

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 36597/2019

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

25/11/19

[Signature]

DATE

SIGNATURE

In the matter between:

FOUNTAIN CIVIL ENGINEERING (PTY) LTD

Applicant

(Respondent in the application for leave to appeal)

and

SOUTH AFRICAN NATIONAL ROADS

AGENCY SOC LTD

First Respondent

(Applicant for leave to appeal)

LOMBARD INSURANCE COMPANY LIMITED

Second Respondent

JUDGMENT

(APPLICATION FOR LEAVE TO APPEAL)

AC BASSON J.

[1] On 13 June 2019, this court made the following order:

"1. The applicant's non-compliance with the rules relating to service and time periods is condoned and the matter is dealt with as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

2. Pending the outcome of dispute resolution by means of an arbitral process to be instituted by the applicant within 21 days from the date of this order, an order is granted interdicting and restraining the first respondent from making a claim under the performance guarantee issued by Lombard Insurance Company Limited in favour of the first respondent on 7 November 2016 under guarantee no: C01660828, failing an agreement, the arbitrator to be appointed by the Association of Arbitrators.

3. The first respondent to pay the costs of the application including the costs consequent upon the employment of senior counsel."

[2] This is an application for leave to appeal against this court's judgment and order and more in particular, the inclusion of an arbitral process in paragraph 2 of the order. (I will continue to refer to the parties as they were in the urgent application.)

[3] It is common cause between the parties that the contract provided for dispute resolution through the courts and not through an arbitral process. However, after an exchange in court and, in order to allay the concerns raised by counsel on behalf of the applicant that the process may be unduly delayed if the agreed dispute resolution procedures (court process) were to be followed, the court inserted a provision that the dispute be resolved through an arbitral process:

"The relief sought

[40] The applicant, in an attempt to address the concerns that the agreed dispute resolution procedures may unduly delay the finalisation of the dispute, proposed an arbitral process. Taking into account the concerns raised, I have proposed an arbitral process to be instituted within 21 (twenty-one) days of this court's order."

[4] The respondent attacks this part of the order on the basis that it was not underpinned by consensus between the parties.

[5] The applicant opposes the application on the basis that the matter is not appealable in that the court did not err in misconstruing the agreement as providing for a dispute resolution process (which is an approach to a court as opposed to providing for a dispute resolution process). It was submitted that the arbitral process was inserted by agreement between the parties in that the respondent (in the event of the court granting interdictory relief) was amenable for the contractual disputes to be referred for determination by means of an arbitral process. Accordingly, if (at best) there was a misunderstanding between the parties which gave rise to the inclusion of a referral to arbitration, then an appeal would be inappropriate and the only remedy available to the respondent would be to apply for rescission, which Mr Wasserman (for the applicant) stated, he would advise his client not to oppose.

[6] Counsel on behalf of SANRAL resisted any reference to the record of the proceedings and submitted that the record is not relevant. He also submitted that, in the event of an appeal, the record would also not form part of an appeal record. I do not agree. It is important to have regard to the record in order to determine whether the impugned part of the order had been incorporated due to a misconceived understanding that there was a concession and thus an agreement between the parties. The relevant part of the record of the proceedings speaks for itself and reflects the following exchange prior to the court inserting the arbitral process as opposed to the contractually agreed court process:

"APPLICANT ATT: The notice of motion is only problematical in one sense and that is because we are in terms of the contract bound to the process...[intervenes]

COURT: *The court process.*¹

APPLICANT ATT: The court process. Now, I was awaiting some suggesting by my learned friend to expedite the process but I have intimated to you in my heads and my submission to you orally that unless they make some kind of proposal it seems as if they are quite happy to await the court process to run its course. We are still suggesting that we are prepared to abide any expedited process either directed by the Court or suggested by SANRAL.

¹ Court's emphasis.

But as it is framed here this is what the parties contracted for. And if it is so that the disputes have to be determined through the court process so be it. Then it has to be determined in that fashion. But my learned friend is still invited to tell you whether they will be amenable to some form of a panel beating of a notice of motion order to accommodate an expedited process we are quite happy to work along those lines but there is but for that no criticism to be levelled against a notice of motion and if SANRAL is not suggesting any change as far as the mediation or the dispute resolution process is concerned then it ought to be granted.

One argument he has is that this is a blanket cover because it would preclude the pre 7 November claims. But M'Lady he has referred you to one cancellation ground [19.7] there are four grounds in that letter. That is one ground that he has referred to and that ground even does not assist because it simply protects the breaches that have arisen. But that is not the only ground upon which reliance was placed. There are four grounds upon which reliance was placed. So, it will only limit your submission to that is somewhat flawed. As it is worded here there is no problem with the notice of motion at all and it is for SANRAL to suggest any mechanism that could expedite the process but we would persist with the notice of motion and we would ask for cost M'Lady.

COURT: Just on the issue of the notice of motion is there no assistance coming from SANRAL if the Court decides to grant the order?

1ST RESPONDENT ATT: M'Lady the challenge with the submission is that it is made for the first time here. I have not got any instructions. *However, I do not think there would be a problem if an order along those lines is made. There is nothing for SANRAL to gain by stalling the process M'Lady. It is not something that I am conceding it is something that the Court is entitled to make.*²

COURT: Yes.

1ST RESPONDENT ATT: As the court pleases.

APPLICANT ATT: I do not know whether I misunderstood is my learned friend suggesting that the form of the order could be held

² *Ibid.*

over for him to get instructions?

COURT: No.

APPLICANT ATT: I am willing to abide that.

COURT: *As I understand it he is quite; he is not going to stand in the way of a tweaking of the notice of motion to provide for dispute resolution.*³ Now whilst we are here in the event that I decide in favour of the applicant perhaps the parties could just assist me in respect of how the order should then be read. Because for me to go and panel beat...[intervenes]

APPLICANT ATT: No, no I understand that.

COURT: I think you can help me more than... so yes.

APPLICANT ATT: Should you give us five minutes, M'Lady?

COURT: Yes, I am going to stand down but in any event maybe talk to one another and see whether we cannot agree maybe on a draft order

.....

COURT RESUMES [12:50]

COURT: Yes can I just hear from the applicant just help me with the exact wording I do not want to make a mistake with prayer two of the notice of motion. I want to record is physically so that the stenographer knows how to formulate that. Pending the outcome of?

APPLICANT ATT: Dispute resolution proceedings by means of an arbitral process.

COURT: Okay just...[intervenes]

APPLICANT ATT: And the rest can be deleted and then...[intervenes]

COURT: Dispute resolution.

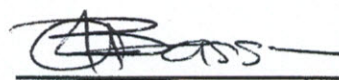
APPLICANT ATT: Yes by means of an arbitral process to be commenced within 21 days the rest stays the same."

[7] In light of the above, I am therefore satisfied that granting leave to appeal in the circumstances would not be appropriate.

Order

³ *Ibid.*

The application for leave to appeal is dismissed with cost.

A handwritten signature in black ink, appearing to read 'AC Basson', is written over a horizontal line.

AC BASSON

JUDGE OF THE HIGH COURT