THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case Number : 434 / 06

In the matter between

LUFUNO MPHAPHULI & ASSOCIATES (PTY) LTD **APPELLANT**

and

NIGEL A ANDREWS **FIRST RESPONDENT**
BOPANANG CONSTRUCTION CC **SECOND RESPONDENT**

Coram : HARMS ADP, MTHIYANE, LEWIS, PONNAN JJA et MALAN AJA

Date of hearing : 5 NOVEMBER 2007

Date of delivery : 22 NOVEMBER 2007

SUMMARY

Arbitration – review of award – grounds for setting aside – condonation – refusal of

Neutral citation: This judgment may be referred to as :
***Lufuno Mphaphuli & Associates* v *Andrews* [2007] SCA 143 (RSA)**

PONNAN JA

[1] The appellant, Lufuno Mphaphuli and Associates (Pty) Ltd ('Lufuno'), was one of Eskom's principal contractors on the Tjatane, Malegale and Sebitse Electrification Project in the Limpopo Province. It in turn concluded, pursuant to a tender process, a written agreement incorporating the engineering and construction short contract with the second respondent, Bopanang Construction CC ('Bopanang'), on 16 May 2002, in terms of which the latter had to execute certain electrical and construction work.

[2] Certain disputes having arisen between Lufuno and Bopanang relating to the execution of the work and payment, the latter issued summons out of the Pretoria High Court for payment of what it alleged were moneys due to it in terms of the agreement. It furthermore launched an urgent application on 11 April 2003 to interdict Eskom from effecting payment of the sum of R656 934.45 (being the amount claimed by it) to Lufuno in terms of the principal electrification agreement. The parties agreed that the dispute between them would be resolved by arbitration and in consequence of that agreement the action was abandoned. The first respondent, Nigel Andrews ('Andrews'), was duly appointed arbitrator.

[3] On 16 October 2003 and after certain preliminary meetings, the parties concluded an arbitration agreement which defined the purpose of the arbitration as follows: 'To determine whether payment is due in terms of the contract …' and, if so -

'The extent of such payment due, having regard to the scope of the agreement, any agreed amendments or instructions for amendments thereto by the defendant or Eskom; the value of the work that has been done by Bopanang; the effect of any defects, if any, and the rectification thereof; any and all payments made to Bopanang. Therefore a final assessment of monies reasonably due by one of the parties to the other needs to be made by the arbitrator.'

The further material terms of the arbitration agreement, to the extent here relevant, were that:

'2 The final award made by the arbitrator . . . shall be final and binding on the parties.

3 Any payment to be made by any of the parties in terms of the award . . . shall be due and payable to the other party within 21 calendar days of the date of the written award . . . .

6 The arbitrator shall be entitled to liaise with Eskom's duly authorised representatives, and to request any documentation with regard to this project from Eskom, who is hereby authorised by both parties to make such documentation available.

7 The arbitrator shall commence with the inspection and measurement of the work done on site on or about 27 October 2003. Each party shall provide their reasonable co-operation with the aim of completing the process as speedily as possible, and appoint representatives to attend the physical inspection and measurement.

10 This agreement constitutes the full and complete agreement reached between the parties and no variation, amendment, alteration, addition or omission shall be valid and binding on the parties unless reduced to writing and signed by all parties or their duly authorised representatives.'

[4] The parties filed their claim and counter-claim respectively and the arbitration was duly conducted before Andrews. On 23 August 2004, Andrews despatched his award ('the award') as well as his reasons therefor to the parties per facsimile. He held that Lufuno was liable to Bopanang in the sum of R339 998.83 with interest at the rate of 0.5 per cent per week, computed from 6 October 2002. Insofar as the costs were concerned, he ordered each party to pay half of his costs and their own legal costs.

[5] After having sought and obtained legible copies of an appendix to the award, Lufuno's then attorney sent a letter to Andrews on 25 August 2004. That letter asserted that Lufuno had already identified certain items which required further clarification and undertook to revert to Andrews with specific queries once the appendix had been thoroughly considered. The letter further suggested a round table discussion with Andrews, in order that 'matters be clarified as soon as possible', which according to the writer would be in the best interests of everybody. That letter elicited the following reply from the Andrews on 27 August 2004:

'In terms of Clause 2 of the signed arbitration agreement between the parties the final award made by the arbitrator is final and binding on the parties. There is no provision in the arbitration agreement for you to respond to the arbitrator on his decision or for the arbitrator to enter into any further discussion on such. I therefore cannot enter into any further discussions upon this issue and it becomes a matter between the parties. I trust this clarifies the situation.'

