

SOUTH AFRICA / JUDGMENT

Thiko Consulting Engineers and Others v University of Venda and Another (161/2022) [2024] ZALMPTHC 26 (26 March 2024)

[2024] ZALMPTHC 26

COURT

Limpopo High Court, Thohoyandou

BEFORE

Khosa AJ

CASE / FILE NUMBER

161/2022

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HIGH

COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

CASE

NO: 161/2022

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

DATE:

26/03/2024

In

the matter between

THIKO

CONSULTING ENGINEERS

NEVHUTALU

CONSULTING ENGINEERS JV

1ST

APPLICANT

THIKO

CONSULTING

ENGINEERS

2ND APPLICANT

NEVHUTALU

CONSULTING ENGINEERS

3RD APPLICANT

And

UNIVERSITY
OF VENDA
1ST RESPONDENT
ABDUL
MAJEED HABIB ABDOOL CARRIM
2ND RESPONDENT
In
re
UNIVERSITY
OF VENDA
APPLICANT
NEVHUTALU
CONSULTING ENGINEERS JV
1ST
RESPONDENT
THIKO
CONSULTING
ENGINEERS
2ND RESPONDENT
NEVHUTALU
CONSULTING ENGINEERS
3RD RESPONDENT

JUDGMENT

KHOSA AJ

Introduction

- [1] This is an interlocutory application brought in terms of Section 6 and Section 13 of the Arbitration Act[1]. In this judgment, I refer to parties as in the main application. The Respondents seek a stay of the main application in favour of the pending Arbitration and the setting aside of the appointment of Abdul Majeed Habib Abdool Carrim (Carrim) as an Arbitrator.
- [2] Carrim filed a notice to abide by the court’s decision. The University of Venda (the University) opposes this Application.

Factual

background

- [3] Around November 2012, the University concluded a Client or Consultant Professional Services Agreement (the agreement) with the Respondents
- in respect of a project called Univen development projects.

[4] The Respondents rendered services and received payments as per the agreement until a dispute arose between the University and the

Respondents relating to payment of certain invoices.

[5] Clause 19 of the agreement provides for Arbitration as a dispute resolution mechanism[2]. The Respondents declared a dispute and referred it for Arbitration. The University and the Respondents could not agree on the appointment of an Arbitrator. Carrim was appointed as an Arbitrator with the intervention of the Legal Professional Council.

[6] The Respondents filed a statement of claim[3] and the University filed a statement of defence including a counter-claim challenging the validity of the agreement in the pending Arbitration. The Arbitration remain pending before Carrim.

[7] The University then launched the main application prior to the finalization of the Arbitration. In the main application, the University seek to challenge its decision and conduct leading up to the allocation of work and conclusion of the agreement with the Respondents. The main application is opposed by the Respondents. The Respondents have filed an answering affidavit to which the University has replied. The Respondents are yet to file their heads of argument in the main application.

Issues

[8] These are the issues for determination;

[8.1] Whether the main application is liable to be stayed in favour of the pending Arbitration between the University and the Respondents;

[8.2] Whether Carrim's appointment as Arbitrator should be set aside.

The law

[9] Section 6 of the Arbitration Act, provides as follows:

"6 Stay of legal proceedings where there is an arbitration agreement

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to

arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just."

[10] Section 13 of the Arbitration Act, provides as follows;

“Termination or setting aside of appointment of arbitrator or umpire

(1) Subject to the provisions of subsection (2), the appointment of an arbitrator or umpire, unless a contrary intention is expressed in the arbitration agreement, shall not be capable of being terminated except by consent of all the parties to the reference.

(2)

(a) The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an

arbitrator or umpire or remove him from office.

(b) For the purposes of this subsection, the expression “good cause”, includes failure on the part of the arbitrator or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award or, in a case where two arbitrators are unable to agree, in giving notice of that fact to the parties or to the umpire.”

Evaluation

[11] It is established principle that when there is an arbitration clause in a contract, the parties are bound by their contract and the Court will usually give effect to the arbitration clause in the exercise of its jurisdiction.

[12] Section 6 of the Arbitration Act clothes the Court with discretion to grant the stay of proceedings and may do so on any terms it considers just.

[13] It is common cause the University and the Respondents are parties to an agreement with incorporates an arbitration clause. It follows that the University bears the onus of satisfying the Court that the matter should not be referred to Arbitration as per the agreement it concluded with the Respondents.

[14] The Respondents seek the stay of the main application after filing the answering affidavit in opposition of the main application. The University opposes the application for stay on the basis that the Respondents are precluded from applying for a stay of the main application in terms of the provisions of Section 6(1) of the Arbitration Act because the Respondents took a step in the main

proceedings by delivering the answering affidavit.

