IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 5366/2016

In the matter between:

GERT WILHELM DANIEL ELS trading as
DUP MEYER BUILDING CONTRACTORS **Applicant**
(in this interlocutory application)

And

THE P RANCHHOD FAMILY TRUST **Respondent**

(IT NO: 5315/1) **(in this interlocutory application)**

IN RE

THE P RANCHHOD FAMILY TRUST **Applicant**

(IT NO: 5315/1) **(in the main application)**

And

TREVOR KAY in his capacity as Arbitrator **First Respondent**
(in the main application)

GERT WILHELM DANIEL ELS trading as
DUP MEYER BUILDING CONTRACTORS **Second Respondent**
(in the main application)

JUDGMENT

BESHE J:

[1] The applicant approached this court for an order in the following terms:

(a) Setting aside the respondent's notice of motion and founding affidavit in terms of rule of court 30(1) of the rules of the Honourable Court;

(b) Granting further/or alternative relief; and

(c) Directing that the costs of this application be borne by the respondent on the scale as between attorney and client.

[2] *Rule 30(1)* provides for the setting aside of an irregular step that has been taken by an opponent or opposing litigant.

[3] It is common cause that the parties in this matter are engaged in arbitration proceedings wherein the applicant is the claimant.

[4] The respondent in the arbitration as well as in this application is the P Ranchhod Family Trust (IT NO: 5315/1). The arbitration is concerned with disputes between applicant and respondent arising from an agreement in terms of which the applicant was employed by the respondent as a contractor for the erection of a building. Applicant claims that the trust failed to pay him certain amounts of money due to him for work validly done. That respondent refuses to finalise the accounting and to pay what is due to him.

[5] In addition to filing a notice of defence, the trust also filed a counterclaim. It appears to be common cause that the arbitration proceedings kicked off on the 25 July 2016. On that date applicant

testified, was cross-examined after which his case was closed. Upon the arbitration proceedings resuming on a subsequent date, respondent raised certain issues with the arbitration including an application for declaratory orders and questioning the jurisdiction of the arbitrator. The arbitrator made rulings on these aspects which apparently did not please or sit well with the respondent. The respondent then approached the court for an order for the postponement of the arbitration proceedings pending an application for the reviewal of certain rulings made by the arbitrator and in some instances failure to make a ruling.

[6] The application for the postponement / stay of the arbitration proceedings was dismissed by *Makaula J*. The respondent then went on to institute review proceedings wherein an order in *inter alia* the following terms was sought:

"1. That the ruling of Arbitrator on 6 October 2016 confirming his jurisdiction to adjudicate on the arbitration proceedings be reviewed and set aside.

2. That the Arbitrator has no jurisdiction to adjudicate o the arbitration proceedings.

3. That the ruling by the Arbitrator dated 6 October 2016 rescinding his ruling on 22 August be reviewed and set aside.

4. That the ruling by the Arbitrator on 22 August that the Applicant's (Respondent in the Arbitration) application for a declaratory order is competent, be reinstated.

5. That the ruling by the Arbitrator on 6 October 2016 that the issue of termination of the agreement between the Parties be argued at a later date be reviewed and set aside and substituted with the following order:

5.1 The Second Respondent's Notice of Referral to Arbitration dated 4 March 2016 addressed to the Applicant is premature.

5.2 The Second Respondent's Notice of Referral to Arbitration dated 4 March 2016 addressed to the Principal Agent does not constitute proper notice and is premature.

5.3 The Second Respondent's Notice of Termination of the Agreement dated 4 March addressed to the Applicant is premature.

5.4 The Second Respondent's Notice of Termination dated 4 March 2016 addressed to the Principal Agent does not constitute proper notice and is premature.
5.5 The Second Respondent's claim is dismissed with costs, such costs be on the High Court Scale and to include:
5.5.1 All costs incurred by Applicant from 3 February 2016 to date of this Order, including any costs of execution of this order."

[7] It is the institution of the abovementioned review proceedings that applicant alleges is an irregular step. This, so contends applicant, is due to the fact that *Section 33 (1) of the Arbitration Act* is only applicable to awards as opposed to rulings made by an arbitrator.

[8] *Section 33 (1) of the Arbitration Act*[1] provides for the setting aside of an award and provides as follows:

"33 Setting aside of an award

(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."

[9] In the *Arbitration Act* and award is simply defined as including an interim award. The Shorter Oxford English Dictionary gives a number of definitions / meanings for the noun award:

- a judicial decision.
- a payment, penalty etc., appointed by a judicial decision.

[1] Act 42 of 1965.

for the verb the following definitions are given:

- decide or determine something after consideration or deliberation.
- grant, assign (to a person) order to be given as a payment, penalty, prize etc.
- decide judicially (a process) issue judicially (a document etc.)

Section 26 of the Act provides for the making of interim awards by the arbitrator at any time within the period allowed for making an award.

