

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: **2021/2321**

CASE NO: **20212333**

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

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SIGNATURE

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DATE

In the matter between:

ET SOLUTIONS SOUTH AFRICA 1 (PTY) LTD

Applicant

Versus

MAIN STREET 957 (RF) (PTY) LTD

Respondent

and

ET SOLUTIONS SOUTH AFRICA 1 (PTY) LTD

Applicant

Versus

RAMIZONE (RF) (PTY) LTD

Respondent

Delivered: *This judgment was handed down electronically by circulation to the*

parties and/or their legal representatives by email, and by uploading

ed to same onto CaseLines. The date and time for hand-down is deemed to be have been on 10 February 2022.

JUDGMENT

MATOJANE J

Introduction

[1] The issues in this matter are substantially the same as issues of fact and law as are in Case Number 2021/2333. The two applications have been heard together at the request of the applicant.

[2] Under Case Number 2021/2321, the applicant seeks an order that the respondent pays the applicant the total aggregate amount of R67 456 014.45 listed in the Notice of Motion for Payment Milestones 9,10,11,13,15,16 and 17 arising out of a construction agreement.

[2] Under Case Number 2333, the applicant claims the sum of R104 640 009.79, which comprises the balance of the certified amount.

[4] In both matters, the applicant and respondents separately entered into written agreements in which the applicant would engineer, procure, construct, and commission a solar energy facility with a capacity of 40MW, located near the town of Aggeneys Northern Cape province and in Case Number 2021/2333 near the town of Pofadder in the Northern Cape.

[3] The applicant would be paid upon certification of Payment Milestones, with the certification done by the respondent and its agent ("the Lender Engineer") and an invoice presented to the respondent.

[4] It is not in dispute that the Lender Engineer and the respondent have certified Payment Milestones 9, 10, 11, 13, 15,16 and 17 ("the certified Payment Milestones"), which aggregate to R159 363 270.22 and the applicant has invoiced for these amounts as it was required to do for payment of the Claimed Amount.

Under Case Number 2021/2333 Payment Milestones 15,16 and 17 and 12% of 11 aggregating to R104 664 407.96 were certified as due to the applicant. The respondent proceeded to set off a portion of the DLDs against the balance of the Claimed Amount with the result that the amount of R104 664 407.96, which had been due to the applicant, was paid off by set-off against the DLDs

[5] The respondent admits that it paid a portion only of the amount invoiced in respect of each of the certified Payment Milestones. The respondent states that it imposed the Delayed Liquidated Damages ("DLDs") against the applicant as a result of the applicant's failure to achieve Substantial Completion by the Guaranteed Substantial Completion Date being 15 October 2019.

[6] The respondent asserts further that the unpaid portion ("the Claimed Amount") was set off against the DLDs in terms of clause 16.6 of the Contract, which it argues are due upon being imposed regardless of the applicant's pending extension of time claims.

[7] On the other hand, the applicant contends that there is no dispute about the Claimed Amount as the individual amounts certified for each Payment Milestones are liquidated, due, owing and payable. It relies on Clause 5.2.1 of the Contract, which provides that:

"the Company shall make payment of all certified Payment Milestones within no more than twelve (12) Business Days after receipt of the Contractor's Contractor's invoice for the amount certified...".

[8] It bears mentioning that clause 5.2.1 does not state that the certified amounts cannot be paid by set-off. Set-off is an agreed acceptable form of payment as provided for in clause 16.6 of the Contract.

[9] In order to determine whether the Claimed Amount is owing, it must first be determined whether the Claimed Amount was paid by set-off as contended for by the respondent. Clause 8.2.1 provides that:

"If Substantial Completion does not occur on or before the Guaranteed Substantial Completion Date, Contractor shall be liable to pay to the Company an amount equal to zero point zero eight seven percent (0.087%) of the Contract Price per Day as liquidated damages (the "Delay Liquidated Damages") for each Day, or part thereof, of delay until Substantial Completion of the Facility is achieved, subject to the limitation outlined in Clause 10.1, and subject to Contractor's entitlement to an extension to the Guaranteed Substantial Completion Date. The amount due in respect of Delay Liquidated Damages will be paid in ZAR, and Value Added Tax, if proven applicable, shall be payable in addition to such amount."

[10] The case for the applicant is that the DLDs the respondent has imposed are not due and cannot be set off against the Claimed amount because firstly, the applicant submitted Change Order Claims, which the respondent adjudicated and rejected and the applicant has notified a dispute about the rejection of the Change Order claims and has referred such dispute to arbitration in terms of clause 20 of the Contract.

[11] Second, the applicant avers that since its claim for extension of the Guaranteed Substantial Completion Date has not been finally adjudicated, and the claim for DLDs are disputed and subject to arbitration, the DLDs cannot be due and are thus incapable of set-off against the liquidated amount due, being the Claimed Amount.

[12] Clause 20 of the Contract is the dispute resolution clause and defines the word "Dispute" as follows:

"Any question, claim, controversy, matter, dispute or difference of whatever nature howsoever arising under or out of in connection with this Contract including breach, effectiveness, validity, interpretation or termination hereof (collectively "Disputes") shall be resolved as follows"

[13] Clause 20.1.1 of the Contract provides as follows:

"Any Disputes which cannot be settled amicably in accordance with Clause 20.1 within (20) Days after the first date of written notice of such Dispute by a Party may be referred by either Party to the Arbitration Foundation of South Africa ("AFSA") under the then-current AFSA Procedures and Rules ("AFSA Rules") except as set forth in clause 20.2";

[14] The dispute about whether clause 8.2.1 of the Contract create a condition that DLDs are not due if there are pending extension of time claims as the applicant alleges is an arbitrable dispute as defined in clause 20 of the Contract and must under clause 20.2.1 of the Contract be referred to arbitration.

[15] The applicant has in any event, elected to submit the dispute whether the DLDs were due when imposed to arbitration. In doing so, the applicant elected to enforce one of the two mutually exclusive remedies resulting in a waiver of the entitlement to approach this court for a finding on those issues.

[16] In a letter dated 19 December 2019, the applicant notified the respondent of various alleged breaches of the Contract and stated at paragraph 91 as follows:

"For reasons set out in this letter in accordance with clause 20 of the Contract, the Contractor notifies a dispute in respect of all issues, claims, controversies, matters, disputes and differences in this letter."

[17] Clause 20.2.2 of the Contract provides that:

"where a party wishes to refer a dispute to arbitration, it shall serve a written notice on the other Party to that effect, and the AFSA Rules shall govern such arbitration".

[18] The applicant has agreed to be bound by the arbitrator's determination. It has invoked arbitration as the remedy and holding the applicant to its Contract would not cause injustice nor irreparable harm.

[19] In my view, the dispute regarding the Claimed Amount is a matter to be decided by arbitration, and the application fall to be stayed pending the outcome of the arbitration.

[20] In the result the following order is made.

Order

1. The applications are stayed pending the outcome of arbitration proceedings
2. Costs are reserved.

K.E MATOJANE

Judge of the High Court

Gauteng Division, Johannesburg.

Judgment

10 February 2022

For the applicant

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