

SOUTH AFRICA / JUDGMENT

Hatch Africa (Pty) Ltd v Mabena N.O and Another (30266/22) [2023] ZAGPPHC 1973 (27 November 2023) [2023] ZAGPPHC 1973

COURT

North Gauteng High Court, Pretoria

BEFORE

Phooko AJ

CASE / FILE NUMBER

30266/22

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case No: 30266/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED

DATE:

27/11/2023

SIGNATURE

In the matter between:

HATCH
AFRICA (PTY)
LTD
Applicant
and
MICHAEL
HENDRICKS MABENA N.O.
First Respondent
MUNICIPAL
INFRASTRUCTURE SUPPORT AGENT
Second Respondent
Delivered: This
judgment was prepared and authored by the Judge whose name is
reflected and is handed down electronically
by circulation to the
Parties/their legal representatives by email and by uploading it to
the electronic file of this matter on
Caselines. The date for
hand-down is deemed to be 27 November 2023.

JUDGMENT

PHOOKO AJ

INTRODUCTION

- [1] This is a review application brought by the Applicant against an arbitration award (“the award”) on the basis that the arbitrator exceeded his powers when he inter alia dismissed the Applicant’s claim for additional fees for the work done for the Second Respondent.
- [2] The arbitration was conducted under the auspices of the Arbitration Foundation of South Africa (“AFSA”).

THE PARTIES

- [3] The Applicant is Hatch Africa (Pty) Ltd, a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa with registration numbers 1995/0072773/07 whose registered office is at 5[...] E[...] P[...] Road, Greenstone Hill, Johannesburg, South Africa.
- [4] The First Respondent is Michael Hendricks Mabena, N.O., an adult male practicing advocate and arbitrator whose principal place of business as a panel member of the AFSA is situated at Groenkloof Chambers, 2[...] F[...] R[...] Avenue, Groenkloof Ext 1[...].
- [4.1] The First Respondent delivered the award against the Applicant and is cited in these proceedings in his professional capacity as the arbitrator duly appointed by the AFSA. There is no relief sought against him.

- [5] The Second Respondent is the Municipal Infrastructure Support Agent (“the MISA”), a Schedule 3 public entity established within the Ministry for Cooperative Governance and Traditional Affairs (“CoGta”) and regulated in terms of the Public Services Act, of 1994 as amended whose principal place of business is at 1[...] H[...] R[...], Riverside Office Park, Letaba House, Centurion, South Africa.

THE ISSUE

- [6] The issue to be determined before this Court is whether the arbitrator inter alia exceeded his powers when he made a finding on the termination of the agreement and whether, as contended by the Applicant, the arbitrator committed gross irregularity by failing to deal with the effect of the signing of the Project Change Notices.

FACTUAL BACKGROUND

- [7] On 10 April 2018, the Applicant and the Second Respondent concluded a service level agreement (“the SLA”) wherein the Applicant was to assist the Second Respondent in developing the Municipal Development Plans (“the MDP”) in respect of 24 municipalities for an amount of R15 000 000,00.
- [8] The SLA was to take place over 3 years. The methodology development of the MDP was conducted as per the Inception Report that was prepared by the Applicant and subsequently approved via a signature by one, Mr. Ngobeni, a representative of the Second Respondent.
- [9] The Inception Report inter alia contained the obligations of the parties, timeframes, and costs for each phase of the project. Each phase of the project was time-sensitive and time frames had to be adhered to as per the Inception Report. The projects were to take place as follows:
- [9.1] Phase 1: 2017/2018 financial year for the sum of R5 820 142.86.
- [9.2] Phase 2: 2018/2019 financial year for the sum of R4 350 548.45.
- [9.3] Phase 3: 2018/2019 financial year for the sum of R6 136 298.48.
- [10] Clause 17 of the SLA and the Inception Report contained provisions that had to be invoked by the Applicant where there was a change due to delays and a change in scope in the methodology. Any change in methodology had to be recorded in the Project Change Notices and approved by the Second Respondent.
- [11] The Applicant submitted various Project Change Notices in respect of phases 1 and 2. According to the Applicant, the Project Change Notices were signed and approved by the Second Respondent through its representative, Mr. Ngobeni. The Second Respondent disputed the approval of the Project Change Notices.

