

SOUTH AFRICA / JUDGMENT

Entsha Henra CC v Sol Plaatje Municipality and Another (410/2015) [2017] ZANCHC 61 (20 October 2017) [2017] ZANCHC 61

COURT

Northern Cape High Court, Kimberley

BEFORE

Olivier

CASE / FILE NUMBER

410/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape High Court, Kimberley)

CASE

NO: 410/2015

DATE

HEARD: 10 OCTOBER 2017

DATE

DELIVERED: 20 OCTOBER 2017

REPORTABLE

OF

INTEREST TO OTHER JUDGES

In

the matter between:

ENTSHA HENRA
CC Plaintiff
and
THE
SOL PLAATJE
MUNICIPALITY 1st
Defendant
MVD
KALAHARI 2nd
Defendant
Coram: Olivier
J

JUDGMENT

Olivier J:

[1.] The plaintiff, Entsha Henra CC, issued summons against the 1st defendant, The Sol Plaatje Municipality, and the 2nd defendant, the firm MVD Kalahari.

[2.] The issues to which I will in due course refer arose from a contract in terms of which the plaintiff would perform construction work for the 1st defendant and the 2nd defendant would act as the Engineer for purposes thereof.

[3.] The terms and conditions applicable to the contract and the execution thereof are contained in a number of documents, the most pertinent of which for present purposes are the General Conditions of Contract for Construction Works[1], to which I will in what follows refer as “the GCC”.

[4.] Also relevant for present purposes are Section C 1.2 of the contract, which is headed “Contract Data”.

[5.] Upon completion of the construction work a payment certificate was apparently issued on the basis that the amount/s in the schedule of prices included value added tax (“VAT”).

[6.] The matter was then referred to the 2nd defendant who concluded, and made a ruling to that effect, that the prices indeed included VAT.

[7.] Dissatisfied with this, the plaintiff issued a dispute notice and the matter was referred to Mr W F Bloem for adjudication as envisaged in clause 10.5 of the GCC. Mr Bloem ruled that the amount/s in the schedule did not include VAT. This meant that the 1st defendant would be liable to pay the VAT to the plaintiff, but the 1st defendant then gave written notice in terms of clause 10.6.1 of the GCC that it intended disputing the correctness of the decision of the adjudicator.

[8.] The plaintiff subsequently issued the summons already referred to. The cause of action is basically that the adjudicator’s ruling is final and binding and on this basis the plaintiff claimed an order that the 2nd defendant issue a payment certificate duly rectified and that the 1st defendant make payment in accordance therewith, as well as mora interest on those amounts. Costs of suit were claimed from the 1st defendant, and from the 2nd defendant only in the event of it defending the action.

[9.] The 2nd defendant never filed a notice of appearance and has not played a role in the pleadings and questionnaires that were subsequently filed.

[10.] In its plea the 1st defendant denied that the adjudicator's decision was final and pleaded that, in the event of notice that such decision was going to be disputed, the decision would only remain binding until revised by a court. The 1st defendant relied upon the provisions of clause 10.6.1 of the GCC, to which I will revert, and pleaded that it had given proper notice as required.

[11.] The 1st defendant also filed a counterclaim in which it sought the setting aside of the adjudicator's decision and a declaratory order to the effect that the contract sum of R29 658 225.03 was inclusive of VAT at the rate of 14%.

[12.] In its plea to the counterclaim the plaintiff basically denied that the adjudicator's decision could in terms of the contract be reviewed or revised by a court. It also denied the 1st defendant's allegations regarding the issue of VAT, made reference to the so-called Standard Conditions of Tender and relied

upon rectification of the contract insofar as it reflected that prices would be inclusive of VAT.

[13.] In reply to the 1st defendant's plea to the counterclaim the plaintiff denied that the Standard Conditions were applicable to the contract and pleaded that a statement by a representative of the 1st defendant to the effect that the sum in the plaintiff's tender excluded VAT, was "patently mistaken".

[14.] The two main issues that are discernable from the pleadings are whether the adjudicator's decision is reviewable in terms of the contract and, if so, what the agreement had been as regards VAT.

