

SOUTH AFRICA / JUDGMENT

Fikeni NO and Others v Godfrey NO and Another (1485/2017) [2018] ZAKZDHC 49 (27 September 2018)

[2018] ZAKZDHC 49

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Vahed

CASE / FILE NUMBER

1485/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

No:- 1485/2017

In

the matter between:

DR

SOMADODA PATRICK MAYIBONGWE FIKENI

NO First

Applicant

DR

GCWALISELE CYNTHIA KABANYANE

NO Second

Applicant

MOROKA

ISAAC BUTCHER MATUTLE

NO Third

Applicant

ZANDILE

QUENETTE LAVINIA MDHLADHLA

NO Fourth

Applicant

MZAMO

MICHAEL MLENGANA

NO Fifth

Applicant

MATSHIPSANA
MERIAM MOLALA
NO Sixth
Applicant
TLOHOTSE
ENOCK MOTSWALEDI
NO Seventh
Applicant
NANDISELE
FLAVOUR THOKO MPUMLWANA NO Eighth
Applicant
PHELISA
NKOMO
NO Ninth
Applicant
RASHID
AMOD SADECK PATEL
NO Tenth
Applicant
ZAKHELE
ALEX TUMMY ZITHA
NO Eleventh
Applicant
and
JOHN
H GODFREY
NO First
Respondent
AZCON
PROJECTS
CC Second
Respondent

JUDGMENT

Vahed J:

- [1] The applicants bring this application in their respective capacities as trustees of the Independent Development Trust (“the IDT”). They seek to review and set aside an award made by the first respondent in his capacity as the duly appointed arbitrator relating to a dispute arising out of a construction contract concluded between the IDT and the first respondent.
- [2] It is necessary to set out a brief background and what follows is either common cause or not seriously in dispute.

- [3] During 2005 the IDT was approached by the Department of Education for the Eastern Cape Province to assist in the erection of certain new buildings, and the renovation and refurbishment of certain existing structures, at the KSD FET Cicira College, Mthatha, Eastern Cape ("the Project"). At the conclusion of a tender process, the second respondent being the successful tenderer, a written agreement ("the agreement") was concluded between the IDT and the second respondent in respect of the works to be undertaken. The agreement was styled "Principal Building Agreement" and was one in the terms provided for in edition 4.1 of the JBCC 2000 Series of Agreements (March 2005).
- [4] The IDT gave possession of the site to the second respondent during April 2007. In terms of the agreement the date for practical completion of the Project and the works was 18 April 2008.
- [5] During the period of the agreement and as the works progressed the IDT was, from time to time, late in making payment due in terms of authorised payment certificates. As a result, the second respondent cancelled the agreement on several of the late payment occasions, and when payment was made thereafter reinstated the agreement. During the various periods of such late payments the second respondent would claim default interest due in terms of the agreement and this was paid in full by the IDT.
- [6] During November 2009 the second respondent again cancelled the agreement. It is not entirely clear whether that cancellation was accepted or whether the IDT contended that the second respondent's attempts to cancel constituted a repudiation of the agreement which prompted it (i.e. the IDT) to cancel the agreement. That aspect is not an issue in this application and has no bearing on the outcome of this application.
- [7] On 29 July 2012 the principal agent issued the final account. It is common cause that disputes arose between the parties in connection with that final account.
- [8] By agreement, the arbitrator (i.e. the first respondent) was appointed on 30 January 2014 to determine the disputes. The arbitrator was initially appointed, in terms of the agreement, as adjudicator, but the parties subsequently agreed that the process should proceed to arbitration by the first respondent, as contemplated in the agreement.
- [9] On 10 December 2014 the first respondent presided over the first preliminary meeting between the parties. It was agreed, inter alia, that the parties would exchange pleadings by certain agreed dates and that those pleadings would set out the issues to be determined by the arbitrator. It was also agreed that the arbitration would be conducted in accordance with the sixth edition of the Standard Rules of the Association of Arbitrators ("the Rules").
- [10] On 24 April 2015 the first respondent presided over the second preliminary meeting. At this meeting it was agreed, inter alia, that the award would not be subject to appeal in terms of Rule 40 of the Rules.