- [12] Around September 2020, the Second Respondent rejected the Applicant's invoice 9[...]8 on the basis that it was already invoiced. This resulted in the Applicant submitting a notice of intention to submit the SLA between the parties.
- [13] The Second Respondent thereafter requested the Applicant to justify the claims made in invoice 9[...]6. However, in October 2020, the Applicant terminated the SLA on the basis that the Second Respondent failed to pay invoices related to additional costs occasioned by the change in methodology.
- [14] Post the termination, the Second Respondent requested the Applicant to submit a financial reconciliation for the work completed by the Applicant, the Applicant submitted a reconciliation reflecting an amount of R6 283 907.78. The Second Respondent disputed the said amount.
- [15] The Applicant referred the matter to arbitration claiming an amount of R6 373 105.71 in respect of phases 1 and 2 as per the alleged change in methodology. The arbitrator found that there was no change in methodology that the Second Respondent had never agreed to for an increase in costs and that the Applicant was unable to justify the demobilisation costs. Consequently, the arbitrator dismissed the Applicant's claims.
- [16] Aggrieved by the outcome of the arbitration, the Applicant now seeks to review and set aside the arbitrator's award. The Second Respondent opposes the review application.

APPLICABLE LAW

- [17] Arbitration reviews are regulated by the Arbitration Act[1] and section 33 (1)(b) provides recourse to courts to a party not satisfied with the award ("the Act"). Section 33 (1)(b) of the Act provides as follows:

"(1) Where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers, 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."

- [18] The aforesaid legal framework for the review of the arbitration tribunal award was restated, with additions, in Eskom Holdings Limited v Joint Venture of Edison Jelano (Pty) Ltd and Others[2] where the court said:

"Section 33(1) of the Arbitration Act 42 of 1965 regulates the 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 his 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”.

[19] In *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another*[3], it was held that:

“It follows that there is no rule of law that an arbitrator cannot enjoy jurisdiction to decide matters not set out in the pleadings. What competence the arbitrator enjoys depends upon what is contained in the arbitration agreement. This holding is an application of the principle of party autonomy. It is also consistent with the Arbitration Act. An arbitration agreement is defined in the Arbitration Act to mean a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement.” (Own emphasis added).

[20] This entails that the source of the arbitrator’s powers emanates from the agreement and/or those that have been agreed to by the parties. Consequently, the arbitrator has no discretion whatsoever to exercise powers that have not been conferred onto him/her.

[21] Considering the above, I now turn to consider the circumstances of this case taking into consideration the written and oral submissions of the parties to ascertain whether the Applicant has made out a case for the relief sought.

APPLICANT’S

SUBMISSIONS

[22] The Applicant argued that section 1 of the Act inter alia defines an arbitration agreement as any agreement providing for the reference to arbitration of any existing dispute relating to a matter specified in the agreement. To this end, counsel contended that the arbitration agreement defines the issues that the arbitrator is called to pronounce upon.

[23] Relying on inter alia *Hosmed Medical Aid Scheme v Thebe Ya Bophelo Healthcare*, [4] counsel averred that the Supreme Court of Appeal has held that:

“...it is clear that the only source of an arbitrator’s power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded”.

[24] Following the above, counsel contended that the terms of the arbitration agreement between the parties required the arbitrator to pronounce on the following:

“29.1. What was the agreed Methodology for the execution of the

services.

29.2. Was there a change in the Methodology, if so what was the change.

- 29.3. Did the change in Methodology have a cost and time consequence for the Claimant, which exceeded the agreed budget allocation per phase.
- 29.4. Did the Defendant agree to pay the Claimant for the increase in costs claimed.
- 29.5. Should the claimant be compensated for the increase in costs claimed.
- 29.6. Has the Defendant overpaid the Claimant as claimed in the counterclaim.
- 29.7. Did the Defendant dispute the invoices in question as required by clause 7 of the Agreement.
- 29.8. Following the termination of the Agreement, the Claimant claimed demobilization costs in accordance with clause 13.6.2 of the Agreement. Is the Claimant entitled to these costs.
- 29.9 Whether the Claimant is entitled to claim the full amount of the contract when it has only rendered services in the amount of R9 464 294.60.”
- [25] Based on the above, the Applicant argued that the non-variation clause outlined in clause 24 of the SLA did not form part of the issues for determination. Consequently, the Applicant argued that the arbitrator’s finding on the non-variation clause when dismissing the Applicant’s claims amounted to an excessive exercise of powers that were not conferred onto him.
- [26] Furthermore, the Applicant inter alia argued that the “lawfulness of the termination of the Agreement is [was] raised mero moto”. In other words, it was never raised by the Second Respondent or by the parties at the hearing arbitration, and it was not one of the issues for **determination.**
- [27] In addition, the Applicant averred that the arbitrator committed an act of gross irregularity because the Applicant had amongst other things argued that by appending his signature on the document, Mr Ngobeni, the Second Respondent’s project manager, had bound the Second Respondent with the contents of the document.
- [28] To this end, counsel contended that the Project Change Notices formed part of the change management process that was agreed to by the parties and was going to lead to an agreement on the change of the methodology. As a result, this is an issue that the arbitrator ought to have pronounced on it based on the information that was placed before him. In addition, counsel argued that during his closing arguments, he “drew the arbitrator’s

attention to case law dealing with the effect of appending ones signature on the document”.

