REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2016/21298

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... 24/8/2016

In the matter between:

EMPIRIC ENGINEERING (PTY) LIMTIED **Applicant**

and

QUITS AVIATION SERVICES LIMITED **Respondent**

JUDGMENT

MOKGOATLHENG J

INTRODUCTION

[1] On 24 June 2016 the applicant obtained an ex parte order against the respondent attaching the aluminium louvre glass goods allegedly belonging to the respondent at the premises of the manufacturer thereof Krause Glass (Pty) Ltd, to found jurisdiction to sue the respondent by way of edictal citation for payment of the sum of R871 900.00 for services rendered to the respondent in Nigeria.

Urgency

[2] *"The applicant contends that the reconsideration application is not urgent, in that the respondent is the author of its misfortune in having created commercial urgency. I agree with the respondent's argument that the reconsideration application is consequential upon the applicant's ex parte application, and as such the respondent as the aggrieved party at the receiving end of an ex parte order which it considers unjust, oppressive and potentially intrusively harmful and invasive to its economic rights, the dictates of commercial urgency entitles the respondent to approach this court on an urgent basis for the reconsideration of the said order. See* ***Oosthuizen v MIJS 2009 (6) SA 266 (W) and Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W) at 586G.***

[3] In any event the respondent contends that the matter is urgent based on the fact that it will suffer irreparable prejudice if the attached goods intended to be shipped to Nigeria by the 26 July 2016, are not released from attachment, further that it will also

suffer damages in the region of R3 300 000.00 and other penalties for failure to open the terminal building timeously for business purposes. The determination that this reconsideration application was urgent was in essence conceded by the applicant's counsel who submitted that the applicant was leaving this issue in the discretion of the court. In my view the respondent has shown that this reconsideration application is urgent.

The *Locus Standi* Of The Entity Referred To As Phenix Construction Technologies

[4] The applicant disputes the *locus standi* of Phenix Construction Technologies and argues that it is not the entity with which the applicant entered into commercial transactions as an agent of the respondent. The applicant contends that the entity which acted on behalf of, Quits Aviation Services Ltd (the respondent) was at all times Phenix Construction Technologies (Pty) Ltd and not Phenix Construction Technologies. The following discourse is an investigation to determine whether the applicant's contention has any merit in law.

[5] In *paragraph 8* of the founding affidavit, the applicant's deponent states that during or about October of November 2014, it submitted a tender pricing estimate in respect of a Terminal Building Contract to be executed in Lagos Nigeria. Pursuant to such estimate Phenix Construction Technologies (Pty) Ltd acting on behalf of Quits Aviation Services Ltd concluded a contract in terms whereof the applicant was appointed as the subcontractor to execute the said building contract.

[6] Further the applicant's deponent states that pursuant to *Annexure "AW2"* the applicant submitted the estimate pricing structure to Phenix in respect of building the Main Staircase and Balustrades at The Terminal Building in Lagos Nigeria. It is noteworthy that the applicant's deponent does not state that the pricing estimate was submitted to Phenix Construction Technologies (Pty) Ltd. What is critical is that applicant's pricing estimate is addressed to Mr Kobus Marais, a director of Phenix Construction Technologies (Pty) Ltd.

[7] It is noteworthy that the letterhead of Phenix Construction (Pty) Ltd *Annexure "AW1"* on the top right hand side thereof and on the left hand bottom thereof refers to both Phenix Construction Technologies and also Phenix Construction Technologies (Pty) Ltd of Cnr 60 Great North and Stanley Road Brentwood Park 1505.

[8] Further *Annexure "AW1"* reflects the directors of Phenix Construction Technologies (Pty) Ltd or Phenix Construction Technologies as;

(a) D J Marais;

(b) P Roscherr; and

(c) B M Mdlalose

[9] On 25 November 2014 per *Annexure "AW3"* indicates that Phenix, or Phenix Construction Technologies which is also referred to as Phenix Construction Technologies (Pty) Ltd responded in terms of *Annexure "AW2"* to Anton Willemse. This letter on *page 23* of the founding affidavit ends as follows:

Yours Faithfully

Phenix Construction Technologies and not Phenix Construction Technologies (Pty) Ltd!!

[10] On 19 November 2014 and 22 April 2014 *Annexures "AW4"* and *"AW6"* respectively are addressed by the applicant's Anton Willemse to Mr Kobus Marais a director of Phenix Construction Technologies (Pty) Ltd. On 6 February 2015 Paul Roscherr a director of Phenix Construction Technologies (Pty) Ltd or Phenix Construction Technologies addressed *Annexure "AW8"* to Anton Willemse CC Kobus Marais.

[11] On 7 February 2015 in *Annexure "AW9"* Anton Willemse responds to Paul Roscherr and CC's. Kobus Marais and Bheki Mdlalose (directors of Phenix Construction Technologies (Pty) Ltd) and Muhammad Bhamjee the same the person whose *locus standi* to represent Quits Aviation Services Ltd is disputed by the respondent! It is common cause that all the parties are corresponding with each other concerning Quits Aviation Services Ltd's Terminal Building Contract to be executed by the applicant in Lagos Nigeria.

[12] On 24 April 2015 in *Annexure "AW16"* Paul Roscherr writes to Anton Willemse CC Kobus Marais and the letter head he uses refers to Phenix Construction Technologies. On 11 May 2015 Kobus Marais per *Annexure "AW18"* writes to Anton Willemse pursuant to *Annexure "AW19"* and CC's James Hamman and Paul Roscherr. This letter ends thus:

Best Regards

Kobus Marais

Phenix Construction Technologies

[13] On 29 September 2015 James Hamman writes to Anton Willemse per *Annexure "AW23"* on a letter head which refers to Phenix Construction Technologies and which depicts the directors of Phenix Construction Technologies (Pty) Ltd as D J Marais, P Roscherr and M Bhamjee, the very person the applicant disputes his *locus standi*!

