REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

HCA CASE NO: HCAA 07/2023

A QUO CASE NUMBER: 5103/2018

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

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DATE 01 08 2024 SIGNATURE [redacted]

In the matter between:

AXTON MATRIX CONSTRUCTION CC	**APPELLANT**
-and-	
ROADS AGENCY LIMPOPO SOC LIMITED	**FIRST RESPONDENT**
MATLA CONSULTANTS CC	**SECOND RESPONDENT**

JUDGMENT

BRESLER AJ:

Introduction:

[1] The matter came before court as an Appeal and Cross appeal against the judgment and order granted by the Honourable Acting Madam Justice Lithole delivered on the 29th of November 2022. Neither the appeal, nor the cross appeal is directed at the judgment and order as a whole, but rather against specified prayers only.

[2] The judgment and order were granted pursuant to an application and counter application respectively launched by the Appellant (hereinafter referred to as 'Axton') and the First Respondent (hereinafter referred to as 'RAL') and heard on an opposed basis on the 4th of August 2021. Axton only appeals against the order dismissing the Counter Application with costs. In return, RAL Counter Appeals against the order dismissing the Main Application.

Factual background relevant to the proceedings:

[3] In or about May 2014, Axton and RAL concluded a construction contract for the Upgrading (gravel to bitumen) of Road D3537 from Harry Oppenheimer (N11) to

Pudiyakgopa to Bakenberg in the Waterberg District of the Limpopo Province (the 'Contract').

[4] The Second Respondent (Matla Consultants CC) (hereinafter referred to as 'Matla') was appointed as the agent of RAL. Matla was appointed by RAL to, *inter alia,* design the road and supervise Axton during the construction process.

[5] The completion date of the project was duly extended by agreement between RAL and Axton purported on the premise of a defective design. According to Axton, the project was effectively completed in November 2016. This is disputed by RAL. The actual completion date is not relevant to these proceedings.

[6] On or about the 30th of June 2017, RAL discovered defects in the road – same is described in their Founding affidavit as:

> *'The main problem identified by the independent experts was the incorrect vertical alignment of the road.'*

[7] RAL claimed that the defects resulted in damages being suffered in an amount of approximately R64,900,000.00. Consequently, RAL issued summons against Matla, and Axton in the alternative, in the above court and under case number 5103/2018 for the recovery of the said amount on the basis of breach of contract. A further alternative claim was instituted against Axton on the premise that a separate and independent legal duty / duty of care rested on Axton to perform its

work properly and not for the sake of monetary gain, ignore defective designs or instructions from the Engineer.

Proceedings in the court *a quo*:

[8] RAL applied for the following relief:

8.1 An order setting aside the dispute resolution provisions, including the arbitration agreement contained in Clause 10 of the General Conditions of Contract for Construction Works (2010) (hereinafter referred to as the 'GCC').

8.2 Alternatively, that the dispute resolutions provisions of the arbitration agreement contained in Clause 10 of the GCC shall cease to have effect with reference between the to any dispute between the Applicant and Respondent already referred, or which may be referred by any of the parties in future for dispute resolution or arbitration.

[9] Simultaneously with opposing the relief applied for by RAL, Axton applied for the following relief by means of a counter application:

9.1 Ordering RAL to make payment of the following sums to Axton within 30 (thirty) days from the date of order and in accordance with the undertaking from RAL's attorneys:

9.1.1 Payment in the sum of R5,257,959.31 (VAT inclusive) being the retention amount withheld by RAL.

9.1.2 Payment in the sum of R125,913.66 (VAT inclusive), being the difference between the sum of R1,630,617.18 (VAT inclusive) admitted as owing by or on behalf of RAL.

9.1.3 Payment of interest at the prescribed rate of interest, *a tempore morae* from 11 June 2018 on the aforesaid sums.

[10] In the alternative to the above, Axton claimed:

10.1 That the decisions delivered by Mr Brian Westcott (the 'Adjudicator') on or about the 27th of February 2020 (in respect of the merits) and on or about the 7th of August 2020 (in respect of the quantum), are binding on Axton and RAL.

