

SOUTH AFRICA / JUDGMENT

Motheo Construction Group (Pty) Ltd v University of Mpumalanga (1174/2022) [2023] ZAMPMBHC 38 (12 July 2023)

[2023] ZAMPMBHC 38

COURT

Mbombela High Court, Mpumalanga

BEFORE

B A Mashile

CASE / FILE NUMBER

1174/2022

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(MPUMALANGA DIVISION,
MBOMBELA)

CASE

NO: 1174/2022

(1)

REPORTABLE:NO

(2)

OF INTEREST TO OTHER JUDGES: YES

(3)

REVISED: YES

DATE 12/07/2023

SIGNATURE

In the matter between:

MOTHEO
CONSTRUCTION GROUP (PTY) LTD
Applicant
and
UNIVERSITY
OF MPUMALANGA
Respondent
This judgment was
handed down electronically by circulation to the parties and/or
parties' representatives by email. The date
and time for
hand-down is deemed to be 12 July 2023 at 10:00.

JUDGMENT

MASHILE J:

INTRODUCTION

[1] The Applicant seeks an order directing the Respondent to:

- 1.1 Comply with an adjudicators order of 06 February 2022;
- 1.2 Pay R14 062.50 to the Applicant in respect of the adjudicator's costs;
- 1.3 Pay the costs of this application.

[2] The Respondent opposes the application on the following five grounds:

- 2.1 That the referral of the disputes was not in accordance with the relevant provisions of the engineering and construction contract thus rendering the adjudicators award void and of no force and effect;
- 2.2 That the nomination of the adjudicator was not in line with the relevant provisions of the engineering and construction contract;
- 2.3 That the Applicant had agreed to stay the adjudication process pending the outcome of the settlement negotiations;
- 2.4 That the Applicant was aware of the Respondent's reasons for non-compliance of the adjudicators decision, which reasons, are canvassed in the Respondent's answering affidavit;
- 2.5 That the Respondent, as an organ of state is bound to observe the provisions of section 195, as such could not partake in the unlawful and improper adjudication process, as it would be exposed to sanctions itself.

BACKGROUND

[3] On 22 June 2020, and pursuant to a tender process, the Applicant was awarded a project described as “Contract Number: NIC0088 – Construction of the Irrigation Laboratory Building at University of Mpumalanga” (the project) by the Respondent. On 3 July 2020, The Applicant signed a form of offer and acceptance. The offer and acceptance was countersigned by the Respondent on 5 July 2020. The contractual relationship between both parties is governed by the NEC3 Engineering and Construction

Contract, Third Edition of June 2005, with June 2006 amendments – Main Option B, as amended, (“the NEC3”).

[4] The NEC3 has core clauses, which always apply, and option clauses which must be selected by the parties to the contract., The contract was carried out on an Option “B” basis. The material terms of the agreement between the Applicant and the Respondent relevant to this Application were as follows:

4.1 The Project Manager was Mr Rudi Louwrens of Glad Africa;

4.2 The Respondent, the Applicant, the Project Manager and the Supervisor act as stated in the contract and in a spirit of mutual trust and co-operation;

4.3 No change to the contract, unless provided for by the conditions of contract, would have effect unless it was agreed, confirmed in writing, and signed by the parties;

4.4 A dispute arising under or in connection with the contract would be referred to and decided by the Adjudicator;

4.5 The parties were to appoint the Adjudicator under the NEC Adjudicator’s Contract current at the starting date;

4.6 If the Adjudicator is not identified in the contract data or if the Adjudicator resigns or is unable to act, the parties were to appoint a new Adjudicator jointly. If the parties did not choose an Adjudicator, either party could ask the adjudicator nomination body to choose one. The adjudicator nomination body was to choose the Adjudicator within four days of the request. The chosen Adjudicator would be the Adjudicator;

4.7 The adjudicator nomination body was the Chairman of ICE-SA, a joint division of the Institution of Civil Engineers and the South African Institution of Civil Engineering;

4.8 Disputes were to be notified and referred to the Adjudicator in accordance with the Adjudication Table;

4.9 In terms of the adjudication table, either party was to refer the dispute between two to four weeks after notification of the dispute to the other party and the Project Manager;

4.10 The party referring the dispute to the Adjudicator had to include referral information to be considered by the Adjudicator. Any more information from a party to be considered by the Adjudicator had to be provided within four weeks of the referral. That period could be extended if the Adjudicator and the parties agreed to an extension;

4.11 The Adjudicator could:

4.11.1 review or revise any action or inaction of the project manager or supervisor related to the dispute and alter a quotation which had been treated as having been accepted;

4.11.2 take the initiative in ascertaining the fact and the law related to the dispute;

4.11.3 instruct a party to provide further information related to the dispute within a stated time; and

4.11.4 instruct a party to take any other action which he considered necessary to reach his decision and to do so within a stated time.

