THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 128 / 08

BANTRY CONSTRUCTION SERVICES (PTY) LTD **Appellant**

and

RAYDIN INVESTMENTS (PTY) LTD **Respondent**

Neutral citation: **Bantry Construction Services v Raydin Investments (128/08) [2009] ZASCA 10 (17 March 2009)**

CORAM: **HARMS DP, BRAND, PONNAN, SNYDERS and MHLANTLA JJA**

HEARD: **26 FEBRUARY 2009**

DELIVERED: **17 March 2009**

SUMMARY: **Arbitration – application for award to be made order of court - failure to counter-apply to review award – consequences thereof.**

ORDER

On appeal from: The Johannesburg High Court, Witwatersrand Local Division (Goldstein J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

PONNAN JA (Harms DP, Brand, Snyders and Mhlantla JJA concurring):

[1] During March 2004, the first respondent, Raydin Investments (Pty) Ltd ('Raydin'), entered into a written principal building agreement with the appellant, Bantry Construction Services (Pty) Ltd ('Bantry'), in terms whereof it employed the latter to erect a new factory and offices for it on premises situated in Linbro Park, Johannesburg.

[2] After completion of the work and the issuance of the architect's final certificate dated 7 December 2004, cracks developed in the plaster work and floor toppings of the new buildings. During August 2005, Raydin wrote to Bantry, formally informing it of the existence of the cracks and notifying it that an independent contractor had been secured who had expressed the opinion ' ... that the majority of the cracks are related to poor construction'. The response from Bantry was that ' ... it is quite normal for new buildings to experience shrinkage and settlement cracks'. Bantry's letter

continued ' ... we do not accept the allegations of "poor construction" '. The battle lines thus came to be drawn between the parties, rendering applicable Clause 40.0 of the agreement, headed ‘Settlement of Disagreements and Disputes’. To the extent here relevant, this clause provides:

'40.1 Should there be any disagreement between the **employer** or his **agents** on the one hand and the **contractor** on the other arising out of or concerning this **agreement**, the **contractor** may request the **principal agent** to determine such disagreement by a written decision to both parties. On submission of such a request a disagreement in respect of the the issues detailed therein shall be deemed to exist

40.2 The **principal agent** shall give a decision specifically in terms of 40.1 to the **employer** and the **contractor** within ten (10) **working days** of receipt of such a request. Such decision shall be final and binding on the parties unless either party disputes the same in terms of 40.3

40.3 Where there is no **principal agent** or should the **principal agent** fail to give a written decision within ten (10) **working days** or either party disputes the decision in terms of 40.2 by notice to the other and the **principal agent** within ten (10) **working days** of receipt thereof a dispute shall be deemed to exist

40.4 A dispute shall be submitted to:

40.4.1 Arbitration in terms of 40.6 or, where the parties so agree, to mediation in terms of 40.5

…

40.6 Where the dispute is submitted to arbitration:

40.6.1 The arbitration shall be conducted according to the rules stated in the **schedule**

40.6.2 The **arbitrator** shall be the person appointed by the parties in the **schedule** or within ten (10) **working days** of the date of submission of the dispute to arbitration. Where the parties make no such appointment the **arbitrator** shall be appointed by the [Chairman of the Association of Arbitrators]

40.6.3 The **arbitrator** shall have the power to open or revise any certificate, opinion, decision, requisition or notice relating to such dispute as if no such certificate, opinion, decision, requisition or notice had been issued or given

40.6.4 The parties, unless otherwise agreed, shall request the **arbitrator** to give a reasoned award

…'

[3] A disagreement thus having arisen in respect of the work performed by Bantry, it was first referred by the parties to the principal agent, the architect of the building project, Roger Davies, on 6 December 2005. On 8 December 2005, Davies recommended that Bantry agree that the cracks were unacceptable and that it undertake remedial work. He added somewhat prophetically: 'we further request the parties reach resolution and avoid unnecessary litigation'. Bantry, however, through Michael Wagner, its attorney of record, disputed the principal agent's findings and formally declared a dispute to exist. The parties accordingly agreed that the dispute be referred to arbitration. Victor Booth, an engineer, who was cited as the second respondent in the court below but who took no part in the proceedings either in the court below or in this court, was duly appointed arbitrator by the Chairman of the Association of Arbitrators. On 18 April 2006, the arbitrator convened what was termed the first preliminary meeting with the parties. At this meeting the parties agreed, as emerges from the arbitrator's award, that the summary rules of the Association would be applicable to their arbitration.

