SBI International Holdings AG v Kenya National Highways Authority (Civil Case E968 of 2022) [2023] KEHC 20793 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20793 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E968 OF 2022

EC MWITA, J

JULY 28, 2023

BETWEEN

SBI INTERNATIONAL HOLDINGS AG ..... PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ..... DEFENDANT

RULING

1. SBI International Holdings AG, (the plaintiff), filed this suit against Kenya National Highways Authority (the defendant), seeking to enforce the Dispute Adjudication Board's (DAB) decision made on 4th June 2021. The dispute arose from Contract No. 0422 dated 8th February 2010 for the rehabilitation of Kericho– Nyamasaria (A1/B1) Road. In that decision DAB awarded the plaintiff USD 4,887,199.20 and Kshs. 1,076,341,681.71, but the defendant did not settle the amounts.

2. The defendant entered appearance and simultaneously filed a preliminary objection and application, (both dated 20th January 2022), seeking to stay the proceedings and refer the dispute to arbitration.

3. The objection was based on the grounds that this Court lacks jurisdiction to hear the suit since the contract contained an arbitration clause in clauses 20.6 and 20.7 of the General Conditions of Contract; and that the suit is incurably defective for failing to comply with Order 4 rule 1 (4) of the Civil Procedure Rules as the Verifying Affidavit is not accompanied by a Board resolution giving authority to swear or file the suit on behalf of the company.

4. The Chamber summons was, thus taken under sections 6 of the *Arbitration Act*, and rule 2 of the Arbitration Rules, seeking to stay the suit and refer the dispute to arbitration as envisaged by the Contract.

5. The application is premised on the grounds on its face, the supporting affidavit and written submissions. The grounds supporting the application are that clauses 20.4 to 20.7 of the General Conditions of Contract provide that disputes arising between the parties would be resolved through arbitration. The defendant having issued a notice of dissatisfaction and intention to commence arbitration following the DAB decision in accordance with clause 20.4, the suit should be stayed and the dispute referred to arbitration.

Submissions

6. The defendant argued that the plaintiff by-passed the arbitration process which both parties had the right to invoke and filed this suit. The defendant asserted that the suit is prematurely before Court and ought to be stayed.

7. On the plaintiff's contention that the application and preliminary objection are res judicata, the defendant asserted that they are not, and that the issues raised are not similar to those determined in SBI International v Kenya National Highways Authority, (HCCC No. E075 of 2020) [2020] eKLR. According to the defendant, the decision in HCCC No. E075 of 2020 is distinguishable because the dispute in that suit emanated from a different contract whose clause 20.7 was modified to provide that the DAB decision was binding on both parties, removing the distinction between "provisional" and "binding."

8. The Court dismissed the application in HCCC No. E075 of 2020 for stay of proceedings to allow the dispute to go to arbitration on grounds that the DAB decision was enforceable whether binding or final and binding, due to the amendment made by clause 20.7 of the particular conditions of contract. In the present case, clause 20.7 of the contract was not modified by the particular conditions of contract, the plaintiff argued.

9. The defendant submitted that without a similar amendment, the plaintiff could not file this suit for enforcement of the DAB decision as it was not final and binding. In that regard, only a 'final and binding' decision is enforceable and can be brought to court for that purpose, a condition that has not been met in this case.

10. The defendant urged that the application be allowed, the suit be stayed and the dispute be referred to arbitration as required by clause 20.4 of the General Conditions of the contract.

Response

11. The plaintiff filed a replying affidavit, grounds of objection and written submissions in response to the application and preliminary objection. The plaintiff argued that the preliminary objection is defective and bad at law; the issues raised in the application and preliminary objection are res Judicata having been determined in Civil Case Nos. E075 of 2020 and E228 of 2020 consolidated with other suits Nos. E229 of 2020; E374 of 2020; E375 of 2020; and E377 of 2020.

12. The plaintiff took the view, that the application and preliminary objection being res Judicata, this Court has no jurisdiction and, therefore, the application and preliminary objection amount to abuse of the court process.

13. According to the plaintiff, clause 20.4 of the General Conditions contractually obligates the defendant to implement DAB decision which is binding, by promptly paying the sums demanded, unless and until set aside through amicable settlement or arbitration.

14. The plaintiff further argued that clause 20.6 of the General Conditions of Contract does not prohibit enforcement of the binding the DAB decision given under clause 20.4.

