

SOUTH AFRICA / JUDGMENT

RSC Avelo (Pty) Ltd v Trencon Construction (Pty) Ltd and Another (2022/057553) [2025] ZAGPJHC 7 (12 January 2025) [2025] ZAGPJHC 7

COURT

South Gauteng High Court, Johannesburg

BEFORE

Lamprecht

CASE / FILE NUMBER

2022/057553

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2022/057553

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

12

January 2025

In

the matter between: RSC
 AVELO (PTY) LTD
 Applicant
 and
 TRENCON
 CONSTRUCTION (PTY) LTD
 First
 Respondent
 DIRK
 VAN ZYL N.O.
 Second
 Respondent

JUDGMENT

LAMPRECHT, AJ:

Background

- [1] This application concerns the interpretation of an arbitration award delivered by the second respondent (the arbitrator) on 26 October 2021, as amended on 8 November 2021.
- [2] The award followed the institution of arbitration proceedings by the applicant, RSC Avelo (Pty) Ltd (Avelo), against the first respondent, Trencon Construction (Pty) Ltd (Trencon).
- [3] Avelo applies to have the award made an order of Court in terms of section 31(1) of the Arbitration Act, 42 of 1965 (the Act).
- [4] No relief is sought against the arbitrator and he does not oppose the application.
- [5] Avelo inter alia claimed escalation amounts from Trencon in the arbitration, contending that Trencon had breached a subcontract (the subcontract) entered into between the parties, providing for the supply, cut, bend and fixing of reinforced steel by Avelo in respect of the Mbombela Square project. Avelo alleged that Trencon failed and/or refused to certify and pay escalation to Avelo in accordance with the requirements of the subcontract.
- [6] The arbitrator's award, following a hearing before him where evidence was led, included the following terms:
 - “1. [Avelo] succeeds in its escalation claim and I direct that an amount of R2,647,829.17 (excluding VAT) be included in the final payment certificate to issued (sic) in terms of the subcontract.”
 2. Any interest on the late certification of the amounts comprising the amount of R2,647,829.17 is to be calculated in terms of the subcontract and is to be included in the payment certificate.”

[7] It is common cause that Trencon subsequently made payment to Avelo of the capital amount of the award, together with certain agreed variations, but did not pay any interest. Following the exchange of correspondence between the parties and their attorneys of record after the delivery of the award, in which Trencon ultimately denied liability for the payment of interest, Avelo launched this application.

[8] The core issues between the parties relate to the relief sought in prayers 2 and 3 of the notice of motion. In prayer 2 Avelo seeks declaratory relief (the primary relief) to the effect that the wording “[a]ny interest on the late certification of the amounts comprising the amount of R2,647,829.17 is to be calculated in terms of the

subcontract and is to be included in the final payment certificate” in paragraph 2 of the award, means:

- a. interest at the rate of 160% of “the interest”, being the bank rate which is applicable from time to time to registered banks when borrowing money from the Central or Reserve Bank of the country named in the schedule, the ruling bank rate on the first of each month shall be used to calculate the interest due (i.e. the “repo rate”), is payable;
- b. on the escalation amounts claimed in the total sum of R2,647,829.17 as per paragraph 1 of the award, as more fully calculated in the column “Capital outstanding/overdue” on the spreadsheet annexed marked “FA2” to the founding affidavit (“the spreadsheet”);
- c. which interest is to be compounded monthly from the date for payment up to and including the date on which the applicant is to receive payment, as calculated on the spreadsheet up and until 30 November 2022 (to be updated until the date of actual payment).

[9] In prayer 3 of the notice of motion and as an alternative to the declaratory relief, conditional upon the court finding that the dispute about interest is to be arbitrated upon and decided by the arbitrator, Avelo seeks an order (the secondary relief) granting it an extension of the time period set out in section 32 of the Act, as provided for in section 38 thereof, for the late delivery of its application and for the dispute in respect of interest payable on the amount awarded, to be remitted to the arbitrator, alternatively such other arbitrator as the parties may agree or appointed by the court, for reconsideration and for the making of a further or fresh award in respect of the payment of interest on the amount awarded.

[10] The arbitrator in the award found that the subcontract comprised of three documents, namely:

- a. A quote from Avelo, annexure FA3.1 to the founding affidavit;
- b. A letter of intent from Trencon, annexure FA3.2 to the founding affidavit; and
- c. the Domestic Subcontract Agreement (DSA), the terms of which were part of the subcontract, save to the extent that they were contradicted by the terms of the quotation as read with the letter of intent, annexure FA3.3 to the founding affidavit.

[11] Trencon accepts, for purposes of this application, that the subcontract comprised of the documents referred to.

