



REPORTABLE

CASE NO: SA 17/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ZILLION INVESTMENT HOLDING (PTY) LTD

Appellant

and

SALZ-GOSSOW (PTY) LTD

Respondent

Coram: SMUTS JA, HOFF JA and FRANK AJA

Heard: 1 April 2019

Delivered: 17 April 2019

SUMMARY: This is an appeal against the judgment in the High Court enforcing the order of an adjudicator pending an arbitration in which the decision of the adjudicator could potentially be set aside or altered and dismissing a counter application to set the decision of the adjudication aside.

The parties entered into a construction agreement that provided for disputes arising between the parties to be referred to a Dispute Adjudication Board (DAB)

which board's decision was subject to an arbitration if a party was aggrieved by it. However pending the arbitration the DAB's decision had to be implemented. In the present matter the parties agreed that a single adjudicator would constitute the DAB.

The adjudicator made a finding against the appellant and ordered it to pay the respondent an amount slightly in excess of N\$3million. The appellant triggered per its Notice of Dissatisfaction the arbitration process but did not make the payment.

The respondent approached the court *a quo* to order the appellant to pay the amount determined by the adjudicator. The appellant opposed the application on the basis that the Notice of Dissatisfaction suspended the operation of the order and also sought to convince the court not to order specific performance in its discretion as this would be unduly harsh on the appellant. Appellant also launched a counter application seeking as main relief the setting aside of the adjudicator's decision as being so unreasonable as to lead to unfairness. In the alternative the counter application sought a stay of any judgment enforcing the decision of the adjudicator pending arbitration proceedings.

The court *a quo* granted the application and without in its reasoning referring to the counter application dismissed it. On appeal the appellant limited the appeal to the dismissing of the main relief in the counter application, namely the failure to set aside the award of the adjudicator.

On appeal it was conceded that the validity of the adjudicator's decision fell within the ambit of the envisaged arbitration but it was submitted that the appellant's inability to pay the amount determined by the adjudicator was a reason why the court should have assumed jurisdiction despite the arbitration clause. It was further submitted that the invalidity of the adjudicator's decision on the basis that it

was so unreasonable or improper as to lead to unfairness should be reviewed as an irregularity.

Held that the impossibility to adhere to the adjudicator's decision was not established. This aspect was raised on the record in the context of the stay application in the counter application where the difficulty in raising the amount (not impossibility) and the resulting adverse consequences and the completion of the project was juxtaposed against the alleged inability of the respondent to repay should the arbitration determine the matter in favour of the appellant. This was clearly to establish that the balance of equities favoured the appellant.

Held that the basis for the approach to assume jurisdiction was thus not established and further that this was not the case for appellants on the record or in the court a quo and that this approach was thus not only without merit but could not be advanced on appeal.

Held that as the same premise (the impossibility to comply with the adjudicator's decision) was sought to be relied upon to review the adjudicator's decision, assuming it was unreasonable, irregular, improper or wrong, would lead to obvious unfairness or be manifestly unjust, this premise was likewise flawed and for the same reason, namely, that no case was made out that it would be impossible for appellant to comply with the order of the adjudicator.

Held that as the construction agreement provided for an arbitration to revisit the adjudicator's decision including its validity the parties are bound thereby pending arbitration. In this matter there is no reason why the contract should not be enforced and it was thus not necessary to decide in which circumstances the normal rule that parties are bound by an arbitration clause would not apply.

Appeal accordingly dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (SMUTS JA and HOFF JA concurring):

[1] The parties entered into a construction agreement in terms whereof respondent had to perform services to appellant. The template of the construction agreement was the standard FIDIC agreement¹ to which the parties made certain amendments. The dispute resolution terms were however accepted unaltered. This meant that any dispute between the parties arising during the course of the construction project had to be referred for adjudication and the decision of the adjudicator had to be complied with, irrespective of the fact that a party aggrieved by such decision could take the decision on arbitration. A dispute arose between the parties which was referred to adjudication and the adjudicator determined that the appellant had to make payment to respondent in an amount of N\$3,246,792 (less an amount standing to the credit of appellant which is N\$ 153,831.54). Appellant, aggrieved by this decision, took the necessary step to initiate an arbitration failing an amicable solution to the dispute, ie it filed the prescribed notice of dissatisfaction. Respondent relying on the agreement brought an application seeking implementation of the decision of the adjudicator. Appellant opposed this application on the basis that the notice of the intended arbitration stayed the award by the adjudicator and that the court should not in its discretion order specific performance. Appellant also brought a counter application to set aside the decision of the adjudicator as the main relief. In the alternative a stay was sought for the application for specific performance and in the alternative, a stay pending the final arbitration in respect of the ruling by the adjudicator.

