REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 188/2015

In the matter between:

ROADS AUTHORITY	**APPLICANT**
And	
GERD KUCHLING	**FIRST RESPONDENT**
RONALD BRUNAUER	**SECOND RESPONDENT**
NICLAAS LOUW	**THIRD RESPONDENT**
ROADS CONTRACTOR COMPANY LIMITED/ CONSOLIDATED CONTRACTORS GROUP S.A.L (OFFSHORE) JOINT VENTURE	**FOURTH RESPONDENT**
ROADS CONTRACTOR COMPANY LIMITED	**FIFTH RESPONDENT**

Neutral citation: *Roads Authority v Kuchling* (A 188/2015) [2016] NAHCMD 32 (22 February 2016)

Coram: PARKER AJ

Heard: **11 November 2015**

Delivered: **22 February 2016**

Flynote: Building and construction – Construction contract – Internal adjudication and arbitration clauses – Contract providing for establishment of Dispute Adjudication Board (DAB) and arbitration – Any party to contract entitled to refer

dispute to DAB – Dispute on preliminary issues – Court found that DAB has not made a decision on dispute referred to it – In that event, there must be cogent or convincing grounds entitling court to intervene and stop internal adjudicating process and order referral of the interim decision to arbitration – Court found that DAB has not misconceived its duty under the reference when it made an interim decision on preliminary issues – Court found further that DAB did not breach any procedural rules in terms of the agreement and did not violate common law rules of natural justice – Court held that DAB was entitled to make the interim decision – Interim decision does finally dispose of the dispute under the reference – Decisional process under DAB has not come to an end with the making of the interim decision – Court concluded that DAB's refusal to permit referral of the interim decision to arbitration does not amount to a violation of the procedural duty to act fairly and to adopt procedures suitable to the dispute, avoiding unnecessary delay and expense – Consequently, court concluded that applicant has not established any contractual right which the court may protect by stopping the internal adjudicating process and referring the interim decision to arbitration – Court held that what the applicant now seeks will produce the very consequence the applicant's counsel fears, namely, unnecessary delay and expense.

Summary: Building and construction – Construction contract – By agreement between applicant (employer) and contractor (fourth respondent) any party to the construction contract may refer dispute to a Dispute Adjudicating Board (DAB) established, and members thereof appointed, by agreement between the parties to the contract – Upon receiving dispute referred to it DAB took some interim decision on its jurisdiction, scope of the dispute and some procedural matters – Court found that the DAB was entitled to make the interim decision on the preliminary issues – The DAB did not misconceive its duty under the reference and did not breach any procedural rules under the agreement or rules of natural justice – Applicant brought application for an order to refer DAB's interim decision to arbitration – Rule *nisi* was granted by agreement between the parties – Upon the return day court found that the interim decision has not brought finality to the dispute under the reference and so the decisional process under the DAB has not come to an end – Court found further

that the applicant has failed to establish that the DAB has violated procedural rules under the agreement when it refused to permit its interim decision to be referred to arbitration – The DAB's refusal cannot be considered as violating its procedural duty to act fairly and to adopt procedures suitable to the dispute, avoiding unnecessary delay and expense – Consequently, court concluded that applicant has not established any contractual right which the court may protect by stopping the internal adjudicating process and referring the interim decision to arbitration – Court found that what the applicant now seeks will produce the very consequence the applicant's counsel fears, namely, unnecessary delay and expense – Consequently, rule *nisi* discharged and application dismissed with costs.

ORDER

The rule *nisi* issued on 31 July 2015 is discharged, and the application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

RULING

PARKER AJ:

[1] In an urgent application, the applicant sought the relief set out in the notice of motion. Without beating about the bush, I should say that the instant application is brought to stop an internal and domestic adjudication proceedings from continuing before a Dispute Adjudication Board ('the DAB'). The DAB was established, and its members appointed, by agreement between the applicant and the fourth respondent ('the agreement'). The DAB consists of first, second and third respondents. The instant proceeding concerns the dispute between the applicant and the fourth

respondent ('the dispute'). The duty of the DAB is, therefore, to resolve dispute between the parties to the agreement through adjudication proceedings.

