REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

8/4/2016

CASE NUMBER : 48087/14

DELETE WHICHEVER IS NOT APPLICABLE

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

5.IV.16 DATE

SIGNATURE

In the matter between

EMALAHLENI LOCAL MUNICIPALITY Applicant

and

MAHLALERWA CONSTRUCTION CC 1nd Respondent

HUGO J.MEYER NO 2nd Respondent

CASE NUMBER: 52099/13

MAHLALERWA CONSTRUCTION CC Applicant

and

EMALAHLENI LOCAL MUNICIPALITY Respondent

JUDGMENT

UNTERHALTER AJ,

INTRODUCTION

1. Two matters come before me. The first is an application by Emalahleni Local Municipality ("the Muncipality") to set aside an Award rendered by the second respondent Mr Meyer ("the Arbitrator"), in a dispute referred to the arbitrator by the Municipality and, the first respondent, Mahlalerwa Construction CC ("the Claimant"). The second is an application by The Claimant against The Municipality to have the Award of the Arbitrator, published on the 2 August 2013, made an order of Court. I refer to the first of these applications as the Review Application (case number 4808714), and the second application as the Enforcement Application (case number 52099/13)

THE DELAY

2. The Review Application is made in terms of Section 33 of the Arbitration Act 42 of 1965 ("the Arbitration Act"). Section 33(2) of the Arbitration Act requires that an

application to set aside an award be made within six weeks of the publication of the award to the parties. That period may be extended on good cause shown, in terms of Section 38 of the Arbitration Act.

3. The award of the Arbitrator was published to the parties on 2 August 2013. The Review Application was launched on 30 June 2014. The Review Application is considerably out of time. Recognising this, the Municipality seeks what it describes as condonation for the late filing of the Review Application. The basis upon which the Municipality seeks an extension of time from this Court is set out in the founding affidavit. The Municipality must account for the time between the publication of the Award on 2 August 2013 and its institution of proceedings on 30 June 2014. In sum, the Municipality relies upon the following:

3.1. The Municipality's attorney, Mr D K Siwela was given a copy of the Award by the Municipality in September 2013.

3.2. The documents and correspondence exchanged between the parties in the course of the arbitration in 2011 had been archived in Mr Siwela's computer system, and a computer technician had to be be employed to retrieve the emails and other documents. Quite when it was that this technical problem of retrieval was resolved is not set out.

3.3. From the end of October 2013 and for various periods extending up to February 2014, Mr Siwela suffered ill health and was unable to perform his day

to day duties as an attorney. In November 2013, he was married and his wedding apparently diverted him from his duties.

3.4. On 10 February 2014, the Municipality filed its answering affidavit in the Enforcement Application. As a result, the Enforcement Application was removed from the role on 17 February 2014. New counsel was then engaged by Mr Siwela to attend to the matter due to the unavailability of counsel that had previously been on brief. The reason for such unavailability is not explained.

3.5. New counsel was required to consider the papers and consult with witnesses. The papers in the matter were provided to counsel on 18 February 2014.

3.6. After counsel had considered the papers and consulted with witnesses and rendered an opinion in June of 2014, papers were then drafted and ultimately filed on 30 June 2014.

4. The explanation given for the delay leaves much to be desired. The merits of the Review Application, as set out in the founding affidavit, rest upon a relatively straightforward chronology and a limited number of documents. As I shall explain, the basis upon which the Municipality seeks to set aside the Award raises a narrow issue. It is accordingly hard to conceive of how it could reasonably have taken some eleven months to bring the Review Application.

5. The reasons offered for the delay are threadbare. Whatever technical assistance was required to retrieve documents archived since 2011,that cannot reasonably be an obstacle that takes months to resolve. The ill health of Mr Siwela is regrettable, but if he was not able to attend to his practice, then another attorney should have been instructed in the matter, with Mr Siwela's assistance to explain what had to be done in the case.

