

SOUTH AFRICA / JUDGMENT

Superway Construction (Pty) Limited v Passenger Rail Agency of South Africa (55779/2016) [2017] ZAGPPHC 1060 (1 September 2017) [2017] ZAGPPHC 1060

COURT

North Gauteng High Court, Pretoria

BEFORE

GB Rome

CASE / FILE NUMBER

55779/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 55779/2016

01/09/2017

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED

In the matter between

SUPERWAY CONSTRUCTION (PTY) LIMITED

Applicant

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

JUDGMENT

ROMEAJ:

Introduction

[1]. This matter concerns an application to make a determination by an Adjudicator, whose appointment was provided for under the aegis of the dispute resolution provisions of a contract (the validity of which contract is now in dispute) an order of Court.

[2]. The defence to the application is intertwined with the counter-application. In the counter-application the respondent attacks the validity of the contract that gave rise to the relevant determination. The respondent also challenges the determination on grounds that the Adjudicator's (assuming he was validly pointed, which the respondent disputes) determination was fatally tainted as a result of procedural flaws in the adjudicative process.

Factual matrix

[3]. The factual framework and relevant narrative events are the following.

[4]. The applicant is a contractor within (broadly) the construction industry. The respondent is the Passenger Rail Agency of South Africa. For convenience I refer to the contractor as "the applicant" and the Passenger Rail Agency of South Africa as "Prasa". On its website Prasa describes itself as the implementing arm of the National Department of Transport which is its sole shareholder. It is a state owned entity whose focus is that which is set out in the mandate contained in the Legal Succession Act of South African Transport Services (SATS Act of 1989).

[5]. Although the validity thereof was attacked by Prasa and was thus in issue, it is nevertheless common cause that on 28 September 2012 the parties signed a written JBCC Principal Building Agreement for the completion of a project described therein as "Greenview Station above Platform Level, including external works, package 3".

[6]. The above document is in the standard form type of contract known as the JBCC Series 2000 Principal Building Agreement, edition 5. It is in this judgment referred to as "the Construction Agreement". By (for convenience) so referring to the signed document as "the Construction Agreement" I do not overlook that Prasa has disputed the contractual validity thereof.

[7]. It appears to be largely common cause that pursuant to the conclusion of the Construction Agreement and till 2015 the applicant did (and received payment for) a substantial amount of work on the relevant project. In 2015 disputes arose between the parties about issues of continued interrupted access to and possession of the construction project site by the applicant and a related issue of whether the applicant could be compelled to return to the site in circumstances where it contended it was not obliged to do so as the site had become unsafe.

[8]. As provided for in the Construction Agreement's dispute resolution provisions and on 26 October 2015 the applicant addressed a letter to Prasa. In this letter the applicant referred to the disputes that had arisen between the parties and called upon Prasa to engage with it, with a view to resolving the disagreement within a period of ten working days, failing which it would proceed to exercise its rights under the Construction Agreement.

[9]. On 13 November 2015 the applicant addressed a further letter to Prasa regarding the disputes and requested that the disputes be referred to adjudication in terms of the relevant provisions of the Construction Agreement.

[10]. The relevant body under whose purview the adjudication would (under the provisions of the Construction Agreement) proceed was the Association of Arbitrators. In terms of its applicable Rules, an advocate (one Hanno Steyn) was appointed as the Adjudicator. Such appointment appears to have been confirmed in the minutes of a Pre-adjudication meeting held on 29 February 2016. I note that Prasa was not present at that meeting but it was clearly given an opportunity to file its statement of position.

[11]. The minutes indicate that the parties were to deliver statements of their positions in the form of a statement of claim and a statement defence. Whilst the minutes thus made provision for Prasa to deliver its statement of position (thus setting out any defence it may have had), Prasa did not do so. This despite it having, after the above pre-determination meeting, requested and having been afforded additional time to file its statement of defence.

[12]. The Adjudicator delivered his determination on 29 April 2016. In terms of the Rules applicable to the determination (the JBCCA adjudication Rules, October 2014 edition) he was not required to and did not hear oral evidence or submissions from the Prasa in coming to his determination. Prasa, despite being afforded a proper opportunity to do so had not filed its defence and had not participated actively or meaningfully in the adjudication process. Nonetheless as it was entitled to do under the Construction Agreement, and on 12 May 2016, Prasa delivered a notice of dissatisfaction contesting the correctness of the determination. This is dealt with further below.

[13]. Other than giving the above notice, Prasa took no steps to pursue its dissatisfaction and the process in regard thereto effectively simply lapsed. Prasa instead sought to avoid both the consequences of the determination and the effect of the Agreement's dispute resolution provisions. I turn now to consider Prasa's arguments as to why the determination was/is not binding on it.

