



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2015/10455

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....**13 May 2016**.....
DATE

.....
SIGNATURE

In the matter between:

DIVINE INSPIRATION TRADING 130 (PTY) LIMITED **Applicant**

And

AVENG GREENAKER-LTA (PTY) LTD **First Respondent**

**ASSOCIATION OF ARBITRATORS OF
SOUTH AFRICA** **Second Respondent**

MR. C BINNINGTON **Third Respondent**

JUDGE B JAMMY **Fourth Respondent**

JUDGE I SCHWARTZMAN **Fifth Respondent**

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction:** The applicant seeks an order in the following terms:

1. “Declaring that the agreement between the Applicant and the First Respondent, in so far as it subsists and/or subsisted, made provision for an ex-post facto enforcement of the rights contained therein relating to dispute resolution;
2. Declaring that the agreement between the parties contemplated that in the absence of, or upon the expiry of the Dispute Adjudication Board, either party is entitled to refer any dispute arising out of the agreement is liable to be referred to arbitration by Association of Arbitrators of South Africa;
3. Declaring that the Second Respondent is empowered, alternatively obliged and further alternatively bound to arbitrate upon the dispute referred to it by the Applicant during January of 2014;
4. Costs;
5. Further and/or alternative relief.”

2. The application is opposed by the First and the Second Respondent. The First Respondent submits that paragraphs 1 and 2 of the Notice of Motion seek a declaration confirming a clear wording of a contract between it and the Applicant; and it's as such unnecessary. The Second Respondent further avers that the court can only refer the dispute to the arbitrator if one is presented to it; but the Applicant failed to present a dispute which it could refer to the arbitrator as suggested. The Second Respondent is opposed to paragraph 3 of the Notice of Motion in that being an association, it has no *locus standi* to hear arbitration matters, but it recommends or allocate arbitrators to parties with disputes, and it cannot interfere with the findings made by the arbitrators.

3. **Background:** It is common cause that the Applicant, an engineering construction company, trading as El Shaddai Engineering Services was appointed by the First Respondent, on 05 October 2010 to complete and construct the Sub-Contract works and remedy any defects in conformity with the provision of the Sub-Contract Agreement and the Main Contract. The main contract was concluded between Eskom (Pty) Ltd and several contractors including the First Respondent, for the national key strategic energy project at the Medupi Power Station. The value of the sub-contracted works the Applicant was appointed to do was R59 919 849.00. It is further common cause that the Red Book conditions of contract issued by the *Federation Internationale des Ingenieurs-Conseils* (the FIDIC conditions) published in 1999, as amended by the sub-contract agreement; was applicable between the Applicant and the First Respondent.
4. Clause 20 of the FIDIC conditions provide for the appointment of the Dispute Adjudication Board (the DAB) which would deal with disputes between the parties. Further provisions are to the effect that in case the parties or one of them is not happy with the decision of the DAB, the matter shall be settled by arbitration. Clause 20.8 upon which the Applicant relies, provides that if a dispute arises between the parties in connection with, or arising out of, the Contract or the execution of the Works, and there is no DAB in place, whether by reason of expiry of the DAB's appointment or otherwise; clause 20. 4 and 20. 5 shall not apply; and the dispute may be referred directly to arbitration.¹ It is common cause that up to this date, the DAB has not been appointed. It is the First Respondent's contention that is the dispute needed to be referred to the DAB first, something the Applicant failed to do.

¹ Clause 20. 4 provides for obtaining the DAB's decision and clause 20. 5 provides for amicable settlement.

5. The Appendix to Tender,² being a document included in the sub-contract between the Applicant and the First Respondent provides *inter alia* that the three members of the DAB shall be appointed by the Chairperson of the Second Respondent. Furthermore, clause 20.2 provides that such appointment shall take place by a date to be recorded in the Appendix to Tender. No such date was recorded in the Appendix to Tender.
6. The project was to commence on 20 September 2010 and to be complete by 14 May 2011. Email exchanges between the Applicant and the First Respondent however reflect that as late as June 2013, the project was far from being finished, with letters pointing fingers at each other. The applicant accused the First Respondent of non-payment and behaving like a dominant employer over the Applicant.³ The First Respondent refuted the allegations and instead served the Applicant with a notice in terms of certain contractual provisions accusing them of abandoning the Works, demonstrating the intention not to continue with the performance of their obligation.⁴ The said notice also highlights that the actual work progress was too slow to complete within the required time having fallen behind the programme. The notice also threatened cancellation of a contract unless this was remedied. The First Respondent finally cancelled the contract on 25 November 2013.⁵
7. Following this termination and a number of correspondence letters between attorneys for the Applicant and the Respondent, an arbitration tribunal (the tribunal) was appointed by the Second Respondent at the behest of the Applicant on 12 February 2014. The tribunal comprised of three arbitrators being the Third, the Fourth and the Fifth Respondent. The tribunal sat in a

² See JL1, p. 260.

