
SOUTH AFRICA / JUDGMENT

K H Construction CC v Jenkins N.O. and Another (CA326/2017) [2018] ZAECHGHC 37 (22 May 2018) [2018] ZAECHGHC 37

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Pickering, Chetty, Tokota

CASE / FILE NUMBER

CA326/2017

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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: CA326/2017

Date heard: 14 May 2018

Date delivered: 22 May 2018

In the matter between

K H CONSTRUCTION CC

Appellant

Vs

DENNIS JENKINS N.O.

First Respondent

CONRAD WINTERBACH

Second Respondent

JUDGMENT

PICKERING J:

- [1] This is an appeal to the Full Bench of this Division against the whole of the judgment and order of the court a quo dismissing an application by the appellant for the setting aside of an arbitration award made by the first respondent, namely Mr. Dennis Jenkins.
- [2] Appellant is a close corporation carrying on business in the construction industry in Port Alfred. During 2012 appellant and the second respondent herein, Mr. Conrad Winterbach, entered into an agreement in terms whereof appellant undertook to construct a residential dwelling for second respondent at an agreed tender amount of R2 946 719,00. Unfortunately various disputes arose between the parties regarding the issue in particular as to whether or not the works had been properly completed and the amount, if any, of the monies due to appellant in terms of the agreement. In due course first respondent was appointed as an arbitrator by the Master Builders Association in terms of a Joint Building Contracts Committee Principal Building Agreement to determine the dispute.
- [3] At the hearing of the arbitration proceedings appellant adduced the evidence of three expert witnesses as well as the evidence of its managing member, Mr. Heny. Second respondent gave evidence in chief but, shortly after his cross-examination had commenced, walked out of the proceedings and refused to return despite being afforded the opportunity to do so at a later date. Thereafter, during July 2016, first respondent released his award after appellant had paid both its own and second respondent's portion of first respondent's fees.
- [4] Appellant then launched an application in the court a quo seeking, inter alia, an order setting aside first respondent's award on review as well as an order pursuant to the provisions of section 33(4) of the Arbitration Act no 42 of 1965 for the appointment of a new arbitrator to determine the dispute between the parties afresh. This application was dismissed and leave to appeal against the dismissal thereof was refused. Appellant now appeals to the Full Bench with the requisite leave having been granted by the Supreme Court of Appeal.
- [5] In its statement of claim in the arbitration proceedings appellant stated that it had attended to the construction of the residential

dwelling, had attended to all variations as requested by second respondent, and had completed the same on or before the end of

December 2013. It alleged that second respondent had taken occupation of the dwelling before the completion of the works on 1 October 2013. It stated further that it had submitted a "Practical Completion Progress Claim" on 5 December 2013 in the sum of R614 634,00 in respect of works done up to that date and in respect of which second respondent made part payment on 26 February 2014 in the sum of R300 000,00, without explanation.

- [6] A "Final Completion Progress Claim" was delivered to second respondent on 16 November 2014 in respect of works done up to 14 November 2014. Applicant alleges that "of the total sum due and payable, comprising work done together with interest on late payment, and the 30% mark-up" second respondent refused to pay the outstanding balance of R567 312,00.

[7] In his Statement of Defence and Counterclaim second respondent denied that appellant had completed the works as alleged by him and stated that applicant should in the circumstances not have issued a practical completion progress claim, much less a final completion progress claim. He contended that the appellant's claim for payment should be dismissed and that appellant should be required to repay to him the amount of R570 280,00, this being the amount which he had overpaid to appellant on the contract. He submitted further that appellant should be required to pay to him "the costs of completing the contract, the amount of his damages claimed and contra charges to the extent of R851 940,00." With regard to his claim for damages he stated that first respondent, "having regard for the conservative nature of the calculation of damages and the extent of the incalculable damages, should exercise his authority to impose a punitive damage award" against appellant. At no stage did he seek an order to the effect that appellant should be required to remedy the alleged defects.

