IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1)REPORTABLE: ~~YES~~/NO
(2)OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3)REVISED ✓
3/11/2014 .....
DATE SIGNATURE

03/11/2014.
CASE NO. 58958/2013

In the matter between:

SOUTH AFRICAN POST OFFICE SOC LTD **APPLICANT**

and

UBUHLEBETHU BUSINESS ENTERPRISE CC **1ST RESPONDENT**

RAJINDER JAIN MAHARAJH t/a RAJ MAHARAJH ASSOCIATES **2ND RESPONDENT**

JUDGMENT

BOTES AJ

1. **INTRODUCTION**

1.1 This application emanates from two written agreements which were concluded between the Applicant and:

1.1.1 the First Respondent on or about 16 September 2011, in terms of which the Applicant appointed the First Respondent to provide services of renovation, alteration and redecoration of the existing building at Tshwane Mail Centre in Pretoria (hereinafter referred to as *"the service agreement"*);

1.1.2 the Second Respondent on or about 26 May 2010, in terms of which the Second Respondent was appointed by the Applicant as the principal agent to manage the project (the renovation, alteration and redecoration of the existing building at Tshwane Mail Centre, Pretoria), pursuant to a tender requisition initiated by the Applicant during March 2009 (hereinafter referred to as *"the principal agent agreement"*).

1.2 Both the aforementioned agreements provide for the referral of any dispute which may arose between the parties as a result of the execution of the project to arbitration in accordance with the provisions of the Arbitration Act, No 42 of 1965 (hereinafter referred to as *"the Act"*).

1.3 The First Respondent (as the Claimant) instituted arbitration proceedings

against the Applicant (as the Respondent) during August 2013. Mr Pierre Ferreira, Director of Knowles Husain Lindsay Inc (hereinafter referred to as *"the Arbitrator"*) was appointed as the Arbitrator to facilitate the arbitration. The First Respondent relies in the arbitration on the provisions of the service agreement and on a proper analysis and interpretation of the First Respondent's statement of claim, it is evident that two disputes arose between them, being:

1.3.1 a claim in the amount of R426 505,81 in relation to non-payment for electrical work; and

1.3.2 a claim in the amount of R320 841,17 in relation to non-payment for Latex flooring.

1.4 Clause 7.5 of the service agreement provides for the following:

> *"The Post Office shall pay the amount reflected on the invoice, once the Post Office Contact Person has* ***verified*** *that the Services have been rendered and the invoice amount has been approved by the responsible Post Office's Contact Person."*

1.5 Clause 8.2.1 of the principal agent agreement provides for the following:

> *"The Principal Agent* ***indemnifies*** *the Post Office against any claim*

which may be brought against the Post Office by the Principal Agent's employees or a third party arising from the Principal Agent's execution of this Agreement, alternatively which arises against the Post Office as a result of the Principal Agent's breach of any of the provisions of this Agreement."

1.6 The First Respondent alleges in paragraph 6 of its statement of claim in the arbitration proceedings that the electrical work was undertaken on the direct instruction of the principal agent (the Second Respondent) and that the Applicant received or obtained the benefit of this work.

1.7 The First Respondent furthermore alleges in paragraph 4.13 of its statement of claim that the Second Respondent has refused to certify the Latex flooring work, arguing that no instruction to perform was ever issued by it or the Applicant. The First Respondent therefore came to the conclusion that the real reason for the Second Respondent failing to certify the amount pertaining to the Latex flooring work is solely based on the fact that there is no further budget available from the project's capital sanction.

1.8 The First Respondent accordingly declared a dispute, as is envisaged in clause 22 of the service agreement, which commenced on 26 March 2013 when it issued a dispute notice to the Applicant. The arbitration is currently pending.

2. On or about 11 October 2013, the Applicant's attorney caused:

2.1 a third party notice to be issued in terms of which it claims an indemnification from the Second Respondent (as third party); and

2.2 an annexure to the third party notice to be issued in terms of which it submits that the First Respondent's claims arise from the manner in which the Second Respondent executed its duties in respect of the principal agent agreement.

3. The Applicant submits that the Second Respondent should be joined in the arbitration proceedings as a result of the indemnity which it enjoys by virtue of the provisions of clause 8.2 of the principal agent agreement. The Arbitrator however indicated that unless the Second Respondent submits voluntarily to the arbitration proceedings, he is not empowered to exercise any jurisdiction over the Second Respondent and doesn't have the power or authority to order that the Second Respondent be joined as a third party to the arbitration.

4. With regard to the Arbitrator's powers to join the Second Respondent as a third party to the arbitration, cognisance should be taken of the following:

4.1 Clause 22.4.2 of the service agreement empowers the Arbitrator to settle formalities and procedures for the arbitration proceedings; and

4.2 Clause 22.8.3 of the service agreement empowers the Arbitrator to decide disputes according to what he considers just and equitable in the circumstances.

