

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 016154-2022

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

Judge Dippenaar

In the matter between:

**OPTIPOWER A TRADING DIVISION OF MURRAY & ROBERTS
LIMITED**

APPLICANT

AND

GOLDWIND 4RE SA (PTY) LTD

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 17th of July 2023.

DIPPENAAR J:

[1] For ease of reference the parties will be referred to as plaintiff and defendant. There are two applications which have been enrolled for hearing on the same date. A summary judgment application launched by the plaintiff and an application launched by the defendant for the separation of its special plea under r 33(4). In addition to the separation of its special plea, the defendant seeks its adjudication.

[2] These applications concern action proceedings instituted by the plaintiff against the defendant for payment of a certified interim payment certificate ("IPC 20") issued on 17 December 2020. The certificate was issued in relation to a written electrical balance of plant contract pertaining to the Golden Vally Wind Energy Power Project, concluded between the parties during November 2018. IPC 20 was issued and certified in an amount of R25 134 704.89 (inclusive of VAT). Pursuant to the certification of the amount as due, owing and payable, the plaintiff issued tax invoice 2132 for payment of such amount.

[3] The background facts are not contentious and are by and large common cause. The conclusion of the contract, its terms and the certification of IPC 20 in the amount claimed are common cause. There are no factual disputes between the parties pertaining to the plaintiff's claim. The parties are in agreement that IPC 20 is a liquid document and that the amount reflected therein fell due for payment on 1 February

2021, pursuant to the issuing of an invoice for payment of the amount. It is also common cause that the plaintiff issued an invoice as required by the contract.

[4] Disputes arose between the parties pertaining to the defendant's entitlement to delay liquidated damages ("delay damages") under the contract. The defendant's case is that the plaintiff delayed in achieving the completion dates for each of the sections of the contract by a total amount in excess of 3000 days. The formula in the contract is that if the works are late, delay damages would be calculated at 0.1% of the contract price per day, subject to a cap of 20% of the contract price. The defendant contends that the amount due to it is R58 722 429.00, representing the 20% contractual cap. A tax invoice was delivered to plaintiff on 16 February 2021 for that amount, stating that payment was due to the defendant on 19 March 2021.

[5] The defendant instituted arbitration proceedings in respect of that claim on 15 August 2022. The plaintiff disputed the claim and instituted various counterclaims on 7 October 2022 in terms of which it denies liability for the delay damages. The plaintiff *inter alia*, seeks¹ an award determining the contract price to be R336 003 038.79, payment of an amount of R69 763 792.84 and ancillary relief. The arbitration proceedings are pending before a tribunal of three arbitrators.

[6] The present action was launched by the plaintiff on 19 August 2022. The defendant did not immediately apply for a stay of proceedings² under s 6(1) of the Arbitration Act³. Instead, it raised the arbitration issue by means of special plea on 20 September 2022. The nub of the special plea is that the defendant invokes reliance on clause 22 of the contract which contains an arbitration clause. It seeks an order that the plaintiff's claim falls to be stayed in terms of s 6(1) of the Arbitration Act⁴ pending the referral of the plaintiff's claim to arbitration, alternatively pending the determination of its claim for delay damages in the arbitration proceedings.

¹ In Claim 3: Measurement and evaluation of work performed

² PLC Consulting Services para [7]

³ 42 of 1965

⁴ 42 of 1965

[7] The plaintiff's case in sum is that IPC 20 constitutes a separate cause of action and that there is no dispute in relation thereto which can be referred to arbitration. It argues that as the defendant's claim is not liquidated, no set off can take place as it would only exist if and when an award is made in the defendant's favour in the arbitration.

