THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1011/2019

In the matter between:

MITSUBISHI HITACHI POWER SYSTEMS AFRICA (PTY) LTD **APPELLANT**

and

MURRAY & ROBERTS POWER & ENERGY
a trading division of
MURRAY AND ROBERTS LTD **FIRST RESPONDENT**

ESKOM HOLDINGS SOC LIMITED **SECOND RESPONDENT**

Neutral citation: *Mitsubishi Hitachi Power Systems Africa (Pty) Ltd v Murray and Roberts Ltd and Another* (Case no 1011/2019) [2020] ZASCA 110 (29 September 2020)

Bench: NAVSA, DLODLO and NICHOLLS JJA and POYO-DLWATI and UNTERHALTER AJJA

Heard: 8 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 September 2020.

Summary: Application by a subcontractor for the disclosure by a contractor of information concerning initiative/incentive arrangements concluded between contractor and employer – disclosure sought to assess subcontractor's entitlement to contractual benefits in terms of the subcontract– right to information recognised as an incident of the contractor's duty of good faith and the cooperation required of parties to have an informed understanding of their rights and duties – no conflict of duties found to prevent the contractor from making disclosure – confidentiality claim unfounded- order of court below modified consistent with the scope of the subcontractor's right.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van Der Linde J sitting as court of first instance): judgment reported *sub nom Murray & Roberts Limited v Mitsubishi Hitachi Power Systems Africa (Pty) Ltd and Another* [2019] ZAGPJHC 56.

1. The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

2. The order of the High Court is substituted as follows:

'The first respondent is directed to disclose to the applicant:

(a) those portions of the Incentive Arrangements concluded between the first and second respondents that are relevant to the applicant's entitlement to contractual benefits in terms of clause 11.3 of the subcontracts subsisting between applicant and first respondent ("the subcontracts");

(b) information that is relevant to the contractual benefits received by the first respondent that relate to the subcontract works to which the applicant has an entitlement in terms of clause 11.3 of the subcontracts.

The first respondent is ordered to pay the costs of the application.'

3. The first respondent is ordered to pay the costs of this appeal.

JUDGMENT

UNTERHALTER AJA (NAVSA, DLODLO and NICHOLLS JJA and POYO-DLWATI AJA concurring)

[1] The appellant, Mitsubishi Hitachi Power Systems Africa (Pty) Ltd (Mitsubishi), as the contractor, concluded an agreement (the Main Contract) with the second respondent, Eskom Holdings Soc Ltd (Eskom), as the employer. Mitsubishi concluded agreements (the subcontracts) with the first respondent, Murray & Roberts Ltd (M&R), as the subcontractor, to carry out a portion of the works. These agreements concern the construction of the Medupi and Kusile power stations.

[2] M&R alleged that Mitsubishi and Eskom concluded a further agreement, which M&R referred to as the Incentive Agreement. M&R is not a party to the

Incentive Agreement. M&R sought the disclosure of the Incentive Agreement from Mitsubishi, along with all the relevant details relating to the Incentive Agreement, including the actual benefits received by Mitsubishi from Eskom. Mitsubishi was not willing to make this disclosure.

[3] In terms of the subcontracts, all disputes between the parties must be referred for resolution by a Dispute Adjudication Board (DAB). M&R referred its dispute with Mitsubishi to the DAB. The adjudicator, Mr Myburgh, refused to order Mitsubishi to make the disclosures sought by M&R. Mr Myburgh found that M&R enjoyed a contractual right to the disclosure of the Incentive Agreement. However, Mr Myburgh reasoned that, absent Eskom's consent (which it had declined to give), the Main Contract bound Mitsubishi to keep the Incentive Agreement confidential, and the adjudicator lacked the power to compel Mitsubishi to make the disclosures because this would place Mitsubishi in breach of the Main Contract with Eskom.

