THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 298/2017

In the matter between:

PALABORA COPPER (PTY) LTD **APPELLANT**

and

MOTLOKWA TRANSPORT & CONSTRUCTION (PTY) LTD **FIRST RESPONDENT**

Neutral citation: *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* (298/2017) [2018] ZASCA 23 (22 March 2018)

Coram: WALLIS, DAMBUZA and VAN DER MERWE JJA and PLASKET and SCHIPPERS AJJA

Heard: 8 March 2018

Delivered: 22 March 2018

Summary: Arbitration award – application to set aside – s 33(1)(b) of the Arbitration Act 42 of 1965 – grounds for – gross irregularity – severability of award – permissible if the bad part is clearly severable from good – award may then be enforceable for the residue after severance.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fabricius J sitting at first instance):

1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2 The order of the High Court is set aside and replaced with the following order:

‘1 The application to make the arbitration award dated 9 December 2015 an order of court in terms of s 31(1) of the Arbitration Act 42 of 1965 is dismissed.

2 The application to set the said award aside in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965 is upheld in regard to paragraph D thereof and the award is to that extent set aside.

3 The dispute between the parties in regard to the claim in reconvention in the arbitration is to be submitted to a new arbitration tribunal to be agreed between the parties and, failing such agreement within 30 days of the date of this order, to be determined by this court in terms of s 33(4), read with s 12(2), of the Arbitration Act 42 of 1965.

4 The applicant is to pay the costs of the application and counter-application, such costs to include those consequent upon the employment of two counsel.’

JUDGMENT

Wallis JA (Dambuza and Van der Merwe JJA and Plasket and Schippers AJJA concurring)

[1] On 23 December 2014, at the conclusion of a tender process for the removal of waste from its mine and smelter, the appellant, Palabora Copper (Pty) Ltd (Palabora) addressed a letter to the respondent, Motlokwa Transport & Construction (Pty) Ltd (Motlokwa), headed Notice of Contract Award and saying in the opening sentence that:

'Palabora Copper is pleased to advise you that your final tender offer for the above tender has been successful and accepted.

We confirm that this award is from 01 March 2015 until 31 December 2016 depending on the Smelter Plant future … All details, terms and conditions are contained in the contract document which will be signed off by both parties in January 2015. '

A representative of Motlokwa signed the letter that day under the words 'Award Acceptance'.

[2] After that outwardly optimistic start relations between the parties deteriorated. On 20 February 2015 Palabora launched proceedings in the high court against Motlokwa, seeking a declaratory order that no valid and binding contract had been concluded, alternatively declaring that any contract that had been concluded had been duly cancelled. Motlokwa pleaded to this claim and pursued a counterclaim on the basis that a binding contract had been concluded between the parties. It asked for specific performance, alternatively damages. The latter claim was posited on the refusal by Palabora to permit Motlokwa to perform the contract

constituting a repudiation that entitled Motlokwa to recover, by way of damages, the profits it would have earned had it been permitted to perform the contract.

[3] When the matter came to trial the parties agreed to refer it to arbitration before a retired judge, Justice C J Claassen. During the course of the hearing he made various interim findings in a piecemeal fashion, holding that a valid and binding contract had been concluded by way of the letter of 23 December 2015; that the pleaded defences of lack of consensus between the parties and that any contract was invalid by virtue of *iustus* error[1] were unsound and fell to be dismissed; and, that the contract had not been lawfully cancelled. These rulings appeared in his final award as paras A and B thereof, although they did not dispose of any relief claimed in the arbitration. However, they formed the basis upon which he held in para C that Palabora's claim fell to be dismissed. In para D he then upheld Motlokwa's counterclaim. Consequently his award on the claim and counterclaim read as follows:

'C Prayers 1 and 2 of the Claimant's claim in convention [are] dismissed.

D The Claimant is to pay to the Defendant:

1 The amount of R39 885 315; and

2 Costs, which costs will include the employment of two counsel and the qualifying fees of Mr Cameron-Ellis.'

[4] Two days after the award was published Motlokwa brought proceedings for it to be made an order of court in terms s 31(1) of the Arbitration Act 42 of 1965 (the Act).[2] The application was opposed and a

---

[1] The one light note in an otherwise serious case is that the typist responsible for the preparation of the record, perhaps with unconscious irony, consistently typed this as 'useless error'.

[2] Both the notice of motion and the judgment in the high court say that the application was made under s 33(1) but that is incorrect.

counter-application brought under s 33(1)*(b)* of the Act to set the award aside. Fabricius J in the Gauteng Division of the High Court, Pretoria upheld the application and dismissed the counter-application. He refused leave to appeal, but this Court granted leave on petition.

