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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

31/1/18

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED
DATE:	31/1/2018
SIGNATURE:	<i>eiees</i>

Case No. 28446/2017

In the matter between:

O-LINE PROPRIETARY LIMITED

APPLICANT

And

DATACENTRIX PROPRIETARY LIMITED

RESPONDENT

JUDGMENT

MILLAR AJ

1. This is an application in terms of S 35(4) of the Arbitration Act 42 of 1965¹ to have a costs award made by an arbitrator made an order of this court. Notwithstanding that the award of the arbitrator was common cause, the application was opposed.
2. The respondent brought an application for condonation for the late filing of its answering affidavit. This application was initially opposed but the applicant withdrew its opposition during argument. I granted condonation and the matter proceeded.
3. It was common cause between the parties that on 24 June 2016, the arbitrator to whom the parties had agreed to refer their dispute for arbitration made certain rulings. Pursuant to the conduct of the arbitration and those rulings the parties entered into discussions and decided to:
 - 3.1 Firstly, request an amendment to one of the rulings,
 - 3.2 Secondly, request the postponement of the arbitration *sine die*.
4. The arbitrator obliged and amended the ruling and postponed the arbitration as requested. The parties immediately thereafter decided to enter into an Agreement (“the termination agreement”) in terms whereof the arbitration proceedings would be abandoned and the

¹ Section 35(4) states “If an arbitration tribunal has directed any party to pay costs but has not taxed or settled such costs, then, unless the arbitration agreement provides otherwise, the court may, on making the award an order of court, order the costs to be taxed by the taxing master of the court and, if the arbitration tribunal has given no directions as to the scale on which such costs shall be taxed, fix the scale of such taxation.”

parties would approach this court for the adjudication of their dispute. The main dispute is to be heard in April 2018.

5. The present application centres essentially on the interpretation to be given to paragraph 3 of the arbitrator's ruling:

"3. The wasted costs occasioned by the postponement are to be paid by the Defendant on an attorney-client scale to be taxed in the High Court by the taxing master."

read together with paragraphs 4.3 and 4.4 of the termination agreement.

"4.3 Save for the costs ruling made by the arbitrator, ..., on 24 June 2016, the costs of the arbitration proceedings shall be costs in [the] cause of the intended High Court action referred to in paragraph 4.1 above.

4.4 All rights of the parties regarding the costs ruling remain reserved."

6. The applicant contends that the meaning of these paragraphs is clear and unequivocal and that its right to have the costs order made by the arbitrator made an order of court and enforced is extant therefrom.

7. The respondent contends that the common intention of the parties to agree to postpone the arbitration *sine die* obviated any enforceability by the applicant of the ruling of the arbitrator.²
8. It was common cause that the chronology of events on 24 June 2016 were as follows:
 - 8.1 The arbitrator made his ruling.
 - 8.2 The parties then conducted discussions subsequent to that ruling in consequence of which the ruling was amended by agreement.³
 - 8.3 The parties then informed the arbitrator of the agreement to postpone *sine die*.
 - 8.4 The parties entered into the termination agreement.
9. The agreement to terminate was entered into at a time when the arbitration proceedings had been postponed. The parties were all aware of the contents of the ruling made by the arbitrator.
10. There can be no doubt that the parties intended, notwithstanding that the arbitration was to be terminated, that the costs ruling made by the arbitrator would stand. Paragraph 4.3 of the termination agreement provides for this expressly. Furthermore paragraph 4.4 in its

² Counsel for the respondent expressed this as follows in paragraphs 10 and 11 of his Heads of Argument: "*In the premises further, the matter was in fact not postponed as a result of, or in terms of the written ruling, and no costs could or were wasted as a result of the postponement alluded to in the written ruling.*" and "*As there was no costs order as a result of the agreed postponement, and there was no postponement in consequence of the written ruling, the Applicant is not now entitled to tax the bill of costs arising from the written ruling.*"

³ The agreed amendment was written in manuscript onto the typed ruling of the arbitrator.

terms expressly recorded that the parties had reserved their respective rights in regard to the costs ruling of the arbitrator.

