

Aveng clarifies its position after judgment on arbitrator challenge

Thursday, 26 May 2022

Construction engineering company Aveng Africa on Thursday said it had paid Fifty Seven on Maude – while fully reserving its rights – all of the penalties levied by the latter for failure by the construction company to finish The Leonardo by the agreed completion date.

Aveng said as result, there were no further penalties claimable, due or payable.

The company moved to clarify its position after judgment on an arbitration challenge.

TimesLIVE had on Wednesday reported that Aveng had to pay penalties but the company said it had paid and was instead challenging some of those payments in arbitration. Aveng and Seventy Five on Maude had concluded a contract on October 25 2015 in terms of which Aveng was appointed to construct phase 1 of the basement of the mixed-use building.

Aveng was also appointed to construct phase 2 of the project, which consisted of the podium and tower portion of The Leonardo.

The parties agreed that the penalty would be R450,000 a day after the practical completion date had not been achieved. The initial agreed date for practical completion of both phases was May 14 2018. However, a number of extensions of the time for practical completion were granted by Seventy Five on Maude.

The contract was terminated by Aveng and by Fifty Seven on Maude – each relying on its own basis for termination – on January 6 2020. The termination is the subject of a further dispute between the parties and the liabilities arising therefrom.

"Aveng's position is that the employer repudiated the contract, and that Aveng is entitled to be paid for the work performed by it up to the date of termination," Aveng said.

Fifty Seven on Maude levied penalties at the rate of R450,000 per day from May 1 2019 to January 6 2020.

"Aveng paid (while fully reserving its rights) all of the penalties levied by the employer and there are no further penalties claimable, or due, or payable.

"Having paid all of the penalties with reservation of its rights, Aveng then initiated dispute proceedings for the recovery of the penalties paid for the penalty free period (being 60 days from 30 April 2019)," Aveng said.

Aveng said the nub of the issue is that the appointed arbitrator in the matter made a finding on the so-called date for the practical completion which was in fact not a matter before the arbitrator and in effect unilaterally changed the practical completion date to February 28 2019.

Aveng said it considered this to be a finding outside the arbitrator's jurisdiction.

It said after taking advice from senior counsel, Aveng decided to pursue a review of the arbitrator's award in so far as it sought to impose a different practical completion date to that which was agreed between the parties, on the basis that this finding was beyond the arbitrator's jurisdiction.

Aveng said the judgment in the review application, handed down by the high court in Johannesburg on Tuesday, found that the arbitrator did not exceed his jurisdiction in making such a finding.

In his judgment, judge Marcus Senyatsi said the arbitration tribunal correctly made an award that February 28 2019 was the practical completion date.

"The judgment is being considered by Aveng's legal advisers, after which Aveng will decide on whether there are any grounds to appeal the judgment," Aveng said in a statement.

– This story has been updated after clarification from Aveng Africa.