5. In the event that the Second Respondent did submit to the jurisdiction of the Arbitrator, the Arbitrator would be empowered to join it as a third party, but the Second Respondent decided and elected to oppose the third party notice before the Arbitrator. It is therefore evident that the Second Respondent has no intention to subject itself to the Arbitrator's jurisdiction.

6. **THE APPLICANT'S CASE**

6.1 The Applicant submits that one should distinguish between the issues pertaining to *"liability"* from the issues pertaining to *"indemnity"*.

6.2 Mr Seleka, who appears on behalf of the Applicant, submitted during his argument, correctly in my view, that the Applicant is responsible or obliged to effect payment to the First Respondent in the event that the First Respondent has succeeded in establishing or proving its two claims (pertaining to the electrical work and the Latex flooring). The Applicant therefore has no intention or desire to prolong or to delay the arbitration proceedings, or to escape its liability *vis-a-vis* the First Respondent.

6.3 The Act does not provide for a mechanism in terms of which a third party can be joined in an arbitration. The Applicant is therefore unable to join a party (*in casu* the Second Respondent) to the arbitration, as provided for in Rule 13 of the Uniform Rules of Court. The Applicant therefore has no effective remedy in law at its disposal, hence this application.

6.4 The Applicant concedes that the Arbitrator is not empowered to join the Second Respondent in the arbitration. The Arbitrator cannot exercise any jurisdiction over the Second Respondent and the Arbitrator simply does not have the powers or the jurisdiction to order that the Second Respondent be joined as a third party to the arbitration.

6.5 The Applicant submits that this Court has inherent powers to grant the relief sought by it, based on considerations of convenience, justice and equity, in order to avoid:

6.5.1 unnecessary multiplication of actions and duplication of proceedings on the same subject matter, attended to only be a waste of time and money; and

6.5.2 inconvenience and contradictory judgments or rulings.

6.6 Section 3(2) of the Act provides for the following:

"The Court may at any time on the application of any party to an arbitration agreement, on good cause shown:

(a) set-aside the arbitration agreement; or

(b) order that any particular dispute referred to the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

6.7 The Applicant therefore relies on the provisions of Section 3(2) of the Act for purposes of the relief sought for in the notice of motion.

7. THE FIRST AND SECOND RESPONDENT'S ATTITUDE

7.1 The First Respondent avers that the application is bad in law in that the Act does not confirm jurisdiction on this Court to order a party, who has not agreed in writing in terms of a tripartite arbitration agreement, to be joined to an arbitration which is between two parties, in terms of an arbitration agreement solely made between those two parties. The First Respondent furthermore alleges that this Court would, in the event of any litigation between two parties, have no authority to join the Second Respondent as a third party.

7.2 The First Respondent furthermore submits, correctly in my view, that it is not a

party to the principal agent agreement and that it has no interest in the alleged dispute between the Applicant and the Second Respondent insofar as the indemnification is concerned. Whether or not the Second Respondent has breached the principal agent agreement or not, is irrelevant for purposes of the dispute between it and the Applicant.

7.3 The First Respondent's claims against the Applicant are for work done and of which the Applicant has received the benefit of. The Applicant is utilizing these benefits to the First Respondent's detriment, in that the Applicant refuses to satisfy the First Respondent's reasonable claims in this regard.

7.4 The First Respondent furthermore submits that insofar as the Second Respondent may not have certified the work done by it, same does not make the Second Respondent liable for the cost of such work, even should it later be found that Second Respondent did indeed breach the provisions of the principal agent agreement. Just because the principal agent may have failed to certify an amount which the Applicant is liable for (as against the First Respondent), does not make the Second Respondent (as principal agent) liable for the amount not certified.

7.5 The First Respondent concedes that, had the Second Respondent certified the amounts which the First Respondent claim, that there would be no dispute once such amounts have been *"certified"* by the Second Respondent.

7.6 The Second Respondent's member deposed to an opposing affidavit in which it is alleged that he refuses to certify the amounts claimed by the Fist Respondent, as a result of the fact that the work was not authorized. Mr Maharaj (the Second Respondent's member) avers that his refusal to certify is based upon the absence of written instruction to do so.

7.7 He furthermore disputes the suggestion that if the First Respondent's claim against the Applicant is found to be good, that he is bound to indemnify the Applicant therefore.

