THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 177/2020

In the matter between:

ESKOM HOLDINGS LIMITED	**APPELLANT**
and	
THE JOINT VENTURE OF EDISON JEHANO (PTY) LTD AND KEC INTERNATIONAL LIMITED	**FIRST RESPONDENT**
SYMBION PNC (PTY) LTD (IN LIQUIDATION)	**SECOND RESPONDENT**
JOHANNES ZACHARIAS HUMAN MULLER N O	**THIRD RESPONDENT**
FRANS LANGFORD N O	**FOURTH RESPONDENT**
HLALELENI WATHLEEN DLEPU N O	**FIFTH RESPONDENT**
ELMARIE BOOYSE N O	**SIXTH RESPONDENT**
KEC INTERNATIONAL LIMITED	**SEVENTH RESPONDENT**
JUSTICE LTC HARMS N O	**EIGHTH RESPONDENT**

Neutral citation: *Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and KEC International Limited and Others* (case no 177/2020) [2021] ZASCA 138 (06 October 2021)

Coram: DAMBUZA, MAKGOKA, NICHOLLS JJA, GORVEN and EKSTEEN AJJA

Heard: 16 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 06 October 2021.

Summary: Arbitration – Review of an arbitral award – principle of party autonomy confirmed – interpretation of ‘gross irregularity’ and ‘exceeding powers’ under s 133 of the Arbitration Act 42 of 1965 affirmed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Nel AJ sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel where so employed;

2 The order of the high court is set aside and replaced with the following: 'The application is dismissed with costs'.

JUDGMENT

Dambuza JA (Makgoka, Nicholls JJA, Gorven and Eksteen AJJA concurring)

Introduction

[1] This is an appeal against the judgment of the Gauteng Division of the high court, Johannesburg (the high court), per Nel AJ, in terms of which an application for review of an arbitral award was upheld. In terms of the arbitral award 13 claims that had been made by the first respondent, the Joint Venture of Edison Jehano (Pty) Ltd and KEC International Limited (the Joint Venture), against the appellant, Eskom Holdings Limited (Eskom), for payment of moneys had been dismissed. In setting aside the arbitral award the high court referred six of the claims for fresh consideration before a new arbitrator. This appeal, against the order of the high court, is with its leave.

Backround

[2] On 6 May 2011 Eskom and the Joint Venture concluded a written engineering and construction agreement (the agreement) in terms of which the Joint Venture would construct a 100 km Section B of the 765 KV Gamma-Kappa single circuit transmission line. The agreement incorporated the NEC Engineering and Construction Contract (second edition, with the main option B, November 1995) as published by the Institution of Civil Engineers. The project was to be completed within 547 days i.e. on 10 July 2012, from the date of conclusion of the agreement. The contract price was R320 404 064.98.

[3] The 'core clauses' of the agreement[1] stipulated, amongst other things, that completion of the contract work would be attained when all the work due to be executed as per the 'Works Information', was effected, and the defects that could prevent Eskom from using the works had been 'corrected and notified'. The Joint Venture and Eskom had an obligation to notify each other as soon as they became aware of any matter that could result in an increase in the total price, or a delay in the completion of the works, or impairment of performance of the works.

[4] Clause 60.1 of the agreement stipulated a number of compensation events which would entitle the Joint Venture to extension of time for completion of the works, together with consequent change in the contract prices. These included instructions by Eskom, through its Project Manager, changing the works specifications, and failure by Eskom to give possession of the site or a portion thereof to the Joint Venture on the date specified in the accepted programme.

[5] Clauses 61.1 to 61.3 regulated notification of claims as follows:

[1] As quoted in the Adjudicator's determination (extracted from the 'NEC Engineering and Construction Contract Core Clauses' portion of the agreement).

'61.1 For compensation events which arise from the Project Manager or the Supervisor giving an instruction or changing an earlier decision, the Project Manager notifies the contractor of the compensation event at the time of the event. He also instructs the Contractor to submit quotations, unless the event arises from a fault of the Contractor or quotations have already been submitted. The Contractor puts the instruction or changed decision into effect.

61.2 The Project Manager may instruct the Contractor to submit quotations for a proposed instruction or a proposed changed decision. The Contractor does not put a proposed instruction or a changed decision into effect.

