

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT

GAUTENG DIVISION,



OF SOUTH AFRICA

JOHANNESBURG

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

Date: **26th May 2023** Signature:

CASE NO: 003754/2022

DATE: 26TH MAY 2023

In the matter between:

SEVENTY-FIVE ON MAUDE (PTY) LIMITED

Appellant

and

**AVENG AFRICA (PTY) LIMITED t/a
AVENG GRINAKER-LTA**

Respondent

Neutral Citation: *Seventy-Five on Maude v Aveng Africa (3754/2022)* [2023]
ZAGPJHC 564 (26 May 2023)

Coram: Adams J

Heard: 22 May 2023

Delivered: 26 May 2023 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 26 May 2023.

Summary: Arbitral award – application to have award made an order of Court – award valid and binding – no challenge to the validity of the award – respondent opposing application on the basis that sum payable in terms of the award no longer due and payable – award amount extinguished by subsequent adjudication decision – also contended that, by virtue of set-off, the amounts owing to the applicant have been extinguished –

Arbitration award final and binding – unimpeachable and unassailable – subsequent adjudication decision – not final and still subject to challenge in arbitration – therefore, award can and should be made order of court – Court granting order sought.

ORDER

- (1) The arbitration award published by the arbitrator, retired Judge TD Cloete, on 29 March 2022, amended and signed on 5 May 2022, in the arbitration between Aveng Africa (Pty) Ltd t/a Aveng Grinaker-LTA and Seventy Five on Maude (Pty) Ltd, be and is hereby made an order of court.
 - (2) The respondent is ordered to pay the applicant:
 - (a) The amount of R23 642 336.13;
 - (b) VAT on the amount of R23 642 336.13 at 15%;
 - (c) Interest on the amount of R23 642 336.13 at the rate of 10.25% from 19 July 2019 to date of payment; and
 - (d) The costs of and incidental to the arbitration on the High Court tariff (party and party scale), including the costs of Senior and Junior Counsel, where so employed.
 - (3) The respondent shall pay the applicant's costs of the opposed application, including the costs of Senior Counsel.
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JUDGMENT

Adams J:

[1] On 1 December 2015 the applicant, as the employer, and the respondent, as the contractor, concluded a written contract ('the Contract') for the construction of the *Leonardo*, a multi-use high rise development in Sandton. The agreement concluded between the parties is the so called *JBCC Edition 6.1 Standard Form Agreement*, as amended by the parties, which regulated their

relationship – essentially one for the letting and hiring of work (*locatio conductio operis*). However, payment in terms of the contract does not take place at the end of the contract, but through a system in terms of which the works were periodically certified by the issuing of Interim Payment Certificates ('IPCs') and a Final Payment Certificate.

[2] The agreement provides that the 'Principal Agent shall regularly, by the due date, issue payment certificates to the contractor until and including the issue of the final payment certificate ...'. The IPC was to separately include *inter alia*: a fair estimate of the value of work executed; fair estimate of the value of materials and goods; Security adjustment; Contract price adjustment ('CPA'), if applicable; the gross amount certified; the value previously certified; amounts due to either party in the recovery statement, excluding interest and other non-taxable amounts; and importantly the net amount certified due to the contractor or the employer.

[3] The agreement also provides for the resolution of disputes in relation to the issue of IPCs, and the dispute resolution provisions envisage disputes to be referred first to adjudication and thereafter, as a final step, to arbitration. One such arbitration award, published by the arbitrator, retired Judge Cloete, on 5 May 2022, in terms of which the respondent was directed to repay to the applicant an amount of R23 642 336.13 ('R23 million'), is the subject of this opposed application. The respondent was obliged to repay to the applicant the R23m, which, according to the Arbitrator's findings, had been incorrectly ordered in the preceding adjudication to be paid to the respondent and which was actually paid to the respondent. The applicant seeks to make that arbitration award ('the award') an order of court. Importantly, the respondent does not dispute the validity of the award and it accepts liability for payment of the amount of R23 million as per the award. And ordinarily, the application to have the said arbitral award made an order of court should be granted.