[6] On 16 September 2004, Lufuno's then attorney wrote to Bopanang's attorney that they held instructions to take the matter on review to the High Court. When nothing further was heard from him and after the expiry of the 21 calendar days

envisaged in Clause 3 of the arbitration agreement, Bopanang applied during October 2004, in terms of s 31(1) of the Arbitration Act 42 of 1965, for the award to be made an order of court, and for judgment in its favour in the sum of R339 998.82, with interest. That application was opposed by Lufuno. It filed its answering affidavit on 13 December 2004 and simultaneously launched an application to review and set aside the award, as also for an order that the matter be remitted to the arbitrator for him to review his award.

[7] The principal thrust of Lufuno's application was that Andrews '… had awarded numerous costs in favour of Bopanang for work never done nor even claimed …' by it. And, as Andrews had refused to discuss the matter any further, Lufuno, so it was further contended, would suffer final and irreparable loss. It thus, so the contention proceeded, had no alternative but to approach the High Court for a review of the arbitrator's decision and award.

[8] On 7 March 2005, Andrews filed his reasons as well as a record of the arbitration proceedings with the registrar of the High Court in accordance with Rule 53. On 11 April 2005, Lufuno's then attorney informed Bopanang and Andrews that it did not wish to amend, add to or vary the terms of its notice of motion or supporting affidavit and that they could therefore proceed to file their answering affidavits in the review application. Bopanang and Andrews duly did so, by filing what came to be termed their first answering affidavits on 12 and 16 May 2005 respectively.

[9] In its affidavit Bopanang asserted that Lufuno had failed to comply with s 32(2) of the Act, inasmuch as the review application had not been launched within six weeks after publication of the award. Nor, for that matter, had Lufuno sought an extension of time in terms of s 38 of the Act. Accordingly, as the review application was out of time and as good cause had not been shown, nor relief sought in terms of s 38, the application fell, on that basis alone, to be dismissed with costs.

[10] During June 2005 Lufuno's then attorney withdrew and was replaced with its current attorney of record. There then followed an exchange of correspondence between Lufuno's new attorney and Bopanang's attorney of record. On 21 July 2005, Lufuno's attorney sent a letter of demand to Bopanang's attorney claiming

payment of an amount of R136 000 in respect of what it alleged were penalties arising from Bopanang's repudiation of the contract. In the meanwhile, no replying affidavit having been filed by Lufuno in the review application, Bopanang applied for a court date and the matter was set down for hearing on the opposed roll on 7 October 2005.

[11] On 4 August 2005, Lufuno delivered an amended notice of motion and a supplementary founding affidavit. It now sought in addition to the relief envisaged in its original notice of motion, a declaratory order that Bopanang was liable to it in the sums of R136 000, R115 859.76 and R85 200, with interest on each of those amounts. It accordingly sought an order that the award be substituted with an order that Bopanang pay to it the sum of R623 035.20 together with interest. It furthermore sought an order condoning '… to the extent necessary, the late filing of this application and the amended notice of motion and supplementary founding affidavit.'

[12] Bopanang and Andrews then filed a second set of answering affidavits to Lufuno's supplementary founding affidavit on 16 and 29 September 2005 respectively. On 3 and 4 October 2005 Lufuno delivered replying affidavits respectively to those answering affidavits. On 20 December 2005, Lufuno delivered a second notice of intention to amend its notice of motion. It now sought, in addition, an order in terms of s 38 of the Act, to the effect that the periods stipulated in s 33(2) be extended to provide for the admission of its original founding affidavit as amended by its supplementary founding affidavit. It also sought as an alternative to the matter being remitted to Andrews, that the dispute be referred to trial alternatively for the hearing of oral evidence on certain specified issues.

[13] Both Lufuno's review application and Bopanang's application for the award to be made an order of court were heard by Van der Merwe J in the Pretoria High Court on 24 and 25 January 2006. In each instance Bopanang succeeded with costs on the punitive scale as between attorney and client. Various applications for condonation by Lufuno confronted Van der Merwe J. The learned judge held that Lufuno had

'. . . made out no case on the merits of the application. No case was made out in the founding affidavit. The attempts to make out a case in the various supplementary affidavits did not succeed. The applications for condonation are therefore refused on the basis that there was no proper explanation for the delay as well as on the basis that no case was made out for the relief sought.'