[8] In his award first respondent found that the amount outstanding and owing by second respondent to appellant was the sum of R399 150,00,20

which he awarded to appellant. He found however that "the works have never been completed and until they are completed to the satisfaction of the defendant as provided for below there is no payment due to the claimant." In essence therefore he made an order for specific performance despite the fact that second respondent had not sought such an order but had only claimed damages in consequence of appellant's alleged breach of contract.

[9] These uncompleted works related, inter alia, and in particular to the excessive and ongoing sagging of the major structural beam; the glazing on the north and west faces of the building; the replacement of all the carpets and underlay in the dwelling and the construction of a chimney to the braai.

[10] First respondent stated further as follows:

"Should any of the above works cause the defendant to move out of the house, then the costs of the accommodating him in an accommodation

equivalent to the Halyards Hotel for the whole of the period for which he was out of the property, as well as the costs of necessary

removal and storage of the defendant's furniture and belongings will be borne by the claimant.

Only once these works are complete can the claimant be paid the amount awarded under item 1 above."

[11] The issue relating to second respondent's costs of accommodation did not form part of second respondent's claim

for damages as set out in paragraph 15 of his counterclaim nor were such costs ever quantified by second respondent in the course of his evidence.

[12] The circumstances under which an arbitration award may be set aside are set out in section 33(1) of the Arbitration Act which provides:

“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)”

[13] The legal principles applicable to the review of an arbitrator’s award in terms of section 33(1) of the Act have, with respect, been succinctly and correctly summarised by Smith J in *Eastern Cape Department of Human Settlement v Quthing Construction and Developers CC* unreported case number 3045/2017 delivered on 10 March 2018. Paragraph 24 thereof reads as follows:

“(a) The grounds upon which courts may interfere with arbitration awards in terms of section 33(1) are interpreted reasonably strictly (City of Cape Town, para 14 (supra)); [215 JDR 0202 (WCC)]

- (b) Courts must be mindful of the purpose of arbitrations, namely the fast and cost effective resolution of disputes (*Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC));
- (c) Regarding the approach courts must adopt when dealing with applications to set aside arbitration awards in terms of section 33(1) of the Act, the following guidelines have been stated by the Constitutional Court in *Lufuno Mphaphuli and Associates* (supra): (i) courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently; (ii) the Constitution requires courts to construe the grounds for setting aside an award reasonably strictly; and (iii) if courts are too quick to find fault with the manner in which the arbitration has been conducted and too willing to conclude that the faulty procedure is unfair and constitutes a gross irregularity within the meaning of section 33(1) of the Act, the goals of private arbitration may well be defeated;
- (d) A party challenging an award must establish, not only that there is no evidence on which a reasonable man would have made it, but also that the lack of evidence is so glaring that misconduct on the part of the arbitrator can be inferred (*McKenzie NO v Basha* 1951 (3) SA 783 (NPD) at 786H);

- (e) The term “misconduct” refers to mala fides or moral turpitude and not to legal misconduct which does not involve moral turpitude. And gross irregularity relates to the conduct of the arbitration proceedings, and not the result thereof. The irregularity must have been so serious that it resulted in the aggrieved party not having his case heard (*Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C));
- (f) Legal misconduct is therefore not a ground for review and a bona fide mistake of fact or law cannot be characterised as misconduct. (*Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) and Another* 1993 (1) SA 89 at 100 (C)); and
- (g) By agreeing to arbitration the parties had limited the grounds of interference in their contract by the courts to the procedural irregularities set out in 33(1) of the Act. By necessary implication, they had waived the right to rely on any further grounds of review, whether in terms of the common law or otherwise (*Telecordia Technologies Inc. v Telkom SA Ltd*

[2006] ZASCA 112; 2007 (3) SA 266 (SCA)).”

