

SOUTH AFRICA / JUDGMENT

Enhanced Innovation Projects (Pty) Ltd v Quantibuild (Pty) Ltd (M19/2016) [2018] ZANWHC 12 (9 February 2018) [2018] ZANWHC 12

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

M19/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

No. M19/2016

In

the matter between:-

ENHANCED

INNOVATION PROJECTS (PTY)

LTD Applicant

And

QUANTIBUILD

(PTY)

LTD Respondent

DATE

OF HEARING: 12 December 2017
DATEOF JUDGMENT: 09 February 2018
FORTHE APPLICANT: Adv. Moroka SC with Adv Mmusi
FOR

THE RESPONDENT: Adv. Swanepoel

JUDGMENT

KGOELE J.

[1] This is an application wherein the applicant seeks payments in the sum of R3 603 874.88. The respondent was during June 2012 appointed as a successful bidder by the Thabazimbi Local Municipality (the Municipality) under contract no: MIG/LP 1224/5/11/13, for the upgrading of the Thabazimbi Waste Works: 3,5 ML/D – 6,5ML/D. The cause of action, as relied upon in the founding affidavit, is a written contract in terms whereof the applicant was appointed as sub-contractor for the execution of work and supply of material in respect of the Thabazimbi Waste Water Treatment Works – Outfall Sewer which was part of the Works under this contract.

[2] The amount claimed by the applicant is comprised of two claims. Claim 1 is in respect of the tax invoice number 31 which was allegedly delivered to the respondent for payment in the sum of R1 313 650.89. Attached to it is a payment

certificate number 5 which purportedly indicates that the respondent was paid such amount by the Municipality. Claim 2 is in very similar terms to claim 1 and it relates to tax invoice number 32 and payment certificate number 6 for a total amount of R2 290 223,99. I pause here to mention that the parties agreed that the submissions and arguments in relation to Claim 1 apply with equal force mutatis mutandis to Claim 2 for this reason.

[3] The gist of the applicant's claim is that the applicant's tax invoices number 31 and 32 were received and acknowledged by the respondent. This amount claimed by the applicant was incorporated by the respondent in payment certificate number 5 and 6 respectively which were sent to the Municipality by the respondent. Payment in full was made in respect of the two payment certificates by the Municipality to the respondent and such payment included payment for the work done and material supplied by the applicant to the respondent. The applicant annexed Annexure "AP9" and "AP16" which are the tax invoices number 31 and 32 including Annexure "AP5" and "AP11" which relate to part of the work it did as reflected in payment certificates no. 5 and 6.

[4] The applicant further indicated that, all the final certificates pertaining to the work and material accounted for in payment

certificates number 5 and 6 were approved by the Engineers appointed by the Municipality. The respondent generated payment

certificates number 5 and 6 after it was satisfied that the underlying work was done and material supplied by the applicant so

that it can receive payment from the Municipality. The applicant also in its replying affidavit amongst others attached confirmatory affidavits from the previous Acting Municipal Manager of the Municipality, Mr Booysen, Mr Malema, former CFO of the

Municipality, to the effect that payment was made to the respondent in respect of payment certificates number 5 and 6. A

confirmatory affidavit of a Civil Engineer Mr Korir is also attached to this replying affidavit.

[5] According to the submission made by the applicant's Counsel, the respondent does not pertinently deny the crucial averments made by the applicant in respect of the two tax invoices number 31 and 32 which were incorporated in the respondent's payment

certificates 5 and 6 and further that, it received payment in full. He submitted further that the respondent contents itself by merely providing vague and insubstantial responses hereon.

[6] The other contention which the applicant relied on is to the effect that the respondent admitted and acknowledged its indebtedness to applicant in respect of applicant's claim per invoices number 31 and 32 as set out in this matter. According to the respondent this admission is manifest from the following:-

6.1 On 28 March 2014 respondent in his contemporaneous written summary of payments to applicant, it unequivocally stated that the amount due by it to applicant is exactly the amount of applicant's claim herein, namely, R3 603 874,88.

6.2 In its letter to the applicant dated 15 October 2014, respondent unequivocally declares and confirms as at that date that:-

"Due to delayed progress payments were submitted to [the municipality], we [the respondent] were unable to pay applicant."

All payment certificates were submitted to [the municipality]. Once payment is received, we [respondent] can honour our commitments

towards [applicant].

6.3 In its letter to applicant dated 24 October 2014 respondent again confirms that it is putting on record that the amount of R3 603 874,88 is due to the applicant and that once payment is received from the municipality it will make payment to applicant.

6.4 In response to applicant's demand the respondent responded in summary by saying that once respondent receives payment, the respondent will immediately pay what is legally due to applicant.

6.5 Mr PJA de Bruyn, the contract Manager and Director of respondent, acknowledged and undertook to make payment of the debt due by respondent to applicant in the sum of R3 603 874,88. The other remaining Directors of respondent also undertook to make payment.

