IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: 7848/2015

In the matter between:

TRANSNET SOC LIMITED	**APPLICANT**

And

GROUP FIVE CONSTRUCTION (PTY) LTD	**1st RESPONDENT**
TROTECH ENGINEERING AFRICA (PTY) LTD	**2nd RESPONDENT**
THE ASSOCIATION OF ARBITRATORS (SOUTHERN AFRICA)	**3rd RESPONDENT**
JORDAAN C	**4th RESPONDENT**
POORTER S D	**5th RESPONDENT**
GORDFREY J H	**6th RESPONDENT**
MORGAN R L	**7th RESPONDENT**

Coram: JEFFREY AJ

Heard: 2nd September 2015

Delivered: 9th February 2016

Summary: Engineering and Construction Law – NEC3 Building and Construction Contract – interpretation – provisions concerning appointment of an adjudicator – dispute resolution process including an arbitration clause – Jurisdiction of the High Court.

JUDGMENT

Jeffrey AJ

[1] This is a dispute about the interpretation of the provisions a NEC3 Building and Construction Contract, concluded between the applicant (as the employer) and a joint venture between the first and second respondents (as the contractor), concerning the appointment of an adjudicator.

[2] The contract in question relates broadly to the design, supply, erection and testing of accumulators by the first and second respondents at a specific terminal of a pipeline that forms part of the so-called New Multi Products Pipeline Project.

[3] The applicant contends that, on a proper interpretation of the contract, the fourth respondent has been appointed as the adjudicator for *all* disputes arising under or in connection with the contract. And it seeks a declaratory order to this effect from this Court.

[4] The first and second respondents contend otherwise. In a three-pronged attack they contend – first, it is impermissible for the applicant to approach the Court for the declaratory order sought because the contract provides for an arbitration process in respect of all disputes between the parties; and second, on a proper interpretation of the contract, the parties contemplated the appointment of multiple adjudicators or *ad hoc* adjudicators for each dispute that may arise during the course of the project. Finally, they contend that the applicant is estopped from contending that the contract provides for the appointment of only one adjudicator because of its post-contractual conduct in actively participating in the appointment of different adjudicators. This conduct, so the first and second respondents contend, is consistent with an interpretation that multiple *ad hoc* adjudicators were contemplated by the parties.

[5] The following description of NEC3 contracts is readily and reliably ascertainable and, therefore, I am able to take judicial notice of it. NEC contracts are largely standard form contracts published commercially in the United Kingdom for use in that country and internationally. NEC is an acronym for New Engineering Contract. The first NEC contract was published in 1993 and, thereafter, it has appeared in further editions. Essentially, from the standard form NEC contracts and various ancillary documents as well as filling in their own wording, parties are able to compile a contract that they believe will suit the project that they are concerned with.

[6] In this instance the parties chose to use the NEC3 Engineering and Construction Contract (June 2005 edition with June 2006 amendments) as the basis for their agreement in which they incorporated various ancillary NEC documents and, in addition, they completed the various blanks in the chosen documents with the obvious intention of arriving at a comprehensive agreement.

[7] This contract, in the result, contains a bewildering array of provisions derived from the various NEC options, several of which were incorporated into the contract by the parties and which follow neither a numerical sequence nor a uniform description. Also, the words used in the blanks completed by the parties are often are couched in a cryptic shorthand style. But, in construing this document, I am mindful of what Lord Wright said in *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 (HL) 499H that:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'

This too has been the approach of our Courts: see, for instance, *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) 514B-F; *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) para 14; and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 para 31. I have tried to adopt the same approach and to make some allowance for any lack of such precision as would have been employed by ‘a lawyer

or linguistic precisian' – to borrow the description of such persons by Trollip AJA (as he then was) in *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A) 15C–D.

[8] In what appears to be the seminal Form of the contract and which is styled 'Form of Offer and Acceptance', the parties *inter alia* (a) described the project concerned as 'a contract for the Design, Supply, Erection and Testing of Accumulators at Terminal 1 – Coastal on the New Multi Products Pipeline (NMPP) Project'; and (b) they agreed that the terms of their agreement would be set out in further Forms styled 'Part C1 – Agreement and Contract Data' that included the Form of offer and acceptance; 'Part C2 –Pricing Data'; 'Part C3 – Scope of Work: Employer's Works Information'; and 'drawings and documents (or parts thereof) which may be incorporated by reference into the above listed Parts'.