[4] M&R then made application to the Gauteng Division of the High Court, Johannesburg (Van der Linde J) to secure the disclosure it sought. There it was successful.[1] Van der Linde J found that there was sufficient reason for the matter to be entertained by the court, and, upon a proper interpretation of the relevant provisions of the Main Contract and the subcontracts, held that there was no obstacle to granting the relief claimed by M&R.[2] Van der Linde J issued an order in terms of the prayers in the notice of motion. Those prayers directed Mitsubishi to disclose the Incentive Agreement and all relevant details relating thereto, including the actual benefits received from Eskom (the disclosure order). Mitsubishi was also required

[1] See *Murray & Roberts Limited v Mitsubishi Hitachi Power Systems Africa (Pty) Ltd and Another* [2019] ZAGPJHC 56 para 39.
[2] Ibid para 37.

to pay the costs of the application. With the leave of this court, Mitsubishi appeals the disclosure order and the costs order.

The issues

[5] It was common ground before this court that it was competent for M&R to approach the court below for the relief it sought, and that the court below enjoyed jurisdiction to entertain the application. Mitsubishi had contended that the decision of the DAB precluded M&R from seeking relief before the courts. That contention was rejected by Van der Linde J, who found that there was sufficient reason for the matter to be heard by the high court.[3] This finding was not pursued on appeal by Mitsubishi, and no more need be said of it.

[6] Three issues fall to be considered. First, does M&R have a contractual right to require disclosure of Mitsubishi? Second, if M&R does enjoy such a right, does Mitsubishi owe a duty to Eskom to keep the Incentive Agreement and the details pertaining to that agreement confidential? If so, does this preclude M&R from exercising its right of disclosure? Third, if not, what is the scope of M&R's right and what is the appropriate remedy?

[7] I consider these issues in turn.

The disclosure right

[8] M&R contended that clause 11.3 of the subcontracts provides the basis for its contractual right to disclosure from Mitsubishi. Clause 11.3 reads as follows:

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[3] Ibid para 27 *et seq*.

'The Contractor shall, upon receiving any contractual benefits from the Employer under the Contract, pass on to the Subcontractor such proportion thereof as may relate to the Subcontract Works.'

In addition, M&R relied upon the following provision contained in clause 2.4 of the Variation Agreement concluded between M&R and Mitsubishi:

'Although nothing contained in this Variation Agreement is to be construed as creating a partnership in any legal sense between the Parties, it is nevertheless to be emphasised that the manner in which the parties will act in good faith *vis-à-vis* each other to completion of the amended subcontracts shall portray a "*spirit of partnership*", cooperation and trust . . . .'

[9] M&R submitted that its entitlement to a portion of the contractual benefits received by Mitsubishi under the Main Contract requires that M&R must be given information so as to determine its entitlement and the quantum thereof. Mitsubishi, as the recipient of the contractual benefits, has a duty to pass on to M&R its share of the benefits. It is an incident of this duty and the overarching obligation to act in good faith that renders Mitsubishi liable to make the disclosures sought of it.

[10] Mitsubishi accepted that the terms of clause 11.3 entitle M&R to a portion of the contractual benefits. It relied upon two contentions to negate that seeming entitlement.

[11] First, Mitsubishi claimed that the contractual benefits referred to in clause 11.3 do not include contracts to which M&R is not a party. The Incentive Agreement sought by M&R, it was claimed, does not exist. There are a series of 'Initiative Arrangements' subsisting between Eskom and Mitsubishi to which M&R is not a party. The Initiative Arrangements are for the benefit of Eskom and Mitsubishi, and

not for the benefit of M&R. The benefits derived from the Initiative Arrangements are thus not contractual benefits falling within the scope of clause 11.3. I shall refer to this as the privity argument.

[12] Second, Mitsubishi argued that the Variation Agreement concluded between Mitsubishi and M&R revised the basis upon which M&R was to be remunerated for the works it carried out. M&R was entitled to be paid on a 'cost plus' formula. But this, so it was submitted, excluded additional compensation by way of the contractual benefits provided for in clause 11.3. I shall refer to this as the extinction argument.