[14] In seeking to review and set aside first respondent’s award in the court a quo appellant raised a number of grounds in respect of which it was alleged that the first respondent had either misconducted himself in relation to his duties or had committed gross irregularities in the conduct of the arbitration proceedings or had exceeded his powers. It is necessary to deal with only two of these grounds which were relied upon in terms of s 33(1)(b) of the Act, those, in my view, being decisive of the matter.

[15] As mentioned above second respondent walked out of the arbitration proceedings whilst still under cross-examination. Despite this first respondent in his award, relied upon and accepted second respondent’s untested version in preference to the evidence adduced by appellant. Mr. Beyleveld S.C., who appeared for appellant, submitted that in so doing he committed a gross irregularity in the conduct of the proceedings of so serious a nature that it resulted in appellant not having his case fully and fairly determined. See *Bester’s case* supra at 43 B

- C.

[16] During the course of his cross-examination second respondent became more and more upset at what he obviously perceived to be bias on the part of first respondent. This is illustrated by the following passages in which he was questioned by appellant’s attorney, Mr. Brody:

“Q I put it to you and I will argue at the end of this case, the reason why you paid was because you received the variation orders and all the documentation and all the calculations

A We’ve got an arbitrator who will believe anything you say, but it is obviously nonsense.

Q Sir, that is insulting.

A I am afraid it is the way [interrupted]

Mr. Jenkins That is insulting to me.

A But it is the way it has been happening sir, it's the way every single way has been happening.

Mr. Jenkins It hasn't been happening."

And:

"Q But, sir, if you haven't paid, he would not have given you the property. The builders' lien survives any contract and you know that.

A Are you suggesting to me that at a stage with the house clearly not finished, at a stage where in terms of the money I'd paid over the contract value, he would have succeeded in the legal procedure needed to exercise a builder's lien? Are you suggesting that he would have done that?

Q You cannot ask me questions.

A No, but it is just a question.

Mr. Jenkins You know I probably would.

A I expect no less from you, sir.

Mr. Jenkins No, it is not that sir.

Mr. Brody Do not insult the arbitrator. We know where [interrupted]

A It is absolute rubbish.

Q You cannot say things like this.

Mr. Jenkins No you can't."

And further:

"Mr. Winterbach By the arbitrator's permission you have been flooding me with documents that I haven't had a chance to read let alone examine let alone cross-examine.

Mr. Brody That's not true.

A

I am not allowed to refer to a simple important statement but you keep flooding me with documents, unsupported, incorrect. The one that I have looked and gone through I made an absolute monkey of Richard [Heny] because he's been charging for labour that he's got no right to.

Q

Sir, I put it to you that my client went the extra mile by dealing with your counterclaim when he didn't have to. He called in an expert and that expert has now said, not once, probably thirty times, that you are wrong.

A

And I am telling you that that expert is Mr. Heny's puppet.

Mr. Jenkins No, he is not.

A

And he is putting this ...

Mr. Jenkins No, he is not. He is an independent expert from Port Elizabeth, not Port Alfred, and was independently appointed.

A

And on the one exercise where we tested him?

Mr. Jenkins No, I don't agree.

A

Do you agree that adding R45 000,00 worth of labour is correct?

Mr. Jenkins Yes.

A

You do?

A

Well then, with the greatest of respect, we don't need to go any further. The point has been made.

Mr. Brody If you leave now [interrupted]

A

It will make no difference if I stay or leave. We're just wasting each other's time.

Mr. Brody We will continue in your absence. You've got to understand that. If you leave now we will continue in your absence until this matter is finalised.

A

Well, whatever, it can continue. The appeal court will, the Constitutional Court, but as long as I am getting this sort of

response and this sort of unbiased (sic) opinion, what is the point of me wasting my time? I can use my time more constructively

elsewhere.

Q

Do you want to leave sir?

A

Yes, there is no point in staying.

Mr. Brody Mr. Arbitrator, I now confirm its 12h20 on the 3rd December. Mr. Winterbach has stormed out and has decided to abandon the defence in this matter. May I address you on the merits?

