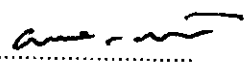


IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT)

13/8/2013  
CASE NO. 3762/13

DELETE WHICHEVER IS NOT APPLICABLE	
1 REPORTABLE	YES/NO
2 OF IMPORTANCE TO OTHER JUDGES	YES/NO
3 REVISED	✓
13/8/2013	
DATE	SIGNATURE

In the matter between:

RUSTENBURG PLATINUM MINES LTD

Applicant

and

ADV L P DICKER N.O.

First Respondent

HERTUS MINING & INDUSTRIAL SERVICES CC

Second Respondent

Date heard: 23 July 2013

Judgment delivered: 13 August 2013

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JUDGMENT

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VAN NIEKERK J

## Introduction

- [1] This is an application in terms of s 33 (1) (b) of the Arbitration Act, 42 of 1965, in which the applicant seeks to review and set aside a ruling made by the first respondent ('the arbitrator'). In his ruling, the arbitrator ordered the applicant to pay the costs of an application for an amendment to its statement of defence on the scale as between attorney and own client (such costs to include the costs attendant on engaging senior counsel), the wasted costs attendant on the amendment (on the same scale) such costs to include the costs of the Arbitration Foundation of South Africa for four days, and the costs attendant on the engagement of counsel for four days, with fifty percent of the cost of counsel's preparation for trial to be considered to be wasted costs.
- [2] The applicant contends that in ordering as he did, the arbitrator exceeded his powers.

## Material facts

- [3] The material facts are not in dispute. The parties agreed to submit a dispute between them to arbitration, to be conducted by the arbitrator under the rules of the Arbitration Foundation of South Africa ('AFSA'). They agreed to an exchange of pleadings and discovery affidavits, and to a hearing before the arbitrator on 11 to 14 December 2012. In relation to procedure, the arbitration agreement provides that the arbitrator would have the power to determine the procedure to be followed and that in doing so, he would have the same powers as a judge of the High Court. In relation to costs, in terms of the minutes of the pre- arbitration agreement held on 19 September 2012, the parties agreed that *inter alia* that:

15.2 The costs of the arbitration will include the arbitrator's fee and the costs of recording and hiring the arbitration venue, calculated on the High Court scale.

15.3 The cost of any postponement of the hearing will include costs of up to and including, but not exceeding, three trial days. Notice of no less than five days of any postponement must be given the arbitrator, failing which the arbitrator may recover his fees on the basis set out in this paragraph. Should

a postponement be agreed upon or granted in the period between six and fifteen days before the hearing of the arbitration, the arbitrator will be entitled to a fee equivalent to half the amount of the fees as calculated above .....

15.7 Taxation of the claimant's and/or defendant's bills of costs, excluding the arbitrator's fees and other AFSA disbursements, such as room hire and recording fees, shall be at the High Court tariff by a Taxing Master of the High Court'

- [4] On 10 December 2012, a day before the commencement of the arbitration hearing, the applicant delivered a notice of intention to amend its statement of defence, in which it sought to withdraw an admission previously made. The notice did not contain any tender of the second respondent's wasted costs. The second respondent objected to the amendment. On the morning of 11 December, the applicant served its notice of intention to amend, again without any tender of wasted costs. On 12 December 2012, answering and replying affidavits were filed and the application argued. The arbitrator delivered the ruling that is the subject of these proceedings on 13 December 2013. It is regrettable that the arbitrator's reasons, which were made available to the parties, have not been incorporated into the papers before me, but be that as it may, the ruling reads as follows:

- '1. The defendant is granted leave to amend its statement of defence dated 8 October 2012 in accordance with its notice of intention to amend, dated 7 December 2012 and delivered on 10 December 2012;
2. The defendant shall effect the amendment by no later than close of business on 13 December 2012;
3. The claimant may effect such consequential amendments as it may wish and/or deliver a reply to the amended statement of defence, by no later than the close of business on 14 June 2013;
4. The arbitration is postponed to 21 January 2013 at Circle Chambers for hearing there from 21 to 25 January 2013;

5. The defendant shall pay the costs of the application for amendment on the scale as between attorney and own client, including the costs attendant upon the employment of senior counsel;
6. The defendant shall pay the wasted costs attended upon the amendment on the scale as between attorney and own client, such costs to include:-
  - 6.1 The costs of AFSA for four days, such costs to include the costs attendant upon the reservation of the revenue and the arbitrator for that period;
  - 6.2 The costs attendant upon the employment of senior counsel for 4 days;
  - 6.3 Fifty percent of the cost of counsel's preparation for trial is to be considered to be wasted costs.

#### The issue

- [5] The issue, crisply stated, is whether the arbitrator exceeded his powers by ordering as he did in paragraphs 5 and 6 of the ruling under review.

#### Analysis

- [6] In essence, the court to determine whether the arbitrator purported to exercise powers that he did not have, and not whether he erroneously exercised a power that he did have (see *Telcordia Technologies Inc v Telkom SA Ltd* [2007] All SA 243 (SCA), at para [52] of the judgment). In other words, whether the arbitrator exceeded his powers is a matter that goes to jurisdiction (to be determined objectively from the relevant instruments) and not to the merits.
- [7] It is not disputed that the arbitrator's powers in the present instance were derived from the Act, the AFSA Rules, and the minute of the pre-arbitration hearing. I deal below with each of the applicant's contentions.

