] It sought a dismissal of the application on the sole basis that it was brought hopelessly out of time. At the hearing, Eskom abandoned its opposition, preferring that the matter is dealt with on the merits. Given that:

> [21.1] the underlying process of resolving disputes between the parties is arbitration, underpinned by consensus;
>
> [21.2] although the Act sets a timeframe within which the review ought to be brought, which Khum Investments defaulted on;
>
> [21.3] the purported agreement to suspend the applicable time frame excluded the arbitrator who has a substantial interest in these proceedings;
>
> [21.4] considering that the arbitrator is cited and opted not to enter the fray;

I considered it appropriate under these circumstances, to heed Eskom's desire to have the dispute resolved on its merits.

[22] Khum Investments contends that it amended its SOC for two reasons. Firstly, when preparing for the continued arbitration, it found mistakes in the schedules attached to its SOC. It found that certain claims in respect of certain resources were duplicated and other claims in respect of hours worked and/ or travel and subsistence were excluded from the schedules by mistake. Therefore, it introduced the amendment to add and/ or subtract amounts to the schedules to correct these errors. It further contends that the basis for the claims remains the same.

[23] Secondly, it sought to introduce the claims provided for in paragraph 8 of the settlement agreement, namely the claims in respect of disputes arising after 30 October 2013, as it submitted its *pro forma* invoices in respect of those claims to Eskom on 07 February 2014. It contends that these amounts were claimed in the amended Claim 15 and specifically annexures "BBB" – October 2013, "CCC" – November 2013 and "DDD" – December 2013 thereto. The total amounts in respect of hours worked only and with the exclusion of any travelling and/ sustenance costs are:

[23.1] annexure "BBB" – R20 918 216.90 (R21 832 737.50 plus CPI R7 184 084.37 plus kilometres R901 394.99);

[23.2] annexure "CCC" – R20 753 618.10 (R15 111 437.50 plus CPI R4 972 427.94 plus kilometres R669 752.72).

[23.3] annexure “DDD” – R7 534 326.23 (R5 479 787.50 plus CPI R1 803 129.28 plus kilometres R251 409.45.

[24] Khum Investments further contends that Eskom ignored these *pro-forma* invoices, did not proceed with the assessment process previously followed and failed to pay the claims in respect of SHEQ services rendered and costs incurred after the hearing of the urgent application on 24 October 2013 until the 13 December 2013 termination date.

[25] In its amended SOD where it pleaded prescription, Eskom contends that claims introduced by way of this amendment have prescribed.

[26] Khum Investments replicated that in terms of the settlement agreement reached on 24 October 2013, all disputes between the parties, including all disputes arising after 30 October 2013, were referred to arbitration. It further replicated that in terms of section 13(f) of the Prescription Act, 68 of 1969, all the disputes between the parties were subjected to arbitration and that these disputes include all the amounts claimed.

[27] Leading up to the second arbitration hearing, the parties concluded a written agreement in respect of the separated issues. In terms of clause 7 thereof, they agreed that part of the separated issues for decision at hearing would be whether any claim for hours worked or travel and subsistence which did not appear in the claimant’s SOC as at 14 April 2014, and sought to be introduced by way of an amendment, had prescribed.

[28] I quote below the arbitrator's handling of this issue, as reflected in the second arbitral award:

> ***"9. <u>ISSUE 7 PRESCRIPTION (CLAIMS 4, 5,6,7,8 AND 15</u>)***
>
> *9.1 On 14 September 2017, Claimant amended its statement of claim to, inter alia, introduce new claims in that each portion of each claim constitutes in my opinion a separate and distinct cause of action.*
>
> *9.2 Each of these additional claims was more than three years old and were accordingly prescribed in terms of the Prescription Act 68 of 1969.*
>
> *9.3 The Claimant replicated to Defendant's Plea of Prescription alleging that Prescription alleging that Prescription had been interrupted by the parties having agreed that – "all disputes between the first Claimant and the Respondent including all disputes arising after 31 October 2013, were referred to arbitration" and thus in terms of Section 13 (f) of the Prescription Act, all these disputes were "subjected to arbitration".*
>
> *9.4 The Defendant argues that a dispute is not "subjected" to arbitration until such dispute is the subject of an actual arbitration (Member of the Sugar Industry Central v Maritz and Another 1984 (4) SA 101). I agree with the submission ad find that the new claims introduced by the amendments were only introduced i.e. when they had already prescribed.*
>
> *9.5 <u>**FINDING**</u>*
>
> *The claims for hours worked or T & S did not appear in the statements of claim as at April 2014 and are now sought to be introduced by the way of amendment have prescribed."*

