

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2020/4931

COMMERCIAL COURT

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

11. iii. 20.....  
DATE

.....  
SIGNATURE

In the matter between:

KATHU SOLAR PARK (RF) (PTY) LTD

APPLICANT

And

TERRY MAHON

FIRST RESPONDENT

LICIASTAR (PTY) LTD

SECOND RESPONDENT

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J U D G M E N T

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## UNTERHALTER J

### INTRODUCTION

1. The applicant, Kathu Solar Park (Pty) Ltd, ("Kathu") employed the second respondent Liciastar (Pty) Ltd ("Liciastar") as the construction contractor in terms of an engineering, procurement and construction contract (" the EPC contract"). The EPC contract engaged Liciastar to construct a solar power plant. The EPC contract, in clause 21, provides for dispute resolution. One type of such dispute resolution is fast track dispute resolution by an independent expert (" the fast track").
2. Liciastar referred a dispute to the fast track. The first respondent, Mr Mahon, was appointed as the independent expert to determine the dispute. Kathu and Liciastar are at odds as to the scope of Mr Mahon's jurisdiction. Mr Mahon abides this court's decision.
3. Kathu brought an urgent application to interdict Liciastar and Mr Mahon from proceeding with the fast track process, pending the determination of Mr Mahon's jurisdiction. The matter came before me for certification as a commercial court case. I certified the case, and rather than burden the urgent court, heard the application for final relief on an expedited basis.

4. It is common ground that on 26 December 2018, Liciastar sent a letter to the Director of the Law Society of the Northern Provinces. Liciastar indicated that a dispute had arisen with Kathu under the EPC contract.

5. In the letter, Liciastar referenced the dispute as follows:

*" The dispute relates to the intention of the Owner to charge Delay Liquidated Damages to the Contractor due to potential delays in achieving the Initial Acceptance Date of the Plant from the 18<sup>th</sup> December 2018 ( the "Dispute")*

*The EPC clauses 13.5, 13.6 and 13.7 regulates DLD and payments, the Contractor, taking into account current Project situation want to dispute any payment of DLD as the EPC Contract says in clause 13.7.1 :*

*" Any dispute between the Parties about whether the Contractor is liable to pay Liquidated Damages pursuant to clauses 13.5 and 13.5 ( sic) shall be determined by an Independent Expert in accordance with clause 21.2"*

6. Kathu and Liciastar agree that at the time that the letter was written to the Law Society a particular dispute had crystalized. The EPC contract provides for a scheduled initial acceptance date ("SIAD"). Initial acceptance references when the facility is considered capable of commercial operation and ready for initial acceptance by the owner, as judged against stated requirements. The SIAD may be extended or amended. The EPC contract distinguishes the SIAD, that is the scheduled date for initial acceptance and the initial acceptance date ("IAD"), being the date on which the owner delivers a



certificate to the contractor stating the date upon which the facility complied with the initial acceptance requirements.

7. The EPC contract regulates the consequences of a failure by the contractor to cause the IAD to occur on or before the SIAD, that is a failure to ensure that the facility complies with the initial acceptance requirements on or before the scheduled date. In that event the contractor shall pay to the owner delay liquidated damages ("DLDs").
8. Liciastar submitted extension of time claims. The effect of these claims, if recognized, would move the SIAD, thus allowing Liciastar more time to meet the initial acceptance requirements. Certain of these claims were recognized by Eskom. This extended SIAD to 18 December 2019.
9. Kathu, however, was unwilling to suspend the imposition of DLDs beyond that date and commenced the imposition of DLDs on 19 December 2018.
10. It is common ground that this gave rise to a dispute between Kathu and Liciastar. Kathu's position was that it was entitled to invoice Liciastar from 19 December 2018 for DLDs and to do so until IAD. Liciastar's stance was that Kathu had no entitlement to do so because the pending extension of time claims would, if recognized, extend SIAD. The dispute that crystallized in December 2018 was this: could DLDs be imposed even though the final SIAD might yet be extended? ("the imposition dispute")
11. Kathu contends that the imposition dispute is the only dispute that was referred to the independent expert, Mr Mahon, and it was determined by him. Liciastar contends that

the dispute referred to the independent expert is far wider and encompasses the liability of Liciastar for DLDs (" the liability dispute ") On 16 July 2019, Mr Mahon decided the imposition dispute in favour of Liciastar. In his decision, Mr Mahon reflected the difference between the parties as to the dispute he was required to determine. Mr Mahon considered this difference to be "*of little moment* " because he considered that the EPC contract in clause 21.2 permitted him to "*take the initiative in ascertaining the facts and the Law*" and this included deciding the order in which issues in dispute should be dealt with. Consequently, Mr Mahon wishes to entertain the liability dispute.

