

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER 12583/21P

In the matter between:

LUKOIL MARINE LUBRICANTS DMCC

APPLICANT

And

**NATAL ENERGY RESOURCES AND COMMODITIES
(PTY) LTD**

RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Applicant is a company incorporated in terms of the laws of United Arab Emirates and having its registered head office or principal place of business at Dubai UAE. It is a subsidiary of Public Joint Stock Company Lukoil Oil Company a Russian multinational energy corporation with its headquarters in Moscow (PJSC Lukoil).

[2] Respondent is a company registered in South Africa and with its registered address as 180 Mahatma Gandhi Road office 222 Spinnaker Durban Point KwaZulu-Natal.

[3] Since 2010 Applicant and Respondent have had a commercial relationship. Applicant engaged Respondent to perform certain services for it.

[4] On 27 April 2016 Applicant and Respondent entered into an agreement headed Distributor and Sales Agreement for Marine Lubricants. This agreement was effective for a period of five years and it would thereafter automatically be renewed for successive five year periods. From the papers it appears that various disputes arose between the parties about stock losses, audits etc. The parties however did not want to cancel the relationship between them and agreed on terms to continue dealing with each other.

[5] On 1 July 2019 Applicant and Respondent entered into a Marine Lubricant Service Provider Agreement. In terms of this agreement Respondent was responsible to store the goods which are supplied to it in a safe place, carry out an audit, sell the goods, compile an inventory once a quarter and at all times ensure that there is adequate insurance cover in respect of the products which it is holding on behalf of Applicant. Agreement was also reached as to payment which had to occur and the invoicing thereof.

[6] Paragraph 11 of the agreement deals with the termination of the agreement and allows for a three month notice period to the other party. It further sets out that if there is a material breach of any terms of the conditions of the agreement and it is not remedied to the satisfaction of the other party then the breach of clauses 3.3 (a) 4, 6 and 7 by Respondent, which relates to the *inter alia* insurance and obligations of Respondent in storing and dealing with the products would be regarded as a material breach entitling Applicant to terminate the contract. It further provides that if the contract is terminated Respondent shall deliver to Applicant the goods which had been delivered to it by Applicant.

[7] Paragraph 16 of the agreement deals with arbitration and states that any claim or dispute or difference arising out of or in connection with this agreement or its validity, interpretation, implementation or alleged breach of any provisions thereof, any contracts, dealings or transactions pursuant thereto or any rights, obligations, terms or conditions contained in the agreement or the interpretation or construction of the agreements or anything done or omitted to be done pursuant to the agreement shall as far as possible be resolved by mutual consultation. It then provides that if after 30 days this cannot be done it will be done by way of arbitration. It then provides “The arbitration proceedings shall be conducted in London and subject to the LMAA rules in force at the time the arbitration proceedings are commenced. The arbitration proceedings shall be governed by English law.”

[8] However due to the disputes that arose between Applicant and Respondent as to quantities of oil and related products which it was alleged had not been accounted for they on the same day as the agreement 1 July 2019 entered into a settlement agreement. In the settlement agreement it was stated as follows in paragraph (C):

“Without any admission of liability by either party, the parties now intend to settle all potential claims arising out of or in connection with the total stock losses, and release each other (and waive any rights that they might have in relation to the same) from any liability incurred in relation to the Total Stock losses and/or the contract.”

Paragraph (D) states:

“This agreement is conditional upon the successful continuation and conclusion of the contract for the full contractual period or full duration of any extension thereof unless terminated by valid breach thereof by Natal and the value Lukoil will pay per the agreed contract price and MT volume as set out herein.”

The “contract” referred to appears to be the contract concluded on 27 April 2016. It was agreed that in respect of the stock losses which were finally settled Respondent would pay 0.05 US \$ per litre of the supplied volume in the month of invoice to Applicant.

[9] Paragraph 10 and 11 of the settlement agreement stipulate it shall be governed by English law that any dispute arising out of or in connection with the settlement agreement shall be resolved by way of London arbitration proceedings governed by the LMAA rules in force at the time of commencement. Both agreements thus require that disputes be settled by arbitration in London.

[10] Applicant contends that due to various breaches by Respondent in that certain quantities of the products have not been accounted for, that there had not been audits, that there had been no insurance etc., that the service provider agreement had thus been terminated and accordingly it is entitled to the relief which is set out in the notice of motion. It therefore seeks that lubricants which are in the possession of Applicant be returned, payment of US \$ 358 526 together with interest a further payment of US \$ 149 124 plus interest and that a customs surety bond deposit with the South African Revenue Services be cancelled by Respondent and costs.