Mr. Jenkins Yes, he is not happy with his cross-examination.”

[17] In his answering affidavit second respondent admitted that he left the arbitration proceedings during the course of his cross-examination but stated, inter alia, that he did so in view of the fact that he had been deprived of any meaningful opportunity to present his evidence in chief, more especially as he had not been allowed to read his statement from his computer, an injustice which, so he said, was compounded by the manner in which Mr. Brody for appellant was conducting his cross-examination. He stated that “enough was eventually enough”. He then stated that he had undergone a heart bypass operation and that he could feel an attack of angina coming on and had left to get his medication. He denied, however, that in leaving he had effectively abandoned his defence and counterclaim.

[18] In reply Mr. Heny, with reference to the transcript and the passages thereof to which I have referred above, reiterated that second respondent left in a rage. He pointed out that second respondent did not request that the matter stand down or be postponed in order for him to obtain his medication.

[19] It is clear, in my view, that second respondent’s explanation concerning his medication is disingenuous. It runs entirely counter to the transcript of the evidence. Second respondent’s comments and utterances as recorded therein illustrate clearly that he left because he considered first respondent to be biased against him and that in the circumstances there was no point in him continuing to take part in the arbitration proceedings. Mr. Beyleveld submitted that second respondent’s conduct in absenting himself from the proceedings without good and sufficient cause as set out in s 15(2) of the Act and in refusing to return thereto amounted to an abandonment by him of his defence and the relief sought by him in his counterclaim. He referred in this regard to *Van Zijl v Von Haebler* 1993 (3) SA 654 (SECLD) where at 668C Kroon J stated as follows:

“It was argued by Mr. van Rooyen that the respondent’s conduct in merely handing his memorandum to De Villiers and then absenting

himself from the proceedings, without addressing argument to De Villiers on the relief sought in the memorandum and allowing the

applicant to oppose same, amounted to an abandonment of that relief and was in fact no more than attempt to force a postponement by improper means. The argument is not without some merit.” (My emphasis.)

[20] In my view it is not necessary to decide whether his conduct amounted to an abandonment as alleged although in the light of his comments to the first respondent to the effect that he was wasting his time and that there was no point in him remaining there as well as his later refusal to return to the arbitration proceedings there is much to be said for Mr. Beyleveld’s submission. For instance, with regard to the possible resumption of the hearing in order for the cross-examination of second respondent to be completed second respondent addressed the following email to first respondent on 19 February 2016:

“You have allowed Mr. Brody to dictate the law (incorrectly), the order of proceedings, and your behaviour throughout this arbitration.

For the first time you took independent legal advice, as you should have done on every occasion where your naivety of the law affected your decision.

Will you now allow this man to continue to dominate you, and over-rule that independent advice?”

[21] After certain further correspondence second respondent addressed a further email to first respondent on 9 May 2016, accusing first respondent of “many breaches of the rules of Arbitration, of the Arbitration Act, and of Common Law.” He stated that “you were given the opportunity of restoring good order. You were urged to take legal advice.” He concluded by stating that “absolutely no benefit can be achieved by the continuation of the farce.”

[22] Be that as it may it is clear from the transcript of the proceedings that, because of second respondent’s conduct in walking out, appellant was denied the opportunity of fully testing second respondent’s version under cross-examination in certain material respects.

[23] Two examples will suffice.

[24] It was common cause that the glazing to the north and west faces of the dwelling was of an “appalling” standard in various respects, inter alia, the glass being too thin to comply with industry standards; the shape of the doors being distorted so that they could not be closed or locked; the doors rattling excessively in the wind; and the ferrous components rusting. In this regard Mr. Heny stated in his founding affidavit that second respondent “wanted to have the benefit of cheaper sub-contractors, relating to work other than ground works, concrete, form work and brickwork, that could be nominated directly by him and prices negotiated by him with the subcontractors. Although I recommended INSO at Port Alfred for the aluminium windows and doors he insisted that another contractor (The Aluminium House) be utilised that he “knew” were R100 000,00 cheaper than INSO’s quote.”