[15] An answering affidavit sets out the Respondents’ basis of defence in the main application. Undoubtedly, an answering affidavit is a further step in the proceedings.

[16] The provisions of Section 6(1) of the Arbitration Act operates squarely against the Respondents. The non-delivery of any pleadings or taking of any other steps in the proceedings is a jurisdictional requirement in Section 6(1) of the Arbitration Act. It prevents an application for a stay if “any pleadings or ... any other steps in the proceedings were taken”.

[17] As a result of the Respondents’ filing of the answering affidavit, one of the pre-requisites for a stay of proceedings in

terms of section 6 (1) of the Arbitration Act is absent. The Respondents thus precluded themselves from making an application for

a stay of the main application in terms of Section 6(1) of the Arbitration Act by filing the answering affidavit in the main application.

[18] Alive to this insurmountable obstacle, albeit, belatedly, the Respondents in the heads of argument seek extension of time in terms of Section 38 of the Arbitration Act. Section 38 of the Arbitration Act provides as follows:

“Extension of periods fixed by or under this Act

The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not.”

[19] The heads of argument are not pleadings. It is a trite principle of our law that a party stand and fall on its papers. In the founding

affidavit in support of the application for stay, the Respondents failed to seek the extension of time or to show good cause for the granting of such extension. The granting of extension is an indulgence to be granted by judicious exercise of court’s

discretionary power.

[20] In my view, absent an application for extension of time being made in the Respondents’ papers, the court’s judicious exercise of discretionary power to extend time is not triggered. In the circumstances, the Respondents’ bid to stay the main

application in terms of section 6(1) of the Arbitration Act must fail.

[21] The next issue for consideration is whether the main application may be stayed in terms of section 6(2) of the Arbitration Act.

[22] The University’s further basis for opposing the stay of the main application is that the question before the Court in the main application is not an agreed issue for Arbitration in terms of the impugned agreement and that the Respondents failed to explain why the court should ignore the legality challenge launched against the agreement embedding the arbitration clause.

- [23] These basis of opposition invites the court to closely examine the arbitration clause, nature of the issues to be determined in the main application and the relief sought by the University.
- [24] An analysis of the arbitration clause reveal that the arbitration clause does not specifically identify the determination of the legality challenge to the University's decision or conduct of concluding the agreement with the Respondents as an issue for referral to Arbitration.
- [25] In the main application, the University launched a review of its own administrative action or decision and seeks a public law remedy. It is the University's case that the agreement was concluded and extended in violation of the procurement policies of the University and Section 217 of the Constitution[4]. The University's self-review is thus founded on the principle of legality and aimed at the agreement in its entirety.
- [26] A legality challenge is the sole preserve of the court. The Arbitrator, bound by mandate, lacks the power vested on the courts in terms of Section 172(1)(b) of the Constitution to order a just and equitable remedy.
- [27] In Independent Development Trust (IDT) v Bakhi Design Studio CC and Others[5], the court held;

"[10] There are compelling reasons why the issue of legality is the sole preserve of the High Court.

10.1 In Department of Transport and Others v Tasima (Pty) Limited[6] the Constitutional Court stressed that the Court is the arbiter of legality.

10.2 Procurement of services in terms of Section 217 of the Constitution is a constitutional issue. Such procurement is required to be in terms of a system which is fair, equitable, transparent, competitive and cost effective. Any conduct which breaches one of these principles, has to be declared invalid in terms of Section 172(1) (a) of the Constitution. The Court then has a discretion to grant just and equitable relief in terms of Section 172(1)(b) of the Constitution. These are powers which, in terms of the Constitution, are the preserve of the Court.

10.3 The privatisation of litigation regarding legality would not pass constitutional scrutiny. The fact that arbitrations are private

removes those proceedings into a private realm. In the High Court public participation in litigation on constitutional issues is

fundamental. Notification of the public of the constitutional issue at hand takes place in terms of Rule 16A. This provides an

opportunity to interested parties to apply to join the proceedings as amici curiae. There is no equivalent process for public participation

in private arbitrations.

10.4 Further, the publication of judgments in Law Reports and online has the effect of notifying the general public of decisions relevant to constitutional matters. This in turn fosters public debate within the context of a constitutional democracy and has the effect of bolstering confidence in the Constitution. Public participation and general publication of arbitration awards are not features of private arbitrations.”

