

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2012/29984

- | | |
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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |

21 February 2013

FHD VAN OOSTEN

In the matter between

EMFULENI LOCAL MUNICIPALITY

APPLICANT

and

**TAU YA MARIRI TRANSPORT
AND GENERAL SERVICES CC**

RESPONDENT

and

ENGCOR CONSULTING ENGINEERS CC

THIRD PARTY

Arbitration pursuant to a construction adjudication agreement – main application for referral of dispute to arbitration withdrawn - counter application for immediate implementation of arbiter's award - award providing for payment by applicant to respondent of amount awarded within 28 days of delivery of a certificate by the engineer - construction and interpretation of rider added to order for payment - such falls within meaning of word "implementation" in clause 2.6 of the adjudication agreement and

therefore constitutes a contractual obligation - order for immediate implementation granted.

J U D G M E N T

VAN OOSTEN J:

[1] The applicant, in the main application, sought an order for the referral to arbitration of an alleged dispute arising from a decision made by an adjudicator pursuant to a construction adjudication agreement concluded between the applicant and the respondent (the adjudication agreement). The respondent in turn, by way of a counter application, seeks an order for the immediate implementation of the decision of the adjudicator, irrespective of a referral to arbitration. The third party in its capacity as the engineer appointed in terms of the construction agreement between the applicant and the respondent (the construction agreement), has been joined by the respondent as the third party to these proceedings (the engineer). At the commencement of the hearing before me, Mr *Mills*, who appeared for the applicant and the third party, withdrew the main application on the basis that it was, in his view, "ill-conceived". The argument accordingly proceeded on the narrow basis of the respondent's entitlement to an order for the immediate implementation of the adjudicator's decision. No answering affidavit to the counter-application had been filed prior to the hearing. At the hearing Mr *Mills* by way of a notice of motion, applied for condonation for the late filing of an answering affidavit, which is annexed to the application. The answering affidavit in essence sets out the arguments relied on by the applicant and the third party and contains nothing new. Its introduction was not seriously contested by Mr *Malatji*, who appeared for the respondent and I accordingly allowed its introduction.

[2] A brief summary of the background to the application is the following. The construction agreement was concluded on 27 August 2009. It adopts the form of the General Conditions of Contract for Construction Works (2004), published by the South

African Institution of Civil Engineering (the GCC). The GCC in turn provides for a dispute resolution modelled on the GIDB Adjudication Procedure (the adjudication procedure). I shall where necessary refer to the relevant provisions thereof as contained in the construction and adjudication agreements. It is important, and relevant for purposes of the contentions relied on by Mr Mills, to note that the adjudication agreement was concluded between the applicant and the respondent to which the engineer was not a party. The decision of the adjudicator, dated 12 December 2011, followed upon a payment dispute between the applicant and the respondent and was in favour of the respondent. In terms thereof, the applicant was directed to pay the sum of R2 342 823.74 to the respondent within 28 days of a certificate which the engineer was to issue. It is common cause that no payment has been made.

[3] The crisp issue in this matter concerns the rider added to the adjudicator's order providing for payment within 28 days of delivery of a certificate by the engineer. The contention advanced by Mr *Mills* was that the third party was neither the agent of the applicant nor a party to the adjudication agreement and that accordingly the decision of the adjudicator, in effect ordering the third party to issue a certificate, was irregular and void of any binding effect.

[4] As a point of departure it is necessary to refer to the CIBD adjudication procedure which in terms of the adjudication agreement, applied to the adjudication. Clause 2.5 thereof provides that the adjudicator's decision shall be binding "until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement". In terms of clause 2.6 thereof the parties "shall implement" the adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration.

[5] The meaning to be attributed to the word "implement" in clause 2.6 is of decisive importance. Mr *Mills* submitted that the word means nothing more than that payment should be made. I am unable to agree. Implementation of an order as rightly submitted by Mr *Malatji*, has a much wider connotation: it means that steps are to be taken "to put


into effect” the provisions of the order (see *Concise Oxford Dictionary* 10th ed). Applied to the present order, implementation thereof requires the applicant to effect compliance with the order, in particular, to procure the issuing of an engineer’s certificate, which in my view is not a pre-condition to payment but rather an administrative procedure inserted *ex abundanti cautela* probably to conform with the provisions of the construction agreement. In this regard Mr *Mills* pointed to a difficulty he perceived, which is that the engineer, in terms of the construction agreement, was not contractually bound to issue the certificate referred to in the adjudicator’s order. The applicant, accordingly, so he concluded, could not, in the absence of a contractual relationship between it and the engineer, obtain the required certificate. Mr *Mills* juxtaposed the NEC adjudication procedure (as dealt with in the unreported judgement of Kathree-Setiloane J in *Freeman NO and another v Eskom Holdings Ltd* [case no 43346/09, delivered on 23 April 2010]) which provides that the decision of the adjudicator is enforceable “as a matter of contractual obligation between the parties and not as arbitral award”. In the absence of such or similar provision in the CIBD procedure, the argument concluded, no contractual obligation exists.

[6] The argument, in my view, cannot be sustained. Such difference as there may be between the two procedures, is more apparent than real. The order of the adjudicator, as I have alluded to, binds the parties thereto contractually. As far as implementation is concerned, there are other ways in which the applicant can and should, be it by way of contract, instruction or otherwise, procure implementation in compliance with the order. The issue raised, even if decided in favour of the applicant, in my view, in any event, constitutes no bar to payment.

[7] One final observation: the respondent does not claim interest in this application. The applicant has been in remiss for a substantial period of time. I consider it fair and just that the respondent be afforded the opportunity, in the way reflected in the order I propose to make, to claim such interest as it may be entitled to.

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

1. The applicant is ordered to implement, within 7 days of the date of this order, the order of the adjudicator, dated 12 December 2011, in
 - 1.1 procuring the delivery by the engineer to the applicant and the respondent of the payment certificate referred to in clause 49.1 of the construction agreement;
 - 1.2 paying to the respondent, within 28 days after receipt of the payment certificate referred to in paragraph 1.1 above, the amount of R2 342 832-74.
2. In the event of the applicant's failure to procure the delivery of the said payment certificate within 7 days of the date of this order, the applicant is ordered to forthwith pay to the respondent the sum of R2 342 832-74.
3. The respondent is granted leave to apply, on the same papers, duly supplemented where necessary, for an order for payment by the applicant of interest on the amount referred to in paragraphs 1 and 2 above
4. The applicant is ordered to pay the costs of the application including the costs of the respondent's application for the joinder of the third party and the respondent's counter-application.


EHD VAN OOSTEN
JUDGE OF THE HIGH COURT

**ATTORNEY FOR APPLICANT
AND THIRD PARTY**

MR GP MILLS

**APPLICANT AND THIRD PARTY'S
ATTORNEYS**

MILLS & GROENEWALD

ATTORNEY FOR RESPONDENT

MR G MALATJI

RESPONDENT'S ATTORNEYS

GILFORD MALATJI INC

DATES OF HEARING
DATE OF JUDGMENT

19 & 20 FEBRUARY 2013
21 FEBRUARY 2013