

SOUTH AFRICA / JUDGMENT

K H Mining and Engineering Projects (Pty) Ltd v Evander Gold Mining (Pty) Ltd and Another (2024-130458) [2024] ZAGPPHC 1320 (10 December 2024)

[2024] ZAGPPHC 1320

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

2024-130458

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 2024-130458

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE: 10 December 2024

SIGNATURE:

In

the matter between:

K
H MINING AND ENGINEERING PROJECTS (PTY) LTD
Applicant
and
EVANDER
GOLD MINING (PTY) LTD
First Respondent
MPC
CHEMICALS SOUTH AFRICA (PTY) LTD
Second
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

- [1] This urgent application pertains to two agreements entered into between the applicant and the first respondent for the provision of vamping and de-watering services at the mine where the first respondent is engaged in mining activities. On 12 September 2024 the first respondent issued notices of termination of the agreements, in terms of which the agreements would have terminated on 9 October 2024. The applicant disputes the first respondent's entitlement to terminate the agreements and as result, applies for an interim interdict restraining the first respondent from implementing the termination notices pending the finalisation of arbitration proceedings.

Factual matrix

- [2] The applicant, KH Mining and Engineering Projects (Pty) Ltd, provides labour services, in terms of the two agreements mentioned supra, to the first respondent, Evander Gold Mining (Pty) Ltd.
- [3] The second respondent is MPC Chemicals South Africa (Pty) Ltd. No relief is claimed against the second respondent and the second respondent was merely cited because it is a party to one of the agreements entered into between the applicant and the first respondent.
- [4] On 24 February 2022 the parties entered into an agreement in terms of which the applicant had to perform de-watering services for the first respondent. The initial contract period was from 1 March 2022 to 29 February 2023.

[5] On 14 September 2023, the applicant, the first respondent and the second respondent entered into a Tripartite agreement in terms of which the applicant was appointed as a sub-contractor to perform vamping services on behalf of the second respondent for the benefit of the first respondent. The initial contract period was three months. Both contracts were extended from time to time and the latest extension provides for a contract period from 1 July 2024 to 30 June 2025.

[6] On 14 July 2024 the first respondent issued a purchase order in respect of the de-watering services. The order pertains to services for the period July 2024 to June 2025 and the following clause appears at the end of the order:

“Please complete, sign and return this Purchase order as acknowledgment and agreement that your company shall commence with the services on the terms and conditions of this Purchase Order.” (own emphasis).

[7] On 26 July 2024 a similar purchase order was issued in respect of vamping services.

[8] The termination notices dated 12 September 2024 is similar in wording and the notice in respect of vamping services reads as follows:

“We refer to the contract entered between JH Mining Consultants (Pty) Ltd and Evander Gold Mining (Pty) Ltd (EMG) for the services of Contract Vamping at EGM 7 Shaft.

This letter serves to inform JH Mining (Pty) Ltd that Evander Gold Mining (Pty) Ltd is terminating the services as per clause 12.2 and its subclauses of the contract referenced above.

JH Mining Consultants (Pty) Ltd is hereby given 30 (thirty) calendar days’ notice effective from 11th September 2024 and ending on 9th October 2024.

Final payment shall be done as per contract and all invoices to be submitted to the relevant EMG representative.”

[9] Clause 12 of the Tripartite agreement in respect of the vamping services regulates the termination of the agreement by notice and reads as follows:

“12.1 Evander Gold may terminate this Agreement for its convenience by providing MPC and KH Mining with thirty (30) days’ prior written notice informing them of its decision to terminate for its convenience and the effective date of such termination.”

[10] The de-watering termination notice was given in terms of clause 8 of the de-watering agreement. The wording of clause 8 differ slightly from the wording of clause 12.1, to wit:

“8.1.2 EGM may in its sole discretion, without cause or reason, terminate this Agreement by giving 30 (thirty) calendar days prior written notice to the CONTRACTOR, without being in breach of the Agreement. CONTRACTOR may in its sole discretion, without cause or reason, terminate this Agreement by giving 60 (sixty) calendar days prior written notice to EGM, without being in breach of Agreement.”

