/EVDM

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case Number: 63394/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

19/11/2012
DATE

SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
JUDGE'S SECRETARY
2012 -11- 19
REGTERS KLERK
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

JONROUX BUILDERS & CONTRACTORS (EDMS) BEPERK **PLAINTIFF**

and

PTY PROPS 16 (EDMS) BEPERK **DEFENDANT**

JUDGMENT

Delivered on: 19 November 2012

POTTERILL J,

1 The plaintiff set the matter down for trial. At the commencement of the trial I was informed that by agreement between the parties only the special plea, excluding paragraph 7.4 of the special plea, is to be argued and decided. I accordingly in terms of rule 33(4) ordered separation of the Special Plea from the other issues before Court.

2 The second amended special plea of the defendant reads as follows:

"1. The plaintiff's claim against the defendant is based upon the terms, conditions and provisions of a written Principal Building Agreement which was entered into between the parties.

2. The plaintiff has erroneously contended, in paragraph 2.2 of it's declaration, that, in concluding such written agreement, the parties did not incorporate pages 25 to 27 thereof.

3. The parties incorporated all of the pages of the written agreement, and a complete copy thereof is annexed hereto marked "A".

4. Clause 40 of annexure "A" hereto details and prescribes the dispute settlement procedure which was to be followed in the event of any disagreement arising between the plaintiff and the defendant as to any matter arising out of or concerning the agreement.

5. Such dispute settlement mechanism prescribes and stipulates that, in the first instance, any such dispute was to be submitted to adjudication and that the adjudicator's decision would be binding on the parties who would give effect to it without delay unless and until it may subsequently be revised by an Arbitrator in terms of clause 40.5.

6. *Clause 40 of the agreement further stipulates and prescribes the procedure which was to be followed in the event of a party being dissatisfied with the decision given by the adjudicator, and prescribes further that any dispute which is the subject of a notice of dissatisfaction shall be finally resolved by way of arbitral proceedings.*

7.1 *Although the Plaintiff initially, as it was obliged to do, failed to invoke and/or follow the relevant dispute resolution procedures and mechanisms provided for and prescribed in terms of Clause 40 on Annex "A" hereto prior to the institution of this action, the Plaintiff during June 2011 as to provided for in Clause 40 of Annex "A" hereto referred the matter to Adjudication.*

7.2 *The Adjudicator provided his award on the 21st of June 2011.*

7.3 *Consequently, the matter has been finally resolved by way of a dispute resolution proceedings, as provided for in terms of Clause 40 of Annex "A" hereto."*

3 The common cause facts setting out the relevant background to the matter is the following:

3.1 The plaintiff issued a simple summons against the defendant founded on a written agreement whereupon work was done and the amount of R1 335 614, 29 is claimed pursuant thereto.

3.2 The defendant delivered a notice of intention to defend whereupon the plaintiff filed and served an application for summary judgment.

3.3 The defendant filed an affidavit resisting summary judgment. In this affidavit *inter alia* as *bona fide* defence is raised the fact that the plaintiff did not attach to the summons the written agreement, the Principal Building Agreement. In this agreement, clause 40 prescribed what procedure is to be followed in the event of any disagreement arising as to any matter arising out of or concerning the contract. The plaintiff did thus ignore the contract and clause 40 thereof. [Paragraphs 8 & 9 of the answering affidavit]. *"The aforegoing is compounded when regard is had to the plaintiff attorneys' own letter of 16 July 2009, a copy of which is annexure "N2" hereto. In that letter, the plaintiff's attorneys themselves declared a dispute in terms of clause 40 of the agreement and recognised that, thereafter, such dispute would have to be referred to adjudication..."* [Paragraph 10] This letter was dated 16 July 2009 and the application for summary judgment was to be heard on 20 January 2010.

3.4 The attorneys for the plaintiff by notice removed the application for summary judgment from the roll *"whereas the Respondent disclosed a possible bona fide defence."* [p82 of notices bundle]

3.5 The plaintiff then filed its declaration. Paragraph 2.2 of the declaration read as follows:

"*'n Afskrif van die kontrak word hierby aangeheg as aanhangsel "A" en hierin geinkorporeer en ten opsigte waarvan bladsye 25-27 nie deur die partye geinkorporeer is nie.*"

3.6 The defendant filed a special plea to the declaration and also pleaded over. The defendant attached a copy of the signed agreement including the initialled pages 25-27. A special plea was raised that the action be stayed pending the invocation and final determination of the parties' disputes by way of dispute settlement provisions as contained in clause 40 of the agreement between the parties.

3.7 The plaintiff thereupon did not take any further steps in the action, but instead referred the matter to adjudication.

