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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D3638/2023

In the matter between:

AECOM SA (PTY) LTD

APPLICANT

and

DUBE TRADEPORT CORPORATION

RESPONDENT

ORDER

The following order shall issue:

The application is dismissed with costs on the attorney-and-client scale, such costs to be taxed on the basis of employment of Senior Counsel.

JUDGMENT

Z P NKOSI J

[1] The applicant seeks an order declaring that the respondent's claim of breach of contract, which forms the basis of the respondent's Statement of Claim against it, has prescribed. The application is opposed by the respondent.

[2] On 30 July 2013, the respondent appointed the applicant to provide site wide geotechnical services for a proposed new Dube Tradeport Corporation Hotel at King

Shaka International Airport. The applicant delivered its first geotechnical investigation report in July 2014. The geotechnical report produced by the applicant was thereafter utilized by the construction contractor and the professional team when planning, designing and constructing the Double Basements at Block B.

[3] On 9 December 2015, the applicant and respondent concluded an addendum to the main agreement in terms of which the applicant was requested to conduct a further geotechnical investigation at Trade Zone 1B site. The applicant and respondent thereafter concluded a Project Specific Addendum on 7 November 2016.

[4] On 17 July 2017, the respondent extended the contractors time by 46 days. The respondent contends that the geotechnical investigation report was erroneous with regard to the rock location and boreholes layout which resulted in it suffering damages from:

- (a) an extension of time claims in the amount of R1 326 727.10; and
- (b) additional expenses and loss claim costs for the ramp removal, relocation and rebuilding of a second temporary access ramp in the amount of R2 016 188.64.

[5] On 18 October 2019, the respondent declared a dispute. On or about 9 December 2022, the respondent served its Statement of Claim in order to claim the aforesaid damages alleging breach of contract by the applicant.

[6] The applicant contends:

- (a) that the claim of the respondent became enforceable, on 17 July 2017, when the extension of time claim was approved and thus a period of more than three years has lapsed; and
- (b) that the respondent's claim has never been the object of a dispute subjected to arbitration within the meaning of s 13(1)(f) of the Prescription Act;¹ and as a result, the respondent's claim has prescribed as contemplated in the Prescription Act;
- (c) and the respondent's attempt to initiate arbitration proceedings against the applicant on a claim that has prescribed is incompetent.

¹ Prescription Act 68 of 1969.

- [7] The respondent, on the other hand, contends that:
- (a) the arbitration has already commenced since a declaration of dispute was delivered in writing, in terms of clause 28 (1) of the agreement, on 18 October 2019 and the applicant undertook to respond in due course. The applicant is thus deemed to have agreed to a longer period envisaged in clause 28.3;
 - (b) the Statement of Claim was delivered on 9 December 2022. Simultaneously the respondent requested the Arbitration Foundation of South Africa ("AFSA") to provide names of arbitrators and AFSA's fees were settled;
 - (c) an arbitration agreement is not necessary; the payment of fees is what is required to start the arbitration; and
 - (d) the applicant entered the arbitration on 13 January 2023.

[8] The respondent denies that the debt became enforceable on or after 17 July 2017. At the time the claims were made by the contractor, the respondent alleges that it was not known that the claims had arisen from the applicant's breach of contract and failure of its professional duties until and in the course of assessing the claims, the respondent appointed engineering and environmental consultants to advise it on the prima facie liability of any party in June 2018. Only thereafter did expert professional advice point to the applicant's failure which led to the written dispute notice of 18 October 2019.

[9] The main issue for determination is whether the respondent's claim has prescribed. Closely linked to the determination is whether the dispute was subjected to arbitration by the delivery of the written dispute notice and if prescription was thus delayed in terms of s 13(1) of the Prescription Act. If so, whether this court should hear this matter when arbitration has commenced or at all.

[10] It is argued by Mr *Dickson* SC appearing for the respondent that the procedure adopted by the applicant is not the appropriate method of determining prescription. The procedure adopted is precisely the same as an exception where the excipient states that

on the facts pleaded by the claimant, there is no cause of action.² This results in prescription being a matter for a special plea and not an exception.³

[11] The applicant submits that if it is correct in what it contends i.e. that the respondent's debt prescribed as it was not interrupted by the provisions of s 13(1)(f) of the Prescription Act, the court's decision would dispose of the whole dispute between the parties; and would work out to be cheaper. If not, the parties would then proceed to arbitration.

[12] I consider the procedure adopted by the applicant, on the contrary, to prolong the resolution of the dispute between the parties and to increase the costs thereof. However, since prescription of the debt seems to be a pertinent and controversial issue in the resolution of the dispute and has been debated in great detail, I will oblige and deal with the inappropriateness of the procedure adopted in a costs order.

[13] There are factual disputes relating to the commencement of prescription, arbitration and interruption or delay thereof. These disputes are to be resolved on the basis of the respondent's facts being accepted in accordance with the *Plascon-Evans Paints Ltd v Van Riebeeck Paints*⁴ decision unless it is found to be untenable.