[25] Mr. Heny then proceeds to state:

“The arbitrator’s finding that the faults in the glazing were attributable to the applicant entirely ignores the fact that

Winterbach nominated the glazing company for reasons given above and was therefore responsible for any defects relating thereto. At no stage were these issues raised until the counterclaim was filed by Winterbach and after more than a year. Winterbach is fully aware of the fact that any nominated sub-contractor, or sub-contractor, is liable for defective work as a matter of contract

and law. No evidence was led by Winterbach in regard to this claim nor was the quantum of this claim quantified by an expert, or Winterbach.”

[26] In his answering affidavit these allegations were simply denied by second respondent who stated that “there were no nominated sub-contractors.”

[27] Although the issue of the appointment or otherwise of nominated sub-contractors was touched on at the commencement of second

respondent’s cross-examination the issue as to whether second respondent employed appellant or The Aluminium House to do the glazing and the consequences thereof was not dealt with before second respondent walked out. Despite this first respondent accepted second respondent’s untested evidence and ordered appellant to complete or to replace the defective glazing.

[28] The second example relates to the replacement of the carpets in the house. The dispute between the parties in this regard was in respect of one carpet and turned largely on when the carpet was laid, and when second respondent took occupation of the residence, appellant denying that it was responsible for any damage occasioned to the carpet. There was no cross-examination on this issue before second respondent walked out, thereby precluding appellant from testing his evidence. Despite this first respondent accepted second respondent’s evidence and then ordered appellant to replace “all of the carpets and underlay” at its own cost.

[29] In its application for leave to appeal appellant submitted with regard to this issue as follows:

“It was argued on behalf of the applicant that the arbitrator had failed properly to take into account the refusal of second respondent to complete his cross-examination by applicant’s legal representative and that such failure constituted a gross irregularity. This argument was not addressed by the learned judge in his judgment. Had he considered this issue he would have decided the application differently.”

[30] In response hereto the learned Judge in his judgment refusing leave to appeal stated as follows:

“Regarding the ground of appeal that I did not consider the submission that the second respondent’s failure to allow the applicant’s

legal representative to complete his cross-examination of the second respondent, I point out that that submission was dealt with in paragraph 22 of the judgment. In that paragraph I found that the applicant cannot rely on the submission that the second

respondent's failure to subject himself to further cross-examination constituted a gross irregularity 'when no factual basis was laid for it in the founding affidavit.'"

[31] In paragraph 22 of his judgment on the merits of the application the learned Judge stated as follows:

"The facts set out in Mr. Heny's affidavit could not have prepared the second respondent for a submission that the arbitrator committed a gross irregularity on the basis that he made a finding based on an untested version whereas there was a version before him which was subjected to cross-examination. In my view it is not open to the applicant to rely on this submission when no factual basis was laid for it in the founding affidavit."

[32] In this regard Mr. Schäfer, who appeared for second respondent, stressed that it was incumbent on appellant to set out in his founding affidavit the grounds for any review as well as the facts and circumstances upon which it wished to rely. See: *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) at 287 A – B; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) at 507E; *Harrielall v University of Kwa-Zulu-Natal* [2017] ZASCA 25 at paragraph 8.

[33] Whilst this is a trite principle the rule is not an absolute one and, as was stated in *Nkengana and Another v Schnetler and Another*

[2011] 1 All SA 272 (SCA) at paragraph [10] "the present tendency seems to permit greater flexibility with regard to the admission of new matter, at least in the absence of prejudice, and to apply the rule with a fair measure of common sense.

[34] Similarly, in *Lagoon Beach Hotel (Pty) Ltd v Lechane N.O. and Others* 2016 (3) SA 143 (SCA), it was stated at paragraph [16] that in applying the rule "practical common sense must be used."

