IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CASE NO. E075 OF 2020

BETWEEN

SBI INTERNATIONAL HOLDINGS (KENYA)..................................APPLICANT

AND

KENYA NATIONAL HIGHWAY AUTHORITY.............................RESPONDENT

RULING

Introduction

1. The Plaintiff filed this suit seeking to enforce Dispute Board decisions made under the contract No. KeNHA/RD/SP/1912/2016 dated 17th May 2016 ("the Contract") for it to carry out works known as Dualling of Kisumu Boys Roundabout (Jn A1/B1) – Mamboleo Junction (Jn A1/C34) Road A1. The Defendant filed a Memorandum of Appearance dated 30th March 2020. It thereafter filed the Chamber Summons dated 30th April 2020 seeking an order for stay of proceedings and an order referring the dispute to arbitration. The Plaintiff opposed the application by filing grounds of objection encompassing a preliminary objection dated 28th May 2020.

Background

2. The facts upon which the application is grounded are common cause and concern the dispute resolution process under the Contract. The Contract adopts a standard dispute resolution clause in construction contracts based on the International Federation of Consulting Engineers ("FIDIC") conditions of contract. The relevant parts of Clause 20 of the Contract provide as follows:

> *Obtaining Dispute Board's Decision*
>
> *20.4 If a dispute (of any kind whatsoever) arises between the parties in connection with, or arising out of, the contract or the execution of the works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either party may refer the dispute in writing to the DB for its decision, with copies to the other party and the Engineer. Such reference shall state that it is given under this Sub-Clause.*
>
> *For a DB of three persons, the DB shall be deemed to have received such reference on the date when it is received by the chairman of the DB.*
>
> *Both parties shall promptly make available to the DB all such additional information, further access to the site, and appropriate facilities, as the DB may require for the purposes of making a decision on such dispute. The DB shall be deemed to be acting as arbitrator(s).*
>
> *Within 84 days after receiving such reference, or within such other period as may be proposed by the DB and approved by both parties, the DB shall give its decision, which shall be reasoned and shall state that it is given under this sub-clause. <u>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 as described below.</u> Unless the contract has already been abandoned, repudiated or terminated, the contractor shall continue to proceed with the works in accordance with the contract.*
>
> *If either party is dissatisfied with the DB's decision, then either party may, within 28 days after receiving the decision, give notice to*

the other party of its dissatisfaction and intention to commence arbitration. If the DB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, the either party may, within 28 days after this period has expired, give notice to the other party of its dissatisfaction and intention to commence arbitration.

In either event, this notice of dissatisfaction shall state that it is given under this sub-clause, and shall set the matter in dispute and the reason(s) for dissatisfaction. Except as stated in sub-clause 20.7 [Failure to comply with dispute board's decision] and sub-clause 20.8 [Expiry of dispute board's appointment], neither party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this sub-clause.

If the DB has given its decision as to a matter in dispute to both parties, and no notice of dissatisfaction has been given by either party within 28 days after it received the DB's decision, then the decision shall become final and binding upon both parties.

Amicable Settlement

20.5 Where notice of dissatisfaction has been given under sub-clause 20.4 above, both parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

Arbitration

20.6 Unless indicated otherwise in the particular conditions, any dispute not settled amicably and in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by arbitration. Unless otherwise agreed by both parties:

Failure to Comply with Dispute Board's Decision

20.7 In the event that a Party fails to comply with a final and binding DB decision, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration], Sub-Clause 20.4 [Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

3. The Contract also contained Section II-B comprising Particular Conditions which its stated, "*shall supplement the GC (General Conditions)*" and which prevail in the event of a conflict with the General Conditions. Part B of the Particular Conditions replaced Clause 20.7 in its entirety with the following clause which is now the operative clause under the Contract:

20.7 In the event that a Party fails to comply with any decision of the DB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference. [Emphasis mine]

4. The purpose of this provision is to provide an accelerated process for deciding disputes where the Adjudicator's, in this case the Dispute Board, decision may be rejected by either party and submitted to amicable settlement or arbitration but is nevertheless binding on the parties unless and until it is set aside or overturned in the arbitration. This formula of dispute resolution is often referred to, "*Pay now argue later*" (see ***AMEC Capital Projects Ltd v Whitefriars City Estates Ltd*** **[2004] EHWC 393 (TCC)**).

