REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no**:** HC-NLD-CIV-ACT-CON-2017/00252

In the matter between:

NICKELBACK BRICKS CC	**APPLICANT/PLAINTIFF**
and	
SANTIAGO INVESTMENTS TWENTY-NINE CC	**1ST RESPONDENT/DEFENDANT**
ADVANCED REFRIGERATION & ELECTRICAL SERVICES CC	**2ND RESPONDENT/DEFENDANT**
OSHANA POWER LINES CC	**3RD RESPONDENT/DEFENDANT**

Neutral citation: *Nickelback Bricks CC v Santiago Investments Twenty-Nine CC* (HC-NLD-CIV-ACT-CON-2017/00252) [2023] NAHCNLD 02 (16 January 2023).

Coram: MUNSU, AJ
Heard on: **05 July 2022**
Delivered: **16 January 2023**

Flynote: Practice – Applications and motions – Application to have award made order of court – Jurisdictional facts – Award made in terms of valid arbitration agreement – Award not met.

Summary: The parties conducted a variety of businesses in northern Namibia. They entered into an agreement for the erection of a steel structure. The construction went wrong and the parties have been at loggerheads. They sued each other in both the Northern Local Division and the Main Division of this court. Eventually, the matters were consolidated and continued under one case number at the court's Northern Local Division.

After the matter was set down for trial, the parties decided to refer the dispute to private arbitration. They agreed to vacate the trial dates and the matter was postponed for the outcome of arbitration. In terms of the arbitration agreement, the parties agreed that the written arbitration award shall be final and binding on all the parties; that it shall not be subject to an appeal; and that it shall be made an order of this court. The written arbitration award was handed down; however, it has not been met. The plaintiff intends to enforce the award, hence the application before court. The defendants oppose the application on the basis that there were gross irregularities at arbitration and that the award was improperly obtained.

Held, that arbitration took place in terms of a valid arbitration agreement. The arbitrator made the award and the award has not been met.

Held further, that in terms of section 28 of the Act, the award became final and not subject to appeal and the parties are to abide by and comply with the terms of the award.

Held further, that once the above jurisdictional facts have been met, the court has no legal basis not to make the award an order of court. The only discretion that the court has is to correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

Held further, that in the present matter, the defendants did not at any point launch an application to review and set aside the award as envisaged in section 33 of the Act. Neither did the defendants launch a counter-application.

Held further, that if the court is to attempt to view the defendants' opposition as some form of application aimed at having the award quashed, the difficulty is firstly that there is no proper application before court, and secondly it would mean that the defendants would be making an application in their answering papers which is not in line with the order of filing papers in motion proceedings.

Held further, that the jurisdictional facts to have the award made an order of court have been met and the court has no legal basis not to make the award an order of court.

JUDGMENT

MUNSU, AJ:

Introduction

[1] This is an opposed motion by the plaintiff to have a written final arbitration award made an order of court. For convenience, I will refer to the parties as they are cited in the combined summons.

[2] The record is voluminous, mainly due to the issues that arose when the defendants opposed the application. The plaintiff is of the view that the defendants' answering affidavits are irregular. As a result, the plaintiff raised two points in *limine.* The first is an application to strike out several allegations contained in the defendants' answering affidavits. The second point in *limine* pertains to the authority of the deponents to the answering affidavits, to oppose the application.

[3] I am indebted to counsel for the helpful submissions and the manner in which they arranged the record.

Parties and representation

[4] The applicant is Nickelback Bricks CC, the plaintiff in the main action. The deponent to the founding affidavit in support of the application is one Mark Thomas Wylie, the plaintiff's sole member. He avers that he is duly authorised to launch this application on behalf of the plaintiff and to depose to the founding affidavit.

[5] The first respondent is Santiago Investments Twenty Nine CC, the first defendant in the main action. Its sole member is Marius Nagel.

[6] The second respondent is Marius Nagel trading as Advanced Refrigeration & Electrical Services, the second defendant in the main action.

[7] The third respondent is Oshana Power Lines CC, the third defendant in the main action. Its members are Marius Nagel and Nicolais Shikongo.

[8] The plaintiff is represented by Ms. De Jager while the defendants are represented by their respective members.

Background

[9] During October 2017, the plaintiff instituted action against the defendants in the court's Northern Local Division under case number HC-NLD-CIV-ACT-CON-2017/00252. The defendants entered appearance to defend the matter, and the third defendant filed a counterclaim against the plaintiff which counterclaim the plaintiff in turn defended.

