THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 528/12
Reportable

In the matter between:

RADON PROJECTS (PTY) LTD **Appellant**

and

N V PROPERTIES (PTY) LTD **First Respondent**

GARY STEPHEN MYBURGH **Second Respondent**

Neutral citation:	*Radon Projects v N V Properties & another* (528/12) [2013] ZASCA 83 (31 May 2013)
Coram:	NUGENT, LEACH and PILLAY JJA and ERASMUS and SALDULKER AJJA
Heard:	**14 MAY 2013**
Delivered:	**31 MAY 2013**
Summary:	**Dispute resolution – Principal Building Agreement of the Joint Building Contracts Committee 4th ed March 2004 – jurisdiction of arbitrator – duty of arbitrator when jurisdictional objection taken.**

ORDER

On appeal from Eastern Cape High Court, Grahamstown (Da Silva AJ sitting as court of first instance).

The appeal is upheld with costs. The order of the court below is set aside and substituted with an order dismissing the application with costs. The costs in each case are to include the costs of two counsel where two counsel were employed.

JUDGMENT

NUGENT JA (LEACH and PILLAY JJA and ERASMUS and SALDULKER AJJA CONCURRING)

[1] Large construction projects provide considerable scope for disputes of various kinds to arise, both in the course of executing the works and after the works have been completed. Most construction contracts make provision for their resolution. This appeal concerns the manner in which disputes are to be resolved under the Principal Building Agreement of the Joint Building Contracts Committee (JBCC) 4th ed March 2004.

[2] It arises from a contract concluded in that form between NV Properties (Pty) Ltd (the first respondent, which I will refer to as the employer) and Radon Projects (Pty) Ltd (the appellant, which I will refer

to as the contractor) under which the contractor undertook to construct for the employer what was to be known as the East London Convention Centre. The contractor has asserted various claims against the employer. The employer disputes liability for the claims. At the instance of the contractor an arbitrator was appointed to resolve the disputes. Contending that the arbitrator had no jurisdiction to consider and rule upon the bulk of the claims the employer applied to the Eastern Cape High Court for an order to that effect. Da Silva AJ granted the order and the contractor now appeals with the leave of that court.

[3] Construction contracts most often require disputes to be resolved by arbitration, but at the same time postpone arbitration until the works have been completed, so as to avoid interruption. Earlier contracts in common use made an exception in certain limited circumstances. That was the case in Britain under the JCT[1] Standard Form of Building Agreement (1980 edition),[2] and in this country under the General Conditions of Contract 1982 for use in connection with Works of Civil Engineering Construction (Fifth Edition).[3] In both cases an arbitration could not be opened until after completion of the works, except on limited issues that, by their nature, demanded earlier resolution, in particular disputes concerning payment certificates.

[4] It has now become common internationally – in some countries by legislation[4] – for disputes to be resolved provisionally by adjudication. In

[1]Joint Contracts Tribunal.
[2]Clause 41, in *Keating on Building Contracts* 5 ed (1991) by Sir Anthony May, at 673-5.
[3]Clause 69(3), in P C Loots *Engineering and Construction Law* (1985) at 338.
[4]It is also provided for in the 2011 edition of the JCT Standard Form of Building Agreement. See clause 9, in *Keating on Building Contracts* 9 ed (2012) by Stephen Furst and Sir Vivian Ramsey para 20-398.

Macob Civil Engineering Ltd v Morrison Construction Ltd [5] 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*[6] observe that under New Zealand construction legislation[7] adjudication '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'.[8]

[6] In the present contract the resolution of disputes is provided for in clause 40 as follows:

'40.1 Should there be any disagreement between the employer or his agents on the one hand and the contractor on the other arising out of or concerning this agreement, the contractor may request the principal agent to determine such disagreement by a written decision to both parties. On submission of such a request a disagreement in respect of the issues detailed therein shall be deemed to exist.

