

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO. A 44/2016**

In the matter between:

**SALZ-GOSSOW (PTY) LTD**

**APPLICANT**

and

**ZILLION INVESTMENT HOLDINGS (PTY) LTD**

**RESPONDENT**

**Neutral citation:** *Salz-Gossow (Pty) Ltd v Zillion Investment Holdings (Pty) Ltd*  
(A 44/2016) [2017] NAHCMD 72 (9 March 2017)

**Coram:** ANGULA, DJP

**Heard:** 10 November 2016

**Delivered:** 09 March 2017

**Flynote:** Applications and Motions - Building and Construction – dispute resolution prescribed by the standard FIDIC Conditions of Contract - Dispute first to be referred to Dispute Adjudication Board (DAB)- Contract stipulating that the DAB’s decision “shall be binding on both parties who shall promptly give effect to it unless and until it shall be revised”- Notice of dissatisfaction by a party not detracting from the obligation to give effect to his the DAB decision- Until the decision of DAB is revised by amicable settlement or by arbitral award.

**Summary:** The applicant and the respondent agreed upon a dispute-resolution procedure that was contained in clause 20 of the Standard FIDIC Conditions of Contract. Clause 20.4 provided that disputes between the parties had to be referred, in the first instance, to a Dispute Adjudication Board (DAB); that the DAB was obliged to give a decision on that dispute; that a party dissatisfied with that decision may give a notice of dissatisfaction after which the decision of the DAB is to be referred to arbitration (if not amicably settled before that); but that the decision of the DAB is in the interim binding on both parties shall be binding on both parties who shall promptly give effect to it, unless and until it shall be revised in an amicable settlement or an arbitral award.

A dispute arose between the applicant and the respondent and it was referred to the DAB. The DAB made a decision and ruled in favour of the applicant. Thereafter the respondent gave notice of dissatisfaction with the ruling of the DAB. The applicant however, demanded compliance with the ruling. The respondent refused, alleging that by giving notice of dissatisfaction, suspended the enforcement of the DAB ruling. In an application to court for an order to enforcement the ruling of the DAB, the applicant relied on clause 20.4 of the Contract. Respondent opposing the enforcement of the DAB ruling, alleging that the enforcement would operate unreasonably hard on the respondent due to the fact that the respondent’s financial position showed a negative liquidity and therefore it would not be in a position to reimburse the respondent in the event the DAB ruling is reversed in its favour.

*Held that* the parties were obliged to promptly give effect to the ruling of the DAB; that the issuing of the notice of dissatisfaction did not in any way detract from respondent's obligation to comply with the DAB ruling; that until the ruling is revised, it will remain binding, and the parties were obliged to give prompt effect to it.

*Held further that* a negative liquidity is not ground for holding that the applicant would not be able to reimburse the respondent whereas its assets exceeded its liabilities by some N\$12 million in comparison to the possible sum of about N\$3 million which the applicant might have to reimburse to the respondent in the event the DAB ruling is revised in the respondents favour; that based on the audited balance sheet of the applicant the respondent would be able to be compensated by way of damages in the event the applicant were unable to reimburse the respondent through cash repayment.

*Held*, accordingly, that even though the court has a discretion, in exceptional circumstances, not to order specific performance, in the instant matter, the respondent has failed to prove that exceptional circumstances existed to move the court to exercise its discretion to decline to order specific performance. Application granted.

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**ORDER**

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1. The application to strike has partially succeeded.
2. The application for referral of the matter to oral evidence is dismissed.
3. The respondent's counter- application is dismissed.
4. The applicant is ordered to give effect to the decision of the Dispute Adjudication Board dated 17 November 2015 by depositing the amount N\$ 3 246 792.71 into the trust account of the legal practitioner for the applicant. Such amount is to be invested in an interest bearing account pending happening of the events set out in par 5 below.
5. The order in paragraph 4 above shall endure until such time, if at all, that the said decision of the Dispute Adjudication Board is revised in amicable settlement or by an arbitral award in the arbitration proceedings to be initiated by the parties in terms of the FIDIC Conditions of Contract between the parties
6. The respondent is ordered to pay the applicant's costs, such costs to include the costs of one instructed counsel and one instructing counsel.

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## JUDGMENT

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ANGULA, DJP:

### Introduction

[1] In this application the applicant seeks an order directing the respondent to give effect to the decision of the Dispute Adjudication Board (DAB) in terms whereof the respondent was ordered to pay the amount of N\$3 246 792.71 to the applicant forthwith.

