HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable
Not of interest to other Judges

CASE NO: 68613/2016

22/12/17

ZAMBLI/MAGODA CONSTRUCTION JOINT VENTURE Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR INFRASTRUCTURE DEVELOPMENT, GAUTENG PROVINCE First Respondent

TERRY MAHON Second Respondent

ORDER

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1. The decision by the second respondent dated 25 April 2016 in terms of which the applicant's claim was dismissed, is reviewed and set aside;

2. The dispute between the applicant and the first respondent is referred back for adjudication by a new adjudicator to be agreed upon by the parties within 30 (thirty) days of this order;

3. Should the parties fail to agree on a new adjudicator as set out in paragraph 2 above, the applicant is granted leave to institute its action in this court against the first respondent within 30 days from the date referred to in paragraph 2 above;

4. The first respondent is ordered to pay the costs of the application.

JUDGMENT

MAKGOKA, J

Introduction

[1] The applicant, Zambli-Magoda Construction Joint Venture, comprises SMADA Construction (Pty) Ltd, previously known as Zambli 216 (Pty) Ltd, and Magoda Construction CC. It seeks an order reviewing and setting aside a decision of the second respondent, Mr Terry Mahon, a practising attorney who acted as an adjudicator in a dispute involving it and the first respondent, the member of the executive council for Infrastructure Development, Gauteng Province.

[2] Upon the setting aside of the decision, the joint venture seeks an order that the dispute be referred back for determination by a new adjudicator. The relief sought by the joint venture is opposed by the first respondent. The second respondent, as is customary, does not oppose the application and abides the decision of this court. For the sake of convenience, I shall refer to the first respondent simply as 'the respondent'.

Factual background

The main agreement

[3] On 3 December 2013 the MEC advertised a tender for certain construction and engineering works, styled 'Proposed New Tshwane Tolab (Phase 1).' The tender was for over R11,4 million. The applicant submitted a bid, which was accepted by the respondent. As a result of the award of the tender, the applicant and the respondent concluded a written agreement on 25 February 2014. However, subsequently the respondent decided not to proceed with the project. In consequence, the agreement concluded between the parties was terminated. A dispute arose between the parties in respect of the applicant's claim for damages.

The appointment of the adjudicator

[4] On 19 August 2015 a meeting between the parties was held at the offices of the adjudicator. During that meeting, an agreement was signed appointing the

adjudicator. The agreement is titled 'Adjudicator's Contract – Form of Agreement.' The applicant, the respondent and the adjudicator are reflected as the parties to the agreement, and the agreement was signed on behalf of the parties and by the adjudicator. Paragraphs 1 and 2 of the agreement read as follows:

'1. The parties appoint the adjudicator in accordance with the conditions of [the] contract and contract data attached to this agreement.

2. The adjudicator accepts this appointment and undertakes to carry out the adjudicator's duties as described in the conditions of [the] contract.'

In the contract data attached to the agreement, it is stated among others, that the 'contract between the parties is: New Tshwane Tolab (Phase 1) 120/11/2013.'

[5] The minutes of that meeting, which were also signed on behalf of the parties and by the adjudicator, reflect that the following issues were agreed upon:

(a) the appointment of the adjudicator;

(b) the jurisdiction of the adjudicator (it was agreed that the adjudicator 'did have jurisdiction to deal with the matter.');

(c) the procedure for filing of the parties' respective submissions and a time-table for the dates of hearing and the decision of the adjudicator;

(d) the adjudicator's fees; and

(e) mode of delivery of the parties' submissions.

The adjudication

[6] The adjudication took place on 14 April 2016. It seems to be common cause that the adjudicator was required to make a decision in respect of the claim by the applicant for payment of the tender amount of R11 468 086.44, interest and costs. Counsel for the joint venture handed up the applicant's stated case, the respondent's plea thereto and the applicant's replication. In addition, a bundle of documents was handed up by counsel for the applicant to be used in the adjudication, without objection. No evidence was adduced during the adjudication process.

