IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION

DATE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

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

(3) REVISED ✓

22/2/2006 (Sgd) W J van der Merwe
Date Signature

CASE NO: 27225/04

In the matter between:

BOPANANG CONSTRUCTION CC Applicant (the contractor)

AND

LUFUNO MPHAPHULI & ASSOCIATES (PTY) LTD Respondent (the employer)

CASE NO. 33188/2004

In the matter between:

LUFUNO MPHAPHULI & ASSOCIATES (PTY) LTD Applicant

AND

NIGEL ANDREWS 1st Respondent (the arbitrator)

BOPANANG CONSTRUCTION CC 2nd Respondent

JUDGMENT

VAN DER MERWE, J.

In this judgment the parties will be referred to as follows:

1. Bopanang Construction CC as the contractor;
2. Lufuno Mphaphuli & Associates (Pty) Ltd as the employer;
3. Nigel Andrews as the arbitrator.

Case no 27225/2004 between the contractor as applicant and the employer as respondent, will be referred to as the contractor's application.

Case no 33188/2004 between the employer as applicant, the arbitrator as the first respondent and the contractor as the second respondent will be referred to as the employers application.

On 16 May 2002 the employer and the contractor entered into a written electrification contract in terms whereof the contractor had to execute certain electrical and construction work for the employer. For purposes of clarity it need be stated that the contractor was the main contractor to Eskom in respect of the electrical and construction works. The contractor was therefore a subcontractor to the employer.

During the execution of the works disputes arose between the contractor and the employer regarding payment and execution of the works. The contractor issued a simple summons against the employer for payment of an amount allegedly due by the employer to the contractor. The contractor furthermore launched an urgent application against the employer and Eskom to interdict further payments to be made by Eskom to the employer. By agreement an order was granted interdicting such payment pending the finalization of the action instituted either by way of litigation or arbitration.

The parties decided to resolve their disputes by way of arbitration and appointed the arbiter for that purpose. The appointment of the arbiter and the process to be followed pre-arbitration is contained in a document headed "voorverhoor notule" dated 21 July 2003. It is not necessary to deal in any detail with the contents thereof.

As agreed between the parties, the contractor filed a statement of case, the employer pleaded thereto whereafter the contractor filed a reply.

After a preliminary meeting between the parties and the arbitrator on 1 September 2002, the arbitrator prepared a preliminary proposal to the parties. The parties thereafter during October 2003 entered into a written arbitration agreement. During argument the parties referred to various clauses in the arbitration agreement. It is therefore necessary to quote it in full. It reads as

follows:

" ARBITRATION AGREEMENT

WHEREAS the plaintiff instituted an arbitration action against the defendant in terms whereof the plaintiff claimed payment of an amount of R656 934,44; interest on the amount of R143 395,53 at 0,5% per week from 6 October 2002; interest on the amount of R208 937,54 at 0,5% per week from 21 April 2003; interest on the amount of R304 601,37 at 0,5% per week from 21 April 2003 and cost of suit;

Page 4

AND WHEREAS defendant opposed the action and inter alia claimed payment of whatever amount appears to have been overpaid by the defendant to the plaintiff;
AND WHEREAS the parties have reached an agreement regarding the finalization of the arbitration proceedings and the mandate to be given to the arbitrator, Mr Nigel Andrews;
NOW THEREFORE the parties agree as follows:

1.

PURPOSE OF ARBITRATION

The purpose of the arbitration is to determine whether payment is due in terms of the contract concluded between the parties, and if it is determined that payment is in fact due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by the defendant or Eskom; the value of the work that has been done by the plaintiff the effect of any defects, if any, and the rectification thereof; any and all payments made to the plaintiff. Therefore a final assessment of moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator.

Page 5

2.

AWARD OF ARBITRATOR IS FINAL AND BINDING

The final award made by the arbitrator as described in clause 1 above shall be final and binding on the parties.

3.

PAYMENT TO BE MADE IN TERMS OF AWARD OF ARBITRATOR

Any payment to be made by any of the parties in terms of the award made by the arbitrator shall be due and payable to the other party within 21 calendar days of the date of the written award made by the arbitrator.

4.

PROVISION OF DOCUMENTATION

The parties record that the arbitrator has already been provided with a bundle of documentation forming part of the plaintiff's particulars of claim. In addition hereto, each party shall be entitled to submit such documentation as it may deem necessary to the arbitrator by not later than 10 October 2003.