The parties' contentions

[12] The parties in their respective affidavits and heads of argument incorporated extensive and detailed contentions relating to the interpretation of the award and related matters. I have had regard to all these contentions, but do not consider it necessary to traverse all contentions in detail in this judgment.

[13] The essence of Avelo's contentions relating to the primary relief is to the following effect:

- a. The arbitrator awarded interest to it and effect must be given to the award.
- b. When regard is had to the statement of claim, interest was claimed by Avelo either in terms of the subcontract, or in terms of the legally prescribed rate applicable (the mora rate), insofar as it could be suggested that interest was not catered for in the subcontract.
- c. The arbitrator "awarded interest" to be calculated in terms of the subcontract, with the result that the rate and mechanism for calculating interest is governed by the contract and not by the Prescribed Rate of Interest Act.
- d. When regard is had to the arbitrator's award, he found that the "pay when paid" provisions in the DSA (clause 31.9 of the DSA) did not form part of the contract. Where Avelo does not receive payment of the amount due by due date, Trencon would be liable for default interest on the amount without prejudice to any other right that Avelo may have, which interest would be compounded monthly from the date for payment up to and including the date on which Avelo is to receive payment (clause 31.11 of the DSA) and Trencon would calculate such interest at the rate of 160% of the Interest (as defined) (clause 31.11 as read with 31.11.1 of the DSA);
- e. Trencon having failed to allow for escalation, the interim payment certificates and consequently the invoices issued by Avelo to Trencon for interim payments were less than they should have been. On being successful in the arbitration Avelo became entitled to receive the escalated amounts and it should have been paid interest to make up for the delay in payment. This is default interest because Trencon was in default of certifying and then paying the amounts it should have paid.
- f. Read in context, clause 31.11 of the subcontract means that where the subcontractor does not receive payment of the amount due, the contractor shall be liable for default interest on the amount without prejudice to any other rights the subcontractor may have. The award contemplates that Trencon is liable for default interest on the amount which ought to have been certified.

- g. The date of default appears from the statement of claim and from the annexures thereto, with reference specifically to annexure R8 to the statement of claim, annexed to the founding affidavit as annexure FA6. This document forms the basis for FA2 to the founding affidavit, which reflects the capital outstanding and reflects when the escalation amounts fell due.
 - h. The arbitrator clearly intended to compensate Avelo for the failure by Trencon to include amounts in the various payment certificates from time to time that should have been so included.
- [14] With reference to the secondary relief Avelo contends that the award is clear when read in context and adopting the appropriate test for purposes of interpreting an arbitration award. It says that to the extent that the award for any reason lacks clarity, then it would be open to the arbitrator to clarify his award and the remedy of remitting the award to the arbitrator is then appropriate. It contends, furthermore, that a proper case for condonation for the late filing of the application in terms of section 32 of the Act is made out in the founding affidavit, having regard to the interests of justice. It says that remittal was only ever contemplated in the alternative and alleges (in the replying affidavit) that this only occurred when senior counsel was requested to settle the founding affidavit, during September 2022. It says that remittal of the award was not considered at any stage prior to September 2022, because Avelo was (and remains) of the view that it is a simple matter of interpreting the award.
- [15] Reduced to its essence, Trencon's core contentions and grounds for opposition the primary relief sought, are the following:
- a. Trencon argues, in the first instance, that the subcontract does not provide any basis for the levying of interest on "late certification". It says that the primary relief now sought by Avelo was neither asked for nor awarded and that Avelo, under the guise of interpreting the award, in impermissible and improper manner seeks to reargue the merits of the arbitration, in circumstances where "the proper interpretation" of the subcontract was never pleaded by Avelo in its statement of claim, nor ventilated by the parties at the hearing of the matter. Avelo did not in the statement of claim set out when, where or how interest became payable on the amount claimed "in accordance with the agreement", when, where or how "the amount became due" or when, where or how interest is to be calculated.
 - b. When regard is had to the statement of claim, Avelo claimed interest "from the date the amount owed became due". This is important as no amounts became due. The arbitrator did not, as Avelo suggests, award interest "to be calculated in terms of the subcontract". It was awarded "on the late certification of the amounts ... to be calculated in terms of the subcontract". Avelo did not seek interest on late certification but from the date the amount owed became due.

