



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: 17 February 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another (1226/2021) [2023] ZASCA 13 (17 February 2023)

Today the Supreme Court of Appeal (SCA) upheld an appeal from the Gauteng Division of the High Court, Johannesburg (high court). This appeal revolved around arbitration proceedings between the appellant, OCA Testing and Certification South Africa (OCA Testing), and the first respondent, KCEC Engineering (KCEC). On three separate occasions, OCA Testing and KCEC entered into three written agreements in terms of which OCA Testing were to deliver advisory, technical and mechanical services to KCEC. The business relationship regrettably broke down after KCEC refused to settle tax invoices submitted by OCA Testing; the parties agreed to implement arbitration proceedings, as set out in terms of the written agreements. The second respondent was appointed arbitrator (the arbitrator).

In reliance on the three written agreements, OCA Testing sued KCEC for payment of a globular amount of R2 603 729.44. The aggregate sum claimed comprised three amounts: R142 002.46 in terms of the first agreement, R2 355 768.05 in terms of the second and R276 744.00 in terms of the third. KCEC admitted that the services were provided by OCA Testing but it disputed liability by asserting that the services were rendered late, resulting in KCEC suffering damages. Furthermore, KCEC had also overpaid OCA Testing to the tune of R1 961 770.24, which it sought to reclaim via its counter-claim; and it had suffered liquidated damages in the sum of R1 646 220.00 occasioned as a result of OCA Testing's default in breach of its contractual obligation.

After having analysed the parties' pleadings, the arbitrator dismissed the claim, basing the dismissal of the entire matter on the first written agreement, as the arbitrator maintained that payments due in terms of the second and third agreements would not have resulted in obliging OCA Testing to perform in terms of the first agreement. KCEC's counter-claim was also dismissed as it was not based on the *condictio indebiti* or that OCA Testing could be liable for damages in terms of special damages.

The matter proceeded to the high court where it was dismissed. In the high court, the question was posed whether the second applicant failed to deal with the validity of the claim. The high

court was of the view that the arbitrator had fully understood the nature of the enquiry into the first agreement and there was, therefore, no reason to set the arbitrator's finding aside.

Upon appeal, the appellant contended that there could be no way in which the arbitrator could have arrived at the conclusion to dismiss the aggregate claim with reference to the first agreement only. The allegation was levelled that the arbitrator committed a gross irregularity in the conduct of arbitration proceedings as contemplated in s 33(1) of the Arbitration Act 42 of 1965 (the Act), resulting in him misconducting himself in his duties as arbitrator. This Court accordingly had to determine whether the arbitrator engaged the matter correctly, in the context of the facts. The Court found that the arbitrator's finding that KCEC's defences in relation to the second and third agreements were devoid of merit. In addition to dismissing the counter-claim, he inexplicably dismissed the residue of the globular amount claimed when he had already found that there was nothing that stood in the way of an award in favour of OCA Testing in respect of the claims in terms of the second and third written agreements. The Court held that the arbitrator did not do so, manifested a lack of appreciation of the matter, which is tantamount to have committed a gross irregularity in terms of s 33(1) of the Act.

Furthermore, the Court held that the failure of the arbitrator to deal with the residue of the globular amount, after having dismissed the claim in respect of the first agreement, indicated that the matter was not fairly heard. The arbitrator was mandated to decide whether OCA Testing was entitled to any money flowing from the second and third agreements. The arbitrator simply did not direct his mind to the crucial question whether OCA Testing was entitled to the residue of the globular amount claimed, less the amount in respect of the first agreement. Had he dealt with the amounts flowing from the second and third agreements, his award would have been immune from impeachment under s 33(1) of the Act. The arbitrator inexplicably dismissed the claim in its entirety without engaging in any analysis in regard to the amounts claimed pursuant to the second and third agreements. Thus, in failing to address the residue of the claim, just as he had done with the component of the claim flowing from the first agreement, the arbitrator effectively closed off his mind to the fundamental question that he was called upon to answer. This omission prevented a fair trial of the totality of the issues and amounted to a gross irregularity. The SCA determined that a new arbitrator ought to be appointed in order to ensure the issues at hand would be determined afresh.

In the result, the SCA upheld the appeal from the high court and set the order of the high court aside. In its place, an order was made setting aside the arbitrator's award insofar as it related to the amounts claimed in terms of the second and third agreements and that the dispute that pertained to the residue of the second and third agreements was to be submitted to a new arbitrator, as agreed upon between the parties.

-----oOo-----