5. In this case, the Dispute Board ("the DB") heard and determined the following three disputes that are now the subject of this suit;

a. The first decision was rendered on 8th June 2018 awarding the Plaintiff an extension of time of 360 days from 5th January 2019 and Kshs. 341,857,828.16 to be paid within 14 days of the decision of Dispute Board.

b. The third decision was rendered on 5th April 2019, awarding the Plaintiff USD 4,708,314.00 and Kshs. 279,946,606.41 to be paid within 14 days of the decision of Dispute Board;

c. The fourth decision was rendered on 15th April 2019, which was corrected for clerical and mathematical errors on 20th April 2019, awarding the Plaintiff USD 1,210,515.55 and Kshs. 62,962,244.54 to be paid within 14 days of the decision of Dispute Board;

6. The second decision dated 10th March 2019 was by consent. The Plaintiff filed a Notice of Dissatisfaction against the first decision while the Defendant filed Notices of Dissatisfaction against all the decisions. Neither party has taken out arbitration proceedings. Instead the Plaintiff filed this suit to enforce the DB decisions by seeking judgment for the sums due under those decisions.

7. As indicated in the introduction, the Defendant now seeks to stay these proceedings pending reference to arbitration under **section 6(1)** of the ***Arbitration Act, 1995*** ("the ***Arbitration Act***") which provides as follows:

6(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

8. The Plaintiff has opposed the application on procedural as well as substantive grounds. I shall first deal with the procedural grounds upon which the preliminary objection raised by the Plaintiff is based.

Preliminary Objection

9. The Plaintiff argued that by filing an unconditional Memorandum of Appearance dated 30th March 2020 without simultaneously filing an application for stay and referral of the suit to arbitration, the Defendant waived its right to apply for stay and accepted the court's jurisdiction over the subject matter. Counsel for the Plaintiff cited several decisions to support its position; ***Eunice Soko Mlagui v Suresh Parmar and 4 Others*** **[2017] eKLR**, ***Adrec Limited v Nation Media Group Limited*** **[2017] eKLR**, ***Evergreen Marine (Singapore) PTE Limited and Gulf Badar Group (Kenya) Limited v Petra Development Services Limited*** **MSA CA Civil Appeal No. 91 of 2015 [2016] eKLR**, ***Hassan Zubeidi v Active Partners Group Limited and 3 Others*** **[2018] eKLR** and ***Charles Njogu Lofty v Bedouin Enterprises Limited*** **CA No. 253 of 2003 [2005]**.

10. The Defendant took a contrary view and submitted that the filing of a Memorandum of Appearance does not vitiate the right of a party to seek stay of proceedings pending reference to arbitration. It contended that while it filed a Memorandum of Appearance, it did not take any further steps in the matter or even acknowledge jurisdiction by filing its defence. Counsel supported its position by reference to the *dicta* in ***Eunice Soko Mlagui v Suresh Parmar and 4 Others*** **(Supra)** and ***Adrec Limited v Nation Media Group Limited*** **(Supra)**. Further, the Defendant submitted that the requirement of filing a conditional Memorandum of Appearance does not apply in cases of stay of proceedings pending arbitration but only in cases where the issue is whether the Kenyan Court should cede their jurisdiction to foreign court as was held in ***Evergreen Marine (Singapore) PTE Limited and Gulf Badar Group (Kenya) Limited v Petra Development Services Limited*** **(Supra).**