[4] The respondent does, however, oppose the application on the basis that the applicant is not entitled to an order for payment of the said amount of R23 million because the said sum is no longer due and payable, so it is contended

by the respondent, for one of the following three reasons: (a) it has already been accounted for in a corrected interim payment certificate (IPC50) in favour of the respondent, in terms of which a total sum of R417 257 758.01 ('R417 million') is due by the applicant to the respondent; (b) by virtue of set-off, the amounts owing to the applicant have been extinguished; or (c) the payment of the award should be dealt with in the Final Account and in the Final Payment Certificate process, as provided for in the agreement.

[5] The issues to be considered in the application are therefore whether the grounds of opposition raised by the respondent are valid and whether they preclude the applicant from obtaining an order to have the arbitral award made an order of court. The respondent's opposition to the applicant's application is based on the facts set out in the paragraphs which follow and which are, by and large, common cause.

[6] The agreement between the parties was terminated on 6 January 2020. The parties are in dispute about whether the termination was at the instance of the applicant or at the instance of the respondent. That matter and the related disputes have been referred to arbitration before retired Justice Southwood.

[7] On 15 December 2021 – almost two years after the cancellation of the agreement – applicant claimed from the respondent damages, which it allegedly suffered as a result of the termination of the contract. The applicant accordingly instructed the Principal Agent to make provision in a recovery statement accompanying an IPC for the recovery of such damages. The Principal Agent then issued IPC50 on 28 December 2021. This IPC, after the completion of the adjudication process before Adv Trisk SC on 24 June 2022, reflected that an amount of approximately R417 million was payable by the applicant to the respondent. By 24 June 2022, the initial IPC by the Principal Agent, certified an amount of R250 million owing to the applicant by the respondent, had been 'corrected' by the Adjudicator (Adv Trisk SC) to an IPC which certified that an amount of approximately R417 million was owing by the applicant to the respondent.

[8] In his decision, Adv Trisk SC set out what the net effect of the corrected IPC50 was when the three previous IPCs (47 to 49 which were unpaid) were taken into account. The reconciliation showed an amount of R81 429 911.93 payable to the respondent by the applicant. In coming to the amount set out in the IPC50, the adjudicator in the dispute relating to IPC50, accounted for the steel escalation amount in calculating the amount due to the respondent, that being that he took cognisance of the fact that it had already been deducted in the previous three IPCS (47,48 and 49).

[9] The applicant has disputed the decision by Adv Trisk SC and that matter has been referred to arbitration before Adv Eloff SC. Furthermore, there is an application issued out of this Court to enforce Adv Trisk SC's decision in the adjudication. The respondent contends that the amount certified in the IPC50 (as corrected by Adv Trisk SC) in favour of the respondent took into account the R23 million awarded to the applicant by the Arbitrator, retired Judge Cloete, and is part of a decision in the adjudication, which remains binding on the applicant unless set aside in the arbitration before Adv Eloff SC.

[10] The respondent therefore submits that the award should not be made an Order of Court as the amount thereof is no longer due to the applicant, the latter's entitlement to same having been superseded by events, which had the effect of extinguishing that liability. And it is immaterial, so the argument on behalf of the respondent continues, that the decision by the Adjudicator is presently the subject of an arbitration. The contention by the respondent is that the IPC50, as corrected by the Adjudicator, is a liquid document and they rely for that contention on clause 25.7 of the Agreement, which states as follows:

'25.7 The [applicant] shall pay the [respondent] the amount certified in an issued payment certificate within fourteen (14) days of the date for issue of the payment certificate, including default and/or compensatory interest.'

[11] Reliance is also placed by the respondent on clause 30.6.3 of the Agreement which provides that:

'30.6.3 A determination given by the adjudicator shall be immediately binding upon, and implemented by the parties.'

