IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 16580/2021

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

22/02/2022 [redacted]

DATE SIGNATURE

In the matter between:

TEK-CENT GLASS & ALUMINIUM (Pty) LTD Applicant

and

BELO & KIES CONSTRUCTION (PTY) LTD Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an application wherein the Applicant seeks to enforce compliance by the Respondent with an adjudication award that was handed down by the adjudicator on 21 February 2021. The persistent failure by the Respondent to comply, without delay, has resulted in the present application.

[2] The Respondent is opposing the application on the basis that the adjudicator's determination is unenforceable as the adjudicator had exceeded his jurisdiction. It appears further that the Respondent surmises that this application has been brought prematurely in that the Respondent had given a notice of dissatisfaction to both the Applicant and the adjudicator subsequent to the receipt of the adjudication decision.

FACTUAL BACKGROUND

[3] The Applicant and the Respondent are parties to a written subcontract agreement which incorporates the provisions of the JBCC Nominated/Selected Subcontract Agreement Edition 5 of July 2007 ('the N/S agreement')

[4] The pertinent terms applicable to the subcontract are;

4.1 Clause 1.8 provides that the written agreement, including this clause, may not be terminated, varied by any agreement or addendum, added to or deleted, unless in writing and signed by both parties;

4.2 Clause 40.1 provides that in the event of a disagreement between the parties arising out of or concerning the written agreement or its

termination, either party may give notice to the other for the resolution of the disagreement;

4.3 In terms of Clause 40.2, should the disagreement not be resolved within ten (10) working days of receipt of the notice referred to in clause 40.1,it shall be deemed that a dispute has occurred. The dispute shall be referred by the party who gave notice for an adjudication. (in terms of the edition of the JBCC Rules for Adjudication applicable at the time the dispute was declared.)

4.4 Clause 40.3.3 is to the effect that the adjudicator's decision shall be binding on the parties and shall be given effect to without delay, unless and until the decision has subsequently been revised by an arbitrator.

4.5 In terms of Clause 40.3.4, should either party be dissatisfied with the decision of the adjudicator, or should no decision have been made by the adjudicator within the period set in the rules, such party may give notice of its dissatisfaction to both the other party and the adjudicator within ten (10) working days of receipt of the decision or within ten (10) working days of the expiry of the date by which a decision ought to have been given. The dissatisfied party may then refer the dispute to arbitration.

[5] On the 5 November 2019 the Applicant submitted a notice of a disagreement concerning an interim payment certificate no. 6 dated October 2019 in terms of clause 40.1 of the agreement. The disagreement could not be resolved within ten working days and was, accordingly, deemed to be a dispute in terms of clause 40.2.

[6] On the 21 January 2020 the Applicant and the Respondent confirmed the appointment of Advocate Lee Harding as the adjudicator who was then placed in possession of the information necessary to facilitate the adjudication. The Respondent had also submitted a counterclaim.

[7] Upon completion of his task, the adjudicator handed down the decision to both parties on the 21 February 2021 in the following terms:

"21 Belo & Kies are directed to certify the amount of R1 232 538-00 (excluding VAT) for alleged defective work which has been certified by the Principal Agent and R 174 888-00 for Variations (excluding VAT,), less R 75 1911-18 for retention (excluding VAT) and R 89 315-39 (excluding VAT) for damages, being the total amount of R 3 269 008-58 (excluding VAT) or R 3 790 409-87 (including VAT).

22 Belo & Kies are to make payment to Tek-Cent of the amount of R3 790 409-87 (including VAT), less R 2 882 362-43 (including VAT) for monies previously paid, being R 908 047-44 (including VAT) now due.

23 Belo & Kies are to pay Tek-Cent interest at the Prescribed Rate, from 6 March 2020 to date of payment.

24 The Counterclaim is dismissed.

25 Each Party to pay its own costs and share the adjudicator's fees.

EVENTS FOLLOWING THE DECISION

[8] Despite the adjudicators decision and subsequent correspondence between the parties, the Respondent has failed to comply with the determination of the djudicator and in breach of the terms of clause 40.3.3 of the agreement.

[9] The Respondent filed its notice of dissatisfaction on 11 March 2021.