- [28] On a cumulative analysis of the nature of the University’s challenge to the agreement in the main application, the relief sought therein and the arbitration clause, the Arbitrator lacks the power to adjudicate the University’s legality challenge to the Agreement between the University and the Respondents.
- [29] Further, the University’s legality challenge to the agreement is clearly pleaded in the statement of defence filed by the University in the Arbitration as a counter-claim[7].
- [30] In the face of the Arbitrator’s glaring lack of jurisdiction to adjudicate upon the University’s legality challenge to the agreement, is there sufficient reason why the dispute should be referred to arbitration and effectively subject the University to Arbitration under protest? The answer is a resounding no.
- [31] The Respondents’ right to refer a dispute to Arbitration is founded in an agreement. The arbitration agreement is a clause in the agreement subject to the legality challenge in the main application. The real question is what is the effect of the arbitration clause embedded in the agreement which is the subject of a legality challenge?
- [32] In *North West Provincial Government & another v Tswaing Consulting & others*[8], Cameron JA held that an arbitration clause ‘embedded in a fraud-tainted agreement’ could not stand. The court referred in this regard to *Wayland v Everite Group Ltd*[9] which in turn relied on *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk*. That decision referred to *Heyman & another v Darwins Ltd* where Viscount Simon LC said:

‘An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.’

- [33] The University challenges the legality of the coming into existence of the agreement. Consequently, the arbitration clause the Respondents

seek to enforce is also a subject of the legality challenge. The legality challenge to the decision to enter into an agreement with the Respondents is thus beyond the right to arbitration birthed by the agreement itself.

[34] Having regard to the nature of the main application, compelling the University to the Arbitration proceedings would be futile given the Arbitrator's obvious lack of jurisdiction.

[35] In the circumstances of this matter, I am satisfied that there is sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement. Consequently, there is no basis for the exercise of this court's discretion to stay the main application in favour of the pending Arbitration in terms of the provisions of Section 6(2) of the Arbitration Act.

Setting aside of Carrim's appointment as Arbitrator

[36] The Respondents seek an order setting aside the appointment of Carrim as the Arbitrator in terms of Section 13 of the Arbitration Act and his replacement by an Arbitrator appointed by the Chairman of the Association of Arbitrators. Carrim was appointed as an Arbitrator in the enforcement of the arbitration clause. The same holds true for the setting aside of his appointment and his replacement by another Arbitrator.

[37] In my view, the setting aside of the appointment of Carrim is dependent on the positive outcome of the application to stay the main

application in favour of the pending Arbitration between the University and the Respondents

[38] The Arbitration between the University and the Respondents would not proceed until the court has finally pronounced on the legality

challenge to the agreement embedding the arbitration clause irrespective of the identity of the Arbitrator.

[39] Having found that there is no basis to stay the main application, I find it insignificant to adjudicate on whether a case has been made for the setting aside of Carrim's appointment as an Arbitrator and the ancillary relief for appointment of another arbitrator. That determination will be of no practical effect.

Costs

[40] In awarding costs, a court has a discretion which should be exercised judicially. The purpose of an award of costs is to indemnify a successful party who has incurred expenses in instituting or opposing legal proceedings. The general principle is that costs follow the result and no basis has been advanced for deviation from the general principle.

[41] I therefore make the following order:-

[41.1] The application is dismissed.

[41.2] The Respondents (Thiko Consulting Engineers Nevhutalu Consulting Engineers JV, Thiko Consulting Engineers And Nevhutalu Consulting Engineers) are ordered to pay the costs of the University of Venda, such costs to include the costs of employment of two Counsel, one paying the other to be absolved.

ACTING JUSTICE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

For the Respondents : Adv P Tshavhungwe

Instructed by

: PG Matsheka Attorneys Inc

For the Applicant

: Adv M M Mojaelo

: Adv R M Maphutha

Instructed by

: Madima M Attorneys

Date of Hearing

: 30 October 2023

Date of Judgment

: 26 March 2024

Judgement

date : judgment handed down in court and electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is 26 March 2024.

[1] Arbitration Act 42 of 1965

[2] Application in terms of Section 6(1) and 13 of the Arbitration Act – Bundle A at Pg 38

[3] Ibid pg 186

[4] The Constitution of the Republic of South Africa, 1996

[5] [2023] ZAGPPHC 363; 033351/2023 (12 May 2023) at para 10

[6] 2017(2) SA 622 (CC)

[7] Application in terms of Section 6(1) and 13 of the Arbitration Act – Bundle A at Pg 204

[8] NorthWest Provincial Government and Another v Tswaing Consulting CC and Others (190/05) [2006] ZASCA 108; [2007] 2 All SA 365 (SCA); 2007 (4) SA 452 (SCA) (21 November 2006) at para 13

[9] Wayland v Everite Group Ltd 1993 (3) SA 946 (W)

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