Submissions

by parties

- [11] The applicant states that the agreements between the parties were executed in two formats, to wit: written agreements and purchase orders. The purchase orders are for specific periods within which the work had to be concluded and according to the applicant, are distinguishable from the written agreements
- [12] The applicant acknowledges that the written agreements may be terminated in terms of the clauses referred to supra. According to the applicant, the purchase orders, however, created separate contractual obligations and the first respondent may not unilaterally cancel the orders without sufficient reason to do so. Insofar as the “termination for convenience” clauses in the written agreements are concerned, the applicant submits that the enforcement thereof in circumstances where the applicant has not breached the terms of the agreement, will yield an absurd result with far-reaching consequences.
- [13] The applicant contends that the question whether the written agreements and the purchase orders are separate contracts and the question of the interpretation of the “termination for convenience” clause in the written agreements should be referred to arbitration as envisaged in the written agreements.
- [14] The first respondent does not agree and contends that the express provisions of the purchase orders incorporate the terms and conditions of the agreements between the parties and/or the first respondent’s standard terms and conditions. Insofar as the purchase orders might create separate contractual obligations, the first respondent states that the orders are still subject to the first respondent’s terms and conditions for purchase. In this regard, the first respondent referred to the clause at the end of the purchase orders, which clause has been referred to supra.
- [15] The first respondent, however and without any reasonable explanation, failed to attach the terms and conditions for purchase to the answering affidavit. The terms and conditions for services were attached and according to the first respondent these terms and conditions are similar to those applicable to purchases.
- [16] The first respondent, furthermore, referred to clause 2.1.1 of Annexure “A” attached to the de-watering agreement and submitted that purchase orders are merely issued for the work to commence. The clause reads as follows:
- “The work will only commence once a Purchase Order or, in the case of a standing order, once a quotation has been approved by EGM.”*
- [17] The first respondent referred to clauses 7.1.1 and 7.1.2 of the de-watering watering agreement that expressly linked the purchase orders to the agreement, namely
- “7.1.1 EGM shall pay the price to the Contractor.*

7.1.2 All payments due in terms of or as a consequence of this Agreement shall be paid as stipulated in Purchase order together with such additions and subject to such deductions there from as are provided herein.”

- [18] The first respondent pointed out that the applicant has neglected to set out the terms and conditions of purchase and has therefore failed to establish a prima facie right to arbitration.
- [19] Save to state that it is entitled to cancel the agreements for “convenience”, the first respondent did not address the interpretation and applicability of the term in the present circumstances.

Interim interdict: requirements

- [20] The parties were ad idem that the only real issue in dispute insofar as the requirements of an interim interdict is concerned, is whether the applicant has established a prima facie right to the relief claimed. I agree and will for present purposes accept that the applicant has established the requirements of irreparable harm, balance of convenience and no other satisfactory remedy.

Prima facie right

- [21] Mr Russell, counsel for the first respondent, quite correctly, submitted that in order to establish a prima facie right the applicant must demonstrate that it has prospects of success in the arbitration proceedings. In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC) the majority held that the existence of a “viable case” in the intended proceedings will suffice [para 284].
- [22] Mr Russell, once again correctly so, contended that the question in the arbitration will involve the interpretation of the agreements.
- [23] The applicant does not deny the terms and conditions of the agreements. The applicant, furthermore, does not deny that the purchase orders were issued in terms of the agreements. Clause 12 and clause 8, respectively, confer a right on the first respondent to cancel the agreements for convenience. The fact that the notices of termination were duly issued in terms of the provisions of these clauses is also common cause between the parties.
- [24] Against the aforesaid common cause facts, this court must, albeit on a prima facie basis, determine whether the unknown terms and conditions of purchase, amend or alter the express wording of the agreements. Without knowing what these terms and conditions are, I am simply unable to do so. Thus, I am on the present facts, of the prima facie view that the purchase orders are subject to the terms and conditions of the agreements.
- [25] In view of my prima facie view supra, it is necessary to have regard to the terms and conditions of the agreements insofar as the “termination for convenience” clauses are concerned

[26] Mr Roos, counsel for the applicant, referred to Phambili Environmental Services (Pty) Ltd v Pikitup Johannesburg SOC Limited (39499/2018) [2018] ZAGPJHC 677 in which the respondent submitted that the program forming the subject matter of the agreement between

the parties was not cost effective and as a result it decided to terminate the contract for convenience. The court held that there was no evidence to suggest that the program which was cost effective at its inception is no longer cost effective. The court found that in the aforesaid circumstances “It does prima facie lend credence to the argument that the notion of ‘convenience’ ought not to be measured against the subjective whim of the respondent’s representatives, but ought to be objectively ascertainable, bearing in mind the following factors...”

