Construction Industry Development Board

DEVELOPMENT THROUGH PARTNERSHIP

CONSTRUCTION INDUSTRY DEVELOPMENT BOARD ("CIDB")

CASE SUMMARIES AND ANALYSES

JULY 2013 – SEPTEMBER 2013

PO Box 2107, Brooklyn Square, 0075 | **Tel** +27 12 482 7200 / +27 86 100 cidb
Fax +27 12 349 8986 / +27 86 681 9995 | **Registers Call Centre** 0860 103 353
Anonymous Fraud Line 0800 112 452 | **Email** cidb@cidb.org.za | **www.cidb.org.za**

BDE CONSTRUCTION v BASFOUR 3581 (PTY) LTD 2013 (5) SA 160 (KZP)

Court	KwaZulu-Natal High Court, Pietermaritzburg
Judge	Swain J
Heard	August 13, 2012
Judgment	August 31, 2012

Facts:
The applicant seeks a stay of legal proceedings instituted as a result of a breach of an arbitration agreement in which payment of a sum of money was sought from the respondent to pursue a claim by way of arbitration. The respondent, however, relying upon the decision of Wallis J (as he then was) in *Aveng Africa Ltd (formerly Grinaker LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD), 2013 (5) SA.

In reliance upon the judgment in Aveng case, the respondent submitted that the applicant was accordingly obliged to abandon the present litigation by withdrawing the application as he was not entitled to keep the present litigation in place and proceed to arbitration.
The respondent further contends that the dispute between the parties falls within the terms of the arbitration agreement and the applicant is accordingly in breach of its terms.

The judge in this case stated that where a party to an arbitration agreement institute proceedings in breach of the arbitration agreement, the other party is faced with an election on whether to enforce the arbitration agreement by seeking a stay of the proceedings, or not.

It was stated that if the innocent party elects to enforce the arbitration agreement, it must be done either of the following:

(a) applying for a stay of the proceedings in terms of section 6 of the Arbitration Act 42 of 1965 before the delivery of any pleadings or the taking of any further step in the proceedings. Should the innocent party take a further step in the proceedings without having applied for a stay, it thereby precludes itself from doing so; or

(b) filing a special plea in the nature of a dilatory plea, for the stay of the proceedings until the dispute has been determined by arbitration.

In this case, as in *Aveng*, the respondent did not contest the entitlement of the applicant to institute these proceedings by seeking their stay. The judge further stated that it is clear the respondent, when faced with what it contends was a breach of the arbitration agreement, elected not to seek its enforcement. It is trite that having made such an election, the respondent is bound by it and thereby waived any reliance upon, and thereby condoned, the applicant's alleged breach of the arbitration agreement. As stated in the often quoted dictum of Watermeyer AJ in *Segal v Mazzur* 1920 CPD 634 at 645:

> *'Now, when an event occurs which entitle one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct: see Croft v Lumley (6 HLC 672 at 705) per Bramwell; Angehrn & Piel v Federal Cold Storage Co Ltd (1908 TS 761 at 786) per Bristow J. As already stated, the question whether a party has elected not to take advantage of a breach is a question of fact to be decided on the evidence, but it may be that he has done an act which, though not necessarily conclusive proof that he has elected to overlook the breach, is of such a character as to lead the other party to believe that he has elected to condone the breach, and the other party may have acted on such belief. In such a case an estoppel by conduct arises and the party entitled to elect is not allowed to say that he did not condone the breach.'*

The onus is therefore on the respondent to prove that the applicant has waived the relief he claims, or failing such proof, that he is estopped from claiming it which implies that the doctrine of election is a combination of waiver and estoppel.

The court submitted that the arbitration agreement imposes reciprocal obligations upon the parties, such that performance by the one party is conditional upon performance by the other, and that the applicant may have ignored its contractual obligations under the arbitration agreement and proceeded with the present application, which the respondent has not challenged, does not alter the fact that the respondent in electing not to challenge the present proceedings, made an election not to enforce the arbitration agreement by which it is bound, which has as a consequence condonation of the applicant's breach of the arbitration agreement.

The court concluded that the applicant was entitled to seek a stay of the legal proceedings and was not obliged to withdraw them, before referring the parties' dispute to arbitration.

The order was accordingly granted on the following terms:

(a) That the application be stayed pending the outcome of the arbitration proceedings;
(b) That the dispute between the applicant and the respondent be determined by arbitration at a time and place agreed upon by the applicant, the respondent and the arbitrator, and in a manner agreed upon by them, or as determined by the arbitrator; and
(c) That the costs of this application be determined by the arbitrator.

Analysis:

This case is relevant to the *cidb* and the construction industry at large as it considers that any party to an arbitration agreement who commences litigation proceedings prior to referring the dispute to arbitration does not result in the abandonment of its rights to resort to arbitration under the agreement.

If a party to an arbitration agreement institutes court proceedings in breach of that agreement, then the innocent party must choose whether to enforce the arbitration agreement by seeking a stay of the proceedings. If the innocent party elects not to seek a stay, it condones the guilty party's breach of the arbitration agreement, and in such circumstances the guilty party is not obliged to abandon the instituted proceedings before referring the dispute to arbitration under the arbitration agreement.

The decision to the contrary in Aveng Africa Ltd (formerly Grinaker LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd 2011 (3) SA 631 (KZD) is wrong.