[2] The contractor (fourth respondent) was awarded a tender by the employer (applicant) for a road construction project. The contract of employment is regulated by the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, First Edition, 1999 ('FIDIC') and by Particular Conditions of Contract (Volume I) ('PCC'). The applicant and the fourth respondent are the parties to the contract. Henceforth, it will be referred to simply as 'the building contract', and the applicant and the fourth respondent simply as 'the parties'.

[3] On 31 July 2015, after hearing Mr Corbett SC, counsel for the applicant, and Mr Conradie, counsel for the fourth and fifth respondents, and by agreement between the parties, the court granted a rule *nisi*. In the course of events, the rule *nisi* was extended to 22 October 2015. Before that day arrived, on 19 October 2015, the rule *nisi* was further extended to 11 November 2015. On this extended return day, Mr Corbett SC represents the applicant, and Mr Van Zyl the fourth and fifth respondents, who have moved to reject the application. The rest of the respondents have not so moved.

[4] It seems to me that despite the fact that it has been argued extensively and a plethora of authorities have been referred to me, this case falls within an extremely short and simple compass. The essence of the material contentions of the parties that are at the centre of the dispute between the parties resolve themselves into the following interrelated considerations:

(a) Has it been established on the papers –

    (i) that the DAB misconceived its duty under the reference by making the interim decision?

(ii) that, in the terms of the agreement or the contract, the DAB was not competent to make the interim decision?

(iii) that, in the making of the interim decision the DAB failed to follow procedural rules that bind it?

(iv) that there has been a failure of justice in the making of the interim decision because, for instance, there was bias or appearance of bias on the part of the DAB, or because a party has been denied a proper hearing?

(v) that the DAB's refusal to permit a referral of its interim decision to arbitration violates its duty to act fairly and impartially between the parties and to adopt procedures suitable to the dispute, avoiding unnecessary expense?

(b) (i) Is the decisional process in relation to the referral completed, with the making of the interim decision?

(ii) Does the interim decision bring to finality the dispute in the referral?

(c) If the applicant fails to establish that –

(i) the DAB, in terms of the contract or agreement, is not competent to make the interim decision;

(ii) the decisional process in relation to the referral has been completed;

(iii) the interim decision has determined the dispute referred to the DAB for adjudication; and

(iv) the DAB, in refusing to permit a referral of the interim decision to arbitration, has breached its duty under the agreement to act fairly and impartially between the parties and to adopt procedures suitable to the dispute, avoiding unnecessary delay or expense,

(aa) is there any contractual right of the applicant that this court may protect;

(bb) are there any cogent or convincing grounds entitling the court to intervene in and put a stop to the ongoing adjudication by the DAB and order a referral of the interim decision to arbitration; and

(cc) will the order that the applicant seeks, if granted, not rather subvert the DAB's duty to adopt procedures suitable to the dispute, avoiding unnecessary delay or expense?

[5] The DAB made the interim decision, dated 30 June 2015. The decision is contained in an annexure entitled 'Dispute Adjudication Board' (Annexure 'FN9' to the founding affidavit). The decision (bar Appendixes) runs into 21 A-4 size pages. As I see it, it contains the analyses, reasoning and conclusions which resulted in the interim decision, which reads:

'The DAB decides that the scope of the dispute as referred by the Contractor and defined in its CPP (PCC) (Dispute Referral) is permissible. The DAB accordingly has jurisdiction over the dispute, and the Parties are required to proceed with the adjudication accordingly.'

