

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 44235/2020

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

SENYATSI ML
SIGNATURE

28 JULY 2021
DATE

In the matter between:

NEXUS CONNECTION (SA) (PTY) LTD

First Applicant

SEPCO COMMUNICATIONS (PTY) LTD

Second Applicant

VSNL SNOSPV PTE LTD

Third Applicant

and

LIQUID TELECOMMUNICATIONS HOLDINGS

First Respondent

SOUTH AFRICA (PTY) LTD**BERNARD KATZ**

Second Respondent

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 28 July 2021*

SENYATSI J:

- [1] This is an opposed application to review and set aside the determination made by an accounting expert appointed by the parties to determine various disputed issues regarding ongoing arbitration proceedings.
- [2] The applicants are the defendants in the arbitration proceedings and the first respondent is the claimant. The second respondent is not opposing the application and he elected to abide by the court's decision. Consequently, no relief is sought against him.
- [3] The parties entered into a sale agreement which provided for arbitration in case of disputes. Three arbitrators were appointed to preside over the arbitration. These are Messrs M.D Kuper SC, A Grautschin SC and CD Loxton SC. Loxton SC was later substituted by Mr D Fine SC due to scheduling conflicts.
- [4] The parties separated certain issues at the arbitration proceedings and these were to be heard on 19 November 2020 after the statements of claim and defence were finalised. The separated issues included the first respondent's alleged purchase price adjustment claim and the merits of the unaccrued creditors
- [5] Before the arbitration hearing, the applicants delivered an expert witness statement prepared by Mr A Felet ("Mr Felet") in which he disputed the

inclusion of certain line items as unaccrued creditors in the first respondent's amended claim. The statement was rebutted by Mr. C Domoney ("Mr Domoney") on behalf of the first respondent and purported to explain why line items disputed by Felet in his report were allegedly correctly classified as unaccrued creditors.

[6] The arbitration proceedings did not proceed as scheduled on 19 November 2020 but were instead postponed by agreement between the parties to 11 June 2021. The parties consequently agreed to refer the issue of whether the first respondent's line items described in the amended claim were indeed correctly identified as unaccrued creditors as of 10 February 2017. Barnard Katz ("Mr Katz"), who is the second respondent was jointly appointed as accountant expert and the disputed line items of the amended claim were referred to him for determination. The terms of reference were duly agreed to between the parties and were sent to Katz on 23 November 2020.

[7] The terms of reference ("Mandate") were crafted as follows:

"1. Barnard Katz is appointed as an umpire to determine:

1.1. whether those items on annexure "X" hereto, which are placed in issue by Mr. Felet, were accrued creditors as at 10 February 2017 ("the Closing Date") being based on the documents And witness statements and explanations to be provided to the umpire, and using the decision tree methodology provided in the report of Mr Felet, viz that the goods and services were:

1.1.1. provided on or prior to Closing Date;

1.1.2. not paid for prior to Closing Date and were paid for after closing date;

1.1.3. *not already accounted for in the Closing Statement.*

- 1.2. *whether the R25 million Homix provision was included as liability, specifically as part of the R50 million purchase price adjustment, in the Closing Statement (and thus deducted in determining the Price).*
2. *For the purposes of the umpire's determination the following will be made available to the umpire:*
 - 2.1. *the pleadings;*
 - 2.2. *the witness statements bundle;*
 - 2.3. *arbitration bundles A and B.*
3. *The umpire will apply the following principles in order to arrive at his decision:*
 - 3.1. *the first respondent Bears the onus of proof and in the event that the umpire is undecided on a particular item listed on annexure "X", that item will be resolved against the first respondent;*
 - 3.2. *proof will be required by way of documentary evidence.*
4. *In the event that either party wishes to use a document that has not been discovered, they will be obliged to provide it to the other side at least 24 hours in advance of a meeting referred to below.*
5. *A meeting will take place between the umpire and representatives of the parties, viz Mr Nel (re: the Hormix provision) and Prof Weiner and Mr Domoney (re: unaccrued creditors) and Mr Felet. Each party will appoint one spokesperson to address the issue(s) placed before the umpire, to ensure balance in the procedure... subject to the procedure set out above the umpire will determine his own procedure for reaching a decision.*
6. *In the interest of expediency, the umpire is required to make his decision in writing within two days of the meeting.*

7. *The determination by the umpire will be final and binding on the parties."*

[8] Upon receipt of the Mandate, Mr Katz sent an email to both parties' legal representatives and stated that his understanding was that he was going to listen to the two sides who will be required to justify and prove their respective claims. This understanding was promptly corrected by the applicant's legal representative and she restated the mandate to Mr Katz.

[9] The meeting took place as provided for in the mandate on 30 November 2020 between the first respondents' expert witness, Professor Wainer ("Prof Wainer") and the first respondent's two factual witnesses Mr Domoney and Mr F Nel ("Mr Nel") and the applicant's expert Mr Felet. The first respondent sent a previously undiscovered and undisclosed document as permitted in terms of paragraph 4 of the Mandate in support of its claim to Katz and the applicant's experts more than 24 hours before the meeting.

