

SOUTH AFRICA / JUDGMENT

Eskom Holdings SOC Limited v TSSA (Pty) Ltd and Others (038256/2022) [2023] ZAGPJHC 1469 (21 December 2023)

[2023] ZAGPJHC 1469

COURT

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

038256/2022

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IN THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG LOCAL
DIVISION, JOHANNESBURG
Case No: 038256/2022
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
NOT REVISED

In

the matter between:

ESKOM
HOLDINGS SOC LIMITED
Applicant
and
TMMSA
(PTY) LTD
1st
Respondent
ADVOCATE
PATRICK LANE SC
ADVOCATE
MOHAMMED CHOCHAN SC
MR
GEOFFREY GRANT
ADVOCATE
AZHAR BHAM SC
ADVOCATE

CHRIS LOXTON SC
2nd
Respondent
3rd
Respondent
4th
Respondent
5th
Respondent
6th
Respondent
ADVOCATE
LEE HARDING
7th
Respondent

JUDGMENT

NOKO J

Introduction

- [1] The applicant launched proceedings for interim interdict to stay the adjudication of two disputes before two Dispute Adjudication Board Panels (DAB panels) pending the outcome of events set out below.
- [2] The first dispute relates to Claims Dispute (constituting of two parts, viz, merits and time-bar parts) which is sought to be stayed pending the finalisation of the adjudication of arbitration proceedings and also pending the finalisation of the investigations conducted by the Special Investigation Unit (SIU) into contractual arrangements between the applicant and the respondent. The panel would be referred to as Claims DAB panel. The panel is constituted by second to fourth respondents. Members of the panel are not opposing the application and have filed notice to abide.
- [3] The second dispute sought to be stayed relates to the termination of contractual and transactional arrangements between the parties. The stay should also be ordered pending the finalisation of the investigation by the SIU. The panel constituted to adjudicate this dispute would be referred in this lis to as Termination DAB panel and is constituted by fifth to seventh respondents. Members of this panel are also not opposing the application and have also filed notice to abide.
- [4] Reference to respondent in this lis refers to TMMSA (Pty) Ltd.

Background

- [5] The background set out below is in general common cause between the parties and shall be dealt with under the separate headings.

Contract and SIU Investigation.

- [6] The parties entered into a building contract on or about 2 or 3 November 2010 in relation to works to be executed at the applicant's Kusile Power Plant (Kusile contract). The contract was based on the FIDIC Conditions of Contract for Plant and Design-Build, first edition 1999 (Yellow Book). The contract had three sections, first, P24B Contract, which related to terrace materials handling. Secondly, P24E Contract, which related to the limestone works and thirdly, P24C Contract, which related to stockyard works[1]. The disputes between the parties arose from the execution of the P24B Contract.
- [7] During April 2018 the SIU commenced investigations relating to maladministration and corruption in the business and operations of

the applicant. Relevant to this matter the applicant avers that "...the scope of the SIU investigations include the Contract concluded between Eskom and TMMSA, TMMSA's Claims dispute against Eskom, reported corrupt fraudulent activities, and the existence of TMMSA's alleged global settlement." [2] Some corrupt (fraudulent) activities under investigation were reported by the respondent.

- [8] The SIU's investigations were mandated in terms of Proclamations R11 of 2018[3] and R3 of 2020[4]. The investigation includes the declaration of findings and evidence of the investigations by the SIU and recommendations NDPP for possible charges emanating from the investigations. Despite the launch of the investigation the implementation of the Kusile contract continued.

Claims Dispute

- [9] In February 2019 the respondent submitted several claims which related to additional costs and extensions of times arising from Eskom's alleged breaches of the contract. The claims were considered and disapproved by the applicant's Engineer. The respondent aggrieved by the engineer's decision submitted the disapproved claims for adjudication by a DAB in accordance with the dispute resolution procedure under the contract. The referral submission was made on or about 16 April 2021.
- [10] The Claims Dispute has two prongs. First, time-bar aspect which relates to the question whether the claims were submitted on time and secondly, the merits aspect (and quantum) of the claims. The parties have agreed that the time-bar aspect of the dispute will be adjudicated first and separately from the adjudication of the merits which shall come second. The adjudication of the time-bar aspect continued, and the Claims DAB panel decided in partly in favour of the respondent. The parties were not satisfied with this outcome thereof and filed notice of dissatisfaction in terms of which Claim DAB's outcome is

referred for arbitration.

