IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

8/9/2016

Case Number: 99212/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED. ✓

8/9/16 .... DATE

.... SIGNATURE

In the matter between:

MOTLOKWA TRANSPORT
AND CONSTRUCTION (PTY) LTD — APPLICANT

And

PALABORA COPPER (PTY) LTD — RESPONDENT

JUDGMENT

Fabricius J,

1.

The Applicant herein, Motlokwa Transport, seeks an order that the arbitration award dated 9 December 2015 by C. Claassen J, be made an order of Court in terms of ***Section 33 (1) of the Arbitration Act 42 of 1965***. The Respondent, Palabora Copper, opposed this application and filed a counter-application seeking that the relevant award of the arbitrator be set aside in terms of the provisions of Section 33 (1) (b) of the said *Act*.

2.

Palabora Copper (Pty) Ltd had previously issued summons in the High Court, Motlokwa Transport as Defendant pleaded thereto, and ultimately the issue was set down before the High Court. When no Judge was available on that particular day of the hearing, the parties referred the dispute to arbitration.

3.

An arbitration agreement was drawn up and the preamble thereto reads as follows:

"There is a dispute between the parties, as presently embodied in the Gauteng Division pleadings under case number 13606/15, as to whether an agreement came into being between the parties, and if so, whether it was validly cancelled ("the dispute")".

Under the heading "The Powers Of The Arbitrator", it was said that the dispute to be determined by the arbitrator may be widened by amendments to the pleadings (to be filed) as agreed by the litigants or as allowed by the arbitrator, and his powers and jurisdiction to determine the dispute shall be accordingly extended. In relation to the regulation of procedural or evidential matters, the arbitrator shall have the same powers, directions and authority over the litigants as a Judge of the High Court. All applications of whatsoever nature (either pending or which may arise) will be dealt with by the arbitrator in accordance with the ***Uniform Rules of Court***, and according to the time periods provided therefor in the ***Rules***, as amended, adapted and/or abridged as an arbitrator may in his discretion allow, and as expeditiously as possible.

4.

Under the heading "PROCEDURAL RULES FOR ARBITRATION", the agreement states that the arbitration will be conducted in accordance with the provisions of the ***Arbitration Act*** and the ***Uniform Rules of the High Court*** as adapted, abridged and/or deviated from as the arbitrator may in his discretion allow, having regard to the exigencies of the matter. The parties also agreed that the case would proceed on both merits and quantum, and also agreed that the award would not be subject to an appeal. It is therefore clear that the arbitrator was granted wide discretionary powers in a number of material requests.

5.

A pre-arbitration meeting was held on 24 July 2015, and the relevant Minute recorded further arrangements relating to the exchange of documents and interlocutory disputes and processes.

6.

At the commencement of the hearing, the arbitrator was referred to the pleadings which were analysed in some detail, and the onus of proof was also discussed.

7.

According to the amended Particulars of Claim, Plaintiff issued a written Request for Proposal to a number of potential tenderers for the rendering of transportation, crushing, and other services to the Plaintiff. Plaintiff then awarded the tender in writing to the Defendant on 23 December 2014 for the period 1 March 2015 to 31 December 2016, "depending on the smelter plant future". It is alleged that Defendant signed acceptance of the letter of award, and returned the same to

Plaintiff. The notification was conditional upon the conclusion of a contract, so it was alleged. Defendant failed to sign the draft contract as a result of which no agreement came into being. Plaintiff contended that no agreement came into being between the parties for lack of consensus and pleaded the relevant reasons. In the alternative, it was alleged that in the event of it being found that an agreement had come into being, such agreement was induced by mutual mistake and the parties were mutually mistaken with regard to each other's intention, details of which were so pleaded. In the alternative to that allegation, Plaintiff also pleaded that it erred regarding Defendant's tender, and that such error was reasonable, and that the mistake was *iustus*. Reasons for that allegation were then also pleaded. As a further alternative, it was pleaded that in the event of it being found that an agreement had come into being, Plaintiff then contended that by refusing to sign the draft contract, and by contending for a different interpretation of the contents and meaning of a particular notification, the Defendant had repudiated the agreement. Plaintiff accepted this repudiation and cancelled the agreement, alternatively cancelled it by the issue of summons. As a result, so it was alleged, the agreement has been duly cancelled. The order that was sought by Plaintiff was the following:

1. "An order declaring that no agreement came into being between the parties pursuant to the Defendant's tender dated 10 December 2014 and the Plaintiff's purported acceptance thereof on 23 December 2014; and
2. Alternatively to 1. above, an order confirming or declaring that any agreement that may have come into being pursuant to the Plaintiff's purported acceptance of the Defendant's tender dated 10 December 2014 was duly cancelled by the Plaintiff".

8.

A plea was filed and it was alleged that an agreement had been concluded and the details of such written agreement were then stated. It was also denied that the agreement was induced by mistake, that the parties were mutually mistaken, that any misrepresentations were made and there had been no consensus.

9.

