IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

[REPORTABLE]

Case No. 7926/20

In the matter between:

CONFACT CORE CONSTRUCTION CC Applicant

and

JLK CONSTRUCTION (PTY) LTD Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 25 NOVEMBER 2020

KUSEVITSKY J

[1] This is an application to order the Respondent to give effect to an adjudication award which was handed down on 15 June 2020 by the Adjudicator, Dr. HKJ Macdonald. The Respondent opposes the application on the basis that it alleges that the referral to adjudication was not competent. It also seeks an order, by way of counter application, suspending the implementation of the adjudication award in the event that this court grant's the Applicant's main relief. Ancillary technical objections in the form of disputing the Applicant's authorization to initiate the proceedings and

the commissioning of the founding affidavit were wisely abandoned at the hearing of the matter. This leaves the remaining defences, which disputes the competency of the relief sought by the Applicant and the contention that the adjudication proceedings were void.

The factual background

[2] On 28 March 2017, the Applicant as the sub-contractor and the Respondent, as the main contractor, entered into a sub-contractor agreement for the supply and installation of formwork for a project known as Docklands in De Waterkant. The subcontract agreement incorporated the provisions of the JBCC[1] Series 2000, Edition 5.0, July 2007 N/S subcontract ("the n/s agreement"). The relevant material clauses of the subcontract pertaining to the issue of dispute resolution, included the following:

> "40.0 **SETTLEMENT OF DISPUTES**
>
> 40.1 Should any disagreement arise between the contractor and the subcontractor arising out of or concerning this n/s agreement or its termination, either party may give notice to the other to resolve such agreement.
>
> 40.2 Where such disagreement is not resolved within ten (10) working days of receipt of such notice it shall be deemed to be a dispute and shall be referred by the party which gave such notice to either:
>
> 40.2.1 Adjudication [40.3] where the adjudication shall be conducted in terms of the edition of the JBCC Rules for Adjudication current at the time when the dispute was declared, or
> 40.2.2 Arbitration [40.4] where the arbitrator is to be appointed by the body selected by the parties [41.3] whose rules shall apply. Where nobody is stated or where the stated body is unable or unwilling to act, the appointment shall be made by the chairman for the time being of the Association of Arbitrators (Southern Africa). The appropriate rules current at the time when the dispute is declared shall apply.
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> 40.3 Where a dispute is referred to adjudication the following shall apply:
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> 40.3.1 The adjudicator shall be appointed in terms of the Rules [40.2.1]
> 40.3.2 The adjudicator shall not be eligible for subsequent appointment as the arbitrator

[1] Joint Building Contracts Committee

40.3.3 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.

40.3.4 Should either party be dissatisfied with the decision given by the adjudicator, or should no decision be given within the period set 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 10 (ten) days of expiry of the date by which the decision was required to be given the dissatisfied party shall refer the dispute to arbitration."

[3] During the course of 2018, various disputes arose between the Respondent and its Employer, which culminated in litigation and eventual settlement between them. The details of that matter is of no moment to this application, suffice to say that on the 3 December 2018, according the details contained in the adjudication award, the Employer terminated the main agreement with the Respondent.

[4] On 27 January 2020 ("the January letter"), some 13 months later, the Applicant addressed a letter to the Respondent in which it recorded that the subcontract had been terminated in terms of clause 38.3 of the n/s agreement and demanded *inter alia* payment of amounts due arising out of the subcontract in respect of work done, the return of retention money held by the Respondent and interest, which payment had to be effected by 31 January 2020. It is stated that no response was received to that demand.