[10] The applicant avers that contrary to the Mandate, during the course of the meeting and after discussion uncertain of the items on Annexure "X", Mr Katz requested the first respondents' witnesses to produce additional documentation in support of its claim, namely copies of the three invoices listed an audit fee provision, schedule previously submitted by Mr Domoney; a full breakdown of trade payables as at 31 January 2017; a full breakdown of the break cost provision disclosed in the closing statement; the breakdown of the project accruals relating to the Vodacom Irene Farm Villages project and

a full breakdown of the operating lease accrual's outstanding BB1 accruals and the BB1 cost of sales accruals as at 31 January 2017, which documentation would provide evidence for the BB Infracore CDH, Deloitte, Shred-It, SBD, Webber Wentzel and Power Minster Electrical Contractor line item referred to in Annexure "X". The documentation was to be produced after the conclusion of the meeting and would be discussed at a further meeting to be convened by Mr Katz.

[11] The applicant contends that this was contrary to the provisions of the mandate, it should be remembered that all documentation had been discovered at the arbitration which was ongoing and the undiscovered documentation had only been made available to the other side more than 24 hours prior to the scheduled meeting with the expert. This was in line with the provisions of Mandate, namely, paragraph 4.

[12] When Mr Felet felt aggrieved by Mr Katz at the meeting and expressed his views on the process Mr Katz was embarking upon, which he argued was not in line with the Mandate, he was advised that he would be given an opportunity to consider additional documentation and comment thereon. A further meeting was to be arranged by Mr Katz with all the experts once the additional documentation required was at hand.

[13] As a consequence of the developments, the applicant's legal representatives directed an email to Mr Katz and advised him that he was not entitled to allow the first respondent to produce further documentation to prove line items if he

was undecided on these issues at the time of the meeting in light of what the Mandate provided which is that those line items must be decided against the first respondent if not documentary proof exists at the time of the meeting. Mr Katz was also not entitled to hold a second meeting because the Mandate contemplated only one meeting, so continued the email. Mr Katz was requested to render his determination within two days of the meeting held as provided in the Mandate.

[14] The first respondent responded on behalf of Mr Katz, through their mail dated, 30 November 2020 that it disagreed with the approach as set out in [13] but no reasons were provided for the disagreement. Mr Katz also responded and advised that he did not entirely agree with the applicant's record that there were several alleged unaccrued creditors items, including BB Infracore the CDH payment and the Deloitte fees, where the first respondent was unable to provide the required documentary proof at the meeting and support of these claims. The applicants contend that Mr Katz did not provide reasons for his disagreement. Mr Katz also confirmed that he did ask for additional documentary evidence and invited Mr Felet to do likewise.

[15] In spite of the objections against additional documentation, the first respondent emailed additional documentation on 1 December 2020 and Mr Felet was copied thereto but not the applicants' attorneys. Mr Katz then failed to call a further meeting and raised various objections to the applicant's emails. Mr Katz reached a decision on 2 December 2020.

[16] The decision by Mr Katz led to a litany of emails exchanges between the parties legal representatives and Mr Katz. It is clear from the emails that the applicant's attorneys objected to the determination by Mr Katz especially that the determination was reached notwithstanding that the applicant, had placed in dispute Mr Katz's alleged entitlement to request and consider the additional documentation. When a determination was made the disputed issue had not yet been resolved.

[17] In an answer to the complaint by the applicants, the first respondent contends that Mr Felet was given an opportunity to submit additional documentation to Mr Katz and he failed to do just that. The first respondent further contends that Mr Katz was within his rights to ask for additional documentation to assist him to make a determination. I disagree with this contention as it is not supported by any provision in the Mandate. The Mandate states that the parties are to prove their claims based on the documentation made available at the meeting. The Mandate further states that if the expert is undecided, the indecision will go against the first respondent in respect of the line item where the expert is undecided.

[18] The issue in my respectful view is whether Mr Katz acted within his money when he called for additional documentation related to the line items specified by him and if not whether his determination and to be reviewed and set aside.

[19] In *Transnet National Ports Authority v Reit Investments (Pty) Ltd and Another*¹ the Supreme Court of Appeal had an opportunity to consider the mandate of

¹ (1159/2019) [2020]ZASCA 129 (13 October 2020)

an expert when performing his or her functions. The Court held that “once given a mandate, it is not open to the expert to disregard the parties explicit instructions and, on a frolic of his own, have regard to the provisions of clause three of the lease of which incidentally he was unaware as neither party had alerted him to them. In reaching its conclusion to the contrary, the High Court failed to see the wood for trees and consequently committed a fundamental error. Mr Seota's source of authority was not the notarial lease but the joint mandate of the parties from which he was not at liberty to depart.”

