IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO: 1107/2020

Heard on: 3 December 2020

Delivered on: 19 January 2021

In the matter between:

PRO-KHAYA CONSTRUCTION CC	**APPLICANT**
and	
TONY ASHFORD	**1ST RESPONDENT**
STRATA CIVILS	**2ND RESPONDENT**
JDM DRILLING (PTY) LTD	**3RD RESPONDENT**

JUDGMENT

GQAMANA J:

[1] In the main, the relief the Applicant seeks in this application is to review and set aside an arbitration award dated 5 March 2020 issued by the arbitrator (the First Respondent). Such relief is opposed by the Second Respondent and the latter has also filed a provisional counter-application seeking an order that such award be made an order of court.

[2] A short background and common cause facts in this are as follows. The Applicant, a close corporation with its principal place of business in Port Elizabeth was awarded a contract on or about April / May 2015 by the Coega Development Corporation (Pty) Ltd ("CDC") for works in respect of contract No. CDC/132/5 relating to extensions and addition to existing Coega Dairy Zone 3. The Applicant, on or about 20 May 2015 then appointed the Second Respondent (a private company with its principal place of business in Port Elizabeth) as a sub-contractor in terms of a sub-contract agreement.

[3] In terms of the aforesaid sub-contract agreement, the Second Respondent was required to *inter alia*, lay fire reticulation system using (uPVC pipes) underground in open excavated areas. The contract and relationship between the Applicant and Second Respondent was governed by what is called the FIDIC[1].

[4] Although not much relevant for purposes of the issues herein, but the Third Respondent was also appointed by the Applicant as a second sub-contractor. In terms of such agreement, the Third Respondent was required to *inter alia*, supply and install HDPE pipes under existing roads via horizontal directional drilling and to connect such pipes to the uPVC pipe works installed by the Second Respondent. Such pipes were to be connected to each other by a klamflex dedicated flange adaptor.

[5] The CDC rejected the works[2] on account of movement and slippage of the uPVC and HDPE pipes and insisted on remedial works. The Second Respondent represented to the Applicant that the defective work was caused

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[1] *The Fèdèration Internationale des Ingènieurs – Conseils*, conditions of sub-contract for construction for building and engineering works designed by the employer, first edition, published 1999.
[2] On or about 15 December 2015.

solely by the Third Respondent. However, the Third Respondent refused to attend to such remedial works. The Applicant then appointed the Second Respondent to attend to such remedial works and same were completed on 24 June 2016.[3] The Second Respondent was paid the sum of R200 000.00 for the remedial works.

[6] A dispute then arose between the parties pertaining to the payment of the Second Respondent's fees on account of the extension of the sub-contract time for completion of the project which was delayed, *inter alia*, because of the rejected works. The parties agreed to refer such dispute to arbitration and to the appointment of the First Respondent as the arbitrator. Subsequent thereto, the Second Respondent submitted on 3 February 2017, a statement of case.[4] Thereafter the Applicant submitted its statement of defence and a counterclaim.[5] Relevant hereto for the moment is that, the Applicant's counterclaim was prepared after it had obtained an expert opinion on 27 February 2017 from Uhambiso Consult (Pty) Ltd. The exact date as to when the Applicant became aware of the possibility that the Second Respondent was potentially to blame for the defective works as mentioned in paragraph 5 above is a hotly contested issue between the parties, but in this application, I do not have to decide that issue because the present review is confined on the procedural irregularity and not the merits of the counterclaim. However, this was one of the *lis* before the First Respondent.

[7] At the arbitration hearing in June 2017, the Second Respondent objected on the adjudication of the Applicant's counterclaim on the basis that the First Respondent had no jurisdiction to determine it. An agreement was reached

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[3] A period of approximately 160 days after the contractual completion date.
[4] Index to Review application, pp 96 – 139.
[5] Index to Review application, pp 140 – 182.

between the parties to file heads of argument on the issues serving before the First Respondent and also whether the counterclaim should be included in the arbitration proceedings.

