

SOUTH AFRICA / JUDGMENT

Generational Training and Development (PTY) LTD v Mining Qualifications Authority (MQA) (22367/17) [2018] ZAGPPHC 37 (3 September 2018) [2018] ZAGPPHC 37

COURT

North Gauteng High Court, Pretoria

BEFORE

PM Mabuse

CASE / FILE NUMBER

22367/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 22367/17

DATE:

9 March 2018

GENERATIONAL

TRAINING AND

DEVELOPMENT

(PTY)

LTD

Applicant

MINING

QUALIFICATIONS AUTHORITY (MOA)

Respondent

JUDGMENT

MABUSE J:

[1] The battlefield of the parties in this matter revolves around the proper interpretation of a clause in a written agreement between the parties. That particular clause, which is clause 11 of the parties' Agreement, reads as follows:

"11.1 Any dispute, which arises between the MQA and the Host Company pursuant to this Agreement, shall be resolved between the parties first and in accordance with clause 27 of the General Conditions of the Contract.

11.2 The dispute shall first be referred to a joint Committee consisting of the CEO of the MQA and one other person nominated by the CEO and two representatives of the Host Company. This joint Committee shall use its best endeavours to resolve the dispute within (14) fourteen days after the dispute has been referred to them."

[2] The said clause constitutes part of the Internship Programme (Mining and Related Disciplines) contract concluded between the Mining Quantification Authority, the Respondent, and Generational Training and Development (Pty) Ltd, the Applicant, on 31 March 2015. In terms of the said Agreement, the Respondent had undertaken to remunerate the Applicant on a quarterly basis for its services, being the identification and appointment of suitable internship candidates and thereafter placing such suitable interns with suitable employment for workplace training. The Applicant would then monitor the interns' progress and submit reports on their progress to the Respondent. The submission of the reports was the actual invoicing mechanism that the parties had agreed on.

[3] On 3 July 2016 the Respondent wrote a letter to the Applicant. In this letter the Respondent informed the Applicant that, in keeping with the provisions of clause 9.2 of the contract, it cancelled the contract with immediate effect because the Applicant had committed a

material breach of the said Agreement and after the Applicant had been given an opportunity to remedy the breach and the Applicant had failed to do so. The Applicant regarded the cancellation of the said Agreement by the Respondent as a repudiation of the parties' Agreement and duly accepted it. There was therefore a cancellation of the Agreement by the Respondent with the Applicant regarding such cancellation as repudiation and electing to accept it. The Applicant does not state whether it notified the Respondent of its election to accept the "repudiation" of the contract and how it communicated such notice to the Respondent. It is nevertheless common cause between the parties that the agreement was terminated and that the Applicant accepted such termination.

[4] The Applicant contends that at the time of the said cancellation or repudiation of the said Agreement the Respondent was indebted to it for services rendered by it to the Respondent for the period commencing in June 2015 and ending in March 2016. Through its legal team on 15 September 2016 the Applicant sent a demand to the Respondent for payment of

outstanding monies. In addition its legal representative informed the Respondent that formally it invoked the provisions of clauses 11.1 and 11.2 of the Agreement and that it declared a dispute between the parties. A copy of the said letter of demand is attached to the founding affidavit. In paragraph 6 thereof it is recorded that:

"6. Further to the above, and in consequence of several provisions of the Internship Programme contract we wish to record the following:

6.1 We hereby declare a dispute regarding the Internship Programme contract and its termination thereof

6.2 We hereby invoke clauses 11.1 and 11.2 of the said contract which mandate the resolution of a dispute to be referred to a joint committee."

[5] On 22 September 2016 the Respondent responded by way of a letter in which it set out its position. The Respondent stated in the said letter that it would appear that the Applicant had intended to challenge the termination of the Agreement in terms of clauses 11.1 and 11.2 of the Agreement. It went further and pointed out that the provisions of clauses 11.1 and 11.2 applied to the disputes between the parties during the currency of the Agreement and not upon its termination. This position was underscored by Adv . Kutumela, who appeared for the Respondent. Furthermore, it pointed out that from the careful reading of the provisions of the clauses of the Agreement it appeared that clause 13.1 was the appropriate clause under which the Applicant could challenge the termination of the Agreement . The said clause reads as follows:

"13.1 The Parties submit to the jurisdiction of the High Court (Gauteng) in respect of any matter arising from or connected to this Agreement, its implementation or termination ."

