REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
6/08/2021
DATE SIGNATURE

Case No.: 2172/2021

In the matter between:

OCA Testing Inspection and Certification South Africa (Pty) Ltd	**Applicant**
and	
KCEC Engineering and Construction (Pty) Ltd	**First Respondent**
The Honourable Judge NP Willis	**Second Respondent**

JUDGMENT

Malindi J:

[1] This matter came before me as an unopposed application wherein the Applicant, which is the Claimant in concluded Arbitration proceedings, seeks an order remitting the Arbitration Award as follows:

> "1. In terms of section 32 of the Arbitration Act, 1965, paragraph 1 of the Award of the Second Respondent published on 14 December 2020 (a copy of which is annexed to the founding affidavit) is set aside;
>
> 2. In terms of section 32 of the Arbitration Act, 1965, the Applicant's claims for payment in respect of the second and third agreements (as referred in the Award) is remitted to the Second Respondent for reconsideration and the making of a further Award or a fresh Award;
>
> 3. The Second Respondent is ordered to reconsider the Applicant's claims in respect of the second and third agreements in light of the content of the founding affidavit in this application, together with any further affidavits filed in the matter and any judgment of this Court."

[2] The First Respondent's attitude to the application is rather ambiguous. In its letter dated 29 January 2021 to the Applicant (which has been made available by the Applicant to the court) it states:

> "KCEC consider that is no justification for a remittal to reconsider the Award requested by OCA. That is the reason to not opposing at Court to the Application of OCA in terms of section 32 of the Arbitration Act, paragraph 1 of the Award of the Second Respondent published on 14 December 2020 for your reconsideration."

[3] I therefore proceed on the basis that the application is not opposed as a matter of fact as no opposing responses have been filed even though a view is expressed in the letter that there is no justification for a remittal for reconsideration of the Award.

Grounds for Remittal

[4] Prayer 1 seeks the setting aside of paragraph 1 of the Award in terms of section 32 of the Act. However, the Act provides for a setting aside of an award in section 33(1) which provides for the circumstances under which an Arbitration Award may be set aside. These are:

"33. Setting aside of award- (1) Where-

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

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

(c) an award has been improperly obtained, ..."

[5] Prayer 2 seeks the remittal of claims for payment in respect of the second and third agreements to the Arbitrator ("the Second Respondent") for reconsideration and the making of a further Award or a fresh Award in terms of section 32(2) of the Act which empowers the court to remit any matter which was referred to arbitration to the arbitration tribunal for reconsideration and for making a further award or a fresh award or for such other purpose as the court may direct.

[6] The Applicant contends that:

"Thirdly I shall address the question of whether good cause exists for the remittal of the Award back to the Second Respondent for the making of a further award, or a fresh award or for such other purpose as the Court may direct;"

[7] It is alleged that the Second Respondent made a material mistake by omitting to make any award in respect of two of the Applicant's claims. It is contended that the Second Respondent made an Award only in respect of the first agreement and that the claims in respect of the second and third agreements have no result.

Analysis

[8] The Statement of Claim recapitulates the history of entering into the three relevant agreements and the applicable terms and condition. Paragraph 2 thereof states that during the period of 25 May 2018 to 25 August 2018 the Claimant rendered services to the Defendant in terms of the first, second and third service agreements.

[9] After rendering the said services in terms of each of the agreements the Claimant delivered seven invoices to the Defendant. The Claimant pleaded that the Defendant was at the time of the claim, "indebted to the Claimant in the cumulative sum of R2 603 729.44…", and that:

"Notwithstanding demand, the Defendant has failed and/or refused to make payment to the Claimant of the total amount owing in the sum of R2 603 729.44 (Two million six hundred and three thousand seven hundred and twenty-nine Rand and forty- four cents).

Wherefore the Claimant claims from the Defendant:

(a) R2 603 729.44 (two million six hundred and three thousand seven hundred and twenty-nine Rand and forty-four cents);

(b) Interest thereon at the rate of 10,25% per annum from date of demand to date of payment in full;

(c) Costs of suit;

(d) Further and/or alternative relief. "

[10] The Claimant claimed the amount with neither breaking it down in individual amounts per service agreement nor was this globular amount broken down in terms of each agreement in the letter of demand dated 3 October 2018.

[11] The Applicant referred to the case of Lochrenberg v Sululu[1] for the proportion that each invoice forms a separate cause of action and that the Second Respondent ought to have made it clear in his Award that he was discussing the claims under each agreement.

