

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 1995/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE:

SIGNATURE:

In the matter of:

SOUTH AFRICAN NATIONAL PARKS

Applicant

and

MADYAYIMILE TRADING CC

First Respondent

EL GOLDSTEIN N.O.

Second Respondent

JUDGMENT

Todd AJ.

1. The Applicant applies under the provisions of section 31 of the Arbitration Act, 1965, to have an arbitration award dated 4 July 2019 made an order of this court. The

arbitration award was made in terms of a settlement agreement concluded between the parties in the course of arbitration proceedings.

2. The First Respondent opposes the application and pursues a counter application in which it seeks an order setting aside both the settlement agreement and the arbitration award which incorporates it.
3. The background to the matter is that the First Respondent was engaged by the Applicant under the terms of a construction contract to perform certain building work at various locations within the Kruger National Park. The further details of the work that was required to be performed under the contract are not relevant for present purposes.
4. What is relevant is that a dispute arose between the Applicant and First Respondent regarding the amounts payable under the terms of the construction contract. That dispute was in due course referred by the parties to arbitration.
5. The arbitration proceedings were postponed on a number of occasions and were ultimately scheduled to take place between 1 July 2019 and 5 July 2019. The Second Respondent was the appointed arbitrator.
6. In the arbitration proceedings both parties were legally represented throughout. At all material times the First Respondent was represented by the same attorney, and on the scheduled arbitration dates in July 2019, by counsel as well. Each party had also appointed expert witnesses whose evidence was considered to be material to resolving the underlying disputes that had been referred to arbitration.
7. Essentially the issues to be determined in the arbitration boiled down to the question whether amounts claimed by the First Respondent as being outstanding under the construction contract were payable, or whether, as the Applicant alleged, the consequence of various interim payments made by the Applicant during the course of the contract was that the First Respondent had been overpaid and was liable to repay certain amounts.
8. On the scheduled dates of the arbitration the parties conducted settlement negotiations. These involved attorneys and counsel on both sides and the parties' experts. The settlement negotiations were successful and resulted in the settlement agreement, which was signed by each party's attorney of record on 4 July 2019.

9. By agreement between the parties, the terms of the settlement agreement were made an arbitration award by the Second Respondent on the same date.
10. The terms of the arbitration award were not, however, complied with. This led the Applicant to approach this court for an order that the arbitration award be made an order of this court under the provisions of section 31 of the Arbitration Act.
11. The factual basis on which the First Respondent opposes that application and brings its counter application is its contention that the settlement agreement was concluded by its attorney without a mandate. As a result, the First Respondent contends that the settlement agreement was not binding on it and should be set aside, and that the arbitration award similarly falls to be set aside.
12. Mr Hlungwane, who appeared for the First Respondent, submitted that the First Respondent did not bring the counter application under the provisions of section 33 of the Arbitration Act. When asked on what other basis an application could be brought to set aside an arbitration award, if not under section 33 of the Arbitration Act, Mr Hlungwane submitted that the cause of action relied upon to attack the arbitration award was the averment that the settlement agreement which had been made an award had been entered into without authority. That being so, he submitted, it was permissible and appropriate for this court to set aside both the settlement agreement and the arbitration award without relying on the provisions of section 33 of the Arbitration Act. He submitted that the grounds on which the First Respondent relied did not fall within the ambit of those set out in section 33(1), but that the First Respondent was nevertheless entitled to seek the relief sought in the counterclaim without regard to those provisions.
13. Mr Els, who appeared for the Applicant, submitted that an attack on the award could be brought only under the provisions of section 33 of the Arbitration Act, that in any event on the facts the First Respondent's attorney clearly had actual or implied authority to settle the disputes that had been referred to arbitration, and that even if the attorney had not had the necessary authority the First Respondent was precluded by estoppel from relying on the absence of authority.
14. The parties were in agreement that the appropriate sequence in which I should deal with the matters was first to determine whether or not the counter application should succeed. If it did and if I set aside the arbitration award there would of course be no

award to make an order of court in the main application. Similarly, if the counter application were to be dismissed, there would be no grounds on which to oppose making the arbitration award an order of court.

15. The counter-application falls at the first hurdle. There are no grounds on which to seek to set aside an arbitration award outside the ambit of section 33 of the Arbitration Act. Not only must an application be brought under the provisions of that section, it must be brought within six weeks of the publication of the award to the parties. On the facts asserted by the First Respondent the only ground on which it could conceivably have relied to set aside the award would have been that it was improperly obtained as contemplated by section 33(1)(c) of the Act. Mr Hlungwane, however, expressly disavowed reliance on that provision.
16. Even if that were not so, the First Respondent has in any event failed to establish any proper factual basis for the assertion that its attorney responsible for the conduct of the arbitration throughout lacked actual or ostensible authority to settle. The First Respondent's sole member was at least aware of the settlement negotiations. The assertion that the import of what was contained in the settlement agreement was explained to the First Respondent's sole member only by an interpreter and was incorrectly explained supports the conclusion that the attorney indeed had authority to settle the matter whether or not the First Respondent's member properly understood the terms that were ultimately agreed.
17. In addition, having regard to the detailed versions set out in the Applicant's founding and replying papers about what transpired in the run up to and in the course of the settlement negotiations, as contrasted with the vague and implausible assertions made on behalf of the First Respondent and the absence of any reply by the First Respondent to what is set out in the answering affidavit in the counter-application, I agree with the submission of Mr Els, who appeared for the Applicant, that the First Respondent has put up little more than a bare denial of authority of its attorney to settle.
18. Applying the well-established approach in *Plascon Evans* to resolving factual disputes on the papers there is no doubt that the Applicant has established at least implied authority on the part of the First Respondent's attorney to conclude the settlement agreement.

19. Furthermore, the First Respondent has failed to show good cause for the lengthy period of delay in bringing its attack on the award, which was raised some ten months after the main application was brought to make the arbitration award an order of court and more than sixteen months after the award was made. The counter-application would have failed on that ground too.
20. Mr Hlungwane properly conceded that if the counter application failed there were no other grounds on which to oppose the relief sought in the main application. I have in any carefully considered the answering papers in the main application and am satisfied that there are no good grounds of opposition to the main application disclosed there.

ORDER

In the circumstances I make the following order:

1. The First Respondent's counter-application is dismissed.
2. The arbitration award dated 4 July 2019 annexed to the founding affidavit as annexure SP4 is made an order of court.
3. The First Respondent is ordered to pay the Applicant's costs incurred in relation to both the main application and the counter-application.

C Todd

Acting Judge of the High Court of South Africa.

REFERENCES

For the Plaintiff:

Adv. APJ Els

Instructed by:

Liebenberg Malan Liezel Horn Inc.

For the Defendant:

Adv. K L Hlungwane

Instructed by:

TF Hlungwane Attorneys

Judgment reserved:

17 August 2022

Judgment delivered:

23 August 2022