IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 10086/2019

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

6 April 2021

DATE

SIGNATURE

In the matter between:

ICON EARTHWORKS (PTY) LTD Applicant

and

CALIBER 293 (PTY) LTD Fist Respondent

P L GOLDSTEIN N.O. Second Respondent

This judgment was handed down electronically by circulation to the parties' representatives by email. The date of the judgment shall be deemed to be 6 April 2021.

JUDGMENT

AVVAKOUMIDES AJ

INTRODUCTION:

1. This is an application for leave to appeal against a judgment of this court handed down on 28 October 2020 (the judgment). The judgment dealt with an application by the applicant to review the award of the second respondent, sitting as arbitrator. The review was brought in terms of section 33(1) of the Arbitration Act, Act 42 of 1965 and was limited to procedural irregularities.

2. In the review application, the applicant relied on two grounds of review, namely that the arbitrator misconducted himself in relation to his duties as arbitrator, and, that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings or exceeded his powers. In amplification, the applicant also submitted that the finding by the arbitrator:

   2.1 regarding the applicability of penalties was wrong;

   2.2 the finding by the arbitrator that the applicant had completion dates to achieve in respect of any phases of work was wrong;

   2.3 the finding by the arbitrator that the applicant's refusal to return to the site when called upon to do so constituted a repudiation of contract between the parties, was wrong;

2.4 the arbitrator did not investigate the evidence, and,

2.5 the arbitrator made findings about a contract not pleaded by the parties and/or did not grant opportunity for argument to the parties.

3. In the review application, the first respondent submitted that the grounds of review relied upon cannot support the review application and relied on the following for the submission:

3.1 the fact that the review is limited to procedural irregularities;

3.2 the authority in *Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 268 (SCA) para [51]*;

3.3 the statutory grounds listed in the Arbitration Act are narrower than the common law grounds;

3.4 the principle of party autonomy in arbitration proceedings is applicable to the requirement that a court must give due deference to an arbitrator's award. What this means is where an arbitrator has engaged in the correct inquiry but has erred either on the facts or on the law, such errors do not constitute an irregularity and are not a basis for setting aside an arbitrator's award. The first respondent relied on *Phalaborwa Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd 2018 (5) SA 462 (SCA) at 486*

(A);

3.5 a review of an arbitrator's award must be measured against the standards aforesaid and where parties choose arbitration, courts endeavour to uphold the decision of the parties. It is thus not the court's function in a review application to reinterpret a contract, for example.

3.6 the failure by an arbitrator to deal with facts that go to the merits of a case does not constitute an irregularity and neither does it mean that the arbitrator ignored such facts. The general principle applicable to *"gross irregularity"* is that it concerns the conduct of the proceedings rather than the merits of the decision made by the arbitrator. It thus follows that factual findings by an arbitrator become binding upon the parties.

4. The review application was dismissed, and I expressly stated that I could not align myself with the applicant's argument that the arbitrator either misconducted himself in relation to his duties, or committed any gross irregularities in respect thereof, or exceeded his powers. I found that the arbitrator engaged in the correct inquiry and, even if he erred on the facts or the law, which I did not find to be the case, such errors would not constitute an irregularity forming the basis for setting aside his award. Having so held I specifically stated that I considered this Court to be bound to the decision in *Phalaborwa (supra)*.

THE APPLICATION FOR LEAVE TO APPEAL:

5. The applicant submitted that the arbitration award is unusable and therefore unenforceable. The applicant is critical of the first respondent by submitting that because the first respondent has not addressed the fact that the arbitration award is unusable and therefore unenforceable, it effectively concedes that the application of the award remains an unsolvable equation and unusual in practice.

6. The applicant submits that the acceptance of the first respondent of this scenario after the award is astounding and could never have been the objective of an arbitration, given the resources spent in time and money to resolve the dispute between the parties. In particular, the applicant submitted that the inescapable fact is that the arbitrator failed to grasp the importance of *"how"*, should he find that the penalties were to apply, is indeed a reviewable decision.

7. This, so argued the applicant, is the very definition of latent irregularity. If it is not, then the *jurisprudence* ought to state as much clearly and unequivocally so that parties in arbitration understand what an unusable award ultimately means for them.

8. The applicant submitted that the effect of the arbitration award is non-sensical, and it is striking that the first respondent has so readily accepted the arbitration award because it does not actually help the first respondent to

resolve the dispute between the parties.

