IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022-003038

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

9 July 2024
DATE

[redacted]
SIGNATURE

In the matter between:

JUVANSU TRADING CC	Plaintiff / Applicant / Appellant
and	
PUMA ENERGY PROCUREMENT SOUTH AFRICA (PTY) LTD	First Defendant / Respondent
PUMA ENERGY SOUTH AFRICA (PTY) LTD	Second Defendant / Respondent
HENDRIK LOUW N.O	Third Defendant / Respondent

Heard: 17 April 2024

Delivered: This Judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines. The date and time for hand down is deemed to be 10:00 am on 9 July 2024.

JUDGMENT

GREEN, AJ

[1] The Applicant applies to review and set aside an award made by the Third Respondent who sat as an arbitrator in a dispute between the Applicant and the First and Second Respondents.

[2] The dispute between the parties has its origin in a Dealer and Supply Agreement ("the Agreement"). That Agreement is concluded between the Second Respondent, to whom I will refer to as "Procurement", and the Applicant, to whom I will refer to as "Juvansu".

[3] The Juvansu and the Respondents are engaged in the fuel supply industry, with Juvansu operating a filling station and the Respondents being involved in the supply of fuel to filling stations.

[4] On 20 July 2015 the representative of Juvansu signed the Agreement and it was despatched. When the dispute between Juvansu and the Respondents arose, and the Respondents sought to rely on the arbitration provision contained in the Agreement. Juvansu took the view that the Agreement was not valid and operative.

[5] Juvansu's contention that the Agreement was not valid, and operative is based on two grounds.

[5.1] Firstly, Juvansu says that prior to the arbitration being commenced it had never seen a copy of the Agreement that had been signed by Procurement and on that basis challenged whether the Agreement had in fact been signed by Procurement and whether the signatory was authorised to do so. In this context it bears mention that the version of the Agreement that was available during the arbitration proceedings is signed by a person who is described as "*C Fourie*" on 28 July 2015.

[5.2] The second ground on which Juvansu challenged the validity of the Agreement was that the conditions in clause 2 of the Agreement had not been fulfilled. This is relevant because clause 2.2 of the Agreement provides that the whole of the Agreement is subject to the suspensive condition *"that the Sale of the Shares and Claims Agreement is signed and entered into by the parties to it and that it takes effect and becomes unconditional according to its terms.".*

[6] The arbitration clause in the Agreement is contained in clause 31.1 and provides:

> *"*In the event of any dispute arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, then any Party may give written notice to the other Party to initiate the procedure set out below (the Dispute Notice)*."*

[7] Clause 31.3 provides that the parties must agree the arbitration procedure and failing agreement the UNCITRAL arbitration rules will apply.

[8] The Agreement also provides for the Association of Arbitrators (Southern Africa) to appoint the arbitrator. That Association appointed the Third Respondent as the arbitrator.

[9] The parties exchanged pleadings setting out their respective positions and the arbitration was set down for hearing in December 2019. At the beginning of the arbitration proceedings the parties asked the Arbitrator to allow the matter to stand down whilst they engaged in discussions. Following on those discussions the Arbitrator was requested to postpone the hearing *sine die*, and he did so.

[10] After the postponement of the hearing the First and Second Respondents, as claimants in the arbitration, gave notice to amend their statement of claim. The

amendment, shorn of unnecessary detail, sought to name the existing claim that had been advanced as Claim A, and to introduce an alternative Claim B. Claim B was to the effect that the dispute between Juvansu and Procurement had been settled when the matter was stood down during December 2019. The amendment was objected to by Juvansu, and the Arbitrator was requested to rule on the amendment. The point of Juvansu's objection was that the Arbitrator lacked jurisdiction to hear Claim B. The Arbitrator ruled that the amendment should be allowed.

[11] On 17 June 2021 the parties agreed to separate out, for prior determination, certain issues. Given the relevance of that which was separated, I deal with it in detail.

[12] The Separation Agreement provides that paragraphs 4, 5, 17, 29 – 31 and 44 of the Statement of Claim, read together with paragraphs 4.2, 18, 19 and 24 of the Statement of Defence, and paragraphs 2.1.1 and 2.1.2 of the minutes of the second pre-arbitration meeting held on 12 September 2019 were to be separated and heard first.

[13] In order to understand the separation, it is necessary to consider the pleadings.

