

SOUTH AFRICA / JUDGMENT

Modimolle-Mookgophong Local Municipality v CMXI (Pty) Ltd and Another (70315/2018) [2020] ZAGPPHC 758 (26 November 2020) [2020] ZAGPPHC 758

COURT

North Gauteng High Court, Pretoria

CASE / FILE NUMBER

70315/2018

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

Case number: 70315/2018

REPORTABLE :YES

OF INTEREST TO OTHER

JUDGES:YES

REVISED

DATE:26/11/2020

In

the matter between:

MODIMOLLE-MOOKGOPHONG

LOCAL

MUNICIPALITY

APPLICANT

AND

CXMI (PTY) LTD

1ST RESPONENT

ADVOCATE G MALINDI

N.O

2ND RESPONDENT

JUDGMENT

INTRODUCTION

- [1] The applicant brought an application in terms of section 33(1) of the Arbitration Act 42 of 1965 (the Arbitration Act). Part A of the application dealt with the provision of the transcript of the arbitration proceedings and was finalized. This court must determine Part B of the application in which the applicant seeks condonation for non-compliance with section 33(2). Secondly, applicant seeks an order that the award of the Second Respondent (the arbitrator) dated 3 July 2018 be set aside. Thirdly the applicant seeks a costs order against the first respondent (CXMI).
- [2] This matter relates to a tender that was awarded to CXMI by the Modimolle Local Municipality (Modimolle) during July 2011. The arbitrator published his award on 3 July 2018. Subsequent to the award being made and during the arbitration proceedings, the arbitration was postponed on several occasions, at the request of the applicant. On one occasion to bring a review application. The review application was brought under case no. 61871/2016 and was dismissed with costs on 12 May 2017, the order was never rescinded or appealed against. In the notice of motion of that application, the applicant inter alia sought an order that the agreement entered into during June 2012, between Modimolle and CMXI, be declared void and unenforceable, alternatively be reviewed and set aside. That application dealt with the same facts as those in this application, but Modimolle was the applicant. Modimolle was however disestablished on 3 August 2016, in terms of the Provincial Government Gazette Notice 94 of 2016[1] and the applicant was constituted. In terms of the notice the assets, liabilities, rights and obligations of inter alia Modimolle were transferred to the applicant. The applicant, partaking in the arbitration proceedings and by instituting these proceedings, in my view, admitted that it is the successor in title of Modimolle, despite protestations to the contrary.
- [3] The application was allocated as a special motion on 10 December 2019, to be heard on 29 April 2020. On 17 April 2020 the registrar of the judge to whom the matter was initially allocated made arrangements for the hearing, as this period fell during the National Lockdown. On 24 April 2020 the correspondence indicates that the judge postponed the matter to 29 June 2020, to be heard by her, during the last week of the second term. The reason for the postponement during April was that senior counsel for the applicant, Mr Strydom (Sc), was in the Western Cape and could not access his brief, as he could not travel to his chambers in Gauteng. Due to unforeseen work commitments the judge could not hear this matter and it was allocated to me. This matter was heard on 29 June 2020 during a virtual hearing on the Zoom platform.

THE STATEMENT OF CLAIM

- [4] CMXI instituted arbitration proceedings against Modimolle on 28 February 2015. According to the statement of claim CMXI was appointed in terms of bid number 741/1/597 to supply and install water and electricity metres to 15 000 households in terms of an agreement entered into on 4 June 2011 between CMXI, represented by Ms Fanoe and Modimolle represented by Mr Kupe, the municipal manager (MM) at the time. This agreement is referred to as the first service level agreement (the first SLA).
- [5] On 6 July 2011 and pursuant to an authorisation supplied by Modimolle, CMXI placed an order with its suppliers for 15 000 water and electricity metres.
- [6] On 1 August 2011 CMXI cancelled the order, because Modimolle requested that the first SLA be amended from an outright purchase to a fee for service model. CMXI alleged that on 1 June 2012 Ms Fanoe and Mr Kupe entered into a written agreement, amending the first SLA. In terms of this second agreement (the second SLA) CMXI was now contracted by Modimolle, to inter alia, supply and install 7 500 electrical and water metres in terms of phase one of the project at a cost of R32 000 000-00 (thirty-two million rand). It was also agreed that Modimolle would be responsible for the signing of a financial repayment plan and CMXI would be responsible for provision of a finance option in respect of phase one.
- [7] CMXI, in compliance with its obligation to provide finance options, obtained approval of financing from Standard Bank, on condition that Modimolle must stand surety for the fee of the service agreement. CMXI alleged that Modimolle failed to sign off on a financial repayment plan for phase one and that CMXI had suffered damages in the sum of R32 000 000-00 plus interest as per the Master Service Agreement, after an amendment, which was not opposed the sum was reduced to R14 399 500-00.

