REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED.	CASE NO: 42863/18 41910/18
..... SIGNATURE	14.01.2020 DATE

In the matter between:

SASOL SOUTH AFRICA (PTY) LTD **APPLICANT**

And

MURRAY AND ROBERTS POWER AND ENERGY **FIRST RESPONDENT**
(A TRADING DIVISION OF MURRAY AND ROBERTS LTD)

LTC HARMS N.O. **SECOND RESPONDENT**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] The present proceedings involve two independent applications: an application by Sasol South Africa Pty Ltd ("Sasol") for the partial review and setting aside of the second respondent's ("the arbitrator") award and an application by the first respondent, Murray and Roberts Limited, to enforce the arbitrator's award. If the review application succeeds, the enforcement application must fail.

[2] The subject of the arbitrator's award was an NEC 3 engineering and construction contract related to a project at Sasol in Secunda. The contract was concluded on 15 March 2015, between Sasol as Employer and Murray and Roberts Limited, as the contractor (hereinafter referred to as the Contractor). The contract provided for the nomination of a Project Manager ("PM") who had certain circumscribed functions and required that disputes relating to an "action" or "inaction" of the PM be notified, thereafter referred to adjudication and then on to arbitration; all within prescribed timeframes.

[3] At the heart of the review is *"Project Manager's Communication 200"* ("PMC200") a written notification issued by the PM to the Contractor on 1 March 2017. PMC200 concerned the reduction of resources engaged on the project. In the communication the PM warned the Contractor that manpower not reduced in accordance with PMC200 would not be paid for. The Contractor did not reduce manpower and Sasol continued to sign off the timesheets which included the resources requested to be removed. In due course the matter of payment arose. On 20 April 2017 and 1 June

2017 respectively, the PM issued payment advices no 27 and 28, disallowing amounts claimed by the Contractor in respect of resources that were the subject of PMC200.

[4] The Contractor notified and referred a dispute relating to the PM's certificates 27 and 28 (which recorded the disallowance) to adjudication. In the dispute referral the Contractor claimed under various heads a total amount of R46 885 337.34. This included a claim for R23 587 548.00 for the cost of resources which the PM had disallowed as a consequence of the Contractor's failure to comply with PMC200 (Claim 3), and in addition thereto, amounts claimed for overtime (Claim 4) as well as preliminary and general items (Claim 6) and interest relating to the cost disallowed pursuant to PMC200.The adjudicator found in favour of Sasol. Dissatisfied with the outcome of the adjudicator's decision, the Contractor referred the dispute for arbitration. The arbitrator found in favour of the Contractor and ordered Sasol to pay. Sasol failed to adhere to the award and the Contractor launched the enforcement application. Sasol, in turn, then issued review proceedings.

[5] The arbitrator in coming to his award *inter alia* considered and determined the validity of PMC200. He found that PMC200 was not an instruction in accordance with the contract and concluded that it was not possible to comply with PMC200. Sasol contends that the arbitrator was not entitled to consider the validity of PMC200 as the Contractor never informed or referred a dispute in relation to PMC200 for adjudication. The arbitrator therefore did not have jurisdiction to consider the validity of PMC200 and exceeded his powers. The Contractor on the other hand contends that the jurisdiction of the arbitrator to consider the validity of PMC 200 was never disputed. Sasol instead pleaded, for the first time, a "time bar defence" in the

arbitration which necessitated a prior consideration by the arbitrator whether PMC200 was valid. The Contractor further submits that the pleadings in the adjudication and arbitration proceedings in any event broadened the scope of the dispute and permitted the arbitrator to determine whether PMC 200 was a valid instruction.