Validity of the Construction Agreement

[14]. Prasa's principal argument was that the Construction Agreement was fatally tainted by an irregularity that occurred in the tender process that preceded its conclusion thereby rendering the agreement invalid. In order to follow this argument, it is necessary to set out in brief the relevant factual narrative.

[15]. Prasa was required by law to put the relevant project provided for in the Construction Agreement out to tender. It did so. At the end of July 2012 it informed the applicant that it had been selected as the chosen tenderer.

[16]. The relevant document of Prasa (in which the applicant was informed of its selection) was in the form of a "Letter of Acceptance" addressed to the applicant and dated 30 July 2012. This letter was signed on behalf of Prasa by Mr Chris Mbatha whom the letter indicates to be Prasa's Group Chief Procurement Officer:

Supply Chain Management. Given the importance which Prasa places on this letter in its defence/counter-application, I quote the relevant paragraphs thereof:

"The Passenger Rail Agency of South Africa (Prasa) is pleased to inform you that your proposal has been considered and approved for the construction of a new Greenview Station building above Platform Level and external works at an amount of R63 340 000.00.

It would be appreciated if you can indicate your willingness to accept this offer by return of a written response to the undersigned by no later than 12h00, Tuesday 31 July 2012". (Emphasis added)

[17]. Also and on the same day (30 July 2012) day Prasa addressed a further letter to the applicant in which it referring to additional related work it required to be done on the above project and stated that it wished to:

"Take this opportunity to make an offer of R14 million including VAT to complete the additional work.

It would be appreciated if you can indicate you (sic) willingness to accept the offer by return of a written response by no later than 16h00, Tuesday 31 July 2012". (Emphasis added)

[18]. On 31 July 2012 albeit seemingly after 12h00 the applicant wrote to Prasa stating inter alia that it accepted its appointment/selection for the project and for the additional work.

[19]. The applicant's expressed acceptance was however later qualified in that subsequent thereto and on 30 August 2012 it advised Prasa in the following terms that the parties were still required to conclude a written contract:

"In terms of the Conditions of Contract, please note the following.

1. Contract Agreement

The Parties shall enter into a Contract Agreement within 28 days after the contractor receives the Letter of Acceptance, unless they agree otherwise..."

[20]. It is clear that in its above letter the applicant recognised that its acceptance of its selection did not by itself result in a construction contract between the parties for the relevant project. Rather, the applicant's acceptance of its appointment came with an important qualification apparently required by Prasa from the outset, namely that the parties would still enter into a "contract agreement" within 28-days of the letter of acceptance, unless they agreed otherwise.

[21]. Prasa also contended because the applicant communicated its acceptance after noon on the following day (31 July 2012) in circumstances where the first of the applicant's above two letters of appointment had stated that: "It would be appreciated if you can indicate your willingness to accept this offer by return of a written response to the undersigned by no later than 12h00, Tuesday, 31 July 2012", there was not the requisite level of offer and unqualified acceptance necessary to result in the formation of a contract.

[22]. Both of the arguments are misconceived. In the first instance, the record did not indicate that the above exchange of letters of themselves resulted in a construction agreement. The fact that the conditions of contract seemingly referred to the necessity of the conclusion of a contract within 28 days of the acceptance letter, is a strong indication that both parties understood that the applicant's appointment did not per se mean that they had entered into a building contract for the project and the additional works.

[23]. In any event, it was common cause that the parties (duly represented) indeed went onto conclude the written contract, albeit outside the above mentioned 28-day period. To the extent that the parties may have anticipated that after a 28-day period they were no longer obliged to conclude a formal/extensive written building contract and that the applicant's selection had been rendered redundant thereafter, they nonetheless, by signing the agreement outside such period had agreed (to use the language of the conditions of contract) otherwise at the time concluding their written agreement (on 28 September 2012).

[24]. Prasa sought to find some support for its position in the case of *Command Protection Services v South African Post Office SOC Ltd* 2013 (2) SA 133(SCA) . That case is however entirely distinguishable from the present matter.