[13] I observe that the affidavits of M&R and Mitsubishi are particularly sparse in their treatment of the agreements concluded between Eskom and Mitsubishi, as employer and contractor, and Mitsubishi and M&R, as contractor and sub-contractor. Excerpts of the agreements are attached to the papers. This fragmentary approach has made it difficult to obtain a full understanding of the contractual landscape.

[14] That notwithstanding, neither the privity argument nor the extinction argument can prevail. As to the privity argument, the clear language of clause 11.3 stipulates that Mitsubishi, as the contractor, shall pass on to M&R a proportionate share of the contractual benefits received from Eskom, as the employer. I will refer to this as 'the pass-on obligation'. Nothing in clause 11.3 requires that M&R must be in privity of contract with Eskom and Mitsubishi to have an entitlement to a portion of the contractual benefits received by Mitsubishi. On the contrary, clause 11.3 contemplates that the contractual benefits received by Mitsubishi under the

Main Contract give rise to the pass-on obligation owed by Mitsubishi to M&R under the subcontract. Mitsubishi's pass-on obligation is an incident of its bilateral subcontract with M&R. The contractual benefits payable to Mitsubishi under the Main Contract is the factual basis upon which Mitsubishi undertook to pay a share of those benefits to M&R. But that does not require that M&R must be a party to the Main Contract to enforce the bargain it struck under the subcontracts.

[15] Nor can the mere assertion in Mitsubishi's answering affidavit, that the Initiative Arrangements are solely for the benefit of Eskom and Mitsubishi, suffice to avoid M&R's claim. That would require Mitsubishi to establish that what it receives under the Initiative Arrangements does not qualify as a contractual benefit in terms of clause 11.3. Nothing is said as to what benefits Mitsubishi received under the Initiative Arrangements and why such benefits fall outside the wide remit of contractual benefits specified in clause 11.3. The privity argument accordingly fails.

[16] The extinction argument is premised upon the following propositions: the Variation Agreement determines M&R's claims for payment, clause 11.3 of the subcontracts has been superseded by the Variation Agreement, and hence the disclosures sought by M&R have become irrelevant.

[17] Mitsubishi has contented itself with the following averment in the answering affidavit:

'In any event, given the cost reimbursable nature of the applicant's works subsequent to the conclusion of the Variation Agreement, the applicant has been and continues to be paid for all resources which are authorised to be carried out on site. As such, the disclosure of the Initiative

Arrangements has no relevance whatsoever to any entitlement that the applicant may or may not have and which cannot affect any valid claim that may vest in the applicant.'

The obscurantism of this averment does not afford proof that the Variation Agreement novated clause 11.3 and thereby extinguished the pass-on obligation. At best for Mitsubishi, it claims that the Variation Agreement changed the basis upon which M&R was reimbursed for the works it undertook. It does not establish that the contractual benefits contemplated under clause 11.3 and the pass-on obligation to which it gives rise were extinguished and subsumed by the payment obligations of Mitsubishi in the Variation Agreement.

[18] It follows that M&R's entitlements under clause 11.3 hold good.

[19] The question, then, is whether those entitlements in terms of clause 11.3 require Mitsubishi to make the disclosures sought by M&R.

[20] I have already observed that the contractual benefits with which clause 11.3 is concerned are received by Mitsubishi in terms of the Main Contract with Eskom. M&R is not a party to that contract. M&R's entitlement to a portion of the contractual benefits comes about because of Mitsubishi's pass-on obligation under the subcontracts concluded between Mitsubishi and M&R. Since M&R is not a party to the Main contract, it has no knowledge as to the contractual benefits due to Mitsubishi, the contractual benefits actually received by Mitsubishi, nor the basis of apportionment in relation to the subcontracted works that found M&R's claim to a portion of the contractual benefits received.