[8] Key to the issues in this application is that, on or about 13 July 2017,[6] the First Respondent penned an email to the parties wherein he recorded the following: "**In conclusion the Parties mutually agreed the following course of action to be adopted:**

1. ***Whereas all proceedings in the arbitration had been concluded, apart from the matter of the Respondent's counterclaim, and for which appeared that some further presentations to the Arbitrator by the parties would warrant consideration, the arbitration process between Strata Civils and Pro-Khaya Construction with particular regard to the matter of the Respondent's, counterclaim, would be suspended.***"

[9] Sometime in August 2017, an application was instituted by the Applicant in this Court under case no: 2889/17 involving the same parties and one Willem Hendrik Olivier as the Respondents. Such application was dismissed. However, in between the filing of such application and the judgment thereto, the First Respondent on 30 August 2017, issued a ruling on the counterclaim[7] wherein he effectively ruled that the counterclaim formed part of the proceedings before him.

[10] The Applicant appealed against the judgment under case no: 2889/17 referred to above. The appeal was however dismissed with costs on 19 November 2019. Shortly thereafter, the First Respondent informed the parties of his intention to finalise the arbitration award and he anticipated to have same issued early in 2020, but due to his commitments the issuing of the arbitration award was delayed.

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[6] Index to application, pp 257 and 258.
[7] Index to Review application, p 305.

[11] Towards the end of the first quarter of 2020,[8] the First Respondent directed an email to the parties indicating that he was in the process of drafting the arbitration award and that, no further comments had been received since the suspension of the arbitration proceedings and as such he would approach the matter on the basis of the documents / evidence provided to him.[9]

[12] The response of the Applicant's attorneys to the aforesaid email was forwarded to the First Respondent on the eve of the National Lockdown Level 5. The Applicant contends that the purport of the First Respondent's email was not fully appreciated by its attorney. On 5 May 2020, the relevant arbitration award was issued. In the award, the First Respondent dismissed the counterclaim on the basis that the Applicant was time-barred as envisaged in clause 3.3 of the FIDIC conditions[10] to institute a claim against the Second Respondent.

[13] From the outset and as indicated in paragraph 6 above, the First Respondent's substantive findings on clause 3.3 of FIDIC conditions is not an issue in this application. The Applicant's sole gripe is the procedural approach adopted by the First Respondent. Its fundamental argument is that, it was not afforded an opportunity to either present evidence or argument on its counterclaim.

[14] In its founding affidavit, the Applicant contends *inter alia*, that:

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[8] On 24 March 2020.
[9] Index application; p 310 annexure "M".
[10] For completeness sake, clause 3.3 reads:
If the contractor considers himself to be entitled to any payment under any clause as these conditions or otherwise in connection with the subcontract, the contractor shall give notice to the subcontractor describing to the event or circumstance giving rise to the claims. The notice shall be given as soon as practicable and not later than 28 days after the contractor became aware of the event or the circumstances giving rise to the claim and shall specify the basis of the claim."

(a) the First Respondent misconducted himself in not allowing it to present evidence and argument on its counterclaim;

(b) it was not afforded opportunity to lead evidence as to when it became aware of the possibility that it may have a claim against the Second Respondent for the defective works; and

(c) as a consequence thereof, the First Respondent committed a gross irregularity in the conduct of the arbitration proceedings.

[15] In terms of s 33(1) of the Arbitration Act 42 of 1965, ("the Act"), this court may review and set aside an arbitration award if the arbitrator misconducted himself in relation to his duties or has committed a gross irregularity in the conduct of the arbitration proceedings.[11]

[16] The Second Respondent, in its heads of argument[12] has referred me to various authorities on the interpretation and application of the word "misconduct" as set out in s 33(1) (a) of the Act. All those authorities were very useful and of great help. However, in argument the Applicant's case was basically confined to the contention that the First Respondent committed a gross irregularity as envisaged in s 33(1) (b) of the Act.

[17] Although in *Herholdt v Nedbank Ltd (Cosatu as Amicus Curiae)*,[13] the Supreme Court of Appeal held that in a review application of an arbitration award, the emphasis is on the result of the case rather than the reasons for arriving at the result. However, in *Telcordia Technologies Inc v Telkom SA Ltd*[14], Harms JA with reference to the *Ellis v Morgan* 1909 TS 576 said the following:

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[11] S 33(1) (a) and (b) of Act 42 of 1965.
[12] From par 4.3 to 4.8 of the heads of argument, pp 9 – 15 and the footnotes thereon.
[13] 2013(6) SA 224 (SCA).
[14] 2007(3) SA 266 (SCA) at para (72).

