

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO. 49822/09

In the matter between:

BELLINGAN INGENIEURS ONTWIKKELING (PTY) LTD Applicant

and

SAAB GRINTEX DEFENCE (PTY) LTD 1st Respondent

THE SECRETARIAT OF THE INTERNATIONAL
CHAMBER OF COMMERCE INTERNATIONAL
COURT OF ARBITRATION 2nd Respondent

JUDGMENT

Legodi J,

1. The interpretation of the so called Amended Co-operation agreement and Escrow Agreement concluded on the 21 February 2006 and 24 February 2006 respectively is the subject of the dispute before me.
2. The applicant seeks a relief to the effect that it be declared that the dispute between the applicant and the first respondent that has been referred by the first respondent for arbitration by International Chamber of Commerce International Court of Arbitration (second respondent) falls to be determined by way of inter-pleader proceedings before this court and not by way of arbitration before the second respondent. In the alternative that insofar as it relates to the Escrow intellectual property right it be declared that it falls to be determined by this court by way of inter-pleader proceedings.
3. The applicant in seeking for relief as set out above, seems to rely on the following averments contained in paragraphs 15.9 and 16 of the applicant's founding affidavit:

"15.9 The applicant disputes the jurisdiction of the ICC Court of Arbitration to determine the aforesaid dispute. It is the applicant's contention that upon a proper interpretation of the Amended Co-operation Agreement, read with Escrow Agreement (especially clause 6.6 thereof), the dispute between the parties falls to be determined by way of interpleader proceedings before this Honourable Court, which is a Court of competent jurisdiction, and not by way of arbitration before the ICC court of Arbitration.

16. The issue that must be determined by this Honourable Court is thus whether upon a proper interpretation of the Amendment Co-operation Agreement, read with the Escrow Agreement (especially clause 6.6 thereof), the dispute between the parties

falls to be determined by way of interpleader proceedings before this Honourable Court, which is a court of competent jurisdiction or by way of arbitration before the ICC Court of Arbitration.

4. Whilst the applicant's counsel sought to argue the applicant's cause of the application beyond clause 6.6 of the Escrow Agreement, the cause of action is founded on clause 6.6. Prayer 2 of the notice of motion read together with clauses 16 and 17 of the Escrow Agreement makes it clear to this effect.
5. Clause 6.6 referred to in paragraph 15.9 of the founding affidavit reads as follows:

"6.6 In the event that (i) any dispute shall arise between the Parties with respect to the disposition or disbursement of any of the assets held hereunder or (ii) the Escrow Agent shall be uncertain as to how to proceed in a situation not explicitly addressed by the terms of this Agreement whether because of conflicting demands by the other parties hereto or otherwise it shall be permitted to interplead all of the assets held hereunder into a court of competent jurisdiction, and thereafter be fully relieved from any and all liability or obligation with respect to such interpleaded assets. The parties hereto other than the Escrow Agent further agree to pursue any redress or recourse in connection with such a dispute, without making the Escrow Agent a party to same.

6. As contended by the respondents' counsel, clause 6.6 deals with the Escrow agent's right (hereinafter referred to as the agent) to interplead in the event of an occurrence referred to in (i) or (ii) under clause 6.6. It is not peremptory on the agent to interplead. However, in the event the

agent so chooses to interplead, it shall be so allowed to interplead (my own emphasis).

7. If the agent chooses not to interplead, any of the parties that is, the first respondent or the applicant would be entitled to pursue any redress or recourse in connection with such dispute referred to in clause 6.6 and as this happens, the agent shall not be made a party to any such dispute. Neither the applicant nor the first respondent is authorised to interplead under clause 6.6. To be more precisely you cannot interplead when you are a party to the dispute.
8. Therefore any cause of action for the relief sought and based on clause 6.6 is without a basis whatsoever. However, counsel for the applicant, during the discussion sought to suggest that a cause of action based on clause 6.6 should be seen in context. Before I deal with this contention, I need to immediately state that the cause of action as pleaded in paragraph 15.9 and 16, does not justify a relief for a declaratory order proposed by the applicant.
9. Coming back to the context in which it is suggested that the matter should be approached, a brief background to the dispute might be necessary.
10. The first respondent having sought to have terminated the two agreements, approached the second respondent in terms of clause 17 of the Amended Co-operation Agreement. Clause 17 of the said agreement provides that any dispute arising out of or in connection with this agreement should be finally settled by arbitration in accordance with the provisions of the Interpretations Chamber of Commerce as are in force at that time.
11. Having referred the dispute to the second respondent regarding termination of the agreement and the applicant having been notified of

the arbitration proceedings held in South Africa, the latter decided not to participate in the arbitration proceedings. The applicant took the point apparently that arbitration was the wrong forum to deal with the dispute. According to the applicant the terms and conditions of Amendment Co-operation Agreement are not applicable to the dispute.

12. In other words, the applicant contends that the dispute being about delivery of intellectual property held by the agent, it has to be decided in terms of the provisions of the Escrow agreement. In making this submission, I understood counsel for the first respondent to rely mainly on the provisions of clauses 4 and 11 of the Escrow agreement. Clause 4 deals with release of Escrowed intellectual property and it provides as follows:

“4.1 The ESCROWED IP may be removed and/or exchanged only on written instructions signed by a person authorised by a specific Party and to a person authorised by the other Party.