The adjudicator's decision

[7] On 12 May 2016[1] the adjudicator handed down his decision. In paragraph 9 of the decision, it is stated that two preliminary points were raised on behalf of the respondent. First, that there was no dispute to be referred due to the fact that 'a settlement agreement had been concluded.' Second, that the applicant had 'failed to comply with the provisions of clause W1.3 [of the main agreement] which has resulted in the claim becoming time barred'. The adjudicator dismissed the first point but upheld the second on the basis that clause W1.3 of the agreement had not been complied with. According to the adjudicator:

[1] The decision is marked 25 April 2016. Despite this date, it appears that it was only handed down on 12 May 2016, for reasons which are not relevant to this application. However, nothing turns on either of the two dates, for the mere reason that on either date, the notice of dissatisfaction within the four-week period, provided for in the agreement, has not been given.

'[W1.3] is a condition precedent to the adjudication process. In part one of the contract data which forms part of the contract, provision is made for the appointment of "the project manager". This part of the contract data was never completed by the parties and at the hearing it became apparent that a project manager had never been appointed. In my view without a project manager having been appointed there is no entitlement by either party to refer a dispute to adjudication and under the circumstances I do not have jurisdiction to decide the dispute.'

[8] The adjudicator rejected the submission on behalf of the applicant that the respondent had waived any right to dispute the adjudicator's jurisdiction by virtue of the agreement reached on 19 August 2015, in terms of which it was agreed that the adjudicator did have jurisdiction. The adjudicator held that the respondent could not have waived its right because at the time of the meeting, the applicant 'had not as yet delivered its referral.'

[9] The adjudicator proceeded to consider the applicant's claim in the event his conclusion on jurisdiction was incorrect. Here, he dismissed the applicant's claim on the basis that the main agreement between the parties had not been validly terminated. He made reference to the termination clause of the agreement which sets out the procedure for termination of the agreement, and concluded that such had not been complied with.

[10] The adjudicator rejected the submission advanced on behalf of the applicant that the termination clause could not properly be interpreted as ousting the jurisdiction of the court. He pointed specifically to clause 90.2 which provides that the applicant 'may terminate only for a reason identified in the termination table.' The adjudicator concluded:

'I therefore conclude that the contract was not terminated validly by the contractor [the applicant] and that on the basis of the submissions made to me the contractor is neither entitled to damages or to payment in terms of clause 93 of the contract.'

The applicant's complaint

[11] The applicant is aggrieved by the adjudicator's findings on jurisdiction and dismissal of its claim. It was contended that the adjudicator committed a gross irregularity and misdirected himself by arriving at the conclusion on jurisdiction despite the parties' agreement that he has jurisdiction. Furthermore, it was submitted that, having concluded that he did not have jurisdiction, the adjudicator misdirected himself by considering the substance of the applicant's claim and dismissing it, thereby 'acting as though he had jurisdiction.'

Preliminary point

[12] I first have to dispose of a preliminary point raised by the respondent. The respondent contends that this court does not have jurisdiction. This is so, asserts the

respondent, because the applicant's dissatisfaction with the adjudicator's decision was not dealt with in the manner set out in the main agreement. In this regard, reliance is placed on two clauses of that agreement: clauses W1.3(10) and Clause W1.4(2). Clause W1.3(10) provides:

'The adjudicator's decision is binding on the parties unless and until revised by the tribunal[2] and is enforceable as a matter of contractual obligation between the parties and not as an arbitration award. The adjudicator's decision is final and binding if neither party has notified the other within the times required by this contract that he is dissatisfied with decision of the adjudicator and intends to refer the matter to the tribunal.'

[13] Clause W1.4(2), on the other hand, provides a time period within which a party may refer a decision of an adjudicator to a tribunal. It provides that a party 'may not refer a dispute to the tribunal unless this notification is given within four weeks of notification of the adjudicator's decision.' The adjudicator's decision was given on 12 May 2016. Accordingly, the four-week period within which a notice of dissatisfaction was supposed to be given expired, at the latest, on 13 June 2016. It is common cause that no notification of dissatisfaction was given by the applicant at all, whether within or after the period of four weeks, prior to the launching of the present application on 1 September 2016.

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[2] It is common cause between the parties that in terms of the contract data of the agreement, the tribunal is described as a South African High Court.