[5] On 17 February 2020, the Applicant addressed another letter to the Respondent ("the February letter"). In that letter, it stated that despite demand, the Respondent failed to make any payment, or address any of the issues raised therein. As a result, it recorded *inter alia* that:

5.1 a disagreement existed between the parties as contemplated in clause 40.1 of the n/s agreement;[2]

5.2 that the disagreement related to the non-payment of retention monies as well as for work done and not certified, including interest on both amounts[3];

5.3 in terms of clause 40.2 of the n/s agreement, notice was given that should the disagreement not be resolved within 10 working days from the date of the letter, such disagreement shall be deemed to be a dispute and that the Applicant reserved the right to refer the matter to either adjudication or arbitration.[4]

[6] According to the Applicant, the disagreement referred to in the 17 February 2020 letter was not resolved within 10 working days and the disagreement was accordingly deemed to be a dispute as contemplated in clause 40.2 of the n/s agreement.

[7] The matter was ultimately referred by the Applicant for adjudication as is evident by a letter received by the Association of Arbitrators ("the Association") on 27 March 2020. It is common cause that the Applicant and the Respondent were unable to agree to the appointment of an adjudicator and as a consequence, on 9 March 2020, the Association was requested by the Applicant to appoint an adjudicator. The letter *inter alia* recorded the appointment of the Association; noted the application form requesting the appointment of an adjudicator; and notifying them of the appointment by them of Dr. MacDonald as the Adjudicator.

[2] Paragraph 3 of the letter dated 17 February 2020
[3] Paragraph 4 ibid
[4] Paragraph 5 ibid

[8] Upon a referral to adjudication, the JBCC Adjudication Rules[5], which forms part of the Adjudicator's appointment, becomes applicable. The following clauses are of relevance:

> "Clause 2.1: The parties shall appoint the adjudicator by mutual agreement at any time but not later than five (5) working days after the date on which the disagreement was deemed to be a dispute in terms of the Dispute Resolution clause of the respective agreement(s).
>
> Clause 2.2: Where the parties have failed to make an appointment within such period, either party may request the Chairman of the Association of Arbitrators (Southern Africa) to appoint an adjudicator and shall furnish the other party with a copy of such request. No objection to such an appointment by either party shall be admissible."

[9] On 18 May 2020, the Applicant delivered its submissions to the Adjudicator in which it set out its claims. According to the founding affidavit, the Respondent, despite having had ample opportunity to do so, did not respond to the Applicant's adjudication submission. On 15 June 2020, the Adjudicator handed down the Adjudication Award to both the Applicant and the Respondent.

[10] The following findings were contained in the adjudication award:

> ***"ADJUDICATION AWARD***
>
> *111. I find that the security held by the Contractor as of 5 July 2018 is R472 894.47 (Excl. VAT), and the outstanding security shall be paid to the Sub-Contractor on 27 January 2020.*

[5] Published: October 2014

112. I find that the additional security held by the Contractor as of 30 September 2018 for Payment Certificate No. 19 is R87 829.89 (Excl. VAT), and the outstanding security shall be paid to the Sub-Contractor on 27 January 2020.

113. I find that interest, on the security held by the Contractor as of 5 July 2018 in the sum of R472 894.47 (Excl. VAT) is to be paid from 27 January 2020 to date of payment.

114. I find that interest, on the additional security for Payment Certificate No.19, held by the Contractor as of 30 September 2018 in the sum of R87 829.89 (Excl. VAT), is to be paid from 27 January 2020 to date of payment.

115. I find the amount of R910 680.80 (Incl. VAT) is due to the Sub-Contractor for interim Payment Certificate No. 19, on 30 September 2018.

116. I find that interest on the sum due for Payment Certificate R910 680.80 (Incl. VAT), is to be paid from 30 September 2018 to date of payment.

117. …

118. I find that the Sub- Contractor is awarded the costs of the award and the Contractor shall pay the Sub- Contractor costs in the adjudication as paid by the Sub- Contractor to the Adjudicator, in the sum of R86 396.40"

[11] Various correspondence and demands for payment pursuant to the granting of the adjudication award were sent by the Applicant to the Respondent argued the Applicant. These were admittedly ignored by the Respondent. The Applicant argues that clause 40.3.3 of the n/s agreement clearly states that the Adjudicator's decision is binding on the parties who are obliged to give effect to it without delay unless and until it is subsequently revised by an arbitrator.