[10] During April 2018, the second defendant instituted action against the plaintiff in the court's Main Division under case number HC-MD-CIV-ACT-CON-2018/01437. The plaintiff entered appearance to defend the matter.

[11] On 16 November 2018, the matter registered in the Main Division was transferred to the Northern Local Division and was consolidated with the matter registered at the Northern Local Division. Both matters continued in the court's Northern Local Division under case number HC-NLD-CIV-ACT-CON-2017/00252.

[12] The action that was instituted in the Northern Local Division was referred to as 'the first matter', while the action that was instituted at the Main Division was referred to as 'the second matter'.

[13] Both matters were set down for trial on 1 to 12 February 2021. However, the parties decided to refer the disputes between them under the consolidated matter to private arbitration. The parties agreed to vacate the trial dates and the matter was postponed for the outcome of the arbitration proceedings.

[14] Advocate Ramon Maasdorp was appointed as the arbitrator. It was agreed, in terms of the arbitration agreement, that the written arbitration award shall be final and binding on all the parties; that it shall not be subject to an appeal; and that it shall be made an order of this court.

[15] The second matter was settled prior to the arbitration hearing.

[16] The first matter proceeded to private arbitration. The arbitration hearing commenced on 12 August 2021 and continued until 17 August 2021. The written arbitration award was handed down on 22 December 2021. The plaintiff states that neither the second nor the third defendant made any payment whatsoever to the plaintiff pursuant to the award. The plaintiff intends to enforce the award. In order to enforce the award, the plaintiff requires it to be made an order of court.

Lack of authority to oppose the application

[17] In his founding affidavit on behalf of the plaintiff, Wylie states that the first and third defendants are juristic persons, however, neither of the answering affidavits contain an allegation that either of the deponents are authorised to oppose the application and to depose to the answering affidavits on behalf of the first and the third defendants.

[18] Wylie avers that, in so far as the first and the third defendants are concerned, the answering affidavits are fatally defective and there is no opposition to this application on behalf of the first and third defendants. Wylie asserts that this court is entitled to determine this application on an unopposed basis and implored the court to do so.

[19] In both their written and oral submissions, the members purporting to act on behalf of the first and the third defendants did not deal with this point in *limine.* I brought it up during oral submissions and the best they could do was to respond with a statement from Mr. Shikongo (a member of the third defendant), who stated that he and the only other member of the first defendant were present in court and that if there was anything he might have forgotten to mention, the first defendant's member would address that.

[20] Where a party alleges that he or she is authorised to institute or defend proceedings on behalf of a legal person, the onus is on the deponent to prove that allegation, particularly if the issue of authority is questioned.[1] In the present matter, it is particularly noteworthy that the plaintiff's clear challenge on the issue of authority received no answer.

Strike out application

[21] Wylie, the deponent to the founding affidavit on behalf of the plaintiff states that a number of allegations contained in the answering affidavits are scandalous, vexatious and/or irrelevant, as envisaged in rule 70(4). The said allegations are contained in more

[1] See *MGM Properties (Pty) Ltd v Bank Windhoek Limited* (HC-MD-CIV-MOT-GEN-2019/00195) [2020] NAHCMD 511 (05 November 2020) para 18; *National Union of Namibian Workers v Naholo* 2006 (2) NR 659.

than 200 paragraphs of Mr Nagel's answering affidavit and in more than 165 paragraphs of Mr Shikongo's answering affidavit.

[22] The plaintiff applies for the offending paragraphs or portions thereof, as the case may be, to be struck out from the respective answering affidavits for being scandalous, vexatious and/or irrelevant.

[23] Wylie avers that the plaintiff will be unfairly prejudiced by the allegations if the application to strike out is not granted.

[24] According to Wylie, the allegations sought to be struck out are irrelevant to the relief sought in this application. Wylie avers that the allegations sought to be struck out do not apply to the issues at hand, and they also do not contribute one way or the other to the resolution of the dispute which the court have to resolve in this application.

[25] Furthermore, Wylie states that the allegations sought to be struck out are not a fair response to the allegations contained in the founding affidavit relevant to the relief sought in this application. He claims that the allegations sought to be struck out are so worded to convey an intention to harass or annoy and/or to be abusive and/or defamatory.

[26] In addition, Wylie asserts that the allegations sought to be struck out contain inadmissible hearsay evidence, inadmissible opinion evidence, argument, speculation and/or are contrary to the parol evidence rule.

