CCA/0003/2013

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

M&C CONSTRUCTION INTERNATIONAL (PTY) LIMITED **APPLICANT**

AND

LESOTHO HOUSING AND LAND DEVELOPMENT CORPORATION **RESPONDENT**

JUDGMENT

Coram : L.A. Molete J
Date of Hearing : 4, 5 August, 2014
Date of Judgment : 19th March 2015

SUMMARY

Arbitration – When proceedings may be set aside – Arbitrator granting Award under "loss of opportunity" – Matter referred back to him and award confirmed – Court's Power to intervene where gross irregularity committed – Loss of opportunity claim assessed – Mora interest held to be sufficient – Loss of opportunity not part of our law – Parties ordered to agree on another arbitrator – Award set aside.

ANNOTATIONS

CITED CASES

Holmdene Brickworks V Roberts Construction Company 1977(3) SA670 (A)

Telcordia Technologies Inc. V Telkom SA Ltd 2007(3) SA 266 (SCA)

Goldfields Investment Ltd and Another V City Council of Johannesburg and Another 1938 TPD 551 at 559

Sidumo and Another V Rustenburg Platinum Mines Ltd and Others 2008(2) SA 24 (cc)

Jaremy Edward Clarke et al V Semenya et al 2008 Za GPHC 391

Future Rustic Construction (PTY) Ltd V Spillers Waterfront (Pty) Ltd 2011(5) SA 506

Nationwide Car Rentals (Pty) Ltd V Commissioner, Small Claims Court, Germiston and Another 1998(3) SA 568(W)

Dickenson & Brown V Fisher Executors 1915 A.D. 166

Donner V Ehrlich 1928 WLD 159

North & Son (Pty) Ltd V Albertyn 1962(2) SA212

Union Government V Jackson and Others 1956(2) S.A. 398

Scoin Trading (Pty) Ltd V Bernstein NO 2011(2) S.A. 118

Steyn N.O. V Ronald Bobroff & Partners 2013(3) SCA311

STATUTES
Arbitration Act No:12 of 1980

BOOKS

[1] This claim arises out of a contract between the parties which was referred to arbitration when the parties failed to agree on the value of the work done and amounts due and payable to Applicant by the Respondent.

[2] It is necessary to set out briefly the relevant facts in order to understand where the dispute lies and the issues which are relevant for determination by this Court.

[3] In June, 2006, the Respondent invited tenders for the "design and construction of a water reticulation scheme for the residential development at **MASOWE III** housing project" at **Ha Lepolesa** in the **Maseru district.** The tenders were required from contractors who would be able to demonstrate financial capacity and proven record of profitable civil engineering operations.

[4] The invitation to tender included the necessary background information concerning Respondent and the project; conditions of and instructions to tender; as well as project specifications. It contained in the appendixes a stipulated form of tender; evidence of experience of tenderer; manpower resources, proposed subcontractors as well as tender guarantee and performance guarantee.

[5] All the requirements were met and fulfilled by the Applicant, M & C Construction. It won the tender and was informed in writing by the LHLDC that its tender to design and construct the water reticulation works for the sum of M1, 617, 391-60 was accepted.

[6] The tender was accepted clearly and unequivocally, but subject to the following;

(a) That the parties shall enter into a contract to be prepared by the LHLDC prior to the commencement of the works.

(b) That detailed drawings would be provided by M&C for approval by WASA (Water and Sewerage Authority) prior to signing the contract and commencement of the works.

[7] It is important to note also that the parties agreed to the express term that;

> "Unless and until the formal agreement is prepared and executed, this tender together with the written acceptance thereof by yourselves…….. shall constitute a binding contract between us."

[8] In the months that followed there were many disputes over the agreement. Allegations of repudiation and denial of contract; breaches of obligations to pay and a breach of obligation to allow the company M&C access to the site.

[9] This resulted in litigation, with Respondent at first launching interdict proceedings against M&C to prevent it from carrying on any further project work, and thereafter the M&C also issuing summons claiming certain outstanding payments. These proceedings were never taken to a conclusion and are still pending.

[10] What is important however is that on or about 11 May 2001, parties concluded an interim settlement of their disputes and signed a Memorandum of Understanding in terms of which M&C would complete the works and be paid. The matter was then referred to arbitration by the

parties on the remaining disputes. All the necessary processes and procedures for the arbitration were then set in motion and concluded and the arbitration was commenced. The arbitration was conducted in terms of the Arbitration Act, 1980 of Lesotho.

