IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Not Reportable

Case No:2025-150329

In the matter between:

CITICON PROJECTS (PTY) LTD Applicant

And

THE LUPHA ENTERPRISE KADIMA First Respondent

CORP PARTNERSHIP / JOINT VENTURE

THE OUDTSHOORN MUNICIPALITY Second Respondent

Neutral citation:

Coram: Mgengwana; AJ

Heard: 3 June 2026

Delivered : 5th November 2026

Delivered electronically: The judgment is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be 30 October 2026.

Summary: Subcontracting – Liquidated monetary claim – Applicant seeks Order compelling Second Respondent, who is not party to the agreement between the Applicant and First Respondent, to make payment of moneys owed by the Second Respondent to the First Respondent over to the Applicant in the event of this Court finding that the First Respondent is liable to pay the Applicant a specified amount of money – Whether Second Respondent who has a duty to pay the First Respondent for work done as per the written agreement should be ordered to pay Applicant instead of First Respondent – Execution by attachment of indebtedness in terms of Rule 45(12) of the Uniform Rules of this Court.

ORDER

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1. The Applicant's application against the First and Second Respondents is dismissed with costs, inclusive of the costs of the urgent application and Senior Counsel's costs on Scale C.

JUDGMENT

MGENGWANA, AJ

Introduction

[1] This is an application in which the Applicant is seeking an order in the following terms against First and Second Respondent:

(a) That the First Respondent be ordered to immediately pay the amount of R786 825.95 to the Applicant.

(b) That the Second Respondent be ordered to make payment to the Applicant in the amount of R786 825.95 from the first monies due and payable by the Second Respondent to the First Respondent in the event of this Court granting the prayer above.

(c) Such further and/or alternative relief be granted to the Applicant which this Court deems reasonable and appropriate under the prevailing circumstances.

[2] According to the Applicant, the second prayer is premised on Uniform Rule 45(12). According to the Applicant, the Second Respondent herein is joined in this application by virtue of its interest in the subject matter and to enable execution of any judgement granted against the First Respondent. Should this Court grant judgment as prayed for in prayer one, the Applicant

will be entitled to execute against the Second Respondent by attaching its indebtedness to the First Respondent in terms of Rule 45(12) of the Uniform Rules of this Court. The relief sought against the Second Respondent is accordingly contingent on judgment being granted against the First Respondent.

Background

[3] On 28 January 2025, the First Respondent appointed the Applicant as a subcontractor to carry out certain sealing works at Dysselsdorp Hoog Reservoir (the Reservoir) under Contract TD 04/01/2024, Work Package B (the Contract), after being appointed as the main contractor by the Second Respondent for the broader works under the contract. The initial subcontract was for an amount of R795 770.04 excluding VAT. On 7 March 2025, the First Respondent requested the Applicant to submit a revised quotation for additional sealing work to be performed on the Reservoir which then pushed the subcontract value to R1 416 377.04 excluding VAT. Letters of Appointment in favour of the Applicant were issued for both of these amounts on 28 January 2025 and 13 March 2025, respectively, by the First Respondent.

[4] Even though it is not clear what precipitated the contents of the email, on 24 June 2025, the First Respondent addressed an email to Proper Consulting Engineers (the Engineers) which was appointed by the Second Respondent and acting as “Engineers” under General Conditions of Contract and to Chris Swart of the Second Respondent in which the deponent to the

Founding Affidavit in support of this application was copied. The following, among other things, was stated in the said email:

(a) That the First Respondent had appointed the Applicant on specific scope of work that the Applicant priced for.

(b) That the Engineers and the Applicant had had their own discussions without the First Respondent, wherein they agreed to increase the Applicant's scope of work.

(c) That the First Respondent was never party to those discussions.

(d) That the Applicant has a list of demands that the First Respondent cannot meet as it is not the Second Respondent.

(e) That the Applicant has done work that it has never discussed with the First Respondent before it did.

(f) That the Applicant has been receiving mandates directly from the Engineers.

(g) That because the First Respondent does not know much about the work that has been done with the authorisation of the Engineers, the First Respondent cannot plan for Applicant's payment within their payment limits.

[5] In response to the email above, the Engineers issued Site Instruction 029 instructing the First Respondent to, once again, amend the Applicant's Letter of Appointment to reflect a revised contract value of R2 446 141.26 including VAT. It should be noted that no Letter of Appointment was issued

by the First Respondent in respect of Site Instruction 029. The date of issue of Site Instruction 029 is 27 June 2025. Site Instruction 029 "authorized" additional work in terms of the Applicant's quotation CCP 02112 plus various variation orders. On 30 June 2025, the Applicant issued an invoice to the First Respondent for additional work completed under Quotation CCP 02112 together with the scope executed in terms of Variation Orders B, C and D. This invoice amounts to R786 825.95 including VAT and it is the subject of this application.