6. What is clear is that when an answering affidavit was filed in the Enforcement Application, the Municipality's principal defence was that the Award was reviewable and that the Municipality intended to bring a review based on the misconduct of the Arbitrator, gross irregularities committed by the Arbitrator and the improper obtaining of the Award by the Claimant. The answering affidavit of the Municipality in the Enforcement Application then sets out the basis upon which a setting aside will be sought and recites much of the correspondence and makes averments similar to those that now serve as the basis for the Review Application.

7. In these circumstances, it is difficult to conceive of how the Municipality can explain the delay from 18 February 2014 until 30 June 2014, when it clearly understood what review it meant to bring and the basis of the review. The unexplained necessity to employ new counsel cannot explain the delay. And the retention of new counsel could not have required a consideration of the review *de novo* because Mr Siwela was already steeped in the matter and was well able to guide new counsel as to the drawing of the review papers.

8. The time taken beyond the six weeks ordinarily required by the Arbitration Act cannot be properly explained or justified.

9. Nor is there reason to distinguish the position of the Municipality and its attorney, Mr Siwela. It is the deponent to the Municipality's founding affidavit, Ms Pather, in the Review Application that advances, and thus adopts the reasons given for the delay. Ms Pather does not suggest that the Municipality was in any measure dissatisfied with the discharge by Mr Siwela of his instructions on behalf of the Municipality.

10. The insufficiency of the explanation offered by the Municipality for the delay is aggravated by the conduct of the Municipality, acting through its attorneys of record, in the arbitration process. A recitation of the conduct of the Municipality in the course of the proceedings referred for arbitration is set out in the affidavits of the parties, as also in a "diary of events and comments" that is attached to the Arbitrator's Award.

11. A detailed recitation of this conduct is not required. What emerges is that the Municipality, having submitted to arbitration, obstructed the arbitration process. The Municipality failed to file its statement of defence on due date, after numerous opportunities were afforded to it by the Arbitrator to do so, over the objections of the Claimant. Mr Siwela was instructed by the Municipality in July 2011, in place of the attorney of record who had been charged with the matter. Yet even after July, on 19 August 2011, the statement of defence was not filed, and Mr Siwela

explained that he was on sick leave. This meant that the hearing of the matter could not proceed. The Arbitrator further postponed the delivery of the statement of defence until 29 August 2011. This deadline was also not met, and Mr Siwela promised to deliver the statement of defence on the 31 August 2011. This deadline was also not met. A further deadline was set for 13 October 2011. This deadline was also not met. It was at this point that the Arbitrator notified the parties that he intended to proceed without the Municipality's statement of defence. The Arbitrator nevertheless on 21 October 2011 indicated in an email to Mr Siwela that "in the interests of serving justice I shall receive your statement of defence, providing it is delivered on time to allow the Claimant fifteen days to reply before the date of the hearing which the Claimant is about to determine." The statement of defence was filed in an unsigned form on 1 November 2011.

12. The delays occasioned by the failure to file a defence are compounded by the Municipality failing to pay its share of the Arbitrator's fees both before the Award was handed down and thereafter. As appears from the founding affidavit in the Enforcement Proceedings, after the Award was finalised by the Arbitrator in 2011, it was not published to the parties before August 2013 because the Municipality refused to pay the Arbitrators fees and failed even to adhere to a Court order that was obtained requiring the Municipality to do so. This conduct is unconscionable, and accounts for a further substantial delay in permitting the Claimant to enforce its Award. The Award was finally delivered by the Arbitrator on 2 August 2013, only when the Claimant made full payment to the Arbitrator.

13. There is a further matter that I take into account. In the course of the correspondence between Mr Siwela and the Arbitrator, on 11 November 2011, Mr Siwela indicated that he held instructions to proceed with Court proceedings against the Arbitrator. In an earlier email of 28 October 2011, Mr Siwela set out the basis upon which he indicated that the "matter falls to be removed from the forum arbitrated by H J Meyer" and that the High Court would be approached on an urgent basis to stay the arbitration process pending final determination by the Courts. These proceedings were never brought.

