IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 6387/2019

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

26.4.2021
DATE

In the matter between:

AGRICULTURAL RESEARCH COUNCIL APPLICANT

and

NAP DESIGNS (PTY) LTD FIRST RESPONDENT

HILTON MACDONALD N.O. SECOND RESPONDENT

ASSOCIATION OF ARBITRATORS (SA) NPC THIRD RESPONDENT

JUDGMENT

BASSON J

INTRODUCTION

[1] The applicant (Agricultural Research Council) seeks an order in terms of which the arbitration award (the award) made by the second respondent (the arbitrator) under the auspices of the third respondent (Association of Arbitrators (SA) NPC) dated 7 December 2018 is reviewed and set aside.

[2] In the event that the award is reviewed and set aside, the applicant seeks an order in terms of which the third respondent is directed to appoint an arbitrator other than the current arbitrator with sufficient legal qualifications and experience to arbitrate the dispute between the applicant and the first respondent afresh. The applicant does not seek a costs order against the arbitrator. Only the first respondent, NAP Designs (Pty) Ltd, (hereafter referred to as the respondent) opposed the application.

[3] The respondent in turn sought an order that the arbitration award be made an order of court in the event the court dismisses the review.

THE LEGAL FRAMEWORK

[4] The applicant launched its application to set aside the arbitrator's award in terms of section 33 of the Arbitration Act[1] (the Act), which reads as follows:

> "**33. Setting aside of award —**
>
> (1) Where —
>
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
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> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
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> (c) an award has been improperly obtained,
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> 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."

[1] 42 of 1965.

[5] An arbitration award can therefore be set aside where the arbitrator has misconducted himself in relation to his duties as arbitrator or umpire (section 33(1)(a) of the Act); or where the arbitrator has committed a gross irregularity in the conduct of the arbitration in accordance with section 33(1)(b) of the Act; or where the arbitrator has exceeded his powers (section 33(1)(b) of the Act); or where the award was improperly obtained (section 33(1)(c) of the Act).

[6] The basis upon which a court will set aside an arbitrator's award is a very narrow one. The court in the well-known case of *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd*[2] set out the legal principles as follows:

> "Before considering these grounds, it is as well to emphasize that the basis upon which a court will set aside an arbitrator's award is a very narrow one.
>
> The submission itself declared that the arbitrator's determination 'shall be final and binding on the parties'. And s 28 of the Arbitration Act provides that an arbitrator's award shall -
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> > 'be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms'.
>
> It is only in those cases which fall within the provisions of s 33(1) of the Arbitration Act that a court is empowered to intervene. If an arbitrator exceeds his powers by making a determination outside the terms of the submission that would be a case falling under s 33(1)*(b)*. As to misconduct, it is clear that the word does not extend to *bona fide* mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a court might be moved to vacate an award: *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174-81. It was held in *Donner v Ehrlich* 1928 WLD 159 at 161 that even a gross mistake, unless it establishes *mala fides* or partiality, would be insufficient to warrant interference."

[7] Once the parties have selected an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was.[3] The onus rests on the applicant to prove that the arbitrator misdirected

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[2] 1994 (1) SA 162 (A) at 169B.

[3] See *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174:"The parties have selected the arbitrator as judge both of fact and law, and if he be ever so erroneous in the decision at which he has arrived it is conclusive upon the parties . . .; his award is final, and whether it be right or wrong in point

himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration.[4]

The Arbitrator misconducted himself in relation to his duties

[8] An error does not amount to misconduct unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct or partiality.[5]

[9] A *bona fide* mistake of either law or of fact cannot be characterised as misconduct.[6] The court in *Bester v Easigas (Pty) Ltd and Another*[7] found that:

> "In my opinion, applicant can therefore only succeed on the ground under consideration if he can show that there was some improper, *mala fide* conduct on the part of second respondent in relation to his duties as arbitrator.
> Applicant does not rely on any direct evidence of 'misconduct' (in this sense) by second respondent. What applicant therefore has to prove is not only that second respondent made mistakes, but that these mistakes were so gross or manifest as to justify the inference of *mala fides* on the part of second respondent. This placed applicant in the difficult position where he had what was described in a similar context as 'a hard row to hoe', particularly since 'one does not lightly infer dereliction of duty and untruthfulness from a responsible body' (*per* Holmes JA in *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895B-F)."