THE STATEMENT OF DEFENCE

- [8] Modimolle responded in terms of article 6 of the Rules of the Arbitration Foundation of Southern Africa (the Arbitration Rules). It was stated that Modimolle did not express a choice of an arbitrator in terms of articles 6.1.1 to 6.1.3 of the Arbitration rules and reserved its rights in this regard.
- [9] The arbitration clause was not disputed, but the validity and enforceability of the documents titled “Service Level Agreement” and “Master Service Agreement” was disputed.
- [10] In the statement of defence it was alleged that on 15 February 2012 (the date must be incorrect and should be 15 February 2011) Modimolle issued a public tender. On 30 May 2011 the Bid Adjudication Committee recommended to the Accounting Officer that CMXI be appointed. It was further recommended that the project be funded from the Development Bank of South Africa (DBSA) grant. The Accounting Officer approved the recommendations on 6 July 2011.
- [11] It was alleged that two conditions were imposed by the Accounting Officer on the successful bidder:

- a) it would be responsible for raising the funding; and
- b) contingency payments would be made from real savings.

[12] It was also noted that the first SLA was signed on 4 July 2011. It was pointed out that in procuring goods Modimolle was obliged to act within the confines of the Municipal Finance Management Act, 56 of 2003 (MFMA), its own procurement policies, instructions from National Treasury and related municipal procedures and processes.

[13] Modimolle alleged that the agreement was invalid for the following

reasons:

- a) The signatory of Modimolle had no authority to enter into the agreement on its behalf;
 - b) Modimolle had not budgeted for the project, hence the recommendation that it be funded from the DBSA grant and that CMXI should source funding; and
 - c) The processes after the Bid Adjudication Committee's recommendations were a nullity, as there was no compliance with the legislative framework.
- [14] In its plea over, and in the event that the agreement was found to be valid and enforceable, Modimolle averred that CMXI was in default and did not perform in terms of the agreement.

THE PRE-ARBITRATION MEETING

- [15] In pre-arbitration minutes dated 6 February 2015 it was recorded that the parties agreed that a valid arbitration agreement existed and that all the pre-conditions for an arbitration had been met.
- [16] It was further noted that it was agreed that the Arbitration rules would apply, and witness statements containing a summary of witnesses' evidence would be provided by the parties. It was noted that it was agreed that the arbitrator would determine whether the issues fell within the arbitration clause. The date of hearing was set down for 21 and 22 April 2015. The pre-trial minutes were not signed by the applicant's representatives. However, in an email dated 3 March 2015, from Modimolle's attorneys to CMXI's attorneys, reference was made to the pre-trial meeting that was held

and an indulgence was sought as the applicant's statement of issues, which was supposed to have been filed by 27 February 2015 was late. Nothing was noted about the rest of the pre-trial minutes, or any dispute raised about the contents thereof. There is no other reasonable inference to be drawn than that Modimolle agreed with the contents of the minutes, despite not signing it.

- [17] There were also no other indication in any correspondence that the contents of the pre-arbitration meeting were disputed, the only inference that can be drawn is that the parties did agree on proceeding by way of arbitration. The applicant proceeded with the arbitration after Modimolle was disestablished.

