SOUTH AFRICA / JUDGMENT

Professional Mobile Mapping (Pty) Ltd v Matjhabeng Local Municipality (4250/2024) [2025] ZAFSHC 33 (7 February 2025)

[2025] ZAFSHC 33

COURT
Free State High Court, Bloemfontein

BEFORE
Mpama

CASE / FILE NUMBER
4250/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
FREE STATE DIVISION,
BLOEMFONTEIN
Reportable / Not
reportable
Case no: 4250/2024
In
the matter between
PROFESSIONAL
MOBILE MAPPING (PTY) LTD
APPLICANT
and
MATJHABENG
LOCAL MUNICIPALITY
RESPONDENT
Neutral
citation: Professional
Mobile Mapping (Pty) Ltd v Matjhabeng Local Municipality (4250/2024)
Coram: Mpama AJ
Heard: 31 OCTOBER 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII.
The date and time for hand-down is deemed to be
07 February 2025
at 15H00

Summary: ORDER
1.
The respondent's first special plea is dismissed.
2.
The respondent's second special plea is upheld.
3.
No costs order is made.

JUDGMENT

MPAMA AJ

[1] This is an application in terms of s 31 of the Arbitration Act 42 of 1965 (the Act) for an arbitration award (the award) to be made an order of the court. The applicant and the respondent concluded arbitration proceedings and an award was granted in favour of the applicant. The applicant now applies for an order confirming the award and the respondent opposes the application and has raised points in limine.

[2] The applicant is a company duly registered in terms of the company laws of South Africa with domicilium executandi at 36 Radloff Street, Wilkoppies, Klerksdorp. The respondent is an organ of the state in terms of s 2 of the Local Municipal Systems Act 32 of 2000 with a domicilium citandi et executandi at 319 Stateway, Welkom.

[3] The applicant and the respondent concluded a written Service Level Agreement (SLA) in terms of which the applicant would develop a web-based document management solution over a period of 36 months and for the amount of R9 936 000.00 for the respondent. A dispute arose between the applicant and the respondent over the payment of an amount of R5 464 800.00. The dispute resolution procedure provided for in the SLA was the referral of the dispute to arbitration, that such hearing be held at Welkom and in accordance with the rules of AFSA.

[4] The applicant and the respondent agreed to refer the dispute to arbitration as it is provided for in the SLA. Advocate Lance Friedman was appointed as an arbitrator.

[5] On 12 March 2024, a pre-arbitration meeting (the meeting) was convened virtually. The respondent, despite being notified and having confirmed its availability for the meeting, did not attend. There was no explanation for non-attendance. The minutes of the meeting were sent via email to the respondent. It had been agreed at the meeting that the hearing of the arbitration, as a cost-cutting measure, will be held virtually. The applicant furnished the arbitrator and the respondent with the statement of claim. Nothing was forthcoming from

the respondent as it failed to deliver its statement of defence.

[6] The arbitration hearing took place virtually on 24 April 2024, as agreed in the meeting. Once again, there was no appearance by and for the respondent, with no explanation proffered. The arbitration hearing proceeded and an award was made in favour of the applicant by default. The award was signed and published by the arbitrator in Johannesburg on 13 May 2024.

[7] The applicant, armed with the award, approached this court and sought the following relief:

'That an arbitration award made on 13 May 204 by arbitrator, Adv Lance Friedman in respect of arbitration proceedings between the above stated parties, is made an order of the court in terms of section 31 of the Arbitration Act 42 of 1965'.

[8] The respondent opposed the application. In the opposing affidavit the respondent, inter alia, raised two points in limine: first, that this court has no jurisdiction to confirm an award obtained and issued in Johannesburg and, second, since there is a pending review matter against this award, this court is precluded from hearing this application. The parties agreed that the court should first decide the points in limine before dealing with the merits of the application.

[9] The applicant asserted in its replying affidavit that the arbitrator was in Johannesburg when he signed off and published the award. However, that alone cannot be interpreted to mean the award was made in Johannesburg. The applicant averred that the parties agreed in the SLA that the seat of any arbitration hearing shall be Welkom and the situation was not altered by where the award was signed.