9. Section 17 of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given where the judge concerned is of the opinion that:

9.1 The appeal would have a reasonable prospect of success; or

9.2 There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

10. I am mindful of the fact that the main application before me was a review of an arbitrator's award. I do not intend repeating the principles governing arbitration awards, save to state that in order to successfully review an award it would have to be shown that the arbitrator misconducted himself in relation to his duties; or committed a gross irregularity or exceeded his powers; or the award was improperly obtained.

11. There can be no doubt that the application to review the award was based on procedural aspects of the arbitration and not any substantive aspect thereof.

12. In its written heads of argument, the main thrust of the application for leave to appeal, it is submitted that the arbitrator failed to apply his mind properly to the matter leading to a latent-gross irregularity in his duties as an

arbitrator when he misconceived the nature of the inquiry and created an unsustainable award, modified the contract to support his award, and ultimately ignored the Conventional Penalties Act. The submission pertaining to an unsustainable award together with the submissions pertaining to the Conventional Penalties Act were not issues argued before me in the main application. In my view, it would not have made any difference, particularly the submissions pertaining to the Conventional Penalties Act.

13. Furthermore, again in its written heads of argument, the applicant has raised issues which were not argued before me in the main application, for example, the question is posed rhetorically whether the arbitrator has actually resolved the dispute at hand when he failed to appreciate the nature of earthworks and how that related to the completion of *"units"* as described in the penalty section. The main submission (complaint) is that the arbitrator has not provided a workable solution to the dispute at hand. The arbitrator, so argues the applicant, has not resolved the dispute but only raised a further dispute regarding how one should now consider and/or calculate penalties.

14. The submissions of the first respondent are as follows:

14.1 Firstly, the first respondent argued, in my view correctly, that an applicant for leave to appeal is confined to the issues argued before the court from whom the leave to appeal is sought. The first respondent explains the submission by submitting that the question

is whether, on the issues before it, the court gave judgment in respect of which another court would reasonably come to different conclusion. When a ground has not been argued and the court has not considered such ground, this test, which has to be satisfied before leave to appeal can be granted, cannot apply.

14.2 The first respondent further submitted that an applicant for leave to appeal is bound by the grounds set out in its application for leave to appeal. The reason for this is because the respondent and the court are entitled to be informed of the grounds of the application in order to prepare for the hearing for leave to appeal. The applicant, so argues the first respondent, cannot thus expound upon the grounds advanced in its application for leave to appeal by means of heads of argument or oral argument.

14.3 By way of analogy, the first respondent submitted that considerations which normally apply in applications for leave to appeal against the decision of a trial court are not applicable in this case because this court has had all the advantages that an appeal court would normally have, namely everything which is required to be considered is contained in documentary form and the court has had the benefit of the documents in arriving at a decision to refuse the review application.

14.4 The first respondent submitted that this court was possessed of all

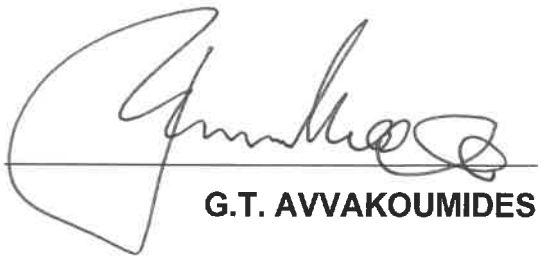
the advantages which a court of appeal normally has. This, according to the first respondent, is an important consideration when considering the applicant's submission that this court overlooked certain considerations.

14.5 The first respondent submitted, correctly, if regard is had to the argument in the main application, that the applicant has now for the first time contended that the *"arbitrator's contract"* lacks efficacy and is difficult or impossible to implement in practice. This is clearly a new argument which was not placed before the court in the main application.

14.6 The first respondent highlighted that there is no dispute between the parties about what the arbitrator was called upon to decide. This is so because a mandate given to the arbitrator is succinct and unambiguous. In amplification, the first respondent submitted that the arbitrator's mandate was never to pronounce upon whether the contract was good or bad or whether or not the contract could lead to complications or impossibilities when it was applied in practice.

15. The remaining submissions and arguments contained in the first respondent's written heads of argument are largely in response to the applicant's written heads of argument and in response to the grounds upon which the applicant seeks leave to appeal. I have considered all the

submissions made, written and oral. I am not persuaded that an appeal would have a reasonable prospect of success under the prevailing circumstances and accordingly the application for leave to appeal is dismissed with costs.



G.T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Representation for parties:

On behalf of Applicant:	Adv P Bellin
Instructed by:	C de Villiers Attorneys
	Email: caroline@cdvlaw.co.za
On behalf of First Respondent:	Adv TALL Potgieter SC
Instructed by:	RN Incorporated Attorneys
	Email: johan@roelfnelinc.co.za