[5] Palabora couched its attack on the award in general terms, but it was largely confined to an attack on the award of damages to Motlokwa. This was the principal issue debated in argument before us. The argument hinged around three propositions. These were:

- that on a proper construction of the pleadings it was for Motlokwa to prove that it had suffered damages arising from Palabora's repudiation of the contract and, as it had led no evidence to substantiate that it had suffered damages, its counterclaim should have been dismissed;
- that the arbitrator wrongly placed the onus on Palabora to show that Motlokwa would not have suffered any damages; and
- that the arbitrator misconstrued an agreement on quantum reached by the parties during the arbitration, by ignoring the qualifications embodied in the agreement that required Motlokwa to prove certain assumptions central to its claim to have suffered damages and concluding that there had been no meeting of the parties' minds in regard to the terms of the quantum agreement.

[6] The other argument advanced by Palabora was that there was a gross irregularity in the manner in which the arbitrator dealt with its claim. The contention was that, in making his first ruling that there was a valid and binding contract, the arbitrator pre-empted his decision on Palabora's later argument that there was a lack of consensus between the

parties as to the subject matter of the agreement. The earlier conclusion precluded him from properly considering that argument and this constituted a gross irregularity vitiating his conclusions on and dismissal of Palabora's claim. As the counterclaim was dependent on the finding that there was a binding contract this irregularity was said to have also fatally infected the arbitrator's findings on the counterclaim.

The law

[7] The legal principles that govern the circumstances in which a court can set aside an arbitration award are reasonably clear, although their application in any particular instance may be problematic. The statutory provision invoked in the present case is s 33(1)(*b*) of the Act, which reads as follows:

'(1) Where —

(*a*) …

(*b*) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(*c*) …

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[8] This provision was the subject of detailed consideration by this Court in *Telcordia*.[3] It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair

[3] *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA).

trial of the issues that constitutes a gross irregularity.[4] The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it.[5] The attack on the award must be measured against these standards.

The pleadings

[9] In its particulars of claim Palabora alleged that it called for tenders in terms of a request for proposals and received a tender from Motlokwa that it accepted in terms of the Notice of Contract Award. This was admitted. Palabora went on to plead that a draft contract prepared for signature by Motlokwa was not signed as provided for in the Notice of Contract Award and that this failure meant that there was no binding agreement. It furthermore alleged that there was no consensus between it and Motlokwa, because the request for proposals did not include a provision for the contractor's monthly overheads, whereas Motlokwa's tender did. It pleaded that this was a counter-offer not accepted by Palabora and therefore there was 'no, or insufficient, consensus between the parties regarding their true intention.'

[10] Apart from these allegations Palabora alleged that any contract that came into existence had been induced by mutual mistake, alternatively, *iustus* error, or had been lawfully cancelled. Nothing more

---

[4] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581; *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551 at 560-561.
[5] *Clark v African Guarantee & Indemnity Co Ltd* 1915 CPD 68 at 77; *Telcordia supra* paras 4 and 5; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC) para 219.

needs to be said about these defences, as they did not feature in the argument before this court.

[11] Together with its plea Motlokwa delivered a counterclaim. It relied on the acceptance of its tender, as embodied in the Notice of Contract Award, as bringing into existence a contract between itself and Palabora. Initially it sought an order for specific performance, but by the time of the arbitration its counterclaim was for damages in lieu of performance on the basis of a breach of the contract. This claim was pleaded in the following terms:

'30. But for the plaintiff's breach of the agreement, the defendant would have performed in terms of the agreement.

31. In the circumstances, the defendant has suffered damages in the amount of R39 855 315.00, alternatively R33 007 175.00, which amount represents:

31.1 the revenue that the defendant would have earned; less

31.2 the costs and expenses the defendant would have incurred, for the duration of the agreement.'

[12] Palabora denied these allegations 'as if specifically traversed' and required Motlokwa to prove them. But it did not rest there. Its plea went on as follows:

'7.3 In amplification of the aforementioned denial, the Plaintiff avers that:

7.3.1 Almar Investments (Pty) Limited (…) being the Defendant's joint venture partner that had the necessary experience and skill to perform the work under the contract withdrew from any involvement with the Defendant on 20 January 2015, resulting in the Defendant lacking the necessary experience and skill to perform the said work;

7.3.2 The Defendant would not have been able to raise the necessary finance of approximately R60 million in order to finance the acquisition of the equipment and vehicles necessary to perform the said work;

7.3.3 Even if the Defendant had been able to obtain the said financing, it would still not have been able to obtain the equipment and vehicles necessary to perform the said work timeously, in order to commence performing the work on 1 March 2015;

7.3.4 As a result of the Defendant not being able to perform the work, not having the necessary equipment and vehicles and/or not being ready and able to commence performing the work on 1 March 2015, the Plaintiff would have cancelled the agreement with the Defendant, as it would, in the circumstances, have been able to do. The basis of the cancellation would inter alia be that the Defendant was unable to conduct its normal line of business in the ordinary and regular manner, as provided for in clause 7.3(a) of the General Conditions.

