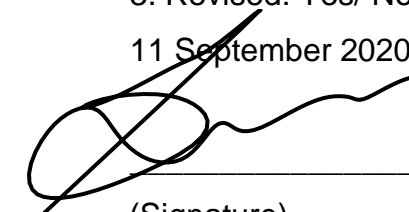




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19/28187

1. Reportable: ~~Yes~~/ No
2. Of interest to other judges: ~~Yes~~/ No
3. Revised: Yes/ ~~No~~, on date reflected below
11 September 2020


(Signature)

In the matter between:

AVENG (AFRICA) (PROPRIETARY) LIMITED

Applicant

and

ESKOM HOLDINGS SOC LIMITED

First Respondent

MASSEY, IAN

Second Respondent

JUDGMENT

REYNEKE AJ:

The applicant (“Aveng”) and the first respondent (“Eskom”) concluded a construction agreement for the design, refurbishment and optimisation of the rail yard and coal offloading facility at the Majuba Power Station (“the Contract”)

In the event of disputes between the parties the Contract requires such disputes first be referred to adjudication. The decision of the Adjudicator is final and binding *“unless and until revised by”* arbitration and is *“enforceable as a matter of contractual obligation”*. If a party who is dissatisfied with the Adjudicator’s decision fails to note its dissatisfaction and intention to refer the matter to arbitration within four weeks of the Adjudicator’s decision, the Adjudicator’s decision becomes final and binding.

In this instance five monetary claims by Aveng against Eskom were disputed and the second respondent was appointed as the Adjudicator (“the Adjudicator”). In a decision dated 16 April 2019 the Adjudicator upheld Aveng’s claims 3,4 and 5 and awarded monetary amounts that were to be paid by Eskom. In respect of claim 2, which form the subject matter of this application, the Adjudicator found Eskom to be liable but deferred the quantification of the amount to be paid to a further hearing. The parties were directed to submit written submissions regarding the quantum of the amount to be paid.

The Adjudicator on 30 May 2019 directed Eskom to pay Aveng the sum of R40 087 353.06 in respect of claim 2. The Adjudicator in his

second award recorded that the parties had been engaged in settlement negotiations in respect of all of the claims that were subject to the adjudication. The Adjudicator recorded that the balance of Claim 2 *“be settled for the agreed sum of R40 087 353.06”*.

Eskom has paid Aveng in respect of claims 3 and 4. It has not done so in respect of claims 2 and 5. Through this application, Eskom seeks the enforcement of the Adjudicator’s decision relating to claims 2 and 5. Eskom has conceded the relief sought in respect of claim 5. Eskom, however, persists in its refusal to satisfy the Adjudicator’s decision in respect of claim 2.

Eskom disputes liability to make payment of the amount of R40 087 353.06 for the reason that it alleges that an agreement was concluded between itself and Aveng in terms of which payment of the amount was conditional upon prior approval of the payment by Treasury pursuant to its obligations in terms of the Public Finance Management Act No. 1 of 1999 (“PFMA”) and compliance by Eskom with its internal corporate governance processes.

Eskom further maintains that this payment agreement was incorrectly recorded because the Adjudicator was not apprised of the full terms of the agreement and that the Adjudicator’s award stands to be corrected.

It furthermore maintains that no payment is due because there has not been compliance with the governance processes, nor has there been Treasury approval. Eskom maintains that, as an organ of state, it was precluded from entering into an unconditional agreement to make the payment as recorded by the Adjudicator.

Aveng denies that any agreement rendering payment subject to fulfilment of any conditions were concluded or that the Adjudicator's award would only be enforceable once Eskom's internal governance processes had been complied with and Treasury's approval was obtained.