11. I will first dispose of the issue whether the filing an unconditional Memorandum of Appearance amounts to acceptance of the court's jurisdiction. As a starting point, I would point out that neither the ***Arbitration Act*** nor the Rules made thereunder refer to a conditional Memorandum of Appearance. The issue of filing a conditional appearance was discussed by the Court of Appeal in ***Evergreen Marine (Singapore) PTE Limited and Another v Petra Development Services Limited*** **(Supra)**, a case dealing with exclusive jurisdiction clauses, where it observed as follows:

Where parties have bound themselves on the jurisdiction and the law to govern the transaction, a party, by conduct may be presumed to have waived the term and submitted to the jurisdiction of the local courts. The well-known circumstances where a party is so presumed include where the party upon service of summons enters appearance without protesting jurisdiction like the appellants initially did. For the exclusive jurisdiction clause to have effect it must be clear to all that jurisdiction is protested at the earliest point of entering appearance. A defendant like in the case of **United India Insurance Co. Ltd (supra)** *can enter appearance in protest and quickly follow it with an application for stay of all further proceedings or for the dismissal of the suit on account of lack of jurisdiction. A party may also file a notice of preliminary objection. See* ***Raytheon Aircraft Credit Corporation and another v Air Al-Faraj Limited Civil Appeal No. 29 of 1999*** *where the court stated that;*

"There are no rules of the court prescribing the procedure for challenging the jurisdiction of the High Court by a foreign defendant who has been sued in this country in breach of contractual forum selection and the exclusive jurisdiction clause. The procedure suggested by the predecessor of the court in ***Prabhadas (N) & Co. v Standard Bank (1968) EA 679*** *at page 684 paragraph C-E is to enter a conditional appearance and then move the court for setting aside the process."*

This procedure seems to have gained sufficient traction in law to the point that it is safe to say that the point is settled. In ***Fonville v Kelly III and other (2002) 1 EA 71*** *it was reiterated that the entering of appearance or filing of a defence under protest, the filing of an application for stay of proceedings or for striking out the proceedings and the raising of a preliminary objection to the suit before trial are all legitimate means of challenging the jurisdiction of the court.*

12. My understanding of that case is that the requirement for a conditional Memorandum of Appearance or Memorandum of Appearance under protest applies to cases where a defendant seeks to rely on an exclusive jurisdiction clause. In this case, **section 6(1)** of the ***Arbitration Act*** requires that a defendant who wishes to stay proceedings, "*applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought."* This implies that a defendant may apply for stay at the time of filing the Memorandum of Appearance or any time before acknowledging the claim.

13. While the Defendant did not apply for stay at the time of filing the Memorandum of Appearance, it cannot be said that it acknowledged the Plaintiff's claim say by filing the statement of defence. This the position taken by the Court of Appeal in ***Eunice Soko Mlagui v Suresh Parmar and 4 Others*** **(Supra)** where the court contrasted the law prior to 2009 when the ***Arbitration Act*** was amended to the current position. After setting out the provisions of **section 6** of the ***Arbitration Act***, the court observed as follows:

Prior to the 2009 amendment, the pertinent part of section 6(1) provided that:

"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration..."

The main difference between the position before and after 2009 is that before 2009, a party was required to apply for referral of the dispute to arbitration at the time of entering appearance or before filing any pleadings or taking any other step in the proceeding.

> *After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision*. [Emphasis mine]

14. Following the above decision, the Defendant was entitled to file the application to stay proceedings before taking any further steps acknowledging the Plaintiff's claim. Since the Defendant had not filed any defence or taken any steps which would construed as acknowledging the Plaintiff's claim, the application for stay and reference to arbitration is properly before the court. The Preliminary Objection lacks merit and is dismissed.

Whether proceedings should be stayed

15. Under **section 6(1)** of the ***Arbitration Act***, the court will decline an order of stay where the arbitration clause is null and void, inoperative or incapable of being performed or that there is in fact no dispute. The Plaintiff takes that view that the matter should not be referred to arbitration because the DB decisions are binding on the parties and it entitled to apply to the court for enforcement under the Contract. The Defendant's case is that since both parties having filed Notices of Dissatisfaction, the matter should now be referred to arbitration for resolution.