[25]. In *Command Services* the issue was whether the parties had concluded an agreement based on the contractor's acceptance of its appointment or selection as the successful tender. Brand JA explained the nature of the issue arising in such a situation:

"The dispute thus arising is not novel. It frequently happens, particularly in complicated transactions, that the parties reach agreement by tender (or offer) and acceptance while there are clearly some outstanding issues that require further negotiation and agreement. Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked *animus contrahendi* because it was conditional upon consensus being reached, after further negotiation, on the outstanding issues. In that event the law will recognise no contractual relationship, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail (see eg *CGEE Alstom Equipments ..*.)"[1]

[26]. In Command Protection the facts were that whilst services were provided, no contract between the parties had been concluded. The Court concluded that whilst the contractor had commenced doing work following its selection/appointment, in the absence of a finalised written contract there was in the circumstances of that case no contract between the parties on which the contractor could rely to claim payment.

[27]. Prasa's position is in effect the reverse of the contractor's contentions in Command Services. In casu neither the applicant nor Prasa allege that the parties failed to reach consensus on the outstanding issues. After Prasa's letters of acceptance/appointment the parties in fact proceed to conclude a formal contract for the works identified in the letters. That there was a duly concluded agreement between the parties governing the work to be done by the applicant in respect of the project is thus clear, common cause and entirely uncontroversial.

[28]. Insofar as the 28-day requirement is concerned, I am doubtful that the applicant's above letter and its appointment can be elevated to the status of a written agreement, which may never be varied. In any event, the parties

manifestly agreed to enter into the Construction Agreement despite the lapse of 28 days after the letter of acceptance. In other words, insofar as the conditions of contract may have required the conclusion of a contract within 28 day of the applicant's selection, such conditions nonetheless did not preclude both the parties from agreeing otherwise as to the date of the

conclusion

of their agreement. By concluding the agreement on the date thereof the parties accordingly simply agreed otherwise in respect of the time frame stipulated for the conclusion thereof.

[29]. As to Prasa's arguments regarding the timing of the applicant's communication of its acceptance letter, given that the parties ultimately concluded a formal extensive written agreement governing the applicant's provision of its services, the exchange of correspondence that preceded the agreement has no bearing on whether a contract was concluded or not.

[30]. Had the applicant relied on the exchange of correspondence to establish the necessary agreement the position may well have been different. However, as mentioned above it was not necessary for the applicant to do so because unlike the situation in Command Protection the applicant did not contend that its selection as the successful tender (or its acceptance of its appointment) resulted in the relevant contract. Rather, the applicant relied on the Construction Agreement, which plainly could not be undone by an attack on the timing of the correspondence in which it was offered and accepted its appointment. The Construction Agreement was a self-standing agreement containing the usual entire agreement clause. Pre-contractual dealings were thus entirely irrelevant in respect of whether the parties had in fact entered into the Construction Agreement on its terms.

[31]. In the circumstances, the attack on the validity of the Agreement was unfounded and the counterclaim (which is premised on the same attack) is without merit and fall to be rejected and dismissed.

Fairness of the determination

[32]. The second issue pertains to Prasa's arguments concerning the fairness in the adjudicative process. To assess these contentions it is useful to have regard to the relevant provisions of clause 40 of the Construction Agreement which provides as follows

"40.1 If a dispute or disagreement arises between the parties, either party may give notice to the other to resolve such disagreement.

40.2 Where such disagreement is not resolved within 10 working days after receipt of Notice of Disagreement, the disagreement is deemed to be a dispute and the party which gave the Notice of Disagreement shall be required to refer the dispute for determination to either adjudication or for the arbitration to be conducted in terms of the edition of the JBCC Rules for adjudication current at the time when the dispute was declared/or Arbitration where the arbitrator is to be appointed by the Body selected by the parties whose rules shall

apply.

Should either party be dissatisfied with the Adjudicator's decision such party may give notice of dissatisfaction to the other party and to the Adjudicator within 10 days of receipt of the decision. The dispute will then be referred to arbitration under the provisions of the Agreement."

[33]. After the determination was made, Prasa gave its notice of dissatisfaction; it then took no steps to proceed with the relevant arbitration, which process in has accordingly effectively lapsed and in in terms of the Construction Agreement the parties remain bound by the determination.

[34]. Prasa contends that the determination and the relevant process leading thereto essentially contravened rules of natural justice and also contended that in any event the dispute was one which should have been subject to arbitration not expert adjudication.

[35]. The Adjudicator's determination however indicates the following relevant facts (which facts were not disputed by Prasa in the present application)-

35.1. on the 7th of April 2016 the Adjudicator received a letter from the applicant's attorneys advising him that they had received a letter from Prasa's attorneys who had been placed on brief to attend the adjudication. The letter recorded that the parties had agreed that Prasa would file a statement of defence on 20 April 2016;

35.2 . notwithstanding the above, the Adjudicator did not receive any submissions or statement of defence from Prasa;

35.3. he accordingly recorded that in terms of rule 5.5.11 of the JBCC Adjudication Rules, he would make a determination notwithstanding Prasa's failure to attend meetings or to submit a statement of defence.