THE CONTRACT AND PMC 200

[6] On 1 March 2017, the PM issued PMC200 to the Contractor. As stated earlier, PMC200 concerned the reduction of resources engaged on the project. It stated as follows:

> *"Project Manager's Communication.*
>
> *The Contractor is to refer to the attached revised manpower plan for immediate implementation. Should the Contractor be in disagreement with any of the planned demobilisations or work hours, the Contractor is to formally communicate the recommendation with motivations for the Project Manager's consideration. The Contractor may use its own discretion on which persons to keep in approved positions per period.....*
>
> *Resources not reflected in the manpower plan for a particular period, will not be paid for that period. The Contractor is to also take note of the work hours listed per approved position.....*
>
> *If the Contractor fails to remove the abovementioned resources as requested by the Project Manager, the Project Manager will disallow costs of these resources in terms of clause 11.2(25)."*

(*Clause* 11.2(25) provides, *inter alia,* for the disallowance of costs by the PM of the resources *"not used to Provide the Works or not taken away from the Working Area on the PM's request")*

[7] The Contractor responded and further communications from the PM followed on 6 April 2017 and 12 April 2017 on the demobilisations in response to the Contractor's inputs. In the PM's communication of 6 April 2017 the PM advised the Contractor that he had considered the Contractor's feedback and had incorporated some of the Contractor's requests. He also informed the Contractor that if it decides not to demobilise resources as requested, the PM will disallow the costs of these resources in terms of clause 11.2.25.

[8] On 19 April 2017, the Project Manager issued an early warning notification to the Contractor. It recorded as follows:

"The Project Manager is aware of the Contractors decision to retain resources which the Project Manager has requested to be demolished as per demobilisation plan issued under 638-IMT-MRPE-PMC-200. The Employer reiterates that costs of resources which the Contractor has decided to demobilise as the Project Manager requested, will be disallowed for payment in terms of Clause 11.2(25), as resources were not taken away from the working areas when the Project Manager requested.

The Contractor is reminded that should he be in disagreement with any of the planned demobilisation or work hours, the Contractor is to formally

communicate the recommendation with motivations for the Project Manager's consideration".

[9] In response to the early warning notification, the Contractor issued a formal communication to the PM on 20 April 2017, wherein, after raising a number of misgivings about the content of PMC200 stated the following:

" With reference to the Project manager's correspondence re: 200, dated 1 March 2017, and early warning, dated 19 April 2017, the Contractor herewith notified the Project Manager as follows:

The Contractor is not in agreement with the Project Manager's planned demobilizations and work hours as the planned demobilisations and work hours will considerably affect the agreed Key dates, Completion Date and Contractor's ability to execute the works.

The Contractor proposes that all resources remain as previously approved by the Project Manager prior to the issuing of Project Manager' Communication number 200.

However, the Contractor will obey the Project Manager's instruction in terms of Core Clause 27.3, as given in the above reference Project Manager's correspondence [PMC200], and continue with the instructed demobilisations and work hours. The Project Manager is to note that this will increase the total of the Prices, delay Completion and delay meeting Key Date...." (Core Clause

27.3 states that the contractor obeys an instruction which is in accordance with this contract and is given to him by the PM or the Supervisor).

[10] It is common cause that the Contractor did not reduce demobilisations and work hours and that Sasol continued to sign off on timesheets which included the resources requested to be removed. It is further common cause that none of the parties notified or referred a dispute in relation to PMC 200 for adjudication. It was only when the PM disallowed certain costs in relation to payment certificates 28 and 29 that the Contractor notified and referred a dispute to the adjudicator.

[11] The contract provides that in the event of a dispute arising in connection with an action or inaction of the PM or supervisor it must be referred to and decided by an adjudicator. The dispute resolution procedure takes place within strict timeframes. The Contractor must refer the dispute to the adjudicator between two and four weeks after the Contractor notified the employer and the PM of the dispute. If the dispute matter is not notified and referred within the times set out in the contract, neither party may subsequently refer it to the adjudicator or tribunal. Sasol contends that PMC 200 constituted an "action" by the PM and because the Contractor did not notify and referred PMC 200 to the adjudicator, the "action" of the PM became final and is no longer susceptible to challenge.

[12] The contract further provides that the arbitrator has no power to consider a dispute as the dispute resolution of first instance and a *"party does not refer any dispute under or connection with this contract to the tribunal unless it has first been referred to the adjudicator in accordance with this contract"*. Sasol contends that the effect of this provision is that it therefore did not fall within the arbitrator's powers to

determine a dispute of which timeous notice had not been given and which had not been referred to the adjudicator.