[12] The point made by the respondent is simply that, if regard is had to the wording of the above provisions of the agreement, which relate to the adjudication of disputes, an intention is reflected by the parties in their agreement that effect be given immediately to the adjudicator's decision. In that regard, Mr Reyneke SC, who appeared on behalf of the respondent with Mr Stylianou, referred me to *Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd*¹, in which this Court (per Mokgoathleng J), in dealing with a clause in similar terms as the clauses under consideration *in casu*, concluded that the Adjudicator's decision was enforceable, despite a future arbitration. In similar vein, it was also held by this Court (per Spilg J) in *Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd JV v Bombela Civils JV (Pty) Ltd*² as follows:

'The [Adjudicator's] decision is not final but the obligation to make payment or other performance under it is. ...

The key to comprehending the intention and purpose of the [adjudication] process is that neither payment nor performance can be withheld when the parties are in dispute.'

[13] In sum, the contention by the respondent is that the Adjudicator's decision is binding unless and until varied, or overturned, by an arbitration award. I agree. A court has no appellate jurisdiction over adjudicators even in circumstances where an adjudicator is demonstrably mistaken. It should be only in rare circumstances that the courts will interfere with the decision of an Adjudicator. In this matter, there can be no doubt that the parties expressed in the clearest of terms that they will comply with the Adjudicator's decision made in terms of his mandate and make immediate payment in terms of the agreement.

[14] The point is simply that the scheme of the agreement between the parties envisages that an Adjudicator's ruling that one party shall pay to the other a certain amount of money shall have the effect that that amount of money is to be regarded as having been paid to the party in whose favour the decision is made. In other words, as soon as the Adjudicator's decision is made it becomes immediately enforceable – *in casu*, that would in effect mean that

¹ *Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd* (41109/09) [2010] ZAGPJHC 75 (9 March 2010);

² *Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd JV v Bombela Civils JV (Pty) Ltd* 2014 JDR 1824 (GJ), at paras 11 and 12;

R81 million is in the proverbial back pocket of the respondent because of the ruling by the Adjudicator and that is so despite same being subject to arbitration proceedings. It bears emphasising that, until such time as the decision of the Adjudicator is reversed in arbitration, it is contractually binding on the applicant.

[15] The question, however, is whether this then means that the applicant can and should be precluded, in the circumstances, from obtaining a court order, which in effect would direct the respondent to pay the R23 million, which, on the basis of the binding Adjudicator's ruling, is not due to the applicant. Put another way, the question is whether the respondent can be compelled to pay an amount as per an Arbitrator's award, which cannot and will not change, because of an Adjudicator's ruling, which may or may not be confirmed in the arbitration proceedings?

[16] The foregoing questions are to be considered also in the context of set-off. The amount owed to the respondent in terms of and pursuant to the IPC50 (as corrected by the Adjudicator, Adv Trisk SC) is more than double the amount of R23 million claimed by the applicant.

[17] In *Siltek Holdings (Pty) Ltd (in liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd*³, the Supreme Court of Appeal explained the principle of set-off as follows:

'[6] In our law set-off takes place if two parties owe each other liquidated debts which are payable. In essence set-off constitutes a form of payment by one party to the other. In *Schierhout v Union Government* 1926 AD 286, Innes CJ explained set-off in the following terms:

"The doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognised principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the court – as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together." (My emphasis).

³ *Siltek Holdings (Pty) Ltd (in liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd* [2009] 1 All SA 571 (SCA);

[18] That brings me back to the questions postulated above. And if one accepts, on the basis of the doctrine of 'set-off', that, as things stand, the R23 million indebtedness of the respondent to the applicant had been extinguished by the latter's debt owed to the former, does it mean that the applicant is not entitled to have the award made an order of Court?