[21] Mitsubishi contended that M&R must simply make its claim, if it has one, under conditions of ignorance. That would place M&R in an intolerable position. It is precisely because M&R cannot know if it has a claim, and if so, in what amount, that it seeks disclosure. Absent disclosure, M&R would be required to make an entirely vacuous demand predicated upon wholly speculative assumptions. A claim formulated on the basis that if Mitsubishi has received benefits it must pay M&R its share would rightly be rejected as mere conjecture.

[22] Such a state of affairs could not have been contemplated when Mitsubishi and M&R concluded the subcontracts. Two related considerations support this position.

[23] First, contracts are to be interpreted on the basis that they have commercial efficacy. It is altogether improbable that the parties to the subcontracts intended the stark asymmetry of information contended for by Mitsubishi, so as to leave M&R significantly impaired in seeking to enforce its entitlements under clause 11.3. Rather, the subcontracts make commercial sense if Mitsubishi is required to provide information sufficient to permit M&R to assess its entitlements and claim what is due to it.

[24] Second, clause 2.4 of the Variation Agreement requires of the parties that they act in good faith and in the spirit of partnership, cooperation and trust. Even if the parties had not made this capacious undertaking to one another, good faith is a principle that is integral to the way in which parties make and perform their contracts.[4] Fidelity to this principle requires that, under circumstances where M&R

[4] *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC) para 57.

cannot have insight into the Main Contract from which its entitlements derive, Mitsubishi, who receives the contractual benefits, must play open cards so as to place M&R in a position to know what entitlement it may have to the portion of the contractual benefits promised to it in terms of clause 11.3. That is done by requiring disclosure.

[25] The matter may be tested in this way. Assume that Mitsubishi pays an amount to M&R. Would M&R be required to accept that Mitsubishi had discharged the pass-on obligation? If M&R were to request an accounting as to how Mitsubishi determined the share of the benefit paid to M&R, could Mitsubishi, in terms of the subcontracts, decline to do so? I think not. M&R would be entitled to know what benefits were due to Mitsubishi from Eskom, what benefits had been received, what portion of such benefits relate to the subcontract works, and hence what should be passed on to M&R. A refusal to provide this information would be inconsistent with the duty resting upon Mitsubishi to act in good faith in performing the contract. If this is so in circumstances where Mitsubishi has made payment in terms of clause 11.3, it is difficult to comprehend why the duty of disclosure does not arise in advance of any payment being made.

[26] M&R depends upon Mitsubishi to obtain from the employer the benefits due to Mitsubishi, so that M&R, in turn, may enjoy its share. Without disclosure, M&R cannot determine if there is any benefit due to it or whether what has been received or promised from Mitsubishi is in conformity with clause 11.3. There is plainly a need for disclosure so that M&R can enjoy and, if necessary, enforce its rights. A refusal to make disclosure fails to accord with what good faith, cooperation and trust requires of the parties because it would leave M&R entirely dependent on the say so

of Mitsubishi as to what, if anything, is due. Parties who cooperate in good faith do so on the basis of an informed understanding of their rights and obligations. In some cases, that information must be provided by one of the parties to the contract. This is such a case.

[27] For these reasons, I find that M&R enjoys a right to be provided by Mitsubishi with information so as to permit M&R to ascertain and enforce its rights in terms of clause 11.3.

Confidentiality

[28] It was submitted on behalf of Mitsubishi that if the disclosures sought by M&R are ordered (as the court below has done) this will cause Mitsubishi to breach its undertakings of confidentiality to Eskom in terms of the Main contract. Whether this is so is the issue to which I now turn.

[29] Clause 1.12 places Mitsubishi, as the contractor, under an obligation not to disclose or to make available information regarding the contract or the project to any third party. Mitsubishi interprets third party to mean any person other than Eskom and Mitsubishi, as the parties to the Main Contract.

[30] This interpretation is at odds with a number of provisions in the Main Contract and the Conditions of Subcontract.