THE PLEADINGS

[13] The dispute notified and referred by the Contractor for adjudication is the PM's Payment Assessment no 27 and 28, in its entirety. The dispute was further defined in the pleadings exchanged between the parties. In the *"Contractor's Referral of a Dispute"* the Contractor set out the material facts of the dispute. In paragraph 43.2.1 and 44.2.1 the following was stated:

> *"43.2.1.The Project Manager's deduction was for resources allegedly not taken away from the Working areas when the Project Manager requested-Including overtime worked. (See Annexure L -* ***Project Manager's Communication No: 200).***
>
> *44.2.1. The referenced request by the Project Manager to remove resources from site was dated 1 March 2017. However the Project Manager disregarded its own instructions to the Contractor for the execution of works, which also constituted changes to the Works Information as follows:*
>
> *44.2.1.1 Project Manager's Instruction no 316 and 338 dating from 9 March to 28 June 2017.....*
>
> *44.2.1.2 Site Instructions issued.....*
>
> *44.2.2 The above mentioned changes to the Works Information could not have been completed with the remaining resources (and/or the resources sought to be removed by the Project Manager). By issuing*

the instruction, the Project Manager represented to the Contractor that it was requires to employ (and/or keep in employ) resources to execute such works and that it would be paid for such works in accordance with the contract. The Contractor acted upon such instructions and kept the resources in its employment for the execution of such works for the benefit of the Employer.

44.2.3 The Employer and/or Project Manager approved the resources, which he previously requested to be removed, utilised to complete the work by signing off the timesheets as per the Works Information Item.....

44.2.4 It is to be noted that all hours worked (including overtime) has been approved by signing off the timesheets as stipulated, no other method was utilised or procedure specified in the conditions of contract.

44.2.5 The Parties agreed that any and all changes to the Works information will be assessed and paid based on actual hours worked, verified and agreed on the timesheets signed by the Contractor and the Employer's Construction Management...."

[14] It is clear from the above that the Contractor raised at least five factual disputes in relation to PMC200: (1) The PM disregarded PMC200; (2) This constituted changes to the Works Information; (3) PMC200 was impossible to comply with; (4) The PM or Employer approved the resources by signing off on the timesheets; and (5) The parties agreed that the Contractor would be paid based on actual hours worked.

[15] Sasol responded by relying on PMC200 as an instruction in the following manner:

> *"9.3 On the 1st of March 2017 the Project Manager issued an instruction to the Contractor under Project Manager's Communication 200..... These instructions were issued to the Contractor to instruct him to immediately implement the revised resource plans.*
>
> *9.7 The Contractor did not comply with the various requests from the Project Manager and accordingly in terms of Clause 11.25 the Defined Costs of the resources not taken away and non-compliance with the resource plan are disallowed costs.*
>
> *9.8 The Employer accordingly submits that the Project Manager was correct in disallowing the costs as the contractor did not comply with the request of the Project Manager."*

[16] On a fair reading of the referral and responses of the parties the dispute referred to the adjudicator was the disallowance of certain costs as a result of *inter alia* PMC200. Although the validity of PMC200 was clearly raised and disputed by the Contractor, Sasol did not raise any jurisdictional point or time bar defence in relation to PMC 200. (Sasol did however raise these issues in relation to the disallowance of historical costs. See for example *"Employer's Response"* paragraph 14.5 – 14.14). In the "*Employer's response to the Contractor's responding submission relating to the Project Manager's Certificates no.27 and No.28*," Sasol in fact stated that the underlying cause of the dispute does not relate to calculations, but *"whether or not*

the calculations were based on a correct interpretation of the Contract" and *"if the Adjudicator finds that the Contractual provisions as pleaded by the Employer entitled the Project Manager to make the deductions as it did, then the calculations would be a non-issue as the calculations were based on the Project Manager's exercising its rights under the contract".*

[17] In terms of the contract the adjudicator may review any action or inaction of the PM related to the dispute. In its decision the adjudicator therefore made reference to various documents, amongst others PMC200. After considering the documents he then found that he agreed *"with the Employer's interpretation of the documents"* and found in favour of Sasol.

[18] There is, therefore, no doubt that the validity of PMC200 was raised and considered in the adjudication proceedings.