7.4 Further to paragraph 7.3 above, and even in the event that the Defendant was able to, and did, commence performing the work on the said commencement date (which is denied):

7.4.1 taking into account the amounts which the Plaintiff would be required to pay to the Defendant, the Plaintiff would immediately have tested the market to ensure that just and fair prices were paid;

7.4.2 In such event, the Defendant, if given the opportunity to quote, would have been unsuccessful in its bid, and the agreement would have been terminated …'

[13] It is clear from these pleadings that the primary issue before the arbitrator was whether a contract had been concluded between the parties. This involved two questions. The first was whether the letter containing the Notice of Contract Award gave rise to a contract or whether it was merely a preliminary indication of matters and of no force or effect, unless the parties duly executed the written agreement containing the 'details, terms and conditions'. The second was what was described in the arbitration and before us as consensus. It is apparent that this was being used in the special sense described above, namely that because the tender was formulated differently from the request for proposals and had been accepted without Palabora realising that it involved payment not only for

the work but also for Motlokwa's overheads, there was no true consensus between the parties. Unless there was a valid contract that Palabora could not avoid on these or any of the other pleaded grounds Motlokwa's counterclaim was stillborn.

[14] As to the counterclaim, if Motlokwa surmounted the hurdle of showing the existence of a valid and binding contract, there was no dispute that Palabora refused to permit it to perform in terms of the contract and had indeed purported to cancel it. That left in issue the allegation made by Motlokwa and denied, with amplifying reasons, by Palabora that Motlokwa would have performed in terms of the contract. It also left in issue the allegation that it suffered damages being the difference between the amount it would have earned had it been permitted to perform and the expenses that it would have incurred in effecting that performance.

[15] The allegations by Palabora in amplification of its denial that Motlokwa had suffered damages were essential as a matter of pleading to alert Motlokwa to the case it would have to meet at the trial. That case was that it would not have been able to perform, and would not in fact have performed the contract and would therefore not have suffered any damages as a result of a breach by Palabora. Motlokwa recognised in para 30 of its counterclaim, that its ability to have performed the contract was the basis for its contention that it had suffered a loss of profits as alleged. These allegations did not create a separate defence to the counterclaim, nor did they shift the onus of proving that it would have suffered damages and the quantum thereof from Motlokwa to Palabora. The latter contended that the failure to recognise this lay at the heart of what went awry in the arbitration.

The arbitration

[16] Early on the first day of the arbitration the arbitrator asked whether, in the light of the pleaded issues, it would not be convenient to separate the determination of Palabora's claims from the counterclaim. The suggestion was welcomed by Palabora's counsel and greeted more cautiously by Motlokwa's counsel. By the third morning, both sides had agreed that this was a sensible approach. The arbitrator then made the following order in terms of their agreement:

'… the agreement that has been arrived at is that there will be a separation of the claim by the claimant from the defendant's counterclaim. So the defendant's counterclaim will stand over for another day. In the present proceedings we will only be concerned with the declarator in the claimant's claim to establish whether or not an agreement has been concluded or not.'

Both counsel confirmed the agreement. Thereafter Palabora led some further evidence and closed its case. Motlokwa closed its case on the claim without calling any evidence. The hearing then adjourned for the preparation of heads of argument.

[17] The argument that followed initially revolved around the question whether an enforceable contract was concluded in consequence of the Notice of Contract Award. Palabora contended that a contract would only have come into existence after further negotiations and the conclusion of a more complete written agreement containing all the details, terms and conditions of the contract.[6]

---

[6] *CGEE Alstholm Equipments et Enterprises Electriques South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92.

[18] On conclusion of argument on this point the arbitrator said that he understood that he was required to make a ruling, with reasons to follow later and that this would dispose of the question whether there was a contract between the parties. Counsel for Palabora interposed and said this was incorrect, as there remained the alternative argument that there was no consensus between the parties. He said that the arbitrator was only required to rule on whether an additional written contract was required for an agreement to come into existence and then to hear argument on the question of consensus. The arbitrator's response was clear: 'I say no, it was not required' and asked if that was enough for a ruling, to which counsel for Palabora responded 'Yes'.

[19] Confusion was introduced by the intervention of counsel for Motlokwa. He indicated that in his view any ruling would dispose finally of the question whether a contract had been concluded including the issue of consensus. When the arbitrator then suggested that his ruling should say that a contract came into existence as a result of the Notice of Contract Award, counsel for Palabora objected that this would exclude his reliance on both the defence of lack of consensus and that of *iustus* error.

