THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 17331/2018

DATE: 2019.06.10

In the matter between

RURAL MAINTENANCE (PTY) LTD — Applicant

And

FAST PULSE TRADING 63 (PTY) LTD — 1st Respondent

D2 SA (PTY) LTD — 2nd Respondent

JUDGMENT

BOZALEK, J:

The applicant in these proceedings seeks the following main relief:

1. An order in terms of Section 3(2)(c) (of the Arbitration Act), that the arbitration agreement shall cease to have effect in respect of the dispute forming the subject matter of the pending arbitration proceedings between the parties.

2. An order directing the first respondent, alternatively the respondents, to immediately effect transfers in certain stands, seven of them, as set out in Annexure E to the memorandum of agreement annexed to the founding affidavit, being erven on portion 9 of erf 957, Saldanha, Western Cape, to the applicant, or in the alternative the relief sought in prayer 1, which I have mentioned, plus orders:

(i) Granting judgment against the first respondent in the sum of some R25 000 000,00.

(ii) Declaring the said erf in Saldanha executable, it having been bonded in favour of the applicant, plus costs on the attorney and client scale.

The application is opposed by the respondents.

The applicant is a provider of civil and electrical infrastructure, whilst the first respondent is the owner of the immovable property in question and the second respondent is the development rights holder of the property. In 2015 the applicant contracted with the respondents to provide the civil and electrical infrastructure to 31 individual saleable stands on the property which was being developed by the respondents. These services included the entire electrical reticulation, as well as the water, sanitation, storm water and road infrastructure.

The agreement provided that the applicant would provide these services to the value of R23 380 301,60 excluding VAT, and would receive payment through the transfer and acquisition of ownership of seven of the 31 stands referred to in Annexure E to the agreement upon completion of 85% of the bulk services. The first respondent was required to provide the applicant with a first covering bond over the property to secure the applicant's investment made on the property and this the first respondent duly did. The applicant would be entitled to have recourse to the covering bond upon failure by the first respondent to meet its said obligations to the applicant. Upon registration of the stands in the name of the applicant, the covering bond would be simultaneously cancelled.

The agreement further provided that should any dispute arise from or in connection with the agreement, it would be resolved in accordance with the rules of the Arbitration Foundation of South Africa. Should additional or less work be performed by the applicant than was initially envisaged, adjustments would be made either by the allocation of further stands to the applicant, or by the applicant sacrificing stands or paying further amounts to the first respondent. It is common cause that the applicant has fully rendered all the services it was required to provide, but the respondents have yet to effect transfer of any stands to the applicant.

It is also common cause that a dispute arose between the applicant and the respondents relating to the value of the work performed by the applicant, which dispute was referred to arbitration by the applicant. The dispute was fully pleaded through a statement of claim, a statement of defence, a counterclaim, a plea thereto and a replication. No arbitration hearing was commenced before the appointed arbitrator, but one or more pre-arbitration meetings were held. In its statement of claim, the applicant claimed the following relief. I am quoting from prayers 1.1 to 1.6:

> "1. The claimant is entitled to re-elect the stands to be transferred to it as remuneration for the services rendered by the claimant in terms of the agreement between the parties dated 31 March 2015.
>
> 2. That industrial stands are valued at R400,00 per square metre as set out in the agreement.
>
> 3. That the table in Annexure E be replaced with a table so provided for in paragraph 12.2.
>
> 4. That the total cost project be R31 305 694,01 excluding VAT.
>
> 5. That the respondent pay the VAT on the stands to be so transferred to the claimant, so that the stands can be transferred.
>
> 6. An order that the defendant shall transfer or

caused to be transferred to the claimant, the stands in the industrial estate, situated on portion 9 of erf 957, Malmesbury Road, Saldanha Bay, Western Cape, re-elected by the claimant to the value of R31 305 000,00."

In their counterclaim the respondents pleaded:

"5. Defendants are entitled to an award to the effect that by operation of the agreement and the addendum, claimant is to be remunerated in the sum of R24 890 000,00 excluding VAT, to be paid by means of the transfer of stands in accordance with Annexure E to the agreement and the table therein."

and claimed an award against the applicant in terms of prayer 1 reading:

"By operation of the agreement and addendum, claimant is to be remunerated in the sum of R24 890 000,00 (I am rounding out these figures) excluding VAT, to be paid by means of the transfer of stands in accordance with Annexure E to the agreement and the table therein."

In paragraph 3.1 of its plea to the respondent's counterclaim,

the applicant pleaded as follows in paragraph 3.1:

> "In view of the concession by the defendant that it is liable to remunerate the claimant by means of the transfer of stands in accordance with Annexure E to the agreement, and the table therein, in the sum of R24 890 000,00, the claimant is entitled to an interim award as set out in the claimant's replication."