- c. Trencon nevertheless contends that this is not relevant and that the issue is how the award of interest is to be calculated.
- d. Clause 31.11 of the DSA contemplates the accruing of default interest where an interim payment certificate has been issued and Trencon has failed to make payment within the time period contemplated by clause 31.9. Clauses 34.10 to 34.12 contemplate the accruing of interest on the late payment of the amounts certified in the final payment certificate, and apply the provisions of clause 31 *mutatis mutandis*. The subcontract does not contemplate the accruing of interest on the late certification of amounts, but contemplates the calculation of interest for the non-payment of amounts already certified. Had a final payment certificate been issued incorporating the escalation amount, interest would accrue on such amount due in terms of the final payment certificate had Trencon failed to pay the final payment certificate within the time periods contemplated by the subcontract. This did not occur as it is common cause that Trencon timeously paid the escalation amount after it was certified.
- e. It contends, furthermore, that Avelo is effectively (inconsistent with the express wording of paragraph 2 of the award) seeking to claim interest from the date upon which the amounts should have been certified, that this contention depends on a proper interpretation of the subcontract, which was neither pleaded nor traversed in evidence. This, so Trencon contends, amounts to an attempt to in impermissible manner request the Court to interpret the subcontract and not to seek a proper interpretation of the award itself.
- f. To the extent that the arbitrator intended to compensate Avelo for the failure to certify escalation and for interest to be payable on the amount that “ought to have been certified” (which is denied), he could not competently make such an award. It was not a pleaded issue and not part of the dispute between the parties, with the result that the Arbitrator then exceeded his powers, and that paragraph 2 of the award is unenforceable.

[16] With reference to the secondary relief, Trencon’s contends as follows:

- a. The arbitrator is *functus officio* in that he issued his award and determined the matter of interest.
- b. Section 32(2) of the Act only allows a remittal of matter “which was referred to arbitration”. In circumstances where the proper interpretation of clause 31.11 of the subcontract was not referred to arbitration, this aspect does not fall within the ambit of section 32(2) of the Act. No purpose would accordingly be served in remitting the matter to the arbitrator for reconsideration.

- c. The remittal application was brought some 14 months after the award was handed down and that Avelo has not made out a proper case for the granting of condonation for the late filing of the remittal application. The additional explanation for the late filing of the remittal application, contained in the replying affidavit, is to be disregarded, and the explanation (which hinges on the views of senior counsel) in any event does not constitute an adequate explanation for the failure to timeously deliver the remittal application.

Relevant legal principles

- [17] An arbitration award, in the same way as the construction of a court's judgment and order, must be interpreted having regard to the language of the award, the context of the award, which includes the reasons given, the issues submitted for arbitration and evidence led, as well as the purpose of the award.[1]
- [18] Regard should be had to the text, context and purpose at the same time, often referred to as a unitary interpretation exercise.[2]
- [19] A sensible and business-like interpretation is to be preferred to one that undermines the apparent purpose of a document.[3]
- [20] Where more than one interpretation of an award is possible, an interpretation resulting in the award being effective is to be preferred to one rendering the award meaningless and thus invalid.[4]
- [21] Where parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision is.[5]
- [22] A party cannot oppose an application for an arbitrator's award to be made an order of court on the ground of certain alleged gross

irregularities or misconduct on the part of the arbitrator. The lack of competence of the arbitral tribunal can also not be invoked at the time of the recognition of the arbitral award. The dissatisfied party alleging such must have the award set aside by invoking the statutory review provisions of section 33(1) of the Act. If the party does not make such a challenge, he waives his rights to do so and cannot raise those matters at the time of recognition.[6]

- [23] An arbitrator does not have inherent jurisdiction to determine matters not pleaded or agreed to be referred to arbitration. An arbitrator is limited to determine disputes raised on the pleadings, or agreed to be referred to arbitration, and if he determines a dispute not on the pleadings or so agreed to be referred, he exceeds his powers.[7]
- [24] In terms of section 32(2) of the Act, a court may, on application by any party to an arbitration after due notice to the other party made within six weeks after the publication of the award, on good cause shown "remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the Court may direct".

- [25] Good cause as envisaged in section 32 is not a *numerus clausus*. It will exist *inter alia* where the arbitrator has failed to deal with an issue that was before him. Once an issue has been addressed by the arbitrator, there is little room for remitting the matter for reconsideration. [8]
- [26] Remission of a matter where an arbitrator has made a mistake is inappropriate.[9]
- [27] Where an award is sought to be remitted on the basis of ambiguity or lack of clarity, an arbitrator is not vested with the power to make a “fresh or further” award. In such an instance the arbitrator will rather furnish further information required to explain or finalise the award.[10]