[35] In his founding affidavit Mr. Heny stated as follows:

"The applicant and its expert gave their evidence and the applicant's case was closed whereafter Winterbach decided to give evidence. After half an hour of cross-examination by the applicant's attorney of record, he eventually became very angry and exited the arbitration venue despite being cautioned that if he did so the arbitration would continue in his absence. Winterbach effectively abandoned the hearing and his defence and counterclaim."

[36] Mr. Heny then stated further as follows:

“I wish to emphasise that the arbitrator has essentially determined that my claim is sound and that I am not in entitled to any interest on my claim until I complete the work that is referred to in the award at Winterbach’s property. This in circumstances where Winterbach did not complete his evidence, or his case, and abandoned same within half an hour of being cross-examined.”

[37] He continued:

“I also contend that the award should be set aside for the following additional reasons:

Had Winterbach allowed the cross-examination to continue, when he gave evidence, various points in evidence would have been put to him and which would have been decisive of the matter ... The arbitrator had no alternative but to find (sic) the whole case on the basis of applicant’s evidence where it differed from that advanced by Winterbach. That he did not do this was a gross irregularity which tainted the whole procedure and the award.” (My emphasis)

[38] He concluded by stating that:

“... for all the reasons given above the arbitration award stands to be set aside in terms of section 33 of the Act.”

[39] In his replying affidavit Mr. Heny stated:

“I emphasise again that applicant’s attorney was not afforded an opportunity of cross-examining Winterbach on the carpet issue ... His abandonment of the proceedings precluded applicant’s attorney from putting evidence and questions to him.”

[40] In my view it is apparent from the above averments in the founding affidavit read together with the averments in reply that appellant did in fact lay a factual basis for its submission. Indeed, the facts and circumstances relating to the irregularity complained of are fully ventilated in the papers from which the alleged gross irregularity is self-evident. The passages in the founding papers to which I have referred make it clear that appellant was relying on this gross irregularity. In my view, on a common sense approach, second respondent could have been under no illusion at the hearing of the application that appellant was alleging that the reliance by first respondent on second respondent’s untested version in preference to that of applicant constituted a gross irregularity in the conduct of the proceedings in terms of s 33(1)(b) of the Act. In my view further, the technical point taken by second respondent in this regard is an opportunistic attempt

to escape the consequences of his conduct in walking out of the arbitration before the conclusion of his cross-examination. I should mention as an illustration of the unfairness of the proceedings that second respondent’s cross-examination of Mr.

Heny ran for 285 pages of the transcript in the course of which all his complaints concerning appellant’s conduct were exhaustively

covered, whereas the cross-examination of second respondent ended after a mere 33 pages before he lost his temper and walked out

thereby precluding appellant from fully testing his evidence under cross-examination.

[41] In my view therefore the learned Judge erred, with respect, in his finding that no factual basis had been laid in this regard.

[42] Mr. Schäfer, who appeared for second respondent, submitted that in any event the fact that appellant was precluded by second respondent's conduct from fully cross-examining him did not constitute a gross irregularity in the conduct of the proceedings. He relied in this regard on *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) where at paragraphs [21] and [22] Wallis JA stated as follows:

"[21] In my view the modern demands of arbitration dictate that arbitrators should be free, in the absence of anything in the arbitration agreement to the contrary, to determine the admissibility of evidence without being shackled by formal rules of evidence. The correct approach is that arbitrators may follow such procedures in regard to the admissibility of evidence as they deem appropriate, provided always that the parties are afforded a fair hearing."

[22] It follows that even if some of the evidence placed before and considered by the arbitrator in this case, in accordance with the strict rules of evidence, would have been inadmissible its admission would not have constituted an irregularity or an act in excess of the arbitrator's powers."