³ See ES6, p. 204 being a letter from the Applicant dated 04 June 2013.

⁴ See ES7, p. 207 being a letter from the Respondent dated 09 October 2013.

⁵ See JL4, p. 265.

preliminary hearing on 06 March 2014 and after hearing the submissions from the Applicant and the First Respondent, made a pronouncement that it has no jurisdiction to hear the matter. No reasons were furnished for that decision.

8. It is clear that regurgitation of the terms of the contract is unnecessary since it would not help the Applicant. All the applicant needs is to have the dispute referred to an arbitrator who would hear the dispute and give a ruling. The submission by the Second Respondent to the effect that it is an association which does not preside over disputes, and whose only role is to appoint arbitrators, was not contested by the Applicant. Moreover, it is conceded by the applicant that the Second Respondent adduced its responsibility when it appointed the tribunal on 12 February 2014. The Applicant is rather dissatisfied with the decision by the tribunal to the effect that it has no jurisdiction to hear the dispute referred to it.
9. The Applicant opted not to review the decision by the tribunal and there is no order sought against it or the individual arbitrators who formed the tribunal. Realising that it will find no joy in the relief sought, the Applicant amended its submissions at the stage of arguments to request that the court should order the Second Respondent to appoint another tribunal. Counsel for the Applicant therefore conceded that the Applicant needs a different relief than what it sought in the Notice of Motion. In support of these submissions, counsel argued that this should not be an issue since in the Notice of Motion, there is a request for “further or alternative relief.”
10. With no relief sought against the tribunal, and the only relief sought against the Second Respondent being misdirected for lack of *locus standi* to perform the act; the only hope the Applicant has is to have the an “alternative relief” not contained in the Notice of Motion. I do not know how this would help

the Applicant even if the court was to accede to this request seeing that nothing bars any newly appointed tribunal to reach the same decision reached by the tribunal that ruled that it has no jurisdiction. Ordering a declarator based on a contract which runs parallel with the ruling made by the arbitrator would not help either since that would not directly address that ruling.

11.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).⁶ Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of 'further and/or alternative relief'.⁷

12. In *Johannesburg City Council v Bruma Thity Two (PTY) LTD*⁸ Coetzee J held that “the prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. Whatever the Court can validly be asked to order on papers as framed, can still be asked without its presence. It does not enlarge in any way "the terms of the express claim.” I agree with Van Zyl J in *Mgoqi v City of Cape Town*⁹ when he cautioned against allowing the relief to be pushed through the heads of argument while the

⁶ *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 112D.

⁷ See Erasmus *et al Superior Court Practice* at B1 - 130A.

⁸ 1984 (4) SA 87 (T) at 93E-F

⁹ 2006 (4) SA 355 (C) at 362F-363B. See also *Queensland Insurance Co. Ltd v Banque Commerciale Africaine*, 1946 AD 272 at p. 286 and *Hirchowitz v Hirchowitz* 1965 (3) SA 407 (W).

same is not in the notice of motion or the founding affidavit. The Applicant had an option to apply for the amendment of the Notice of Motion so as to include the relief it now seeks, but opted not to. This can be potentially prejudicial to the other parties who may have entered notice of intention to oppose based on the prayers sought. This is apparent from the Second Respondent who until now has argued that it cannot perform the relief sought against it.

13. The court is of the view that the relief sought is misdirected and is aimed at the wrong parties. The court is equally not persuaded to grant this relief not contained in the notice of motion. It is therefore not necessary to consider other reasons submitted by the First Respondent in opposing the application.

14. For the reasons stated above, the following order is made:

14.1 The application is dismissed with costs.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: 04 May 2016

Judgment Delivered: 13 May 2016

For the Applicant: Adv. M Mathaphuna
Instructed by: Nyachowe Attorneys
Sandown

**For the First Respondent:
Instructed by:**

**Adv. S Bunn
Cliff Dekker Hofmeyer Inc
Sandton**

**For the Second Respondent:
Instructed by:**

**Adv. S Mitchel
Bowes & Turner Inc
Rosebank**