I can add that the Mandate in the instant case was crafted with such clarity that Mr Katz had no authority to call for additional documentary evidence.

[20] The Transnet² case also approved in reference to the arbitration agreement in its decision in *Host Med Medical Aid Scheme v Thebe la Bophelo Healthcare Marketing and Consulting(Pty) Ltd and Others*³ which stated as follows:

" in my view, it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded."

[21] In *Wright v Wright and Another*⁴ The court held that:

“ the position of a referee under section 196⁵ is, as High Court correctly found, similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965”.

² Above

³ [2007] ZASCA 163; 2008 (2) SA 608 (SCA) at para 30

⁴ 2015 (1) SA 262 (SCA) para 10

⁵ See *Bekker v RSA Factors* 1983 (4) SA 565 (T)

[22] It is also our law that once a determination has been made, it can only be impugned on narrow grounds.

[23] In *SA Breweries Ltd v Shoprite Holdings Ltd*⁶ it was also held that in general the requirements for a valid arbitral award are equally applicable to an expert determination.⁷ In other words, the expert is required to make a determination in accordance with the process provided in the empowering Mandate. It is impermissible in my view for the expert to stray outside of the process that is regulated by the Mandate.

[24] A court will intervene if the expert can be shown to have undertaken something other than that which the governing mandate allowed him to do.⁸

[25] As already stated, when a meeting was called by Mr Katz to make a determination, all the documentation had been discovered for evidentiary purposes. There was only one additional documentation that the first respondent sought to use to prove its amended claim. The document was disclosed to Mr Felet more than 24 hours before the scheduled meeting and this was permitted by the Mandate. In my respectful view, it was not up to Mr Katz to require one of the parties to provide him with additional documentation to prove the line items on which he could not decide. The eventuality of his inability to decide was provided for in the Mandate and it was clearly to go

⁶ 2008 (1) SA 203 (SCA)

⁷ See David Butler and Eyvind Finsen *Arbitration South Africa Law and Practice* (1993) p260-264

⁸ See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

against the party seeking to prove the line item concerned, in this case the first respondent.

[26] Mr Katz's request after the conclusion of the meeting, which was the only meeting mandated him by the parties to call upon the first respondent to provide for additional documentation was outside of his mandate.

[27] It should be remembered that paragraph 3.1. of the Mandate provided that the first respondent bears the onus of proof and in the event that the umpire is undecided on a particular item listed on Annexure "X" that item will be resolved against the first respondent. With such clear language used, Mr Katz as already stated, ought not to have called for the additional documentation after the meeting even if he could not make a determination because that is precisely what the parties agreed would not happen. I, therefore, hold the view that by calling for additional documentation, Mr Katz became partisan, something he ought to have avoided at all costs.

[28] Mr Katz erred by receiving additional documentation outside of his mandate and simply ignoring the complaints raised by the applicants regarding his failure to make a determination after the first meeting and considering the additional documentation he called for on his own. He compounded, in my view, his irregular conduct by ignoring the contestation raised by the applicants. It makes no sense why he did not call for the second meeting but to have considered documentation submitted after the meeting was in my

view unwarranted and beyond the scope of his mandate. I can only infer that he realised that the Mandate provided for only one meeting.

[29] Mr Katz also failed, without proper explanation to afford Mr Felet to provide, his comment, on behalf of the applicant whilst affording the same privilege to Prof Wainer, Mr Domoney and Mr Nel. This was in my view, unfair and prejudicial to the applicants. However, even if Mr Felet was given an opportunity to comment on the additional documentation called for after the meeting by Mr Katz, it would not change the irregularity of such request because it was contrary to the Mandate. I am of the view that the determination ought to have been made with documentation as presented to Mr Katz on 30 November 2020.

[30] It is my considered view that that the applicants have made out a case.

ORDER

[31] I make the following order:

- (a) It is declared that the second respondent:
 - (i) erred in requesting, allowing and taking into consideration for the purposes of making his determination issued on 2 December 2020 and purportedly amended on 4 December 2020 (“the determination”) additional documentation (“the additional documentation”) provided to him by the first respondent after the

meeting contemplated in his terms of reference had already taken place on 30 November 2020 (the meeting”) and;

(ii) erred in failing to allow the applicant's expert an opportunity to address the second respondent with regard to the additional documentation before rendering the determination;

- (b) The determination is hereby reviewed and set aside.
- (c) The second respondent is directed to issue a revised determination without taking into consideration the additional documentation within 10 days of the granting of this order;
- (d) The first respondent is ordered to pay the costs of this application including the costs of senior counsel.

SENYATSI ML

*Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

REPRESENTATION

Date of hearing: 18 May 2021

Date of Judgment: 28 July 2021

Applicants Counsel: Adv A Franklin SC

Instructed by: Bowman Gilfillan Inc.

1st Respondents Counsel: Adv J.G. Wasserman SC

Adv C. Robertson

Instructed by: Cliffe Dekker Hofmeyer