

SOUTH AFRICA / JUDGMENT

**Future Rustic Contruction (Pty) Ltd v
Spillers Waterfront (Pty) Ltd and
Another (9120/2010) [2011] ZAKZDHC
23; 2011 (5) SA 506 (KZD) (27 May 2011)
[2011] ZAKZDHC 23**

COURT

Kwazulu-Natal High Court, Durban

BEFORE

K. Swain

CASE / FILE NUMBER

9120/2010

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 9120/2010

In the matter between:

FUTURE RUSTIC CONSTRUCTION (PTY) LTD.APPLICANT

and

SPILLERS WATERFRONT (PTY) LTD.1st RESPONDENT

GRANT L. LISTER-JAMES N.O.2nd RESPONDENT

JUDGMENT Delivered on 27 May 2011

SWAIN J

- [1] At the conclusion of argument in this matter, the relief sought by the applicant was in the form of an amended order, in terms of the alternative prayer, contained in the notice of motion, reading as follows:

“In terms of Section 32 (2) of the Arbitration Act No. 42 of 1965 the award is remitted to the second respondent for reconsideration and the making of a fresh award with particulars as to

- (a) The final amounts awarded upon each of the applicant's twenty-two causes of action upon which the applicant's claim is based.
 - (b) The amount deducted for omitted work arising out of variation orders 1 to 18.
 - (c) The rate of interest on the amount of the final award.
 - (d) The date from which interest on the amounts awarded will commence to run".
- [2] The applicant no longer sought an order in terms of the primary relief sought in the notice of motion, namely that the award made by the second respondent as arbitrator in the arbitration between the applicant and the first respondent, published on 25 June 2010, be set aside in terms of Section 33 (1) (b) of the Arbitration Act No. 42 of 1965 (the Act). The grounds upon which the applicant sought such primary relief, which was contested by the first respondent, and which are not relevant to the alternative relief sought, accordingly no longer have to be considered, except in so far as they may be relevant to the issue of costs. The applicant's cause of complaint was that because of the paucity of information supplied by the second respondent (the arbitrator) the applicant was unable to correlate the globular award made by the arbitrator, to the twenty-one separate claims which the applicant alleged were the subject matter of the arbitration (the applicant no longer contending for twenty-two separate causes of action).
- [3] The main ground of opposition by the first respondent (the arbitrator having offered no opposition) to the relief sought, was that at a pre-arbitration meeting it was agreed between the parties inter alia that "The award will be without reasons". Mr. Mullins S C, who appeared for the first respondent, argued that because the parties agreed that the arbitrator need only furnish an award without reasons, no party to the arbitration could complain (or seek a remittal to the arbitrator) in order to obtain any details of the reasoning behind the award. He submitted that the applicant did not seek, and the reference did not require of the arbitrator, that he make separate awards in respect of the various items to be taken into account, in determining the balance of the adjusted contract price due to the applicant. The applicant sought a single award and that is what the arbitrator provided. On this approach it is a misnomer to describe the applicant's claim as comprising twenty- one causes of action, and to do so is simply an attempt to compel the arbitrator to furnish reasons for the award made, when he is not obliged to do so.
- [4] The argument of Mr. Harcourt S C, advanced on behalf of the applicant, was that the applicant's claim was one for payment of twenty-one separate claims for the prices of seventeen variation orders issued by the architect, appointed as the principal agent, in terms of an agreement concluded between the applicant and the first respondent, in terms of which the first respondent employed the applicant, to do alterations and additions to a shopping centre in Port Shepstone. The total claim, including additional preliminary general expenses and price escalation, totalled R1,520,625.00 together with interest and costs. He submitted that the primary concern of the applicant was not the reasons for the award, but simply the calculation of the twenty-one component parts of the globular award

made by the arbitrator.