[27] It is Wylie's averment that if the allegations sought to be struck out are retained, it would call for lengthy answers, and if left unanswered, it would be defamatory. He asserts that the allegations sought to be struck out will prejudice the plaintiff in having to provide not only lengthy, but also unnecessary and irrelevant answers. Over and above, if the plaintiff is to deal with irrelevant, scandalous and/or vexatious allegations, as in this matter, the main issue will be side tracked, and if left unanswered, the allegations would be defamatory.

[28] It is only the third defendant, through Mr Shikongo who briefly addressed the court on the application to strike out. According to Mr Shikongo, the allegations which the plaintiff seeks to have struck out relate to the condition of the building which is the subject of the dispute, hence, the allegations should stand.

Discussion

[29] In *Vaatz v Law Society of Namibia*[2] the meaning of the terms scandalous, vexatious and irrelevant matter was briefly stated as follows:

> 'Scandalous matter - allegations which may or may not be relevant, but which are so worded as to be abusive or defamatory.
>
> Vexatious matter - allegations which may or may not be relevant, but are so worded as to convey an intention to harass or annoy.
>
> Irrelevant matter - allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.

[30] The court held that even if the matter complained of is scandalous or vexatious or irrelevant, the court may not strike out such matter unless the respondent would be prejudiced in its case if such matter were allowed to remain.

[31] The court went further to say the following:[3]

'The phrase 'prejudice to the applicant's case' clearly does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances; for instance, in motion proceedings it is necessary to answer the other party's allegations and a party does not do so at his own risk. If a party is required to deal with scandalous or irrelevant matter, the main issue could be side-tracked, but if such matter is left unanswered, the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent party.'

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[2] *Vaatz v Law Society of Namibia* 1990 NR 332 (HC) at 334 to 335.
[3] At 335 para F-I.

[32] Given the voluminous nature of the allegations, Ms De Jager for the plaintiif submitted that the court is not expected to rule on each and every allegation to determine whether or not the allegation should be struck out for being scandalous or vexatious or irrelevant. She implored the court to consider, in the determination of the application before court, only the relevant averments and disregard any allegation that is irrelevant, vexatious or scandalous.

[33] I have considered the allegations complained of. Most of those allegations relate to the history and merits of the matter. If the plaintiff is to reply to these allegations, it will have to provide lengthy answers which could side-track the main issue before court.

[34] It is important to note that once the parties agreed to take the dispute to private arbitration, they waived their right to have the matter litigated in a court of law. Thus, it is not available to any of the parties to go back to the merits of the dispute. For purposes of this application, the allegations concerning the merits of the dispute are irrelevant because that is what the arbitrator was tasked to resolve. It would be a different matter in the case of a review application or where a counter application is filed. Accordingly, the allegations on the history and merits of the dispute fall to be struck out.

[35] Other allegations contained in the second defendant's answering affidavit are scandalous and convey the innuendo of improper conduct by the plaintiff's member. These are: that the plaintiff's member argued over money; that he used offensive language by swearing while demanding his money; that he threatened to take the second defendant to lawyers and that the plaintiff's member had money problems. If the plaintiff is to reply to these allegations, it will have to provide lengthy answers which could side-track the main issue before court. Accordingly, these allegations stand to be struck out.

The application before court

[36] The plaintiff launched this application in order to have the award made an order of court in terms of section 31 of the Arbitration Act 42 of 1965 (the Act).The defendants opposed the application on the basis that if the award is to be made an order of court, the

defendants would be paying for an incomplete and worthless building which does not conform to the standards and procedures of the building industry.

[37] Mr Shikongo 'suggested' that this court set aside the award so that the plaintiff returns to the site in order to complete the work as agreed. Other reasons for opposing the application include claims of alleged gross irregularities on the part of the arbitrator and that the award was improperly obtained.

[38] In *Da Cunha Do Rego v Beerwinkel t/a JC Builders*[4] the Supreme Court held that:

'[29] Section 31 of the Arbitration Act 42 of 1965 provides that an arbitration award may be made an order of court on application by any party to the agreement referring the dispute to arbitration after due notice to the other party. Before a court will make an order, however, it must be satisfied that the arbitration took place in terms of a valid arbitration agreement, that the arbitrator made the award and that the award has not been met.'

[39] As stated earlier, arbitration in this matter took place in terms of a valid arbitration agreement. The arbitrator made the award and the award has not been met. In terms of section 28 of the Act, the award became final and not subject to appeal and the parties are to abide by and comply with the terms of the award.

