IN THE HIGH COURT NORTH GAUTENG, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NUMBER ~~55379/08~~ 49702/10

In the matter between:

QUONDISA DEVELOPMENT FACILITATORS CC APPLICANT

and

HEINRICH REGENASS FIRST RESPONDENT

CORPORATE & SOCIAL MARKET RESEARCH CC SECOND RESPONDENT

JUDGEMENT

BAM AJ

1. The applicant and the second respondent were parties in an action adjudicated by an arbitrator, the first respondent. The first respondent, in accordance with his mandate completed a Financial Report which is now the center of dispute between the parties.

2. The applicant, dissatisfied with the award in the Financial Report, applies to this Court for the following relief:

   (i) That the late filing and service of this application be condoned in terms of section 33(2) of the Arbitration Act 42 of 1965;
   (ii) That the Financial Report of the First Respondent, dated 10 October 2009 be reviewed and set aside in terms of section 33 of the Arbitration Act 42 of 1965.
   (iii) That the disputes between the parties (as set out in the founding affidavit) be resolved by way of the action brought in this Court under case no 08/2162.
   (iv) That the first respondent pay the costs of the applicant in bringing this application;
   (v) That the second respondent pay the costs of the applicant in bringing this application only in the event of it opposing the application.

   Both respondents oppose the application.

3. The applicant's application for condonation for the late bringing of this application is brought in accordance with the provisions of section 33 of the Arbitration Act 42 of 1965 (the "Act"). The application should have been brought within six weeks in terms of the said section. This did not happen. The period of six weeks expired before the end of May 2010 in view of the fact that, according to the applicant, the arbitration award became final on 9 April 2010.

4. The applicant avers that he was out of town from 12 May to 23 May 2010, he visited Germany, and, on his return he consulted with counsel regarding the contents of the first respondent's letter dated 31 March 2010 concerning the first respondent's contention that *no further work could be done by him concerning the dispute 'as it is a legal argument'*. Correspondence between the parties followed pertaining to the issue whether second respondent insisted that a tacit agreement existed between the parties regarding the issue whether over-expenditure on the budget was permitted or not. According to the applicant the situation developed to the point, as suggested by the applicant, that if second respondent insisted that such an agreement indeed existed, then the matter would have to be resolved by the Court. In a letter dated 2 June 2010 the second respondent's attorneys rejected the said suggestion and informed the applicant's attorneys on 19 July 2010 that an application to enforce the first respondents report would be lodged, which application was served on the applicant's attorneys on 3 August 2010, after the expiration of the six weeks deadline.

5. The first respondent, however denies the averments of the applicant regarding the *tacit agreement* and contended that his letter of the 31st March clearly stated that *should nothing happen or further inputs be made by the parties on 9 April 2010* his finding of 10th March, the date of the Financial Report, would be final.
Apparently the applicant's attorneys were only informed of the situation, by their correspondent attorneys, on 16 August 2010, which further delayed the issue. The applicant also stated that he had to go to Malawi on 4 July 2010 on family business, which caused a further delay.

6. The provisions of section 33 of the Arbitration Act, no 42 of 1965 read as follows:

"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 himself in relation to his duties as arbitrator or umpire; 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"

7. In terms of a written agreement entitled "AGREEMENT TO APPOINT INDEPENDENT AUDITOR" between the applicant and the second respondent, the first respondent was appointed *" as the Auditor to perform a forensic audit on the disbursements and work done by each party on behalf of the joint venture and to ascertain the exact amount due and payable by each party in terms of the itemized Budget (Annexure Q2 to the Defendant's Plea) of the joint venture and the agreement concluded between the parties on 13 August 2007 as well as the contract for consulting services between the German Agency for Technical Co-operation and the Defendant on behalf of the joint venture (Annexure B to Plaintiff's Particulars of Claim) and any subsequent agreements applicable."*

8. The applicants' grounds for the review of the award was put as follows in the applicant's supplementary heads of argument:

(I) *"The applicant's complaint in the present matter is that the First Respondent failed to apply his mind properly to the issue of whether or not it had been agreed between the parties that over expenditure on the budget of the project could be covered by other line items in the budget where there were savings."*

9. The first respondent's mandate *inter alia* involved meetings and discussions with both the applicant and the second respondent separately in order to discuss how money received from the German Agency for Technical Co-operation ("GTZ") should be allocated.
According to the applicant the first respondent was informed by the applicant that a final instalment of R208 320.34 was used by the applicant to *finalize the report as authorized by GTZ* at the end of January 2008, after the second respondent sent his resignation to GTZ. According to the applicant it was further informed by GTZ that the applicant was responsible for the finalization of the project and authorized that the said amount be used to pay for the costs of finishing the task. The payment was made to the applicant for the said purpose and dealt with accordingly.
The applicant averred that it's instructions to the first respondent to allocate the said amount as an expense for the applicant was refused because first respondent decided that professional fees paid out for finalizing the work could not be regarded as an expense which, according to the applicant, is an incorrect interpretation of project management and project budget administration.

10. The applicant blames the first respondent for not having determined what had been agreed between the applicant and the second respondent whether or not over-expenditure could be recovered by other *line items* in the budget where there were savings. The applicant alleges that the first respondent ignored the fact that GTZ, as stipulated in the *Itemized Budget* had to authorize over-expenditure on the line items, which is allegedly a further irregularity committed by the first respondent.
According to the first respondent the applicant only raised the issue that there had been no agreement between the parties after the filing of his report on 9 April 2010.

11. The first respondent pointed out that the par 3 of the initial agreement between the applicant and the second respondent, attached to the applicant's founding affidavit as annexure MM5, reads as follows:
"3. *Payment*
In the event of the bid submitted by QDF-CSR joint venture being accepted by GTZ, CSR and QDF shall agree on the financial framework for the project with the condition that such agreement shall primarily cover all costs associated with the execution of the bid.

It is furthermore agreed that the financial framework agreement shall remunerate each joint venture partner for work executed in relation to the execution of the approved bid."

With reference to the above quotation it was contended by the first respondent that at the time the parties entered into the aforesaid agreement *all details of the financial framework envisaged in the agreement, has not as yet been finalized and it is clear from the contents of paragraph 3, that it was anticipated that the parties will finalise the details of the financial framework, once the bid has been accepted or at the very least somewhere in future."*

12. The first respondent, to my mind adequately explained in his opposing affidavit how he came to the conclusion to finalise the Financial Report containing the award. It is clear to me that the first respondent, apart from consulting with the parties also had access to all the relevant documentation.

13. The ultimate question that had to be addressed was whether the award was fair given the circumstances of the case. See **Lefuno Mphapuli and Associates (Pty) Ltd v Andrew and Another 2009(4) SA 529 CC.**

14. The first respondent granted the applicant and the second respondent the opportunity to supply him with further instructions before the award was regarded as having been finalized. The applicant's argument that the first respondent only decided after his final report whether the footnote at the bottom of the *budget framework* was included in the agreement between the parties or not, does not seem to be correct. The first respondent's alteration of the award prior to the final date indicates to me that the first respondent in fact gave heed to the said *footnote* before the finalization of the award.

15. After having considered the allegations of the applicant contending that the award by the first respondent should be reviewed and set aside as a result of the irregularities allegedly committed by the first respondent, and having taken into account the response of the first respondent and the arguments of counsel I am of the opinion that the applicant's application is without merit. I could find no reason to say that the first respondent did not properly apply his mind or that he acted irregularly in any way or that the award is unfair.

16. Although the applicant's application for condonation should succeed the application for the review of the award and the other relief sought by the applicant cannot succeed.

Accordingly the application is dismissed with costs.

A J BAM ACTING JUDGE OF THE HIGH COURT