[15.] At this stage, and after a ruling in terms of Uniform Rule 33(4), the only issue to be decided is whether the contract, upon a proper

interpretation thereof, provided that disputes arising from or in connection with the contract would be referred to an Adjudication

Board, and not to a court or for arbitration, and that the adjudicator's decision would be final[2].

[16.] Several bundles of documentary evidence were placed before me, but the issue to be decided essentially revolves around the interpretation of the contract, the relevant parts of which form part of the documentation.

[17.] The argument of Mr Olivier SC, counsel for the plaintiff, was essentially that the parties had in the Contract Data elected to choose adjudication in terms of clause 10.5 as the exclusive and final mechanism for the resolution of disputes, while Mr Van Niekerk SC, counsel for the 1st defendant, argued that the election in the Contract Data (of adjudication as a mechanism of dispute resolution) pertained to only

the initial or so-called first level mechanism of dispute resolution and did not exclude a so-called second level of dispute resolution in the form of the review of the adjudicator's decision by either an arbitrator or a court.

[18.] The “golden rule’ of interpretation (is that) the language in a document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument”[3].

[19.] It is also important to consider the meaning of provisions “... having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole...”[4].

[20.] An interpretation that would lead to a “sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results”[5].

[21.] The provisions of clause 10 of the GCC are really the crux of this matter and sub-clauses 5 and 6, respectively relied upon by Mr Olivier and Mr Van Niekerk, should be considered in the context of the whole of clause 10, the heading of which is “Claims and Disputes”.

[22.] Clause 10.1 deals with claims by contractors for an extension of time and is irrelevant for present purposes.

[23.] Clause 10.2 is titled “Dissatisfaction Claim” and it deals with the right to deliver a written dissatisfaction claim to the Engineer, and with the latter’s ruling thereon. I have already alluded to the fact that the 2nd defendant had in the present matter ruled that the amount/s in the schedule of prices included VAT, and it is safe to assume that that happened in terms of the provisions of clause 10.2.

[24.] Clause 10.3 provides for the issue of a “Dispute Notice” in the event of an unresolved claim, and for the referral of such a dispute to adjudication in terms of clause 10.5, “unless amicable settlement is contemplated”.

[25.] A process of amicable settlement of disputes and claims is provided for in clause 10.4. It envisages an invitation to amicable settlement by one of the parties and, in the event of a rejection of the invitation, a failure to respond thereto or of the attempt to settle amicably being unsuccessful, eventual referral of the dispute to adjudication; clearly still as envisaged in clause 10.5.

[26.] What is of some significance is that clause 10.4.2 also envisages the possibility of settlement negotiations after a process of adjudication, and it provides that if an attempt at amicable settlement should in such a case fail, “the dispute shall be resolved by arbitration or court proceedings, whichever is applicable in terms of the Contract”. Arbitration and court proceedings are clearly envisaged as 2nd tier forums, to be approached after the process in the 1st tier forum of adjudication. Furthermore the words “whichever is applicable”, as opposed to for example “if applicable”, clearly pertain to the two possible 2nd tier forums and to which of them would be the applicable forum in a particular case, and are clearly not an indication that the right to 2nd tier dispute resolution may in terms of a particular contract not be applicable.

[27.] Clause 10.5 provides for the adjudication of a dispute, either by “a standing Adjudication Board” or by “ad-hoc (sic) adjudication”, depending on which one the Contract Data eventually provided for.

[28.] Clause 10.6 is headed “Disagreement with Adjudication Board’s Decision”[6]. Of specific relevance for present purposes are the provisions of clause 10.6.1 and clause 10.6.1.1, which I quote in full:

“10.6.1 Each party shall have the right to disagree with any decision of the Adjudication Board and refer the matter to arbitration or court proceedings, whichever is applicable in terms of the Contract;

Provided that:

10.6.1.1. The decision shall be binding on both parties unless and until it is revised by an arbitration award or court judgment, whichever is applicable in terms of the Contract”.

