IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 25428/22

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

[redacted]

E.M. KUBUSHI **DATE: 09 FEBRUARY 2024**

In the matter between:

SEZIGEN CONSULTING ENGINEERS AND PROJECT MANAGERS (PTY) LTD	Applicant
and	
JUDGE L MPATI N.O. (Cited in his official capacity as the Arbitrator)	First Respondent
ARBITRATION FOUNDATION OF SOUTHERN AFRICA	Second Respondent
HOUSING DEVELOPMENT AGENCY	Third Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines The date and for hand-down is deemed to be 09 February 2024.*

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] This is an application to review and set aside part of an arbitration award. The application is launched by Sezigen Consulting Engineers and Project Managers (Pty) Ltd ("the Applicant") against an Arbitration Award delivered on 28 January 2022 by the First Respondent, the Retired Justice Lex Mpati, in his official capacity as the Arbitrator ("the First Respondent"). In particular, the Applicant seeks to review and set aside only the portion of the Arbitration Award regarding the findings on damages.

[2] In seeking to review and set aside part of the First Respondent's Arbitration Award, the Applicant relies on section 33(1) of the Arbitration Act ("the Arbitration Act").[1] Specifically, the Applicant relies on subsection (b) which provides that where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers, the Court may on application of any party to the reference after due notice to the other party or parties, make an order setting the award aside. As it will appear more clearly later in the judgment, the review application in this matter, is premised on the allegations that the Arbitrator has committed gross irregularity in the conduct of the arbitration proceedings.

[3] The matter is opposed only by the Third Respondent, the Housing Development Agency ("the Third Respondent"). The First and Second Respondents have given notice to abide the outcome of the proceedings. In opposing the application, the Third Respondent requests that the review application be dismissed with costs on the scale between attorney and client, including the costs consequent upon the employment of two counsel.

[4] The application was not brought within the period as envisaged in section 33 of the Arbitration Act. In addition to the review relief sought, the Applicant wanted specific relief to extend the period fixed to launch the application as envisaged in section 38 of the Arbitration Act. The Third Respondent opposed the condonation application but abandoned the opposition at the commencement of the hearing thereof. Condonation should, therefore, be granted.

---

[1] Act 42 of 1965.

[5] The Applicant has in its papers, raised an *in limine* point which was mounted on the contention that the deponent to the answering affidavit, Mr Justice Naledzani who is the Third Respondent's acting Legal Manager, was not duly authorised to depose to the answering affidavit and also, did not have personal knowledge of the facts of this matter. This point was, also, abandoned at the commencement of the hearing of this application.

FACTUAL BACKGROUND

[6] On 18 September 2018, the Applicant was appointed by the Third Respondent as a service provider for the establishment of a *Project and Programme Management Office* ("PMO"). The Applicant alleges that subsequent to the appointment, the parties entered into negotiations in respect of the contract price which was reduced as the Third Respondent did not have sufficient funds to cover the amount proposed by the Applicant in its bid; the method of termination or suspension of the Agreement which could only be done in consultation with the Applicant; and the review of the project which would require a discussion three months before the start of the next financial year.

[7] Premised on the negotiations, the Applicant and the Third Respondent entered into a written agreement – a Service Level Agreement ("the Agreement"). In terms of the said Agreement, the Applicant was appointed as an independent contractor to render certain services on behalf of the Third Respondent. The Agreement was effective from 2 October 2018 to 31 March 2021, for a period of 27 months, spanning over three financial years. The agreement was subject to review at the beginning of the 2019/2020 and 2020/2021 financial years, subject to budget availability and an addendum which will be signed at the beginning of each financial year, depending on the project requirements. Discussions in this regard would be entered into three months prior to the start of the next financial year.

[8] The Agreement provided for the Applicant to provide certain services to assist the Third Respondent in the establishment of the PMO. The scope of work to be achieved was set out in an addendum attached to the Agreement as Annexure "A". The Applicant was therefore, in terms of the scope of work expected to deliver services such as a project stage plan, a project management office implementation mythology and resource capacity plan, implementation plan and change management strategy.

The Third Respondent would then be liable for payment of the services provided by the Applicant at the total Agreement amount of R41 396 524.70 inclusive of VAT, excluding disbursements at 5% of R36 073 145.45. Payment of the services was to be done in line with the payment milestones agreed to by the parties in the Agreement. The fees would include disbursements reasonably incurred by the Applicant in performing the services as set out in the Agreement.

[9] It was an explicit term of the Agreement that the Third Respondent may in consultation with the Applicant, terminate or suspend all or part of this Agreement for any reason on 30 days' written notice to the Applicant which shall upon receipt of such notice, immediately suspend all work.