[4] On 19 May 2006, Raydin filed its Statement of Claim and on 1 June 2006 Bantry filed its Statement of Defence. A second preliminary meeting was held on 7 July 2006 and, a week later, the arbitrator despatched to the parties a minute recording inter alia the following:

'It was agreed that following this inspection and my having taken full cognisance of the experts' comments, as previously written, I would then be able to use my own knowledge and technical expertise to decide upon the matter without the expense of a formal hearing.

It was agreed that there would be no right of appeal on my award.

Evidence, *per se*, will not be led at the *in loco* inspection beyond what is already embodied in the existing written reports. However, if, after the *in loco* inspection, the parties' respective experts wish to add anything further to their previous written statements and/or to confirm anything that may have been said on site and to lead such statements as additional evidence, I will allow 5 working days for a further such written submission from each.

The time limits for the award protocol will follow the recommendations in the "Rules" of the Association of Arbitrators. Viz. my award will be published within 20 working days after the last evidence was received.'

[5] On 27 July 2006, an *in loco* inspection was held. Thereafter the arbitrator sought and obtained a report from the project engineer. He also requested certain drawings. On 6 September 2006 the arbitrator received the requested drawings and on 14 September 2006 he wrote to both attorneys:

'I have not yet had the opportunity to look at the documents as the delay has put many other items on my day agenda and I have been out of town a great deal. I am sure that copies of what I have received will be made available to all concerned. In the interests of the fairness of the procedure I believe that I should wait for all to be in possession of these same documents before I proceed. '

Thereafter correspondence was exchanged regarding the quality of some of the drawings. On 28 November 2006, the arbitrator despatched a letter to the parties stating 'I have some questions to be answered if we are to resolve this before 06-12-2006 after which I am away for four weeks'.

[6] In the meanwhile, during December 2006, certain remedial work was undertaken at the premises. Thereafter and in response to a request from the

arbitrator, the architect submitted a report in which he opined that 'the cause of the cracks and defects were not as a result of the absence of detail . . ., but as a direct result of the failure by the contractor to carry out the construction in a proper manner and the improper use of materials and defective materials in the construction'. The architect added:

'The photographs taken when repairs were effected clearly illustrate defective construction relating to the brickwork and plastering. Any reasonable contractor would agree that it is poor common brickwork when over a small area plaster thickness vary from 15mm to 40mm and brickwork joints vary from 6mm to 50mm. My concern is that the Contractor made no effort to investigate the problems when first highlighted.... we note that it is neither a large nor a complicated building.'

[7] That report elicited the following response from Bantry's attorney:

'We are of the view that [the architect's] response, seen as a whole, does not provide any evidence, aside from speculation on his part, that the cracks were due to latent defects for which our client is liable.'

On 8 January 2007, the arbitrator wrote 'I'm sure that we would all like to bring this to a conclusion and await the info previously requested'. In correspondence addressed to the arbitrator dated 16 February 2007, Raydin's attorney, Alec Drobis, wrote: 'I trust that you are now in possession of what you have called for in order to render your decision'. On 19 March 2007, Drobis once again enquired when the arbitrator would be in a position to let them have his determination. On 28 March 2007, the arbitrator requested Raydin to fully and formally quantify the claim. In response Raydin filed a damages affidavit on 8 May 2007. Two days later, Wagener wrote to the arbitrator suggesting that he make his award in the following two stages: first, whether Bantry was liable at all and, if so, for which cracks. Once an award of that nature was made, so the e-mail continued, Bantry would be in a position to provide its reasoned estimate of the cost of repairing the defects set out in the award.

