



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:
YES/NO
Of Interest to other Judges:
YES/NO
Circulate to Magistrates:
YES/NO

Case number: 2288/2022

In the matter between:

RAUBEX/NODOLI CONSTRUCTION JOINT VENTURE

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL:
FREE STATE DEPARTEMENT OF POLICE, ROADS
AND TRANSPORT, FREE STATE PROVINCIAL
GOVERNMENT N.O.**

Respondent

JUDGMENT BY: C REINDERS, J

HEARD ON: 6 OCTOBER 2022

DELIVERED ON: 20 FEBRUARY 2023

- [1] On 10 May 2019 the applicant and the respondent entered into a written contract (essentially based on the New Engineering Contract 3, April 2013-“the NEC3”) for maintenance of the public road between Sasolburg and Heilbron in the Free State Province. A dispute arose between the parties culminating in an adjudicator hearing the dispute and handing down his decision (the adjudication decision/award) on 7 April 2022.
- [2] The applicant moves for relief that effect be given to the adjudication award in the following terms:
- “1. The respondent is forthwith to give effect to the adjudication award handed down on 7 April 2022, a copy of which is annexed hereto to the founding affidavit marked “C9”;
- 1.1 Pursuant to the above-mentioned adjudication award, the respondent is ordered to pay the applicant:
- 1.1.1 R14 280 737.40 plus VAT less R8 222 621.10, in other words R8 200 229.91;
- 1.1.2 Interest on the amount of R14 280 737.40 plus VAT at the rate of 7% per annum from 26 October 2021 to 31 March 2022; and
- 1.1.3 Interest on the balance of the amount due of R8 200 229.91 (inclusive of VAT) at 7% per annum from 1 April 2022 to the date of payment.
- 1.2 The respondent is ordered to pay the costs of this application on an attorney and client scale.”
- [3] The respondent opposes the relief claimed by the applicant, contending that the applicant is not entitled to such relief until the arbitration proceedings are finalized and “an arbitration award is issued in its favour.” In essence it is submitted that the adjudication decision (including any payment) is suspended pending the dispute being revised by the arbitrator in terms of the dispute

resolution process agreed upon by the parties. Applicant, so the argument goes, seeks court to give effect to the decision of the adjudicator not being final and binding as there is no provision in the NEC3 that the decision should be promptly given effect to or without undue delay, whilst the arbitration process is still pending.

- [4] A brief factual background to the application is mostly common cause (or not seriously disputed) and can be summarized as follows:

- 4.1 The NEC3 incorporated in the contract is a standard contract used within the construction industry in terms of which parties can select certain clauses to govern their rights and obligations and regulate the completion of a specific project. The contract also envisages the appointment by the employer (the respondent) of a project manager, with the task to manage the contract on behalf of the employer. Included in the contract (with the applicable portions annexed to the applicant's founding papers) is the dispute resolution (Option W.1) agreed upon by the parties. Provision is also made in the contract for what is termed 'compensation events' allowing the contractor to claim from the employer additional payment and extra time to do the work.
- 4.2 It is not disputed that the applicant claimed for compensation relating to the national lockdown (Covid-19) during the period March to May 2020, and that the employer's instruction on 25 March 2020 to cease work was a compensation event entitling the applicant to an extension of time and compensation. The matter was referred for adjudication after a dispute arose between the parties. The parties duly filed their written submissions and the adjudicator handed down his award on 7 April 2022.

4.3 Pursuant to the award a trial of correspondence ensued between the parties. I do not deem it necessary to comprehensively deal with the precise content of these electronic mails as the content thereof is not in dispute.

4.3.1 It suffices to say that the applicant claimed payment from the respondent in the amount of R 8 708 861,64 on 13 April 2013. The respondent (as represented by Mr M Monyane) on even date replied that it wished to advise the applicant that "it is our instructions to approach the tribunal to challenge the decision of the Adjudicator" and "...has four weeks to do so." In a further response Mr Monyane replied:

"Yes the decision of the adjudicator is binding and must thus be referred to Tribunal if there is dissatisfaction.

By taking a decision to refer it to Tribunal suspend (*sic*) the payment until final decision is arrived at.

For now, there is no willingness on our part to pay any amount except the one already paid to your client.

We will wait for the Tribunal decision."

4.3.2 The applicant's attorneys of record responded by stating that referring the decision to the tribunal does not suspend payment and pointed Mr Monyane to Option W.1.3 (10) of the contract. On 5 May 2022 the respondent addressed an email to the attorneys of the applicant and the adjudicator that it "notify" the applicant and the adjudicator of its "...intention to refer the matter for arbitration as it is not satisfied about the Ruling made on the 5th April 2022."