4.12 The Adjudicator would decide the dispute and would notify the parties and the Project Manager of his decision and his reasons within four weeks of the end of the period for receiving information. The four-week period could be extended by agreement between the parties;

4.13 The Adjudicator's decision would be binding on the parties unless and until revised by the tribunal and would be enforceable as a matter of contractual obligation between the parties and not as an arbitral award. The Adjudicator's decision would be final and binding if neither party notified the other within the times required by the contract that he was dissatisfied with the decision of the Adjudicator and that he intended on referring the matter to the tribunal;

4.14 The aforesaid notification had to be given within four weeks of the notification of the adjudicator's decision;

4.15 Either party could, at any time, notify the other party of the names of two persons he has chosen from the panel of NEC Adjudicators set up by ICE-SA whose availability to act as the Adjudicator the notifying party had confirmed. The other party was to select one of the two persons chosen to be the Adjudicator within four days of receiving the notice, failing which the person chosen by the notifying party would be the Adjudicator.

[5] On 6 December 2021, the Applicant, through its attorneys, attempted to reach agreement on the appointment of an Adjudicator with the Project Manager and the Respondent. In his response, which was directed at the Applicant, the Project Manager indicated that he could not respond to the Applicant's attorneys' letter as it had not been advised that the Applicant gave its attorneys a mandate to act. Thereafter, he referred the Applicant to an amended clause Z3 from the incorrect contract. This, despite the Applicant's attorneys making it clear that they were on record for the Applicant.

[6] Given the response and lack of consensus as to an adjudicator, the Applicant's attorneys made application to the Chairman of the ICE-SA for the appointment of an Adjudicator on 8 December 2021, in accordance with clause W1.2(3). The Applicant delivered its founding submissions, and all annexures thereto, along with its application, with the Respondent's representatives and Project Manager in copy. By 8 December 2021, the Respondent and its Project Manager were

in receipt of the Applicant's founding submissions.

[7] On that day, ICE-SA enquired as to whether the parties had attempted to reach agreement on the appointment of an Adjudicator. The Applicant's attorneys advised ICE-SA that agreement could not be reached. On 9 December 2021, the Project Manager wrote to ICE-SA, advising ICE-SA that:

7.1 The Applicant had not followed clause Z3 of the contract;

7.2 The Applicant's attorneys are not a party to the contract and accordingly the Project Manager could not respond to the correspondence from the Applicant's attorneys; and

7.3 The parties should be given the opportunity to follow the contract.

[8] ICE-SA invited both parties to first try and agree on the appointment of an Adjudicator. The Applicant's attorneys wrote to the Respondents suggesting three possible names of people who could be appointed as adjudicators, which they had obtained from ICE-SA. The Applicant addressed a letter to ICE-SA and the project manager of the Respondent and advised them that:

8.1 Cox Yeats are the Applicant's attorneys of record and wrote to the Project Manager on the Applicant's behalf;

8.2 The Applicant is perturbed that the Project Manager seeks to frustrate the process;

8.3 The Applicant in fact had received no written communication from the Respondent confirming the change of Project Manager;

8.4 As per Z3 – either party may (as opposed to shall / must) notify the other and endeavour to reach agreement on an Adjudicator - it is not required;

8.5 Regardless, the Applicant's attorneys proposed potential Adjudicators in a letter dated 6 December 2021. The four-day period referred to in option clause Z3 expired on 10 December, and so the Project Manager could select one of the proposed Adjudicators by that date;

8.6 The application to ICE-SA did however have to be by 8 December 2021, given the strict time periods contained in the NEC3;

8.7 To the extent that the Project Manager responded with the acceptance of one of the proposed Adjudicator, the Applicant was willing to accept that, failing which, the Applicant would ask ICE-SA to make the appointment; and