[31] First, the Main Contract recognises and contemplates that subcontractors may be appointed to carry out part of the works. Clause 1.1.2.8 defines a subcontractor

to mean any person named in the contract as a subcontractor or appointed as a subcontractor, for a part of the works. The Main Contract does not differentiate, in a binary way, between the parties to the Main Contract and all other parties, styled as third parties. Rather, the Main Contract recognises, in addition, subcontractors and project contractors who are not third parties. Hence, if subcontractors are not third parties, then no duty of non-disclosure is owed by Mitsubishi under clause 1.12 in respect of the information sought from it by M&R.

[32] Second, clause 1.12 references information concerning the project, including proprietary information of other project contractors made available to the contractor for or in the course of the execution of the works. The Main Contract defines 'other Project contractors' to mean, 'the various contractors, consultants, tradespersons or other persons engaged in the Project works from time to time other than the Contractor and any Subcontractor'. The obligation to preserve confidentiality extends to information of this kind. The Main contract therefore contemplates that, to carry out the works, project contractors will make proprietary information available which must be protected. But this information must of necessity also be conveyed to the subcontractor, for how else would the subcontractor be able to carry out the works it has contracted to undertake? It follows that third parties cannot include subcontractors because, if that was the case, the contractor would not be able to convey necessary information concerning the project to subcontractors, rendering the subcontracting contemplated in the Main Contract dysfunctional.

[33] Third, an extract from the Conditions of Subcontract, annexed to the papers, permits the parties, for the purpose of executing the works, to disclose each other's data and information to project contractors and other subcontractors. However, if

such disclosure is to be made, the parties must secure confidentiality undertakings from the project contractors and other subcontractors in a form substantially similar to the undertakings the parties give to each other in the Conditions of Subcontract not to disclose any information regarding the subcontract or the project to third parties. This provision mirrors the obligation of Mitsubishi in clause 1.12 of the Main Contract. These provisions create a regime for the protection of certain information from disclosure. That regime requires that those who receive information to carry out the works must undertake not to disclose this information to third parties. The need for this protection arises because M&R, in order to carry out the works, will receive information concerning the project that Mitsubishi is obliged to protect from disclosure in terms of clause 1.12 of the Main Contract. And M&R, in turn, if it conveys this information to other subcontractors or project contractors, must secure like confidentiality undertakings from these persons. If Mitsubishi was prohibited from making such information available because M&R is a third party for the purposes of clause 1.12, there would be no reason to require M&R in terms of the subcontracts to protect information Mitsubishi was bound never to make available to M&R. The confidentiality regime required by the Conditions of Subcontract clearly exclude subcontractors, such as M&R, qualifying as third parties.

[34] I conclude that M&R does not qualify as a third party for the purposes of determining the scope of Mitsubishi's obligations in clause 1.12. Once that is so, the obligation of Mitsubishi to make the disclosure to M&R under the subcontracts does not give rise to any conflict with Mitsubishi's obligation to protect information from disclosure to a third party in terms of clause 1.12 of the Main Contract.

[35] That Mitsubishi is not burdened with the resolution of a conflict of duties to M&R and Eskom, for which it has contended, is a conclusion that may be reached on another basis. Eskom was approached by Mitsubishi to ascertain whether the Initiative Arrangements were confidential and protected from disclosure to M&R, as a subcontractor, under the terms of the Main Contract. In correspondence sent to Mitsubishi, Eskom claimed that the Initiative Arrangements were protected and declined to consent to their disclosure. This stance led Mr Myburgh, as the adjudicator, to conclude in his award that he lacked the power to compel Mitsubishi to act in breach of its contractual commitments to Eskom.

[36] Quite apart from my finding that Mitsubishi bore no such duties to Eskom in respect of the Initiative Arrangements, Eskom, cited as a party in the application before the court below, chose not to assert any right to prevent disclosure. Eskom abided the outcome. Eskom's supine position as to whether it enjoyed any defensible interests that Mitsubishi should defend conduces to the conclusion that, if Mitsubishi was burdened with a conflict of interest, which I have found it did not, there would have been little to weigh in the scales in favour of non-disclosure.