[8] On 31 May 2007, the arbitrator, in an e-mail to both parties, stated:

'I AM SURE THAT BOTH PARTIES NOW WANT CLOSURE ASAP.

I WOULD LIKE THE OPPORTUNITY TO NOW VIEW THE REMEDIAL WORK AND BE FULLY INFORMED AS TO EXACTLY WHAT WORK WAS DONE AND WHERE. PLEASE ADVISE WHO I CAN MEET AT THE PREMISES WITH TIME AND DATE. MAYBE THE APPROPRIATE PERSON COULD CONTACT ME DIRECTLY TO ARRANGE THIS.

I WILL THEN HAVE A 21 WORKING DAYS TO DELIBERATE AND PRESENT MY AWARD.'

With reference to that e-mail, the arbitrator wrote on 4 June 2007:

'I HAVE NOT RECEIVED THE PARTIES' CONFIRMATION AS REQUESTED. HOWEVER MR MIDGIN [the Chief Executive Officer of Raydin] RANG ME ON 01-06-2007 AND SAID THAT HE WOULD SHOW THE REMEDIAL WORK TO ME.

DOES [BANTRY] WISH TO BE REPRESENTED AT THE ASSESSMENT?

PLEASE ADVISE ASAP SO THAT I CAN ARRANGE A TIME AND DATE TO MEET MR MIDGIN ETC'.

[9] Wagener responded that his client did indeed wish to be represented at the inspection and furnished the arbitrator with the contact details of a certain Bob Wagener. He furthermore drew attention to his earlier e-mail (which had apparently gone unanswered) that had suggested that the arbitrator's award should be made in two stages. He then proceeded to articulate what he described as three concerns that had been raised by his client. Those were:

'1 The inordinate length of time it has taken to obtain an Award.

2 The fact that you appear to be communicating directly with Mr Midgin. My client would like the assurance from you that there are no current or prior dealings between you and Mr Midgin.

3 Your expressed desire to view the remedial work already carried out appears to be an indication that you have already decided that my client is liable for the cracks.'

[10] The next morning, the arbitrator apologised for the oversight in not replying to the e-mail in question. He recorded that he had noted the suggestion that the arbitration award be made in two stages. Some 40 minutes later he replied to the three concerns thus:

'1 The inordinate length of time it has taken to obtain an Award;

IT IS MY RECOLLECTION THAT THE TIME FRAME HAS, GENERALLY, NOT BEEN DETERMINED BY ME BUT BY THE LONG RESPONSE TIMES OF THE PARTIES TO VARIOUS ISSUES.

THE HISTORICAL CHAIN OF CORRESPONDENCE SHOULD BEAR TESTIMONY TO THAT.

2 The fact that you appear to be communicating directly with Mr Midgin. My client would like the assurance from you that there are no current or prior dealings between you and Mr Midgin.

I HAVE HAD ONE BRIEF PHONE CONVERSATION FROM MR. MIDGIN WHEREIN HE REQUESTED THAT HE COULD BE THE PERSON TO SHOW THE REMEDIAL WORK TO ME. I IMMEDIATELY SENT AN EMAIL TO THE PARTIES ADVISING THEM OF THIS REQUEST AND CONFIRMATION OF A REPRESENTATIVE FROM THE OTHER SIDE.

I WILL BE CONTACTING BOTH MR. MIDGIN AND MR. BOB WAGENER EARLY NEXT WEEK. PLEASE LET ME HAVE MR. WAGENER'S EMAIL ADDRESS SO THAT, AS I HAVE DONE IN THE PAST, I CAN COPY EVERBODY WITH THE COMMUNICATIONS. IT IS UNFORTUNATE THAT MR. MIDGIN'S PHONE CALL TO ME IS BEING CONSTRUED IN A SINISTER LIGHT.

