IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 8201/2011

In the matter between:

B. LANGTON CONSTRUCTION CC **APPLICANT**

and

QUIPMORE BUSINESS FINANCE (PTY) LTD **RESPONDENT**
MARK BINGHAM **SECOND RESPONDENT**

JUDGMENT Delivered on 13 February 2013

STRETCH A J

[1] The applicant has applied for an order reviewing and setting aside the order of the second respondent ("the arbitrator") granted on 7 June 2011, where the arbitrator dismissed its special plea with costs, contending that this Court should also dismiss the arbitration with costs.

[2] The applicant also originally contended in the alternative that the aforesaid arbitration should be stayed pending the outcome of another matter in this Division.

[3] The arbitrator has indicated that he will abide by the decision of this Court.

[4] The applicant and the first respondent were party to a general sales agreement ("the sales agreement") the relevant arbitration clause of which reads as follows:

> "Any dispute between the parties in regard to this Agreement or any matter arising out of it may at the sole discretion of CAPITAL FORTY8 (being the first respondent) be submitted to arbitration for decision."

[5] Subsequently the applicant and MV Maintenance Services CC ("MV") entered into an agreement ("the acknowledgment of debt") reflecting their joint and several indebtedness and the details thereof, to the first respondent.

[6] On 8 October 2010 the first respondent declared a dispute for arbitration and issued a statement of claim against the applicant for payment of the sum of R3 640 029,63.

[7] The applicant raised two special pleas:

[7.1] The first is that the arbitrator did not have jurisdiction to hear the matter as he could only derive such jurisdiction by virtue of the arbitration clause in the sales agreement which allows for a dispute in regard to the arbitration agreement only, to be submitted to an

arbitrator. The applicant contends that the first respondent's claim is founded amongst other things upon the terms and conditions of the acknowledgment of debt, and upon a breach thereof. It is contended that as the acknowledgment of debt is not the sales agreement, the arbitrator has no jurisdiction to arbitrate the disputes between the parties in terms of the arbitration clause reflected in the sales agreement.

[7.2] The second special plea claims that the first respondent had instituted proceedings in this court *inter alia* against the applicant, which proceedings are still pending. It is averred that the first respondent relies upon the acknowledgment of debt, being a written agreement entered into amongst the first respondent, the applicant and MV. It is pleaded that the validity of the acknowledgment of debt forms part of the subject matter in the high court dispute, and that the resolution of this dispute will also apparently resolve the dispute before me. The second special plea is accordingly one of *lis pendens*.

[8] On 7 June 2011 the arbitrator dismissed the first special plea with costs.

[9] In his ruling on jurisdiction the arbitrator stated that it was agreed at a pre-arbitration meeting that the issue of jurisdiction would be determined first.

[10] On this aspect Ms Langton in her affidavit in support of the applicant's claim before me, says the following:

"The First Respondent launched arbitration proceedings before the Second Respondent against the Applicant despite the Applicant's continual insistence that the arbitration proceedings were the incorrect proceeding having regard to the Applicant's contention that the arbitrator does not have jurisdiction to make a finding as between the Applicant and the First Respondent. . . . . It was accordingly agreed that despite the Applicant's contention that that the Second Respondent does not have jurisdiction, the Second Respondent could make a finding based on the assumption that he was entitled to make a finding that he does not have jurisdiction . . . . The aspect of jurisdiction was argued without acknowledging that the Second Respondent in any way has jurisdiction to hear the matter and the Second Respondent eventually made a finding in accordance with annexure "BL1" (the arbitrator's ruling on jurisdiction), holding that he has jurisdiction to hear the claim and to find regarding the validity of the Second Agreement. . . . It is submitted that the Second Respondent by making this finding has exceeded his powers and made the order irregularly insofar as the Second Respondent has no power to make a finding conferring jurisdiction upon himself."

[11] Mr Accolla, in his affidavit opposing the application on the first respondent's behalf, responds to the aforegoing as follows:

"It is common cause that at the pre-arbitration meeting it was agreed that the arbitrator would decide whether or not he has jurisdiction. In the applicant's plea, which is an annexure to the founding affidavit, the applicant itself requested the arbitrator to make an award whereby 'the claimant's claim should be dismissed with costs.' There is therefore absolutely no doubt that the parties agreed, expressly or tacitly that the arbitrator be asked to make a decision one way or the other and it is not open to the applicant now to challenge the arbitrator's award on the basis that he ought not to have made a decision at all, when he was invited by both parties to do so. . . . . As already pointed out the applicant in fact requested the arbitrator to make a substantive decision namely a dismissal of the claim with costs. Presumably if the applicant had succeeded, it would have been prepared to go to court and have the order made an order of court so as to permit execution. The only basis upon which that could have been done is by an acquiescence and

agreement that the arbitrator must make a decision either way. With respect the applicant cannot have agreed to the arbitrator making a decision only if he found in the applicant's favour."