[6] In its Answering Affidavit, the Second Respondent has averred that it is uncertain whether the Engineers had authority to issue Site Instruction 029 and that this aspect is a subject of its investigation. In addition to this, the Second Respondent averred in its Answering Affidavit that the Applicant had invoiced for an amount of R2 353 988.14 and has only received an amount of R1 567 162.19 from the First Respondent, which then leaves a balance of R786 825.95.

[7] The Second Respondent further averred in its Answering Affidavit that the person who is responsible at their Municipality for the issuing of any variations was one Mr. Chris Swart (Mr. Swart) who held the position of Senior Manager: Water and Sanitation Services. It was not known at the time the Answering Affidavit was deposed to whether he authorised or purported to authorise any variation order or revised scope of work for the project which includes the issuing of Site Instruction 029 as this is also under investigation.

Issues for determination

[8] Based on the above set of facts, this Court is enjoined to make a determination on the following:

(a) Whether the First Respondent should be ordered to immediately pay the Applicant an amount of R786 825.95 to the Applicant.

(b) If so, whether the Second Respondent's point in limine should succeed.

(c) If no, whether the Second Respondent should be ordered to pay to the Applicant an amount of R786 825.95 from the first monies due and payable by the Second Respondent to the First Respondent.

Parties' submissions

[9] It has been noted by this Court that the Applicant's submissions in support of prayer one are scant, which is very unfortunate as this is the first hurdle that the Applicant has to surmount before moving to the second prayer.

[10] The Second Applicant has, however, submitted as follows:

(a) Despite the fact that First Respondent has to date not opposed the application for judgment against it, the Court must still consider whether a case has been made out by the Applicant for the grant of the default judgment sought.

(b) Although the Second Respondent does not seek to make any submission on behalf of the First Respondent, it is nevertheless submitted that, in the Court considering whether the Applicant has

made out a case in its founding papers for the judgment sought against the First Respondent in the amount of R786 825.95, the following must not be lost sight of:

(i) On its own version and founding papers, the Applicant states that, after the issue of Site Instruction 029 to the First Respondent, the First Respondent was instructed to amend the Applicant's appointment to a revised contract value of R2 446 141.26 (inclusive of VAT). If given effect to, this would have been the second amendment to the Letter of Appointment, as between the Applicant and the First Respondent;

(ii) According to the first amendment to the Letter of Appointment dated 7 March 2025, it was expressly provided that any increases in the budget must receive written approval from the First Respondent before the work being proceeded with;

(iii) What the Applicant did not disclose in its founding papers, was that the Applicant's Letter of Appointment with the revised contract value of R2 446 141.26 (inclusive of VAT), has to date never been signed off as between the Applicant and the First Respondent;

(iv) The failure to amend the Letter of Appointment calls into question whether the Applicant indeed has any contractual claim for payment from the First Respondent.

(c) The Second Respondent has made it clear in its answering papers that it was required to prepare its answering papers, without any co-operation from the First Respondent. However, it is clear that on the

face of the allegations contained in the Applicant's founding papers which require to be investigated extensively by the Second Respondent (as appears from the Answering Affidavit), there are certain material shortcomings which the Applicant ought to have addressed and which cannot be disregarded when consideration is given to the grant of the default judgment sought by Applicant against the First Respondent, or for the purposes of considering whether the relief sought by the Applicant should be granted against the Second Respondent.

Case Law

[11] In Pillay v Krishna18 at 951-2, a three-legged approach was stated as follows with regards to burden of proof:

'The first principle in regard to the burden of proof is … If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it … Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it … But there is a third rule, which Voet states in the next section as follows: "He who asserts, proves and not he who denies, since a denial of fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.'[1][12]

[12] Harms DP stated the following in *National Director of Public Prosecutions v Zuma* when dealing with factual disputes in motion proceedings:

[1] Pillay v Krishna 1946 AD 946 at 951-2

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."[2]

Discussion

[13] As stated in the Applicant's Founding Affidavit, the relief it seeks against the Second Respondent is contingent upon this Court granting default judgment against the First Respondent. So, the question that needs to be answered first and foremost is whether the Applicant has shown on a balance of probabilities that it is entitled to default judgment against the First Respondent based on what is contained in its Founding Affidavit, the Second Respondent's Answering Affidavit, and the Applicant's Replying Affidavit.

