REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT DIVSION, PRETORIA

11/3/15

Case Number: 56782/13

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

12/03/2015 DATE

SIGNATURE

In the matter between:

KALEIDA PROJECT MANAGEMENT COMPANY LTD Applicant

and

KALAGADI MANGANESE (PTY) LTD 1st Respondent

MDM ENGINEERING 2nd Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicant seeks the following relief:

1.1 that first respondent pay applicant an amount of R9 216 900.00;

1.2 that first respondent pays the costs of this application.

[2] The following facts are common cause:

2.1 On 28 June 2011 first respondent awarded the applicant a tender for the supply, delivery, installation and commission of a wagon tippler to be used at the respondent's Kalagadi Mines Sinter Plant.

2.2 On 28 June 2011 the first respondent issued the applicant with a letter of award, in terms of which clause 2.1 provided that the tender was subject to the condition that the applicant and the first respondent conclude an agreement for the execution of the contract and/or services by 30 July 2011.

2.3 prior to the conclusion of the agreement being concluded and whilst the applicant and the first respondent were negotiating the terms of the proposed agreement, the applicant commenced with preparing some preliminary technical drawings relating to the project.

2.4 On 19 July 2011 the applicant issued invoices to the amount of R9 261 900.00 for work already done. These invoices were accompanied by a certificate of completion prepared by the second respondent who was the first respondent's project manager with regard to this project.

[3] It is the applicant's contention that first respondent is liable to it in the amount claimed based on the fact that the first respondent has acknowledgement of indebtedness made by the first respondent through various correspondences between the employees of the applicant and the first respondent.

[4] The correspondence relied upon by the applicant as evidencing the first respondent's acknowledgement of its indebtedness to the applicant are the following:

4.1 an e-mail dated 30 August 2011 in which Xolile Kubheka ("Kubheka"), first respondent's financial administrator, in responding to a query by Samantha Reddy ("Reddy") (presumably an employee of the applicant) about the invoice numbers and the total amount of the invoices, indicated that the amount 'scheduled for payment' is R9 216 900.00; and

4.2 an e-mail dated 31 August 2011 from Kubheka to Reddy in response to a query by Reddy as to when payment of the invoices can be expected, in which it is indicated that payment would be made on 6 September 2011.

[5] It is the applicant's contention that the first respondent's indebtedness is based on the e-mails referred to above, which were pursuant to a partly written, partly oral agreement between the parties, alternatively that the first respondent owes it the amount claimed on the basis of services rendered by the applicant.

[6] The first respondent denies having acknowledged any indebtedness to the applicant in the amount claimed. It is the first respondent's contention that when the applicant undertook to perform the preliminary work pertaining to the project, the applicant knew that it was working at the risk of the main agreement being concluded between the parties. In this regard the first respondent relies and did attach to its answering affidavit an e-mail sent by the applicant to the first respondent, dated 10 August 2011, in which the applicant acknowledges that until the negotiations towards the conclusion of the main agreement, it is working on risk. It

was argued on behalf of the applicant that the applicant could not rely on e-mails sent by a junior employee and any undertakings made by the project manager as neither had the authority to bind the first respondent particularly as they were not aware with the legal terms applying to the agreement between the applicant and the first respondent. Furthermore, the applicant indicated in the same e-mail that it is not comfortable with the situation and was considering suspending the work it was doing. It is further the first respondent's contention that this court has no jurisdiction to hear the matter in view of clause 20 of the letter of award, which provides that in the event of a dispute, the aggrieved party should refer the dispute to arbitration. It was further submitted on behalf of the first respondent that the parties did not enter into a main agreement, as there were problems with regard to the applicant's financial statements.

[7] The following issues are in dispute:

7.1 whether, when the applicant undertook the preliminary technical work it was working at risk;

7.2 whether there is an acknowledgement of debt by the first respondent.

[8] From the letter of award, in particular clause 2.1, it is common cause that the letter of award was subject to a main agreement being entered into between the parties. Having regard to the e-mail sent by the applicant's representative on 10 August 2011 in which it expresses its discomfort at continuing with the work whilst negotiations were not concluded, there is an acknowledgement by the applicant that it is working at risk. From this e-mail it can be inferred that the applicant understood that it would not be paid unless the condition precedent as contained in clause 2.1 of the letter of award was fulfilled, bearing in mind clause 9 of the letter of award which reads as follows:

"Payment of invoices will be effected not later than 36 days from end of the month on which the invoice is accepted. In addition, all payments shall be subject to payment terms and conditions of Kalagadi Manganese."

[9] Therefore, I am satisfied that the applicant took the risk of rendering services, which it knew would not be paid unless the main agreement was concluded.

[10] With regard to the alleged acknowledgement of debt, the applicant averred that the acknowledgement of indebtedness

was evidenced by the two e-mails referred to in paragraph 4 above in pursuance of a partly written, partly oral agreement. However, on the evidence before me I am of the view that the applicant has not proven that a partly oral agreement was concluded with the first respondent. Furthermore, on a perusal of the e-mails the applicant relies on they do not reflect an unequivocal or unconditional acknowledgement of indebtedness. The fact that the first respondent's project manager has certified that work has been completed does not impute on the first respondent an acknowledgement of indebtedness if one takes into account the terms and conditions as contained in the letter of award.

[11] Consequently the following order is made:

'The application is dismissed with costs.'

MNGQIBISA-THUSI J

Judge of the Gauteng High Court Division

Appearances:

For Applicant: Adv H Groenewald

Instructed by: Van der Elst Attorneys Inc

For Respondent: Adv M Sikhakhane

Instructed by: Edward Nathan Sonnenbergs