Notwithstanding the aforementioned, the Escrow Agent shall release the ESCROWED IP to at the offices of the Escrow Agent upon a determination (“Determination”) that either of the following events (a “Triggering Event”) has occurred.

4.1.1 An event of Force Majeure occurs and BED is unable to deliver the Product under the Agreement for a period of 12 (twelve) months after the contractual delivery date; or

4.1.2 A Party has committed an irreparable breach, which resulted in termination of the Agreement. In such event access will be given to the ESCROW IP, to the non-defaulting Party.

13. “BED” referred to in clause 4, is the applicant. Clause 11 on the other hand provides that Escrow agreement shall be governed by and construed in accordance with the laws of South Africa and that, the parties hereto consent to the jurisdiction in Pretoria.
14. A more or less similar provision is made in clause 16 of the amended main-cooperation agreement and it reads as follows:
“This agreement shall be construed in accordance with and be governed by the laws of the Republic of South Africa”.
15. It looks like the applicant’s counsel wishes to equate “Parties hereto consent to the jurisdiction in Pretoria” as a consent to the jurisdiction of “this court”. Clause 11 of the Escrow agreement makes no reference to a court, but rather to a place or area that will have a jurisdiction to deal with the parties. In other words, it deals with the area where proceedings must be instituted. The arbitration proceedings are said to have been instituted in Pretoria, but later moved to Sandton as same would be convenient for participating parties and for the people involved in the arbitration proceedings, the applicant having elected not to participate in such proceedings. I do not see clause 11 as creating a jurisdiction upon this court by consent.
16. The other point which was taken by the applicant and vigorously argued by counsel on behalf of the applicant was that, for the purpose of its application, the Escrow Agreement should be seen as being existing independently and separate from the Amended Escrow agreement. In making this submission, counsel for the applicant sought first to understate the provisions of clause 14 of the amended main cooperation agreement and secondly, sought to rely on the preamble to the Escrow agreement.

17. Clause 14 of the main co-operation agreement deals with the Escrow agreement and it provides that the Escrow agreement attached hereto as annexure A forms an integral part of this agreement. The relevant portion of the preamble relied upon, states as follows:

“WHEREAS, AVITRONICS and BED have entered into an agreement entitled “Amended Co-operation Agreement” dated 21 February 2006 (the “Agreement”);

WHEREAS, Clause 14 of the Agreement provides that this Escrow Agreement forms an integral part thereof, which in turn provides for a Triggering Event. In the event of a triggering event BED shall grant AVITRONICS access to own, used, apply, or reproduce the intellectual property subsisting in the ESCROWED IP (as hereafter defined) to undertake the manufacture, support, supply and development of the HSDL, (“the Product”) as defined in the Agreement; and

WHEREAS, AVITRONICS and BED (the parties) desire to provide Escrow Agent with the terms and conditions under which certain information to be deposited with the Escrow Agent will be released;

NOW, THEREFORE, in consideration of the above and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto do hereby agree as follows:

Definitions

- 1.1 *Unless the context requires or otherwise defined herein, the capitalized terms set forth herein shall have the definitions and meanings set forth in the Agreement,*
- 1.2 *The term “ESCROWED IP” shall be the IP as defined under clause 8 of the Amended Co-operation Agreement dated 21*

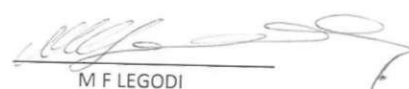
February 2006 and consist of software and all other material sufficient to allow the manufacture and support of the Product, including, but not limited to, source code, object code, and available source listings and source documentation on CD format, Standard text files for the technology used to manufacture the Product or its development data to date of a Trigger Event

18. I cannot see how the preamble makes the applicant's case better on the alleged existence of the Escrow agreement separate from or independently from the main co-operation agreement. Clear that the triggering event referred to in clause 4 of the Escrow agreement should be seen as part of the main cooperation agreement. Secondly, the capitalised Terms set forth in the Escrow agreement, shall have the same definitions and meanings set forth in the main co-operation agreement **(See clause 1.1 of the Escrow agreement, see also clause 1.2 of the Escrow agreement quoted in paragraph 17 above).**

It did not appear that the applicant was contending that the arbitration was not the right forum to deal with whether or not there has been a material breach in terms of clause 4.1.2 of the Escrow agreement. What the applicant sought to contend if I understood it correctly was that as far as the delivery of the intellectual property was concerned, it could only be entertained by this court and not by the arbitrator. Assuming that the applicant is right in this regard, the issue before the arbitrator is said to be whether or not there has been a material breach in terms of clause 4.1.2 of the Escrow agreement and not delivery of the intellectual property per se. The question that arises is why the applicant did not participate in the arbitration proceedings and raise the very same issue in respect of which it now seeks a declaratory order. The applicant says it made a choice not to participate and that it was entitled to do so. This

attitude in my view, smacks the serious desire of wanting to have the dispute be resolved as soon as possible.

20. Should the arbitrator find that there was a breach by the applicant as envisaged in clause 4.1.2, the first respondent as a non-defaulting party would be entitled to delivery of the intellectual property. To have boycotted the arbitration proceedings, in my view, is and was not helpful to the applicant.
21. On the pleaded cause of action, I am not satisfied that the applicant made out a case for the relief sought. The alternate relief suggested by the applicant's counsel can also not be justified.
22. Consequently, the application is hereby dismissed with costs.


M F LEGODI
JUDGE OF THE HIGH COURT

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