8.8 Notwithstanding, the Applicant's application / referral was made timeously.

[9] on 13 December 2021, the Applicant instructed its attorneys to re-submit its application for the appointment of an Adjudicator to ICE-SA (as specifically requested by ICE-SA). On that day, ICE-SA nominated Mr Peter Odell (Mr Odell) as the Adjudicator. By this time, the nominating body of ICE-SA was satisfied that the application process as outlined in the contract had been fully complied with. On 14 December 2021, the Applicant sent Mr Odell its founding submissions directly. Mr Odell then advised the parties that 14 December 2021 would be the referral date, and that the Respondent's submissions would be due on 11 January 2022.

[10] On 15 December 2021, the Respondent issued a memorandum to the Applicant indicating that:

10.1 The appointment of the Adjudicator is noted and that the matter "would receive full cooperation and the necessary attention it deserves";

10.2 However, the Respondent would not be in a position to deal with the adjudication between 16 December 2021 and 17 January 2022 (both days inclusive) – presumably due to their year-end break.

[11] The Respondent's answering submissions were due on the 17th of January 2022. The memorandum from the Respondent was not sent to Mr Odell, nor did the Respondent / the Respondent's Project

Manager write to the Adjudicator for the purpose of revising the adjudication timelines. It only came to the Applicant's

attention early in 2022. Observing that the Respondent was failing to deliver its answering submissions, on 12 January 2022, the

Applicant's attorneys informed Mr Odell of the Respondent's memorandum and indicated that it was prepared to allow the Respondent a further two weeks to deliver its answering submissions.

[12] In terms of clause W1.3 of NEC3(3), in order for the adjudication timeline to be varied, both parties and the Adjudicator had to agree, in writing, to such variation. Mr Odell indicated that he would wait to hear from the Respondent on the proposal. No response was forthcoming from Respondent or the Respondent's Project Manager. As at 4 February 2022, the Applicant had not yet received a response from the Respondent or the Respondent's Project Manager. Instead, the Applicant was advised that the adjudication timeline had not commenced as the Respondent had neglected to sign the Mr Odell's contract. According to the Applicant, this notion was contractually incorrect.

[13] The Applicant instructed its attorneys to write to the Adjudicator, and to request the delivery of his award. On 4 February 2022, the Applicant's attorneys wrote to Mr Odell and advised him that:

13.1 The referral date was 14 December 2021;

13.2 The Respondent's answering submissions was due by 11 January 2022 – as per Mr Odell's directive and the NEC3;

13.3 Clause W1.3(8) records that the Adjudicator decides the dispute and notifies the parties and the Project Manager of his decision within four weeks of the end of the period for receiving information. That four-week period could be extended if the parties agree;

13.4 Since the Respondent's answering submissions should have been delivered by 11 January 2022, the Adjudicator's award was to be delivered within four weeks thereafter, not later than 8 February 2022;

13.5 Given the lack of participation in these proceedings by the Respondent, the Applicant requested the Adjudicator to deliver his default award by 8 February 2022;

13.6 The Applicant tendered full payment of the Adjudicator's costs and would seek to recover the 50% due by the Respondent from it; and

13.7 The Respondent was of the view that the timelines in the adjudication had not commenced since its representatives had not signed the Adjudicator's contract.

[14] On 06 February 2022, the arbitrator delivered, essentially finding against the Respondent.

ASSERTIONS ADVANCED BY THE PARTIES

[15] The Applicant contends that insofar as the compliance with the order of the adjudicator is concerned, the adjudicator was properly appointed in terms of the contract between the parties. If the adjudicator was not properly appointed, the Applicant submits that the Respondent is nonetheless bound by the award because it has acquiesced or waived its right to object to the appointment. In respect of the alternative relief, the Applicant argued that given the background of the relationship and conduct of the parties, it is appropriate to extend the time periods for referral of adjudication. In essence, the Applicant asserts the referral for adjudication was done in terms of the relevant clauses in the contract.