*The award of costs on the attorney own client scale.*

- [8] The arbitration agreement between the parties is silent on the scale of costs that the arbitrator may award. Section 35(1) of the Act provides that subject to the terms of any arbitration agreement, and arbitrator may in his or her discretion award costs and give directions as to the scale on which costs are to be taxed. The section provides that an arbitrator may "... *award costs as between attorney and client.*" Although the Supreme Court of Appeal has on at least one occasion<sup>1</sup> questioned whether an award of costs on the scale as between attorney and own client is justifiable, the prevailing authority suggests that there is no difference between them. In *Aircraft Completions Centre (Pty) Ltd v Rossouw*,<sup>2</sup> Stegmann J, in an extensive judgment, concluded:

'8. Therefore, an order in the hybrid form that one party should pay the costs of another 'taxed as between attorney and own client', does not, as a matter of law achieve anything more than an order in the established form that one party should pay the costs of another 'taxed as between attorney and client'. Equally, an agreement in the hybrid form takes the matter no further than an agreement to pay 'attorney and client' costs.

9. For all of these reasons, the Taxing Master is obliged to act on an order that one party is to pay the costs of another 'taxed as between attorney and own client' in exactly the same way as he is obliged to act on an order that one party is to pay the costs of another 'taxed as between attorney and client'. As a matter of law there is no difference between them..."<sup>3</sup>

- [9] To the extent that the applicant's objection to the arbitrator's award is premised on the s 35 (1) of the Act, and in particular, the power of an arbitrator to award costs as between attorney and client, it follows that the arbitrator's ruling amounts to no more than what is contemplated by the Act, and that the objection to an order that costs be paid on the scale as between attorney and own client is of no consequence. In my view, there is no basis beyond the pedantic on which to interfere with the arbitrator's ruling.

<sup>1</sup> See *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000(1) SA 639 at 648H.

<sup>2</sup> 2004 (1) SA 123 (W),

<sup>3</sup> At 186 H-187A

*50% of counsel's fees*

- [10] Section 35 of the Act empowers an arbitrator to determine any part of the costs to be paid. This is precisely what the arbitrator did, in ordering that 50% of the costs of counsel's preparation for trial is to be considered wasted costs. The applicant's primary objection to this part of the award is that what constitutes wasted costs is a matter to be determined by the taxing master.
- [11] In the present instance, the arbitrator heard argument on the application for leave to amend. He was in possession of the pleadings that had been exchanged prior to the scheduled commencement of the hearing, and was in a position to assess the nature and extent of the amendment sought, as well the extent to which preparation for the hearing had been frustrated. The arbitrator was thus well-placed to quantify the amount of preparation that had been wasted.
- [12] In making the order that he did, in my view, the arbitrator did not usurp the powers of the taxing master, nor did he exercise powers not contemplated by s 35 of the Act. In the course of making orders for costs, the courts frequently engage in exercises of quantification in relation to preparation. In doing so, they do not purport to perform the function of taxation, which remains the purview of the taxing master, who is at liberty to scrutinise any bill of costs prepared in accordance with the court's directions, and to tax-off any unreasonable amounts claimed.
- [13] In my view, the arbitrator was empowered to make the order he did in relation to the costs of preparation for the arbitration hearing.

*The amount of days for wasted costs*

- [14] The parties do not dispute the proposition that where an application to amend is made at a stage when postponement is necessary in order to enable a respondent to meet the amended pleading, the applicant is ordinarily liable for all wasted costs. The applicant contends that in terms of the pre-arbitration minute, any liability for wasted costs is limited to the costs of three days, and that by ruling as he did, the arbitrator exceeded his powers. The second respondent submits that properly construed, clause 15.3 of the minute relates

to a postponement prior to the commencement of proceedings, and not to any costs wasted in consequence of an application for amendment to pleadings moved during the course of the hearing

- [15] In my view, the wording of clause 15.3 of the pre-arbitration minute, read in its proper context, regulates postponements prior to the commencement of the arbitration proceedings, and then only liability for the arbitrator's fees consequent on the postponement. In the present instance, the first three days of the scheduled hearing were taken up by the application to amend, the fourth day being a day on which consequent on leave to amend being granted, the second respondent was entitled to file a reply to any consequential amendments. In other words, the four wasted days (11 to 14 December) were wasted by reason of the amendment sought by the applicant, and not consequent on any postponement. Even if the hearing had continued, there would in any event have been four days' wasted costs.
- [16] For these reasons, the application to review and set aside the arbitrator's ruling fails. There is no reason why an order for costs should not follow the result, such costs to include the costs consequent on the employment of senior counsel.

I make the following order:

1. The application is dismissed, with costs, such costs to include the costs consequent on the employment of senior counsel.



ANDRÉ VAN NIEKERK  
ACTING JUDGE OF THE HIGH COURT  
NORTH GAUTENG DIVISION

## APPEARANCES

FOR THE APPLICANT: Adv C Rip, instructed by Mothle Jooma Sabdia Inc, (012) 362 3137, fax 086 694 4081 (ref RUS2.0029)

FOR THE SECOND RESPONDENT: Adv Q Pelsers SC, instructed by Cromje-De Waal Skhosana Inc , c/o HW Theron Inc (012 347 2000)