

SOUTH AFRICA / JUDGMENT

Royal Mnandi (Pty) Limited v Jones and Others (46600/2012) [2013]

ZAGPPHC 443 (11 December 2013)

[2013] ZAGPPHC 443

COURT

North Gauteng High Court, Pretoria

BEFORE

S L Magardie

CASE / FILE NUMBER

46600/2012

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG, PRETORIA)

CASE

NO: 46600/2012

DATE:

11 DECEMBER 2013

In

the matter between:

ROYAL

MNANDI (PTY)

LIMITED.....Applicant

and

LOUIS

MARTIN

JONES.....1st

Respondent

JOHANN

CHRISTIAAN KRIEGLER, N.O.....2nd

Respondent

PERCY

BLIEDEN,

N.O.....3rd

Respondent

JOHN

MICHAEL SUTTNER, N.O.....4th

Respondent

JUDGMENT

MAGARDIE AJ

1. This is a review application in terms of section 33(1) of the Arbitration Act.[i] There were two processes that preceded this application, to wit, the arbitration presided by Adv Burger SC and the arbitration appeal

before the second to fourth respondents. It is the outcome of the arbitration appeal that the applicant seeks to review herein.

2. It is apposite to mention forthwith that the complete record of the arbitration proceedings was not filed in this matter. The parties agreed to use certain snippets of the arbitration record which had relevance on the issues ventilated before me. I was informed that the complete record was spanning over some nine thousand pages and that it was not expected of me to peruse same. Further, that the snippets made available to me would be sufficient to adjudicate on the issues.
3. The arbitration proceedings emanated from the termination of the first respondent's employment. A dispute also arose with regard to the question whether there was termination of employment at the instance of the applicant or whether the applicant repudiated the employment agreement.
4. It is clear that the payments of large amounts of commissions to the first respondent were the principal source of the problems that ended up bedeviling the employment relationship between the parties. It may well be that at the time when the parties entered into the employment agreement, it was not anticipated that the first respondent's success would be so phenomenal.
5. After the appointment of a new Chief Executive Officer for the applicant, an investigation was conducted into the employment contract of the first respondent and how it came about that the first respondent was paid such huge amounts of money. The new CEO was definitely unhappy about the money that was paid to the first respondent. The applicant appointed one Mr Dames to conduct such investigation. Mr Dames came to the conclusion that the first respondent was paid such moneys on the basis of a wrong calculation of using the gross contract contribution formula instead of the net profits (according to standard accounting practice) generated by the applicant.
6. As a result of Mr Dames report, the applicant took the view that the first respondent was overpaid by an amount of R 13 million, which amount was later reduced to R 10 million. The applicant demanded that the first respondent should repay the amount of R10 million in alleged overpayment made to the first respondent.

7. The first respondent steadfastly denied ever owing the applicant the claimed amount and held the view that the commission due to him was paid correctly in terms of the formula agreed between the parties. The first respondent's contention was that the understanding between the parties was that he would be paid a commission based on the net contract contribution which denoted something different from net profit in accounting standards.
8. It was as a result of the impasse between the parties that the applicant decided to terminate the first respondent's employment contract and the matter was referred to arbitration. I must mention that Mr Dames was also called to testify as a witness for the applicant.
9. The parties referred, inter alia, the following issues to arbitration:
 - 9.1 The interpretation of the addendum;
 - 9.2 The claim for rectification of the addendum;
 - 9.3 Whether the applicant was estopped from relying on its interpretation of the addendum in the event of it being upheld and in the event of the addendum not being rectified;
 - 9.4 The dispute regarding the alleged breach/repudiation of the addendum;
 - 9.5 When and why the first respondent's employment's contract was cancelled;
 - 9.6 Whether the first respondent was constructively dismissed by the applicant and was consequently entitled to compensation as a result thereof;
 - 9.7 Whether the first respondent procured the Ingula Dam, Group 5 Pipeline and Group 5 Vrede business on the applicant's behalf;
 - 9.8 The amount of sales commission and operating incentive, if any, that still had to be paid to the first respondent in addition to what was already paid to the first respondent as at the date of termination of employment;
 - 9.9 Whether the first respondent received operating incentives and sales commission in excess of what he was entitled to in terms of the addendum, prior to the termination thereof;
 - 9.10 Whether the applicant was entitled to recover any excess payment made to the first respondent;
 - 9.11 Formula used for the calculation of the applicant's counterclaim;
 - 9.12 The first respondent claimed payment of commission on three contracts, namely Moatize Temporary Kitchen, Sasoi extension and Group Five Vrede contract.
10. Before me, the following issues were common cause facts:
 - 10.1 During August 2006, the applicant and the first respondent entered into an employment contract in terms of which the first respondent would provide what was termed Project Support Services (PSS).

