



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5002/2018

In the matter between:

GEO HYDRO TECHNOLOGIES OFS (PTY) LTD Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL: 1st Respondent

OF POLICE, ROAD & TRANSPORT FREE STATE

PROVINCIAL GOVERNMENT

SSI & TSHEPEGA JOINT VENTURE 2nd Respondent

PEYPER ATTORNEYS 3rd Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: 10 October 2019

DELIVERED ON: 19 December 2019

MHLAMBI, J

- [1] The applicant seeks an order as against the second respondent for the payment of the amount of R 2 247 917.44 to the applicant, interest *a tempore morae*, calculated from the date that such payment was made to the second respondent until date of final payment and costs of the application.
- [2] The amount represents the total of:
- 2.1 R 165 091.81, representing the capital portion of monies due to the applicants and;
 - 2.2 R 2 082 925.63, which represents “agreed compensation” (essentially interest), that became payable to the applicant due to late payment¹.
- [3] The application against the first respondent was not proceeded with as the applicant filed a notice of withdrawal of application against the first respondent on 5 September 2019, as the amount claimed was paid to the third respondent by the first respondent. The third respondent did not oppose the application.
- [4] The second respondent opposed the application and raised the following three points in *limine*:
- 4.1 The applicant’s claim related to and was founded on invoices dating from 2 November 2010 to 11 February 2013. The application was launched on/or about 4 October

¹ Paragraph 9 of the Founding Affidavit

2018 based on a cause of action that arose during 2010 and the claim had prescribed and the applicant was barred from pursuing same.

4.2 The applicant was not entitled to the interest prior to 28 November 2017, being the date of the receipt of payment by the second respondent from the first respondent in terms of the sub-consultancy agreement which provided that the second respondent was obliged to pay the applicant within 7 days after the receipt of the partial or complete payment from the first respondent. Alternatively, the plaintiff was only entitled to the interest running from the 7 days after the date of the receipt of the payment by the second respondent. The applicant's claim deserved to be dismissed because the total amount claimed by the applicant was not due to the applicant; alternatively, that the applicant failed to properly compute the claim for the interest.

4.3 The applicant was not a party to the proceedings under case number 393/2012 and 4352/2013 which gave rise to the settlement order granted on 20 June 2017, which did not direct the second respondent to make any payment to the applicant. The settlement order indicated no obligation on the second respondent to effect payment to the applicant in the amount claimed in the application.

[5] In its heads argument, the second respondent's attitude is succinctly stated as follows:

“The applicant’s claim is convoluted. On the one hand the claim appears to rely on a court order (which provides no right to the applicant). At the same time, the claim appears to rely on contract (in which case the claim has prescribed).”

Brief background

- [6] The second respondent was appointed as per the first respondent’s letter of 15 March 2010 to render services and to assist the department of Police, Roads and Transport, to manage the implementation of the road repairs and rehabilitation programme for the Free State road network. An agreement, entered into by and between the parties, provided for the appointment of a sub-consultant to act as an Independent Environmental Control Person (IECP) for the Free State rehabilitation programme. On 1 October 2010 the applicant was, as per the communications of first and second respondent, appointed as an IECP for the Northern Free State Region based on the applicant’s financial offer of R 1 962 813.34 for the estimated project duration.
- [7] The sub-consultancy agreement was signed during January 2011 and its salient terms were the following:
1. The applicant was appointed at the behest of and on the instruction of the first respondent;
 2. The applicant was to commence with the sub-consultancy service within a period of 14 days after the date of the signing of the agreement;

3. The payment terms of the general conditions of the contract were amended to provide that the applicant shall receive payment via the second respondent, and within 7 days after SSI Tshepega had received partial or complete payment from the first respondent.
4. The applicant would be entitled to monthly payments, to issue invoices to the second respondent for individual and separate payments by the first respondent;
5. The total amount of services rendered would be R 1 962 813.34.

[8] After the conclusion of the agreements, both the applicant and the second respondent rendered services to the Department. The Department then stopped the payments to the second respondent entirely after the amount of approximately R 30 000 000.00 was paid, the last payment having been received during November 2011. The second respondent issued summons against the department under case number 393/2012 for the payment of approximately R 44 700 000.00. The department defended the action.

[9] During 2013, the applicant sought an order against the first respondent for the payment of the amount of R 1 967 824.75 for works done and services rendered to the first respondent including costs. Though the second respondent was cited as a respondent, no substantive relief was sought against it. It was

merely used as a conduit to receive payment from the first respondent for onward transmission to the applicant. The second respondent was also represented by Peyper Sesele Attorneys in the application. It (the second respondent) was well aware of the launching of that application and supported it.²

