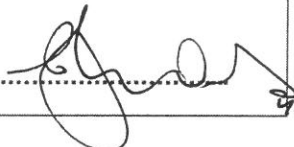


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO.: 32497/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>10/3/2017</u>	
	

In the matter between

SYNTHESIS PROJECTS CC
(Registration No.: 2003/039526/23)

APPLICANT

and

SBTJ PROPERTIES CC
(Registration No.: 1999/030192/23)

RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] The parties in this matter are at loggerheads. Not surprising though, the matter pertaining to a building contract and a dispute in respect of payment.
- [2] On or about 29 July 2013, the parties, duly represented, concluded a written JBCC Series 2000, Edition 5.0, Code 2101 building agreement, as amended by the contract data agreed between the parties (JBCC

Contract). The JBCC Contract related to the construction of a project named Nina Apartments Project.

- [3] A dispute arose as to breaches of the JBCC Contract *inter alia* relating to payments and ultimately a termination of the contract arose. Those disputes were referred to adjudication in terms of the JBCC Contract. The adjudication process was instituted and the parties agreed that the JBCC Adjudication Rules (October 2014) would dictate procedure.
- [4] Ms E.Y. van der Vyver was appointed as the adjudicator. The parties presented written submissions to the Adjudicator and a hearing was held on 18 May 2016. The Adjudicator handed down her decision on 11 August 2016.
- [5] In accordance with the aforesaid Adjudicator's decision, the applicant issued an invoice to the respondent on 15 August 2016. Despite demand, the respondent did not comply.
- [6] On 23 August 2016 the respondent gave notice of dissatisfaction with the Adjudicator's decision. That step necessitated pursuing arbitration proceedings. The respondent, however, failed to take the required steps to pursue the arbitration proceedings.
- [7] In terms of the provisions of clause 40.3.3 read with clause 6.1.4 of the JBCC Contract, the adjudicator's written determination of the dispute shall be binding on the parties until such determination of the dispute is overturned or varied in whole or in part by arbitration in terms of the Dispute Resolution clause of the JBCC Contract. In terms of clause 6.1.3 of the JBCC Contract, the parties shall give immediate effect to any requirements of such determination.
- [8] Clause 6.2.2 of the JBCC Contract provides that either of the parties may apply to court for the enforcement of the adjudicator's determination.

- [9] It was held in *Tubular Holdings (Pty) Ltd v Dbt Technologies (Pty) Ltd* (2016) JOL 36509 (GSJ)¹ that the notice of dissatisfaction does not detract from the obligation of the parties to give prompt effect to the decision until it is revised, if ever, on arbitration.
- [10] The applicant applies in terms of clause 6.2.2 of the JBCC Contract for the enforcement of the Adjudicator's decision of 11 August 2016. The respondent opposes the application. However, the respondent has narrowed the opposition to the issue of whether the adjudicator had the required jurisdiction to adjudicate the dispute. This limited issue requires consideration and determination.
- [11] The principle to be extracted from the *Esor* judgment, *supra*, is that the adjudicator's decision is not final, but the obligation to make payment, as determined, is.
- [12] The respondent's opposition to the applicant's request that the adjudicator's decision be made an order of court is premised upon the terms of clause 40.1 of the JBCC Contract and the scope thereof.
- [13] Clause 40.1 of the JBCC Contract provides as follows:
- "Should any disagreement arise between the employer, including his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other to resolve such disagreement."*
- [14] The respondent's view as to the ambit of clause 40 is stated in its opposing affidavit as follows:

¹ P. 5, par. 13; see also *Esor Africa (Pty) Ltd / Franki Africa (Pty) Joint Venture v Bombela Civils Joint Venture (Pty) Ltd* SGHC Case no. 12/7442 at p. 6, par 11

“34. The Respondent is advised by its legal representatives that the jurisdiction afforded to van der Vyver to decide any disagreement arising from annex GR2, is to be determined by the parameters of clause 40.1 thereof. Van der Vyver’s jurisdiction was limited to-

34.1 Matters arising out of the conclusion of annex GR2; and

34.2 Concerning annex GR2, or the termination of annex GR2.”

[15] Applying the canons of construction of a document, whether it is a statute, an agreement or other document,² clause 40.1 of the JBCC Contract contain the following categories of disagreement that stand to be either adjudicated or arbitrated upon:

- (a) A disagreement arising out of the agreement; or
- (b) A disagreement concerning the agreement; or
- (c) The agreement’s termination.

[16] The scope of clause 40.1 is accordingly wide. It is not limited in any way.³

[17] Following on the alleged breach of the JBCC Contract, and particularly in respect of the issue of payment, on the part of the respondent, the applicant terminated that agreement. Negotiations ensued and a “second” agreement came into being. In terms of the “second” agreement the applicant withdrew its letter of cancellation. The applicant submitted that the “second” agreement was conditional. The

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) at [18]; See also *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016(1) SA 518 (SCA) at [29] – [31]

³

respondent alleges that the “second” agreement had the effect that it “revived” the JBCC Contract. On either version, the JBCC Contract would remain in place.