[14] To reiterate *Annexure "AW3"* the letter of appointment of the applicant as the Selected Subcontractor dated 25 November 2014 is written on a letter head depicting Phenix Construction Technologies and states that the appointment is based on the following terms and conditions:

(1) Conditions of the subcontract shall be those embodied with the terms and conditions of;

(a) Nominated/Selected Agreement (JBCC March 2005 Edition 4.1). The letter of appointment ends thus:

Yours Faithfully

Phenix Construction Technologies

[15] *Annexure "AW5"* refers to Contract Instruction No. 001 Project Quits Aviation – Terminal Building and South Wing and this letter emanates from Phenix Construction Technologies and the total amount of Contract Instruction No. 001 is reflected as R706 402.00. Contract Instruction No. 002 also emanates from Phenix Construction Technologies and is costed in the amount of R871 990.00.

[16] In *Annexure "AW22"*, the applicant refers in *paragraph D* to Contract Instruction No. 001! And in *paragraph B* thereof the applicant refers to Contract Instruction No. 002! The appointment letter *Annexure "AW3"* dated 25 November 2014 refers in *paragraph 2*, that the scope of the subcontract work shall include... Main Staircase, Balustrades and Handrails.

[17] The applicant's *Annexure "AW22"* refers to the Main Staircase, Balustrades and Handrails. The applicant's *Annexure "AW6"* dated 22 April 2015 in *paragraph D* thereof refers to; Steel Stairs, to Drivers Lounge, *Annexure "AW22"* in *paragraph C* thereof refers to additional work: All Balustrades revised to comply with the Hilton Specification *Annexure "AW22"* in *paragraph B* thereof refers to All Balustrades Revised to Comply With The Hilton Specification.

[18] The applicant pertinently bills Phenix Construction Technologies (Pty) Ltd for all the work referred to in *Annexures "AW6", "AW22" and "AW3"* of Contract Instructions No. 001 and No. 002!!

[19] Phenix Construction Technologies in *Annexure "AW23"* pursuant a letter dated 29 September 2015 by James Hamman addressed to Anton Willemse of the applicant responds to the applicant's *Annexure "AW22"* regarding the issues raised by the applicant under the following heads:

(a) Main Staircase Balustrade and Handrails;

(b) All Balustrades revised to comply with Hilton Specification Contract Instruction No. 001;

(c) Steel Stair to Driver's Lounge;

(d) Erection of Structural Roof Contract Instruction No. 001;

(e) Remedial Work to Structural Steel;

(f) Additional Material Supplied;

(g) Claim for Loss of Production;

(h) Cost of Visas!!

[20] *Annexure "AW32"* by Anton Willemse addressed to Paul Roscherr and CC's to Kobus Marais, Muhammad Bhamjee, James Hamman, and Henk Grobler dated 1 March 2016, in *paragraph 2* thereof states *"I have agreed on the condition that he turn the Phenix management inhumane decision around to put my people in the street at 16h00 around."*

[21] Anton Willemse responds on *page 72* per e-mail dated 1 March 2016 addressed to Paul Roscherr CC Kobus Marais, Muhammad Bhamjee and James Hamman. "*Gentlemen you are interfering with my people. It is unacceptable*"!! Paul Roscherr on the same day 1 March 2016 responds to *Annexure "AW32"* on a letter head Phenix Construction Technologies.

[22] Anton Willemse is aware that Phenix, Phenix Construction Technologies and Phenix Construction Technologies (Pty) Ltd are names used interchangeably and synonymously by Phenix Construction Technologies (Pty) Ltd. Indeed Anton Willemse accepted the *status quo* of such nomenclature without questioning the *locus standi*, status or identity of Phenix or Phenix Construction Technologies! Anton Willemse knows as any reasonable litigant should that there is only one contract which the applicant

concluded with Quits Aviation Services Ltd represented by Phenix Construction Technologies (Pty) Ltd and that, that entity is also known as Phenix or Phenix Construction, and further that the contract the applicant concluded to construct the Terminal Building at Lagos Airport in Nigeria was negotiated with Phenix, Phenix Construction Technologies (Pty) Ltdor Phenix Construction Technologies representing Quits Aviation Services Ltd.

[23] The court can take judicial notice of the commercial practise by commercial entities who use different commercial names or different corporate identities or different abbreviated trading names which all encompass the commercial corporate identity of such commercial entity and use the said commercial nomenclature, corporate or trading names interchangeably whilst referring to a single corporate entity.

[24] It must be obvious to any reasonably intelligent person in the context of this matter that the applicant and Quits Aviation Service Ltd represented by Phenix, Phenix Construction Technologies or Phenix Construction Technologies (Pty) Ltd speak of and refer to the same Terminal Building Contract which emanates initially from the tender advertised through *Annexure "AW1"* to which the applicant responded to in terms of *Annexure "AW2"* and which in terms of the letter of appointment *Annexure "AW3"* dated 25 November 2014, the applicant was appointed as the subcontractor as evidenced by *Annexures "AW2", "AW3", "AW4", "AW5" "AW6" and "AW7"* respectively to execute the contract in respect of constructing the Terminal Building in Lagos Nigeria!!