[14] On the respondent's facts, the debt did not become due on 17 July 2017 as submitted by the applicant that the dispute arose at the latest on or about July 2017. The respondent avers that it only became aware of the applicant's liability on 7 November 2018 and thereafter declared a dispute in writing on 18 October 2019 to which the applicant promised to revert "in due course". Thereafter, the Statement of Claim was delivered on 9 December 2022 – well within the prescribed three year period.

² *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) para 5.

³ *Jugwanth v MobileTelephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) paras 5-17.

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634-635.

[15] It is evident from these facts that the dispute notice was delivered more than three years prior to the service of the Statement of Claim. I shall suppose that prescription commenced running once the respondent became aware of the applicant's liability for the debt. Prescription was due to have run its course by 6 November 2021. Did the delivery of the dispute notice render the respondent's debt the "object of a dispute subjected to arbitration" as envisaged in s 13(1)(f) of the Prescription Act? Was the prescription of the debt therefore delayed?

[16] The question of when a debt becomes "the object of a dispute subjected to arbitration" was considered in the matter of *Murray and Roberts Construction (Cape) (Pty) Ltd v Upington Municipality*.⁵ The court's point of departure was to have regard to the wording of the relevant arbitration clause existing between the parties which provided an extrajudicial means of resolving a dispute between the parties. It held that 'once the parties have entered upon the procedures which it lays down, they will achieve certainty about the debt which forms the subject-matter of their dispute;⁶ and in 'the meantime recourse to the ordinary courts would be difficult if not impossible.⁷

[17] The parties in this matter agreed on a dispute resolution in their agreement. Clause 28 of the agreement provides as follows:

'SETTLEMENT OF DISPUTES

28.1 In the event of any dispute between the Parties arising from this Agreement the Party wishing to declare the dispute will deliver to the other Party a written notice, which sets out:

- (a) A brief description of the nature of the dispute, including the amount involved, if any, and the date on which the dispute arose; and
- (b) The relief sought.

⁵ *Murray and Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 580-582.

⁶ *Ibid* at 579H.

⁷ *Ibid* at 582E.

- 28.2 Within 14 (fourteen) days from the date of delivery of a notice of the dispute, the Parties will attempt to settle such dispute by negotiation conducted in good faith among those representatives of each Party with the appropriate decision-making authority.
- 28.3 If such individuals are unable to reach agreement within the 14 (fourteen) day period, or such longer period as they may agree, the dispute will be referred to arbitration by a single arbitrator to be nominated by the Arbitration Foundation of Southern Africa (AFSA).
- 28.4 In all respects the arbitration will be conducted in accordance with the rules, requirements on procedures determined by AFSA.'

[18] Accordingly, and when a dispute arises between the parties, the steps to be taken are:

- (a) the delivery of the dispute notice;
- (b) within 14 days from delivery of the dispute notice, the parties will attempt to settle such dispute by negotiations in good faith; and
- (c) after the period of 14 days, or such longer period as they may agree, the dispute will be referred to arbitration.

[19] Mr Jooste for the applicant however contends that the delivery of a dispute notice does not amount to the referral of the dispute for extra-judicial decision or resolution as contemplated in the *Murray and Roberts* decision. He seems to suggest that in a case like the present a dispute would not be "subjected to arbitration" before the last stage of clause 28 had been reached. It seems to me that this argument is based on a false premise.

[20] Clause 28 contains an extrajudicial mechanism to settle disputes between the parties and provides how it should be activated. The first step is delivery of the written dispute notice. Such delivery in my view activated the impediment of arbitration, the first stage of which was deferred at the instance of the applicant. The impediment continues to exist until an arbitration award, if other means laid down in the agreement fail, is

awarded. That is so because "at one or another stage of the proceedings the dispute will be finally resolved, thereby creating certainty about the existence of the alleged debt".⁸

[21] So, clause 28 must be wholly considered as one of arbitration until the course of arbitration has been abandoned. In my considered view, clause 28 is indistinguishable from the clauses which served the same function as in the *Murray and Roberts* decision.⁹

[22] I therefore conclude that the dispute notice started or was a precursor to arbitration and started the impediment which has not, to date, been lifted. The agreement to arbitrate is binding and the arbitration has commenced. Likewise, the respondent's debt has not prescribed. An arbitration agreement in this case is not necessary as the procedures of AFSA (referred to in clause 28.4) do not require an agreement. The payment of the fees is what is required to start the arbitration. I, therefore, find that prescription was delayed.

[23] These proceedings were therefore unnecessary as they raised an issue which could have been dealt with as a special plea in arbitration. With regards to the costs incurred, the respondent should not be out of pocket due to the unacceptable conduct of the applicant.

Order

[24] In the premises the application is dismissed with costs on an attorney and client scale, such costs to be taxed on the basis of employment of senior counsel.



ZP NKOSI J

⁸ Ibid at 582D-E.

⁹ Also see the Arbitration Act 42 of 1965, ss 1 and 3; *South African Breweries Ltd v Grinaker Construction (Natal) (Pty) Ltd* 1986 (1) SA 191 (D) at 197-198.

CASE INFORMATION

DATE OF HEARING : 07 June 2024
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