[14] After reading these affidavits, the following becomes common cause:

[2] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at par 26

(a) On 28 January 2025, the First Respondent appointed the Applicant as a subcontractor to carry out certain sealing works at Dysselsdorp Hoog Reservoir (the Reservoir) under Contract TD 04/01/2024, Work Package B (the Contract), after being appointed as the main contractor by the Second Respondent for the broader works under the Contract.

(b) The initial subcontract was for an amount of R795 770.04 excluding VAT.

(c) On 7 March 2025, the First Respondent requested the Applicant to submit a revised quotation for additional sealing work to be performed on the Reservoir which then pushed the subcontract value to R1 416 377.04 excluding VAT.

(d) Letters of Appointment in favour of the Applicant were issued for both of these amounts on 28 January 2025 and 13 March 2025 respectively by the First Respondent.

(e) These Letters of Appointment contained, *inter alia*, the following clauses:

> (i) Citicon Projects (Pty) Ltd (Applicant) is hereby selected as a Sub-Contractor for the above-mentioned contract to proceed with the works to a value of the amounts specified above VAT Exclusive.
>
> (ii) Any variations above this budget (being the amounts stated in the Letters of Appointment) must receive written approval from Lupha Enterprise JV Kadima (First Respondent) prior to proceeding.

(iii) Lupha Enterprise JV Kadima Corp will be responsible for Payment to Citicon Projects (Pty) Ltd, and all invoices must be addressed to Lupha Enterprise JV Kadima Corp. All payments will be paid within 30 days after submission of an approved invoice on completion.

(iv)You are requested to immediately contact Lupha Enterprise JV Kadima Corp to start facilitating commencement.

(f) No Letter of Appointment was issued for an amount of R2 446 141.26 by the First Respondent; therefore, Applicant's work was limited to the value of R1 416 377.04 Vat Exclusive. This is despite the fact that there was Site Instruction 029 issued by the Engineers. This is so because the Letter of Appointment makes it clear that any variation of the stated budget of R1 416 377.04 must receive written approval from the First Respondent and the Applicant has neither averred in its Founding Affidavit that such written approval was received by it from the First Respondent nor has it attached this written approval to its papers.

[15] Lack of written approval for work amounting to R2 446 141.26 was specifically averred in the Second Respondent's Answering Affidavit but the Applicant failed to deal with same in its Replying Affidavit. The Applicant was also referred to an email from the First Respondent dated 24 June 2025 wherein the First Respondent, *inter alia*, specifically averred that they had appointed the Applicant based on a specific scope of work that the Applicant priced for. Thereafter, the Applicant and the Engineers had their own discussion which did not include the First Respondent wherein they agreed

to increase the scope of work of the Applicant. As a result of the agreement reached by the Applicant and the Engineers, the Applicant proceeded to do work that was neither discussed with the First Respondent nor approved by the First Respondent. In response to the email referred to above, the Engineers simply gave the First Respondent instructions to issue another Letter of Appointment based on Site Instruction 029. The averments contained in the aforementioned email were never dealt with by the Applicant in its Replying Affidavit. This Court must therefore accept that some of the work that the Applicant's claim is based on was not authorised by the First Respondent and therefore the Applicant cannot claim payment in respect thereof.

[16] Based on authorised work, the Applicant was entitled to an amount of R1 628 833.60 (R1 416 377.04 + 15%) but was only paid an amount of R1 567 162.19 according to annexure "FA5" which then leaves a difference of R61 671.41 which could be a shortfall. However, the Second Respondent has averred in its Answering Affidavit that the Applicant has been overpaid by an amount of R364 056.99 which is the difference between R1 992 890.59 and R1 628 833.60. If confirmed, this would then mean that the Applicant has no claim against the First and Second Respondent. The issue of overpayment but not the quantum thereof has been conceded by the Applicant in its Replying Affidavit.

[17] Therefore, based on the finding that some of the work done by the Applicant was not authorised by the First Respondent and that the Applicant has been overpaid by the First Respondent, this Court is not satisfied that the Applicant has shown that it is entitled to default judgement in the amount of

R786 825.95 or in any amount against the First Respondent. This finding having been made, this Court cannot order the Second Respondent to pay the Applicant the amount of R786 825.95 or any amount, as this Order was contingent on default judgement being granted against the First Respondent.

[18] In the result, the following order is made:

1. Applicant's application against the First and Second Respondents is dismissed with costs, inclusive of the costs of the urgent application and Senior Counsel's costs on Scale C.

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TJ MGENGWANA
Acting Judge of the High Court

APPEARANCES:

For the Applicant : Mr. H.J. de Wet SC

Instructed by : DC Robertson Attorneys Incorporated

: Mr. H. Prinsloo

For the Respondent: Mr. D.W. Gess SC

Instructed by : MD Dixon Attorneys