Subsequent to the Adjudicator's award of 16 April 2019 the parties engaged in without prejudice negotiations to settle the unresolved quantum debate in respect of claim 2. Eskom indicated that it was willing to pay the amount of R40 087 353.06 but subject to compliance with Eskom's internal governance processes and Treasury's approval. Aveng rejected this offer because Eskom was unable to provide any fixed date by which the compliance and approval would be achieved. In rejecting Eskom's offer, Aveng's in an e-mail on 22 May 2019 stated as follows: *"Given that Eskom is not able to accelerate its governance processes and the risks related to the timing thereof, we will have to continue with the adjudication process."*

Pursuant to the rejection of the settlement offer Eskom filed its written assessment of claim 2 and therein maintained that the quantum to be awarded should be the amount of R40 087 353.06. The assessment was not accompanied by any statement that payment should be conditional in any way.

In response to Eskom's delivery of its assessment of claim 2 Aveng addressed an e-mail to the Adjudicator and Eskom, in which it recorded that Eskom has assessed the quantum of claim 2 and that *"this amount is a concession and admission of [Aveng's] entitlement to at least at R40 087 353.06"* and that Aveng *"accepts this amount as assessed by [Eskom] and requests that the Adjudicator proceed to make an award in respect of this amount"*. Eskom did not at any time object to Aveng's characterisation of Eskom's assessment of claim 2.

As requested by Aveng the matter was set down for a hearing by way of a teleconference at which both parties were represented. During the course of the hearing the Adjudicator was informed of Aveng's acceptance of Eskom's assessment of the claim in the amount of R40 087 353.06. Eskom's legal representative did not maintain that the payment of the amount was subject to Treasury approval or Eskom's internal governance processes, either arising from an agreement or as a legal requirement. As a consequence, the Adjudicator issued an award in terms of which the balance of Claim 2 *"be settled for the agreed sum of R40 087 353.06"*.

Having regard to the facts as set out above there is no room to find that the parties entered into an agreement regarding the settlement of claim 2. The opposite appears from the facts namely that the Adjudicator was requested to proceed with the adjudication and make an award for the reason that the parties were at odds with each other and unable to reach any agreement. The amount payable and awarded by the Adjudicator did not arise from any agreement between the parties but from the acceptance by Aveng of Eskom's assessment of claim 2 as part and parcel of the adjudication proceedings.

In view of the finding that no agreement was concluded between the parties the issue of rectification of the agreement or the correction of the award does not arise. The award of the Adjudicator was correct and based on the facts placed before him. The Adjudicator did not act a scribe recording an agreement between the parties but executed his obligation in terms of the contract by issuing an award. The fact that the quantum was no longer in dispute does not render it less of an award.

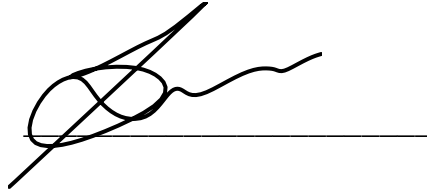
On behalf of Eskom it was conceded that any requirements relating to Treasury's approval or compliance with Eskom's internal governance processes did not apply to adjudication awards.

The final matter that requires consideration is whether this Court should decline to issue an order for specific performance. There are no considerations that mitigate against such an order. To decline ordering Eskom to pay what is due in terms of the contract would undermine the contract itself.

It follows that the relief as prayed for should be granted and the counter application should be dismissed.

The following is made an order of this Court:

- 1 The first respondent's counter application is dismissed;
- 2 The first respondent is directed to pay the applicant the amount of R40 087 353.06 together with the interest thereon until the date of payment;
- 3 The first respondent is directed to pay the costs of this application and the costs of opposing the counter application on the High Court scale as between parties, including the costs of two counsel.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke extending to the right.

J.J. REYNEKE AJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

APPEARANCES

HEARD : 18 May 2020

DELIVERED : 11 September 2020

APPLICANTS : Adv. Jawaid Babamia & Hendrick Pretorius

Pinsent Masons SA Inc

Junaid.Banoonbhai@pinsentmasons.com

RESPONDENTS : Edward Nathan Sonnenbergs Attorneys

aaguitar@ensafrica.com