In a counter-claim the Defendant, Palabora Copper, pleaded that it was willing and able to perform in terms of the agreement and tendered compliance with whatever obligations it had. It therefore sought an order declaring that Plaintiff's purported cancellation of the agreement was of no force and effect, that the Plaintiff be directed to give effect to the agreement and permit Defendant to perform in terms thereof. In the alternative, and in the event of it being found that the Defendant was not entitled to enforce the agreement, then Defendant pleaded that Plaintiff's refusal to permit the Defendant to perform, constituted a breach of the agreement. It was also alleged that, but for such breach, the Defendant would have performed in terms of the agreement and as a result of Plaintiff's breach, it suffered damages in the amount of some R 39 million, alternatively R 33 million, which amount represents the revenue that the Defendant would have earned less the costs and expenses it would have incurred.

10.

It is clear from the arbitration agreement and Counsel's submissions to the arbitrator at the commencement of the hearing, that the arbitrator had to decide the stated issue between the parties with due regard to the pleadings in the High Court, and any evidence presented.

11.

In the counter-application, Palabora Copper confined itself to the grounds for review provided in terms of Section 33 (1) (b) of the ***Act***, namely that the arbitrator committed a number of gross irregularities and exceeded his powers. In particular, the Respondent contended that the arbitrator had exceeded his mandate in "instructing" the claimant to amend its plea to the Applicant's counter-claim, that he made an award that neither party had asked for, that he did not determine the assumptions or the Respondent's defence to the Applicant's counter-claim in accordance with the provisions of clause 3 of the parties' agreement In Principle On Quantum, that he entertained verbal exceptions, or a verbal exception, to the

Respondent's plea to the Applicant's counter-claim, and prohibited the Respondent from leading evidence on these defences, that he strayed beyond the parties' definition and limitation of the issues in their pleadings in finding that the agreement that formed the subject matter of the arbitration had been cancelled, and that he failed to make a determination, despite being obliged to do so, on the Applicant's main counter-claim for specific performance, with damages being an alternative counter-claim. It was alleged that these grounds, whether individually or collectively, precluded the proper presentation of the Respondent's case and resulted in the Respondent not having "a fair hearing".

12.

During the hearing, and on 8 December 2015, a written "AGREEMENT IN PRINCIPLE ON QUANTUM", was arrived at by the parties. This agreement related to the quantum of the counter-claim and states that it was premised on, and subject to the following assumptions being established, namely

2.1 That the Defendant would have succeeded in timeously obtaining finance for the amount of approximately R 54 million in order to purchase the equipment necessary to perform the work, and an additional approximately R 6 million, as working capital;

Alternatively

2.2 That the Defendant would have succeeded in timeously

2.2.1 Obtaining finance for the amounts approximately R 19.4 million for the purchase of equipment, and a further approximately R 6 million in respect of working capital; and

2.2.2 Entering into a rental agreement for the renting of the balance of the equipment required to the value of approximately R 34 million;

2.3 That the Defendant would have purchased, alternatively rented all of the necessary equipment in time, in order to have the same delivered to the mine on or before 1 March 2015.

3 The claimant intends persisting with all of its defences as set out in its plea to the counter-claim.

4 If the assumptions in paragraph 2 above are proved, and depending that upon any finding in relation to the claimant's defences to the counter-claim first being made, the parties agree to the following:

4.1 R 39 885 315 in the event of it being proved that the equipment would have been purchased;

alternatively

4.2 R 33 007 175 million in the event of it being proved that the equipment would have been hired."

13.

At the hearing before the arbitrator the Plaintiff, Palabora Copper, did not persist with its claim for specific performance. The effect of this agreement was debated in great detail before the arbitrator and the crux of that particular issue between the parties was dealt with by the arbitrator as follows: (Bundle 8 p. 726)..."in effect is the clear reading of clause 2 however it is also clear to me that clause

2 does not specifically state upon whom the onus is to prove the allegations in paragraph 2 of Annexure A.

In my mind that further enhances the argument that the literal effect of this document was never properly understood. It seems to me that grave injustice would occur if this document drafted in this manner should lead to a dismissal of Defendant's counter-claim in circumstances where a witness called by a the claimant as well as the Defendant's expert witness agree as to the quantum of loss suffered by the Defendant as a result of what I have already held to be an unlawful cancellation of the contract by the claimant. This confusion arose because of the progress in the manner in which the matter proceeded, and I would be doing a grave injustice to a party who has an agreed quantum to deny him the quantum because of the interspacing of a document which was clearly not understood by Counsel from both parties in the same manner.

Mr Bekker SC seemed to argue that the document is clear in its wording. I disagree with that, because the document had to be interpreted in the context in which it was prepared, and in the context in which the manner in which it was argued, and in the context of the progression of the matter as it proceeded from yesterday to today. In those circumstances I am therefore of the view that there was no need on the part of the Defendant to establish the allegations or what is called assumptions referred to in paragraph 2 of Annexure A. If that is my conclusion it follows that once there was a duty on the Defendant to establish that which was really a defence originally raised by the claimant then the agreed quantum stands and the Defendant is therefore entitled to an order for the quantum as agreed between the parties being the amount stated in paragraph 4.1 of Annexure A I therefore make an award in favour of the Defendant in the amount of R 39 805 315..."