KOPM LOGISTICS (PTY) LTD v PREMIER, GAUTENG PROVINCE, AND OTHERS 2013 (3) SA 105 (GNP)

Court	North Gauteng High Court, Pretoria
Judge	Kruger AJ
Heard	October 5, 2012
Judgment	October 5, 2012

Facts:

During 2007, the Gauteng Shared Service Centre ("the fourth respondent) in conjunction with the Premier of Gauteng ("the first respondent), called for tenders to be submitted to implement a so-called 'smart card system' for the Department of Health and Social development ("the third respondent). In short, the 'smart card system' entails the designing of software and the issuing of a card, similar to a credit card, where all the details, history, treatment and all other information relating to a specific patient can be recorded on the card. As and when the patient presents himself/herself at the hospitals or clinics run by the third respondent, the patient will produce the card and the amount of administration, paperwork and waiting time will be drastically reduced. Another obvious advantage is that should the patient attend at another hospital or clinic where he/she received treatment in the past, the history will immediately be available to the healthcare practitioner to treat the patient.

On or about 15 August 2007, the KOPM Logistics ("the applicant) submitted a tender to the third and/or fourth respondents. On or about 6 December 2007, the fourth respondent notified the applicant that the tender had been awarded to the applicant, subject to the following two conditions:

(a) the successful negotiation of the pilot phase of the smartcard system; and

(b) the conclusion of a mutually acceptable agreement between the applicant and the third respondent.

Early in April 2008, the third respondent and the applicant committed themselves to the pilot phase in terms of a so-called 'Projects Charted'. The pilot phase was successfully implemented and terminated on or about 9 February 2009. However, the second condition referred to above, that is, the conclusion of a mutually acceptable agreement, proved to be a bone of contention. The upshot was that applicant issued an application in this court, seeking relief to the effect that the failure and/or refusal of the third respondent, to continue negotiations with the applicant to

conclude a mutually acceptable agreement pursuant to the award of the tender, be reviewed and set aside. The relief also entails:

- That an order will issue, in terms of s 8(1)*(c)*(ii)*(aa)* of the Promotion of Administrative Justice Act 3 of 2000, against the third respondent in terms whereof the third respondent is ordered to recommence and continue the bona fide negotiations with the applicant in order to conclude a mutually acceptable agreement in respect of the award of the tender aforesaid, until such time as a mutually acceptable agreement has been concluded or, alternatively, the negotiations break down due to the parties' inability to agree on essential terms of such agreement;
- That third respondent be ordered to conduct the negotiations with the applicant in accordance with the terms and conditions of the said tender;
- That third respondent be ordered to pay the applicant's costs and that any other respondent who opposes the application be ordered to pay applicant's costs jointly and severally with third respondent.

The application currently before the court was an interlocutory application to the main application and the applicant seeks the following relief:

- That the first, second and third respondents be ordered to file the record of proceedings as contemplated in rule 53(1)*(b)* containing all documentation relating to all and any negotiations and other steps taken to negotiate with the applicant to conclude an agreement pursuant to the award of the tender, which documentation shall include, but not be limited to:
    - stage whereupon the third respondent failed and/or refused to continue with the negotiations. The applicant therefore submits that it is entitled to the record (that is, for purposes of the main application), which record consists of all documentation from the date when the tender was awarded to the applicant, on 19 December 2007, until the third respondent refused to continue with the negotiations during April or May 2011. On 31 October 2011, the State Attorney served on the applicant's attorney:
    - the minutes of all meetings of representatives of the third respondent pertaining to this matter;
    - any correspondence and/or memoranda exchanged within the third respondent relating to this matter;
    - any agreements prepared in draft format by the third respondent.

The applicant contends that, pursuant to having been awarded the tender, the envisaged negotiations commenced and progressed to an advanced filing notice purporting to be the record in terms of rule 53, accompanied by a lever-arch file

containing documentation. However, the applicant alleges that all the documentation so made available only included documentation leading up to the award of the tender and not any documentation pursuant thereto. Accordingly, the applicant's attorney returned such documentation to the State Attorney, pointing out the aforesaid facts by way of a letter dated 4 November 2011. Pursuant thereto and on 15 November 2011, the State Attorney once again served a record of proceedings in terms of rule 53 on the applicant's attorney under a copy of an index. The applicant contends that the index, consisting of nine items, referred to the same irrelevant documents previously returned to the State Attorney on 4 November 2011.

In its founding papers in the main application the applicant referred to various documents which, so it contends, must exist and which will, inter alia, constitute part of the record that the applicant seeks. In this regard reference was made, inter alia, to a meeting between the representatives of the applicant and relevant officials of the third respondent, which took place on 9 March 2009 at the latter's attorneys. The applicant refers to the fact that minutes do exist pertaining to a second negotiation meeting which was conducted during March 2009 and argues that, similarly, minutes regarding the first meeting should also exist. Another example referred to by the applicant pertains to a 'revised contract' which had been referred to in correspondence and which would have been forwarded by the third respondent to the applicant, for the latter's review and response. The applicant submits that it is entitled to the 'revised contract' in all its relevant phases and that such contract forms part of the record sought by the applicant through these proceedings.

The deponent on behalf of the third respondent states that the 'record' which was filed on 31 October 2011 contains the only documents that the respondents have in their possession; that the applicant had been informed by the Head of the Department that —

> *'none of the meetings were minuted and that the respondents have no documents in their possession other than what was filed as the record F or what is attached to the founding affidavit';*

and that —

> *'a diligent search has been conducted by officials within the third respondent . . . and I am informed that no further documents or tape recordings exist. The respondents therefore have no documents to file in terms of rule 53.'*

It is against this background that the application must be adjudicated. The third respondent is a department of a provincial government. As such it is a creature of statute and an organ of state. In general terms, therefore, it derives its power to enter into contractual relationships from statute, as do other bodies or persons empowered

by it to enter into contractual relationships on its behalf. Hence, it exercises a public power when entering into contractual relationships.

