IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before:

The Hon Mr Justice L G Nuku

Case No: 20035/2024

In the matter between:

AMAKHALA EMOYENI RE PROJECT 1 (RF) (PTY) LTD	Applicant
and	
NORDEX ENERGY SOUTH AFRICAN (RF) (PTY) LTD	First Respondent
ENGINEERING COUNCIL OF SOUTH AFRICA	Second Respondent
REFILWE BUTHELEZI N.O (in her capacity as the President for the time being of the Engineering Council of South Africa)	Third Respondent

Date of hearing : 31 January 2025
Date of Judgment : 8 April 2025

JUDGMENT

NUKU J

[1] The applicant and the first respondent are parties to an Engineering, Procurement and Construction Contract dated 8 May 2013 (**the EPC Contract**) in terms of which the first respondent was obliged to supply, erect and install constituent components of wind turbine generators that make up the wind farm that is owned and operated by the applicant.

[2] Clauses 33 and 34 of the EPC Contract deal with resolution of disputes arising from the EPC Contract. Paragraph 33 specifically deals with what I would term '*general disputes'* and paragraph 34 which deals with what I would term '*specified disputes'*. Different regimes apply to the resolution of general disputes and specified disputes, and for the regime that applies to the resolution of general disputes is not relevant to this application.

[3] Specified disputes are subject to resolution by an independent expert according to a fast-track dispute resolution process. TÜV Nord, Germany (**TÜV**) was appointed as the independent expert to resolve specified disputes. In the event of TÜV's unavailability or inability to act the parties may agree to appoint an alternative independent expert and failing agreement, any party may request Engineering Council of South Africa (**ECSA**) to nominate one.

[4] A dispute arose between the parties regarding the existence of a specified dispute and on 20 May 2024, the applicant requested TÜV to confirm its availability and ability to act as an independent expert. The applicant received no response from TÜV.

[5] Considering TÜV's failure to respond as indicative of its unavailability or inability to act, the applicant approached the first respondent seeking its agreement to appoint an alternative independent expert to resolve the dispute.

[6] The response by the first respondent was to dispute that TÜV's failure to respond means that it is unavailable or unable to act as contemplated in the EPC. The result was that the parties could not reach an agreement regarding the appointment of an alternative independent expert.

[7] The parties having failed to reach an agreement regarding the appointment of an alternative independent expert, the applicant requested ECSA to nominate an alternative independent expert. ECSA declined to nominate an alternative independent expert on the basis that the request was not jointly made by the parties and this is what prompted the applicant to approach the court seeking declaratory relief to the effect that (a) it is entitled to request ECSA to nominate an alternative independent expert and that (b) ECSA is entitled to nominate an alternative independent expert.

[8] The first respondent opposed the application on the following bases:

(a) that the dispute between the parties on whether TÜV is available and able to act is one that falls to be resolved in terms of the regime that applies to the resolution of general disputes as set out in paragraph 33 of the EPC Contract, which includes arbitration, and that the application should therefore not have been brought;

(b) that the conditions for the appointment of an independent expert have not been met in that the applicant had not referred the dispute to TÜV; and

(c) that the applicant had failed to show good cause why the provisions of clause 33 should not apply to the dispute relating to the applicant's entitlement to approach ECSA to nominate an alternative independent expert.

[9] The deponent to the first respondent's answering affidavit, in the course of responding to the applicant's case, stated that the disputes between the parties are wider than specified disputes, such that they are not suitable for resolution by an independent expert. In this regard, he stated that '*the ambit of the dispute sought to be referred to the fast-track is beyond the proper scope of the fast-track procedure and requires determination in terms of clause 33.4 of the EPC Contract'*.

[10] The applicant, in reply, treated what was stated in the first respondent's answering affidavit above as an offer by the applicant to have all the disputes determined in terms of clause 33.4 of the EPC Contract. Having treated it as an offer, it proceeded to state its acceptance and, based on its acceptance, it applied to amend the notice of motion to introduce an amended prayer to the effect that the parties have reached an agreement on the ambit of issues to be referred to arbitration in terms of clause 33.4 of the EPC Contract. The applicant's application to amend its notice of motion was not preceded by the customary notice of intention to amend in terms of rule 28 (1) of the Uniform Rules of Court.