I DID ASSUME THAT HE HAD HIS ATTORNEY'S PERMISSION TO DO THIS AND THAT IT HAD BEEN CLEARED WITH YOURSELVES IN AN ATTEMPT TO NOW SPEED THINGS ALONG.

I HAVE NEVER MET MR. MIDGIN, HAVE NO KNOWLEDGE OF HIM AND I HAVE NEVER SPOKEN TO HIM BEFORE IN MY LIFE.

3 Your expressed desire to view the remedial work already carried out appears to be an indication that you have already decided that my client is liable for the cracks.

SURELY, MY WISH TO SEE THE REPAIR WORK SHOULD BE CONSIDERED AS A NORMAL ACTIVITY IN THE WHOLE CHAIN OF EVENTS AND NOT DOING SO WOULD PROBABLY ATTRACT CRITICISM. I CAN ASSURE YOU THAT I HAVE NOT MADE ANY DECISION ON LIABILTY AND, AFTER MUCH ELAPSED TIME, I WILL REFAMILIARISE MYSELF WITH ALL ASPECTS OF THE DISPUTE BEFORE MAKING ANY DETERMINATION.'

That afternoon, Wagener wrote in an e-mail to the arbitrator: 'Having gone through our records we note that you have conducted an inspection *in loco* on 27 July 2006. Kindly provide us with a report on that visit as well as a fresh report on your proposed 2nd visit to the site'. That elicited the following response: 'Arbitrators don't write reports. They consider the evidence and, using their expertise, when given permission to do so (as is the case here), and a judgment, make a reasoned award.'

[11] On 8 June 2007, Wagener wrote to the arbitrator:

'I regret to inform you that your reply to my e-mail of 7 June 2007 is in conflict with both Rule 31.1.4 of the Rules for the Conduct of Arbitrations promulgated by the Association of Arbitrators (Southern Africa) as well as the common law. Insofar as you have exceeded the time limit contained in s 23 of the Arbitration Act for making your award by a substantial margin, the arbitration has lapsed.'

In response, on 13 June 2007, the arbitrator wrote to the parties:

'Rules for the conduct of arbitrations

Rule 31.1.4 states that, "the arbitrator shall record his observations …….. in such a manner as he may decide and such record …….. shall form part of the proceedings of the arbitration".

This is not to be construed as him having to supply a "report" to the parties.

Arbitrations Act No. 42 (1965)

Clause 13 (1)

"the appointment of an arbitrator …….. shall not be capable of being terminated except by the consent of all the parties."

Should the claimant also wish to dispense with my services then this clause may be invoked.

Clause 13 (2)(a)

Upon application the court may set aside my appointment "on good cause shown".

However, due to the protracted series of events caused by the parties' own delays in providing certain documents etc. the court would probably not consider this to be "on good cause shown".

Furthermore, I refer you to clause 40.2 of the "Rules" which requires any objection to be lodged promptly or the right to object will be considered as waived. There are many aspects of this arbitration which tacitly fall into this category.

Clause 23

My e-mail to the parties dated 31st May, 2007 is relevant.

Both parties have communicated freely for many months until the 6th June 2007 and tacitly accepted the content of my e-mail dated 31st May, 2007 which stated that I would deliver my award 21 days after my final inspection, once that had been arranged. I refer you to M. Wagener's email dated 4th June and Drobis's e-mail dated 6th June.

The inspection is now delayed due to the respondent's recent dissatisfaction and this issue must be resolved before I can continue.

Both parties to now advise me to continue or otherwise.'

[12] The arbitrator's letter prompted the following missive from Wagener:

'We regret to record that our client is dissatisfied with your conduct of the arbitration on a number of grounds including your failure to provide us with an account of your findings with regard to the first inspection carried out by you.

We record further that, to date, you have not responded to our request to have the proceedings decided in two stages, i.e. liability and quantum.