Section 217 of the Constitution, under the heading 'Procurement', provides in section (1):

> *'When an organ of state in the National, Provincial or Local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'*

Clearly, section 217 accords with the founding principles encapsulated in section 1 of the Constitution, and in particular the reference in the latter section to the 'democratic government' based on 'accountability, responsiveness and openness'.

In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) ([2006] 1 All SA 478) para 12 at 158D – E the court reiterated that the evaluation of a tender is a process governed by administrative law. Harms JA, speaking on behalf of the court, stated:

> *'Once the tender is awarded, the relationship of the parties is that of ordinary contracting parties, although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship.'*

In the current instance it is common cause that the acceptance of the applicant's tender did not give rise to the simultaneous coming into being of a contract. In this regard the letter of acceptance under the hand of the deputy general manager: procurement, Gauteng Shared Service Centre, dated 6 December 2007, clearly states that 'your bid in respect of the abovementioned tender has been successful, subject to the provisions of paragraph 2'. The latter paragraph then reads:

> *'This award is subject to the successful negotiation of the pilot phase and conclusion of a mutually acceptable agreement between your company and the Gauteng Department of Health. This office will be in contact with you shortly to commence the contractual matters.'*

Based on the last-mentioned letter it was argued on behalf of the respondents that the acceptance of the tender read with the said letter amounts to 'an agreement to agree, to contract on terms still to be agreed upon'. Therefore (so the argument goes) the process pursuant to the acceptance and awarding of the tender is governed by the normal civil law of contract or the common law, that it does not constitute administrative action and is therefore not subject to review. Such an agreement to agree in future is not binding. (See *Van Aardt v Galway*2012 (2) SA 312 (SCA); Kerr *The Principles of the Law of Contract* 6 ed at 80). Suffice it to say that respondents' attitude in this regard is inherently unfair. One glimpse at the tender documentation presented by the applicant is sufficient to make one realise the

amount of time, effort and cost which applicant must have put into the tender. The question remains, however, whether respondents' attitude is legally justifiable?

The emphasised remarks by the court in *Steenkamp* supra (that is, the requirements of administrative justice which may have an impact on the contractual relationship in particular circumstances) referred back to the earlier judgment by the Supreme Court of Appeal in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) ([2003] 1 All SA 424). With reference to certain conditions which applied to a tender offer Cameron JA (as he then was) speaking for the court in *Logbro* said the following in para 7 at 466F – G:

> *'Even if the conditions constituted a contract (a finding not in issue before us and on which I express no opinion), its provisions did not exhaust the province's duties towards the tenderers. Principles of administrative justice continued to govern the relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights — such as the entitlement to give no reasons — would necessarily yield before its public duties under the Constitution and any applicable legislation.'*

In para 8 at 466H – 467A Cameron JA continued:

> *'This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.'*

With reference to the judgment in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) Cameron JA stated:

> *'The case is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.'*

Paragraph 10 at 467H – 468A. In para 11 at 468B – C Cameron JA continued:

> *'In the present case, it is evident that the province itself dictated the tender conditions, which McLaren J held constituted a contract once the tenderers had agreed to them. The province was thus undoubtedly, in the words of Streicher JA in Cape Metropolitan acting from a position of superiority by virtue of it being a public authority in specifying those terms. The province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract.'*

Clearly, then, the court distinguished *Cape Metropolitan* on the basis that in *Logbro* the administrator was acting from a position of superiority. Hence, the decision to call for new tenders was administrative, even if it were sourced in contract.

In the current instance the stage of entering into a contractual relationship has not yet been reached. In view of the remarks by Cameron JA, particularly with regard to public duties of fairness when exercising the powers deriving from the terms of (an already established) contract, there seems to be no good reason why the on-going process (that is, negotiations post-acceptance of the tender, but preceding the establishment of a contract) should not also be subject to the province's public duties of fairness and openness. In addition, if in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship itself (*Steenkamp* supra) the nature of the process under consideration can only be that of administrative law.

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*2000 (1) SA 1 (CC) (1999 (10) BCLR 1059; [1999] ZACC 11) it was held that whether conduct constituted administrative action can better be decided on a case-by-case basis. Relevant considerations in the diagnosis may include: the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related to policy matters which are not administrative or the implementation of legislation, which is characteristic of administrative action.

Applying these criteria to the current facts, it is evident that the latter are on all fours with the approach followed in *Logbro*: the on-going, post-tender process still derives from the implementation of legislative powers. Moreover, it is not closely related to policy matters and constitutes the exercise of a public power. Procedural fairness applies and, hence, the requisites of openness, transparency and bona fide negotiations are applicable. Therefore, the on-going process is clearly distinguishable from the common-law position where an agreement to agree does not have binding force. The considerations here are different. The nature of the relationship is determined by constitutional considerations and imperatives: the on-going process falls within the parameters of administrative action which may materially and adversely affect the rights or legitimate expectations of the applicant. At the very least the process must be procedurally fair (section 3(1) of the Promotion of Administrative Justice Act 3 of 2000) and must accord with the constitutional norms of fairness and openness.