[25] It is obvious and indisputable that Phenix Construction Technologies (Pty) Ltd uses the names Phenix, Phenix Construction Technologies and Phenix Construction Technologies (Pty) Ltd interchangeably. Further it is patent that the office bearers of Phenix, Phenix Construction Technologies are the same office bearers of Phenix Construction Technologies (Pty) Ltd!! Further it is patent that Phenix Construction Technologies, or Phenix, or Phenix Construction Technologies (Pty) Ltd through their office bearers represented Quits Aviation Services Ltd in respect of procuring construction entities to submit tenders to build the Terminal Building at Lagos, Nigeria. It is pursuant to this Terminal Building Contract that the applicant was appointed as the subcontractor in terms of the JBCC 2005 4.1 Edition Rules to construct the Lagos Terminal Building.

[26] When the applicant's deponent Anton Willemse who conducted extensive correspondence with Kobus Marais, Paul Roscherr and James Hammad of Phenix Construction Technologies also known as Phenix, or Phenix Construction Technologies (Pty) Ltd pertaining to the construction of the Terminal Building at Lagos Airport in Nigeria states that Phenix Construction Technologies is not the entity with which the applicant entered into commercial transaction, he is technically crucifying the truth to achieve a dishonourable technical advantage which impacts on his *bona fides* and that of the applicant as honest litigants because he knows and understands through the correspondence conducted that there is only one entity he is and was dealing with.

[27] As per letter of appointment dated the 25 November 2014 and signed on the 17 February 2015, the applicant Empiric Engineering

(Pty) Ltd accepted that the commercial agreement between itself and Quits Aviation Services Ltd will be governed by the *JBCC 2000 Series March 2005 Edition 4.1*. Furthermore it acknowledged that Phenix Construction Technologies (Pty) Ltd would act as an agent of Quits Aviation Ltd in its appointed capacity.

[28] Consequently, the applicant's argument that Phenix or Phenix Construction Technologies is not the same entity as Phenix Construction Technologies (Pty) Ltd which the applicant contracted with, has no merit because in truth and fact the applicant entered into a subcontract with Phenix Construction Technologies (Pty) Ltd also known and trading as Phenix Construction Technologies and knows that this is the entity which represented the respondent Quits Aviation Services Ltd in concluding a subcontract with the applicant to build the Terminal Building on behalf of Quits Aviation Services (Pty) Ltd at Lagos.

[29] This shows indisputably that Quits Aviation Services Ltd appointed Phenix in all its guises and usage of corporate identity and nomenclature to be its principal agent in interacting with the applicant. Quits Aviation Service Ltd has never terminated its agents mandate, consequently, the applicant cannot be head to be advancing a technical defence and argue that Phenix Construction Technologies is not the entity it contracted with on behalf of the respondent but that Phenix Construction Technologies (Pty) Ltd is the only entity it contracted with. This technical argument has no merit whatsoever because there is only one subcontract the applicant has concluded, and that is it was facilitated with the agent by the agent of Quits Aviation Services Ltd.

The *Locus Standi* of Muhammad Bhamjee and The Authorisation by Quits Aviation Services Ltd

[30] Muhammad Bhamjee states under oath that he is the Group Managing Director of Phenix and has been involved in all interaction between Phenix and Empiric (the applicant) as evidenced by the correspondence between the parties referred to in this judgment and he also states that the Chief Executive of Quits Aviation Services Ltd provided him with the an authorisation in his capacity as Group Managing Director of Phenix to act for Phenix.

[31] In its Authority Resolution Quits Aviation Services Ltd empowers its Chief Executive Officer Sam Iwuajoku to instruct attorney Yousha Tayob to represent Quits Aviation and Phenix Construction and Technologies (Pty) Ltd. One does not have to be an Einstein to realise that (AND) between the words Phenix Construction and Technologies (Pty) Ltd is a typographical error.

[32] It would be extremely technical and churlish for one to construe this obvious typographical error otherwise. Any argument to the contrary would be disingenuous! Compare the authorisation given to Muhammad Bhamjee it states: *"(the company that is, Quits Aviation Services Ltd appoints Muhammad Bhamjee of Phenix Construction Technologies (Pty) Ltd as its agent. To state the obvious, there is no word AND between Phenix Construction and Technologies (Pty) Ltd in this authorisation"!!*

[33] Muhammad Bhamjee pursuant to Quits Aviation Services Ltd authorisation is empowered and appointed by Quits Aviation Services Ltd to be its representative and to depose to any affidavit

and do all things necessary in the litigation between Quits Aviation Services Ltd and Empiric Engineering (Pty) Ltd in relation to the subcontract for the project known as Quits Aviation Centre Terminal Building!!

Factual Background Regarding the Contractual Dispute and Whether the JBCC 2000 (March 2005 Edition 4.1 Rules are Applicable to the Parties Contract signed on 25 November 2014.

[34] The applicant contends that "*there is a reliance placed on an unsigned document described as the JBCC (Joint Building Contacts Committee) which appears at paginated pages 38-82 of the founding papers in this application for reconsideration. Neither party has signed such document, and on this basis alone, any purported reliance thereon calls into question the bona fides of the application for reconsideration, and also undermines the argument that the matter belongs more properly in an arbitration forum. What is more, the JBCC document was never furnished to applicant, as appears from paragraph 14 of the founding affidavit in the attachment application. On this basis, there is already a dispute made known to the above Court regarding the applicability or otherwise of the JBCC specimen building contract, March 2005 edition.*"

[35] In contradistinction the respondent contends that *Annexure "AW3"* (the letter of appointment) read with the *JBCC Rules* regulated the conduct of the parties and constituted the full and sole agreement between themselves. *Clause 20 of Annexure "AW3"* clearly states that *Annexure "AW3" and the JBCC (Series 2000) (March 2005 Edition)* constituted the sole agreement between the parties and

that any negotiations not included in *Annexure "AW3"* were of no force and effect.