[8] Defendant's case in sum is that the plaintiff's claim for payment under IPC 20 is not due or payable, which is a dispute within the meaning of clause 1.2.66 of the contract and that, as such it should have referred its claim to arbitration. It argues that the amount due by the plaintiff to it in respect of the delay damages exceeds the value of IPC 20 and the defendant enjoys the principles of set off. After set off of the delay damages, the plaintiff would be indebted to it in an amount of R6 214 552.06 and the plaintiff's claim would be extinguished. As its claim is presently subject to arbitration, it was not raised as a counterclaim. It is argued that even if the defendant is wrong, judgment on its claim falls to be stayed until the determination of the delay damages claim. Lastly, the defendant contends that the plaintiff's claim under IPC 20 is already part of the arbitration proceedings, given that IPC 20 has been raised in the pleadings and the plaintiff has claimed the difference between the contract price and the amount paid therein in its counterclaim and has in the process claimed payment of IPC 20 therein. The contract price is in dispute between the parties in the arbitration proceedings.

[9] The first issue to determine is the order in which the applications are to be determined. Whilst the parties are in agreement that the applications must be heard together they are in dispute as to the order in which the applications should be heard. The plaintiff contends that the summary judgment should be heard first as it was lodged first in time and that the separation application is incompetent, subverts the summary judgment procedure and constitutes a delaying tactic.

[10] The defendant on the other hand argues that the special plea raises a distinct issue of law and fact which conveniently should be decided separately. It further

contends that to avoid delay, the special plea should be determined first and only thereafter the summary judgment application insofar as the special plea is not upheld. The defendant argues that the question whether the plaintiff's claim should be referred to arbitration is a serious question requiring resolution prior to the court hearing the summary judgment application and that if it ought to be so referred, the defendant has a legal right to have the claim so referred and to have the arbitration question decided first before any enquiry into summary judgment.

[11] It must be borne in mind that the applications are separate and distinct. Although the separation application is referred to by the defendant in the summary judgment agreement, that does not constitute a defence to the plaintiff's claim. That much is undisputed.

[12] Having considered all the facts, I conclude that it is appropriate that the summary judgment application must be determined first, so that the defendant may rely on the contents of the affidavit delivered in opposition thereto. Only if that application is unsuccessful, would the separation application require determination. Were the separation application be determined first and, if granted, the special plea, the defendant could only rely on the content of the special plea.

The summary judgment application

[13] The summary judgment procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of its day in court.⁵ In the context of summary judgment, the special plea must be considered as to whether it raises a *bona fide* defence to the plaintiff's claim or raises a triable issue. In those proceedings, a court does not attempt to decide those issues or determine whether there is a balance of probabilities in favour of the defence raised. All a court enquires into is whether the defendant has fully disclosed the nature and grounds of his defence and the material

⁵ Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) para [32]

facts upon which it is founded and whether on the facts so disclosed the defence is both *bona fide* and good in law.⁶

[14] The plaintiff contends that the defendant's claim for delay damages is irrelevant to its liquid claim. It argues that the defendant's claim can only be set off insofar as the defendant brings itself within the ambit of the terms of the contract. Its case is that the contract expressly envisages that any deductions to which the defendant is entitled are to be accounted for in the amount certified, otherwise it is to be catered for in subsequent interim payment certificates. It further argues that insofar as defendant seeks to invoke the defence of set off outside the interim payment certificate, an entitlement to its claim for the delay damages is being pursued in arbitration and it is not yet fixed as payable. The claim would only be payable if and when the arbitration tribunal issues an award on its claim. It argues that as the defendant has failed to demonstrate compliance with clauses 5.6.3 and 5.6.4 and has not made the necessary averments on this issue in its affidavit, the defendant has not illustrated a *bona fide* defence to plaintiff's claim.

[15] It is well established that a dispute has to exist before it can be referred to arbitration⁷ and that the existence of an arbitration clause is no bar to summary judgment.⁸ It is common cause that a certified interim payment certificate is a liquid document, the equivalent of an acknowledgement of debt.⁹

[16] Whilst there are no factual disputes regarding the plaintiff's claim under IPC 20 and its validity, authenticity and correctness, the dispute centres around whether IPC 20 is due and payable, given that the defendant has raised a claim for delay damages in the arbitration.

