IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

2/3/2017

CASE NO: A700/15

In the matter between:

MOOIKLOOF ESTATES (PTY) LIMITED Appellant

and

(1) REPORTABLE: ~~YES~~ / NO

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

28/02/17
DATE

[redacted]
SIGNATURE

OJ VAN DER WALT First Respondent

MITHRO CONSTRUCTION MANAGEMENT CC Second Respondent

JUDGMENT

Tuchten J:

1 This is an appeal from a judgment of Pretorius J. It arises from an arbitration under the Arbitration Act.[1] The first respondent (the Arbitrator) made an award in favour of the second respondent (Mithro). Aggrieved by that award, the appellant (Mooikloof) applied to the court below to set the award aside. Mithro opposed the application and brought a counter-application to make the award an

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[1] 42 of 1965.

order of court. Pretorius J ruled in favour of Mithro, dismissed the application and upheld the counter-application. Mooikloof appealed to this court with the leave of the learned judge below.

2 In a statement of claim dated, in its final form after amendment, 19 August 2013, Mithro claimed payment of a sum in excess of R16 million, interest and costs, arising from a building agreement (the agreement) with Mooikloof. Mithro had undertaken to build twelve identical double storey office blocks with semi-basements.

3 The contract sum was in excess of R47 million, excluding VAT. The works had to be completed in sections. Penalties could be levied for late completion. Payment was to be made pursuant to monthly payment certificates to be issued by the person described in the building agreement as the principal agent.

4 The principal agent was in terms of the agreement appointed by Mooikloof. One of the further duties of the principal agent was to determine whether the date for practical completion of the works should be revised for certain contingencies described in clause 29.

5 During the course of the execution of the works, the principal agent issued 19 interim payment certificates. Mooikloof paid all of them except certificate no. 19. The principal agent then after some delay issued payment certificate no. 20 which was described as a final payment certificate. This final payment certificate made provision for an amount of R4,809 million for late completion after the principal agent had granted certain extensions of time, called in the agreement revisions of the date for practical completion. The effect of the final payment certificate was that it certified that an amount of something under R2 million was owed by the contractor, Mithro, to Mooikloof.

6 Mithro disputed the final payment certificate and referred the dispute to arbitration. Clause 40 of the agreement provided for dispute resolution. In the first instance the parties could follow processes called in the clause adjudication and mediation. In the final result under the agreement, a dissatisfied party could require that the dispute be resolved by arbitration. Under item 42.7.3 of an annexure to the agreement, the arbitrator for this purpose would be a person nominated by the chairman of the Association of Arbitrators. The agreement is silent as to the procedure to be followed by the arbitrator so appointed but it is common cause on the papers that the sixth edition of the Rules for the conduct of Arbitrations of the Association

of Arbitrators (Southern Africa) (the Rules) applied to the conduct of the arbitration.

7 The Rules themselves provide for the delivery to the arbitrator of a statement of claim by the claimant, a statement of defence by the defendant, a counterclaim by the defendant, a reply by the claimant to a counterclaim and replications. They also provide for the parties to the arbitration to agree on a procedure by which the arbitrator's award might be taken on appeal. No such appeal procedure was agreed in the present case. The arbitrator's award was therefore, subject to the provisions of the Arbitration Act, final and binding upon the parties to the arbitration.[2]

8 The dispute came before the Arbitrator for determination. As I have said, Mithro presented its claims in the arbitration in a statement of claim. Mooikloof delivered a reply to the statement of claim and a counterclaim in which Mooikloof asserted that Mithro was indebted to Mooikloof in an amount of at least some R3 million. The claimant delivered a plea[3] to Mooikloof's counterclaim. Mooikloof replicated to Mithro's plea.

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2 Section 28

3 ie a reply, to use the terminology of the Rules

9 Mithro's case in the arbitration was that it had not been given adequate extensions of time and that the quantum of the penalties imposed upon it was excessive. Extensions of time or, as it is put in clause 29 of the agreement, revisions of the date for practical completion, and the calculation of penalties were, under the agreement, in the first instance within the province of the principal agent.

10 Mooikloof's case was that the extensions of time which had been given by the principal agent had been wrongly so given to Mithro and in its counterclaim sought to have the final account between the parties revised in accordance with what Mooikloof considered was the correct position. It is implicit in Mooikloof's counterclaim that Mooikloof contended that the extensions of time given by the principal agent to Mithro were too generous and should be revised in Mooikloof's favour.

