IN THE HIGH COURT OF SOUTH-AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/59086

Heard on: 6 March 2023
Judgement on: 5 June 2023

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

DATE 05/06/2023 SIGNATURE

IN THE MATTER BETWEEN:

ELSYS (PTY) LTD t/a **APPLICANT**

ELECTROSYSTEMS

AND

BTS ELECTRICAL AND **FIRST RESPONDENT**

MECHANICAL SERVICES

(PTY) LTD (in liquidation)

TERRY MAHON, N.O. **SECOND RESPONDENT**

Neutral Citation: *Elsys (Pty) Ltd t/a Electrosystems v BTS Electrical and Mechanical Services (Pty) Ltd and Terry Mahon N.O.* (Case No: 59086/2021) [2023] ZAGP JHC 624 (05 JUNE 2023)

JUDGMENT

Strijdom AJ

INTRODUCTION

1. In this matter the applicant (the respondent in the arbitration), ('Elsys') applied to this court for orders in terms of section 13 and 33 of the Arbitration Act 42 of 1965 ('the Arbitration Act'):

    1.1 reviewing and setting aside the arbitration award ('the award') handed down on 3 November 2021[1] by the second respondent, the arbitrator, in favour of the first respondent (the claimant in the arbitration) ('BTS');

    1.2 removing the arbitrator in relation to the arbitral disputes between Elsys and BTS.[2]

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[1] CaseLines: 04 – 247 – 287 FA

[2] Section 33(1) and 13(2) of the Arbitration Act 42 of 1965

2. This review does not affect those claims which Elsys had not disputed, which consequently do not fall to be reviewed and set aside, i.e.:

   2.1 R 166 878.90;

   2.2 R 21 823.00;

   2.3 R 16 491.42; and

   2.4 R 319 388.17.

3. BTS instituted arbitration proceedings against Elsys in 2016.

4. In terms of the award, the arbitrator has directed Elsys to pay BTS the following sums, which are subject to review[3], excluding interest and costs:

   4.1 R 9 517 084.77;

   4.2 R 196 222.50;

   4.3 R 16 437.22;

   4.4 R 1 638 988.78;

   4.5 R 4 993 152.99;

   4.6 R 47 464.01;

   4.7 R 81 479.08;

   4.8 R 20 441.14;

   4.9 R 200 000.00; and

[3] CaseLines: 04 – 285 to 286

4.10 R 1 173 342.10.

5. BTS has counter-applied for the award to be made an order of court.[4]

6. Elsys opposed the counter-application and its opposition is based on the review.

7. The arbitrator has filed a notice of intention to abide.

The Review:

8. The review is based on three (3) grounds:

   8.1 the arbitrator misconducted himself in relation to his duties as arbitrator;

   8.2 the arbitrator conducted a gross irregularity in the conduct of the proceedings; and

   8.3 the arbitrator exceeded his powers.

9. It was submitted by the applicant that regarding each of the grounds above, the arbitrator:

   9.1 based his award on matters other than BTS's pleaded case, i.e., he ignored BTS's pleadings and based his findings on matters that were not covered by the pleadings when he was obliged to determine the claims on BTS's pleaded case;

   9.2 treated the parties differently by preventing Elsys from introducing further limited evidence and documents, after having allowed BTS to rely on evidence of a single factual witness, Mr Ivan Pretorius ('IP'), who had testified outside the contents of his single page witness statement, which

[4] CaseLines: 04 – 613 AA and section 33(1) of the Arbitration Act

was in its terms, only confirmation of the evidence of another witness (who was not led in evidence on the merits of the claim); and

9.3 in doing so, the arbitrator treated Elsys unfairly and committed a gross irregularity.

10. In the arbitration, the first respondent (BTS) was the claimant and the applicant (Elsys) the defendant. The dispute was referred to arbitration in October 2016. The first respondent (as claimant) sought an award for payment for the supply of goods and services to the applicant (as defendant).

11. The disputes between the parties concerned two (2) unrelated projects and three (3) categories of claims arose for consideration:

11.1 The Boskrans claim (claim 27, as it appears in the first respondent's statement of claim); and

11.2. The claims relating to the ADM works, which, in return comprised:

11.2.1 the measured works (where a bill of quantities is applicable); and

11.2.2 the remaining (or *ad hoc*) claims (claims 9 to 26, as they appear in the first respondent's statement of claim). These claims are considered to be of an *ad hoc* nature, because they related to goods and services, not included in a bill of quantities.