We are of the respectful view that the provisions of section 23 of the Arbitration Act are peremptory and override the rules to which you refer in your letter.

In the circumstances, our client maintains its position that the arbitration has lapsed and can only be revived by the court on good cause shown.

Our client will oppose any such application to the court.'

[13] Unbowed, the arbitrator asserted:

'AD PARA 2

I reiterate my e-mail response to you of 07-06-2007 that Arbitrators do not write reports but that their observations at an *in loco* inspection will be taken into account in the award.

AD PARA 3

I did respond to this in my other e-mail dated 07-06-2007 and advised you that "your suggestion is noted".

AD PARA 4

Both parties agreed, voluntarily, to enter into the arbitration procedure and to be governed by the rules and that the summary rules will apply. I REITERATE THAT THE AMOUNT OF ELAPSED TIME HAS BEEN CAUSED BY THE PARTIES TO THE DISPUTE AND ONCE AGAIN REFER YOU TO RULE 40.2 WHEREBY ANY PARTY WAIVES ITS RIGHT TO ANY OBJECTION ON PROVISIONS IF NOT DONE SO PROMPTLY.

I WILL NOW BE AWAY UNTIL 2ND JULY 2007 AT WHICH TIME I WILL DETERMINE THE EARLIEST MUTUALLY ACCEPTABLE TIME AND DATE FOR MY INSPECTION OF THE REMEDIAL WORK. DUE TO THE DELAY IN THE PROCEEDINGS OF THE PAST 10 DAYS CAUSED BY THE RESPONDENT'S RECALCITRANCE TO PROCEED AND THE OBJECTIONS THERETO, WHICH I HAVE HAD TO DEAL WITH, I WILL THEN CONTINUE WITH OR WITHOUT THE RESPONDENT'S ATTENDANCE.

BOTH PARTIES ARE HEREBY GIVEN DUE NOTICE OF THIS.'

[14] On 19 June 2007, Wagener wrote to Dobris that neither he nor the arbitrator had dealt with the provisions of s 23 of the Arbitration Act, which were, according to him, peremptory. He reiterated that the arbitration had lapsed, which required a formal application to court for it to be revived. He concluded 'Our client will not be taking further part in the arbitration and you proceed at your own risk'. On 6 July 2007, the arbitrator visited the premises to examine the remedial work. That effectively being the last piece of evidence considered by him in the conduct of the arbitration, the arbitrator then handed down his award 20 days later on 3 August 2007. He found for Raydin and ordered Bantry to pay damages in the sum of R124 900, plus 50% of the arbitration costs, plus VAT, plus interest from 3 August 2007.

[15] As the award remained unsatisfied, Raydin approached the High Court (Johannesburg) for the arbitrator's award to be made an order of court in terms of s 31(1) of the Arbitration Act.[1] Bantry opposed the relief sought. It filed an affidavit of some six pages in answer. Much of what was contained in Raydin's founding affidavit was not responded to, much less challenged or disputed. Instead, Bantry contented itself with a recital of the correspondence exchanged during the arbitration process.

[16] The gist of its opposition is to be found in the following four brief paragraphs under the heading 'Gross Irregularities or Misconduct on behalf of the [Arbitrator]' (my numbering):

'(i). The second respondent failed to provide the parties with information regarding his observations during inspections in loco on 27 July 2006 and 6 July 2007.

(ii). He committed a gross irregularity in that he failed to identify the cracks for which the first respondent was liable and secondly to give the first respondent an opportunity to tender evidence on the reasonable cost of repairing such cracks.

(iii). He continued with the arbitration after it had lapsed.

(iv). He was not empowered to make the arbitrary financial adjustments contained in his award. Rather he was required to identify the cracks and to apportion liability on a rational basis.'

The affidavit then concludes:

'In the premises it is respectfully submitted that the application to have the award made an order of court should be set aside with costs.'

