

SOUTH AFRICA / JUDGMENT

Senekal v Knipe and Others (2181/2024) [2024] ZAFSHC 347 (29 October 2024)

[2024] ZAFSHC 347

COURT

Free State High Court, Bloemfontein

BEFORE

Nemavhidi AJ

CASE / FILE NUMBER

2181/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Not

reportable

Case no: 2181/2024

In

the matter between

FREDERICK

JACOBUS SENEKAL

APPLICANT

And

ROBERT PETER KNIPE

FIRST

RESPONDENT

JOHN

DOUGLAS JANSEN KNIPE

SECOND

RESPONDENT

JACQUELINE

MOIRA DEBORA VIGNE

THIRD

RESPONDENT

ANDRE

BAZZETT JANSEN KNIPE

FOURTH
RESPONDENT
CAROL
JESSE KATHLEEN LOTZ
FIFTH
RESPONDENT
CHAVONNES
BADENHORST
ST
CLAIR COOPER N.O
SIXTH
RESPONDENT
SIMON
MALEBO RAMPORORO N.O
SEVENTH
RESPONDENT
TMA
AUCTIONEERS
EIGHTH
RESPONDENT
Neutral
citation: Frederick Jacobus Senekal
v Robert Peter Jansen Knipe
Coram: Nemavhidi AJ
Heard: 20 June 2024

Delivered: This judgment was handed down in open court, and released to SAFLII.
The date for hand-down is deemed to be 29
October 2024

Summary: Arbitration – arbitration award to be made
order of Court in terms of s 31(1) of the Arbitration Act 42 of 1965.
ORDER
The application is
dismissed with costs on order for costs including counsel's
fees on scale B of rule 67A.

JUDGMENT

- [1] The applicant is an attorney practicing as the sole director under the name of FJ Senekal Incorporated. He was the fourth respondent in the arbitration proceedings to which the application relates. The first respondent, Robert Peter Jansen Knipe, is a businessman who was the fourth claimant in the arbitration proceedings. No relief is sought against the remaining respondents.

[2] The applicant requests the Court to exercise its discretion in terms of the common law or s 31(2) of the Arbitration Act 42 of 1965 (the Act) to declaring that he is entitled to recover costs in respect of claims 1 and 5, as he claims that this Court is empowered to rectify this accidental slip or omission in the terms of the aforementioned section. The second claim was dismissed with costs on the party and party scale, such costs to be calculated on the basis that the employment of senior counsel was reasonable.

[3] In respect of claim 6, the award was inter alia as follows:

‘It follows that claim 6 must be dismissed with costs. The costs of the enquiry are ordered to be treated as administration costs of the estate of the insolvent companies.’

[4] After the Arbitrator had delivered his award in respect of claims 2 and 6, the applicant presented his bill of costs in the arbitration for taxation before the taxing master of the South Gauteng High Court on 25 March 2024, but the costs consultant representing the first respondent contended that the applicant was only entitled recover costs in respect of the arbitration awards issued in respect of claim 2 and further contended that the award in respect of claim 6 entailed that the applicant’s costs were to be borne by the liquidated companies as there existed no liability for costs for the first respondent and claimants.

[5] The applicant informed the taxing master that he would approach the court for the necessary relief in respect of the costs of the arbitration and it is trite that the taxing master does not have any discretion to decide on issues where liability for costs is disputed. The applicant addressed a letter to the arbitrator in an attempt to have the matter resolved, but the arbitrator declined to entertain the matter. Thus, the applicant approached this Court for necessary relief.

[6] In respect of prayer 2, the first respondent raised a point in limine on the basis that the applicant failed to invoke s 30 of the Act, which provides that an arbitrator ‘may correct any clerical

mistake or any patent error arising from any accidental slip or omission.’ He also raised a point in limine based on the provisions of para 16 of the arbitration agreement which contains a so-called automatic right of appeal against the award of the arbitrator by any party.

[7] The first respondent further opposes the application on the basis that there has been an unreasonable delay by the applicant in seeking to invoke the provisions of s 31 of the Act, which he contends is equivalent to rule 42(1)(b) of the Uniform Rules of Court. It says that it is incumbent on the applicant who seeks the type of relief to do so within a reasonable

period because it is the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of the awards.