[2] The applicant is represented by Mr Totemeyer whereas the respondent is represented by Mr Barnard. Both counsel filed compressive heads of argument and also provided the court with a neatly arranged bundle of copies of the authorities referred to in their heads of argument. The court would like to express its appreciation for their diligence and industry.

### Background

[3] The dispute between the parties arises from a written agreement for the development of services infrastructure of the Sun Bay Development at the coastal town of Henties Bay. The respondent was the “employer” and the applicant was the “contractor” in terms of the agreement.

[4] A dispute then arose between the parties regarding the payment due to the applicant by the respondent. As a result, the parties entered into a Dispute Adjudication Agreement. The arbitration proceedings were held before a Dispute Adjudication Board consisting of a single arbitrator, a certain Mr Kevin Spence. The hearing took place on 3

November 2015. Thereafter on 18 November 2015 Mr Spence delivered his ruling. In terms of the ruling the respondent was found to be liable to the applicant for the payment of the amount of N\$3,246 792.71. The applicant concedes that an amount of N\$ 155, 831.54 must be deducted from the amount of N\$3 246 792.71. The amount of 155, 831.54 concerns the credit due to the respondent.

[5] After the ruling was handed down the respondent filed a notice of the dissatisfaction against the ruling by Mr Spence on 1 December 2015

[6] Clause 20.4 of the FIDIC Conditions of Contract in terms of which the dispute adjudication took place provides that: *"the decision [of the DAB] shall be binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below"*.

[7] Furthermore clause 20.5 of the FEDIC Conditions of Contract reads: *"Where notice of this dissatisfaction has been given under sub-clause 20.4 above the parties shall attempt to settle the dispute amicably before the commencement of arbitration"*.

[8] It is common cause that no payment has been made by the respondent in terms of the ruling nor has an amicable settlement has been reached between the parties. It is further common cause that the respondent took the position that once a notice of dissatisfaction was given been given, the decision of the dispute adjudication board is of no further effect. Naturally the applicant did not agree with the respondent's interpretation of those specific terms of the Contract. Thereafter on 20 February 2016 the respondent's legal practitioner informed the applicant's legal practitioner that they held instructions to accept service of this application on behalf of the respondent. The applicant's papers were subsequently issued and served. The application now serves before this court.

The applicant's case

[9] The applicant's case is based on the proper interpretation and application of clause 20.4 of the FEDIC Conditions of Contract. The applicant submits that the effect of clause 20.4 is that the decision of the DAB, handed down on 3 November 2015, had to be given effect to, promptly and the amount of N\$3 246, 792.71 had to be paid immediately, regardless of what happens in the future. The applicant further submits that, in the event that any portion thereof may be revised in an amicable settlement or by an arbitral award, the amount or a portion thereof that may have been over repaid to the respondent, the applicant will be able to reimburse the respondent.

#### The respondent's opposition

[10] The respondent opposed the application on the following grounds:

As a matter of policy the court will generally not make an order to enforce an order which is not final; and furthermore a court will not order specific performance in the circumstances of this matter as it will operate unreasonably on the defendant and will produce injustice and be inequitable under all the circumstances.

[11] The respondent at the same time filed a counter- application in which the following orders are sought:

*"1. Setting aside of the award by the DAB;*

*2. Alternatively, a stay of the applicant's application for specific performance;*

*3. Further alternatively that the execution of any judgment of the court enforcing the award by the adjudicator be stayed pending the final arbitration of the proceedings between the parties in respect of the ruling of the DAB."*

[12] The grounds upon which the respondent seeks the court's intervention are *inter alia* that:

The award by the adjudicator is invalid and unenforceable; that the adjudicator reached a conclusion and made decisions and an award which is patently incorrect and grossly unreasonable to the extent that the respondent is entitled to have it set aside; and that the DAB erred in interpreting, *contra proferentem*, two conflicting clauses regarding whether the applicant is entitled to interest after the completion date being 31 October 2012, on the amount to be paid.

