THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no. 946/2012

In the matter between:

REWARD VENTURES 01 CC **Appellant**

and

ROLAND GUY WALKER **First Respondent**

PIETRO LUIGI GUISEPPE CARRARA **Second Respondent**

Neutral citation: *Reward Ventures 01 CC v Walker* (946/12) [2013] ZASCA 207 (05 December 2013)

Coram: Maya, Bosielo, Wallis, Petse JJA and Meyer AJA

Heard: 7 November 2013

Delivered: 5 December 2013

Summary: Review application – s 33(1) of the Arbitration Act 42 of 1965 – whether arbitration award which did not expressly dismiss the opposing parties' counter-claims final – whether the arbitrator committed a gross irregularity by making such an award.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Kathree-Setiloane, Moshidi and Makgoka JJ sitting as court of appeal):

1 The appeal is upheld with costs including the costs of two counsel.

2 The judgment of the court below is set aside and replaced with the following:

'The appeal is dismissed with costs.'

JUDGMENT

MAYA JA (BOSIELO, WALLIS, PETSE JJA and MEYER AJA concurring):

[1] This is an appeal against an order of the South Gauteng High Court, Johannesburg (Kathree-Setiloane J, Moshidi and Makgoka JJ concurring). The full court upheld an appeal against the order of the court of first instance (Tsoka J) dismissing the respondents' application for the setting aside of an arbitration award made by Mr Clifford Mosdell (the arbitrator) in terms of ss 33(1)(*a*) and (*b*) of the Arbitration Act 42 of 1965. The appeal is with the special leave of this court.

[2] The dispute arose from a written sale agreement (the agreement) concluded by the parties on 4 June 2008 in terms of which the appellant sold the respondents the Paquita restaurant situated in Knysna for a sum of R2,64 million. According to the agreement, this sum excluded Value Added Tax (VAT). But the respondents contended otherwise. They alleged that the price included VAT as previous drafts and a prior

cancelled agreement in respect of the restaurant attested. They reckoned that the appellant had, prior to signature of the agreement, surreptitiously altered the agreement to reflect the purchase price as 'R2,64 million plus Value Added Tax'. Accordingly, they refused to pay the VAT portion which the appellant claimed from them.

[3] The parties could not resolve the dispute. In January 2009, the appellant commenced arbitration proceedings against the respondents as provided by the agreement. It claimed payment of the VAT portion in the sum of R369 000 less R123 518,43 which it said it owed the respondents under the agreement. In their defence, the respondents averred that clause 4 of the agreement, which set out the purchase price, did not reflect the true agreement between the parties. They pleaded that it was a tacit alternatively implied term of the agreement that the purchase price was inclusive of VAT and that the insertion of the words 'plus Value Added Tax', which they sought to have deleted by rectification of the agreement in a counterclaim, was occasioned by a common error or an intentional act by the appellant. They also sought a statement and debatement of the detailed account of all transactions of the restaurant for the period 14 April to 15 July 2008 and the calculation of profit for that period.[1]

[4] The proceedings started. After making certain procedural directives and an interim award concerning the venue, allowing the exchange and amendment of the pleadings and the giving of discovery between the parties and hearing evidence, the arbitrator decided the matter in the appellant's favour. He granted the relief sought by the appellant without furnishing his reasons or expressly dismissing the counterclaims. The respondents were not pleased with the arbitrator's award and complained that it was incomplete because it did not give his reasons and did not address their

[1] In an addendum to the agreement the parties had, *inter alia*, agreed that the respondents would be entitled to Paquita's profits for this period in respect of which the appellant would provide, effective from 15 July 2008, a detailed account of all transactions for the period, verified by an independent accountant, and pay them the amount determined. According to the appellant, supported by an accountant's report, the sum of R123 518,43, which it offered to set off against its claim for VAT, represented these profits. The relief sought by the respondents for a detailed account and debatement thereof was claimed on the basis that the appellant had failed to provide a detailed account on the effective date or appoint an independent accountant to verify it.

counterclaims. In their opinion, this constituted a failure by the arbitrator to discharge his arbitral duties and they asked him to furnish his reasons. The arbitrator refused the request because he regarded himself *functus officio* and the agreement made no provision for the furnishing of reasons which the parties did not seek during the proceedings. The respondents then launched the review proceedings under ss 33(1)(*a*) and (*b*) of the Arbitration Act which provides for the review of an arbitrator's award in certain circumstances. They cited gross irregularity and misconduct based on several grounds chief of which were that the award was arbitrary, biased and unfair because it ignored the counterclaims and was not supported by the evidence.

[5] Tsoka J found that the arbitrator had committed no irregularity or misconduct and dismissed the review application. He reasoned that the arbitrator had merely exercised the discretion vested in him by the parties and was not obliged to provide reasons in accordance with their agreement; that the evidence adduced at the arbitration that the respondents had requested a tax invoice from the appellant to claim a VAT refund from the Receiver of Revenue, which they were actually paid, after establishing that the purchase price excluded VAT, was fatal to the contention that rectification was not considered and that the record made clear that the arbitrator dealt with and dismissed the counterclaim by implication; and that it was unnecessary for the arbitrator to deal with the second counterclaim expressly as the accountant's testimony in the arbitration showed that the respondents, and not the appellant, bore the obligation to furnish the accountant with a detailed account of the relevant transactions because they were in possession of the restaurant during the period in issue and the award took the accountant's determination of R123 518,43 into account and accordingly credited the respondents' account.