[10] In the absence of any direct evidence of misconduct, an applicant will have to prove, not only that the arbitrator made mistakes, but that these mistakes were so

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of law, it is a matter with which I am not entitled to deal." And in the same case LORD HERSCHELL said: "The arbitrator whether he has decided rightly or wrongly is supreme. There is no power to review his decision, whether he has made a mistake in law or whether he has made a mistake in fact." And that the law of Natal on this subject is to the same effect is, I think, quite clear."

[4] *Total Support Management (Pty) Ltd and Another v Diversified Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at para 21.

[5] *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176.

[6] See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 85: "The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case".

[7] 1993 (1) SA 30 (C) at 38E – G.

gross or manifest as to justify the inference of *mala fides* on the part of the arbitrator. This requirement ought to be considered in light of the fact that "one does not lightly infer dereliction of duty and truthfulness from a responsible body".[8] See *Total Support Management (Pty) Ltd and Another v Diversified Systems (SA) (Pty) Ltd and Another*:[9]

> "Proof that the second respondent misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for setting aside the award. The *onus* rests upon the appellants in this regard. As appears from the authorities to which I have referred, the basis on which an award will be set aside on the grounds of misconduct is a very narrow one. A gross or manifest mistake is not *per se* misconduct. G At best it provides evidence of misconduct (*Dickenson & Brown v Fisher's Executors (supra* at 176)) which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what has variously been described as 'wrongful and improper conduct' (*Dickenson & Brown v Fisher's Executors (supra* at 176)), 'dishonesty' and '*mala fides* H or partiality' (*Donner v Ehrlich (supra* at 160 - 1)) and 'moral turpitude' (*Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others (supra* at 1108A))."

[11] Misconduct in the required sense will not readily be inferred on the part of an arbitrator who is a professional of considerable experience in his field with a reputation to uphold, merely based on mistakes in the judgment that could never be described as gross.[10]

The Arbitrator committed a gross irregularity in the conduct of the arbitration proceedings

[12] An irregularity relates to the conduct of the proceedings and not the result thereof. The irregularity must be such that it resulted in the applicant not having his or her case fully and fairly determined with the result that it did not receive a fair trial.

[13] The court in *Ellis v Morgan; Ellis v Dessai*[11] explains:

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[8] *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) at 38H.
[9] 2002 (4) SA 661 (SCA) at para 21.
[10] See *Total Support Management (Pty) Ltd and Another v Diversified Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at para 36.
[11] 1909 TS 576 at 581.

> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to 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."

[14] The question is whether the arbitrator's conduct during the trail prevented a fair trial on the issues. If it did prevent a fair trial of the issues, then it may amount to a gross irregularity in the proceedings. The court in *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another*[12] explains:

> "Where the point relates to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake lead to the Court's not merely missing or misunderstanding a point of law on the merits but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial."

[15] The applicant relies on six grounds for review. Most of them deal with alleged misconduct committed by the arbitrator during the arbitration. Counsel on behalf of the applicant conceded, when it was put to him that no allegations of *mala fides* were levelled against the arbitrator in the papers, that the applicant no longer relies on misconduct as a ground for review.

[16] It appears from the papers that the main review ground relied upon by the applicant is the allegation that the arbitrator misconceived the jurisdictional boundaries set (most notably in the pleadings) for the arbitration in that the arbitrator entertained the Quantity Surveyor's Final Account dated 3 October 2016. The applicant submitted therefore that the arbitration award should be reviewed and set aside on this ground alone.

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[12] 1938 TPD 551 at 560.