[43] In my view *Dexgroup supra* is clearly distinguishable. The present matter does not concern the issue of the admissibility of evidence by first respondent contrary to formal rules of evidence during the course of an arbitration hearing and the flexible approach to be adopted in that regard. It concerns the reliance by first respondent upon evidence which appellant was precluded from testing by way of cross-examination, something very different to issues of admissibility.

[44] In my view, there can be no doubt that the acceptance by first respondent of second respondent's evidence in these circumstances where by the latter's conduct he prevented appellant from properly and thoroughly testing his version under cross-examination does indeed constitute a gross irregularity in the conduct of the proceedings by first respondent and it "prevented a fair trial of the issues." See: *Goldfields Investments Ltd v City Council of Johannesburg* 1938 TPD 551, approved in *Telcordia supra* at paragraph [73].

[45] As was stated in *Carroll v Carroll* 1947 (4) SA 37 (N) at 40 the objects sought to be achieved by cross-examination "are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the

witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party."

[46] In *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) the following was stated at

[61] and [62]:

“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness’s testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.

[62] The rule in Browne v Dunn is not merely one of professional practice but “is essential to fair play and fair dealing with witnesses”. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[47] As stated above the institution of cross-examination constitutes a right. That right goes to the root of a fair hearing.

Conversely the failure to allow cross-examination and the negation of this right is a serious irregularity. Not only does a party have the right to cross-examine any opposing witness but he also has the duty to do so. See: S v Heslop 2007 (4) SA 38 (SCA) at paragraph [12]. Indeed, even “the disallowance of proper questions sought to be put to a witness by cross-examining counsel” is an irregularity which would entitle a party to relief on review unless there is no prejudice. Distillers Korporasie (SA) Bpk v Kotze 1956 (1) SA 357 (AD) at 361 H.

[48] Mr. Schäfer submitted that even if an irregularity had been committed appellant had suffered no prejudice in consequence

thereof. I cannot agree. It is impossible to know what might have transpired had appellant had a proper opportunity of cross-examining second respondent.

[49] In my view the prejudice occasioned to appellant in consequence of first respondent unfairly relying on evidence which appellant was prevented from testing under cross-examination is manifest. In my view therefore the learned Judge erred in his finding in this regard and the appeal must succeed.

[50] This, however, is not the only basis on which in my view the appeal should succeed.

[51] As set out above, second respondent, in his defence and counterclaim sought repayment of an alleged overpayment as well as damages sustained by him in consequence of appellant’s alleged defective performance. Despite second respondent not having sought relief in the form of an order for specific performance first respondent, without having afforded either party an opportunity of dealing therewith made an award for specific performance instead of damages. It was argued in the court a quo that in so doing first respondent exceeded his powers and thus committed a gross irregularity. The point was again taken on behalf of second respondent that the facts set out in Mr. Heny’s founding affidavit did not alert second

respondent to “the fact or even a possibility” that the award would be assailed on this basis.

[52] The learned Judge upheld this submission stating “that submission, no matter how attractive, cannot be sustained for the simple reason that it is not based on facts set out in applicant’s

affidavits.”

[53] In *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) van Heerden JA stated as follows at 551 C – D:

“While it is so that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically raised in the papers, provided that all relevant facts are before the court, this will not be allowed if it causes prejudice to the other party.”

[54] It is trite that the jurisdiction of an arbitrator is limited to matters pleaded and that an arbitrator has no jurisdiction to decide a matter not pleaded. In other words, the issues before an arbitrator are defined by the pleadings. In *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA) Lewis JA reiterated at paragraph [30] that an arbitrator has no jurisdiction to decide a matter not pleaded.

[55] Similarly, in *Lufuno Mphaphuli supra*, the following passage from *Interbulk Ltd v Aidan Shipping Co Ltd, The Vimiera*

[1984] 2 Lloyd’s Rep 66 was cited with approval at [168]:

“The essential function of an arbitrator, indeed a judge, is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain alive issues. If an arbitrator believes that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced counsel and solicitors – then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of material justice to put the point to them so that they have an opportunity of dealing with it.”