[10] This application was launched after the successful “*test application*” of one of the sub-consultants, Terra Graphics (Pty) Ltd t/a Terra Works, which was instituted against the first respondent in this court. A date for the argument of the applicant’s 2013 application was allocated but the department brought a substantive application for its hearing to be stayed, pending the final determination of the action instituted by the second respondent against the department. The applicant was represented by Peyper Attorneys who deposed to the applicant’s affidavit opposing the department’s application for the stay of the hearing. Settlement negotiations ensued between the department and the second respondent that resulted in the granting of the court order of 20 June 2017. It is common cause that on 5 April 2017, the applicant received a letter from the second respondent in which the following was stated:³

- “1. *The department conceded that SSI and Tshepega’s appointment was valid and similarly considered the validity of the appointment of the sub-consultants;*
2. *19 to 23 June 2017 was set aside for arguments to “deliberate the quantum of payment due to SSI/Tshepega”*

² Paragraph 7 of the Founding Affidavit of the 2013 Application; page 52 of the indexed papers

³ Paragraph 43 of the Founding Affidavit and paragraph 27 of the Answering Affidavit.

3. *SSI and Tshepega is (sic) preparing a report with supporting documentation to substantiate the total value of their claim, including the total value owed to sub-consultants;*
4. *Geo Hydro is to confirm in writing the “minimum value for settlement as well as conditions associated with the settlement”;*
5. *SSI and Tshepega commits (sic) to conduct all negotiations with the department to serve the best interest of their own claim as well as the claims of their sub-consultants.”*

[11] On 1 December 2017, the applicant received a letter from Peyper Attorneys,⁴ in which the applicant was advised of the court order granted against the first respondent on 20 June 2017. It was stated in that letter that it was specifically agreed between the second respondent and the applicant that the second respondent would make payment of all amounts that became payable under the provisions of the sub-consultancy agreement within 7 days after receiving payment from the department as recorded in paragraph 4 of the sub-consultancy agreement, read with Schedule 4 entitled “Payments of the sub-consultant”. An amount of R 1 733 493.34 would be transferred to the applicant’s nominated bank account on 5 December 2017, provided that written acceptance of the offer was made by return of mail prior to that date. On 12 December 2017, Peyper Attorneys addressed another letter to the applicant confirming that it would retain the amount of R 3 797 170.32 in their trust account pending the final resolution of the dispute between the applicant and the second respondent. That office would no

⁴ Annexure “I” to the Founding Affidavit

longer act on behalf of either the second respondent or the applicant in the dispute as a result of a conflict of interest⁵.

The applicant's response to the defences raised by the second respondent

[12] The applicant responded as follows to the second respondent's preliminary points:

12.1 Section 12(1) of the Prescription Act, 68 of 1969, provides that prescription shall commence to run as soon as the debt is due. The sub-consultancy agreement provided that the second respondent shall not be obligated to pay the applicant until all the parties' invoices were invoiced to the first respondent. Payment to the applicant would be made by the second respondent within 7 days after receipt of payment from the first respondent. As the second respondent only received payment from the first respondent during November 2017, the applicant's right to claim payment from the second respondent only arose at that stage. Prescription commenced to run from November 2017. The applicant's claim would only expire three years' later, during November 2020.

12.1.1 The applicant only became aware of the payment made by the first respondent to the second respondent on receipt of a letter from the state attorney, informing the applicant of such

⁵ Annexure "K" on page 338

payment. In terms of the provisions of sections 12(2) and (3) of the Prescription Act, prescription would only commence running from the date of receipt of such letter⁶. Section 14 (1) of the Prescription Act provides that the running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor. It is common cause that the third respondent, acting as the attorneys of record and on the instruction of the second respondent, made payment to the applicant to the amount of R 1 733 493.34 on 14 March 2018. This payment constituted an express acknowledgement of liability and thus interrupted prescription. Consequently, the applicant's claim against the second respondent had not prescribed.

12.2 The first respondent paid the amount of R 5 585 321.04 plus interest to the second respondent in respect of *“agreed compensation”* which, in effect, was the contractually agreed upon interest. The agreement expressly provided that the payment terms of the applicant, as sub-consultant, should be the same as those of the consultant, i.e. the second respondent. The amounts due to the sub-consultant should be paid within 28 days of the sub-consultant's invoice as provided for in clause 5.2.1 of the agreement. The agreed compensation for overdue payments is set out in the particular conditions, which is

⁶ Annexure “RA1”

prime bank rate plus 2%. The second respondent's allegation that interest would only commence to run 7 days after the date of receipt of payment by the second respondent was therefore factually wrong. The second respondent conflated two altogether different issues. The obligation to pay occurred 7 days after receipt of the money, whereas the agreed compensation or interest, commenced to run if such payment did not occur within 28 days of the date of invoice.

12.3 The court order specifically allocated the amount of R 11 170 642.08 to the sub-contractors and only the sub-contractors were entitled to share in that amount. The second respondent's attorney addressed a letter dated 23 January 2019 to the state attorney⁷ indicating that the claims of all sub-contractors were included in the settlement amount which was reflected in the court order. The defence that the sub-contractors were not nominated in the court order was without substance. The second respondent's attorneys advised that the amount of R 3 797 170.32 was kept in trust pending the final resolution of the dispute between the applicant and the second respondent. It followed from the attorneys' letter that once the dispute was resolved, payment would have been made. The second respondent's defence on this point should be rejected.

