

SOUTH AFRICA / JUDGMENT

**Gap Infrastructure Corporation (Pty) Ltd previously
named Barzani Development (Pty) Ltd v Oxy Trading
295 (Pty) Ltd t/a Devan Lotter Construction
(M483/2023) [2024] ZANWHC 246 (25 September 2024)
[2024] ZANWHC 246**

COURT

North West High Court, Mafikeng

BEFORE

K D Ramolefe

CASE / FILE NUMBER

M483/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

NORTHWEST

DIVISION, MAHIKENG

CASE

NUMBER: M483/2023

Reportable: YES/NO

Circulate to Judges:

YES/NO

Circulate to

Magistrates: YES/NO

Circulate to Regional

Magistrates: YES/NO

In

the matter between:

GAP

INFRASTRUCTURE CORPORATION

(PTY)

LTD

previously

named BARZANI DEVELOPMENT

(PTY)

LTD

Applicant

and

OXY

TRADING 295 (PTY) LTD

t/a

DEVAN LOTTER CONSTRUCTION

Respondent

This

judgment was handed down electronically by circulation to the parties' representatives via email. The date for hand-down is deemed to be 14h00 on 25 September 2024.

ORDER

(i)

The respondent is ordered to comply with the Adjudicator's Award dated 7 July 2023;

(ii)

The respondent is ordered to pay the applicant R5 883 920.00 (excluding VAT) in terms of the Adjudicator's Award;

(iii)

Interest on the aforesaid amount at the rate of 9.25% from 7 July 2023 to

date of payment;

(iv)

Costs against the respondent on attorney and own client scale.

JUDGMENT

RAMOLEFE AJ

Introduction

[1] In this application, the nub of the dispute between the applicant and the respondent ("the parties") can readily be gleaned from the relief sought in the notice of motion. That relief is cast in the following terms –

1. The respondent is ordered forthwith to give effect to the Adjudicator's Decision handed down on 9 June 2023 and corrected on 7 July 2023;
2. Pursuant to the abovementioned Adjudicator's Decision, the respondent is ordered to pay the applicant –

2.1 R5,883,920.13 (excluding VAT); and

2.2 Interest on the amount of R5,883,920.13 (excluding VAT) at the rate of 9.25% compounded monthly from 9 June 2023, alternatively 7 July 2023, to date of payment;

3. The respondent is ordered to pay costs of this application on an attorney and client scale;
4. Further and/or alternative relief.

The

facts

[2] In or around October 2018, the parties concluded an agreement for the construction of civil services for extensions 17 and 18 Wolmaransstad. The contract is governed by the second edition of the General Conditions of Contract 2010 as published by the South African Institute of Civil Engineering (“the contract”).

[3] The contract was subsequently amended on 8 February 2019, 4 December 2019, and 9 July 2020. By mutual agreement between the parties, it was terminated on 23 March 2021. Following

termination, certain disputes arose between the parties relating to the completion of works envisaged in the contract, and the

computation of the final account in respect of the work done. These disputes were referred for adjudication, resulting in the award.

[4] At the heart of this matter is clause 10.6.1.1 of the contract. This clause provides that the Adjudicator’s Award (“the award”) shall be binding on both parties unless and until it is revised by an arbitration award or court, whichever is applicable in terms of the contract (my underlining).

[5] Accordingly, the present dispute between the parties revolves around the aforementioned clause and the respondent’s failure to comply with the terms of the award, or if in disagreement with the award, the failure to refer the award for arbitration, within the prescribed period[1], to be dealt with as provided for in clause 10.6.1 of the contract.

[6] At the commencement of the hearing, Advocate Scholtz, for the

respondent, asked to address the Court first, and sought leave to hand up from the bar a copy of what he said was an application to review and set aside the award. I granted the indulgence. During the course of his address, Advocate Scholtz informed me that the review application had been issued in the Gauteng Division of this Court.

[7] Advocate Scholtz proceeded to address the Court, with zeal, on what he said were the merits of the review application and how that application, so proceeded his argument, had a material bearing on the present application and could well determine its outcome. From the bar, Advocate Scholtz moved for the present application to be postponed in order for what he said was the review application to be dealt with first.