[6] The next level of the enquiry takes me to an examination of the aforementioned considerations. The starting point is the identification of the duty of the DAB under the agreement. On the papers it is clear that the DAB's duty is to adjudicate disputes referred to it by the parties to the building contract. In the instant proceeding, a dispute respecting claim 2 and claim 3 arose; and so, a dispute was

referred to the DAB. Of the view I take of this case which will become apparent in due course, in this proceeding, I am not interested in the respective contentions of the parties. It need hardly saying that it was because a dispute respecting the building contract and the agreement arose that was why the dispute was referred to the DAB for the DAB to resolve it, and the DAB has not resolved it and it has not refused to resolve it, as will be explained in due course.

[7] I do not find it established that the DAB misconceived its duty under the reference by making the interim decision. It has also not been established that there has been a failure of justice in the making of the interim decision on the basis that there was bias or appearance of bias on the part of the DAB or on the basis that a party was denied a hearing or that the DAB did not follow procedures it was bound to follow.

[8] In its own papers, the applicant states that 'there was an exchange of correspondence between the parties and the DAB, and both Parties made written representations to the DAB in connection with the matter'. It seems to me clear that it was after the DAB had considered the correspondence and the parties' individual written representations that it made the interim decision. And as I have found, the interim decision was made as a result of analyses, reasoning and conclusions covering some 21 A-4 size pages.

[9] In the decision ('Annexure 9') the DAB makes the following pertinent introductory remarks:

'The Decision (Interim Decision) herein is given under sub-clause 20.4 of the contract.

The Contractor has referred a dispute to the DAB on 15 May 2015. The Employer has raised its objection as to the scope of the dispute and has questioned whether the DAB

has jurisdiction to adjudicate the Dispute referred to it. The DAB has decided to address these matters before dealing with the referred dispute per se.

Decision: The DAB decides that the scope of the dispute as referred by the contractor and defined in its CPP (Dispute Referral) is permissible. The DAB accordingly has jurisdiction over the dispute, and the Parties are required to proceed with the adjudication accordingly.'

[10] I see that the DAB made the interim decision in terms of 'clause 20.4 of the Contract' (ie FIDIC) on matters of scope of the dispute and the DAB's jurisdiction. I find that it has not been established that the DAB was not entitled to consider these points at the threshold before determining as the DAB puts it, 'the merits of the matter'. Indeed, clause 20.6 of the contract indicates clearly that the agreement contemplated a situation where the DAB would have to make a decision that is relevant to the dispute referred to it but which does not dispose finally of the dispute under the reference. And such decision could 'be opened up, reviewed and revised' by the arbitrator.

[11] In my opinion, the interim decision falls into such category of decisions contemplated in the aforementioned clause 20.6. And what is more; the procedure adopted by the DAB to determine the preliminary issues as a prelude to determining the dispute on the merits cannot be faulted, if regard is had to the fact, as Mr Van Zyl submitted, that the parties to the dispute agreed that the DAB was specifically empowered to establish the procedure to be applied in deciding disputes and to decide on the DAB's own jurisdiction and on the scope of any dispute referred to it.

[12] Furthermore, I find that DAB gave each of the parties to the dispute reasonable opportunity to put their cases. And, as I have found previously, it has not been established that there was bias or appearance of bias on the part of the DAB, that is, that the DAB did not act impartially.

[13] I conclude, therefore, that in making the interim decision the DAB did not misconceive its duty under the reference and did not breach any rule of natural justice. And it has not breached any procedural rules under the agreement. And the irrefragable fact that remains is that although a decision that is relevant to the dispute has been made, no decision has been made that disposes finally of the dispute under the reference. In sum, I find that the DAB has adopted procedures suitable to the dispute, avoiding unnecessary delay and expense, pursuant to the agreement.

[14] Based on these reasons and conclusions, with the greatest deference to Mr Corbett, I fail to see how it can seriously be argued that the DAB has breached any procedural rules under the agreement for refusing to refer the interim decision to arbitration when the decisional process in respect of the reference has not come to an end. As Mr Van Zyl submitted, it has not been established that the applicant will be denied the opportunity to put its case before the DAB when the DAB is determining the merits of the dispute, which is the subject of the reference.