⁶ Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423 F-G

⁷ PLC Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA) para [7]

⁸ Joob Joob para [17]

⁹ Joob Joob paras [27]-[28] and the authority cited therein

[17] The defendant relies on clause 22 of the contract concluded between the parties which contains an arbitration clause in terms of which either party may refer a dispute of any kind whatsoever in connection with or arising out of the contract to arbitration in terms of clause 22.3 pursuant to the provisions of clause 22. It argues that its entitlement to set off is a dispute as envisaged by the clause. It further argues that its interpretation of the contract pertaining to delay damages is an arbitrable dispute. The latter contention is not disputed and that claim is already the subject matter of the arbitration.

[18] “Dispute” is defined in clause 1.2.66 of the agreement as:

“any question, claim, controversy, matter, dispute or difference of whatever nature howsoever arising under, out of in connection with the contract, including breach, effectiveness, validity, interpretation or termination hereof”.

[19] The clause is widely worded. It is not for present purposes necessary or appropriate to determine the defendant’s argument that its delay damages claim is a liquidated debt as it is capable of easy calculation, based on an exercise in interpretation of the contract and that set off operates automatically under clause 7.13 of the contract. I agree with the defendant that the interpretation issue and its claim for delay damages are arbitrable disputes.

[20] Although the interpretation issue is relevant to the defendant’s claim and not to that of the plaintiff, it is relevant to the issue whether the plaintiff is entitled to payment of the amount claimed in the present action and thus whether the plaintiff’s claim is due and payable. Even if the delay damages claim is not liquidated and set off does not presently apply¹⁰ and such issue is to be determined in the arbitration proceedings, it will have an impact on the plaintiff’s entitlement to payment of IPC 20. Even if the claim is not liquidated, it may still ultimately defeat the plaintiff’s claim if that claim is extinguished. That raises a triable issue.

¹⁰ Capricorn Beach Home Owners Association v Potgieter (752/2012) [2013] ZASCA 116 (19 September 2013) para [13] with reference to Schierhout v Union Government (Minister of Justice) 1926 AD 286 at 289

[21] It can thus not be concluded, as argued by the plaintiff, that the defendant has not raised any *bona fide* defence or triable issue, because the claim for delay damages is irrelevant to its liquid claim as it is not yet fixed and payable. It is not appropriate to comment on the issues which will be determined in the arbitration or the various arguments raised by the respective parties. It is open to the parties to raise such arguments in the arbitration proceedings.

[22] It must further be borne in mind that the defendant further relied on the plaintiff's claim already forming part of the pleadings in the arbitration proceedings. It was not disputed by the plaintiff that IPC 20 has been raised in its plea in those proceedings and that the amount claimed by it as one of its counterclaims includes the amount set out in IPC 20. In those proceedings the contract price is in dispute and the plaintiff claims an amount of R96 763 792.84 as owing to it. The plaintiff delivered its statement of defence and counterclaims after the defendant delivered its plea in the present proceedings.

[23] There is thus merit in the defendant's argument that two different forums are called upon to determine the various disputes and that the issues which the plaintiff seeks the court to determine in its summary judgment application are already before the arbitration tribunal. Thus, unless the action is stayed, there is a risk of different findings by the arbitration tribunal and the court on the issues raised in the claims and counterclaims as to the obligations and liabilities of the parties to each other.

[24] It must be borne in mind that for purposes of summary judgment, the defendant is not obliged to prove its claim on the probabilities. It merely has to fully disclose the nature and grounds of its defence and the material facts upon which it is founded. It must for present purposes be concluded that on the facts so disclosed, the defence is both *bona fide* and good in law.

[25] For these reasons I conclude that the summary judgment application must fail. There is no reason to deviate from the normal principle that costs follow the result.

The separation application.