[11] Various correspondence ensued between the parties relating to the claim of stock losses, the reasons therefore that there was no insurance cover and that the necessary audits were not conducted. Applicant contends that it terminated the agreement after the breaches by Respondent were not rectified.

[12] In its answering affidavit Respondent as a first point *in limine* contends that the settlement agreement was concluded and all rights in respect of any claims for stock losses had been settled. There are disputes as to where the goods were stored, insurance claims that were still pending and where goods had to be delivered to. It further contends that in the event of any dispute in terms of the agreement and settlement agreement entered into on the same day it was agreed that it should be governed by English law and by way of arbitration proceedings to be convened in London by the LMAA

rules. The parties failed to resolve the matter and accordingly in terms of the agreements the English law will apply and it will have to be done by way of arbitration in London. It then requests that the application should be stayed pending arbitration proceedings to be pursued and conducted in London according to the LMAA rules.

[13] The second point *in limine* was that due to the numerous disputes of fact and a counter application which is to be instituted by Respondent that it should be referred to trial. It then addresses the issues raised in connection with stock losses, insurance, audits etc. which it is not necessary at this stage to deal with.

[14] Applicant in reply sets out that it seeks the return of certain products which Respondent has no right to hold. It contends that the relationship has been terminated and accordingly it is entitled to have such goods returned to it.

[15] It was submitted on behalf of Applicant that the agreements have been cancelled, and that Respondent was changing its version. It first contended that the agreement was invalid but now wants to take it to arbitration in England in terms of the agreements. It was submitted that an election has to be made in that regard. If Respondent can change its mind then it must pay the costs. It was submitted that Applicant was entitled due to the breaches as set out in its papers to cancel the agreement. There were no disputes of facts and that on Respondent's version Applicant was entitled to cancel the agreement. The amounts which are being claimed have to be paid and Respondent was moving the goal posts the whole time.

[16] It was submitted on behalf of Respondent that it has to be determined whether indeed there was a repudiation by Respondent resulting from the correspondence that had taken place. That was an enquiry which had to be conducted. Applicant relied upon a breach which appears from annexure "SA15" a letter dated 13 August 2021 and then

the termination notice. That was the first time that there was mention of a repudiation. It is submitted that it happened over the covid-19 period, that there was no automatic cancellation and no repudiation. It was submitted that the arbitration clauses were applicable and that it had to be referred to arbitration. In the alternative that it will have to go to trial due to the various disputes of fact.

[17] It was however submitted on behalf of Applicant that in the event of the matter being referred to arbitration that Respondents must pay the costs of the application. This is based on the submission that at first Respondent contended that the agreements were invalid.

[18] From a reading of the papers it is apparent that from the time Respondent filed its answering affidavit it has set out that it is a term of the agreements that any dispute has to be resolved by arbitration if it cannot be resolved and that this should take place in England. It may have been Respondents contention in various of the letters that the agreements were invalid but since this application was brought Respondent has been consistent that the agreements require that disputes be resolved by arbitration in London.

[19] In my view in terms of the agreements it is agreed between the parties that any dispute which may result from the said agreements have to be dealt with by arbitration in England in terms of English Law if it cannot be resolved. From the papers it appears that there is a dispute as to whether there has been repudiation or not. Whether there is still the requirement for the payment of the monetary amounts due to the settlement agreement which was reached and whether indeed there were breaches thereof and on what basis they could perhaps have been justified or not. These are issues which in my view cannot be determined from the papers before me. It would be the correct approach that the matter be decided in arbitration proceedings in terms of the agreements, which is to be in London. There is no bar to the matter being heard by arbitration in London.

Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another (2022) ZASCA 68 (17 May 2022).

[20] It would appear to me that the matter be stayed pending the finalisation of the arbitration proceedings in London is the most feasible solution in the circumstances.

[21] Applicant could after the answering affidavit was filed have agreed to arbitration. This could have reduced the costs in this matter. In my view it is not appropriate to make any costs order at this stage.

I accordingly make the following order:

1. The application is stayed pending the finalisation of arbitration proceedings in London according to English Law and the LMAA rules prevailing at the time.
2. Costs are reserved.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON: 16 FEBRUARY 2023

JUDGMENT HANDED DOWN ON: 16 MARCH 2023

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