40.2 The principal agent shall give a decision specifically in terms of 40.1 to the employer and the contractor within ten (10) working days of receipt of such a request. Such decision shall be final and binding on the parties unless either party disputes the same in terms of [40.3]

40.3 Where there is no principal agent or should the principal agent fail to give a written decision within ten (10) working days or either party disputes the decision in

[5] *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] B.L.R. 93 at 97, cited in *Keating on Building Contracts* 9 ed, para 18-018.
[6] *Hudson's Building and Construction Contracts* 12 ed (2010) eds Nicholas Dennys QC, Mark Raeside QC and Robert Clay.
[7] Construction Contracts Act 2002.
[8] At 1375, citing *Concrete Structures (NZ) Ltd v Palmer* [2006] NZHC 342.

terms of 40.2 by notice to the other and the principal agent within twenty (20) working days of receipt thereof a dispute shall be deemed to exist

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

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 …

40.5 The dispute referred to mediation in terms of 40.4.1, adjudication in terms of 40.4.2 or arbitration in terms of 40.4.3 shall be:

40.5.1 Dealt with in terms of the JBCC Dispute Resolution Procedures

40.5.2 Held in abeyance over an annual holiday period where such period is noted in the schedule

40.6 Reference of the dispute for resolution in terms of 40.4 shall not relieve the parties from liability for the due and timeous performance of their obligations

40.7 The cancellation of this agreement shall not affect the validity of this clause 40.0.'

[7] The Adjudication Rules issued by the JBCC for use with the contract describe adjudication as 'an accelerated form of dispute resolution in which a neutral third party determines the dispute as an expert and not as an arbitrator and whose determination is binding unless and until varied or overturned by an arbitration award'. An adjudicator is given wide inquisitorial powers that enable disputes to be resolved summarily and expeditiously. He is empowered, for example, to determine the dispute on the basis alone of the documents submitted to him by the parties, or on the basis alone of an inspection of the works. He may make use of his own specialist knowledge, he may open up and review any determination or certificate or valuation related to the dispute, and generally, he may 'adopt the most cost- and time-effective procedure

consistent with fairness to determine the dispute'. A determination by the adjudicator is 'binding upon the parties unless and until such determination is overturned or varied in whole or in part by arbitration in terms of clause 40.5 of the Agreement'.

[8] When read together with the Rules, I think it is plain that, in keeping with modern practice internationally, adjudication under clause 40 is designed as a measure for the summary and interim resolution of disputes, subject to their final resolution by arbitration where appropriate. The effect of clause 40, properly construed, is that the first port of call for a contractor, where disagreement arises with the employer, is the principal agent.[9] The clause does not purport to limit the time within which the principal agent may be called upon to do so. But once he has been called upon he must resolve the disagreement within ten days. If he fails to do so, or if either party disputes his decision within 20 days, a dispute is deemed to exist. If he gives a decision, and it is not disputed within that time, then his decision becomes final and binding.

[9] Once a dispute is deemed to exist either party may (but not must) submit the dispute for independent resolution. Once again the clause does not purport to prescribe a time within which that must be done. But if a party wants it resolved before practical completion, it must be submitted to adjudication. After practical completion it must be resolved by arbitration. (I leave aside the opportunity for mediation by agreement. Needless to say, it is also open to the parties, after practical completion, to agree to adjudication.) An adjudicator's determination is clearly not

[9]The JCT Standard Form of Building Agreement does not require that preliminary step. As pointed out by P C Loots, above, at 341, in relation to the comparable requirement in the General Conditions of Contract 1982, 'in the great majority of cases the reference to the engineer [now the principal agent] is little more than an irritating and time-wasting formality, since his decision is likely to be a foregone conclusion, having previously been indicated to the contractor or employer when the claim was first advanced and the dispute arose'.

exhaustive of the dispute. After practical completion the dispute might be submitted again to arbitration for final resolution. Whether a dispute is to be resolved by adjudication or by arbitration, in other words, depends upon when the dispute is submitted for resolution, and not upon the nature or genesis of the dispute.

[10] The contract defines 'practical completion' of the works as 'the stage of completion where, in the opinion of the principal agent, completion of the works has substantially been reached and can effectively be used for the purposes intended'. It is a significant event because failure to reach practical completion by the agreed date renders the contractor liable to penalties.

[11] The contract recognises that delays might occur in the course of construction for any number of reasons. Where the delay occurs through no fault of the contractor then generally the contractor will be entitled to revision of the date for practical completion, and in some cases also to adjustment of the contract value. Delays that give rise to those entitlements are listed in clauses 29.1 to 29.3 of the contract but need no elaboration for present purposes.