¹ Conditions for contract for Construction published by the Federation Internationale des Ingenieurs-Conceils (FIDIC) 1st ed 1999.

[2] The court *a quo* dealt with the application and found that the agreement between the parties was clear, namely that pending the arbitration the ruling of the adjudicator had to be complied with and there was no reason why specific performance should not be granted as contemplated in the agreement. In this regard, an order for the amount involved to be paid into a trust account of respondent's lawyers pending the arbitration or an amicable settlement between the parties was made. (This approach was adopted as respondent's lawyers tendered it). Without giving reasons the counter application was dismissed with costs.

[3] Respondent in its Notice of Appeal launched an appeal against the whole of the judgment *a quo*. In the heads of argument filed on behalf of the appellant the appeal is, however, confined to the refusal of the main relief in the counter application, ie, the alleged invalidity of the adjudicator's decision.

[4] The dismissal of the counter application unfortunately doesn't follow from the upholding of the application. This is so because different questions arise. The question raised in the main relief of the counter application is the validity of the decision by the adjudication. The question raised in the application is the immediate enforcement of the decision of the adjudicator. The question in respect of validity of the decision of the adjudicator is whether a court must deal with it at this interim juncture or whether the validity must be accepted pending arbitration where this issue can also be raised as it falls within the ambit of the powers of the arbitrator(s).

[5] The appellant now on appeal only contends that the court *a quo* erred in not dealing with the validity of the decision of the adjudicator. It thus follows that the appellant now accepts that if it was unable to establish the invalidity of the adjudicator's decision or unable to attack that decision in the court *a quo* it is bound to give effect to the adjudicator's decision.

[6] The court *a quo* with reference to South African case law held that the provisions of the agreement were clear and that the decision of the adjudicator had to be given effect to pending the arbitration.² This interpretation is in my view clearly correct and is also in line with the international approach. This interpretation also gives business efficacy to the type of contract under consideration. The approach is described by South African Supreme Court of the appeal in the following terms:³

'4 It has now become common internationally — in some countries by legislation — for disputes to be resolved provisionally by adjudication. In *Macob Civil Engineering Ltd v Morrison Construction Ltd* adjudication was described, in the context of English legislation, as —

“a speedy mechanism for settling disputes [under] construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process.”

5 The authors of Hudson's Building and Construction Contracts observe that under New Zealand construction legislation adjudication —

² *Stocks & Stocks (Cape) (Pty) Ltd v Gordon and others NNO* 1993 (1) SA 156 (T) and *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ).

³ *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and another* 2013 (6) SA 345 (SCA).

“is regarded as essentially a cash flow measure implementing what has been colloquially described as a quick and dirty exercise to avoid delays in payment pending definitive determination of litigation”.’

[7] Despite the fact that the appellant now concedes that it is bound to comply with the decision of the adjudicator pending the arbitration, it persists that it is not liable to make such payment as it sought an order in the counter application declaring the decision of the adjudicator invalid.

[8] Counsel for the appellant in his submissions advanced two main propositions for the stance that the validity of the adjudicator’s order be dealt with by the court. Firstly, appellants simply cannot afford the amount determined by the adjudicator and as appellant’s contentions mostly involve legal issues as opposed to factual issues the court should assume jurisdiction despite the arbitration clause in the agreement between the parties. Secondly, that as far as the main finding of the adjudicator was concerned relating to the question whether interest was payable on outstanding payments, that decision was ‘so unreasonable, improper, irregular or wrong as to lead to obvious unfairness’ and should be set aside.⁴ Counsel for the appellant with reference to case law stated the test as follows; namely ‘where the adjudicator does not exercise the judgment of a reasonable man, where his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result, or a manifestly unjust evaluation’. The patently inequitable result or ‘obvious unfairness’ in the present matter being the

⁴ *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia and another* 1993 NR 274 (HC) at 285; *Perdikis v Jamieson* 2002 (6) SA 356 (w) at [5] and [6] and *Wright v Wright and another* 2015 (1) SA 262 (SCA) at [10].

fact that appellant would have to pay an amount it could not afford, presumably leading to extremely adverse consequences for appellant, pending the arbitration.

[9] The problem with the submissions based on the lack of fairness to appellant if compelled to give effect to the decision of the adjudicator is that this was not the case in the court *a quo* nor does it appear in such stark terms from the record as suggested by counsel. In fact, the deponent on behalf of the appellant states the position as follows in the counter application (where as indicated, among others, a stay of the adjudicator's decision pending the arbitration was sought): 'If an amount of N\$3,246 792.71 is paid, the (appellant) will have to raise this amount by means of finance, even if only for limited period. It will seriously affect the ability of the (appellant) to complete the development of further phases as agreed with the Henties Bay Municipality. It will be a setback that (appellant) may not be able to recover from.'