EVENTS IN RE THE ARBITRATION BEFORE THE MAKING OF THE AWARD

- [18] On 15 July 2014 AFSA wrote to Modimolle in re a request for an arbitration received from CMXI, on 21 February 2014. An objection to the arbitration followed, but the applicant did not attach the objection to the papers, what was attached, was a letter dated 21 October 2014 in which the objection to the arbitration was withdrawn, but under protest.
- [19] In this letter certain points were raised pertaining to the objection and certain allegedly factual errors were corrected. The objections dealt with:
- a) an allegation that the claimant did not suggest that the arbitrator be a qualified advocate;
 - b) an allegation that the claimant did not express a choice, or a number of arbitrators, and seeing that the applicant did not know who was on the panel could not make a choice;
 - c) the applicant raised a request that a list be provided from which the arbitrator could be agreed on, or nominated;
 - d) the applicant requested that it was advised that advocate Malindi (Sc) was to be appointed as the arbitrator;
 - e) it was placed on record that AFSA placed the applicant on terms, to agree within a certain period of time, to the appointment of Adv Malindi (Sc) as arbitrator, failing which his appointment would be confirmed, and it was placed on record that applicant required a list of panellists from which the arbitrator could be nominated or suggested.
- [20] CMXI pointed out that the main action was instituted during February 2014, and that, after initially raising an objection to the arbitration, applicant withdrew that objection on 21 October 2014 and contended that the belated objection to the arbitration had no merit. The pre- arbitration minutes which, read with the email of the applicant referred to earlier, confirmed a valid arbitration. This must in my view also be seen within the context that both Modimolle and later the applicant partook in the arbitration proceedings without raising any objection.
- [21] None of the parties dealt with what occurred on the dates of 20 and 21 April 2015, which was the first dates allocated for the hearing of the arbitration, but the founding affidavit stated that the arbitration was scheduled for hearing on 11 August
2016. The only inference that can be drawn is that the arbitration was postponed to August 2016. On 11 August 2016 the applicant requested a postponement, pending a review application setting aside the agreement. A postponement was granted pending the determination of the review proceedings. An interim award was made by the arbitrator, directing applicant to pay the wasted costs occasioned by the postponement. Applicant complained that, the interim award was erroneous, as the arbitrator was allegedly not entitled to hear the matter.

- [22] The Arbitrator on that occasion ordered the parties to proceed expeditiously with the review proceedings, adhering strictly to the rules. The fixed amount for wasted costs was set at R217 623-00, in doing so the arbitrator relied on article 13 of the Arbitration Rules. The applicant persisted that the award was unlawful, as the agreement on which the arbitration was based, was unlawful. This aspect is, according to the applicant, the subject of a counter-application in this court under case number 94879/2016, which is still pending.
- [23] On 12 May 2017 the review application, under case number 6187/2016 was dismissed with costs. The applicant failed to file a replying affidavit in these proceedings and as far as could be established, apparently failed to appear and the application was heard on an unopposed basis. Although the applicant belatedly raised the point that its attorneys was negligent, because they did not appear at the hearing, it took no steps to address the alleged negligence or filed a rescission application.
- [24] On 23 October 2017 an interim award was made, this award determined that the applicant had to begin with the preliminary point that was raised in response to the counterclaim of 24 August 2017, being the alleged lack of jurisdiction of the arbitrator. This aspect was heard and the arbitrator found that he had the necessary jurisdiction.
- [25] After the applicant failed to file witness statements and on 30 October 2017 an interim determination was made relating to the filing of witness statements.
- [26] On 30 January 2018 the applicant sought yet another postponement of the arbitration, and according to CMXI, tendered costs at an agreed amount of R566 938-00. This court order was the subject of a rescission application, however following an urgent application by CMXI in the Polokwane High Court, the applicant agreed to pay both the interim awards of R217 623-00 and R566 938-00 respectively.
- [27] The applicant failed to comply with the interim awards and CMXI had to approach the court to make the awards an order of court. The order was granted on 22 May 2018. The applicant failed to comply with the order and the Sheriff finally had to execute on it, and attached assets of the applicant. The applicant launched an intervention application, in which it was inter alia stated that CMXI was owed money by Modimolle.
- [28] On 28 May 2018 the matter finally came before the arbitrator. A postponement was yet again sought by the applicant, it was however refused. The matter proceeded and the applicant's defence was struck and on 29 May 2018 the arbitrator proceeded with the arbitration, heard evidence presented by CMXI and an award was made for damages in the amount of R13 595 750-00 in favour of CMXI. Applicant complained that this award was flawed, in that it was inflated and was not corroborated by the facts, was granted without supporting evidence and without taking into consideration that CMXI was not in a position to execute the contract because of financial constraints. The applicant contended that the award constituted a gross irregularity as it constituted the awarding of an unproven and undetermined claim.