[9] There are optional standard form provisions that the parties also chose to include in their contract. Of relevance to this dispute, they chose option W1, a Form relating to dispute resolution procedure including the appointment of an adjudicator and an arbitration process in the event of a party being dissatisfied with a decision of the adjudicator. They also chose option Z, a Form relating to additional conditions of contract and incorporating *inter alia* certain additions, deletions or omissions but none of these provisions, however, are pertinent to the issue that I have to determine. Both options W1 and Z comprised part of the aforementioned 'Part C1 – Agreement and Contract Data' Form.

[10] Turning to the relevant clauses in the contract, these are the following:

(a) Clause 12.2 of the Form C.2 Contract Data provides that 'the law of the contract is the law of the Republic of South Africa subject to the jurisdiction of the Courts of South Africa.'

(b) Clause 11 of the Form C.2 Contract Data sets out the data relating to the dispute resolution option W1. Clause 11.W1.1 provides that:
'The Adjudicator is – To be appointed under the NEC3 Adjudicator's Contract (June 2005) if and when a dispute arises.'

(c) Clause 11.W1.2(3) provides that:
'The Adjudicator nominating body is: The Association of Arbitrators (Southern Africa)'

(d) Clause 11.W1.4(2) provides that:
'The tribunal is – arbitration.'

(e) Clause 11.W1.4(5) provides that:
'The arbitration procedure is – The current 'Rules for the Conduct of Arbitrators' published by the Association of Arbitrators (Southern Africa)

The place where the arbitration is to be held is – Johannesburg

The person or organisation who will choose an arbitrator if the Parties cannot agree a choice or if the arbitration procedure does not state who selects an arbitrator is – the Chairman of the Association of Arbitrators (Southern Africa).'

(f) Clause 12.1 of the Core Clauses provides that:

'In this contract, except where the context shows otherwise, words in the singular also mean in the plural and the other way round and words in the masculine also mean in the feminine and neuter.'

(g) The relevant dispute resolution provisions in Option W1 itself are:

'W.1.1 A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator.

W1.2 (1) The Parties appoint the Adjudicator under the NEC Adjudicator's Contract current at the starting date[1].

(2) The Adjudicator acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.

(3) If the Adjudicator is not identified in the Contract Data[2] or if the Adjudicator resigns or is unable to act, the Parties choose a new adjudicator jointly. If the Parties have not chosen an adjudicator, either party may ask the Adjudicator nominating body[3] to choose one. The Adjudicator nominating body chooses an adjudicator within four days of the request. The chosen adjudicator becomes the Adjudicator.

(4) …

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[1] Defined clause 31.2 of the form C1.2 Contract Data as 2 August 2010.
[2] As in this instance, see clause 11.W1.1 above in para [10](c).
[3] Defined as 'The Association of Arbitrators (Southern Africa)' in clause 11.W1.4(5) see para [10](c) above.

(5) …

W1.3 (1) Disputes are notified and referred to the Adjudicator in accordance with the Adjudication Table[4].

(2) … [Provisions relating to the extension of times for notifying and referring a dispute to the Adjudicator are set out] … If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the Adjudicator or the tribunal[5].

(3) – (9) …

(10) The Adjudicator's decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied with the decision of the Adjudicator and intends to refer the matter to the tribunal.

(11) …

W1.4 (1) A party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been referred to the Adjudicator in accordance with this contract.

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[4] Then follows a table setting out the type of dispute, which party may refer that dispute to the adjudicator and the strict time-lines of when that dispute may be referred to the Adjudicator. It is clear that all disputes between the parties are contemplated in this Table.

[5] Defined as 'Arbitration' in clause 11.W1.4(2), see para [10](d) above.

(2) If, after the Adjudicator notifies his decision a Party is dissatisfied, he may notify the other Party that he intends to refer it to the tribunal. A Party may not refer a dispute to the tribunal unless this notification is given within four weeks of notification of the Adjudicator's decision.

(3) If the Adjudicator does not notify his decision within the time provided by this contract, a Party may notify the other party that he intends to refer the dispute to the tribunal. A Party may not refer a dispute to the tribunal unless this notification is given within four weeks of the date by which the Adjudicator should have notified his decision.

(4) The tribunal settles the dispute referred to it. The tribunal has the powers to reconsider any decision of the Adjudicator and review and revise any action or inaction of the Project Manager or the Supervisor related to the dispute. A Part is not limited in the tribunal proceedings to the information, evidence or arguments put to the Adjudicator.

