

SOUTH AFRICA / JUDGMENT

## Bombardier Africa Alliance Consortium v Passenger Rail Agency of South Africa (65099/2017) [2018] ZAGPPHC 413 (18 May 2018) [2018] ZAGPPHC 413

COURT

North Gauteng High Court, Pretoria

BEFORE

Nochumsohn

CASE / FILE NUMBER

65099/2017

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

CASE NO. 65099/2017

In

the matter between:

BOMBARDIER  
AFRICA ALLIANCE CONSORTIUM  
Applicant  
and  
PASSENGER  
RAIL AGENCY OF SOUTH AFRICA  
Respondent

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**JUDGMENT**

NOCHUMSOHN (AJ)

1. This is an application for an order to give effect to the decision of a Dispute Adjudication Board created in terms of a contract entered into between the parties, which decision was handed down on 20 April 2016 ("the decision").
2. On 26 March 2013, the parties concluded a written contract in terms of which the Respondent appointed the Applicant to design, construct and implement a new railway signalling system and install centralised traffic control at the Rosburgh Hub in Durban, KwaZulu-Natal, for a contract price of R1 288 772 839.74 (one billion two hundred and eighty eighty million seven hundred and seventy two thousand eight hundred and thirty nine Rand and seventy four cents).
3. In terms of clause 20.4.1 of the contract, in the event of a dispute arising between the parties, either party could refer the dispute to a Dispute Adjudication Board ("DAB").
4. A dispute arose between the parties which was referred to the DAB for adjudication, as foreshadowed in the contract.
5. I quote the DAB decision verbatim:

"The instruction of change request CRO4 constitutes a variation to the contract. The contractor is accordingly entitled to an extension of time for completion of 186 calendar days and a payment of R26 164 593.00 (twenty six million one hundred and sixty four thousand five hundred and ninety three Rand) (excluding VAT and escalation);

The NUMSA strike of July 2014 constituted force majeure in terms of the contract. The contractor is entitled to an extension of time for completion of thirty-one days and payment of costs in the amount of R4 200 086.00 (four million two hundred thousand and eighty six Rand) (excluding VAT and escalation) with the proviso that profit, (if any), must be extracted from the rates used to calculate this amount;

The changes to the system architecture required by the employer subsequent to the signing of the contract constituted a variation in the scope of the project for which the contractor is entitled to a lump sum payment of R116 096 717.00 (one hundred and sixteen million and ninety six thousand seven hundred and seventeen Rand) (excluding VAT and escalation)."

6. This decision of the DAB was unanimous and was signed on 20 April 2016 by the three parties comprising the DAB, Advocate PM Lane S.C., Mr S Amod and Advocate V Maleka S.C.
7. The main thrust of this application turns on the meaning of the last two sentences of paragraph 20.4.4 of the contract, which reads:

" The decision shall be binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitrable award as described below. Unless the contract has already been abandoned, repudiated or terminated, the contractor shall continue to proceed with the works in accordance with the contract."

8. Subsequent to the decision of the DAB:

8.1. On 18 May 2016, the Respondent furnished the Applicant with a Notice of Dissatisfaction of the DAB's decision. In such notice, the Respondent does not contend that the DAB's decision is a nullity due to a lack of jurisdiction or a failure of the rules of natural justice;

8.2. The Applicant did not immediately seek to be paid the full amount in accordance with the DAB decision, but elected instead to claim

payment of the debt during the progress of the work. The Applicant did this under reservation of its rights to claim immediate payment of the full debt, in the event of the Respondent failing to pay any progress payment. This reservation was communicated by way of letter from the Applicant's attorney dated 27 May 2016;

8.3. The relevant portions of such letter lie in paragraphs 3 and 4, which read as follows:

"3. In terms of clause 20.4.4 of the contract until an amicable settlement is finalised or an arbitrable award is given, the parties are bound by the DAB award.

4. Notwithstanding that the contractor is entitled to payment in full in terms of the DAB award and as a gesture of goodwill in the interests of maintaining a good working relationship with the employer, the contractor will be invoicing the employer for the costs incurred to date. In the event that the employer fails to make payment of the relevant invoices, the contractor reserves its rights to claim payment in full under the DAB award."