- [29] For the first time in this application the point was raised that CMXI did not make out a proper case in its statement of claim, and that the statement of claim was excipiable. An exception to the statement of claim had never been raised during the arbitration proceedings.

THE TRANSCRIPT

- [30] The transcript of the proceedings of 28 May 2018 revealed that the applicant was represented at the hearing and requested yet another postponement. The applicant's failure to comply with the interim awards and subsequent court orders were raised and the legal representatives of CMXI requested that in the light thereof the defence, including the preliminary points raised by the defendant, be struck in terms of section 11.2.3[2] of the Arbitration rules. The various postponements and the applicant's general recalcitrance were raised as reasons for the application.
- [31] The representative of the applicant opposed this application. The issue of prejudice was raised. During this argument the legal representative for the applicant conceded that the witness statements on its behalf had still not been filed and that the interim awards had not been complied with. It was argued by applicant's representative, that a substantive application should have been brought by CMXI for striking of the defence. CMXI's representative in argument referred to the numerous failures of Modimolle and applicant to comply with various rulings, interim awards and court orders, and submitted that an oral application was sufficient.
- [32] The arbitrator considered the arguments of the parties and in terms of article 11.1[3] and 11.2.3[4] read with article 10.1.3[5] and 10.1.4[6] of the Arbitration rules, struck the defence and ordered the applicant to pay the costs. He stated that the reasons for the award would be given in his final award.
- [33] The matter stood down until the following morning. The applicant's representative was not present on 29 May 2018, but was clearly fully aware that the matter would proceed, in the light of the events of the previous day. The evidence of Ms Fanoë, the managing director of CMXI, was led. She testified regarding the nature of the business of CMXI and how CMXI responded to the tender and the background to the tender being awarded to CMXI, the subsequent negotiations and the agreements concluded between the parties. She also explained how CMXI would have executed its obligations in terms of the agreement.
- [34] She testified about the funding of the project and how it was going to be financed. She testified that the first SLA was signed by her, on behalf of CMXI and by the MM, on behalf of Modimolle. The Chief Financial Officer (CFO) gave the go ahead by giving an order to start executing. At first Modimolle suggested that CMXI should place an order and they would then be paid through a DBSA grant and debt collection. She testified that the purchase order was issued in terms of the agreement, for an outright purchase of the metres, Modimolle however defaulted. The MM and CFO had further meetings with CMXI where inter alia a decision was made that CMXI would find the necessary funding.

[35] Ms Fanoë said orders that were placed were cancelled. She confirmed that in terms of the agreement CMXI had to find funding, but Modimolle had to sign as surety for the funding obtained. The corporate services manager started attending the meetings, she said that he was mentioned in the notices as the acting MM. She testified that while looking for funding, they were also working on complying with Treasury's requirements. Standard Bank was approached and indicated that it was willing to assist with the funding. The second SLA had in the meantime been signed, but the master agreement on the repayment had not. The master agreement was sent by the MM to Treasury. Treasury raised certain issues. According to Ms Fanoë, CMXI complied with these issues and the new master agreement was signed by the MM and one of the committee members.