4.4 The applicant hereafter launched this application to have the adjudicator's award enforced.

[5] The applicability of the dispute resolution provisions of the contract (NEC3) that governs the relationship between the parties is not in dispute. The main bone

of contention between the parties relates to the aforementioned clause W1.3 (10) which reads:

“The Adjudicator’s decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The Adjudicator’s decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied with a decision of the Adjudicator and intends to refer the matter to the tribunal.”

- [6] The dispute between the parties is accordingly the question whether the adjudication award which the applicant seeks to enforce, is binding in the event that the award was referred for arbitration in terms of the aforementioned dispute resolution provisions in view of W1.3(10). Counsel held different views and both in their heads of argument and in submission before me, referred me to case law in support of such views.
- [7] Applicant placed reliance, amongst others, on the case of ***Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd***¹ where the court concluded that the notice of dissatisfaction does not suspend the obligation to give effect to the decision. The applicable clause in ***Tubular Holdings*** stated that the decision of the Dispute Adjudication Board is binding on the parties and should be promptly given effect to, whereas in ***Steffanuti Stocks (Pty) Ltd v S8 Property (Pty) Ltd***² the applicable dispute resolution clause included the wording “without undue delay.”
- [8] Counsel for respondent sought to distinguish the aforementioned case law by submitting that reliance on such case law is misplaced as *in casu* clause W1 does not contain any provision that that the adjudicator’s decision should be

¹ 2013 JDR 2441 (GSJ)

² 2014 (1) SA 244 (GSJ)

given effect to “promptly” (or without unduly delay), but instead the clause provides that the decision is enforceable as a contractual obligation. Relying on, inter alia, ***Britstown Municipality v Beunderman (Pty) Ltd***³ and ***Blue Circle Projects (Pty) Ltd v Klerksdorp Municipality***⁴ in respect of the finality of an arbitrator’s award, he submitted that the decision of the adjudicator the matter at hand is not final and binding whilst the arbitration process is still pending. I pause to mention that ***Britstown*** pertains to an award made by an arbitrator, whilst ***Blue Circle Projects*** dealt with the opinion of a mediator.

- [9] Recently, the Supreme Court of Appeal comprehensively dealt with the legal principles applicable to the status of an adjudicator’s award in ***Framatome v Eskom Holdings SOC Ltd***⁵ (***Framatome***). The summary of the judgment reads: “Construction contract – contract providing for dispute resolution process through adjudication – adjudicator’s award final and binding on the parties until and unless set aside on review – High Court erred in not enforcing the award.” In my view ***Framatome*** put this issue to bed. I find it apposite however to quote liberally from the applicable paragraphs of the unanimous judgment penned by Mathopo JA on behalf of the full bench. All emphases are that of myself.

- 9.1 The appeal in ***Framatome*** emanated from the Gauteng South Division and concerned a dispute that arose between the parties in relation to whether the project manager’s notification (and assessment) amounted to a compensation event. The trial court had declined an order to enforce the award by the adjudicator. Although the applicable edition of the NEC3 was that with amendments of June 2006, the principles in terms of the dispute resolution process (and more specifically clause W1.3 (10)) are identical to that of the application that serves before me for adjudication.
- 9.2 Having set out the background to the appeal, Mathopo JA addressed in paragraph [20] the issue whether the high court correctly declined the order of enforcement and referred to the judgment of ***Radon Projects (Pty) Ltd v NV***

³ 1967 (3) SA 154 (C)

⁴ 1990 (1) SA 469 (T)

⁵ (357/2021) [2021] ZASCA 132 (1 October 2021)

Properties (Pty) Ltd & Another,⁶ where the process of adjudication (and its purpose) was comprehensively dealt with and described.

9.3 Clause W.1.3 (10) was quoted and the court concluded by holding "...It is clear that only the arbitration is the appropriate forum. In argument before us, Eskom conceded that the dispute has been referred to arbitration."⁷

9.4 The arguments tendered by counsel for the respondents, were found to be without merit. Mathopo JA held:

"[23] If the interpretation contended for by Eskom is correct, it will substantially undermine the effectiveness of the scheme of adjudication. It is plain that the purpose of adjudication was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration. As far as the procedure is concerned, adjudicators are given a fairly free hand. They are required to act impartially and permitted to take the initiative in ascertaining the facts and the law. Sight should not be lost of the fact that adjudication is merely an intervening, provisional stage in the dispute resolution process. Parties still have a right of recourse to litigation and arbitration. Only a tribunal may revise an adjudicator's decision. As that decision has not been revised, it remains binding and enforceable..."

