IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

DATE: **23 February 2023**

SIGNATURE:

Case No. 56241/2021

In the matter between:

KOMATILAND FOREST SOC LIMITED **Applicant**

And

JOHN WRIGHT VENEERS (PTY) LTD **1ST Respondent**

ADV. L MAITE N.O **2ND Respondent**

Coram: Millar J

Heard on: 3 February 2023

Delivered: 23 February 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division Pretoria and by

release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 23 February 2023

JUDGMENT

MILLAR J

1. This is an application brought by the Applicant ("Komati") in order to set aside an arbitration award made by the Second Respondent against it in favour of the First Respondent ("JWV").

2. Komati is a wholly owned subsidiary of the South African Forestry Company SOC Ltd ("SAFCOL"). SAFCOL was established under The State Forests Act.[1] SAFCOL and Komati falls within the definition of a state-owned company (SOE) as set out in the Companies Act.[2] JWV operates a sawmill. During 2017, a tender was issued for bidders to submit a price for the processing of logs. The contract was to be for a period of 3 years and the total cost was not to exceed R72 757 500.00 (seventy-two million seven hundred and fifty-seven thousand five hundred rand). JWV submitted a bid.

3. Komati awarded the tender to JWV on 1 November 2017. This was formalized in a written agreement ("the Contract"). The period of the tender was from that date until 31 October 2020, a total period of three years. During March 2019, JWV gave notice to Komati that it wished to negotiate for a revision and increase of the processing fees for the logs and it is this notice (given in terms of the Contract) and events that followed wherein lies the genesis of the present application.

THE ORDER SOUGHT

---

[1] 84 of 1998.
[2] 71 of 2008.

4. The order sought in the present application is framed widely with a number of alternatives. It was couched in the following terms:

> *"[1] An order declaring that the second respondent exceeded her jurisdiction in granting the award in the arbitration between the applicant and the first respondent, and such award is reviewed and set aside under* ***section 33(1) of the Arbitration Act 42 of 1965.***
>
> *[2] To the extent necessary the applicant in the alternative seeks an order declaring that the second respondent when granting the award had unlawfully assumed and executed administrative powers reserved for the organ of state and thus against relevant administrative legislation to the applicant including but not limited the Public Finance Management Act 1 of 1999 ("PFMA"); Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA") and the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), as such the award ("A") is reviewed and is set aside on grounds of* ***legality.***
>
> *[3] In addition to the above, as a further and alternative, the applicant seeks an order declaring that Schedule 9 of the Agreement concluded between the applicant and the first respondent does not conform with the* ***Constitution*** *and legislation as identified in prayer 2 above, in circumstances where Schedule 9 purports to empower the second respondent to adjust the fixed contract value of tender 014/2017 and therefore is unlawful and is set aside.*
>
> *[4] Further alternative, the applicant seeks rectification of the Agreement concluded between the applicant and the first respondent by the deletion of schedule 9 above.*
>
> *[5] The applicant also seeks, but only to an extent necessary, an order that the award of tender 014/2017, is reviewed and set aside on the basis of legality in that the applicant concluded an agreement with Schedule 9*

which is at variance with section 217 of the Constitution; the PPPFA and the PFMA. The declaration of invalidity in respect of tender 014/2017 is limited to Schedule 9.

[6] An order that the second respondent committed a reviewable error in granting a costs order in favour of the first respondent for obtaining expert witnesses in circumstances where the agreement precludes such an order as to costs, and such cost award is therefore set aside both in terms section 33(1) of the Arbitration Act and on legality review principles.

[7] The applicant seeks a stay of the enforcement of the award ("A") pending the final determination of the above disputes between the parties. Such order to operate as interim relief pending the final determination of the review application."

5. Shorn of all verbiage, Komati's case is that the inclusion of the arbitration clause as schedule 9 to the tender was unlawful. The reason proffered for this was that within the context of a tender awarded by a state-owned enterprise, submission to the decision of a third party which may result in the imposition of financial liability in effect divests the board of Komati from the determination of exactly how much and for what a successful tenderer should be paid.

6. It was argued that the award by the second respondent in favour of JWV had created a circumstance in terms of which, that for which the tender had been awarded, would not be delivered on the terms that had been agreed. The argument went further, it was only in circumstances where the second respondent found against Komati and in favour of JWV that the argument of illegality would find application. If the second respondent found in favour of Komati, then there was no illegality. In such an instance the arbitration clause would not offend the Constitution, the PPPFA and PMFA.