[11] Notwithstanding the referral of the outcome to arbitration the respondent informed the applicant that merits aspect of the claim should be adjudicated by the DAB panel. The applicant resisted the suggestion and contended that the arbitration should first determine the time bar aspect of the claim and only thereafter and (if applicable), the parties should proceed with the adjudication on the merits. The Claims DAB panel has also conveyed to the applicant that indeed the adjudication on the merits should proceed as contended by the respondent and unless the proceedings are interdicted through an order of court otherwise the adjudication on the merits aspect would commence.

[12] Pursuant thereto the applicant launched these proceedings.

Termination dispute

[13] The applicant terminated the contract with the respondent via a letter dated 13 December 2021 on the basis, inter alia, that respondent has "...committed various acts in violation of sub-clause 15.2(f). The unlawful conduct is common cause, given the self-reporting by TMMSA of some of these acts". The letter of termination further stated that

"[T]he parties respective experts have been collaborating with the Special Investigating Unit to determine the quantum of the overpayment to TMMSA arising out of the bribery and corruption in terms of Sub-clause 15.2(f), which quantification is near completion. The

current Quantum Progress Update from these experts details millions of Rands in overpayment to the Contractor as a result of bribery and corruption." [5]

[14] The respondent in retort disputed the applicant's alleged right to terminate the contracts and further averred that the conduct of the applicant is construed as repudiation which was rejected by the respondent. The respondent then proceeded to issue a termination letter to the applicant. In the premises both parties contends that each of them has validly terminated the contract.

[15] Termination would ordinarily trigger repayment of amounts received by the Applicant following its recourse on various security bonds under the contract if the termination at the instance of the respondent is found to be valid. At the same time if the termination is determined in favour of the applicant there are also financial consequences.

[16] Pursuant to the foregoing the parties constituted a second DAB (Termination DAB panel) to adjudicate over the termination dispute. In one of the pre-hearing meetings the parties agreed that "the dispute ...between the Parties is as defined in the DAB agreement". The parties are not, yet, in agreement as to what the dispute should be. The applicant contends that the dispute should only deal with termination whereas the respondent contends that it should deal with both termination and consequences of termination.

- [17] The DAB has determined that it is not endowed with jurisdiction in view of the fact that, though the parties have appointed the panel “... parties have not concluded a DAB agreement, defining the dispute to be submitted... for determination”. [6]
- [18] The respondent has pursuant to the decision of the termination DAB panel elected on 1 December 2022 to refer the dispute to arbitration since “...as the parties had failed to constitute a dispute adjudication board to hear the Termination Dispute.” [7]. That notwithstanding the applicant has launched the proceedings to interdict the DAB on termination dispute to which the respondent raised a point in limine that there is no dispute before DAB and as such the relief sought is nugatory.

Issues

- [19] The issues for determination are, first, point in limine and secondly whether the applicant has made out a case for the reliefs sought.

Points in limine.

- [20] The respondent contends that the issue in relation to the stay of the claims dispute (merits aspect) has been rendered nugatory since the respondent has already agreed to the stay of the proceedings pending arbitration of the time bar aspect of the claims dispute.
- [21] The applicant in retort contends that the concession to the stay was only made after the court papers were served on the respondent and the court should grant an order confirming the stay by agreement inter se and further order the respondent to pay costs at a punitive scale. This is predicated on the argument that the attempts were made to procure the concurrence of the respondent to the stay adjudication of the merits aspect of the claim but the latter was recalcitrant and only took a volte face stance after the court papers were served.
- [22] I will therefore make an order that the merits aspect of the claim dispute shall be stayed pending arbitration on the determination by the Claims DAB on the time-bar aspect of the claim dispute.
- [23] Regarding the termination dispute it is axiomatic to note that the Termination DAB made a ruling [8] that it has no “jurisdiction to deal with any dispute as might exist between the parties”. [9] As such until such time as the parties agree on the dispute the Termination DAB panel is seized with no dispute to adjudicate upon. The ruling by the Termination DAB panel has been referred to arbitration by the respondent in accordance with the notice of referral annexed to the respondent’s answering affidavit marked AA6. [10] Termination DAB is therefore appointed in vacuo. It therefore follows that there is no dispute pending before the Termination DAB panel. As such the relief sought in this regard is unsustainable and incompetent.