[29.] Of significance is that once again one finds the phrase “whichever is applicable in terms of the Contract” in the same context as in clause 10.4.2, and in apparent relation to the applicability of either arbitration or court proceedings.

[30.] Clause 10.6.3 provides that, should the Adjudication Board fail to give its decision within the applicable time period, “either party shall have the right to submit the dispute to arbitration or court proceedings, whichever is applicable in terms of the Contract”. This would in my view, on a proper reading of clause 10 as a whole, be the only instance where a dispute in respect of which no decision had been taken by an adjudicator, could be dealt with on arbitration or in court proceedings.

[31.] Clause 10.7 is headed “Arbitration” and clause 10.7.1 provides that “If the Contract Data provides for determination of disputes by arbitration and a dispute is still unresolved, the matter shall be referred to a single arbitrator”[7].

[32.] The title of clause 10.8 is “Court proceedings” and clause 10.8.1 provides that “If the Contract Data does not provide for the settlement of disputes by arbitration, and a dispute is still unresolved, the dispute shall be determined by court proceedings”[8].

[33.] It is apparent that, while clause 10.7 requires that the Contract Data should specifically provide for the applicability of arbitration proceedings for it to be available as a forum, clause 10.8 does not contain the same requirement in respect of a court as a forum. The court will be available as a forum in any case where the parties had not in the Contract Data elected arbitration as a forum, and by necessary implication in my view also where the parties had not in the Contract Data made any election at all in this regard.

[34.] Clause 10.10.3, which falls under the heading “Common Provisions”, inter alia provides that “The arbitrator and the court shall have full power to... reconsider any decision of the Adjudication Board...”[9].

[35.] Finally, clause 10.10.1, which falls under the same heading, confirms “the right to institute immediate court proceedings in respect of failure by the Employer to pay the amount of a payment certificate on its due date, or to pay any amount of retention money on its due date for payment”[10].

[36.] The significance of the use of the word “immediate” is that, in cases referred to in clause 10.10.1, the parties would not have to follow the route to court via adjudication. The effect is that in the case of a “failure” to make timeous payment, as opposed to a case where a dispute is involved, the Contractor would automatically be entitled to approach a court directly, without first having to resort to the Engineer or adjudication.

[37.] In my view the whole scheme of clause 10 as a whole is that arbitration and court proceedings would not, in the event of disputes, be available as first tier dispute resolution mechanisms, in other words as forums where the initial consideration and determination of a dispute could take place, as opposed to forums where the result of a first tier dispute determination are “reconsidered”[11].

[38.] The scheme or process envisaged in clause 10, as a whole and apart from mere failures to make timeous payment, is that a “dissatisfaction” will be considered by the Engineer. In the event of a party not agreeing with the Engineer’s ruling the “dissatisfaction” becomes a “dispute”.

[39.] When a “Dispute Notice” is then delivered the procedure will be that, unless amicably settled, the relevant dispute “shall be referred immediately[12] to adjudication in terms of Clause 10.5”[13].

[40.] The provisions of clause 10 simply do not provide that a “dispute”[14] can be placed directly before an arbitrator or a court.

[41.] This is the only feasible explanation for the fact that the parties, in clause 10.10.1 of the GCC, deemed it necessary to record that failures to make payment on the due date (as opposed to disputes) could indeed be taken directly to court.

[42.] It is in my view also clear from the wording of clauses 10.7 (Arbitration) and 10.8 (Court proceedings) that neither arbitration nor court proceedings were envisaged as a first tier forum in respect of disputes. A dispute can only land up before an arbitrator or in court “if a dispute is still unresolved”. These words can, in view of the sequence that the different steps and processes are provided for in clause 10, justify no other inference than that the intention had been to refer to disputes that remained unresolved after the process of adjudication.

[43.] This inference is fortified by the clear meaning of the provisions of clause 10.6.1, which specifically refers to the right to refer a matter to arbitration or to a court, but only in the event of a party disagreeing with a decision made on adjudication.