[8] On whether the review application was properly before this Court, he conceded that it was not. Accordingly, attempts to have the review application placed before Court, or to have the matter postponed, were soon abandoned. The application therefore proceeded on the basis of the papers properly before Court.

[9] These papers in turn reveal two rather insurmountable hurdles for the respondent. The first relates to the respondent's failure to deal with the award within the time frames stipulated in clause 10.6.1.2 of the contract, and the second, like the first, relates to the respondent's failure to seek condonation for the late filing of its answering affidavit, with condonation being sought even much later.

[10] Advocate Maree, on behalf of the applicant, made three crisp points. First, that unless and until set aside by a Court the award stands and must be complied with. Second, he argued that the respondent had

delayed in setting aside the award as required in clause 10.6.1 of the contract, and that the setting aside was considerably out of time. Third, and dealing with the review application, he argued that the respondent was similarly out of time with the review application and that, in the answering affidavit - brief and sparse in equal measure - the substantive allegations in the founding affidavit had not been answered, and that even the case pleaded for the reviewing and setting aside of the award was wholly inadequate. I agree.

[11] The delay to file the answering affidavit timeously is explained in that affidavit as being "the fact that the Respondent is in the process of launching a review application in the High Court Johannesburg to have the entire written Adjudicator's Decision between the Applicant and Respondent be reviewed and set aside"[2]. This affidavit is dated 8 December 2023, and the review application that surfaced in Court on the morning of the hearing was said to have been issued in August 2024.

[12] Neither in the answering affidavit, nor in either the condonation application or submissions made on behalf of the respondent was anything said about what had transpired between December 2023 and August 2024: a period of eight months. Without putting too fine a point on this aspect, and the patently inordinate delay, in the condonation application filed on 8 February 2024, the deponent states that the respondent "is now in a position to proceed with the review application"[3]: hardly a cognizable or adequate explanation for the delay, especially when the review application only came to light in September 2024.

[13] The respondent's heads of argument refer to a range of issues dealing in the main with its dissatisfaction with the award. Put in proper perspective, these are precisely the issues that fell to be referred to arbitration. Instead, the respondent approached this Court on the footing that the instances of dissatisfaction with the award offer it defences to this application.

[14] The respondent's heads of argument also suggest that the "issues in this matter were legally and factually complex from the outset"[4]. It should be said that this is all the more reason why the disputes relating to the contract, indeed as provided for in the contract

itself, fell to be decided by adjudication, and in cases of dissatisfaction, referred to arbitration.

The law

[15] The respondent cited several authorities in support for the condonation[5] sought. These authorities address instances where condonation may or may not be granted, and they are clear. However, none of the authorities relied upon assist the respondent in that it failed, as a point of departure from its papers, to make out a case for condonation which, in any event, was sought months after the answering affidavit had been filed. As a result, the authorities relied upon do not assist the respondent.

[16] Among the authorities relied upon to support the respondent's challenge to the award is *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [6]. The respondent places reliance on the dictum that international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between

the parties, and in default of that, by the arbitrator. I agree fully with this formulation, this being exactly what happened in this matter.

[17] Both the contract concluded between the parties and the award are clear. For its part, clause 10.6.1.1 of the contract provides that the decision of the arbitrator shall be binding on the parties unless and until revised by an arbitration award, or Court judgment. The award, issued on 7 July 2023, directed the respondent to pay the applicant "in the interim of finalizing the Final Account"[7], the total sum of R5 883 920.13 + R35 720.00 = R5 919 640.13.

[18] As indicated, both the contract and the award are clear. But even clearer is the law. In *Basil Read (Pty) Ltd v Regent Devco (Pty)Ltd*[8], the Court held that –

"The respondent only has a right to dispute the adjudicator's determination and attempt to set it aside in arbitration proceedings."

...

"...the parties not only agreed to be bound by the adjudicator's decision, but also agreed to give effect thereto without delay unless and until it was subsequently set aside by an arbitrator."

"...the respondent shall be bound by the decision of adjudicator and shall give effect thereto without delay unless and until the adjudicator's

decision is set aside by an arbitrator".