[11] The statement of claim of the M&C construction Company before the arbitrator consisted essentially of the unpaid claims, interest, lost opportunity and devaluation. The claimant argued that in addition to some unpaid amounts, and interest due on the monies overdue; payment must also be made of damages for the loss of opportunity suffered due to the late payments, because the company was unable to exploit and benefit from available business and construction opportunities. Also compensation to M&C for the reduction in the value of money over that time. The total amount of the claims was M11,048,594-19 (Eleven million Forty Eight thousand Five hundred and Ninety four maloti; and Nineteen lisente).

[12] The Respondent's defence at the stage was that there were suspensive conditions which the claimant had to fulfil prior to commencing with the project work. It either failed to comply with the suspensive conditions, or alternatively breached material terms of the contract in that it commenced with the project work, without fulfilling the material terms and therefore no contract become of force between the parties. The conditions referred to were;

> "(i) That you shall enter into a contract prepared by LHLDC prior to commencement of the works.

(ii) That you produce detailed drawings for approval by WASA prior to the signing of the contract and the commencement of the works."

[13] Argument and submissions by both counsel was advanced before the **Arbitrator, Justice P.B. Cilliers** and he duly gave his award on the 4th February 2013 which I will call the first or initial award.

[14] It is important to note that both parties called experts in the arbitration proceedings. **Claimant** called **Mr E.S. Sykes, an engineer** with expertise and experience in civil engineering operations, who also had personal knowledge of the facts relating to the project. He apparently represented M&C Construction in the project.

[15] The Respondent on the other hand called **Mr Cedric Peterson, a Chartered Accountant (S.A.)** who also had vast experience in the field. He was the managing partner of the firm Warner and Weston (Bloemfontein) and specialised in tax planning and consulting, business valuations and attorneys trust and business audits.

[16] The initial award of the Arbitrator was made on the 4th February 2013. He ordered the defendant to pay the claimant an amount of **M11,569,100-00** with interest at 18.25% per annum from 5th October 2012 to date of payment. He furnished the parties with his full reasons for the award.

[17] The amount was an award that consisted mainly of the loss of opportunity claim by the claimant. In this regard it would seem that the arbitrator rejected the argument of the Respondent, which in summary and in the relevant part was as follows;

"120.5 The parties entered into the so-called MOU and agreed that certificates issued by ZMCK, would only be paid on condition that WASA and LHDLC approved of the works.

120.6 During the beginning of March 2010 WASA measured all the repair work done and still to be done by the claimant and on 9th March 2010 an agreement was entered into between the parties that the Defendant would pay M & C Construction the sum of M1,327,867-54. This agreement was in full and final settlement of the disputes between the parties.

120.7 WASA thereafter certified the revised certificate NO.4 which was paid by the defendant. WASA did not certify the Rectification works certificates NOs 5 to 9 and the claimant was not entitled to be paid any monies in respect of these certificates.

120.8 Claimant failed in any event to prove its loss of opportunity and failed to submit any financial statements or proof thereof to the arbitrator.

120.9 Furthermore, the claimant failed to prove that it was in the contemplation of the parties that should defendant breach the agreement between the parties claimant would suffer a loss of opportunity (not a loss of profit) if this distinction it draws, has any merit.

120.10 Claimant therefore failed to prove any loss of opportunity in respect of the relevant period.

120.11 Claimant's claim should therefore be dismissed with costs."

[18] The part of the award that I consider contentious is really the **M11,560,100- 41** awarded in respect of the loss of opportunity. The claimant had claimed a return in excess of 35% per annum, but the arbitrator came to the conclusion that;

> "a claim of loss of opportunity of 15% for loss of opportunity was justified and proved".

[19] It appears that this award was not paid by the LHLDC which caused the M&C construction to lodge an Application in terms of **Section 32 of the** Arbitration Act[1]. Applicant sought to have the award made an order of Court and granting judgement in favour of the applicant in terms of the award.

[1] No.12 of 1980

[20] On the other hand, the Lesotho Housing and Land Development Corporation filed a counterclaim for setting aside of the Award on various specified grounds.