[26] Rule 33(4) in relevant part provides:

“If in any pending action.....it appears to the court...that there is a question of law or fact which may conveniently be decided separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately”.

[27] Where a party applies for a separation, a court must grant an order for separation unless it appears that the questions cannot conveniently be decided separately. The purpose of the rule is to shorten the trial proceedings.

[28] The defendant argues that separation is convenient and in the interests of judicial economy. It is trite that “convenience” denotes fairness and appropriateness to all the parties concerned.¹¹

[29] It is undisputed that the special plea raises a distinct question of law and fact, which may be conveniently decided separately.

[30] Considering the facts, I am persuaded that it is convenient to have the special plea determined separately.

[31] It follows that the application must succeed. There is no reason to deviate from the normal principle that costs follow the result.

¹¹ Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No1) 1997 (4) SA 908 (W) 927

The defendant's special plea

[32] The central issues are whether the plaintiff's claim must be referred to arbitration or whether the plaintiff's claim should be stayed pending the determination of the arbitration proceedings.

[33] Section 6 of the Arbitration Act provides:

"6(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleading or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make such an order staying such proceedings subject to such terms and conditions as it may consider just".

[34] In the present instance, the defendant did not avail itself of s 6(1) but rather took further steps in the proceedings and raised the issue by way of special plea. That is permissible¹² but means that the defendant did not challenge the court's jurisdiction.

[35] I do not agree with the defendant's argument that the plaintiff's claim should be referred to arbitration. The defendant's failure to pay the undisputed amount reflected in IPC 20 itself does not itself constitute a dispute that requires the issue of payment to be referred to arbitration. If the claim is referred to arbitration, it is for the arbitrators to determine whether they have jurisdiction to entertain it and whether such issue was properly referred to them.

¹² PLC Consulting fn 7 above

[36] The real issue is whether the plaintiff's claim should be stayed as sought by the defendant in the alternative. I have already dealt with the special plea in the context of the summary judgment application, which remains apposite to the present application.

[37] Given that the defendant was not able to raise its delay damages claim as a counterclaim in the present proceedings, launched after institution of the arbitration proceedings, the provisions of r 22(4) are not available to it to seek a court exercising its discretion in favour of postponing the plaintiff's claim pending determination of its counterclaim, so that both claims are heard together.

[38] I agree with the defendant that in this context it does not matter whether the delay damages claim is liquid or illiquid and that the plaintiff now has a tactical advantage. This is a factor militating in favour of granting a stay.

[39] It is undisputed that the defendant's claim and its entitlement to apply set off are to be determined in the pending arbitration proceedings. It is not for this court to express a view about the prospects of success of the defendant's delay damages claim. The arbitration tribunal will determine it in due course. All the arguments raised by the plaintiff will be available to it in the arbitration proceedings. It is also for the arbitration tribunal to decide the interpretational issues under the contract and whether set off is available to the defendant to defeat the plaintiff's claim.

[40] I conclude that the special plea must be upheld. It follows that the defendant is entitled to a stay of plaintiff's claim as sought in the alternative. There is no reason to deviate from the normal principle that costs follow the result.

[41] I grant the following order:

[1] The plaintiff's application for summary judgment is refused with costs

[2] The defendant's special plea is separated under rule 33 (4);

[3] The plaintiff is directed to pay the costs of the separation application;

[4] The defendant's special plea is upheld with costs;

[5] The plaintiff's claim is stayed in terms of s 6(1) of the Arbitration Act 42 of 1965 pending the determination by way of arbitration of the defendant's entitlement to delay liquidated damages.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 09 May 2023
DATE OF JUDGMENT	: 17 July 2023
PLAINTIFF'S COUNSEL	: Adv. W G La Grange SC Adv. AC Russell
PLAINTIFF'S ATTORNEYS	: Tiefenthaler Attorneys Inc. Mr M Van der Schyf
DEFENDANT'S COUNSEL	: Adv. P Carstensen SC Adv. KD Iles
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