IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NUMBER 09/18199

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

25 September 2009 FHD van Oosten

In the matter between

ALSTOM ELECTRICAL INDUSTRIES (PTY) LTD **FIRST APPLICANT**

PHILIP REYNOLDS NO **SECOND APPLICANT**

and

LOTHLORIEN (PTY) LTD **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This application concerns a contractual claim for payment in respect of steam supplied pursuant to a steam supply agreement (the agreement). The first applicant conducts business in the boiler industry. The second applicant is the duly appointed liquidator of Alstom John Thompsom (Pty) Ltd (in voluntary liquidation) (AJT). The respondent owns and operates a boiler house and plant on its site in Germiston. In the manufacturing process of its products the supply of steam is necessary. AJT was a provider of steam. The agreement was concluded 25 October 2006 between AJT and the respondent. The first applicant subsequently in terms of a sale of business agreement acquired the boiler business of AJT and further in terms thereof became entitled to substitute AJT in respect of the agreement which the

applicants contend has been effected. The respondent however disputes that it consented to or that it was aware of the substitution. In the light of the dispute the applicants decided to pursue the claim in the name of AJT only. The application therefore is between the second applicant and the respondent.

[2] AJT's end obligation in terms of the agreement was to supply steam according to prescribed specifications to the respondent for use in its industrial facility. For that purpose AJT was obliged to operate and maintain the respondent's boiler plant. One of the components supplied by AJT to the respondent for the production of steam was coal the cost of which as will become apparent later, was factored into the total cost per ton of steam supplied. It is common cause between the parties that AJT in terms of the agreement in fact from time to time supplied steam to the respondent; that AJT's invoices in respect thereof were rendered to the respondent; that the respondent fell into arrears with its payments; that the respondent has failed to pay the arrears initially from September 2008 and thereafter from March 2009 and that the agreement has been cancelled. The second applicant's claim is for payment of the total sum of R 4 064 201.30 subdivided into ten claims each based on an invoice with dates ranging from 6 October 2008 to 3 March 2009.

[3] The respondent denies that AJT supplied steam in accordance with the prescribed specifications and further disputes the correctness of the charges for which it was invoiced. The defences raised by the respondent in essence concern the *quantum* of the second applicant's claim. Firstly, the respondent alleges that it has since October 2008 been overcharged in respect of the quality of coal supplied to it in terms of the agreement and secondly, that it is entitled in terms of clauses 20.4 and 20.6 of the agreement to certain deductions from the amount payable by it with the result that nothing is owing to the second applicant.

[4] Before dealing further with the respondent's defences it is convenient to first consider the argument raised by counsel for the respondent to the effect that the application falls to be dismissed for the reason that the applicants have failed to furnish sufficient particularity in the founding papers as to how the amounts claimed were computed. The agreement contains extensive provisions relating the price structure applicable between the parties including formulae for calculating components such as "feed water" and "condensate return". These are not dealt with at all by the applicants who instead in the founding affidavit have merely referred to and annexed the ten invoices I have earlier referred to in support of the claims. The invoices typically merely mention the "capacity charges" and the amounts in respect thereof for a particular month, as well as VAT thereon and interest on arrears. This counsel for the respondent submitted amounts to robustness in the extreme, resulting in the applicants who by their own doing have elected to claim by way of motion proceedings, not having made out a cause of action. For the reasons that follow the contention is without merit and falls to be rejected.

[5] The respondent's initial arrears came up for discussion between the parties as far back as during October 2008. Of significance is the response thereto by the respondent's managing director, Ms Carrara. In an email to Mr Dawson the general manager of AJT, she firstly, blames a strike by employees of the respondent "which unfortunately affected cash flows severely" for the arrears and, secondly, almost begs AJT to "bear with us, the outstanding invoice will be settled shortly and the invoice for next month will be on track". The email contains no inkling of a dispute regarding the calculation of the amounts on this invoice. After that the respondent again fell into arrears. This resulted in a meeting that was held on 3 March 2009 during which amongst others the respondent advised (as was later confirmed in an email) that "the outstanding 30 days payment of R1 274 549 would be paid by 5 March 2009". Again one looks in vain for any dispute on the calculation of the amounts payable. After the service of the application on the respondent and before filing the answering affidavit, the deponent thereto Mr Koekemoer (who is the brother of Ms Carrara) says that he availed him of time to reflect. One of the aspects that came to mind, he says, is that the agreement