[5] According to counsel, the failure to interpret the aspect of the signing of the Project Change Notices resulted in the arbitrator misconstruing the “whole nature of the inquiry” and therefore did not give the Applicant a fair hearing on the determination of the issues that were interlinked with the finding on the signature.

- [29] In light of the above submissions, counsel argued that the arbitrator exceeded the powers conferred upon him and committed gross irregularities. Therefore, counsel submitted that the award should be set aside.

SECOND RESPONDENT’S SUBMISSIONS

- [30] The Second Respondent argued that the Applicant was selective in the reading of the award and did not synthesize “the logic that led the Arbitrator to reference the non-variation clause”.
- [31] Counsel for the Second Respondent contended that since the SLA governed the contractual relationship between the parties, the Applicant “bore the onus to prove that if there was a change in methodology, such change was effected in terms of SLA (compliance with the non-variation clause)”. According to the Second Respondent, the Applicant failed to discharge the onus of proof in that there was a change in methodology and that the Second Respondent managed to place evidence to the effect that no such change in methodology had been approved. Therefore, the Second Applicant argued that a “reference to the non-variation clause was necessary and intricately linked to claimant’s case”.
- [32] Relying on article 11 of the AFSA, counsel argued that the arbitrator has wide discretion and powers to receive and consider oral or written evidence as he/she deems relevant. Counsel referred this Court to the decision of this division in *Kruinkloof Bushveld Estate NPC v The Chairperson of the Panel of Appeal Arbitrators and Others*[6] where it was held that:

“... If the issues decided by the arbitrator fall within the terms of the agreement that the parties agreed the arbitrator should decide then, matters of substantive law aside, the arbitrator is said to have jurisdiction. Decisions made by an arbitrator on issues falling within her jurisdiction are within her powers, decisions made on issues falling outside her jurisdiction are instances of ‘an arbitrator exceeding her powers’. Of course there are other ways in which an arbitrator can exceed her powers but those do not arise in this matter” (footnotes omitted).

- [33] Based on the above, counsel argued that the parties had placed an issue for a determination that relates to a change in methodology before the arbitrator. Consequently, counsel submitted that the determination of the validity of the change in methodology involved the consideration of evidence of compliance with the SLA. According to counsel, the arbitrator was therefore “within lawful bounds to consider such evidence and apply the provisions of the SLA to such evidence”.
- [34] Counsel argued that clause 13.6.2 of the SLA provides that:

“13.6.2 in the case of any suspension or termination of this Agreement, MISA will pay the Service Provider for all Services provided and costs incurred up to the effective date of suspension or termination, including all reasonable demobilisation costs”.

[35] Counsel averred that even though the award refers to the cancellation of the contract as unjust in paragraph 4, the crux of the arbitrator’s reasoning turned on the fact that the Applicant was unable to justify the demobilization costs.

[36] About the signature, the Second Respondent argued that even though the signature of Mr Ngobeni is on Project Change Notice 006, it was “simply an acknowledgment of receipt and not a commitment to make payment for the additional costs”. According to counsel, any such commitment would inter alia not supersede the regulatory framework of the Public Service Management Act[7] (“the PSMA”).

[37] The Second Respondent directed this Court to the decision of the Supreme Court of Appeal in Provincial Government of the Eastern Cape and Others v Contractprops 25 (Pty) Ltd[8] where it was held that:

“...The fact that respondent was misled into believing that the Department had the power to conclude the agreements is regrettable and its indignation at the stance now taken by the Department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were ultra vires the powers of the Department and they cannot be allowed to stand as if they were intra vires”.

[38] Counsel contended that although the facts of the aforementioned case were distinguishable from the present one, “the golden thread remains the same and is identical” and that the prescribed steps contained in the PSMA and other regulations should be followed as failure to do so will negatively affect any agreement concluded between the parties.

[39] Counsel further argued that the contradictions identified by the Applicant “are not of a degree that would either materially entitle the applicant to the relief” set out in section 33 of the Act or “materially influence the outcome of the proceedings, and inadvertently influence the outcome of this review application”.