[36] It is common cause that the applicant was duly appointed as the selected subcontractor on 25 November 2014 pursuant to *Annexure "AW3"* which states: *"On behalf of the client Quits Aviation Services, we hereby appoint you as a selected subcontractor on the abovementioned project based on the following terms and conditions:*

> *[1]* *Conditions of the subcontract shall be those embodied with the terms and condition of;*
>
> (a) *Nominated/Selected Subcontract Agreement (JBCC March 2005 Edition 4.1)."*

[37] The applicant commenced work pursuant to the said contract. Due to various problems as a result of the respondent's alleged failure to timeous supply products and materials and its failure to pay the applicant for work performed, a breakdown of the contractual relationship ensued which resulted in the applicant terminating the contract on 1 March 2016.

[38] Pursuant per e-mail dated 22 September 2015 *Annexure "AW22"* the applicant pursuant to Payment Certificate No. 6 demanded from Phenix the payment of damages in respect of work completed up to 18 September 2015 in the amount of R802 283.71.

[39] Phenix Construction (Pty) Ltd the respondent's agent responded to the applicant's demand through *Annexure "AW23"* dated 29 September 2015, and addresses *Paragraphs B, C, E, F, G and H* of the applicant's letter of demand and rejected certain of the

claims contained therein. Critically Phenix in terms of Payment Certificate No. 4 dated 2 October 2015 demanded payment from the applicant in the amount of R474 615.15. The applicant disputed this demand and adviced Phenix that it was proposing declaring a dispute.

[40] Pursuant *Annexure "AW25"* dated 28 October 2015 Phenix Construction (Pty) Ltd claimed a further amount of R261 968.41 from the applicant. In *paragraph 3 of Annexure "AW25"* Phenix expressly states "*Please find the attached format that your claims are required to be submitted in to Mr James Hamman. Please note that this is per Clause 31.2 (except: "for a lump sum contract the subcontractor shall compile such information in a form as agreed upon by the principal agent and contractor" of the JBCC 2000 (March 2005) as referenced in your letter of disagreement"*

[41] In a letter dated 2 March 2016 per *Annexure "AW33"* Phenix writes to the applicant under the heading Re Unlawful Suspension:

"3 As per your letter of appointment dated the 25 November 2014 and signed on the 17 February 2015 Empiric Engineering (Pty) Ltd you accepted that the commercial agreement between themselves and Quits Aviation Services Ltd will be governed by the JBCC 2000 Series March 2005 Edition 4.1 "To this end we gave and we give notice3 to Empiric of its default in terms of Clause 36.1 JBCC as we hereby do.

(a)Your failure to comply our instruction (as set out above point 10) is considered as a default under the provision of Clause 36.1 of the JBCC.

...

[42] In *paragraph 4(d)* thereof it is stated: "*Please make reference to the relevant JBCC 2000 (March 2005) Clauses for reasons above.*

In *paragraph 4(e)* thereof it is stated: "*Lastly please provide proof of the relevant JBCC notification that has been communicated timeously as required by the JBCC 2000 (March 2005) to Phenix Construction Technologies (Pty) Ltd representative.*

[43] In *paragraphs 5(d), 5(f), 6(b)* thereof Phenix refers to the relevant *JBCC 2000 Rules (March 2005)* with respect to the default "*Further Empiric is reminded of Clause 40.9 of the JBCC 2000 (March 2005) contract whereby the subcontractor even when disagreement as per Clause 40.1 as stated in your aforementioned letter is not relieved of his duties in terms of proceeding timeously for "the due and timeous performance of their obligation."*

[44] *The applicant pursuant to Annexure "AW26" dated 6 November 2015 responded to the Phenix's e-mail dated 28 October 2015 and states in paragraph 7(f)" No date for practical completion was ever agreed upon"...*

We would like Phenix to issue us their latest updated program taking into consideration actual site deliveries of materials after which we will present our program to complete the works.

Please also provide the signed copy of the N/S Contract Data pertaining to Empiric indicating the different dates for completion of each individual stage of site."

[45] On 15 October 2015 in terms of *Annexure "AW24"* the applicant addressed a letter to Phenix under the heading Notice of Dispute in Terms of JBCC 2000 (March 2005) Contract and states, "*in*

terms of our contract the JBCC 2000 Series (March 2005) we hereby provide notice that we are in disagreement with the following:

(1) Interim Payment Certificate issued 02 October 2015…"

"*This notice is in terms of Clause 40.1 of the JBCC and the dispute needs to be resolved as per Clause 40.2 failure which the processes of Dispute Resolution as per contract agreement will be*

"This notice is in terms of Clause 40.1 of the JBCC and the dispute needs to be resolved as per Clause 40.2 failure which the processes of Dispute Resolution as per contract agreement will be followed to get resolution hereon."

[46] Phenix pursuant a letter dated 28 October 2015 *Annexure "AW25"* headed Re letter of Dispute 15 October 2015 Ref Notification of Dispute 001 with regard to point 2 of the applicant's letter in *paragraph 4* States: (d): "*Please make reference to the JBCC (March 2005) Clause 5 for the reason for the above.*

[47] In *paragraph 4 (e)* lastly please provide proof of the relevant JBCC notifications that has been communicated timeously as required by the JBCC 2000 (March 2005) to Phenix Construction Technologies (Pty) Ltd's representative. With regard to point 6 of the applicants letter, Phenix in paragraph 6(b) refers to the JBCC 2000 (March 2005) notification, and further in the penultimate paragraph the said letter states "*Furthermore Empiric is reminded of Clause 40.9 of the JBCC 2000 (March 2005) contract whereby the sub-contractor even when in disagreement as per Clause 40.1 as stated in your aforementioned letter is not relieved of his duties in*

terms of proceeding timeously for" the due and timeous performance of their obligation."

