



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 12/7442

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

12/2/2013

In the matter between:

ESOR AFRICA (PTY) LTD / FRANKI AFRICA (PTY) LTD

Applicant

JOINT VENTURE

and

BOMBELA CIVILS JOINT VENTURE (PTY) LTD

Respondent

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JUDGMENT

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SPILG, J:

INTRODUCTION

1. The applicant is a joint venture partnership of contractors who were employed by the respondent to carry out piling and lateral support work on the Gautrain rapid rail link project. The terms of employment in relation to the execution of the work was governed by a standard form Conditions of Contract for Construction issued by the

International Federation of Consulting Engineers (First Edition 1999 as amended by the Particular Conditions of Contract agreed between the parties).

2. The contract incorporated a dispute resolution clause (clause 20) which provides for the appointment of a Dispute Adjudication Board ("DAB"), which may consist of only one adjudicator, to rule on any dispute in connection with, or arising out of, the contract or the execution of the works.
3. A dispute arose and the parties implemented the dispute resolution procedures provided for in the contract and Adv Jordaan SC was appointed the sole adjudicator. On 27 July 2011 he gave his decision and directed that the respondent pay to the applicant the sum of R8 662 628.09 together with interest and declared that the applicant *"is not required to pay an excess in the sum of R650 000 and is entitled to be refunded this amount if he has been debited with it"*.

## THE ISSUES

4. The applicant seeks enforcement of the DAB decision alternatively an order that the respondent issues an interim payment certificate in the amount of R9 313 629.09 together with interest and pay such amount immediately upon issue of the certificate.
5. The respondent contends firstly that the DAB decision is not final and binding because it does not automatically render the monetary amount due, owing and payable because the respondent gave notice of dissatisfaction in respect of the decision and contends this prevents the decision from being *"final and binding"*. In particular the respondent contends that once a notice of dissatisfaction is given then the parties are required to engage one another in attempting to settle the matter amicably failing which the matter must go to arbitration. Allied to this is the contention that the dispute resolution process has not been completed and the application to court is premature.

6. The second issue raised follows on from the first; this Court should not exercise jurisdiction as the parties agreed to proceed to arbitration if they were unable to settle the matter after delivery of the notice of dissatisfaction with the DAB decision.
7. In my view the issues are resolved by a proper interpretation of the dispute resolution clauses dealing with the effect of a DAB decision. In doing so it will be necessary to consider the contract as a whole in order to determine the parties' intention and purpose in agreeing to the DAB process. As to the proper method of interpreting a contract by reference to its provisions as a whole, even if the specific clause in issue is clear and unambiguous, see *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) per Joubert JA at pp 767E-768E; *Glenn Brothers v Commercial General Agency Co Ltd* 1905 TS 737 at 740 -1 per Innes CJ and *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182 (AD) at 1187 E. See also *Christie, The Law of Contract in South Africa* (5<sup>th</sup> ed) at pp 206 to 210, 235 and 238.

In *Coopers & Lybrand* the court said;

*"According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument ...*

*The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself...*

The court then set out the proper application of the 'golden rule'.

It is therefore evident that recourse is had to the document as a whole to determine if there is ambiguity or absurdity or other repugnancy; the enquiry is

triggered even if the word or phrase in contention is itself clear and unambiguous.

## RELEVANT DAB PROVISIONS

8. The DAB dispute resolution process in respect of a particular issue, including the amount that ought to be certified for an interim draw, occurs while the contractor continues to perform the balance of its construction obligations under the contract. It is therefore not a process that occurs once the contract has been performed or upon its termination for any other reason including cancellation. It is self-evidently a means to ensure that the parties continue with the contractual relationship in a non-adversarial manner for their mutual advantage- namely to complete the contract timeously without the one withholding performance of its obligations until the dispute is resolved. In my view it is unnecessary to refer to the clauses from which this is to be gleaned. It permeates the essence of the dispute resolution provisions which run into some five pages of printed text of which arbitration is but one contemplated process. Moreover key provisions of the dispute resolution clause (clause 20) were amended by two pages of text.

