

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 6319/2022

In the matter between:

MILLING TECHNIKS (PTY) LTD

APPLICANT

and

**THE MEC FOR THE DEPARTMENT OF TRANSPORT
KWAZULU-NATAL**

FIRST RESPONDENT

TONY SMITH N.O.

SECOND RESPONDENT

ORDER

The following order is granted:

1. The appointment of the second respondent as the adjudicator to determine the dispute between the applicant and the first respondent is declared to be valid and binding.
2. The first respondent is directed to sign and deliver the adjudicator's contract to the second respondent within five days from the date of service of this order upon the first respondent.
3. In the event that the first respondent fails to comply with para 2 of the order, the sheriff of this court is authorised and directed to sign the adjudication contract on behalf of the first respondent, to serve the original on the second respondent and to furnish a copy to the applicant and the first respondent

4. The first respondent is directed to pay costs of the application.

JUDGMENT

E Bezuidenhout J

Introduction

[1] The applicant, Milling Techniks (Pty) Ltd, applies *inter alia* for relief against the first respondent, the MEC for the KwaZulu-Natal Department of Transport, relating to the appointment of the second respondent, Mr Tony Smith, as the adjudicator to determine a dispute between the applicant and first respondent. It seeks *inter alia* that the appointment of the second respondent as the adjudicator be declared valid and binding in terms of the contract between the parties.

[2] It is common cause that the applicant and the first respondent concluded an agreement on 18 December 2018, in terms of which the applicant was to provide management and supervisory services over routine road maintenance activities performed by emerging contractors in the New Hanover and Umshwathi areas under contract number ZNT4064/16T. The contract is governed by the General Conditions of Contract (the GCC).¹

Issues to be determined

[3] The main issue that requires determination is whether the applicant timeously submitted its dissatisfaction claim, and if not, whether the adjudicator has the power to determine whether the applicant is time-barred. Additional issues arise as to whether the first respondent is required to comply with the adjudication proceedings instituted and whether the second respondent (an engineer appointed by the South African Institute of Civil Engineers (SAICE)) was validly appointed as an adjudicator.

Background

¹ The General Conditions of Contract 3 ed (2015).

[4] As mentioned above, the agreement between the parties is governed by the GCC, which includes a mandatory dispute resolution process by way of adjudication, as contained in clause 10.

[5] In terms of clause 10.2.1, its provisions shall apply to any claim and in respect of any matter arising out of or in connection with the contract. The contractor or the employer shall have the right to deliver a written dissatisfaction claim to the employer's agent, supported by particulars and substantiated.

[6] Clause 10.2.2 states that if the contractor or employer fails to submit a claim within 28 days after the cause of dissatisfaction, it shall have no further right to raise any dissatisfaction relating to such matter.

[7] In terms of clause 10.2.3, the employer's agent shall, within 28 days after the contractor or employer has delivered the dissatisfaction claim to him, give effect to clause 3.2.2 and give his adequately reasoned ruling on the dissatisfaction claim, in writing, to the contractor and the employer.

[8] Clause 10.3.1 states that the contractor or the employer may deliver to the other party, a written notice, referred to as a 'dispute notice', of any dispute arising out of or in connection with the contract, provided that the dispute arises from a rejected claim. A copy of the dispute notice shall be delivered to the employer's agent within 28 days of the event giving rise to the dispute. Failing such delivery, the parties shall have no further right to dispute the matter.

[9] In terms of clause 10.3.2, the dispute shall immediately be referred to adjudication upon either party giving notice in compliance with clause 10.3.1.

[10] Adjudication is dealt with in clause 10.5. In terms of the contract data, which forms part of the agreement between the applicant and first respondent, one adjudicator would be appointed and the dispute would be referred to ad-hoc adjudication as provided for in clauses 10.5.2 and 10.5.3, the latter dealing with the Adjudication Board rules. In terms of clause 3.2 of the Adjudication Board rules, the referring party shall select three or more persons from the panel of ad-hoc

adjudicators of SAICE and confirm their fees and availability to resolve the dispute in question. The other party shall within seven days select, from the nominees, the adjudicator as allowed for in the contract data. Failing selection, the president of SAICE shall on the application of either party, nominate a person or persons as the Adjudication Board.

[11] The applicant alleges that the first respondent and its chief engineer disallowed in its entirety the applicant's claim for a management fee in respect of payment certificate 25. The applicant submitted the payment certificate on 10 August 2021, which included a claim for a management fee.

[12] It appears from the papers that on 11 August 2021, correspondence was exchanged between the applicant and the first respondent's engineer, Mr Vahed, in terms of which the applicant was informed that no management fee could be claimed. Reference was made to previous correspondence between the chief engineer of the first respondent and the applicant.