[13] The respondent further filed an application that the matter be referred to oral evidence on the following issues:

*“1.1.1 whether the agreement between the parties can be interpreted to the effect that any outstanding payments due to the applicant bears interest after the completion date the 31 October 2012:*

*1.1.2 whether the parties agreed that the value of two erven, erf number 2654 and 2655, donated by the respondent to Mr Jurgen Gossow personally, in the amount of N\$1 031 360.00 would be part of payment of the contract price by the respondent to the applicant; and*

*1.1.3 whether the financial position of the applicant is such that should the respondent pay the amount of the award of N\$ 3 246 792.71 to the applicant the respondent will have reasonable prospect of recovery of this amount once th award is set aside on arbitration;*

*1.2 That the deponents to affidavits in this matter are ordered to appear personally and the parties shall also be entitled to subpoena any other person to give evidence viva voce in connection with the above factual dispute provided that notice thereof as well as statements in terms of the rules of the evidence to be given by such witnesses is given to the opposing party or by parties at least 20 days before the date [of hearing];*

*1.3 that the costs occasioned by the hearing shall be cost in the cause; and*



1.4 that [certain specified passages] be struck from the applicant's replying/answering affidavit as being inadmissible evidence and in conflict with a parol evidence rule."

[14] The respondent further brought an application for condonation for the late filing of certain documents and affidavits including supplementary founding affidavit to the counter-application. This applications were not opposed by the applicant. On the other hand, the applicant brought a condonation application for the late filing of its heads of argument. All these applications were granted.

Application to strike considered.

[15] As indicated in paragraph 13 above, the Applicant also filed an application to strike out certain portions from the respondent's answering affidavits. Before I proceed to deal with the main and counter applications I will first, so to speak clear the deck, by dealing with application to strike out.

[16] The applicant applied for the striking out of the portions of the affidavits on behalf of the respondent on the grounds that: those portions contain evidence not placed before the adjudication board; the portions contain privileged information relating to settlement negotiations; and that the portions constitute new matters.

[17] The two grounds relating to the portion containing evidence not placed before the DAB relate to the counter-application as well as portions containing new evidence are in many respects intertwined. In the light of the view I take on the counter- application as will later become more apparent, it is not necessary for me to deal with these grounds. With regard to the ground to strike out the portions relating to settlement negotiations, Counsel for the respondent conceded that two of such paragraphs amount to communications in the course of settlement of a dispute. Accordingly paragraphs 13 and 14 of the affidavit by Mr Metcalfe are struck out.

[18] It is trite law that a statement which forms part of the genuine negotiations for compromise of a dispute is inadmissible as privileged. There are two requirements: firstly a dispute must exist and secondly the statement must be part of the negotiations for the settlement or compromise of such dispute.<sup>1</sup> Regarding the portions referred to in paragraphs 1, 2 and 4 of the notice to strike also relating to settlement negotiations Counsel points out that those portions do not relate to settlement negotiations because a dispute had not yet arisen at the time these communications were made. I have considered the context in which and the stage at which the said statements were made and am in agreement with Counsel that they were made before the dispute had arisen. Accordingly the statements are not liable to be struck out.

[19] As to the costs occasioned by the application to strike out, the applicant has somewhat succeeded though, in my view, not substantially but even with that small measure of success I do not see the reason why the costs should not follow the result. Accordingly the respondent is ordered to pay the costs occasioned by this application. For the benefit of the Taxing Officer, the time devoted to the arguments with respect to the application to strike was approximately fifteen minutes all in all.

[20] It is trite procedure that the main application and a counter-application are heard together. Furthermore that the counter-application only becomes relevant in the event the court does not dismiss the main application. I shall follow that approach in this matter.

#### Issues for determination

[21] It would appear to me that the issues for determination are firstly the correct interpretation of the provisions of clause 20.4 of the FIDIC Conditions of the Contract and the application of the said provisions to the facts of this application; secondly whether or not the court has a discretion to order specific performance; and thirdly

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<sup>1</sup> Venmop 275 (Pty) Ltd v and Another v Cleverlad Projects (Pty) and Another 2016 (1) SA 78 (GJ) at [20]

whether on the facts the respondent has made out a case to move the court to exercise such discretion in its favour.

### Applicable law

[22] The interpretation of the aforementioned clauses have been considered in a number of cases by the South African courts. Those judgments have been referred to by counsel in their heads of argument. I will take a brief survey of those judgments.

[23] In the matter of *Blue Circle Projects (Pty) v Klerksdorp Municipality*<sup>2</sup>, the court held that in terms of the law of arbitration the court will not enforce an award which is still subject to revision and not 'finally' final. The headnote of that judgment reads as follows:

*"Applicant undertook certain building works for the respondent and numerous disputes arose between them as to the amount due to the applicant. The disputes were eventually referred to a 'mediator' in terms of a clause of the general conditions of contract. The mediator gave a 'final opinion' to the effect that the respondent was obliged to pay the applicant R1 471 690. The respondent was dissatisfied with this opinion and required the matter to be referred to arbitration in terms of the contract. At the hearing of the present application the arbitration proceedings were still pending. The applicant sought an order directing the respondent to pay the amount due to it in terms of the mediator's final opinion."*

[24] I pause here to observe that it would be noticed that the facts and the dispute in *Blue Circle Projects* matter are more or less similar to the facts and dispute in the present matter.