- [5] Clearly, the furnishing of reasons in respect of the award made by the arbitrator, would encompass not only his reasons as to “why” he made the award, but also his reasons as to “how” he arrived at the award.
- [6] Consequently, unless the arbitrator was required in terms of the referral, to make separate awards in respect of each of the amounts claimed for each of the variation orders, as well as the amount claimed as a consequence of such variations, for preliminary and general expenses, as well as price escalation, this would constitute his reasons as to “how” he arrived at the amount awarded and would be precluded in accordance with the terms of the referral.
- [7] In my view, the answer to this issue must be found within the applicant’s statement of claim. In respect of each of the variation orders issued by the architect, details are furnished by the applicant of precisely how each claim is made up. In addition, precise details are furnished of the additional preliminary and general expenses claimed by the applicant, as a consequence of the extensions of time for practical completion, caused by the variation orders. In addition, precise details are furnished by the applicant of the amount claimed in respect of price escalation, in the cost of materials.
- [8] The claim of the applicant is then calculated by adding the amounts claimed in respect of each of the variation orders, the amount claimed in respect of preliminary and general expenses, and the amount claimed in respect of the price escalation. From these amounts are deducted credits due to the first respondent for work omitted in terms of variation orders numbers 18 and 18 A, as well as the amounts paid by the first respondent.
- [9] As regards the rate of interest awarded and the date from which it was to run, it is quite clear that the applicant alleged that the agreement provided for interest at the rate of one hundred and fifty percent of the prime overdraft rate. Specific allegations were made as to what the rate of interest was and in the prayer for relief, detailed claims were made as to the rate of interest and the dates from which specific rates of interest were to run. In the alternative interest was claimed at the legal mora rate.
- [10] The response of the first respondent was to deny these allegations and make specific averments in support of its denial of liability to make payment of the amounts claimed. The first respondent denied that the applicant was entitled to the interest claimed on the basis that “no amount is due to the claimant and therefore no interest is due to the claimant”:
- [11] It is self evident that in order to determine the dispute between the applicant and the first respondent, the arbitrator had to decide each of the amounts claimed in respect of the variation orders, as well as the preliminary and general expenses, as well as the price escalation. In addition, the arbitrator had to decide the rate of interest to be applied to any amount owing to the applicant and the date from which it was to run. Without a determination by the arbitrator on each of these issues, it would not be possible to decide

the applicant's claim. Without a decision by the arbitrator on each of these issues, the award would be "incomplete" and the award would be "vague and uncertain".

[12] I use the quoted terms advisedly, derived as they are from dicta in the cases of

Basson v Herman

1904 TS 98 at 100

Dutch Reformed Church v Town Council of Cape Town

(1898) 15 SC 14 at 23

both of which were quoted with approval by Selikowitz J in

Benjamin v Sobac South African Building & Construction

1989 (4) SA 940 (C) at 960 C – D and 962 I – J

as examples of factors to be considered in deciding whether a matter should be remitted to an arbitrator.

[13] In Basson, Innes C J in a judgment concurred in by Wessels J and Curlewis J stated the following where the objector claimed the award was not an award at all, as it was incomplete

'The Court has under our law a wide discretion, and could in my opinion refer the award back to the arbitrator to be rendered final and complete. But it does not follow that the Court will always follow that course; it will exercise its discretion. There may be circumstances when the Court would not only refuse to make an incomplete award a rule of Court but would treat it as null; but it does not follow that it is null unless the Court so determines.'

[14] In Dutch Reformed Church, Lord de Villiers found that the Court had a discretion to remit awards and suggested that remittal of an award would be appropriate to "render certain that portion which is somewhat vague and uncertain".

[15] Although both of these cases were concerned with the power of a court to remit a matter to the arbitrator, and as pointed out by Selikowitz in Benjamin, at 959 I, by reference to the decision in

Dickenson & Brown v Fishers Executors

1915 AD 166 at 174

it is to the legislation and not to the common law, to which a court must look to determine the courts' jurisdiction to review and set aside an award, and that at common law the court had a discretion to remit even where the application was to set aside the award, I regard the dicta as instructive in deciding whether "good cause" has been shown in terms of Section 32 (2) of the Act, to remit a matter to an arbitrator.

[16] As decided in

S A Forestry Company Ltd. v York Timbers Ltd.

2003 (1) SA 331 (SCA) at 338 I – J

the test for remittal “on good cause shown” is a phrase of wide import that requires the Court to consider each case on its particular merits, in order to achieve a just and equitable result in the particular circumstances. In order to decide whether it would be just and equitable to remit the matter to the arbitrator, it is necessary to examine, in respect of which items, awards were made by the arbitrator. The awards were made as follows:

[16.1] The arbitrator awarded a single amount in respect of variation orders 1 to 17 (paras 5 to 21 of the statement of claim) without specifying the amount awarded in respect of each variation order.

[16.2] The arbitrator awarded as a deduction (“omissions”) a single amount in respect of variation orders 18 and 18 A (paras 22 and 24 of the statement of claim) without specifying the amount awarded in respect of each variation order.

[16.3] The arbitrator made a specified award in respect of variation order No. 19 (para 25 of the statement of claim).

[16.4] The arbitrator made a specified award in respect of the claim for additional preliminary and general expenses (para 26 A of the statement of claim).

[16.5] The arbitrator made a specified award in respect of the claim for price escalation, in the cost of materials (para 26 B of the statement of claim).

[16.6] The arbitrator made a specified award in respect of the claim for interest at the rate of one hundred and fifty percent of the prime overdraft rate from 15 March 2008 (para 32 of the statement of claim) but then awarded interest on the balance owing by the first respondent, after deduction of the amounts awarded on first respondent’s counter-claim, at the mora rate, from the date of the award.

[17] In my view, it is therefore clear that the award made by the arbitrator was neither complete, nor certain and the information to be furnished by the arbitrator to render it so is as follows:

[17.1] The separate amounts awarded in respect of each of the variation orders 1 to 17 inclusive.

