IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV)/34/2020

CCA/0094/2020

IN THE MATTER BETWEEN

BATAUNG CHABELI CONSTRUCTIONS (PTY) LTD **APPELLANT**

AND

ROAD FUND **1ST RESPONDENT**

PEMAHN CONSULTING (PTY) LTD **2ND RESPONDENT**

DIRECTOR GENERAL- DCEO **3RD RESPONDENT**

MINISTRY OF FINANCE **4TH RESPONDENT**

MINISTRY OF PUBLIC WORKS **5TH RESPONDENT**

ATTORNEY GENERAL **6TH RESPONDENT**

CORAM: DR K.E MOSITO P
DR P. MUSONDA AJA
N.T MTSHIYA AJA

HEARD: 14 APRIL 2021

DELIVERED: 14 MAY 2021

SUMMARY:

Civil Procedure- Parties failing to submit to arbitration in accordance with arbitration agreement- jurisdiction of court ousted due to need to respect arbitration agreements in contracts.

JUDGMENT

N.T MTSHIYA AJA

INTRODUCTION

[1] This is an appeal against the judgment of the court *a quo* which dismissed the appellant's application for an interdict. In the court *a quo*, the appellant prayed for the following relief:

> " 1. Condoning the applicant's non- compliance with the rules relating to time periods, service, forms and that this application be disposed of as urgent in terms of Rule 8(22) of the Rules of Court.
>
> 2. It be declared that the Respondents not be allowed to take Contract number RFS/MAIN/POL/03A to re-tendering as envisaged in the Public Eye Newspaper dated 31 July – 6 August 2020 pending finalization of the matter.
> 3. A rule *nisi* be issued calling upon the Respondents to appear and show cause why an order in the following terms should not be made:
>
> 3.1 the 1st, 4th and 5th Respondents [shall not be] interdicted, prohibited and restrained from:
>
> 3.1.1 Proceeding with the implementation of the decision to invite bids for completion of the construction and upgrading of Toll Infrastructure at Caldonsport, Maputsoe and Maseru Bridge pending finalization of this matter.
>
> 3.1.2 Taking any steps in relation to the performance of any activity pursuant to the decision of recruiting the new

contractor pending finalization of this matter.

3.1.3 Assaulting, threatening to assault, intimidating, by way of violent action or otherwise instigating others to assault, threaten or intimidate any of the Applicant's staff, workmen and or representatives at the afore mentioned sites pending finalization of this matter.

3.1.4 Interfering with, disrupting or restricting in any manner whatsoever access of Applicant's peaceful, undisturbed and beneficial use of the sites, occupation and enjoyment of the property by the Applicants and without restriction, any of its staff, workmen and or representatives.

3.1.5 An order directing 1st and 2nd respondents to dispatch the record of the deliberations of all the meetings which ensued between Applicant and their officials, documents incidental and connected with the decision to appoint the arbitrator and decision to waive the appointment of the arbitrator in favor of re-tendering to this Honorable Court seven (7) days after service of this order".

4. An order reviewing and setting aside the decision of the 1st Respondent to make an invitation to bids for completion of construction and upgrading of Toll Infrastructure at Calendonspoort, Maputsoe and Maseru Bridges.
5. An order declaring that the Applicant is entitled to the benefits of the exercise of option to present its case before the Arbitration Tribunal.
6. An order reviewing and setting aside the decision of the 1st respondent to terminate the contract of Applicant as irregular and of no leg force and effect.
7. An order reviewing declaring the "indifferent" attitude and failure of DCEO to probe and investigate the corruption involved in contract number RFS/MAIN/POL/03A contrary to what it did in respect of Mpilo Boulevard project as violating sections 18 and 19 of the constitution of Lesotho.

8. The costs of the application are to be paid by the 1st, 2nd and 7th respondents on the scale of attorney and own client.
9. Granting further or alternative relief.

10. Prayers 1 & 2 , paragraphs 3.1 and 3.6 operate as interim orders with immediate effect, and will remain in full force and effect until the final determination of this application and if the rule *nisi* should be confirmed, also thereafter."