5.

REQUEST FOR ADDITIONAL DOCUMENTATION

The arbitrator shall be entitled to require from any of the parties to make such further documentation available as he may require. The parties shall provide such

requested documentation within 3 (three) days from such written request of the arbitrator.

6.

LIAISON WITH ESKOM

The arbitrator shall be entitled to liaise with Eskom's duly authorized representatives, and to request any documentation with regard to this project from Eskom, who is hereby authorized by both parties to make such documentation available.

7.

INSPECTION AND MEASUREMENT

The arbitrator shall commence with the inspection and measurement of the work done on site on or about 27 October 2003. Each party shall provide their

reasonable co-operation with the aim of completing the process as speedily as possible, and shall appoint representatives to attend the physical inspection and measurement.

8.

ACCEPTABLE GUARANTEE

Each party shall by not later than 23 October 2003, provide the arbitrator with an acceptable guarantee, eg an office undertaking from their respective attorneys to the amount of R40 000,00 for the purpose of securing the anticipated costs of the

arbitrator. Until such time as the arbitrator has made a final award, each party shall be liable for 50% of the arbitrator's costs.

9.

ORDER AS TO COSTS

The arbitrator shall be entitled, within his discretion and having regard to his findings and the co-operation, or lack thereof, by the parties, to make such order as to costs, which will be on the party and party scale of the High Court of South Africa. The costs of the arbitration shall form part of any order as to costs.

10.

FULL AGREEMENT

This agreement constitutes the full and complete agreement reached between the parties and no variation, amendment, alteration, addition or omission shall be valid and binding on the parties unless reduced to writing and signed by all parties or their duly authorized representatives."

The parties proceeded with the arbitration and on 23 August 2004 the arbitrator published his award. It is not necessary to deal with the award in detail. In essence the arbitrator concluded that the employer is liable to pay the amount of R339 998,83 to the contractor together with interest on that amount at 0,5% per week from 6 October 2002. The effect of the arbitrator's costs order is that each party was to pay half the arbitrator's costs and thereafter to pay their own costs.

The employer, through its attorneys, asked the arbitrator for clarification on certain aspects of his award. The arbitrator reacted by stating that his award is final and binding on the parties and that there is no provision in the arbitration agreement for the arbitrator to enter into any further discussions on his award. The employer through his attorneys then notified the contractor's attorneys that the employer intended bringing an application for review.

As nothing further was heard from the employer, and no payment was effected by it, the contractor brought an application in terms of section 31(1) of the Arbitration Act (the Act), 42 of 1965 for the award to be made an order of court. The contractor pointed out in its founding affidavit that the period of six weeks referred to in section 32 of the Act during which the employer was entitled to bring an application for the remittal or setting aside of the award had already expired and that no application for condonation for the failure to bring any application within that period had been brought.

The employer opposed the application and the contractor filed a replying affidavit.

Thereafter on 13 December 2004 the employer brought an application for the review of the arbitrator's award. In the notice of motion the employer asked that the award be reviewed and set aside and that the matter be referred back to the arbitrator to review his award having regard to the issues raised in the founding affidavit of that

application, The application was brought under case no 33188/2004. Both the contractor and the arbitrator were joined as respondents and the employer asked for an order that they jointly and severally pay the costs of the application. I will later deal in more detail with the contents of the founding affidavit. It is common cause that the application was brought outside the period of six weeks referred to in section 32 of the Act. No application for condonation in terms of section 38 of the act appears in the founding affidavit.

Though some dispute took place on the question whether the employer followed the procedures laid down in rule 53 of the Uniform Rules of Court in bringing the application under case no 33188/2004, it is now common cause that the application was in fact brought in terms of rule 53 of the Uniform Rules of Court.

On 7 March 2005 the arbitrator filed his reasons as contemplated in rule 53(l)(b) of the Uniform Rules of Court. He furthermore notified the employer and the contractor that he, together with his reasons filed the record of the arbitration proceedings with the registrar of this court and drew the parties' notice to the provisions of rules 53(3) and (4) of the Uniform Rules of Court.

On 18 May 2005 the contractor filed its answering affidavit. In its answering affidavit the contractor referred to the provisions of the act as well as to the fact that the employer failed to bring the application within the period of six weeks without an application for an extension of that time period.

Page 10

Also on 18 May 2005 the arbitrator filed his answering affidavit.