[17] The court was referred to *HOS+MED Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* wherein the court confirmed the jurisdictional ambit of an arbitrator's powers:[13]

> "[30] In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded. Hosmed's rejoinder put in issue Thebe's allegation that there had been compliance with s 228. Had Hosmed intended to rely on the principle of unanimous assent it would have had to plead it specifically because it amounts to a classic confession and avoidance. There is a fundamental difference between a denial (where allegations of the other party are put in issue) and a confession and avoidance where an allegation is accepted, but the other party makes an allegation which neutralises its effect - which is what the raising of unanimous assent would seek to achieve. It is of course possible for parties in an arbitration to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct, but no such agreement that the pleadings were not the only basis of the submission can be found in the record in this case, and Thebe strenuously denied any agreement to depart from the pleadings."

[18] Similarly in *Telcordia Technologies Inc v Telkom SA Ltd*:[14]

> "[65] Corbett CJ was at pains to draw a distinction between common-law reviews and those based on statute (such as the present) and to state expressly that the quoted rule (and the others mentioned by him) applies to the former. Apart from the fact that I do not believe that he intended to propound a rule applicable to consensual arbitrations, the rule would in any event prevent the review of material errors of law because the arbitrator was, subject to the limitations in the Act, intended to have exclusive jurisdiction over questions of fact and law. That follows from the provisions of the Act, which exclude appeals and limit reviews. The fact that a court may be approached to decide a question of law under s 20 does not affect this conclusion. If s 20 were used, a review or appeal for an error of law is not possible because, once again, the opinion of the court (of first instance) and even that of

[13] 2008 (2) SA 608 (SCA).
[14] 2007 (3) SA 266 (SCA).

> counsel (learned or otherwise) is final. A statutory provision such as that contained in s 28, that unless the arbitration agreement provides otherwise, an award is, subject to the provisions of the Act, final and not subject to appeal, and that each party to the reference must abide by and comply with the award in accordance with its terms, clearly indicates that the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions were submitted to it, including any question of law. That is what the parties agreed. This does not imply that the arbitrator has the exclusive right to decide the scope of his jurisdiction because if he exceeds his powers the award is reviewable on that ground."

THE FACTS

[19] The applicant appointed the respondent to implement its project for the improvement of its security measures at its central office.

[20] The appointment was subject to the conclusion of an agreement between the applicant and the respondent. To this end the applicant and the respondent concluded the JBCC Principal Building Agreement Series 2000 Edition 5.0 of July 2007 (the JBCC agreement).

[21] On 29 July 2015 the site was handed over to the respondent.

[22] On 30 October 2015 the respondent submitted an application for an extension of time to complete the works. By agreement between the parties, the completion date was revised to 18 November 2015. There was no further extension of the completion date beyond 18 November 2015.

[23] In 2016, after the date of completion of the works had already passed, the respondent referred a dispute to adjudication in terms of clause 40.2 of the agreement and the Adjudication Rules for the JBCC Principal Building Agreement.

The dispute referred to adjudication

[24] In its statement of referral for adjudication, the respondent requested the adjudicator to decide that:

(i) the agreement between the parties was terminated by mutual agreement with effect from 17 March 2016;

(ii) the respondent was entitled to payment in the amount of R1 210 535.84 including VAT, which amount represented the value of the works completed by the respondent; and

(iii) the respondent was entitled to compensatory interest of 7% per annum on the aforesaid amount of R1 210 535.84 with effect from 17 March 2016 to date of payment.

[25] The applicant denied that the respondent was entitled to payment in an amount of R1 210 535.84 (incl. VAT), denied the mutual termination agreement and pleaded that the JBCC Contract had come to an end by effluxion of time.

[26] The respondent therefore requested the adjudicator to decide that the agreement between the parties *"was terminated by mutual agreement with effect from 17 March 2016*" and if this finding was made, the respondent would be entitled to an order directing the applicant to pay the respondent the amount of R1 210 535.84 together with interest thereon at the rate of 7% per annum.