On the facts of the matter it is highly improbable that third respondent and/or parties under its control and/or acting on its behalf, possess no documentation which may be relevant for purposes of the main application and the relief sought therein. The denials made on behalf of third respondent in this regard are unconvincing, generalised in nature, not well substantiated, and bold.

The duty to negotiate in good faith inter alia implies that respondents must keep proper records of all relevant documentation. The probability of the existence of, at the very least, minutes of meetings and draft agreements is overwhelming. In any event, no basis has been laid to claim privilege over any of the documentation which is probably still in its possession.

The court granted the following order:

(a) That the first, second and third respondents are ordered to file the record of proceedings as contemplated in rule 53(1)*(b)*, containing all documentation relating to all and any negotiations and other steps taken to negotiate with the applicant to conclude an agreement pursuant to the award of tender No RFPGT/GDH/103/2007 to the applicant, commencing on 19 December 2007 to the date hereof, which documentation shall include, but not be limited to:
    1.1 minutes of all meetings of representatives of the third respondent pertaining to this matter;
    1.2 any correspondence and/or memoranda exchanged within the third respondent relating to this matter;
    1.3 any agreements prepared in draft format by the third respondent.

(b) That the third respondent is ordered to pay the costs of the application, which costs shall include the costs occasioned by the employment of two counsel.

Analysis:

This case is relevant to the *cidb* and the construction industry at large as it considers that where a tender has been awarded to a tenderer subject to the condition that a mutually acceptable agreement is concluded between the appropriate authority and the tenderer, the on-going post-tender process, including the negotiation of the mutually acceptable agreement, still derives from the implementation of legislative powers. Moreover, it is not closely related to policy matters and constitutes the exercise of a public power. Procedural fairness applies and, hence, the requisites of openness, transparency and bona fide negotiations are applicable. Therefore, the on-going process is clearly distinguishable from the common-law position where an agreement to agree does not have binding force. The considerations here are

different. The nature of the relationship is determined by constitutional considerations and imperatives: the on-going process falls within the parameters of administrative action which may materially and adversely affect the rights or legitimate expectation of the tenderer. At the very least the process must be procedurally fair (section 3(1) of the Promotion of Administrative Justice Act 3 of 2000) and must accord with the constitutional norms of fairness and openness. The duty to negotiate in good faith, inter alia, implies that respondents must keep proper records of all relevant documentation, which should be filed in terms of rule 53(1)*(b)* of the Uniform Rules of Court in review proceedings in respect of such administrative action.

PEEL AND OTHERS v HAMON J&C ENGINEERING (PTY) LTD AND OTHERS 2013 (2) SA 331 (GSJ)

Court	South Gauteng High Court, Johannesburg
Judge	Moshidi J
Heard	June 8, 2012
Judgment	November 16, 2012

Facts:

Joseph Edward Peel Jnr, Joseph Edward Peel Snr, Bonisiwe Duduzile Pandela and Gillian Quari ("the applicants) were directors and shareholders of Hamon J&C Engineering (Pty) Ltd ("the first respondent), which was a subsidiary of Hamon South Africa (Pty) Ltd ("the second respondent), which was in turn a subsidiary of Hamon & Cie (International SA) ("the third respondent).

They were thus 'related' juristic persons as intended in section 2(1) of the Companies Act 71 of 2008. On the papers a reference to 'the Hamon respondents' is a reference to the second and third respondents, namely Hamon SA and Hamon & Cie, respectively, while a reference to 'the joint venture company' is a reference to Hamon J&C.

The applicants, had in October 2010 entered into a complex joint venture agreement that was devised to align the interests of the various companies, but by 2012 the relationship between the applicants and respondent companies had soured to the extent that they sought to part ways, the applicants alleging in particular that they had been oppressed by the conduct of the respondents in engaging in 'fronting' in a fraudulent attempt to improve their BEE status. The applicants contended that the J&C's reputation in South Africa had been tainted by respondents' conduct to the extent that its business prospects were now in danger and, relying on section 163 of the Act, asked the court for an order severing the ties between J&C and the other respondents.

The respondents argued in turn that the applicants had failed to bring themselves within the purview of section 163 of the Act and that they were in any event obliged,

in terms of the joint venture agreement, to resolve their dispute by means of arbitration, and not by litigation in court.

Section 163 (1) of the Act entitles a 'shareholder or director' of a company to relief if 'acts or omissions', or the 'business conduct' of a company or 'a related person', 'has had a result that was oppressive or unfairly prejudicial to, or disregards the interests of' the applicant. Section 163(2) of the Act then grants the court wide powers to make appropriate interim or final orders.

This application in terms of section 163 of the new Companies Act is largely based on the alleged conduct of the Hamon respondents and their directors. The alleged conduct relates to an attempt by the Hamon respondents to improve the black economic empowerment status of the third respondent. The applicants ' attitude is that the conduct is of such a serious nature that it jeopardises continuation of any business with Hamon. The applicants feel that they simply cannot be associated with the Hamon respondents any more.

The applicants contended that in the South African business environment, committing a fraud relating to broad-based black economic empowerment (BBBEE), and thereby abusing the most vulnerable members of our community in circumstances described above, is seen in a very serious light. The nature of the work that Hamon J&C engaged in often came from organs of state or public entities, such as work from Eskom relating to air pollution solutions for power stations.

Further, even non-governmental organs took into account a contractor's BEE status for purposes of their procurement points in respect of their own BEE scorecards. If the applicants and their business, which they are now conducting through the joint venture company under the Hamon name, were to be tainted by these serious allegations, it has the potential for destroying their business prospects going forward; and that the applicants have been or are exposed to a serious business risk. The applicants cannot see their way clear to continue working with or being associated with the Hamon respondents, in a business relationship that has clearly broken down irretrievably as a result of the mistrust that has arisen.