8.4. In accordance with the Applicant's proposal, the Respondent paid the Applicant the sum of R28 326 848.06 (twenty eight million three

hundred and twenty six thousand eight hundred and forty eight Rand and six cents) (excluding escalation and VAT) over the period August 2016 to June 2017, through the mechanism of Quarterly Payment Certificates. Those payments were made in compliance with the DAB's decision and reduced the Respondent's debt accordingly;

8.5. On 21 June 2017 the Respondent's attorneys addressed a letter to the Applicant's attorneys, the relevant paragraphs of which are

paragraphs 2, 3, 4 and 5, which read as follows:

"2. As you are aware, our client has given its Notice of Dissatisfaction with the Adjudicator's award and the matter should therefore proceed by arbitration. We have already previously agreed that the arbitration will be conducted in accordance to the AFSA rules and the Tribunal will consist of Judge Southwood, Judge Ncgobo and Judge Harms.

3. All that remains is for the Arbitration Agreement to be finalised, (we have already sent you a draft awaiting your comments). Thereafter the arbitration can commence.
4. In the meantime, even though our client is not able to do so, we have been instructed that an amount of R28.3 million has been made by our client to your client pursuant to the DAB award.
5. Our client is not required to make payment under this DAB award until finalisation of the arbitration and consequently our client will not make any further payments. Our client has also instructed us to advise that all communication in relation to this matter should only be through the attorneys."
9. At 10.00 pm on the night before this application was heard the Respondent's attorneys delivered a substantive Application for Leave

to file a Supplementary Answering Affidavit attached thereto comprising, with annexures some ninety- five pages. The Supplementary Affidavit is deposed to by Mr Dingiswayo, the General Manager of Group Legal Services of the Respondent. The nub of this Affidavit is that the Respondent endeavours to raise a new defence inconsistent and irreconcilable to the defence set out in its Answering Affidavit to the main application. This attempted new defence embraces allegations to the effect that:

9.1. Subsequent to the DAB award, the parties orally agreed upon payment terms in relation to the entire project, inclusive of the award made by the DAB, to the effect that the Applicant would claim payment of the debt during the progress of the work;

9.2. The suggestion that the payment plan was a gesture of goodwill was far from accurate. It was an agreement concluded between the parties and observed by both;

9.3. The continued payments by the Respondent constituted, if not the continuation of such alleged oral agreement, a new agreement in terms of which the Respondent continued to make payment in accordance with the old agreement between the parties;

9.4. The only amount outstanding relates to Payment Certificate 17 in the amount of R27 324 008.28 (twenty seven million three hundred and twenty four thousand and eight Rand twenty eight cents) including VAT and, the reason that the Certificate had not been paid was attributable to the Respondent's inability to release payments above R25 000 000.00 (twenty five million Rand) in their capital SAP system, which was in the process of being attended to so as to enable further payments;

9.5. Even though the DAB awarded the lump sum, it was always intended by the parties that the amounts would only be paid upon the Applicant

achieving contractual milestones;

9.6. The Applicant would only be paid the amounts due once it had achieved the relevant milestones, which included the amount granted to the Applicant by the DAB;

9.7. At the time when the Respondent prepared its Answering Affidavit, it was not aware that subsequent to the granting of the DAB award in March 2016 that the parties had agreed on the milestone payment schedule and that the DAB monetary awards would be incorporated in the Payment Certificates which are payable as and when the milestones are reached;

9.8. The deponent was unaware that Mr Imraan for the Technical Adviser and the First Respondent and Mr Mohamed Karrim of the Applicant had indeed agreed on the payment plan;

9.9. Since 10 May 2018, the deponent avers that this Agreement was brought to his attorney's attention by Mr Imraan appointed by the Respondent and who himself was unaware that the Applicant had launched these proceedings.

10. The Respondent's attorney, Mr Dlamini, deposed to a Confirmatory Affidavit. However, there was no Confirmatory Affidavit deposed to by the said Imraan, which calls into question the legitimacy of such evidence. There is no explanation for the failure to have attached a Confirmatory Affidavit by Imraan.
11. Mr McAslin for the Applicant, opposed this application by the Respondent for the admission of such further Answering Affidavit. .
12. The contents of such Affidavit is materially at variance with the defence raised by the Respondent in its Opposing Affidavit to the main application. In the latter Affidavit, the Respondent avers that the referral to the arbitration suspends the operation of the Order of the DAB. In the former Affidavit, the Respondent raises for the first time on the morning of the hearing an unsupported and uncorroborated oral agreement. Mr Makola, who appeared for the Respondent, was unable to explain why the intended Supplementary Affidavit fails to identify the party who allegedly represented the Respondent in concluding such oral agreement, or where such oral agreement took place. Neither could any explanation be given to the court as to the reasons for the failure to have complied with Rule 18(6) in this regard.
13. It is simply not acceptable to confront the Applicant on the morning of the hearing with an application and Affidavit of this nature, to which the Applicant could not reasonably be expected to respond, given the aforesaid deficiencies and failures in such document.
14. For the aforesaid reasons I dismissed the application for the Respondent to be granted leave to file such Supplementary Answering Affidavit, out of hand, on the basis that the costs in respect thereof will be dealt with as part and parcel of the costs order in the main application.
15. The total of the amounts ordered by the DAB is R146 461 396.00 (one hundred and forty six million four hundred and sixty one thousand

three hundred and ninety six Rand), without regard to the proviso that profit (if any) must be extracted from the rates used to

calculate this amount.

