REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 06757/2013

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

3/05/2013
DATE

SIGNATURE

In the matter between:

TUBULAR HOLDINGS (PTY) LTD Applicant

and

DBT TECHNOLOGIES (PTY) LIMITED Respondent

JUDGMENT

D T v R DU PLESSIS AJ:

1 The respondent is the main subcontractor to one of the main contractors to Eskom on the Kusile Project. Part of this subcontracted project was in turn subcontracted by the respondent to the applicant.

2 The current value of the subcontract is in excess of R1.3 billion and its anticipated duration is more than four years. For present purposes the relationship between the applicant and the respondent is that which pertains between contractor and employer in a construction contract.

3 The dispute resolution procedure agreed upon between the parties is that contained in clause 20 of the Standard FIDIC Conditions of Contract. Of particular relevance to this application are sub-clauses 20.4 and 20.6. They provide that disputes between the parties are referred to, in the first instance, a Dispute Adjudication Board ("DAB") who is to give a decision on that dispute; that a party dissatisfied with that decision may give a notice of dissatisfaction after which it is to be referred to arbitration (if not settled before that); but that the decision of the DAB is in the interim binding on both parties who shall promptly give effect to it.

4 It is common cause that a dispute arose between the parties, that it was referred to the DAB, that the DAB made a decision and that the respondent gave a notice of dissatisfaction with this decision (as did the applicant). In this application the applicant demands, in the interim, compliance with the decision as the respondent refuses so to comply.

5 The essence of this dispute is the interpretation of clause 20.4. The applicant submits that the parties are required to give prompt effect to the decision by the DAB which is binding unless and until it is set aside by agreement or arbitration following a notice of dissatisfaction, whereas the respondent says that the mere giving of a notice of dissatisfaction undoes the effect of the

decision. The respondent also raises other defences, which will be discussed herein.

6 In terms of the respondent's notice of dissatisfaction it is dissatisfied with the merits of the decision. There is no suggestion that the decision is a nullity for some jurisdictional or other reason.

7 As the real disputes turns on the interpretation of clauses 20.4 and 20.6, I propose to quote the relevant provisions of these clauses and then to discuss them. These sub-clauses in turn consist of several unnumbered paragraphs. The numbers in brackets refer to the unnumbered subparagraphs.

7.1. Clause 20.4 (4):

> *"The decision shall be binding on both Parties who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract."*

7.2. Clause 20.4 (5):

> *"If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision ..."*

7.3. Clause 20.4 (7):

> *"If the DAB has given its decision as to the matter in dispute to both parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties."*

7.4. Clause 20.6 (1):

> *"Unless settled amicably or otherwise agreed by the parties in writing, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by arbitration in accordance with this Sub-Clause 20.6."*

8. The effect of these provisions is that the decision shall be binding unless and until it has been revised as provided. There can be no doubt that the binding effect of the decision endures, at least, until it has been so revised. It is clear from the wording of clause 20.4 that the intention was that a decision is binding on the parties and only loses its binding effect if and when it is revised. The moment the decision is made the parties are required to "*promptly*" give effect to it. Given that a dissatisfied party has 28 days within which to give his notice of dissatisfaction it follows that the requirement to give prompt effect will precede any notice of dissatisfaction.

9. The final sentence of clause 20.4 (4), requiring the contractor to continue to proceed with the works, underscores the intention of the parties to the effect that life goes on and is not interrupted by a notice of dissatisfaction.

10. A dissatisfied party may elect to wait 28 days before giving his notice of dissatisfaction. However, this will have no effect on his obligation to give effect to the decision which has to happen promptly on the giving of that decision. In the event where no notice of dissatisfaction has been given within the prescribed time, the decision becomes final and binding on both parties.

11. The distinction between the situation in clause 20.4 (4), where the decision shall be binding on both parties and clause 20.4 (7), where it becomes final

and binding upon both parties is significant: in the first instance it is binding but of an interim nature;[1] in the second it is binding but now finally so.

12. Where no notice of dissatisfaction had been given the decision becomes final and binding. Clause 20.6 (1) is concerned only with a decision in respect of which a notice of dissatisfaction has in fact been given. In other words, this is a situation envisaged in clause 20.4 (4): the decision is binding on both parties who must promptly give effect to it unless and until it has been revised in an arbitral award as referred to in clause 20.6 (1). Clause 20.6 (1) obviously only arises if there had indeed been a notice of dissatisfaction.