See: *Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd*[9] where, at para 11, the Court held that –

"...whilst the DAB decision is not final the obligation to make payment or otherwise perform under it is...", and further, that "...the respondent was not entitled to withhold payment of the amount determined by the adjudicator..."

Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd[10] where the Court held, at para 18, that

–

“...the parties are obliged to promptly give effect to a decision by the DLB...” and that, “...until revised, the decision binds the parties, and they must give prompt effect thereto” (my underlining).

Conclusion

[19] Looked at fairly and squarely, what the respondent has really done over the months since the award was made on 7 July 2023 can only be described as playing fast and loose with the applicant, and making every possible attempt to keep moving the goalposts. Not only when Advocate Scholtz sought to hand up a review application from the bar

but more, when he suggested that the matter should be postponed in order for the review to be determined before this application, it became at once clear that the plea for the postponement sought was designed to further delay the final resolution of this matter.

[20] At a certain point, this runaround needs to be halted. To this end, this Court need do no more than return the parties to clauses 10.6.1 and 10.6.1.1 of the contract, and paragraphs 17 to 20 of the award, and direct compliance with those clauses, and paragraphs. As such, unless and until set aside, the award stands, and the respondent must comply fully with its exact terms.

[21] A failure to order compliance with the award and instead countenance any of the bases for opposition advanced by the respondent, and in particular the explanation that there is a review application in the

offing - which it is hoped can stay payment of the award amount - would simply be to encourage lawlessness. And the sanctity of

contracts, freely concluded by parties, and so too all processes and obligations resulting from such contracts, and the by now accepted goals of private arbitration, would suffer unwarranted subversion. This is to be avoided.

[22] If the respondent was truly serious about challenging the award, it had more than ample opportunity and should have done so timeously. Efforts to delay, or avoid the obligation to pay the amount of the

award are bound to yield only temporary respite for the respondent. Meanwhile, this heaps up undue and unwarranted hardship on the applicant.

[23] Ultimately, the respondent has only itself to blame for the inordinate delay in challenging the award, glossing over the vital issue of condonation and not providing an adequate explanation for the delay in filing the answering affidavit, and in the end, the consequences that both delays can only have on the outcome of this application.

[24] The authorities governing the dual questions of condonation for the late filing of an affidavit, and similarly a litigant's failure, refusal, or attempts to circumvent compliance with an award as happened in this matter are clear. There being no support from any authorities for the respondent's act, and conduct, there can only be one result.

[25] Consequently I make the following order –

(i) The respondent is ordered to comply with the Adjudicator's

Award dated 7 July 2023;

K D Ramolefe

Acting Judge of the High Court

North West Division, Mahikeng

Appearances:

For the applicant: Adv G V Maree Instructed by: Maree & Maree Attorneys For the respondent: Adv H Scholtz Instructed by: CJP Oelofse Attorneys Date of hearing: 12 September 2024. Date of judgment: 23 September 2024.

- [1] Recorded in clause 10.6.1.2 of the contract to be not “before 28 days or after 56 days from receipt of the decision”.
- [2] Answering affidavit, paginated page 285, para 3.2.
- [3] Condonation affidavit, paginated page 313, para 3.5.
- [4] Respondent's heads of argument, page 7, para 32.
- [5] Du Plooy v Anwes Motors (Edms) Bpk 1983(4) SA 212 (O) at 215 C, Silverthorne v Simon 1907 TS 123 at 126-7, Dalhouzie v Bruwer 1970 (4) SA 566 (C); Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC).
- [6] 2009
- (4) SA 529 (CC), at para 236.
- [7] Adjudicator's Decision dated 9 December 2023, paginated page 259, para 17.
- [8] Case number 41108/09 at para 50.
- [9] 2014 JDR 1824 (GD).
- [10] 2014
- (1) SA 244 (GSJ).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2024/246.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/gap-infrastructure-corporation-pty-ltd-previously-named-barzani-development-pty-ltd-v-oxy-unknown-topic-anwhc-2024>

Prepared on 10 October 2026 · Esheria