

SOUTH AFRICA / JUDGMENT

ISA & Partners (Pty) Ltd v M3D Suppliers (Pty) Ltd t/a S & W Consulting and Another (A117/2020) [2021] ZAFSHC 38 (9 February 2021)

[2021] ZAFSHC 38

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue, Majosi

CASE / FILE NUMBER

A117/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Reportable:

NO
Of Interest to other Judges: NO
Circulate to
Magistrates: NO
Case
number: A117/2020
In

the matter between:

ISA
& PARTNERS (PTY) LTD
and
M3D
SUPPLIERS (PTY) LTD t/a S&W CONSULTING
GEORGE
GEORGHIADES N.O.
Applicant
1st
Respondent
2nd
Respondent

CORAM: DAFFUE
J et MAJOSI AJ
ORDER
GRANTED ON: 1
FEBRUARY 2021

JUDGMENT

BY: DAFFUE J

REASONS

DELIVERED: 9 FEBRUARY 2021

REASONS

I

INTRODUCTION

- [1] On Monday, 1 February 2021 we heard arguments in an opposed application via a virtual hearing on the Webex internet platform. The parties were informed that judgment would be delivered within a few days by electronically forwarding same to the email addresses of the attorneys and advocates concerned. Later that day we decided to issue orders which were electronically forwarded to both counsel and the two sets of attorneys. For the sake of completeness, the orders are incorporated herein as follows:

“1. The applicant’s application for leave to supplement its application papers is dismissed with costs.

2. The applicant’s main application is dismissed with costs.
3. Reasons shall be delivered electronically in due course.”

These are the reasons.

- [2] The civil action instituted by the plaintiff (the first respondent in this application) against defendant (the applicant in this application) in the Regional Court, Welkom under case no 427/2014 could not be finalised and dragged on until 7 March 2018 when the parties agreed that the action be stayed pending the determination of the disputes on arbitration. An arbitration hearing eventually took place from 17 to 20 June 2020 in Pretoria whereupon the arbitrator handed down his award on 16 July 2020. The unsuccessful party in the arbitration proceedings, being dissatisfied with the outcome, approached this court for relief. The provisions of s 33 of the Arbitration Act, 42 of 1965 (“the Act”) and the possible applicability of rule 53 of the Uniform Rules of Court will be considered in this judgment.

II PARTIES

- [3] Applicant is ISA & Partners (Pty) Ltd, a company with its principal place of business and registered address in Welkom, Free State Province. It has been represented in the proceedings before us by Adv EG Lubbe, duly instructed by Webbers Attorneys, Bloemfontein.
- [4] First respondent is M3D Suppliers (Pty) Ltd, t/a S&W Consulting, an entity that conducts business as consulting and electrical engineers with registered address in Harrismith, Free State Province. The first respondent was represented in the proceedings before us by Adv J Eastes of Pretoria, duly appointed by Jarvis Jacobs Raubenheimer Inc, who made use of Rossouws Attorneys in Bloemfontein as the local correspondents.
- [5] The second respondent is Mr George Georghiades who acted as arbitrator in the arbitration proceedings. He does not oppose the application and played no role in the High Court proceedings.

III THE RELIEF SOUGHT

- [6] Ex facie the notice of motion applicant sought the following relief:

“1. The award of the Second Respondent dated 16 July 2020 is set aside;

2. The dispute between the applicant and the first respondent is referred to hearing afresh before a newly constituted arbitration tribunal;
3. The First Respondent to be held liable for the costs of the application;
4. Granting such further and/or alternative relief as the above Honourable Court deems meet.”

- [7] In support of the relief sought applicant’s deponent, Mr Christopher Kimaru deposed to an extremely brief affidavit. He is the project manager and director of applicant and the person that not only attended the arbitration proceedings, but testified on behalf of applicant. The following issues were raised in the brief affidavit:

7.1 The application is brought in terms of s 33(1) of the Arbitration Act, 42 of 1965[1];

7.2 The deponent has “serious concerns regarding the selection and appointment of Georghiades and will more fully deal with this issue after the record has been filed.”[2]

7.3 The deponent was advised that he was entitled to supplement his affidavit and the notice of motion on receipt of the record of proceedings.[3]

7.4 In an attempt to make out a case the following legal conclusions were arrived at without alleging any facts whatsoever:

“Suffice to state that in considering the award it is clear that Georghiades misconducted himself in relation to his duties as arbitrator, that he has committed gross irregularities in the conduct of the arbitration proceedings and that he has exceeded his powers.”[4]

The quoted sentence is merely a regurgitation of s 33(1)(a) and (b) of the Act. Applicant failed to place essential evidence before the court in support of its case. It is also apparent from the contents of the notice of motion that applicant was under the impression that the procedure set out in rule 53 of the Uniform Rules of Court was applicable.[5]

IV POINTS IN LIMINE

[8] Two points in limine were raised by first respondent in the answering affidavit. It is claimed in the first place[6] that the process envisaged in ss 33(1) and (2) of the Act is sui generis and that the provisions of rule 53 do not apply. It is apparent from the notice of motion and founding affidavit that applicant seeks an order that second respondent's award be set aside and not that it or any proceedings be reviewed. This alleged

irregularity was brought to the notice of applicant in a letter dated 27 October 2020, annexed as annexure "M1".[7] Applicant was informed in no uncertain terms that its application was defective, that it did not have a right to supplement the founding affidavit and that first respondent would proceed to deliver its answering affidavit which it did on 10 November 2020.

