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 No: 834/2017

In the matter between:-

SET-MAK CIVIL & GOLOLOSEGANG BASADI CIVIL JV **APPLICANT**

and

MASILONYANA LOCAL MUNICIPALITY **RESPONDENT**

CORAM: MHLAMBI, J

HEARD ON: 18 MAY 2017

DELIVERED ON: 8 June 2017

MHLAMBI, J

[1] This is an application in terms of which the applicant seeks an order on the following terms:

1.1 Declaring that the respondent is indebted to the applicant in the amount of R 1 252 851.10 together with interest on the said amount at the prescribed rate for arrears (10.25% per annum) in accordance with section 1 of the Prescribed Rate of Interest Act No 55 of 1975;

1.2 The respondent be ordered to pay the amount of R 1 252 581.10 together with interest at the aforesaid rate (10.25% per annum) to the applicant;

1.3 That respondent be ordered to pay costs of this application.

[2] The application is opposed.

[3] Pursuant to a tender process, the applicant was awarded a contract, contract No: M/FS/0575/5/07/08, for the eradication of 1261 buckets in the Winburg/Makeleketla area for the contract price of R 6 211 187.69 as per the letter dated 25 February 2014 from Babereki Consulting Engineering CC, the project manager appointed by the respondent. Makhaotse Narasimulu and Associates (Pty) LTD are the appointed engineers to whom the applicant had

to deliver monthly payment certificates indicating amounts due and the engineers in turn had to certify amounts they considered due to the applicant.

[4] Upon the issuing of a practical completion certificate by the engineer, the applicant would attend to the "*Snags" or defects* within 14(fourteen) days, whereupon 50% of the retention monies would be released. The defects liability period was six calendar months for structural works, three calendar months for gravel roads and twelve calendar months for civil works. Upon expiry of the defects liability period, the applicant would be entitled to payment of the remaining retention monies.

[5] On 19 May 2014, the engineer issued a practical completion certificate indicating that the project had been inspected and was deemed practically completed in conformity with the provisions of the contract and had satisfactorily passed any final tests except for the outstanding terms listed as snag list and any defects not yet discovered. The snag list items were anticipated to be completed before 2 June 2014. The completion certificate would, in terms of the contract, be issued upon the satisfactory completion of the snag list items and any defects not yet discovered.

[6] On 7 July 2015 the engineer addressed a letter to the Respondent's director of infrastructure which reads as follows:

"Dear Sir

MIG FS/0575/S/07S08 BUCKET ERADICATION PROFECT IN MAKELEKETLA- WINBURG;- FINAL INSPECTION AND REALESE OF 50% RETENTION AND SURETY

On the 19th of May 2014 a site visit was conducted for the above mentioned project along with the Masilonyana Municipality and the Contractor in order to issue out a practical completion certificate to Se-Mak Civils & Gololoseng JV for completion of the scope of works allocated. The Contractor was given till the 2nd of June 2014 to complete the snag that was issued.

However, in this regard the Contractor hereby requests that the 50% of retention and surety be released. Furthermore, in accordance to GCC 2010 as the project has come to a completion and the completion certificate be issued subsequent the final site inspection. The following should be taken into consideration;

1. *The performance guarantee (if any), shall be returned within 14 days to the guarantor,*
2. *The defect liability period shall commence subsequent final site visit and approval of the snag provided/issued,*
3. *The withheld retention money along with surety money guarantee shall be reduced to half in terms of **Clause 6.10.5**, which will amount to **R 815, 744.63 14% VAT INCL.***

We have also attached a request letter from the Contractor along with the issued practical completion certificate.

We trust the above information is in order and remain."

The contractor's letter of request was a confirmation of the completion of the snag list which was compiled during the practical completion site visit and a request for the release of the retention and all outstanding monies flowing from the contract. Also sought was an indication when the final completion inspection would be conducted so that the outstanding payment could be finalised.

[7] On 6 September 2016, the applicant addressed a letter to the Respondent's municipal manager advising that the total amount owing inclusive of the retention and the surety money was R 1 252 581.10. A letter of demand dated 15 September 2016 was addressed to the respondent by the applicant's attorney in which they demanded:

a) immediate arrangements be made for the final site hand over;

b) a final compliance certificate be issued;

c) payment of the retention and the surety money in the sum of R 1 036 000.71;

d) Payment of the contract monies due to the applicant in the sum of R 216 580.37 for work done.