[20] After lengthy discussion between the arbitrator and counsel a compromise ruling was drafted that was intended to dispose of the issue already argued, while leaving it open to Palabora to pursue its contentions based on lack of consensus and *iustus* error. It read as follows:

'It is ruled that the contract between the parties did come into being upon the acceptance on 29 December 2014 by the claimant of the defendant's tender dated 10 December 2014. Subject to the claimant's right to attack the validity of that contract on the basis of its further defences.'

This ruling was eventually incorporated in para A of the arbitrator's award, but of itself it plainly does not constitute an award on any issue submitted to arbitration.

[21] Both parties having expressed satisfaction with this ruling argument then commenced, without any further evidence, on the issues of lack of consensus, mutual mistake, *iustus* error and cancellation. When the argument ended the arbitrator indicated that he rejected all of Palabora's contentions on these issues. Again there was some debate with counsel. This ended with the arbitrator making two rulings that he called B and C respectively and that feature in the final award in those terms. The first was that the 'further defences of lack of consensus, mutual mistake and/or *iustus* error' failed. The second was that prayers 1 and 2 of Palabora's claim in convention were dismissed. Like para A of the final award, para B was not itself an award, but a finding leading to the award in para C that the claim in convention be dismissed. For present purposes it can be disregarded.

[22] At this stage the parties agreed that the question of costs in regard to the claim would be dealt with at the end of the proceedings. The parties then turned to the counterclaim and the quantum of Motlokwa's damages. I will return to this in due course, but for now it is necessary to address Palabora's argument that the initial part of the arbitration was affected by a gross irregularity that requires the award to be set aside in its entirety.

Pre-judgment of issue

[23] I have little difficulty with the notion that an arbitrator who makes a preliminary ruling on one issue and thereby, without hearing argument on a second issue, effectively forecloses any argument on that issue, or

pre-determines the answer to it, may be guilty of a gross irregularity. The position there seems to me no different from that which would arise if the arbitrator were to refuse entirely to hear argument from one of the parties on a point. The issue is whether that occurred in this case as a result of the events described above.

[24] Palabora argues that it became impossible for the arbitrator to consider the argument of absence of consensus properly once he made his initial ruling that the issue of the Notice of Contract Award and its acceptance resulted in the conclusion of a contract. Accordingly, it submitted that the outcome of the argument on that point was foreordained.

[25] I do not agree. The parties agreed to separate Palabora's claim from Motlokwa's counterclaim. They then argued one point namely whether the issue and acceptance of the Notice of Contract Award was insufficient on its own to give rise to a contract and whether the signature, in January 2015, of the contemplated written agreement containing the 'details, terms and conditions' was a pre-requisite to the conclusion of a binding contract. The arbitrator rejected this contention. When doing so the arbitrator was well aware that this was all that had been argued before him. That much is apparent from the exchange between him and Palabora's counsel quoted above in para 18.

[26] After Motlokwa's counsel's intervention described earlier, Palabora's counsel made it clear that he still wished to advance its contention that there was a lack of consensus. From the discussion that followed it is plain that the arbitrator's aim and intention was to formulate a ruling on the point already argued, that left it open to Palabora to argue

the remaining points that had not been considered. The ruling eventually made may have been clumsily worded, and may have led counsel for Motlokwa to argue that the further arguments were inconsistent with it, but nothing could be plainer than that the arbitrator did not prevent argument on the point of lack of consensus. Indeed the further pages of the record show that it was vigorously argued.

[27] I appreciate that Palabora's contention is subtler than merely saying that it was prevented from advancing the argument. Instead counsel contended that the impact of the initial ruling that a contract came into being upon the acceptance on 29 December 2014 by the claimant of the defendant's tender was inevitably that the argument of lack of consensus would not be sustained. I do not agree. The arbitrator made a preliminary ruling. It is apparent from the circumstances in which he did so that all he intended to do was to reject the argument that the execution of a further written agreement was necessary in order to bring a binding contract into existence. He deliberately qualified his ruling to enable Palabora to advance the lack of consensus argument. It is true that he seemed sceptical of its merits, or whether it was more properly part of the argument on *iustus* error, but he was entitled to form those views, so long as he was willing to entertain the argument and consider it on its merits as he saw them. Whether he was right or wrong is no concern of this court. I therefore reject this argument on behalf of Palabora.

The counterclaim

[28] Once the stage of dealing with the counterclaim arrived the parties' experts concluded an agreement in regard to quantification of Motlokwa's claim. They embodied the agreement in a document that was handed to the arbitrator. The material portion read:

‘2. This agreement is premised upon and subject to the following assumptions being established, namely:

2.1 That the Defendant would have succeeded in timeously obtaining finance for the amount of approximately R54 million in order to purchase the equipment necessary to perform the work, and an additional approximately R6 million, as working capital;

alternatively

2.2 That the Defendant would have succeeded in timeously:

2.2.1 Obtaining finance for the amounts of approximately R19.4 million for the purchase of equipment, and a further approximately R6 million in respect of working capital; and

2.2.2 Entering into a rental agreement for the renting of the balance of the equipment required to the value of approximately R34 million;

2.3 That the Defendant would have purchased, *alternatively* rented all of the necessary equipment in time, in order to have the same delivered to the mine on or before 1 March 2015.