[21] The Respondent did not agree with the findings of the arbitrator in any event and proceedings lodged resulted in the parties agreeing to a Consent Order in terms of which the matter was referred back to the arbitrator to reconsider almost all his findings. I find it unnecessary to refer to the many aspects and will assume the arbitrator was correct in those. I will only confine myself to the "loss of opportunity" award.

[22] The arbitrator upon the referral back to him of the matter, made only this statement on the loss of opportunity award;

> "There is only one aspect on which I wish to say a bit more. This concerns the question of loss of opportunity. I must say that initially I had reservations as to this part of the claim. As mentioned in the reasons for the award, this is quite a novel type of claim. **Mr Kemp** forcefully argued this part of the claim should have been disallowed. He almost convinced me to do so in reconsidering the matter. The gist of his argument related to the lack of documentary evidence supporting the alleged loss. However, having had another look at the evidence of the claimant on this aspect and considering the development of the law in this field as set out in my reasons. I am satisfied that the claim for loss of opportunity was rightly allowed."

[23] In the first Award it is correct that the arbitrator made reference to the damages of this nature as …….. "an award of a rather novel nature."

[24] His conclusion and the reasons therefor can only be found in this paragraph of the initial Award where he says;

> "I do not find it necessary to decide on this argument as **Mr Edeling's** alternative submission seems to be sound. He says that since **Corbett JA's** judgement in
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> **Holmdene Brickworks V Roberts Construction Company**[2]
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> the test whether damages are regarded as special damages changed to a flexible one in which such factors as foreseeability play a part. He referred me to legal writing and judgments indicating that reasonable foreseeability these days govern most cases where damages are claimed and that loss of opportunity is regarded as a form of direct loss in England and India. I find my own view in accordance with this."

[25] In argument before this Court, **Mr Edeling for the Applicant** submitted that the court can only interfere where there was gross irregularity. He argued that the arbitration award is not subject to appeal and the court's powers of review are limited. The thrust of the Respondent's argument is outcome based and therefore has to fail as this was a private arbitration.

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[2] 1977(3) SA 670 (A)

The argument was that as this was a consensual arbitration the court's powers of review are curtailed.

[26] On behalf of the Respondents, **Mr Kemp** said that the review related to irrationality, non-compliance with the mandate and gross irregularity which diverted the Arbitrators mind from the core issues placed before him. He also submitted that the failure of the Arbitrator to give full reasons for his award the second time around rendered the Award impeachable reflecting on unfair and irregular process.

[27] It is correct that a consensual Arbitration cannot be impugned and set aside because the Arbitrator made a mistake of fact or law in the Award according to decided cases in South Africa. We follow the South African Law in this regard.

See Telcordia Technologies inc. V Telkom SA Ltd[3]

However, an Award can be impugned on review grounds recognised by the Arbitration Action.

[28] The position both in Lesotho and South Africa is that it may be set aside on the grounds of gross irregularity. "Gross irregularity" as a concept may seem to suggest conscious denial of justice or intentional arbitrariness, but no sinister connotation is justified.

Goldfields Investment Ltd and Another V City Council of Johannesburg and Another[4]**.**

[3] 2007(3) SA 266 (SCA)
[4] 1938 TPD 551 at 559

[29] The LHLDC submits that the matter is reviewable in that there was gross irregularity in the proceedings. It is argued that because the arbitrators ruling was irrational and did not comply with his mandate this constituted gross irregularity.

[30] I am inclined to agree with the position as summarised in **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others**[5]**,** that where the arbitrator fails to have regard to a matter which is material to the dispute, the proceedings are unfair, and may in appropriate circumstances be set aside because such failure may constitute gross irregularity in the proceedings.

[31] I am of the view that even if a consensual arbitration may not be reviewable, for being outcome based, it is important to assess how that outcome was reached. If it was reached through a process that is irrational and could not have been reached on a fair and proper application of the law or facts to the issue, that it would seem to me amounts to gross irregularity.

[32] It is further clear that if the matter could be referred back to the arbitrator by an order of Court, albeit a consent order, it is equally competent for the court to determine whether the order or mandate was carried out as fully and effectively as was required or ordered.

[33] In addition, it is the application of the LHLDC that the arbitrator's award be made an order of Court and therefore become executable. The court is obviously expected to adopt the order only after thorough consideration and assessment to avoid absurdity.