There is a further judgment by the arbitrator dated 11 December 2015 which in some detail deals with the issues between the parties as per the pleadings, and also with reference to the evidence led. It dealt with the defences of lack of consensus, mutual mistake and concluded that a contract did in fact come into being, consisting of various documents that were referred to in the ruling. It was also held that the contract could not be vitiated by the defences raised in the pleadings by the claimant. There is a further 'judgment' by the arbitrator which deals with the ruling that a contract did come into being between the parties and what the terms of this contract were. (Bundle 8 p. 680)

This judgment also dealt with a "verbal exception" to paragraphs 7.3 and 7.4 of the Plea to the counter-claim. The relevant part that is sought to be held objectionable reads as follows: "It is therefore in my view a no-defence to the claimant's counter-claim to rely on contingencies which never occurred, and for which there was no cancellation by the claimant at all in the first place and for those reasons I am of the view that the exception taken by Mr Wassermann is successful and that defences raised in paragraph 7.3 and 7.4 should be struck out and they are struck out". In my view this decision was not made in the context of a material irregularity so that it can be said that no fair hearing was conducted. This issue was fully debated and the arbitrator used his extensive powers after a consideration of all relevant issues on the facts and law.

I need scarcely repeat that the award or the awards of the arbitrator are not appealable. It is necessary at this stage therefore to refer to the relevant principles applicable to the review of an arbitrator in terms of Section 33 of the *Act* and more particularly, Section 33 (1) (b). An erroneous exercise of the power vesting in the arbitrator cannot be reviewed. It is clear that the crucial question is whether any alleged irregularity prevented a fair trial of the issues.

See: ***Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA).***

The grounds of review must be construed strictly in relation to private arbitration, and the enquiry whether or not a fair hearing was provided is really a question of fact. The arbitrator analysed all the relevant facts in the light of the pleadings and he concluded that an agreement had come into being. This finding is not appealable and I cannot discern any regularity in the proceedings in that context. A claim for specific performance was not proceeded with and all allegations relating thereto, or defences or assumptions, or whatever verbiage one may apply, became accordingly irrelevant. The counter-claim was therefore confined to damages and experts met and agreed upon the method or formula for the calculation of the damages. All the issues and "defences" were considered argued and, where applicable, dismissed. In a number of instances, this occurred without evidence being adduced and on the basis that these issues lacked merit, and on the basis of what had been pleaded not constituting legally valid defences. Again, if the arbitrator was wrong in this context, this is not appealable and in my view neither is it reviewable on the basis of any gross irregularity in the proceedings.

15.

It must be remembered that the arbitrator had, in regard to procedural and evidential matters, the powers and authority of a Judge of the High Court. In my view he acted in accordance with the terms of reference. Issues were separated by agreement and dealt with by the arbitrator. The agreement in principle on quantum could not be construed, in my view, to mean that the Applicant was obliged to lead evidence on issues that the Respondent had pleaded and relied on. The Respondent led no witnesses on quantum. The arbitrator's ruling dealt with all relevant issues in that context. The case for specific performance was not proceeded with and it was therefore also not necessary that the arbitrator make a formal finding on this alternative claim. It cannot be said that he did not make a finding on all the issues before him.

16.

I have analysed the complaints against the arbitrators conduct and rulings. I have also kept in mind the relevant dictum of the Constitutional Court in ***Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews 2009 (4) SA 529***, where it was said that the Courts should not defeat the goals of private arbitration by being too quick to set proceedings aside on grounds of alleged gross irregularity. Further, fairness in arbitration proceedings should not be equated with the process established in the ***Uniform Rules of Court***, or the conduct of proceedings before our Courts. It is clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and in default of that by the arbitrator. Further, it is clear from the ***Telcordia*** decision *supra* (par. 86) that "it is fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Evidence like I have mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate".

17.

In applying these dicta to the present facts I am unable to find that a gross irregularity was committed by the arbitrator or that a fair hearing was not held, or that any other justiciable irregularity occurred that entitles me to set aside the proceedings. It is also irrelevant whether I would have followed a different process than the arbitrator did, or whether I would have made different rulings from time to time. That is not the test in terms of the provisions of Section 33 (1) (b).

18.

Accordingly, the following order is made:

1. **The arbitration award referred to by the Applicant (Motlokwa Transport and Construction (Pty) Ltd) and referred to in paragraph 1 of the Notice of Motion, dated 11 December 2015, is made an order of Court.**

2. **Respondent (Palabora Copper (Pty) Ltd), is ordered to pay the costs of this application including costs of two Counsel.**

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 99212/15

Counsel for the Applicant: Adv S. J. Bekker SC

Adv A. Ramlaal

Instructed by: Mogaswa Inc

Counsel for the 1st to 4th Respondents: Adv J. Wasserman SC

Adv J. Daniels

Instructed by: Markram Inc

Date of Hearing: 31 August 2016

Date of Judgment: 8 September 2016 at 10:00