[10] On the 01 April 2021, the Applicant launched this application against the Respondent seeking the relief that;

10.1 The respondent is ordered to forthwith give effect to the adjudication award handed down on 21 February 2021 by Advocate Lee Harding;

10.2 Pursuant to the abovementioned award, the Respondent is ordered to pay the Applicant:-

10.2.1 R908 047,44 (including VAT); and

10.2.2 interest on the abovementioned amount at the Prescribed Rate from 6 March 2020 to date of payment.

10.2.3 The Respondent is ordered to pay the costs of this application.

OPPOSITION

[11] The Respondent filed its notice to oppose the application on the 16 April 2021, followed by its answering affidavit on 17 May 2021. In essence, the Respondent premises its opposition on the notice of dissatisfaction it had given to both the

Applicant and the adjudicator on 11 March 2021 in alleging that the dispute between it and the Applicant will now be determined by an arbitrator.

[12] In substantiation of its contention that the Applicant is not entitled to the relief sought, the Respondent has set out numerous grounds in the answering affidavit, mainly critiquing the adjudication process of the adjudicator which the Respondent alleges was replete with flaws, including that the adjudicator had exceeded his mandate. In respect of the latter aspect, the Respondent alleges that the adjudicator's mandate was to determine, *inter alia;*

12.1 the Applicant's claim for certification and payment of: (a) an amount withheld as a result of rejected work; and, (b) alleged "contractor variations";

12.2 The Respondent's counterclaim, and,

12.3 The Respondent's claim that, should the adjudicator determine that any payment is due to the Applicant, such determination be stayed pending; (a) final determination of the arbitration proceedings to follow at the behest of the Respondent, and, (b) issue of a final payment advice to the Applicant.

[13] The use of the words 'inter alia', above, without an explicit identification of the specific aspects in respects of which the adjudicator had allegedly exceeded his mandate, negates the critique in that the words presuppose the existence of additional aspects for adjudication.

[14] At para 10.1 to 10.5 of the answering affidavit, the Respondent sets out what it refers to as "tacit, alternatively implied" terms {which} are basic prerequisites

(conditions) that must be complied with and fulfilled, before any adjudication determination can (and ought to) be given effect to as provided for in clause 40.3.3."

[15] The above contentions by Respondent appear in my view to be subjectively selected by the Respondent to suit it circumstances. In this regard I make reference to the matter of *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd 2014 (1) SA 244 (GSJ)* the court had the following to say in regard to the interpretation of tacit or implied terms in an agreement:

"The *decision in Bombela is supported by a number of judgments, both here and abroad, dealing with similar provisions in different standard forms of construction contracts which point clearly to a practice relating to the immediate enforcement of an adjudicator's decision leaving it to the dissatisfied party to refer the decision to arbitration in order to set it aside until so set aside it remains binding. Evidence of this approach is relevant on two- basses: firstly, it assists in the interpretation of the relevant contractual provisions, and secondly it is material which would have been present in the mind of the parties when they contracted and thus admissible as evidence of background circumstances".*

[16] In the present case the agreement between the parties expressly stipulates that there shall be no variation of the agreement, unless in writing and signed by both parties. The Respondents' contention that tacit or implied terms should have been read in the agreement is therefore untenable.

[17] The Respondent furthermore avers that the Applicant had failed to disclose in its statement of claim the conclusion of a written settlement agreement which would ostensibly had exonerated it from liability. It is also the Respondents version that both parties had not made submissions to the adjudicator regarding the settlement agreement, but instead, the adjudicator had determined the

question whether the Respondent was entitled to rely on tacit or implied terms to amend the Subcontract (or terms not expressly stated in the Settlement Agreement) - (the unasked question). To this end the Respondent submits that the adjudicator had exceeded his jurisdiction and the determination is a nullity and accordingly unenforceable.

[18] It is unfathomable that a party to a favourable written settlement agreement would elect not to ensure that the terms thereof are core in the adjudicator's adjudication, but in the same breath, critique the adjudicator for not having considered those terms. On the Respondent's own version, neither party made submissions relating to the Settlement Agreement. Worst still is the Respondent's opportunistic raising of the alleged failure by the adjudicator, in proceedings for the enforcement adjudication, to justify a submission that the adjudication award is unenforceable.

[19] On 20 and 21 October and 04 November 2020, the Respondent alleges to have requested the adjudicator for an opportunity to make oral submissions prior to a determination being made. The request was turned down by the adjudicator on 5 November 2020.

[20] Subsequent to requesting certain clarifications from both parties on 29 January 2021 and having received responses from them, the adjudicator handed down his adjudication and award on 21 February 2021.