- [11] On 1 August 2016 the first respondent presided over the third preliminary meeting. At this meeting it was agreed, inter alia, that in the event that it considered it necessary, the second respondent would amend its statement of claim on or before 12 August
2016. In my view this agreement was related to a question of timing and was not, as the second respondent contended, an agreement by the IDT permitting the second respondent to amend its statement of claim. Amendments were to be governed by the Rules as will be demonstrated later in this judgment.
- [12] In its amended statement of claim the second respondent raised at least five disputes for determination by the first respondent.
- [13] Aspects surrounding only one of those disputes forms the subject matter of the present application. The applicant conveniently referred to it as "the first dispute". I shall retain that convenient label.
- [14] In the first dispute the second respondent initially claimed to be entitled to extensions of time (with increased provisional and general costs ("P & G costs")) because of the IDT's late payment of payment certificates which, so contended the second respondent, caused delays when it had to terminate and reinstate the agreement on the several occasions referred to earlier.
- [15] The IDT delivered its statement of defence and counterclaim during August 2015. For reasons unconnected with this application, the arbitration hearing was delayed.
- [16] By July 2016 the parties had amended their respective pleadings in the arbitration. Concerning the first dispute, the IDT denied that the second respondent was entitled to any extension of time, or any increase to P & G costs, as a result of the cancellations and the reinstatements that had taken place. The IDT contended that the second respondent had been entitled to charge default interest, that it had done so, and that all default interest had been paid by the IDT.
- [17] The arbitration was set for hearing on 24 August 2016.
- [18] On 26 July 2016 the second respondent delivered notice of intention to call on the evidence of an expert, Mr G J Fendt, and delivered his expert witness statement which has come to be referred to by the parties as "the Fendt Report".
- [19] The Fendt Report dealt with the first dispute and, so contended the applicant, sought also to deal with new causes for delay that had not been pleaded in the second respondent's amended statement of claim. This is disputed.
- [20] On 8 August 2016 the second respondent delivered notice to further amend its statement of claim so as to incorporate the disputed aspects of the Fendt Report. That notice sought expressly to incorporate the contents of the Fendt Report into the statement of claim as a new paragraph in that statement of claim.

- [21] On 15 August 2016 the IDT responded by delivering two notices: firstly an objection to the proposed amendment to the statement of claim, and second, an objection to the expert notice and the evidence of Mr Fendt.
- [22] At the hearing on 24 August 2016 the applicant contended that both of those objections ought to be argued as preliminary matters. The applicant contended that both objections were linked and that accordingly they ought to be argued together. The applicant contends that the second respondent indicated that it was either not willing or not ready to argue the objection relating to Mr Fendt's evidence and report, contending also that it had not been properly set down for argument. In the result the first respondent ruled that the admissibility of Mr Fendt's report would be argued on a different occasion, holding that it had not been set down for hearing, but ruled further that the application to amend and the objection thereto would proceed to argument. That then took place on 24 August 2016 after which the arbitration adjourned to await the first respondent's ruling.
- [23] On 22 September 2016 the first respondent published his award allowing the amendment sought by the second respondent.
- [24] The IDT seeks to have that award reviewed and set aside on two principal themes. Both themes are interlinked and are underpinned by s 33(1) of the Arbitration Act, 1965 ("the Act"). That section provides as follows:

"Where –

- (a) any member of an 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 has 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 all parties, make an order setting the award aside."

- [25] The IDT relies only on s 33(1)(b) of the Act, contending that the first respondent committed a gross irregularity in the conduct of the proceedings and that he exceeded his powers.
- [26] The two interrelated themes of review are firstly that the first respondent was not entitled to give consideration to the contents of the Fendt Report (in the context of considering the amendment alone) in the absence of the challenge to its admissibility and to the evidence of Mr Fendt; and secondly, that the first respondent exceeded his powers by allowing the second respondent to amend the statement of claim so as to include claims that had not been referred to arbitration.

[27] Dealing with the first theme Mr Berger SC, who with Mr Mahlangu appeared for the applicants, contended that by failing to consider both objections and applications simultaneously the first respondent

committed a gross irregularity within the meaning of s 33(1)(b) of the Act. The two issues, so he argued, could not be considered

separately because the contents of the Fendt Report was the sole basis of the application to amend. By deciding to allow the amendment

the first respondent rendered moot the objection to the Fendt Report. This, so the argument developed, was unfair and fundamentally

affected the IDT's right to a fair trial (a procedurally fair arbitration hearing). The inescapable conclusion, he said, was that

the report became admissible and the evidence allowable because the amendment rendered it so as an issue on the pleadings.