In the applicant's, i.e. the claimant's replication to the respondents' plea, the applicant repeated the above assertions, claiming an interim award, but also reserved its rights in the following terms:

> "1.4 Subject thereto that the claimant reserves its right to:
>
> 1.4.1 claim the balance of the amount due to the claimant as set out in certain paragraphs of the statement of claim.
>
> 1.4.2 claim rectification of Annexure E to the agreement... which will have the effect that the agreed values of the stands to be transferred to the claimant is reduced to R24 135 000,00.
>
> 1.4.3 claim transfer of further stands in accordance with the agreement, as remuneration for any balance between the amount that may be

found to be due to the claimant and the amount conceded by the defendant to be due to the claimant;

1.4.4 The claimant hereby accepts transfer of the stands in accordance with Annexure E to the agreement and the table therein, to the value of R28 374 000,00... ."

It concluded its replication as follows:

"1.6 In the premises the claimant, tendering as set out in paragraph 1.4 above claims an interim award that stands in accordance with Annexure E to the agreement and the table therein, be transferred to the plaintiff to the value of R28 374 000, subject thereto that the claimant's rights, as set out in paragraph 1.4 above, be reserved."

Against this background, one would fully expect that the applicant would immediately seek from the arbitrator, at the least, the interim award to which it claims it was entitled by virtue of the respondents' alleged concessions. This did not occur however, principally it would appear, for two reasons. Firstly, the respondents disagree that the applicant was entitled to any such interim award and secondly, before the arbitration could commence, as it was scheduled to in October

or November 2018, the applicant launched the present proceedings and declined to participate in the arbitration before these proceedings were finalised.

In its opposing affidavit, the respondents explained why they oppose the granting of the interim award sought by the applicant as follows, I am commencing with paragraph 9:

> "9. Respondents in fact delivered a claim in reconvention in which it pleaded the essence of the opposing versions of the parties and the essence of the points of disputes as follows:"

And then paragraphs 3 and 4 are quoted as follows:

> "3. In the statement of claim in convention, claimant avers that by operation of the agreement and addendum, it is to be remunerated in the sum of R31 305 000,00 to be paid by means of the transfer of stands not in accordance with Annexure E to the agreement and table therein, and claims an award to such effect.
>
> 4. In the plea in convention, defendants aver that by operation of the agreement and addendum, claimant is to be remunerated in the sum of R24 890 000,00, to be paid by means of the transfer of stands in accordance with Annexure E to the agreement."

Paragraph 12:

"12. As applicant had claimed stands re-selected by it beyond the parameters of Annexure E, respondents were not in position to instruct conveyancers in regard to commencing the process for the transfer thereof.

13. Applicant then delivered a replication in which it accepted that Annexure E would apply insofar as the identity of the stands was concerned and averred that an interim award was to be granted in its favour. That made no sense, bearing in mind the pleaded issues and disputes. It was respondents' case that the Annexure E stands applied and had prayed for declaratory relief in that respect against the applicant.

14. Applicant called for a meeting between the legal representatives of the parties, at which it requested an interim award, directing the transfer of the Annexure E erven. Respondents naturally declined to agree thereto, its version all along being that the Annexure E erven applied and not a re-selection outside its parameters. There was accordingly no dispute that the Annexure E stands applied and no need for an award, either interim or otherwise, that being respondents version. It was further stated that the conveyancers could now be instructed that these stands were to be transferred and to

do what was necessary in this respect and to request them to confirm this with the applicant.

15. The conveyancers were duly instructed and the correspondence from them is attached to the founding affidavit. The establishment of new stands by means of subdivision, as in the instant matter, involves various procedures and offices, such as the surveyor general and not infrequently involves aspects such as conditions of subdivision approval having to be complied with or relaxed or amended or departures having to be obtained. This may even involve appeals as in the instant matter.

20. In essence, applicant should have simply agreed to an award as sought by the respondents in reconvention in the arbitration, as it is effectively what it now seeks as primary relief in this application insofar as quantification and the applicable stands are concerned. That award was sought by the respondents to be made against applicant, wherefore defendants claim an award against claimant as follows:

(i) By operation of the agreement and addendum, claimant is to be remunerated in the sum of R24 890 000,00, to be paid by means of the transfer of stands, in accordance with Annexure E to the agreement.

(ii) Costs.

