

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)CASE No: 7562/23

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

DIAMOND AJ

4 JUNE 2024

SIGNATURE

DATE

In the matter between:

SEOKODIBENG PROPERTIES DEVELOPER // ELIAS
 HOMES CC JV.

APPLICANT

and

MEC FOR PUBLIC WORKS & INFRASTRUCTURE
 LIMPOPO.

FIRST RESPONDENT

THE HOD: DEPARTMENT OF PUBLIC WORKS
 INFRASTRUCTURE, LIMPOPO.

SECOND RESPONDENT

 JUDGMENT

DIAMOND A J:

- [1] This matter came before Kganyago J, on the 2nd November 2023, to make two arbitration orders court orders in terms of Section 31 of the Arbitration Act, 1965 ("the Act"). The court ordered at that stage that the matter be removed from the roll, and advised the Applicant that the Applicant should obtain a single consolidated award from the arbitrator to put the court in a position to make a sensible court order.
- [2] The Applicant did obtain such an order on 8 December 2023.
- [3] The Applicant approached to the Judge President, on 14 December 2023, for a preferential hearing date, and on 30 January 2024, the Judge President allocated the hearing date of 8 February 2024.
- [4] The Applicant served a notice of set down, for the particular date on the Respondent, but up until that stage the application was unopposed.
- [5] On that date, the Applicant had applied in terms of Section 31 of the Arbitration Act, 1965, that the consolidated award of the arbitrator be made an order of court.
- [6] On that date, however, counsel appeared on behalf of the First Respondent and indicated that the First Respondent wished to oppose the application.
- [7] Counsel who appeared on behalf of the Applicant, Mr E.T Mashile was surprised by the development.

[8] Counsel appearing on behalf of First Respondent also indicated that he was present in court when Kganyago J made the order on 2 November 2023 and indicated that the Applicant did not present the content of the proceedings of 2 November 2023 accurately to the court.

[9] This was also a surprising attitude since it was based on what had transpired in the court on 2 November 2023, that the judge president allocated a preferential trial date for the Applicant.

[10] Be that as it may: after a short discussion in the court it was agreed, by the parties, that the First Respondent shall be given the opportunity to oppose the application and an order was made, based on the agreement of the parties, that the Applicant shall file a supplementary founding affidavit, if it wished to do so before or on 22 February 2024 and the First Respondent would file an answering affidavit on 14 March of 2024 while the Applicant would be entitled to file replying affidavit before on 28 March 2024. It was ordered that both counsel were to file Heads of Argument before or on 8 April 2024, and the matter was postponed to 9 April 2024.

[11] The matter could eventually not proceed on 9 April 2024, due to a medical emergency involving the court, and the matter was eventually before this court on 2 May 2024 after the date had been agreed upon by both parties following communication with the Judge's Registrar.

[12] On 2 May 2024, Mr. E.T Mashile for the Applicant, appeared and moved the application. There was no appearance for the First Respondent.

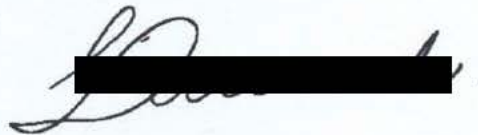
- [13] The Applicant did not file a supplementary affidavit, nor did the First Respondent file an opposing affidavit or Heads of Argument. The Applicant filed Heads of Argument.
- [14] Consequently, the application was once again unopposed.
- [15] The events leading up to this application having been brought, are simple: the Applicant initiated arbitration proceedings in a dispute with the First Respondent, in terms of a written arbitration clause, which is contained in a construction contract.
- [16] During the arbitration proceedings, certain pre-trial procedures took place, and an arbitration award was made ordering the First Respondent to discover certain documents. This order was however made in very general terms.
- [17] When the First Respondent failed to comply with this order, the Applicant once again approached the arbitrator for a second order detailing in detail which documents the First Respondent needed to discover. The First Respondent also failed to comply with this order.
- [18] The Applicant thereafter brought an application in terms of Section 31 of the Act, after which the matter was enrolled for 2 November 2023 and after which the events described above unfolded.