Submissions

15. The plaintiff posited that the issues raised in the preliminary objection and application require this Court to make a substantive determination on the clauses in the contract which cannot be resolved through exercise of the court's judicial discretion at interlocutory stage. The plaintiff relied on Mukhisa Biscuit Company v Westend Distributors Limited [1969] EA 696; Oraro v Mbaja [2005] KLR 141 and John Musakali v Speaker of County of Bungoma & 4 others [2015] eKLR.

16. It is the plaintiff's further case, that the issues raised are res judicata, having been settled by courts of competent jurisdiction. Reliance was placed on the decision in SBI International Holdings (Kenya) v Kenya National Highway Authority, (HCCC No. E075 of 2020 (Supra) that under FIDIC contracts, the right to enforce the DAB decision had accrued and had to be given effect promptly upon delivery. There was no dispute to be referred to arbitration in view of clear and unequivocal obligation to pay now, and argue later.

17. According to the plaintiff, the fact that a party has issued a notice of dissatisfaction and intention to commence arbitration, it does not relieve him the obligation to pay since he has an opportunity to contest the DAB decision through arbitration under clause 20.6.

18. The plaintiff again relied on the decisions in case Nos. E228, E229, E374, E375, and E377 of 2020 where the defendant's applications of a similar nature were dismissed because the issue had been determined in Case No. E075 of 2020.

19. The plaintiff posited that while clause 20.6 obligates any dispute to a DAB decision to be settled by arbitration, deploying the explicit words 'shall be', clause 20.4 of does not obligate enforcement proceedings under the contract to be settled exclusively by arbitration. In that case, according to the plaintiff, clauses 20.5, 20.6 and 20.7 do not restrict it right to apply to court for enforcement of the DAB decision since clause 20.4 obligates compliance with the decision, notice of dissatisfaction and intention to commence arbitration, notwithstanding.

20. The plaintiff relied on the decisions in SBI International Holdings (Kenya) v Kenya National Highway Authority, (HCCC No. E075 of 2020 and SBI International Holdings (Kenya) v Kenya National Highway Authority, (HCCC No. E375 of 2020.) as well as South Africa decisions in Esor Africa (Pty) Ltd /Franki Africa (Pty) Ltd v Bombela Civilis (Pty) Ltd, (12/7442) [2013] ZAGPJHC 407 (12 February 2013) and Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd (06757/2013) [2013] ZAGPJHC 155; 2014 (1) SA 244 (GSJ) (3 May 2013).

21. The plaintiff urged the Court to dismiss the application and the preliminary objection with costs.

Determination

22. The application seeks stay of proceedings so that the dispute can be referred to arbitration on the DAB decision because the defendant had issued a notice of dissatisfaction and intention to commence arbitration as required by clause 20.4 of the contract.

23. The plaintiff took the view that the application is not only frivolous, but also res judicata because similar applications had been previously determined and dismissed.

24. From the contestations in this application, the issue falls on the interpretation of the contractual clauses. Where the court is called upon to interpret contractual clauses, the general principle is that

contractual expressions must be understood as intended by the parties to the contract and the court in its interpretive approach, must look for the intention of the parties and give effect to it. In doing so, the court has to consider the contract as a whole in order to determine the parties' intention and purpose in agreeing to the dispute resolution mode and the DAB process.

25. In (Arnold v Britton [2015] UKSC 36, Lord Neuberger stated:

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean." And it does so, by focusing on the meaning of the relevant words.

26. clause 20.4 which is at the centre of the dispute, states that where a dispute arises between the parties in connection with the contract, either party may refer the dispute to the DAB for its decision. The DAB is required to give its decision within 84 days after receiving the reference or within such other period the DAB may propose, with the approval of the parties.

27. The clause further states, which is material to this dispute, that "the decision [of 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. (underlining)

28. The clause again states that if either party is dissatisfied with the DAB's decision, the party has 28 days after receiving the decision, to give notice of dissatisfaction and intention to commence arbitration. Where the DAB fails to give its decision within 84 days or as otherwise approved, either party may within 28 days after expiration of the period for rendering the decision give notice to the other party of its dissatisfaction and intention to commence arbitration.

29. Clause 20.5 is on amicable settlement; so that where a notice of dissatisfaction and intention to commence arbitration has been given under clause 20.4, both parties should attempt to settle the dispute amicably before the commencement of arbitration. If no agreement is reached, arbitration may commence (on the fifty-sixth day after the day on which a notice of dissatisfaction and intention to commence arbitration was given), even where no attempt at amicable settlement has been made.