[36] The terms were changed, in that the project was split into two phases. The first phase required 7 500 metres. The MM, when signing the agreement, told Ms Fanoë that his term was coming to an end, but he hoped that his contract would be extended, he also told her that it was the CFO's project, and that she must start executing and gave her a certain Mr Shivimbi as a contact person. She had to get an updated order and the repayment plan had to be finalised, as Standard Bank required it as a year had passed since the initial order was placed.

[37] The CFO then became the acting MM. Ms Fanoë met her and went with her through the documents. Despite promising to revert back to Ms Fanoë, she failed to do so. The acting MM, returned to her position as CFO and another acting MM took over. Extensive correspondence between the applicant and Ms Fanoë commenced. Ms Fanoë was worried that CMXI would fall behind on the project and requested a meeting with the acting MM on several occasions, but to no avail. She then went to the mayor to request her to facilitate a meeting. The management at the municipality was constantly changing, which complicated matters. The

mayor finally gave Ms Fanoë an email address of a contact person. By then it was already July 2013. She testified that she had a 1 000 metres ready for installation. Finally, she succeeded in arranging a meeting with the CFO and gave her all the documentation. Ms Fanoë was satisfied that the meeting was productive. By then another updated order was required by Standard Bank, as by now two years had passed. The CFO asked that the minutes should be sent to her and she would let Ms Fanoë know when the kick off would take place. After this everything ground to a standstill, Ms Fanoë and her lawyer then met with Mr Moagi the acting MM, at the time and the legal advisor to try and mediate the situation, nothing came of that and it was at this point that the arbitration proceedings started.

[38] Ms Fanoë testified how the losses claimed were incurred. She testified that she did not take into consideration all the losses that had been suffered by CMXI. She just took into account the hardware and consulting services. She quoted R300 000-00 for this in the tender. Her costs were R200 000-00, which included the engineers and sending people out to start preparing for the services that were to be rendered. CMXI spent two to three months walking through the areas and determining where metres would be installed and what was

needed to execute the installation. They also travelled a lot, over the period of two years, to Modimolle and incurred expenses in doing so. CMXI charged R1 883-00 per metre and its cost was R850-00 per metre. The components were imported but assembled in South Africa. She testified about the costs and the estimated profit. She testified about each item and how she calculated it and also indicated which items should not be included in the calculation.

THE AWARD

- [39] In his award the arbitrator mentioned the delays that occurred. The arbitration should have commenced on 20 - 21 April 2015, but the hearing finally took place on 29 May 2018. He pointed out that the pleadings closed during January 2015, but the review application was only filed by the applicant during August 2016. This caused considerable delay.
- [40] An interim award was issued on 30 January 2018 in terms whereof the matter was postponed to 28 May to 1 June 2018, applicant had to pay the wasted costs for 29 January 2018 and 2 February 2018. The applicant undertook to pay the wasted costs on or before 15 February 2018 and to ringfence adequate amounts in relation to the giving of instructions and related costs.
- [41] It is in the light of the criticism raised by the applicant against its erstwhile legal representatives, important to note that the arbitrator remarked that the applicant was unable to meet the arbitration costs, but also unable to give proper instructions to its legal team. This in my view clearly points to a failure by the applicant to do its duty, rather than negligence on the side of its legal representatives. In any event no steps were ever taken to address the alleged negligence of the legal representatives, as far as can be ascertained from the papers.
- [42] The arbitrator referred to the interim award that preceded the one made on 30 January 2018, namely the one made on 30 October 2017, which applicant did not comply with when the hearing was postponed to 29 January 2018. The arbitrator again remarked on the applicant's inability to proceed with its defence, because of a lack of funds and an inability to "give instructions at all."
- [43] The arbitrator referred to postponements on 8 June 2016, 4 July 2016, 11 August 2016, 13 October 2017, all of which were at the instance of the applicant. He noted that on the day of the hearing on 28 May 2018 the applicant again sought a postponement. This was refused and the defence was struck. The arbitrator set out his reasons for doing so in the award.
- [44] He then proceeded to deal with the merits based on the evidence by Ms Fanoë. He dealt with the contractual obligations between the parties and the merits of the case. He concluded that the applicant had to pay the amount of R13 595 750-00, interest at 10% a tempore morae from date of the award and costs.