3. The Claimant intends persisting with all of its defences as set out in its Plea to the counter-claim.

4. If the assumptions in paragraph 2 above are proved, and depending upon any finding in relation to the Claimant’s defences to the counter-claim first being made, the parties agree to the following *quantum*:

4.1 R39 885 315 in the event of it being proved that the equipment would have been purchased;

alternatively

4.2 R33 007 175 in the event of it being proved that the equipment would have been hired.’

[29] Clauses 2 and 4 of the agreement were relatively straightforward. Motlokwa’s calculation of its claim was agreed between the two experts, but their agreement was subject to the important qualification that it applied if the assumptions in clause 2 were proved. In the one scenario the assumption that had to be proved was that Motlokwa would have been

able to procure the necessary finance and working capital to acquire the equipment to perform the contract. In the other it had to prove that it would obtain the finance and working capital necessary to lease, as opposed to purchase, the equipment. A further assumption applicable to both scenarios was that it would have done so sufficiently expeditiously to enable the equipment to be delivered to the mine on or before 1 March 2015 when it was supposed to commence work under the contract.

[30] Some confusion was caused by the references in clause 3 to Palabora persisting with 'all its defences' contained in its plea to the claim in reconvention. It is true that in that document Palabora had incorporated all the allegations advanced in its particulars of claim in support of the contention that no binding contract had been concluded, or that it had been cancelled. Manifestly all those issues had already been disposed of and, to the extent that at some points in the record counsel for Palabora appears to have thought that some of them were still alive, he was mistaken. However he was perfectly clear that the issues that were the subject of proof as set out in the quantum agreement were those raised in para 7 of Palabora's plea to the counterclaim quoted earlier in para 12 of this judgment.

[31] For the reasons already explained in dealing with the pleadings the onus of proof in regard to damages rested squarely on Motlokwa.[7] It was obliged on the pleadings to prove that it would have suffered damages in consequence of the repudiation or unlawful cancellation of the contract and to prove the quantum of those damages. What evidence was required

---

[7] In the context of the present case such loss of profits as Motlokwa proved would not be special damages, but those flowing naturally from the breach of contract. *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22.

and where the duty to adduce evidence lay were separate questions, but there could be no dispute in regard to where the onus lay. Of course in many cases where the damages are based upon an alleged loss of profits there is no real issue concerning the ability of the injured party to perform the contract and the issue is rather as to the quantification of its losses. But in principle it is for the claimant to allege (as Motlokwa did), and prove, the fact of loss and the amount thereof. At a trial a failure to do so would have resulted in an order of absolution from the instance.[8] All of this flowed from the principle that breach of contract is not in itself a wrong carrying an award of damages unless the aggrieved party has suffered patrimonial loss.[9]

[32] The quantum agreement did not alter this position. If anything it made it even clearer in specifying that proof of the assumptions was required and that an award of damages could only flow from such proof. All it did was narrow the scope of the enquiry to proof of the assumptions. If those were proved and loss had been suffered the quantum of the damages was agreed. The proof required related to the manner in which Motlokwa would have carried out the contract. The arbitrator was accordingly required to determine whether it would have done so and, if so, whether it would have done so by raising the requisite finance to purchase vehicles and equipment or would have raised the finance to lease the vehicles and equipment it needed.

[33] This was perfectly straightforward. What complicated it was the contention by Motlokwa that it was under no obligation to prove anything

---

[8] *Aucamp v Morton* 1949 (3) SA 611 (A).
[9] *LAWSA* Vol 7 (2 ed, 2005), sv 'Damages' para 47 and the cases cited in fn 2.

further and that the effect of the quantum agreement was to settle both its entitlement to damages and the quantum thereof entitling it to an award in its favour. The submission was made that what were called assumptions in the quantum agreement were 'no more than the defences raised in the plea' and that there was nothing in the agreement that Motlokwa 'is called upon in law to establish in order to create a prima facie case'. The further submissions by counsel for Motlokwa made it clear that he was speaking of the issues in paras 7.3 and 7.4 of the plea to the claim in reconvention. His approach was that the arbitrator should exclude reliance on these because they were not a defence sustainable in law.