14. There is thus not just an absence of justification for the delays occasioned by the conduct of the Municipality and its attorney, but the position is considerably aggravated by the fact that the Municipality sought to frustrate the arbitration proceedings to which it had consented. And even when it considered that the arbitration was subject to legal challenge in November 2011, it took no steps to bring such proceedings. Rather it further frustrated the publication of the Award by non-payment of the Arbitrator's fees, and by failing to abide by a Court order that payment should be made.

15. There is little then to be said for the reasons given as to why I should exercise my discretion to extend the statutory period stipulated for in Section 38 of the Arbitration Act.

16. I must however have regard to the prospects of success that the Municipality might have in respect of the Review Application. And it is to this matter that I now turn.

PROSPECTS

17. Although the Review Application was originally founded upon a number of alleged irregularities, it became clear in the course of argument that the Municipality's case for review rests upon the contention that the Arbitrator proceeded to render an award without giving the Municipality an opportunity to be heard at a hearing. Rather, so it is submitted, the Arbitrator proceeded without a hearing (and therefore without notice of a hearing) to determine the dispute and render an Award on the pleadings and documents submitted by the parties. This, the Municipality says, infringes the requirements of Section 15(1) of the Arbitration Act and renders the Award a nullity, because without a hearing (and without notice of such a hearing) the Arbitrator lacked jurisdiction to make an Award.

18. The Claimant resists the review on the merits on the basis that the Municipality had adopted an obstructive position in respect of the arbitration; the Municipality had been given opportunities to participate which it had declined to take; that in any event the Municipality had indicated that no purpose would be served by a hearing scheduled for 23 November; and that the rules governing the Arbitration allow for an Award without an oral hearing.

19. I am not persuaded that the Review Application brought by the Municipality lacks merit. The Arbitrator, notwithstanding the obstructive conduct of the Municipality, nevertheless permitted the Municipality to file a Statement of Defence. The Arbitrator stipulated that such Statement of Defence must be delivered on 1

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19. I am not persuaded that the Review Application brought by the Municipality lacks merit. The Arbitrator, notwithstanding the obstructive conduct of the Municipality, nevertheless permitted the Municipality to file a Statement of Defence. The Arbitrator stipulated that such Statement of Defence must be delivered on 1

November 2011. The Municipality filed an unsigned Statement of Defence and counter claim on 1 November 2011. The hearing was scheduled for 23 November 2011. As the Arbitrator's diary of events and comments explains, the Claimant had expressed an opinion to the Arbitrator that a hearing was unnecessary and that the Arbitrator should proceed to base his Award on the documents.

20. On 17 November 2011, Mr Siwela, on behalf of the Municipality, wrote to the Arbitrator. In his e-mail the following is recorded:

"It is not correct that we are of the opinion that a hearing will serve no purpose herein. It is the Claimant and his representative who are satisfied that this matter be resolved on a document only basis.

All we indicated and communicated was that in the light of pending litigation contemplated by the Defendant herein, a hearing herein may serve no purpose. We do think this is capable of any other meaning except what it says Mr Arbitrator. In the contrary, should this matter proceed to be heard on 23 November 2011 or at any time thereafter, the Defendant expects a proper hearing where witnesses will testify viva voce over and above the production of documents with the Defendant's right to cross-examine any witness and interrogate every document produced at the hearing...

I am taking instructions on your apparent readiness to proceed with the drafting of your Award so prematurely at this stage."

21. Notwithstanding this communication from the Municipality, the Arbitrator did not schedule a hearing and proceeded to prepare and render his Award on the documents submitted to the Arbitrator.