[27] The applicant opposed the relief sought by the respondent in the adjudication proceedings. It contended, with reference to correspondence exchanged between the parties, that no mutual agreement was concluded to terminate the agreement with effect from 17 March 2016. Although the parties did discuss the mutual termination of the agreement, a mutual termination agreement was not concluded on 17 March 2016 as is evident by the fact that draft settlement agreements were exchanged between the parties even after 17 March 2016.

[28] The respondent on one occasion specifically stated in an email that should a settlement agreement not be reached; the JBCC Contractual Agreement would remain in place.

[29] The adjudicator ruled in favour of the respondent. Both parties were, however, not satisfied with the adjudication determination and the matter then proceeded to arbitration.

ARBITRATION PROCEEDINGS

The arbitration clause

[30] The arbitrator's jurisdiction is derived from the arbitration agreement found at clause 40 of the JBCC Principal Building Agreement, which provides:

> "40.1 Should any disagreement arise between the employer, including his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other to resolve such disagreement.
>
> 40.4 Where a dispute is referred to arbitration the following shall apply:
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> 40.4.2 The arbitration shall be conducted by the arbitrator in accordance with the rules of the body stated in the contract data.
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> 40.4.3 The arbitrator shall have the power to open or revise any certificate, opinion, decision, requisition, or notice relating to the dispute as if no such certificate, opinion, decision, requisition or notice had been issued or given.
>
> 40.4.4 The arbitrator's decision shall be binding on the parties who shall give effect to it without delay."

[31] The arbitration proceedings were conducted in terms of the 2013 edition of the rules for the conduct of arbitrations of the association (the Rules). Article 20(2) of the Rules provides that a statement of claim shall include, amongst others, the following particulars:

(i) a statement of the facts supporting the claim;
(ii) the points at issue;
(iii) the relief or remedy sought; and
(iv) the legal grounds supporting the claim.

[32] Article 21 of the Rules further provides that a respondent in arbitration proceedings shall communicate its statement of defence in writing and that such statement of defence shall reply to the statement of claim. In terms of article 21(3) of the Rules a respondent may make a counterclaim in its statement of defence. Article 21(4) of the rules provides that the provisions of article 20(2) to (4) of the rules shall apply to the counterclaim.

The award

[33] The arbitrator's award was delivered in December 2018 setting aside the adjudication determination. The arbitrator, with reference to clause 40 (the arbitration clause) of the JBCC, concluded that —

(i) the JBCC Contract was not terminated, either by effluxion of time on 18 November 2015, nor by mutual agreement on 17 March 2016. The arbitrator held that the JBCC Contract was still valid and extant for the project and would be used to determine the remaining claims between the parties.

(ii) the certificate as included as the Principal Agent's Final Account dated 6 May 2016 is not the final account and must be set aside.

(iii) the respondent is not entitled to payment in the amount of R1 210 535.84 (including VAT) for the work performed by the respondent for the applicant.

(iv) the respondent is not liable for any deductions for penalties on the project in the amount of R248 000.00.

(v) the respondent is entitled to alternative relief and payment of the Final Account certified by the Principal Agent's Quantity Surveyor (the QC Final Account) in the gross amount of R1 053 311.55 (excluding VAT) less the payment in the sum of R350 150.55 (excluding VAT) for works performed by the respondent for the applicant.

(vi) the respondent was entitled to the interest for amounts due to the respondent for work done for the applicant on the gross sum of R 864 561.55 excluding VAT less the payment in the sum of R 350 150.55 excluding VAT for certificates 1 and 2.

(vii) the respondent is awarded the costs of the award. Each party shall bear their own costs for the adjudication.

The applicant's case

[34] The applicant premised its argument on the principle that the arbitration proceedings had to be conducted in light of the contents of the statement of claim and statement of defence and that the arbitrator was by law required to conduct the proceedings in accordance with the rules and what was pleaded in the statement of claim and statement of defence.