[12] If the contractor anticipates such a delay occurring he is required by clauses 29.4 to 29.6 to give the principal agent reasonable and timeous notice of the anticipated delay, to take steps to avoid or reduce the delay, and to give notice to the principal agent, within a stipulated time, of his intention to claim a revision, failing which the principal agent need not consider the claim. The contractor must also submit any such claim to the principal agent, incorporating certain specified information, within 60 days of the delay ceasing, failing which the claim is forfeited.

[13] Within 20 working days of receiving such a claim the principal agent is required by clause 29.7 to

‘29.7.1 Grant, reduce or refuse the period claimed

29.7.2 Determine the revised date for practical completion in relation to the working days granted

29.7.3 Identify each circumstance and relevant subclause for each revision granted or give reasons for amending or refusing such claim’.

If the principal agent fails to act in accordance with that clause the claim is deemed to have been refused (clause 29.8).

[14] The agreed date for practical completion in this case was 17 October 2008 and the contractor was liable to a penalty of R35 000 for every day thereafter until practical completion was reached.

[15] The present dispute concerns claims by the contractor for revisions to the date for practical completion (and related revisions) in consequence of delay. During the course of construction a number of such claims were submitted to the principal agent under clause 29. Those that were granted, in whole or in part, extended the date for practical completion to 9 March 2009. The project was brought to practical completion only on 14 December 2009, in consequence of which the contractor incurred penalties amounting to a little more than R6 million.

[16] After practical completion the contractor submitted to the principal agent what was called a ‘consolidated claim’ – a consolidation of a number of individual claims – for revisions of the contract on account of delay. According to the contractor these were claims made in the course of construction, but revised in the light of information that subsequently

came to hand. The principal agent failed to respond to the consolidated claim and, says the contractor, it was therefore deemed to have been refused, as contemplated by clause 29.8. On 4 August 2010 the contractor called upon the principal agent to ‘determine the disagreement’ (with regard to the validity of the claims) under clause 40.1, which the principal agent failed to do. At the request of the contractor the second respondent (who has played no role in the proceedings) was then appointed by the Association of Arbitrators to resolve the dispute.

[17] The contractor subsequently abandoned some of the claims. Those that it pursues were pleaded in a statement of claim. In addition to claims for revision in consequence of delay, the contractor pleaded three other claims. It has given notice of its intention to abandon one of those claims, and the other two, which are claims for interest, are of no consequence for present purposes.

[18] I have found the formulation of the objections to the jurisdiction of the arbitrator in the founding affidavit to be rather confusing but on close analysis the objections really come down to two. Both are founded upon the employer’s contention that the contractor is purporting to revive claims that were disposed of finally in the course of construction.

[19] The employer alleges that most of the claims now being advanced are claims that were submitted to the principal agent in the course of construction and were refused, whereupon the contractor called upon the principal agent to resolve the disagreement under clause 40.1. It is alleged that the principal agent did so, and the contractor failed to dispute his decision within 20 days, in consequence of which his decisions became final and binding, and no dispute came into existence. On that basis, so it

was submitted, there is no dispute between the parties capable of being submitted to arbitration.

[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'.

[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.

[22] But both objections founder on more fundamental grounds because they misconceive the nature of the claims that are now being advanced. The case made out by the contractor in its answering affidavit is that it was entitled to revise and update its earlier claims in the light of information that came to hand after completion of the works, and that the

principal agent was obliged to consider the revised claims, and allow those that qualified for extensions of time. The contractor has advanced various reasons for that alleged entitlement to submit revised claims but I need not go into them. It is those revised claims that are now sought to be pursued before the arbitrator, and not the initial claims that were refused in the course of construction.

[23] Whether or not the contractor was indeed entitled to submit revised claims is not a matter that we need to consider. It might well be that there is no merit in its contention that it was entitled to do so but that is not material for present purposes. If the contention has no merit then the claims will fail but that is no reason why the arbitrator has no jurisdiction to consider them. It means merely that the employer might have a good defence to the claims. It ought to be trite that the question whether a tribunal has jurisdiction to consider a claim is not dependent upon its merit or otherwise. The question is only whether the claim as formulated in the pleadings falls within the scope of his jurisdiction to consider.

[24] That was made clear by this court when rejecting a similar jurisdictional objection in *Makhanya v University of Zululand*.[10] That case concerned the jurisdiction of a court, but the principle applies as much to the jurisdiction of an arbitrator. This court said the following:

'[51] The submissions that were made before us by counsel for the University, when examined, came down to asserting that [the court had no jurisdiction because the claim is a bad claim]…. Her submission, in short, was that the court had no power in the matter because the University had a good defence to the claim.