[28] I do not agree. Separating the objections as the IDT has done is, to my mind, placing form over substance. Admittedly, the second respondent was somewhat mischievous in the manner in which it sought to amend the statement of claim. The more elegant, and perhaps more traditional approach to the amendment would have been to have set it out "word-for-word", so to speak, rather than simply adopting the shortcut of incorporating by reference the contents of Mr Fendt's Report. The only objection that was capable of being dealt with was the objection to the amendment itself. That fell to be considered on its terms and, properly considered, if the objection was allowed, the evidence is then not capable of being lead because the issue is not on the pleadings. If, on the other hand, the objection is not allowed and, the amendment permitted, then the issue is one quite properly raised on the pleadings, thereby permitting evidence to be led to address it. Thus, in my view, the only issue before the arbitrator was the one relating

to the amendment. The objection to the evidence of Mr Fendt, and the objection to his report, is nothing more than a red herring.

[29] That view can perhaps be put into perspective by this example: all other things being equal a particular arbitration allows for the statement of claim to be amended. In the example I have in mind the one side of the coin concerns the delivery, long before the actual hearing of the arbitration, of an expert report (or a summary), and the notice referring to the intended evidence of the author of that report, which deals with an issue not covered in the pleadings. An objection to the reception of that report (or summary) and the calling of that evidence will be well mounted because the issue is not covered in the pleadings. The other side of that coin is concerned with, also long before the actual hearing of the arbitration, the delivery of an application to amend the statement of claim so as to introduce an issue, properly the subject matter of an arbitration, but one which is not yet prescribed. Absence any prejudice which cannot be cured by an appropriate order for costs one would be hard

pressed to think why

any objection to that amendment would be sustained. Once allowed the expert evidence in support of that new amended issue then follows the usual course by the delivery of a report (or summary) and the notice of intention to call evidence relating thereto. The question that must be asked is this: how different is that from the issue at hand? The only difference here is that the second respondent, perhaps in a misguided attempt to save time and/or effort, introduced the proposed amendment by incorporating by reference the words of the Fendt Report. The waters became muddied and the issues blurred when the report and the amendment and the objections thereto were dealt with at the same time. In truth and in fact the only issue before the first respondent was whether it was permissible to allow the amendment within the context of the arbitration and its issues before him.

[30] There is accordingly no merit in the first theme of the review and in my view the decision to consider the amendment alone without regard to the objection to the Fendt Report was correct in the circumstances and not a gross irregularity within the contemplation of s 33(1)(b) of the Act.

[31] The surviving theme of the review related to the contention that the first respondent exceeded his powers by allowing the second respondent to amend its statement of claim so as to include claims that had not been referred to arbitration.

[32] It is common cause that the sole source of the first respondent's powers is the terms of the arbitration agreement concluded between the parties. See *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd & Ors* [2007] ZASCA 163; 2008 (2) SA 608 (SCA) at par 30. Indeed, that statement is hardly contentious. Here the parties agreed that their disputes would be resolved by

arbitration. What happened here was that instead of there being a defined reference to arbitration in respect of properly delineated

disputes, the parties instead agreed that the ambit of their dispute would be defined by the arbitration pleadings. In addition, the parties agreed that the Rules would apply to the conduct of their arbitration.

[33] Rule 14 of the Rules provides for the delivery of the statement of claim. Rule 15 governs the delivery of the statement of defence and rule 16 likewise the delivery of a counterclaim. Rule 17 and Rule 18 provide for a reply and a replication respectively. Rule 19 deals specifically with amendments and submissions. It provides:

"19.1 The parties may not amend the submissions or deliver any additional submission or replication other than as provided in Rule 18, except by leave of the Arbitrator.

19.2 A claim may not be amended in such a manner as would exclude the claim from the scope of the arbitration agreement.

19.3 the Arbitrator may make such order as to costs incurred or wasted by such amendment, replication for further submission as he considers appropriate."