10.2 During May 2007, the parties agreed on an addendum to the original contract. One of the significant aspects of the addendum was that it provided for the full payment of the commission accruing to the first respondent in advance, provided the financial position of the applicant permitted. It was the addendum that became the centerpiece of the contestation between the parties.

10.3 Between the period May 2007 and September 2009 the first respondent was paid a total amount in excess of R20 million in line with the terms of the addendum.

10.4 The first respondent's employment contract was terminated during October 2009. Part of the first respondent's claim at arbitration (where he was the claimant) was that he was constructively dismissed.

10.5 The arbitrator found against the first respondent on the issue of repudiation, resulting in the dismissal of the claim for damages flowing from repudiation.

10.6 The interpretation of the formula for payment of commission and incentives was one of the key aspects of the arbitration proceedings. The arbitrator was required to, inter alia, determine the meaning of "11 net contract contribution" and "net profit" in accounting standards.

10.7 Prior to the commencement of the arbitration proceedings, the parties were allowed space to effect numerous amendments of their pleadings.

10.8 At the end of the arbitration proceedings, the arbitrator made an award in terms of which the first respondent was to pay amounts of R3 339 098.82 for sales commission and R2 514 434.00 for operating incentives respectively.

11. It is indeed so that the arbitrator and appeal tribunal were also required to decide whether the first respondent was overpaid between the period 01 May 2007 to 31 May 2009, and if so, the amount of overpayment. The applicant denied any liability for specific performance in relations to the total amount of R2 888 159.00 claimed by the first respondent for outstanding commissions and/or incentives.
12. According to the first respondent's statement of claim, the amounts of R90 000.00 and R135 000.00 were respectively claimed in respect of the Sasol Extension and Group Five Vrede contracts.
13. The arbitrator made certain findings regarding the respective claims of the parties. Both parties were not satisfied with the outcome of the arbitration resulting in them appealing against the arbitration award for various reasons.
14. Some of the findings made by the arbitration appeal tribunal were the following:

14.1 That on the evidence, it was clear that the parties intended the phrase "net profit" to denote net contract contribution and to calculate the first respondent's commission in terms thereof;

14.2 That the applicant was not entitled to the repayment of the amount of R4 140 000.00 sales commission paid to the first respondent in relation to the Ingula Dam contract. In other words, the appeal tribunal found that the said amount was correctly paid to the first respondent and that the latter was entitled to same;

14.3 The appeal tribunal upheld the arbitrator's finding that there was an oral agreement concluded after the addendum in terms of which it was agreed that the first respondent would be paid commission upfront depending of the applicant's cash flow generated from the new business;

14.4 The appeal tribunal found that there was no need for the rectification of the addendum insofar as the evidence on record clearly demonstrated that, although no attention to the wording of the addendum was given, the parties were clear on what they agreed upon and on the scope of the addendum to the contract.

15. In this matter the applicant criticizes the evidence of Mr Engelbrecht regarding the method of calculation of the commission due to the first respondent as hearsay and argues that same should not be considered. The appeal tribunal was correct in its view that there was no application made before the arbitrator to expunge such evidence. There was also no evidence presented by the applicant to gainsay Mr Engelbrecht's evidence.

