REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 22975/2018

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: NO
[3] REVISED.

28/2/19
Date:

WHG VAN DER LINDE

In the matter between:

Murray & Roberts Limited — Applicant

and

Mitsubishi Hitachi Power Systems Africa (Pty) Limited — 1st Respondent

Eskom Holdings SOC Limited — 2nd Respondent

JUDGMENT

Van der Linde, J:

[1] The applicant applies for an order against the 1st respondent directing it to disclose to the applicant what it styled as *"the incentive agreement concluded between the 1st and 2nd respondent"*, and all relevant details relating to it, including *"the actual benefits received*

from the 2nd respondent". The 2nd respondent was joined to the application but has not opposed the relief claimed nor participated in the hearing.

[2] The parties are contractually related in a set of construction contracts that concern power stations being constructed at the 2nd respondent's instance: the 2nd respondent as employer, the 1st respondent as contractor, and the applicant as subcontractor. The case made out by the applicant is that the 1st respondent concluded an agreement with the 2nd respondent which is referred to as "*the incentive agreement*", and the 1st respondent is obliged to disclose to the applicant both the incentive agreement as well as all relevant details in relation to the incentive agreement, in particular details of any benefits received by the 1st respondent from the 2nd respondent in terms of the incentive agreement. The obligation, according to the applicant, arises from amongst others clause 11.3 of the subcontract agreement between the applicant and the 1st respondent.

[3] In terms of clause 11.3 of the subcontract between the applicant and the 1st respondent, the following is provided:

"The contractor shall, upon receiving any contractual benefits from the employer under the contract, pass on to the subcontractor such portion thereof as may relate to the subcontract works."

[4] The applicant relies also on the terms of an agreement concluded between the applicant and the 1st respondent, called "*the variation agreement*". In terms of that agreement, specifically clause 2.4, and sub-clauses 2.4.1 and 2.5, the following is provided (emphasis supplied):

"2.4 *Although nothing contained in this variation agreement is to be construed as creating a partnership in any legal sense between the parties, it is nevertheless to be emphasised that the manner in which the parties will act in good faith vis-à-vis each other to completion of the amended subcontracts shall portray a 'spirit of partnership', cooperation and trust in such a way as to:*

2.4.1 optimise the subcontracting management and operating structures to the benefit of the scope under the amended subcontracts; ..."

[5] Sub-clause 2.5 provides as follows:

"2.5 The parties have signed an appropriate non-disclosure agreement so as to enable them to evaluate various aspects of the subcontracts pursuant to the non-disclosure agreement. HPA has performed a due diligence and has verified the value (by category and period) of the past costs up to 31 March 2011. HPA will perform a similar due diligence exercise in respect of the costs for the period 1 April 2011 to 30 June 2011. The latter due diligence exercise will be completed by no later than 15 August 2011 provided all information is made available for this purpose by 15 July 2011. The parties have their remedies in law arising from any non-disclosure or misrepresentation."

[6] There are therefore the following relevant agreements: As between the applicant and the 1st respondent there is the subcontract agreement, an extract of which appears at "A4" of the founding affidavit; there is the variation agreement, an extract of which appears at annexure "A2" of the founding affidavit; there are the conditions of subcontract, an extract of which appears at annexure "A3" of the founding affidavit; and also, on the second day of the hearing, Mr Berridge, SC for the 1st respondent handed up pages 002 to 007 of the subcontract. As between the 1st respondent and the 2nd respondent there is the main contract, clause 1.12 of which is pertinent. And then there is the contentious incentive agreement.

[7] The subcontract suite of agreements between the applicant and the 1st respondent contains clauses dealing with resolution of disputes. In terms of clause 16 of the variation agreement *"all disputes of whatsoever nature...shall be dealt with"* on the basis set out in sub-clauses 20.2 to 20.9 of the amended subcontracts. In turn, those sub-clauses provide that such disputes are to be referred to a Dispute Adjudication Board ("*DAB*"), which is to give a decision on such disputes, which decision shall be reasoned.

[8] That decision *"shall be binding on both parties"*, unless and until it is revised in terms of an amicable settlement or an arbitral award, the next two sequential tiers in the usual three tier dispute resolution process found in such construction contracts. If either party is dissatisfied with the DAB decision, that party may within 21 days give notice to the other party of its dissatisfaction.

[9] In terms of clause 20.5, where such a notice of dissatisfaction shall have been given, both parties shall attempt to settle the dispute amicably. If they cannot settle the dispute amicably, then arbitration proceedings may be commenced with on or after the 56th day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement will have been made.

[10] The sub-clause dealing with arbitration (clause 20.6) provides that such a dispute *"shall be finally settled by arbitration"*. There is elaborate provision for the process before and the powers of the Arbitral Tribunal comprising of three arbitrators.