[36]. A review of the contents of the Adjudicator's determination indicates that the Adjudicator, based on the material before him, came to a reasoned decision. In so doing he complied with the precepts underlying construction dispute resolution adjudications, namely "a cash flow measure implementing what has been colloquially described 'a quick and dirty exercise' to avoid delays in payment pending affirmative determination of litigation"[2].

[37]. The above statement is taken from Nugent JA's judgment in *Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd and Another* where the learned Appellate Justice described the relevant type of construction determination herein as follows:

"The Adjudication Rules issued by the JBCC for use with the contract describe adjudication as 'an accelerated form of dispute resolution in which a neutral third party determines the dispute as an expert and not as an arbitrator and whose determination is binding unless and until varied or overturned by an arbitration award'. An adjudicator is given wide inquisitorial powers that enable disputes to be resolved summarily and expeditiously."

[38]. A review of the adjudicator's determination does itself not indicate any failure of natural justice or material irregularities in the adjudication process. It is also somewhat surprising that such an allegation is made in circumstances where Prasa chose not to participate in any meaningful way in the determination process.

[39]. As to the argument that the dispute could not be referred to adjudication and had instead been sent to arbitration, I disagree with this assessment. The Construction Agreement, allows the initiating party to refer disputes either to arbitration or to expert determination. The argument that there was some sort of adjudicative failure herein because the initiating party chose to institute expert determination proceedings, as opposed to arbitration proceedings, is thus without merit.

[40]. Similarly, the Adjudicator clearly fulfilled the role designated for him under the Construction Agreement. His cognisance in his award of determination that he was presiding as an expert in a determination process as opposed to an arbitration is evident from the fact *inter alia* that no costs were awarded.

[41]. Having come to the above conclusion, it is not necessary to traverse further issues raised in Prasa's heads of argument (and in it is oral submissions at the hearing) to the effect that Courts display no greater degree of deference to decisions made by adjudicators than do in regard to the awards of arbitrators. This may well be so. Nonetheless in either type of extra curial referral there is a degree of judicial deference to the findings of arbitrators and/or experts sitting as such in an expert determination[3].

[42]. Having considered Prasa's arguments about the adjudicative process and taking into account the fact that Prasa by delivering a notice of objection had initially chosen to internally challenge the determination by way of arbitration and then shifted its argument to those usually associated with a review of an arbitrator's award, I do not find that there is any merit thereto; in any event none of the complaints raised by Prasa suffice to review or set aside the

determination.

Can Prasa be ordered to make payment

[43]. I deal finally with the following issue, which arises out of the following allegation/submission contained in the founding affidavit. The applicant is entitled to an order to give effect to the Adjudicator's determination, which includes the applicant's right to receive payment of the amount certified in terms of the contract.

[44]. I do not agree that the Adjudicator's determination reflects a due, owing and payable debt in the form of a present entitlement on the applicant's part to receive payment of an amount certified. The term or phrase "amount certified" appears to be a reference to the applicant's own internal certification in accordance with the provisions of clause 38 of the Construction Agreement in circumstances where the Principal Agent is in breach of its obligations to finalise, sign and/or submit payment certificates. The applicant's own certification (where there is a breach) however unlike the certification of the Principal Agent will not (and does not in this matter) amount to an admission of indebtedness by Prasa.

[45]. As the Adjudicator correctly noted the applicant may, depending on Prasa's attitude to the applicant's own certificate, still have to sue for the amount it regards (or it has internally determined) to be due to it. There are no facts before this Court that might lead to a different conclusion in this regard to the one reached by the Adjudicator. It follows that insofar as the applicant in its notice of motion has also asked for payment of amount certified as being due to it, such claim is unsustainable.

[46]. As to costs the applicant has succeeded in large with its claim and the respondent has been unsuccessful in its counterclaim. The applicant is accordingly entitled to its costs.

[47]. In the result, the following order is made -

47.1. The counter-application is dismissed with costs

47.2. The determination of the Adjudicator, advocate Hanno Steyn dated 26 April 2016, is made an order of Court.

47.3. The determination is declared to be final and binding on the parties.

47.4. The respondent is to pay the costs of the application and the counter- application.

GB ROME

ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING15

MAY 2017

DATE OF JUDGMENT30

AUGUST 2017

[1] Command Services supra at para 12.

[2] Per Nugent JA in Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd and Another (2013 (6) SA 345 (SCA) at para 7

[3] Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews 2009

(4) SA 529 (CC) at paragraph 195, page 585; Radon supra

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