[10] According to the Applicant, even though the Applicant was able to complete the project within less than a year, it was agreed between the parties during the negotiations, that the Applicant spread the scope of work over three financial years, which actually meant that the payments would be spread over three financial years in order to lessen the payment burden on the Third Respondent. The delivery support was, however, to be provided over three years as *per* the agreed deliverables and because this was an actual service that would be provided.

[11] On 11 October 2018, the Third Respondent instructed the Applicant by issuing a purchase order ("the First Purchase Order") for the first phase of the services for 2018/2019 financial year to the value of R13 020 848. The purchase order was based on a programme and milestones as agreed between the parties and as set out in an addendum attached to the Agreement as Annexure "B". Annexure "B" which is titled 'Payment Milestones', sets out all the payment milestones to be achieved and the related payment amount for each milestone. According to the Applicant, it delivered these milestones and services to the Third Respondent as *per* the Payment Milestone attached to the Agreement. The said milestones were even completed far beyond the First Purchase Order due to the nature of the work being integrated and co-dependant. However, the agreement was that the Applicant would only invoice the Third Respondent for this work once it had received the next purchase order from the Third Respondent, this in order to facilitate the payment over three financial years, as agreed between the parties.

[12] It is common cause that after completion of the work related to the First Purchase Order, the Applicant rendered three invoices to the Third Respondent totalling R3 846 411. 51, which invoices were paid. The total outstanding amount in terms of the First Purchase Order was R9 174 436. 49. According to the Applicant, when it rendered the said invoices, it had already completed most of the milestones, except those which were time based, which still had to be delivered under the delivery support. The further total outstanding amount of R28 375 676.70 inclusive of VAT but excluding disbursements of 5%, which made up the balance of the total Agreement amount of R41 396 524.70, was to be allocated over the remainder of the financial years.

[13] On 20 December 2018, the Applicant was informed by the Third Respondent and without consultation, and contrary to the Agreement, that the Applicant's Agreement had been suspended. The Applicant disputed the suspension of the Agreement as unlawful, but the Third Respondent continued with it and subsequently made it clear to no longer be bound to the terms of the Agreement. The Applicant did not receive payment of the work already done due to the suspension of the Agreement by the Third Respondent.

[14] On 23 July 2019, the Applicant made formal demand for payment of the Agreement amount and outstanding amounts, being the outstanding amount of R9 174 436. 49 in terms of the First Purchase Order, and the amount of R28 375 676.70 inclusive of VAT excluding disbursements of 5%, which was supposed to have been allocated over the remainder of the financial years. Despite such demand, the Third Respondent, allegedly, refused alternatively, failed further alternatively, neglected to make payment of the amount so demanded. This caused the Applicant to initiate the private arbitration proceedings which proceeded before the First Respondent.

Arbitration Proceedings

[15] The Applicant being not satisfied with the conduct of the Third Respondent in suspending the Agreement without consultation with it, referred the matter for arbitration with the Arbitration Foundation of Southern Africa ("AFSA"), as *per* the terms of the Agreement. The arbitration proceedings were adjudicated by the First

Respondent who on 28 January 2022 issued an unsigned Award wherein he requested the parties to point to evidence regarding damages, and on 28 February 2022 delivered the final Award.

[16] In its statement of claim, the Applicant averred that it suffered damages 'due to the unlawful and unexpected suspension of the Agreement by the Third Respondent; that it accepted the repudiation of the Agreement and that it attempted to mitigate further damages by preventing further costs. It consequently, claimed from the Third Respondent, payment of the sum of R37 550 113. 19 as damages allegedly suffered as a result of the suspension of the Agreement. The said amount was divided into two claims, namely Claim 1 made up of an amount of R9 174 436.49, allegedly being the outstanding amount for services rendered by the Applicant in terms of the First Purchase Order; and Claim 2 in the sum of R28 375 678.70, allegedly being for the outstanding agreement amount in terms of milestones completed and damages for early cancellation of the agreement. The Third Respondent denied liability in respect of both these claims.