16. The applicant contends that the appeal tribunal exceeded its mandate by:

16.1 Deciding to award the first respondent an amount of sales commission in excess of what was claimed in the Sasol Extension and the Group Five contracts;

16.2 Allowing the first respondent to adjust the amount of the net contract contribution on which operating incentives were calculated by the "accelerated depreciation" expense of almost R2 million; and

16.3 Determining the first respondent's claim for operating incentives on the basis of net contract contribution up to 31 October 2009.

17. The basis upon which the applicant makes the claim that the appeal tribunal exceeded its powers appears to be based on the arbitrator's finding in favour of the applicant. Taken logically, the applicant seems to suggest that the appeal tribunal was supposed to have left the findings of the arbitrator intact insofar as they favoured the applicant. Such contention is unwarranted; the appeal tribunal's appeal powers could not be circumscribed by not revisiting the arbitrator's findings that favoured the applicant's case.

18. From the reading of the award made by the appeal tribunal, it is abundantly clear that there was no finding made in favour of the rectification of the addendum. It is not easily understood as to where the applicant gets the drift that the appeal tribunal made a decision to rectify the addendum. What is abundantly clear is that the appeal tribunal decided, on the basis of the evidence on record, that clause 4 of the addendum was inadvertently included. Accordingly, such clause had to be excised in its entirety.

19. The question that I am required to determine is whether the appeal tribunal strayed and decided issues that were not submitted before it in accordance with the parties' pleadings and also whether there were acts of gross irregularities in the appeal tribunal proceedings pertaining to the disregard of relevant evidence and submissions. The applicant has traversed various aspects, which need not be regurgitated herein, to demonstrate why I should find that the appeal tribunal pronounced itself on issues that were beyond the pleadings and disregarded relevant evidence.
20. It is trite that an arbitration forum is not like a court of law; it cannot decide any issue beyond those that are submitted before it by the parties to the arbitration agreement. In deciding the issues before it, the arbitration forum is required to interpret the pleading.[ii] The only way the arbitration forum can decide an issue that is not literally part of the pleadings before it is if it can be said that the issue is incidental to the pleadings as interpreted. Beyond that, the arbitration forum would be going astray if it takes it upon itself to visit issues not before it. In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*[iii]the following was said:

"[20] The advantages of arbitration over litigation, particularly in regard to the expeditious and inexpensive resolution of disputes, are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined in a straitjacket of legal formalism that the parties to the arbitration have sought to escape. Arbitrators should be free to adopt such procedures as they regard as appropriate for the resolution of the dispute before them, unless the arbitral agreement precludes them from doing so."
21. In deciding whether or not to interfere with an arbitral award, our courts have emphasisedthat the aspect of party autonomy and finality of awards are paramount. A court would be loath to interfere with arbitral awards unless it can be demonstrated that the arbitration forum misconducted itself; or that the award was improperly obtained or that there were some forms of gross irregularities that go to the heart of the fairness of the proceedings.
22. Party autonomy notwithstanding, it cannot be said that an arbitration agreement is a complete ouster of an aggrieved party's right to approach a court once one or more of the grounds mentioned in section 33(1) of the Act is established. The essence of party autonomy and finality of awards is intended to curb the protracted litigation of issues already properly ventilated and adjudicated upon by an arbitration forum by limiting a right of a party to the arbitration agreement from approaching a court outside the section 33(1) grounds.
23. Having listened to arguments from both parties and considered the complaints articulated by the applicant, I am of the considered view that the issues that the appeal tribunal pronounced itself upon emanated from the findings of the arbitrator. On this score, I am unable to find any conceivable fault on the part of the members of the appeal tribunal in deciding the aspects at issue herein.