[11] The first respondent opposed the application to amend the applicant's notice of motion based on the applicant's failure to comply with the provisions of Rule 28 (1) of the Uniform Rules.

[12] When I heard the matter on 31 January 2025, the substance of the dispute had somewhat faded in that it was clear that both parties intended to refer all disputes between them to arbitration in terms of clause 33.4 of the EPC Contract. The difference was that the applicant sought an order to that effect (based on the amended notice of motion), whereas the first respondent preferred to have its position recorded in the court order.

[13] After hearing arguments from both parties each counsel was requested to provide the court with a proposed draft order. The draft order provided by the applicant's counsel, in the relevant part, reads:

> *'. . . IT IS HEREBY ORDERED THAT:*
>
> *1. The applicant's interlocutory application to amend its notice of motion is granted, its non-compliance with Uniform Rule 28 is condoned and the notice of motion in the main application is amended accordingly.*
>
> *2. It is declared that:*
>
> *2.1 there is a binding arbitration agreement between the applicant and the first respondent in terms of which the dispute between them regarding a serial defect, which includes the dispute regarding the existence of a serial defect, can be referred to arbitration in accordance with clause 33.4 of the EPC Contract between the applicant and the first respondent (i.e. arbitration under the ICC rules); and*
>
> *2.2 in the event that the applicant invokes the aforesaid arbitration agreement, the first respondent has accepted the jurisdiction of the arbitrator and cannot object thereto on the basis that the fast-track process provided for in clause 34 of the EPC Contract should be employed to determine whether or not a serial defect exists.*
>
> 3. *The first respondent shall pay the applicant's costs in the main application, and in the interlocutory application such costs as were occasioned by its opposition thereto, which shall include costs of two counsel on Scale C.'*

[14] The draft order provided by the first respondent's counsel, on the other hand, reads:

'. . . IT IS HEREBY ORDERED THAT:

1. The applicant's non-compliance with the provisions of Rule 28 (1) is condoned and the applicant's application for leave to amend its notice of motion is granted.

2. The applicant's main relief (as amended) and the applicant's alternative relief are refused, and the main application is dismissed.

3. It is recorded that the first respondent agrees and undertakes that, if the applicant refers the dispute regarding the applicant's serial defect claim, which includes the dispute regarding the existence of a serial defect, to arbitration in terms of clause 33.4 of the EPC Contract (i.e., arbitration under the ICC rules), the first respondent will accept the jurisdiction of the arbitration tribunal and will not object on the basis that the fast track process provided for in clause 34 of the EPC Contract should be employed to determine whether or not a serail defect exists.

4. The first respondent will pay the applicant's party and party costs of suit incurred up to and including the date of delivery of the first respondent's answering affidavit, and the applicant will pay the first respondent's party and party costs of suit incurred after the date of delivery of the first respondent's answering affidavit. In each case such costs shall include the costs of two counsel, where employed, on Scale C.'

[15] Examining the two draft orders side by side reveals that there are three issues that each draft order deals with, namely, (a) the application for amendment; (b) the entitlement of the applicant to an order in terms of the amended notice of motion; and (c) costs. I deal with each of these issues in turn below.

[16] Starting with the application for amendment, the parties agree that the applicant's non-compliance with Rule 28 should be condoned and that the applicant should be granted leave to amend its notice of motion. An order to that effect will accordingly be granted as agreed.

[17] The next issue relates to the applicant's entitlement to the amended declaratory relief. The applicant accepts that the amended relief it seeks is not the one provided for in the EPC Contract and in fact, varies the dispute resolution procedures prescribed by the EPC Contract. This is because the EPC Contract provides separate regimes for resolution of general disputes as well as specified disputes. The amended relief that the applicant seeks is to have both the general as well as the specified disputes resolved under the regime that, in terms of the EPC Contract, applies in respect of general diputes. That notwithstanding, the applicant contends that it is entitled to the amended relief because it accepted the first respondent's offer to refer the disputes to arbitration in terms of clause 33.4 of the EPC Contract that the first respondent made in its answering affidavit.