Having expressed himself quite firmly on the merits and having demonstrated his displeasure at what he described as vexatious conduct on the part of Lufuno with a punitive costs order, the learned judge thereafter and without furnishing any reasons, somewhat surprisingly, granted leave to appeal to this court.

[14] The legal principles applicable to an enquiry of this kind were recently set out by Harms JA on behalf of this court.[1] Applying those principles to the facts of this case, which I have set out in some detail in this judgment, illustrates, to my mind, that Lufuno fundamentally misconceived the nature of its relief. Moreover, Lufuno's founding papers assumed, erroneously so - as was subsequently conceded by it - that the private arbitration process was an administrative one, which had to be lawful, reasonable and procedurally fair.[2] That fundamental misapprehension permeated its founding application, which as I shall presently show, it subsequently sought in its supplementary papers, to remedy. The parties clearly intended Andrews to have exclusive authority to decide whatever questions were submitted to him and that each was precluded by virtue of the provisions of Clause 2 of the arbitration agreement from appealing against his decision. The parties had accordingly waived the right to have the merits of their dispute re-litigated or reconsidered.[3] Interference by a court was therefore limited to the ground of procedural irregularities as set out in s 33(1) of the Act.[4] Lufuno could thus challenge the award only by invoking the statutory review provisions of s 33(1) of the Act, as any further ground of review, either at common law or otherwise, had by necessary implication been waived by it.[5]

[15] The grounds for any review, as well as the facts and circumstances upon which a litigant wishes to rely, have to be set out in its founding affidavit amplified insofar as may be necessary by a supplementary affidavit after the receipt of the

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[1] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).
[2] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA)(Pty) Ltd* 2002 (4) SA 661 (SCA) para 25.
[3] *Telcordia* para 50.
[4] *Telcordia* para 51.
[5] *Telcordia* para 51.

record from the presiding officer, obviously based on the new information that has since become available.[6] The original founding affidavit filed by Lufuno comprised ten pages excluding annexures. Lufuno abused its right to amplify in this case by filing a supplementary affidavit of 80 pages in which it raised all manner of new allegations.

[16] The only new information that emerged from the record of the arbitration proceedings filed by Andrews in terms of Rule 53(1)(*b*) was what Lufuno described as evidence of three 'secret meetings' between Andrews and Bopanang's representative. That new information could hardly justify the lengthy supplementary affidavit that had been filed, ostensibly in terms of Rule 53(4). Leaving aside for the moment the secret meetings to which I will return, Lufuno sought in effect to make out a completely new case in its supplementary affidavit. That plainly was not authorised by Rule 53 or by any other principle of our law. In those circumstances, it seems to me, the court below can hardly be faulted for having exercised its judicial discretion against Lufuno under s 38 of the Act. It has not been suggested that the discretion was exercised capriciously or upon a wrong principle or upon any other ground justifying interference by a court of appeal.[7] That, one would have thought, would have been the end of the matter. But, says Lufuno, relying primarily on the 'secret meetings' to which I have already alluded, Andrews exhibited conscious bias in favour of Bopanang and against it. Bopanang, on the other hand, urged upon us that in this case an arbitration *stricto sensu* was not intended and that the Act does not apply. Foundational to that argument is the contention that Andrews was acting as an expert or valuer and not as an arbitrator whose position was governed by the Act. Each of these contentions will be considered in turn.

[17] In its founding affidavit Lufuno stated :

'It should be noted that the task of the arbitrator was primarily to work through the documentation provided and to conduct a physical inspection and measurement of the work factually done by [Bopanang]. The agreement does not provide for pleadings or oral evidence by the parties or their witnesses.'

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[6] *Telcordia* para 32.
[7] *Ex parte Neethling* 1951 (4) SA 331 (A) at 335.

In that context, Andrews had invited comment from the parties on technical issues pertaining to the measurements that he had made. As Lufuno itself stated, the agreement had not provided for pleadings or oral evidence by the parties or their witnesses. It followed that Andrews' inspection, re-measurement and estimation had to form the basis upon which he would arrive at a determination which by agreement between the parties was to be conclusive. That, plainly, had to have been within the contemplation of the parties when they concluded their agreement. Lufuno fully participated in that process. Furthermore, no legal argument or submissions were to be made by the parties prior to Andrews' finalisation of his award.

