

SOUTH AFRICA / JUDGMENT

Kroon and Another v Rens and Another (1331/2011) [2012] ZAECHGC 49 (14 June 2012)

[2012] ZAECHGC 49

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E Smith

CASE / FILE NUMBER

1331/2011

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION,

GRAHAMSTOWN

Case no:1331/2011

Date Heard: 31/05/12

Date Delivered: 14/06/12

In the matter between:

SIMON BRUCE
KROON1ST
APPLICANT
BELINDA MARION KROON
.....2ND
APPLICANT
Versus
RAY RENS, NOMINO
OFFICIO1ST
RESPONDENT
SIRAYKIN CC t/a HAWKINS HOMES
.....2ND
RESPONDENT

JUDGMENT**SMITH J:****Introduction**

- [1] Simon Bruce Kroon and his wife Belinda Marion Kroon seek an order setting aside the arbitration award issued by the First Respondent ("Rens") on 10 February 2011. They also challenge subsequent amendments which Rens purported to make to his initial award on 30 March 2011 and 16 August 2011, respectively. The arbitration proceedings concerned a dispute between the Kroons and the Second Respondent ("Hawkins") arising out of a building contract.
- [2] The Kroons challenge the arbitration award, inter alia, on the grounds that Rens had failed to disclose that he had previously acted as an advisor to Hawkins; that he purported to amend his award when he was functus officio; and that he had ignored the express provisions of the contract, and adopted a "quantity surveying professional method" on an arbitrary basis. They contend that that he had therefore exceeded his powers, and his actions amount to misconduct as contemplated by s. 33(1) of the Arbitration Act, 42 of 1965 ("the Act").

Extension of prescribed time limit

- [3] The Kroons learnt of the prior existing relationship between Rens and Hawkins on 25 March 2011, and launched these proceedings on 20 April 2011, some ten weeks after the publication of the initial award. Section 33(2) of the Act requires the proceedings to be brought within six weeks after the publication of the impugned award. They have therefore applied for condonation for their failure to launch the proceedings within the prescribed time period. Having regard, inter alia, to the limited extent of the delay and the reasonable prospects of success, I am satisfied that good cause exists for the period of six weeks to be extended in terms of s. 38 of the Act.

Factual background

- [4] The Kroons and Hawkins concluded a building contract during December 2009 in terms whereof they agreed, inter alia, that the construction works would be done on the basis of various quotes amounting to R795 991. 47. They subsequently purported to alter the contract by entering the phrase "under the cost plus basis" below the paragraph listing the various quotes.
- [5] This term was however undoubtedly inchoate and meaningless and appeared to have been so regarded by the parties, because during January 2010 Hawkins requested the Kroons to sign an addendum to the original agreement. The effect of the addendum would have been to change the contract price from the lump sum basis which was initially agreed upon to the "cost plus basis" which would have entitled Hawkins to add a 15% mark-up to the cost of

material and labour. The addendum also provided for Hawkins to charge "Preliminaries and Generals" at the rate of R60 218.73 per month. The parties however never signed the addendum. Because the original contract provided that any amendments or deletions must be in writing to have any effect, the addendum therefore did not have any binding effect.

[6] The dispute which was the subject of the arbitration proceedings arose during March 2011, when Hawkins submitted his final account for payment. The Kroons disputed the account and eventually only paid an amount of R50 000.00, purportedly in full and final settlement. Hawkins accepted the payment but declared in writing that he did not accept it in full and final settlement of his account. He insisted that the outstanding balance amounted to R136 331.69, and that after payment of the R50

000. 00 a balance of R86 331.39 still remained payable.

[7] Hawkins subsequently took the initiative to refer the dispute for arbitration in accordance with the arbitration clause contained in the agreement, and requested Rens to act as arbitrator.

[8] On 22 October 2010 Hawkins wrote to Rens and presented the dispute to him in the following manner:

"We quoted in September last year to do various works under a few fixed price quotations. However we suggested in the beginning of this year, in order to help save money for the Client, we could do a cost plus contract. The works were executed under the cost plus system. There were numerous extras and variations, all of which have been approved by the Client. A dispute has arisen as a result of the P & G's. There is a different amount for the P & G's under the cost plus system compared to the fixed price contract. This was as a result of us changing the P & G calculations at the beginning of this year. The Clients are now wanting to use the lower P & G's which was from the fixed price contract, and use these figures in the cost plus system.