[10] The facts of this matter are largely common cause between the applicant and the respondent. It is not in dispute that:

(i) The arbitration hearing was conducted virtually, the respondent failed to attend the hearing and by default an award was made in favour of the applicant.

(ii) The award was signed and published in Johannesburg by the arbitrator on 13 May 2024 and

(iii) The award in question is a subject to review in an application filed by the respondent in the Gauteng Division of the High Court, Johannesburg. The respondent is applying for the review and for the setting aside of the award as well as for the arbitration hearing to start de novo. The application in terms of s 31 of Act 42 of 1965 was brought whilst the review proceedings are pending.

Points in Limine

A. Jurisdiction of this court in terms of s 31 of Act 42 of 1965:

[12] '(1) An award may, on the application to a court of competent jurisdiction by any other party to the reference after due notice by the other party or parties, be made an order of the court.'

(i) The wording of this section indicates that the court has the discretion to refuse to make an award an order of the court.

(ii) Jurisdiction is the power vested in a court to adjudicate upon, determine and dispose of a matter. This power is territorial and conferred to the court by s 21 of the Superior Courts Act 10 of 2013, which provides:

'Persons over whom and matters in relation to which Divisions have jurisdiction.

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance" and has the power-. . .'.

(iii) The arbitrator did not seat in Welkom at any time during the arbitration processes including the hearing. The applicant sat in its place of business at Klerksdorp during the arbitration hearing. The arbitration award was signed and published at Johannesburg. Nothing connected the arbitration hearing and the award to Welkom.

(iv) The applicant waited for the proverbial shoe to drop and now seeks to conveniently bet its bottom dollar on the dispute resolution arrangement provided for in the SLA.

(v) The dispute between the parties arose within the jurisdiction of this Court (not in dispute), however the dispute has been decided and put to rest by the arbitrator. It is for this reason that the facts that arose to the dispute are not an issue before the court. The court must decide whether to confirm or not to confirm the award. The gist of these proceedings is no longer a dispute between the parties, however an arbitration award made by the arbitrator. My view is that the power of this court cannot be extended to the subject matter that occurred beyond its territorial jurisdiction. This point in limine must be upheld.

B. The application and the pending review of the arbitration award

[13]

(i) The applicant argued that this court must confirm the arbitration award despite the pending review application. The applicant's view is that it may take a year to finalize the review application and the applicant cannot be held at ransom by the respondent's review application. The applicant labelled the respondent's conduct an abuse of process, a delaying tactic and referred the court to the case of Diamond Mines (Pty) Ltd and Others v Government of the Rebublic of South Africa.[1]

(ii) The respondent contended that the court is precluded from hearing this application whilst there is pending review application. It referred the court to the following decision amongst other decisions: Blue Marine (Pty) Ltd V CCMA and Others[2] where it was held:

'[15] It is important to realise that once the award is made an order of the court the award, from which such order was made, falls away. In other words, the two instruments cannot co-exist alongside each other. Therefore, upon an award being made an order of the court, there can be no question again of application of review, aimed at reviewing and setting aside the same award. By then, the award no longer exists. Any party who feels aggrieved by the award can then only look for remedy to challenge the court order and not the award.'

[14] An unavoidable consequence of s 31 of the Act is that should the application succeed, the award will be elevated to a court judgment and the award ceases to exist. The court is not automatically excluded from confirming an award in terms of s 31 of the Act by a pending review application. The court has a discretion to either proceed with the application or postpone the application pending the finalisation of the review application and in so doing, consider potential prejudice to either of the parties. My view that this point in limine must be dismissed.

[15] In the circumstances I order as follows:

1. The respondent's first special plea is dismissed

3. No cost order is made.

L. MPAMA, AJ

Appearances For the Applicant: Adv N Jagga Instructed by: JM Inc Klerksdorp c/o Phatsoane Henney Inc Westdene Bloemfontein For the Respondent: Mr Voyi Instructed by: Voyi Inc Attorneys Midrand c/o EG Cooper Majiedt Inc Westdene Bloemfontein

[1] Diamond Mines (Pty) Ltd and Others v Government of the Rebublic of South Africa 1999

(2) SA 279 (T).

[2] Blue Marine (Pty) Ltd V CCMA and Others [2003] 9 BLLR 853 (LC).

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