[19] The Contractor's claim, relating to the amount disallowed by the PM in giving effect to PMC200, featured in the arbitration as Claim 3. The Contractor, in its statement of claim, contended that Sasol was not entitled to make the deductions, alternatively, that the deductions were made contrary to the terms of the contract governing the relationship between the parties. The Contractor further dealt extensively with the validity of PMC 200 in the statement of claim. Sasol, in the statement of defence, did not object to the Contractor disputing the validity of PMC200, but challenged the Contractor's claim 3 *inter alia* on the basis that the Contractor had been time barred from disputing PMC200 by virtue of its failure to notify and/or refer a dispute relating thereto within the strict timeframes prescribed by the dispute resolution process of the contract.

[20] The arbitrator rejected this point and held that the question before him and the adjudicator was whether the Employer could rely on PMC200. He concluded that he therefore had jurisdiction to consider the issue. He found that PMC200 was not an instruction in accordance with the contract and that it was not enforceable. In dealing with Claim 3 the arbitrator said the following:

> *"Claim 3:*
>
> *PMC200, according to its name and number, is a PM communication and not a PMI (a PM instruction). However, the parties dealt with it as an instruction to demobilise-all equipment had to be removed from site as well as certain resources as per category.*
>
> *The Contractor did not comply because it was not feasible to do so. For example, one cannot remove a crane which is required to lift pipes for several meters and one cannot dig a hole without civils. The undisputed evidence was that it was not possible to comply with the instruction. It is not necessary to deal with the evidence in this regard save to remark that the Employer did not present any evidence vindicating the content of PMC200.*
>
> *Claim 3 relates to the resources properly utilised despite PMC200. The PM decided to disallow them, relying on core clause 12(25) quoted above, more particularly the seventh bullet point:*
>
> > *"Disallowed cost is cost of resources not taken away from the Working Areas when the Project Manager requested"*

Request by the PM must be requests in terms of the contract and not request to satisfy a whim or convenience or wish of the PM or the Employer. Such a "request" must, in the context of the contract, be by way of an instruction, and an instruction must be one in accordance with the contract:

27.3 The Contractor obeys an instruction which is in accordance with this contract and is given to him by the Project manager or the Supervisor.

The Employer justified the instruction with reference to core clause 24.2:

.....

Counsel's fall-back position, if I understood him, was that an instruction was an instruction and had to be obeyed. This he said, was an instruction to demobilise and had to be complied with. That again raises the question whether an instruction to demobilise is an instruction in accordance with the contract.

WI 3.3.4 prescribes the procedure that must be followed to demobilisation:

> *3.3.4 Demobilisation*
>
> *During the latter stages of accomplishing the works, and prior to delivering notice of Completion of the works, The Contractor submits its plans for demobilization from jobsite to the Project manager for approval and complied with such demobilization plan as approved by the Project manager.*

The PM is not entitled to circumvent this provision by means of an instruction because such an instruction would not be in accordance with the contract.

Finally, on this claim, it was submitted that the Contractor had failed to declare a dispute under PMC200 in good time and that the adjudication and this

review were consequently time barred and that I do not have jurisdiction to consider the claim. During argument, counsel for the Employer conceded that the point had no merit, but it was raised again in a written submission filed after conclusion of the proceedings. I therefore deal with it. The argument is based on a misconception of the nature of the dispute. The Contractor raised its dispute in relation to the two mentioned payment advices. Its case was that it had done the work and supplied the equipment and that the Employer accepted it all by signing of the time sheets. The employer sought to justify the deductions with reference to PMC200, ***and the question before me and the adjudicator was consequently whether the Employer could rely on PMC200. I therefore conclude that I do have jurisdiction to consider the issue"*** (Emphasis added).

