



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1016/2021

In the matter between:

JVE CIVIL ENGINEERS INC.

APPELLANT

and

**BLUE BANTRY INVESTMENTS 235 (PTY) LTD
RESPONDENT**

FIRST

**PETRUS BURTON FOURIE N.O
RESPONDENT**

SECOND

Neutral citation: *JVE Civil Engineers Inc. v Blue Bantry Investments 235 (Pty) Ltd and Another* (1016/2021) [2023] ZASCA 12 (16 February 2023)

Coram: Van der Merwe, Mocumie and Hughes JJA and Goosen and Windell AJJA

Heard: 23 November 2022

Delivered: 16 February 2023

Summary: Arbitration – Arbitration Act 42 of 1965 – review of arbitration award in terms of s 33(1)(b) of the Act – arbitrator exceeded powers – determined two claims in dispute on grounds not pleaded – defence (compromise) pleaded in respect of another claim found to be proved by arbitrator – constituted complete

defence to two claims in dispute – artificial and unjust to disregard defence because not specifically pleaded in respect of claims in dispute – appeal dismissed.

ORDER

On appeal from: Western Cape Division, Cape Town (Pangarker AJ sitting as a court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Hughes JA (Van der Merwe, Mocumie JJA and Goosen and Windell AJJA concurring):

[1] This is an appeal against the order of the Western Cape Division of the High Court, Cape Town (the high court) dismissing the review application of an appeal arbitration award. The appeal is with leave of the high court.

[2] The appellant is JVE Civil Engineers Inc (JVE), an engineering company which provided engineering services to the first respondent, Blue Bantry Investment 235 (Pty) Ltd (Blue Bantry), a property developer in the Western Cape Province. The parties were engaged in a residential property development on the farm Groot Phesantekraal, Durbanville, Western Cape Province.

[3] JVE sued Blue Bantry in the high court for fees arising from engineering services it had rendered to Blue Bantry with regards to this development. During the course of such litigation, the parties opted for arbitration proceedings and concluded an arbitration agreement in August 2018. They further agreed that the pleadings in the high court would stand as pleadings in the arbitration. JVE was unsuccessful in the arbitration and proceeded to appeal the award which came before the second

respondent, retired Judge Fourie.¹ On 12 December 2019, he dismissed JVE's appeal. A determined JVE proceeded to the high court to review the appeal arbitration award, raising a number of grounds to have the award reviewed and set aside. I deal with these grounds further in the judgment. On 15 June 2021, the high court dismissed JVE's review application with costs.

Background

[4] A brief background is necessary. The facts are as follows: Mr van Eeden of JVE and Mr Brink of Blue Bantry had a longstanding personal and professional relationship. Blue Bantry purchased Groot Phesantekraal and sought the assistance and engineering services of JVE to develop part of the farm. JVE had assisted Blue Bantry with engineering services during both Phase 1 and Phase 2 of the residential development. During the course of these two phases, no agreement was documented due to their close relationship.

[5] During 2008, a change in the ownership regime took effect at Blue Bantry and for the first time, on 12 May 2008, JVE and Blue Bantry recorded an agreement in respect of the engineering services for Phase 3 of the residential development (Phase 3), in an email, referred to as the JVE1 agreement. JVE was thus appointed by Blue Bantry as civil engineers for Phase 3. The JVE1 agreement set out the scope of work to be conducted, the relevant instructions for JVE and the fee and payment structure applicable to this phase. JVE's claims against Blue Bantry are in relation to this agreement in respect of Phase 3.

[6] As I shall demonstrate, this matter concerns engineering fees in respect of external bulk infrastructure services. Municipalities levy Bulk Infrastructure Contribution Levies (BICL) from developers in respect of the use of existing municipal bulk infrastructure services for new residential developments. These bulk infrastructure services relate to water, stormwater, sewage and roads. When the existing infrastructure requires upgrades or additions, the developer is expected to erect or install such services, for which the developer would be compensated by receiving BICL credits from the municipality.

¹ The second respondent, Judge Fourie, did not partake in the appeal.

[7] Clause 6 of the JVE1 agreement read as follows:

'Fees for external services will be paid at 100% of the [Engineering Council of South Africa (ECSA)] rate if it can be fully recovered from the bulk services contributions otherwise a 20% discount will also apply here. Interim payments will be calculated at the 20% discount. 100% fee scenario will therefore only apply if the bulk services contributions exceeds the cost obligation to infrastructure provided by the client/developer.' (As interpreted by the respondent.)²

The 'bulk services contributions' in clause 6 referred to BICL credits. This clause thus meant that JVE would receive 80% of the ECSA tariff for work related to external services, unless BICL credits exceeded the costs of the infrastructure provided by Blue Bantry, in which case the additional 20% would become payable. The parties were also ad idem that in terms of the ECSA tariff a 1.25 multiplication factor, which would translate to a 25% addition to fees, applied where the work concerned constituted alterations to existing work.