[21] At para 25 of its heads of argument, the Respondent makes further submissions in support of its averment that the adjudication of the adjudicator is a nullity and unenforceable. The Respondent states, without cogent substantiation that:

> *''21.1 the findings of the adjudicator are legally untenable to the extent that it (sic) constitutes a material misdirection, which cannot be enforced;*

21.2 The adjudicator did not determine the respondent's claims;

21.3 The adjudicator did not give reasons for all his determinations; and

21.4 The issues raised in the Respondent's notice of dissatisfaction."

APPLICANT'S POINTS IN LIMINE TO THE OPPOSTION

[22] The Applicant has taken several exceptions to the respondent's opposition, being that by;

22.1 serving its notice of intention to oppose on 15 April 2021, and

22.2 serving its answering affidavit on 13 May 2021, the Respondent had failed to comply with the Rule 6(5)(d)(ii) in that the answering affidavit was served five days out of time, yet the Respondent has not sought condonation or provide any reason or explanation for the late service of the answering affidavit;

[23] The Applicant had presented an ambiguous submission regarding the late filling of the Respondents' answering affidavit. This submission, in my view could refer to either there being no valid opposing answering affidavit before the Court, or generally that there is no merit in the Respondent's defence. Factually, there was neither an application for the condonation of the late filing of the answering affidavit nor an explicit objection to argument being presented on the basis of the contents of the answering affidavit.

ANALYSIS

[24] The question whether the Applicant is entitled to the relief sought hinges on a variety of findings this Court is enjoined to make in the circumstances of this

case. These range, in the first instance on the unexpressed stance of the Applicant to the admissibility of the Respondent's affidavit in opposition of the relief sought by the Applicant. I prefer to address this aspect later In my consideration of the over-all events in this matter.

[25] It is common cause that the subcontract agreement between the parties states that the adjudicator's adjudication is binding on the parties who shall comply therewith without delay, unless it is set aside by an arbitrator. It is needless to state that the engagement of an arbitrator is not an automatic event following an arbitration, but requires an active role on the part of a party who is dissatisfied with the outcome of the adjudication process; in the present matter, the Respondent.

[26] The n/s agreement requires a dissatisfied party to give notice of dissatisfaction to both the other party (Applicant) within ten (10) working days of the receipt of the adjudication and award. The adjudication and award were given to the parties on 21 February 2021.The Respondent, being the dissatisfied party, gave notice of its dissatisfaction as aforementioned on the 11 March 2021 – far more than the stipulated period of ten days from the receipt of the adjudication. The Applicant has referred to correspondence between the parties' legal Representatives emanated from the Applicant's attorneys specifically enquiring from the Respondent's attorneys on progress regarding the notice of dissatisfaction, more specifically the name of Respondent's proposed arbitrator.

[27] The responses were either that no instructions had been received yet, or that the Respondent was not available and would be contacted later and, ultimately, there was no response at all to follow up correspondence. While the Respondent has referred to correspondence from its attorneys to the Applicant's attorneys regarding the issue, it has not expressly stated that the Applicant has been or is un-cooperative. The adjudicator's award made on 21

February 2021 still stands and has been not complied with without delay. In *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ) para 22 to 23 the Court addressed aspects pertaining to a delay and the expected actions on the part of the dissatisfied party in the following terms:

> *"The decision in Bombela is supported by a number of judgments, both here and abroad, dealing with similar provisions in different standard forms of construction contracts which point clearly to a practice relating to the immediate enforcement of an adjudicator's decision leaving it to the dissatisfied party to refer the decision to arbitration in order to set it aside. Until so set aside it remains binding."*

[28] In the present matter there are no demonstrable reasonable steps afoot on the part of the Respondent to have the dispute subjected to arbitration. The exclusion of the possibility that a calculated delaying tactic is at play in these circumstances is an impossibility. The delay persists to the detriment and prejudice of the Applicant. In *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* 2013 JDR 2441 (SGJ) para 16 the Court stated the following;

> *''The purpose of the policy to implement the adjudicator's decision is also to obviate the tactical creation of disputes with a view to the postponement of liability."*

From a time perspective, the Respondent's slow pace to achieving its goal of having the matter subjected to arbitration is, my in view, a ploy to delay payment to the Applicant.