[34] These and similar submissions made on behalf of Motlokwa were based on the assumption that the effect of the quantum agreement was an admission that it had suffered damages in the amounts set out in the agreement. This was apparent from counsel's submissions in a number of passages in the record. Thus he said 'there is no sustainable answer in law to the quantum conceded' and most tellingly:

'… as I always understood it, if you claim loss on the basis of a breach of contract you never have to allege, I would have done the work. It is not part of your *essentialia*. It is a non-defence. … [T]here is no obligation on the party claiming the loss to make a positive allegation or to lead any evidence because the only basis, the only thing you have to prove is that there was an unlawful termination of contract.'

Counsel appears to have overlooked that Motlokwa had alleged that it would have performed the contract and that its claim was one for loss of profits, so that it was essential for his client to prove that it would have earned those profits had it been permitted to perform the contract.

[35] Instead counsel submitted that the pleas in 7.3.2 and 7.3.3 of the plea to the counterclaim were not viable pleas in law. That prompted the arbitrator to ask whether he was taking a verbal exception to these

paragraphs. The answer was in the affirmative and a ruling was sought 'before we even consider leading evidence'.

[36] Following argument the arbitrator struck out 'the defences' in paras 7.3 and 7.4 of the plea. After this ruling counsel for Palabora tried to lead some evidence to show that the assumptions underpinning the quantum agreement were not well founded, only to be told by the arbitrator that the defences he was relying on had been struck out. When he said that it was not a defence, but that the quantum agreement was conditional on proof of the assumptions, he was allowed briefly to call one of the experts. He did so and referred him to certain documents emanating from Standard Bank. This prompted an objection and the arbitrator said that he did not have to listen to hearsay evidence.[10] That brought an end to the evidence of that witness and no attempt was made to call any further evidence.

[37] There was then a final argument on behalf of both parties. Palabora's counsel contended strongly that as no attempt had been made to prove the assumptions underlying the quantum agreement the counterclaim had to fail. In all fairness the arbitrator recognised that this was Palabora's argument. In response counsel for Motlokwa said that this was not what the quantum agreement meant and it 'could never be saddled with a duty to lead evidence in order to destroy the defences he has raised which are not sustainable in law'. He argued that Palabora was labouring under a misapprehension in regard to the need to lead evidence on the issues of whether Motlokwa had suffered damages and reiterated

---

[10] The proposition was incorrect if that evidence had probative value and its admission would not have led to any unfairness to Motlokwa. *Dexgroup (Pty) Ltd v Trsutco Group International (Pty) Ltd and Others* [2013] ZASCA 120; 2013 (6) SA 520 (SCA) paras 17-22.

his view that it had never been necessary for him to lead any evidence on this issue.

[38] When it came to giving a judgment on these issues the arbitrator held that the quantum agreement reversed the onus of proof; that this could not have been intended; and accordingly that there was no meeting of the minds in regard to its terms. These were issues that he raised in the course of argument. They formed no part of Motlokwa's argument and had the radical outcome of invalidating the quantum agreement. He then without further ado made an award in favour of Motlokwa of the higher amount in the quantum agreement, namely, R39 885 315.00. This was presumably based on the quantum agreement in respect of which he had just held that there was no consensus between the parties.

[39] In the result, what started as a clearly pleaded case on damages, where the basis for the claim that damages had been suffered was clearly challenged on specified grounds, ended up with every endeavour by Palabora to pursue those grounds being blocked. Motlokwa brought no evidence to show that it could or would have fulfilled the contract, had it been permitted to do so. Finally and without more, it was given an award in the higher of the two amounts set out in the quantum agreement, without any evidence or argument being advanced to the arbitrator as to why this was the appropriate amount to be awarded and without the arbitrator advancing any reason for selecting the one ahead of the other. As Holmes J once said in a different context 'What is the Court to do about this drollery?'[11]

---

[11] *Dreyer v Naidoo* 1958 (2) SA 628 (N) at 629A – the case of the ambidextrous sheriff.

[40] Had the problem of the quantum agreement referring to two separate amounts been considered, the arbitrator would surely have recognised that it was necessary at the very least to determine whether in the performance of the contract Motlokwa would have pursued the course of purchasing or leasing the necessary equipment. That in turn would have required an investigation into its ability to raise the finance necessary for those purposes. Counsel endeavoured to address this difficulty by referring us to answers given in cross-examination by witnesses called by Palabora that initially they believed that Motlokwa would be able to fulfil its contractual obligations and an answer by a bank official, sub-poenaed *duces tecum* to produce certain bank records, that Motlokwa and the broader organisation of which it was a part were good clients who had never been refused banking facilities. Not only were those answers not directed at the issue of Motlokwa's ability to perform the contract or the manner in which it would have done so, but they were given in the context of Palabora's claim, not the counterclaim, on which no evidence at all was led.