[12] In the opposing affidavit, the Respondent avers that the adjudication process is void. The Respondent contends that paragraph 2.1 of the JBCC Adjudication Rules provides that the parties shall appoint an adjudicator by mutual agreement at any time but not later than five (5) days after the date on which the date on which the disagreement was 'deemed to be a dispute' in terms of the Dispute Resolution clause of the respective agreement. As I understand the argument, according to their interpretation of clauses 2.1 and 2.2 of the Adjudication rules, clause 2.2 does not automatically follow from 2.1. In other words, the Respondent contends that in the event of no mutual agreement of a specific adjudicator, it does not follow that one can simply be appointed. This approach is clearly incorrect for the following reasons.

[13] According to the Respondent, the Applicant alleges that the issue of non-payment by the Respondent arose on or about 21 August 2018. A dispute is deemed to exist if either party gives notice to the other to resolve such disagreement and should the parties fail to resolve the disagreement within ten working days of receipt of such notice. The Respondent avers that the Applicant's *request for payment* during August 2018, and the Respondent's refusal to pay, resulted in the *dispute* arising on 5 September 2018. Consequently, it argues that the Applicant was

required to refer the matter to adjudication on or before 12 September 2018 and that since the Applicant failed to do so, it was compelled to rather refer the matter to arbitration. I disagree with this contention. This approach presupposes that every time a subcontractor submits an application for payment, that that date could be used to determine the date of a dispute by the defaulter, unbeknownst to the party submitting the account, that the employer has no intention to pay.

[14] This construction also flies in the face of the provision of clause 40.1 which provides that either party may give *notice* to the other party to resolve such disagreement, should any disagreement arise between the contractor and the subcontractor. Such a notice was duly given by the Applicant to the Respondent on 17 February 2020 where it specifically states[6] that "*we refer to clause 40.1 of the n/s agreement and record that a disagreement exists between the parties as contemplated therein*."

[15] To contend that the submission of an account has the same effect as a notice is absurd. Consequently, the argument that the Applicant was required to refer the matter on or before 12 September 2018, had failed to do so and was thus compelled to refer the matter to arbitration, must fail.

[16] The second reason that the argument advanced by Respondent is flawed can be found in the provisions of the contract, read as a whole.[7] It is evident that Clause 40.2 of the n/s agreement provides to a party an election between adjudication

[6] para 3 of the letter dated 17 February 2020
[7] Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd joint Venture v Bombela Civils Joint Venture, Case 2012/7442, para7

(clause 40.2.1) and arbitration (clause 40.2.2). This is evident from the word '*or*' between the two sub-paragraphs.

[17] The rules of interpretation have been settled. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18 Wallis JA said the following:

> *'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective.* A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against*, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'* (own emphasis)

[18] Following this approach, the normal rules of grammar and the plain reading of the paragraphs, it is clear that the parties have an election to choose between the two methods of dispute resolution; either through the forum of adjudication as contained in clause 40.2.1 of the n/s agreement, or through the forum of arbitration as provided for in clause 40.2.2 of the n/s agreement. These clauses are an important feature in building and construction contracts as it sets out a mechanism

for dispute resolution within a stipulated time frame, after a disagreement has been deemed a dispute, and any party dissatisfied with the adjudicator's decision may give notice of dissatisfaction within a stipulated time and may refer the dispute to arbitration. There is no indication that a notice of dissatisfaction was filed within 10 days and it is common cause that the Respondent as dissatisfied party did not refer the dispute to arbitration. I am therefore satisfied that on a plain and straightforward reading of the provisions, against the background of a dispute relating to a building contract, that the contention advanced that Applicant was precluded from pursuing adjudication, is misplaced.