7. Initially there were 2 main legs to the applicant's review. The first related to the legality of the inclusion of the arbitration clause in the Contract. The second related to one of the terms of the arbitration award.

8. The challenge to the arbitration award in its own terms was against the award by the second respondent of the costs in favour of JWV, of 2 experts who had testified at the arbitration. It was common cause that neither the Contract nor the referral to arbitration or the agreement between the parties relating to the arbitration provided for such costs to be awarded. During argument counsel for JWV formally abandoned these costs and accordingly nothing more need be said about this ground of review.

THE CONTRACT

9. The Contract entered between the parties on 1 November 2017 provides that:

> "*1.1 This Agreement shall in all respects be exclusively governed by and be interpreted according to the laws of the Republic of South Africa. The headings to the clauses of this Agreement shall have no effect upon its interpretation.* ***The various provisions of this Agreement constitute one indivisible Agreement."*** (my emphasis)

and

> "*29 It is recorded that* ***all Schedules*** *annexed hereto form an integral part of this Agreement"* (my emphasis)

10. What is readily apparent from the first and last clauses of the Contract is that the Schedules, of which there are eleven, are regarded as intrinsic and fundamental to the Contract.

11. The following further provisions are germane to the present application:

11.1 There was an agreed amount of logs that would be delivered by Komati annually to JWV for processing.[3]

11.2 JWV would work exclusively for Komati.[4]

11.3 There was a minimum processing target for each year.[5]

11.4 There was a minimum production target.[6]

11.5 Provision was made for the adjustment of the processing fee initially quoted.[7]

11.6 Komati retained the right to summarily terminate the agreement if JWV failed to perform;[8]

---

[3] Clause 4.1 – "*The volume of logs to be delivered by KLF annually in terms of the Agreement is 60 000 cubic meters. Subject to clause 17. KLF shall deliver the agreed volume of logs in approximate equal monthly quantities (hereinafter referred to as "monthly commitment"). To make provision for the annual shut down period during approximately middle December to middle January, "monthly commitment" shall for purposes of this clause mean 1/11th of the annual agreed volume.*"

[4] Clause 9.2 - "*The Contractor shall only process logs supplied by KLF in terms of this Agreement at this sawmill*".

[5] Clause 10.1 – "*A minimum intake volume of 50 000^{m3} over the full year of 234 production days should be achieved based on the tender requirements and scheduled delivery of the logs by KLF.*

[6] Clause 11.1 -"*A minimum net mill recovery rate of 55% as stated in Schedule Eight is required, calculated on kiln-dried dimensions and standard KLF log volume formulation and based upon accepted industry standards.*

[7] Clause 11.2 –"*Should the recovery rate deviate from that as stated in clause 11.1 above, the monthly Processing Fee shall be adjusted according to the provisions stated in Note 2 of Schedule Eight.*" read together with Schedule 8 Note 2 - *The quoted processing fee will be adjusted according to the calculated financial impact resulting from actual production deviations on intake volume, recovery and product mix value from the base case scenario as stipulated and determined by formulas in attached appendix (calculation formula sheet). The financial impact (profit value difference from base case profit) of the production related deviations will be allocated as follows:*

- *"Better than base case profit" – 60.50 split between Contractor and KLF respectively.*
- *"Lower than base case profit" – 75.25 split between Contractor and KLF respectively."*

[8] Clause 11.3 - *Should the recovery rate fall by 8% below the guaranteed recovery rate or lower in any month, KLF shall, notwithstanding the provisions of this Agreement, and specifically notwithstanding the provisions of clause 23, be entitled, in its sole discretion, to summarily terminate this Agreement."* and read together with the General Conditions of the Tender clause 11.11 which was not included in the

11.7 Either party had the right to terminate the Contract by giving 6 months' notice of its intention to do so. It was specifically provided that no reasons need be furnished save that if Komati terminated, it could not do so to enter a similar Contract with another party in the event of a breach by JWV unless JWV had first been placed in breach and given an opportunity to remedy it. [9]

11.8 The total value of the contract would not exceed R72 757 500.00.[10]

12. The Contract also provided in Schedule 9 that:

"Should the Parties fail to reach agreement on the revised cutting fee before 15 May in any given year, the matter may be referred to arbitration and the following shall be adhered to:

Contract but accepted as a precondition by JWV - *"11.11 Should the parties at any time before and/or after the award of the Bid and prior to and – or after conclusion of the contract fail to agree on any significant product price or service price adjustment, change in scope/Technical specifications, change in services, etc. Komatiland Forests shall be entitled, within 14 (fourteen) days of such failure to agree, to recall the letter of award and cancel the Bid by giving the applicant not less than 7 (seven) days written notice of such cancellation, in which event all changes in fees on which the parties failed to agree shall, for the duration of such notice period, remain fixed on those fee/prices applicable prior to the negotiations. Such cancellation shall mean that Komatiland Forest reserves the right to award the same Bid to another applicant it deems fit."*

[9] Clause 25 – "*25.1 Notwithstanding any other conditions in this Is agreement. It is specifically recorded that my party may terminate this agreement with six months within notice.*

25.2 The Parties may terminate the agreement in terms of clause 25.1 for any reason without any obligation to provide reasons for termination. The only exception being that KLF shall not entitled to terminate the Agreement in order to enter into similar Agreement about the same subject matter with another party unless if the Contractor has breached this agreement and has not taken any steps to remedy such breach within the time period stated in clause 23.

25.3 Notwithstanding clause 25.1 and 25.2 above, KLF will have a right to summarily terminate this Agreement in the event that the Contractor falls without proper explanation and\or reason(s) to provide the services and\or to provide to the satisfaction of KLF.

25.4 Should this Agreement be summarily terminated or cancelled for any reason including in terms of clause 25.1 and 25.3, KLF shall have thirty (30) days from the termination date to remove its Product from the premises of the Contractor provided that KLF is able to do so and that no reasonable conditions are present which prevent KLF from removing its Products. A storage fee will become applicable should KLF not be able to comply with conditions above".

[10] Clause 14.4 – "*The total Processing Fee payable over the duration of the Agreement shall not exceed the Contract Value of R 72 757 500 (Seventy-Two Million and Seven Hundred and Fifty-Seven Thousand and Five Hundred Rand).*"

1. *The party referring the matter to arbitration shall be called the "Claimant" and the other party the "Respondent."*

2. *The Parties shall appoint an arbitrator, in the event of the Arbitrator being a corporate entity then it shall in its sole discretion, appoint an individual or individuals to conduct the proceedings and give effect to the contract and this Schedule.*

3. *The Arbitrator shall set up individual briefing sessions with the Parties during which sessions the Parties may present him with their views on a revision, including any such documentary evidence the party wishes the Arbitrator to consider.*

4. *After having met with both Parties, the Arbitrator shall deliver his award within seven days.*

5. *The Arbitrator shall act as an expert and may conduct independent and informal investigations without reference to the Parties.*

6. *The award of the Arbitrator shall be final and binding on the Parties.*

7. *The Arbitrator shall be entitled to make a costs award within its discretion but subject to the principle that the costs are to be paid by the party being substantially unsuccessful in the arbitration. Such costs shall be limited to the costs and fees of the Arbitrator."*

13. It is not in dispute between the parties that JWV sought a revision of the processing fee or that Komati refused to acquiesce. A dispute was declared, and it was only after an application[11] was brought to court for the Legal Practice Council to nominate an arbitrator as provided for in Schedule 9, that the second respondent was then nominated.

---

[11] Brought in this Court under case number 69220/2019.

THE ARBITRATION

14. The second respondent was nominated in January 2020. The Contract came to an end on 31 October 2020. Although it did not appear from the papers, I was informed from the bar by counsel, and it was not disputed, that all the logs that had been delivered to JWV during the period of the Contract had been processed. Furthermore, I was also informed, and it was common cause, that the total paid by Komati to JWV during the period of the contract, even were the award of the second respondent taken into the reckoning, did not and would not exceed the R72 757 500.00 provided for in clause 14.4.[12]

15. On 19 March 2021, a pre arbitration meeting was convened. It was agreed at the meeting[13] *inter alia* that:

    15.1 The second respondent was appointed to conduct the arbitration.[14]

    15.2 There was a binding agreement to refer the dispute to arbitration and that the dispute was arbitrable.[15]

    15.3 The nature of the arbitration was technical and not legal and that it related to the 'Cutting Fee' as provided for in Schedule 9.[16]

---

[12] Footnote 9 supra; Also testified to by one of the Experts (Mr. van Tonder) during the arbitration hearing.

[13] A minute was produced recording what had been discussed and agreed. It was signed on 23 March 2021.

[14] Pre-Arbitration Minute paragraph 3.

[15] Ibid paragraphs 4.1 and 4.2 which state: "*The parties agree that:*
4.1 There is a binding agreement to refer the dispute between the parties arising from the Agreement dated 1 November 2017 to arbitration;
4.2 There is an arbitrable dispute; and
4.3 The Issues will be those as defined in the pleadings, subject to any amendments agreed to by the parties or allowed by the Arbitrator."