This in essence, is combining a fixed price contract with a cost plus contract. Our opinion is, you either have a fixed price contract or a cost plus contract, but not the combination of both. With this in mind we are prepared to settle on the fixed price contract with extras and variations, including extra P & G's. Alternatively to revert back to the cost plus contract for settlement. The Client has declined both these options."

[9] After considering written submissions from both parties, Rens issued his award on 10 February

2011. In terms thereof he determined that the Kroons owed Hawkins an amount of R145 345. 91, as a final payment, on the following bases:

He had, "after due consideration, discarded" the defences put up by the Kroons for the reason that in his opinion there was "a lack of proof available";

He decided to adopt a quantity surveying professional method "on an arbitrary basis";

He had adjusted the provisional sums, all variations "both adds and omits of builder's works", added the agreed 15 % mark up; and

Added the agreed sum for additional P & G's due to the contract's "elongation" and finally added 14% VAT.

[10] After the publication of the award the Kroons discovered that Rens had previously acted as advisor to Hawkins in a different matter. They were understandably concerned about how this would have affected Rens' ability to adjudicate impartially. They therefore wrote to Hawkins to query the fact that this had not been disclosed either by Hawkins or Rens before the commencement of the arbitration proceedings.

[11] On 30 March 2011 Rens wrote to both parties and stated the following regarding this issue:

"When I was approached to act, it was taken for granted by myself that in the course of your discussion Mr Hawkins had indicated to you that I had previously acted as Mr Hawkin's advisor in a dispute, I assure you that that case has absolutely nothing to do with the current case now in front of me."

He also, in the same letter, purported to amend his original award, because he had "erroneously mistaken amounts as being excluding VAT where they in fact included VAT. He had as a result reduced the amount payable to Hawkins to R110 331. 29.

[12] On 16 August 2011, some four months after the Kroons instituted these proceedings, Rens again purported to amend his award and determined that the "total inclusive arbitrary sum of the subject Contract" is considered to be R890 592. 29. He then determined that an amount of R105 692. 29 was payable to Hawkins.

Legal principles

[13] In terms of s. 33(1) of the Act the court may set aside an award where:

- (a) Any member of an arbitartion tribunal has misconducted him or herself in relation to the duties of an arbitrator or umpire;
- (b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) An award was improperly obtained.

[14] These statutory grounds for interference by courts are exhaustive. Our courts are therefore generally reluctant to interfere with an arbitration award because the parties had chosen to go for arbitration, selected their tribunal, and had agreed that the award of the tribunal would be final and binding.

[15] 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). The term “misconduct” refers to mala fides or moral turpitude and not to legal misconduct which does not involve moral turpitude, and “gross irregularity in the conduct of the arbitration proceedings” relate to the conduct of, and not the result of the arbitration. 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)).

- [16] 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 (W)* 1993 (1) SA 89 at 100C).
- [17] An arbitrator performs a judicial function and where there are any circumstances known to either of the parties, which would, in the eyes of the reasonable litigant, create an apprehension that he or she may not get a fair trial, the arbitrator should recuse him or herself. The test is obviously more stringent in a case where a litigant, despite being aware of the connection between the arbitrator and one of the parties, nevertheless agreed for the arbitrator to be appointed. In such a case the court will require that at least a probability of bias had been shown. See: *Appel v Leo and Another* 1947 (4) 766 (WLD) at 774.
- [18] In *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers’ Union and Another* [1992] ZASCA 85; 1992 (3) SA 673 (A) Hoexter JA held that it is “a hallowed maxim that if a judicial officer has an interest in the outcome of a matter before him (save an interest so clearly trivial

in nature as to be regarded under the de minimus principle) he is disqualified, no matter how small the interest may be...The law does not seek, in such a case, to measure the amount of his interest.”. The learned judge then went on to state that the considerations are no different in the case of a lay litigant who might reasonably apprehend bias. (at 694H-695A)

See also: *Ndimeni v Meeg Bank (Bank of Transkei)* 2011 (1) A 560 (SCA) at 564 – 566.

