

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

Case No. : 401/2014

In the matter between:-

SASOL CHEMICAL INDUSTRIES LTD

Applicant

and

PETER ODELL

First Respondent

E-HEL CIVIL SERVICES (PTY) LTD

Second Respondent

HEARD ON: 17 FEBRUARY 2014

JUDGMENT BY: KRUGER, J

DELIVERED ON: 20 FEBRUARY 2014

- [1] This matter came before me as an urgent application on 17 February 2014. The reason why applicant went to court is that the first respondent, who was appointed as adjudicator in respect of disputes arising from the contract between the applicant and the second respondent, E-Hel Civil Services (Pty) Ltd, took the view that it was not within his power to grant the applicant an extension of time for it to lodge its submissions more than four weeks after the referral date, being 17 December 2013.

- [2] The main question in this case is whether the adjudication decision of the first respondent can be set aside because first respondent did not entertain a request by the applicant for an extension of time.
- [3] In terms of the dispute resolution mechanism agreed upon between the parties, clause W1.3 (3) provides that further information is to be provided to the adjudicator within four weeks of the referral. In this case that means that the applicant had to place its information before the adjudicator before 16 January 2014. When the referral notice of the second respondent was served on the applicant on 17 December 2013 the builders' holiday had commenced and the person dealing with this matter was on leave. The deponent to applicant's founding affidavit, who worked with the contract, says he went on leave on 14 December 2013 and returned to work on 13 January 2014. On 14 January 2014 he requested the second respondent for an extension and the second respondent was not willing to accede to such request.
- [4] On 30 January 2014 the applicant launched this application. The relief sought in prayer 2 was that the first respondent be interdicted from giving a decision in the adjudication and prayer 3 reads:

“3. That a declaratory order is made that the first respondent is entitled to consider a request by the applicant for an

extension of time in which to file a response or to furnish information to the second respondent's Referral Notice."

- [5] The applicant explained in its papers that in terms of the contract the first respondent was obliged to give his decision on 11 February 2014. For that reason the application was set down in the urgent court for hearing on 10 February 2014. The answering affidavit was filed on 3 February 2014.
- [6] On 3 February 2014 the first respondent made his decision. This meant that the applicant could no longer seek an order that the first respondent be interdicted from making his decision. Consequently the applicant on 6 February 2014 filed a "Notice of Amendment of Notice of Motion" together with a supplementary (founding) affidavit and its replying affidavit in reply to the second respondent's answering affidavit.
- [7] In the Notice of Amendment of Notice of Motion the applicant stated that it would at the hearing of this application amend prayer 2 to read as follows:

"2.1 That the first respondent's Adjudication Decision dated 3 February 2014 in the adjudication proceedings between the applicant and the second respondent is set aside.

2.2 Alternatively to 2.1 –

That the second respondent is interdicted from obtaining payment of the amount awarded to it in terms of the first respondent's Adjudication Decision dated 3 February 2014 and from enforcing compliance with the Adjudicator's Decision through legal proceedings pending

the final determination of proceedings to set aside the first respondent's decision.”

Prayer 3 in the original notice of motion remains unchanged:

“3. That a declaratory order is made that the first respondent is entitled to consider a request by the applicant for an extension of time in which to file a response or to furnish information to the second respondent's Referral Notice.”

Mr Burman in argument said that the need for the amendment of the notice of motion arose due to the unexpected conduct of the first respondent in not being willing to consider the applicant's request for an extension. It is important to note that the Notice of Amendment of the Notice of Motion does not seek the court's leave to amend. It reads:

“Take notice that the applicant intends at the hearing of the application to amend the Notice of Motion as follows:”

[8] The applicant could just as well have said:

“Take notice that the relief sought by the applicant at the hearing will be the following:”

[9] The applicant says the first respondent was wrong in not even considering its request for an extension.

[10] Mr Snellenburg, on behalf of the second respondent, took three points:

- (i) urgency;
- (ii) the amendment of the notice of motion should not be allowed;
- (iii) the applicant has suffered no prejudice, and has an alternative remedy.