13. Thus the notice of dissatisfaction does not in any way detract from the obligation of the parties to give prompt effect to the decision until such time, if at all, it is revised in arbitration. The notice of dissatisfaction does, for these reasons, not suspend the obligation to give effect to the decision. The party must give prompt effect to the decision once it is given.

14. The scheme of these provisions is as follows: the parties must give prompt effect to a decision. If a party is dissatisfied he must nonetheless live with it but must deliver his notice of dissatisfaction within 28 days failing which it will become final and binding. If he has given his notice of dissatisfaction he can have the decision reviewed in arbitration. If he is successful the decision will be set aside. But until that has happened the decision stands and he has to comply with it.

8 In the unreported decision of Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV and Bombela Civils JV (Pty) Ltd, SGHC case no. 12/7442, the parties had

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1 But the obligation to perform in terms of this decision is final.

referred a dispute to the DAB in terms of clause 20.4 of the FIDIC Conditions of Contract. The DAB gave its decision which was in favour of the contractor. The employer refused to make payment in terms of the decision relying, *inter alia*, on the fact that it had given a notice of dissatisfaction and the contractor approached the Court for an order compelling compliance with the decision.

9 The matter came before Spilg J who commented that he found the wording of the relevant contractual provisions to be clear and that their effect is that whilst the DAB decision is not final

> *"the obligation to make payment or otherwise perform under it is..."*[2]

10 The court found the key to comprehending the intention and purpose of the DAB process to be the fact that neither payment nor performance can be withheld when the parties are in dispute:[3]

> *"the DAB process ensures that the quid pro quo for continued performance of the contractor's obligations even if dissatisfied with the DAB decision which it is required to give effect to is the employer's obligation to make payment in terms of a DAB decision and that there will be a final reconciliation should either party be dissatisfied with the DAB decision..."*[4]

11 The court further held that the respondent was not entitled to withhold payment of the amount determined by the adjudicator and that he

> *"is precluded by the terms of the provisions of clause 20 (and in particular clauses 20.4 and 20.6 from doing so pending the outcome of the Arbitration."*[5]

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2 Judgment, para 11.
3 Judgment, para 12.
4 Ibid.
5 Judgment, para 14.

12 Mr Burman SC, who appeared for the respondent, criticized the Bombela-decision on the basis that the court did not refer to any authority in the judgment. In this regard the learned Judge said the following[6]:

> *"I have considered a number (of) local and foreign cases that were dealt with in argument. In my view this is a straight forward case based on the reading of the contract and the underlying rationale for requiring the immediate implementation of the DAB decision."*

13 I am bound to give effect to the judgment in Bombela

> *"unless the Court is completely satisfied that such previous decision is wrong, and has been arrived at by some manifest oversight or misunderstanding, and that a palpable mistake has been made."*[7]

14 I cannot make such a finding. Far from being "clearly wrong" the Bombela judgement is, in my view, correct: the Court had regard to the relevant authorities applicable to the construction of contracts and then looked at the wording of the contract and concluded, quite correctly, that such wording is clear. That was the correct approach.

15 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.

16 Evidence of this approach is relevant on two bases: firstly, it assists in the interpretation of the relevant contractual provisions, and secondly it is material

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6 Paragraph 14

7 *R v Philips Dairy (Pty) Ltd* 1955 (4) 120 (T) at 122 C per Price J (Rumpff J concurring).

which would have been present in the mind of the parties when they contracted and thus admissible as evidence of background circumstances.

17 Some of the relevant cases are the following:

17.1 Stocks and Stocks (Cape) (Pty) Ltd v Gordon and others NNO:[8]

17.1.1 The contract in this matter, which appears to have been an *ad-hoc* agreement, (which had been concluded during the 1980's) referred to mediation as opposed to adjudication. It provided that the parties could obtain the opinion of a mediator but if dissatisfied, it could refer it to arbitration. It provided that

"The opinion of the mediator shall be binding upon the parties and shall be given effect to by them until the said opinion is overruled in any subsequent arbitration or litigation."[9]

17.1.2 Van Dijkhorst J disagreed with the previous dissenting decision in Blue Circle Projects (Pty) Ltd v Klerksdorp Municipality[10] as being clearly wrong and could find no objection to giving effect to an agreement in terms of which interim payments are to be made which may later be followed by an adjustment of account and a claim for repayment of what has been paid should the opinion be set aside in arbitration: after all, that is the effect of the agreement.[11]

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8 *Stocks & Stocks (Cape) (Pty) Ltd v Gordon and Others NNO* 1993 (1) SA 156 (T).
9 p 157 E.
10 1990 (1) SA 469 (T)
11 p 160 BD.