[48] In *paragraph 5(b) and 5(f)* Phenix repeats the reference with regard to points of the contract which will be followed to get resolution hereon and pursuant a letter dated 28 October 2015 *Annexure "AW25"* headed Re letter of Dispute 15 October 2015 Ref Notification of Dispute with regard to point 2 of the applicant's letter in the reason for above; that in terms of the applicant's duties it is to proceed timeously for "*the due and timeous performance of their obligation."*

[49] In an e-mail dated 10 February 2016 *Annexure "AW29"* Anton Willemse on behalf of the applicant advices James Hamman and Muhammad Bhamjee of Phenix, "*Ons kan in ons JBCC stand punt negeer voor da tons hierdie betaling ontvang het nie. Die nie iutreiking van 'n sertifikaat we seen van ons dispuit on vir alle praktiese doeleindes is daar nog steeds me in sertifikaat uitgereik nie."*

[50] In a letter dated 1 March 2016 *Annexure "AW32"* and states:

"Also note as per point 4 of the same mail Phenix made no attempt to resolve the dispute that was declared with the specific period, nor did they respond amicably to the notification, Empiric do hereby declare once again that the dispute officially exist as contemplated in Clause 40.2 of the JBCC n/s subcontract Agreement (series 2000) (March 2005) read in conjunction with the JBCC principal agreement Series 2000 (March 2005) and we therefore reserve our rights to act in terms of the contract and refer the matter for dispute resolution."

"To date the negotiations were not concluded satisfactory and due to the fact that the time bar period as stated in Clause 38.2 lapsed, we are now entitled to proceed with cancellation of the said contract and claim damages and expenses and loss in terms of Clause 33."

[51] In a further letter *Annexure "AW33"* dated 2 March 2016 under the heading Re Payment Certificate No. 7 and Payment Advise No. 7

Phenix refers to the fact that the applicant has not submitted any JBCC notification to avoid an impasse regarding the evaluation of adjustment of contract value having been done on a sympathy basis as provided for in the *JBCC Rules*. In *paragraph 7* of the letter item 2 Remedial work to structural steel, reads, *"as per attached Annexure "C" the breakdown provided by Empiric as cost as per JBCC Clause paragraph 9 item 7" reads "No JBCC notification with reference to the relevant clauses submitted to date..."*

[52] *Paragraph 17.4* of the letter of appointment refers to payment of material to be based on the *JBCC Format Clause 17.14* refers to *Clause 31 of the Non Nominated Subcontract Agreement 1994 Edition JBCC 2000 Non Nominated and Nominated/Selected Subcontract Agreements)* to be replaced by *Clause 31 (Nominated/Selected Subcontract Agreement JBCC 1991*).

[53] *Clause 17.15* of the letter of appointment states:

Certain provisions set out in the Principal Building Agreement (JBCC 2000 or JBCC 2005 Edition) and will apply to the Sub-Contract Agreement and the Subcontractor accepts and has

familiarised himself with the contents of these Clause and the Principal Agreement as a whole.

[54] *Clause 17.16* of the letter of appointment refers to the right of the Contractor to deduct from any certified payments as due to the Subcontractor the amounts of any claims or costs which the contractor the amounts of any claims or costs which the contractor may have against the Subcontractor Ref Clause 34.0 Nominated Subcontract Agreement 2005 Edition. Nominated/Selected Subcontract Agreement JBCC 2005 Edition).

[55] In *paragraph 14* of founding affidavit the applicant states: *"In terms of Clause 1 thereof Annexure "AW3" the conditions of the subcontract were to be governed by the provisions of the JBCC building contract March 2005 edition…"*

[56] The applicant on the 15 October 2015 in terms of *Annexure "AW24"* advised the respondent: "*This notice is in terms of Clause 40.1 of the JBCC and the dispute needs to be as per Clause 40.2 failure which the processes of Dispute Resolution as the Contract Agreement will be followed to get resolution thereon."*

[57] I agree with the respondent's contention that the applicant's claim *is subject to the agreed JBCC n/s Subcontract agreement (series 2000) (March 2005 Edition 4.1) which provide dispute resolution mechanism.* Consequently the parties had thus elected the forum and manner of resolution of this dispute and chosen for the dispute not to be considered by this Court because it effectively precluded from determining the primary relief. The applicant *must follow the dispute resolution process outlined in the JBCC, the issues of the Court's jurisdiction to determine the applicant's claim does not*

arise; no attachment is necessary to clothe the Court with jurisdiction as such attachment cannot clothe the Court with jurisdiction in light of the agreed dispute resolution mechanisms.

[58] *The applicant has on two occasions admitted that there was a "disagreement" in terms of Clause 40 and invoked the provisions of Clause 40. The applicant thereby conceded that the Annexure "AW3" and the JBCC Rules remained extant and were applicable to the parties contract. These two occasions are as follows -*

(a) The first on 15 October 2015, in terms of *Annexure "AW24"* at *page 57.* The material portion reads –

"This notice is in terms of Clause 40.1 of the JBCC and the dispute needs to be resolved as per Clause 40.2 failure which the processes of Dispute Resolution as the Contract Agreement will be followed to get resolution thereon [sic]."

(b) *The second on 29 February 2016, in terms of Annexure "AW31" at page 70. The material portions reads –*

"Also note as per point 4 of same mail Phenix made no attempt to resolve the dispute that was declared with the specific period, nor did they respond amicably to the notification, Empiric to hereby declare once again that the dispute officially exist as contemplated in Clause 40.2 of the JBCC n/s Subcontract Agreement (series 2000 (March 2005) read in conjunction with the JBCC principal agreement Series 2000 (March 2005) and we therefore reserve our rights to act in terms of the contract and refer the matter for dispute resolution."

