

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 13909/21

REPORTABLE: No

OF INTEREST TO OTHER JUDGES: No

REVISED.

24 May 2022

In the matter between:

AVENG AFRICA (PTY) LTD

Applicant

and

SEVENTY FIVE ON MAUDE (PTY) LTD

First Respondent

NUGENT, R.W.

Second Respondent

***Case Summary:* APPLICATION – REVIEW AND SETTING ASIDE OF ARBITRAL
AWARD IN TERMS OF SECTION 33(1) OF THE ARBITRATION ACT 42 OF 1965**

JUDGMENT

SENYATSI J

[1] In this application, the Applicant seeks the review and setting aside of an arbitral award in terms of section 33(1) of the Arbitration Act, 42 of 1965 (“the Act”) given by the Second Respondent, the arbitrator on 8 February 2021.

[2] The basis of the Application is that the arbitrator exceeded his powers and committed a gross irregularity in the conduct of the arbitration proceedings.

[3] The Applicant is a private company incorporated with limited liability in accordance with the laws of South Africa with its primary principal place of business at the High Street, Melrose Arch, Johannesburg.

[4] The First respondent is also a private company incorporated with limited liability in accordance with the company laws of South Africa and with its principal place of business at Baobab House, 5 Autum Road, Rivonia, Johannesburg.

[5] The Second Respondent is a retired Justice of the Supreme Court of Appeal and is cited in his capacity as the appointed arbitrator in arbitration conducted between the Applicant and the First respondent (“the arbitrator”).

[6] The First respondent and the Applicant concluded a building contract on 25 October 2015 in terms of which the Applicant was appointed to construct Phase 1 of the basement of the mixed use high rise building called Leonardo in Sandton (“the Works”). Phase 2 of the project consisted of Podium and Tower portion of the Leonardo.

[7] On 21 September 2016 the Applicant was appointed to do Phase 2 of the works. The contract between the parties consisted of the Principal Building Agreement JBCC Edition 6.1 (March 2014) which contained general conditions as amended by the priced bills of quantities, the Preliminaries (“the Preliminaries”) and the contract data (“the Contract Data”).

[8] The letter of appointment dated 25 October 2015 states that the Program for the Works would be as follows:

8.1 for the Basement - 8 months and

8.2 for the Podium and Tower Black structure up to the date of practical completion – 22 months making the total construction period 30 months

[9] The standard terms of the JBCC agreement provides for a “defects liability period” of 90 days which commences after the achievement of Practical Completion within which period the contractor may be instructed by the principal agent to attend to such defects.

[10] The defects liability period was done away with by the Applicant and First respondent (“the parties”) and replaced with a “Snagging Period” of 2 months after the achievement of practical completion date, bringing the total construction period to 32 months

[11] The clause related to the penalties was also amended by the parties. Clause 24.1 of the standard JBCC agreement provides that should a contractor fail to bring the works to practical completion by the date for practical completion or the revised date for practical completion, then the contractor would be liable for a penalty.

[12] The parties agreed that the penalty would be R450 000 (four hundred and fifty thousand rand) per day after the practical completion date that has not been achieved. The parties also agreed that no penalties would be imposed on the Tower Block for the first 60 days of any delay to the overall completion date of the works.

[13] The works on Phase 1 commenced on 15 November 2015 and on 21 September 2016 the First respondent exercised its option to extend the contract to Phase 2. The initial agreed date for practical completion of Phase 1 and 2 was 14 May 2018.

[14] A number of extensions of the time to the stipulated date for practical completion were granted by the First respondent to the Applicant as follows:

14.1 the initial date for practical completion 14 May 2018;

14.2 20 working days for excessive ground works 12 June 2018;

14.3 2 weeks due to column demolition 30 June 2018;

- 14.4 1 month for complexity of the floors between level 5 and 6, 30 July 2018;
- 14.5 2 months in terms of the agreement concluded between the parties during May 2017, 30 September 2018
- 14.6 3 weeks due to an additional floor (42 to 43 floors), 19 October 2018
- 14.7 13 calendar days for one duplex flooring, 3 November 2018
- 14.8 3 weeks for the complexity of all duplex floors, 23 November 2018
- 14.9 21 days for inclement weather, 15 December 2018

[15] On or about 27 August 2018 the First respondent advised the Applicant that it was considering extending the works up to 51 floors and proposed that an extension of time of 3 and a half months be granted for this purpose along with a 3-week provision for inclement weather and a builder's holiday. The Applicant states that the new date for practical completion was therefore 30 April 2019. It contends that the parties are ad idem that at the very least, the stipulated date for practical completion is no earlier than 30 April 2019.