[19] Counsel for Respondent, Mr. Montzinger, advanced a further reason as to why the matter should not have proceeded by way of adjudication. This is because despite the fact that notice was ostensibly given in February 2020, the contract had already terminated in 2018. They argue that adjudication is a specific process which caters for specific time frames, the aim and purpose for which is quick and immediate resolution whilst the contract still endures. If the contract is no longer in force, then the parties should use arbitration and they will effectively be barred from adjudication. As support for this contention, he relied on the *obiter* in paragraph 21 of *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another*[8] for this proposition. That appeal focused on clause 40 of the building agreement which dealt with the resolution of disputes and when and to which forum, those disputes had to be referred, given the specified time periods.[9] Mr Montzinger argued that based on

[8] [2013] 3 All SA 615 (SCA)

[9] "40.4 A dispute in terms of 40.2 or 40.3 shall be submitted to:
40.4.1 Mediation where the parties so agree
40.4.2 Adjudication where practical completion in terms of 24.0 or practical completion of the last section in terms of 28.2.2 has not been achieved

paragraph 21 of *Radon*, the parties were obliged to go to arbitration since, as I understand the argument, the work had been completed and the contract had come to an end. He argued that adjudication was a specific process which is time specific in that it provides a quick remedy for parties whilst the contract is still alive. On this basis, he contends that the Applicant was barred from proceeding to adjudication.

[20] For context, I cite the preceding paragraph 20 in *Randon* as well.

> "[20] The employer went on to allege that even if a dispute came into existence it is not competent to submit it to arbitration, because the dispute arose before practical completion, and is thus required to be resolved by adjudication. As the objection was expressed in the founding affidavit, '[the contractor] was obliged to have submitted the disputes to adjudication and … it is not entitled to now attempt to refer disputes, which should have been adjudicated, to arbitration …'. And later: '[W]here a dispute, properly established in terms of the relevant procedural requirements manifests prior to practical completion it falls to be dealt with in accordance with the adjudication procedures'.
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> [21] The latter objection can be disposed of at once. I have already explained at some length that the question whether a dispute is to be resolved by adjudication, or whether it is to be resolved by arbitration, depends upon when it is submitted for resolution, and not upon when the dispute arises. A contractor is not obliged to submit a dispute to adjudication. He may choose instead to complete the works and submit it then to arbitration. If the present disputes can indeed be said to have arisen before practical completion that would be no bar to their resolution by arbitration.

[21] The dispute resolution terms in that agreement made provision for adjudication where practical completion had been achieved and arbitration, where practical completion in terms of that agreement, had been reached. The Respondent argued that since the agreement was cancelled and no longer in effect, the Applicant was compelled to follow the arbitration process.

[22] The Applicant on the other hand countered that the dispute resolution clauses in *Randon* differ substantially from the contract under discussion. In the first

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40.4.3 Arbitration where practical completion in terms of this n/s agreement has been achieved or where expressly stated in terms of the n/s schedule …"

instance, the two underlying contracts are different. *Randon* was based on the March 2004 edition of the JBCC, whereas the contract in *casu* is based on the October 2014 edition of the JBCC. In *Randon's* March 2004 edition, provision for referral to adjudication or arbitration is based on the phase of completion, which differs materially from the election provisions contained in the October 2014 edition.

[23] I am in agreement with the Applicant that the two contracts are materially different and I am therefore of the view that the Respondent's reliance on the *Randon's* provision is misplaced. This argument can therefore safely be rejected.

[24] The third basis of opposition is the Respondent's claim that the Applicant's relief is incompetent, as the Applicant still has the right to refer the matter to arbitration and has done so, according to the Answering Affidavit. There are numerous authorities that support the proposition that a party to a construction contract is obliged to give effect to the terms of an adjudication award, including payment, until it is set aside. *See Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd joint Venture v Bombela Civils Joint Venture, Case 2012/7442, para13; Tubular Holding (Pty) Ltd v DBT Technologies (Pty) Ltd 2014 (1) SA 244 (GSJ) para 40. In Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd [2011] JOL 27946 (GSJ),* the court held the respondent's remedy lie in the clauses which stipulate that should either party be dissatisfied with the decision given by the adjudicator, such party shall give notice of its dissatisfaction to the other and the dispute shall be resolved by arbitration. If the respondent exercised its contractual right by referring the dispute to arbitration, the respondent is still bound by the decision of the adjudicator and shall give effect

thereto without delay unless and until the adjudicator's decision is set aside by an arbitrator.