12. I must decide two issues. First, what disputes have been referred to the independent expert and what disputes may he determine? Second, if the independent expert lacks jurisdiction to determine the liability dispute, was it permissible for Kathu to approach this court for relief as it has done, and is Kathu entitled to the relief that it claims?

### **JURISDICTION**

13. Whether Mr Mahon enjoys the jurisdiction to determine the liability dispute depends, in the first place, upon an interpretation of the relevant provisions of the EPC contract and what it is that was referred for dispute resolution.
14. The EPC contract recognizes two species of dispute resolution. The first is by way of negotiations to reach a settlement, failing which the dispute shall be resolved by arbitration. The second is by way of the fast track. Dispute resolution by negotiations



and if necessary arbitration must be used, unless the provisions of the EPC contract permit a dispute to be referred directly to the fast track ( clause 21.1). Clause 21.2, which regulates the fast track commences as follows: “ *Disputes expressly referred for determination pursuant to this clause 21.2 shall be determined by the relevant Independent Expert*”

15. Clauses 13.5, 13.6 and 13.7 regulate DLDs. Clause 13.7.1 read as follows : “*Any dispute between the Parties about whether the Contractor is liable to pay Liquidated Damages pursuant to clauses 13.5 and 13.6 shall be determined by an Independent Expert in accordance with clause 21.2* ”

16. It is clear from the wording of clause 13.7.1 , and was common ground between the parties, that both the imposition dispute and the liability dispute are disputes that the EPC contract requires to be determined by the fast track.

17. However, the introductory language of clause 21.2 stipulates that disputes must be expressly referred for determination. It is disputes thus referred that shall be determined by the independent expert by way of the fast track.

18. Before the independent expert can assume jurisdiction over a dispute two requirements must be satisfied. First, the dispute must be one that the EPC contract permits of resolution by recourse to the fast track. Second, the dispute must be expressly referred to the independent expert under the fast track.

19. Since it is common ground that the imposition dispute and the liability dispute may permissibly be resolved by recourse to the fast track, the question is whether the

liability dispute was expressly referred to Mr Mahon under the fast track. The parties are at odds on this question.

20. What is it, then, that Liciastar referred for determination by the independent expert? I must in the first place consider the text that Liciastar used in its letter of 26 December 2018 to the Law Society in which it defined the dispute and sought to refer the dispute in terms of clause 21.2 of the EPC contract.

21. I have set out above the relevant passage from the letter.

22. Liciastar emphasizes this portion of the letter : “ ... *the Contractor, taking into account current Project situation wants to dispute any payment of DLD as the EPC contract says in clause 13.71 ...*”. Liciastar submits that it placed in dispute any payment of DLDs and that covers the liability dispute.

23. I do not agree. First, the relevant text defines the dispute. The dispute, as defined, relates to the intention of Kathu to charge DLDs due to potential delays. There can be little doubt that this refers to the imposition dispute. Having defined the dispute, Liciastar references the relevant clauses of the EPC contract that regulate DLDs and payments.

24. What then of the portion of the letter emphasized by Liciastar ? This says, “*taking into account current (sic) Project situation*”. As at 26 December 2018, the current project situation was that Liciastar sought extensions of the SIAD, Kathu nevertheless sought to impose DLDs, and Liciastar disputed its entitlement to do so. The only dispute that had crystalized was whether DLDs could be imposed, even though extensions of SIAD



were sought by Liciastar. When Liciastar then referenced in the passage quoted that it “*wants to dispute any payment of DLD ...*”, it was disputing payment of DLDs on the basis that Kathu could not impose DLDs while Liciastar sought extensions of SIAD. That was the only dispute that then existed concerning payment of DLDs. Hence, the portion of the letter relied upon by Liciastar, properly interpreted as part of the passage as a whole, was simply saying that whether payment could be claimed when the imposition of the DLDs was in dispute was a species of dispute that the EPC contract requires to be determined under the fast track.