9.5 The court dealt with the submission by Eskom that the adjudicator exceeded his jurisdiction and the proper procedure had not been followed, and found that even this aspect did not entitle Eskom not to comply with the adjudicator's award: ... The adjudicator formulated the dispute with the understanding and appreciation of what the parties contemplated. It is trite that if upon an application for enforcement of an adjudication decision, it is found that the adjudicator did not have the requisite jurisdiction, his decision will not be binding or enforceable'.⁸ Mathopo JA proceeded to state: "A determination of whether or not Framatome's quotation was valid under the Contract and whether the process for the deemed acceptance of

⁶ [2013] ZASCA 83; [2013] 3 All SA 615 (SCA); 2013 (6) SA 345 (SCA) (31 May 2013) para 3-5.

⁷ At paragraph [22].

⁸ At paragraph [25]

that quotation requires an analysis of the facts. This is an issue which the arbitrator will deal with in due course. That said, it is clear that the decision of the adjudicator is binding and enforceable.⁹ At paragraph [29] it was held that ... 'In the final analysis, the question to be asked is whether the adjudicator's determination is binding on the parties. The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into an error.'¹⁰

The respondent did not attack the granting of the relief claimed by applicant on the basis that the adjudicator did not confine himself to a determination of the issues put before him. It can thus be accepted that the adjudicator indeed confined himself to such issues before him and the parties are consequently bound by his determination. Whether the adjudicator was correct in his findings is for the arbitrator to decide.

- [10] Counsel for respondent pressed on me to exercise my discretion in declining to enforce the adjudicator's award in view of the fact that arbitration proceedings were pending and, as conveyed from the bar, submissions by the parties had already been furnished to the arbitrator. In **Framatone** arbitration proceedings in respect of the adjudicator's decision was, like in this instance, already instituted and pending. Despite this aspect being dealt with thoroughly as indicated in the above mentioned paragraphs of the judgment, the court did not apply any discretion leading to a dismissal of the appeal. In fact, Mathopo JA concluded: ... 'To my mind, no justifiable reason exists for not fully giving effect to the adjudicator's award. Refusing to comply with the payment award of the adjudicator is disingenuous.'

The appeal was upheld, the order of the trial court was set aside and replaced with the order as prayed for by the appellant (as applicant) in the trial court.

⁹ At paragraph [26]

¹⁰ The court referred to *Carillion Construction Limited v Devonport Royal Dockyard Ltd* [2005] EWHC 778 (TCC) at paragraph 63.

[11] Applying the facts of this application to the principles enunciated by and findings of the Supreme Court of Appeal in *Framatome*, I am satisfied that the applicant has made out a proper case for the relief claimed. Despite the able arguments proffered by counsel for the respondent to convince me that the application should be dismissed in view thereof that the award of the adjudicator is not final (due to it being subject to review by the arbitrator) and the application is accordingly premature, I have not been so convinced. Counsel for applicant submitted that a proper case for the relief claimed was made out. I agree with her. The respondent made payment of only R 8 222 621.10. The notice of motion embodies the precise wording of the adjudicator's award which includes a calculation of this amount being subtracted from the amount of R 14 280 737.40 (plus VAT), as well as interest as set out in paragraphs 11.2 and 11.3 of the award. I was not called upon to review the adjudicator's award and thus refrain from any comments in respect of the wording of the order and the paragraphs relating to interest. It seemed that the respondent did indeed make certain payments, but the amount so mentioned is different from that which is indicated to be subtracted in the arbitration award that I am being requested to enforce. In my view it would be up to the parties to calculate the correct amounts due to the applicant in terms of the award.

[12] There is no reason why costs should not follow the event. Although counsel for applicant pressed on me to award costs on a scale as between attorney and client. In my view the respondent, as an organ of state holding the purse of the public, was at liberty to defend its view on the issues raised.

[13] Accordingly I make the following order:

13.1 The respondent is forthwith to give effect to the adjudication award of Adv. A Gautschi SC dated 5 April 2022 and handed down on 7 April 2022 as annexed to the applicant's founding affidavit and marked "CS9".

13.2 Pursuant to the adjudication award, the respondent is ordered to pay the applicant:

13.2.1. R14 280 737.40 plus VAT less R8 222 621.10, in other words
R8 200 229.91;

13.2.2 Interest on the amount of R14 280 737.40 plus VAT at the rate of 7%
per annum from 26 October 2021 to 31 March 2022; and

13.2.3 Interest on the balance of the amount due of R8 200 229.91 (inclusive
of VAT) at 7% per annum from 1 April 2022 to the date of payment.

13.3 The respondent is ordered to pay the costs of this application.



C REINDERS, J

On behalf of applicant:

Ms J Harwood

Instructed by:

Hewlett Bunn Inc.

c/o Lovius Block Attorneys

BLOEMFONTEIN

On behalf of respondent:

Adv BS Mene SC

Instructed by:

State Attorneys

BLOEMFONTEIN