On 5 August 2005 the employer filed an amended notice of motion. In the amended notice of motion it still asks that the award be reviewed and set aside but then continues to ask for a declarator that the contractor is liable to pay to the employer certain amounts of money. The employer then also asks that the award be substituted with an order that the contractor pays the sums referred to. The employer also asks that the contractor be ordered to pay its costs of the arbitration as well as the costs of the urgent application referred to earlier.

A prayer is also inserted for condonation, to the extent necessary, for the late filing of the application and the amended notice of motion and supplementary founding affidavit. A supplementary founding affidavit was then filed with the amended notice of motion. In the supplementary founding affidavit reference is made to the record of the arbitration proceedings and the fact that the employer's newly appointed attorneys (the employer had in the

new material and facts.

Page 12

In this respect it need be pointed out that the applications were enrolled to be heard on 7 October 2005. On 4 October, as stated earlier, the employer filed two further affidavits. The arbitrator intended filing an answer to that affidavit. It also become clear that the matter would last more than a day and the matters could therefore not proceed on 7 October 2005. The parties arranged with the honourable judge-president for a hearing over a period of two days and 24 and 25 January 2006 were allocated. The last two mentioned affidavits were filed subsequent to the previous hearing and approximately one month before the actual hearing.

On 23 January 2006 the arbitrator filed a reply to the employer's reply to its founding affidavit.

I will later, in so far as may be necessary, refer to the contents of the various affidavits.

The parties agreed that both applications be heard together. The legal representatives in essence made submissions in case no 33188/2004. They were ad idem that the outcome of that application would also dictate the outcome of the application in case no 27225/2004.

Page 13

Various applications for condonation are contained in the papers. Counsel for the employer agreed that basically three applications for condonation need be considered. They are:

1. The application for condonation for the late filing of the employer's reply to the arbitrators and the contractor's answering affidavits filed in response to the employer's initial founding affidavit.
2. The application for the condonation of the late filing of the supplementary founding affidavit.
3. The application for condonation of the late filing of the founding

affidavit in view of the provisions of the act.

It is common cause between all legal representatives that the merits of the application play an important role in my decision whether to condone the failure to comply with any of the time periods.

I now deal with the merits of the application as it is set out in the various affidavits filed by the employer.

In its application the employer asks for the arbitrator's award to be reviewed and set aside. Section 33 of the Act deals with the grounds on which a court may set an award aside. Section 33(1) of the Act reads as follows:

Page 14

"33(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

(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."

In paragraphs 12 and 13 of its founding affidavit the employer deals with the grounds for review. No attempt whatsoever is made by the employer to set out any fact to justify the setting aside of the award on the grounds contained in section 33(1) of the Act as set out above. At most, it appears as if the employer alleges that:

1. the arbitrator allowed or awarded "numerous costs" in favour of the contractor for work never done or even claimed by the contractor;
2. the arbitrator did not entertain the fact that "certain retention monies" are being retained by Eskom;

Page 15

3. the arbitrator did not allow all remedial work undertaken by a

further contractor known as AA Electrical;

4. the contractor was not required to account for two hundred and thirteen prepaid meters to the value of R85 200,00 which it received but never installed;

5. that the total award of the arbitrator would be wiped out if it is rectified as required by the employer.

Besides the fact that the employer's application was brought outside the time period prescribed in the Act, it is fatally defective as no ground of review is made out as required in terms of section 33(1) of the Act to entitle a court to consider reviewing and setting aside the award.

As stated above both the arbitrator and the contractor filed answering affidavits during May 2005. I do not intend dealing with the contents of the answering affidavits in detail. The essence of the arbitrator's answering affidavit is that the arbitration agreement "envisages that my adjudication should be based upon a re-measurement of the work executed and that such re-measurement be done myself in co-operation with both parties." The arbitrator further alleges that the parties appointed representatives who attended the physical inspection and re-measurement of the work. It is clear that the

inspection and re-measurement was a cumbersome process but that the parties discussed and agreed on the work actually done by the contractor. The arbitrator furthermore alleges that due to the terrain and more informal houses than initially expected, more work had been done by the contractor than initially thought by the parties. The arbitrator, however, did the inspection and re-measurement, asked the parties for inputs and eventually considered the facts and made his award.

Independently from the arbitrator the contractor explained the very same methodology.

If one considers the employer's founding affidavit and the two answering affidavits, it is abundantly clear that the employer has not made out a case for

reviewing and setting aside the award at all.