[2] This appeal calls for the proper approach to judicial intervention in mutual contracts where parties have an arbitration agreement to deal with any disputes that may arise in their contractual relationships. The appeal enjoins this court to delve into the extent to which a court may refuse jurisdiction on the basis of protecting the sanctity of contracts.

[3] On 7 October 2020 the High Court dismissed the appellant's application referred to in paragraph 1 above. The High Court said it had no jurisdiction to entertain the application.

[4] On 13 October 2020, displeased with the decision of the High Court, the appellant then filed this appeal citing the following grounds:

> "1.The Learned Judge in the court a quo, misconceived the cause of action as defined, the nature of the enquiry, the dispute relation to the interpretation of the contract, the duties of the arbitrator and the scope of his duties and powers to decide issues which the appellant presented for adjudication.
>
> 2. The learned Judge in the court a quo erred and totally misconceived the factual matrix providing the context in which the contract was terminated by the 1st Respondent. This is so notwithstanding the fact that the 1st and 2nd Respondents have conceded to the delayed provision of structural drawings, total failure to provide reinforcement

drawings and officially communicated possession of Caledonspoort site in January 2020 contrary to the provisions of Site Possession Certificate that the parties signed in March 2019.

3. The learned Judge erred and misdirected himself in the manner in which he declined jurisdiction and at the same time making a complete contradiction that the undisputed evidence on papers is such that the contract had been rightly terminated.

4. The learned Judge in the court a quo erred and misdirected himself in holding that the decision of the 1st Respondent to terminate the contract called in the operation of the maxim *omnia praesumuntur rite essa* act which extends to the decision it made to submit the project to re-tendering when there is no competent finding as to who breached the contract between the parties.

5.The court a quo erred in risking disorder or self-help in holding that aside from concessions as to the existence of dispute of fact in regard to who breached the contract between the parties, the premise on which it declined jurisdiction is that the contractual obligations in the Joint Building Contracts Committee [JBCC] are such that the court a quo did not have the competence to set aside the action and or decision of 1st Respondent to terminate the contract because that would have been the reserved powers of the stultified arbitration process.

6. The court a quo erred in holding that Appellant has a right to contractual damages assuming the same jurisdiction he also declined and downplayed the underlying nuances of the binding Arbitration Act No. 12 of 1980 and the provisions of JBCC.

7. The court a quo erred in downplaying the particular circumstances dealing with the details of the tender contract which impose obligations to commit dispute to arbitration before there could be a decision of re-tendering the project in a manner that has resulted in partial and unequal treatment to a substantial degree prejudicial to the Appellant, impliedly leaving Appellant remediless.

8. In view of the above finding, the court a quo erred in declining jurisdiction over the prayers sought in the Notice of Motion citing that they are predicated on the stultified arbitration process that had stalled as a result of what may best be described as contractual procedures and requirements which were not implemented. The judge had no basis and gave no reasons for declining jurisdiction and making adverse findings in the same case.

9. In view of the finding above, the Court a quo erred in holding that the reliefs presented in the Notice of Motion were not contractual in nature, hence the court would not review the administrative decision of the 1st Respondent to subject the project to re-tendering in the absence of a specific contractual relief targeted at reviewing the contractual decision to terminate the contract.

10. The court a quo ignored or mischaracterized all the relevant evidence and materials referred to in annexures and opposing affidavits which provide the involvement of the Directorate on Corruption and Economic Offences in the matter.

11. The court a quo erred in upholding the point in limine by the 3rd Respondent in that the citation DCEO was not a necessary prelude to an order sought against it.

12. The Appellant reserves the right to file additional grounds of appeal."

Background

[5] The 1st respondent is a fund specifically dedicated to funding the maintenance of roads as established by the Lesotho Government through Legal Notice No 179of 1995 and operationalised by the Finance (Road Fund) Regulation 2012. During the course of its mandate, 1st respondent issued a tender for the construction and upgrading of Toll infrastructure at Caledonspoort Border, Maputsoe Boarder and Maseru Bridge. The tender was granted to and accepted by the appellant as

indicated through its letter of 31 January 2019. A formal agreement was then signed on 08 March 2019 - Contract No RFS/MAIN/POL/03 (hereinafter ‘’the contract’’).