10.2 That RAL makes the following payments to Axton within 30 days from the date of order:

10.2.1 The sum of R2,440,031.05 (VAT inclusive) being the amount as determined by the Adjudicator.

10.2.2 The sum of R127,684.01 (Vat inclusive) being the 50% share payable by RAL for the costs of the adjudication proceedings.

10.2.3 Payment of interest at the prescribed rate of interest, *a tempore morae*, from 11 June 2018 on the aforesaid amounts.

[11] Both the Main Application as well as the Counter Application was opposed. Of particular importance to the current proceedings are the following concessions made by RAL in their Founding affidavit:

11.1 They participated in the adjudication proceedings, albeit reluctantly. They will however not abide by the Adjudicator's decision.[1]

11.2 Despite RAL's protestations, there are currently two parallel processes pending pertaining to the disputes between the parties, being the adjudication process in respect of the retention amount and the litigation in the Main action in respect of the damages claims based on breach of contract and delict.[2]

11.3 RAL submits that the two processes have nothing to do with each other and are premised on separate causes of action.[3]

[1] See paragraph 6.44 of the Founding affidavit contained on page 36 of the record.
[2] See paragraph 6.45 of the Founding affidavit contained on page 36 of the record.
[3] See paragraph 6.46 of the Founding affidavit contained on page 36 of the record.

11.4 RAL in effect raises the defence of set off in as far as unliquidated damages should in due course be set off against the claim for retention amounts.[4]

The judgment and order in the Court *a quo:*

[12] The Honourable Acting Madam Justice Lithole dismissed both the Main Application as well as the Counter Application with costs. In her reasoning she confirms that the Main Application is launched in terms of the provisions of Section 3(2) of the **Arbitration Act,** Act 45 of 1965. It is therefore a requirement that 'good cause' be shown for the setting aside of the arbitration agreement.

[13] The learned Acting Judge concluded that RAL failed to discharge the *onus* of showing that good cause exists for the setting aside of the arbitration agreement. More specifically:[5]

> *'RAL failed to prove that if the arbitration agreement, is implemented, it would "unjustifiably" diminish or limit protections afforded by the Constitution. It only raised the point that it would lead to multiplicity of proceedings which would be inconvenient and expensive for RAL.'*

[14] On this basis the Main Application was therefore dismissed with costs.

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[4] See paragraph 6.48 of the Founding affidavit contained on page 37 of the record.
[5] Paragraph 66 of the Judgment on page 737 of the record.

[15] As to the Counter Application, the learned Acting Judge found that there is a real dispute of facts. She furthermore found:[6]

> *'For one it is not quite clear how much is Axton entitled to in the retention amount. Axton is claiming different amount to the amount awarded by the Adjudicator. Based on the facts it is impossible to decide on paper as to whether, it is Matla or Axton or both the parties, which are to be blamed for the defective road complained about. There is real dispute which cannot be decided on paper'.*

[16] The Counter Application was thus likewise dismissed with costs.

Analysis of the Facts and Law:

The Main Application

[17] In this Court's view, the Court *a quo* correctly dismissed the Main Application.

[18] First and foremost, it must be noted that RAL applies for the setting aside of the dispute resolution provisions contained in Clause 10 of the GCC, alternatively that the provisions of Clause 10 shall cease to have effect with reference to any dispute between the Applicant and the Second Respondent already referred or may be referred by any of the parties in future for dispute resolution or arbitration.

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[6] Paragraph 57 of the Judgment on page 734 of the record.

[19] In support hereof they submit that the current litigation proceedings, instituted by them, fall outside of the ambit of Clause 10 of the GCC. As stated before, they also concede that the adjudication proceedings are 'pending' thus rendering them valid.

[20] Section 1 of the **Arbitration Act,** defines an 'arbitration agreement' as follows:

> *'arbitration agreement' means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not.*

[21] Clause 10.5 of the GCC provides for adjudication. Clause 10.6.1 clearly states that either party shall have the right to disagree with any decision of the Adjudication Board and refer the matter to arbitration or court proceedings, whichever is applicable in terms of the Contract.

