

SOUTH AFRICA / JUDGMENT

KNS Construction (Pty) Ltd v Genesis Partnership (9861/2016) [2016] ZAGPJHC 273 (9 September 2016) [2016] ZAGPJHC 273

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

9861/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 9861/2016

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

DATE: 9 SEPTEMBER 2016

In the matter between

KNS CONSTRUCTION (PTY) LTD

APPLICANT

and

THE GENESIS PARTNERSHIP

RESPONDENT

Arbitration

- pursuant to arbitration agreement - application to make an arbitral award an order of court in terms of s 31 of the Arbitration Act 42 of 1965 - whether or not the award is subject to a pending appeal - applicant noting appeal - respondent noting a cross-appeal - respondent's right to cross-appeal challenged – held: such right afforded to the respondent on a proper interpretation of the arbitration agreement – arbitration agreement providing for the High

Court Rules of the Republic of South Africa to govern the arbitration – held: arbitration agreement capable of one meaning only which is that the parties intended the rules of court to apply to the appeal procedure – applicant having withdrawn its appeal the cross-appeal thus remains pending - application dismissed

with costs.

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is an application to make an arbitral award an order of court in terms of s 31 of the Arbitration Act 42 of 1965 (the Act).

Procedural history

[2] The crisp issue for determination is whether or not the award is subject to a pending appeal. It is accordingly necessary to refer to the procedural steps that were taken in regard to the noting of appeal by both parties after publication of the arbitral award on 27 January 2016.

[3] The arbitration was conducted in terms of an arbitration agreement (the agreement) concluded between the parties. It expressly provides ‘either party may appeal the award of the arbitrator to an appeal tribunal consisting of three arbitrators’ and further that ‘any party wishing to appeal must give notice of such within 20 days after the publication of the award’.

[4] On 16 February 2016 the applicant noted an appeal. On 17 February 2016 the respondent noted a cross-appeal. On 18 March 2016 the applicant abandoned its appeal and launched the present application. The cross-appeal however, remains valid (Erasmus Superior Courts Practice 2nd Ed (Service 2, 2016) A2-35) and in regard thereto, the issue arises whether or not it is pending.

The opposing contentions of the parties

[5] The applicant contends that the cross-appeal is invalid and ineffectual on the ground that the respondents’ right of appeal

in terms of the agreement has lapsed the day before it was noted. In this regard reliance is placed on the civilian method of computation

(*Nell v Mulbarton Gardens (Pty) Ltd* 1976 (1) SA 294 (W)) of the period of twenty days which would have expired on 16 February 2016.

[6] The respondent on the other hand relies on clause 5 of the arbitration agreement, which provides:

‘The rules governing the arbitration shall be High Court Rules of the Republic of South Africa, except as amended herein, or as subsequently amended by way of agreement between the parties

In similar vein, I should add, clause 11.1 of the arbitration agreement provides that the Arbitration Act ‘shall apply to the arbitration except as varied herein, or as otherwise agreed between the parties, or by the rules of the High Court of South Africa’. The respondent accordingly submits that the computation of the twenty day period as laid down in the Rules of Court applies. The rules define ‘court day’ as ‘any day other than a Saturday, Sunday or public holiday’ and further provide that ‘only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court’. The notice of cross-appeal, employing this method of computation, was served within the twenty day period. As a corollary to this, the respondent argues that, premised on the appeal procedure being governed by the rules of court, the respondent was entitled, as of right (rule 49(3)) to cross-appeal within 10 days of the applicant’s notice of appeal. And lastly that the respondent remains entitled to seek an extension of time or condonation in terms of rule 27, should it be found that the filing of the cross-appeal was out of time.

Discussion

Does the arbitration agreement provide for a cross-appeal?