Discussion

- [28] The arbitrator, in paragraph 2 of the award, directed that “[a]ny interest on the late certification of the amounts comprising the amount of R2,647,829.17 is to be calculated in terms of the subcontract and is to be included in the payment certificate”.
- [29] In paragraph 1 of the award, the arbitrator found that Avelo had succeeded with its escalation claim and directed that the amount of R2,647,829.17 had to be included in the final payment certificate.
- [30] No reasons were furnished for the award in respect of interest. Irrespective, and on a linguistic treatment of paragraph 2 alone, it is apparent that the arbitrator not only dealt with and awarded interest, but also intended to finally dispose of the interest issue. He directed that interest on the late certification “is to be calculated in terms of the subcontract and is to be included in the payment certificate”.
- [31] Notably, Avelo and Trencon both contend that the arbitrator determined the issue of interest and intended to award interest.
- [32] Importantly, the interest awarded, was awarded on the “late certification of the amounts comprising the amount of R2,647,829.17”. This in my view accords with Avelo’s contention that the award contemplates that Trencon is liable for default interest on the amounts which, in the words of Avelo, “ought to have been certified”. The interest award evidently contemplated that Avelo should be compensated for the failure to timeously certify the “amounts comprising the amount of R2,647,829.17”, and not, as Trencon contends, for any future late payment of amounts certified in the final payment certificate.
- [33] What remains to be considered is what the arbitrator had in mind when directing that “[a]ny interest.... is to be calculated in terms of the subcontract”.

- [34] Avelo relied heavily on the fact that the arbitrator found that the “pay when paid” provisions in the DSA (clause 31.9 of the DSA) did not form part of the contract as well as on a contextual interpretation of clause 31.11 of the DSA, which it argued means that where it did not receive payment of the amounts due in respect of escalation, Trencon had to be liable for default interest on the amounts.
- [35] Trencon, on the other hand and as stated earlier, argued that –
- a. the subcontract does not provide any basis for the levying of interest on “late certification”;
 - b. the primary relief now sought by Avelo was neither asked for nor awarded;
 - c. Avelo, under the guise of interpreting the award, in impermissible and improper manner, seeks to reargue the merits of the arbitration, in circumstances where “the proper interpretation” of the subcontract was never pleaded by it, nor ventilated by the parties at the hearing of the matter;
 - d. Avelo claimed interest “from the date the amount owed became due”, but that no amounts became due;
 - e. Avelo did not seek interest on late certification of amounts but from the date the amount owed became due.
 - f. the above is in any event irrelevant in that the issue is in any event how the award of interest is to be calculated;
 - g. the subcontract does not contemplate the accruing of interest on the late certification of amounts, but contemplates the calculation of interest for the non-payment of amounts already certified;
 - h. Avelo is effectively (inconsistent with the express wording of paragraph 2 of the award) seeking to claim interest from the date upon which the amounts should have been certified, that this contention depends on a proper interpretation of the subcontract, neither pleaded nor traversed in evidence, amounting to an attempt by Avelo to in impermissible manner request the court to interpret the subcontract and not to seek a proper interpretation of the award itself;
 - i. to the extent that the Arbitrator intended to compensate Avelo for the failure to certify escalation and for interest to be payable on the amount that “ought to have been certified”, he could not competently make such an award as it was not a pleaded issue and not part of the dispute between the parties, with the result that the arbitrator then exceeded his powers, and that paragraph 2 of the award is unenforceable.

- [36] The question whether the subcontract, whether on a contextual reading or otherwise, makes provision for the payment of interest on late certification is in my view irrelevant, save insofar as any inferences relevant to the interpretation of the award itself, can be drawn from it. I, in this context, agree with Trencon's submission (despite itself also to some extent advancing contentions relating to what the subcontract and DSA contemplated) that it is not for the court to seek to interpret the subcontract.
- [37] The arbitrator, without furnishing reasons, awarded interest on the late certification of the escalation amounts "to be calculated in terms of the subcontract". Whether he did so because he formed the view that the subcontract (on a contextual reading or otherwise) provided for interest on late certification, is not apparent. An analysis of whether the subcontract, on a contextual reading or otherwise, provides for interest on late certification, does not to my mind assist in interpreting the interest award, where the arbitrator did not furnish reasons for the interest award. To the extent that the subcontract does not make provision for interest on the late certification, as argued by Trencon, and the arbitrator mistakenly assumed that it does, *cadit quaestio*, he was entitled to make a mistake, and this has no bearing on the validity or enforceability of the award.
- [38] In circumstances where the arbitrator evidently determined the issue of interest and intended to award interest on the late certification of escalation amounts, the only sensible interpretation of the words "[a]ny interest.... is to be calculated in terms of the subcontract", is that the arbitrator thereby intended the rate and mechanism for calculating interest governed by the subcontract to apply.