[34] The IDT contends, because the second respondent's original statement of claim, delivered by it consequent upon the agreement concluded between the parties at the first preliminary meeting, introduced the claims with the words that suggested that that document "... sets out... the various disputes it has with the [IDT]..."; that what was set out therein constituted the defined disputes referred to arbitration. Once that document had set out the limits of the dispute, no further dispute (or claim) could be added into the mix unless, I assume, by agreement between the parties.

[35] As originally pleaded the first dispute related to delays and consequent late payments resulting from what the parties referred to as successive terminations and reinstatements of the contract. The Fendt Report dealt with those late payments and also dealt with delays caused by the inability of the second respondent to access buildings on the site due to illegal strikes, certain site instructions, inclement weather and other miscellaneous

reasons.

[36] The IDT submits that apart from delays relating to terminations and reinstatements, all other causes for delay as delineated in the Fendt Report, constitutes new causes of action. The second respondent disputes this but in any event takes issue with the principle that amendments to the statement of claim were not permissible.

[37] Although I have some doubt in that regard, I shall assume, without deciding, that the amendment did indeed seek to introduce an additional cause (or additional causes) of action.

[38] It is abundantly clear (in situations like these) that the issues before an arbitrator are to be determined by reference to the pleadings. That much was also made clear in Hos+Med. However, I am of the view that it is perfectly legitimate to widen those issues by amendment, provided that that amendment is achieved within the context of what was agreed between the parties.

[39] Here the parties expressly adopted the Rules as being applicable to the unfolding dispute, and more particularly as being the means by which that dispute would be delineated. Part and parcel of that adoption was the adoption of a power accorded to the first respondent to allow amendments to the pleadings on application. I cannot conceive of any other interpretation being placed upon the adoption by the parties of the Rules.

[40] I am fortified in that view by the discussion in *Holford v Carleo Enterprises (Pty) Ltd* 9977/2013) [2014] ZASCA 195 (28 November 2014) where at para [7], discussing Hos+Med, the following was said:

"Where the pleadings in that matter define the issues to be decided, it was held not permissible to broaden the pleadings as a court could do along the lines set out in Shill v Milner [1937 AD 101]. In order to be broadened, the pleadings will have to be amended."

[41] To my mind, having regard to what the parties agreed at the preliminary meetings, and adopting the Rules as being the method by which their disputes would be defined, it cannot be that causes of action which existed (i.e. disputes and/or claims that existed) between the parties would be excluded simply because they were not contained in the initial pleading. The parties had agreed to refer all their disputes to arbitration and had agreed that arbitration was their preferred dispute resolution process. In that

context to suggest that a dispute which did exist at the time ought to be excluded defies logic, particularly when the arbitrator has the express power to allow same in terms of Rule 19.

[42] Mr Wallis, who appeared for the second respondent, submitted that as the parties elected to resolve all their disputes by arbitration and resolved further that no appeal would lie from the first respondent's decision, it was improper for the applicants to avoid the

consequences of that election and that resolution. His overarching submission was that the object of the present application amounted to an attempt by the applicants to elevate a discretionary matter of procedure on the part of the arbitrator to that of a gross

irregularity so as to bring their complaints within the ambit of s 33(1)(b) of the Act. I agree.

[43] In *Riversdale Mining Limited v Du Plessis* (536/2016)

[2017] ZASCA 007 (10 March 2017) the court dealt also with issues relating to whether an arbitrator exceeded his jurisdiction thereby committing a gross irregularity. At para [28] it held:

"[28] So, did the arbitrator exceed his jurisdiction in deciding the issue? 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'."

[44] Mr Berger, during argument, attempted to persuade me that *Riversdale Mining* is distinguishable and therefore not applicable in the present case. Admittedly a completely different set of facts obtained there but I cannot see why the principle set out in the extract I refer to above does not hold true.

[45] Accordingly, I can find nothing in the language of the agreement or in the language of the minutes of the preliminary meetings which indicate express exclusions from the arbitrator's jurisdiction, particularly when Rule 19 points in exactly the opposite direction.

[46] In the result I find that the first respondent was perfectly entitled to entertain the application for an amendment brought by the second respondent and was further at liberty to allow that amendment, as he did. In that process he committed no gross irregularity.

[47] The application is dismissed with costs.

Vahed J

Case Information:

Date of Argument:

6 September 2018

Date of Judgment:

27 September 2018

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D Berger SC (with N Mahlangu)

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