[11] So here the applicant contended that the 1st respondent and the 2nd respondent concluded the incentive agreement, and given the terms of the subcontract the 1st respondent was contractually obliged to disclose to the applicant the agreement and details relating to any benefits received, as alluded to above; but the 1st respondent disputed any such obligation. The matter was then referred to the DAB chaired by Adv J F Myburgh, SC. In an eleven page decision given under his hand, the DAB refused the ruling sought by the applicant. The ruling that was sought before the DAB was effectively the same relief that is now sought before this Court.

[12] In its reasoning the DAB posed the question whether the applicant has the right to the *"initiative arrangements"* (so referred to there, but referred to here as the *"incentive agreement"*). Having analysed the relevant clauses at paragraphs 6 to 12 of the decision, the

DAB came to the conclusion that in terms of the provisions of the subcontract agreement and the variation agreement, the applicant does have a contractual right to documents such as the initiative arrangements. It further concluded that the 1st respondent had a corresponding obligation to furnish the document concerned and to furnish particulars of any benefits received.

[13] However, the DAB reasoned that, given that the applicant is contractually entitled to the document and information, *"... MRPE's (the applicant) position is similar to that of a litigant who is entitled to the discovery of documents in his opponent's possession"*. Having drawn that inference, the DAB then went on to reason that the confidentiality arrangement between the 1st respondent and the 2nd respondent contained in clause 1.12 of the main contract, precludes the 1st respondent from making the document and information available to the applicant without the consent of the 2nd respondent. And it concluded (emphasis supplied): *"I do not believe that an Adjudicator has the power to compel MHPSA to act in beach of its contractual commitment to Eskom."* And so it declined the relief. The 2nd respondent is self-evidently not a party to the arbitration agreement contained in the subcontract, nor was it a party before the DAB.

[14] Clause 1.12 of the Conditions of Contract of the main contract provides (emphasis supplied):

"The contractor shall not disclose or make any information regarding the Contract or other information concerning the Project (including proprietary information of other Project Contractors made available to the contractor for or in the course of the execution of the works) available to any third party including any news medium or use any other means of publishing or disseminating such information and shall use such information only for the purpose of carrying out and completing the works. This undertaking does not, however, apply to information which at the time of disclosure or thereafter, without any default on the part of the contractor, enters the public domain or information which was already in the possession of the contractor at the time of disclosure (evidenced by written records in existence at that time).

If the contractor is uncertain about whether any information is to be regarded as confidential, it shall be regarded as such until written clarification is obtained from the engineer."

[15] The applicant describes the earlier process before the DAB and its conclusion in its founding affidavit and at paragraph 25 records what the DAB concluded in relation to the issue of confidentiality. The applicant then proceeds in paragraph 26:

"Due to the contractual hierarchy and interrelationship between the outcome and reward set out above, the applicant is entitled to the information, which the 1st respondent refuses to disclose despite the applicant's undertaking to deal with such information on a confidential basis."

[16] That then is the applicant's pleaded case. The principled and primary point made on behalf of the 1st respondent in its affidavits and in argument by its counsel, is that the applicant is bound by the DAB decision and precluded by it, and the subcontract terms, from approaching this court. That amounts in effect to reliance on the provisions of the Arbitration Act 42 of 1965 (and the common law of arbitration).

[17] The discussion starts therefore the provisions of that Act. In particular, section 3 provides as follows (emphasis supplied):

"*Binding effect of arbitration agreement and power of court in relation thereto*

(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.

(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown –

(a) set aside the arbitration agreement; or

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

Section 6 of that Act provides as follows (emphasis supplied):

"Stay of legal proceedings where there is an arbitration agreement

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleading or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just."

[18] The subcontract describes the three tiered arbitration process. Such a suite of alternative dispute resolution provisions is fully enforceable and forms an integrated whole. A party is bound by them and unless a court is persuaded *"on good cause shown"* or for *"sufficient reasons"* to order that a particular dispute shall not be referred to arbitration, the jurisdiction of the court to determine the dispute is excluded except for considerations of inherent oversight, which do not arise now.

[19] It is well accepted in our law that the requirements of *"good cause"* in section 3(2), and of *"sufficient reasons"* in section 6(2), of the Act are not easily established. In discussing this aspect of the Act, the author of Juta's electronic publication, *The Law of Arbitration: South African and International Arbitration,* Peter Ramsden (at page 136 and following) says:

"Courts have found that they had the right to terminate an arbitration agreement on good cause shown where –

(a) a defendant's counterclaims affected third parties not subject to the provisions of the arbitral agreement and in respect of which the arbitrator had no powers of investigation, and where a court of law was in a better position to adjudicate and conclude all the issues in the same process;

(b) a party against whom fraudulent conduct was alleged requested that the disputed averments of fraud should be ventilated in open court rather than in the privacy of arbitration proceedings. However, far less weight is accorded to an application by the party alleging fraud that the dispute be heard in open court than to a similar application by the party accused of fraud; and

(c) there were a number of legal problems at stake in the dispute, and where the technical matters were easily resolved by a court of law.