[24] I therefore find in favour of the respondent that the relief sought relative to the termination dispute is incompetent.

Interim interdict

[25] Having dealt with points in limine raised by the respondent the only outstanding issue serving before me relates to the second relief sought by the applicant under Claims Dispute, being that the claim dispute should be stayed pending the finalisation of the investigation by the SIU.[11] This relief cannot be competent or co-exist with relief to stay pending arbitration. Otherwise, the orders would be mutually contradictory and self-destructive. The application should have been to either stay the Claims dispute (merits aspect) pending arbitration alternatively pending SIU investigation. The applicant is therefore approbating and reprobating. To this end, the second relief under Claims Dispute is bound to fail.

[26] In view of the above findings any other issue raised by the parties need not detain this court any further.

Costs

[27] The applicant contends that the court should convey its displeasure by mulcting the respondent with punitive costs order due to its recalcitrant. attitude. It does not appear to have been an unreasonable reaction by the respondent as it was also shared by the three senior counsels who also ruled that the adjudication on the merits should continue even though the dispute on the time bar aspect is pending before the arbitration. To this end mulcting the respondent with costs on punitive scale may not be appropriate under the circumstances.

[28] Both parties have however been successful in that the dispute on time bar aspect of the claim dispute is stayed pending the arbitration as a relief sought by the applicant. On the other hand, the respondent succeeded in argument advanced that there is no dispute pending before the termination DAB panel regarding termination of the Kusile contract between the parties. In the premises, I find that ordering each party for their respective legal costs would be apt.

[29] I make the following order:

1. That the merits aspect of the claims dispute is stayed pending arbitration of the claim dispute on time-bar aspect of the claim.
2. The application for the stay of the proceedings of the claim dispute pending SIU investigation is dismissed.
3. The application for the stay of the termination dispute pending SIU Investigation is dismissed.
4. Each party shall pay their respective legal costs.

Mokate Victor Noko

Judge of the High Court

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 21 December 2023.

Appearances

For the Applicant: Adv A Jansen van Vuuren

Attorneys for the Applicant: Kapditwalwa Inc. t/a Dentons, Johannesburg.

For the Respondent: Adv Burman

Attorneys for the Respondent Pinsent Masons South Africa Inc.

Date of hearing: 4 September 2023

Date of judgment: 21 December 2023

[1] See para 8.2 of the Applicant's Founding Affidavit, CL 001-26.

[2] See para 6.22 of the Applicant's Founding Affidavit, on CL 001-18.

[3] Published in Government Gazette No 41561, 6 April 2018.

[4] Published in Government Gazette No. 42979, 31 January 2020.

[5][5] See para 9.4 of the Applicant's Founding Affidavit, CL 001-31. The applicant alleged, strangely, in para 53.3 of the Replying Affidavit that "[T]he applicant contends it terminated the Contract with TMMSA on the basis of fraud, corruption and TMMSA's insolvency". (underlining added).

[6] See para 39 of the DAB panel's ruling on jurisdiction/Disputes, CL 007-51.

[7] See para 7.3 of the Respondent's Answering Affidavit, CL 007-9.

[8] The applicant appreciate that the dispute has not been defined and has stated in para 57.4 of the Applicant's Replying

Affidavit. CL 008-28 that "... the parties agreed that on the DBA Panel to be appointed, but the applicant disputed the nature and scope of the dispute before the DAB Panel, so that it would not be overly broad or open-ended. The Termination DAB Panel agreed with this in its ruling."

[9] See DAB panel's ruling para 39.3, CL 007-63.

[10] See para 7.3 of the Respondent's Answering Affidavit, CL 007-9.

[11] See para 9.2 of the Applicant's Replying Affidavit, CL 008-6

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Prepared on 13 October 2026 · Esheria