“contains a number of onerous and one-sided clauses” that were not brought to his sister’s attention when she signed the agreement which he then concludes is in violation of the “respondent’s right in terms of section 34 of the Constitution”. Fortunately this aspect, wisely I am constrained to add, was not pursued any further. But it has this significance: the respondent was now faced with an application for payment where as for the amounts claimed, the applicants’ sole reliance was placed on the invoices annexed. But that on the deponent’s reflection does not seem to have caused him concern, on the contrary, he in answer to the invoices annexed and the amounts claimed merely states: “I admit the allegations contained in these paragraphs”. I agree with counsel for the applicants: the respondent undoubtedly on the amounts claimed confessed and avoided. The avoidance is by raising the defences I have referred to, resulting in the attack now launched on the absence of particulars concerning the calculation of the amounts claimed, drifting into irrelevance.

[6] This brings me to the defences relied upon by the respondent. By way of background it is again significant that the reliance on these defences also emerged rather belatedly. The first reference to problems the respondent had is to be found in an email of Mr Koekemoer addressed to Mr Dawson in response to the meeting of 3 March 2009 I have already referred to. There Koekemoer states that they will not be paying their account “until a few issues are sorted out”. Only one complaint is then raised which concerns the alleged use by AJT of B-grade coal (instead of A-grade coal) “meaning we are and have been overcharged for a long time now as there is a cost saving which you have enjoyed”. As the matter progressed the defences developed and amplified into what they have eventually become in argument before me.

[7] In regard to the respondent’s overcharge defence the terms of the agreement concerning the calculation and adjustment of the steam price payable by the respondent to AJT are of critical importance. The total price of the steam consisted of a “monthly capacity charge” of R158 405.00 per month, plus a “variable charge” of R51.57 per ton of steam used, which was payable when firing on coal; less a credit (or plus a debit, as the case may be)

for condensate return based on a formula set out in clause 14.2.3 of the agreement. The "monthly capacity charge" and "variable charge" were to be calculated, based on the formula set out in Schedule IV to the agreement, utilising *inter alia* the cost for coal supply per ton by AJT as at date of signature of the agreement. Clause 20.1 of the agreement provides:

> >From the anniversary of the Signature Date [i.e. from the anniversary of 24 October 2006], the price as set out in 19 shall be adjusted on the basis set out in **Schedule IV** hereto. The parties shall review the method of price adjustment 3 (three) years after the Steam Supply date. Should the parties then fail to agree on a new method of price adjustment, the method used at that time will continue to apply until the dispute between the parties has been resolved by arbitration in terms of …

[8] Schedule IV bears the heading "PRICE ADJUSTMENT AND PAYMENT FOR THE INITIAL PERIOD". Below this there are two sub-headings, the first "Monthly Capacity Charge payable by the Customer to AJT" reflecting the amount of R158 405.00 and the second "Monthly Variable Charge per ton of Steam payable by the Customer to AJT when Firing on Coal". The variable charge is in turn made up of two components, a coal and a PPI-based variable component. The coal component is computed in accordance with a formula recorded in the agreement. Alongside the coal component there is firstly, stated in the column under the heading "Proven cost or adjustment basis at contract signature date (Excl VAT)" the sum of R327.30 per ton of coal; then under the heading "Price at Base Date (Excl VAT)" the sum of R42.39 and lastly, under the heading "Basis of Price Adjustment" the words "Proven Costs".

[9] The grade of coal is not specified in the agreement. It is the respondent's case that the quality and grade of coal supplied to it was important in this respect: a lower quality coal does not burn as efficiently as a higher quality coal, resulting in blockages and nesting in the respondent's boiler tubes thereby causing downtime and ultimately a loss of production and profit. For this reason it was required that AJT supply the respondent with A grade coal for which it would be charged accordingly.