[8] It would appear as if this communication, *inter alia,* elicited a response as Mr Elias Kaise, the respondent manager of legal services forwarded an e-mail to the applicant's attorney which reads as follows:

"*Good day Sir*

We refer to the matter above and our telephonic conversation yesterday, dated the 10 of October 2016.

Kindly take note that the Municipality, with specific regard to the client's claim and the much appreciated explanation through the documents you attached on 5 of October 2016, writer hereof was enlightened and managed to advice the Municipality on the true facts with regard to liability.

Kindly take note further subsequent to the advice it was then agreed that the technical advisor, Mr Janvos, together with the consultants, upon realising the alluded to facts, were tasked to do a maintenance budge which would address the deficit caused by miscalculation of the project implementation to such a point that there was a drying up of funds to complete the project, you will understand that due to this misfortune the Municipality, through MIG, ended up paying the retention fee to complete the project.

Kindly not furthermore that the estimated time or period to complete the application process for funding in order to settle your clients outstanding claim, being the full and final settlement, is approximately a month. The Municipality suggest that give or take six(6) weeks will be sufficient to finalise this matter, including MIG approving the fund and then favouring the Municipality with proof of payment to your trust account. The Municipality request your indulgence in the matter and shall keep you posted with any development to the finalisation of this matter.

We trust you find above in order.

Best regards

Mr Kaise."

It is on the basis of this acknowledged indebtedness, that the applicant filed this application.

[9] The applicant resists this application and raised four preliminary points under the headings of the court's lack of jurisdiction, no cause of action, non-joinder and that the declaration order sought was against the principle of legality. I shall revert to the preliminary points later. On the merits the respondent questioned the validity of the practical completion certificate, suggesting that it was a rehash of the applicant's letter dated 1 July 2015 which was attached to the engineer's letter to the respondent's director of infrastructure dated 7 July 2015. Besides, the applicant's contract with the respondent was terminated on 29 August 2014. The applicant was therefore not entitled to the retention amount in the amount of R 1 252 581.10.

[10] In paragraph 22 of the answering affidavit, the respondent stated that *"the applicant did not complete the project and is only entitled to payment up to the date on which his contract was terminated and that will be ascertained once the progress report has been presented to the Respondent."* It was argued further on behalf of the respondent that a practical completion certificate did not declare the

project completed. The only certificate that declared the project completed was the completion certificate which was not yet issued in favour of the applicant.

[11] Paragraph 37, 38 and the conclusion in paragraph 4.1 of the respondent's heads of argument read as follows:

"37.Since the Applicant's contract was terminated and a new contract (sic) was appointed to complete the remaining part of the project, the Respondent submit that the Applicant is not entitled to the retention amount of R 1 252 581.10.

38. The respondent is not disputing that there is retention money due to the Applicant under the tender contract, but the Respondent disputes that such money amounts to R 1 252 581.10. As already stated in the Respondent's answering affidavit, the Respondent is still waiting for the progress report from the company that concluded the tender project in order to enable it to calculate the exact amount due to the Applicant, which amount will be less than the claimed amount of R 1 252 581.10.

4.1 We submit with respect that the relief sought by the Applicant is unprecedented and will prejudice the Respondent in that the Applicant will be unjustly enriched with the money that is not due to him.

[12] In oral argument, it was conceded that the respondent was indebted to the applicant under the contract in a certain amount still to be determined on receipt of the progress report which was exclusive of the retention money. However, the respondent insisted that the application was

pre-mature as, in terms of the contract, the final competition certificate had not been issued. It was furthermore conceded that the preliminary points of non-joinder, lack of jurisdiction and arbitration were being abandoned. The approach to so abandon the preliminary points raised was correct, as a perusal of the answering affidavit and the respondent's heads of argument including the oral argument, indicate clearly that the contract, the acknowledgement of indebtedness and the court's jurisdiction, even though not pertinently admitted, were not in dispute. In fact, in substantiation of the preliminary and other points raised, the respondent relied on the very contract that the applicant used as background material for its cause of action. The preliminary points were but an obfuscation of the real issue.