[11] The matter was fully argued before me and I am satisfied that an urgent decision is required to avoid prejudice.

[12] As to the amendment, the applicant states in the Heading of the Amended Notice of Motion that the relief it will seek at the hearing is as set out in the amended notice of motion. These are urgent proceedings and the applicant can amend the time periods and requirements as it deems appropriate, subject to what the court hearing the matter decides is permissible. In my view the second respondent knew what case it had to meet.

[13] Mr Burman, for applicant, said the real question before the court is what the correct interpretation of clause W1.3(3) of the contract is, which reads as follows:

“(3) The Party referring the dispute to the *Adjudicator* includes with his referral information to be considered by the *Adjudicator*. Any more information from a Party to be considered by the *Adjudicator* is provided within four weeks of the referral. This period may be extended if the *Adjudicator* and the Parties agree.”

[14] The first respondent adopted the view that he had no power to extend the period allowed for submissions by the applicant because the second Respondent did not agree to such extension, as contemplated in the last sentence of clause W1.3(3).

[15] The applicant's case is that the first respondent had the power to consider and grant an extension to the applicant. Mr Burman argued this on the basis of three separate and individual grounds:

(1) The fact that clause W1.3(3) states that the period may be extended if the adjudicator and the parties agree does not exclude other ways to get an extension. Mr Burman says clause W1.3(2) contains an absolute bar:

“(2) The times for notifying and referring a dispute may be extended by the *Project Manager* if the *Contractor* and the *Project Manager* agree to the extension before the notice or referral is due. The *Project Manager* notifies the extension that has been agreed to the *Contractor*. If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the *Adjudicator* or the *tribunal*.”

Mr Burman contends that the parties could not have intended to shut the door to a party who has not applied in time under clause W1.3(3). That he says would amount to an abortion of the process of adjudication.

- (2) The second basis upon which Mr Burman contends that the first respondent's refusal to allow the applicant an extension has the effect that the first respondent takes a decision without all the information. Mr Burman relies on bullet points 2, 3 and 4 at the top of page 46 of the papers under clause W1.3(5):

“(5) The *Adjudicator* may

- (1) review and revise any action or inaction of the *Project Manager* or *Supervisor* related to the dispute and after a quotation which has been treated as having been accepted,
- (2) take the initiative in ascertaining the facts and the law related to the dispute,
- (3) instruct a Party to provide further information related to the dispute within a stated time and
- (4) instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time.”

The adjudicator is in charge of the proceedings, he is the master of the process. He must see to it that he has all the information he needs to come to a fair decision. He has the power to obtain further information. If he relies on clause W1.3(3) to refuse to consider a request for an extension he abdicates his responsibility to come to a fair decision. The first respondent says in his finding that he did not have the applicant's version to a number of points, but closes his eyes to that. Mr Burman stresses that it is the duty

of the adjudicator to get outstanding information, which must include the applicant's version.

- (3) The last ground the applicant relies upon to say that the first respondent should have considered its request for an extension is natural justice. Mr Burman says the proceedings before the adjudicator are quasi-judicial proceedings and the *audi alteram partem* rule applies. The first respondent must be in a position to hear all parties. The first respondent had the duty in law to give the applicant an opportunity to place its case before him.

[16] Mr Snellenburg says the applicant has a remedy as contained in clause W1.4, the review by the tribunal. The application for review by the tribunal must be made within four weeks of notification of the adjudicator's decision. Clause W1.4(4) contains the powers of the tribunal:

- “(4) The *tribunal* settles the dispute referred to it. The *tribunal* has the powers to reconsider any decision of the *Adjudicator* and review and revise any action or inaction of the *Project Manager* or the *Supervisor* related to the dispute. A Party is not limited in the *tribunal* proceedings to the information, evidence or arguments put to the *Adjudicator*.”

Mr Snellenburg stresses the last sentence of clause W1.4(4), that parties at the tribunal are not limited to the evidence placed before the adjudicator. The applicant will

have the opportunity to place its case fully before the tribunal. This says Mr Snellenburg constitutes a suitable alternative remedy for the applicant: It can place its case before the tribunal.