- [8] The first respondent raised a point in limine based on 'res judicata' contending that as the arbitrator has determined the dispute between the parties, the parties are bound by that determination in any further litigation or arbitration on the matter as he has already pronounced on the aspect of costs, by making no order as to costs.
- [9] In respect of claim 1, the applicant states that he was confronted with various arguments during taxation on 25 March 2022 regarding his so-called non-entitlement to costs. In respect of claim 2, and in an attempt to avoid review proceedings and further time and costs delays, he approached the arbitrator by way of letter on 3 April 2024, seeking rectification of the arbitration award. However, he did not receive a favourable reply from the arbitrator and therefore proceed with the current application.

THE APPLICATION OF THE LAW

- [10] Section 31 of the Arbitration Act 42 of 1965 provides as follows:

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

(ii) The Court to which application is so made, may before making the award an order of the Court, correct in the award any clerical mistake or any patent error arising from any accidental slip of omission.

(iii) An award which has been made an order of the Court may be enforced in the same manner as any judgment or order to the same effect.'

- [11] In *Ramphela v Mlambo*,^[1] it was held that where it was clear from the award that the arbitrator intended to make an award of costs, but did not expressly say so, the matter falls squarely within the ambit of s 31(2) of the Act. In *Northpark Construction v Burnett*,^[2] the Court held that a 'patent' error is something that is 'obvious' and where it is obvious that the award contains an error or omission, the Court when making an order of the Court, correct such error or omission under the provisions of s 31(2) of the Act.

- [12] The application stems from the arbitration proceeding which were concluded during May and October 2021. After the almost three years, the applicant seeks to enforce cost awards and perceived cost entitlements in his favour. The respondent raised four points in limine against the applicant's entitlement to be granted a cost order in his favour based on s 31(2) of the Act. In prayer 1, the applicant seeks an order that the awards in respect of claim 2 and 6 be made an order of the court in terms of s 31(1) of the Act.

In prayer 2, the applicant wants this Court to declare that he is entitled to costs in respect of the arbitration agreement in claims 1 and 5, in terms of s 32(2) of the Act.

- [13] The first respondent conceded that he is liable for the applicant's costs in the arbitration in respect of claims 2 and 6 for which clear cost awards were made by the arbitrator. In respect of claim 2, the first respondent is liable, jointly and severally with the other claimants, and in respect of claim 6, the first respondent is only jointly liable together with the other claimants.
- [14] The applicant, at para 50 of his founding affidavit, states that the cost consultant of first respondent on the taxation dated (25/03/2024) indicated that he is entitled to recover his costs in respect of the arbitration award issued in respect of claim 2, yet the cost award under claim 2 was not taxed because the award was not made an order of the Court.
- [15] When an arbitration award is to be made a court order, the court may before making the award an order of the court correct any award for clerical mistake or patent error. It is therefore a prerequisite that there must be an award. The taxing master is only authorised and mandated to tax costs in terms of court order and not arbitration awards. The applicant neglected to convert his arbitration costs awards into a court order for a period of almost three years. This delay remains unexplained and cannot be attributed or be blamed on the first respondent
- [16] The applicant contends that the liquidators settled with the respondents on 15 May 2021, which settlement was made an award which was made order of the court under case number 3933/2020. The applicant was not a party to this settlement agreement which was made an order of the court. The applicant has failed to explain with reference to claim 1 and 5, which award he seeks to make an order of the court as a court is only permitted, in terms of s 31(2), before making the award a court order, to correct that existing award for any clerical mistake or patent error. In para 27 of the applicant's founding affidavit, he acknowledged 'although no specific costs orders were awarded in respect of claims 1 and 5', which is an

admission that there exists no award that stands to be corrected.