[6] The duration of the contract was initially for a period of 200 working days and was due to end on 13 December 2019. However, due to delays, the parties extended the contract to 13 March 2020.

[7] On 16 December 2019, the 1st respondent served on the appellant two letters. The one confirmed the value of the contract between the parties and the other dealt with unsatisfactory performance on the part of the appellant and also intimated that the contract would not be renewed after 13 March 2020. The 1st respondent main concern was that appellant’s performance would not achieve completion of the project as agreed.

[8] The appellant on its part objected to the intended termination of the contract alleging that it would be unlawful as no proper notice had been served on it. The 1st respondent, however, argued that notice had been served via email as permitted under the contract.

[9] The 1st respondent then proceeded to advertise a tender inviting for bids in areas occupied by the appellant. Disgruntled by the action of the respondent, the appellant wrote a letter to the Director General requesting that the bidding process be halted to allow for arbitration as provided for in the contract. This yielded no results, leading to the urgent application filed by the appellant in the court a quo.

[10] It is common cause that, notwithstanding the existence of an arbitration agreement, the parties never declared a dispute or triggered the arbitration process. However, contrary to agreement, the appellant went on to nominate a potential arbitrator prior to the declaration of a dispute in terms of the agreement. This move was not accepted by the 1st respondent and negotiations between the parties commenced. There is no evidence that the 1st respondent ever rejected the invocation of the arbitration clause. What comes out of the papers is that the 1st respondent wanted submission to arbitration to be done procedurally. However, when negotiations were still in progress, the appellant proceeded to seek redress from the High Court.

Issues for determination

[11] Notwithstanding the several grounds of appeal cited by the appellant, my reading of the papers leaves me with one issue for determination, namely: 'Whether or not the High Court had jurisdiction to entertain the application.' A determination of that issue will tie up with ground of appeal No 3 which reads as follows:

> "3.The learned Judge erred and misdirected himself in the manner in which he declined jurisdiction and at the same time making a complete contradiction that the undisputed evidence on papers is such that the contract had been rightly terminated."

[12] My view is that, if a finding that the High Court indeed had no jurisdiction, then all the other grounds of appeal will not fall

for determination under this appeal. This is so because such a finding will certainly disable this court from considering the merits of the appeal and that will be the end of the case. In coming to this conclusion I derive comfort from this court's decision in **Motlats Pelesa and Ngaka Molouoa C OF A (CIV) 36/20.** That case was decided during this session. In that case the court emphasized that where jurisdiction does not exist, the court cannot proceed any further. In coming to that conclusion Musonda, AJA, quoted, with approval, from a Kenyan Court of Appeal Case, **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited, (1989) KCR 19,** where the court said:

> "It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceeding… A court of law downs tools in respect of the opinion that it is without jurisdiction…. Where the Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing…."

[13] I fully agree with the position of the law as explained in the above quotation.

Jurisdiction and the Law

[14] In the face of the arbitration agreement, the court a quo held that it had no jurisdiction to deal with the matter. In their

disputes clause, parties agreed that in the event of any dispute, they would make use of alternative dispute resolution methods, arbitration included. The relevant clause relating to arbitration in the agreement provides as follows:

> "40.0 **SETTLEMENT OF DISPUTES**
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> 40.1 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.
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> 40.2 Where such disagreement is not resolved within ten (10) working days of receipt of such notice it shall be deemed to be a dispute and shall be referred by the party which gave such notice to either:
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> 40.2.1 Adjudication (40.3) where the adjudication shall be conducted in terms of the edition of the JBCC Rules for Adjudication current at the time when the dispute was declared, or
>
> 40.2.2 Arbitration (40.4) where the arbitrator is to be appointed by the body selected by the parties (41.3) whose rules shall apply. Where no body is stated or where the stated body is unable or unwilling to act, the appointment shall be made by the chairman for the time being of the Association of Arbitrators (Southern Africa). The appropriate rules current at the time when the dispute is declared shall apply
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> 40.3-
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> 40.4 Where a dispute is referred to arbitration the following shall apply:

> 40.4.1 The arbitrator shall be appointed at the request of either party by the body stated in 40.2.2.
>
> 40.4.2 The arbitration shall be conducted by either the arbitrator in accordance with the rules of the body stated in the contract data
>
> 40.4.3 The arbitrator shall have the power to open or revise any certificate, opinion, decision, requisition, or notice relating to the dispute as if no such certificate, opinion, decision, requisition or notice had been issued or given."