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[5] 2008 (2) SA 24 (CC)

[34] I will not go into every aspect, but will confine myself to three aspects the arbitrator was asked to reconsider on referral back;

> "2.6 bearing in mind that neither the commencement date nor the amount payable or the date that such payment would became payable had been proved by second Respondent, why was first Respondent entitled to any interest.
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> 2.7 During the arbitration Mr Hoohlo and Tlali, on behalf of the Applicant testified that the parties had reached agreement …….. all disputes regarding the repair works to the system were settled between the parties in an amount of M1,327,857-54 which was paid by the Applicant. On what basis was this evidence not accepted by the First Respondent (arbitrator)……
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> 2.9 Bearing in mind that Second Respondent did not furnish the Arbitrator with any financial statements or proof of contracts lost for the period 2006 to 2009 and therefore provided no documentary proof of any nett loss of development opportunity; on what basis would the Second Respondent be entitled to any award for loss of opportunity or loss of profit and how could such a loss be calculated?"

[35] I have no doubt that the parties came to the conclusion to refer the matter to the Arbitrator for reconsideration after careful evaluation and assessment of all aspects of the matter. I think it cannot be otherwise because they were represented by experienced and outstanding counsel on both sides.

[36] There is no dispute and our law is settled that the court has the power in appropriate circumstances to refer the matter back to the arbitrator for reconsideration with instructions to address specific issues;

See Jaremy Edward Clarke et al V Semenya et al[6]

Future Rustic Construction (Pty) Ltd V Sallers Waterfront (Pty) Ltd[7]

In this instant the parties agreed, and we could say the Court ordered accordingly.

[37] Applicants also relied on the case of **Nationwide Car Rentals (Pty) Ltd V Commissioner, Small Claims Court, Germiston and Another**[8] in which the South African Courts held that;

> "Although the process in the small claims court is informal and inquisitorial, the approach to be adopted is essentially no different to that in any Civil Court. The Commissioner concerned is required to listen to the

[6] 2008 ZA GPHC 391
[7] 2011(5) SA 506
[8] 1998(3) SA 568 (W)

relevant evidence; weigh it to determine what is probable; and reach a conclusion according to law."

[38] The same can be said of the arbitrator and his role. He cannot therefore be subject to criticism where he has done that and reached a conclusion which is incorrect in relation to the law or facts. As long as it can be shown that he tried fairly and reasonably to do so his Award cannot be set aside.

[39] On the other hand; if the arbitrator has so misdirected himself as to for instance apply facts which are non-existent in the case; or apply Indian or English principles to a case in which the Lesotho law is to be applied, that is a flaw in the process and accordingly may amount to a gross irregularity in the conduct of the matter and it may be set aside on review in terms of the Act.

[40] In the case before me, the inquiry essentially is whether the arbitrator was justified to award loss of opportunity and interest over and above the *mora interest* and whether he could make such a conclusion with the facts; materials and documents that were before him.

[41] The older cases in South Africa are rather strict and do not persuade me. The proposition that;

> "It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a court can be moved to vacate an award"

Dickenson & Brown V Fishers Executors[9].

> Or that "even a gross mistake, unless it establishes *mala fides* or partiality, would be insufficient to warrant interference unless it establishes *mala fides* or partiality".

Donner V Ehrlich[10]

[42] In other words in theory; an arbitrator can fail to apply applicable law, make findings without evidence; fail to follow his mandate, commit a gross irregularity and make incorrect, unfair and unreasonable findings resulting in an irrational award. He may misconceive the nature of the inquiry and his duties, but still make an award which may not be set aside either on review or appeal because misconduct, *mala fides* or partiality cannot be proved. If that is what is meant, I am not inclined to follow it. I am sure on fair interpretation these cases would not go that far. Otherwise in those instances the Award may be set aside for "gross irregularity" in terms of the Act.

[43] All things considered it goes back to the question of fairness and justice between the parties; which is the main purpose and principle of the law.

[44] In this case what we see is a late payment of M1.3 million (paid 18 months later) become an award of over M11 million as a result of the alleged "loss of opportunity."

[45] The immediate concern is whether this is part of our law. If it is, the next question is whether such loss was established before the arbitrator. I am

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[9] 1915 A.D. 166 at 178
[10] 1928 WLD 159 at 161

in agreement that the "loss of opportunity" must fall under special damages, and needs to be proved to a sufficient degree. It cannot be otherwise.

[46] In all cases where payment is made late there is always a possibility that the money could have been used elsewhere profitably. However it is not in all cases that the loss of opportunity can be claimed.