24. The fact that certain submissions and arguments advanced on behalf of the applicant were not mentioned in the award does not mean that they were not considered. It was not required of the appeal tribunal to mention each and every point argued by the parties.
25. It may well be so that the notices of appeal and cross-appeal defined those issues that were being appealed against. However, in order to do justice to the matter, the members of the appeal tribunal had to traverse the foundation of the arbitration award so as to determine sustainability of the findings made therein with due regard to the evidence presented before the arbitrator. In traversing those issues, in some respects, the appeal tribunal arrived at the same conclusions as the arbitrator, and in others; the appeal tribunal found that the arbitrator erred. The appeal tribunal was not expected to engage in a superficial exercise in revisiting the findings of the arbitrator in order to understand the underpinnings thereof.
26. Although the applicant's papers are replete with reference to acts of gross irregularities pertaining to the alleged disregard of evidence presented at arbitration hearing and argument before the appeal tribunal, thereby making a veiled suggestion of some form of bias against the applicant; perusal of the decision of the appeal tribunal demonstrates that the said evidence and argument were carefully weighed and considered. It must be mentioned that the rejection of argument or evidence on any aspect cannot be said to constitute gross irregularity. Many arguments are made during ventilation of issues before courts and arbitration proceedings; however, it does not mean that all such arguments would finally be persuasive or accepted by the presiding officer. In the end, the rejection of any such arguments cannot be held against the presiding officer as constituting misconduct on the part of such presiding officer.
27. The applicant also made an issue about the rectification of the addendum. Although the appeal tribunal found that the parties were *ad idem* on the terms of the addendum and its application, it was also the finding of the appeal tribunal that the evidence of the witnesses sufficiently established that the parties did not apply their minds to the wording and content of the addendum. Further, the tribunal found that the parties were also *ad idem* on the fact that the concept of "net profit" in the addendum was used to denote "net contract contribution" For this reason, *inter alia*, the appeal tribunal found that it was unnecessary or rectification of the addendum to be made.
28. Related to the foregoing finding was the applicability of clause 4 of the addendum. It was the evidence of Mr Coote, as reflected in the snippets of the record, that paragraph 4 of the addendum was inadvertently included in the draft addendum having been imported from a draft of a Joint Venture agreement. Clause 4 of the addendum did not belong in the addendum. However, there was a bit of confusion on this aspect of Mr Coote's evidence during cross-examination; it was not clear whether the entire clause had to be excised or only the phrase dealing with admin fees. Considering the subsequent explanations and evidence of the witnesses, particularly Messrs Engelbrecht and Coote, on the addendum, the appeal tribunal arrived at the conclusion that clause 4 should be excised in its entirety, not

only insofar as the first sentence thereof was concerned.

29. The applicant was also aggrieved by the decision of the appeal tribunal to excise clause 4 in its entirety, submitting that the decision of the appeal tribunal went beyond what was pleaded. I find no merit in the applicant's contention on this aspect. On proper reflection, if the first sentence of clause 4 were excised, the second sentence would be out of place. Considering the fact that the evidence on record was that the clause belonged in the joint venture agreement that did not materialise and was copied as was for the purpose of the addendum, there could have been no meaning flowing from the second sentence. In my view, the appeal tribunal was correct in excising the entire clause 4 from the addendum.
30. It must be emphasised that at the end of the two arbitration processes, namely, the arbitration and the appeal tribunal, the question whether either of the party owed money to the other was vital. Each party maintained the position that the other owed money, be it in the form of overpayment by the applicant to the first respondent or payments due to the first respondent accruing from commission earned in business deals procured by the first respondent.
31. Another issue raised by the applicant was the manner in which the appeal tribunal arrived at the amount due to the first respondent. What is disconcerting on this aspect is that the applicant categorically states that the first respondent was not able to establish that the contracts on which the calculations were made had commenced at the time when the first respondent's employment was terminated or that the first meals on the contracts were served. The applicant was also not of any assistance to both the appeal tribunal and this court on whether the contracts had indeed commenced or first meals served seeing that this aspect fell entirely within the knowledge of the applicant. It appears that the applicant intended to unduly gain advantage against the first respondent by non-disclosure of this fact. However, what I did not hear the applicant submitting was that the said contracts were cancelled when the first respondent's employment was terminated or even before the termination of the employment contract
32. Be that as it may, even if the contracts had not commenced or the first meals had not been served on the said contracts, there was already incontrovertible evidence that the parties agreed on the full payment of the full commission upfront to the first respondent. That being the case, it can be accepted as a matter of logic that the appeal tribunal arrived at its conclusion and amount due based on the evidence and calculation before it. Therefore, it can hardly be said that the appeal tribunal committed acts of gross irregularities in that regard.