As stated above the employer filed an amended notice of motion and a supplementary founding affidavit during August 2005. In the supplementary founding affidavit the employer does not deal with the two answering affidavits referred to above.

In the supplementary founding affidavit the employer broadens the scope of the relief sought. 1 am not going to deal with the amended notice of motion in detail. Enough to say that the employer asks the court to order the contractor to pay specific amounts of money in respect of penalties, retention monies and prepaid meters to it. In the alternative the employer asks the court to review the award and to set it aside and

to remit the matter to the arbitrator to review his reward regarding the issues raised in the supplementary founding affidavit. Condonation is also sought for the late filing of the supplementary founding affidavit and for the first time for condonation for the failure to bring the initial application for review within the prescribed period of six weeks.

The employer now bases its grounds for review on:

1. the alleged failure by the arbitrator to perform his mandate;
2. the allegation that the arbitrator committed manifest errors; and
3. the allegation that the arbitrator was biased in favour of the contractor or that there was at least a reasonable perception that the arbitrator was so biased.

Because of the view I take of this matter it is not necessary to deal in any detail with the contents of the supplementary founding affidavit. The following, however, need to be stated.

This court cannot substitute the arbitrator's award with its own. This court cannot order the contractor to pay any amount of money to the employer. It therefore came as no surprise when that relief was abandoned on behalf of the employer.

From the supplementary founding affidavit it appears as if the employer is regarding the present procedure as an appeal against the arbitrator's award. The employer totally disregards the nature of the proceedings before the arbitrator. The employer approaches the matter as if it was a formal hearing where evidence was led and the arbitrator was obliged to receive submissions by the parties The employer totally disregards the fact that the arbitrator had to inspect and re-measure the work done. It also disregards the fact that representatives of both parties assisted the arbitrator, that discussions took place between those representatives and the arbitrator on re-measurements and that agreement was reached after such re-measurement.

The employer clearly ignores the fact that in spite of the arbitrator notifying the parties that the record of the proceedings was available at the Registrar's office, his previous attorneys never demanded sight of the record but instead demanded that the arbitrator and contractor file answering affidavits and that the matter be proceeded with. I will later return to this aspect as well as the allegation that the arbitrator was biased in favour of the contractor.

As appears from what is stated above the arbitrator and the contractor filed answering affidavits to the employer's supplementary founding affidavit. The employer in turn filed replying affidavits to those answering affidavits. Only in December 2005 did the employer file replying affidavits to the arbitrator's and the contractor's answering affidavits filed during May 2005. In its replying affidavits the employer again referred to new matter which was not contained in any of the previous affidavits.

The arbitrator tendered a further affidavit to the employer's replying affidavit to his answering affidavit. I need not deal with the contents of this last-mentioned affidavit.

As stated above the arbitrator filed his reasons as contemplated in rule 53(1)(b) of the Uniform Rules of Court on 7 March 2005. Upon receipt of the

notice in terms of rule 53(b)(b) the employer's then local attorney wrote to the employer's attorney in Polokwane stating *inter alia* the following:

> "Mr Mphaphuli's consideration of these measurements is urgent and we look forward to hear from you regarding the possible amendment or supplementation of the founding affidavit"

The attorney clearly had the provisions of rule 53(4) in mind which allows an applicant to amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit.

In reaction thereto the employer's Polokwane attorneys recorded as follows:

> "We submitted the preliminary site measurements to our client for his further consideration. Our client informed us that those measurements do not take the matter any further and in fact we still have no response from the adjudicator on the aspects raised by our client. The adjudicator merely stated that he has no

> further reasons to furnish other than those already furnished by him when he initially announced his decision. Under the circumstances the matter will have to be enrolled as soon as is possible."

The employer's Pretoria attorneys thereafter informed the contractor's attorney that-

> "The applicant does not wish to amend, add to or vary the terms of his notice of motion as provided for in rule 53(4). Your client may proceed to file his opposing affidavit (if any) as provided for by rule 53(5)."

As stated earlier there is no indication whatsoever that the employer or his attorney ever demanded sight of the record filed with the Registrar. The employer was in communication with the arbitrator trying to get explanations for certain aspects of the award. In my view the employer through its attorney took a considered decision not to amend its notice of motion or to supplement its founding affidavit but to demand that the matter proceed to court as soon as possible. It was only when a new set of attorneys appeared on the scene that

the employer relied on the so-called unavailability of the record to now amend its papers and to practically bring a new case before court.