[14] The respondent contends, in the circumstances, that in terms of clause W1.3(10) the adjudicator's decision became final and binding upon the expiry of the four-week period, and the joint venture is therefore barred from approaching this court. Accordingly, it was submitted on behalf of the respondent, that this court does not have jurisdiction to hear the matter.

[15] As a prelude to considering the respondent's preliminary point, I make the following observation. Both the adjudicator and the respondent proceed from the assumption that the main agreement was in esse. This is clearly a wrong premise. It was common cause between the parties that the agreement was terminated when the respondent decided not to proceed with the project.[3] Therefore, its provisions, including those relied upon by the respondent, were no longer enforceable between the parties. In both written and oral submissions, counsel for the applicant correctly submitted as much.

[16] At law, the decision by the respondent not to proceed with the signed agreement amounted to a repudiation of the main agreement, which the applicant accepted. At that point, the agreement was terminated. As a natural consequence of the termination of the agreement, the question of the applicant's damages loomed

[3] See in this regard, paragraph 7.12 of the applicant's founding affidavit, read with paragraph 9.11 of the respondent's answering affidavit.

large. The meeting on 19 August 2015 was been convened solely to discuss that aspect. It bears emphasis that the reason why the parties concluded the adjudication agreement was that the main agreement had been terminated.

[17] The minutes of that meeting, read with the adjudicator's formulation of what the dispute before him was, support this view. In fact, the adjudicator himself acknowledged that the main agreement had been terminated. His only concern was that, in his view, it had not been validity terminated. He then embarked on an exercise to find support for this view. Having concluded that there was no valid termination, he proceeded on the footing that the parties were bound by the provisions of the main agreement, including the appointment of a project manager before referral to adjudication.

[18] With respect to the adjudicator, that exercise was unnecessary, and it led him astray. It was certainly not within his mandate to make that determination. In any event, to expect the applicant to have appointed a project manager in the face of termination of the agreement by the respondent seems untenable. The repudiation of the agreement made this impossible.

[19] It seems to me that the adjudicator misconstrued his mandate, and the factual background that gave rise to the referral of the dispute to him. I say this because in

his reasons he mentioned that in terms of the agreement, the applicant was only entitled to terminate the agreement under certain circumstances, and that because those circumstances were not present, the applicant was not entitled to terminate the agreement.

[20] But with respect to the adjudicator, the applicant sought no such thing. The applicant was an innocent party against whom a validly concluded agreement was unlawfully terminated by the respondent. As a result, it claimed damages from the respondent, the determination of which was referred to the adjudicator. That, and only that, was referred to him to determine, and nothing else.

[21] The entire substratum of the respondent's preliminary point, rests on the assumption that the main agreement is in esse. Having have demonstrated that it is not, the preliminary point falls to fail. Even if this conclusion is wrong, and it be that the parties are bound by the provisions of the terminated main agreement, the applicant has sought condonation for the late referral of the adjudicator's decision to this court. That application was unopposed. It is granted, to the extent it is necessary.

The adjudicator's jurisdiction

[22] I turn now to the adjudicator's conclusion that he did not have jurisdiction. In this regard, it was submitted on behalf of the applicant that the arbitrator misdirected

himself by ignoring the agreement of the parties in the minutes of the meeting of 19 August 2015 that he had jurisdiction to determine the issue referred to him. On the other hand, in the written submissions on behalf of the respondent, it was asserted that the agreement 'contemplated and empowered [the adjudicator] to determine whether or not he had jurisdiction to decide a particular point.'

It was further submitted that by accepting that the adjudicator had the required jurisdiction 'to hear the parties' the respondent did not waive its right 'in respect of the arguing of jurisdiction of the actual dispute.'

[23] I have difficulty in accepting any of these contentions. In the first place, the agreement was not that the adjudicator had jurisdiction to 'hear the parties.' It was agreed that he had jurisdiction to 'deal with the matter.' The 'matter', of course, was whether the applicant was entitled to damages in the wake of the termination of the main agreement. What is more, there is no ambiguity in the wording of the clause agreeing to the jurisdiction of the adjudicator. I am therefore unable to conclude that the clause does not mean what it says.