[44.] In the present matter the Contract Data section is divided into three columns. In the column on the left hand there is a brief description of the issue intended to be addressed, in the centre column the number of the relevant clause of the GCC is reflected and in the right hand column what is agreed upon in this regard is recorded.

[45.] In the present matter the issue of disputes is addressed as follows on the second page of the Contract Data section:

“Settlement of disputes to be referred to 10.5 Court/Arbitration Law 1965 (Law No 42/1965)
Adjudication Board * Delete whichever is inapplicable ** Information to be provided by the
Tenderer”*

[46.] The words “Court” and “Arbitration Law 1965 (Law No 42/1964)” in the right hand column had clearly at some stage been struck through. It is not clear whether the words “Adjudication Board” were already there at the time of the striking through, or whether they were inserted then. Nothing really turns on this.

[47.] When regard is had to the Contract Data sections of the other tenders of which copies have been included in the plaintiff’s bundles of documents it is very clear that the striking through is identical in all the Contract Data forms and the inescapable inference is that it had already been done by the time that the tenderers were required to sign the Contract Data forms.

[48.] It is significant, when the Contract Data form in the plaintiff’s tender is compared to those in other tenders, that the striking

through or deletion also appeared to be standard and already done in the case of other aspects of the GCC. In this regard reference can be made to the particulars in respect of clause 8.6.1.2 of the GCC and the issues of “Special Risk Insurance (Political riot insurance)*” and “if required, to be arranged by*”[15].

[49.] As far as the issue of disputes is concerned the Contract Data forms were therefore standard forms that were presented to tenderers. In fact, with the exception of the particulars of the address, contact person and telephone and fax numbers of the tenderer that were inserted in the form of writing, all the other particulars (which pertain to a variety of clauses of the GCC) are typed and clearly standard in the forms.

[50.] This has the implication that the invitation to “Delete whichever is inapplicable” in respect of the referral of disputes was meaningless. The forms in reality left the tenderers with no options to delete as far as the issue of the settlement of disputes was concerned. It would also therefore appear as if the plaintiff on all indications did not in any way contribute to what appears in the Contract Data in this regard.

[51.] Mr Olivier developed his argument regarding this part of the Contract Data as follows:

50.1 He argued that clause 10, as a whole, provided the choice of three forums, either a court, or arbitration or adjudication, and that the striking through of the options of arbitration and court proceedings in the Contract Data amounted to an express agreement that disputes would be resolved through adjudication, and that arbitration and court proceedings, as envisaged in clause 10.6.1, would not be resorted to (Whether as first tier or second tier forum).

50.2 His argument was furthermore that, even if it could be said that the right of referral to arbitration or to court had not been excluded through the deletions in the Contract Data, the words “whichever is applicable in terms of the Contract” in clause 10.6.1 would have required an already existing election between arbitration and court proceedings, and that without such an election no right to arbitration or court proceedings could exist, or at least be exercised. In the present matter no such election had been made, which according to Mr Olivier resulted in the contract in effect not providing for either arbitration or court proceedings, not even as a second tier forum.

50.4 He furthermore argued that, insofar as there may be any ambiguity in the contract in this regard, this should on the *contra proferentem principalis*[16] be interpreted in favour of the plaintiff.

[52.] The contents of the Contract Data, as far as settlement of disputes is concerned are not, in my view, in any way susceptible to the interpretation proposed by Mr Olivier[17].

[53.] Clause 10.5 deals exclusively with adjudication. It does not, in itself, provide for dispute settlement by arbitration or court proceedings. Clause 10.5 would not have provided a tenderer with the deleted or struck through options of court proceedings or arbitration in the right hand column.

[54.] Mr Olivier experienced difficulty to explain why arbitration and court proceedings, as methods of dispute resolution, would in any event have been presented as options alongside a reference to sub-clause 5 of clause 10 of the GCC:

53.1 He initially suggested that the reference to clause 10.5 must have been inserted in the centre column after the options of court proceedings and arbitration had been deleted, but was ultimately constrained to concede that the particular document had been standardised and had been made available to all tenderers for signature in this form.