30. Where the DAB gives a decision but no notice of dissatisfaction and intention to commence arbitration is given by either party within 28 days after receipt of the decision, the DAB's decision becomes "final and binding."

31. Clause 20.6 is on arbitration and states, where relevant:

> Unless indicated otherwise in the Particular Conditions, any dispute not settled amicably and in respect of which the DB' decision (if any) has not become final and binding shall be finally settled by arbitration.

32. Clause 20.7 states that where a party fails to comply with a final and binding DAB decision, the other party may, "without prejudice to any other rights it may have", refer the failure itself to arbitration under cause 20.6

33. The issue before this court, as I understand it, is whether or not, clause 20.4 permits enforcement of the decision of the DAB once issued or enforcement has to await completion of the arbitration process where a notice of dissatisfaction and intention to commence arbitration has been given.

34. The defendant's argument is that under clause 20.4, the DAB decision, though binding, is provisional and not final. For that reason, the decision cannot be enforced but should await arbitration whose decision will be "final" and "binding" to the parties. The plaintiff takes the opposite view, that the decision is enforceable, notice of dissatisfaction notwithstanding.

35. Parties agree that the DAB a decision in favour of the plaintiff. The defendant was dissatisfied and issued a notice of dissatisfaction and intention to commence arbitration. That notwithstanding, the plaintiff filed this suit seeking to enforce the DAB's provisional decision before a final and binding decision from the arbitral proceedings.

36. This application turns on the interpretation of clause 20.4 and more so, the meaning to be ascribed to the words "the decision 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.

37. The words, the decision shall be "binding" on both parties, means the decision once made would assign positive obligations to the contracting parties. The parties are then required to "promptly give effect" to the obligations emanating from the DAB decision, unless and until the DAB is revised in an amicable settlement or arbitration. This means parties have an obligation to "promptly" comply with the decision of the DAB by implementing and giving effect to it, even as they wait for the "final" and "binding" decision in the amicable settlement or intended arbitral process.

38. Although the DAB decision is provisional at this stage, the intention of the parties was, in my view, to have the decision "promptly effected" the other processes, including amicable settlement or arbitration, notwithstanding. The language in the words "the decision 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, is plain and must be given the meaning parties intended which was to promptly implement the DAB decision.

39. If parties intended to wait for the decision of the arbitration that would have emerged from the document which I do not find. The intention I decipher from clause 20.4, is that parties are to implement the DAB decision once made, and unless the contract has been terminated, the contractor is required to continue with the contract as they wait for the conclusion of the next stage of proceedings, if any.

40. The plaintiff argued that similar applications had been dismissed where the court dealt with the same issue regarding interpreted clause 20.4 and held that the DAB decision was binding and enforceable without waiting for the "final" and "binding" decision from arbitration.

41. I have perused the decision in SBI International Holdings (Kenya) v Kenya National Highways Authority (Case No. E 075 of 2020) [2020] eKLR where the court, (Majanja J), extensively dealt with the import of Sub Clauses 20.4 -20.7. The court stated:

> [30] ...Under the Contract, a DB decision that is "binding on the parties" imposes on the parties an obligation to give it effect promptly. It however remains provisional or interim if the parties avail themselves of the amicable settlement process or arbitration if they file a Notice of Dissatisfaction. The filing of Notice of Dissatisfaction does not in any way discharge the party from its obligation to promptly give effect to the decision. The words, "unless and until" underpin the duty of the employer in this case to comply with its obligation. It is this obligation to give prompt effect to the DB decision that the Plaintiff now seeks to enforce. I find that under Clause 20. 4, the obligation imposed by the DB decision is binding on the parties and the successful party is entitled to enforce the decision unless it is set aside by amicable settlement

or by arbitration. The right to enforce the DB either by arbitration or through a court action is preserved by the Clause 20.7 of the Particular Conditions.

42. The same issue once again fell for consideration in SBI International Holdings (Kenya) v Kenya National Highways Authority (Case No. E 375 of 2020) [2020] eKLR, (consolidated with other suits), where the Court, (Mativo J, as he then was), agreed with the position taken in the earlier decision, holding that:

> (22) Sub-Clause 20.4 creates contractual obligations which are immediate and which must be performed promptly. By dint of the said clause, the fact that a party had engaged the other to attempt amicable settlement or the fact that a party had reserved the right to appeal the decision of the DB to arbitration by giving notice to the other party of its dissatisfaction and intention to commence arbitration does not suspend the duty to perform the obligations determined by the DB, and conversely does not bar a successful party before the DB from enforcing the decision of the DB. Determinations of the DB being an assessment of rights and obligations of parties under the contract is enforceable, binding and continue to be binding unless upset by amicable settlement of the parties or by an arbitral award.