- [17] Section 30 of the Act provides that 'An arbitration tribunal may correct in any award any clerical mistake or any patent error arising from any accidental slip of omission'. The arbitrator seized with the matter, considered all the submissions and evidence, and was the suitable forum to address the applicant's query. This should have happened within a reasonable time from dispensing with the arbitration proceedings.
- [18] Rule 42(1)(b) and s 30 of the Act are exactly the same. With reference to Rule 42, it has been stated that the rule is a procedural step to amend

expeditiously on obviously wrong judgments or orders and the need to proceed rapidly to correct an order mistakenly granted has been stressed.[3] In *Firestone South Africa (Pty) Ltd v Genticuro*[4] Trollip JA stated:

'[t]hus, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases. . .'[5]

[19] It is common cause that the arbitration awarded were granted in 2021 and were available for the applicant scrutiny and consideration. The applicant had ample opportunity to have come to the realisation that the arbitration awards for the purposes of taxation were required to be made an order of the court. He failed or neglected to consider that clerical mistake or patented errors occurring in the awards with reference to claims 1 and 5 had to be attended timeously, not three years after the arbitration was concluded.

[20] The applicant should have resorted to s 30 of the Act in order to approach the arbitrator to correct the clerical mistake or patent error which arose from the accidental slip or omission. In *First National Bank of SA Ltd v Van Rensburg N.O. and Others*[6]: In *RE FNB LTD v Jurgens & Others* 1994(1) SA 677T the Court held that:

'Even if it can be said that the order granted by Coetzee J was erroneously sought or contains a patent error, the application should, in my view, have been dismissed by reason of the long time lapse. As mentioned previously, the appellant's attorney uplifted the order on approximately 10 September 1988. The application in casu was launched on 18 November C 1991, more than three years later. Rule 42(1) was designed, as was said in *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471EF, 'to correct expeditiously an obviously wrong judgment or order'.The need to proceed rapidly to correct an order mistakenly granted was mentioned by Trollip JA in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306H: D 'Thus, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases . . .'.That was admittedly said in relation to the common law power of correcting E an order of Court, but the reasoning applies equally well to applications under Rule 42(1).

It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled within a reasonable time after the issue thereof to know that the last word has F been spoken on the subject.'[7]

[21] Section 28 of the Act provides that unless the arbitration agreement provides otherwise, the award is final and not subject to appeal and that each party must abide by and comply with the award in accordance with its terms. This Court cannot sit as an appeal forum and cannot have regard to any evidence or submission made before the arbitrator. This Court will always be most reluctant to interfere with the award of an arbitrator.

[22] The disputes between the parties as to their rights and obligations have been decided by the arbitrator who pronounced on the aspect of costs by making no award as to costs in favour of the applicant in claims 1 and 5, which aspects of costs was entertained in the settlement. In *Ascendis Animal Health (Pty) Ltd v Merck Shape Dohme Corporation and Others*[8] the Constitutional Court Khampepe J confirmed the test *res judicata* is standing on four legs:

- a) Same parties
- b) Same cause of actions
- c) Same relief
- d) A final judgment (the Arbitrator's judgment).[9]

[23] In the result:

1. The application is dismissed with costs on order for costs including counsel's fees on scale B of rule 67A.

Nemavhidi AJ

Appearances For the Plaintiff: Adv M Louw Instructed by: FJ Senekal incorporated Bloemfontein
For the First Respondents: Adv FC Lamprecht Instructed by: Hill Mc Hardy and Herbst Attorneys Bloemfontein

[1] *Ramphele v Mlambo*

[2019] ZAGPPHC 81.

[2] *Northpark Construction v Burnett*

[1998] JOL 3956 (W).

[3] *Kili and Others v Msindwana in re Msindwana v Kili and Others*

[2001] 1 All SA 339 (Tk).

[4] *Firestone South Africa (Pty) Ltd v Genticuro AG* [1977] 4 All SA 600 (4).

[5] *Ibid* at 606.

[6] *First National Bank of SA Ltd v Van Rensburg N.O. and Others: In Re FNB Ltd v Jurgens and Others* 1994

(1) SA 677 (T).

[7] *Ibid* at 681B-E.

[8] *Ascendis Animal Health (Pty) Ltd v Merck Shape Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327.

[9] *Ibid* para 24.

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