(5) If the tribunal is arbitration[6], the arbitration procedure, the place where the arbitration is to be held and the method of choosing the arbitrator are those set out in the Contract Data.[7]

(6) A Party does not call the Adjudicator as a witness in tribunal proceedings.'

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[6] As it is in this matter in terms of Clause 11.W1.4(2), see para [10](d) above.
[7] Clause 11.W1.4(5), see para [10](e) above.

JURISDICTION

[11] The first issue to be determined is that raised *in limine* by the first and second respondents – namely, that this Court should decline to determine and refuse this application because the applicant has not complied with the agreed arbitration process or, perhaps more accurately expressed, the dispute resolution process.

[12] There is a clear distinction drawn in the contract, however, between the adjudication process and the arbitration process, both of which form part of the dispute resolution process that was agreed to by the parties, the provisions of which are set out in Option W1[8].

[13] Mr *Gajoo*, who appeared for the applicant, argued that there is a dearth of authority in South African law on whether or not an adjudicator may determine his own jurisdiction and referred me to certain English authority[9] on this point in support of the proposition that an adjudicator may consider his own jurisdiction but such a finding would not be binding on the employer in the absence of an agreement that it would be. Mr *Gajoo* urged me to find that this Court does have jurisdiction to determine this application and grant the relief sought.

[14] Mr *King*, who appeared for the first and second respondents, argued that the point *in limine* had been misconstrued by the applicant and the question was not whether or not the adjudicator could determine own jurisdiction but was whether or not the applicant should be permitted

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[8] See para [10](g) above.

[9] Coulson *Coulson on Construction Adjudication* (2ed) 203-7 at paras 7.09-7.16; and Fastrak Contractors Ltd v Morrison Construction Ltd [2000] BLR 168 para 32.

to bypass the arbitration process to which it had agreed to in the contract. He submitted, on the authority of *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) that the applicant was not permitted to do so and that this Court should refuse the application.

[15] The 'arbitration process' referred to by Mr *King* in his argument, perhaps more accurately expressed, forms the part of the dispute resolution process that I have referred to.[10] Mr *King* indeed argued that it does not matter that a dispute between the parties must first be submitted to an adjudicator and thereafter, if one of the parties are dissatisfied with the adjudicator's award, the dispute is referred to an arbitrator. It is clear from the contract between the parties that the dispute resolution process is a two tiered process – the dispute is first referred to an adjudicator and thereafter it may be referred to arbitration.

[16] Where the parties have expressly agreed to an arbitration process our Courts are generally are not entitled to determine issues that fall within the province of an arbitrator in terms of that process unless an order has been granted in terms of s 3(2)(b) of the Arbitration Act, No. 42 of 1965: see *Zhongji* para 54.

[17] This principle, although confined in *Zhongji* to an arbitration process, in my view applies equally to the dispute resolution process in this matter that encompasses an arbitration process in its second tier.

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[10] See para [12] above.

[18] The Courts have consistently respected the provisions of arbitration agreements and will give effect thereto: see *Zhongji* paras 55 – 57 and the authorities cited. I am not entitled to depart from the aforementioned principle.

[19] In the premises, this application must fail.

INTERPRETATION OF THE CONTRACT RELATING TO THE APPOINTMENT OF AN ADJUDICATOR

[20] But if I am wrong in finding in favour of the first and second respondents on their point *in limine*, I am of the view that, on a proper interpretation of the contract between the parties, the contract contemplates and the parties intended that several *ad hoc* adjudicators may be appointed to resolve disputes that may arise.

[21] The modern approach to the interpretation of written documents, including statutory provisions, are to be found in several decisions of the Supreme Court of Appeal. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 Wallis JA succinctly summarised the law on this subject that, as he later said in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 11, reflected the developments as at 2012 in contractual interpretation found in *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA) para 7; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39; and *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) paras 12 – 14. Wallis JA's summary read:

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

And at paras 25 and 26 Wallis JA added:

‘Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context

of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity. In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA) para 16 Wallis JA said:

'… the developments in the interpretation of written documents reflected in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality* … make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of

interpretation from the outset. The approach of the arbitrator cannot be faulted in this regard.'

In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para [12] Wallis JA said in relation to the summary of the earlier approach to the interpretation of contracts by Joubert JA in *Coopers & Lybrand and Others v Bryant*1995 (3) SA 761 (A) 768A – E:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.'