[16] The Applicant contends that contrary to the 60 day moratorium on penalties, the First respondent levied penalties from 1 May 2019 to 29 June 2019 at R450 000 per day. In continued to levy the penalty until 6 January 2020 and purported to terminate the agreement. The termination is the subject of a further dispute between the parties.

[17] However, in the statement of defence as appearing from the record and the First Respondent's evidence, the parties are not ad idem that 30 April 2019 was to be the

date of practical completion. It is alleged in the statement of defence that it was to be the date for practical completion with qualifications. The First respondent contends that the issue in the arbitration did not relate to what was “given up or abandoned” by the Applicant. This is also apparent from the opposing affidavit as amplified in the heads of arguments.

[18] The issues for determination is whether the arbitrator exceeded his powers in making the award that the First respondent was entitled to levy the agreed penalty from 1 May 2019 and whether as contended by the Applicant, the First respondent committed serious irregularity during the arbitration proceedings regarding cross-examination of Mr Dorrenstein and by finding the that the 28 February 2019 was the date of practical completion

[19] Arbitration reviews are regulated by the Arbitration Act 42 of 1965 and section 33 (1)(b) provides recourse to courts to a party not satisfied with the award. (“the Act”). Section 33 (1)(b) of the Act provides as follows:

“(1) Where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers, the court may, on the Application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.”

[20] In *Eskom Holdings Limited v Joint Venture of Edison Jelano (Pty) Ltd and Others*¹ the court in restating the legal framework of the review of arbitration tribunal award said the following:

“[21] Section 33(1) of the Arbitration Act 42 of 1965 regulates the review of arbitral awards as follows:

(1) Where-

¹ [2021] ZASCA 138

(a) any member of the 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 exceeded his powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after one notice to the other party or parties, make an order setting the award aside.

[22] Speed, efficiency, flexibility and finality of the arbitration process are the reasons that the parties opt to select their own dispute resolution method. Admission of evidence which is not strictly necessary or beneficial to resolution of a dispute detracts of these advantages.² However, the rules of natural justice remain applicable.”

[21] In *Telecordia Technologies Inc v Telkom SA Ltd*³ the court was concerned with the interpretation of the terms “gross irregularity” and “exceeding its power” which justify interference by courts with arbitral awards as provided in section 33(1)(b) of the Act. The court reaffirmed the principle of autonomy – a realization of freedom enjoyed by the parties to execute arbitration agreements and that the courts will interfere only in limited cases as provided for in the Act. The court defined gross misconduct as a “process standard which is to all intents and purposes identical to a ground of review” available in relation to proceedings in judicial proceedings. The ultimate test of whether an arbitrator’s conduct constituted gross irregularity is whether the conduct of the arbitrator or

² See 2 LAWSA 3rd Ed at paras 80 and 122

³ 2007 (3) SA 266 (SCA)

arbitral tribunal prevented a fair trial of the issues⁴. The common law grounds of review are excluded.⁵

[22] The principle of party autonomy in arbitral awards was also approved by the Constitutional Court in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another*⁶ the court held that section 34 of the Constitution which provides for a right to a fair public hearing, did not apply to private arbitrators.

[23] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*⁷, it was held that in modern arbitral practice, fairness goes beyond strict observation of the rules of evidence provided that the procedure adopted is fair to both parties and conforms to the rules of natural justice.

[24] As regards the legal frame work relating to the alleged lack of jurisdiction or exceeding powers by the arbitrator, the court in *Telcordia Technologies Inc v Telkom SA Ltd*⁸ referred to a distinction made by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SPA and Others*⁹ between a tribunal purporting to exercise a power or jurisdiction which it does not have and erroneous exercise a power that it has. The court held in Lesotho Highlands Development Authority case that it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power can exist.

[25] The powers given to an arbitration tribunal in each case are regulated by the Act, the arbitration agreement, the pleadings (or statements of case) and any other document prepared by the parties for that purpose. In the instant case, the parties agreed that the pleadings that had been served before the arbitrator would stand in

⁴ *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581.

⁵ See *Telkordia Technologies Inc v Telkom SA Ltd supra* at para 51

⁶ 2009 (4) SA 529 (CC)

⁷ 2013 (6) SA 520 (SCA)

⁸ *Supra*

⁹ [2005] UKHL 43 at para 24 where the court was considering the meaning of “exceeding its powers” within section 68 (2) of the English Arbitration Act 1996.

relation to the arbitration proceedings. These included letters of extension of the date of practical completion as filed by the parties.

[26] During the oral evidence adduced by the parties, and in particular Mr Dorrenstein for first respondent and Mr Maire for the applicant, it is without clear that all parties understood the contract term in terms of the JBCC to put 30 months plus 2 months. In other words, the building works had to be completed within 32 months. The innovation agreed to by the parties as to the 60 days' penalty free period was always determinable from the contract end period, which they either called it Practical Completion Date or simply completion date of the works.