[24] The sum total of these considerations is that the adjudicator was not entitled to ignore what was agreed by the parties at the meeting held on 19 August 2015, in which it was pertinently and expressly agreed that he had jurisdiction to deal with

the matter. It was not open to him to revisit that issue. The parties had agreed on it, and their agreement should have been given effect to. The parties had clearly waived their rights to contend the contrary. This must be so, lest the agreement reached on 19 August 2015 be rendered nugatory and its apparent purpose is undermined. That agreement, like any other document, must be read in a sensible or business-like manner.[4]

[25] All what was required of the adjudicator was for him to make a decision on the issue referred to him: whether the applicant was entitled to damages pursuant to the termination of the main agreement, which issue he correctly identified in paragraph 7 of his decision. He was confined to decide only the matter referred to in the 'pleadings' filed of record. Therefore, it was not open to him to go beyond the issue referred to him for adjudication. By doing so, and embarking on an exercise to determine his own jurisdiction in the circumstances where the issue had been agreed upon, the adjudicator committed a gross procedural irregularity, and materially misdirected himself.

The termination of the agreement

[4] See *Natal Joint Municipality Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA) para 18; *Cloete Murray N.O. & another v Firstrand Bank Ltd* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 30.

[26] Lastly, the adjudicator dismissed the applicant's claim, and found that the applicant was not entitled to damages, on the basis that the main agreement was not validly terminated. But he was not asked to make such a determination. As a matter of fact, and as stated already, that main agreement had been terminated, was common cause between the parties. The manner in which it was terminated and whether the termination was a valid one, were plainly not an issue, and certainly not for him to decide. The adjudicator was therefore incorrect and misdirected himself in finding that the main agreement was not terminated validly, and in dismissing the applicant's claim on that basis.

[27] In any event, I doubt whether it was at all permissible for the adjudicator, having concluded that he did not have jurisdiction, to proceed to act as if he had, by considering the merits of the application. If he did not have jurisdiction, he should have simply referred the dispute back, to enable the parties to comply with what the adjudicator considered to be conditions precedent or jurisdictional factors for the referral of the dispute for adjudication.

Summary

[28] To sum up, the respondent's preliminary point that this court lacks jurisdiction to hear the matter has no merit, as it is based on the provisions of a terminated agreement, which is no longer binding on the parties. With regard to the

adjudicator's conclusion that he did not have jurisdiction to decide the dispute referred to him, he was clearly wrong as the parties' agreement of 19 August 2015 is clear that he had jurisdiction. He was not entitled to determine his own jurisdiction. His conclusion to dismiss the applicant's claim was also predicted on a misconception of his mandate. As pointed out, he should not have concerned himself with the merits of the applicant's claim in the light of his finding on jurisdiction. The application should therefore succeed. Costs should follow the event.

[29] Given these conclusions, and in particular that it was common cause that the main agreement had been terminated, it is not necessary to consider whether the agreement of 19 August 2015 constituted a novation of the main agreement.

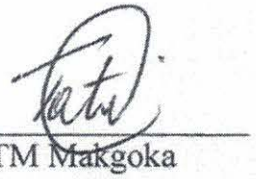
Order

[30] In the circumstances the following order is made:

1. The decision by the second respondent dated 25 April 2016 in terms of which the applicant's claim was dismissed, is reviewed and set aside;
2. The dispute between the applicant and the first respondent is referred back for adjudication by a new adjudicator to be agreed upon by the parties within 30 (thirty) days of this order;

3. Should the parties fail to agree on a new adjudicator as set out in paragraph 2 above, the applicant is granted leave to institute its action in this court against the first respondent within 30 days from the date referred to in paragraph 2 above;

4. The first respondent is ordered to pay the costs of the application.



TM Makgoka
Judge of the High Court

APPEARANCES:

For the Applicant:	DA Smith SC Instructed by: Waldick Jansen Van Rensburg Attorney Inc., Pretoria
For the First Respondent:	T Mnyandu Instructed by: Mncedisi Ndlovu & Sedumedi Attorneys, Johannesburg.

No appearance for the Second Respondent