[13] The court order provided that:

⁷ Annexure "RA5"

- "1 The Defendant is to pay to the Plaintiff the capital amount of R20 380 788.00 and an additional amount of R20 380 788 which is payable in terms of clause 5.2.2 of the General Conditions of the Agreement.*
- 2. The Defendant is to pay to the Plaintiff an amount of R5 585 321.04 in respect of the sub – consultants and an additional amount of R5 585 321.04 which amount is payable in terms of clause 5.2.2 of the General Conditions of the Agreement.*
- 3. The Defendant is to pay to the Plaintiff an amount of R600 000.00 in respect of the management fee of the sub-consultants and an additional amount of R600 000.00 payable in terms of clause 5.2.2 of the General Conditions of the Agreement.*
- 4. Payment of the abovementioned amounts will be made within 90 days after date of this order.*
- 5. Payment shall be made into the trust account of the Plaintiff with the following particulars:*

PEYPER ATTORNEYS

Absa Bank

Account Number : 406 815 1700

- 6. The Defendant is to pay the agreed and/or taxed costs of the plaintiff including the costs of two counsel where employed, and including all reserved costs".*

- [15] In oral address, Mr Manchu, on behalf of the second respondent, submitted that the second respondent did not refuse to pay, but disputed the amount of R 2 082 825.63 which represented the agreed compensation (essentially interest) that became payable to the applicant due to late payment. The real enquiry, he submitted, was the calculation of the interest payable and the specific date on which it should be calculated. He contended that the sub-consultancy agreement provided that the second respondent would, in consideration of the applicant's performance of its services, pay such amounts as became payable under the provisions of the sub-consultancy agreement within 7 days after the receipt of the money from the department or the first respondent.
- [16] He contended that clauses 5.2.1 and 5.2.2 of the Model Services Agreement (which referred to the payment for services), were not applicable to the applicant but regulated the relationship between the second respondent and the first respondent. These particular provisions provided that the amounts due to the consultant, should be paid within 28 days of the consultant's invoice unless otherwise stated in the particular conditions of the agreement. Should the consultant not receive payment within the 28 days as stipulated, it would be paid agreed compensation at the rate defined in the particular conditions, compounded daily on the sum overdue. The applicant was therefore not entitled to the payment of the agreed compensation as set out in these provisions. He argued that the interest payable should be on the outstanding capital amount of R 165 650 091.81 being the outstanding capital balance, having deducted the amount of R

733 493.34 which was paid by Peyper Attorneys to the applicant on 14 March 2018. The interest payable thereon should be calculated from 28 November 2017, when the first respondent effected payment to Messrs Peyper Attorneys who acted on behalf of the second respondent. He conceded that the consequences of his oral arguments nullified or jettisoned the defence of prescription as raised in the papers.

- [17] Paragraph 6 of the sub-consultancy agreement provides that the same payment conditions between the client and the consultant apply between the client and the sub-consultant. This means that the same payment conditions that applied between the first and second respondents also applied between the first respondent and the applicant. It is evident that paragraph 2 of the court order specifically authorised the payment in accordance with clause 5.2.2 of the general condition of the agreement and specifically awarded agreed compensation to the sub-consultants. It is clear that the argument raised by the second respondent that the applicant had no rights in terms of the court order cannot stand and deserve to be dismissed. Mr Acker, on behalf of the applicant, submitted during oral address and, in effect, prayed for the amendment of the notice of motion in that the amount of R 2 247 917.44, as reflected therein, should be replaced with the amount of R 2 063 676.98 as indicated on the written calculations which were handed into court by the consent of the parties. The latter amount took into account two payments (R89 186.60 + R 95 053.87) by the second respondent which had not been taken into account before by the applicant.

[18] Mr Manchu contended that two amounts of R25 507.92 and R90 492.14 should be deducted from the outstanding capital amount of R165 091.82 as these claims had not been claimed timeously and had therefore prescribed. This argument does not hold water. The outstanding capital amount of R165 091.82 represented the difference between the capital amount of R1898 585.16 less the payment made of R1 733 493.34. The capital amount plus the agreed compensation as per the agreement gives the amount of R 3 797 170.32 which was held in the trust account by the attorneys. Taking into account that prescription only came into play after November 2017, prescription never started to run in respect of these two amounts. These two amounts were included in the amount claimed.

[19] I am therefore satisfied that the applicant has succeeded to prove on a balance of probabilities that it is entitled to the relief as contained in paragraph 5.1 of the notice of motion as amended.

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

ORDER:

1. The second respondent is instructed and directed to pay to the applicant the amount of R 2 063 676.98 together with interest *a tempore morae*, calculated from the date that such payment was made to the second respondent and/or paid to

the third respondent to be held on its behalf until the date of final payment.

2. Costs of the application

MHLAMBI, J

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