[40] Relying on cases such as Pepcor Retirement Fund and Another v Financial Services Board and Another[9] where it was “indicated” that:

“Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review

provide.”

- [41] Counsel submitted that the inaccuracies identified by the Applicant should be considered with caution.

EVALUATION OF EVIDENCE AND SUBMISSIONS

- [42] From the onset, I need to indicate that even though I have considered all the grounds for the review raised, I do not propose examining all of them in this judgment.

- [43] Concerning the submission that the arbitrator exceeded his powers, a simple glimpse of the issues that were agreed to by the parties for determination is reproduced below as follows:

claimed demobilization costs in accordance with clause 13.6.2 of the Agreement. Is the Claimant entitled to these costs.

- [44] However, a perusal of the award reveals that the arbitrator went further than what is contained in the above quotation to deal with the non-variation clause and the lawfulness of the termination of the SLA *mero moto*. Counsel for the Second Respondent tried to persuade this Court that even though the award refers to the cancellation of the contract as unjust, the crux of the arbitrator’s reasoning turned on the fact that the Applicant was unable to justify the demobilization costs. I am not persuaded by this submission. The source of the arbitrator’s powers was spelled out as per the issues that were set out for determination. That is where he derived his powers from.

- [45] In *Minister of Public Works v Haffejee NO[10]* it was held that:

“...Where a tribunal is a creature of statute with no inherent powers (such as a compensation court), it cannot by its own ruling or decision confer a jurisdiction upon itself which it does not in law possess” (Own emphasis added).

- [46] Counsel for the Applicant referred this Court to several authorities regarding the essence of the exercise of powers that are outlined in the agreement and the extent to which such powers ought to be exercised. This was not disputed by the Second Respondent. It has long been settled by our courts that “what competence the arbitrator enjoys depends upon what is contained in the arbitration agreement”.[11] The agreement is the source of power “that must be exercised within its lawful parameters and for the purpose it has been given”.[12]

- [47] Considering the above, the evidence before this Court points me to one conclusion, exceeding of authority was shown on the part of the arbitrator in terms of section 33(1)(b) of the Arbitration Act. This occurred when the arbitrator ventured into issues that were beyond his scope. In other words, this Court is persuaded by the Applicant’s submissions and thus left with no other option but to accept that the arbitrator exceeded his powers when he opted to go beyond the issues that were set out by the parties for determination and dealt with the non-variation clause and the lawfulness of the termination of the SLA.

[48] On the issue of gross irregularity, fair hearing of the issues, and signature, the test is whether the arbitrator's conduct

prevented a fair trial of the issues.[13] The Applicant's main contention is that the arbitrator, despite having his attention drawn to several cases dealing with the effect of appending one's signature on the document, did not deal with this aspect. A reading of the award shows that the arbitrator inter alia stated that "I also accept that the PCA is to serve as an agreed record of delays, costsmanaged going forward"[14] and in the same paragraph he continues to indicate that "the signing of the PCA does not mean MISA was responsible for accepting and going to settle any additional costs". In my view, this is not only confusing but contradictory. It is not clear as to why the evidence of the Applicant regarding

signatures was disregarded but the explanation of Mr Ngobeni that he did not approve was accepted.

[49] The Second Respondent's argument to the effect that the signature of Mr Ngobeni on Project Change Notice 006 was "simply an acknowledgment of receipt and not a commitment to make payment for the additional costs" deserves attention. There is nowhere in the award that this aspect is extensively dealt with. In my view, the aspect of a signature and the effect thereof ought to have been given more attention. I am mindful that the Project Change Notice 006 contains words such as "approved by client" and that there is a signature next to the words "approved by client". Further, there are also words such as "the client has advised, on several occasions that there are no additional funds available..." All these factors lead me to one direction, these aspects ought to have been fully addressed by the arbitrator regardless of whether any commitment via signature would not supersede the regulatory framework of the PSMA.

[50] I do not understand the point that that counsel for the Second Respondent sought to make when she referred this Court to the decision of Provincial Government of the Eastern Cape and Others v Contractprops 25 (Pty) Ltd because the two cases are different from one another. This is something that counsel for the Second Respondent also admitted. However, she went on to state that "the golden thread remains the same and is identical" and that the prescribed steps contained inter alia should be followed as failure to do so may render any agreement concluded between the parties invalid. I am of the view that the reference to the aforesaid case is misplaced. Unlike in the present case, there was a clear disregard of the Tender Board processes in Provincial Government of the Eastern Cape and Others v Contractprops 25 (Pty) Ltd. Furthermore, the Respondent was misled into believing that the Department of Education, Culture, and Sport of the Eastern Cape Province had the power to conclude the agreements. These features are absent in the present case.