[10] As is evident from what is stated above it was never stated that the appellant would not be able to raise the amount. It was simply stated that such money would have to be financed and that this could and even would adversely affect the project. This was stated in the context of the stay application and was juxtaposed against the respondent's alleged 'precarious financial position' so as to conclude that 'there is a probability that if payment is made by the (appellant) in satisfaction of the decision by the adjudicator this sum of money will not be recovered once the arbitrator finds in favour of the (respondent).' In essence, the appellant, for the purposes of the stay application, attempted to make out a case that whereas the raising of the finances to pay the money would prejudice them in the completion of the project, the real prejudice would be the fact that they would

not be able to recoup this money from the respondent if they are successful on arbitration. In this manner the appellant attempted to show the balance of equities were in its favour for the purpose of the stay application.

[11] The questions of the alleged 'precarious financial position' of the respondent did feature in the court *a quo* but in the context of whether the court should order specific performance, ie payment of the amount determined by the adjudicator. As pointed out by the court *a quo* appellant's hardship to comply with the adjudicator's decision was not that 'I do not have funds to effect payment' and that the 'undue hardship is envisaged to be suffered some time in the future in that (respondent) would not be able to reimburse the (appellant) due to respondent's current negative liquidity position'. It is this stance which had been adopted by the applicant in the court *a quo* which probably led to the tender that the money could be paid into a trust account pending the arbitration.

[12] Once it is accepted that the appellant's position had never been that it simply was not in a position to pay the amount determined by the adjudicator, but that it would mean that the money would have to be raised at great cost and that they feared if they were successful in arbitration, the respondent would not be able to pay it (or some of it) back then a vital building block in respect of both propositions advanced on appeal is missing and both propositions must fail.

[13] The first proposition relating to the assumption by the court of jurisdiction despite the arbitration clause fails as this lack of resources is at the centre of the proposition being the sole reason why this court must assume jurisdiction. It needs to be mentioned in passing that this was also not the case made out on the papers

or in the court *a quo*. But for the fact that this supposed lack of finances had to be considered in the context of the second proposition on behalf of the appellant this assumption of jurisdiction stood to be rejected solely on the basis that it was never the case for the appellant.

[14] As far as the second proposition is concerned it is conceded that all the issues raised to indicate that the adjudicator came to the wrong conclusion can be addressed and set aside or altered on arbitration. However, it is submitted the arbitration cannot proceed because of the appellant's inability to, in the interim, make the payment determined by the adjudicator and a court may and should set aside the decision of the adjudicator at this interim juncture of the dispute resolution process based on the test proposed by the appellant. This is so because the inability to pay would lead to 'obvious unfairness' or be 'manifestly unjust'.

[15] Once the alleged financial impossibility falls away I can see no reason why a court will not enforce the contractual provisions of the contract between the parties. This will, after all, be in line with what the parties agreed upon. In the present matter this is in fact what appellant initially intended to do when a notice of dissatisfaction was filed and even a notice of arbitration together with particulars of claim served on the lawyers of the respondent. Once it is conceded that the relief sought from the court can be sought in the arbitration that should normally, in my view, be the end of the matter and it should proceed on arbitration.⁵ I should mention in passing that the initiation of the arbitration proceedings by appellant

⁵ *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper CO SARL* 2015 (1) SA 345 (SCA).

may also bar him from seeking relief from a court as it evidences an election which implicitly discounts litigation as far as the dispute is concerned.⁶

[16] Because of the conclusion reached above, it is not necessary to deal with the nature of the adjudicator's decision and in what circumstances it can be attacked in a court of law. It simply needs to be stated that the decision differs from decisions of persons such as experts or valuers in that the decisions of such persons are usually final whereas those of adjudicators are not. It is also not necessary to deal with the decisions of the adjudicators in respect whereof appellant is aggrieved.

[17] In short the decision of the adjudicator stands and must be enforced pending the arbitration. This includes, in the circumstances of this matter, accepting its validity pending the arbitration.

[18] In the result the appeal is dismissed with the costs including the costs of two instructed and one instructing counsel.

FRANK AJA

SMUTS JA

⁶ *Ekurhuleni West College v Segal and another* (26624/2017) [2018] ZAG PPHC 662 at [38].

HOFF JA

APPEARANCES

APPELLANT:

P C I Barnard

Instructed by Du Pisani Legal
Practitioners

RESPONDENT:

R Töttemeyer (with him G Dicks)

Instructed by Ellis Shilengudwa Inc