12. The applicant instituted a counter-claim which was ultimately withdrawn.

13. The issue in this matter is whether the award is one which should be reviewed and set aside in terms of one or more of the grounds in section 33 of the Arbitration Act.

14. Section 33 (1) of the Arbitration Act provides as follows:

'33 Setting aside 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, 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.'

15. The onus rests upon the applicant in this regard.[5]

16. Wrong findings on the correct dispute are not reviewable. In **Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd**[6] it was held as follows:

'It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with 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. If parties

[5] Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another 2002 (4) SA 661 (SCA)
[6] 2018 (5) SA 462 (SCA)

choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards.'

17. The parties had no written contract between them containing a dispute resolution clause when the alleged disputes arose.

18. In the absence of a written contract containing a dispute resolution clause, the written arbitration agreement, comprising the minutes of the first pre-arbitration agreement held on 24 October 2016, read with the AoA rules, governs the disputes between the parties, and may be regarded as the parties' written arbitration agreement. The parties agreed that the Association of Arbitrator's Rules for the conduct of arbitrators 2013 edition ('the AoA rules') will be applicable to the arbitration.[7]

19. After the commencement of the arbitration, but before any evidence had been led, the parties agreed to separate out an issue for determination first i.e., the terms of the agreement between them.

20. On 6 November 2017, the arbitrator issued an interim award in which, *inter alia*, he stated:

'9.1 The claimant's case is summarized in paragraph 4 of its Heads of Argument as follows:[8]

'4. The claimant's case, as evidenced in the statement of claim (and witness statement of Grant) is simple. In respect of both contracts:

4.1 The claimant was a supplier and not a sub-contractor in the sense contended for by the defendant.

[7] CaseLines: 04 – 330 to 331
[8] CaseLines: 04 - 212

4.2 The claimant tendered as per a bill of quantities ('BOQ') and was subsequently provided with a purchase order.

4.3 The claimant supplied and delivered in accordance with the purchase order and the BOQ. To the extent that the BOQ was re-measurable, quantities may have increased and the defendant is liable in accordance with the rates in the BOQ, subject to the CPA.

4.4 Where deliverables, whether in the nature of goods and equipment or related services, fall outside the relevant BOQ, such deliverables were supplied in accordance with separate agreements, on an *ad hoc* basis, concluded between the claimant and the defendant.'

'18. In view of what is set out above, I make the following award:

18.1 The separate issue is decided in the claimant's favour and the contractual terms between the parties are as contended for by the claimant and not as contended for by the defendant in paragraph 1.8 and 3.12 of the amended Statement of Defence...'

21. On 26 January 2018, following a request by Elsys for an interpretation of the interim reward, the arbitrator clarified his interim award by identifying the BOQ which forms part of the AMD agreement as 'The BOQ was that contended for by the claimant.'[9]

22. It was submitted by Elsys that the arbitrator was obliged to determine the disputes on the basis of the parties' pleaded cases, with the proviso that any

[9] CaseLines: 04 – 244 to 246

claims which fell outside the R76 million BOQ, were simply not before him unless they had been pleaded as 'separate agreements, on an *ad hoc* basis, concluded between the claimant and the defendant.' This was part of BTS's summary of the terms of the agreement, which was accepted by the arbitrator in the preliminary hearing.[10]

23. BTS contended that it was never asked to pick a bill of quantities, it supplied goods and delivered work on the basis of rates in a bill of quantities. These are rates that were taken into consideration when AECOM measured the works and it was common cause that AECOM measured only with reference to a bill of quantities and that every item that appears in certificate 31 also appears in the bill of quantities.

24. In the clarification, the arbitrator does not identify the 'correct' bill, nor does he say that the R76 million bill of quantities is the 'correct' bill.

25. BTS, in its pleadings, relied on a bill of quantities that was varied.[11]

26. From the evidence it is clear that the BOQ had been replaced, supplemented and amended from time to time, but at all times, there was only one BOQ.

27. The arbitrator found that Elsys was misdirected as far as its point on the correct or applicable BOQ was concerned and it transpired that Ms Kelly's investigations were largely fruitless.