25. It is difficult to postulate a different interpretation. To refer a dispute for determination, there must be a particular live controversy between the parties. *Delfante*<sup>1</sup>, put it this way: there must be an issue, palpable and genuine. If no dispute has yet crystalized, there is nothing to refer. Even if a party anticipates a dispute, that too does not suffice. The dispute may not actually come about, or the dispute may yield to concession or compromise. In neither case is there anything to refer. If there is a dispute, there may be further requirements that must be met before a referral can take place. But absent a dispute, there can be no referral – nothing comes from nothing.

26. It follows that if, as Liciastar concedes, the only live dispute between the parties when the referral took place was the imposition dispute, then all that could have been referred to the independent expert was the imposition dispute. That Liciastar may have anticipated other disputes, including the liability dispute, is irrelevant. There can be no anticipatory referral of a dispute that has not yet crystalized.

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<sup>1</sup> *Delfante and another v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C) at 227



27. Counsel for Liciastar, *Mr Reyneke SC*, pressed the point that once Liciastar indicated that it wanted to dispute any payment of DLDs, that permitted of a referral to the independent expert of the liability dispute even though this dispute was not yet an issue between the parties. That submission falls to be rejected. An anticipatory referral, for the reasons given, is not competent.
28. Mr Mahon considered that the difference between the parties as to the scope of the referral to be of little moment. He understood clause 21.2 to allow him to "*take the initiative*" and on the grounds of convenience entertain the liability dispute.
29. That is not a competence that Mr Mahon enjoyed. Clause 21.2 requires the independent expert to act impartially and "*may take the initiative in ascertaining the facts and the Law*". Whatever freedom this may allow the independent expert to apply his industry and expertise, and use inquisitorial procedures, it does not extend to a competence to fashion the scope of the dispute that has been referred to him. The manner in which the independent expert goes about ascertaining the facts and the law relates only to the dispute referred to him. This provision in the EPC contract affords the independent expert no power to expand the scope of the dispute requiring his determination.
30. In so holding, I should not be misunderstood to say that the independent expert could not investigate what disputes had been referred to him. He could have done so. He might then have declined to adjudicate further on a reference not properly made or he may have decided to proceed and determine the dispute. However, unless the EPC contract conferred the power upon the independent expert to decide the jurisdictional

dispute, in addition to the underlying dispute, the independent expert cannot determine his own jurisdiction. The party challenging jurisdiction would then resist enforcement of any determination, and the courts would decide the jurisdictional issue. But here Mr Mahon did not rule on the jurisdictional issue as to what dispute had been referred to him. Rather, he decided of his own initiative to assume jurisdiction to decide the liability dispute. The EPC contract provides no competence for the independent expert to assume jurisdiction by unilateral fiat.

31. For these reasons, I find that Mr Mahon enjoys no jurisdiction to determine the liability dispute.

#### **ARE THE PROCEEDINGS PERMISSIBLE?**

32. Liciastar contends that under the terms of the EPC contract, the parties bound themselves to take their disputes to dispute resolution and not to the courts. The parties are before Mr Mahon in the fast track process. Mr Mahon has adopted a two stage process. He has determined the imposition dispute and would now proceed to determine the liability dispute. The court, it was submitted, should be slow to intervene in these circumstances. Rather, Kathu should raise its jurisdictional objections before Mr Mahon. Should these be unavailing, Kathu can always resist enforcement of any adverse determination that Mr Mahon may make.



33. Ultimately, Liciastar does not say that I cannot make an order to vacate the jurisdiction of Mr Mahon in respect of the liability dispute, but that I should not do so.
34. Fast track dispute resolution under the EPC contract is not an arbitration. It is thus not subject to the supervisory jurisdiction given to this court under the Arbitration Act 42 of 1965. Akin to arbitration, however, the fast track is based upon agreement by the parties to have defined disputes referred for private determination. This choice, the Constitutional Court in *Lufuno*<sup>2</sup> has stressed, should be respected by the courts.
35. That respect does not mean that the remedies that a court standardly applies to agreements are avoided. The lack of a statutory underpin for expert determinations means that such determinations are approached by the courts by reference to the law of contract. Where an expert has exceeded his mandate in some material respect, the resulting determination is a nullity. That is precisely what occurs when an expert in the position of Mr Mahon seeks to assume jurisdiction over a dispute that he does not have. I can see no reason of principle why a party to such an agreement where compliance with the agreement has not taken place may not seek appropriate relief. That is the position in English law,<sup>3</sup> and our law is no different.
36. The burden of Liciastar's submission is not that I cannot intervene at this stage of the fast track proceedings, but that I should not do so, in deference to the process before Mr Mahon. Kathu submits that since its case is predicated upon the enforcement of

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<sup>2</sup> *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 526 (CC) at [219]

<sup>3</sup> *Shell UK Limited v Enterprise Oil PLC* 1999 (2) Lloyd's Reports 456 at 470

its contractual rights, whether I should provide relief is not a question of discretion, if it has made out its case, an order must follow.