[15] The following cases, although they are of persuasive effect, are relevant to the issue before this Court in the sense that they emphasize the need for courts to respect arbitration clauses in contracts. ***In Zhongii Development Construction Enginnering Company Ltd v Kamoto Copper Company SARL: [2014] 4 AII SA 617 (SCA) Gouern, AJA***, had this to say:

> "This Court has said that parties who refer matters to arbitration "implicitly, if not explicitly, (and subject to the limited power of the Supreme Court undersection 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator". The Constitutional Court dealt with the question whether section 34 of the Constitution applied directly to arbitrations. In finding that it did not do so, O' Regan ADCJ said: "The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated; the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters."

[16] In **Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker- LTA Building East v Midros Investments (Pty) Ltd2011 (3) SA 631 (KZD),** Wallis J had this to say:

> " I am fortified in this approach to clause 40 by the fact that the modern approach to arbitration clauses is to respect the parties' autonomy in concluding the arbitration agreement, and to minimise the extent of judicial interference in the process. The historical desire of courts to protect their own jurisdiction, and their consequent suspicion of arbitration as a means of resolving disputes, has been replaced by a recognition that arbitration is an acceptable form of dispute resolution with which the courts should not interfere."

[17] Also in Barkhuizen v Napier [2007] ZACC 5; 2007 (5) SA 323 (CC) Ngcobo J, had this to say;

> "Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity…' Courts should not be quick to intervene in contractual agreements unless their adherence would be inter alia unfair, contrary to public policy or unconstitutional. The sanctity of contracts should be respected".

[18] Clearly the principles of law enunciated in the above cases emphasize the point that where arbitration agreements exist, courts should not be quick to intervene unless the agreements

offend public policy. To that end courts are obliged to respect the sanctity of contracts.

[19] Furthermore, the **Arbitration Act 1980,** respects arbitration agreements between parties. Section 4 of the act provides as follows:

> "4. 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."

Analysis

[20] Guided by the parties' own agreement, the Act and the persuasive case authorities cited above, I have no hesitation in concluding that by opting for arbitration, as is the case in *casu*, the parties voluntarily selected a dispute resolution mechanism as an alternative to litigation through the conventional courts. That choice ought to be respected by the courts. Indeed if a party wishes to abandon an arbitration agreement, it is at liberty to do so as provided for under section 4 (2) of the Act quoted above. That is not the case in *casu*. The parties are still bound by the arbitration agreement in as far as any disputes

arising under the contract are concerned. Admittedly in *casu* no dispute was ever declared. However, it goes without saying that a matter can only be referred to arbitration upon a declaration of a dispute. It is only after the declaration of a dispute that the arbitration processes will then be triggered. The 1st respondent as already stated wanted the process to be done procedurally.

[21] The foregoing leads me to the final conclusion that, as long as arbitration remained the declared route of resolving disputes under the contract, it was not proper for the appellant to change course and follow the litigation route through the courts. To that end, the High Court cannot be faulted for having declined jurisdiction. As already pointed out in paragraphs 12 and 13 of this judgment, without jurisdiction, this court cannot consider the merits of the appeal. The High Court, in my view, correctly respected the contractual arrangement between the parties.

[22] This appeal cannot therefore succeed and should be dismissed with costs.

Determination

[23] I therefore order as follows:

a. This appeal is dismissed.
b. The appellant shall bear costs of the appeal.

N.T MTSHIYA

ACTING JUSTICE OF APPEAL

I agree

DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree

DR P. MUSONDA

ACTING JUSTICE OF APPEAL

FOR APPELLANTS: ADV CJ LEPHUTHING

FOR RESPONDENTS: ADV P THENE and ADV M MOKEBISA