[10] Applicant contends that the arbitrator has not issued any award, he only made rulings which are interlocutory in nature in the course of conduct of the arbitration. It was submitted further that an award has to be final in nature and must be made at the end of the arbitration proceedings. *Section IV of the Association of Arbitrators* (South Africa). *Rules for the Conduct of Arbitrations 2013 Edition Standard Procedure Rules*, deals with awards or the award. The definition of an award is not provided in *Section IV*. What appears under *Article 34* of this section is the following:

"*Article 34*

1. The arbitral tribunal may make separate awards on different issues at different times.

2. All awards shall be made in writing and shall be final and binding on the parties.

The parties shall carry out all awards without delay."

A reading of *Article 34 (1)* suggests that awards can be made on different issues at different times and that interpretation would accord with respondent's (Trust) case / contention. Namely that the rulings made by the Arbitrator are akin to a court order.

[11] A reading of *Article 34 (5)* suggests otherwise. It suggests that an award is made after the closure of the hearing. It reads thus:

"Unless the parties otherwise agree, the arbitral tribunal shall make its award as soon as practicable, but in any event within 60 days after the closure of the hearing,

provided that the parties, at the request of arbitral tribunal, can extend this period in writing signed by them … … … ."

(my emphasis)

Suggesting that an award can only come or be made after the closure of the hearing.

[12] The applicant in this application which is in terms of *Rule 30* complains that the notice of application for review is a gross abuse of the process as provided for in *Rule 30 (2)*, and thus constitutes an irregular step. *Rule (30) (2)* provides that:

"An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, … …"

[13] It was argued on behalf of the applicant that the interim rulings made by the arbitrator are capable of being revisited during the arbitration proceedings and therefore do not amount to awards. Further that an issue that is pending before an arbitrator cannot be enquired into by a court.

[14] In resisting this application respondent argues that it is this present application that constitute an abuse of the courts' process. It is submitted that it is ill considered and frivolous as applicant's complaint is not covered by *Rule 30*. Respondent avers that the arbitrator, by *inter alia* refusing to make a ruling regarding whether it was not premature for the applicant to institute action against the trust and therefore whether the Arbitrator had jurisdiction to deal with the matter – connotes that the arbitrator failed to comply with his mandate. And therefore the arbitration stands to be reviewed.

[15] I do not propose to traverse the merits of what has transpired thus far in the arbitration proceedings wherein it appears parties agreed on a separation of issues. One such separated issue being prematurity of the notice of termination. It would appear that the jurisdiction of the arbitrator was initially submitted to by the parties. What appears to be a bone of contention is the determination by the Arbitrator of the separated issues whether it was to be with the rest of the issues or at a later stage / in future. This is so in particular as regards the prematurity of the notice of termination. In my view however, whatever the terms of the agreement regarding the determination of issues was, the fate of this application depends on whether or not the decisions taken by the arbitrator during the course of the pending arbitration proceedings amounted to an award. In which case, if they did, review of such an award or awards will be competent.

[16] It is trite that the *Arbitration Act* is meant to provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcements of the awards of such arbitration tribunals. Applicant contends that the issue of prematurity of cancellation was one of issues that was separated from determination during the arbitration and was only to be decided later / in future with other separated issues. The respondent holds a different view, namely that the agreement was that the Arbitrator would be required to make a declaratory relating to *inter alia* the prematurity of the notice of termination before the proceedings resume. To this end it would appear that the Arbitrator was indeed called upon to make a ruling or declaratory about this issue during the Arbitration. The Arbitrator at first ruled that the application for this declaratory was competent and later however

rescinded his ruling in this regard and ruled that the application for such a declarator was not competent. This is one of the rulings / decisions that have led to the review application in respect of which umbrage is taken by the applicant using *Rule 30 of the Uniform Rules* of this court.

[17] As part of the application for the review the respondent contends that by refusing to make a decision on this issue the Arbitrator is not only acting contrary to some of the provisions of the *Rules of Conduct of Arbitrations* but also contrary to the parties' agreement. Respondent contends further that in light of an admission made on behalf of the applicant, a ruling to the effect that the notice of termination was premature would have dealt the Arbitration proceedings a fatal blow. It would have rendered the matter a *res judicata*. This presupposes that the Arbitrator would have ruled in favour of prematurity of the notice of termination.

[18] It may well be that had the Arbitrator made a declaratory regarding the prematurity or otherwise of the termination, that would have sounded a death knell to the arbitration proceedings. In my view however, the provisions of *Section 33 (1) of the Act* only come into play in the event of an award (final award) having been made by the Arbitrator. The review application is specifically made in terms of *Section 33 (1) of the Arbitration Act* which provides for the setting aside of an award. In my view no award has been made by the Arbitrator. In the absence of an award to be set aside on review, the review application amounts to as impropriety and stands to be set aside.

[19] Accordingly respondent's notice of motion in respect of the review application is set aside in terms of *Rule 30 (1) of the Uniform Rules* of this court.

Respondent is ordered to pay costs of this application.

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NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: Paterson SC
Instructed by	:	WHEELDON RUSHMERE & COLE INC. 119 High Street GRAHAMSTOWN Tel.: 046 – 622 7005 Ref.: B Brody/Glyn/S19732
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Date Heard	:	23 February 2017
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