[16] Ibid paragraph 6.1 which states that *"The parties are in agreement that the nature of this Arbitration is not a legal but rather a technical Arbitration relating to the Cutting Cut fee as provided for in Schedule 9 of the Agreement."*

16. The arbitration commenced on 22 June 2021. When it commenced, Komati sought to argue that it should not proceed for the reasons advanced in the present review. This did not find favour with the second respondent. Komati then withdrew from any further participation in the arbitration.[17] The arbitration was concluded the following day and the award issued on 23 July 2021.

17. Despite the ruling against it and the withdrawal of its participation, Komati did not exercise any of its rights in terms of s 3(2)(a) & (b) of the Arbitration Act[18] to either *"set aside the arbitration agreement"* or seek an *"order that any particular dispute referred to in the arbitration agreement not be referred to arbitration"* or seek an "order that the arbitration agreement shall cease to have effect with reference to any dispute referred." The reason for this is self-evidently because such a course of action would have no prospect of success. Schedule 9 of the Contract is in the first instance clear and unequivocal in its terms. Furthermore, Komati had explicitly agreed to the arbitration proceedings and the specific dispute to be arbitrated.

18. Once the arbitration award was made, both Komati and JWV were bound by it.[19] After failing to comply with the award, JWV placed Komati on terms to make payment of the award within 3 weeks of 21 September 2021. It was in response to this demand that Komati indicated it may take action to have the award vitiated. The present application was given life on 8 November 2021 when it was issued, almost four months after the award. The first order sought is that the arbitration award be set aside in terms of S33(1) of the Arbitration Act. The section provides:

---

[17] Komati cannot assert that the arbitration was not fairly conducted and did not seek to do so in the present proceedings – it simply withdrew. See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at para 235; see also Telcordia Technologies Inc. v Telkom Ltd 2007 (3) SA 266 (A) at para 50.

[18] 42 of 1965 – Section 3(2) provides "*The court may at any time on the application of any party to an arbitration agreement, on good cause shown:*

(a) set aside the arbitration agreement or

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

[19] S 28 of the Arbitration Act read together with Schedule 9 to the Contract.

"33 Setting aside of award.

(1) Where

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers or (my underlining)

(c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

19. It was never suggested that the second respondent had misconducted herself *qua* her duties as an arbitrator or in the conduct of the arbitration proceedings or that the award once made had been improperly obtained.

20. The crux of Komati's case was that because the inclusion of Schedule 9 was itself an illegality, *ipso facto*, so the argument went, the arbitration and everything that followed was similarly so. A situation which it was argued fell squarely within the latter part of S 33(1)(b).

THE PURPORTED ILLEGALITY OF THE ARBITRATION CLAUSE

21. It was argued that notwithstanding the express provisions of the Contract, the effect of the arbitration clause, only where an award was made against Komati, was what rendered it unlawful. It was argued that award made by the second respondent had the effect of increasing the liability of Komati (and through it SAFCOL and the State). It was argued that properly construed, the Public

Finance Management Act[20] (PFMA) read together with s 217 of the Constitution imposed an obligation upon Komati to contract for goods and services applying principles of "*fairness, equity, transparency, competitiveness and cost effectiveness.*"

22. It is not in issue in the present instance that the advertising, bid reviews and subsequent award of the tender by Komati to JWV was done lawfully and complied with both the PFMA and s 217 of the Constitution. The argument for Komati is that "cost effectiveness" extends beyond the procurement process to the ultimate commercial outcome of the Contract. Such extension must on this argument be applied retrospectively and only in favour of the SOE.

23. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*[21] it was held:

> "*The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting*

---

[20] 1 of 1999 and s 51(1)(iii) which mirrors s 217(1) of the Constitution.
[21] 2001 (3) SA 1013 (SCA) at para [18].

as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution." (my underlining).

24. What is readily apparent is that notwithstanding the framework within which Komati is obliged to contract, the conclusion of the terms of the contract and its implementation is eminently a matter that has been negotiated and determined by the parties themselves. A clear distinction is to be drawn between the circumstance in which the SOE invites bids as against where it then enters a contract. The Contract reflects the negotiation of the respective interests, rights, and obligations towards a particular outcome.[22] In the present matter it is not in issue that JWV performed in all respects its part of the Contract.