3.8 The adjudication proceeded before an appointed Adjudicator. Both parties filed pleadings and supporting documentation. The parties' legal representatives made written submissions. On 21 July 2011 the Adjudicator made an award in favour of the plaintiff in the amount of R169 811, 20.

3.9 The defendant in a letter dated 2 August 2011 to the plaintiff's attorney noted its dissatisfaction with the Adjudicator's decision. This dissatisfaction was withdrawn in a letter dated 4 August 2011. The amount as awarded by the Adjudicator was tendered and the plaintiff was requested to withdraw the action.

3.10 The plaintiff's attorney on 5 August 2011 noted its objection to the award of the arbitrator. Paragraph 3 of this letter reads as follows:

"*Dit is verder ons opdrag om kennis te gee, soos ons hiermee doen, dat ingevolge klousule 40 van die JBCC kontrak tussen die Werkgewer en Kontrakteur die dispuut finaal verwys word vir beslissing deur 'n Arbiter (klousule 40.5).*"

3.11 Both attorneys took certain stances reflected in their correspondence, which is not relevant and in any event came to nothing. The result was however that the plaintiff's attorney on 16 August 2011 resorted to requesting the Association of Arbitrators for the appointment of an Arbitrator.

3.12 The defendant in a letter dated 17 August 2011 to the Chairman of the Association of Arbitrators set out the following:

"*In Annex "R1" the Contractor refers to a request to the Adjudicator that he arithmetically rectifies the Adjudicator's Determination. A copy of that request is annexed hereto and which is dated the 28th July 2011. We also enclose herewith a copy of a letter from ourselves to the Adjudicator dated the 29th July 2011 which deals with that letter. Quite simply the Contractor's request of a so-called correction can under no stretch of the imagination be considered a request as is envisaged in terms of Rule 7.2.1 of the Adjudication Rules.*"[par. 5]

In the event that you are inclined to appoint an Arbitrator then we object to the appointment of the parties referred to subparagraph 2.3.1 of the Contractor's letter."

The reasons forwarded in the letter were that that no CV's of the "to be appointed Arbitrators" were attached and since technical issues were to be decided upon, the CV's were a necessity.

3.13 On 14 September 2011 the defendant's attorneys wrote to the plaintiff's attorneys with the following in par 2 thereof:

"...*In breach of the Arbitration Agreement the Contractor issued summons out of the North Gauteng High Court. It remains in breach in this regard and the only manner in which the breach can be cured is for the Contractor to withdraw that action and tender the Employer's costs. There is no question that the action was informally stayed pending the matter being pursued by way of dispute resolution and such allegation is denied.[Par 2]*

Until the Contractor withdraws the action and tenders costs(as it is obliged to do) then the Employer will exercise its rights, as it is entitled to do, whether the Contractor pursues the matter by way of either litigation or in terms of the Dispute Resolution mechanism.[Par 3]

In the event of the Contractor withdrawing the action, as aforementioned, then any defence raised that the Contractor is in breach of the Dispute Resolution Clause, alternatively that the matter is lis pendens obviously falls away..."

3.14 The plaintiff's attorney react hereupon in a letter dated 21 September 2011 as follows:

""Dit is weens die Verweerder se onophoudelike aanhoudende tegniese besware teen dispuutbeslegting, wat onnodige koste veroorsaak en uitrek van die saak meebring, wat ons kliënt noop om met die aksie voort te gaan

todat[sic] die Hof mag besluit om die aksie op versoek van die Verweerder op te skort hangende arbitrasie."

3.15 A notice of set-down for trial for this court is served on the defendant on 2 February 2012.

3.16 The defendant filed, served and effected an amendment to the special plea on 23 July 2012. A further amendment to the special plea was effected on 28 October 2012. This is the amendment quoted in paragraph 2 supra including paragraph 7.4

4.1 On behalf of the defendant it was argued that on the common cause facts the matter was referred to adjudication in terms of clause 40 of the written agreement between the parties. The Adjudicator made his decision on 21 July 2011. As it stands the adjudication process was completed in terms of 40.3 of the contract, but the Arbitration process has not commenced. The effect of clause 40.3 is that the Adjudicator's decision while subject to the Plaintiff's notice of dissatisfaction, is binding upon the parties. Although adjudication like mediation is administrative in nature in the normal course it was styled in clauses 40.2 and 40.3 with the peremptory rider that it is "*binding between the parties.*"[40.3]. If there was a notice of dissatisfaction then it was to be finally resolved by the Arbitrator. If there was no notice of dissatisfaction then the Adjudicator's decision was final and binding. As it stands now the Adjudicators award is binding *inter partes* until an Arbitrator finds on the notice of dissatisfaction.

