

SOUTH AFRICA / JUDGMENT

ACL/Intara Joint Venture v Baran Engineering (17127/2015) [2016] ZAGPJHC 143 (12 February 2016) [2016] ZAGPJHC 143

COURT

South Gauteng High Court, Johannesburg

BEFORE

A P Rubens

CASE / FILE NUMBER

17127/2015

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IN THE HIGH COURT

OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

CASE

NO: 17127/2015

DATE:

12 FEBRUARY 2016

In

the matter between

ACL/INTARA

JOINT

VENTURE.....APPLICANT

And

BARAN

ENGINEERING.....RESPONDENT

JUDGMENT

RUBENS A.J.:

On 11 May 2015 ACL Group Limited (“ACL”) and Intara CC (“Intara”) (collectively the applicants) launched an application in which the following relief was claimed:

“1.1: That the arbitration award of the Third Respondent (received on 2 April 2015) be remitted back to him in terms of Section 32(2) of the Arbitration Act 42 of 1965 in order to reconsider/making (sic) a fresh award, regarding the following:

1.1.1: The final amount;

1.1.2: Reasons for his finding in the computation of the abovementioned amount.

1.2: That the Respondents, jointly and severally be ordered and directed to pay the costs of this application.”

[2] I shall refer to this application as the main application, to the first and second respondents as Baran and to the third respondent as the Arbitrator.

[3] Baran delivered a notice of counter application on 18 June 2015 which was accompanied by an affidavit which served both as the answering affidavit in the main application and as a founding affidavit in the counter application.

[4] The following relief is sought in the counter application:

“1: That the arbitration award of the third respondent, annexure ‘B’ to the applicant’s founding affidavit, be made an Order of Court.

2: That the applicant be ordered to pay the costs of this application.”

[5] The main application is not opposed by the arbitrator.

[6] Neither a replying affidavit in the main application nor an answering affidavit in the counter application was delivered by the applicant.

[7] On 13 October 2015, Barren caused the matter to be set down for hearing on 8 February 2016. To that end, Baran’s counsel filed Heads of Argument on 7 September 2015 and a Practice Note on 26 November 2015. No Heads of Argument or Practice Note was filed on behalf of the applicant.

[8] When the matter was called before me on Monday 8 February 2016, Mr Van Der Vyver who appeared for the applicant, handed up an

application for a postponement of the matter sine die, in which the applicant tendered to pay the costs occasioned by the postponement. The application for a postponement was served on Baran’s attorneys on Sunday, 7 February 2016. On 8 February 2016 Barren delivered its Answering Affidavit in the postponement application.

[9] The grounds upon which a postponement of the matter was sought are set out in an affidavit deposed to by one Mr Mellet, who also deposed to the founding affidavit in the main application. These are the following:

[9.1] The applicant was represented by an attorney, Mr Du Plooy, from the inception of the dispute until the termination of the latter’s mandate by the applicant on 29 January 2016. Mr Du Plooy cause a notice of his withdrawal as the applicant’s attorney of record to be served on the same day.

[9.2] Mr Du Plooy was, according to Mr Mellet “...always intricately involved in the matter to the degree, where he enjoyed autonomy on dealing with the matter on a general mandate...”

[9.3] Mr Mellett also pauses to mention that “...as a result of the Applicant’s operations, relating to a vast number of projects, including a number of projects in different African countries, I, as the only representative of the Applicant having intricate knowledge of the matter, entrusted the matter entirely to Du Plooy. My trust in him was also solidified by my past long standing relationship with him.”

[9.4] Mr Mellett then goes on to allege that:

“3.11: After the delivery of the application for remittal, Du Plooy did nothing to bring the matter to finality, despite him (sic) having been mandated to pursue the matter.

3.12: I only discovered that the matter had not been attended to at all by Du Plooy on 26 January 2016, when I met with Du Plooy to discuss the matter, as well as other matters that he is currently assisting the applicant with.

3.13: During this discussion, he intimated to me that an affidavit is required to be filed in respect of the counter-application.

3.14: He intimated to me that the Applicant has not yet delivered its replying affidavit to the remittal application, as well as an answering affidavit to the counter application. He made mention that an application for condonation might be required.

3.15: During this meeting, I was supplied with certain documentation including a notice of set down...