[35] The applicant submitted that the arbitrator did not confine himself to the pleadings but went on to consider and make findings and rulings on issues which fell outside the pleadings and which he was not authorized to entertain in terms of the Rules. This, the applicant submitted, constitutes a gross irregularity in the conduct of the arbitration proceedings because the arbitrator exceeded his terms of reference or jurisdiction.

The pleadings

[36] The applicant, in applying for the arbitrator to revise the adjudicator's award, filed a statement of claim in terms of which it pleaded as follows:

(i) The completion date for the works was extended to 18 November 2015 and not further. Accordingly, the JBCC Contract came to an end by effluxion of time on 18 November 2015;

(ii) The adjudicator was called upon to decide that the JBCC Contract was terminated by mutual agreement on 17 March 2016 and, having found that it was not so terminated, was not entitled to make a finding that the respondent was entitled to payment for the works completed by it. In essence, the applicant pleaded that the respondent's entitlement to payment for works completed would only arise if the JBCC Contract was cancelled by mutual agreement on 17 March 2016;

(iii) The adjudicator had regard to documents, drew inferences, made assumptions and came to conclusions that he was not entitled to, that were not supported by the evidence before him, and that were not part of the issues placed before him.

[37] The applicant prayed in its statement of claim that the adjudicator's decision be revised to read that: (i) The respondent's referral is dismissed; (ii) The applicant's costs (in the adjudication) shall be paid by the respondent; and (iii) The applicant's costs in the arbitration shall be paid by the respondent.

[38] The respondent, who also applied for the arbitrator to revise the adjudication determination, filed a statement of defence in terms of which the respondent denied that the JBCC Contract was terminated by effluxion of time on 18 November 2015 and pleaded that the JBCC Contract was terminated by mutual agreement on 17 March 2016.

[39] In paragraph 20.3 of the respondent's statement of defence the respondent specifically stated:

> "the respondent is entitled to payment in the amount of R1 210 535.84… inclusive of VAT for works performed by the Respondent for the Claimant."

[40] The respondent denied that an award in favour of the respondent for payment for works completed was dependent on a finding that the JBCC Contract was terminated by mutual agreement on 17 March 2020 and pleaded that the claim for payment was a claim based on the value of works completed by the respondent as certified by the principal agent. The applicant disagreed with the argument and submitted that the respondent was only entitled to what was claimed and, because the respondent's claim flowed from the settlement agreement it argued was concluded, once the settlement agreement was found not to have been concluded, the respondent was not entitled to the R1 210 553.84 claimed in paragraph 20 of the statement of defence. That, according to the applicant, should have been the end of the matter because that was the only issue that was in dispute according to the pleadings. By entertaining the QC Final Account, the arbitrator strayed beyond its jurisdiction rendering the award reviewable. Therefore, so it was submitted, the arbitrator was not called upon, by the pleadings, to make a payment order based on the quantity surveyor's final account. The applicant also submitted that it was not heard on whether or not it was liable in the amount set out in the QC Final Account because, the applicant submitted, that was not an issue in dispute on the pleadings.

GROUNDS OF REVIEW

[41] The applicant raised six grounds of review. In light of applicant's counsel's concession that no case has been made out for a review on the basis of misconduct (section 33(1)(a) of the Act), I will therefore no longer consider those grounds of review that deal with misconduct. The main ground for review is encapsulated in more than one of the grounds for review. In essence it is argued that the arbitrator exceeded its jurisdiction in entertaining a claim based on the Final Account of the QC dated 3 October 2016 and that it did so without giving the applicant an opportunity to be heard thereon. It is also submitted that the arbitrator was biased in favour of the respondent and against the applicant in relying on the 3 October Final Account (as this was not the applicant's pleaded case and by not inviting the applicant to make representations as to why an order should not be made against it in relation to the 3 October 2016 Final Account). The applicant submitted that this was unfair and resulted in there not being a fair trial to which the applicant was entitled.

[42] These grounds of review fall within the purview of section 33(1)(b) of the Act. In order to succeed on this ground the applicant must persuade the court that it did not have its case fully and fairly determined before the arbitrator and that it therefore did not receive a fair trial.