11. The ruling made by the arbitrator is clear and unambiguous⁴ and in its terms the respondent was to pay the wasted costs of the applicant.

12. Similarly, the text of paragraph 4.3 of the termination agreement is clear and unambiguous. The qualification “save for” in respect of the costs ruling made by the arbitrator leaves no doubt that it was specifically excluded from the agreement that all the costs of the arbitration were to be costs in the High Court action.⁵

13. What then were the rights that the parties had reserved to themselves? On the part of the applicant this was the right to enforce the cost ruling. For the respondent, it was the right to challenge the costs ruling by taking it on review.⁶ Counsel for the respondent argued that there was a further right that the respondent had reserved – the right to challenge the enforceability of the costs ruling by opposing the present application.

14. Counsel for the respondent argued that regard should be had to not only the agreement but to all the surrounding circumstances, notwithstanding that the termination agreement provides:

⁴ *Simon NO and Others v Mitsui and Co Ltd and Others* 1997 (2) SA 475 (W).

⁵ The use of “save for” in this context has the meaning “Except, with the exception of” Shorter Oxford English Dictionary, Volume 2, Fifth Edition, Oxford University Press, 2002 at page 2677.

⁶ Rule 53 of the Uniform Rules of Court.

“6. *This document contains the entire agreement between the parties relating to the subject matter hereof. No term, warranty or representation whether express or implied shall bind any of the parties if not specifically contained in this agreement.*”

15. The test to be applied is set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:⁷

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective.”

and

⁷ 2012 (4) SA 593 (SCA) at 603 F-G and 604 A-C.

“The ‘inevitable point of departure is the language of the provision itself’ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

16. The language of the agreement is clear and unequivocal and to my mind neither it nor the surrounding circumstances insofar as they may be relevant support the interpretation contended for by the respondent. It is self-evident that only those issues that were still in dispute could be postponed and this was certainly not the case in respect of the costs ruling made before the agreed postponement.
17. I find that the relevant portion of the arbitrators ruling read together with the termination agreement favour the interpretation placed upon them by the applicant.
18. The applicant sought costs on a punitive scale from the respondent. This stemmed from what the applicant regarded as obstructive behavior on the part of the respondent. The respondent was entitled to oppose the taxation of the bill of costs when presented for taxation, prior to the ruling having been made an order of this Court,⁸ and, also this application *ab initio*⁹ prior to the amendment of the relief sought. The application was heard on the day it was set down and while the respondent may have delayed somewhat in the delivery of its answering affidavit, I find that the inconvenience complained of by the applicant and which was occasioned thereby, attributable as much to the Court recess


⁸ *Phillips and Others v Van Den Heever NO and Another* 2007 (4) SA 511 (W); [2007] All SA 159 (W).

⁹ The relief as initially framed was for a declaration that the ruling of the arbitrator was “valid, effective and binding”.

and December vacation period as to the respondent's late delivery of its affidavit. I do not find that the conduct of the respondent is such that a punitive order for costs is warranted.

19. In the premises, I make the following order:

1. The late delivery of the respondents answering affidavit is condoned.
2. The costs award made by the Arbitrator in paragraph 3 of his ruling of 24 June 2016 in favour of the applicant is made an order of this Court.
3. The applicants' bill of costs dated 22 August 2016 may be set down for taxation forthwith.
4. The respondent is ordered to pay the costs of this application which costs are to include the costs of the application for condonation on the scale as between party and party.



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 29 JANUARY 2018

JUDGMENT DELIVERED ON: 31 JANUARY 2018

COUNSEL FOR THE APPLICANT: ADV J BABAMIA

INSTRUCTED BY: BOWMAN GILFILLAN

REFERENCE: MS J ANDROPOLOUS

COUNSEL FOR THE RESPONDENT: ADV G WAGENER SC

INSTRUCTED BY: PIETERSE & CURLEWIS INCORPORATED

REFERENCE: DR L CURLEWIS