16. The Defendant submitted that after the DB decisions, both the Plaintiff and Defendant issued notices of dissatisfaction pursuant to Clause 20.4 and therefore under Clause 20.6 the matter now ought to proceed to arbitration. Counsel for the Defendant submitted that under Clause 20.4 any dispute filed before the DB must be rendered within 84 days and upon determination of the dispute, the parties may agree with the decision amicably and implement it or differ with the outcome, give a notification of the dispute and proceed to initiate arbitration proceedings. The satisfied party, under Clause 20.7 is granted leeway to enforce the DB decision via arbitration or through any other forum. In this case though, the Defendant submitted that as the Contract had been terminated, the decisions of the DB lack the urgency of element of implementation characterized by the adjudication process hence the leeway granted to the parties under Clause 20.7 does not apply. Counsel referred to the supplemental part of Clause 20.4 which provides that:

> *The Decisions of the Dispute Resolution Board shall be in accordance with a strict interpretation of the express provisions of the contract, applicable laws and regulations of the Republic of Kenya and the facts and circumstances involved in the dispute.*

17. Counsel for the Defendant cited ***County Government of Nyeri and Another v Cecelia Wangechi Ndungu*** **[2015] eKLR** where the court held that in interpreting any document, the court must make reference to the precise words used, the documentary and factual context, where identifiable their aim and context taking into account that every issue of interpretation is unique in terms of the nature of the various factor involved. Counsel urged considering the foregoing dicta and Clause 20.4, the court should consider that the adjudication was meant to assist settlement of issues while parties continued to execute the demands of the contract but as in this case, where the contract has been terminated, the disputes on the DB decisions touches on the finality of the matter and that therefore the parties should proceed to arbitration for determination of disputes before proceeding to implement the DB decisions particularly since both parties have filed notices of dissatisfaction.

18. The Defendant further submitted that since the Contract has been terminated, the urgency of enforcement envisaged under Clause 20.7 does not apply and hence Clause 20.6 comes into play which means that the DB decisions have not become final and binding and shall be settled by arbitration hence the court ought to refer the matter to arbitration. Counsel cited ***Anzen Ltd and Others v Hermes One Ltd*** **[2016] UKPC 1** where it was held that, "*Arbitration clauses commonly provide that unresolved disputes "should" or "shall" be submitted to arbitration. The silent concomitant of such clauses is that neither party will seek any relief in respect of such dispute in other forum."*

19. In response to this contention, the Plaintiff submitted that Clause 20.7 of the General Conditions as amended by the Particular Conditions does not make arbitration mandatory because under that clause it is immaterial whether the DB's decisions to be enforced are binding, yet not final, or binding and final. In both instances, it contended that the winning party has the right to enforce the decision through arbitration for summary relief, or through any other lawful forum as the party has lawfully done. It further submitted that there is no provision in the Contract that makes arbitration the exclusive means of enforcing DB decisions unlike the provisions governing the primary provisions under Clause 20.6 of the Contract.

20. The Plaintiff further submitted that under Clause 20.4, the Defendant is obligated to implement the decisions of the DB by paying the demanded sums promptly as the decisions are binding unless and until set aside by amicable settlement or arbitration. Therefore, the decisions of the DB not having been set aside are binding in accordance with Clause 20.4. The right to file the suit, the Plaintiff further submitted, is not affected by the Defendant's right to file a notice of dissatisfaction and intention to commence arbitration under Clause 20.4 as the purpose of evincing such an intention is to preserve the right to proceed to arbitration but this does not affect or excuse the legal obligation to pay.

21. Counsel for the Plaintiff also submitted that even in the absence of express and equivocal wording in Clause 20.7 requiring that failure to comply with DB's decisions should be enforced exclusive through arbitration, it should be construed strictly against the Defendant in a manner that does not impede the Plaintiff's right to seek relief from the courts. This means that enforcement of the DB decisions through arbitration is permissive only and not mandatory as the right to refer the dispute to court was preserved and is available to the parties and would take express words to exclude the right.