Paragraph 21 of the opposing affidavit reads:

> "Once the effective capitulation had been made by applicant as aforesaid, the way was cleared and respondents, of course, had no problem in instructing its conveyancer that the Annexure E stands were to be transferred and do what was necessary in this respect, and to request them to confirm this with the applicant. That process, of course, requires all procedures to have been completed as referred to above."

> 22. The actual physical transfers and the timing thereof was, and is, obviously dependent on the stands themselves being ready for and capable of transfer in law and fact. It is wholly unbusinesslike to expect that the transfer must of necessity be capable of being given effect to immediately, because there may be processes which still have to be dealt with."

The respondents then go on to explain various difficulties which arose as a result of the expropriation by the province of a portion of land near a bridge and the location of an access road, all of which necessitated amendments to certain conditions of approval of the subdivision plan by the local authority and which amendments have to be done through an

appeal against those conditions. Another difficulty was the omission of an internal road which, in turn, required stand boundaries to be amended and thus the amendment of the subdivision plan.

In this regard the respondents' deponent stated in the opposing affidavit : "(v)ariations of the above nature are part and parcel of the process of undertaking a property development of the nature of that in issue in this matter and were contemplated by the parties thereto."

In a supplementary affidavit dated 11 March 2018, the respondents' deponent gives an update on the process of transferring the promised stands to the applicant and states as follows:

> "We believe that they are now satisfied and that the subdivision plan will be endorsed within a number of days to enable our surveyor to proceed with lodgement of the two general plans for the two phases. As indicated above, it should take the surveyor general between four and six weeks to approve these general plans. On receipt of the two approved plans, it will go to our conveyancing attorney, who will then be in a position to register the general plan for phase 1 and simultaneous

> therewith transfer the necessary properties to (applicant). The transferring process normally takes about two an a half months from date of receipt of the approved general plans."

Earlier the respondents stated that the process of transfer of amending the development plan, the subdivision plan, was currently being undertaken and should be completed and the stands ready for transfer within the next few months. If correct, and if, in particular, the contents of the supplementary affidavit are taken into account, this would mean that transfer of the stands to the applicant is now imminent.

As I see this matter, the applicant faces two major difficulties in obtaining the primary relief it seeks, namely an order in terms of Section 3(2)(c) of the Arbitration Act that the arbitration agreement shall cease to have effect in respect of at least part of the dispute, and an order directing transfer of certain erven to the applicant. The first difficulty is to establish that there exists "good cause" for the court to make an order in terms of Section 3(2)(c) of the Act. The second difficulty is to establish that if such an order could or should be granted, it is also entitled to the further relief it seeks, namely an order directing transfer of the erven to the applicant.

I deal, firstly, with the requirement of good cause necessary for the court to invoke the provisions of Section 3(2)(c) of the Act. Section 3(2)(c) provides as follows:

> "The court may at any time on the application of any party to an arbitration agreement on good cause shown... (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

Firstly, it must be noted that our courts do not lightly override the agreement of parties to resolve their business disputes by way of arbitration. As was recently stated in *Riversdale Mining Limited v Du Plessis* 2007 JDR 0501 (SCA), albeit in the context of a dispute concerning the interpretation of an arbitration clause, at paragraph 28:

> "The basic principle in the interpretation of arbitration clauses is that they must be construed liberally to give effect to the essential purpose which is to resolve legal disputes arising from commercial relationships before privately agreed tribunals instead of through the courts. When business people choose to arbitrate their disputes, they generally intend all their disputes to be determined by the same tribunal, unless they

express their wish to exclude any issues from the arbitrator's jurisdiction in clear language. There is thus a presumption in favour of "one stop arbitration"."

Accordingly, the applicant bears the onus to avoid arbitration. See *Kathmer Investments v Woolworths (Pty) Limited* 1970 (2) SA 498 (A) at 504H. Furthermore that onus is "not easily discharged" and the applicant must make out "a very strong case". See *Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Company (Pty) Ltd* 1971 (2) SA 388 (W) at 391E. and *The Rhodesian Railways Limited v Mackintosh* 1932 AD 359. Some courts have even gone further and found that the discretion to make the order is one which "will very seldom be exercised" and the instances in which it "should be exercised are few and far between". See *Polysius v Transvaal Alloys* 1983 (2) SA 630 (W) at 640B.

Mr Labuschagne, who appeared on behalf the applicant, was unable to give me a satisfactory reason why this court should in effect assume jurisdiction over at least a part of the dispute between the parties. In particular, he could give no satisfactory explanation why the arbitrator could not have been asked to give the "interim award" to which he submitted the applicant was entitled. Inasmuch as he sought to explain this

on the basis that the respondents would not consent to such an interim order or award, this is, of course, no explanation at all. In that instance the logical and obvious cause of action was to press that claim upon the arbitrator. In this regard, it is also material that an arbitration hearing was imminent in October or November of 2018 but instead the applicant chose not to participate, but to launch these proceedings at that time which have taken a further eight months to come to hearing.