3.16: Upon perusal of the Notice of set down, I cannot glean which application has been set down. I similarly have not seen any heads of argument by the First and Second Respondents or a practice note indicating their intention for the motion week of 8 February

2016. I can only gather the (sic) application and counter application was (sic) enrolled as a single application.

3.17: As a result of Du Plooy’s failure to execute his mandate herein, an impasse occurred between the Applicant and Du Plooy,

insofar Du Plooy (sic) did not follow and prosecute the application. Herein he failed to alert me that an affidavit, as well as heads of argument must be drafted. The fact that I only became aware on 26 January 2016 that the matter was not pursued, was the last straw and I consequently terminated his mandate shortly thereafter as I had lost all trust in him.”

[9.5] Mr Mellett also explains that he:

“4.7: ...must pause and highlight that I, as a result of other business ventures, of the Applicant I maintain an extremely busy schedule. Herein the Applicant has mining operations in Maun Botswana, telephonic services in Ivory Coast, operations in Namibia that relate to civil works and 4 sites in South Africa that require my constant intervention. Copies of two pages of my passport is (sic) attached...”

4.8: I was also hospitalised for a period of 2 months last year since September 2015 in Bloemfontein as a result of a viral infection. I attach hereto proof of the October 2015 hospital account...

4.9: I raised the aspects in paragraph (sic) 4.7 and 4.8 to highlight to the above Honourable Court that the past couple of months, I was in any event unable to constructively pursue this matter, even if I was fully briefed by Du Plooy of the status of the matter. I however confirm that the Applicant is committed to the process and has an intense desire to prosecute the application for remittal herein.”

(The October 2015 hospital account annexed to Mr Mellet’s affidavit in the postponement application indicates that Mr Mellet was hospitalised for the month in question. No document is attached which evidences Mr Mellet’s hospitalisation in September 2015 as alleged by him and no explanation is provided for the omission.)

[9.6] Barnard Incorporated was appointed as the applicant’s attorney on 29 January 2016. Mr Viljoen of the latter firm addressed a letter to Baran’s attorneys on the same day which records, inter alia, the following:

“3: We have now received some of the pleadings and is (sic) still in the process of obtaining instructions.

4: We are therefore instructed to kindly request that the matter be postponed on the 8th of February 2016 in order to gather information and consult with counsel on the way forward.

5: As this coming Monday will be 7 days prior to the set down date, we trust that reservation fees will be avoided.”

[9.7] Baran’s attorneys rejected the request for postponement in a letter addressed to Barnard Incorporated on 1 February 2016 which records, inter alia, the following:

“3.3: On 30 June 2015 (the date on which your client ought to have delivered a replying affidavit), the writer enquired from Mr du Plooy as to whether your client intends to deliver a replying affidavit. Mr du Plooy advised that it was indeed your client’s intention to do so by 7 July 2015.

3.4: Three further extensions of time were afforded to your client to deliver its replying affidavit, the last date being no later than 22 July 2015. In this regard, we attach a copy of the letter addressed to Mr du Plooy on 21 July 2015 for ease of reference.

3.5: Your client failed to deliver a replying affidavit (or an affidavit opposing the counter application) by 22 July 2015 or to date.

3.6: A number of subsequent telephone calls were made to Mr du Plooy, in particularly (sic), on 1 September 2015, 2 September 2015, 21 September 2015 and 14 October 2015 to enquire as to whether your client has abandoned its application. No written response was ever received.

3.7: Given your client's apparent attempt to delay payment of our clients' claim, our clients delivered their heads of argument and updated index and proceeded to enrol the matter (albeit incorrectly) for hearing on 19 October 2015.

3.8: On 14 October 2015, Mr du Plooy informed us that the correct date for the hearing of this matter, i.e. Monday, 8 February 2016. A copy of Mr du Plooy's letter is also attached for ease of reference.

4: In view of the above, it is apparent that your client has had ample opportunity to consider its position, take legal advice and to consult with counsel in regard to this matter. Consequently, your client's request for a postponement is denied.

5: We record that the disputes which had arisen between our respective clients were referred to arbitration by agreement on 25 April 2015. We also record that the purpose of consensual arbitration proceedings is to reach finality in regard to dispute.

6: We are instructed to advise that our clients (sic) view your client's request for a postponement as mala fide and yet another attempt to delay payment of our client's claim. Please be advised that any application which your client intends to bring in this regard shall be opposed. Moreover, your client will be required to apply to Court for condonation, should it wish to deliver a replying affidavit before the hearing of this matter.

[10] Although Mr Mellett does not say so specifically, it is implicit in his allegation that Mr Du Plooy failed to alert him to the fact that: "...an affidavit, as well as heads must be drafted..." that his version is that Mr Du Plooy did not advise him of the numerous extensions of time afforded to the applicant as recorded in Baran's Attorneys' letter of 1 February 2016.