[16] The Respondent asserts that:

16.1 The referral of the dispute was not in accordance with the contract. As such, the award is null and void;

16.2 The nomination of the Adjudicator was improper and unlawful in so far as it failed to comply with the provisions of clauses W1.1, W1.2, W1.3 and Z;

16.3 The parties had agreed to stay the adjudication pending outcomes of the settlement negotiations;

16.4 The Applicant was aware of the reasons why the Respondent could not comply with the adjudicators decision;

16.5 The Respondent was bound by section 195 and could not partake in the unlawful and improper adjudication process;

[17] In my view, the assertions relating to the referral of the dispute for adjudication and the nomination of the adjudicator are more critical and deserve more attention. That said, the other assertions will for the sake of completeness nonetheless be traversed. I say this since those are the only two assertions which deal directly with the contract.

ISSUES

[18] From the above factual background and assertions of the parties the Court is to determine whether or not:

18.1 The adjudicator was properly appointed in terms of the contract between the parties;

18.2 Assuming that the adjudicator was unlawfully appointed, the Respondent was nonetheless bound by the award by reason of its acquiescence or waiver in that appointment;

18.3 The referral of the dispute was made in accordance with the provisions of the agreement;

18.4 In the context of the relationship and conduct of the parties, it is appropriate to extend the time periods for referral of adjudication.

LEGAL FRAMEWORK AND

ANALYSIS

[19] Before I deal with the issues, it is noted that close inspection of the papers filed by the parties, more particularly the notice of motion and founding affidavit, reveals that there is no prayer in the notice of motion to make the arbitration award and order of Court. To elaborate further I will quote the relevant passages from the papers I have already alluded to supra. The notice of motion reads as follows:

“BE PLEASED ...

1. The Respondent is directed to comply with the order of the adjudicator dated 6 February 2022 forthwith;
2. The Respondent is directed to make payment in the sum of R14 062.50 to the Applicant in respect of the adjudicator’s costs

forthwith;

3. The Respondent is directed to pay the costs of the application;
4. Further and/or alternative relief.”

- [20] Paragraph 55 of the Applicant's founding affidavit, reads that the Applicant applies to this Honourable Court for an order that the adjudication award be made an Order of court, so that it can enforce the award against the Respondent.
- [21] The general rule is that enforcement of an arbitration award must be preceded by application to have the award made an order of Court. However, this is not an inflexible rule, as in appropriate circumstances, one can invoke the "further and/or alternative relief" prayer. This was the case in *Divine Inspiration Trading 130 (Pty) Limited v Aveng Greenaker-LTA (Pty) Ltd and Others*[1] where it was held that:

"Further or alternative relief: Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given)."[2]

- [22] Besides, it is clear from paragraph 55 of the founding affidavit referred to above, that the intention has always been to make the arbitration award an order of Court. This omission of the prayer in the notice of motion appears to have been inadvertent. Moreover, in reply to paragraph 55 of the founding affidavit referred to above, the Respondent merely noted the contents, suggesting that it does not take issue with the point. Against this backdrop, I am satisfied that an order making the arbitration award an order of Court is appropriate.

Appointment of the adjudicator and/or acquiescence to his appointment

- [23] Turning to the issues outlined above, the first dealing with whether or not the adjudicator was appointed in terms of the contract between the parties. The clauses in the contract that find application in this regard are clauses W1.1, W1.2 and Z3. Clause W1.1 sets out that an adjudicator is a person selected by the parties in terms of the relevant clause Z from the panel of NEC adjudicators set up by ICE-SA.
- [24] Clause W1.2 in turn sets out that the adjudicator nominating body is the chairman of ICE-SA. Clause Z3 reads that any party may notify the other party, the names of two adjudicator nominated from the panel of NEC adjudicators set up by ICE-SA, from which the latter must elect one within four days, failing which, the notifying party may elect the adjudicator.
- [25] The Applicant approached the Respondent in an attempt to secure an agreement on who to appoint as an adjudicator. This failed to yield any positive results as the project manager refused to engage with the Applicant's attorneys despite being advised that they were on record[3]. The process set out in clauses W1.1, W1.2 and Z3 unfolded when the Applicant approached ICE-SA. Ultimately, this resulted in Mr Odell being appointed[4]. From the above the Applicant could not have been expected to do anything different. In view of the above I am satisfied that the Applicant has strictly adhered to the terms of the contract. Accordingly, the Respondent's contention does not find favour with this Court and is dismissed as devoid of any merit.