[6] The respondents' application for leave to appeal against this judgment was granted to the full court to decide only whether the arbitrator made a final order. The full court characterized the issues before it as being whether (a) the arbitrator had made a

finding in respect of the counterclaims; (b) the award was final; and (c) the arbitrator, in making the award as he did, committed an irregularity as contemplated in s 33(1) of the Arbitration Act. The full court overturned Tsoka J's judgment on the following findings. The need to infer that the counter-claims were considered and dismissed by implication resulted in an impermissible hybrid order which was partially a finding made by the arbitrator and partially a finding made by the court. This meant that the award was not final as it did not deal expressly with the counterclaims especially where reasons had not been given, which constituted misconduct. Furthermore, the court of first instance improperly enquired into the merits of the award and thus conflated its review powers with its appeal powers. The arbitration award was therefore set aside and the appellant was ordered to pay the costs of the review application and the appeal. It is against this decision that this court granted the appellant special leave.

[7] The issues on appeal before us were whether (a) the full court exceeded the ground on which the court of first instance granted leave to appeal; (b) the arbitrator's decision was final; and (c) if it was not, the arbitrator was guilty of gross misconduct in the conduct of the arbitration. The appellant argued that the full court should have confined its adjudication to the sole question whether the arbitrator granted a final order which included the counterclaims and that the judgment of the court of first instance was correct for the reasons it gave. The respondents countered that the question whether or not the award was final was inextricably intertwined with the question whether the arbitrator, in making the award as he did, committed a gross irregularity and that once the full court found that the award was not final, it was competent for it to consider whether the arbitrator committed a gross irregularity in the conduct of the arbitration and whether the award should be set aside.

[8] It seems to me that the question whether or not the full court exceeded its jurisdiction need not engage us as it would not be dispositive of the entire appeal in any event. The primary issue between the parties, ie whether the award constitutes a final

order encompassing the counterclaims, was squarely before the full court and the correctness of its finding in that regard would still have to be decided even if it were found that it went beyond the scope of the issue referred to it. I will therefore assume without deciding that the full court acted within its appeal powers.

[9] Section 28 of the Arbitration Act indeed requires an award to be final to be binding upon the parties and decrees that '[u]nless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, 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'. Section 33(1), upon which the respondents relied, allows a court to interfere with an award where an arbitration tribunal has misconducted itself or committed a gross irregularity or has exceeded its powers in relation to its duties or the award has been improperly obtained.[2]

[10] As indicated, the parties' dispute was referred to arbitration in terms of their agreement the relevant part of which provided as follows:

'12. Any dispute at any time between any of the parties hereto in regard to any matter arising out of this agreement or its interpretation or rectification shall be submitted to and decided by arbitration . . . The arbitration shall be held . . . in a summary manner . . . on the basis that it shall not be necessary to observe or carry out either . . . the usual formalities of procedure; or the strict rules of evidence . . . The arbitrator shall decide the matters submitted to him according to what he considers just and equitable in the circumstances and therefore the strict rules of law need not be observed or be taken into account by him in arriving at his decision . . .'

[11] The respondents' counsel rightly accepted during argument that the arbitrator was not obliged to furnish an award embodying reasons because of the provisions in clause 12 of the agreement. However, he urged us to draw an inference that the

[2] *Leadtrain Assessments v Leadtrain* 2013 (5) SA 84 (SCA) para 9.

arbitrator did not apply his mind to the counterclaims because had he done so he would have ordered rectification as he previously did, on the strength of the prior cancelled agreement, in respect of the parties' dispute concerning the venue of the arbitration proceedings which stood on the same grounds as the VAT counterclaim. Surprisingly, this submission was made for the first time in the entire proceedings on appeal before us and had not been raised in the affidavits or even in argument in the courts below. I daresay that its merit is highly doubtful and it would, in any event, be unfair to the appellant to allow it to be raised when it has not been properly canvassed or investigated previously.[3]

[12] But there is a more compelling yet simple answer to the respondents' contention that the arbitrator disregarded their counterclaims. In the award itself, the arbitrator first set out clause 12 of the agreement in terms of which the dispute was referred to him and its provision for summary proceedings. He then described the relief sought by the appellant. And thereafter, in paragraph three of the award, he fully described the relief sought by the respondents in their counterclaims. Finally, the arbitrator referred to the parties' agreement in relation to the determination of his fees and gave his order for payment of a sum of R246 081,57 which comprised the VAT sum of R369 600 less the amount due in respect of the respondents' claim for a debatement of account, R123 518,43. Surely, no other inference but that the arbitrator considered the respondents' counterclaims and found them wanting can be drawn from these facts. Therefore, the arbitrator executed his mandate as envisaged in clause 12 of the agreement and did not breach any provisions of the Arbitration Act.

[13] This, in my view, is the end of the enquiry. The questions whether the arbitrator committed a gross irregularity or misconduct or whether the respondents even invoked the correct provisions of the Arbitration Act, if the award was indeed inchoate, do not arise. It should be pointed out though that the soundness of the arbitrator's assessment

[3] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 30 and cases there cited.

of the evidence, in particular regarding questions such as whether the accountant's evidence provided a 'reconciliation contemplated in terms of the agreement', seem to me to be issues to be properly decided in an appeal. They bear no relevance in these proceedings which are concerned purely with the conduct of the arbitration and not its merits.

[14] In the result, the following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The judgment of the court below is set aside and replaced with the following:

'The appeal is dismissed with costs.'

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MML Maya

Judge of Appeal

APPEARANCES:

For the Appellant:	PMM Lane SC (with G Doubell)
	Instructed by:
	Smit Jones & Pratt, Johannesburg
	Symington & De Kok, Bloemfontein
For the First Respondent:	JP Daniel SC
	Instructed by:
	Thompson Wilkes Inc, Johannesburg
	Webbers