[10] The respondent contends that the monthly capacity charge and the monthly variable charge were fixed for 12 months commencing from signature

date of the agreement, to be adjusted only on the anniversary of the signature date and thereafter only again on the next anniversary date on the basis set out in Schedule IV to the agreement. Based on this contention the respondent has performed a reconciliation and has established that AJT increased charges contrary to the provisions of the agreement (and taking into account further incorrect coal rates used by AJT for calculation the monthly variable charge per ton of steam) showing that the maximum amount payable to AJT would have been R116 341.62. Nonetheless the respondent relies on further alleged breaches by AJT for example the supply of inferior quality grade coal for contesting liability even estimating (on the information at its disposal) overpayment by it.

[11] The starting point is to interpret clause 20 of the agreement read with Schedule IV thereto. The opposing contentions of the parties concern the question whether the coal charges after the first anniversary date of the signature date is variable either on a monthly or only an annual basis as the respondent would have it. The first difficulty arising from the respondent's interpretation as correctly pointed out by applicants' counsel, lies in the wording of the term itself: it is hardly conceivable that a "monthly variable charge" is only variable on an annual basis. Clause 19.1.2 indeed merely refers to "a variable charge of R51.57" but that must as provided for in clause 20.1, be read together with Schedule IV dealing specifically with price adjustment, which puts it beyond doubt that it is nothing but a monthly variable charge from the anniversary of the signature date. I am unable to read into the agreement an intention by the parties that the adjusted monthly variable charge on the anniversary of the signature date would remain fixed until adjusted on the next anniversary of the signature date. The ordinary plain grammatical meaning of the provisions I have referred to, in my view excludes the interpretation contended for by the respondent. It is not necessary as contended for by counsel for the respondent to call in the aid of looking at the subsequent conduct of the parties to interpret the provisions of the agreement. Counsel for the respondent submitted that evidence was required to prove the applicants' interpretation and that the matter should therefore be referred to trial. I do not agree. The agreement is capable of an interpretation

on the papers before me and in view hereof it will serve no purpose for the matter to proceed to trial.

[12] Finally, I come to the issue as to the grade of coal supplied by AJT. The defence raised is that a lower grade of coal was supplied which led to AJT incorrectly charging the respondent. I have already mentioned that the agreement does not prescribe the grade of coal to be supplied by AJT. Counsel for the respondent relied on a number of factors in support of the contention that the required A-grade coal was to be used. He referred to the industry prices which are fixed on an annual basis, the fixed prices that were obtained prior to the conclusion of the agreement, that AJT knew it was required not to expose the respondent to fluctuating coal prices and that the use of A-grade coal as explained by the respondent, in many respects such as it would have prevented "nesting", was beneficial in the process of producing steam. I am not persuaded that a departure from the normal rules of interpretation is called for in the instant matter. The agreement requires AJT to deliver certain volumes of steam. The amount of coal necessary to produce the required results was the applicant's concern. A lower grade may well have resulted in the usage of increased tonnage of coal but that is clearly an aspect the parties who are role players in this specialised industry, must have considered when the agreement was concluded. Had they wanted to regulate this aspect to make more business sense as the respondent now contends, one would have expected specific words or terms to that effect in the agreement of which there are none. Much was made of the "proven costs" in relation to the basis of the coal's price adjustment which has not been defined in the agreement but which the respondent submitted cannot mean whatever grade of coal AJT would decide to supply. Nothing in my view turns on this, it is plainly and simply the basis used for price adjustment and does not in any way support the respondent's contention.

[13] For these reasons I have come to the conclusion that the respondent has failed to raise any sustainable defence against AJT's claims and it follows that the second applicant has become entitled to judgment as prayed for in the notice of motion.

[14] In the result an order is granted in favour of the second applicant in terms of prayers 1, 2 and 3 (costs to include the costs of two counsel) of the notice of motion.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	***16 SEPTEMBER 2009***
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