- [18] The respondent in its opposing affidavit, and in argument, contends that the appointed adjudicator did not have jurisdiction to decide any of the issues placed before her. It would allegedly extend to embarking upon an investigation that was to extend far beyond the parameters of the rights and obligations of the parties arising from the JBCC Contract.

- [19] In the adjudication proceedings, the applicant sought *inter alia* payment of the unpaid certified payment certificates issued in terms of the JBCC Contract, but also payment of monies not certified and not paid and also payment for loss of profit.

- [20] In its opposition to the adjudication proceedings, the respondent did not only oppose the relief that the applicant sought, it also submitted a counterclaim premised upon the JBCC Contract.

- [21] The relief that respondent sought in its Statement of Defence to the applicant’s Statement of Claim, is recorded as follows:

“Claims Nos. 1 -3 (inclusive of 3.1-3.3):

These claims be dismissed and the Defendant be discharged of all liability in connection with all the Claimant’s claims submitted;

Alternatively and in the extent that it is found that the Claimant properly terminated Contract and that the Revival Agreement is not binding and enforceable, all of which is denied, then and such event (sic) any award that may be granted in favour of the Claimant should be set off against the Defendant’s Counterclaim which will be delivered simultaneously herewith.”

- [22] The respondent's counterclaim was premised upon the alleged "revived" JBCC Contract. The respondent claimed in its counterclaim various amounts under a number of rubrics, all of which are in terms of the "revived" agreement. The alternative relief referred to above, was reiterated in the Counterclaim.
- [23] The "revived" agreement is the JBCC Contract entered into between the parties during July 2013 and referred to above.
- [24] It clearly appears from the respondent's statement of defence and its counterclaim that the adjudicator was to consider the issues relating to the termination of the JBCC Contract and the subsequent agreement allegedly "reviving" that agreement.
- [25] At no stage did the respondent contest the adjudicator's jurisdiction in that regard.⁴ It participated in the adjudication proceedings actively without any reservations. In the respondent's notice of dissatisfaction the issue of jurisdiction is not raised.
- [26] The issue of the adjudicator's jurisdiction is premised upon the provisions of clause 40.1 of the JBCC Contract. The respondent submitted that those provisions do not extend to or include the disputes placed before adjudicator either by way of the applicant's Statement of Claim or the respondent's Statement of Defence and Counterclaim.
- [27] I have already found that the provisions of clause 40.1 are of wide scope. It is common cause between the parties that the *fons et origine* of the disputes and relevant claims is the JBCC Contract, whether it was terminated or "revived". Both the applicant's claims and that of the respondent are premised upon the provisions of the JBCC Contract.

⁴ See *Pollack on Jurisdiction*, pp. 10 - 12

- [28] In my view, the scope of the provisions of clause 40.1 is wide enough to extend to the issues before the adjudicator. I have recorded above that the respondent at no stage objected to the adjudicator deciding the issues placed before her by the applicant and the respondent. The parties clearly accepted that the adjudicator had the required jurisdiction to decide the disputes.
- [29] However, the issue of jurisdiction of an adjudicator or arbitrator is to be determined at the stage when the adjudicator or arbitrator is appointed, i.e. when the disputes that are to be decided are formulated.⁵ The adjudicator's jurisdiction is derived from the formulated disputes as set out in the applicant's Statement of Claim and the respondent's Statement of Defence and Counterclaim.
- [30] Clause 40.1 of the JBCC Contract provides the mechanism for resolving disputes between the parties flowing from the JBCC Contract. The appointment of an adjudicator or arbitrator is still required as well as the formulation of the dispute. Clause 40.1 of the JBCC Contract does not determine the "jurisdiction" in respect of the disputes, it is the agreement appointing the adjudicator or arbitrator to determine the disputes formulated at that stage that determines the jurisdiction.
- [31] I referred above to the disputes that the adjudicator was required to adjudicate upon. The claims of both the applicant and the respondent arise from the provisions of the JBCC Contract. Those issues were the issues considered and determined by the adjudicator.
- [32] There is accordingly no merit in the respondent's submissions relating to the issue of non-jurisdiction. The respondent's opposition stands to be dismissed.


⁵ See *Total Support Management (Pty) Ltd et al v Diversified Health Systems (SA) (Pty) Ltd et al* 2002(4) A 661 (SCA) at 673 par [24] *in fin* and par [25]

[33] It follows that the decision of the adjudicator stands until reversed on arbitration.

[34] I therefor find that the applicant is entitled to the relief it seeks.

I grant the following order:

- (a) The respondent is ordered to forthwith give effect to the Decision of the Adjudicator handed down on 11 August 2016 and to pay the applicant the sum of R3 603 302.28;
- (b) The respondent is ordered to pay interest to be calculated by a third party in accordance with the Decision of the Adjudicator;
- (c) The respondent is ordered to pay the costs of this application on an attorney and client scale.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Plaintiff: P W Belger
Instructed by: Fasken Martineau Attorneys

On behalf of Defendant: W B Pye
Instructed by: Bowes & Turner Inc.

Date of hearing: 27 February 2017

Date of judgment: 10 March 2017