CIV/APN/117/2013

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

QUANTUM QUALITY SURVEYORS (PTY) LTD	Applicant
And	
LESOTHO CONSOLIDATED CIVIL CONSTRUCTION (PTY) LTD	1st Respondent
G.M.T. CIVILS (PTY) LTD	2nd Respondent
NEW STUDIO DIMENSION	3rd Respondent

JUDGEMENT

Coram	:	Hon. Mr. Justice T. E. Monapathi
Date of Hearing	:	4th April 2013
Date of Judgement	:	4th April 2013

SUMMARY

Where in the parties agreement for arbitration there is no mention of number of arbitrators reference shall be reference to a single arbitrator. Applicant was in the circumstances of this case entitled to nominate an arbitrator. The matter was arbitrable.

CITED CASES

Goodwinstable Trust v Duonex (Pty) Ltd and another 1988 (4) SA 606, 621 D-J

STATUTES

Arbitration Act 1980

BOOKS

***THE LAW OF ABBITRATION : SOUTH AFRICAN AND INTERNATIONAL ABBITRATION Peter Ramsden*.**

[1] This application was simple in that it sought only two major prayers namely:

"a) ………………………

b) Declaring that this is an arbitrable dispute between Applicant and Respondents;

c) Appointing Advocate Kuena Mophethe as the arbitrator in the dispute between the Applicant and Respondents.

d) …………………………………"

[2] There was no dispute about identity of the parties namely: the quantity surveyor Applicant and the contractors – Respondents the latter who are a partnership. Furthermore that the parties had agreed to arbitration in the written agreement of the 6th October 2010. In that agreement no mention was made as to the number of arbitrators. Reference will be made to section 10 of the **Arbitration Act 1980** in that regard.

[3] Secondly, it is common cause (see paragraph 4.7 of Applicants' founding affidavit) that Applicant declared a dispute and accordingly called Respondents to agree to an identified nominee arbitrator but the latter refused.

[4] Strangely, to that paragraph 4.7 Respondents replied to say:

> "There is a dispute. But the crucial issue is that we maintain that the appointment of such an arbitrator be undertaken in such a way that is acceptable to both parties." (my emphasis).

The question was: what was acceptable? It had become clear that the matter was arbitrable.

[5] Where the Applicant, as in paragraph 5 of the founding affidavit said the court has the power and authority to appoint an arbitrator in terms of section 13 (2) of ***Arbitration Act 1980,*** in view of the parties disagreement in the matter, the Respondents surprisingly said that "the contents are noted". It is surprising because the Respondents should have stated whether they denied or admitted or some such attitude. I took that it was not denied because it was not denied.

[6] This section 13 (2) of the ***Arbitration Act*** says:

> "If the appointment referred to in the notice served under sub-section (1) is not made or agreed to, as the case may be, within seven (7) days after the service of the notice, the party who gave the notice to the other party or parties or the arbitrators, as the case may be, apply to the court to make the necessary appointment, and thereupon the court may appoint an arbitrator or arbitrators or umpire." (my emphasis).

The Applicant accordingly felt that it was justified in coming to court in the circumstances. I agreed with respect. See generally ***Goodwinstable Trust v Duonex (Pty) Ltd and another 1988 (4) SA 606, 621 D-J***.

[7] Interesting Respondents contend that Applicant should not have come to court because as they say in annexure "G".

> "we maintain that are offers an open to discussion that could lead to settle this matter amicably."

That is after they had said in the preceeding paragraph that:

> " we propose that there be a three (3) men arbitrators panel where each nominate a one arbitrator as parties and they in turn nominate the third."

[8] Respondents' further suggested that their offices were open to discussions that could lead to settling this matter amicably. Mr Hoeane would boldly say that without those further discussions the Applicant ought not to have approached the court. I made it clear to him that I did not agree. Neither did I agree that anything should touch on the merits of the case at this stage. The arbitrator or arbitrators would deal with the merits.

[9] I agreed with Mr. Sakoane that in the absence of mention or directions as the number of arbitrator in the parties' agreement resort shall be had to section 10 of the ***Arbitration Act***. The ***Act*** says:

> "10 Reference to a single arbitrator. Unless a contrary intention is expressed in the arbitration agreement, the reference shall be to a single arbitrator".

I could not receive any sound response from Respondents to above statement of the law.

[10] Indeed a request had been made by the Applicant on the 13th February 2013, in annexure "E", which spoke about arbitration in terms of ***Arbitration Act of Lesotho*** as per clause 19 of schedule one of JV Agreement. Most helpfully the seminal authority on arbitration of ***The Law of Arbitration South African and International Arbitration*** – Peter Ramsden, has this to say at 6.7.2 on page 75:

> “The court will not appoint an arbitrator where a valid arbitration agreement does not exist.”

[11] There was an agreement that the parties would subject themselves to arbitration in this case.

[12] I decided that the application ought to succeed with costs to the Applicant.

T. E. MONAPATHI
JUDGE

For Applicant	:	Adv. S. P. Sakoane
For Respondents	:	Adv. T. Hoeane