[13] On 13 August 2021, the applicant requested Mr Vahed to certify the amounts on the payment certificate delivered to him and to make the amendments he saw fit or was instructed to make. Mr Vahed indicated that they would be removing the management fee and will return the payment certificate for invoicing purposes. The applicant again requested him to make the amendments and to certify the payment certificate.

[14] Payment certificate 25 was subsequently issued on 25 August 2021.

[15] On 21 September 2021, the applicant submitted its dissatisfaction claim, in terms of clause 10.2.1 of the GCC, due to the removal of the management fee from payment certificate 25. It was a detailed document, setting out the applicant's contentions and also contained a timeline of events.

[16] On 23 September 2021, the first respondent's chief engineer, Mrs Lazarova, issued a ruling on the applicant's dissatisfaction claim. It was contained in an email

with the subject line referring to the contract number and the 'Management Fee Dissatisfaction Claim'. It read as follows:

'Attached is the letter response of your dissatisfaction claim 2 years ago. This letter response still stands.'

Attached to the email was a letter dated 28 June 2019, addressed to the applicant by Mrs Lazarova (who also attested to the first respondent's answering affidavit). The heading of the letter contained a description of the contract and concluded with the words 'Management Fee'. She was responding to a letter from the applicant dated 26 June 2019, and addressed certain aspects relating to the calculation of the management fee which was apparently raised at a site clarification meeting and which was subsequently emailed to each tenderer. Reference was made to item B13.06 (the management fee) and it was stated that since it was neither a rate nor a provisional sum, a price was required to be included in the 'amount' column. If the tenderer had omitted it, then this item would be considered to have a nil rate or price.

[17] It is unclear from perusing the letter of 28 June 2019 whether it relates to a dissatisfaction claim in respect of a payment certificate, or to a specific enquiry relating to the claiming of a management fee. It certainly contains no reference to a dissatisfaction claim or the rejection of such claim.

[18] It is apparent from the papers that the applicant tendered a rate of 30% for the management fee and that it subsequently included the claim for its management fee at that rate in payment certificate 25.

[19] On 1 October 2021, the applicant delivered a combined notice of dispute and notice of adjudication, in terms of clause 10.3.1 of the GCC and clause 4.1.1 of the Adjudication Board rules, to the first respondent. The applicant suggested that Mr Rod Stewart be appointed as the adjudicator as he had apparently previously dealt with a similar dispute between another company in the applicant's group, Raubex KZN (Pty) Ltd, and the first respondent. The first respondent was asked to provide the names of three alternative adjudicators if it was not amenable to the appointment of Mr Stewart.

[20] It is common cause that the first respondent failed to respond to the applicant's request. The applicant subsequently approached SAICE for an adjudicator to be appointed, which was done on 22 October 2021, when SAICE confirmed the appointment of the second respondent.

The first respondent's case

[21] The first respondent alleges that the applicant is time-barred from proceeding to adjudication on two fronts. Firstly, the applicant failed to file a dissatisfaction claim after receiving Mrs Lazarova's letter of 28 June 2019 within the prescribed 28-day period or at all, thereby also creating the impression that the applicant accepted what was stated by Mrs Lazarova in that letter. From the correspondence attached to Mrs Lazarova's affidavit and as mentioned above, it appears that her letter of 28 June 2019 was in response to a letter from the applicant dated 26 June 2019 wherein the issue of the 30% management fee was debated. The applicant set out its views, and concluded its letter by expressing a willingness to discuss the matter further with Mrs Lazarova.

[22] It does not appear to be framed as a particular claim or dissatisfaction claim in respect of a payment certificate. There is no indication that the applicant was expecting a decision from the engineer. The first respondent is in essence saying that the conclusion by Mrs Lazarova in her letter that 'the Contractor is not entitled to any payment under item B13.06' should have been followed by the delivery of a dissatisfaction claim.

[23] The second point raised by the first respondent relating to time-barring, is the applicant's alleged failure to file its dissatisfaction claim dated 21 September 2021 within 28 days. The first respondent contends that the 28-day period started to run on 11 August 2021, when Mr Vahed had sent an e-mail to the applicant, stating that it was not entitled to claim the management fee. According to the first respondent, the 28-day period lapsed on 9 September 2021.

[24] The first respondent did not dispute that its engineer disallowed the management fee from payment certificate 25. As mentioned above, the payment

certificate was issued by the engineer on 25 August 2021, followed by the applicant's dissatisfaction claim which was submitted 27 days later on 21 September 2021.