In *Commissioner, South African Revenue Service v Bosch and Another* 2015 (2) SA 174 (SCA) para 9 Wallis JA said in relation to the interpretation of a provision in the Income Tax Act, No. 58 of 1962:

'The primary issue in dispute was whether the two taxpayers exercised a right to acquire the shares, within the meaning of that expression in s 8A(1)*(a)*, when they exercised the options, or whether they only did so when the time for payment and delivery arrived. That involves the proper construction of the section in accordance with ordinary principles of statutory construction. The words of the section provide the starting point and are considered in the light of their context, the apparent purpose

of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as "excessive peering at the language to be interpreted without sufficient attention to the [historical] contextual scene".'

[22] Applying these principles, the starting point is the contract itself. The central provisions are first, Clause 11.W1.1 that provides that 'The Adjudicator is – To be appointed under the NEC3 Adjudicator's Contract (June 2005) if and when a dispute arises.' [11] Second, Clause W1.1 and W1.2(1) of Option W.1 that respectively provide: 'A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator' and 'The Parties appoint the Adjudicator under the NEC Adjudicator's Contract current at the starting date.' Although these clauses refer to the adjudicator in the singular, clause 12.1 of the Core Clauses expressly contemplates the plural as well. It provides: 'In this contract, except where the context shows otherwise, words in the singular also mean in the plural and the other way round …'.

[23] The words 'If and when a dispute arises' may be ambiguous. The words could mean that an adjudicator is appointed initially 'if and when a dispute arises' and then retains such appointment, as the applicant contends, throughout the period of the project. They could equally mean

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[11] Emphasis added.

that an *ad hoc* adjudicator is appointed 'if and when a dispute arises' for that dispute only and another *ad hoc* adjudicator may be appointed 'if and when' each subsequent dispute arises.

[24] But construed in the context of the contract as a whole that provides in great detail for large and extensive works consisting of the design, supply, erection and testing of accumulators by the first and second respondents at a specific terminal of a pipeline forming part of the so-called New Multi Products Pipeline Project, objectively '…the parties, as rational businessmen, are likely to have intended…'[12] that multiple disputes could arise during the course of the project and that the determination of these disputes would require the expertise of *ad hoc* adjudicators from different disciplines or experience or, depending upon the number of disputes at any given time, more than one *ad hoc* adjudicator. This intention would be sensible, practical, expeditious and businesslike and would not stultify the broader operation of the contract because it is axiomatic that the purpose of appointing an adjudicator to determine a dispute with the tight time-lines set out in the contract is to ensure as far as possible that the dispute is resolved as expeditiously as possible so that the project is not stultified by delays caused by the existence of the dispute. It is likely that the expeditious progress of a large project like this one would be jeopardised if *ad hoc* adjudicators were not appointed. Furthermore - and although this consideration does

[12] To echo Lord Hoffmann's words in *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] 4 All ER 951 (HL) para 13.

not in itself determine the issue - the subsequent conduct of the parties[13] underscores the parties' intention that *ad hoc* adjudicators could be appointed. Advocate Lane SC was appointed to adjudicate the 'tank dispute' only and not to adjudicate every dispute that subsequently arose. The applicant's project manager also suggested that an alternative adjudicator be chosen for the 'radii dispute'. What is more, the applicant suggested that the appointment of Advocate Lane SC had been 'abandoned' which is contrary to its case that only one adjudicator was contemplated in the contract.

[25] In short, therefore, the interpretation sought to be placed by the applicant on the provisions of the contract regarding the appointment of adjudicators cannot be sustained.

ESTOPPLE

[26] In view of the conclusions I have reached above it is unnecessary for me to decide the third point on estopple raised by the first and second respondents. It is left open.

COSTS

[27] In my view the complexity and nature of this matter warranted the employment of senior counsel.

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[13] In ascertaining the parties' intentions in these circumstances it has been held that regard may be had to subsequent conduct in determining what the parties really intended to achieve: see *Rane Investments Trust v Commissioner, SA Revenue Service* 2003 (6) SA 332 (SCA) para 27 and the authorities cited. Cf. *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson* 2013 JDR 2722 (SCA) paras 17-23.

ORDER

The application is dismissed with costs, such costs to include the costs of senior counsel where employed.

JEFFREY AJ

Appearances

For applicant:	Mr V Gajoo SC Instructed by: Cliffe Dekker Hofmeyer Inc c/o Livingston Leandy Inc Ref. Mr G Pentecost
For 1st and 2nd respondents:	Mr J C King SC Instructed by: Norton Rose Fullbright South Africa Inc Ref. Mr G Rademeyer/GFT1