Consequently, first respondent sought dismissal of the application with costs on an attorney and client scale.

[9] The second point in limine was raised in the alternative. In terms thereof, and only if it was found that rule 53 was applicable, then the notice of motion does not set out the decision or proceedings sought to be reviewed, but furthermore, the founding affidavit does not set out the grounds, the facts and the circumstances upon which applicant relies and consequently, there was a failure to comply with rule 53(2). Therefore, if the application was considered as an application in terms of rule 53, it was also totally defective insofar as no cause of action was disclosed. In this regard, no facts were relied upon in the founding affidavit. Bald and unsubstantiated allegations were made in order to copy the requirements of s 33(1) as indicated supra. It must be mentioned at this stage already that insofar as rule 53 is not applicable, applicant did not have a right to deliver a supplementary founding affidavit as envisaged in rule 53(4) as it also accepted in the founding affidavit in support of the application for leave to file a supplementary affidavit.[8]

V THE APPLICATION FOR LEAVE TO FILE A SUPPLEMENTARY AFFIDAVIT

[10] Applicant did not heed the warning contained in the letter dated 27 October 2020, annexure "M1", whereupon first respondent filed its answering affidavit on 10 November 2020. Insofar as the court files were marked as a rule 53 application, the matter was set down for hearing of the "review" application on 1 February 2021. On 11 December 2020 these files were allocated to the scribe hereof and an acting judge still to be appointed. On that same day I requested my secretary to issue emails to the legal representatives of the parties, indicating inter alia that no supplementary affidavit was filed as applicant intended to do, but if rule 53 was not applicable, applicant did not have a right to supplement and furthermore, that notwithstanding the two points in limine taken by first respondent, applicant had failed to

reply thereto. First respondent's attorneys indicated that they were ready to proceed on the 1st of February 2021, but applicant's attorneys held a different view.

- [11] About a month after my emails and two and a half months after the written warning of first respondent's attorneys, a notice of motion was filed on 7 January 2021 in terms whereof applicant sought leave to supplement its papers. In the supplementary affidavit applicant's deponent made certain allegations in an attempt to support its claim that second respondent's award should be set aside. I shall briefly return hereto.
- [12] On 15 January 2021 first respondent gave written notice to oppose the application to supplement and also filed an answering affidavit on 29 January 2021 to which applicant did not reply as is also the case in the main application.
- [13] When the matter was heard, I directed that we be addressed on all disputes to prevent a situation where we had to adjourn in order to consider judgment on a separate issue. Consequently, I shall deal with the application for leave to file a supplementary affidavit when the evidence and submissions of counsel are evaluated.

VI SECTION 33 OF THE ARBITRATION ACT

- [1] Founding affidavit para 7
- [2] Ibid para 9 p 8
- [3] Ibid para 10
- [4] Ibid
- [5] Paras
- (a) & (b) on p 2 & para (c) on p 3
- [6] Paras 8 & further pp 56 & 57
- [7] Paras 8 – 13, pp 56 – 58 & P 74
- [8] Para 3, p 176
- [9] Government of the Republic of South Africa v Midkon (Pty) Ltd and another 1984
- (3) SA 552 (T) p 558D - I
- [10] 2007
- (3) SA 266 (SCA)
- [11] Ibid para 32
- [12] 2009
- (4) SA 529 (CC)

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- [13] Ibid para 219
- [14] Ibid para 235
- [15] Loc cit para 67
- [16] Ibid para 85
- [17] Ibid para 86
- [18] Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at p 200D;
- Wightman t/a JW Construction v Headfour (Pty) Ltd and another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 12;
- [19] 1979
- (1) SA 626 (A) at 635H – 636C
- [20] On 17 June 2020, 7 minutes and 4 seconds into the record
- [21] Pleadings p 104
- [22] Record pp 115 & 116
- [23] Annexure “M7” p 117
- [24] Annexure “M8” p 118 - 124
- [25] It is first respondent’s case that at no stage before, during or after the arbitration hearing, or even before or after the ruling by the arbitrator until 16 September 2020 when the application was instituted, was a complaint raised about the arbitrator, his appointment or any other issue pertaining thereto. See paras 39.30 – 39.31 pp 71 & 72 of the record as well as annexure “M12”, the affidavit of Mr Raubenheimer of Jarvis Jacobs Raubenheimer attorneys.
- [26] Paras 3.1 and 4, p 190
- [27] Para 7 of the founding affidavit, p 178
- [28] Para 7 p 8 of the record
- [29] Record p 46
- [30] Para 2.3 p 45 of the record
- [31] Paras 3.1 and 4, p 190
- [32] Annexure “FA1,” 181
- [33] Para 3, p 176
- [34] Para 14 supra

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Prepared on 13 October 2026 · Esheria