[22] Clause 10.7 provides for arbitration. RAL however does not apply in their Notice of Motion for the setting aside of this clause. It stands to be noted that Counsel presumably made a proposal to the Court *a quo* as to a revised order referring to Clause 10.7. This is in line with the submission in the Replying affidavit. The record however does not show that a formal amendment was affected, and the court therefore need not determine if this proposed revised order should be considered.

[23] Having realised their oversight, the concede in their Heads of Argument that their relief, as prayed for, cannot and should not succeed. They consequently move for revised relief only dealing with the current litigation and arbitration proceedings.

[24] Be that as it may, RAL's argument in its Founding affidavit is mutually destructive. On the one hand it argues that the current litigation falls outside of the provisions of the GCC and on the other hand it argues that the clauses pertaining to adjudication and arbitration should be set aside so as to not apply to the pending litigation.

[25] In this Court's view, the concept of 'good cause' does not include an instance where the Applicant submits that the alternative dispute resolution provisions are not applicable. More specifically, it is not appropriate to apply for relief in the form of setting aside an arbitration agreement on the basis that the dispute is not susceptible to arbitration. A court should not be burdened with determining a theoretical dispute that may or may not exists.

[26] The pending litigation is however not the only dispute between the parties. It is common cause that an adjudication award was made that forms the *crux* of the Counter Application. It must therefore be determined if this dispute is capable of being resolved by means of arbitration and if it can be considered by the Court by means of litigation. It must also be borne in mind that the adjudication award does not feature as a dispute in the Main Action. It is common cause that no Counterclaim was instituted by Axton for the recovery of this amount.

[27] Before the Court can determine if RAL's application has any merits in respect of the adjudication award, this court must first determine if there is a dispute capable of being referred to arbitration. There can be no referral to arbitration if there is no dispute. Section 1 of the **Arbitration Act** provides that the purpose of an arbitration agreement is the reference of an *existing or future* dispute to arbitration.

[28] On the 6th of April 2020 and on the 14th of September 2020, Axton delivered Notices of Dissatisfaction in respect of the First and Final Adjudicator's decisions and awards. On the 29th of October 2020, Axton pertinently withdrew its respective Notices of Objection.

[29] On the 18th of November 2020, Axton delivered a Notice of Arbitration as contemplated in Article 3 of the Rules in respect of Arbitrations.

[30] Clause 10.6.1.2 of the GCC states the following:

> *'10.6.1.2 A party shall not dispute the validity or correctness of the whole or a specified party of the decision before 28 days or after 56 days from receipt of this decision.*
>
> *Unless either party shall on or after the said 28 days, or on or before the said 56 days from receipt of the decision, give written notice to the other party, referring to this Clause, disputing the validity or correctness of the whole or a specified part of the decision, he shall have no further right to refer such a*

dispute to arbitration or court proceedings, whichever is applicable in terms of the Contract.'

[31] Clause 10.6.2 furthermore provides:

> *'10.6.2 In the event that a decision of the Adjudication Board was not disputed and a party fails to comply with the decision, the other party may, without prejudice to any right he may have, refer the failure to arbitration or court proceedings, whichever is applicable in terms of the Contract'.*

[32] It must be noted that this Court is not privy to the full Contract, nor is this Court privy to specifically the full Contract Data. It appears from the Arbitration notice and the Replying affidavit that the parties have elected arbitration as dispute resolution mechanism as opposed to litigation. One would have assumed that this election would be a prominent feature in the respective affidavits. It furthermore appears from the Replying affidavit that they agreed that the Arbitration will be stayed pending outcome of these proceedings.

[33] Having regard to the aforesaid, a dispute therefore exists as contemplated in the **Arbitration Act.** This dispute is currently pending and stands to be determined by means of arbitration. In opposition of the Adjudicator award, RAL *inter alia* raised the issue that the matter is pending before this Court and that a possible counter claim stands to be determined against Axton. For the sake of convenience, so they submit, the final determination of the Adjudicator award should be dealt with by the

Court. Hence, they refuse to comply with the award. This objection defies the object of arbitration proceedings and is quite counterproductive. Essentially, they are forcing Axton to make use of litigation for the sake of their own convenience. The issue that stands to be determined by means of arbitration does not relate to an intricate factual synopsis or any legal argument that is not suitable for determination by means of arbitration. There is no reason why it cannot be referred to arbitration and dealt with by a suitable Arbitrator accordingly.