7.8 The Second Respondent furthermore confirmed the following under oath:

> *"It would not be appropriate at this stage for me to deal with the merits of the dispute between the First Respondent and the Applicant, unless required to give evidence in the proposed arbitration between the First Respondent and Applicant to explain my refusal to certify and allow the Arbitrator to then determine whether or not to amend my certificates and the concomitant obligations of the Applicant."*

7.9 Mr Maharaj, in conclusion, submits that he cannot be compelled to participate in an arbitration between the Applicant and the First Respondent in terms of the provisions of the service agreement, nor can the arbitration provisions (provided for in the principal agent agreement) be imported into the pending arbitration between the Applicant and the First Respondent.

7.10 It is common cause that the Second Respondent has not agreed to submit to the pending arbitration proceedings which were initiated in accordance with the provisions of the service agreement. The Second Respondent relies on the provisions of the principal agent agreement and submits that it is *"not open"* to the Applicant to join it in the present arbitration with the First Respondent.

8.

8.1 The Second Respondent's attorney addressed two letters, dated 31 October 2013 and 20 November 2013 respectively, to the Applicant's attorney. The content of both letters are important and relevant for purposes of this application. The Second Respondent's attorney is of the opinion that if the First Respondent's claim against the Applicant succeeds, it does not automatically follows that the indemnity is triggered. The indemnity arises in specific circumstances, not out of a legitimate claim.

8.2 The Second Respondent's attorney furthermore submits the following:

> *"In regards to the two claims in question, it is common cause that our client has refused to certify these claims.*
>
> *With respect, our client is between a rock and a hard place.*

On the one hand, your client refuses to pay these claims to the First Respondent, whilst on the other hand, it states that if it has to pay these claims, our client should pay them.

If our client was to certify the claims, it would be in breach of its obligations in terms of its service agreement. It cannot be so that a refusal to certify a claim in consultation with the property manager or your client, can ever trigger an indemnification provision.

The indemnification relates to circumstances where our client has breached its agreement, causing your client a loss, not where he lawfully certifies or refuses to certify a claim.
The fact of the matter is that there are claims made against your client, which it refuses to pay. Ultimately, the arbitrator will substitute for our client, the principal agent, in determining whether or not the claims have validity.

It is apparent that your client contends that these claims do not have validity. Our respective clients therefore are of the same view, namely that the claimant's claims are to be defeated.

With the greatest respect, it is inappropriate for our clients to be joined in these proceedings with regards to an indemnification.

The first question is whether the claims have merit. If they do not, then the indemnification becomes academic.

If the claims have merit, then we similarly fail to understand on what basis our client should be obligated to pay lawful claims submitted by a contractor appointed by your client."

8.3 The Second Respondent's approach, which appears from its attorney's letters, seems to have merit. The fact of the matter is whether or not these disputes should be ventilated in two separate arbitrations, or rather in one *"consolidated"* hearing or trial.

9. **THE LEGAL PRINCIPLES WHICH ARE APPLICABLE**

9.1 Mr Glendinning appears on behalf of the First Respondent and he filed comprehensive heads of argument. Heads of argument were also filed on behalf of the Second Respondent, but the Second Respondent decided not to brief counsel to address this Court during the hearing of this application. The Second Respondent's attorney withdrew as attorney of record during September 2014. The Second Respondent abides this Court's decision.

9.2 Mr Glendinning directed my attention in his heads of argument to various principles and authorities. The First Respondent holds the view that this

Court does not enjoy any authority to order a party who has not agreed to be joined in an arbitration which is between two parties, in terms of a written arbitration agreement, made between those two parties, by virtue of the fact that the Act does not entitle this Court with jurisdiction to make such an order.

9.3 No South African authority was sourced, in relation to the *"forced joinder"*, in private arbitration proceedings, with the only authority found being that of the Court of Appeal of the Republic of Singapore.

9.4 Mr Glendinning furthermore alluded to the principles which are applicable in circumstances where payment certificates are issued, insofar as the duties of the principal agent (the Second Respondent) is concerned. Just because the Second Respondent has failed to certify certain amounts (the amounts which the First Respondent claims) does not *ipso facto* make the Second Respondent liable for such amounts. The refusal to certify the aforementioned work does not trigger the indemnification provided for in clause 8.2 of the principal agent agreement. Mr Glendinning's submissions in this regard are in my view correct.

10. This is, unfortunately, not the end of the matter. The purpose of joinder, as is envisaged in Rule 13 of the Uniform Rules of Court, is similar to *"consolidation"* of actions under Rule 11. This Court may, accordingly, in cases other than in disputes between joined wrongdoers *"give one judgment disposing of all matters in the dispute"*, as provided for in Rule 11.

10.1 Thus, where it is convenient or expedient in the sense of being fit and fair to the parties concerned, the Court may issue a judgment sounding in money against a third party who are joined to the proceedings in accordance with the provisions of Rule 13.

10.2 The facts of this matter demonstrate that the same issues will be ventilated between the parties if two separate proceedings were to be pursued, thereby creating the possibility of conflicting findings.