- [19] The basis for the application is, based on the founding papers, not contentious: in terms of Section 31 of the Act, an award¹, may be made an order of the court after which the order is enforceable by the normal processes of the court. The award made by the arbitrator complied with the requirements of Section 24 of the Act, that is the award is in writing and signed by the tribunal.
- [20] There appears to be no reason why the arbitration award should not be made an order of court.
- [21] The picture that does appear from the founding papers, is simply one of inexplicable failure by the First Respondent to comply with the arbitration award. Given the fact that it had requested an opportunity to oppose this application and still failed to do so, no conclusion can be drawn other than that it purposefully tries to delay the finalisation of the arbitration proceedings.
- [22] What is most troubling, is the fact that counsel that appeared for the First Respondent alleged in court that the Applicant prosecuted the application based on a misinterpretation of the proceedings before Kganyago J.
- [23] When allowed to explain this to this Court, the First Respondent simply failed to do so, once again without explanation.
- [24] I am of the view that a punitive cost order against the First Respondent is justified.

¹ In terms of section 1 of the Act, the term "award" includes an interim award.

I consequently make the following order:

- (a) The order made by arbitrator Emeka Ogbugo, made and signed by him on 8 December 2023, and which is attached hereto as Annexure "A", is made an order of court in terms of Section 31 of the Arbitration Act, 1965 (Act 42 of 1965).
- (b) The First Respondents is forthwith ordered to comply with Annexure "A".
- (c) The First Respondent is ordered to pay the costs of the Applicant on a scale as between attorney and client, which costs shall include the cost of the day for 8 February 2024 as well as the 2nd May 2024. Counsel's fees for the 2nd May 2024, shall be on Scale "B" as provided for in Rule 69 (7), of the Rules of this Court.



DIAMOND AJ

Acting Judge of the High Court
Limpopo Division, Polokwane

APPEARANCES:

**IN THE ARBITRATION HEARING
HELD AT PRETORIA**

Case No.: A150-0708/2023

In the matter between:

SEOKODIBENG PROPERTY DEVELOPER //
ELIAS HOMES CC JV

THE CLAIMANT

and

**THE MEC FOR PUBLIC WORKS,
ROADS & INFRASTRUCTURE, LIMPOPO**

1ST RESPONDENT

**THE HOD : DEPT. OF PUBLIC WORKS,
ROADS & INFRASTRUCTURE, LIMPOPO**

2ND RESPONDENT

CONSOLIDATED ARBITRATION INTERIM ORDER TO PRODUCE DOCUMENTS

**HAVING READ THE DOCUMENTS FILED OF RECORD AND HAVING
CONSIDERED THE MATTER**

It is hereby ordered

- 1. That the Interim orders of 10 July 2023 and 31 July 2023 are hereby consolidated.**
- 2. That the respondent produced to the Claimant and to the Arbitrator, within 14 calendar days of the date of this order, a copy of each of all the documents listed hereunder :**

- 2.1 Copies of all periodic progress payment certificates issued to the Claimant for the whole period of the contract between the Parties under Tender No.: LDPW – B/ 05513 – Construction of New Rebone Health Center, District of Waterberg,
- 2.2 Proof of payment of all the monies, as stated in paragraph 16 of the Respondent's Statement of Defense,
- 2.3 Copies of all Site Meeting Minutes of Tender No.: LDPW – B / 05513,
- 2.4 Copies of all the Minutes of the meetings of the Project Steering Committees,
- 2.5 Copies of the Closing Report of the Project by the Department of Public Works,
- 2.6 Copy of the. Handing Over Report of the Project, by the Department of Public Works, Limpopo, to the Department of Health, Limpopo,
- 2.7 Copy of the Service Level Agreement entered into between the Department of Public Works and the Claimant,
- 2.8 Copy of the signed Principal Agreement / Contract (JBCC Series 2000) dated January 2003,
- 2.9 Copies of all Variation Orders dated 04 December 2009 : number 1 in the amount of R4 032 650.00, number 2 in the amount of R38 558 547.69.
Also furnish a detailed breakdown of the variation orders referred to above,
- 2.10 Copies of the Variation Order referred to in the letter from the Department of Health and Social Development dated 07 March 2011 (hereto attached marked "B")
- 2.11 Detailed findings of the Independent Quantity Surveyor referred to in the above-mentioned letter dated 07 March 2011.

8

DATED AT PRETORIA ON THIS 8TH DAY OF DECEMBER 2023.

Sgd 

EMEKA OGBUGO : ARBITRATOR

(under the Rules of the Association of Arbitrators

Southern Africa for the Conduct of Arbitrations -2021 edition)

21 Troika Crescent

Silver Stream Estate,

Silver View Ridge

Pretoria