[59] In seeking the discharge of the attachment order the respondent's grounds for release respondents are categorised as follows:

"*The claim of Empiric is subject to the agreed JBCC n/s Subcontract agreement (series 2000) (March 2005 Edition 4.1) which provided for a dispute resolution mechanism. The parties had thus elected the forum and manner of resolution of this dispute and chosen for the dispute not to be considered by the Courts.*

[60] *By agreeing to be subjected to the dispute resolution mechanisms and then arbitration in terms of Clause 40 of the JBCC Rules the applicant agreed that this Court would not exercise any jurisdiction in respect of any claims it may have."*

[61] *Consequently this Court is thus effectively precluded from determining the primary relief of Empiric. Empiric must follow the dispute resolution process outlined in the JBCC; the issues of the Court's jurisdiction to determine Empiric's claim does not arise; no attachment is necessary to clothe the Court with jurisdiction as such attachment cannot cloths the Court with jurisdiction in light of the agreed dispute resolution mechanism."*

[62] *In paragraph 14 of the Founding Affidavit the applicant states that:*

> *"(a) there is a dispute about whether the terms of the JBCC is relevant or not. In my view this dispute in itself amounts to a disagreement in terms of Clause 40 and is thus similarly one that falls within the purview of the dispute resolution mechanisms outlined in Clause 40.*

[63] The respondent declared a dispute in terms of *Clause 40 of the JBCC*. On 2 March 2016 the respondent issued a notice to the

applicant of the intended cancellation of the unlawful suspension of works and stated that the applicant was in breach of *Clause 15.3 of the JBCC Rules*.

[64] The applicant's claims for several amounts are rejected by the respondent and the reasons are provided in *Annexure "AW23"* (dated 29 September 2015). The respondent submitted certificate 4 (2 October 2015) and 5 (1 December 2015) which evidence an amount of R474 615.56 owed by the applicant in respect of;

(a) the total payments already made to the applicant exceeding the works certified by an amount of R261 968.41; and

(b) the recovery of losses and expenses in the amount of R212 647.24.

[65] In response to certificate 4, in *Annexure "AW24"* (dated 15 October 2015);

(a) the applicant declared a dispute in terms of the provisions of *Clause 40*, recorded above. To repeat the material portion reads –

"This notice is in terms of clause 40.1 of the JBCC and the dispute needs to be resolved as per clause 40.2 failure which the processes of Dispute Resolution as the Contract Agreement will be followed to get resolution thereon [sic]."

[66] The issue of interim certificates is regulated by the provisions of *Clause 31 of the JBCC*, in particular –

1 Clause 31.4 rendered the interim certificate a "reasonable estimate of the value of subcontract work

executed…' and "a reasonable estimate of the value of the material and goods…";

2 *Clause 31.14 states that the interim certificate "shall not be evidence that the n/s works and materials and goods are in terms of the principal agreement;*

3 *Clause 32 allows for adjustment to the contract value consequent to a contractor's instruction Clause 33 affords the right to the respondent to recover damages, expenses and losses detailed in the JBCC agreement. By virtue of the provisions of the JBCC, interim certificates are not final proofs of amounts actually owed and are subject to further certifications."*

[67] The respondent disputes that it is indebted to the applicant in the amount claimed and states that pursuant *Clause 31 of the JBCC* the issue of an interim payment certificate "*shall not be evidence that N/S works and materials and goods are in terms of the principal agreement*" and the interim certificates are estimates, because pursuant to *Clause 33* expenses and losses, default interest compensatory interest, advance payments and damages could be recovered in terms of *Clause 25.3.1 to 25.3.8.*

[68] The respondent states that the amount claimed by the applicant fall with the provisions of the dispute resolution mechanism contained in *Clause 40 of the JBCC Rules.* The amounts are disputed by the respondent. The respondent states that the applicant has not delivered the completed work free of defects, that a final account has only now been rendered.

[69] In the founding affidavit on 29 February 2015 the applicant at *page 70* the applicant states: *"Also note as per point 4 of same mail Phenix made no attempt to resolve the dispute that was declared with the specific period, nor did they respond amicably to the notification. The applicant hereby declare once again that the dispute officially exists as contemplated in Clause 40.2 of the JBCC n/s Subcontract Agreement (Series 2000) (March 2005) read in conjunction with the JBCC Principal Agreement Series 2000 (March 2005) and we therefore reserve our rights to act in terms of the contract and refer the matter to dispute resolution.*

[70] The amounts claimed by the applicant as encompassed in the its founding affidavit falls squarely within the provisions of the resolution mechanisms outlined in Clause 40 of the JBCC – these amounts are disputed, by the respondent. The applicant disputes the recovery statements lodged by the respondent. To this extent –

[71] In *Annexure "AW31"*, on 29 February 2016, in response to interim payment 6, the applicant state that the negotiations were not concluded satisfactorily and *"declares once again that the dispute officially exist as contemplated in clause 40.2 of the JBCC n/s Subcontract Agreement (series 2000) (March 2005) read in conjunction with the JBCC principal agreement Series 2000 (March 2005) and we therefore reserve our rights to act in terms of the contract and refer the matter for dispute resolution."*

[72] *Clause 40 of the JBCC Rules* provides as follows:

"40.1 Should there be any disagreement between the employer or his agents on the one hand and the contractor on the other arising out of or concerning this agreement, the contractor

may request the principal agent to determine such disagreement by a written decision to both parties. On submission of such a request a disagreement in respect of the issues detailed therein shall be deemed to exist.