[40] It seems to me that once the above jurisdictional facts have been met, the court has no legal basis not to make the award an order of court.[5] The only discretion that the court has, before making such an award an order of court, is to correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.[6]

[41] Any other power given to the court is found in section 33(1) which provides for three grounds for setting aside an arbitration award, namely, misconduct by the arbitrator, gross irregularity in the conduct of the proceedings, and an award having been improperly obtained.

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[4] *Da Cunha Do Rego v Beerwinkel t/a JC Builders* 2012 (2) NR 769 (SC).
[5] See *NAMSOV Fishing Enterprises (Pty) Ltd v Merit Investment Eleven (Pty) Ltd* supra footnote …..
[6] Ibid.

[42] In *Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd*[7] the Supreme Court of Appeal of South Africa had the following to say:

'[21]…Suffice it to state that once again a litigant has fundamentally misconceived the nature of its relief. The parties here had waived the right to have their dispute relitigated or reconsidered. Given the nature of Bantry's opposition, it was for it to challenge the award by invoking the statutory review provisions of s 33(1) of the Act. It ill-behoved Bantry to adopt the passive attitude that it did. It ought instead to have taken the initiative and applied to court to have the award set aside within six weeks of the publication of the award or alternatively to have launched a proper counter-application for such an order. Had that been done then the arbitrator could have entered the fray and defended himself against the allegations levelled by Bantry, instead of it falling to Raydin to do so on his behalf – a most invidious position for any litigant.' *(my underlining*)

[43] In the present matter, the defendants did not at any point launch an application to review and set aside the award as envisaged in section 33 of the Act and a period of six weeks has since lapsed. Neither did the defendants launch a counter-application. This to me is the end of the defendants' opposition. Should this court attempt to view the defendants' opposition as some form of application aimed at having the award quashed, the difficulty is firstly that there is no proper application before court, and secondly it would mean that the defendants would be making an application in their answering papers which is not in line with the order of filing papers in motion proceedings.

[44] Although not relevant to these proceedings, I feel the need to briefly highlight the defendants' complaint against the arbitrator and the plaintiff's response thereto.

[45] The defendants argued that there were gross irregularities at arbitration. They allege that there were email communications between the arbitrator and the plaintiff's team; that the arbitrator was informed by the plaintiff to deny a postponement to the defendants; that after the arbitration hearing was concluded, the arbitrator requested for supplementary representations, a clear sign that the arbitrator realised that he improperly handled the arbitration hearing.

[7] *Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd* 2009 (3) SA 533.

[46] In response, the plaintiff pointed out that whenever the arbitrator sent an email to one of the parties, the other parties were also copied. Thus, there is nothing untoward about the issue of emails. On the issue of supplementary representation, the plaintiff states that the arbitrator had found it necessary and requested same from all the parties.

[47] The issue of the defendants' seeking a postponement arose after they terminated the mandate of their legal practitioner during arbitration proceedings. In the present application before court, the defendants maintained that they had misunderstandings with their legal practitioner even prior to arbitration and also during arbitration proceedings.

[48] The parties agreed on the dates of the arbitration hearing well in advance. The plaintiff argued that the defendants chose their legal practitioners and opted to remain with them despite allegedly having had issues with them for a considerable amount of time.

[49] Further, and as is borne out by the record, the defendants were alerted and forewarned by the arbitrator of the risks associated with terminating the mandate of their legal practitioner in the middle of the arbitration, among others, that the arbitration hearing would continue. In addition, only Mr Shikongo was present at arbitration. He did not have authority to apply for a postponement on behalf of the first and second defendants. Also, Mr Shikongo stated that he was not authorised to represent the third defendant alone. The plaintiff contended that the arbitrator did not have a choice but to refuse the application for postponement as the person who moved the application did not have authority.

[50] The arbitrator allowed the parties to make representations on the application for postponement. In the end, he took into account a number of factors, including the duration of the dispute; the defendants' earlier delays brought on by a shift in how they approached the issues; and whether prejudice to the plaintiff could be cured by a costs order.

[51] The plaintiff refers to section 15(2) of the Act which provides that if any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without

having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.

[52] As stated earlier, these issues would have been relevant if there had been a review application or possibly a counter-application.

[53] The plaintiff refers to *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*[8] wherein the Constitutional Court of South Africa held that the values of the Constitution will not necessarily be best served by interpreting section 33(1) of the Act in a manner that enhances the power of courts to set aside private arbitration awards. Rather, the contrary seems to be the case. The court went on to state:

'[236] …First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. …The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated.'