[27] In casu the first respondent stated that there is a good business rationale to the entitlement to terminate, namely, that gold prices and the cost to mine gold fluctuates. The first respondent must, therefore, be in a position to swiftly respond to such fluctuations

and reduce costs.

[28] The first respondent explains that the termination of the applicant’s services and the taking over of its work force was necessitated by the fact that the costs to mine and extract gold is substantially more than what it is able to recoup from the sales of the gold.

[29] The first respondent stated that the situation cannot continue as it will result in mass retrenchments and potential closure of the mine. An extract of its annual report for the year ending 30 June 2024 confirming the negative outlook is attached to the answering affidavit

[30] In view of the aforesaid financial dilemma, the first respondent decided in early 2024 to reduce operating costs by terminating all of its subcontracting arrangements and to either carry out the required work itself or through a single contract mining company. To this end, the first respondent has facilitated employment of the applicant’s entire workforce through its mining contractor, KB Mining.

[31] In providing a reason for its decision to terminate the agreements, the first respondent acknowledges that, notwithstanding the provisions of clauses 12 and 8, convenience still needs to be established. This acknowledgment is in line with the finding in Phambili Environmental Services (Pty) Ltd v Pikitup Johannesburg SOC Limited, supra. It is not clear from the papers if, and how much the first respondent will save by substituting the applicant with its mining contractor. Curiously, the first respondent stated that the decision to reduce cost by terminating the contracts of sub-contractors was taken in early 2024. Notwithstanding the aforesaid decision, the first respondent extended the two agreements in July 2024 for a period of one year. As stated supra purchase orders for the whole period of the agreements were issued by the first respondent.

[32] I pause to mention, that the first respondent did not raise any problems with the applicant's performance. In view of the fact that the first respondent still requires the services rendered by the applicant in terms of the agreements between the parties and the lack of any detail in respect of the so-called "saving" if the services are rendered by another contractor, an arbitrator may well find that the proclaimed "convenience" the first respondent relies on does not justify the decision to terminate the agreements some six months prior to their expiry date.

[33] To this end, I am of the view that the applicant has established a prima facie right that the interpretation of "convenience" and its applicability in the prevailing circumstances should be tested in arbitration proceedings. Save to state that the applicant

has at least a viable case for purposes of the arbitration proceedings, I do not pronounce on the ultimate success of its case.

[34] The first respondent did raise a concern that arbitration proceedings will take a long time to conclude, which would in turn result in the interim relief becoming final.

[35] Arbitration proceedings is, however, capable of speedy resolution. It will be in the hands of the parties to ensure a speedy resolution. Arbitrators are, in the normal cause, readily available and the parties can agree on strict timelines for the exchange of pleadings.

Costs

[36] Costs of the application will be costs in the arbitration. Should the applicant fail to institute arbitration proceedings in terms of this court order, the applicant is ordered to pay the costs of the application.

ORDER

The following order is granted:

1. The first respondent is interdicted and restrained from implementing or giving effect to the notices of termination of the vamping and de-watering agreements pending the finalisation of arbitration proceedings.
2. The applicant is to commence arbitration proceedings by delivery of a written referral to arbitration, together with a statement of claim, within 10 days from date of this order, failing which the interim order shall lapse.
3. Costs is costs in the arbitration. Should the applicant fail to institute arbitration proceedings with 10 daysof date of this order, the applicant shall pay the costs of the application.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT

DIVISION, PRETORIA

DATE HEARD:

04 DECEMBER 2024

DATE DELIVERED:

10 December 2024

APPEARANCES

For the Applicant: Advocate W Roos Instructed by: Velile Tinto & Associates Inc For the 1st
Respondent: Advocate A Russel Instructed by: Malan Scholes Inc

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