40.2 The principal agent shall give a decision specifically in terms of 40.1 to the employer and the contractor within ten (10) working days of receipt of such a request. Such decision shall be final and binding on the parties unless either party dispute the same in terms of [40.3].

40.3 Where there is no principal agent or should the principal agent fail to give a written decision within ten (10) working days or either party disputes the decision in terms of 40.2 by notice to the other and the principal agent within twenty (20) working days of receipt thereof a dispute shall be deemed to exist.

40.4 A dispute in terms of 40.2 or 40.3 shall be submitted to:

40.4.1 Mediation where the parties so agree;

40.1.2 Adjudication where practical completion in terms of 24.0 practical completion of the last section in terms of 28.2.2 has not been achieved.

40.1.3 Arbitration where practical completion in terms of this n/s agreement has been achieved or where expressly stated in terms of the n/s schedule…

40.5 The dispute referred to mediation in terms of 40.4.1, adjudication in terms of 40.4.2 or arbitration in terms of 40.4.3 shall be:

40.5.1 Dealt with in terms of the JBCC Dispute Resolution Procedures

40.5.2 Held in abeyance over an annual holiday period where such period is noted in the schedule

40.6 Reference of the dispute for resolution in terms of 40.4 shall not relieve the parties from liability for the due and timeous performance of their obligations

40.10 The cancellation of this agreement shall not affect the validity of clause 40 of the JBCC Rule."

[73] In ***Radon Projects (Pty) Ltd v N v Properties (Pty) Ltd and Another 2013 (6) SA 345 SCA*** Nugent JA dealing with the manner in which disputes are to be resolved under the *Principal Building Agreement Contract Committee (JBCC 4 ed (March 2004)*

Nugent JA in dealing with the abovequoted clause stated that the effect of clause 40, properly construed, is that the first port of call for a contractor where disagreement arises with the employer, is the principal agent. The clause does not purport to limit the time within which the principal agent may be called upon to do so. But once he has been called upon he must resolve the disagreement within ten days. If he fails to do so, or if either party disputes his decision within 20 days, a dispute is deemed to exist.

Once a dispute is deemed to exist either party may (but not must) submit the dispute for independent resolution. Once again the clause does not purport to prescribe a time within which that must be done. But if a party wants it resolved before practical

completion, it must be submitted to adjudication. After practical completion it must be resolved by arbitration.

An adjudicator's determination is clearly not exhaustive of the dispute. After practical completion of dispute might be submitted again to arbitration for final resolution. Whether a dispute is to be resolved by adjudication or by arbitration, in other words, depends upon when the dispute is submitted for resolution, and not upon the nature or genesis of the dispute.

The contract defines 'practical completion' of the work as –

'the stage of completion where, in the opinion of the principal agent, completion of the works has substantially been reached and can effectively be used for the purposes intended.'

It is a significant event because failure to reach practical completion by the agreed date renders the contractor liable to penalties."

[74] Consequently I find the *JBCC Rules* applicable to and form part of the parties contract. It is patent that both parties were aware that their contractual relationship is governed by *JBCC Rules* as exemplified by the letter "*AW31*" emanating from the applicant wherein it states:

> *"Empiric do hereby declare once again that the dispute officially exists as contemplated per Clause 40.2 of the JBCC N/S Sub-Contract Agreement (Series 2000) (March 2005) read in conjunction with the principal JBCC Building Agreement (Series 2000 March 2005) and we therefore*

reserve our rights to act in terms of the contract and refer the matter for dispute resolution."

The applicant's *malafides* in its failure to disclose material facts and its breach of good faith

[75] *I agree with the respondent that the applicant in its application did not -*

1 *Attach a copy of the JBCC agreement;*

2 *Advise the Court of the arbitration Clause 40 which it was well aware of, as evident from Annexures "AW24" and "AW31";*

3 *Advise the Court that the interim certificate 6 relied on by it: was interim, and was not evidence of the work, and, thus, could not amount to an acknowledgement as alleged by the applicant;*

4 *Advise the Court that it could not cancel the JBCC, in terms of Clause 38.6, and Clause 40.10 as the applicant was in breach of the JBCC and this breach is admitted by the applicant in its founding affidavit;*

5 *Advise the Court that it declared a dispute and was specifically obliged to submit same subject to the dispute resolution mechanisms in the JBCC Rules.*

[76] *I also agree with the respondent that the applicant has been economical with the material facts when applying for the ex parte application and has failed to disclose the terms of the JBCC in*

respect of the dispute resolution mechanisms in respect of the self-same dispute which it now seeks to have this Court determine.

[77] *The applicant has utilized the attachment in terrorem, to force Quits to pay it monies in circumstances where the applicant was well aware of the dispute between the parties and that its dispute is subject to an arbitrator's jurisdiction and not the Courts jurisdiction.*

[78] *Annexure "AW3" (the letter of appointment) incorporates the provision of the JBCC n/s Subcontract agreement (series 2000) (March 2005 Edition 4.1). Annexure "AW3" and the requisite JBCC thus form the agreement between the parties. This appears from the applicant's version in the Founding Affidavit.*

[79] In ***Schlesinger v Schlesinger 1979 (4) SA 342 (W)***

Citation: 1979 (4) SA 342 (W) it was stated"

"Practice – Application and motions – Ex parte application – When interested party entitled to oppose application.

Practice- Application and motions – Ex parte application – Failure to disclose material facts – Discretion of Court to rescind or preserve order obtained thereon – Duty of applicant not to omit any reference to a fact or attitude of his opponent which is relevant – order obtained with a reckless disregard of the full and true facts – Application to set aside such order granted with costs on attorney and client scale.

