In the High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg

Case No: 4485/2015

In the matter between:

Msweli Electrical Contractors Mandini CC Applicant

And

Eskom Holdings Soc Limited Respondent

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Judgment

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Lopes J

[1] The applicant is an approved contractor registered on the respondent's panel of contractors. In 2013 the applicant and the respondent concluded an agreement in terms of which the applicant was to perform work upon an electrification household project where the respondent was the principal contractor.

[2] The applicant alleges that it was to provide all the supervision, labour, plant, equipment, material and transport for the completion of the project. It did so. A

mechanism for payment was adopted by the parties, and although it was not strictly in accordance with the written agreement, it was followed by the parties. This process involved the applicant rendering invoices, and the respondent's site consultants, ZD Project Management, would effectively verify the invoices and issue a payment certificate. If any amendments were to be made the applicant would provide an amended invoice which would then be paid by the respondent. This process was followed for five payments. The payments for each of the amounts claimed were paid by the respondent pursuant to a payment certificate issued by its site consultants.

[3] When the applicant issued an invoice for the sixth payment in the sum of R4 202 961,31, payment was not forthcoming, despite the site consultant's payment certificate number 6 having been issued on the 8th May 2014 in the amount sought by the applicant. Despite repeated requests and the passage of a considerable period of time, the respondent has failed to make payments in terms of payment certificate number 6. The applicant in this application seeks a money judgment in a lesser sum, because an amount of R2 245 148,20 was apparently paid on the 1st March 2016.

[4] The defences of non-payment raised by the respondent are vague and imprecise to say the least. An allegation is made that during the course of an audit conducted during October 2013 'certain anomalies' in the previous payments made to the applicant were discovered. Apparently the most significant of these 'anomalies' was that there may have been an over-claim by the applicant for work

having to be done in 'hard rock' which would have entailed extra time and cost, and for which the applicant levied an extra charge. No quantification of the alleged over-payment made to the applicant is set out by the respondent in its papers. It states only that approximately 80 per cent of the hard rock claim should have been paid. That said, it has done absolutely nothing in the interim to claim the amount back from the applicant, or to tender to pay to the applicant the amount of payment certificate number 6 less the 20 per cent hard rock allocation over-payment allegedly made to the applicant.

[5] Mr *Nicholson*, who appeared for the respondent, submitted that the only defence raised by the respondent was that the disputed over-payments to the applicant should be referred to trial. He conceded that the so-called 'anomalies' referred to in the respondent's answering affidavit are not properly articulated. He also submitted that although the method of payment had not strictly been followed as per the written agreement, this had only been raised by the respondent for the first time in the papers. It was suggested that when this was raised with the accounts office, the respondent did not do anything to remedy the situation, but simply refused to pay. There has also been no insistence by the respondent that any alternative method be followed.

[6] Having considered the explanations for non-payment put up by the respondent, I am of the view that they fall within the category set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634 I –

namely that '… *the denial by respondent of a fact alleged by the applicant may not be such as to raise real, genuine or bona fide dispute of fact* …'.

[7] The respondent has not begun to articulate the basis upon which it claimed it was entitled to withhold payment from the applicant. Nor has the respondent in any way sought to quantify the amount of any over-payment which had been made to the applicant. The respondent's failure to do, so coupled with the fact that it has done nothing about quantifying that amount in the interim year since the application was launched, leads to the inevitable conclusion that it has no lawfully acceptable excuse for not paying the amount claimed by the applicant.

[8] With regard to costs, Ms *Franke,* who appears for the applicant, submits that the applicant is entitled to a punitive order of costs because of the conduct of the respondent in failing to make payment timeously, and thereafter opposing the application without any proper basis for so doing. Mr *Nicholson* submitted that the respondent was compelled to pay the interest which was compounded weekly, which was a form of penalty imposed on the respondent and which would compensate the applicant for the late payment of the debt. As Ms *Franke* pointed out however, the imposition of the interest was part of the contractual agreement between the parties.

[9] In my view the delay on the part of the respondent in making proper payment of what was due to the applicant is not in any way justified or excused on the papers. Recalcitrant contractors can and do often drive sub-contracting companies into

insolvency because of the non-payment of amounts which are due to them. This has the domino effect of causing employees to lose their jobs and damaging the economy generally. I agree that an award of costs on an attorney and client basis is warranted.

[10] In all the circumstances I make an order in the following terms :

(a) The respondent is directed to pay to the applicant the amount of R1 957 813,19 within 30 days of the grant of this order;

(b) The respondent is directed to pay interest :

(i) on the amount of R4 202 961,31 at the rate of 0,5% per week compounded weekly, from the 31st May 2014 up to and including the 29th February 2016;

(ii) on the amount of R1 957 813,19 at the rate of 0,5% per week compounded weekly from the 1st March 2016 to date of payment.

(c) The respondent is directed to pay the applicant's costs calculated on the scale as between attorney and client.

Date of hearing : 21st April 2016

Date of judgment : 29th April 2016

Counsel for the Applicant : S Franke (instructed by Jasat and Jasat Attorneys)

Counsel for the Respondent : W A J Nicholson (instructed by Hughes-Madondo Inc)