17.2 Freeman NO and another v Eskom Holdings Limited [12]

17.2.1 In this matter Kathree-Setiloane AJ (as she then was) considered the NEC form of contract, which provides for adjudication and for notification by the dissatisfied party to a tribunal who has the power to settle the dispute referred to it. It also provides that the adjudicator's decision is binding upon the parties "*unless and until*" revised by the tribunal and is enforceable as a matter of contractual obligation between the parties and not as an arbitral award.[13]

17.2.2 In this matter the contractor had obtained an adjudicator's decision in its favour. It issued summons against the employer based on this decision. The employer entered appearance whereupon the contractor applied for summary judgment.

17.2.3 Summary judgment was resisted, *inter alia*, on the grounds that the employer had given notice of dissatisfaction. The Court held that this did not constitute a *bona fide* defence to the claim as the adjudicator's decision is final and binding unless and until revised by the tribunal.[14]

17.3. Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd:[15]

17.3.1. Clause 40 of the JBCC Principal Building Agreement deals with dispute resolution and allows a referral of a dispute to an

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12 Unreported, SGHC Case number 4336/09 (Dated 23 April 2010)
13 NEC3 Form, page 44, clause (10).
14 Judgment, paras 16 and 17.
15 Unreported, SGHC Case Number 41108/09, in paragraphs (51) and (56).

adjudicator. Any party dissatisfied with the adjudicator's decision may give notice of dissatisfaction within a stipulated time and may then refer the dispute to arbitration. The arbitrator shall have the power to reopen any previous decision including that of the adjudicator. It stipulates, however, that[16]

"the adjudicator's decision shall be binding upon the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator".

17.3.2. In this matter, which was also decided in this division, Mokgoatlheng J construed these provisions as imposing an obligation on the dissatisfied party to give effect to the decision without delay unless and until it is subsequently set aside by the arbitrator. The dissatisfied party's remedy is to procure set-off or adjustment in the following payment certificates should he succeed in having the decision set aside after he had performed.[17]

17.4. <u>The United Kingdom:</u>

17.4.1. Here the matter is now dealt with by statute which is to the same effect as the clauses referred to above.

17.4.2. In commenting on the statutory scheme the Court of Appeal[18] remarked in paragraph 87 that

"In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication

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16 Clause 40.3.3.
17 Para (60).
18 *Carillion Construction v Devonport Royal Dockyard* [2006] BLR 15 at 20-22.

under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly."

17.4.3. It seems that the underwhelming minority which the Court of Appeal had in mind is where the adjudicator simply answered the wrong question rendering his decision a nullity. However, this is not the respondent's complaint in this case.

18. I therefore find that the terms of the relevant contractual provisions are perfectly clear: the parties are obliged to promptly give effect to a decision by the DAB. The issue of a notice of dissatisfaction does not in any way detract from this obligation; whilst such a notice is necessary where the dissatisfied party wishes to have the decision revised it does not affect that decision; it simply sets in motion the procedure in which the decision may be revised. But until revised, the decision binds the parties and they must give prompt effect thereto.

19. Any room for doubt regarding the interpretation of these provisions was laid to rest by the judgment of this court in Bombela.[19] This court has declared that a notice of dissatisfaction does not excuse performance by the party giving such notice from giving effect to the decision in the interim.

20. The wording of the provisions in question is entirely consistent with other forms of contract and are indicative of a practice currently existent in the

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19 Supra.

construction industry to the effect that dissatisfied parties are required to give prompt effect to the decisions of adjudicators in question despite their notices of dissatisfaction; those notices merely allow a possible revision of these decisions without affecting their interim binding nature.

21. Mr Burman has also argued that the fact that the decision determined that the subcontract was re-measurable only means that the decision determined that the subcontract is re-measurable in respect of the eight claims before the DAB. In this regard he referred to the following paragraph in the respondent's answering affidavit:

> *"6.11 During the adjudication hearing the Applicant's new allegation that remeasurement was applicable to the 8 claims was raised. The Respondent was prepared to allow the question as to whether the 8 claims should be determined on a remeasurement or lump sum basis, to be considered. Remeasurement being generally applicable and being applicable to any other items or any interim payment certificates was not raised or discussed at all."*

22. On the basis of this allegation he submitted that the applicant was bound to the factual statement. In light of the rule in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd[20], the court should accept this allegation and determine the matter in accordance therewith. However, this allegation is contradicted by the relevant documents which form part of the application. In its decision the DAB concluded that

> *"the Contract between DBT and Tubular is a re-measurable contract based on the incorporated Bill of Quantities."*[21]

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20 1984 (3) SA 623 (A)

21 Annex B, p 29.

23. That decision pertains to the subcontract as a whole; there can be no question of the subcontract being re-measurable for one purpose and not for another. After all, a contract of this nature is either re-measurable or it is not.