There is nothing inherently wrong or contrary to public policy in an interested party opposing an ex parte application which has come to his notice fortuitously or by informal notice: Rule of Court 6 (4)

(b) provides for this very contingency. On principle any person who sows a direct and contribute something to a just decision of the case, should not be deprived of an opportunity of being heard.

(1)In ex parte application all material facts must be disclosed which might influence a Court in coming to a decision; (1) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission and (3) the Court, apprised of the true facts, has a discretion to set aside the order obtained on material facts not disclosed or to preserve it.

Unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte or incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant. A litigant who approaches a Court ex parte is not entitled to omit any reference to a fact or attitude of his opponent which is relevant to the point in issue merely because he is not prepared to accept the correctness thereof."

[80] It is disingenuous for the applicant to contend that there is a dispute about whether the terms of the JBCC are relevant or not when it is patent that *Clause 1* of the letter of appointment it as a subcontractor expressly state that the conditions of the subcontract shall be those embodied with the terms and conditions of;

(a) *Nominated/Selected Subcontract Agreement (JBCC March 2005 Edition 4.1);*

[81] It is also disingenuous for the applicant to state that the *JBCC Rules* were not attached to the subcontract, when *Clause 17.15* states that "the clauses set out in *the Principal Building Agreement*

(JBCC 2000 or JBCC March 2005 Edition 4.1 and will apply to the Subcontract Agreement and the Subcontract or accepts and has familiarized himself with the contents of these Clauses and the Principal Agreement as a whole. These documents are held at our offices and can be viewed by appointment. What is amazing is that although in one breath the applicant claims he never received a copy of the JBCC Rules in another breath it quotes the same JBCC Rules it has never ever seen! In any event the applicant's Anton Willemse on 17 February 2015 signed the JBCC Agreement and the letter of appointment. So much for mendacity and mala fides.

[82] The assertion that the JBCC was not signed is equally ill-founded as the same was incorporated in the letter of appointment (*AW3*). Incorporation by reference is acceptable and creates binding obligations between the parties. See ***Industrial Development Corporation of SA (Pty) Ltd v Silver 2003 (1) SA 365 (SCA).***

[83] I concur with the respondent that the applicant agreed that their contract was subject to the *JBCC Rules Dispute Resolution and Arbitration Mechanisms* which ousted the jurisdiction of the High Court at this stage, consequently the launching of the urgent application in respect of the attaching of the respondents property *ad fundandum* was ill conceived and premature, because a dispute exists between the parties which requires to be resolved and arbitrated in terms of the *JBCC Rules.*

[84] I agree with the respondent submission that the about turn in respect of the binding nature of the JBCC is simply an admission that the applicant t has not disclosed material facts when seeking

the ex parte application, and now seeks to avoid this patent non-disclosure. This is furthered by the applicant's clear failure to disclose to the court that it subjected itself to the provisions of the dispute resolution mechanism in terms of *Annexures "AW24" and "AW31"*. These material non-disclosure entitle this Court, without more, to set aside the ex parte order. See ***Sclesinger v Schlensinger 1979 (4) SA 342.***

[85] The agreement to adjudicate and then arbitrate amounts to the parties, having abandoned their right to litigate in this Court, save for certain circumscribed purposes. See the discussion in ***Zhongji Development Construction Engineering Co Ltd v Komoto Copper Co Sarl 2015 (1) SA 345 SCA***.

[86] I agree that the primary rationale for an attachment to found jurisdiction, in order to clothe this Court with jurisdiction to compel the respondent to litigate in South Africa, did not exist at the time of the attachment and *fundandem* application. See ***Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A); Tsung v Industrial Development Corporation of SA Ltd 2006 (4) SA 177.***

[87] The applicant was thus well aware of its own election to invoke *Clause 40 of the JBCC*, and by this election it has been eschewed litigation before this Court. Consequently I agree that the attachment was perpetrated solely in *terrorem* as no underlying basis for the same existed and this attachment was utilized for the ulterior purpose of forcing the payment of disputed claims. See ***Price Waterhouse Coopers Inc and Others v national Potato Co-Operative Ltd 2004 (6) SA***.

[88] *In paragraph 17 of the founding affidavit the applicant's deponent admits that the applicant signed a copy of the acceptance of its tender pricing Annexure "AW3", and also admits in paragraph 14 of the founding affidavit that "in terms of Clause 1 thereof the conditions of the subcontract were to be governed by the provisions of the JBCC Building Contract March 2005 Edition not that such document was never attached to our agreement…." This statement is disingenuous because on the 17 February 2015 the applicant's Anton Willemse signed the JBCC Building Contract. See page 86, and he initialled each and every page of the said contract.*

Abuse of process

[89] *The applicant, knowing full well that there was no basis for the attachment, proceeded to attach the louvres. This is with respect a furtive attempt to force Quits to meet the disputed amounts of Empiric and steal a march on Quits. Empiric has thus utilized the Court's processes in terrorem and for an ulterior purpose.*

[90] *It is consequently mendacious for the applicant to categorically state that "after signing a building contract in certain instance in terms thereof were utilized by either Phenix and applicant and in other instances not" when Clause 20 of Annexure "AW3" clearly states that a dispute as to whether or not the terms of the JBCC are relevant or not"!! Pursuant to Clause 40.1 "should any disagreement arise between the contractor and subcontractor as to any matter arising out of or concerning this n/s agreement other than in terms of 40.8 either party may give notice to disagreement."*

[91] *Consequently, the applicant breached its duly of good faith when it did not disclose the material facts that counted against the Court granting an order in its favour."*

[92] The Order

(1)The attachment *ad fundandem* is set aside;

(2)The applicant is ordered to pay the costs of this application on an attorney and own client scale.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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