[52] I have pointed out that the term 'jurisdiction' … describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it

[10] *Makhanya v University of Zululand* 2010 (1) 62 (SCA).

is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim.

[53] The submission that was advanced by counsel invites the question how a court would be capable of upholding the defence (and thus dismissing the claim) if it had no power in the matter at all. Counsel could provide no answer – because there is none.

[54] There is no answer because the submission offends an immutable rule of logic, which is that the power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim. The Chief Justice, writing for the minority in *Chirwa*,[11] expressed it as follows:[12]

"It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it."'

[25] I will accept for present purposes that decisions made by the principal agent under clause 40.1 in relation to the initial claims that were refused in the course of construction became final and binding and no dispute capable of being submitted to arbitration came into existence in relation to those claims. But those are not the claims that are now in issue. I have said that the contractor alleges an entitlement to submit revised claims to the principal agent, which it did when submitting its 'consolidated claim'. Those are the claims that became disputed once the principal agent failed to respond to the contractor's request for a decision under clause 40.1 in August 2010. A dispute thereupon arose as to the validity of those claims, which was one 'arising out of or concerning the agreement' – it is only because the agreement exists that the dispute has arisen – that is subject to resolution by arbitration. The application ought thus to have failed and the appeal must succeed.

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[11] *Chirwa v Transnet Ltd and others* 2008 (4) SA 367 (CC).
[12] Para 155.

[26] There is a further issue that I think I ought to deal with lest further jurisdictional objections arise in the course of the proposed arbitration.

[27] When confronted with the employer's objection the arbitrator's response was that he was bound to enter upon the arbitration nonetheless, and that the objection should properly be raised in the pleadings and dealt with accordingly, but the matter was taken out of his hands, because it was said he had no power to 'determine his own jurisdiction'.

[28] The response of the arbitrator cannot be faulted. When confronted with a jurisdictional objection an arbitrator is not obliged forthwith to throw up his hands and withdraw from the matter until a court has clarified his jurisdiction. While an arbitrator is not competent to determine his own jurisdiction that means only that he has no power to fix the scope of his jurisdiction. The scope of his jurisdiction is fixed by his terms of reference and he has no power to alter its scope by his own decision (in the absence of agreement to the contrary).

[29] But that does not preclude him from enquiring into the scope of his jurisdiction, and even ruling upon it, when a jurisdictional objection is raised. He does so at the risk that he might be wrong – in which case an award he makes will be invalid – but in some cases it might be convenient to enter upon the arbitration nonetheless. As it is expressed in the fifth edition of *Keating on Building Contracts*[13] (before the Arbitration Act 1996), in reliance on *Christopher Brown Ltd v Genossenschaft Oesterreichischer etc*:[14]

'If the arbitrator's jurisdiction is challenged he should not refuse to act until it has been determined by some court which has power to determine it finally. He should

[13] Above, at 392-3.
[14] *Christopher Brown Ltd v Genossenschaft Oesterreichischer etc* [1954] 1 QB 8.

inquire into the merits of the issue to satisfy himself as a preliminary matter whether he ought to get on with the arbitration or not, and if it becomes abundantly clear to him that he has no jurisdiction then he might well take the view that he should not go on with the hearing at all.'

[30] The position was fully explained by Devlin J in that case as follows:[15]

'It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties.'

[31] In short, what is called for when confronted with a jurisdictional objection, is sound judgment by the arbitrator on the course that should be followed, based on his view of the strength of the objection, and the circumstances that present themselves in the particular case. Mustill and

[15] At 12-13.

Boyd: *The Law and Practice of Commercial Arbitration in England*[16] and *Russel on Arbitration*[17] provide helpful assistance as to the manner in which an arbitrator should exercise his judgment.

[32] The appeal is upheld with costs. The order of the court below is set aside and substituted with an order dismissing the application with costs. The costs in each case are to include the costs of two counsel where two counsel were employed.

R W NUGENT
JUDGE OF APPEAL

[16] Sir Michael J Mustill and Stewart C Boyd *The Law and Practice of Commercial Arbitration in England* 2 ed (1989) at 574-576.
[17] *Russell on Arbitration* 22 ed (2003) by David St. John Sutton and Judith Gill paras 5-075 to 5- 089.

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