[29] Khum Investments contends that prescription cannot be raised against its amendment because:

> [29.1] in terms of section 13 (f) of the Prescription Act, completion of prescription is delayed if the debt is the object of a dispute subjected to arbitration and that the settlement agreement had that effect;
>
> [29.2] the amendment does not introduce any new cause of action. The new amounts formulated in claim 15 merely represent a fresh

quantification of the original claims and/ or the addition of further items arising from the same cause of action;

[29.3] at that stage, the issue in dispute was who the applicant had to pay and not whether monies were payable for services rendered.

[29.4] the referral of the disputes and future disputes by the parties in the settlement agreement is not merely an agreement to refer disputes to arbitration as referred to in *Sugar Industry Central*[4], but the referral to an arbitration actually proceeding. By failing to distinguish the facts and principles in *Sugar Industry Central*, the arbitrator failed to apply the Prescription Act, which required him to have held that the matter was subject to prescription in terms of section 13 (f);

[28.5] the words in clause 8 of the settlement agreement, namely "All disputes arising after 30 October 2013 shall also form part of the arbitration," means that the disputes as contained in the amended statement of claim were subjected to arbitration as provided for in the Prescription Act and therefore prescription has been delayed;

[29.6] by finding that the new claims introduced by the amendment were only subjected to arbitration when they were introduced is based on a misconception of the law and facts as the claims were subjected to arbitration in terms of clause 8 of the arbitration agreement, which

[4] *Member of the Sugar Industry Central v Maritz and Another* 1984 (4) SA 101

arbitration proceedings commenced on 4 November 2013 with the appointment of the arbitrator;

[29.7] the consequences of the arbitrator's factual error in fact and in law resulted in gross irregularities in the conduct of the proceedings in that the arbitrators exceeded his powers or misconceived the nature of the enquiry and his duties in connection therewith. These errors are material to the outcome of the arbitration, in that they rendered the outcome of the continuation of the arbitration, as far as it relates to the plea of prescription unreasonable as it denies Khum Investments to claim payment on amounts in respect of resources who worked for Eskom to its benefits in the amounts set out in the amended claims 9 and 15 compared with the original SOC. Therefore a reasonable arbitrator could not have reached the same conclusion regarding prescription as this arbitrator on all the material that was before him. In this regard, it relied on *Telcordia Technologies Inc v Telkom SA.*[5]

[30] Eskom contends that Khum Investments' reliance on section 13 (1) (f) of the Prescription Act is misplaced. It further contends that while it does not have to show in these proceedings that that the arbitrator was correct as an arbitral award is only reviewable on the basis of a gross irregularity in the conduct of the arbitration proceedings, the arbitrator correctly upheld the prescription plea because:

[5] 2007 (3) SA 266 (SCA)

[30.1] acknowledging that there are disputes that exists between the parties, in terms of clause 1,3 and 8 of the settlement agreement, the parties referred all existing disputes and disputes arising after 30 October 2013, to urgent arbitration;

[30.2] section 31 (1) (f) of the Prescription Act provides that the running of prescription is delayed if the debt is the object of a dispute subjected to arbitration.

[30.3] based on *Sugar Industry Central*, reference to arbitration must be distinguished from the concept of a dispute subjected to arbitration as contemplated in section 13 (1) (f) if the Prescription Act. Khum Investments' disputes could not have been subjected to arbitration when the parties concluded a settlement agreement because the applicant had not formulated its disputes.

[30.4] Khum Investments only formulated its disputes in the SOC, delivered on 13 December 2013. It had between 30 October 2013 and the delivery of its SOC to include its disputes with Eskom in the SOC. Only then were its disputes subjected to arbitration in terms of section 13 (1) (f).

[31] The parties are *ad idem* regarding the legal principles applicable to the review of arbitral awards, which have become trite.

[32] The power of a court to review a consensual arbitration award is limited to the grounds listed in section 33(1). There are no residual common law grounds on which the court may review an arbitration award made in terms of the Act.

[33] To succeed under section 33(1) (b), the applicant ought to show that:

[33.1] the arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings; or

[33.2] exceeded his powers.