43. I agree with the interpretation assigned to clause 20.4 by the court in the above decisions.

44. The same interpretation has been given by courts in other jurisdictions, including South Africa, Singapore and Namibia. In Esor Africa (Pty) Ltd /Franki Africa (Pty) Ltd v Bombela Civilis (Pty) Ltd, (12/7442) [2013] ZAGPJHC 407 (12 February 2013), (South Africa). The applicant sought enforcement of the DAB decision for payment on an interim payment certificate for R9 313 629.09 together with interest.

45. The respondent contended that the DAB decision was not final and binding because it did not automatically render the monetary amount due, owing and payable because the respondent had given notice of dissatisfaction in respect of the decision, which prevented the decision from being "final and binding." The respondent took the view, that once a notice of dissatisfaction was given, parties were required to engage in attempting to settle the matter amicably failing which, the matter must go to arbitration, thus the move to court was premature.

46. The court held that:

> (11) ...The DB decision is not final but the obligation to make payment or otherwise perform under it is. In the most elementary way the DAB process ensures the interim solution of an issue which requires performance and requires that the decision is implemented. The parties' position may be altered by the outcome of the eventual arbitration which is a lengthier process and there may be a refund ordered of monies paid or an interest readjustment if too little was decided by the DAB.

47. In Tubular Holdings (Pty) Ltd v DTB Technologies (Pty) Ltd (06757/2013) [2013] ZAGPJHC 155; 2014 (1) SA 244 (GSJ) (3 May 2013), the same issue arose with regard to the interpretation of Clause 20.4. The court held that:

> (8) The effect of these provisions is that the decision shall be binding unless and until it has been revised as provided. There can be no doubt that the binding effect of the decision endures, at least, until it has been so revised. It is clear from the wording of clause 20.4 that the intention was that a decision is binding on the parties and only loses its binding effect if and when it is revised. The moment the decision is made the parties are required to "promptly" give effect to it.

48. The issue of enforceability of the DAB decision was also considered by the Court of Appeal of Singapore in PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30, where the court, Menon CJ delivering the judgment of the majority, stated:

> (55) We begin with the interpretation of cl 20.4 of the Conditions of Contract in so far as the effect of a DAB decision is concerned. In our judgment, that clause imposes one distinct contractual obligation on the parties and confers a conditional right on a party who wishes to challenge a DAB decision. First, as to the obligation, we are satisfied that cl 20.4...imposes an affirmative obligation on the parties to "promptly give effect to [a DAB decision]". In particular, the paying party (ie, the party that is required to make any payment under the DAB's decision) has a contractual obligation to pay promptly, notwithstanding its views on the merits of the DAB's decision.

49. In Namibia, the decision of the DAB under clause 20.4 was again considered in Salz-Gossow(Pty) Ltd v Zillion Investment Holdings (Pty) Ltd (A 44/2016) [2017] NAHCMD 72(9 March 2017). The court 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.

50. On appeal to the Court of Appeal in Zillion Investment Holding (Pty) Ltd v Salz-Gossow (Pty)Ltd (SA 17 of 2017) [2019] NASC 10 (17 April 2019); the Court of Appeal dismissed the appeal, holding that the decision of the adjudicator stands and must be enforced pending the arbitration. "This includes, in the circumstances of this matter, accepting its validity pending the arbitration."

51. The interpretation of clause 20.4 yields one view, that the DAB decision is binding and must be enforced. This view agrees with the decisions, both local and from other jurisdictions, that the decision of the DAB, though not final, confers a positive obligation to the paying party to promptly give effect to the DAB decision, thus making the decision immediately enforceable for the benefit of the successful part.

52. The next stage of proceedings will not prevent implementation of the DAB decision and the final and binding decision from arbitration is not a condition precedent to enforcement of the DAB decision.

Conclusion

53. Having considered the application, the response and submissions made on behalf of the parties and the attendant local and persuasive foreign decisions, I agree that the intention of the parties was that the DAB decision given under clause 20.4 of the General Conditions though not final, is nonetheless, binding and enforceable.

54. I also agree with the plaintiff that this application is res judicata, the court having pronounced itself on the issue more so, on the interpretation of the contentious clauses. The defendant was aware of the court's pronouncements and nothing has changed to revive the issue and call for reconsideration by this court.

Disposition

55. The application is dismissed with costs

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2023

E C MWITA

JUDGE