[27] As I understand it, the end of the contract terms as evidenced by the JBCC agreement and supplemented by the various extensions, would be the time at which the works would be fully completed and ready for use. The Applicant would then be afforded the opportunity to attend to the minor defects and these, in my respectful view, were to be done during the construction period including the penalty free period.

[28] The analysis of the record of the arbitral proceedings indicates that, during the exchange of pleadings, the parties especially First respondent categorically stated that the Practical Completion date would be 30 April 2019 subject to certain conditions or agreement and absent such agreement, then 28 February 2019. This was the state of the pleadings as exchanged between the parties.

[29] A further analysis of the record of proceedings at the arbitration tribunal proceedings, reveals that no agreement was reached that in fact the 30 April 2019 was the Practical Completion Date.

[30] The Applicant challenged the award the award on the basis that he was never asked to make a determination of the practical completion date as parties were ad idem that 30 April 2019 was the Practical Completion Date was beyond his jurisdiction. This contention is without any factual basis as I will set down below.

[31] When the Applicant declared a dispute and referral thereof to the arbitration tribunal, its case was that the First respondent had levied penalties from 1 May 2019 when it was not entitled to do so. It also contended by the Applicant before the arbitrator that it was agreed that only the snagging period had been brought forward.

[32] The dispute referred to adjudication by the Applicant was:

“9.1 Whether, on a proper interpretation of the Contract, there is a 60 days penalty free period which runs from the then current date for practical completion which prohibits the [first respondent] from levying penalties against the [applicant] for the first 60 days of any delay to the then agreed date of practical completion.

9.2 Whether the [first respondent] was entitled to levy penalties from 1 May 2019 or not (in the light of the penalty free period);

9.3 Whether there has been an amendment / variation / waiver of the penalty free period as alleged by the [first respondent].”

[33] It is clear from the record that the issue in 9.1 was accepted by first respondent and was not in dispute in the adjudication and arbitration.

[34] It appears without doubt that paragraph 9.2 was indeed in dispute which is whether first respondent was entitled to levy penalties from 1 May 2019 or not. It is for the reason in my respectful view, that in order to adjudicate on the issue, the arbitration tribunal had to rely on the pleadings exchanged, documents in support of the exchanged pleadings and the evidence adduced by the parties. It was therefore within the arbitration tribunal to make a determination of the date of practical completion and give effect to the 60 days penalty free period to give effect to what the parties had agreed to in terms of the extensions.

[35] In repeat that first respondent had accepted 30 April 2019 as practical completion date with conditions and absent such conditions, the practical completion date was

clearly set out by the first respondent to be 28 February 2019 which was supported by evidence before the arbitration tribunal.

[36] The applicant in my respectful view, failed to discharge the burden of proof that in fact the conditions stated by Mr Dorrenstein of the first respondent in the exchange of correspondences had been met. On the contrary, Mr Dorrenstein in his testimony led evidence, which was unchallenged that no agreement had been reached to give effect to 30 April 2019 and the Practical Completion Date. The arbitration tribunal, correctly in my view, made an award that the 28 February 2019 was the Practical Completion Date the effect of which is that the penalties agreed stated to and from 1 May 2019.

[37] It follows therefore that the arbitration tribunal did not exceed the scope of its authority when it gave the award that 28 February 2019 was the Practical Completion Date.

[38] On the issue of gross irregularity, I have perused the record of the proceedings of the arbitration tribunal. Counsel for the Applicant was allowed to cross-examine the witnesses of the first respondent. It appears from the record that the cross-examination did not focus on challenging the evidence led by first respondent on substantive issues. I say so because it was for instance, it was never put to Mr Dorrenstein that acceptance of 30 April 2019 as a Practical Completion Date was subject to conditions that had been met. This was completely ignored and the evidence that the conditions were never met as stated in the correspondence remained unchallenged.

[39] I noted that the second respondent intervened when he felt that the cross-examination did not deal with facts and issues before the tribunal but simply a proposition by counsel for the applicant which was not supported by facts. Such intervention was done in the normal course and is part of managing the arbitration process. It does not amount to gross irregularity as averred by the Applicant.

[40] Accordingly, I find no basis that the arbitration tribunal has committed gross irregularity justifying interference of the award by this court. It follows therefore that this ground must also fail.

ORDER

[41] The following order is made:

- (a) The application for review of the award made by the first respondent is dismissed with costs.

M.L. SENYATSI
JUDGE OF THE HIGH COURT

Heard:	25 October 2021
Judgment:	24 May 2022
Counsel for Applicant:	Adv A. Subel SC
Instructed by:	Pinsent Masons Inc. Sandton
Counsel for First Respondent:	Adv B.W. Burman SC
Instructed by:	Tiefenthaler Attorneys Inc. Dunkeld