33. After considering all the submissions, I have come to the ineluctable conclusion that the applicant's case is one of appealing the decision of the appeal tribunal and not one of review. It is not available to the applicant to appeal the merits of the decision of the appeal tribunal. The allegation that the appeal tribunal did not consider the submissions made on behalf of the applicant is nothing further than the truth. The decision of the appeal tribunal demonstrates the direct opposite of the applicant's claim.
34. I find that the issues listed by the applicant as constituting acts of gross irregularities have to do with the merits of the arguments presented before the appeal tribunal. None of the issues raised constitute any form of irregularity whatsoever, let alone gross irregularity. I am not swayed by the applicant's submission that the appeal tribunal strayed from the issues before it. I am also unmoved by the submission that the appeal tribunal failed to consider relevant evidence or disregarded the submissions made on behalf of the applicant. From the perusal of the applicant's complaints, it immediately becomes self-evident that such issues were all ventilated before the arbitrator.
35. What I found disconcerting was that the applicant, without more, made allegations of actual bias against the appeal tribunal. There is nothing in the snippets of the record before me, or even argument presented on behalf of the applicant, to even begin to bolster any trait of bias on the part of the appeal tribunal.
36. With the appeal before the appeal tribunal, the parties presented the very record of proceedings that served before the arbitrator, consisting of the pleadings exchanged between the parties and documents presented during the hearing, supplemented by the notices of appeal and cross-appeal.[iv] It follows that the contention that the appeal tribunal acted beyond its mandate is also misplaced.
37. On scrutiny of the applicant's gripes against the decision of the appeal tribunal, I am of the considered view that the applicant is using the medium of the review to appeal against the findings of the arbitration appeal tribunal. Such conduct cannot be countenanced.

There is no dispute regarding the existence of an arbitration agreement governing both the arbitration and appeal process therefrom. Both parties adhered to the process as agreed between them. It will be tantamount to allowing the applicant to undermine the arbitration agreement voluntarily concluded between the parties if the applicant's review application were to be entertained. Indeed the decision of the Constitutional Court in *LufunoMphaphuli & Associates (Pty) Ltd v Andrews & Another* is instructive.[v] In that matter the following was said:

"[235] To return then to the question of the proper interpretation of s 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of s 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in

this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.[vi]

38. In the result, I am of the considered view that the application cannot succeed. Therefore the application is dismissed with costs.

S L MAGARDIE

ACTING JUDGE OF THE HIGH COURT

FOR THE APPLICANT:

J P VORSTER, SC &

J VAN DER WESTHUIZEN

INSTRUCTED BY: WEAVIND & WEAVIND ATTORNEYS

FOR THE FIRST RESPONDENT: W J DE BRUYN

INSTRUCTED BY:

COWAN-HARPER INC.

[i] Act 42 of 1965.

[ii] *Sneece v R N Griffin Investment (Pty) Ltd* 2012 JDR 1007 GSJ

[iii] Unreported judgment of the SCA (687/12) (2013) ZA SCA 120 (20 September 2013).

[iv] *Gutsche Family Investment (Pty) Ltd & Other v Mettle Equity Group (Pty) Ltd & Others* 2012 JDR 0358 SCA

[v] 2009 4 SA 529 CC.

[vi] See paragraph 245 at page 588-589. See also *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 3 SA 266 (SCA)

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Prepared on 10 October 2026 · Esheria