22. Counsel for the Plaintiff referred to cases from other jurisdictions in which the courts interpreted clauses similar Clause 20.4 in the FIDIC contract. In ***Esor Africa (Pty) ltd/Franki Africa (Pty) Ltd v Bombela Civils Joint Venture (Pty) Ltd*****, [2013] ZAGPJHC 407** and ***Tubular Holding (Pty) Ltd v DBT Technologies (Pty) Ltd*** **[2013] ZAGPJHC 155**, the courts in South Africa held that the while the decision of DB is not final, the obligation to make payment under it is final and the Employer was required to give effect to the decision until set aside by amicable settlement or arbitration.

23. Resolution of this matter turns on the interpretation of the Contract. Performance of the Contract while the parties resolve their disputes is

underscored by Clause 20.4 which provides that the DB decision shall be "*binding on both parties*," who shall promptly give effect to it unless and until it is revised either by amicable settlement or by arbitration. Under the same Clause 20.4, the DB decision only becomes "*final and binding*" when neither party files a notice of dissatisfaction. However, where either party signifies it dissatisfaction with the DB decision by issuing a Notice of Dissatisfaction, then matter may be settled amicably under Clause 20.5 and failing which, the matter, "*shall be finally settled by arbitration*" under Clause 20.6 unless the particular condition provide otherwise.

24. The use of the word "*shall*" used in Clause 20.6 implies that the reference to arbitration is mandatory. Harking back to Clause 20.4, a DB decision which is subject to a Notice of Dissatisfaction is only, "*binding on both parties*", as opposed to "*final and binding*." Under Clause 20.7, it is only when a party fails to comply with a "*final and binding DB decision*" that a party may refer the matter to arbitration or file suit. In other words, resort to litigation is only an option where the DB decision is "*final and binding*".

25. In this case though, Clause 20.7 as modified by the Particular Conditions which supercede the General Conditions. Clause 20.7 of the Particular Conditions entitle the party aggrieved by the party who fails comply with the DB decision, *'' whether binding or final and binding,"* to refer the matter to arbitration "*without prejudice to any other rights it may have*". This implies that the right to enforce the DB decision, whether interim or final, is preserved and the aggrieved party has the right to elect whether or not to proceed to arbitration or file a claim in court.

26. Counsel for the Defendant submitted that the Clause 20.7 as amended only excludes applicability of Clause 20.4 and 20.5 and does not exclude DB decision from being subject to Clause 20.6. I reject this contention as General Clause 20.6 contemplates that the parties may agree otherwise in the Particular Conditions and since the parties have agreed otherwise in Clause 20.7 of the Particular Conditions then the right to pursue enforcement of the interim DB decision in court by the aggrieved party is preserved. Clause 20.7 of the General Condition was limited only to the enforcement of "*a final and binding decision*" while the Clause 20.7 of the Particular Conditions deals specifically with the consequences of failure to comply with the DB decisions, "*whether binding or final and binding*."

27. Since Clause 20 of the Contract is a standard clause in the FIDIC Conditions of Contract, it has been subject to consideration in other jurisdictions. These decisions are persuasive and this court is free to depart from them. However, it must be borne in mind that parties who adopt these standard form contracts expect consistency in interpretation across jurisdictions. In particular, and in the context of international commercial transactions, commercial certainty engendered by these contracts reduces the cost of business and scope of disputes. They also promote commercial comity between states. Our courts should strive to give effect to these principles.