28. No purpose would have been served by taking into account the Scott Schedule that was prepared for purposes of illustrating the differences between what Elsys perceived was the 'correct' and the 'incorrect' BOQ's. This is clear from paragraphs 33 and 34 of the final award and the applicant's contention to the effect that the arbitrator found in favour of Elsys without any evidence or basis to do so, is incorrect.

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[10] CaseLines: 04 - 212

[11] CaseLines: 04 – 80 paragraph 8.2.1

29. Ms Kelly's investigations in my view were indeed fruitless and pointless in circumstances where in fact, the arbitrator did not restrict or confine the Elsys' case to the BOQ that Elsys insisted should be applicable.

30. I concluded that this ground for review lacks merit and do not support the relief sought in the notice of motion.

31. In respect of claims 1 – 8 it was contended by Elsys that the arbitrator was not empowered to consider a claim for payment for the measured works other than the claim as pleaded by the first respondent and that the BTS has led no evidence to support the factual averments upon which its claims were based. It was further argued that the arbitrator did not have regard to the pleadings or the pleaded basis for the measured works claims.

32. To prove its case, BTS relied on the evidence of Mr Pretorius who provided a first-hand account of what happened 'on-site', the evidence of Ms Kelly as to the correctness and accuracy of AECOM's measurements, with reference, *inter alia*, to certificate 31, the evidence of Mr O'Reilly and the numerous concessions by Elsys' factual witnesses.

33. It is apparent from evidence (mostly notably, the cross examination of Mr Martyn that Malawi Engineering did not take or have contractual responsibility for any part of BTS's scope of work. It was common cause that Malawi Engineering did not submit any claim for payment. Malawi Engineering was responsible, at the request of the TTM JV to provide additional labour, not as a replacement for BTS.[12] Both Messrs Robert and Martyn van Beek confirmed that BTS was not 'de-scoped' in favour of Malawi Engineering or any other third party.[13]

34. BTS contended that it was entitled to payment of the full amount claimed towards the measured works, and that it ought to have been awarded R 11 284 315.16 (inclusive of VAT) in respect of the measured works.

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[12] CaseLines: 04 – 725 BTS 5.5
[13] CaseLines: 04 – 729 BTS 5.6

35. The arbitrator awarded a lessor amount. It is clear from the final award that the arbitrator applied his mind to the evidence of the experts and factual witnesses. The arbitrator also took in consideration and determined Elsys' alleged entitlements towards deductions (Malawi Engineering, remedial works).

36. There is no room for a finding that the arbitrator found in favour of BTS, without evidence or without BTS having additional evidence.

37. The arbitrator was entitled to take into consideration all evidence that was adduced, irrespective of the party who adduced it.

38. Claim 9 comprised two claims. The first claim of R 166 878.90 towards the cable calculations was conceded, with payment withheld pending the determination of a counter-claim, which was withdrawn and there can be no objection to this being awarded.

39. On the second claim, the applicant accepted that the first respondent provided a new racking design. It disputed the quantum of the claim.

40. Mr Robert van Beek testified that R 196 222.50 would, according to the applicant, represent a reasonable price for this work. This was a concession made by the witness. In my view the arbitrator was entitled to take evidence into consideration, which included concessions of this nature, although it was not pleaded.

41. The first respondent could not have known, when it prepared a statement of claim, that this concession would be made in evidence and as such, the suggestion that the arbitrator strayed beyond the disputes on the pleadings is incorrect. The dispute was and remained contractual, as pleaded. If the applicant is of the view that the arbitrator made an incorrect assessment of the evidence, or drew a wrong inference, this is not a ground for review.

42. It was submitted by the respondent that claims 15 and 16 (R1 638 988.78 and R 4 993 152.99 towards additional labour and overtime) were correctly awarded.

43. Mr Martin van Beek testified that the applicant received the claims, added a mark-up and asked AECOM to approve it for payment. The obvious inference to draw from the evidence of Mr Van Beek was that the applicant would not have claimed from CMC (via AECOM) if the work in question had not been done by agreement and unless the applicant was satisfied with the value of the first respondent's claim.

44. The arbitrator found for the first respondent on the basis of concessions made under cross-examination. There could be no basis on which to suggest that these concessions ought to have been foreshadowed and pleaded by the first respondent. This complaint, in my view, is also without merit.