EVALUATION

[21] Sasol submits that having not previously validly disputed PMC200 or referring it to the adjudicator, that instruction was no longer a matter in dispute between the parties and was not open for consideration or determination by the arbitrator. It is submitted that the arbitrator had to accept PMC200 as fact and considered, not its lawfulness and correctness, but only its effect on the Contractor's entitlement to payment. The arbitrator's findings and his award in respect of Claim 3, and Claim 4 and Claim 6 (to the extent that they are affected by the award in respect of Claim 3),

should therefore be reviewed and set aside in terms of section 33 (1)(b) of the Arbitration Act[1]

[22] The Contractor submits that PMC200, which is expressly labelled as a demobilisation plan with an invitation to engage with Sasol if the Contractor disagreed with it, did not constitute an instruction and Sasol's own conduct affronts any notion that the Contractor became bound to it. It is contended that when the Contractor referred the dispute for adjudication it was not common cause that PMC200 constituted an instruction. PMC200 was a communication labelled 'Manpower Plan' which the PM invited the Contractor to communicate its disagreement and recommendations to the PM for consideration. The PM nonetheless relied on it for the first time in making the deductions.

[23] Evidence was led during the arbitration proceedings about the validity of PMC200 and whether it was an instruction or not. Counsel for Sasol cross-examined the witness who testified on behalf of the Contractor who maintained that it was not an instruction. No objection was made to the evidence led. The procedure applicable to the arbitration is set out in the Rules for the conduct of Arbitrations[2]. Rule 12.2 states that *"A party to the reference wishing to challenge the jurisdiction of the arbitrator or who avers that the arbitrator is exceeding his jurisdiction shall raise the jurisdictional issue at the first available opportunity, failing which he shall be deemed to have consented to the arbitrator's jurisdiction."* The jurisdictional point was only raised during argument and counsel appearing on behalf of Sasol conceded that the

[1] Act 42 of 1965.
[2] The Association of Arbitrators (Southern Africa), Sixth Edition.

point had no merit. The arbitrator however dealt with it and found that he had jurisdiction to deal with the validity of PMC200.

[24] But, although PMC200 featured during the proceedings it was always the case of the Contractor that PMC200 was irrelevant due, to *inter alia,* the contractual nature of the timesheets signed off daily by Sasol in line with the various instructions by Sasol's representatives that directly contradicted PMC200. The arbitrator considered the evidence and made a factual finding. He found that the signed off timesheets were binding between the parties in light of the intricate involvement of representatives for both parties on site during the so-called 'demobilization period'. This was when representatives of both parties realised the obvious unworkability and unfeasibility of PMC200. Sasol approved the timesheets on a daily basis in line with the undertaking given by the Project manager on 3 March 2017 (two days after the issuing of PMC200) that the demobilisation plan would be reviewed on a daily basis. The correctness of the arbitrator's finding that PMC200 is invalid is therefore irrelevant as the liability for claim 3 (that Sasol seeks to review) is not dependent on whether the arbitrator had such jurisdiction or not. Over and above the validity of PMC200, the arbitrator found that Sasol approved and signed off the claimed resources in the timesheets and that cl 11.2(25) (relied upon for the deduction in claim 3) was not "*in accordance with the contract*". This finding in itself automatically renders all deductions made by the PM unjustified.

[25] In any event, the question whether the contractor had to dispute PMC200 in time only arises once Sasol proved that PMC200 constituted a valid instruction in terms of the contract. The invalidity of PMC200 (as the basis for deductions) had been raised expressly as an issue in the adjudication papers and thus found its way into the

arbitration papers as a dispute, hence the repeated reference to PMC200 in the adjudicator's decision. It is trite that any dispute that is raised as a defence to a claim becomes part of the arbitrator's jurisdiction. It is clear from a proper reading of the pleadings as well as the evidence and arguments presented that, in order to determine the dispute, the adjudicator and the arbitrator had to consider whether PMC200 was an instruction and if it was a valid instruction in accordance with the contract. The arbitrator therefore did not exceed his powers in determining the validity of PMC200.

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

1. The application for the partial review of the arbitrator's award is dismissed with costs.
2. The enforcement application is granted with costs;
   2.1 The award of the arbitrator dated 9 October 2018 is made an order of court in terms of Section 31(1) of the Arbitration Act 42 of 1965.
3. The costs include the costs of senior counsel.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Applicant's Attorneys:	Cliffe Dekker Hofmeyer
Counsel for Applicant:	Adv. PHJ Van Vuuren SC and Adv HM Viljoen
Respondent's Attorneys:	Tiefenthaler Attorneys
Counsel for Respondent:	Adv. LJ van Tonder SC
Date of hearing:	10 September 2019
Date of judgment:	14 January 2020