[15] After having pored over the applicant's founding papers very carefully – as I should – I see that the real and true reason why the applicant contends the DAB has no jurisdiction to determine the dispute referred to it after making the interim decision is not what the applicant's counsel, Mr Corbett, tells the court in his submission, namely that, the DAB's refusal to refer the interim decision to arbitration violates the procedural rules, that is, the duty to act fairly and the duty to adopt procedures suitable to the dispute, avoiding unnecessary expense. The true reason is captured in para 47 of the founding affidavit. The deponent of the affidavit states:

'It is the essence of the Employer's case that the material misdirection by the DAB in accepting jurisdiction to determine the belated second claim, involving as it does a claim of N$45 million, and not permitting this decision of the DAB to be challenged by way of arbitration, fundamentally violates the principles of the procedural rules namely:

47.1 The duty to act fairly; and

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47.2 The duty to adopt procedures suitable to the dispute, avoiding unnecessary expense.

In amplification hereof, the Employer points out the first dispute lodged by the Contractor in 2012 involves a disputed issue which can easily be determined by the DAB. The second claim being the belated dispute concerning “new rates” is a very complex dispute involving a claim of some N$45 million. According to my investigations, there are at least 10 lever arch files of documents related to this latter matter which will involve a huge amount of effort on the part of the Employer, its engineers and their instructed legal practitioners to peruse, analyse and prepare evidence on this claim. This will in all likelihood amount to 2 weeks of particular preparation on the second “new rates” claim. It would require the detailed attention of a number of key management personnel of the Employer, including its engineering staff. It would add to greatly increased costs of the arbitration both in time and in terms of the time involved and the cost of the proceedings itself. Ultimately the DAB should not subject a matter such as this to adjudication when it is absolutely clear the DAB has no jurisdiction to determine the second belated “new rates” claim.’

[16] This, on any pan of scale, is not a cogent or convincing reason to impugn the interim decision and the DAB’s ruling that the adjudicating proceedings should continue on the determination of the merits of the matter that is, on the determination of the dispute referred to it. It should be remembered that, after all, by agreement the parties referred to a *final decision* of the DAB the dispute that stands between them. (Italicized for emphasis)

[17] Given these facts and conclusions this court is not interested in the merits or demerits of the contentions that were placed before the DAB; neither is the court interested in whether the interim decision is wrong, as the applicant contends. It cannot be the burden of the court to determine whether the interim decision is wrong or right. It is irrelevant in this proceeding. What are relevant are that: (a) The DAB is competent to make the interim decision. (b) It is common cause between the parties that the parties had ample and sufficient opportunity to put their respective cases to the DAB, and they did, before the DAB made the interim decision, including that

‘[T]he DAB accordingly has jurisdiction over the dispute, and the parties are required to proceed with the adjudication accordingly’. (c) The DAB, therefore, acted fairly and impartially between the parties. (d) The procedure the DAB adopted as respects determining the preliminary issues before it enters upon the determination of the dispute on the merits is suitable for the resolution of the dispute and avoids unnecessary delay or expense; it avoids going back and forth in the making of a final decision on the reference.

[18] What are equally relevant in the instant proceeding are that the decisional process that the DAB is seized with has not come to an end with the making of the interim decision; and so, the interim decision does not determine the decision referred to the DAB. In that event, the question that falls to be answered is this: Has the applicant placed cogent or convincing grounds before the court entitling the court to intervene and stop a domestic or internal process before the process has come to an end, that is, ‘without there being finality on the dispute’, as Mr Van Zyl submitted?

[19] What grounds have the applicant placed before the court in its attempt to persuade the court to intervene in the DAB proceedings? It is only this: ‘It is the essence of the Employer’s (applicant’s) case that the material misdirection by the DAB in accepting jurisdiction to determine the belated second claim of N$45 million, and not permitting this decision of the DAB to be challenged by way of arbitration, fundamentally violates the principles of the procedural rules namely: (47.1) The duty to act fairly; and (47.2) The duty to adopt procedures suitable to the dispute, avoiding unnecessary expense’.