[11] What is significant is that despite Mr Mellet's accusations of gross neglect on the part of Mr Du Plooy he nowhere alleges that a meeting which he had with Mr Du Plooy on 26 January 2016: "...to discuss the matter, as well as other matters, that he [was]...assisting the applicant with..." was to bring Mr Du Plooy to book. In fact, Mr Mellet offers no explanation

whatever for his own inaction and failure from 11 May 2015 until 26 January 2016, to make any enquiry concerning the matter, more

particularly, in the light of Mr Du Plooy's alleged failure to report to him for a period in excess of some eight months since the launch of the main application. Mr Mellet's allegedly busy schedule and hospitalisation (the duration of which he falsely exaggerated) are not a satisfactory excuse when all it would have taken for him to address an enquiry to Mr Du Plooy was an email or a telephone call.

[12] I also find it strange that Mr Mellet refers to the fact that, as he alleges, he only found out on 26 January 2016 that Mr Du Plooy had not pursued the matter as "...the last straw..." On Mr Mellet's version, this was the only conversation that he had with Mr Du Plooy since the launch of the main application. For that to have been "...the last straw..." something must have occurred in the intervening period but Mr Mellet is careful to avoid explaining what this was.

[13] Copies of various letters which passed between Baran's attorneys and Mr Du Plooy are annexed to Baran's answering affidavit in the postponement application. These reveal that on 7 July 2015 Mr Du Plooy intimated that what could only have been a reference to the applicant's

replying affidavit in the main application and answering affidavit in the counter application would be finalised by the applicant's senior and junior counsel on 8 July 2015. On 17 July 2015 Mr Du Plooy advised that the applicant's senior counsel was only available to settle the applicant's replying affidavit in the main application from 20 July 2015, that Mr Mellet's brother had passed away on 11 July 2015 as a result of which Mr Mellet had not been available in the week of 17 July 2015 for consultation and final instructions and that it was his (Mr Du Plooy's) opinion that "...the affidavit..." would be filed in the course of the following week and that condonation would be sought. On 14 October 2015 Mr Du Plooy confirmed that the matter would be heard on 8 February 2016.

[14] If Mr Mellet's allegations regarding Mr Du Plooy's unexplained

and inexcusable inaction are true, it is surprising that he did not request

Mr Du Plooy to provide a confirmatory affidavit. I must assume that he did not do so because nothing is said by him in this regard.

[15] In addition to the fact that Mr Mellet, in the founding affidavit in the postponement application, makes no mention of the applicant's prospects of success in the main application, on the applicant's own version, even if the main application were to succeed, the applicant would be liable for payment of an amount of R775 564.46 plus interest. The arbitration award was issued on 30 March 2015. No payment has been forthcoming nor is any explanation provided by Mr Mellet for that failure.

[16] In the context of private arbitration the principle of finality is an important factor.[1] The application for a postponement has all the hallmarks of an attempt to delay the counter application in order to delay payment of what is due by the applicant to Baran for as long as possible.

[17] Mr Theron SC who, together with Mr Booysen, appeared for Baron, urged me, with considerable force, not to grant the postponement. However, and in order to give the applicant a final opportunity to present its case, I ordered the applicant to file its answering affidavit and replying affidavit by no later than 11 February 2016 and I stood the matter down for argument on 12 February 2016.

[18] On 12 February 2016 Mr Theron SC advised me that the applicant's latest attorneys had filed a notice of withdrawal as attorneys of record and had addressed a letter to Baron's Attorneys on 10 February 2016, the relevant portion of which reads:

"We have been unable to obtain instructions from our client's representative as a result of his unavailability."

[19] Turning now to the merits of the main application, the applicant seeks a remittal of the award to the arbitrator in terms of section 32(2) of the Arbitration Act 42 of 1965 as amended ("the Act") which provides that:

"The court may on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for making of a further award or a fresh award or for such other purpose the court may direct."

[20] The phrase "...on good cause shown..." which is of wide import requires the court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.[2] As I have already mentioned, in private arbitrations the principle of finality will count heavily but other relevant factors such as the relative prejudice that will be caused if the matter is not remitted must also be considered.[3]

[21] The pertinent facts appear from the award. These are the following:

[21.1] In about February 2012 Baran was appointed as subcontractor to ZTE Corporation of South Africa (Pty) Ltd for the construction, supply, delivery, installation and testing of ducting and fibre optic cable along a predesignated route.