[13.1] Paragraph 4 of the Statement of Claim alleges the conclusion of the Agreement, and paragraph 5 of the Statement of Claim attaches a copy of the Agreement.

[13.2] Paragraph 4.2 of the Statement of Defence is responsive to paragraphs 4 and 5 of the Statement of Claim. In paragraph 4.2 Juvansu pleaded:

> "The Defendant –
>
> 4.2.1 has no knowledge regarding the identity or authority of the signatory who purported to sign the Agreement on the First Claimant's behalf, the identity, signature and authority of such signatory accordingly being specifically denied;

4.2.2 denies that all suspensive conditions were fulfilled and/or waived whether timeously or at all;

4.2.3 in the premises denies that the Agreement is of any force or effect and puts the Claimant to the proof thereof."

[13.3] Paragraph 17 of the Statement of Claim alleges that all of the suspensive conditions in the Agreement were either fulfilled or waived, and that the Agreement is extant.

[13.4] Paragraphs 29 to 31 of the Statement of Claim provides that Claim B is pleaded in the alternative to Claim A, allege the conclusion of an agreement in terms of which "*the dispute(s) that formed the subject of the pleadings in this arbitration as they stood on 2 December 2020, were fully and finally settled as between the Claimants and the Defendant (*"**the Settlement Agreement**")", and paragraph 31 pleads the terms of the Settlement Agreement.

[13.5] Paragraphs 18 and 19 of the amended Statement of Defence are responsive to the paragraphs 29 to 31 of the Statement of Claim. Paragraph 29 of the Statement of Claim is denied the following is pleaded in paragraph 19 of the statement of defence:

"19.1. To the extent that an oral agreement (hereinafter referred to as "the Settlement Agreement") was concluded, whether in the terms alleged or at all (all of which are denied) the defendant pleads as follows:

19.1.1. The defendant repeats its plea above in respect of Claim A as if incorporated herein, and specifically its denial that the Agreement pertaining to Claim A ("the Agreement") is of any force and effect

19.1.2 to the extent that the Agreement is of no force and effect. Claim B is not subject to arbitration and the Arbitrator has no jurisdiction to determine Claim B

19.1.3. To the extent that the Agreement is of any force and effect, the Settlement Agreement amounts to a novation of the Agreement, with the result that -

19.1.3.1 Claim B is not subject to arbitration;

19.1.3.2 the Arbitrator has no jurisdiction to determine Claim B.

19.1.4. Moreover, and to the extent that the Agreement is of any force and effect, clause 33.2 thereof provides that no variation, amendment or consensual cancellation thereof or any provision or term thereof will be binding or have any force and effect unless reduced to writing and signed by or on behalf of the parties.

19.1.5. If the Settlement Agreement was concluded, whether in the terms alleged or at all, it constitutes an oral variation, amendment or consensual cancellation of the Agreement and of its provisions and terms, and the Settlement Agreement is accordingly not binding or of any force and effect."

[13.6] Paragraph 24 of the Statement of Defence is responsive to paragraph 44 of the Statement of Claim and provides:

"24.1. The defendant pleads that the allegation to the effect that Claim B is also a dispute arising out of or relating to the Agreement, and is accordingly a dispute subject to arbitration, is not sustainable, as a matter of law."

[13.7] In the pre-arbitration minute of September 2019, the parties agreed that the arbitrator had to decide:

"2.1.1 The Defendant denies that all suspensive conditions were fulfilled and/or waived, having implications on the validity of the agreement and the arbitration agreement."

2.1.2 At the hearing of the matter the Arbitrator will be required to make a finding thereon and the validity of the agreement, effectively on his jurisdiction."

[14] In his Award on the separated issues the Arbitrator held that the suspensive conditions had been fulfilled and that the Settlement Agreement had been concluded, and what the terms of the Settlement Agreement were.

[15] The applicant's review raises the question of whether the arbitrator had jurisdiction. That issue, as I understand the applicant's pleaded case involved two questions.

[15.1] The first question is whether the Agreement had been signed by an authorised representative of Procurement and linked to that is whether the suspensive conditions had been fulfilled ("**the Suspensive Condition Issue**").

[15.2] The second question is whether the arbitrator had jurisdiction to determine issues relating to the Settlement Agreement. ("**the Settlement Agreement issue**").

[16] I will deal with the two issues in turn.