[26] Assuming that the appointment was unlawful as the Respondent would have this Court believe, did the Respondent nonetheless acquiesce to his appointment? In response to the letter of Odell dated 14 December 2021, the Respondent on 15 December 2021, issued a memorandum to the Applicant indicating that the appointment of the Adjudicator was noted and that the matter “would receive full cooperation and the necessary attention it deserves”[5]. The memorandum is a clear indication of the acquiescence for if it did not agree, it would have unambiguously so stated, as it did with its unavailability between 16 December and 17 January the following year. It was only when the proverbial shoe began to pinch that the Respondent tried to summersault. In a case of *Naidoo v EP Property Projects (Pty) Ltd*[6] the facts were almost ‘on all fours’ with the current case. In this case the Court held that:

“Not having objected to the jurisdiction of the arbitrator at the outset and thereafter having voluntarily participated in the arbitration

until his application for a postponement was refused, Tobias must, in my view, be deemed to have acquiesced to his jurisdiction.

[27] This passage exhibits strong similarities with this application. Though the Respondent did not participate fully in the arbitration proceedings, he agreed to cooperate. I suppose the key question is, would the Respondent have raised this point had the arbitrator found in its favour? I think not. To raise the appointment of the adjudicator at this juncture as a defence is not only improper but it is misplaced. The Respondent had ample opportunity to contest the arbitrator’s appointment and cannot seek to do so when the horses have bolted. I am inclined to agree with the Applicant that the Respondent acquiesced to the adjudicators appointment. In any event, I have already alluded to the fact that the appointment was done in terms of the contract.

The referral and/or extension of time for referral

[28] In dealing with these issues, I feel compelled to mention a passage in *Clark v African Guarantee and Indemnity Co Ltd*[7] where it was stated that: “The Court will always be most reluctant to interfere with the award of an arbitrator”. The fact remains, the arbitration award was made. In my view, remains valid until set aside. The memorandum issued by the Respondent that the matter “would receive full cooperation and the necessary attention it deserves” not only acquiesced to the adjudicators appointment but also to its referral. Tersely, the Respondent acknowledged the validity of the arbitration proceedings that had commenced and any conduct that demonstrates otherwise occurred after the commencement. The fact is, there is an arbitration award which the Respondent has not disposed of or even attempted to. Needless to say that the Respondent had an opportunity to revise the award at the tribunal but did not[8]. If the Respondent felt aggrieved by the decision of the arbitrator why was it not revised?

[29] This Court, as with other Courts, observe a high degree of deference to arbitral decisions in line with the principle of party autonomy[9]. Failure to recognize the arbitration award would mean parties can flagrantly disregard such awards which would render arbitration proceedings superfluous. The scope for intervention by the Courts is very limited. The circumstances under which an arbitral award can be set aside are set out in s 33[10] of the Arbitration Act[11] which I will not deal with since no application has been brought before this Court. I accept the referral of the matter to arbitration was legitimate and as a result of the Respondent's acquiescence.

CONCLUSION

[30] In conclusion, the adjudicator's appointment was done in terms of the contract to which the Respondent acquiesced. This Court is reluctant to interfere with the arbitration proceedings. The Respondent had sufficient opportunity to dispute the referral of the matter for adjudication but failed to do so.

ORDER

[31] In the result, I make the following order:

1. The award of the adjudicator is made an order of this court;
2. The Respondent Is to forthwith comply with the order of the adjudicator dated 6 February 2022;
3. The Respondent is to forthwith make payment in the sum of R14 062.50 to the Applicant in respect of the adjudicator's costs;
4. The Respondent is liable for payment of the costs of the application.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

Counsel for the Applicant: Adv PJ Wallis SC Instructed by: Cox Yeast Attorneys C/O Christo Smith Attorneys Inc
Counsel for the Respondent: Adv B Leech SC Adv R Rothlisberger Instructed by: Zwane Sambo Attorneys
Date of Judgment: 12 July 2023

[1] (2015/10455)

[2016] ZAGPJHC 99 (13 May 2016)

[2] Port Nolloth Municipality v Xhalisa 1991

(3) SA 98 (C) at 112D.

[3] See paragraph 5

[4] See paragraph 6, 7, 8 & 9

[5] See paragraph 9 & 10

[6] (444/2012)

[2014] ZASCA 97

[7] 1915 CPD 68 at 77

[8] Clause W1.3(10)

[9] Note 3 supra

[10] Where

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or (c) an award has been improperly obtained, 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.’

[11] 42 of 1965

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