[21.2] Baran in turn appointed the applicant as its sub-subcontractor to execute and complete the civil works.

[21.3] The applicant sued Baron for various relief arising out of the execution and termination of the contract between them and Baran instituted a counter claim against the applicant.

[21.4] The applicant commenced with the execution of the works. Two of its invoices remained unpaid, namely one dated 19 November 2012

for R1 169 556.38 and the other dated 22 January 2013 for R786 249.45.

[21.5] The applicant insisted on payment of the invoiced amounts on a basis which was at variance with the terms of the contract, and on 4 December 2012, suspended the execution of the works.

[21.6] By letter dated 30 January 2013 Baran alleged that the applicant had repudiated the contract and terminated it. Its acceptance of the applicant's repudiation was justified.

[21.7] Although the amounts of the applicant's last two invoices to which I have referred may not have been due at the time, it is common cause that the work reflected therein was all eventually approved and that the work had been completed before the contract was terminated.

[21.8] The applicant effectively claimed a quantum meruit in respect of the work done by it, an equitable remedy available to a contracting party which has not performed fully in terms of the contract.

[21.9] The applicant failed to prove the quantum of its incomplete performance.

[21.10] Baran employed another contractor to complete the work which had not been completed by the applicant. Its entitlement to do so was established by the contract which provided that if the applicant failed to complete the works by a specified date, Baran would be entitled to complete the works itself or by third party contractors and that the applicant would be liable for all costs incurred in this regard. This accordingly amounted to a claim for specific performance rather than damages.

[21.11] The cost of completion amounted to R2 771 370.32 being the amount which Baran was therefore entitled to be paid.

[22] The conclusion arrived at by the arbitrator is articulated in the award as follows:

"The question now needs to be asked whether the amounts of [the applicant's] invoices dated 19 November 2012 and

22 January 2013, or any other amounts such as retention, must be deducted from this amount.

The calculation of the amount to which Baran is entitled shows that it assumes that the applicant's last two invoices and other amounts such as retention had not been paid.

If those [the applicant's] invoices, or any other unpaid amounts, are brought into account, they would be added to the amount due to Baran only to be deducted again.

The amount due to Baran is accordingly net of any amounts due to [the applicant], and [the applicant] is not entitled to any other

deduction.

I mention in passing that this would also have applied to any quantum meruit proved by [the applicant]."

[23] The grounds on which the remittal of the award to the arbitrator is sought are set out in the applicant's founding affidavit in the main application as follows:

"8.1 I submit that the findings of the [arbitrator], as set out in paragraph (sic) 33 and 46 of his award be referred back to him for reconsideration and for making a further and/or fresh award.

8.2 As shown ... above, the [arbitrator] found at paragraph 33 of his award that the amount of the last two invoices of the applicant, being the one dated 19 November 2012 in the amount of R1 169 556.39 and the other dated 22 January 2013

in the amount of R786 249.45 is due and payable to the applicant.

8.3 The applicant claimed payment of the two invoices and interest thereon as well as a retention amount pertaining to these invoices and other invoices previously paid to Baran ... as set out above.

8.4 I submit that the arbitrator omitted to give judgment in favour of the two invoices in line with his proportionate-decision in applicant's favour. His omission to deal with this finding and or payment of the amounts should be remitted for consideration.

8.5 As far as the arbitrator's reasoning as set out in paragraph 46 of the award is concerned, I submit that it does not make sense that the above mentioned two invoices, including the retention amount, pertaining thereto, should be added to the amount due to Baran. Baran submitted as exhibit "K1-K7" the breakdown and calculation of their quantum. Exhibit "K1-K7" is attached hereto as annexure "K". The [arbitrator] however found in paragraph 45 of the award that the amount of R2 771 370.32 (the counterclaim) is due to Baran. I submit that that amount, as well as the retention amount should be deducted from the amount of the counterclaim, if the two invoices (as mentioned above) is payable (and judgment has been granted for that amount).

8.6 I therefore submit that the arbitrator made an error in computation of the amount and that the matter be remitted to him for reconsideration."

