THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 16 February 2023

Status: Immediate

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JVE Civil Engineers Inc. v Blue Bantry Investments 235 (Pty) Ltd and Another (1016/2021) [2023] ZASCA 12 (16 February 2023)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal from the Western Cape Division of the High Court, Cape Town (high court). The matter pertained to a review application of an appeal arbitration award. The appellant, JVE Civil Engineers Inc (JVE) provided engineering services to the first respondent, Blue Bantry Investment 235 (Pty) Ltd (Blue Bantry) in the development of certain property. The parties initially enjoyed an amicable relationship whereby JVE assisted in the development of phases one and two of the property. However, a change in JVE's ownership resulted in Blue Bantry and JVE entering into a written agreement (JVE1 agreement) in respect of the third phase, accompanied by a schedule which had clearly set out the scope of work required, as well as the applicable fee and payment structure.

This matter concerned engineering fees in respect of bulk infrastructure services levied by municipalities in terms of municipal Bulk Infrastructure Contribution Levies (BICL) for the use of existing municipal bulk infrastructure services in new residential developments. Any infrastructural alterations or additions attendant to new residential developments were to be erected by the developers, who were, in turn, compensated by amounts recovered from the municipality, the City of Cape Town, in terms of BICL credits. In terms of clause 6 of the JVE1 agreement, JVE would receive 80% of the Engineering Counsel of South Africa (ECSA) tariff for work related to external services, unless BICL credits exceeded the costs of the infrastructure provided by Blue Bantry, resulting in the payment of an additional 20%. The parties also agreed to a 1.25 multiplication factor fee, which resulted in a 25% addition to the relevant fees. Subsequently however, Blue Bantry and the City of Cape Town entered into a new service agreement (the 2008 agreement) which extended the scope of BICL credits available to Blue Bantry.

When the matter proceeded to arbitration, it concerned claims by JVE for external and internal services as well as a claim for damages resulting from breach of contract. The claims for external services included a claim for the additional 20% (the BICL claim) in terms of clause 6 as well as the 1.25 multiplication factor fee (multiplication claim). JVE contended that the conditions attached to its entitlement of the additional 20% had been fulfilled in terms of the JVE1 agreement, regardless of the subsequent 2008 agreement. Similarly, JVE contended that the work related to eligibility for the 25%

multiplication claim, had been completed. Blue Bantry conceded these contentions, but in its defence set out in an amended plea, held that a separate agreement had been entered into between Blue Bantry and JVE in 2009 in which Blue Bantry stated that JVE was not entitled to either 20% of 25%, but such amounts would be paid in any event, once the amounts had been recovered from the City of Cape Town. JVE agreed to this.

Upon arbitration and the subsequent appeal, JVE was unsuccessful. In light of the entirety of the matter, only the BICL claim and the multiplication claim remained relevant to the appeal because the appeal arbitrator held that the 2008 agreement entered into by Blue Bantry and the City of Cape Town amended the JVE1 agreement, thereby precluding any reliance on clause 6 of the JVE1 agreement. In addition, as far as the multiplication claim was concerned, the relevant amounts had not yet been recovered from the City of Cape Town in terms of the 2008 agreement, and therefore the claim was premature, and failed. In the high court, JVE sought to review the arbitration proceedings in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965, on the grounds that the arbitrator had committed a gross irregularity or exceeded his powers. JVE held this contention on the basis that the arbitrator determined two claims on a basis that had not been pleaded, thereby exceeding his powers.

On appeal, the SCA found that the arbitration agreement limited the powers of the arbitrator to the determination of the issues as defined in the pleadings. The amendment of the JVE1 agreement by the 2008 agreement was never a pleaded issue, meaning the arbitrator exceeded his powers when he dismissed the BICL claim on this basis. In the result, he did not apply his mind to whether the condition in clause 6 had been fulfilled or that the amended plea was pleaded as part of a defence to a claim for damages and not specifically to the two claims under consideration.

Despite this, the SCA held that, these factors did not justify reviewing and setting aside the arbitration appeal award. The SCA stressed the importance of the nature of the agreement set out in the amended plea. Blue Bantry, at the time, denied liability towards JVE for the BICL and multiplication claims but nevertheless offered to pay these amounts once they were recovered from the City of Cape Town. JVE expressly accepted the offer, thereby having entered into a compromise with Blue Bantry. This Court found that this compromise constituted a complete defence to these claims, and it would have been artificial and unjust to disregard them simply because they had not been directly pleaded in answer to the claims.

In the result, the dismissal of the claims did not amount to a gross irregularity in terms of s 33(2)*(b)* and the appeal was dismissed with costs.