[12] In particular (and in my view this is the crux of this application), the first respondent disputes the applicant's contention that the second respondent has exceeded his powers in that the second respondent has no power to make a finding conferring jurisdiction upon himself.

[13] Ms Langton in her affidavit in reply comments on the first respondent's grounds of opposition as follows:

"The Applicant's complaint is twofold and is brought on two alternate grounds, the first being a review and the second a stay of the arbitration. The question which this Honourable Court is to answer is whether or not the Second Respondent exceeded his powers. . . . I deny that it is common cause that the arbitrator could decide whether he has jurisdiction or not. It was always indicated that the arbitrator did not have jurisdiction. It was initially agreed that pleadings would be filed despite the Applicant's contention that the arbitrator did not have jurisdiction. It was thereafter agreed that the issue of jurisdiction would be argued before the arbitrator. This did not amount to a consent that the arbitrator had jurisdiction to decide his own jurisdiction. In this regard I also annex hereto the heads of argument which were utilised from which it is clear that it has always been contended that the arbitrator does not have jurisdiction nor did he have jurisdiction to make a finding whereby he has jurisdiction or to confer jurisdiction upon himself by making such a finding. In any event, the arbitration proceedings insofar as the arbitrator does not have jurisdiction would be a nullity . . . . It was always contended that the arbitrator does not have jurisdiction nor could he confer jurisdiction upon himself by making a finding that he has jurisdiction. This the

arbitrator was well aware of which is the reason why his e mail annexing the arbitration award makes indications in respect of these proceedings."

[14] This e-mail however, is not before me.

[15] In a supplementary affidavit Ms Langton further points out that the first respondent had since issued summons out of the Johannesburg High Court against her in her personal capacity as the applicant's sole member, as well as against MV and certain other parties. She contends that the applicant should be joined in those proceedings instead, as the first respondent in those proceedings relies on exactly the same agreements as those relied on in the arbitration with the result that a further court is being called upon to make a finding with respect to the same facts.

[16] In this affidavit Langton also points out that the application which was brought in this court has been dismissed with costs, thus making it unnecessary for me to make a finding with respect to the applicant's second prayer for a stay based on *lis pendens.*

[17] The first respondent has not responded to any of the averments set forth in this supplementary affidavit.

[18] There is something to be said for the applicant's contention that it was always of the view that the arbitrator did not have the power to

decide the question of his own jurisdiction. In his ruling on this point, the arbitrator refers to heads of argument which had been submitted to him, wherein the applicant unequivocally states that an arbitrator cannot determine his or her own jurisdiction. The arbitrator continues to refer to these heads of argument, pointing out that the applicant had relied on three authorities for the contention that an arbitrator cannot determine his own jurisdiction. They are:

- ***McKenzie N.O. v Basha 1951 SA (3) NPD***
- ***Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others 2007 (5) SA 491 (SCA)***
- ***Goodwin Stables Trust v Duohex (Pty) Ltd and Another 1998 (4) SA 606 (CPD)***

[19] In ***McKenzie's*** case it was held that this Court may interfere with an award which extends to matters not submitted or may set aside an award which is not in terms of a submission (***at 786A-B***). Broome JP, in referring with approval to previous judgments, said the following:

"The binding force of an award must depend in every case upon the submission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission, the award is a nullity. The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission" (***at 787H-788A***).

"Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the Court and not with the umpire . . . . It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true

construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties" (***at 788A***).

[20] Two points of particular significance were made in the ***Goodwin*** matter. Firstly, that in an application to set aside arbitration proceedings on the grounds of the arbitrator's lack of jurisdiction, the overall and primary onus lies with the respondent, and secondly, that an arbitrator cannot determine his own jurisdiction (***at 615D to 616A***).

