



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 3360/2016

In the matter between:

VALORTRADE 74 (PTY) LTD t/a M C
STEELWORKS

Applicant

and

SASOL CHEMICAL INDUSTRIES LIMITED

Respondent

HEARD ON: 22 March 2018

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 12 APRIL 2018

JUDGMENT

[1] **INTRODUCTION:**

- [1] On **9 May 2006** the Applicant and the Respondent concluded a written agreement in terms of which the Applicant would provide miscellaneous welding maintenance and construction works to the Respondent for a certain period of time. The contract contained a dispute resolution clause providing for a process whereby disputes between the parties would be resolved without the need of resorting to formal litigation in the Courts.
- [2] Long before the contract period came to an end, the Respondent suddenly suspended the contract on **15 August 2013** and then went on to terminate the contract on **20 June 2014**. On **16 September 2015** the Applicant for the first time declared a dispute in writing with the Respondent in order to invoke the provisions of the dispute resolution clause in the contract. The Respondent reacted by contending that the declaration of a dispute was out of time, and that it would therefore not cooperate in the process of resolving the dispute as envisaged by the clause in question.
- [3] The Applicant now makes application in terms of Section 8 of the Arbitration Act no. 42 of 1965 ("the Act") for orders to the effect that its failure, if any, to timeously invoke the provisions of the clause, be condoned, that the Respondent be directed to engage

in the dispute resolution process, and that the action meanwhile instituted by the Applicant against the Respondent in this Court on **21 July 2016**, be stayed pending the outcome of the resolution process.

[II] **THE FACTS:**

[4] The dispute resolution clause reads as follows:

“If any dispute or difference shall arise between the parties out of or in relation to or in connection with this contract or the interpretation thereof or any breach thereof or its termination, both while in force and after its termination, the party claiming such dispute or difference shall forthwith advise the other in writing thereof. Within fourteen (14) days of receipt of such notice, the parties shall meet and negotiate in good faith in order to resolve such dispute or difference.”

[5] The clause further provides that, should the parties fail to resolve the dispute within fourteen (14) days of their first meeting, either party may refer the dispute to mediation. Failing such a resolution, the dispute, if arbitrable in law, shall be finally resolved by an

arbitrator or arbitrators appointed by AFSA. It is common cause between the parties that their dispute is arbitrable in law.

[6] According to the Applicant, it could not forthwith declare a dispute in terms of the clause, since the Applicant was not aware that there was a dispute prior to the termination of the contract and the acceptance of the termination. This is so because the Applicant has never been apprised of the exact nature of the allegations against it, and has therefore been deprived of the opportunity to properly consider and rebut the allegations.

[7] It is common cause that, at a meeting of the parties some two (2) weeks after the suspension of the contract during **August 2013**, the Applicant was advised that it would be informed of the specific allegations against it. It appears from the papers that, since then, and until the time of the declaration of a dispute on **16 September 2015**, the Applicant constantly engaged with the Respondent, occasionally assisted by its attorneys, to obtain the specifics of the allegations against it, but without any success. The Applicant alleges in its founding affidavit that it still has no detail relating to the allegations that resulted in the suspension and the termination of the contract.

[III] **THE ISSUES:**

[8] The issues to be determined are therefore the following:

8.1 Did the Applicant fail to timeously invoke the provisions of the dispute resolution clause?

8.2 If so, did the Applicant show sufficient cause to be granted condonation for its failure?

8.3 And if so, should the Respondent be directed to engage in the dispute resolution process and the pending action be stayed for such purposes?

[IV] **DETERMINATION:**

[9] As for the first question above, the express terms of the dispute resolution clause are clear to the effect that the party claiming a dispute or difference “*shall forthwith*” advise the other in writing thereof, such dispute or difference having arose from the interpretation of the contract or any breach thereof, or its

termination. It is self-evident that the word "*forthwith*" means immediately and without delay. At best for the Applicant, it could mean without any reasonable delay.

[10] As indicated above, the Applicant deemed fit to declare a dispute only on **16 September 2015** that is some two (2) years after the contract was suspended and some fifteen (15) months after the contract was terminated. The clause in question refers to a dispute or difference arising from any breach of the contract or the termination thereof. In the summons issued by the Applicant in the pending action in this Court, under the above case number, the Applicant's cause of action consists of a breach of contract in that the notice of suspension lacked legality and in that the notice of termination was issued without affording the Applicant any opportunity to be heard.