[18] The first respondent, for its part, denies that it made an offer to have all the disputes referred to arbitration in terms of clause 33.4 of the EPC Contract and contends that it merely stated its position, which it maintains, that it will not insist on the strict compliance with the dispute resolution procedures contained in the EPC Contract such that it would agree to the referral of specified disputes to arbitration even though the EPC Contract requires these to be resolved in terms of the fast-track process.

[19] I have some reservations about the applicant's entitlement to the amended relief. Firstly, it is not the relief that the applicant could claim in terms of EPC Contract, and it, in fact, is a variation of the EPC Contract. Clause 37.11 of the EPC Contract which deals with variation of its terms provides that '*A variation of any term of this contract shall be in writing and signed by the parties*'. It is common cause that the variation has not been signed by any of the parties, even if one were to accept that the first respondent made an offer which was accepted by the applicant. Such an accepted

offer, without being reduced to writing and signed on behalf of both parties, is not one that the applicant can claim to be entitled to enforce.

[20] The second reservation I have about the applicant's entitlement to the amended relief arises from the fact that there is a disagreement between the parties about the very existence of the agreement that the applicant seeks to have made an order of court. In the circumstances, my view is that granting the amended relief would amount to this court making a contract for the parties, something that is not within the competency of this court. In the final analysis I am not satisfied that the applicant is entitled to the amended relief.

[21] The first respondent, on the other hand, has made a tender that it will not object to the referral of all disputes (including specified disputes) to arbitration under the ICC rules and that this can be recorded in the order that this court makes. It is difficult to understand the applicant's objection thereto as the recordal of the first respondent's tender, in substance, achieves what the applicant sought to achieve by way of its amended relief to which it is not entitled as a matter of law. An order recording the first respondent's tender will accordingly be made

[22] Turning to the issue of costs, I am of the view that the cost order as contained in the first respondent's draft order is reasonable, in that the applicant was justified in approaching the court seeking the declaratory order regarding its entitlement to request ECSA to appoint an alternative independent expert. The position, however, changed when the first respondent indicated its preparedness to adopt a pragmatic approach to resolving the disputes by referring all of them to arbitration. Subsequently, there was no point in continuing with the application as there was no longer a live dispute between the parties. A cost order that follows the one provided for in the draft order provided by the first respondent shall accordingly be made.

[23] In the result I make the following order:

23.1 The applicant's non-compliance with the provisions of Rule 28 (1) is condoned and the applicant's application for leave to amend its notice of motion is granted.

23.2 The applicant's main relief (as amended) and the applicant's alternative relief are refused, and the main application is dismissed.

23.3 It is recorded that the first respondent agrees and undertakes that, if the applicant refers the dispute regarding the applicant's serial defect claim, which includes the dispute regarding the existence of a serial defect, to arbitration in terms of clause 33.4 of the EPC Contract (ie, arbitration under the ICC rules), the first respondent will accept the jurisdiction of the arbitration tribunal and will not object on the basis that the fast-track process provided for in clause 34 of the EPC Contract should be employed to determine whether or not a serail defect exists.

23.4 The first respondent will pay the applicant's party and party costs of suit incurred up to and including the date of delivery of the first respondent's answering affidavit, and the applicant will pay the first respondent's party and party costs of suit incurred after the date of delivery of the first respondent's answering affidavit. In each case, such costs shall include the costs of two counsel, where employed, on Scale C.

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L.G. Nuku

Judge of the High Court

APPEARANCES

For applicant: R Goodman SC and S G Fuller

Instructed by:	Cliffe Dekker Hofmeyr Inc, Cape Town
For first respondent:	D Davis SC and M Davids
Instructed by:	LNP Beyond Legal, Sandton
C/O:	Goliath & Co, Cape Town
For second and third respondents:	No appearance