[17] The first issue which the First Respondent dealt with was the question of whether in suspending the Agreement between it and the Applicant, the Third Respondent complied with the terms of clause 17 of the Agreement which allowed the Third Respondent to terminate or suspend the Agreement in consultation with the Applicant. The First Respondent found in favour of the Applicant on this issue, that is, he found that the Third Respondent acted unlawfully in suspending the Agreement without consulting the Applicant, which resulted in the repudiation of the Agreement. A further finding by the First Respondent was that the Applicant suffered damages as a result of the suspension of the Agreement by the Third Respondent. Even though such findings were made in favour of the Applicant, nevertheless, the First Respondent found that the Applicant failed to discharge its *onus* regarding the quantum of damages. The review, thus, relates to the quantification of the amount claimed by the Applicant as there is already a correct finding regarding the merits of the claim - hence the Applicant's quest to review and set aside only a portion (the damages) of the award.

Article 12 Application

[18] The Applicant was aggrieved by the Award issued by the First Respondent contending that the First Respondent failed to address and make findings on each of the Applicant's respective claims and instead dealt with the claims combined as damages. As a result, the Applicant initiated the Article 12 Application in accordance with Article 12.7 of the AFSA Commercial Rules, on the ground that the First Respondent failed to give due regard, consideration and attach sufficient weight to the portfolio of evidence provided and led by the Applicant's witnesses regarding the quantification of the damages.

[19] In essence, the Applicant sought a correction of the Arbitration Award on the basis that the First Respondent had not referenced the following documents for purposes of quantifying the claim, namely, the Project Procedure Manual page 500 volume E, the ISO 9001 document, the statement of claim, the statement of defence and the testimony of the Applicant's witnesses. On 12 March 2022, the First Respondent delivered his ruling refusing the Article 12.7 Application on the basis that none of the documents referred to and testimonies, elicit or constitute any evidence to prove the Applicant's damages or loss. This resulted in the Applicant approaching Court for the review application.

RELIEF SOUGHT

[20] The relief sought by the Applicant is to review and set aside the Arbitration Award in so far as the finding on damages is made and either:

20. 1. Replace it with an order of this Court; or

20.2. Alternatively, for the first Respondent to hear the matter on damages; or

20.3. Further alternatively, to have the matter referred back to the Arbitration Foundation of Southern Africa ("AFSA") to proceed *de novo* before another arbitrator.

ARGUMENT

[21] There are two jurisdictional factors which the Applicant must prove in order to succeed in the review application. The Applicant must show that the First Respondent committed a gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers. From the Applicant's papers, it is evident that the Applicant relies on the element of gross irregularity of the conduct of the arbitration proceedings which resulted in the Applicant not having its case fully and fairly determined, that led to the Applicant having an unfair hearing of the matter. The mainstay of the Applicant's grief is that it failed to receive a fair hearing because the First Respondent failed to properly assess all the evidence placed before him and make a finding as *per* his mandate on Claim 1 and Claim 2, instead, the First Respondent dealt with the two claims as if it were a single claim for damages without assessing the evidence that related individually to each of the claims to assist him in quantifying the claims.

[22] According to the Applicant, the First Respondent was mandated to assess the two individual claims placed before him. Claim 1 was based on the First Purchase Order and the evidence tendered in that respect related to the scope of work that had been completed in terms of the First Purchase Order but was not yet invoiced at the time of the suspension. Claim 2, on the other hand, was based on work completed, where a purchase order and milestones had not been provided, and the evidence relating thereto was provided in terms of the project implementation plan to prove the claim for damages in this regard.

[23] The two claims, so the Applicant argues, are set apart by the fact that Claim 1 had a purchase order with a complete breakdown of payments to be made upon completion; whereas, Claim 2 had no such breakdown. Thus, the First Respondent not only dealt with the assessment of the claims incorrectly but failed to deal with them as *per* his mandate set out in the pleadings. This resulted in the First Respondent not attaching weight to the correct evidence or any evidence placed before him for the determination of the respective claims.

DISCUSSION

[24] Because of the decision finally reached in this judgment, it is not necessary to deal with each and every aspect that has been raised in issue by the parties, as the issues have to be revisited. It is trite that quantification of losses needs to be based on

factual evidence, documents and witness statements, as well as expert reports. Losses should be quantified at the amount which should be paid to the claimant to put it in the same position that it would have been but for the wrongful act.

[25] The First Respondent found that he could not do the calculation for the damages or loss suffered by the Applicant because, according to him, the parties had agreed that the milestones and deliverables should be charged on a time basis only, and there was no evidence before him to suggest the method of calculating the loss suffered by the Applicant. In order to calculate the extent of the Applicant's damages or loss he intimated that he required evidence of the time spent on the work performed on each milestone in respect of which no invoice has been submitted for payment. He explains this evidence as 'something akin to the portfolio of evidence and amounts paid in respect of past claims or invoices.'