[56] Mr. Schäfer submitted with reference to the applicable formalities prescribed by the Association of Arbitrators’ Rules for the Conduct of Arbitrations (2013) that the formalities are much less demanding than the rules applicable to High Court pleadings and affidavits. He submitted therefore that the first respondent was entitled to adopt a broad view of the pleadings so as not to be “confined in a straitjacket of legal formalism.” *Dexgroup supra* at paragraph [20]

[57] He relied further on *Three Cities Management (Pty) Ltd v Bantry Bay Management Company (Pty) Ltd and Another* (7474/2017) [2017] ZAWCHC 109 (22 September 2017), a matter in which it was argued that the arbitrator had exceeded his authority by finding that a contract had been cancelled notwithstanding that cancellation had not been pleaded. In the course

of his judgment Davis J reiterated that because of “their general reluctance to interfere with arbitrators’ awards, the courts are prepared to adopt a rather generous approach to pleadings.” He proceeded to state that the finding by the arbitrator as to cancellation “flowed directly from the evidence which had been presented by the parties, as was made clear not only in the statement of case and defence but in the correspondence which was part of the proceedings and in the evidence of Mr. Moore ...”

- [58] In my view the Three Cities case, *supra*, is distinguishable from the present matter. Unlike the Three Cities case nowhere in the statement of case and defence nor in the evidence adduced at the hearing was the possibility of specific performance raised as an alternative to the claim for damages and the award of specific performance does not flow directly from the evidence which had been presented.
- [59] In my view, therefore, having regard to the relevant authorities, the learned Judge erred, with great respect, in his finding that appellant’s submission in this regard was not based on facts set out in applicant’s affidavits. As stated above second respondent in his counterclaim set up a claim for damages as opposed to a claim for specific performance in respect of the alleged defects in construction. That being the case it appears clearly from the papers that first respondent exceeded his powers in contravention of s 33(1)(b) of the Act in making an award for specific performance. In my view therefore the application in the court a quo should have been upheld on this basis as well.
- [60] The appeal must accordingly succeed. There was some debate as to the formulation of the order in such event. Section 33(4) of the Act provides that if the award is set aside “the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.” Mr. Beyleveld accordingly sought an order directing that the dispute be submitted to a new arbitration tribunal and that the new arbitrator be an advocate of good standing appointed by the leader of the Eastern Cape Society of Advocates (Grahamstown). In my view this would be appropriate especially having regard to second respondent’s insistence before first respondent that the latter obtain proper legal advice.
- [61] As to costs there is no reason why the costs of the appeal as well as the costs of the review application before the court a quo should not be paid by second respondent. Furthermore, having regard to the circumstances of the matter it would be appropriate to order second respondent to pay the wasted costs of the arbitration hearing before first respondent including first respondent’s costs and the costs of appellant’s experts.
- [62] The following order will therefore issue:
1. The appeal succeeds with costs.
 2. The order of the Court a quo is set aside and substituted by the following order:

- a. The award of first respondent dated 23 June 2016 and released by first respondent on 10 July 2016 is hereby reviewed and set aside.
- b. It is directed that the dispute between applicant and second respondent be submitted to a new arbitration tribunal.
- c. The arbitrator shall be an advocate of good standing appointed by the leader of the Eastern Cape Society of Advocates (Grahamstown).
- d. The costs of the arbitration hearing before first respondent shall be paid by second respondent including the costs of first respondent and of applicant's experts.
- e. The costs of the review application before the court a quo shall be paid by second respondent.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

D. CHETTY

B.R. TOKOTA

Appearing on behalf of Appellant: Adv. Beyleveld S.C.

Instructed by: Wheeldon Rushmere and Cole, Mr. Brody

Appearing on behalf of Second Respondent: Mr. Schäfer

Instructed by: Netteltons Attorneys, Mr. Nettelton

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