53.2 Mr Olivier also argued that the particular part of the Contract Data had effectively invited tenderers to accept adjudication as the only and final dispute resolution mechanism. He seemed to argue that the options mentioned in the right hand column would all have been available as equal options and he repeatedly stated that the tenderers basically had three choices of dispute resolution, either adjudication, or arbitration or Court proceedings.

[55.] There is no merit in this argument. It is clear from the scheme of clause 10 as a whole, as already said, that arbitration and court proceedings were never intended to be first tier dispute resolution procedures.

[56.] As already indicated, a contractor would in any event be entitled to adjudication in terms of clause 10.5. It would be superfluous

to record that in the Contract Data. Once a “dissatisfaction” has not been satisfactorily resolved by the Engineer and escalates in status to a “dispute”, the only further step provided for in clause 10 of the GCC[18] would be a “Dispute Notice” and then adjudication.

[57.] The wording of clause 10.3.2 is also instructive in this regard. It provides that, if a dispute notice has been given, “the dispute shall be referred immediately to adjudication in terms of Clause 10.5”[19]. It is common cause that such a notice was given by the plaintiff. Clause 10.3.2 makes it clear that the dispute will in such event be considered on adjudication. Its clear wording does not leave room for an interpretation that such a dispute could also “immediately” (in other words instead of “to adjudication”) be referred to arbitration or to court.

[58.] The only options available at that stage would be to either elect adjudication by a “standing Adjudication Board” or not, in which case the adjudication would be done by an ad hoc appointed adjudicator.

[59.] Court proceedings and arbitration are not the subject of clause 10.5 and are not, as I have said, dispute resolution mechanisms which could be considered as alternatives to adjudication.

[60.] Mr Olivier argued that, by agreeing on Contract Data in which the references to court proceedings and arbitration had been struck through, the plaintiff and the 1st defendant effectively agreed that those dispute resolution mechanisms would not be available, be it on a first or a second tier basis.

[61.] Mr Olivier at first readily conceded that this would have amounted to the waiver of the right that clause 10 generally gives to arbitration or court proceedings as a second tier forum. When confronted with the trite principle that proof of such waiver would have to be clear and unequivocal[20], Mr Olivier changed tack and argued that the parties were merely agreeing on a method of dispute resolution and that this had not

amounted to the waiver of a right to any of the other two methods that were not eventually chosen. This argument may have had merit if it could be said that the parties had three choices of first tier dispute resolution procedures available and had merely chosen one. This is, however, not the case. Clause 10 of the GCC made provision for the review of the decision of an adjudicator, as a second tier dispute resolution mechanism, and at least as far as the latter mechanism is concerned the parties would, by accepting the deletion of court proceedings and arbitration, on Mr Olivier’s argument have waived a right.

[62.] The particular section of the Contract Data form does not in my view, for reasons already alluded to, provide sufficient proof of an intention to waive the right, set out not in sub-clause 5 of clause 10, but rather in sub-clauses 6, 7 and 8 thereof, to have the decision of an adjudicator reviewed.

[63.] The explicit reference to sub-clause 5 in the Contract Data, and the absence of any reference to sub-clauses 6, 7 or 8 with it, militates against the possibility that the parties, when considering that particular part of the Contract Data form, contemplated a waiver of the right to review by an arbitrator or in court proceedings.

[64.] Mr Olivier argued that the Contract Data would have included, in its centre column, a reference to sub-clauses 6, 7 and/or 8 of clause 10 if the intention had been to provide for a review of the adjudicator's decision. I disagree. It would not have been necessary to provide for this right in the Contract Data. It is a right which the parties to the contract would in any event have had in terms of the GCC.

[65.] Mr Olivier argued that, even if it could be said that the Contract Data in its present form had left intact the option of the review of the adjudicator's decision, the fact would be that the parties would not have made an election between arbitration and court proceedings as a forum to deal with it. Mr Olivier argued that the words "whichever is applicable in terms of the Contract" in clause 10.6.1 amount to a requirement that the contract reflect such an election before a right to review can exercised.