[26] From the totality of uncontested evidence presented by the Applicant, it appears that there were milestones and deliverables that were completed and/or achieved which, as the First Respondent found, formed part of the loss or damages claimed by the Applicant. It would, thus, mean that there was actual performance on the part of the Applicant and it (the Applicant), would under such circumstances have to be compensated for the loss occasioned by the repudiation of the contract.

[27] It is accepted without concluding that from the evidence tendered by the Applicant, it does not appear that the parties had agreed that the milestones and deliverables should be paid on a time basis only. It is, also, accepted without concluding that the evidence that the First Respondent required, which he says was not placed before him, was presented to him in evidence by the Applicant's witnesses. Claim 1 is based on actual performance in terms of the purchase order issued and the evidence presented if properly evaluated, might have assisted the First Respondent in the calculation of the loss.

[28] The Applicant's Claim 2 is based on positive *interesse* on the ground that the Third Respondent unlawfully and without due cause repudiated the Agreement. It is a fundamental principle of our law that an injured party should be placed, by an award of damages, as far as possible in the position he would have occupied had the

agreement been fulfilled. Put differently, he should be placed in the position he would have occupied had the agreement been properly and timeously performed.[2]

[29] In addition, in *Hersman v Shapiro and Co.*[3] Stratford J stated the approach that a Court should take :

> "Monetary damages having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary damages have been suffered, the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it."

[30] There is no finding by the First Respondent that damages herein are capable of mathematical computation expecting the Applicant to have produced evidence to substantiate the exact amount of the damages. Perhaps, this is a case where the First Respondent could have assessed the damages on the available evidence.

CONCLUSION

[31] The conclusion is that the First Respondent committed a gross irregularity in failing to properly assess the evidence that was before him. In committing this irregularity, the First Respondent prevented the Applicant from having a fair trial.

[32] It has been held that under our law a Court has a wide discretion, and could refer the award back to the arbitrator to be rendered final and complete. But it does not follow that the Court will always follow that course, it will exercise its discretion.[4] Consequently, the relief the Applicant seeks ought to be granted with an order that the matter be referred back to AFSA to be heard *de novo* before another arbitrator.

---

[2] See Novick v Benjamin 1972 (2) SA 842 (A) at p857G and Willie's Principles of South African Law 9th ed p882 – 883.

[3] 1926 TPD 367 at 379.

[4] Basson v Harman 1904 TS at 100

COSTS

[33] The Applicant claimed costs only if the matter is opposed. The matter has become opposed, and the Applicant being the successful party should be awarded costs against the opposing party, who is the Third Respondent.

[34] The Third Respondent's Counsel, however, submitted that due to the issue of failure by the Applicant to select the parts of the record, which is voluminous, for reading by the Court and the Third Respondent, the Applicant should be meted out by a punitive cost order. The submission being that failure to adhere to the Court rules should have consequences, especially in circumstances where issues could have been narrowed to the specific pages and all parties could focus on their preparations.

[35] In response thereto, Counsel for the Applicant argued that the Applicant had to file the record as it is because of the relief it seeks against the First Respondent. One of the prayers sought is for the Court to make a determination of the award and in that case the Court would require the complete record in order to be able to do so.

[36] It is trite that the awarding of costs is in the discretion of the Court hearing the matter. It is found that it was imperative for the Applicant to file a complete record because of the specific relief it sought for this Court to replace the award with an order of this Court. As such there is no need to mulcted the Applicant with costs as prayed for by the Third Respondent. The Third Respondent is ordered to pay the costs of this application on a party and party scale.

ORDER

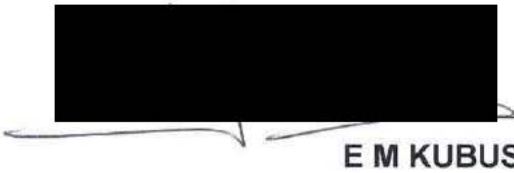
[37] The following order is made:

a. The Condonation application is granted.

b. The Arbitration Award delivered on 28 January 2022 by the Retired Justice Lex Mpati, in his official capacity as the Arbitrator is hereby reviewed and set aside.

c. The matter is referred back to the Arbitration Foundation of Southern Africa to proceed *de novo* before another arbitrator.

d. The Third Respondent is ordered to pay the costs of this application on a party and party scale.



E M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 17 October 2023

Date of judgment: 09 February 2024

APPEARANCES:

For the Applicants:	Adv KA Wilson instructed by Mpoyana Ledwaba Incorporated.
For the Third Respondent:	Adv Lindelani Sigogo SC and Adv Lindeni Kalipa instructed by Mathopo Moshimane Mulangaphuma Incorporated.