45. The final award on claim 20 (the sum of R 81 479.08) related to labour (hours) costs in respect of switching and commissioning in the medium voltage sub-station. The applicant admitted that the first respondent was instructed to provide the labour, but denied the hours spent.

46. Mr Robert van Beek testified that the applicant should only be liable for R 12 000.00 in respect of this claim. He conceded that a qualified electrician was required to attend to this work, that the applicant did not have such a person available, and therefore requested the first respondent to attend this work.

47. The arbitrator was entitled taking concessions made by the witness into consideration, and in doing so, it does not mean that disputes were enlarged or that non-pleaded disputes were determined.

48. Claim 22 was for payment of R 4 170 638.07, in respect of the QC Officer.

49. Mr Robert van Beek conceded the applicant's obligation to remunerate the first respondent, but took issue with the quantum claimed. He indicated that the applicant would be liable for approximately R 200 000.00 just for the QC packs in respect of the applicant's free-issue materials. He testified that a calculation – or a comparison – ought to be done with reference to the initial budget for QC

packs and the increase in the project. He was unable to do so and the applicant did not instruct Ms Kelly to attend to such an exercise.

50. Having regard to the uncontested evidence of, *inter alia*, Mr Pretorius as to the extent of the work done in this regard, and the vague complaint that these costs are 'too much'. I am of the view there can be no valid objection to the arbitrator taking concessions made by the witness into consideration.

51. In respect of the final award on Boskrans, claim 27, the defendant in its amended statement of defence, admitted in principle an amount of R 1 173 342.10, which in turn was made up of: [a] R 319 388.17; and [b] R 853 953.93. These amounts have been uncontroversial from even before the disputes were submitted to arbitration. They are referred to as 'payable' by the applicant in the schedule[14]. From this, the applicant sought to deduct R 432 256.07 as the cost incurred to allegedly attend to defects (or 'punch-list items').

52. This amount is made up of what Mr Martin van Beek said is 'actual costs' incurred by the applicant and includes the labour costs, per hour, for 'normal' and 'overtime' hours of eight employees of the applicant, together with their living, travel and accommodation expenses and the cost of materials.

53. The first respondent argued that the labour component fell to be disregarded on the basis that this is not a cost incurred by the applicant, because the employees were not paid for their work, per hour. Instead, they earned salaries and their salaries would be (and had been) paid, irrespective of whether they were deployed at Boskrans or not:

    53.1 'normal' hours amounted to R 177 660.00; and

    53.2 'overtime' hours amounted to R 46 001.00.

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[14] CaseLines: 04 - 806

54. As far as the accommodation, travel and living expenses were concerned, it was accepted by the applicant that these employees were not on site, only for purposes of the outstanding punch-list items.

55. It was submitted by the first respondent that the award on the Boskrans claim ought to be as follows:

    55.1 R 1 173 342.10 on the basis of the deduction being disallowed *in toto*.

56. All the relevant evidence were taken into consideration by the arbitrator and he found in favour of the first respondent on this claim. Even if the arbitrator was wrong in his assessment of the evidence, this is not a ground for review.

57. It was submitted by the applicant that a final award was issued, without evidence of how invoices were compiled and submitted.

58. The date of invoices would ordinarily determine the date on which payments were due. It was not the case of any party, that payment must be excused until and unless an invoice was delivered[15]. The fact that evidence was not adduced of how invoices were compiled was irrelevant to the issues and the determination of the disputes between the parties. This does not constitute a reviewable irregularity.

59. It was submitted by the applicant that it was precluded from leading evidence of further witnesses which would have been succinct, and which was supported by witness statements together with a limited number of documents.

60. The arbitrator required Elsys to make a substantive application to introduce the further witness statements which it did, and BTS was provided with an opportunity to answer the application. The respondent elected not to respond to Elsys' affidavit and argued that it would be prejudiced as it had closed its case.

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[15] CaseLines: 04 – 240 and 04 - 245

61. The arbitrator found against Elsys and refused to permit it to lead the further evidence.

62. It was contended by the applicant that the arbitrator considered himself in the same position as a judge confronted with an application to make late discovery or introduce documents at a late state which have not been discovered.

63. All that this court must determine is whether the failure to lead the evidence amounts to a gross procedural irregularity or not.

64. It was submitted by the applicant that the respondent was allowed to lead the evidence of Mr Pretorius 'off-script' without any advance warning to the applicant, thus being allowed to present its case as fully as it required. Conversely the applicant, having at least provided supplementary and further witness statements, was denied to present its case fully as it required.

