

In the KwaZulu-Natal High Court, Pietermaritzburg

Republic of South Africa

Case No :11800/07

In the matter between :

Inkunzi Civils CC

Plaintiff

and

The Greater Kokstad Municipality

Respondent

Judgment

Lopes J

[1] The plaintiff in this matter is Inkunzi Civils CC. It carries on business as a civil engineering contractor. During 2004 it tendered for, and was awarded, contract number 1179 by the Greater Kokstad Municipality, the defendant in this action. The contract was for the construction and rehabilitation of certain roads in the Greater Kokstad area. It is common cause that the plaintiff performed its obligations in terms of the contract, but the defendant, in breach of the terms thereof, failed to make timeous payment in respect of certain payment certificates certified by the contract engineer Mark Eyan Ducasse ('Ducasse'). As a result of the defendant's breach of the contractual conditions, the plaintiff eventually cancelled the contract.

[2] In a separate action, the plaintiff sued for the payment of amounts due in terms of the payment certificates. In addition, it instituted this action for damages arising as a result of the defendant's breach of contract and the consequent cancellation thereof. The plaintiff sued under three heads of damages, two of which have been settled between the parties. The remaining claim for damages is for the costs of labour and plant standing time. It is the only claim which I am to consider.

[3] The plaintiff led the evidence of three witnesses. The first of them was Ducasse who testified that he was a qualified civil engineering technologist and was appointed by the defendant as the contract engineer and agent of the defendant. His function was to assess the need for the work done, motivate improvements, implement the designs for the roads and put the contract out to tender. Thereafter he was to adjudicate the tenders, and monitor and conduct site supervision of the contract and to sign payment certificates.

[4] It was clear from the evidence given by Ducasse that the breakdown in the contractual relationship between the parties was solely attributable to the defendant's failure to pay amounts due to the plaintiff as and when they fell due. Ducasse made every effort to persuade the defendant to honour its obligations. Various spurious objections to the work done by the plaintiff were raised by one Thubane, the then municipal manager. Those objections had no merit, and eventually out of desperation the plaintiff cancelled the contract.

[5] Ducasse's evidence was clear that the plaintiff had made every effort to keep the contract alive and was initially prepared in the event that it was paid, to reinstate and complete the contract. However, payments were not forthcoming from the defendant. Both Ducasse and a representative of the defendant, V Chetty, the technical head of the municipality, understood that the job would have to be completed eventually and that to hire another contractor to do so would be an expensive exercise. They accordingly persuaded the plaintiff not to de-establish the site and abandon the works. Promises of payment induced the plaintiff not to abandon the site. These promises, however, were not kept.

[6] The plaintiff's claim for the standing time of plant and labour was calculated from the date of cancellation of the contract – the 2nd February 2005, to the 2nd May 2005 – a period of three months. Indeed, the evidence of Ducasse was that as much as six months later the problems had still not been resolved.

[7] Ducasse testified that he had perused the plaintiff's claim and regarded it as reasonable in all respects. He also recorded that the plaintiff had undertaken to reduce its initial claim, then estimated at R500 000 to R130 000 in the event that the defendant paid the amounts outstanding. However it did not, and that proposal fell away.

[8] In cross-examination by Mr *Duminy* for the defendant, Ducasse

emphasised that the defendant wanted to reinstate the contract and induced the plaintiff to stay on site by those entreaties.

[9] During the first few months after cancellation, the plaintiff had carried out certain further work for the defendant on the side drains in Dower Street in order to prevent rain damage occurring. Ducasse told the court that although he did not know from where the plaintiff's plant had been sourced, he knew which plant had been used. Ducasse was of the view that the original claim of some R486 000 was reasonable in all respects.

[10] The second witness for the plaintiff was Grant Michael Buchanan ('Buchanan') a civil engineering contractor of 20 years experience who was one of three members of the plaintiff. He was also the sole member of Bladecon CC. For the performance of the plaintiff's contract, Buchanan procured that Bladecon CC supplied the plant and labour. In addition he also allowed certain plant which he owned in his own capacity to be used by the plaintiff. He made it clear that Bladecon CC did not invoice the plaintiff for the plant and equipment provided because that was part of what Buchanan 'brought to the table' as he put it. He told the court that this was the biggest contract they had done and that the plaintiff had been brought to its knees because of the non-payment by the defendant. Ultimately the plaintiff had had no choice but to cancel the contract.

[11] Buchanan testified that for weeks after the cancellation of the contract they believed they would be paid and would be asked to complete the

contract by the defendant. The plaintiff's representatives were very keen that the job be seen as successful. They regarded this as important in the development of the plaintiff as a civil contractor. He relied on the assurances of Chetty and Ducasse that the problem would be resolved.

[12] Throughout the period of the contract the plaintiff gave plant and labour reports to the defendant. The plaintiff had ultimately been prepared to compromise its claim in the event they were paid on the payments certificates and allowed to complete the contract, but this did not happen.

[13] Although the plaintiff's plant and equipment had stood for more than three months, Buchanan had reluctantly agreed to be bound by a three month period because he was advised by one Brian Storey, a contractual claims consultant, that that was a reasonable period and normal in the industry. A reduction of 28% had been applied to the computation of standing time for plant and equipment to allow for the fact that the equipment was not being used.