[8] During the course of Phase 3, Blue Bantry and the City of Cape Town concluded a new service agreement in December 2008 (Service Agreement 2008). It extended the scope of BICL credits available to Blue Bantry, as follows:

'7. Cost of bulk services versus development contributions

Table 5

...

7.1 COMPANY must fund the payment of the municipal services (as detailed in Table 5) on the basis of completed work as certified by the consultants, from own sources: provided that the amount due by COMPANY to the City in respect of bulk services contributions, will be credited with the approved capital costs. This includes all bulk services contributions (roads, water, sewage and stormwater) that have not been levied as on 1 December 2008. See Table 6.

7.2 Any additional infrastructure provided by the COMPANY which exceeds bulk contributions as detailed in Table 6 will be carried forward and refunded by the City in terms of credit on bulk service contributions for any further development by the COMPANY or any nominated entity of the COMPANY's choice for development in the northern corridor area

² Record Vol 1 p 143: '6. Fooie vir eksterne dienste sal teen 100% van ECSA tarief betaal word SLEGS indien dit ten volle kan verhaal word van die grootmaat dienste bydraes andersins sal 20% afslag ook hier geld. Interim betalings sal bereken teen die 20% afslag. 100% fooi scenario sal dus slegs van toepassing wees indien die grootmaatdienstebydraes die koste verpligtinge om infrastruktuur te voorsien deur die klient/ontwikkelaar oorskry.'

(As currently defined by The City of Cape Town). The monetary value of the additional infrastructure will be calculated by converting the value into current equivalent development contributions for residential erven and/or commercial area and/or industrial area. Once bulk infrastructure contributions levies are payable for future development as mentioned above, the credit due to COMPANY or his nominated entity will become claimable in part or in total.

7.3 For the avoidance of doubt it is specifically agreed that the [intention] above is to compensate the company for its loss of interest on the capital expenditure [through] the benefit of having year to year growth in value of the credits for bulk contribution obligations.

...'

Arbitration proceedings

[9] Before the commencement of the arbitration proceedings, the parties narrowed the issues for determination and compiled a document headed 'Points of Dispute'. In terms thereof, certain issues stood over for later determination. The remaining issues concerned claims by JVE for fees for external services, fees for internal services and damages for alleged breach of contract. The claims for external services included a claim for the additional 20% fees under clause 6 (the BICL claim), as well as a 1.25 multiplication factor fee claim in respect of alterations to existing work (the 1.25 multiplication factor claim).

[10] The BICL claim was squarely based on clause 6 of the JVE1 agreement. JVE contended that the condition that entitled it to the additional 20% fees had been fulfilled, irrespective of or because of the effect of the Service Agreement 2008. It is unnecessary to relate the particulars of these contentions. In respect of the 1.25 multiplication factor claim JVE's case was that the claimed fees related to work that constituted alterations to existing work and that the relevant requirements of the ECSA tariff had been met. These allegations were eventually conceded by Blue Bantry. As part of its answer to the damages claim, in para 8.2.4 of its amended plea, Blue Bantry pleaded the conclusion of a separate subsequent agreement, as follows:

'Between 20 August 2009 and 7 September 2009 the parties met so as to discuss the Plaintiff's fees as aforesaid. The Plaintiff was represented by the said Van Eeden and the Defendant by the said Hooper and Brink. At this meeting Brink and Hooper advised Van Eeden that, whilst he was not entitled to the payment of the 20% discount and/or 25%

surcharge, the Defendant would pay him these amounts if and when they were recovered from the municipality. Plaintiff agreed thereto.'

[11] In both the arbitration and its appeal, JVE was unsuccessful. As I shall explain, it is only necessary to consider the reasoning and findings of the appeal arbitrator. Only the BICL and 1.25 multiplication factor claims remain relevant to the appeal. The appeal arbitrator held that the Service Agreement 2008 had amended the JVE1 agreement, which precluded reliance on clause 6 as a cause of action. He proceeded to hold that the contents of para 8.2.4 of the amended plea had been proved and had, in fact, been admitted in evidence by Mr van Eeden. As it was common cause that the relevant amounts had not been recovered from the City of Cape Town, the appeal arbitrator held that the 1.25 multiplication factor claim was premature and had to fail.

In the high court

[12] In terms of s 33(1) of the Arbitration Act 42 of 1965 (the Act), an award may be reviewed and set aside where (a) an arbitrator has misconducted themselves in relation to their duties as arbitrator or (b) where an arbitrator has committed a gross irregularity or exceeded their powers in arbitration proceedings or (c) where an award was improperly attained. In the high court, JVE sought to have the decision of the appeal arbitrator set aside in terms of s 33(1)(b).