[37] There is thus no reason why an order for disclosure should be withheld. Mitsubishi invoked the court's discretion on the basis that it would be inequitable to order Mitsubishi to disclose information that would place it in breach of its obligations under clause 1.12 of the Main Contract. No such risk arises. But even if this was not so, there is no reason of equity that should deprive M&R of information that is necessary to protect its contractual rights, when Eskom has chosen to provide no reasons why protection is warranted.

[38] I find therefore that the exercise by M&R of its right to disclosure is not precluded by Mitsubishi's confidentiality undertakings to Eskom in the Main Contract.

Remedy

[39] The disclosure order granted by the court below is framed in the wide terms sought by M&R in the notice of motion. The disclosure order requires Mitsubishi to disclose the Incentive Agreement and all relevant details relating to that agreement, including the actual benefits received from Eskom.

[40] M&R cannot secure a disclosure remedy that is greater than the right that it enjoys. I have held that M&R has a right to secure the disclosure of information from Mitsubishi so as to be placed in a position to assess what entitlement, if any, it has to contractual benefits specified in clause 11.3 of the subcontracts.

[41] There was some semantic jousting in the affidavits as to whether the Iniative Arrangements acknowledged by Mitsubishi are the Incentive Agreements claimed by M&R. In its founding affidavit, M&R defined the incentive agreement it was seeking to be 'the incentive agreement and/or initiative arrangement'. Since Mitsubishi admits that there are Incentive Arrangements, these are the documents that should be disclosed.

[42] Mitsubishi's disclosure obligation should however be limited in two ways. First, Mitsubishi should only be required to disclose those portions of the Incentive Arrangements that are relevant to M&R's entitlement to contractual benefits in terms of clause 11.3. What is not relevant may be redacted. However, this is not an

invitation to Mitsubishi to use redaction to assert again the privity and extinction arguments that have been raised and rejected before this court. Second, M&R is only entitled to the information that will permit it to ascertain the contractual benefits received by Mitsubishi that relate to the subcontract works. That is the share of the contractual benefits to which M&R has a claim in terms of clause 11.3. Here, too, Mitsubishi should exercise care. Since M&R's claim is by definition a share of a greater whole, the information should place M&R in a position to ascertain the basis upon which contractual benefits fall within or outside the category of subcontract works.

[43] These remedial limitations reflect the scope of the right to disclosure and the substantive entitlement of M&R in terms of clause 11.3.

[44] The disclosure order granted by the court below is too wide. It fails to give proper expression to the need to tailor the right of disclosure to the substantive entitlement of M&R in terms of clause 11.3. The disclosure order cannot stand. It must reflect the limitations I have referenced.

[45] As to the question of the costs, although I find that the remedy which should issue is somewhat attenuated, Mitsubishi has not prevailed on the main issues in this appeal. The costs must accordingly follow the result.

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

1. The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.
2. The order of the High Court is substituted as follows:

'The first respondent is directed to disclose to the applicant:

(a) those portions of the Incentive Arrangements concluded between the first and second respondents that are relevant to the applicant's entitlement to contractual benefits in terms of clause 11.3 of the subcontracts subsisting between applicant and first respondent ("the subcontracts");

(b) information that is relevant to the contractual benefits received by the first respondent that relate to the subcontract works to which the applicant has an entitlement in terms of clause 11.3 of the subcontracts.

The first respondent is ordered to pay the costs of the application.'

3. The first respondent is ordered to pay the costs of this appeal.

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David Unterhalter
Acting Judge of Appeal

APPEARANCES:

For Appellants:	A Subel SC Instructed by: Pinsent Masons SA Inc., Johannesburg Lovius Block Attorneys, Bloemfontein
For Respondents:	L van Tonder SC (with him M Daniels) Instructed by: Tiefenthaler Attorneys, Johannesburg Honey Attorneys, Bloemfontein