[34] A finding that the arbitrator committed a factual error leading him to a wrong conclusion is insufficient to render an arbitral award reviewable. Such an error only renders an arbitral award reviewable if it results from failure by the arbitrator to act in terms of his mandate. The word "misconduct" does not extend to a *bona fide* error of fact or law by the arbitrator. It is only where a mistake is so gross or manifest as to evidence misconduct, *mala fides* or partiality on the part of the arbitrator that it renders the award reviewable.[6]

[35] This court's disagreement with the arbitrator's decision on the basis that it is incorrect is irrelevant. The arbitrator's decision is not reviewable because it is wrong. An arbitrator is allowed to be wrong. The applicant must not only

[6] *Lufuno Mphaphulj and Associates (Pty) Ltd v Andrews and Another* (2009 (6) BCLR 527 (CC) at para 7.

allege that the arbitrator's decision was legally wrong. It must show that no reasonable arbitrator could have made the decision on the material before him.

[36] I resorted to these principles to determine the merits of this application.

[37] Khum Investments has offered two divergent reasons for amending its SOC. On the one hand, it asserts that it would have made no sense to have incurred more costs by amending the SOC earlier when the whole basis of the claim, namely, its *locus standi* was *sub judice* in arbitration and subsequently, review and appeal proceedings. On the other hand, it asserts that it did not amend the SOC because it believed that the amended schedules were covered by the settlement agreement.

[38] The first reason seems to relate to an election Khum Investments made at the time, to wait until all the proceedings relating to the first arbitration were exhausted prior to amending the SOC. Therefore it has to bear the consequences of this election. The second seems to relate to a view it held, that the settlement agreement covered the amended schedule. This view was not upheld by the Arbitrator.

[39] Eskom's contention that the new amounts which Khum Investment sought to introduce by way of an amendment, constitute new debt as envisaged by the Prescription Act and has prescribed, was upheld by the Arbitrator. The Arbitrator also rejected Khum Investment's contention that all the disputes between the parties became subject to arbitration when the settlement agreement was concluded. The Arbitrator's conclusion cannot be faulted.

[40] Khum Investments has not established any irregularities in the proceedings. Its complaint lies against the result of the arbitration. In the absence of any irregularities, the review is competent. .

[41] Khum Investments has also failed to show that the Arbitrator misconstrued the nature of the enquiry he is required to undertake, his duties and the scope of his powers. The relevant terms of the settlement agreement are clear and hardly require interpretation. The parties agreed to refer all disputes between them to urgent arbitration in terms of Article 23 of the rules for commercial arbitration of AFSA, whether such disputes arose before or after 30 October 2013. This is an agreement to refer. Its conclusion did not subject the disputes between the parties to arbitration. This construction is supported by the agreement at the first meeting with the Arbitrator to set out the parties' respective claims and defences in their SOC and SOD. The SOC and SOD were only filed on the dates stated earlier. Until the SOC was filed, the disputes between the parties were not subject to arbitration. They only became subject to arbitration when the SOC was filed, initiating the arbitration. Therefore, Khum Investment's reliance on *Sugar Industry Central* is misplaced.

[42] Prior to the second arbitration, the parties agreed on the issues to be determined by the Arbitrator, which included Eskom's prescription point. Therefore, by determining this point, the Arbitrator acted within his mandate. He did not misconstrue the nature of the enquiry in relation thereto. By determining the question against Khum Investment, the Arbitrator did not, by his own conduct deny Khum Investment the right to claim payment on these

amounts. His determination that Khum Investment's new claims have prescribed invariably has the effect that those claims become excluded from the rest of the arbitration. This is the consequence of the nature of the legal question that the Arbitrator was called upon to determine. It is not consequent upon the arbitrator's conduct.

[43] Khum Investment's attempt to attribute the exclusion of the claims to the conduct of the arbitrator is disingenuous, as the parties went into the second arbitration fully conversant with the consequences that would flow from his decision. For that reason, the review is brought on spurious grounds, warranting a punitive cost order as claimed by Eskom.

[44] In the result, the following order is made:

ORDER

1. The application is dismissed with costs on the attorney and client scale.

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MADAM JUSTICE L T MODIBA
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

APPEARENCES

Counsel for applicant:	Advocate GC Pretorius SC Advocate IM Lindeque

Attorney for applicant:	Breytenbach Mostert Skosana Inc
Counsel for first respondent:	Advocate A Gautschi SC Advocate M Seape
Attorney for first respondent:	Koikanyang Incorporated
Date of hearing:	29 August 2019
Date of judgment:	23 January 2020