[17] In its replying affidavit, Raydin took issue with Bantry's failure to launch a counter-application to review and set aside the arbitrator's award. Only then did Bantry file a counter-application that the award of the arbitrator be set aside,

[1] Act 42 of 1965.

supported by a three page affidavit described as ‘an affidavit in support of [an] application for condonation’. With reference to the final paragraph of its earlier answering affidavit, the later affidavit states: 'It would have been clear that . . . [Bantry] was in fact applying to have the award of [the arbitrator] set aside and not the "application" '. It continued 'All the grounds on which [Bantry] relies to set aside the [arbitrator's] award are set out in my answering affidavit.' Bantry accordingly submitted that the 'answering affidavit is in the form of a counter-application'.

[18] Goldstein J granted the relief sought in the main application. In his judgment he made no reference whatsoever to the counter-application or the condonation that was sought by Bantry in respect of its failure to timeously launch the counter-application.

[19] I have set out the factual matrix in greater detail than is absolutely necessary because it illustrates, the extent to which Bantry’s case appeared to shift with the passage of time. Moreover, as is readily apparent, the four principal contentions advanced in opposition in the court below, of which only the first and fourth were pressed on appeal, amounted to no more than conclusions that were devoid of any factual foundation.

[20] I will nonetheless very briefly consider each of the two contentions advanced before us on behalf of Bantry. As set out in its heads of argument, they are:

(a) ‘The arbitrator refused to make known to the parties the evidence obtained at the two inspections in loco prior to his award. This evidence relates to what was

seen by the arbitrator and what was said by the experts nominated by the parties who accompanied him on his inspection':

There is nothing in the arbitrator's award to suggest that he did in fact rely on any relevant information secured during the inspections, as opposed to information gleaned from other sources such as the reports that had been furnished to him by the parties. That much is made plain by the arbitrator in the introductory comments of his award where he states: 'It is my duty to present my award based on the written and oral evidence provided by the parties and their representatives … It must also be recorded that it was agreed that I could use my own technical expertise in arriving at my conclusions and my award'. After all, it was for Bantry to show that the arbitrator had seen something at the inspection that he had relied upon in determining the dispute between the parties. That it had failed to do.

(b) 'In assessing the quantum of the claim he acted on caprice and failed to apply his mind to the facts':

No evidence whatsoever has been adduced in support of the contention that the arbitrator had acted capriciously. Quite the contrary, Mr Wagener conceded quite candidly that the award was a properly reasoned one. Instead we were asked to infer capriciousness by virtue of the following: Raydin had submitted a damages affidavit alleging that the fair and reasonable cost of repairing the cracks was R149 900. From that figure the arbitrator had deducted and then added back certain amounts. In so doing, so the argument went, the arbitrator had exceeded his mandate and had acted arbitrarily. But that could hardly be so. In his award the arbitrator stated: 'I find the rates quoted for the repair work [R149 900] not to be unreasonable'. Quite clearly that determination fell within his mandate and, were he to have ended there, there

would have been no cause for complaint. That being so, as the subsequent deduction and adding back operated to benefit rather than prejudice Bantry, it could hardly - from its perspective – be labelled capricious.

[21] The legal principles applicable to an enquiry of this kind were recently set out by Harms JA on behalf of this court.[2] It is not necessary to recapitulate those principles. 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 re-litigated 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.[3] 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.

[22] It follows that the learned Judge in the court below cannot be faulted and in the result the appeal must fail. It is accordingly dismissed with costs.

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[2] *Telcordia Technologies Inc v Telkom Ltd* 2007 (3) SA 266 (SCA); see also *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA).
[3] Butler & Finsen *Arbitration in South Africa: Law and Practice* para 7.10.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	Wagener (Attorney)
	Instructed by: Bowman Gilfillan Attorneys Cape Town Matsepe Inc Bloemfontein
For Respondent:	A Kemack
	Instructed by: Drobis & Associates Sandton Naudes Attorneys Bloemfontein