24. Mr Jordaan SC, who appeared for the applicant, handed up the respondent's written submissions on the disputes before the DAB. He argued that the decision was based on the definition of the disputes before the DAB including these submissions, which contained a reference that the "*General Issues*" before the DAB included

> "*1.1 whether the Subcontract is a lump sum contract or a re-measurable contract ...*"[22]

25. It was not suggested that these issues was restricted to a limited number of claims, nor could it have been.

26. In its notice of dissatisfaction[23] the respondent recorded that it was dissatisfied with the determination (including but not limited to) that

> "*the determination that the Subcontract is re-measurable ...*"

27. It seems clear that the respondent appreciated that the interpretation of the contract to the effect that it was re-measurable was an interpretation for all purposes is.

28 There was another aspect which required the interpretation of the contract and that was the invocation by the respondent of certain procedural provisions[24] notably clauses 1.9, 4.27, 13 and 20.1 of the Particular Condition ("the Procedural Provisions") on the basis that they constituted a bar to the

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22 Replying Affidavit, p 110.
23 Annex C, p 56.
24 Annex B, paras 23 to 37, p 29-37

contractor's claims.[25] The applicant's contention was that, on a proper interpretation of the subcontract agreement, the procedural provisions did not apply to the subcontract. This was another "*general*" issue before the adjudicator.[26]

28. The adjudicator received full argument on this matter and decided that the procedural provisions do not apply to the subcontract agreement. This finding is summarised in paragraph 37 of the decision.[27]

29. In any case, the specific relief sought in the notice of motion[28] is simply that the respondent is to re-measure the work performed by the applicant and to make payment of what is found to be due. That is what the adjudicator had decided.

30. It seems clear that the interpretation of the contract required by the introduction of these two issues gave rise to the major debate before the adjudicator and required a great deal of his attention as emerges from his decision. Moreover, it is beyond dispute that a decision on these two issues was essential for the adjudication of the eight individual claims before the adjudicator. The decision on this score endures once and for all (unless revised in arbitration) certainly on the subcontract in its present form and on its present wording: it cannot change because a different claim is made.

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25 Replying Affidavit, para 4.3.1, p 108.
26 Replying Affidavit, para 4.3.4, p 109-110.
27 Annex B, p 37.
28 Paras 2 and 3, p 1-2.

31. It will not be open to the respondent to revisit these two issues in the event of further claims being made by the applicant in the future (at least until the decision had been revised).

32. I therefore conclude that the decision by the adjudicator is applicable, at least until it has been revised, to the whole contract.

33. As far as costs are concerned, I am satisfied that the applicant was entitled to employ two counsel. At the hearing only Mr Jordaan SC was present, but I was informed that his junior was involved in the preparations preceding the hearing. Insofar as two counsel were involved, the applicant is therefore entitled to such costs.

34. In the premises I make the following order:

    1. The respondent is ordered to forthwith give effect to the decision of the Dispute Adjudication Board handed down on 5 December 2012;

    2. The respondent is ordered to forthwith re-measure and pay the applicant's Interim Payment Certificate number 37 dated 25 January 2013;

    3. The respondent is ordered to forthwith re-measure and pay such further Interim Payment Certificates as the applicant may present from time to time in terms of the subcontract between the parties;

    4. The orders in paragraphs 2 and 3 above shall endure until such time, if at all, that the said decision of the Dispute Adjudication Board is revised in amicable settlement or an arbitral award;

4. The orders in paragraphs 2 and 3 above shall endure until such time, if at all, that the said decision of the Dispute Adjudication Board is revised in amicable settlement or an arbitral award;

5. The respondent shall pay interest a tempore morae on all amounts due to the applicant;

6. The respondent shall pay the applicant's costs of the application, including the costs of two counsel (where applicable).

DTvR DU PLESSIS: AJ
ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Adv. C Jordaan 011 895 9000 / 082 416 4914
Instructed by:	
On behalf of the Respondent:	Adv. BW Burman 011 291 8600 / 082 906 7017
Instructed by:	
Dates of Hearing:	29 April 2013
Date of Judgment:	03 May 2013