16. In the Founding Affidavit, the Applicant contends that such proviso is not applicable, with the result that the effect of the DAB's decision insofar as the payment of money is concerned, was such that the respondent had to pay the Applicant an amount of R146 461 396.00 (one hundred and forty six million four hundred and sixty one thousand three hundred and ninety six Rand), (excluding VAT and escalation.
17. In relation to the Applicant's contention to the effect that the aforesaid proviso was not applicable, the Respondent, in its Answering Affidavit asserted that the provisions of the DAB decision are applicable in toto to the Applicant and the Applicant had not submitted a Notice of Dissatisfaction regarding such proviso. The Respondent thus contends

that it is incompetent for the Applicant to seek to amend the DAB decision, absent the filing of a Notice of Dissatisfaction. In the Replying Affidavit, the Applicant explained that it simply confirmed, in the founding papers, that the amount of R4 200 086.00 (four million two hundred thousand and eighty six Rand) did not include profit, and, consequently, it did not have to be reduced. In such Replying Affidavit, the Applicant explained further that it was not dissatisfied with the DAB decision, on the contrary, it sought to enforce the decision, and thus it was not incumbent upon the Applicant to deliver a Notice of Dissatisfaction.

18. In the Founding Affidavit, the Applicant states that the aforesaid payment by the Respondent of R28 326.848.06 (twenty eight million

three hundred and twenty six thousand eight hundred and forty eight Rand and six cents) serves to reduce the total amount of the Order of R146 461 396.00 (one hundred and forty six million four hundred and sixty one thousand three hundred and ninety six Rand) to an amount of R118 134 547.94 (one hundred and eighteen million one hundred and thirty four thousand five hundred and forty seven Rand and ninety four cents) (excluding escalation and VAT). Arithmetically, this is correct.

19. The Applicant avers further that by the application of the escalation provided for in clause 14 of the Contract, in accordance with the stipulated formula, the said amount of R118 134 547.94 (one hundred and eighteen million one hundred and thirty four thousand five hundred and forty seven Rand and ninety four cents) increases to R151 963 986.67 (one hundred and fifty one million nine hundred and sixty three thousand nine hundred and eighty six Rand and sixty seven cents) in relation to which the Applicant attached a calculation sheet to the Founding Affidavit as annexure "FA8", which accords with the formula set out in paragraph 14.4.1 of the Contract.

20. In its Answering Affidavit, the Respondent does not attack the arithmetic or the legitimacy of the stipulated formula. The Respondent merely avers that the Applicant did not compute the escalation into its calculations and such omission cannot with respect be corrected by this court. The Applicant, in its Replying Affidavit, correctly in my view, states that the DAB awarded the Applicant the amount of its claims excluding escalation and VAT, with the result that it is entitled to the escalations in accordance with clause 14 of the Contract.
21. The Applicant alleges that the applicable amount of VAT equates to R21 274 958.13 (twenty one million two hundred and seventy four thousand nine hundred and fifty eight Rand and thirteen cents), making up the total amount due, in accordance with the Notice of Motion of R173 328 944.80 (one hundred and seventy three million three hundred and twenty eight thousand nine hundred and forty four Rand and eighty cents).
22. Whilst it is common cause between the parties that the disputes must be finally decided by the Arbitral Tribunal, the central issue is whether or not the Respondent is contractually obligated to comply with the decision of the DAB, pending the finalisation of the matter in a hearing before the Arbitral Tribunal.
23. The Respondent raises several defences, the effect of which is that it is not obliged to give effect to the decision of the DAB, having given notice of dissatisfaction with such decision and having referred the matter to arbitration. As such, the Respondent contends that the matter is *lis pendens* and that the provisions of paragraph 20.7 of the Contract ought to find application.
24. Paragraph 20.7 of the Contract reads:

"20.7 Failure to Comply with Dispute Adjudication Board's Decision

20.7.1 In the event that:

20.7.1.1 neither party has given notice of dissatisfaction within the period stated in sub-clause 20.4 (obtaining Dispute Adjudication Board's decision);