[13] In the review proceedings before the high court JVE acknowledged that an arbitrator was 'entitled to be wrong'. It contended, however, that the appeal arbitrator had exceeded his powers and/or committed a gross irregularity in the conduct of the proceedings by determining the two relevant claims on a basis not pleaded at all (the amendment of JVE1 agreement) and not pleaded in answer to these claims (para 8.2.4 of the amended plea).

[14] The high court found that the appeal arbitrator 'considered the arbitrator's approach and findings, [in relation to] paragraph 8.2.4 of the amended Plea' with reference to the concession of Mr Van Eeden during cross examination. It concluded that '[t]he aspect regarding the oral agreement concluded between the parties in August/September 2009, and on which evidence was lead, was

specifically pleaded at paragraph 8.2.4 of the amended Plea'. Thus, the high court dismissed the review application, as it found that the appeal arbitrator acted within his powers when he made his finding as regards the oral agreement.

The law

[15] The terms of the Act, though no specific mention is made of appeal arbitrations, 'clearly enable an agreement to refer an arbitrator's award to an appeal body, and the provisions of the Act must apply to an appeal tribunal, and its award, in the same way as they do to an arbitration and an arbitral award.'³ It follows that should the appeal arbitration award be set aside on review, the original arbitration award would not be revived or reinstated, but s 33(4) of the Act finds application. It provides that in such a case the dispute must at the request of any of the parties be submitted to a new arbitration tribunal constituted in the manner directed by the court.

[16] Harms JA, in *Telcordia Technologies Inc v Telkom SA Ltd*⁴, said the following:

'The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the *nature of the inquiry* – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.'⁵

³ *Hos+Med Medical Aid Scheme v Thebe ya Pelo Healthcare and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA) (*Hos+Med Medical Aid Scheme*) para 3.

⁴ *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA).

⁵ *Ibid* para 85.

[17] I am also mindful of what Wallis JA stated in *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*,⁶ that ‘[i]t suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of issues that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, 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 the 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.’⁷

[18] An arbitrator has only the powers afforded to her or him in terms of the relevant arbitration agreement; the arbitrator has no inherent power. Lewis JA articulated this 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. Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded . . . It is of course possible for parties in an arbitration to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct . . .’⁸ [Footnotes omitted]

[19] I now turn to consider the grounds raised by JVE in the review application before the high court.

Discussion

[20] In this matter the arbitration agreement limited the powers of the arbitrator to the determination of the issues as defined in the pleadings. It is common cause that it was not a pleaded issue that the Service Agreement 2008 had amended the JVE1 agreement. In dismissing the BICL claim on this basis, the appeal arbitrator

⁶ *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* [2018] ZASCA 23; [2018 (5) SA 462 (SCA) (Palabora Copper).

⁷ *Ibid* para 8.

⁸ *HOD+MED Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA) para 30.

exceeded his powers. In the result he did not apply his mind to whether the condition in clause 6 had been fulfilled as alleged. It is also clear that para 8.2.4 of the amended plea was pleaded as part of the defence to the damages claim and not specifically to the two claims under consideration. The question is whether these factors justified the review and setting aside of the appeal arbitration award. For the reasons that follow, I am of the view that the answer to the question must be 'no'.

[21] It is important to have regard to the nature of the agreement referred to in para 8.2.4 of the amended plea. Mr Brink on behalf of Blue Bantry at the time denied liability towards JVE for the BICL and 1.25 multiplication factor claims. He nevertheless offered to pay these amounts if and when they were recovered from the City of Cape Town. Mr van Eeden on behalf of JVE expressly accepted the offer. Thus, a compromise was entered into in respect of these claims. The compromise constituted a complete defence to the claims. It would be wholly artificial and unjust to disregard the pleaded and proved compromise simply because it had not been pleaded directly in answer to these claims. Put differently, it could not in the circumstances be said that the appeal arbitrator failed to afford the parties a fair hearing. Consequently, the dismissal of these claims did not amount to a gross irregularity within the meaning of s 33(1)(b).

Order

[22] Consequently, I make the following order:

The appeal is dismissed with costs, including the costs of two counsel.

W HUGHES
JUDGE OF APPEAL

APPEARANCES

For the Appellant: C Joubert SC
Instructed by: Laas & Scholtz Inc., Cape Town
Webbers Attorneys, Bloemfontein.

For the Respondent: Roelof Van Riet SC
S Miller
Instructed by: Roelof Feenstra Inc., Cape Town
Lovius Block Inc, Bloemfontein.