In terms of the provisions of section 163 of the new Companies Act the primary relief sought by the applicants is to sever ties so that Hamon J&C is no longer a subsidiary of the second respondent and third respondent or otherwise associated with the Hamon respondents.

In this regard the applicants seek an order directing an exchange of shares between the second applicant and second respondent as envisaged in section 163(2)*(e)*; and/or directing the restoration of the second respondent by the second applicant.

The court stated that the remedy provided by section 163 of the new Companies Act. must be interpreted, bearing in mind that not only the contents of the preamble to the new Companies Act, namely to, inter alia, 'provide appropriate legal redress for investors and third parties with respect to companies', but also the definition of 'related and inter-related persons, and control', as contained in section 2 of the new Companies Act, as set out earlier in the judgment.

In *Henochsberg on the Companies Act 71/2008* at 568, under the discussion of section 163, the following is said:

> *'A number of circumstances could give rise to the remedy under this section becoming available. The first is where an act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant (section 163(1)(a)). The phrase has had a result indicates that the act must be completed. It is also the result, and not the act, that must be oppressive or unfairly prejudicial. Secondly where the business of the company or a related person is carried on in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant (section 163(1)(b)), or, thirdly (section 163(1)(b)), where the powers of a director or prescribed officer (see reg 38 sv prescribed officer) of the company, or a person related to the company are exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant (section 163(1)(b)). See section 2 for the definition of a person related to the company, which can include a subsidiary and/or holding company of the company.'*

In the more recent judgment of *Kudumane Investment Holdings Ltd v Northern Cape Manganese Co (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ), Satchwell J had the occasion to deal with the provisions of section 163(1) of the new Companies Act. In paras 49 – 50 of the judgment the learned judge said:

> *'Section 163(1) of the Act provides that a shareholder of a company may apply to court for relief if any act or omission of a person related to the company has had the result that [it] is oppressive or unfairly prejudicial to or unfairly disregards the interests of the applicant.'*

On entering into the joint venture company, the applicants had reasonable expectations of profiting financially, at least, from the association of the Hamon name. The fact that the BEE issue is not being resolved makes the conduct oppressive towards the applicants. In *Contemporary Company Law* 2 ed (Juta 2012) the learned authors at 761 state:

> *'The concept of a related person, as defined in section 2 of the Act, includes a holding company and subsidiary relationship, as well as direct or indirect control of another company or its business (or the direct or indirect control of each of them or the business of each of them or the business of each of them by a third person).'*

The respondents contended that the court was unable to decide on the relief sought in that the applicants were obliged to resolve the present dispute by means of arbitration in terms of clause 22 of the shareholders' agreement.

Clause 22 of the shareholders' agreement contained an arbitration provision. In this regard clause 22.1 provides that:

> *'Any disputes arising from or in connection with this Agreement, should be finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa (AFSA) by an arbitrator or arbitrators approved by AFSA. There shall be no right of appeal as provided for in article 22 of the aforesaid rules.'*

The court stated that there are several obstacles to the respondents' contention having regard to the particular circumstances of the matter. The courts would generally give effect to arbitration provisions in agreements. However, it has been held on occasion that an arbitration clause does not necessarily oust the jurisdiction of the courts. As regards the onus, it is settled law that a party wishing to invoke an arbitration clause must allege and prove the underlying jurisdictional facts required in order to rely on the clause. One of the requirements is that a party wishing to rely on an arbitration clause must show that such clause is applicable to the dispute between the parties.

In *PCL Consulting (Pty) Ltd t/a Phillips Consulting v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) Cloete JA said in paragraph 7:

> *'In the present proceedings, the defendant has simply pointed out that the lease agreement has an arbitration clause in wide terms. That is not sufficient. The defendant was obliged to go further and set the terms of the dispute.'*

Applying the above principles to the facts of the present matter, it is plain from the nature of the dispute between the parties that it is not a dispute that arises from or in connection with the shareholders' agreement. The Hamon respondents have failed to suggest either the basis or the specific clause/s in the shareholders' agreement on which they rely for their contentions. The respondents rather rely on the general statement contained in paragraph 6.3 of the answering affidavit, that:

> *'The dispute which is the subject-matter of this application is a dispute arising from or in connection with the shareholders agreement being concerning the relationship between the applicants and the second respondent in the first respondent and. . . .'*

The present application is brought under the provisions of section 163 of the new Companies Act. The entity that is supposed to conduct the arbitration process,

namely AFSA, clearly does not have the powers to grant the relief as envisaged in section 163 of the new Companies Act, only a court does..

In the allegations relating to the BEE issue, the applicants have imputed fraudulent conduct on the part of the Hamon respondents. It is, on its own, a serious allegation that cannot properly be ventilated by arbitration proceedings. In *Rawstorne and Another v Hodgen and Another* 2002 (3) SA 433 (W) in para 25 Solomon JA said:

> *'In the present matter it is the applicants who have been accused of fraudulent conduct and it is they who object to the arbitration. I am mindful that there should be compelling reasons for refusing to hold a party to his contract to have a dispute resolved by arbitration. It seems to me, however, that where fraud of the kind alleged in the present matter is imputed, it would be wrong not to allow the party accused thereof the opportunity of having so grave a personal imputation adjudicated upon in open Court.'*

The applicants' objection to arbitration was upheld as they have succeeded to prove on a balance of probabilities that they are entitled to the relief sought as it falls within the ambit of the provisions of section 163 of the Companies Act 71 of 2008.