[11] The Applicant must therefore have been aware of a breach of contract already on the date of suspension, but at best for it, on the date of termination. It stands to reason that the Applicant has therefore failed to declare a dispute "*forthwith*" in breach of the dispute resolution clause contained in the contract between the parties.

[12] The next question is then whether the Applicant has shown sufficient cause for condonation of his late referral of the dispute to the resolution process. In terms of the established requirements for an order of condonation, the defaulting party must provide the Court, *inter alia*, with a reasonable explanation for his delay. In the present case, the Applicant relies on the reluctance of the Respondent over a period of time to furnish it with a detailed account of the allegations against it. Were this the only requirement to be determined, the Applicant would not have succeeded, the reason being that when he eventually gave his notice of a dispute, he was in no better position than before regarding the detail of the allegations. In this respect the Court is also mindful of the fact that at the time of instituting these application proceedings, the Applicant on his own version, was still not informed of the detail of the allegations. In addition, the Applicant provided no explanation at all for the delay of some nine (9) months from the date of summons to the date of issue of this application on **13 April 2017**.

[13] In my view, it speaks for itself that the initial suspension and the following termination already created a massive dispute between

the parties upon which the Respondent was obliged in terms of the contract to invoke the dispute resolution process without delay. Full information relating to the detail of the allegations was not a prerequisite.

- [14] But that is not where the enquiry ends. In terms of Section 8 of the Act, the Applicant is required to demonstrate that it would suffer undue hardship in the event of the Court not condoning the late referral. The Applicant indeed deals with this requirement by stating in its Founding Affidavit that it would suffer hardship which is disproportionate to its fault if condonation is not granted. When it comes to the specific nature of the hardship itself, the Applicant alleges as follows:

“In the event that condonation is not granted, the Applicant will be deprived of the opportunity to properly ventilate the matter, to recover its losses and, in all probability, its existence will terminate, thereby affecting the lives of its members and employees.”

In a further paragraph, the Applicant states that it shall be gravely prejudiced if the dispute is not ventilated. The Applicant provides no further grounds for the undue hardship it relies on.

- [15] In **ADMINISTRATEUR, KAAP v ASLA CONSTRUCTION (PTY) LTD 1989 (4) SA 458 (C)** the Court remarked that the proof of undue hardship in terms of Section 8 is an essential prerequisite for any relief under the section (**at 470 F**). Quoting with approval from the English case of **THE JOCELYNE (1977) 2 Lloyds Reports 121**, the Court explained that undue hardship means, *inter alia*, excessive hardship, and where the hardship is due to the fault of the Claimant, it means the consequences of which are put out of proportion to such a fault.
- [16] In the present case, the hardship, if any, is due to the fault of the Applicant. As indicated hereinbefore, the Applicant should have declared the dispute without any delay when the contract was terminated by the Respondent on **20 June 2014** at the very latest. It only came to Court seeking condonation in **April 2017**, that is almost three (3) years later, claiming that it will suffer undue hardship in the sense that it will be deprived of the opportunity to ventilate the matter properly and to recover its losses if condonation is not granted.

[17] In my view, the Applicant has failed to prove any hardship relating to an opportunity to ventilate the matter and to recover its losses. Such opportunity will certainly avail the Applicant in the pending action proceedings and the prelude thereto, while an order condoning the inordinate delay will only serve to prejudice the Respondent in circumstances where the lines have already been drawn in the action proceedings. The Applicant has not alleged any other hardship in his Founding Affidavit, for instance that he is no longer able to fund the pending action or that a date for the hearing of the action could not be found in the near future. I therefore find that the Applicant has not shown sufficient cause to be granted condonation.

[18] In the premises, it is not necessary to consider the question as to whether the Respondent should be directed to engage in the dispute resolution process and whether the action should be stayed for such purposes.

[19] The following order is made:

1. The application is dismissed with costs.

P J LOUBSER, J

For the Applicant: Advocate R Bedhesi SC

Instructed by: Bhikha Incorporated, c/o Webbers, Bloemfontein

For the Respondent: Advocate P Ellis SC

Instructed by: T O'Reilly, Symington & De Kok Attorneys, Bloemfontein