- [7] The appropriate point of departure is to consider the question whether the respondent was of right entitled to note a cross-appeal.
- [8] By way of background and in regard to civil appeals from the high court, rule 49 provides for the procedure in regard to appeals and cross-appeals. The rule therefore does not create a right to appeal or cross-appeal. Appeals are provided for in chapter 5 (ss 15 – 20) of the Superior Courts Act 10 of 2013 (the SCA Act). The SCA Act however, relating to appeals, does not distinguish between appeals and cross-appeals (see *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 607G-608A, in regard to the distinction between appeal and cross-appeal, based on the now repealed s 21 of Act 59 of 1959). A right to cross-appeal, accordingly, exists by inference and is based on the construction of similar statutory provisions relating to appeals by the courts in the past (*Gentiruco* 607E).
- [9] Next it is necessary to interpret the agreement in order to establish whether a right to cross-appeal is afforded to the other party, once one of the parties has appealed the award.
- [10] The principles applicable to interpretation of documents were summarised as follows in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the

circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

In *Bothma Batho Transport v S Bothma & Seun Transport* (802/2012)

[2013] ZASCA 176 (28 November 2013), Wallis JA added thereto as follows:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

[11] Applying these principles in interpreting the agreement, it is necessary to consider the wording of clause 10.5, which confers the right of appeal on 'either party'. 'Either' in this context bears the meaning of 'each of the two' (Oxford Dictionary 10th Ed) which leads to the conclusion that the right of appeal is conferred on both parties. The right is phrased in wide terms and there are no indications in the wording of the clause which would justify a restriction of the right of appeal to only the aggrieved party. The parties, having invoked the rules of court to govern the arbitration and expressly conferring a mutual right of appeal, must moreover be assumed to have been aware of the rules of court providing for the procedures to be followed in regard to appeals and cross-appeals. Had it been their intention to exclude a cross-appeal, words to that effect would have been used of which there are none. On a proper interpretation of the arbitration agreement as a whole, it is my finding that the right of appeal conferred on both parties, includes a right to cross-appeal.

[12] Should I be wrong in my interpretation of the arbitration agreement, the cross-appeal, in my view, can and should be held to constitute an appeal. Both parties may conceivably appeal at the same time, the one fortuitously before the other (*Gentiruco supra*). The cross-appeal may either arise from or be incidental to the appeal. Substance over form dictates that the cross-appeal is simply an appeal merely tacked on to the appeal and the mere denotation of

the document as a cross-appeal, in the context of the agreement, is of no moment (*Goodrich v Botha and Others* 1954 (2) SA 540 (A) 544).

Do the rules of court apply to the appeal?

- [13] The decisive consideration in determining the issue whether or not the cross-appeal is pending, is whether the parties intended in the arbitration agreement that the rules of court should apply to the appeal procedure. It must be remembered that the Arbitration Act specifically ousts appeals. Parties may of course agree on the right of appeal, as is the case here, but they cannot confer appeal jurisdiction on the court (*Goldschmidt and Another v Folb and Another* 1974 (1) SA 576 (T); *Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC* 2006 (6) SA 91 (C)). It is for this reason that provision is made in the arbitration agreement for the constitution of an appeal tribunal consisting of three members.
- [14] Read in the context of the arbitration agreement as a whole, the reference to 'arbitration' in clauses 5.1 and 11.1 quoted above, must be taken to include the procedure relating to the appeal provided for in clause 10.5. An appeal procedure (except for the nomination of members of the appeal tribunal) is not provided for in the arbitration agreement. Nor does the Act contain any such provisions. The arbitration agreement is accordingly capable of one meaning only which is that the parties intended the rules of court to apply to the appeal procedure.

Is the cross-appeal pending?

- [15] As correctly pointed out by counsel for the respondent, the notice of cross-appeal, served on 17 February 2016, computing the twenty day period as provided for in the rules of court, occurred within the twenty day period. Had it been out of time the respondent would have been entitled to invoke the rules of court in regard to condonation or extension of time. In any event, in the absence of a rule 30A application by the applicant for the setting aside of the cross-appeal as an irregular step, it remains valid and effective.
- [16] It follows that the cross-appeal is pending and that the application cannot succeed.

Order

[17] In the result I make the following order:

1. The application is dismissed.
2. The applicant is to pay the costs of the application such costs to include the costs consequent upon the employment of senior counsel.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

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NORTON ROSE SA

DATE OF HEARING

1 SEPTEMBER 2016

DATE OF JUDGMENT

9 SEPTEMBER 2016

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