[29] Having set out what the Respondent referred to as tacit or implied terms the adjudicator allegedly failed to consider in his adjudication, the Respondent ended with a prayer that, in the event that the adjudicator finds that the Respondent was to pay the Applicant, the adjudicator should suspend the payment pending finalisation of the arbitration process – a process the Respondent clearly appears to misuse as a mechanism to avoid timeous payment to the Applicant.

[30] With regard to the reference to tacit or implied terms in an agreement, the Respondent appears to be oblivious to the non-variation clause contained in the agreement. The Respondent seem to suggest that the adjudicator should have drawn inferences which, in its subjective mind, ought to have been drawn. In the case of *Fir & Ash Investments (Pty) Ltd v Cronje & Others* [2007 JOL 20668 (C) para 5 the Court expressed an approach to the interpretation of non-explicit or tacit terms in a contract as follows:

> *''In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and the surrounding circumstances under which it was entered into. Furthermore, a tacit term will not be inferred if it would be in conflict with the express provisions of an agreement."*

[31] The Respondent has not demonstrated that the inferences it seeks to have been drawn would not have been in conflict with the explicit terms of the agreement and, importantly, that the terms of the Settlement Agreement it sought to rely on were themselves not in conflict with the explicit terms of the N/S agreement.

[32] The Respondent, in my view, as a participant in the construction industry, ought to be aware of the Rules governing the adjudication process and, in particular, that the adjudicator is entitled to determine the manner in which he intends to conduct the adjudication process. The adjudication rules in Annexure "RA2" to the replying affidavit state, inter alia, that the adjudicator may;

32.1 conduct a hearing, but he is not obliged to do so (rule 5.1.1);

32.2 determine a dispute on the basis of the submitted documents only and/or an inspection of work related to the dispute as may be appropriate (rule 5.5.2);

32.3 either party may apply to the High Court for the enforcement of the determination (rule 6.2.2).

CONCLUSION

[33] The Respondent, in my view, has not raised any defence nor triable issue negating the granting of the relief sought by the Applicant. Instead, the overall conduct of the Respondent points to obstructionism solely to delay payment to the Applicant. The application must, therefore, succeed.

COSTS

[34] In awarding the costs for this application, I take into consideration that the Applicant has unjustifiably been prejudice by the Respondent's conduct both in disregard of the terms of the agreement and the mandatory requirement that the Respondent complies with the adjudication without delay. Furthermore, the Respondent did not only fail to give notice of dissatisfaction timeously as provided for in the agreement, but has also done the same in respect of the filing of its answering affidavit. No explanation for the delay, particularly in the latter instance, has been given nor was there an application for the condonation of the late filing of the answering affidavit made. I can find no reason why punitive costs should not be ordered in these circumstances.

ORDER

[35] Resulting from the findings in this judgment, the following order is made:

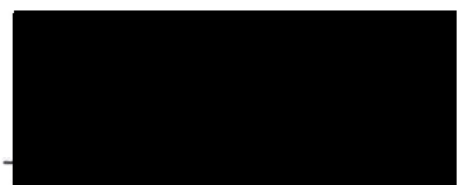
1. The Respondent is ordered to forthwith give effect to the adjudication award handed down on 21 February 2021 by Advocate Lee Harding;

2. The Respondent is ordered to pay the Applicant:-

2.1 R908 047,44 (including VAT); and

2.2 interest on the abovementioned amount at the Prescribed Rate from 6 March 2020 to date of payment.

2.3 The Respondent is ordered to pay the costs of this application on an Attorney and own client scale.



M. MBONGWE J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA.

APPEARANCES

For the Applicant:	Mr S Bunn (Attorney with the right of appearance in High court)
Instructed by:	Hewlett Bunn Incorporated Scott Hewlett & Julie-Anne Harwood C/O Klagsbrun Edelstein Bosman Du Plessis Incorporated 220 Lange Street Nieuw Muckleneuk Pretoria.
For the Respondent:	Adv A.J Daniels SC with Adv C. De Villiers-Golding
Instructed by:	Helen Ellis Attorneys Hellen Ellis Mattisson C/O Macrobert Inc Cnr Justice Mohamed & Jan Shoba Street Brooklyn Pretoria.

Date of hearing: 08 September 2021

JUDGMENT TRANSMITTED ELECTRONICALLY TO THE PARTIES/ LEGAL REPRESENTATIVES ON THE 22nd FEBRURARY 2022.