The court proceeded to hold as follows:

> '*The conduct of J&C and INT in undertaking the inappropriate BEE exercise and failing to take measures to remedy it was oppressive, unfairly prejudicial to the applicants, disregarded their interests, and exposed them to serious business risk as well as criminal prosecution. The respondents' argument that the conduct complained of was in the past and therefore irrelevant should be dismissed on the basis that s 163 clearly covered both past and future oppressive or unfairly prejudicial conduct, even if it were no longer persisted in. (Paragraphs [56] – [61] at 354D – 357A.) As to whether the arbitration clause in the joint venture agreement should be implemented: the respondents were unable to show that the arbitration clause was applicable to the dispute between the parties, and in any event only courts E could grant the relief envisaged by section 163.'*

The court granted the following order:

(a) That the applicants are ordered to forthwith take the necessary steps to change the name of the first respondent from Hamon J&C Engineering (Pty) Ltd to J&C Engineering (Pty) Ltd;

(b) That the second respondent is ordered to ensure that all directors appointed to it to the board of the first respondent resign, and in the absence of them doing so within seven days, the applicants are authorised to take such steps as may be necessary in the offices of the Companies and Intellectual Property Commission to reflect such directors as having been removed;

(c) That the second and the third respondents pay the costs of this application, jointly and severally, the one paying the other to be absolved.

Analysis:

This case is relevant to the *cidb* and the construction industry at large as it considers the following aspects:

- That a member of a joint venture may make an application to court if the conduct of the other joint ventures members are engaged in “fronting” in a fraudulent attempt to improve their BBBEE status;
- That the court's jurisdiction is not ousted by arbitration agreement (i) where party wishing to rely on it is unable to show that agreement applicable to dispute between parties, or (ii) where entity that is supposed to conduct arbitration lacking power to grant relief claimed.

COMMAND PROTECTION SERVICES (GAUTENG) (PTY) LTD t/a MAXI SECURITY v SOUTH AFRICAN POST OFFICE LTD 2013 (2) SA 133 (SCA)

Court	Supreme Court Of Appeal
Judge	Mthiyane DP, Brand JA, Cloete JA, Pillay JA and Saldulker AJA
Heard	November 1, 2012
Judgment	November 16, 2012

Facts:

The Post Office had invited tenders for the provision of certain services. Maxi Security (Maxi) submitted a tender and on 28 July 2003 received a 'Letter of Appointment' advising it that it had been successful. The letter, however, went on to provide that the appointment was subject to 'BEE improvement' and 'the successful finalisation of a formal contract'. It was accepted and signed on behalf of Maxi.

Although Maxi began providing the services in question from 1 September 2003, no formal agreement was ultimately finalised and signed, and on 30 January 2004 the Post Office wrote a letter informing Maxi that it was appointed on a conditional month-to-month basis, subject to finalisation of the negotiations and conclusion of the agreement. The negotiations did not, however, result in an agreement, and the Post Office proceeded to inform Maxi that it was not prepared to further pursue the matter and would end the month-to-month arrangement.

Maxi contended that the letter of 30 January 2004 constituted a repudiation of the agreement reached on 28 July 2003, when the Post Office had through the letter of appointment accepted the offer made by Maxi in the tender documents. Maxi indicated that it would accept the repudiation and R14 million in contractual damages. The Post Office argued that since the letter of appointment was a conditional acceptance of Maxi's offer, and the stipulated conditions were never fulfilled, the contract relied upon by Maxi never came into existence. A high court found in favour of the Post Office.

On appeal, the court held that when parties conclude an agreement while there are outstanding issues requiring further negotiation, two possibilities would follow:

- That no contract formed because the acceptance was conditional upon consensus, or
- That a contract formed with an understanding that the outstanding issues would be negotiated at a later stage.

Whether the initial agreement acquires contractual force depends on the parties' intention, to be gleaned from their conduct, the terms of the agreement and the surrounding circumstances.

In the present case the letter of appointment of 28 July 2003 stated that the appointment was 'subject to' (1) 'BEE improvement' and (2) 'the successful finalisation and signing of a formal contract', presented Maxi with a conditional acceptance or counter-offer. Accordingly no final agreement had been reached and a binding contract would only come into existence upon the successful finalisation of the negotiations.

Appeal against a decision in the North Gauteng High Court, Pretoria was dismissed with costs because the letter of appointment was not an unconditional acceptance of the tender and that the agreement that then came into existence was an agreement to negotiate.

Analysis:

This case is relevant to the *cidb* and the construction industry at large as it considers that a party that tenders for a government contract cannot assume that a binding contract has been concluded merely because it has received a letter of appointment informing it that it was the successful tenderer. If the acceptance is conditional, for example, if it contemplates further negotiation and the signing of a formal contract, then there would be no binding contract until the contemplated negotiations were concluded and a formal contract signed.

RHOODE v DE KOCK AND ANOTHER 2013 (3) SA 123 (SCA) A

Court	Supreme Court Of Appeal
Judge	Cloete JA, Cachalia JA, Bosielo JA, Wallis JA and Pillay JA
Heard	November 19, 2012
Judgment	November 29, 2012

Facts:
Mr and Mrs De Kock, ("the respondents), instituted motion proceedings against Mr Rhoode ("the appellant"), in the Magistrate's Court in George. They claimed an order ejecting the appellant from immovable property owned by them. The magistrate granted the order. An appeal by the appellant to the Western Cape High Court, Cape Town was dismissed.