[25] In terms of clause 6.10.4 of the GCC, the engineer shall deliver the payment certificate to the contractor within seven days of receipt by the engineer of the contractor's statement. Any dissatisfaction in respect of such payment certificate shall be dealt with in terms of clause 10.2. The amount certified by the engineer is the amount he considers to be due to the contractor, after taking into account the various factors set out in clauses 6.10.1.1 to 6.10.1.8

[26] It appears that the first respondent, whose engineer, on the face of it, took more than seven days to issue and deliver payment certificate 25, is under the impression that the period of 28 days started to run when the email was sent by its engineer, Mr Vahed, on 11 August 2021, whereas clause 6.10.4 clearly states that any dissatisfaction can only be raised upon receipt of the payment certificate.

[27] The first respondent accused the applicant of bringing the present application without disclosing that its claim is time-barred. This accusation would naturally fall away if it turns out that the claim was not time-barred at all.

[28] The first respondent also alleged that the contract data only provided for dispute resolution by referral to ad-hoc adjudication and that the applicant failed to comply with Adjudication Board rule 3.2. Much was made of the applicant's reference to rule 3.3 in its founding affidavit, which was clearly an incorrect reference, but the applicant nonetheless referred to the fact that the dispute should be referred to ad-hoc adjudication.

[29] It is clear from the papers that the applicant invited the first respondent to agree to the appointment of an adjudicator and when no response was forthcoming, it approached SAICE for the appointment of an adjudicator. The first respondent's response to all these allegations was simply to state that the correspondence referred to by the applicant was issued after 8 September 2021, which is when the applicant, according to the first respondent, became time-barred, and that it therefore had no force or effect. The first respondent, in essence, decided that the applicant

was time-barred and that was the end of everything. Doubts were also expressed as to whether the applicant had informed SAICE that its dissatisfaction claim was time-barred. The first respondent went as far as to state that SAICE had no power to appoint an adjudicator where the first respondent has 'justifiably, refused to consent to the appointment of an adjudicator in respect of a claim that is time-barred'.

Previous litigation

[30] Both parties referred to a matter that came before Mossop AJ on 28 May 2021. In that matter,² another company in the applicant's group, Raubex KZN (Pty) Ltd, claimed a management fee similar to what was claimed by the applicant in the present matter, which the first respondent declined to allow. The matter served before an adjudicator who then ruled in favour of Raubex KZN.

[31] The first respondent did not accept the correctness of the ruling and intended to refer the ruling to arbitration. It, however, failed to refer the dispute timeously and became time-barred. It applied to the high court for an order that the time-barring provisions contained in clause 10.6.1 of the GCC be declared unenforceable insofar as it prevented the first respondent from challenging the adjudicator's decision. The application was dismissed with costs.

[32] Mossop AJ only made a brief observation about the first respondent's prospects of success, as it was not for him to adjudicate on the correctness of the adjudicator's decision. The court was of the view that the first respondent's prospects of success were not strong and that a 'business-like consideration' of Raubex KZN's tender conformed with the finding of the arbitrator.³

Analysis and discussion

[33] Counsel for the applicant, Mr I Pillay SC, submitted in his heads of argument that once a dispute is deemed to exist, either party is compelled to use the dispute resolution process if it intends to have the dispute determined. It was also submitted that the relief should be granted as the GCC provides for the dispute to be

² *MEC for the Department of Transport, KwaZulu-Natal v Raubex KZN (Pty) Ltd and another* [2021] ZAKZPHC 77.

³ *Ibid* para 49.

determined by adjudication, that the first respondent's alleged time-bar defence is ill-conceived and that the first respondent is not entitled to frustrate the contractually agreed upon adjudication process because of its stance on the time-barring issue.

[34] In my view, a few issues are clear from the papers before me and in particular from the provisions of the GCC. Clause 6.10.4 of the GCC provides that any dissatisfaction in respect of a payment certificate shall be dealt with in terms of clause 10.2, which in turn provides for a dissatisfaction claim to be made within 28 days. It is common cause that the certified payment certificate 25 did not include the management fee and that this is what led to the applicant delivering its dissatisfaction claim on 21 September 2021, as it was obliged to do in terms of the GCC.

[35] Counsel for the first respondent, Mr Crampton, submitted in his heads of argument that the applicant failed to disclose any factual basis for its allegation that the cause of dissatisfaction occurred or arose on or after 25 August 2021. This submission unfortunately failed to take into account the actual dissatisfaction claim, which was attached to the applicant's founding affidavit as annexure 'F' and which set out all the relevant particulars in detail, including the emails received from Mr Vahed and the fact that the payment certificate was returned on 25 August 2021 with the management fee removed. I am satisfied that this is the date on which the cause of dissatisfaction arose. It follows that I am of the view that the applicant did in fact submit its dissatisfaction claim timeously. The first respondent's submission that the 28-day period started running from when the emails were sent is rejected. The applicant had submitted a payment certificate and could in my view only take further steps once the certified payment certificate was returned by the engineer, as envisaged in clause 6.10.4 of the GCC. The applicant's dissatisfaction was clearly directed at the payment certificate from which the first respondent's engineer had deleted the management fee.

