

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11808/2022

DATE OF EX TEMPORE JUDGMENT: 20-06-2023

DATE WRITTEN JUDGMENT IS DELIVERED TO THE PARTIES:

26-07-2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 26 July 2023

In the matter between

SIGNATURE

PJ Malindi

TORO YO AFRICA CONSULTANTS

Applicant

and

STUART JOHN RIDDLE N.O

First Respondent

GOOD PURPOSE CONSTRUCTION

Second Respondent

(PTY) LTD

LEAVE TO APPEAL J U D G M E N T

MALINDI, J:

Introduction:

1. The respondents had referred a dispute between the parties to arbitration under the auspices of the

Association of Arbitrators, Southern Africa. The issue for determination was whether the applicant had repudiated its agreement with the second respondent and whether it was liable for damages for that reason.

2. The arbitration was heard by the first respondent and he published his award on 6 February 2022. He awarded the second respondent R1 886 123.00 with costs under various heads.
3. The dispute in the arbitration was couched by the second respondent as the applicant's failure to adhere to clause 9 of the *General Conditions of Contract for Construction Works 3rd addition 2015* in that the applicant had failed to follow the process set out in clause 9 for the cancellation of the contract between the parties and therefore that the applicant repudiated the contract when it purported to cancel it. On the other hand, the applicant contended that the second respondent is the one that repudiated the contract by abandoning the site.
4. The applicant had appointed an alternative contractor to replace and complete the works and contends that it was entitled to deduct from what was owed to the second respondent in order to pay the alternative contractor.

The parties:

5. The applicant Toro Ya Africa Consultants("Toro") was the respondent in the arbitration.
6. The first respondent is Steward Johan Riddle sited herein in his official position as the Arbitrator in the arbitration proceedings ("the Arbitrator"). No relief is sought against him and has filed a notice to abide the outcome of this application.
7. The second respondent, Good Purpose Construction, was the claimant in the Arbitration.
8. For convenience the parties shall be referred to as in the arbitration and the 1st respondent as the Arbitrator.

The issues for determination:

9. The Arbitrator records that the parties elected that the arbitration be adjudicated on the papers or documents instead of a hearing. He therefore proceeded to consider the "*voluminous and well structured*" documents, and proceeded to draft the award.
10. Toro Ya Africa has launched review proceedings, seeking the review and setting aside of the award on, among others, the basis that the arbitrator misconducted himself and committed a gross irregularity when he decided to adjudicate the matter "*on a documents only basis.*" Toro contends that the

parties had not agreed to such a process.

11. Two further grounds are that: a damages claim is incapable of resolving on paper and calls for oral evidence; and that disputes of facts arose during the proceedings which called further or oral evidence. Other grounds are subservient to these.

12. The issues for determination are therefore whether the parties had agreed to the adjudication of the matter on paper and whether a damages claim is capable of resolving on paper. If not, submits Toro, then the Arbitrator would have misdirected himself even if the parties had agreed to dispense with oral evidence.

Submissions:

13. Toro submits that the Arbitrator failed to apply trite law to the effect that a dispute of fact can only be satisfactorily determined through oral evidence that can be tested under cross-examination and that a claim for payment of damages normally requires the leading of oral evidence. It submits further that the Arbitrator committed an irregularity as contemplated in section 33(1) of the Arbitration Act, by placing the onus of proof on a defendant or respondent party, that is Toro, instead on the one that alleges, that is Good Purpose.

14. It is common cause that each of the parties alleges that the other repudiated the contract. The conduct of each requires examination in order to determine what they did to constitute such a breach of contract.
15. Good Purpose raised a point *in limine* in its answering affidavit to the effect that whereas Toro's review application is in terms of Rule 53 of the Uniform Rules of Court, it does not state what law it relies on to bring the application.
16. The application is to review an award in a private arbitration which was conducted in terms of the rules of the Association of Arbitrators which is subject to the Arbitration Act. The review stands to be in terms of section 33 of the Act. This should not be an issue that entertains the court much. Therefore, the averments in the replying affidavit to assert this point would not be struck out.
17. Another issue that does not require deep examination is that there was an agreement that the arbitration be determined on the papers. Annexure "AA2" to the answering affidavit is conclusive on this issue. Toro's attorney communicated its consent thereto to the Arbitrator and Good Purpose attorney on 20 November 2021. This was in response to the Arbitrator's inquiry in this regard and having directed

the parties to Article 17.3 of the rules.

18. As stated above, Toro's case is based on contentions of law. That is whether the Arbitrator misdirected himself in the sense contemplated in section 33 of the Act.

Discussion:

19. The Supreme Court of Appeal has firmly established the principle that arbitration proceedings shall not be interfered with or that the process chosen by the parties be lightly disturbed. In *Palabora Copper (Pty)Ltd v Motlokwa*¹ it said:

"It suffices to say that where an Arbitrator for some reason misconceives the nature of the inquiry in the Arbitration Proceedings, with the result that a party is denied a fair hearing or a fair trial of the issues that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct inquiry but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards."

¹[2018] ZASCA 23 at paragraph 8 (case number 298/2017)

20. Toro calls for an inquiry into whether the Arbitrator committed a gross misconduct or exceeded his powers when enquiring into the facts or the law. The parties agreed that the facts are as they appeared on paper. Palabora says there is no recourse for a losing party if the Arbitrator gets the facts wrong. This also means that he could also get it wrong as to determining the facts whether there is a conflict of facts. In this case, it means that the court will not enquire into the facts relating to which party repudiated the contract. If the Arbitrator misapplied the Plascon Evans Rule², the court will not disturb the wrong application of the law.

21. The imposition of the burden of onus is also a point of law that if an Arbitrator gets wrong the court will not reverse in terms of Palabora. This applies to the decision to determine damages on the papers. The disputes as to the work done or not and the reasons therefor was determined on the available documents and submissions by the parties.

22. Whereas conventionally the determination of damages requires oral evidence, and that the Arbitrator was wrong in not calling for same, if and when he discerned the conflict, or potential conflict of facts,

² Plascon-Evans Paints (Tvl) Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 620 (A)

does not come to the rescue of Toro. This includes the obvious conflicts of facts that would arise as to why Good Purpose did not perform work on the days which documents reflects its absence.

23. The award shows a thorough engagement with the documents as the only evidence for consideration in determining the issues before the arbitrator. It is not necessary to traverse this engagement with the papers.

Conclusion:

24. I have come to the conclusion that the Arbitrator did not misconceive the nature of the inquiry or his duties in connection therewith. He conducted the arbitration in terms of the referral and the terms of reference. Toro's contentions are based on his misapplication of the law in the respects referred to above, and his failure to appreciate that a dispute of fact had arisen or that it could potentially arise which disputes could not be resolved on the papers.

25. As stated above, *Palabora* discourages disturbing an award where there is no misconception of the nature of the inquiry even if the Arbitrator errs either on the facts or the law. Toro has failed to discharge its onus to establish a misconception of the nature of the inquiry on the part of the Arbitrator.

ORDER

In the circumstances the following order is made:

1. The application is dismissed.
2. The applicant is to pay the cost on the party and party scale.

PJMalindi

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MALINDI, J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 22-11-2022

DATE OF EX TEMPORE JUDGMENT: 20-06-2023

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