[6] The response jolted the Applicant to launch this application and to seek the following relief:

"1. Declaring that clause 11 of the Internship Programme Contract dealing with the resolution of disputes between the parties remains binding between the parties; and

2. Declaring that clause 11 of the Internship Programme Contract is to be interpreted as enduring beyond the repudiation of the Agreement by the Respondent; and
3. Declaring that Applicant is entitled to invoke the provisions of clause 11 of the Internship Programme Contract in the pursuit of its claim.
4. Costs in the event the matter is opposed.
5. Further and/or alternative relief

[7] THE PARTIES' VIEWS

7.1 The Applicants' view is that nothing in the wording of clause 11 limits the operation of the dispute resolution procedure. Such procedure as outlined in the Agreement being the mechanism the parties have chosen to resolve their disputes. It was contended by Mr Mangolele furthermore on behalf of the Applicant that the provisions

of clause 11 may be invoked even after the termination of the Agreement . There is, according to counsel for the Applicant, only

one interpretation of clause 11;

7.2 This was the view put forward by Mr. Mangolele, the Applicant's counsel. He argued that the wording of the arbitration clause "any dispute" properly construed and given the ordinary grammatical meaning accommodates the applicability of the dispute resolution procedure to survive beyond the termination of the Agreement;

7.3 The Respondent's view, on the other hand, was set out in the attorney's letter dated 22 September 2016. The Respondent persisted with that position even in their answering affidavit. In its answering affidavit deposed to by one, Tebogo Mmotla, the Respondent nailed its colours to the mast by stating that the said clause 11 applied to disputes which arose between the parties about the Agreement while the Agreement was still in operation. In such circumstances, any disputes, would be resolved by the dispute resolution procedure which culminates in arbitration proceedings where the parties were unable to resolve disputes through engagements in the joint committee. According to the respondent's counsel Clause 11 envisages that a contractual relationship between the parties must still be in existence at the time that a dispute is referred to arbitration, that this is so, is clear from clause 11.4 which obliges the Applicant to continue providing its service pending the outcome of the arbitration . Mr Kutumela developed his argument and contended that the dispute resolution mechanism of clause 11 does not envisage its own application beyond the termination of the Agreement .

[8] The issue that the Court is called upon to decide is whether the parties are bound by the terms of an agreement, even after termination of such an agreement. If one of the parties terminates the agreement, whether by cancellation or repudiation, are the parties still bound to act in accordance with the terms thereof? The effect of cancellation or repudiation of a contract is to put an end, not to the entire contractual relationship between the parties, but only to the primary obligations under the contract, in other words, those which relate to the performance due in terms of the contract, According to Christie's Law of Contract in South Africa 7th Edition, page 737:

'Termination of the primary obligations of the contract in (the obligations of both parties to perform) does not terminate all secondary

obligations, such as an obligation to pay damages for breach, or 'unless a contrary intention appears' the obligation to abide by an arbitration clause in a contract.

[9] In paragraph 10 of its letter dated 13 July 2016 the Respondent wrote as follows:

"In the circumstances, the MQA invokes the provisions of clause 9.2 of the contract and terminates the contract with immediate effect.

Clause 9.2 of the said Agreement states that:

"In addition to any other legal remedies, which the parties may have, this Agreement may be terminated with immediate effect if either party commits a material breach of the Agreement.

In the founding affidavit it the Applicant stated that it reluctantly accepted the Respondent's repudiation.

[10] An agreement may be terminated by repudiation or cancellation. A party to a contract commits repudiation, which is another form of breach of contract, when by its words or conduct, and without lawful grounds, indicates to the other party an unequivocal intention no longer to be bound by the terms of the contract or a material part of the contract

or that he will not perform its obligations under it. In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2000] ZASCA 82; 2001 (2) SA 284 (SCA paras 16-17, the Court dealt with, among others, the term "repudiation". In paragraph 16 it quoted with approval the following passage by Corbett JA, in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) 22D-F:

"16. Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract he is said to repudiate the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of the repudiation and rescission to the party who has repudiated"

[11] I felt impelled to give a treatise on "repudiation" for quite obviously the applicant misunderstood it. On the facts before this Court, the Respondent did not repudiate the parties' contract but instead cancelled it. The Applicant was, therefore, not correct to state that "it had accepted the repudiation of the contract". Its acceptance of the repudiation must therefore be construed to mean that it elected to accept the act of cancellation of the agreement by the Respondent.