61.3 The Contractor notifies an event which has happened or which he expects to happen to happen to the Project Manager as a compensation event if

- the Contractor believes that the event is a compensation event,
- it is less than two weeks since he has become aware of the event and
- The Project Manager has not notified the event to the Contractor.'

[6] Disputes arising in relation to the agreement had to be 'submitted to and settled' by an adjudicator within the period specified in an 'adjudication table' which formed part of the agreement. Clause 90.1 provided that a notice to submit a dispute to the adjudicator had to be given 'not more than four weeks' or 'between two and four weeks' after an event.[2] The adjudicator's decision could be reviewed by an arbitration tribunal. The adjudicator's decision was final and binding on the parties subject to revision by the tribunal. In terms of clause 93.1 if a party was dissatisfied with the decision or non-decision of the adjudicator, the matter was 'not referable to the tribunal unless the dissatisfied party notified his intention within four weeks' of certain events.[3]

[7] The Joint Venture failed to complete the works within the stipulated period. It was afforded an extension until 10 May 2013. However it became apparent that it would still not be able to complete the works within the agreed extended period.

[2] Para 47 of the Arbitral Award at page 48.
[3] Ibid Para 46.

In a letter dated 13 March 2013 it requested a further extension from Eskom. In its recovery plan it listed challenges that it had encountered, including some which it attributed to Eskom. Attached to that letter was an annexure with 'early warning and compensation events'.[4] As a result of the delays the cost of the project escalated to R807 129 083.00, substantially more than double the initial contract price.

[8] During the period 23 December 2014 to 14 May 2015 the Joint Venture notified Eskom of 13 claims amounting to R625 079 491.77 which allegedly emanated from the delays occasioned during the 165 days of the extended period. The Joint Venture justified its claims by setting out events which it alleged, led to the delays and disruptions. Eskom denied responsibility for the delays and raised four special pleas. One of these was a time-bar, in terms of which Eskom pleaded that the Joint Venture had failed to notify 11 of its 13 claims and the related compensation events, and to refer disputes emanating therefrom within the stipulated two to four week period. Eskom pleaded that clauses 61.3 and 93.1 of the agreement were time-bar clauses with which the Joint Venture had failed to comply in relation to its claims.

[9] Eskom also filed a counterclaim of R36 million in which it sought to recover from the Joint Venture penalty damages payable in relation to the delays in the completion of the works. In response thereto the Joint Venture declared a dispute. The dispute was referred for adjudication.

[10] On 17 March 2017 the adjudicator issued a decision in terms of which he dismissed all Eskom's special pleas. He further ruled that: (a) the Joint Venture be afforded an extension of time to 31 March 2014; and that (b) Eskom pay to the

[4] As referred to in the arbitral award.

joint venture R82 449 937.02 together with interest on that amount as additional compensation for the extended contract period (ending on 31 March 2014). In relation to the special plea of time bar, the adjudicator found that 'it [was] clear from a consideration of the documents produced by the parties that the time frames governing the notification of compensation events, the determination required to be made by the project manager pursuant thereto and, where necessary, the referral of disputes to adjudication were not adhered to'. He, however, went on to find that nothing in the language of the time-bar clauses reflected an intention by the parties to preclude any claim for relief not made or notified within the stipulated period.

[11] Both parties issued notices of dissatisfaction with the ruling of the adjudicator, and the matter was referred for arbitration. Of relevance to this appeal is an agreement reached by the parties at the pre-arbitration meeting, that: (1) the issues referred for arbitration were those set out in their respective notices of dissatisfaction with the adjudicator's decision, (2) the pleadings filed by them in the adjudication proceedings, would serve before the arbitrator, with each party retaining the right to amend its pleadings, and (3) Eskom's special pleas would be heard as initial, separated issues. The arbitrator ruled, accordingly, that there should be a separate hearing dealing initially with the four special pleas.

[12] At the start of the hearing the arbitrator sought clarity from the parties as to which of the 13 claims were time barred. This inquiry led to each of the parties preparing and submitting to the arbitrator a schedule showing the claims that each contended had not been lodged or notified within the stipulated periods.