The Suspensive Condition Issue

[17] The starting point in unravelling this issue is the arbitration clause in the Agreement. The interpretation of the arbitration clause must be undertaken in the now well-established manner that considers text, context and purpose, as a unitary exercise, with the gravitational pull being towards the words that were used.

[18] The arbitration clause allows the Arbitrator to adjudicate the "*termination"* and "*invalidity"* of the agreement. The adjudication of the termination and invalidity of the agreement must include the adjudication of the continued existence of the Agreement and the validity of the Agreement. This in turn necessarily requires the suspensive condition issue to be determined by the Arbitrator.

[19] My view on the interpretation of the arbitration clause is consistent with the parties' subsequent conduct in agreeing at the September 2019 pre-arbitration meeting that the Arbitrator would determine the suspensive condition issue.

[20] There is nothing anomalous in the parties agreeing that an arbitrator will determine the validity of the very agreement that is the source of the arbitrator's jurisdiction. It is simply a question of giving effect to what the parties agreed. This was recognised in *North West*[1]:

> "It is in principle possible for the parties to agree that the question of the validity of their agreement may be determined by arbitration even though the reference to arbitration is part of the agreement being questioned. That is suggested in Heyman. Lord Porter said:
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> > 'I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract, they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so. They might, for instance, stipulate that, if a dispute should arise as to whether there had been such a fraud, misrepresentation or concealment in the negotiations between them as to make a purported contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done.'"[2]

[21] I find that the Arbitrator had the power to determine whether the suspensive conditions had been fulfilled, and that there is no basis to set aside the Award on the basis that the Arbitrator exceeded his jurisdiction in deciding this issue.

[22] In addition, Juvansu has argued that the arbitrator erred in finding that the Agreement was valid. This criticism is, on my reading, founded on Juvansu's view that the Arbitrator erred in his assessment of the evidence that was presented to prove the

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[1] North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 1 (SCA)
[2] At para 16.

fulfilment, or waiver, of the suspensive conditions. An error of the type suggested by Juvansu does not found a ground to review the Award.

[23] It follows that the Award declaring that the Agreement was valid and binding following the fulfilment of the suspensive conditions is an issue that fell within the Arbitrator's jurisdiction and there is no basis to interfere with that finding. Accordingly, the Suspensive condition issue must be decided against the Applicant.

The Settlement Agreement Issue

[24] Claim B alleges that Claim A was compromised by the Settlement Agreement. Juvansu denies that Claim A was compromised by the Settlement Agreement.

[25] To decide this issue, it is necessary to locate where the Settlement Agreement fits into the scheme of the dispute.

[26] Claim B is an oral agreement that does not have an arbitration clause. It follows that the Arbitrator could not issue an award to enforce the Settlement Agreement. The Respondent's accepted this in their heads of argument and said that it would be enforced in court proceedings.[3]

[27] The Settlement Agreement does not stand alone but stands as a compromise of Claim A. It follows that in order to decide if Claim A has been compromised a decision on the existence of the Settlement Agreement has to be made. That is a decision for the purpose of dealing with Claim A and not a decision for the purpose of enforcing the Settlement Agreement. Once this distinction is recognised the Arbitrator's findings in respect of the Settlement Agreement are put into their correct

[3] At para 47.

context, and it is clear he did not deal with the Settlement Agreement for the purpose of enforcing the Settlement Agreement.

[28] The need to deal with something that is related to an arbitral dispute in order to decide the dispute being arbitrated is not novel. In *Aveng*[4] Wallis J (as he was) in a slightly different context said:

> "I can discern no sound commercial reason why Aveng and Midros should have agreed to submit disagreements concerning the quality of Aveng's work and its entitlement to be paid to arbitration, where those disagreements arose on completion of the contract works, but would exclude an arbitrator from considering the self-same issues when they arose from discussions between the parties in a bid to resolve the initial disagreements between them. The source of the disagreements is the rights and obligations of the parties under the agreement, and the differences between them are disagreements arising out of the agreement. All of them accordingly are disagreements falling within the terms of the arbitration clause."[5]

[29] I agree with what was said in *Aveng*. In this matter it would lead to an absurd result if the Arbitrator were prohibited from considering the Settlement Agreement where that is the agreement that is alleged to have compromised the dispute that is the subject of the Arbitration, but only for the purpose of determining that which is subject to the arbitration.