The history of the matter began on 10 February 2006 when the respondents sold to the appellant a property described as 'The Boathouse, Langvlei, portion 1/191 district George' for R1,85 million. The deed of sale was signed by both respondents, who are married in community of property and in whose names the property is registered. It contained a suspensive condition that a loan for the full purchase price, to be secured by a mortgage bond over the property, would be obtained by the appellant within 12 months of the date of signature, that is, on or before 9 February 2007. The appellant took possession of the property. The loan was never obtained.

On 6 March 2007 and again on 1 September 2008, the parties attempted to extend the deed of sale by substituting those dates for the original date of signature. The amendments were initialed by De Kock and the appellant but not by Mrs De Kock. Between these dates, on 16 March 2007, the appellant paid R400 000 to the respondents in reduction of the purchase price.

On 11 October 2009 De Kock sent an email to the appellant demanding a guarantee for the purchase price and threatening to cancel the agreement unless it was forthcoming within 10 days. This email elicited a response from the appellant's attorneys on 30 October 2009 in which they contended that because the suspensive condition in the original deed of sale had not been fulfilled, the sale had lapsed; namely,

- That the attempts by the parties on 6 March 2007 and 1 September 2008 to revive the sale were void for want of compliance with section 15(2)*(a)* read with section 15(5) of the Matrimonial Property Act 88 of 1984 and section 2(1) of the Alienation of Land Act 68 of 1981, in as much as Mrs De Kock, who was the co-owner of the property, did not sign the amended deed of sale;

- That the appellant was entitled to repayment of the R400 000 he had paid on 16 March 2007; and

- That he reserved the right to claim the amount by which the value of the property had been increased by virtue of improvements made by him, once this amount had been quantified. There was no mention of a lien.

The appellant continued in occupation of the property. In January 2010, the respondents approached the Magistrate's Court, George, ex parte for an order in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The application was accompanied by an affidavit deposed to by De Kock. The order was granted and served on the appellant together with the affidavit.

In his affidavit De Kock said that he and his wife were the registered owners of the property, and annexed a print-out of a deeds office search in support of this allegation. He then rehearsed the facts set out above and recorded the respondents' acceptance of the legal position set out in the email from the appellant's attorney in so far as it dealt with the validity of the parties' attempts to revive the deed of sale.

De Kock went on to say:

> *'It is in my view clear from the aforegoing that there is at present no agreement between us [the respondents] and [the appellant] in terms whereof he occupies the property, and that he therefore has no right to occupy the property.*
> *I concede that [the appellant] has already paid R400 000 to me, but I have a counterclaim against him for the period of his occupation of the property as well as any other damage that I have suffered from the whole incident.*
> *He also alleges that he has effected improvements to the property that have increased its value by about R300 000. I deny this. I have made enquiries at the local authority and no plans for any alterations were submitted or approved. I am advised that the municipality can therefore legally compel me to demolish any illegal additions or alterations and to restore the property to the condition in which it was. That would then indeed cause me a loss that cannot be quantified now. I cannot expand on this aspect as the nature of the so-called improvements is not known to me.'*

The cause of action relied upon by the respondents was clearly the rei vindicatio.

In his answering affidavit, the appellant said:

> *'I depose to this affidavit in opposition to the relief sought by the [respondents]. I do so essentially on the basis that I am lawfully entitled to remain in possession of the property, by virtue of the operation of a so-called improvement lien. As will appear, the lien secures a substantial claim that I have against the [respondents], being the amount by which [they have] been enriched, and I have correspondingly been impoverished, by improvements to the property.'*

The appellant averred that, up to the time his attorney pointed out the legal position, he had laboured under the impression that his occupation of the property was in terms of a binding contract, in terms of which he would become the owner of the property; and on this basis he contended that from 9 February 2007 until the end of October 2009 he was 'in contemplation of law, a bona fide possessor, or at least a bona fide occupier of the property.'

The appellant went on to say:

> *'While I laboured under the belief that I would in due course become its owner, I caused substantial improvements to be effected to the property, as set out below. In order to quantify the cost of the improvements, a local builder of George, one Mr Gerhard Bouwer (of 3 Boom Street, Denneoord, George) was asked to inspect the property, and to furnish an estimation of what the improvements would cost, at current market prices (that is, as at February 2010). Mr Bouwer has furnished the following estimation:*
> *(a) Building and/or rebuilding garden walls: R86 631,84.*
> *(b) Introduction of car port and pergola to main house: R42 472,65.*
> *(c) Repair to and upgrading interior of old house: R11 937,35.*
> *(d) Repair to and upgrading exterior of old house: R23 574,25.*
> *(e) Conversion of shed into three flats/chalets: R683 489,58.*
> *(f) Introduction of veranda for flats/chalets: R38 767,10.*
> *(g) Introduction of swimming pool: R55 685,00.*
> *(h) Introduction of septic tank and plumbing: R36 373,70.*
> *(i) Introduction of fresh water tanks and plumbing: R67 388,50.'*

In a confirmatory affidavit Mr Bouwer said:

> *'I should mention that my aforesaid assessment of the cost of executing the work performed by the defendant in improving the property was not intended to be, and was not presented to him as, a finite or precise quotation of the cost. It is, however, in my opinion, a fair evaluation, which ought not to differ by a substantial margin (whether upwards or downwards) from the result of a more detailed assessment.'*

The total assessment made by Bouwer amounted to R1 046 319,9; of which a little under R600 000 represented materials and the rest, labour.