THE APPLICATION FOR AMENDMENT OF THE NOTICE OF MOTION

[45] On 18 June 2020, a mere six court days before the hearing of this application, applicant launched an application to amend its prayers. The applicant sought to insert the following prayers in Part 8 of its notice of motion:

“5. A declaratory order that the Modimolle Local Municipality was

disestablished as from 3 August 2016 and since ceased to exist;

6. A declaratory order that the Master Service Agreement, attached to the supplementary affidavit as Annexure “MMS4” (page 603 - 623) (“the Agreement”) purportedly concluded between the applicant's predecessor, Modimolle Local Municipality, and the first respondent on 1 June 2012 is invalid and unenforceable, due to inter alia the following circumstances:

6.1 it contains a vague and unenforceable pactum de contrahendo in clause 1.9.1.3 of schedule 1 thereto (vide p 617) that the “Modimolle Local Municipality” will be responsible for the “signing of a financial repayment plan for Phase 1”; and

6.2 the agreement was not signed by or on behalf of the “Modimolle Local Municipality”.

7. A declaratory order that the Master Service Agreement, attached to the supplementary affidavit as Annexure “MMS4” (page 603 - 623), purportedly concluded between the applicant's predecessor, the Modimolle Local Municipality, and the first respondent on 1 June 2012 was entered into in contravention of the legislation listed hereunder and is accordingly unlawful, invalid and unenforceable:

7.1 Section 217(1) of the Constitution of the Republic of South Africa, 1996;

7.2 Section 80, 83 and 84 of the Local Government: Municipal Systems Act, No 32 of 2000;

7.3 Regulation 12(1)(d)(i) of the Municipal Supply Chain

Regulations as promulgated in Government Notice No. R868 of 30 May 2005;

7.4 Sections 19 (read with 17(2), 33, 46, 47, 112(1)(f), 112(1)(h)(ii) and 112(2) of the Local Government: Municipal Finance Management Act, No. 55 of 2003;

8. Alternative to prayers 5, 6 and 7 above, that the issues set out therein be referred to oral evidence.

2. by renumbering prayers 5, 6, 7 and B to be 9, 10, 11 and 12."

[46] The application was brought in terms of Rule 28(10) of the Uniform Rules of Court which reads as follows:

“The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment, grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.”

- [47] The general approach to be applied in applications for amendments is trite, namely that amendments will be allowed, unless the application is mala fide, or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or unless the parties cannot be put back, for purposes of justice, in the same position as they were when the pleadings were filed.[7]
- [48] In this instance the amendment sought at this very late stage will change the whole cause of action set out in the application. Although based on the same facts, the prayers sought, on counsel for the applicant's own version, set out in his heads of argument, now seek to introduce prayers for declaratory orders in terms of the provisions of section 21(1)(c) of the Superior Courts Act 10 of 2013 {the Superior Courts Act), whereas since the launching of the application, applicant solely relied on section 33(1) of the Arbitration Act for its review application. This belated amendment must be evaluated against the historical context of the dispute between the parties.
- [49] The result of this amendment, if granted, will be that the whole legal basis of the applicant's case will change. Despite the fact that the factual matrix will stay the same, the proposed amendment will require a totally different response from CMXI and the answering affidavit which was filed will be totally inadequate. As a result the prejudice to CMXI will be immeasurable as it will have to file a supplementary opposing affidavit, which will delay the matter even further.
- [50] This must be seen against the background of numerous delays from the onset of this matter, which was instituted as far back as September 2018. It must furthermore be noted that this matter was set down for 29 April 2020 and certainly, if the amendments were bona fide, it should have been filed a long time before the hearing and not at this very late stage, leaving the respondents at a serious disadvantage.
- [51] In my view the belated amendment will prejudice the respondent and that prejudice cannot be rectified by any order as to costs, or further postponements, nor can CMXI be placed in the position it was in for purposes of justice. The tender was awarded during 2011. The arbitration commenced in 2014. This application was launched during 2018 and the arbitration award was granted on 3 July 2018. Nine years have passed since the award of the tender. It is in the interests of justice that this matter be finalised. The whole purpose of an expeditious resolution of the dispute had been frustrated by the long delay in this matter, which was caused by the applicant. It is impossible for purposes of justice to place CMXI in the same position as it was in when the papers were filed, in the light of the long and protracted history of this case. In my view the belated amendment should be refused with costs.