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<sup>2</sup> 1990 (1) SA 469 (T)

[25] The court held that in terms of the law of arbitration the courts will not enforce an award which is still subject to revision and not 'finally' final. The court concluded at page 472 to 473 that:

*"The arbitrator can reduce that award of the mediator to nothing. There exists that potential. Consequently it cannot be said that the mediator's award, while arbitration proceedings are pending, is final. It is significant that clause 69(2) says that the opinion expressed by the mediator is only final and binding upon the parties 'unless and until otherwise ordered in arbitration proceedings under sub-clause (3) of this clause'."*

[26] About three years after the judgment in *Blue Circle Projects*, the court in the matter of *Stock v Stock (Cape) (Pty) Ltd v Gordon and Others*<sup>3</sup> had to consider the provisions of similar clause of the FIDIC Conditions of Contract. The court refused to follow the reasoning in *Blue Circle Projects* judgment holding it to be clearly wrong and instead held that:

*"The crisp point which has to be resolved is whether the opinion of the mediator can be enforced when it is disputed by a party to the contract pending resolution of such dispute by arbitration or litigation, where the opinion consists of a monetary award....."*

*The scheme of clause 26 of the contract is conducive to finality and dispute resolution. The last provision of clause 26.3 is included to ensure continuation of the work pending arbitration which occurs, generally speaking, after the completion of the work and to obviate tactical creation of disputes with a view to postponement of liability....."*

*In principle, I have no objection to giving effect to an agreement in terms of which interim payments are to be made which may later be followed by an adjustment of accounts and a claim for repayment of what has been paid. There is nothing contra bonos mores in such arrangement."*

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<sup>3</sup> 1993 (1) SA 156 (T)

[27] The question again arose for determination in the matter of *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty)*<sup>4</sup>. The issue for determination in that matter was exactly the same as in the present application, namely the interpretation and application of sub-clause 20.4 and 20.6 of the FIDIC Conditions of Contract. The contentions of the parties in that matter were similar to the contentions of the parties in the present application. In that matter after a dispute arose between the applicant and the respondent it was referred to DAB. The DAB made a decision. Thereafter both parties gave notices of dissatisfaction with the decision. The applicant demanded interim compliance with the decision. The respondent refused. In an application to court for an order for the enforcement of the decision of the DAB, the applicant relied on clause 20.4 of the Contract.

[28] The court held the relevant provisions of the Contract were clear that the parties were obliged to give prompt effect to the decision of the DAB. The court proceeded to express itself at paragraphs [13] and [14] of the judgment as follows:

*"[13] Thus the notice of dissatisfaction does not in any way detract from the obligation of the parties to give prompt effect to the decision until such time, if at all, it is revised in arbitration. The notice of dissatisfaction does, for these reasons, not suspend the obligation to give effect to the decision. The party must give prompt effect to the decision once it is given.*

*[14] The scheme of these provisions is as follows: the parties must give prompt effect to a decision. If a party is dissatisfied he must nonetheless live with it but must deliver his notice of dissatisfaction within 28 days failing which it will become final and binding. If he has given his notice of dissatisfaction he can have the decision reviewed in arbitration. If he is successful the decision will be set aside. But until that has happened the decision stands and he has to comply with it."*

[29] In my view, the interpretations of the relevant clauses of the Contract by the courts decisions in the matters of *Stocks* and *Tubular Holdings* are sound and

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<sup>4</sup> 2014 (1) SA 244 (GSJ)

commend themselves as good law and I accordingly accept them as correct and will adopt them in this matter.

[30] Mr Barnard for the respondent while accepting that the interpretation of the provisions of the clauses of the FIDIC Conditions of Contract as contended for the applicant and as confirmed by the courts in South Africa are correct, Counsel points out that the respondent in essence takes issue with the application of the provisions of the said clauses to the facts of the present matter. Counsel further submits that the circumstances in each of the South African judgments differed from the circumstances in the present matter in that in those matters the contracts works were still in progress whereas in the present matter the contract works were at the end when the adjudication process was initiated. As a general proposition I agree with Counsel's statement that each case is to be judged in the light of its own circumstances.