9. In my view clause 20.4, 20.5 and 20.6 of the contract ought to be considered together. In the amended form the essential portions read;

*"20.4 If a dispute ...arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either party may, within 28 days of such dispute arising, refer the dispute in writing to the DAB for its decision.... The other Party may within 28 days of receiving a submission to the DAB forward a written reply thereto to the DAB for its consideration prior to its issuing its decision,..."*

*Within 84 days after receiving such reference.... the DAB shall give its decision which shall be reasoned.... The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract*

20.5 The DAB may within 7 days of giving its decision correct any clerical mistake or any patent error arising from any accidental slip or omission made in giving its decision

*If either party is dissatisfied with the DAB's decision, then either Party may, within 14 days after receiving the decision or any correction thereto, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 14 days after this period has expired, give notice to the other Party of its dissatisfaction"*

20.5 Where notice of dissatisfaction has been given ... both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made."

#### 20.6 Arbitration

*Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by arbitration...."*

(Emphasis added)

10. It is common cause that the respondent gave notice of dissatisfaction with the DAB decision but stated that it would be fruitless to settle the matter amicably and that the matter should proceed directly to arbitration. The applicant considered that the issue could be resolved amicably. The period within which settlement negotiations could occur before the arbitration process became effective has expired. Although some subsequent overtures were made to resolve the issue amicably this has not eventuated and the parties continue to implement the dispute resolution procedures.
11. In my view the underlined portions of the provisions cited earlier make it clear that the applicant was entitled to receive cash flows in accordance with the outcome of a favourable DAB decision on a monetary claim. The benefit gained by the respondent was that the applicant could not withhold performance of its obligations but was obliged to carry on with the works even if a DAB finding was not in its favour. In the construction industry cash flow for the contractor and ensuring completion of the works for the employer are essential. The DAB provision is clearly intended to provide an expedited process of dealing with disputes as and when they arise, including the adequacy of interim payment certificates. The DAB decision is not final but the obligation to make payment or otherwise perform under it is. In the most elementary way the DAB process ensures the interim solution of an issue which requires performance and requires that the decision is implemented. The parties' position may be altered by the outcome of the eventual arbitration which is a lengthier process and there may be a refund ordered of monies paid or an interest readjustment if too little was decided by the DAB.
12. The key to comprehending the intention and purpose of the DAB process is that neither payment nor performance can be withheld when the parties are in dispute. The DAB process ensures that the *quid pro quo* for continued performance of the contractor's obligations even if it is dissatisfied with a DAB decision which it is required to give effect to is the employers obligation to make payment in terms of a

DAB decision and that there will be a final reconciliation should either party be dissatisfied with the DAB decision, which by its nature is not an "award" nor is it described as such.

13. In order to give effect to the DAB provisions of the contract the respondent cannot withhold payment of the amount determined by the adjudicator, and in my view is precluded by the terms of the provisions of clause 20 (and in particular clauses 20.4 and 20.6 from doing so pending the outcome of the arbitration. In my view it was precisely to avoid this situation that the clauses were worded in this fashion.

14. I have considered a number local and foreign cases that were dealt with in argument. In my view this is a straight forward case based on the reading of the contract and the underlying rationale for requiring the immediate implementation of the DAB decision.

15. This court is required to give effect to the terms of the decision made by the adjudicator. The DAB decision was not altered and accordingly it is that decision which this court enforces.

## ORDER

16. The following order is made:

1. *The Respondent is to pay the sum of R9 313 629.09 to the Applicant.*
2. *The Respondent is to pay interest at the rate of 15.5% per annum compounded monthly:*

2.1 on the amount of R8 663 628.09 and calculated from 17 October 2010 to date of payment;

2.2 on the amount of R650 000.00 a tempore morae.

3. Costs of suit.

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DATE OF HEARING: 14 June 2012

DATE OF JUDGMENT: 12 February 2013

LEGAL REPRESENTATION:

FOR APPLICANT	ADV CJ McASLIN KNOWLES HUSAIN LINDSAY INC
FOR RESPONDENT	ADV P CARSTENSEN EDAWRD NATHAN SONNENBERGS