[14] With regard to the labour standing time Buchanan said that the employees were paid by the plaintiff's employee one Kerry based on the times that they were on site. In answer to questions by Mr *Duminy* Buchanan admitted that the salaries of the labourers were the responsibility of Bladecon CC and that they were employed by Bladecon CC. He also agreed that the salaries were not paid by the plaintiff. However, it is clear from the tenor of his evidence, that what he intended to convey was that the employees had

employment contracts with Bladecon CC but were nonetheless used by the plaintiff and paid by the plaintiff in the sense that the income from the contract was used to pay the labourers.

[15] He agreed with the suggestion in re-examination that the plaintiff would bear the actual costs of the labour, and that the plaintiff, and not Bladecon CC, was the operating entity. Buchanan reiterated that the plaintiff ran the project, obtained the money, and distributed to the Bladecon CC employees whatever was due to them for their wages.

[16] The last witness for the plaintiff was John Howard Godfrey a contract management consultant. He had been a civil engineer working in the construction industry and specialised in contractual dispute resolution for the last 20 years. In doing so he had worked both as an adjudicator and arbitrator. In his view the plaintiff's claim was conservative with regard to the time period because the equipment had actually stood for more than three months. He regarded the rates which were charged as having been reasonable and accurate at the time for the equipment involved. He also spoke to the reasons why the 28% discount was given – ie that as the equipment was not being used, wear and tear would not take place and the operators would be used for other purposes. Mr Godfrey testified that the industry regarded the loss which would have been sustained by the plaintiff as being what the equipment should have been earning if gainfully employed, but which was no longer being earned because of the cancellation of the contract.

[17] At the end of the plaintiff's case the defendant applied for absolution from the instance. I considered the application and handed down a judgment refusing the application.

[18] The defendant then closed its case. The parties recorded that they had agreed the quantum of the plaintiff's damages for plant and equipment standing time in the sum of R438 984 and the standing time for labour at R20 000. It was also agreed that interest would run from the 26th April 2007 when a written demand was made for the plaintiff's damages.

[19] Mr *Duminy* argued that in respect of labour standing time, these were not damages which had been suffered by the plaintiff, but rather by Bladecon CC. In this regard he referred me to *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A).

[20] In that case the plaintiff sued for damages sustained in a motor collision involving a mechanical horse and trailer purchased by, and registered in the name of, a wholly-owned subsidiary company. The asset however remained the property of the subsidiary company and was not an asset of the controlling company. In those circumstances the controlling company was not the owner of the vehicle and not entitled to sue for the damage sustained to it. The court also held that any piercing of the corporate veil would nonetheless have left the court in total darkness with regard to the ownership of the vehicles.

[21] Mr *Duminy* also referred me to *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A). In that matter the respondent had sought to attach a ship owned by a private company whose issued share capital was owned by the government of India, to found or confirm the court's jurisdiction in an action in personam against the government of India. The court reiterated the rule that the property rights of a company were to be kept distinct from its shareholders, even where there was only one shareholder. The piercing of the corporate veil could only occur where there was an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs.

[22] Finally Mr *Duminy* referred me to *Al-Kharafi & Sons v Pema and others* NNO 2010 (2) SA 360 (W), where the court held that it was necessary for the plaintiff in that case to establish a cession in order to obtain relief. The suggestion was that the court should 'reverse-pierce' the corporate veil in which case the cession would not have been necessary. Given the facts of the case ie that the one company held no shares directly or indirectly in the other company and did not control it and did not have the same directors, they were held to be different entities forming part of different economic and financial structures.

[23] Mr *Duminy* submitted that on the basis of the above authorities there could be no piercing of the corporate veil in order to enable the plaintiff to recover damages for the standing time for labour.

[24] In my view the cases cited above are of no assistance in this matter. I say that because the evidence established that the plaintiff used the labour in the course of the contract and paid that labour out of the proceeds of the contract. In those circumstances whatever the formalities in the company's books may have indicated, the reality was that they were employed and paid by the plaintiff. In those circumstances it is the plaintiff that suffered the damages as a result of the persons employed on the contract incurring standing time after the cancellation of the contract.

[25] The claim for standing time arises out of the defendant's breach of contract, the cancellation of the contract by the plaintiff and the fact that the defendant asked the plaintiff not to de-establish its site after cancellation, pending payment by it of the amounts due. The damages for standing time arose as a direct, natural and probable consequence of the defendant's breach of contract. They were clearly within the contemplation of the parties at the time they concluded the agreement. The equipment remaining on site after cancellation, and the rates applied, were agreed between the parties and no issue arises in that regard.

[26] In the circumstances I make the following order :

'The plaintiff is to pay the defendant :

- (a) the sum of R458 984;
- (b) interest on that sum calculated at the rate of 15.5% per annum from the 26th April 2007 to date of payment;
- (c) costs of suit.'

Date of hearing : 15th August 2012

Date of judgment : 28th August 2012

Counsel for the Plaintiff : S M Alberts (instructed by Pearce Lister & Co)

Counsel for the Defendant : A R Duminy (instructed by Elliot & Walker)