

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 6353/2020

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

TAWANDA WATER INITIATIVE (PTY) LTD t/a

LIMPOPO WATER INITIATIVE

APPLICANT

And

LEPELLE NORTHERN WATER BOARD

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant was awarded a tender by the respondent, and on 17th August 2015 the applicant and the respondent entered into a written Service Level Agreement (SLA) for the design, manufacture, supply, installation and commissioning of a 10 mega litre per day wastewater treatment works at Burgersfort Wastewater Treatment Works, as a turnkey project. During the execution of the work by the applicant, a dispute arose between the parties regarding the extension of time, contract price adjustment, exchange rate damage, interest charges claims and the release of retention monies.
- [2] The parties agreed in writing to refer their dispute to an ad-hoc adjudication in terms of clause 10.5.2 of the General Conditions of Contract for Construction Works (GCC). Their dispute was to be adjudicated by an Adjudication Board conducted in terms of the Adjudication Board Rules, in accordance with the provisions of the GCC. Advocate Hubert Thompson was appointed as the adjudicator, and he found in favour of the applicant. As per the decision of the adjudicator, the respondent was liable to pay the applicant a certain amount of money.
- [3] When the applicant's attorney demanded payment of the money from the respondent as per the adjudicator's findings, the respondent served the applicant with a formal notice of disagreement with the adjudicator's decision in terms of clause 10.6.1.2 of the GCC. The respondent in that notice further notified the applicant that it was referring the dispute for arbitration. The respondent further notified the applicant that they regard the process of adjudication as a form mediation, and that as per clause 7 of the SLA, the dispute resolution agreed between the parties was by way of arbitration.

Based on that the respondent objected to the applicant's demand for payment as per the adjudicator's decision.

- [4] On 30th September 2020, the respondent instituted an action in the High Court seeking to review and set aside the tender awarded to the applicant which led to the signing of the SLA, and refund of payment already made to the applicant in terms of the SLA. The applicant has already filed its plea to the respondent's action. On 6th October 2020, the applicant instituted the present application seeking declaratory orders that the adjudication proceedings submitted to by the applicant and respondent were conducted in terms of clause 10.5.10.6 of the GCC; that these adjudication proceedings were binding on the parties until and unless it was revised by an arbitration award, as provided for in clause 10.6.1.1 of the GCC. Further the applicant is seeking an order that the respondent be ordered to comply with the decision of the adjudicator including payment as per that decision.
- [5] The respondent is opposing the applicant's application. The respondent in its answering affidavit is contending that the proceedings were not adjudication proceedings pursuant to clause 10 of the GCC, but rather some sort of mediation that was not binding on the parties. The respondent in the alternative is applying that the applicant's application be stayed pending final determination of the action it has instituted against the applicant. The applicant contend that its application should not be stayed, as the subject matter in the action is the same subject matter as that of arbitration proceedings, and that the request for a stay is demonstrably unmeritorious.
- [6] The first issue which this court must determine is whether the applicant's application should be stayed pending the outcome of the action instituted by

the respondent against the applicant. Beside the current application, there are pending arbitration and action proceedings against the same parties relating to the same issues. The question is whether these three processes can run parallel to each other at the same time, and if they are allowed to do so what will be the implication.

[7] In *Mokone v Tassos Properties*¹ Madlanga J said:

“[65] In a similar vein, and placing reliance on Kent, the court in Jorgensen held that ‘(t)he Courts do not however act on abstract ideas of justice and equity. They must act on principle.’ In *Clipsal* the Supreme Court of Appeal quoted both Kent and Jorgensen with approval.

[66] This seems to stand in the way of Mokone getting the relief she is seeking. Must it? Section 173 of the Constitution provides:

‘The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice’

[67] Put simply, this says the mentioned courts may regulate their own process taking into account the interests of justice. I will say nothing about equity but, based on this, I do not see why proceedings may not be stayed on the grounds dictated by the interest of justice. Whatever the import of what was said by courts previously may be, the Constitution lays down its own test; and everything to do with the interest of justice.

[68] In this context, the idea of interest of justice is quite wide. I will not attempt to delineate what it encompasses. Suffice it to say, what justice requires will depend on the circumstances of the case.”

[8] The respondent had instituted its action against the applicant before the applicant could institute its application against the respondent. It can therefore not be said that the action that has been instituted by the respondent was in

¹ 2017 (5) SA 456 (CC) at paras 65-68

retaliation to the application that has been instituted by the applicant. In its action proceedings, the respondent is seeking orders that the tender which has been awarded to the applicant be reviewed and set aside on the basis of illegality, that the applicant refund it the money already paid as a result of the alleged illegal contract. Should the applicant succeed with its action, it will have a huge impact on the current application by the applicant. The applicant will be unable to proceed with its claim against the respondent in the current format. However, should the respondent be unsuccessful, the applicant may still be able to proceed with its application in the current format, and also be able to claim interest until date of payment.

[9] The respondent has instituted action proceedings where the parties will be able cross examine witnesses and test their credibility in finding the whole truth about this matter. The applicant does not stand to lose anything if the action proceedings is finalized first, but instead it will benefit from the interest that will have accrued on the outstanding amount. However, should the applicant's application be finalized before the respondent's action proceedings, and the respondent pay the applicant, there is no guarantee that the respondent will be able to recover the full amount if the applicant had already expended that amount should the respondent succeed in its action proceedings.

[10] In *Caesarstone SDOT-Yam v World of Marble and Granite 2000*² Wallis JA said:

[48] I stress that I am not saying that it will would be an abuse of the process of the court for the other members of the Sachs family to try and pursue the Western Cape action, when that

² 2013 (6) SA 499 (SCA) at paras 48 and 49

action has been stayed insofar as WOMAG and Mr Oren Sachs are concerned. However, the practical difficulty of their doing so, when their right to pursue those claims is joint with the persons in relation to whom the action has been stayed, requires the court to exercise the inherent discretion of which Milne J spoke, in order to avoid those difficulties. That discretion is now confirmed in s 173 of the Constitution.

[49] The only issue sensible way in which to address the problem is for the court also to stay the proceedings against the remaining members of the Sachs family, not on the basis of *lis pendens*, but in the exercise of its inherent powers to regulate its own procedures. Once the Israeli proceedings are complete and a final judgment has been given it will be open to them, together with WOMAG and Mr Oren Sachs, to resume the Western Cape action...”

[11] In the case at hand it is vital that the status of the tender which was awarded to the applicant, which led to the SLA been signed by both the applicant and respondent be resolved. Once that has been resolved, it may even curtail proceedings in the current applicant’s application. The applicant had already filed its plea in the respondent’s action, which soon might be ripe for trial. In my view, the interest of justice favours the staying the applicant’s current application pending the final determination of the respondent’s action against the applicant.

[12] In the result I make the following order

12.1 The applicant’s application under case number 6353/2020 is stayed pending the final determination of the action instituted by the respondent against the applicant under case no 6229/20

12.2 Costs are reserved.

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the applicant	: Adv GP van Rhyn
Instructed by	: Becker Attorneys
Counsel for the Respondent	: Adv NA Cassim SC
	: Adv K Naidoo
Instructed by	: NJ Morero Inc Attorneys
Date heard	: 2nd August 2021
Electronically delivered on	: 16th August 2021