[25] In *casu*, during argument it was alleged that the Applicant has in fact referred the matter to arbitration. In terms of the copious amounts of authority on this position, it is clear that the Respondent is obliged to make payment to the Applicant and give effect to the award, unless and until such decision is set aside by the arbitrator.

Counter-application

[26] In its counter application, the Respondent seeks the suspension of the implementation of the adjudication award by Dr. MacDonald, alternatively suspending paragraph 1 of the Applicant's notice of motion, if granted, pending the outcome of the arbitration proceedings to be instituted by the Respondent.

[27] In the supporting affidavit, the Respondent claims that a substantial injustice will result should the application not be granted. The Respondent also claims *inter alia* that;

31.1 the adjudication process was unnecessary;

31.2 the Respondent indicated as early as 22 June 2020 that the adjudication award shall be referred to arbitration;

31.3 the Respondent did not have an opportunity to present its case to the alleged claims of the Applicant.

[28] It finally states that the prejudice that the Respondent will suffer far outweighs any prejudice the Applicant may suffer and that it is in the interest of justice that a stay of the adjudication award is granted.

[29] If one has regard to the correspondence and the time lapse which is complained of, of somewhat 18 months, then it is apparent that Applicant attempted to obtain payment, through its various demands, before it ultimately referred the matter to adjudication.

[30] The Respondent seemingly acted wilfully by refusing to make payment to Applicant, refusing to agree to an adjudicator and refusing to participate in the adjudication process. To now complain that it was not afforded an opportunity to challenge the Applicant's claim is thus astonishing. So too is Respondent's claim that it requires this matter to be ventilated at arbitration, and has been asserting so since 22 June 2020. Remarkably however, by the time that this matter was argued, there was still no indication before me that the Respondent did indeed apply for the referral of the matter to arbitration.

[31] A court has discretion to grant a suspension of an order[10] where real and substantial injustice will otherwise be done. The real and substantial injustice clearly favours the Applicant, but in any event the Respondent has dismally failed to reach the threshold of 'exceptional circumstances'[11] required, let alone meet, to satisfy the granting of a suspension order.

[10] Rule 45A
[11] Section 18(1) and (3) of the Superior Courts Act 10 of 2013

[32] For these reasons, the counter-application is dismissed with costs.

For all the reasons stated above, I make the following order:

1. The Respondent is ordered to forthwith give effect to the adjudication award handed down on 15 June 2020 by Dr. H.K.J. Macdonald.
2. Pursuant to the abovementioned adjudication award, the Respondent is ordered to pay the Applicant:-
   - 2.1 R472 894.47 plus VAT;
   - 2.2 R 87 829.89 plus VAT;
   - 2.3 Interest on the amounts set out in sub-paragraphs 2.1 and 2.2 from 27 January 2020 until date of payment;
   - 2.4 R910 680.80 inclusive of VAT;
   - 2.5 Interest on the amount set out in sub-paragraph 2.4 from 30 September 2018 to date of payment; and
   - 2.6 adjudication costs in the sum of R86 396.40.
3. The Respondent is ordered to pay costs of the application.

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D.S KUSEVITSKY

Judge of the High Court

Western Cape Division

Counsel for Appellant/Plaintiff: Advocate Steven Bunn

Instructed by HEWLETT BUNN INCORPORATED

Counsel for Respondents/Defendants: Advocate A Montzinger

Instructed by Basson Blackburn Inc