> "... *But an irregularity in proceedings does not mean an incorrect judgment, it refers not to the result, but the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.*"

In the instant matter, the challenge against the First Respondent's award is that the Applicant was not afforded the opportunity to lead evidence and present argument on the counterclaim. As a result, so the argument goes, the First Respondent committed gross irregularity in the conduct of the arbitration proceedings.

[18] The Second Respondent in its opposition (leaving aside its contentions on prescription of the counterclaim) argued that an opportunity was given to the parties to indicate their stance on whether they intend to make further submissions and the Applicant did not file any submissions. Furthermore, the argument was advanced that, having regard to all the string of emails[15] the First Respondent had in his possession sufficient evidence to determine the issue of the counterclaim. And as such, his award on the counterclaim issue, is supported by the documents at his disposal and accordingly the procedural irregularity, if any, has not caused prejudice to the Applicant.

[19] The aforesaid argument is devoid of merits. Evident from the First Respondent's email of 13 July 2017,[16] he acknowledged that some further representations on the counterclaim would warrant consideration. So the point here is that, no evidence was presented on the counterclaim. It was not competent for the First Respondent to determine the issue of the counterclaim on the pleadings only without hearing evidence or submissions thereto. On the invitation by the First Respondent to make further submissions, the Applicant states that its attorney failed to appreciate the purport of the First Respondent email due to the fact that it was received on the eve of the

[15] Index application; pp 414 – 419.
[16] Index to application, pp 257 – 258.

National Lockdown on 24 March 2020. What is clearly evident in this matter is that, the Applicant intended and still intends to lead evidence based on the expert report by Uhambiso Consult (Pty) Ltd in support of its counterclaim. The issue of the counterclaim was not ventilated at all and as such the Applicant was not afforded a fair trial of the issues. In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*[17] the Court held that fairness is one of the core values of our Constitutional order. The First Respondent's failure to afford the Applicant an opportunity to lead evidence and/or make submissions on the counterclaim caused severe prejudice to the latter and prevented a fair trial of the issues.[18]

[20] Accordingly, viewed objectively and on the facts at my disposal, the First Respondent committed a gross irregularity in the conduct of the arbitration proceedings and as such his award must be reviewed and set aside.

[21] In the light of my findings above, the counter-application is premature and must fail.

[22] It will not only be fair but also expeditious to remit the matter to the First Respondent to remedy the defect and allow the parties to either lead evidence or submit representations on the counterclaim.

[23] There is no reason why the general rule that costs follow the results should not apply herein. The Applicant also argued that the employment of two counsel was justified and accordingly it should be awarded such costs. I disagree. Although the papers were voluminous, but the matter itself involved

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[17] 2009(4) SA 529 (CC) at par 221.
[18] *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551 at 560.

a very crisp issue as indicated in paragraph 6 above. As such it was not wise and prudent to brief two counsel.[19]

[24] In the circumstances, the following order is issued:

1. The arbitration award issued by the First Respondent dated 05 May 2020 is hereby reviewed and set aside.
2. The arbitration is remitted to the First Respondent to remedy the defect and allow the parties to present evidence or submit representations on the Applicant's counterclaim.
3. The Second Respondent's counter-application seeking an order that the said award be made an order of this court is dismissed.
4. The Second Respondent is ordered to pay the costs of this application.

N GQAMANA
JUDGE OF THE HIGH COURT

[19] *Law v Kin* 1966(3) SA 7(E).

APPEARANCES:

Counsel for the Applicant	:	A Beyleveld SC and T Rossi
Instructed by	:	Friedman Scheckter Attorneys PORT ELIZABETH
Counsel for the 2nd Respondent	:	E J Van Rensburg
Instructed by	:	Johann Viljoen & Associates Attorneys C/O Wikus Van Rensburg Attorneys PORT ELIZABETH