[18] Were an arbitrator to discuss the merits of the matter with one of the parties to the exclusion of the other that, ordinarily at any rate, would constitute a serious irregularity, which may without more warrant the award being set aside.[8] But, against the backdrop of the arbitration agreement and the context of the arbitrator's mandate, those meetings were quite innocuous and had no effect whatsoever on Andrews. To describe them as 'secret meetings', as Lufuno does, is to give to them a sinister connotation that is wholly unwarranted. The purpose of those meetings was simply to verify certain figures and to clarify the use of certain items. That fell within the parameters of Andrews' mandate. That being so, even if he had been wrong those would have been errors of the kind committed within the scope of his mandate.[9]

[19] Proof that Andrews misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for the setting aside of the award. An error of fact or law, or both, even a gross error, would not *per se* justify the setting aside the award.[10] It followed that Lufuno had to go further than that. For, as Smalberger ADP put it:

'A gross or manifest mistake is not *per se* misconduct. At best it provides evidence of misconduct … 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

[8] *S v Roberts* 1999 (4) SA 915 (SCA) para 23.
[9] *Telcordia* para 86.
[10] *Total Support* para 35.

as "wrongful and improper conduct" …, "dishonesty" and "*mala fides* or partiality" … "moral turpitude".'[11]

[20] Lufuno asserted bias. It was for it to establish a reasonable apprehension of bias.[12] The threshold for a finding of real or perceived bias is high.[13] The bias complained of was, according to Lufuno, grounded in the relationship between Andrews and Bopanang. Why Andrews would have shown an inclination to favour the one party to the dispute does not emerge on the papers. The three 'secret meetings', as I have just illustrated, were not only innocuous but also occurred within the scope of Andrews' mandate. The proceedings, on any yardstick, were thus not infected by them. No other overt act is relied upon in support of the proposition that the proceedings were contaminated and that the award is therefore susceptible to attack. Simply put, there are no reasonable grounds to think that Andrews might have been biased. It must follow that the award, on this score, is immune from interference.

[21] I turn to Bopanang's argument that Andrews was not in truth an arbitrator but rather a valuer. The distinction urged upon us in this case is illustrated by Ogilvie - Thompson JA, who observed:[14]

'This argument assumes something in the nature of an appeal to the arbitrator against the decision of the auditor. That is, however, not the position. In making his valuation, the auditor hears neither party. His is not a *quasi*-judicial function. He reaches his decision independently on his knowledge of the company's affairs. His function is essentially that of a valuer (*arbitrator*, *aestimator*), as distinct from that of an arbitrator (*arbiter*), properly so called, who acts in a *quasi*-judicial capacity. The distinction between *arbitri* and *arbitratores* was well known to our writers .... The *arbitrator* or *aestimator* need not necessarily be an entirely impartial person. In discharging his function he is of course required to exercise an honest judgment, the *arbtirium boni viri*; but a measure of personal interest in not necessarily incompatible with the exercise of such a judgment.'

[22] It seems to me that the parties intended the Arbitration Act to apply to their dispute, within the limits of their agreement. A finding that Andrews was a valuer would not assist Lufuno and does not require a decision. Unlike an arbitrator, a

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[11] *Total Support* para 21.
[12] *S v Basson* 2007 (3) SA 582 (CC) para 29.
[13] *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) para 15.
[14] *Estate Milne v Donohoe Investments (Pty) Ltd* 1967 (2) SA 359 (A) at 373H – 374C.

valuer does not perform a *quasi*-judicial function but reaches his decision based on his own knowledge, independently or supplemented if he thinks fit by material (which need not conform to the rules of evidence) placed before him by either party. Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it.[15] It has not been suggested that Andrew's decision was not arrived at honestly and in good faith. Nor was such a case made out on the papers. Here as well therefore, Lufuno must fail.

[23] It follows that the conclusion reached by Van der Merwe J cannot be faulted. In the result the appeal is dismissed with costs.

V M PONNAN
JUDGE OFAPPEAL

CONCUR:

HARMS ADP
MTHIYANE JA
LEWIS JA
MALAN AJA

[15] Per Lord Denning MR *Arenson v Arenson* [1973] 2 All ER 235 at 240 e-f; *SA Breweries v Shoprite Holdings* [2007] SCA 103 (RSA) paras 6, 22 and 41.