THE DELAY IN LAUNCHING THIS APPLICATION

[52] The arbitration award was published on 3 July 2018 and this application was issued on 26 September 2018, that is longer than the six-week period provided for in section 33(2) of the Arbitration Act. This period can only be extended on good cause shown in terms of section 38 of the Arbitration Act.

[1] Provincial Gazette, no 2735, 22 July 2016

[2] 11.2. without detracting from the generality of the foregoing, the arbitrator shall have the following powers

11.2.1 ...

11 2.2 ...

11.2.3 to strike out or dismiss any claim or defence on the grounds of failure of a party timeously to comply with any ruling or interim award of the arbitrator, or on the ground of delaying conduct on the part of a party so as to give rise to a substantial risk of serious prejudice to the other party or parties:

[3] 11.1 The arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final

determination

of all the disputes raised in the proceedings, including the matter of costs.

[4] supra

[5] 10.1.3 In all other cases, hear the parties in the most expeditious or least costly procedure to be adopted for the further conduct of the arbitration, and thereafter rule upon such procedure and upon time limits for complying with such procedures;

[6] 10.1.4 thereafter, in such manner he deems appropriate, on the application of a party or mero motu, conduct hearings or otherwise deal with any further procedural and interlocutory matters. including matters relating to compliance or non-compliance with procedural rulings;

[7] Erasmus Superior Court Practice, Van Loggerenberg, D1-332-333 [Service 7208] [Erasmus]. Moolman v Estate Moolman 1927 CPD 27 at 29

[8] Venmop 275 (Pty) Ltd & Another v Cleverland Projects (Pty) Ltd & Another 2016{1} SA 78 GJ par 23 and cases referred to in par 23

[9] Erasmus supra 0323-324

[10] 2009(4) SA 529 (CC) (Lufuno)

[11] Lufuno para 38

[12] Lufuno para 235

[13]Lufuno para 236

[14]Lufuno para 261

[15] Lufuno para 261

[16] 2007(3) SA 266(SCA) (Telcordia)

[17] Telcordia para 51

[18] Telcordia para67

[19] Telcordia para 71 and 72-73

[20] Telcordia para [50]-[51]

[21] Telcordia para 80

[22] Telcordia para 86

[23] 8.1 Where the Secretariat has accepted a Request for Arbitration, but a party cited as a defendant that he was a party to an arbitration

agreement, or that the arbitration agreement is still valid and operative, or that claim falls within the terms of the arbitration

agreement, or a defendant to a counterclaim disputes that the counterclaim falls within the arbitration agreement, an arbitration

shall be appointed in accordance with these Rules, to consider matter so contested and decide whether or not to proceed with the arbitration, and, if he decides to proceed therewith, to do so”

[24] supra

[25] 11.2.2 to rule on his own jurisdiction, including the rulings on any dispute in regard to the existence or validity of the arbitration

agreement or scope thereof;

[26]

[2013] JOL 30597(SCA)

[27] Radon para 28 and 29

[28]2018(5) 462(SCA) (Palabora Copper)

[29] Palabora Copper para 7&8

[30] 11.2.4 to proceed with the arbitration in accordance with these Rules, and make an award in the absence or without hearing any party who is in default as provide for these Rules, or fails to appear or to comply with any ruling or interim award of the arbitrator

[31] *supra*

[32] *Hlatswayo v Mare and Deos* 1912 AD

[33] 2012

(1) SA 256 (CC)

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