[20] This ground is neither cogent nor convincing. I have previously found that in the making of the interim decision, the DAB did not misconceive its duty under the reference and the DAB acted procedurally fairly and impartially. It did not violate any procedural rules binding on it in terms of the agreement. As I have said more than once, the DAB has not taken a decision on the dispute referred to it. I accept Mr Van Zyl’s submission that what the applicant seeks amounts to a piecemeal adjudication

of the dispute referred to the DAB, and that runs counter to the objective of the DAB proceedings. In this I should say that it is rather the approach the applicant urges the court to take that will undoubtedly cause what Mr Corbett fears, that is, 'unnecessary delay and expense'.

[21] In all this, I take a cue from conciliation proceedings under the Labour Act 11 of 2007. Under that Act, if a dispute is referred to a conciliator to conciliate the dispute by conciliation proceedings and the conciliator takes a decision – an interim decision – relevant to the dispute, but has not decided on the dispute referred to him or her, it will be unacceptable to approach the Labour Court to stop the conciliation proceedings and order a referral of the dispute to arbitration.

[22] As matters stand in the instant proceeding, the DAB has not made a decision on the dispute that was referred to it. In this regard, I have said previously, there must be cogent or convincing grounds entitling the court to stop the DAB proceedings midway and order a referral of the dispute to arbitration.

[23] It must be remembered that an arbitration envisaged in the agreement is a tribunal. And being a tribunal, it is entitled to rehear the dispute; and it is not bound by what was said or was not said at the DAB proceedings; and what is more, the arbitrator can consider any decision of the DAB that is relevant to the dispute even if 'it does not finally dispose of the dispute referred to it. Clause 20.6 of FIDIC says so:

> 'The arbitrator (s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute.'

[24] Thus, the aforementioned clause 20.6 also shows clearly that the agreement between the parties, as I have found previously, contemplated a situation where the DAB would make a decision that is relevant to the dispute referred to it but that does

not dispose finally of the dispute; and such a decision could be opened up, reviewed and revised by the arbitrator. The interim decision, as I have said previously, in my view, falls into such category. Thus, as I have found previously, in making the interim decision on those preliminary issues, the DAB adopted a procedure that is suitable to the dispute.

[25] With all these reasoning and conclusions in my mind's eye, it is with firm confidence that I respectfully reject the applicant's contention that by not permitting the interim decision to be referred to arbitration, the DAB has breached its duty to act fairly and to adopt procedures suitable to the dispute, avoiding unnecessary expense, and has thereby violated some contractual rights of the applicant.

[26] On account of these conclusions and as I have said previously, in this proceeding I am not interested in the merits and demerits of the respective contentions of the parties in their dispute; neither should I concern myself with whether the DAB's interim decision was wrong or right. I, therefore, accept Mr Van Zyl's submission that whether the DAB was right or wrong in its interim decision is neither here nor there for purposes of the present application.

[27] It has not been established that the DAB has breached procedural rules under the agreement or any common law rule of natural justice. And the applicant has not placed any cogent or convincing grounds before the court entitling the court to make such order. Based on these reasons I am not disposed to finding that applicant has a contractual right, as Mr Corbett submitted, which the court may protect by stopping the ongoing DAB proceedings and ordering a referral of the interim decision to arbitration. Consequently, I hold that the applicant has failed to make out a case for the confirmation of the rule *nisi* issued on 31 July 2015.

[28] In the result, the rule *nisi* issued on 31 July 2015 is discharged, and the application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT: A W Corbett SC

Instructed by Ellis Shilengudwa Inc., Windhoek

FOURTH AND FIFTH RESPONDENTS: D R Van Zyl

Instructed by Conradie & Damaseb, Windhoek