A court will not set aside an arbitration agreement where no good cause has been shown. For example, the Constitutional Court found that in a matter that no good cause had been shown and that arbitrating the matter would spare the court having to determine questions of church doctrine."

[20] A judgment referred to by the author in support of the proposition articulated in paragraph (a) above, is *Welihockyj and Others v Advtech Ltd and Others* 2003 (6) SA 737 (WLD) in which Rabie, J at 756C held (emphasis supplied):

"There is another reason for upholding the applicants' contentions. The issues in the respondents' counterclaims also relate to and affect third parties which are not subject to the provisions of the SOB and in respect of which the 4th respondent has no powers of investigation. A court of law will not be curtailed by such factors and would be in a position to adjudicate and conclude all the interwoven issues in one and the same process."

[21] In *LAWSA*, 3rd edition, volume 2, paragraph 95 the author (D W Butler) points to section 6 of the Act and comments:

"The onus on that party (to show 'good cause' or 'sufficient reason') is the same whatever procedure is used and it is a heavy onus and not easily discharged, because the party is trying to avoid its contractual obligation to arbitrate."

[22] The Constitutional Court judgment referred to by Ramsden is *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC) in which it held:

> *"[45] The decisions of the High Court and Supreme Court of Appeal that no good cause has been shown to set aside the arbitration agreement cannot be faulted. Further, arbitration is the appropriate forum to decide if the line that has been drawn by the church in Ms De Lange's case is acceptable. It would not be appropriate for this court to interfere at this stage, especially considering that the line is close to the church's doctrines and values. No good reason has been shown why arbitration would not be suited to resolving the present dispute. In any event, the outcome of the arbitration would be open to judicial reveal and would create room for a full sum and timeous pursuit of an equality claim."*

[23] As I see it, the correct approach to this matter is the following. The 2nd respondent, given the potential reach of clause 1.12 of the main contract, has a *"direct and substantial interest"* in the resolution of the dispute between the applicant and the 1st respondent. Such an interest satisfies the quintessential test for compulsory joinder. If the applicant had approached the court in the first place, it would have been obliged to have joined the 2nd respondent. The question would then have arisen as to whether good cause will have been shown not to follow the arbitration route.

[24] In answering that question, it is necessary to consider an indicated progression of the arbitration route in this matter. The applicant went to the DAB. It held that the applicant had a contractual right to the document and the information, and the 1st respondent a corresponding obligation to provide these. It declined relief however, because it held it did not have the power to grant it.

[25] That decision could conceivably have been wrong, and the applicant could, contractually, have appealed it. The arbitration panel might have upheld its appeal, and might have compelled the 1st respondent to deliver the document and information, either on a different interpretation of the two ostensibly conflicting contractual provisions (clause 11.3 in the

subcontract and clause 1.12 in the main contract) or, if it followed the hypothesis of the DAB (that there is, on a proper interpretation such a conflict), in the exercise of its specific performance discretion. If it did that, and the applicant thus won and ultimately went to court to enforce that award, the 2nd respondent would have been entitled to apply then to join.

[26] That court would likely have allowed the joinder, because the 2nd respondent has a direct and substantial interest in the order that the court might make. The 2nd respondent might then have been heard to say why the award should not be made an order of court. It may have persuaded the court that the conflict interpretation is correct, and that specific performance, which is discretionary, should not be granted against the 1st respondent in favour of the applicant. If the court were then to decline to make the arbitration award an order of court, the arbitration process would have been fruitless. Or, having heard the 2nd respondent, the court may nonetheless have granted an order of specific performance.

[27] The point about this exercise is that it shows that it is legally desirable that the 2nd respondent should have been heard in the dispute between the applicant and the 1st respondent from the get-go, given its direct and substantial interest in the final outcome of this matter. And it thus follows that because the 2nd respondent is not a party to the arbitration agreement between the applicant and the 1st respondent, *"sufficient reason"* has – in principle - been shown to permit the applicant to have approached the court in this application, subject to the next issue.

[28] The 1st respondent argued that whether or not the applicant could have approached the court in the first place, that is not what, as a fact, it did; and it now has a binding decision of the DAB against it, to which it is contractually committed. But is that right? It is true that the DAB decision is binding, but all that that decision was, was to decline to order the document and information because it held it had no power to grant the relief.