[41] The arbitrator's task was not aided by counsel for Palabora persistently describing issues raised in amplification of its denial that Motlokwa had suffered damages, as defences, a theme taken up by his opponent. However, they were clearly not defences and time and again counsel for Palabora also made the point that the issue on which evidence needed to be led was whether Motlokwa had suffered damages, something that could only have occurred if it had been able to perform the contract.

[42] It is plain from the above description of events in the course of the arbitration on the counterclaim that Palabora did not have a fair trial of

the issues it sought to raise in respect of the counterclaim. The arbitrator apparently thought that because quantum had been agreed this meant that it was agreed that Motlokwa had suffered damages. This disregarded the pleadings and the clear assumptions in the quantum agreement. It is unnecessary to consider where the evidential burden, as opposed to the onus of proof, lay in regard to this. The effect of the arbitrator's rulings, especially his striking out of paras 7.3 and 7.4 of the plea to the counterclaim, was to prevent an exploration of these issues by relieving Motlokwa of any obligation, however light evidentially, to prove that it would have performed the contract and had suffered loss as a result of being prevented from doing so. In the result, the arbitrator did not direct his mind to the central issue in the counterclaim, namely, whether Motlokwa proved that it had suffered loss and, in consequence, damages. All this was done in good faith, but the cumulative effect was to deprive Palabora of a fair trial of these issues. It follows that para D of the award cannot stand.

What should be set aside?

[43] Having reached that conclusion the question arises as to the relief to be granted to Palabora. Obviously the appeal must be upheld, but what portion of the arbitrator's award must be set aside? This raises the legal issue of the proper interpretation of the court's powers under s 33(1)*(b)* of the Act. Must a finding of a gross irregularity in the proceedings necessarily result in the entire award being set aside, or is there scope for the court to preserve and enforce the 'good' part of the award and set aside the 'bad'?

[44] The arguments for Palabora were presented under four heads, of which one related to the dismissal of its claim and three dealt exclusively

with the counterclaim. The first argument failed and the arguments in regard to the counterclaim succeed. Counsel for Motlokwa submitted that only para D of the award dealing with the counterclaim and costs should be set aside and the remainder should not be affected. For their part counsel for Palabora submitted that the entire award fell to be set aside in consequence of the success of the arguments in relation to the counterclaim.

[45] To my surprise there is virtually no direct authority on whether it is permissible in circumstances such as those in this case for the court to set aside only a part of the award and not the whole. Section 33(1)*(b)* provides that if arbitrators commit a gross irregularity or exceed their powers the court may make an order setting the award aside, but it says nothing about the situation where the irregularity or excess of powers affects only a discrete part of the award. Our attention was not drawn to any cases where this had occurred in relation to a gross irregularity. My own researches reveal that one textbook[12] says that in an application under s 33(1) of the Act the court may set aside the award in whole or in part. The problem is that the cases cited by the author for that proposition do not support it.[13] In some of the early decisions courts were willing to make a part of an award an order of court, provided the parties consented thereto. In others the court was dealing with statutory arbitrations in relation to labour matters, where an award became what was formerly known as subordinate delegated legislation, to which the principles of severance could be applied.[14] All of this is unhelpful.

---

[12] Jacobs *The Law of Arbitration in South Africa* (1977) para 177, p 145: 'It is competent for a court to sustain an award in part and set it aside in part.'
[13] With the possible exception of *Maladry v De Koning* 1905 TS 528.
[14] *S v Prefabricated Housing Corporation (Pty) Ltd* 1974 (1) SA 535 (A) at 540A-E.

[46] Other standard texts on arbitration in South Africa do not address the issue in the context of a finding of gross irregularity in the arbitration.[15] They do, however, accept that where arbitrators exceed their powers and the exercise of excessive powers does not infect the entire award, the good may be severed from the bad and enforced.[16] Bearing in mind that s 33(1)*(b)* of the Act deals with both exceeding powers and gross irregularity as grounds for setting aside an award, there seems no reason why the same principle should not apply where only part of an award is infected by a gross irregularity.

[47] The current English Arbitration Act[17] addresses the problem directly by saying that where a court may set aside an award it may do so 'in whole or in part'. However, under its predecessor[18] the wording was the same as the current South African statute, namely, that the court may 'set aside the award'. In the last edition of *Russell on Arbitration*[19] before the new statute the law in regard to this provision was summarised as follows:

'An award bad in part may be good for the rest. If, notwithstanding that some portion of the award is clearly void, the remaining part contains a final and certain determination of every question submitted, the valid portion may well be maintainable as the award, the void part being rejected …

---

[15] *LAWSA* Vol 2, 3rd ed (2015) paras 140 and 142. Butler and Finsen *Arbitration in South Africa Law and Practice* (1993) do not mention the matter.
[16] *LAWSA ibid* para 143 and the cases cited in fns 11 to 13. Peter Ramsden *The Law of Arbitration* (2009) p 200 says that where one part of an award is void the valid portion may be enforced, citing *Cone Textiles (Pvt) Ltd v Ayres and Another* 1980 (4) SA 728 (ZA), a case where a part of the award related to a matter not falling within the submission to arbitration. After severance the remainder of the award was enforced.
[17] Arbitration Act 1996 (1996 c 23) s 68(3)(b).
[18] Arbitration Act 1950 (14 Geo 6, c 27) s 23(2).
[19] Anthony Walton QC and Mary Vitoria *Russell on Arbitration* 20th ed (1982) 430-431.