[24] In my view, the arbitrator's conclusion is correct. The applicant failed to prove the quantum of its incomplete performance

and the arbitrator was unable to award it any amount in that regard. The applicant's contention that the arbitrator should have deducted the aggregate of the amounts reflected in its two invoices from the proved cost of completing the works awarded to Baran is unsound. The contract was terminated as a result of the applicant's unlawful repudiation. The applicant's attempt to seek to enforce payment of the invoiced amounts is a claim for specific performance of a contract no longer in existence. Whether or not the arbitrator's remark that if the invoiced amounts or other unpaid amounts are brought to account, they would be added to the amount due to Baran only to be deducted again and that the same reasoning would apply to any quantum meruit proved by the applicant are correct (a matter about which I express no opinion) does not, in my view, undermine the correctness of the arbitrator's conclusion.

[25] Even if I am wrong and the reasoning of the arbitrator and his conclusion are not correct, that does not, in my view, take the matter any further.

[26] An arbitrator is entitled to make a mistake. As stated by Harms JA (as he then was) in *Telcordia Technologies Inc v Telkom SA Limited*[4]:

"[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the enquiry or his duty in connection therewith. It only means that he erred in the performance in his duties. An arbitrator "has the right to be wrong" on the merits of the case and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the enquiry – they may be a misconception of the meaning of law or the admissibility of evidence, but that is a far cry from saying that they constitute a misconception of the nature of the enquiry.

[86] 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..."

[27] In *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others; Sourcecom Technology Solutions (Pty) Limited v Kolber and Another*[5] the position was described as follows:

"[58] It is true, as pointed out by Mr Duminy, that the expression "good cause" suggests a wide discretion. The expression must, however, be interpreted within the context of the other provisions of the Act, such as the provisions of section 28."

This section reads as follows:

"[28] Award to be binding.

Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms."

"[59] It is clear that the agreement in casu does not "provide otherwise". On the contrary, clause 17 – which is the arbitration clause – states that:

"17.6 Each of the parties hereby irrevocably agrees that the decision of the arbitrator (...) in the arbitration proceedings:

17.6.1 shall be final and binding on each of them; and

17.6.2 will be carried into effect; and

17.6.3 can be made an order of any court to whose jurisdiction the parties are subject."

"[60] The only inference to be drawn from all this is therefore that the Legislature and both the parties in this matter all subscribed to the philosophy which transpires from the following dictum by Gardiner J in *Clark v African Guarantee and Indemnity Co Ltd* 1915 (CPD) 68 at 77:

"The Court will always be most reluctant to interfere with the award of an arbitrator. The parties have chosen to go to arbitration instead of resorting to the Courts of the land, they have specially selected the personnel of the tribunal, and they have agreed that the award of that tribunal shall be final and binding. As Halsbury LC said in *Holmes Oil Co v Pumpherston Oil Co* Court of Sess R18 at 53:

'One of the advantages that people are supposed to get by reference to arbitration is the finality of the proceedings when the arbitrator

has once stated his determination. They sacrifice something for that advantage – They sacrifice the power of appeal. If, in their judgment, the particular judge whom they have selected has gone wrong in point of law or in point of fact, they have no longer the same wide power to appeal which an ordinary citizen prosecuting his remedy in the courts of law possess, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law, therefore, that when they have agreed to refer their difficulties to arbitration as they have here, you cannot set aside the award simply because you think it is wrong.'"

[28] In addition section 32(2) does not contemplate a remittal for explanation and elucidation,[6] which is in effect what is sought in paragraph 1.1.2 of the notice of motion in the main application. In the circumstances I make an order in terms of the draft, which I mark as X in terms of which:

[a] the main application is dismissed with costs and the award of the arbitrator, annexure "B" to the founding affidavit in the main application is made an order of court.

[b] the applicant is to pay the costs of the counter application.

[c] the costs in the main application and in the counter application are to include the costs consequent upon the employment of two counsel.

A P RUBENS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT:

NO APPEARANCE FOR THE APPLICANT

INSTRUCTED BY:

NO APPEARANCE FOR THE APPLICANT

COUNSEL FOR RESPONDENT:

E THERON SC

HOGAN LOVELLS (SOUTH AFRICA) INC.

DATE OF HEARING: 12/02/2016

DATE OF JUDGMENT: 19/02/2016

[1] Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd 2013

(5) SA 84 (SCA) 88A

[2] SA Forestry Co Ltd v York Timbers Ltd 2003

(1) SA 331 (SCA) at 338I-J; Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd supra at paragraph 14.

[3] SA Forestry Co Ltd v York Timbers supra at 339 B-C

[4]

[2006] ZASCA 112; 2007

(3) SA 266 (SCA)

[5] 2001

(2) SA 1097 (C)

[6] Silpert v Seymour 1932 TPD 329

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