[13] In the arbitral award the arbitrator found that clauses 61.3 and 90.1 were time bar clauses. He then upheld the time bar special plea in respect of all 13 claims that had been notified by the Joint Venture. His decision in this regard was

premised on, amongst other factors, the schedules prepared for him by the parties and the adjudicator's factual finding that the time frames relating to notification of compensation events and referral of disputes to adjudication had not been adhered to. The arbitrator then set aside the award of compensation in favour of the Joint Venture together with the ruling granting the Joint Venture a further extension of time for completion of the works and the dismissal of Eskom's counterclaim for delay damages.

[14] The Joint Venture applied for correction of the arbitral award in terms of Rule 38 of the Arbitration Rules. It then became common cause that, to the extent that the arbitrator had, in the arbitral award, granted costs of the adjudication, the award was incorrect. Eskom's response to the Joint Venture's Rule 38 application gives an indication as to other bases for that application.[5] First the Joint Venture contended that the arbitrator misunderstood his mandate by 'failing to consider the impact of clause 61.1 on clause 61.3 of the agreement'. Second it contended that it was not clear whether the award intended to render clause 90.1 a time-bar stipulation.

[15] In an Addendum prepared in response to the Rule 38 Application the arbitrator said:

'7. To the extent that it is alleged that the Award is ambiguous or unclear: I found as a matter of law that clauses 61.3 and 90.1 are, each, time bar provisions.

8. My factual finding that all the claims are time barred by clause 61.3 and/or 90.1 was not a clerical mistake or an error arising from an accidental slip or omission. I referred in the Award to the Adjudicator's assessment, which was in these terms:

> "it is clear from a consideration of the documents produced by the parties that the time frames governing the notification of compensation events, the determination required to be made by the project manager pursuant thereto and, where necessary, the referral of disputes to adjudication were not adhered to."

[5] The Rule 38 Application did not form part of the appeal record.

9 In addition, at the hearing I requested the parties for a list of claims affected by the different special pleas. The Contractor's list in respect of all the claims assumed that I would accept its interpretation of the time-bar provisions. It did not state or even suggest that the defence in relation to some of the claims did not fall within my jurisdiction.

10. The Employer [Eskom] submitted that the claims listed under its column 'time bar' would be disposed of if its interpretations were to be upheld. All the claims were so listed. *The contractor [the Joint Venture] did not dispute the correctness of the conclusion on that assumption, and I accepted it and hence my award*. I may have erred but it was not a clerical mistake or an error arising from an accidental slip or omission.' (emphasis supplied)

[16] It is the award and the Addendum thereto that was taken on review before the high court. The basis of the application for review was that the arbitrator: (1) committed a gross irregularity in failing to apply his findings concerning the interpretation of clauses 61.3 and 90.1 of the contract, to the factual averments made by the Joint Venture in its pleadings; (2) exceeded his jurisdiction and/or committed a gross irregularity by accepting the schedule prepared by Eskom as 'conclusive proof as to whether which of the JV's claims were time barred' without having regard to the pleadings, which set out factual disputes; (3) committed a gross irregularity in accepting the assessment of the adjudicator that the time period relating to the notification of compensation events and referral of disputes to adjudication were not adhered to 'without allowing the JV opportunity to prove or disprove such assessment'. The arbitrator thus denied the Joint Venture the opportunity to disprove the adjudicator's conclusion, especially because the time-bar special plea was raised only in respect of 11 of the 13 claims, so it was contended.

[17] Eskom insisted that there was no dispute of fact between the schedule prepared by it and the factual chronology that had been pleaded by the Joint Venture, and that it was apparent from both documents that the Joint Venture had

not submitted the compensation events timeously, and had not referred the dispute for adjudication within the set time period. Although Eskom admitted that in its pleadings it had not raised the time bar defence in respect of two of the 13 claims (U and V), it insisted that the defence was advanced in its Heads of Argument in respect of all the claims, and was fully ventilated in argument by both parties.

[18] The court high court reviewed and set aside the award in respect of six of the 13 claims. It ordered that the six be considered afresh by another arbitrator. In doing so the Learned Judge was of the view that the 'expanded issues' (ie the inclusion of the two claims in respect of which the time bar had not been raised in the pleadings) had not been 'fully ventilated' and that the raising thereof 'by way of argument [did] not equate to a full hearing'. He also found that the arbitrator's consideration of the 'unpleaded issues' contained in the Eskom schedule (the aspects on which dispute of fact was alleged) resulted in an unfair hearing.[6] The Learned Judge found however, that the arbitrator did not exceed his powers as contended by the Joint Venture because he determined issues that were set out in the Notices of Dissatisfaction filed by the parties.