[12] Reference was then made to Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others[2] for the submission that "good cause" for remittal would have been shown "where the arbitrator has failed to deal with an issue that was before him or her."

[1] 1960(2) SA 502 (E) at 503 F-H

[2] 2013(5) SA 84 (SCA) at [9] – [15]

[13] The question that arises therefore is whether the Second Respondent failed to deal with the validity of the claims under the second and third agreements. The Applicant contends that although the Second Respondent correctly identified the dispute between the parties as relating to three separate agreements[3], he only considered the merits of the claim for the invoices relevant to the first agreement when he stated:

> "The claimant has sought judgment for monies due in terms of its unpaid invoices. The total amount allegedly owing to the claimant is in the R2 603 729.44. The defence raised to the payment of the invoices relating to the first agreement was the failure by the claimant timeously to deliver the CoC to the defendant. The evidence makes it clear that claimant was indeed in breach of its agreement with the defendant by failing so to deliver the CoC and consequently, its claim must fail."

[14] The contention is that the result was only in respect of the first claim because only it was subjected to analysis and reasons given for its dismissal.

[15] In my view, although the Award dismisses the Claimant's claim without traversing the claims under each agreement the Second Respondent clearly considers the claimed globular amount which comprises claims under all three agreements in paragraph 53 of the Award.

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[3] See Award: 002-133 para 3

[16] Paragraph 54[4] also makes it clear that the Second Respondent is alive to whether all eleven invoices divided under each agreement are valid claims. This is further mentioned in paragraph 17 of the Award.

[17] The Applicant's submission that the Award is vague in respect of whether the dismissal of the claim is in respect of the claims under the second and third agreements is not well founded. There is no doubt that the whole claim for R 2 603 729.44, inclusive of the claims under the three agreements, is dismissed, with all claims under each agreement having been separately considered.[5]

[18] It is obvious, even on the Applicant's contention, that by addressing the defences to the claims under the second and third agreements, the Second Defendant did consider their merits and came to the conclusion that they too are to be dismissed.

[19] The Second Respondent's non–tabulation of the claims under each agreement in his Award does not amount to a "material and inexcusable mistake" as contended for by the Applicant or a failure to deal or consider the issue(s) before him. It was stated in Leadtrain[6] that "once an issue has been pertinently addressed and decided there seems to … be little room for remitting the matter for reconsideration." In this case the claims under the second and third agreements were addressed in the process of considering the defences thereto.

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[4] "Moreover, it may be pointed out, *en passant,* that the agreements were obviously not interlinked in the sense that a failure to pay an outstanding invoice due in terms of the second agreement and/or the third agreement would have the contractual consequence of not obliging the claimant to furnish the CoC in terms of the first agreement."

[5] Award: 002-139 to 002 -140

[6] At [15]

[20] The question also arises whether a case for setting aside of Paragraph 1 of the Award has been made. "Setting aside" is different from "remitting for reconsideration". In Palabora Copper v Motlokwa Transport[7] the Supreme Court of Appeal said:

> "... It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award..."

[21] The Applicant has not alleged the basis for setting aside Paragraph 1 of the award and the consequences thereof in view of the fact that only a reconsideration of part of the Award is pleaded. It seems that the consequence would be the reconsideration of the validity of the claims under the second and third agreements only. Nevertheless, the same test would apply as in the remittal test, that is that the arbitrator must have misconceived the nature of the enquiry. For the reasons already stated, the Second Respondent fully understood the nature of the enquiry into the first agreement as stated in paragraph 53 of the Award. Therefore, there is no reason to set Paragraph 1 of the Award.

Conclusion

[22] I therefore make the following order:

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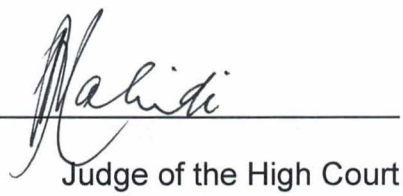
[7] 2018 (5) SA 462 (SCA) at [8]

The application for setting aside the first order of the Award and remitting the Claimant's claims for payment in respect of the second and third agreements is dismissed.



Judge of the High Court

Malindi J

Counsel for the Applicant	:	Adv Immanuel Verasamy
Instructed by	:	Pather and Pather Attorneys
Counsel for the Respondent	:	No appearance
Date of hearing	:	02 August 2021
Date judgment delivered	:	06 August 2021