The bad portion, however, must be clearly separable in its nature in order that the award may be good for the residue. When it is so divisible, the faulty direction will alone be set aside or treated as null. … If the objectionable provisions in the award are inseparable from the rest, or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion, the award will be altogether avoided.'

[48] That approach seems to me to reflect a logical and sensible construction of the statute. There does not appear to be any sound reason why an arbitration, that has been properly conducted on certain issues and has properly determined those issues, should be set aside in its entirety, because of an irregularity in relation to a wholly separate issue. Of course the court will need to be satisfied that the latter issue is wholly separate from the others, but, subject to that, this approach is consistent with the language of s 33(1)*(b)* and gives effect as far as possible to the parties' agreement to have their dispute determined by the arbitrator. It is also an approach that is consistent with those cases in which our courts have set aside portions of an award as being beyond the powers of an arbitrator, but made the balance of the award an order of court. In my view it is correct and should be applied in this case.

[49] Palabora's claim and Motlokwa's counterclaim were separate and distinct, although for convenience they were dealt with in one set of proceedings. The failure of the first was a pre-requisite for success in the second, but that would have been the case if they had been pursued in separate proceedings, where the decision on the existence of the contract would have been *res judicata* in later proceedings. Of more importance is that the issues in respect of the existence of a contract between Palabora and Motlokwa, and whether such contract was invalid because of a lack of consensus between the parties as to its terms or by virtue of the other

pleaded defences, were separated from the counterclaim. The effect of that separation was the same as if the existence of the contract had been determined in entirely separate proceedings from the determination of the counterclaim. As the gross irregularity occurred in relation to the latter alone, it is the award in respect of the latter alone that falls to be set aside.

Order

[50] The appeal must be upheld with costs, including the costs of two counsel. The order of the high court dismissing Palabora's application to set aside the arbitration award must be set aside and replaced with an order setting aside para D of the award. The order making the whole award an order of court in terms of s 31(1) of the Act must also be set aside.

[51] This raises the question whether an order should have been made making para C an order of court. As pointed out above paras A and B were not awards on any issue submitted to the arbitrator for determination. The problem is that making para C of the award an order of court would serve no useful purpose. The purpose of such an order is to make the processes of the high court in regard to the execution of judgments available to the successful party in the arbitration. But there is nothing on which to execute in relation to an order dismissing prayers 1 and 2 of Palabora's claim. They are simply dismissed and the principles of *res judicata* prevent them from being revived. No purpose was served by making that portion of the award an order of court. That order was sought in order to be able to execute on the monetary award on the counterclaim.

[52] Turning to costs Motlokwa has succeeded in maintaining the award dismissing Palabora's claim, albeit without an order in terms of s 31(1). However, the more substantial part of the award was the award of damages on the counterclaim. That must be, and should in the High Court have been, set aside. Palabora has therefore enjoyed substantial success and is entitled to its costs in the High Court. Lastly, Palabora asked us to refer the dispute, insofar as the award was set aside, to a new arbitrator in terms of s 33(4) of the Act. We are obliged to accede to that request.[20]

[53] Accordingly I make the following order:

1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

2 The order of the High Court is set aside and replaced with the following order:

'1 The application to make the arbitration award dated 9 December 2015 an order of court in terms of s 31(1) of the Arbitration Act 42 of 1965 is dismissed.

2 The application to set the said award aside in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965 is upheld in regard to paragraph D thereof and the award is to that extent set aside.

3 The dispute between the parties in regard to the claim in reconvention in the arbitration is to be submitted to a new arbitration tribunal to be agreed between the parties and, failing such agreement within 30 days of the date of this order, to be determined by this court in terms of s 33(4), read with s 12(2), of the Arbitration Act 42 of 1965.

---

[20] *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA).

4 The applicant is to pay the costs of the application and counter-application, such costs to include those consequent upon the employment of two counsel.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: J P V McNally SC (with him K H Shozi)
Instructed by: Webber Wentzel, Sandton
Symington & De Kok, Bloemfontein

For respondent:
Instructed by: J Wasserman SC (with him A J Daniels)
Markram Inc, Attorneys, Nieuw Muckleneuk
Webbers Attorneys, Bloemfontein.