[21] Finally in ***Gutsche's*** case, Cachalia JA said the following:

"Where the parties themselves disagree as to the powers conferred on an appeal arbitrator, the appeal arbitrator cannot extend the area of jurisdiction over the very matter which he is required to resolve. And if he does, he will be acting beyond his mandate. The contention advanced by the appellants is that the appeal agreement empowered the appeal arbitrator finally to determine his own jurisdiction. It is a far-reaching contention implying that the agreement constituted an ouster of the court's jurisdiction. Such an agreement must be provided for specifically, and in the clearest terms.

It is clear that at the commencement of the arbitration appeal there was no agreement on the ambit of the appeal arbitrator's jurisdictional powers. All that was agreed, in the face of the first respondent's jurisdictional objection, was that the appeal arbitrator would deal with both the issue of appealability and the merits in a single hearing. There is no suggestion in the correspondence that the appeal arbitrator was given the power contended for. Indeed, even the appeal arbitrator recognised that any finding he made as to his jurisdiction would be provisional. In these circumstances, where there was no clear agreement conferring such power on the appeal arbitrator, the appellant's contention must founder. Thus, by

declining the jurisdictional question wrongly and then hearing and deciding the merits of the appeal (and the cross-appeal) the appeal arbitrator exceeded his powers, and his award fell to be set aside in terms of s 33(1) of the Arbitration Act 42 of 1965, and the arbitration appeal fell to be declared of no force and effect" (***at 495G to 496A***).

[22] The arbitrator in the matter before me, not only correctly referred to these three cases, but expressed in his ruling an understanding in terms of these authorities that he was not entitled to arrogate to himself jurisdiction over questions which, on a true construction of the relevant arbitration clause, have not been referred to him, and that he may not go beyond the scope of the jurisdiction set forth in the arbitration clause and thereby extend his jurisdiction.

[23] However, having found this the arbitrator then embarked on an exposition as to whether the acknowledgment of debt can be defined as "a matter arising out of" the general sales agreement as intended in the arbitration clause. Found that it was (and probably correctly so) and summarily dismissed the applicant's first special plea with costs, without giving any consideration to the applicant's first contention (which the arbitrator acknowledged in his ruling), that he (the arbitrator) had no jurisdiction to decide whether he had jurisdiction (to put it simply).

[24] In my view, by not only deciding the jurisdictional question himself, but then by also hearing and deciding the merits of the first special plea, the arbitrator acted *ultra vires* and his award falls to be

set aside in terms of section 33(1)(b) of the Act, which allows for the setting aside of an award where an arbitration tribunal has exceeded his powers.

[25] It has been contended on the first respondent's behalf that, this being an application for review, the application is out of time with respect to the six week period referred to in section 33(2) of the Act. The appellant argues that this point is misconceived, such misconception arising from a prior misconception on the part of the applicant in seeking as its principal relief an order for the review of the arbitration award, when in fact the applicant's case is that the award is invalid because there was never any proper submission to jurisdiction in the first place. It is further contended for the applicant that it would be an absurdity to suggest that an invalid award should be reviewed because that begs the question whether the award is invalid in the first place.

[26] Counsel for the applicant has submitted that the relief which ought to have been sought as alternative relief is for a declaratory order that the arbitrator's award is invalid and a nullity. It is contended that this is the kind of case where further or alternative relief should be granted as prayed for by the applicant, as this would not prejudice the first respondent, all the relevant issues already having been canvassed on the papers.

[27] I am of the view that the relief which the applicant now seeks in the alternative is more appropriate in the circumstances. It is so that

relief may be granted under a prayer for further or alternative relief where what is sought is not inconsistent with the substantive relief claimed and where the basis for such relief has been both laid in the supporting papers and also dealt with in the respondent's answer, as in the case before me (see ***Queensland Insurance Co Ltd v Banque Commerciale Africaine 1946 AD 272 at 286; Tsosane and Others v Minister of Prisons 1982 (2) SA 55 (C) at 63 H).***

In the premises I make the following order:

(a) The arbitration award, dismissing the applicant's first special plea on 7 June 2011 is declared to be invalid and is set aside.

(b) The first respondent is directed to pay the costs of this application.

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STRETCH A J

Appearances /…

Appearances:

For the Applicant	:	Mr. A.W.M. Harcourt S C
Instructed by	:	Morris & Associates C/o Stowell & Company Pietermaritzburg
For the Respondents	:	Mr. A. Stokes S C
Instructed by	:	Preston-Whyte & Associates C/o Mason Incorporated Pietermaritzburg
Date of Hearing	:	21 September 2012
Date of Filing of Judgment	:	13 February 2013