On appeal

[19] In the appeal Eskom maintained that the Joint Venture was aware at all times that all 13 claims were affected by the time bar plea. It had the opportunity to address that defence, and it did. Counsel for Eskom submitted that the manner in which the arbitration was conducted was consistent with the less formal, more robust procedures employed in arbitrations and the principle of party autonomy accepted by courts in relation to commercial arbitrations.

[6] In respect of the six claims: M, N, Q (2), R(3), U, and V.

[20] The Joint Venture contended that it was unfair to hold that it should have understood that the issues were 'expanded' merely because of the submissions made by Eskom in its Heads of Argument regarding the relevance of the plea of time bar on the two claims. It was submitted that the issues before the arbitrator were limited to interpretation of the time bar clauses – the impact thereof on the individual claims was never canvassed.

The law

[21] Section 33(1) of the Arbitration Act 42 of 1965 regulates review of arbitral awards as follows:

'(1) Where-

(a) any member of the 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 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.'

[22] Speed, efficiency, flexibility and finality of the arbitration process are the reasons that parties opt to select their own dispute resolution method. Admission of evidence which is not strictly necessary or beneficial to resolution of a dispute detracts from these advantages.[7] However, the rules of natural justice remain applicable. In *Telcordia Technologies Inc v Telkom SA Limited*[8] this Court was concerned with the interpretation of the terms 'gross irregularity' and 'exceeding its power' which justify interference by courts with arbitral awards as provided in s 33(1)*(b)*. The court reaffirmed the principle of party autonomy – a realisation of freedom enjoyed by parties to execute arbitration agreements. It defined gross

[7] 2 *Lawsa* 3rd Ed at paras 80 and 122.
[8] *Telcordia Technologies Inc v Telkom SA Limited* 2007 (3) SA 266 (SCA).

misconduct as a 'process standard'[9] which is 'to all intents and purposes identical to a ground of review available in relation to proceedings in inferior courts'[10]. The ultimate test of whether an arbitrator's conduct constituted gross irregularity is whether the conduct of the arbitrator or arbitral tribunal prevented a fair trial of the issues.[11] The common law grounds of review are excluded.[12]

[23] In *Lufuno Mphaphuli and Associates (Pty) Limited v Andrews and Another* 2009 (4) SA 529 (CC) the Constitutional Court approved the principle of party autonomy in arbitration proceedings by holding that s 34 of the Constitution, which provides for a right to a fair public hearing, did not apply to private arbitrations. In modern arbitral practice fairness goes beyond strict observation of the rules of evidence, provided that the procedure adopted is fair to both parties and conforms to the rules of natural justice.[13]

[24] With regard to 'exceeding [arbitrator's] powers' this Court in *Telcordia* referred to the distinction made by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA and Others*[14] between a tribunal purporting to exercise a power or jurisdiction which it does not have and erroneous exercise of power that it has. Therein the court held that 'If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68*(b)* is involved'.

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[9] At para 42.
[10] At para 53. The court recognised however that this meaning might be affected by the different 'textual setting in relation to proceedings of inferior courts' but for the purposes of the case (which are similar to this case) judgment relating to review of inferior court proceedings were relevant to the meaning of 'gross irregularity' under s 33(1)*(b)* of the Arbitration Act 42 of 1965.
[11] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581.
[12] At para 51.
[13] *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA).
[14] *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2005] UKHL 43 at para 24. The court was considering the meaning of 'exceeding its powers' within s 68(2)(b) of the English Arbitration Act 1996.

[25] The powers given to an arbitration tribunal in each case are determinable with regard to the Arbitration Act, the arbitration agreement, the pleadings (or statements of case) and any other document prepared by the parties for that purpose. As already explained, in this case, the agreement between the parties was that the pleadings that had served before the Adjudicator would stand in the arbitration proceedings and that issues to be determined by the tribunal were those set out in the parties' Notices of Dissatisfaction. The arbitrator recorded in the award that both parties duly filed their Notices of Dissatisfaction.