[31] It would appear to me that in each case where specific performance is demanded the court will be faced with a question whether or not it should exercise its discretion against ordering specific performance. The authorities seems to suggest that the default position is that the court should order specific performance unless special circumstances exist which oblige the court not to order specific performance. Mr Totemeyer for the applicant, with reference to Christie<sup>5</sup> submits that the court, subject to exceptional circumstances, has no discretion to refuse to order specific performance. The instances in which the courts have exercised their discretion in refusing to order specific performance, although performance was not impossible have been: where damages would adequately compensate the plaintiff; where it would be difficult for the court to enforce its order; where the thing claimed can readily be bought anywhere else; where specific performance entails the rendering of services of a personal nature; where it would operate unreasonably hard on the defendant; where the agreement giving rise to the claim is unreasonable; and where the decree of specific performance would produce injustice or would be inequitable under all circumstances<sup>6</sup> Mr Totemeyer submits that none of these exceptional circumstances apply in the present matter.

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<sup>5</sup> The Law of Contract in South Africa, 6<sup>th</sup> ed p546-552;

<sup>6</sup> Haynes v King Williamstown 1951 (2) SA 371 (A) at page 380

Furthermore, that the court cannot refuse to order specific performance in this matter based on equity or the financial position, that is, the applicant's alleged inability to repay the respondent in the event the arbitration were eventually to rule in favour of the respondent.

[32] Mr Totemeyer further submits that the principle of *pacta sunt servanda* - (agreements must be kept or observed: Black Law Dictionary) is not only a rule of the common law but also a constitutional imperative. Parker J accepted that the said principle applies with equal force to the Namibia's constitutional *milieu*.

*"I respectfully adopt Sir Denys's dictum as a correct statement of the application of the rule, as now developed and refined. Indeed, in my view, that dictum conduces to the principle of pacta sunt servanda, which as Ngcobo J stated in the South African Constitutional Court case of Barkhuizen supra is informed by the Constitution. The learned judge of the Constitutional Court observed in para 57 at 341B - C:*

*. . . (P)ublic policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted [eg Brisley v Drotsky 2002 (4) SA 1 (SCA)], gives effect to the central constitutional values of freedom and dignity. 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."*<sup>7</sup>

[33] I fully agree with the legal principles and the approach propounded by Parker J.

[34] What emerges from the authorities referred to and considered above is an affirmative answer to the second question posed earlier in this judgment namely

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<sup>7</sup> Wlotzkasbaken Home Owners Association v Erongo Regional Council 2007 (2) 799 at 811H-812A

whether the court has a discretion to not to order specific performance. The answer is, if it needs repeating, is that the court has a discretion not to order specific performance.

[35] The question still remains whether the circumstances of the present matter are such that it induces the court to refuse to order specific performance. The onus to allege and prove any impediment why the court should not order specific performance rest on shoulders of the respondent.<sup>8</sup>

[36] As I understand the respondent's case, the hardship it fears it will suffer will be in future, that is after it has already carried out the order for specific performance. The court in *Haynes (supra)* matter held that the time for determining whether a party would suffer undue hardship is not the time when the contract was concluded but at the time when performance is claimed. In my view, and by parity of reasoning, if the past is to be excluded, so must the future unforeseen events also be disregarded. I am of the view that the question whether the respondent would suffer undue hardship as a result of the court ordering specific performance such consideration should only be confined to the time when the order is being sought. It should exclude speculation as to what may or might not happen in future if specific performance is decreed.

[37] It is to be noted that in the present matter the respondent does not say that it will suffer undue hardship because for instance that it does not have the funds to effect the payment in compliance with DAB's ruling; nor that it will have to borrow money from financial institutions for which it will have to mortgage its immovable property and that such loan will burden it with both capital and interest repayments. In other words there appears to be no immediate undue hardship to be suffered by the respondent if specific performance is ordered.

[38] On the respondent's case, the undue hardship is envisaged to be suffered some time in future after the performance has been carried out in that the applicant would not be able to reimburse the respondent due to the applicant's current negative liquidity

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<sup>8</sup> Christie: The Law of Contract in South Africa, 6<sup>th</sup> ed p545-546



position. Furthermore, the hardship is dependent upon the happening of certain events in the future and is thus speculative. It is dependent on whether the DAB ruling will be completely or only partially reversed in favour of the respondent. In other words whether the arbitration tribunal will order that the full amount of about N\$3 million which the respondent would have had paid to the applicant must be reimbursed by the applicant to the respondent. It needs pointing out amongst these speculative scenarios, assuming that the respondent is right in its assessment of the applicants current negative liquidity position, that by the time the DAB's ruling is overturned in favour of the respondent the applicant's cash liquidity will have improved and be in position to reimburse the respondent. In my view the respondent's case on this point is based not on facts but on speculation as to what may or might not happen in future. The court cannot make its decision based on speculation and accordingly declines to be drawn into a morass of speculation and surmises.