Turning to the second difficulty facing the applicant. An examination of the applicant's statement of claim in the arbitration shows that the primary relief it sought was declaratory in nature to the effect that it was entitled to re-elect the stands to be transferred to it as remuneration. It also sought rectification of Annexure E to the agreement and an upwards variation in the total project cost to some R31 000 000,00 odd. In the nature of this relief, it could not ask for an order directing transfer to it of any given erven, since it had yet to re-elect them as claimed. Even when it in effect capitulated in its main claim to re-elect the stands it would ultimately take transfer of and claimed an interim award that stands in accordance with Annexure E to the agreement be awarded to it, it misread the respondent's plea as a tender to immediately transfer such stands to the applicant. This is not a fair reading to the respondent's plea which was a

response to the applicant's primary prayer for declaratory relief.

As Mr Kantor, who appeared on behalf of the respondents, pointed out, at that stage the respondents were in no position to tender immediate transfer of the erven which, following its somersault, the applicant had decided were at least part of its due. The reasons why the respondents could not tender immediate transfer have been discussed above. To these can be added that it could not reasonably have been expected of the respondents to have instructed their lawyers to pass transfer of the originally elected erven in circumstances when, until an advanced stage in the pleadings, the applicant decided to abandon the primary relief it initially sought.

There are further reasons why the directory or executive relief now sought by the applicant relating to the transfer of the original erven, is unjustified. In terms of the arbitration clause, all disputes between the parties must be determined in such a forum. I can find no sign in the applicant's statement of claim of a dispute to the effect that notwithstanding that transfer of certain erven are due to it, the respondents have breached the agreement by not passing such transfer timeously. Rather, that is now the case which the applicant seeks to make out before this court, but which, as I have

sought to indicate, is not borne out by its statement of claim.

The respondents have raised the defence to such a case in the form of their assertion that properly interpreted, the agreement between the parties contemplated that there could well be amendments to the initial plan of subdivision and that, as a result, there could also be knock-on effects which would delay the transfer of erven to the applicant. So, thus, even if one assumes that the applicant has made out such a case, it is one which the respondents are entitled to meet in the arbitration hearing. Having regard to the provisions of the *Plascon-Evans* rule, this is certainly not an defence which a court could reject on the papers, even assuming that it should assume jurisdiction as opposed to an arbitrator.

In a nutshell, through this application the applicant is pursuing executive or directory relief when, in the arbitration proceedings, its primary claim was for declaratory relief. It is, moreover, relief which does not assert a failure or unreasonable delay on the part of the respondents in passing transfer of erven to it.

In the draft order which Mr Labuschagne handed up during argument the relief sought was varied. The applicant's directory relief now envisages a *spatium transferendi* of two

months and also makes it clear that the balance of the dispute, not excised in terms of Section 3(2)(c) of the Arbitration Act, will be referred back to the arbitrator. The altered format of the draft order in which the relief is claimed, does not address, however, the principal difficulties I have referred to above. What is more, it inadvertently illuminates the incongruity of this court pronouncing on part of the relief now sought by the applicants whilst leaving other issues to the arbitrator.

10 For these reasons, I consider that the applicant has failed to make out a case for this court to make any declaration in terms of Section 3(2)(c) of the Arbitration Act and accordingly, for the further relief it seeks.

Costs must follow the event but what must be addressed is Mr Kantor's argument that the respondents should be awarded attorney and client costs. He based such an order, *inter alia*, on the authority of *In re Alluvial Creek* 1929 CPD 532 at 535 and what he submitted was the "palpable lack of merit of a
20 misguided and ill-conceived application", and it being an abuse of process and vexatious.

The application has no merit but the further strictures are somewhat harsh. What must also be taken into account is the difficult position in which the applicant finds itself, albeit

arguably through no fault on the part of the respondents. Over the course of four years the applicant has rendered services to the respondents to the value of at least R25 000 000,00. It has received no remuneration at all to date because transfer of the erven due to it have been delayed for any number of reasons and notwithstanding that the applicant has long since delivered on its side of the agreement.

Taking all these and other relevant factors into account, I am not persuaded that a punitive costs order is justified. **In the result, the order I make is simply that the application is dismissed with costs**.

BOZALEK J
JUDGE OF THE HIGH COURT
DATE: 17 JUNE 2019