25. It is somewhat self-serving for Komati to argue that the inclusion of Schedule 9 in the Contract leads to an illegality when the Contract itself makes provision for the adjustment of the processing fee. It does not follow that because the processing fee is adjusted upwards that the cost effectiveness of the entire Contract is to be impugned. There was nothing placed before the court to indicate that this was the case in the present instance. The argument was predicated solely on the inference that the increased processing fee would decrease the volume processed on a monetary basis.

26. The provisions of Schedule 9 are no more than a standard arbitration clause included in a multitude of contracts that are concluded every day. It is unremarkable in the present day and age that parties to a commercial contract provide for an alternative, speedy and efficient mechanism for the resolution of

---

[22] *Wells v SA Alumenite Co* 1927 AD 69 at 73 – *"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice"* (reference omitted); *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 598.

any dispute that may arise between them. Our law recognizes the efficacy of this and has done so for more than half a century. It certainly cannot be said that such a clause, being clear and unequivocal in its terms could ever have been included in the Contract by mistake.[23]Neither party was bound to submit themselves to arbitration in terms of the clause and both had available to them the choice to terminate the Contract, without giving reasons, if they were unable to resolve their dispute or did not want to submit the dispute to arbitration.

27. What is unexplained is why Komati, apparently having reservations about JWV's claim for an increased processing fee as well as the validity of Schedule 9's inclusion in the Contract did not exercise the rights available to it. To start with Komati had the right in terms of clauses 11.3 and 25.1 to summarily terminate the Contract if JWV did not meet its production obligation or if Komati was not prepared to agree to an increase – it chose not to do so. Thereafter, it failed to assert its right to apply to have the schedule set aside in terms of s 3(2) of the Arbitration Act.

28. It rather chose to allow the Contract to run its course while keeping the dispute alive and pending and to thereafter accept the validity of the Schedule as determinative of the process with which the dispute between it and JWV would be resolved.

29. There is no clearer indication of this than the agreement reached at the pre-arbitration meeting that Schedule 9 was binding and that the dispute was an arbitrable dispute.[24] Both Komati and JWV were at least ad idem on this when the pre-arbitration meeting[25] took place on 19 March 2021. It was only after this once

---

[23] *Brits v Van Heerden* 2001 (3) SA 257 at 282C and 283B

[24] Footnote 14 supra.

[25] *HosMed Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA) para. 30 – *"it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties an arbitrator cannot stray beyond their submission where the*

JWV's statement of claim had been delivered that Komati made a *volte face* and then decided to impugn the referral to arbitration itself. By this time, the Contract having run its course, its discretion to summarily terminate the Contract could no longer be exercised.

30. Insofar as Komati failed to exercise its right to summarily terminate the Contract and acquiesced to arbitration, JWV was entitled to accept that the arbitration would be the process through which the dispute was to be resolved.

31. There is for the reasons I have set out above, in my view, no merit in the assertions by Komati that the decision of the second respondent falls to be set aside in terms of s 33 of the Arbitration Act or that the inclusion of Schedule 9 in the Contract impugns it on the basis of legality. The remaining relief sought in the alternative, is similarly and for the same reasons also unmeritorious.

32. The present application was brought outside the 6-week period provided for in s 33(2) of the Arbitration Act and Komati sought condonation for this. I do not intend to deal with this save to say that although it was opposed, on consideration of the application, it seemed apposite to me that condonation should be granted.[26]

33. Both parties were agreed that the matter was of such a nature that the briefing of 2 counsel was a wise and reasonable precaution on their respective parts. It is for this reason that I make the costs order that I do.

34. In the circumstances it is ordered:

    34.1 Condonation for the late filing of the application is granted.

    34.2 The application is dismissed.

---

parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded."

[26] *Ferris v First Rand Bank 2014* (3) SA 39 (CC) at paras [10]–[12].

34.3 The applicant is ordered to pay the respondents costs of the application for as between party and party which costs are to include the costs consequent upon the employment of two counsel. The costs are to include the costs of the application for condonation.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	3 FEBRUARY 2023
JUDGMENT DELIVERED ON:	23 FEBRUARY 2023
FOR THE APPLICANT:	ADV I PILLAY SC ADV T MOSIKILI
INSTRUCTED BY:	MADIBA MATSAI MASITENYANE & GITHIRI ATTORNEYS INC.
REFERENCE:	MS. S MASITENYANE
FOR THE FIRST RESPONDENT:	ADV J DE BEER

	ADV A VAN DYK
INSTRUCTED BY:	KRUSE ATTORNEYS
REFERENCE:	MR R KRUSE

NO APPEARANCE FOR THE SECOND RESPONDENT