The appellant's affidavit continued:

'I respectfully say that, assessed at current market prices, the aforesaid improvements have substantially increased the value of the property (ie, the value that it presently has, with improvements, compared with the value that it would presently have had, without improvements). My attorney has engaged a registered professional valuer, one Mr JP van der Spuy, to undertake an investigation in this regard. Mr Van der Spuy examined photographs of the work that I did at the property (a selection of which is contained in the album marked B) and also caused an appointee in the George area to undertake a physical examination of the property. Mr Van der Spuy's provisional assessment is that my improvements increased the value of the property by about R500 000. I shall obtain, and deliver in support of my opposition in this matter, Mr Van der Spuy's confirmatory affidavit of the above.

. . .

It is self-evident that the improvements which I effected were all necessary and useful improvements, and not luxurious improvements.'

The appellant admitted that the alleged improvements were effected without building plans. He said:

'It is true that the improvements to the property were effected without approved building plans. However, I point out that the property is not within an urban area, in respect of which building regulations are generally more rigorously enforced, but is zoned as farm land . . . . Moreover, it is a common practice for a local authority to receive and approve building plans well after the structure to which they relate has been erected, if the plans and the structure comply with the requirements of the National Building Regulations . . . . The plaintiff has nowhere alleged that the improvements do not so comply, and I respectfully say, in any event, that they do comply substantially, so that the approval of the local authority will in due course be obtained, if necessary.'

In the replying affidavit, the respondents dealt at some length with the nature, extent and alleged necessity for, and usefulness of the improvements. The photographs of the property were also annexed.

Three issues arise for decision on appeal:

- Firstly, whether the appellant has established a lien which entitles him to remain in possession of the property until compensated for the improvements he alleges he has made;

- Secondly, whether the order of ejectment made by the magistrate and confirmed by the high court should be set aside and the matter remitted to the magistrate to receive a fourth set of affidavits; and

- Thirdly, whether the respondents' case was fatally defective, as submitted on behalf of the appellant, because they did not repay or tender to repay the R400 000 paid to them by the appellant on account of the purchase price.

The appellant claimed the rights of a bona fide purchaser based on the decision in *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd*1960 (3) SA 642 (A) at 657.

The appellant therefore claimed to be entitled to recover necessary and useful expenses and to exercise a lien over the property until paid.

The court stated that the affidavit of the appellant on the other hand does not distinguish between the two categories of expenses.

The court further stated the following:

- So far as the claim for necessary expenses is concerned, the appellant would have a claim for reimbursement for expenditure of money or material on the preservation of the property. The problem facing the appellant, however, is that he relies on the evidence of Bouwer who has estimated what the improvements would cost as at February 2010 as that evidence is irrelevant asit does not establish that the appellant actually expended anything in money or materials.

- So far as useful expenses are concerned, the amount of compensation is limited to the amount by which the value of the property has been increased or the amount of the expenses incurred by the appellant, whichever is the less; and the court has a wide discretion. This position was that in Roman law: 6.1.38; the same in the Roman-Dutch law: Voet 6.1.36; and it remains the same in the modern South African law: *Meyer's Trustees v Malan* 1911 TPD 559 at 568; *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648, 656 – 657 and 664 – 665.

Here again, one does not know what the appellant's actual expenses were. In addition, there is no acceptable evidence that the value of the property was increased. The opinion expressed by Van der Spuy is of no assistance as it does not have any factual foundation based on the following:

(a) Van der Spuy never visited the property, but relied upon photographs and what was told to him by an unnamed appointee. Not all of the photographs shown to him were annexed to the appellant's answering affidavit. Moreover, and more importantly, what the 'appointee' sent to examine the property told Van der Spuy is nowhere recorded.

(b) The factors taken into account by Van der Spuy in arriving at his 'provisional' valuation, such as the location of the property, its size and zoning,

comparable sales in the area and the nature, extent and degree of completion of the improvements, are nowhere set out.

The judge stated that the appellant's case amounts to this:

> *'I have made alterations and additions to the respondents' property. I have produced no acceptable evidence to establish whether the property has been improved in value, nor have I disclosed what I expended in money or materials. But I wish to resist an application for ejectment until compensated for an amount that I have not begun to quantify.'*

- To enforce a lien in these circumstances would in the judge's view be to allow an abuse of the process of the court. The mere fact that the appellant would be entitled to repayment of the R400 000 in order to prevent the respondents being unjustly enriched, does not mean that he is entitled to resist ejectment until the amount is repaid or tendered: he could do so only if repayment has to take place at the same time that the appellant is ejected.

The judge reverted to the question on whether the order for ejectment should be made subject to repayment of the R400 000. The respondents have asserted a counterclaim for inter alia the period of the appellant's occupation of the property — which began on 9 February 2007 (more than five and a half years ago) and still continues.

It was stated that the appellant has already instituted a claim in the Western Cape High Court for repayment of the money and it seems to be more appropriate for the respondents' liability to be decided in those proceedings. Should this court order repayment now, it would be depriving the respondents the advantage conferred by rule 22(4), which reads as follows:

> *'If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until H judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application I of either party, make such order as to it seems meet.'*

The appeal by the appellant against the ejecting order granted by the magistrate was dismissed with costs.

Analysis:

This case is relevant to the *cidb* and the construction industry at large as it considers that in order to institute a successful claim, all the relevant evidence to prove the amount of the claim must be produced.