[29] It reasoned that the applicant had a right to the document and information, and the 1st respondent a corresponding obligation to furnish these. Had it actually heard the 2nd respondent, it may/or may not have been persuaded to order specific performance. So it declined the relief claimed, not because the applicant did not have a right to it, but because it held that it had no power to afford the remedy. In effect, it declined to determine the dispute for lack of power.

[30] As I have indicated, that is not the end of the whole arbitral process, because ultimately there lies an appeal to the arbitral tribunal, and in fact the applicant had contractually noted its dissatisfaction with the decision of the DAB. It may be that that tribunal ultimately upholds the appeal, and disagrees with the DAB as to its power. But, as I have also indicated, ultimately the applicant – even if successful – would have to approach the court to obtain enforcement of the award; and there the absence of the 2nd respondent in the process will come home to roost.

[31] I do not see that in this case an applicant can be precluded from approaching a court for relief where it has first embarked upon an integrated arbitral process but has not completed it, for two reasons. First, the DAB in effect declined to determine the dispute because it held it had no power to afford a remedy. Second, even if that conclusion is wrong, and even if it did have the power to afford the relief, and even if the matter were appealed in terms of the arbitration agreement, the prospect of the dispute ultimately finding its way to a court, and the matter having to be determined in the presence of the 2nd respondent as a litigant, is real. And third, clearly the applicant has not accepted the DAB's decision, and so no estoppel or peremption applies.

[32] It follows that I conclude that there is sufficient reason for the matter to be heard by this court. The consequence is that this court must embark on the interpretative process. In this regard I do not agree with Mr Van Tonder, SC who appeared with Ms Daniels for the applicant, that the 1st respondent is bound by the DAB's conclusion that the applicant had an

enforceable right to the document and information, and the 1st respondent a corresponding obligation to provide these. Not only was that only reasoning on the way to the decision, but as I have indicated, ultimately the decision was that here was no power to make a decision.

[33] Contractual interpretation nowadays is about text, context, and purpose. Starting with text, I do not believe the language of clause 1.12 of the main contract justifies such a broad meaning to be ascribed to *"third party"* as would include a subcontractor. The latter is integrally part of executing the two projects and, if anything, it should be cognisant of all information relating to it.

[34] Moving to context, the relationship between the applicant and the 1st respondent is akin to a *"partnership"*, one to be conducted in *"trust"*; in that context, there would have to be strong reasons to justify one partner withholding financial facts, particularly facts bearing on the remuneration of the latter, from the other. As to purpose, I disagree that clause 11.3 is merely the execution mechanism of the entitlements arising under clause 11.2. The term *"benefits"* is used, not *"compensation"*; but in any event, why would clause 11.3 be necessary at all if the entitlement is established under clause 11.2? Rather, the notion of *"contracts benefits"* suggests advantages emanating from and bestowed by the employer on the contractor, and the clause was intended to ensure that the subcontractor receives its *aliquod* share of these.

[35] Finally, the subcontract between agreement between the applicant and the 1st respondent provides in clause 3.2 for an interpretative priority in favour of the subcontract above the main contract in the case of any *"ambiguity, discrepancy, divergence, or inconsistency"* between them. Plainly put: if there is ambiguity between clause 11.3 of the sub-contract and this clause 1.12 of the main contract, the former prevails.

[36] The 1st respondent argued that clause 11.3 does not refer to documents at all. It certainly does not do so expressly; but information is seldom if ever communicated, at least not in a

contractual sense, otherwise than by way of documents in the context of the extended meaning which that word has assumed in law.

[37] I conclude therefore that there is no contractual obstacle to granting the relief claimed.

[38] Should specific performance be ordered? Such relief, although a court has a discretion, is the usual default position. The 2nd respondent has not put anything before the court as to why specific performance should not be granted. Nor has the 1st respondent reasoned – assuming the contractual interpretation adopted here is incorrect - why it should potentially be exposed to a damages claim by the applicant rather than by the 2nd respondent.

[39] It follows that in my view the application must succeed and the following order is made:

> An order issues in terms of prayers 1 and 2 of the Notice of Motion dated 18 June 2018, the order as to costs to include the costs consequent upon the employment of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

Dates argued: 26, 27 February, 2019
Date judgment: 28 February, 2019

For the applicant:	Adv L van Tonder, SC
With him:	Adv N Daniels
Instructed by:	Tiefenthaler Attorneys Applicant's Attorneys Tel: (011) 807 0834 Ref: C Clifton c/o Dockrat Incorporate Attorneys Office Suite B Dunkeld Court 16 North Road Dunkeld West

	Johannesburg Tel: (011) 807 0834
For the 1st respondent:	Adv B Berridge, SC
Instructed by:	Fasken 1st Respondent's Attorneys Building 2 Inando Greens 54 Wierda Road West Sandton Ref: T Siciliano/J Rajpal Tel: (011) 586 6028