[12] The Respondent might have used a word that was employed by the parties in the contract when it intimated that it "terminated" the contract. This word "terminates" in the context of the contract lacks precision. It fails to set out or explain whether the contract was terminated by repudiation or cancellation. In reality a contract may be terminated by, among others, repudiation or cancellation, sometimes referred to as rescission. Cancellation of a contract, on the other hand, is normally an act of a party who is a victim of a breach by the other. "It consists of an unequivocal intention by the victim of certain types of breaches that he is putting a stop to further performance of the contract."

See Wille and Millen *Mercantile Law of South Africa* 17th Edition, page

103. It is accordingly of crucial importance not to confuse

termination of the Agreement by cancellation with termination of the same Agreement by cancellation.

[13] When the Applicant stated that "it accepted the repudiation of the Agreement between them", it actually meant that it accepted the "cancellation" of the Agreement by the Respondent. The Respondent cancelled the Agreement because it held the view that it was a victim of a material breach of the parties' Agreement. The Respondent had lawful grounds upon which to terminate the contract. In turn the Applicant elected to accept such cancellation.

[14] The existence of lawful grounds upon which an agreement may be terminated constitutes a material distinction between termination of an agreement by repudiation which, as already pointed out, takes place in the circumstances where there are no lawful grounds and termination of an agreement by cancellation which takes place where there is a material breach of the agreement.

[15] The effect of cancellation of a contract is to put an end, not to the entire contractual relationship between the parties but only to the primary obligations under the contract, in other words, those which relate to the performances due in terms of the contract. According to Christie's Law of Contract in South Africa 7th Edition, page 639:

"Termination of the primary obligations of the contract (the obligations of both parties to perform) does not terminate all secondary obligations, such as obligations to pay damages for breach, or '(unless the contrary intention appears', the obligation to abide by an arbitration clause in the contract.,,

[16] In *Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical* 1992(1) SA 296 AD, 298 C-E the issue whether arbitration clause survived termination of contract came up for consideration. In this case the Court held that:

"... as to the first contention, that where a contract was dissolved or cancelled by mutual consent, this brought to an end the rights and obligations of both parties to the contract and neither party was left with any claim against the other arising from the earlier contract, so that any submission to the arbitration contained in the contract was generally speaking dissolved or cancelled.

Held, further, that the instant situation was very different: although each party accepted that the other no longer had a duty to perform his primary obligations under the agreements, and were to that extent *ad idem*, they at the same time sought to claim damages from the other arising from an alleged unlawful repudiation, so that there could be no question of consensual cancellation, or anything akin to it.

Held, further, that the real object of the arbitration clause in question was to provide suitable machinery for the settlement of disputes between the appellants and the respondent arising from the agreements, and it '«as reasonable to infer that all the parties intended the provisions to operate even after their primary obligations to perform had come to an end.

Held, accordingly, that the arbitration clause had survived the repudiation of the agreements.¹¹

[17] in terms of our law where one party cancels an agreement and the other one accepts such cancellation, like in the present application, the situation is analogous to where a contract is terminated by mutual consent between the parties. Where such an agreement which contained an arbitration clause is terminated by mutual consent that arbitration clause is also cancelled or annulled.

"Where a contract is dissolved or cancelled by mutual consent, any submission to arbitration contained in the contract must generally speaking, also be taken to have been dissolved or cancelled." See Atteridgeville Town Counsel's case page 304 E-F and all the authorities cited therein.

[18] The parties are therefore not bound by an arbitration clause if the in which such an arbitration clause is cancelled by mutual consent of the parties to it. In the circumstances the application cannot succeed. Accordingly I have come to the conclusion that an arbitration clause in the parties' contract perished with the

cancellation of the contract.

[19] The following order is accordingly made:

1. The application is dismissed, with costs.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv. MS Mangolele

Instructed by: Mpoyana Ledwaba Inc

Counsel for the Respondent: Adv. L Kutumela

nstructed by: Cheadle Thompson & Haysom Inc

Date heard: 1 March 2018

Date of Judgment: 9 March 2018

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