11 After a lengthy hearing, the Arbitrator made an award in which he declined, with one exception, to interfere with the extensions of time afforded by the principal agent and reduced the quantum of penalties imposed. Mooikloof was aggrieved by the award and launched proceedings in the court below.

12 Mooikloof applied to the court below to set the award aside under s 33(1), which reads, in relevant part:

> Where-
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> (a) ...
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> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers
>
> (c) ...
>
> 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.

13 Mooikloof relied in its founding affidavit in the court below on three alleged irregularities: firstly, that the Arbitrator had not allowed Mooikloof to contest the correctness of the extensions of time *in fact* given to Mithro by the principal agent; secondly, that the Arbitrator had irrationally reduced the quantum of the penalties by R720 000; and, thirdly, that in granting the reduction of penalties, the Arbitrator had relied on evidence which he had held during the hearing before him to be inadmissible.

14 IN *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Others,*[4] the Constitutional Court dealt with the concept of arbitration in the modern constitutional era. The court held that a submission to

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[4] 2009 4 529 CC

arbitration was subject to the implied condition that the arbitrator should proceed fairly[5]; and that courts should be careful not to undermine the achievement of the goals of *private* arbitration[6] by enlarging the powers of scrutiny of courts imprudently. For this reason the Constitution requires a court to construe the grounds in s 33(1) "reasonably strictly" in relation to private arbitration.

15 In para 236, the court in *Lufuno Mphaphuli* said:[7]

> The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to

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5 Para 221

6 In contradistinction to statutory tribunals such as the CCMA which perform public functions and exercise public power. Para 233

7 Footnotes omitted.

> find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated.

16 So the question is: in the instances complained of, did the Arbitrator act fairly and in accordance with the contract(s) between the parties?

17 Mithro's pleaded case was in essence that it was entitled to a *revision* of the date of practical completion in the circumstances and on the allegations which Mithro proceeded to plead.[8] Mooikloof's reply was that the quantity surveyor had correctly calculated Mithro's entitlement to a revision and that this calculation had been correctly carried forward into the final accounts. For the rest, Mooikloof denied that Mithro was entitled to a revision of the date of practical completion.[9] Mooikloof in its counterclaim asked that the revisions actually given to Mithro be reduced.[10] In its plea to the counterclaim, Mithro denied that the revisions actually given should be reduced.[11]

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8 Paras 12-16 of the statement of claim.

9 Paras 19-24 of Mooikloof's reply to Mithro's statement of claim.

10 Paras 1-2 of Mooikloof's counterclaim.

11 Paras 1-2 of the plea to the counterclaim

18 During argument before the Arbitrator after all the evidence was in, it was raised by the Arbitrator that Mooikloof was not entitled to challenge the decisions of its agent, the principal agent. This point was not raised on the pleadings by either party. We were told from the bar that the response of counsel for Mooikloof was to ask for an opportunity to place argument before the Arbitrator in this regard. This opportunity was given and counsel on both sides placed such argument before the Arbitrator as they considered appropriate. Counsel for Mithro supported the point advanced by the Arbitrator.

19 It seems to me fairly arguable that because the principal agent was Mooikloof's agent, the decision of the principal agent was in law the decision of Mooikloof. It was not, indeed it cannot be, suggested that in making the decisions in question the principal agent acted otherwise than independently, impartially, fairly and honestly and used his professional skills to reach the right decisions. The point raised, that Mooikloof was not entitled to raise the decisions of the principal agent for reconsideration is in effect a point of law. There is no provision in the Rules for exceptions. It has traditionally not been essential to raise such points of law in the pleadings in courts of law. The question has always been whether the other side has been given fair notice of the point raised. I do not see why it should be otherwise in arbitrations. It was not suggested that Mooikloof's (eminent) senior

counsel was not given fair opportunity to deal with the argument. Whether the Arbitrator was right or wrong in the conclusion to which he came in this regard is beside the point. He approached and decided the point fairly.

20 Counsel for Mooikloof submitted that if the point had been raised at an earlier stage, Mooikloof's case would have been conducted differently. As the point was one of law arising from the need to interpret the agreement, I do not see why this should be so. Counsel further submitted that if properly precognised of the point, Mooikloof would have applied to join the principal agent in the arbitration or seek to have the arbitration stayed so that the issue between Mooikloof and the principal agent could be ventilated by litigation.