37. In the *Inter-Continental Finance* case<sup>4</sup>, the court had to decide between two lines of authority as to whether a court should interdict pending arbitration proceedings on the grounds that the reference to arbitration was not binding. On one view, no harm could come from allowing the arbitration to proceed. The party complaining of a want of jurisdiction can participate under protest. If she succeeds in the arbitration, the complaint falls away. If not, she can resist enforcement of the award. The other view, adopted in *Inter-Continental Finance*, is that to await the outcome of the arbitration and then oppose the enforcement of the award is neither convenient nor just. Rather a party should be permitted to seek an order that prevents futile proceedings that involve wasted and, to some extent, irrecoverable costs.

38. I am seized with an application to declare that Mr Mahon does not have jurisdiction to determine the liability dispute in the fast track process. Although not an arbitration, the issue as to whether a court should grant a remedy that interferes with a process of dispute resolution that is underway is of piece with the question that was answered in *Inter-Continental Finance*.

39. Kathu seeks an order the effect of which is to restrain Mr Mahon from proceeding with the fast track determination of the liability dispute. Kathus's case rests upon Mr Mahon exceeding his mandate. I have found that Mr Mahon has no jurisdiction and thus that

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<sup>4</sup> *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd* 1979 (3) SA 740 (W)



he has, in wishing to proceed with the fast track process, exceeded his mandate. It follows also that Kathu has established a right to enforce the EPC contract, and in particular, the limits of what that contract provides as to dispute resolution.

40. This does not mean that the court is bound to prevent the fast track process that Mr Mahon has commenced. The recognition of Kathu's right does not require that the court must grant an interdict or declaratory relief in all circumstances. This is so because both of these remedies require the exercise by the court of a discretion that is responsive to the circumstances of the case.

41. Nor, with respect to the learning reflected in *Inter-Continental Finance*, is there a single answer to the question as to whether a court should intervene when a party complains that an independent expert lacks jurisdiction. Where the expert enjoys no competence to determine the dispute and the proceedings are at their inception, a court will incline towards intervention so as to avoid cost and provide clarity. Where the question of competence is not self-standing; or where the complaint concerns how the expert exercised a power and not whether he enjoyed the power; or if the proceedings are well underway; or if there is some benefit to be obtained from securing the expert's determination ( the list is by no means exhaustive ), then the court will incline against intervention.

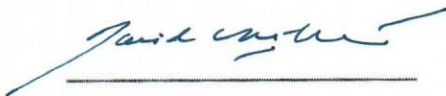
42. In this case, the question of jurisdiction is self-standing and I have found that Mr Mahon lacks jurisdiction in respect of the liability dispute. The proceedings, though underway, have not progressed beyond the pleadings. Kathu has all along contended that Mr Mahon lacks jurisdiction. In these circumstances, I do not consider that there

is benefit in allowing the fast track proceedings to continue. It is unwarranted to put the parties to the cost of proceedings where there is a want of jurisdiction. True enough, Kathu may prevail in the fast track determination of the liability dispute. But it is surely less costly that it achieves that result by way of my determination of the question of jurisdiction. And if Kathu were to fail in the the liability dispute, the courts would then be burdened with determining the very question of jurisdiction that I have decided.

43. For these reasons, and upon my assessment of the circumstances, Kathu is entitled to the declaratory relief that they seek. Liciastar opposed this relief and is liable for the costs occasioned by its opposition.

In the result, I make the following order:

- i) Declaring that the First Respondent does not have jurisdiction in the fast track dispute resolution process to determine the issues or grant the relief set out in the Second Respondent's statement of claim dated 31 January 2020.
- ii) The Second Respondent shall pay the costs of this application



**David Unterhalter**

**Judge of the High Court**



**Gauteng Local Division: Johannesburg**

**Date of Hearing: 6 March 2020**

**Date of Judgement: 11 March 2020**

**Appearances:**

**Applicant: Advocate S Symon instructed by MDA Attorneys**

**Second Respondent: Advocate CS Reyneke instructed by Pinsent Masons  
Attorneys**