65. It was further argued that the fact that the respondent had closed its case, does not carry with it any further hurdles, and the applicant invited it to re-open its case if it wished.

66. The witness statement of Mr Pretorius confirmed what Mr Francois Grant stated in his witness statement. Mr Pretorius was regularly on site and to the extent that Mr Grant was not, Mr Pretorius was able to confirm what Mr Grant's witness statement contained.

67. Elsys' expert, Ms Kelly, testified subsequent to BTS's expert, Mr Robert O'Reilly and prior to Elsys' factual witnesses and the close if its case.

68. A number of issues had arisen from the earlier evidence of, *inter alia*, Ms Kelly and her suggestion that there was 'no evidence' that the relevant work had been done. It was, against this background, that Mr Pretorius testified on issues and topics that were addressed by Ms Kelly and contained in the witness statements presented on behalf of the applicant.

69. The evidence of Mr Pretorius was led by agreement. It was led on the understanding that his evidence-in-chief would be transcribed to effectively

'replace' a witness statement and that the hearing would, thereafter, adjourn to enable the applicant to fully prepare for his cross-examination[16]. The applicant was afforded no less than 2 months in which to consider the evidence of Mr Pretorius. Given the agreement between the parties regarding the evidence of Mr Pretorius, there was no application to 'allow' the evidence and no such application was argued, or granted.

70. The applicant indicated that it wished to introduce further witness statements and additional documents, after the first respondent had closed its case and both the applicant's Ms Kelly and Mr Robert van Beek had testified.

71. The arbitrator disallowed the introduction of further witness statements and related documents by the applicant, after its application for leave to do so had been considered, and after having heard comprehensive argument on the issue[17].

72. The interlocutory application was something to which the arbitrator retained a wide discretion. The arbitrator clearly took the applicant's argument in support of the application into account and found it to lack merit.

73. With regard to the provisions of section 33(1)(a), the Supreme Court of Appeal in **Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another**[18] held as follows:

[21] 'Because the submission to arbitration did not provide otherwise, the parties were precluded by the provisions of clause 30.12.3 of the agreement from appealing against the decision of the second respondent. The appellants can challenge the second respondent's award only by invoking the statutory review provision of section 33(1)(a) and (b) of the Act. Proof that the second respondent misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for setting aside the reward. The onus rests upon the appellants in this regard. As appears from the

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[16] CaseLines: 04 - 779
[17] CaseLines: 04 - 756
[18] 2002 (4) SA 661 (SCA)

authorities to which I have referred, the basis on which an award will be set aside on the grounds of misconduct is a very narrow one. A gross or manifest mistake is not per se misconduct.'

74. As a general proposition, wrong findings on the correct dispute are not reviewable. It was held in **Telcordia**[19] and in **Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd**[20].

'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. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards.'

75. On a conspectus of the evidence before me, the applicant failed to discharge the onus to prove that the arbitrator erred, whether in his findings of fact, or in the application of the relevant legal principles. As already stated in **Telcordia** *supra*, even if I consider the arbitrator to have been materially wrong in one or more of his findings, it is not a basis for review.

76. I further concluded that the applicant does not illustrate that the arbitrator misconducted himself in relation to his duty as arbitrator or that he exceeded his powers.

77. In the result the following order is made:

77.1 The review application is dismissed with costs;

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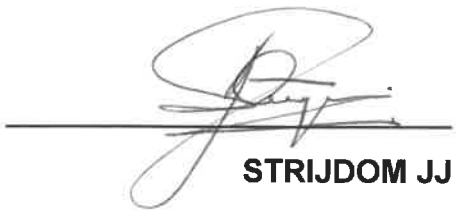
[19] 2007 (3) SA 266 (SCA)
[20] 2018 (5) SA 462 (SCA)

77.2 The award made by the arbitrator is made an order of court (counter claim) with costs, which include the costs of two councel (senior and junior).



STRIJDOM JJ

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Appearances:

For the Applicant:	**Adv Paul Strathem, SC**
Instructed by:	**Hewlett Bunn Inc.**
For the Respondent:	**Adv A J Daniels, SC and Adv de Villiers-Golding**
Instructed by:	**Cox Yeats Attorneys**