[26] However, the Notice of Dissatisfaction prepared by the Joint Venture did not form part of the record in this court. It is therefore not clear what issues were raised therein. But Eskom's Notice of Dissatisfaction raised expressly the issue of failure by the Joint Venture 'to notify a claim and refer disputes within the time periods stipulated under the construction agreement concluded between the parties'. From this stipulation in Eskom's Notice, there can be no doubt that, apart from the interpretation issue, determination of whether there was compliance with the time-bar set in the agreement was placed squarely before the arbitration tribunal.

[27] In addition, it is clear from the remarks of the arbitrator as referred to in para 15 above that he did consider the pleadings filed by the parties. It is on consideration thereof that he formed the view that the Joint Venture had responded in detail to the time-bar special plea raised by Eskom. In the award he remarked that:

'In the pleadings before me the employer [Eskom] once again raised the time bar issue with reference to clauses 61.3 and 90.1. The contractor [Joint Venture] responded in detail, even attaching opinions of eminent counsel, *on the effect of clauses 61.3 and 90.1*. Its contentions did not touch on clause 61.1. It did not allege that 61.3 was irrelevant because the compensation claims fell under clause 61.1 and not under 61.3. It did not allege that the PM had failed in his duties under 61.1, or that absent proof of his prior compliance with 61.1, the time bar clauses

61,3 and 90.1 could not have arisen - a quasi *exceptio non adimplenti contractus* argument.' (emphasis supplied)

[28] Not only that, the arbitrator also considered the event notifications as listed in the schedule filed by the Joint Venture, the contents of which, with regard to notification of events, must be assumed to have been the same as its pleadings. From that list he formed the view that the Joint Venture schedule had assumed that he would accept its interpretation of the time-bar provisions. All this in the context of Eskom having submitted that the claims listed under its time-bar column would be disposed of if its interpretations were to be upheld. Again, as the arbitrator remarked, the Joint Venture never disputed the correctness of that submission.

[29] Notably, the Adjudicator's own conclusion that the specified time-frames had not been adhered to was drawn from the documents filed before him. There was no suggestion by the Joint Venture that the conclusion could not be drawn without evidence having been led.

[30] In the high court, instead of filing the pleadings the parties gave evidence by way of affidavits on the contents of the pleadings. Eskom contended that the dates set out in an annexure (SOR6) to the statement of reply filed by the Joint Venture showed that the Joint Venture's notifications were out of time. The Joint Venture referred to another annexure (RA1) that had been prepared by Eskom arguing that Eskom had pleaded different dates in its statement of defence. This became the basis of the submission on behalf of the Joint Venture that there was a dispute of fact with regard to the notification dates cited by the parties.

[31] However, it was not in dispute that Eskom's schedule as filed in the arbitration proceedings was prepared on the dates that had been pleaded by the

Joint Venture. Although the Joint Venture responded that the contents of Eskom's schedule were wrong it did not deny that it had set out the dates as referred to by Eskom in its schedule. The award was therefore not made on the basis of disputed of facts. In addition there is no evidence that the factual finding made by the adjudicator, that the time limits agreed on between the parties for notification of claims and disputes had not been met, was in contention before the arbitrator.

[32] With regard to the contention that the time bar was pleaded only in relation to 11 of the claims, the Arbitrator explained that Eskom had submitted that if its interpretation of the time bar clauses were to be upheld the claims listed in its schedule would be disposed of. The Joint Venture was therefore alerted to that argument and never refuted it. In the Notice of Dissatisfaction the time bar was referred to the Arbitrator in relation to all claims and the matter was argued before him on the basis that the time bar findings would be applicable to all 13 claims. His determination thereof on the record before him was consistent with the speed, efficiency, flexibility, fairness and finality required in arbitration proceedings.

[33] In the result no gross irregularity or exceeding of authority was shown on the part of the Arbitrator.

[34] Consequently,

1 The appeal is upheld with costs including the costs of two counsel where so employed;

2 The order of the high court is set aside and replaced with the following: 'The application is dismissed with costs'.

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N DAMBUZA
JUDGE OF APPEAL

Appearances:

For Appellant:	J Babamia SC with Luc Spiller
Instructed by:	Gildenhuys Malatji Inc, Sandton.
	Honey Attorneys, Bloemfontein.
For 1st to 7th Respondents:	A Bester SC
Instructed by:	Tiefenhaler Attorneys, Sandton.
	Webbers, Bloemfontein.