4.2 The plaintiff however in flagrant breach of clause 40 while noting dissatisfaction and requesting Arbitration proceeded to set this action down for trial. The plaintiff is ignoring the sanctity of the contractual agreement which it cannot do. The plaintiff cannot if not happy with the Adjudicator's decision resort back to the action hoping for a different outcome. It was not disputed that the plaintiff could start proceedings by way of action, but once the defendant objected to the proceedings in terms of the dispute settlement agreements in the contract and the plaintiff proceeded with adjudication the plaintiff cannot resort back to the action proceedings.

4.3 As support for this contention I was referred to **Aveng Africa t/a Grinaker-LTA v Midross Investments** 2011(3) SA 631 and 641 at E-H and A-B. The plaintiff abandoned the litigation to pursue the dispute settlement procedures, now saddled with a decision they are not happy with they resurrect the action proceedings. In the words of the Aveng-matter supra *"this is not something that a court will countenance."*

The action must thus be dismissed with costs, alternatively plus *petitio* be stayed with the wasted costs contingent to the set-down to be borne by the plaintiff.

5.1 The first argument raised by the plaintiff was that they were entitled to institute action. Support for this submission was found in **PCL CONSULTING (PTY)LTD t/a PHILLIPS CONSULTING SA v TRESSO TRADING 119 (PTY)LTD** 2009(4) SA 68 (SCA) where at par.[7] the following was found:

"The mere fact that parties have agreed that disputes between them shall be decided by arbitration does not mean that court proceedings are incompetent. If a party institutes proceedings in a court despite such agreement, the other party has two options:

(i)It may apply for a stay of the proceedings in terms of s6 of the Arbitration Act 42 of 1965; or

(ii) it may in a special plea(which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration."

5.2 The plaintiff however in view of the special plea did declare a dispute and refer the matter to adjudication. This was done informally and without the defendant formally applying that the action be stayed pending the adjudication process.

5.3 On behalf of the applicant much was made of the fact that in the proceedings before the Adjudicator the defendant argued that the Adjudicator should not entertain the dispute because the plaintiff did not withdraw the action in this court. The defendant argued this despite their special plea relying on the adjudicating process for the action not to proceed.

5.4 The plaintiff replied to the special plea that they do not accept the adjudicator's decision. They attempted to refer the matter to Arbitration but the defendant objected despite their special plea which requested arbitration. The argument was that the plaintiff never withdrew its action and only informally tried to settle the matter by referring it to adjudication. [Par2.5 of the reply.]

5.5 The Adjudicator's finding is not binding and they may resort back to the action. The Adjudicator himself stated that the determination of the Adjudicator is not binding;"*..it is only binding if both parties accept the Adjudicator's determination."[p365 of the bundle].*

5.6 Much reliance was also placed on the following quotation in **Administrateur Tvl. V Zenzile** 1991(1) SA 21 (A) *"Procedural objections are often raised by immeritorous parties. Judges may be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result, But in principle it is vital that the procedural and the merits should be kept strictly apart, since otherwise the merits may be prejudiced unfairly."*

5.7 The action can not be dismissed and the defendant never pleaded that the action be stayed. The defendant's special pleas must be dismissed with costs.

6.1 It is not in dispute that the plaintiff had the right to institute the action in this Court. The defendant then exercised its right to in the special plea raise clause 40 and pray for a stay of the proceedings pending the final determination of the dispute by arbitration.

6.2 The procedure then envisaged in clause 40 is invoked by the plaintiff by declaring a dispute and referring the matter to adjudication. The Adjudicator delivered his decision and the plaintiff noted its dissatisfaction thereof as entitled to do in terms of clause 40.4.

Clause 40 reads as follows:

*"40.1 Should any disagreement arise between the **employer** or his **agents** and the **contractor** as to any matter arising out of or concerning this **agreement** either party may give notice to the other to resolve such disagreement*

*40.2 Where such disagreement is not resolved within ten (ten) **working days** of receipt of such notice it shall be deemed to be a dispute and shall be submitted to:*

*40.2.1# Adjudication in terms of the edition of the **JBCC** Rules for Adjudication current at the time when the dispute is declared. The **adjudicator** shall be appointed in terms of such Rules*

40.2.2# No clause

*40.3# The **adjudicator**'s decision shall be binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an **arbitrator** in terms of 40.5. Should notice of dissatisfaction not be given within the period in terms of 40.4, the **adjudicator**'s decision shall become final and binding on the parties.*

*40.4# Should either party be dissatisfied with the decision given by the **adjudicator**, or should no decision be given within the period set out in the Rules, such party may give notice of dissatisfaction to the other party and to the **adjudicator** within ten (10) **working days** of receipt of the decision or, should no decision be given, within ten (10) **working days** of expiry of the date by which the decision was required to be given.*