[30] In its heads of argument Juvansu articulated five complaints against the Award in respect of the Settlement Agreement Issue.[6] The complaints are:

[30.1] *The arbitrator did not find that he had no jurisdiction to determine Claim B.* This begs the question whether the arbitrator found that he had jurisdiction to determine Claim B. On my reading of the Award the Arbitrator made no such finding, and to the

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[4] Aveng (Africa) Ltd (formerly known as Grinaker LTA) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd 2011 (3) SA 631 (KZD)
[5] At para 15.
[6] Heads of Argument para 76.

extent that he dealt with Claim B he did so in the context of deciding whether the Settlement Agreement had been concluded for the purpose of issuing an award on Claim A

[30.2] *The Arbitrator failed to make any determination on the issue whether he had jurisdiction to determine Claim B, with reference to the allegations in paragraph 19.1.3 of Juvansu's statement of defence – these allegations were to the effect that the settlement agreement, if concluded, would amount to a novation of the Juvansu Agreement, resulting in the Arbitrator not having jurisdiction to determine Claim B.* It is correct that the Settlement Agreement is a compromise of the Agreement, but what Juvansu misses in raising this complaint is that it denied the conclusion of the Settlement Agreement. There was therefore a dispute arising from the Agreement, and that dispute was whether the Agreement dispute had been compromised by the Settlement Agreement. The Agreement dispute was something for the Arbitrator to determine. Juvansu cannot at the same time deny the existence of the Settlement Agreement and thus contend the Agreement dispute remains un-compromised, and at the same time contend that the Agreement has been novated by compromise so that the Arbitrator has no jurisdiction.

[30.3] *The Arbitrator erred by failing to make any determination of the issue whether Claim B is a dispute arising out of or relating to the Juvansu Agreement, and is accordingly subject to arbitration, with reference to the respondents' case pleaded in paragraph 44 of the statement of claim, read with paragraph 24 of Juvansu's statement of defence.* This formulation of the complaint sets up a strawman argument. The Arbitrator did not have to decide if the Settlement Agreement arose out of the Agreement. What the Arbitrator had to decide was the dispute relating to the

Agreement, and that dispute was whether Claim A based on the Agreement had been compromised by the Settlement Agreement.

[30.4] *The Arbitrator erred by declaring that the disputes between Juvansu and the respondents, as they existed in the arbitration proceedings as at December 2019, were fully and finally settled by way of an oral settlement agreement, entered into between Juvansu and Puma Energy on 2 December 2019.* It is not clear why this is suggested to be an error. The Arbitrator was required to make a finding on the Agreement and whether it had been compromised. He did that and cannot be faulted for doing so.

[30.5] *Finally, the Arbitrator erred by determining the terms of the alleged settlement agreement.* To decide whether a Settlement Agreement had been concluded the Arbitrator was of necessity required to consider the terms of the Settlement Agreement to decide whether those terms had been agreed to for the purpose of compromising the dispute arising from the Agreement. I cannot see how the Arbitrator could have decided whether the Settlement Agreement had been concluded, and whether it compromised the dispute arising out of the Agreement without deciding what the terms of the Settlement Agreement were. This is something quite different to the Arbitrator deciding the terms of the Settlement Agreement for the purpose of enforcing the Settlement Agreement.

[31] The arbitrator was, on my reading of his Award, mindful of the distinction between determining the terms of the Settlement Agreement for the purpose of deciding the dispute arising from the Agreement and determining the terms of the Settlement Agreement for the purpose of enforcing those terms. It is for this reason

that the Arbitrator made no decision on substantive relief flowing from the Settlement Agreement.

[32] It follows that the Settlement Agreement issue must be decided against Juvansu.

[33] There is no reason why costs should not follow the result. The First and Second Respondents employed two counsel and were in my view justified in doing so. The issues in the matter are of the type and complexity to justify that Counsel's costs should be awarded on scale C.

[34] For the reasons set out above I make the following order:

"The application is dismissed with costs, such costs to include the costs of two counsel to be taxed on scale C."

I GREEN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Appearances

For the Applicant:	H M Viljoen instructed by Hay & Scott Attorneys
For the First and Second Respondent:	AJ Daniels SC and CT Vetter instructed Webber Wentzel
Date of hearing:	17 April 2024
Date of judgment:	9 July 2024