Interpreting it as meaning that the question whether interest is in fact payable on late certification is still to be determined with reference to the terms of the subcontract, not only leads to absurd results, but is to my mind also inconsistent with the plain wording of the award.

- [39] In terms of the subcontract interest would be compounded monthly from the date for payment up to and including the date on which Avelo is to receive payment (clause 31.11 of the DSA) and Trencon would calculate such interest at the rate of 160% of the Interest (as defined) (clause 31.11 as read with 31.11.1 of the DSA).
- [40] In the circumstance I am of the view that Trencon cannot succeed with the grounds relied upon for opposing the application. The jurisdiction argument must also fail. Avelo claimed interest and this formed part of the issues submitted to the arbitrator for determination. The question whether some of the grounds relied upon by Trencon would have entitled it to seek relief under section 33 of the Act, does not arise for determination in this application.
- [41] Regard being had to my findings in respect of the primary relief it is unnecessary to deal with the secondary relief.

[42] Costs should follow the result. Mr Botha SC, who appeared for Avelo, submitted that costs of counsel should be awarded on scale C. I am of the view, regard being had to the nature of the issues, that Avelo was entitled to brief senior counsel and that an award on scale C is appropriate.

[43] I have modified the order proposed by Avelo slightly in order to specify that the interest calculation on the “compound monthly” portion of the spreadsheet, annexed marked “FA2” to the founding affidavit, applies.

Order

[44] I consequently make the following order:

1. The amended final award dated 26 October 2021 (Amended 8 November 2021) of the arbitrator, a copy of which is annexed marked “FA1” to the founding affidavit, is made an order of court in terms of section 31(1) of the Arbitration Act No 42 of 1965 (as amended).
2. It is declared that paragraph 2 of the award, which reads “[a]ny interest on the late certification of the amounts comprising the amount of R2,647,829.17 is to be calculated in terms of the

subcontract and is to be included in the final payment certificate”, means that:

- 2.1. interest at the rate of 160% of “the interest”, being the bank rate which is applicable from time to time to registered banks when borrowing money from the Central or Reserve Bank of the country named in the schedule, the ruling bank rate on the first of each month shall be used to calculate the interest due (i.e. the “repo rate”), is payable;
 - 2.2. on the escalation amounts claimed in the total sum of R2,647,829.17, as per paragraph 1 of the award, as more fully calculated in the column “Capital outstanding/overdue” on the compounded monthly portion of the spreadsheet annexed marked “FA2” to the founding affidavit (“the spreadsheet”);
 - 2.3. which interest is to be compounded monthly from the date for payment up to and including the date on which the applicant is to receive payment, as calculated on the spreadsheet up and until 30 November 2022 (to be updated until the date of actual payment).
3. The first respondent is to pay the costs of this application, with the costs of counsel after 12 April 2024 to be taxed on scale C.

LAMPRECHT AJ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of hearing: 24 October 2024 Date of judgment: 12 January 2025 Counsel for the applicant: Adv A Botha SC Instructed by: Lowndes Dlamini Inc Counsel for the first respondent: Adv J Hoffman Instructed by: MDA Attorneys

- [1] See Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and Others 1996
- (3) SA 355 (A) at 363A-C; Firestone South Africa (Pty) Ltd v Gentiruco AG 1977
- (4) SA 298 (A) at 304D-H; Eke v Parsons 2016
- (3) SA 37 (CC) at para 29.
- [2] University of Johannesburg v Auckland Park Theological Seminary 2021
- (6) SA 1 (CC), par 65.
- [3] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) SA 593 (SCA) at para 18.
- [4] Interciti Property Referrals CC v Sage Computing (Pty) Ltd and Another 1995
- (3) SA 723 (W).
- [5] Telcordia Technologies Inc v Telkom SA Ltd
- [2006] ZASCA 112; 2007 (3) SA 266 (SCA), para 54
- [6] Ramsden, The Law of Arbitration: South African and International Arbitration, 2nd Edition, at p 239
- [7] Hos+ Med Aid Scheme v Thebe Ya Bophelo Health Care Marketing and Consulting (Pty) Ltd and Others [2007] ZASCA 163; 2008
- (2) SA 608 (SCA) at para 28, as read with Close-Up Mining v Boruchowitz 2023
- (4) SA 38 (SCA).
- [8] Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others 2013
- (5) SA (SCA) 84 at paras 8 – 15.
- [9] Telcordia Technologies Inc v Telkom SA Ltd [2006] ZASCA 112; 2007
- (3) SA 266 (SCA) at paras 54 and 55.
- [10] Future Rustic Construction (Pty) Ltd v Spillers Waterfront (Pty) Ltd and Another 2011
- (5) SA 506 (KZP) at paras 15 – 18.

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