*40.5# A dispute which is the subject of a notice of dissatisfaction shall be finally resolved by the **arbitrator** as stated in the **schedule**. Where*

such person is unwilling or unable to act, or where no person has been stated, the ***arbitrator*** *shall be chosen and appointed by mutual agreement between the parties. Where no agreement is reached within ten (10)* ***working days*** *of such notice, the* ***arbitrator*** *shall be the person appointed at the request of either party by the chairman, or his nominee, of the Association of Arbitrators (Southern Africa). The* ***adjudicator*** *appointed in terms of 40.2.1 shall not be eligible for appointment as the* ***arbitrator****"*

6.3 The plaintiff then in terms of clause 40.5 refers the matter to arbitration. The defendant objected to the names of the proposed Arbitrators as there are no CV's attached. This objection could easily be solved in terms of the same clause 40.5 in the event that both parties can not agree to who the Arbitrator must be. The plaintiff then makes an about turn and places the matter for trial in this court.

6.4 The principle of *pacta sunt servanda* is an entrenched principle in our law and was found to underline the Constitutional principle of *inter alia* human dignity. The parties agreed that when a dispute as to any matter arising out of or concerning this agreement arose then the matter was to be referred to Adjudication. The defendant invoked its right in terms of clause 40 in the special plea to answer to the plaintiff's claim. There was no duty on the defendant to formally apply for the stay of the proceedings because they elected to file a special plea. The plaintiff did not take any further steps in the action but proceeded with the dispute resolution proceedings with the resultant

decision of the Adjudicator. The plaintiff has a right to note its dissatisfaction with the Adjudicator's award. The parties agreed that if such notice was delivered by any of the parties then an Arbitrator will finally decide the dispute. This is the route the parties agreed upon and the plaintiff invoked this process. The plaintiff cannot now make an about turn and set the matter down for trial. Resorting back to the action not only militates against the contract and the entrenched principle of *pacta sunt servanda,* but is bad in law procedurally and substantively. There is a decision and until there is finality on that decision another court will not bring out another judgment on the same cause of action. The decision is binding *inter parties* until an Arbitrator finally decides the matter. The Adjudicator in his decision repeated what the contract stipulated; his decision is not binding if both parties don't accept it. It is in the words of the contract binding if both parties accept it. That however does not end the matter; his decision must be referred to an Arbitrator for finality. The contract between the parties thus effectively gave a party a "right to appeal" which the plaintiff invoked. The jostling between the attorneys at to what issues may be raised before the Arbitrator and who the Arbitrator must be did not give the plaintiff the right to resort back to the action. The Arbitrator will be appointed and the Arbitrator will deal with the issues raised before him. The reason for this is trite: parties cannot initiate two sets of proceedings based on the same claim and then alternate between the processes until they receive a result they like.

6.5 The question then arises whether the action must be dismissed or stayed. The defendant relied on the Aveng-matter supra as support for its contention that

the action must dismissed. The Aveng-matter is however as Wallis J explained quite unique:

"At first blush it is distinctly curious to have a party seeking a stay of proceedings that it instituted. As far as the researches of counsel go, it is a novel application for which no precedent exist." [par. 1].

Already this matter is then distinguishable from the matter *in casu* in that the special plea of the defendant is before court, not the plaintiff requesting a stay of its own proceedings. The plaintiff's action was not dismissed, but its application to stay the proceedings was dismissed thus not authority that the action must be dismissed.

I am of the view that in this matter the dismissal of the plaintiff's claim could be appropriate because the Arbitrator's decision would be final and binding and the plaintiff could not resort back to these proceedings even if there was somehow a further appeal procedure pertaining to the Arbitrator's decision. However I did not have argument as to what circumstances could necessitate a stay versus dismissal and in view of the defendant's argument that I alternatively grant a stay I am granting a stay of the proceedings. I have the jurisdiction to do so despite the special plea not requesting a stay because I can grant a stay as a lessor order.

6.6 The plaintiff incorrectly persisted in setting this matter down for trial. In the letter of the plaintiff's attorney quoted in paragraph 3.14 supra the foolhardy persistence is expessed " wat ons kliënt noop om met die aksie voort te gaan todat[sic] die Hof mag besluit om die aksie op versoek van die Verweerder op te skort hangende arbitrasie."

7 I accordingly make the following order:

7.1 The defendants special plea is upheld.

7.2 This action is stayed pending the finalization of the dispute resolution process.

7.3 The plaintiff is to carry the wasted costs of contingent to the setting down of the matter for trial.

S. Potterill Judge of the High Court

Matter heard on: 07 November 2012

Delivered on: 19 November 2012

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