21 But it seems to me a complete answer in the circumstances that the Arbitrator gave counsel the procedural latitude for which counsel asked: an opportunity to present argument on the point. Counsel did not ask for the principal agent to be joined or for Mooikloof to be given time to take proceedings to stay the arbitration and to ventilate the dispute in court. There was also no reason why Mooikloof could not have brought an action against the principal agent for damages arising from the allegedly wrong exercise of the latter's powers under the agreement.

22 In the result, the Arbitrator found that Mooikloof could not dispute in the arbitration the actual extensions of time given to Mithro, although Mithro could do so. In these circumstances, it seems to me that the Arbitrator acted fairly in taking as the basis for his award the actual extensions of time which had been given to Mithro. Whether the principal agent was right or wrong in his conclusion is of no moment. The first ground relied upon by Mooikloof cannot succeed.

23 The second ground of complaint relates to approach of the Arbitrator to the claim that the amount of the penalties should be reduced. The submission on behalf of Mooikloof is that the Arbitrator's decision in this regard was arbitrary and that he impermissibly had regard to what the industry regarded as fair, without giving Mooikloof an opportunity to lead evidence in this regard. The evidence before the Arbitrator was that the delays had caused Mooikloof losses of R80 000 per month per block and that the penalties amounted to R93 000 per block per month.

24 The Arbitrator stated in the award:[12]

> The industry will also expect from an arbitrator to interpret and decide on issues in terms of the agreement ... . A fair and equitable interpretation of the working of the agreement

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12 Para 9.5

> is especially necessary where the interpretation of its terms may result in the unfair treatment of one of the parties.

25 The Arbitrator dealt with the evidence and concluded that the principal agent had unfairly delayed imposing penalties for poor and late performance and concluded:[13]

> I am consequently convinced that [Mithro] is financially in a worse position that what he would have been in, had the [principal agent] addressed the issue of penalties from approximately 31 March 2008 (7 April for his certificate) onwards. This must be set right so he only carries the responsibility of his poor and late performance but nothing in excess thereto. [Mooikloof] on the other hand must be entitled to his contractual penalty per the [agreement] for the late completion by [Mithro], in so far he and his agents acted in accordance with the contract and what the industry would regard as fair in this regard.

26 It is quite clear from these passages that the approach of the Arbitrator is rational. One may agree or disagree with the Arbitrator on the findings he made leading to his conclusion but irrational they are not.

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13 Para 9.26

27 The recourse of the Arbitrator to the notion of what the building industry would regard as fair is the same as or similar to the notion of the *boni mores* of the community, a concept which courts have for generations applied in making value judgments, without requiring that the parties identify the concept in pleadings or lead evidence. It was quite obvious that the Arbitrator would have regard to fairness in considering the discretion vested in him to determine the quantum of penalties which might justly be imposed. And in a construction case, I do not think that there is anything inappropriate in considering the notion of fairness obtaining in the industry. The Arbitrator's reasons show that he considered the monetary loss suffered as a result of the delay and the failure to impose penalties, as the Arbitrator found, promptly and the inconvenience generally which had been caused on both sides.[14]

28 The third alleged irregularity is that in awarding a reduction of penalties to Mithro, the Arbitrator took into account evidence which the Arbitrator himself had ruled inadmissible. But the passages in the award[15] which Mooikloof contends grounds this complaint make no reference to the evidence which was ruled inadmissible. These passages show that the Arbitrator relied in this regard on his

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14 Paras 9.27-9.29 of the award.

15 Paras 5.8.2 and 5.8.3

conclusion that Mooikloof could not dispute the decisions of the principal agent.

29 I therefore conclude that there is no substance in the complaint regarding the reduction in the quantum of the penalties.

30 It therefore follows that the decision of the learned judge in the court below was correct and that the appeal cannot succeed. I propose the following order:

> The appeal is dismissed with costs, including the costs consequent upon the employment of senior counsel.

NB Tuchten
Judge of the High Court
27 February 2017

I agree. An order is made
as set out in paragraph 30 above.

RG Tolmay
Judge of the High Court
28 February 2017

I agree

PM Mabuse
Judge of the High Court
28 February 2017