[43] This question must be considered taking into account the pleadings and the powers conferred upon the arbitrator in terms of clause 40 of the JBCC agreement in terms of which it is stated that the arbitrator –

> "Should have the power to open or revise any certificate, opinion, decision, requisition or notice relating to the dispute as if no such certificate, opinion, decision, requisition or notice had been issued or given."

[44] I have already pointed out that it is the applicant's submission that the respondent formulated its payment relief on the basis that there was an alleged mutual termination agreement and submitted that, in simple terms, there had to be a mutual termination agreement before the obligation to pay could arise. Once the arbitrator held that there was no settlement agreement, the respondent's entitlement to payment (according to his argument) therefore also fell away.

[45] I do not agree that the arbitrator misconstrued the pleadings and as a result strayed beyond the jurisdictional boundaries imposed on him. Firstly, having regard to clause 40 of the arbitration agreement, the arbitrator was clearly afforded wide powers. Secondly, the respondent referred a dispute in terms of clause 20.3 of its statement of defence regarding its entitlement to payment for works performed by the respondent. Once the arbitrator decided that the settlement agreement was not concluded with the result that the entitlement to payment could not be based on the settlement agreement and that the JBCC Contract was extant and thus applied to the contract, the arbitrator was, in my view, entitled to decide the respondent's entitlement to payment in terms of the contract. The mere fact that the basis for the payment entitlement shifted from the terms of the settlement agreement to the terms of the JBCC contract does not lead to the conclusion that the arbitrator had no jurisdiction. The entitlement for payment for works performed by the respondent to the applicant was before the arbitrator. I must also add that counsel on behalf of the applicant, to a question posed by the court, did not deny that the respondent was entitled to payment for work done, but responded that the respondent then had to amend its pleadings to provide for its claim to payment on that basis. There is no merit in this submission. Thirdly, the issue of the 3 October 2016 Final Account prepared by the QS was before the arbitrator. Despite the fact that the applicant submitted that it was not afforded an opportunity to be heard regarding this account, it is clear from the arbitration record that the account was introduced during the proceedings and that evidence was led about the account.

[46] Mr. Oyewo was the only witness on behalf of the applicant. He was the appointed principal agent on behalf of the applicant in respect of the project. He explained that the respondent had struggled to complete the contract. He confirmed under cross-examination that the Final Account was completed by the consultant QS. Mr. Oyewo explained that he was involved in the preparation of the final account in that he had to define the scope of works (although there was a reduction of the scope of works in order to finish the project) that was completed. He also confirmed the date of the final account to be 3 October 2016 and confirmed that he received it. Importantly, Mr. Oyewo confirmed that because a settlement agreement was not signed, the contract continued on the basis of the JBCC:

> "Because it [the settlement agreement] was never signed we continued to run the contract on the basis of the JBCC. And we then said, the QS then said that if you indeed want me to prepare a final account then the contract, the job has to be concluded or the project determined. So it was only after we had terminated the contract that he then prepared the final account…… Yes I took a look at it. I went through it with the QS."

[47] The applicant also took issue with the arbitrator's formulation of "alternative relief" referred to in paragraph 137 of the award. The applicant submitted that there was no lawful basis to entertain the so-called "alternative relief" more so without giving the applicant a hearing thereon. Nothing turns on this. The dispute about the payment for works completed was properly before the arbitrator and properly ventilated. I should also in conclusion point out that the applicant made out no case that the arbitrator was biased.

ORDER

[48] The following order is made:

(i) The application is dismissed with costs.

(ii) The arbitration award dated 7 December 2018 is made an order of court.

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AC BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically sent therefore unsigned

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 email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 April 2021.

APPEARANCES

For the Applicant:	KENNEDY TSATSWANE SC
Instructed by:	GILDENHUYS MALATJI INC
For the Respondent:	ADV LF LAUGHLAND
Instructed by:	MDA CONSULTANTS
Date of hearing:	16 April 2021
Date of judgment:	26 April 2021