28. The courts in South Africa have taken a firm view that the DB decision is binding unless and until it is set aside and it must be accordingly enforced. In ***Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd*** (Supra) the court interpreting the Clause 20.4 stated as follows:

> *[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. Given that a dissatisfied party has 28 days within which to give his notice of dissatisfaction it follows that the requirement to give prompt effect will precede any notice of dissatisfaction.*
>
> After reviewing the other provisions, the court concluded as follows:
>
> *[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. The decision in ***Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd JV and Bombela Civils JV (Pty) Ltd* (Supra)** involved enforcement of the decision of the DB issued under clause 20.4 of the FIDIC Conditions of Contract. The employer refused to make payment in terms of the DB decision arguing that it had given a notice of dissatisfaction. The learned Judge considered the intention and context of the dispute resolution court holding that

> *[12] [T]he DAB process ensures that the quid pro quo for continued performance of the contractor's obligations even if dissatisfied with the DAB decision which it is required to give effect to is the employer's obligation to make payment in terms of a DAB decision and that there will be a final reconciliation should either party be dissatisfied with the DAB decision…*

The court then concluded as follows:

> *[13] In order to give effect to the DAB provisions of the contract the respondent cannot withhold payment of the amount determined by the adjudicator, and in my view is precluded by the terms of the provisions of clause 20 (and in particular clauses 20.4 and 20.6 from doing so pending the outcome of the arbitration. In my view it was precisely to avoid this situation that the clauses were worded in this fashion.*
>
> *[14] I have considered a number local and foreign cases that were dealt with in argument. In my view this is a straight forward case based on the reading of the contract and the underlying rationale for requiring the immediate implementation of the DAB decision.*
>
> *[15] This court is required to give effect to the terms of the decision made by the adjudicator. The DAB decision was not altered and accordingly it is that decision which this court enforces.*

30. In both cases cited the contractor had applied for summary enforcement of the DB decisions. The courts found that any issues raised by the employer would be dealt with by amicable settlement or arbitration once the Notice of Dissatisfaction is filed. Although the present case deals with stay of the suit pending reference to arbitration in accordance with **section 6(1)** of the ***Arbitration Act***, the same principles apply regarding the obligation to give effect to the DB decision. 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.

31. Since the right to enforce the DB decision has accrued and must be given effect promptly, this means there no dispute to be referred to arbitration in view of clear and unequivocal obligation, "*to pay now argue later*". The fact that a party has filed a Notice of Dissatisfaction does not relieve its burden as it has an opportunity to contest the DB decision but through arbitration under Clause 20.6. It is at a later stage that any error may be corrected. In ***Bouygues UK Ltd v Dahl-Jehnsen UK Ltd*** **[2000] BLR 49 [TCC],** the court addressed this concern as follows:

> *[35] Mr Furst submits that, if Dahl-Jensen is permitted to enforce a decision which is plainly erroneous, Bouygues will suffer an injustice, and this will bring the adjudication scheme into disrepute. But as I said in **Macob**, the purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law or fact. It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes, they will not be able to do so, where, for example, there is intervening insolvency, either of the victim or of the fortunate beneficiary of the mistake.*

32. Counsel for the Defendant submitted that the urgency inherent in Clause 20.4 has since been diminished upon termination of the Agreement. I did not see nor was I referred to any provision in the Contract that affects the DB decisions in that regard given that the DB decisions for all intents and purposes constituted a binding obligation on the parties unless it is set aside. At the end of the day, the contractual provisions which this court is called upon to apply under Clause 20.7 of the Particular Conditions do not make any distinction between a provisional or binding decision in so far as the procedure for enforcement is concerned. Clause 20.7 preserved the right of the aggrieved party to move the court for relief.

Disposition

33. Following the conclusion, I have reached on the tenor and purport of Clause 20. 4 of the General Conditions as read with the 20.7 of the Particular Conditions of the Contract, I decline to stay the proceedings and refer the matter to arbitration. Consequently, I dismiss the application dated 30th April 2020 with costs to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2020

D. S. MAJANJA

JUDGE

Mr Bwire instructed by Echesa and Bwire Advocates LLP for the Plaintiff.

Ms Onyango instructed by TripleOKLaw LLP Advocates for the Defendant.