- [17] Mr Burman says if this court does not grant the applicant relief, the point of not having had an opportunity to place its case before the adjudicator, is lost. That may be so, but the applicant is not prohibited from placing its case before the tribunal.

CONCLUSION

- [18] Adjudication is not subject to the common law. Mr Snellenburg referred to an unreported judgment of the Gauteng South High Court, **Freeman and Another v Eskom Holdings Ltd** (Case No 43346/09, 23 April 2010) where the court points out that adjudication is not arbitration. The **Freeman** case is referred to in **Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd** 2014 (1) SA 244 (GSJ). Both decisions make it clear that the purpose of adjudication is to arrive at a speedy resolution of a dispute. The proceedings before the adjudicator are not subject to the rules of natural justice, save in the plainest cases, as it is put in the dictum of the **United Kingdom Court of Appeal** quoted with approval in para [24.4.2] of the **Freeman** case. The parties are bound by the decision of the adjudicator and the tribunal has the power to re-open the dispute.

[19] Adjudication is meant to be a speedy remedy to assist cash flow and not to hold up the contract. The finding of the adjudicator stands until it is set aside by the tribunal. The remedy of the applicant is to place its case before the tribunal. Even if in this case the adjudicator may have made a mistake by not entertaining the request of the applicant for an extension (and I do not think the adjudicator made a mistake) the adjudication stands. The strict time frames in clause W1.3(3) accord with the intention of adjudication as being a speedy remedy, not subject to the rules of natural justice. The bullet points 2, 3 and 4 on page 46 of the papers provide for further additional information that the adjudicator may request. That information is distinct from the submissions dealt with in clause W1.3(3). The proceedings before the tribunal are more in the nature of arbitration.

[20] The relief claimed by the applicant is a final interdict. For that the applicant has to show a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy – **Setlogetlo v Setlogetlo** 1914 AD 221 at 227. The right the applicant relies upon is the right that the first respondent must consider its request for more time to file papers. Adjudication is in its nature a summary procedure, aimed at speedy resolution of disputes. The adjudication process exists as a speedy mechanism for settling disputes in construction contracts in a provisional interim basis. Mistakes will be made by adjudicators, but that is inherent in

the scheme of adjudication. Such mistakes can be rectified in subsequent arbitration or litigation. In **Bouygues UK Ltd v Dahl-Jenson UK Ltd** [1999] EWHC, a decision of the England and Wales High Court, Queen's Bench Division, Technology and Construction Court, Dyson J made the above points in paragraph 35 of the judgment and granted summary judgment on an award by the adjudicator in which it was clear that the adjudicator had made a mistake. Other steps follow where the applicant can again exercise its rights. In this case the consideration by the tribunal is a further procedure where the applicant will have the opportunity to place the matter before the tribunal. On the papers the applicant has not shown that the first respondent must consider its request. No clear right has been shown.

- [21] As to the injury, Mr Burman says the only chance the applicant has to raise the point that his request for an extension was not considered by the first respondent, is before this court. That may be so, but, as I have indicated, applicant does not have a clear right to demand such indulgence by the first respondent. Further, the fact that the applicant may not be able to raise the point of failure to obtain the indulgence from the first respondent before the tribunal, does not detract from applicant's right to place such material as it deems appropriate before the tribunal:

“A party is not limited in the tribunal proceedings to the information, evidence or arguments put to the adjudication.”

(Clause W1.4(4))

The applicant has not shown that it has suffered or will suffer irreparable harm if the relief it seeks in these proceedings is not granted.

[22] The third requirement for a final interdict is the absence of another remedy. In this case the applicant's remedy lies in the fact that it can place its case before the tribunal, without limitation by what was before the first respondent. The applicant has failed to show that it is entitled to the relief claimed.

[23] The application is dismissed with costs.

A. KRUGER, J

On behalf of applicant:

Adv B.W. Burman SC
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Webbers
BLOEMFONTEIN

On behalf of second respondent:

Adv N. Snellenburg
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