Discussion

- [19] It is common cause that neither Rens, nor Hawkins, had informed the Kroons about the fact that Rens had, prior to the arbitration, acted as an advisor to Hawkins in a different matter. This omission had occurred under circumstances where Hawkins had taken the initiative to unilaterally request Rens to act as arbitrator. The question is whether under these circumstances a reasonable person in the Kroons’ position would have apprehended that he or she may not get a fair hearing. In my view the answer to this question must be a resounding yes. The fact that Rens had acted as advisor to Hawkins, and not merely as an expert witness, in my view required that this fact should have been disclosed to the Kroons before the arbitration.
- [20] In addition, Rens was also enjoined in terms of the rules applicable to the arbitration proceedings to disclose his previous dealings with Hawkins. In terms of Rule 8.3 of the Rules for the Conduct of Arbitrations (6th Edition) an arbitrator is required to sign a statement “to the effect that there are no grounds known to him which are likely to give rise to justifiable

doubts regarding his independence and impartiality, and the arbitrator must further disclose in writing any facts or circumstances which may be of such a nature as to call into question the arbitrator's independence or impartiality in the eyes of the parties." There can be no doubt that the fact that he had acted as an advisor to Hawkins (the party who had initiated his appointment) was a factor which would reasonably "have called into question his independence and impartiality in the eyes" of the Kroons.

- [21] Conversely, it has been suggested on behalf of the Respondents that Rens' position was no different to that of expert witnesses who testify on behalf of different litigants on a regular basis. The fact of the matter however is that these expert witnesses are never required to adjudicate in any matter where the parties concerned are in dispute. The comparison is therefore inappropriate.
- [22] I am therefore of the view that it was incumbent on Rens to disclose to the Kroons the fact that he had previously acted as advisor to the Hawkins. His failure to do so constitute misconduct as contemplated in s. 33(1) of the Act. It was also unfortunate that Rens had elected to join in Hawkins's opposition to the application by filing a confirmatory affidavit. This could only have served to further vindicate the Kroons' perception of bias and lack of impartiality. It is however not necessary for me to make any findings in this regard as our law is clear that reasonable perception of bias is sufficient to compel recusal. The award is liable to be set aside for this reason alone.
- [23] Although it is not necessary for me to consider the other grounds advanced by Mr De La Harpe on behalf of the Kroons, my prima facie view is that they have substantial merit. Rens was required to arbitrate in terms of the written agreement. He had however, on his own admission and on an arbitrary basis, decided to ignore the terms of the agreement completely, and to determine the amount payable to Hawkins on a basis that was never agreed by the parties. In addition, his purported amendments to the initial arbitration award when he was clearly *functus officio* could also amount to gross irregularity in the conduct of the arbitration proceedings. The award can in my view also be set aside on any one of these grounds.

Costs

- [24] Mr Cole, who appeared for Hawkins, submitted that in the event that the arbitration awards are set aside, costs should be reserved for determination at the hearing of the subsequent arbitration. He submitted that if the subsequent arbitrator makes an award equivalent to that made by Rens, the fairness and lack of bias would have been proven in those proceedings. I do not agree with these submissions. The Applicants have been substantially successful in these proceedings and are therefore entitled to their costs.

Order

- [25] In the result the following order shall issue:

The Applicants' failure to institute the proceedings within the period of six weeks referred to in section 33(2) of the Arbitration Act, 42 of 1965, is hereby condoned and the aforesaid period is extended;

The arbitration awards issued by the First Respondent on 9 February 2011; 30 March 2011 and 16 August 2011, respectively, are hereby set aside;

The Second Respondent is ordered to pay the costs of this application on the party and party scale.

J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Advocate De La Harpe

Attorneys for the Applicant : Wheeldon Rushmere & Cole

GRAHAMSTOWN

(Ref: Mr Brody)

Counsel for the Respondents : Advocate Cole

Attorneys for the Respondents : Nettleton's Attorneys

(Ref: Mr Nettelton)

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