20.7.1.2 the DAB's related decision (if any) has become final and binding, and

20.7.1.3 a party fails to comply with this decision; then the other party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under sub-clause 20.6....."
25. To this end, the Respondent contends that this court cannot exercise jurisdiction over the matter as there ought to have been a referral to the Arbitration Tribunal foreshadowed in the clause 20.7. In response, the Applicant correctly argues that this clause would apply only if the losing party in the adjudication does not pay and does NOT give notice of its dissatisfaction with the decision. However, in this matter, the Respondent did give notice of its dissatisfaction, with the result that clause 20.7 finds no application. The Applicant argues further that even if the clause did apply, it is merely

permissive insofar as it states that the other party may, without prejudice to any other rights which it has, refer the failure to arbitration. I agree with the Applicant that the only meaning to be attributed is that it was always open to the Applicant to approach the court and that had the parties intended to oust the jurisdiction of the courts, they would have done so in express and unequivocal terms.

26. Turning to the Respondent's assertion that the matter is *tis pendens* as it asserts that the dispute brought before this court is pending before another forum, I agree with the Applicant that the Respondent misconstrues the nature of the dispute. The issue at hand is simply whether or not the Respondent is bound to comply with the decision of the DAB pending the outcome of the arbitration. This is not the same issue that lies before the Arbitrable Tribunal, which is seized with the underlying contractual dispute.
27. If the decision in the adjudication cannot be enforced pending the final determination of the matter in arbitration, the purpose of adjudication becomes undermined. The contract between the parties contains the express provision in clause 20.4.4, in clear and unequivocal terms that the decision shall be binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitrable award. Thus, the mere fact that the decision is escalated to an arbitration, cannot and does not serve to suspend the operation and implementation of the decision, in the face of a clear contractual term to the contrary. In *Tubular Holdings (Pty) Ltd v DST Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ) the same contractual provision was considered in the context of the same defence, where Du Plessis AJ said:

"[8] The effect of these provisions is that the decision shall be binding unless and until it has been revised as provided.

There can be no doubt that the binding effect of the decision endures, at least, until it has been so revised."

28. The same contractual issues and defence were considered in *Esor Africa (Pty) Ltd/Frankl Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd* (12fl442J) [2013] ZAGP JHC 407, where Spilg J stated:

[11] .... the DAB provision is clearly intended to provide an expedited process of dealing with disputes..... The DAB decision is not final, but the obligation to make payment or otherwise perform under it is.

[13] In order to give effect to the DAB provisions of the contract, the respondent cannot withhold payment of the amount determined by the Adjudicator, and in my view is precluded by the terms of the provisions of clause 20 (and in particular clause 20.4 and 20.6) from doing so, pending the outcome of the arbitration. In my view it was precisely to avoid this situation that the clauses were worded in this fashion."

29. On the issue of costs, and having regard to the Judgment in the case of Ne/ v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD at 597, Mr McAslin sought costs on the scale as between attorney and client. From this judgment, and all cases referred to therein, it is clear that the court is empowered to grant a punitive costs order in deserving circumstances and where it is warranted. Whilst it was wrongful for the Applicant to attempt to change the defence at the eleventh hour, with an unsupported and irregular application, this is not sufficient grounds for the awarding of costs as between attorney and client.

30. Accordingly, I make the following Order:

30.1. The Respondent is ordered to give effect to the decision of the Dispute Adjudication Board handed down on 20 April 2016;

30.2. The Respondent is ordered to pay to the Applicant the amount of R173 238 944.80 (one hundred and seventy three million two hundred and thirty eight thousand nine hundred and forty four Rand and eighty cents);

30.3. The Orders in 30.1 and 30.2 shall endure until such time as the decision of the Dispute Adjudication Board is revised, if at all, by way of an amicable settlement between the parties or an arbitrable award;

30.4. The Respondent is ordered to pay interest on the amount of R173 238 944.80 (one hundred and seventy three million two hundred and thirty eight thousand nine hundred and forty four Rand and eighty cents) at the prescribed rate of interest of 10.25% per annum calculated from the date of this order to the date of payment;

30.5. The Respondent is ordered to pay the costs of this application including the costs of the Application for Leave to supplement the Answering Affidavit, on the scale as between party and party.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: Advocate C J McAslin

Instructed by:

Friedland Hart Solomon & Nicolson

on behalf of:

Edward Nathan Sonnenberg

On behalf of the Respondent: Advocate A L Makola i

Instructed by:

Dlamini Attorneys

Date of Hearing:

15 May 2018

Date of Judgment:

18 May 2018

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