[66.] I disagree. When viewed as a whole the wording of this sub-clause is not in my view susceptible to such an interpretation. It provides that either party "shall" have the right to disagree with the decision taken on adjudication and "shall" have the right to refer the matter to arbitration or court. The words relied upon by Mr Olivier concern the choice between arbitration and court proceedings as two possible forums for review, and in my view mean no more than that, if one of these had indeed in the Contract Data been chosen and decided upon, the reference for review would have to be to that forum.

[67.] If the parties had intended to make the very right of review dependent upon the exercise of an option one would, as already said, have expected words like "if applicable" instead of "whichever is applicable".

[68.] As already said the absence in the Contract Data of an election in this regard would not bar a party from having an adjudicator's decision reviewed, at least by a court.

[69.] In any event, "There is a presumption against the deprivation of, or interference with, common law rights, and in the case of ambiguity an interpretation

which preserves those rights will be favoured"[21].

[70.] The fact that the parties did not in the Contract Data in the present matter indicate a preference between arbitration and court proceedings would therefore not justify the inference that they did not contemplate court proceedings for purposes of review.

[71.] It follows that the question posed should in my view be answered in the negative. There is no reason why costs should not follow this result.

[72.] The following orders are therefore made:

1. THE QUESTION POSED IN TERMS OF THE RULE 33(4) ORDER OF 10 OCTOBER 2017, AS AMENDED, IS ANSWERED IN THE NEGATIVE AND IT IS HELD THAT, UPON A PROPER INTERPRETATION OF THE CONTRACT IN THIS MATTER, IT DID NOT PROVIDE FOR ADJUDICATION TO THE EXCLUSION OF ARBITRATION AND COURT PROCEEDINGS, AND IT IS HELD THAT THE ADJUDICATOR'S DECISION IS THEREFORE NOT FINAL IN THE SENSE OF EXCLUDING THE REVIEW THEREOF BY A COURT IN TERMS OF THE CONTRACT.
2. THE PLAINTIFF IS ORDERED TO PAY THE 1ST DEFENDANT'S COSTS HEREIN.

C J OLIVIER

JUDGE

NORTHERN CAPE DIVISION

For the Plaintiff: ADV J W OLIVIER SC

(oio Herbie Oosthuizen & Ass, c/o Engelsman Magabane Inc.)

For the 1st Defendant: ADV J G VAN NIEKERK SC

(oio Van De Wall & Partners)

[1] Second Edition, 2010

[2] The order proposed by counsel mistakenly referred to the decision of the Arbitration Board as the decision of which the finality had to be decided, and when the Rule 33(4) order was made, that wording was followed. This was, however, taken up with both counsel the day after that order was made and, insofar as it may be necessary, that order is amended accordingly, to read as set out above.

[3] Brink v Premier of the Free State and another

[2009] 3 All SA 304 (SCA) para [11]

[4] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012

(4) SA 593 (SCA) para [18]; also reported as [2012] 2 All SA 262 (SCA)

[5] Ibid; See also Metcash Trading Ltd v Credit Guarantee Insurance Corporation of Africa Ltd 2004 (5) SA 520 (SCA)

[6] The wording of the side-note to the particular sub-clause is identical to that of the heading.

[7] Emphasis provided.

[8] Emphasis provided.

[9] Emphasis provided.

- [10] Emphasis provided.
- [11] Compare clause 10.3.3 and para [34] above.
- [12] Emphasis provided.
- [13] See clause 10.3.2 of the GCC, to which I will revert in due course.
- [14] Or, for that matter, a “dissatisfaction”.
- [15] In exhibit “A1” - pages 189 to 199, exhibit “A2” - pages 437 to 438, pages 451 to 452 and pages 465 to 466.
- [16] Compare *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) para [12]
- [17] Not even applying the contra proferentem approach.
- [18] Barring “amicable settlement”
- [19] Emphasis provided.
- [20] Compare *Hyde Construction CC v Deuchar Family Trust and Another* 2015 (5) SA 388 (WCC) para [65]
- [21] See *SA Breweries Ltd v Food and Allied Workers Union and Others* 1990 (1) SA 92 (A) at 99F - G
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