[17.2] The amount deducted in respect of variation order 18.

[17.3] The amount awarded for extra work done and materials supplied, as well as the amount deducted for omissions, in respect of variation order 18 A.

[17.4] The rate of interest awarded and the date or dates, from which such interest was to run in respect of the interest claimed in para 32 of the applicant’s statement of claim.

[18] An order that the arbitrator furnish specified information to render the award complete and certain, does not require the making of a “fresh” award by the arbitrator, nor the making of a “further” award by the arbitrator. All that is required is that the arbitrator reconsider the matter and furnish the specified details which he must have determined in making the award he did. That this Court has the power to remit the matter to the arbitrator to furnish the specified details, is comprehended by the terms of Section 32 (2) of the Act, which provides that a matter may be remitted to the Arbitration Tribunal not only for “reconsideration and for the making of a further award or a fresh award” but also “for such other purpose as the Court may direct”. In this regard the authors of the section headed “Arbitration” in

The Law of South Africa Volume 1

Second Edition para 603

state the following:

“Section 32

(2) does not contemplate a remittal by the court for explanation or elucidation”

quoting as authority for this proposition, the decision in

Silpert v Seymour

1932 T P D 329

Silpert however was concerned with the provisions of Section 15 of the Arbitration Ordinance No. 24 of 1904 – Transvaal (as repealed by the Act) which provided as follows:

“15 (1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire”.

Barry J, in whose decision Soloman J and Grindley-Ferris J concurred, held on appeal that the purpose for which remission was made in terms of Section 15, was for such matters to be reconsidered. The Court held that the order made by the Court a quo, for the arbitrators to explain their award, did not fall within the provisions of Section 15, stating at page 332

“If it did fall within the provisions of Section 15 then the arbitrators would have to reconsider the matter”.

Section 32 (2) of the Act, although envisaging a reconsideration of the matter by the arbitrator, provides that the remittal may be for a purpose, to be directed by the court, other than the making of a “further” or “fresh” award.. The wording of Section 32 (2) is therefore entirely different and consequently the decision quoted is no authority for the proposition stated. It is therefore unnecessary for an order to be made in the terms sought by the applicant, for the making of a fresh award. I do not regard such an order as one which violates the agreement between the parties that no reasons be furnished by the arbitrator. The arbitrator is asked to

explain neither why, nor how, he made the award that he did. All that is required of the arbitrator is to furnish the specified details to render the award complete and certain.

[19] As regards the issue of the costs of this application, Mr. Mullins S C, submitted that if the applicant was successful in obtaining relief in terms of the alternative prayer, the first respondent should not be mulcted in costs for the following reasons. The applicant had without good cause sought as primary relief, an order setting aside the award in terms of Section 33 (1) (b) of the Act and it was only in the applicant's replying affidavit, that the applicant indicated it would be seeking an order in terms of the alternative prayer. In addition, he submitted that it was only in argument when I suggested to Mr. Harcourt S C, that the alternative claim for the arbitrator to furnish particulars of the "calculation" of each of the amounts awarded, as well as the amounts deducted, would be tantamount to directing the arbitrator to furnish reasons for the amounts awarded, that he further limited the relief sought to one directing the arbitrator to furnish the separate amounts awarded. The fact remains however that at no stage did the first respondent withdraw its opposition to any of the relief sought. That the relief which I will grant is more limited than that which was sought at the hearing, I do not regard as of significance, in the light of first respondent's opposition to any relief being granted at all.

[20] In coming to the conclusion I have on the merits of the application, I have not overlooked the clearly expressed objective of the applicant, to seek a review of the arbitrator's award, in the event that the information furnished by the arbitrator as a result of this application, reveals a reviewable irregularity in the arbitration award. Such an objective cannot detract from the entitlement of the applicant to receive the defined information, on the grounds I have set out above.

The order I make is the following:

The matter is remitted to the second respondent for reconsideration and the second respondent is ordered to furnish to the applicant and the first respondent:

The separate amounts awarded in respect of each of the variation orders 1 to 17 in the applicant's statement of claim.

The amount deducted in respect of variation order 18 in the applicant's statement of claim.

The amount awarded for extra work done and materials supplied, as well as the amount deducted for omissions in respect of variation order 18 A in the applicant's statement of claim.

The rate of interest awarded and the date or dates, from which such interest was to run, in respect of the interest claimed in paragraph 32 of the applicant's statement of claim.

The first respondent is ordered to pay the applicant's costs.

K. SWAIN J /Appearances

Appearances:

For the Applicant : Mr. A.W.M. Harcourt S C

Instructed by : Wilhelm Styenberg Attorneys

C/o Mooney Ford Attorneys'

Durban

For the 1st Respondent : Mr. S.R. Mullins S C

Instructed by : Beall Chaplin & Hathorn Durban

No appearance for the Second Respondent

Date of Hearing : 06 May 2011

Date of Filing of Judgment : 27 May 2011

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