It is trite that an applicant must make out its case in the founding affidavit. Where rule 53 allows an applicant to amend or supplement its founding papers and notice of motion, the employer decided not to do it in the present case. This resulted in a

Page 21

multiplicity of affidavits in which the employer in each instance tried to make out a new case in such further affidavits. This resulted in the employer practically bringing an appeal against the arbitrator's award alleging eventually that there are disputes of fact which should be referred to trial or to oral evidence. Eventually counsel for the employer conceded that that is not a remedy the employer can ask for.

In my judgment the employer has not made out a case for any of the applications for condonation referred to earlier.

As far as the application for the condonation for the late filing of the employer's reply to the arbitrator's and the contractor's answering affidavits filed in response to the employer's initial founding affidavit there was an extraordinary long delay. The replies were only filed on 23 December 2005 where the answering affidavits were already filed during May 2005. That long delay was not explained.

As far as the application for the condonation for the late filing of the supplementary founding affidavit is concerned I am satisfied that the employer through its attorneys made an informed decision not to amend or supplement the initial papers. From the papers before me it is also clear that the employer was all along in possession of all documents contained in the so-called record and was therefore able to make an informed decision.

Page 22

The employer was already forewarned in the contractor's application that the six week period referred to in the Act has expired. In spite thereof the

employer filed its application without asking for condonation and only asked for condonation in the supplementary founding affidavit during August 2005.

If the applications for condonation are refused there is no application before court.

In my judgment, and as briefly referred to above, the employer has made out no case on the merits of the application. No case was made out in the founding affidavit. The attempts to make out a case in the various supplementary affidavits did not succeed.

The applications for condonation are therefore refused on the basis that there was no proper explanation for the delay as well as on the basis that no case was made out for the relief sought.

The employer alleged that the arbitrator was biased in favour of the contractor. It based that allegation on so-called secret meetings that took place. According to the employer it only learnt of these meetings when the record was perused. I have already pointed out that all the documents contained in the record were available to the employer.

The first so-called secret meeting took place on 17 March 2004 between the arbitrator and a representative of the contractor. On the very next day the arbitrator in writing confirmed the discussion that took place and furthermore confirmed an

arrangement for the parties to meet on site on 24 March 2004. It is clear that the arbitrator had already discussed the matter with the employer because the letter confirming the discussion was forwarded to the employer. It is also of significance that the parties met on site on 24 March 2004 and continued any discussion that might have taken place during the first so-called secret meeting.

In respect of the second so-called secret meeting the arbitrator requested the parties on 29 April 2004 to supply him with certain information. The contractor made oral submissions. The employer replied in writing. Both parties therefore were afforded the opportunity to be heard. They, however chose to

supply the arbitrator with the required information in their own way.

The third so-called secret meeting of 29 July 2004 was also the result of the parties responding to a query raised by the arbitrator. Again the contractor replied in writing and oral submissions were made. The contractor only gave a written rely. What is, however, of significance is that the arbitrator decided the question raised in the third meeting in favour of the employer.

There is no merit whatsoever in the submissions on behalf of the employer that the arbitrator was biased in favour of the contractor and that that is proved by so-called secret meetings.

Page 24

Both the arbitrator and the contractor ask for a punitive costs order against the employer.

In my judgment the arbitrator and the employer are both entitled to such orders. As appears from the aforegoing the employer did not make out a case in the founding affidavit and thereafter tried to bolster its case on more than one occasion. In my judgment the employer misconceived its remedy and in fact asked for relief it is not entitled to and tried to have a rehearing of the arbitration. Furthermore the employer made serious allegations against the arbitrator and the contractor and eventually accused the arbitrator of bias. In my judgment the effect of the employer's application and the contents thereof warrants a court to conclude that it is vexatious.

I therefore grant the following orders:-

1. In case no 27225/2004:
   - 1.1 an order is granted in terms of prayers 1 and 2 of the notice of motion dated 18 November 2004;
   - 1.2 the respondent is ordered to pay the costs of the application on the scale as between attorney and client.
2. In case no 31188/2004:
   - 2.1 the application is dismissed,
   - 2.2 the applicant is ordered to pay the costs of the

application as between attorney and client.

(Sgd) W J van der Merwe

W J VAN DER MERWE

JUDGE OF THE HIGH COURT