[13] The practical completion certification was issued on 19 May 2014. The letter of the termination of the contract by Babereki Consulting Engineers is dated 29 August 2014. The letter advising of the completion of the project and the request for the issuing of the completion certificate by the project engineer is dated 7 July 2015. The respondent does not attack the validity of this letter and the authority of the engineer to write such a letter especially in the light of the alleged termination of the contract. One would have

expected that the true position would have been communicated to the engineer either by the respondent or the project manager. The engineer's continued services should have come into question as these should have lapsed with the termination of the contract in regard to the project. On the contrary, paragraph 2 of the said letter confirmed the completion of the project in accordance with the contract as the snag list had been attended to. The defects liability period expired on 7 July 2016.

[14] Paragraph 11.1 and 11.2 of the founding affidavit read follows:

*"11.1 I appended hereto as annexure "**FA6",** a copy of a demand dated **16 September 2016** addressed by Applicant's attorney to the Respondent wherein the outstanding amount owing to the Applicant **(R 1 252 581.10)** is demanded.*

*11.2 I state that on **11 October 2016** my attorney, **Etienne Blignaut,** conducted a telephonic discussion with one **Elias Kaise** in the office of the municipal manager and he confirmed the Respondent's indebtedness to the Applicant in the aforesaid sum and requested an extension for payment, in substantiation whereof I append hereto as annexure **"FA7"**, a copy of a letter date **11 October 2016** addressed by **Bilgnaut** to Respondent; as annexure " FA 8", a copy of an e-mail from Kaise to Blignault; and as annexure **"FA9",** a confirmatory affidavit by **Bilgnaut.**"*

The respondent's response in paragraph 24 of the answering affidavit reads as follows:

"Save to acknowledge a letter of demand, the Respondent denies that it is indebted to the Applicant in the amount of R 1 252 581.10".

[15] In the respondent's heads of argument and more in particular paragraph 31, it was stated that on a proper perusal of annexure "*FA9*", the attorney's confirmatory affidavit, nowhere was it stated that the respondent was indebted to the applicant in the amount of R 1 252 581.10. This argument is disingenuous. The letter of demand dated 15 September 2016 makes mention of the amount of R 1 252 581.10 due and payable, which was confirmed and an extension of payment was requested. The contents of the legal services manager's letter, save for the denial to pay, are not challenged. The only inference to be made is that the *"funding in order to settle your client's outstanding claim being the full and final settlement"*, referred to the amount claimed in the letter of demand and as fully set out in the letter to the Municipal Manager dated 6 September 2016 and attached, marked annexure *"FA 5"* to the founding affidavit.

[16] The denials by the respondent of the facts alleged by the applicant do not raise real, genuine or bona fide disputes of facts. They are so far-fetched and clearly untenable that the court is justified in rejecting them merely on the papers: **Plascon- Evans Paints LTD v Van Riebeeck Paints (Pty)**

LTD 1984 (3) SA 623 (A). It is clear that the facts in this case, although not formally admitted, cannot be denied and must be regarded as admitted. I was referred to **Fakie NO. v CCLL Systems (Pty) Ltd 2006 (4)SA 326 at paragraph 55, an** extract of which reads as follows: *"*

55. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers." I agree that the paragraphs are applicable to the circumstances *in casu.*

[17] In the circumstances, I find that applicant has made out a proper case for the relief sought and it should therefore succeed in its claim. The applicant seeks a punitive costs order as against the respondent. Having regard to the facts of these case, such a request does not seem misplaced.

[18] I therefore make the following order:

ORDER:

1. **Prayers 1.1 and 1.2 of the notice of motion are granted.**
2. **The respondent is to pay the costs of the application on a scale as between attorney and client.**

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J.J. MHLAMBI, J

On behalf of appellant:	Adv. Louw Instructed by: Bilgnaunt Attorneys Bloemfontein
On behalf of Respondent:	Adv. Khokho Instructed by: Rampai Attorneys Bloemfontein

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