22. The Arbitrator explains in paragraph 1.13 of his Award that:

> *"1.13 For their respective reasons, both parties ultimately confirmed that the hearing scheduled for 23 November 2011 would serve no purpose: the Claimant to save costs and the Defendant for still not being prepared. Therefore the Award is based essentially on the documents submitted to me."*

23. Notwithstanding how sorely tested the Arbitrator was by the conduct of the Municipality, the Arbitrator was not permitted to proceed to make an award without affording the parties, but in particular the Municipality, the benefit of a hearing. The Municipality was not in any measure waiving its right to a hearing, as its e-mail to the Arbitrator makes plain. The Arbitrator adopted the stance that the Municipality's position that a hearing on 23 November 2011 was premature, somehow absolved him of the duty to hold a hearing. This is not so. The Arbitrator was free to decide whether in fact a hearing was premature, but no determination of the question of prematurity absolved the Arbitrator of his duty to hold a hearing and allow the Municipality and the Claimant to present their cases to him.

24. As the Supreme Court of Appeal has made plain in the *Vidavsky v Body Corporate of Sunhill Villas 2005 (5) SA 200 (SCA),* Section 15(1) of the Arbitration Act requires

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24. As the Supreme Court of Appeal has made plain in the *Vidavsky v Body Corporate of Sunhill Villas 2005 (5) SA 200 (SCA),* Section 15(1) of the Arbitration Act requires

that parties to an arbitration be heard and that notice of the hearing is obligatory. The absence of a hearing and notice of that hearing are jurisdictional prerequisites for the rendering of a valid award, and absent compliance with these prerequisites, the award is a nullity.

ASSESSMENT

25. In my view, therefore, the Municipality advanced a case with good prospects on the merits. I must accordingly consider whether the merits of the Municipality's review, when weighed against its justification for the delay, warrant an extension of time. There are two over-arching principles to consider. The first is the Claimant's interest in certainty. The legislature in Section 33(2) of the Arbitration Act clearly enunciated the value of certainty by requiring that recourse to the courts to set aside an award must be prompt and stipulated for a six week period. The other principle is that of justice. It has been said that certainty is good, but justice is better. I think this puts the matter too starkly. Certainty is an attribute of justice, but it is not all that can be said to ensure a just result. In my view, the justice of the matter comes down to this. There is merit to the Review Application that has been brought by the Municipality. The Municipality seeks the intervention of this Court so as to proceed afresh with an arbitration before a new arbitrator. The difficulty that I have is that the Municipality has shown contempt, both for this Court and for the arbitration process that it wishes again to engage. As I have recited above, the Municipality took pains to frustrate the arbitration process and further

delayed proceedings by failing to pay the Arbitrator, even in the face of a court order.

26. It seems to me in these circumstances that the conduct of the Municipality, to adopt the language of the Court in *Ferreira vs Ntshingila 1990 (4) SA 271 (AD) at 281J,* has demonstrated such a flagrant and gross abuse that its prospects at success do not warrant a second chance. In the exercise of my discretion, I find that good cause has not been shown for an extension of time.

27. Accordingly, the Review must be dismissed. Absent a successful review, it was common ground between the parties that the Enforcement Application must succeed.

28. In the result, I make the following order:

1. The Review brought under Case No 48087/14 is dismissed with costs, including the costs of two counsel.

2. In case number 52099/13, the Award of the Arbitrator, Mr Hugo J Meyer, in respect of the arbitration between Mahlalerwa Construction cc and Emalahleni Local Municipality concerning contract number 114/2007 for Emsagweni Roads is made an order, and such order includes the order and relief granted by the Arbitrator in paragraph 7 of the Award.

3. The Emalahleni Local Municipality (the Respondent in Case No 52099/13) is ordered to pay the costs of the Application, including the costs of two counsel.

Unterhalter AJ

5 April 2016

For Mahlalerwa Construction cc

TP Kruger and SL Cliff

Instructed by Jordaan and Smit Inc

For Emalahleni Local Municipality

N Erasmus

Instructed by DK Siwela Inc

Heard: 9 February 2016

Judgment: 5 April 2016