[19] In my view, the answer to this question lies in section 31 of the Arbitration Act⁴ ('the Act'), which provides, in the relevant part, as follows: –

'31 **Award may be made an order of court**

- (1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
- (2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
- (3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.'

[20] In the present matter it is common cause that the arbitral award is valid and binding. The respondent accepts the validity of the award, and, in the normal course of events, there would have been no obstacle to the award being made an Order of Court. Moreover, all of the requirements for an arbitral award to be made an order of court have been established.

[21] In my view, what is instructive in this matter is the fact that, unlike the Arbitral award of retired Judge Cloete, which is final, unimpeachable and unassailable, the Adjudicator's decision in IPC50 is pending arbitration. It is possible – and I put it no higher than that – that the Adjudicator's decision will be overturned in the arbitration proceedings, in which case the applicant would at the very least then become entitled to have the Arbitrator's award of Judge Cloete made an Order of Court. The point is simply that the arbitral award, because there is no objection to its validity, stands and will remain in force indefinitely. And for this reason alone, no harm will be done by it being made an order of court. The same cannot be said of the Adjudicator's decision, the validity of which is ardently disputed by the applicant and which is the subject of a pending arbitration.

⁴ the Arbitration Act, Act 42 of 1965;

[22] To sum up, even if it is accepted that the amount payable by the applicant to the respondent in terms of corrected IPC50, as ordered by the Adjudicator, is immediately payable, the applicant is not precluded from obtaining an order making the arbitral award an order of court. On first principles, and having regard to the provisions of the Arbitration Act, the applicant is entitled to such an order. That position is not displaced in any way by a subsequent Adjudicator's ruling, which has the effect of extinguishing the debt due pursuant to the award, which remains effective. The defences raised by the respondent, although not a bar to the court making the award an order of court, may very well be a basis on which to stay execution of such an order. It can also possibly form the basis for a separate court order, which may have the effect of negating the order sought *in casu* by the applicant.

[23] There is, in my view, another reason why the arbitral award should be made an Order of Court and that relates to the fact that the award made provision for payment by the respondent of interests and the costs of the arbitration. These are sums which require quantification and such quantification should be underpinned by a court order. It is therefore not as simple as submitted by the respondent that the amount of the award should simply be set off against the value of IPC50 (as corrected).

[24] The applicant is therefore entitled to the relief claimed in this application.

Conclusion and Costs of Application

[25] For all of these reasons, the applicant's application must succeed and the arbitral award should be made an order of court.

[26] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*⁵. There are no grounds in this case to depart from the ordinary rule that costs should follow the result. I therefore intend granting costs in favour of the applicant against the respondent. The complexity of the matter does, in my view, warrant costs to include the costs of two counsel, with one being Senior Counsel (where so employed).

⁵ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

Order

[27] In the result, the following order is made: -

- (1) The arbitration award published by the arbitrator, retired Judge TD Cloete, on 29 March 2022, amended and signed on 5 May 2022, in the arbitration between Aveng Africa (Pty) Ltd t/a Aveng Grinaker-LTA and Seventy Five on Maude (Pty) Ltd, be and is hereby made an order of court.
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 - (a) The amount of R23 642 336.13;
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 - (c) Interest on the amount of R23 642 336.13 at the rate of 10.25% from 19 July 2019 to date of payment; and
 - (d) The costs of and incidental to the arbitration on the High Court tariff (party and party scale), including the costs of Senior and Junior Counsel, where so employed.
- (3) The respondent shall pay the applicant's costs of the opposed application, including the costs of Senior Counsel.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	22 nd May 2023
JUDGMENT DATE:	26 th May 2023 – judgment handed down electronically
FOR THE APPLICANT:	Adv B W Burman SC
INSTRUCTED BY:	Tiefenthaler Attorneys Incorporated, Johannesburg
FOR THE RESPONDENT:	Adv Reyneke SC, together with Advocate X Stylianou
INSTRUCTED BY:	Pinsent Masons South Africa LLP, Sandton