[36] In light of my finding that the applicant's dissatisfaction claim is not time-barred, I do not deem it necessary to deal with the question as to whether the adjudicator would be able to determine whether a claim is in fact time-barred. I

cannot see why not, bearing in mind the provisions of clause 10.2.1. In *Norland*⁴ the adjudicator raised the issue of time-barring *mero motu*. The court held at para 106 that the adjudicator was not entitled to do so, as it was not an issue which was before him for consideration. This in my view seems to imply that an adjudicator is entitled to consider the issue of time-barring, provided it has been placed before him as an issue to deal with.⁵ The first respondent held the view that because the claim was time-barred, adjudication could not be proceeded with. Instead of making submissions supported by authorities on this particular issue, counsel for the first respondent in his heads of argument simply kicked the ball back to the applicant, submitting that it bore the onus to prove its case. Before me it was submitted on behalf of the first respondent that it does not matter whether the adjudicator has the jurisdiction to determine the time-bar issue. What is important to consider is whether the applicant had made out a case for the relief it seeks - which was referred to as a claim for specific performance.

[37] In respect of the first time-bar issue, namely the letters from June 2019, I am of the view that the first respondent has failed to show that the letter by Mrs Lazarova constituted a rejection in response to a dissatisfaction claim issued by the applicant. The applicant, in its letter of 26 June 2019, refers to discussions which had taken place, sets out what it perceives as the current position and concludes with a statement that it will avail itself for further discussions. There is in my view nothing to suggest that it was a dissatisfaction claim of any sort. Mrs Lazarova states the position of the first respondent at the time but there is likewise nothing to suggest that she issued a ruling, rejecting a dissatisfaction claim. Mr Vahed, in his email of 11 August 2021, referred to 'correspondence previously from Mrs Lazarova'. One would have expected Mr Vahed to refer to a ruling in respect of a previous dissatisfaction claim, if this was indeed the nature of the letter of 28 June 2019, which it clearly is not.

[38] Counsel for the first respondent submitted that the letter by Mrs Lazarova could have been the subject of a dissatisfaction claim and that the applicant, in

⁴ *Norland Construction (Pty) Ltd v OR Tambo District Municipality* [2017] ZAECHGHC 87

⁵ *Ekurhuleni West College v Segal and Another* [2018] ZAGPPHC 662 where at paras 32 and 41 it was held that an adjudicator has to act in accordance with his terms of reference

essence, should have anticipated that what was contained in the letter amounted to a repudiation and/or an anticipatory breach of the agreement, which has contractual consequences. It was submitted that the applicant would have been entitled to submit a dissatisfaction claim in June 2019.

[39] It is difficult to understand why the applicant should have taken the step proposed by the first respondent, when it is clear in my view that the matter was being debated between the parties and that it did not involve a payment certificate or a ruling on a payment certificate. The issue would in my view only arise when a payment certificate was submitted for certification. The applicant included its management fee and only when such fee was excluded and certified by the engineer, could the applicant submit its dissatisfaction claim in terms of the GCC.

[40] In my view, the first respondent is required to comply with the adjudication proceedings as set out in the GCC. The applicant requested the first respondent to suggest the names of possible adjudicators, which is a slight deviation from the rules but which was clearly designed to favour the first respondent by offering it the opportunity to choose an arbitrator. It has not responded and quite correctly in my view, SAICE was approached to appoint someone, who turned out to be the second respondent. The first respondent has raised no objection to his appointment per se.

[41] I am accordingly of the view that the applicant has made out a case for the main relief it seeks.

Costs

[42] The applicant claimed for the first respondent to pay the costs of the application on the attorney and client scale and stated in its founding affidavit that it has been significantly inconvenienced and had to bear legal expenses as a result of the first respondent's attitude. It in essence asked for costs on a punitive scale. It is trite that the question of costs falls within the discretion of the court. Whilst I have sympathy for the applicant, I am of the view that such an order would not be appropriate in the circumstances especially bearing in mind that public funds are involved.

Order

[43] I accordingly make the following order:

1. The appointment of the second respondent as the adjudicator to determine the dispute between the applicant and the first respondent is declared to be valid and binding.
2. The first respondent is directed to sign and deliver the adjudicator's contract to the second respondent within five days from the date of service of this order upon the first respondent.
3. In the event that the first respondent fails to comply with para 2 of the order, the sheriff of this court is authorised and directed to sign the adjudication contract on behalf of the first respondent, to serve the original on the second respondent, and to furnish a copy to the applicant and the first respondent
4. The first respondent is directed to pay costs of the application.

E BEZUIDENHOUT J

Date of hearing: 10 March 2023
Date of judgment: 10 November 2023

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