[34] In the often referred to matter of ***De Lange v Methodist Church and Another***[7] the following was stated:

> *'The Supreme Court of Appeal correctly ventured the view that the requirement of good cause in order to escape an arbitration agreement entails a consideration of the merits of each case in order to arrive at a just and equitable outcome in a specific set of circumstances. Put another way: is it in the interest of justice to hold a party to an arbitration agreement that would result in a futile, unfair or unreasonable outcome or perhaps an unconscionable burden? The Act is of the pre-Constitution kind. Now our understanding of good cause must embrace an enquiry into whether the arbitration agreement, if implemented, would unjustifiably diminish or limit protections afforded by the Constitution. Absent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by*

[7] 2016 (2) SA 1 (CC) at [37]

misconduct or irregularity unless a truly compelling reason exists. As this court itself stated:

> *'the valued of our Constitution will not necessarily best be served by ... enhance[ing] the power of the courts to set aside private arbitration awards ... If courts are to quick to find fault with the manner in which an arbitration has been conducted ... the goals of private arbitration may well be defeated.'*

[35] The court *a quo* therefore correctly found that no good cause has been shown to set aside the arbitration agreement. No compelling reason exists for this Court to come to a different conclusion.

[36] The Appeal of RAL therefore cannot succeed and stands to be dismissed with costs.

Counter Application:

[37] The Counter Application of Axton can also not succeed. In the first instance, Axton wants an alleged settlement agreement to be made an order of court whilst the conclusion of the agreement is in dispute. In terms of the well-known principle enunciated in ***Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd***[8]**,** motion court is not the correct forum to address an issue that is disputed on *bona fide* grounds.

[8] 1984 (3) SA 623 (A) at 634

[38] The court *a quo* made reference to the liability of either Axton or Matla with regards to the damages as being the critical factual dispute that cannot be determined on the papers before court. In this Court's view, the dispute of fact relevant to the relief prayed for, is not the liability for the damages (as this will be determined in the Main Action in due course) but rather the dispute pertaining to the authority of the erstwhile attorney of RAL, Ms Mangena, to bind RAL to any undertaking (which likewise forms the subject of a dispute raised in the Main Case).
Under the circumstances this prayer cannot succeed.

[39] Axton applied in the alternative for an order in terms whereof the adjudication award must be made an order of court. As stated herein before, the provisions of GCC read with the Contract Data provides that an arbitration process must be followed should there be non-compliance with the adjudication award.

[40] No case is made out why the Court should disregard the alternative dispute resolution procedures agreed upon between the parties. No good cause exists as contemplated in the **Arbitration Act** and no compelling reason is displayed in the papers to circumvent the agreed procedural relief. This prayer can therefore also not be granted.

[41] As to the declaratory relief, Axton expects from the court to make a ruling in an opposed application pre-empting the outcome of a defended trial. More specifically, contrary to the trite principles applicable to opposed applications, Axton requires an

order declaring a final outcome on a factual dispute. This is inappropriate and not the intended utilisation of declaratory proceedings.

[42] In lieu of the fact that it is common cause between the parties that these damages claims are the subject of the pending litigation in the Main Case, same cannot be determined on motion.

[43] As such, Axton cannot succeed with the relief and the order by the court *a quo* was therefore correctly granted.

Costs:

[44] There is no reason why the cost order should not follow the outcome of the proceedings. As neither party was successful, the unsuccessful party should be responsible for the costs.

[45] Having regard to the voluminous nature of the matter, as well as the considerable preparation time spent having regard to the complex nature of the proceedings and history in this matter, this court is of the view that awarding costs to Counsel on Scale C is warranted.

Order:

[46] In the result the following order is made:

46.1 The Appeal is dismissed with costs, including costs to Counsel on Scale C.

46.2 The Counter Appeal is dismissed with costs, including costs to Counsel on Scale C.

[redacted]

M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I concur,

[redacted]

TC TSHIDADA
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

I concur,

[redacted]

T DEANE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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