[51] Therefore, I am of the view that the conduct of the arbitrator by failure to deal with the effect of a signature on the document prevented a fair trial of the issues.[15] Consequently, his conduct amounted to a gross irregularity that warrants intervention by this Court.[16]

- [52] Concerning contradictions in the award, I have carefully perused the award. It is difficult to read. It is full of inconsistencies some of which I have referred to in this judgment. Furthermore, the record further reveals that there was evidence from one of the Second Respondent's officials stating that there was a change in methodology[17] but the award states that there was no change in methodology.[18] However, counsel for the Second Respondent argued that the contradictions identified by the Applicant "are not of a degree that would either materially entitle the applicant to the relief". To bolster her argument, counsel quoted the decision in *Pepcor Retirement Fund and Another v Financial Services Board and Another*. [19]
- [53] Again, I do not understand the relevance of referring this Court to the aforesaid warning. In *Pepcor*, the decision maker would not have made the decision had he known of the true facts. In this case, issues such as the alleged change in methodology were brought to the attention of the Second Respondent, and the arbitrator.[20] In any event, it was counsel's concession during oral submissions before this Court that the award was full of confusion. For counsel to now say that the inconsistencies "are not of a degree that would either materially entitle the applicant to the relief" or "materially influence the outcome of the proceedings, and inadvertently influence the outcome of this review application" is unfortunate, to say the least.
- [54] In light of the above, these grounds alone are sufficient to set the whole of the arbitrator's award aside. I therefore need not venture into other issues raised. Even if I were to do so, I would still reach the same conclusion because of the evidence

regarding the ineloquent award.

ORDER

[55] I, therefore, make the following order:

- (a) The arbitration award made by the First Respondent marked annexure "HA2" and dated 26 April 2022 is hereby reviewed and set aside.
- (b) The arbitrable disputes are remitted to the Arbitration Foundation of Southern Africa for reconsideration by an arbitrator to make a fresh award in accordance with sections 32(2) of the Arbitration Act, 1965 (as amended).
- (c) The Second Respondent is ordered to pay the costs of the application on a party and party scale.

M R PHOOKO

ACTING JUDGE OF THE HIGH COURT,

DIVISION, PRETORIA

APPEARANCES:

Counsel for the Applicant: Adv N Mahlangu Instructed by: Fluxmans INC Counsel for the First Respondent: n/a Instructed by: n/a Counsel for the Second Respondent: Adv LJ Mboweni Instructed by: State Attorney, Pretoria Date of Hearing: 7 September 2023 Date of Judgment: 27 November 2023

[1] 42 of 1965.

[2] (177/2020)

[2021] ZASCA 138 (6 October 2021) at para 21.

[3] (286/2022)

[2023] ZASCA 43 at para 12.

[4]

[2007] SCA 163 (RSA) 015/07 at para 30.

[5] See For example, Sprindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd

[1985] ZASCA 111; [1986] 1 All SA 384 (A) at paras 22-23.

[6] [2022] ZAGPJHC 268; 2022 (6) SA 236 at para 38.

[7] 11 of 2014.

[8] [2001] 4 All SA 273 (A) at para 13.

[9] (198/2002)

[2003] ZASCA 56; [2003] 3 All SA 21 (SCA) (30 May 2003) at para 48.

[10] 1996

(3) SA 745 (SCA) at para 11.

[11] Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another

[2021] ZASCA 138 at para 21.

[12] Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd and Another 2023

(4) BCLR 397 (CC) at para 40.

[13] Eskom Holdings Limited v The Joint Venture of Edison Jehamo (Pty) Ltd and KEC International Limited and Others

[2021] ZASCA 138 at para 22.

[14] Arbitration award at para 23.14.

[15] See Telcordia Technologies Inc v Telkom SA Limited Telcordia [2006] ZASCA 112; 2007

(3) SA 266 (SCA) at para 58.

[16] See Eskom Holdings Limited v The Joint Venture of Edison Jehamo (Pty) Ltd and KEC International Limited and Others (case no 177/2020) [2021] ZASCA 138 at para 22.

[17] See Record Vol 14 Caselines at 006-1377.

[18] Award at paras 23.1 – 23.2.

[19] As previously set out in paragraph 40 of this judgment.

[20] Transcribed record, at page 1475.

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