[54] Further, the plaintiff relies on *Westcoast Fishing Properties CC v Gendev Fish Processors Ltd*[9] in which this court referred to Peter Ramsden and quoted that:

"The ground of review envisaged by the use of the phrase gross irregularity in the conduct of the arbitration proceedings in s 33(1)(b) of the Arbitration Act relates to the conduct of the proceedings and not the result thereof…"

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[8] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at para 235.
[9] *Westcoast Fishing Properties CC v Gendev Fish Processors Ltd* (A 228/2012) [2014] NAHCMD 242 (13 August 2014).

[55] At para 50 and with reference to South African authority the court quoted that:

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

[56] Thus, even if the merits of the opposition were relevant to this application and taken into consideration, it is unlikely that the defendants would succeed in having the award annulled.

Conclusion

[57] All things being considered, I have come to the conclusion that the jurisdictional facts to have the award made an order of court have been met. Consequently, the court has no legal basis not to make the award an order of court.

Costs

[58] The parties agreed that the arbitrator shall determine which of the parties are liable for the costs of the arbitration, including the costs of suit prior to the commencement of the arbitration process, and on what scale, save that costs shall be calculated and taxed on the High Court scale, by a tax consultant to be agreed between the parties, and absent agreement, by a tax consultant appointed by the arbitrator.

[59] With the exception of the plaintiff who moved for the costs order as set by the arbitrator, the defendants did not address the court on costs. There is no basis for the court not to endorse the determination by the arbitrator.

Order

[60] In the result, it is ordered as follows:

1. The arbitration award handed down by Advocate Ramon Maasdorp on 22 December 2021 (annexure “MTW1” to the founding affidavit) is hereby made an order of court and to this end the following order is made:

1.1 The plaintiff’s claims against the first defendant are dismissed with the costs of one instructing and one instructed legal practitioner, where employed.

1.2 The following orders are made in respect of the second and third defendants, jointly and severally, the one paying the other to be absolved:

1.2.1 The counterclaim is dismissed with costs as set out below.

1.2.2 Payment in the capital amount of N$792,492.70.

1.2.3 Payment of interest on the capital amount at the rate of 20% per annum calculated from 31 August 2017 to date of final payment.

1.2.4 Mr Uys and Mr Herselman are declared necessary expert witnesses.

1.2.5 Payment of the plaintiff’s taxed costs on a party and party scale of the High Court of Namibia, such costs to include:

1.2.5.1 the costs of one instructing and one instructed legal practitioner;

1.2.5.2 the costs of Mr Uys, including but not limited to, consultation costs, drawing of reports including calculations and sketches, drawing of his expert summaries, his attendances including his attendances at the arbitration;

1.2.5.3 the costs of Mr Herselman, including but not limited to, consultation costs, drawing of reports including calculations,

drawing of his expert summary, his attendances including his attendance at the arbitration;

1.2.5.4 the costs of Mr Van der Berg, including but not limited to, consultation costs, subsistence (accommodation and meals) and travel costs for his attendance to consultations and the arbitration, his attendances including his attendance at the arbitration;

1.2.5.5 the costs of Mr Terblance, including but not limited to, consultation costs subsistence (accommodation and meals) and travel costs for his attendance to consultations and the arbitration, his attendance including his attendance at the arbitration;

1.2.5.6 the subsistence (accommodation and meals) and travel costs of the plaintiff's Mr Wylie and the plaintiff's instructing legal practitioner to attend the arbitration in Windhoek;

1.2.5.7 the costs pertaining to the defendants' witness statements and summaries delivered on 1 June 2021 and the consequential costs pertaining to the plaintiff's witness statements filed on 7 July 2021 pursuant thereto;

1.2.5.8 the costs of the arbitrator including his reasonable disbursements, the venue, recording facilities, the transcription and any other costs pertaining incidental to the administration of arbitration;

1.2.5.9 the costs of the taxing consultant;

1.2.5.10 the costs prior to the commencement of the arbitration process when the matter was in the High Court of Namibia;

1.2.5.11 the costs to follow the arbitration process to have the award made an order of the High Court of Namibia;

such costs to be taxed by a taxing consultant to be appointed by the arbitrator in the award to tax the plaintiff's bill of costs.

2. Insofar as such an order is necessary, the second and third defendants shall pay the costs of this application jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructing and one instructed legal practitioner, such costs not to be limited by the provisions of rule 32(11).

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DC MUNSU

ACTING JUDGE

APPEARANCES

FOR PLAINTIFF:	Ms. De Jager Instructed by W. Horn Attorneys Oshakati
FOR FIRST DEFENDANT:	In person.
FOR THE SECOND DEFENDANT:	In person.
FOR THE THIRD DEFENDANT:	In person.