[47] The loss that should be claimable is that which was within the contemplation of the parties to the agreement, or claimant has to prove that based on exceptional circumstances in the matter, the *mora interest* alone would not constitute appropriate or adequate compensation for the damages suffered.

North & Son (Pty) Ltd V Albertyn[11]

[48] In the cases of **Union Government V Jackson and others**[12] and **Scoin Trading (Pty) Ltd V Berstein**[13] it was decided that *mora interest* is the measure of damages. In the latter case at paragraph 14, the following extract will be found;

> "If a debtors obligation is to pay a sum of money on a stipulated date and he is in *mora* in that he failed to perform on or before the time agreed upon, the damages that flow naturally from such failure will be interest a tempore *morae or mora interest*. The purpose of *mora* interest is to place the creditor in the position he

[11] 1962(2) SA212 at 215
[12] 1956 (2) S.A. 398
[13] NO 2011 (2) SA 118

would have been if the debtor had performed in terms of the undertaking."

[49] The recent case of **Steyn W.O. V Ronald Bobroff & Partners**[14] also stated and reaffirmed the above as the position under South African Law. It is also the position in Lesotho Law which is also based on the Roman Dutch Legal System in this regard.

[50] The Chartered Accountant who was the defendants expert witness testified that to assess the loss of opportunity;

> "One would have to get more insight with regard to the contracts that were not able to take or to not have the opportunity to do that contract and get more details of those contracts and costing with regard to that.
>
> But the starting point would surely be the financial statements to see what the trend is and the profits of the business of the company has in the past."

[51] To my mind; that is stating the obvious. I cannot imagine how the claimant could prove the loss in any other way. Without the financial statements it would otherwise amount to mere speculation.

[52] It was necessary for the arbitrator, especially after referral back of the matter to again examine the available evidence and assess its value. In particular in the light of the arguments advanced to determine what the law in Lesotho is in that regard. I am of the view that it remains the same in South Africa as well.

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[14] 2013 (2) SCA311

[53] It was the obligation of the Arbitrator to set out in some detail his conclusions about the law as submitted by Counsel and to eventually decide on the legal position; and also whether or not sufficient and acceptable evidence had been given to enable him to confirm the initial Award without giving further reasons.

[54] The Arbitrator accepted in both his awards that this part of the claim was "novel". That is correct. The implication being according to the Oxford Dictionary that it is "unusual, different from anything known before, new; interesting and often seeming slightly strange".

[55] In fact so novel was the Award that the Claimant could only refer to England and India as the two countries where it may be applicable and considered a direct loss. There were no authorities provided as to the full meaning and extent of the concept even in those jurisdictions, and under what circumstances such damages could be Awarded..

[56] The omission to give full reasons for his second Award deprives this Court of a reason to depart from the position in our law. He could have perhaps shown that there was reason and justification to deviate from the *mora criterion*. Indeed this was probably the understanding of the parties when they opted for a Judge to do the arbitration. It was assumed that should he seek to move away from what is normal, acceptable or expected in our law, he would at least do so in a fully reasoned and persuasive judgment.

[57] The parties requested the court after concluding their arguments to delay writing of the judgment, presumably because they were still prepared to

negotiate. However, after a little more than a month they indicated that the attempt had failed.

[58] I should mention that it is not the first time I encounter a claim of this nature i.e. damages for "lost opportunity". I am however hesitant to impose the adoption of the concept on our law in Lesotho on the basis of what I consider to be insufficient evidence and motivation in this case. There should be justification for us to adopt the practice in India or England. I do not find it.

[59] It would not be fair to the Arbitrator to refer this matter back to him and I would also consider it to be somewhat disrespectful in the circumstances.

[60] I will therefore make the order that;

1. The composite arbitral award is set aside.
2. The dispute is referred to an arbitrator agreed between the parties within 30 days of this order.
3. Failing such agreement either party may approach this Court to seek the appointment of such Arbitrator.
4. Costs of these proceedings are awarded to the Lesotho Housing and Land Development Corporation.

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L.A. MOLETE

JUDGE

For Applicant	**-**	**Adv. C.S. Edeling and Adv. M. Mathe (instructed by M.T. Matsau & Co)**
For Respondent	**-**	**Adv. K.J. Kemp S.C. and Adv. B Pretorius (instructed by Du Preez Liebetrau & Co**