[39] Furthermore in support of this allegation that it will suffer undue hardship if specific performance is ordered, the respondent points out that the applicant is a private company with limited liability with no immovable property registered in its name; that during the contract period the applicant complained of its precarious financial position and its inability to perform in terms of the contract; that the extract from the audited financial statement of the applicant offered as proof that the total asset of the applicant exceeds its total liability by N\$12 million have been analysed by an accountant and showed a negative liquidity of 8 million; and finally that during September 2016 the applicant agreed to a court order in which liability to a bank in the amount of N\$3,000,836 625.85 was submitted and payment in the monthly instalment of N\$186 000 0.00 was agreed upon.

[40] This court cannot make a determination of the applicant's inability to reimburse the respondent based on negative cash flow. In my view negative liquidity does not constitute an exceptional circumstances in the present matter. I think it is fair to say that it is common knowledge that operating companies experience cash flow problems from time to time but that it is not a static financial position; it fluctuates through the life

span of most operating companies. Negative liquidity can be cyclical depending on the industry in which the company operates. For instance during in the slumped period in the construction industry most companies in that industry will experience cash flow problem due to lack of construction contracts on offer.

[41] It seems to me that the claim by the respondent that it will suffer undue hardship is premised on the assumption that it will succeed at the arbitration proceedings. That may not necessarily be so, because at best the outcome may partly be in its favour and at worst the outcome may be in the applicant's favour. But these are all speculations.

[42] In my view the fact that the audited financial statements show that the applicant's assets exceeds its liabilities by N\$12 million *prima facie* proves that the applicant will be able meet the respondent's claim for damages in the event the applicant would not be able to reimburse the respondent due to the alleged negative cash flow. Mr Barnard's attempted to discredit the admissibility of the audited financial statement in that it is hearsay as the auditor who compiled the financial statements did not file a confirmatory affidavit. In this regard Mr Totemeyer, correctly in my view, pointed out that the financial statements were prepared by the auditor on information supplied by Mr Gossouw who is the managing director of the applicant. The figure of N\$ 12 million is a product of mere arithmetic. It is not an auditor's opinion. In my view the amount is not subject to the hearsay rule.

[43] I am thus of the considered view that in the present matter damages would effectively compensate the respondent should the applicant in future be unable to reimburse the respondent of the amount due to it. I have arrived at the conclusion that the respondent has failed to prove that exceptional circumstances exist to move the court to exercise its discretion to decline to order specific performance. I accordingly decline to exercise my discretion not to order specific performance.

[44] Mr Totemeyer for the applicant informed the court that the applicant would be prepared agree that the money be paid into a trust account in order to allay the

respondent's concern or fear that it would not be reimbursed by the applicant in the event the arbitrator were to rule in favour of the applicant. I think this is a good sign of good will on the applicants' side and the court is prepared to endorse it.

[45] In the light of the conclusion I have arrived at, it has become unnecessary to consider the counter application and the application for referral to oral evidence.

[46] In the result, I make the following orders:

- 1 The application to strike has partially succeeded.
- 2 The application for referral of the matter to oral evidence is dismissed.
3. The respondent's counter- application is dismissed.
4. The applicant is ordered to give effect to the decision of the Dispute Adjudication Board dated 17 November 2015 by depositing the amount N\$ 3 246 792.71 into the trust account of the legal practitioner for the applicant. Such amount is to be invested in an interest bearing account pending happening of the events set out in par 5 below.
5. The order in paragraph 4 above shall endure until such time, if at all, that the said decision of the Dispute Adjudication Board is revised in amicable settlement or by an arbitral award in the arbitration proceedings to be initiated by the parties in terms of the FIDIC Conditions of Contract between the parties
6. The respondent is ordered to pay the applicant's costs, such costs to include the costs of one instructed counsel and one instructing counsel.

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H Angula  
Deputy Judge President

**APPEARANCES**

APPLICANT:

**Mr Totemeyer**

Instructed by Ellis Shilengudwa Inc (ESI)

RESPONDENT:

**Mr Barnard**

Instructed by Du Pisani Legal Practitioners