10.3 In the event that the Second Respondent cannot be joined in the arbitration, it will be incumbent upon the Applicant to institute separate arbitration proceedings against it. This may result in conflicting findings.

11. The requirement of *"good cause"* provided for in Section 3(2) of the Act, has been said to require the showing of a *"very strong case"*. What this means depends on the facts of each case:

> *"It is not possible to define, and certainly it is undesirable for any Court to attempt to define with any degree of precision, what circumstances would constitute a "very strong case"."*

See: **Universiteit van Stellenbosch v JA Louw 1983(4) SA 321 AD**.

11.1 The purpose of this judgment is not to determine whether or not the Second Respondent has attracted liability as a result of the indemnity provided for in clause 8.2 of the principal agent agreement. The dispute, in essence, is not between the First Respondent and the Second Respondent. Whether the First Respondent has a valid and enforceable claim against the Applicant, is a matter of evidence.

11.2 I am bound by the principles referred to by the Supreme Court of Appeal in the matter of **Universiteit van Stellenbosch v JA Louw, *supra***. It seems that the Second Respondent's function in certifying the works performed by the First Respondent, is to determine what is finally due and owing by the Applicant to the First Respondent. In discharging that function, the Second Respondent (an architect) is primarily still acting in the protection of his employer's (the Applicant's) interests.

11.3 In an attempt to avoid a multiplicity of proceedings, I am of the view that *"good cause"* has been established by the Applicant as is envisaged in Section 3(2) of the Act.

12. CONCLUSION

12.1 I am mindful of the concerns and fears raised by the First Respondent

in this application. The First Respondent is in my view entitled to payment of the amounts claimed from the Applicant, in the event that it is in a position to proof what it claims from the Applicant. The First Respondent is furthermore entitled to have the dispute determined and finalized within a reasonable period of time. It was not the intention of the Applicant or the First Respondent to resort to a delayed dispute resolution process and the parties did not foresee any dispute to be resolved by virtue of a full scaled trial in the High Court. The facts of this specific case are to a certain extent unique and the parties could not have foreseen this eventuality. I am sympathetic towards the First Respondent's position, but in my view the First Respondent would not be deprived of an opportunity to proof its claims against the Applicant in the event that the arbitration is converted into a trial.

12.2 The Applicant is also entitled to pursue its remedies, if any, against the Second Respondent. I am not prepared to deprive the Applicant of an opportunity to invoke the indemnity provided for in clause 8.2 of the principal agent agreement. Whether the Applicant is entitled or not to be indemnified by the Second Respondent is a matter that should be dealt with by the Trial Court. In my view the First Respondent should not be mulcted with the costs of this application in the event that it is successful in proving its claim against the Applicant. The First Respondent's claim lies against the Applicant and it is, insofar as the First Respondent is concerned, not concerned whether the Second

Respondent attracts liability towards the Applicant, or not. Mr Seleka conceded that the Applicant would be liable to pay an amount to the First Respondent in the event that the First Respondent succeeds in proving its claims against the Applicant.

12.3 Prevention is in my view better than cure. The parties to this application should be afforded sufficient opportunity to ventilate all the disputes between them which arose from the service agreement and the principal agent agreement, and it is therefore appropriate to grant the relief applied for by the Applicant.

In the premises an order in the following terms is made:

1. **The arbitration proceedings which are currently pending before the Arbitrator, Mr Pierre Ferreira, are terminated as provided for in Section 3(2) of the Arbitration Act, No 42 of 1965, and converted and referred to trial in this Court;**

2. **The First Respondent's statement of claim in the arbitration proceedings shall stand as its particulars of claim in the trial;**

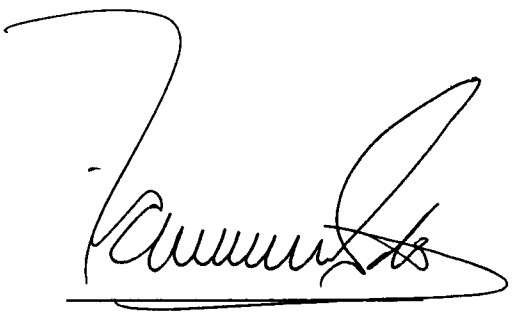
3. **The Second Respondent is joined as the Second Defendant in the trial;**

4. **The Applicant (as First Defendant in the trial) is ordered to file and**

deliver its plea and counterclaim, if any, within a period of 20 days from date hereof;

5. **The provisions of the Uniform Rules of Court are applicable insofar as the future conduct of the trial is concerned, with specific reference to discovery, further particulars, expert notices, etc.; and**

6. **The costs which were incurred in the arbitration proceedings and the costs of this application are costs in the cause of the trial.**



F W BOTES
ACTING JUDGE OF THE HIGH COURT, PRETORIA