[7] Applicant's Counsel finally submitted that there is no real genuine dispute of fact as contended by the respondent. Further that, where viva voce evidence would not disturb the balance of probabilities appearing from the affidavits, then the Court would make a decision on the facts on a consideration of the probabilities emerging from the affidavits.

[8] The respondent raised three Points in Limine in addition to its opposition to the application. The first Point in Limine raised a question whether there existed a foreseeable dispute of fact as pleaded by it. In its answering affidavit the respondent claims that the applicant did not prove that it completed the relevant nominated subcontracted work, or put differently, performed in accordance with its obligations in terms of the contract. The second issue raised under this Point in Limine is whether the applicant is entitled to payment in the amount claimed in terms of the tax invoices submitted by it. The respondent

further contents that it in-fact overpaid the applicant. Lastly that, there is a dispute as to whether the applicant complied with the terms of the written contract by submitting, together with its tax invoices, signed payment certificates issued to the applicant by the relevant projects Engineers certifying the work that was done by the applicant, as well as the amount of payment(s) due and payable to it.

[9] The second Point in Limine relates to whether there exists any lawful cause of action. The respondent's Counsel submitted that in Annexure "AP3"

which the applicant relies on as a written contract between the parties, reference is made to the requirement that the parties should conclude inter alia a signed agreement. Respondent's contention is that it is common cause that no such signed agreement was ever concluded by the parties. Further that, on the applicant's own version, it has cancelled the contract entered into by the parties. The respondent's Counsel submitted that the applicant's contractual claims cannot survive its purported cancellation of the contract.

[10] The last Point in Limine relates to whether the applicant's founding affidavit was authorised by the applicant to institute the present application. This Point in Limine was however not persisted with during the submissions.

First Point in Limine (Foreseeable disputes of fact)

[11] According to the respondent, the documents attached to the applicant's founding affidavit marked Annexure "AP5"

and "AP11" are not payment certificates which were submitted by the applicant to the respondent and which were duly

issued and signed and or certified by KMSD Engineers. The respondent further in paragraph 23 of its answering affidavit indicates that, the professional Engineers that were appointed to verify the correctness of the contents of the payment certificate to be issued and presented by the applicant to the respondent were KMSD Engineers, and the one appointed to certify the correctness of the respondent's own payment certificate were Aurecon.

[12] It is common cause that the applicant did not attach the payment certificates they purportedly submitted to the respondent and which were certified by their Engineer. The applicant relied on its claim solely on the payment certificates which were generated and submitted to the Municipality by the respondent. The applicant claims that this was a

common practice between the parties and further that, only tax invoices were sent to the respondent who will then generate payment certificates certified by Aurecon. According to the applicant, the respondent did not have a problem with this kind of arrangement before and paid them. The applicant further denies that the blessing or the payment certificate issued by KMSD Engineers were required.

- [13] The first problem with the dispute regarding the payment certificates is that it appears from the respondent's averments that this issue was since raised in the application for Summary judgment which was initiated by the applicant but the applicant had since to date, not attached same. This problem persisted even in the application that was heard by Chwaro AJ, the Order thereof still stands.
- [14] The above problem is further compounded by the fact that the respondent alleges that the General Condition of the Contract which it attached to its papers forms part of the terms and conditions of the applicant's appointment as a sub-contractor. This is the document which the respondent heavily relies on in support of the proposition that payment certificates signed by KMSD Engineer were to be submitted by the applicant. Although the respondent indicated that according to "AP3" attached to the applicant's founding affidavit it was specifically recorded as such, the applicant persistently in its papers contents that this document and the conditions therein are totally irrelevant to the issues before Court, do not constitute the agreement between applicant and respondent, and have been incorporated into the contract "Annexure AP3" so as to form the residual terms of the contract between applicant and respondent.
- [15] The applicant further claims that the payment claims were to be processed in accordance with what it alleged in paragraph 8 of the founding affidavit (that is, the alleged common accepted practice described in paragraph 12 above). But paragraph 8.7 of the very same affidavit continues as follows:-

"No Payment Certificate can be processed until the respondent is in possession of a signed copy of applicant's letter of appointment and original tax clearance certificate". [My Emphasis added]

Further in paragraph 8.8 the following is written,

"Applicant shall have the right to institute immediate Court proceedings in respect of failure by respondent to pay the amount of any payment certificate on its due date". [My Emphasis added]

- [16] To put this issue in a better perspective, it is important to indicate that all of these subparagraphs quoted above follow

subparagraph 8.1, 8.2, 8.3, 8.4, 8.5 and 8.6 of the applicant's founding affidavit which talks about the manner in which claims and tax invoices are to be submitted and which according to the applicant's own mouth, are the terms of the contract between the parties which are material to the subject matter in this application. It therefore becomes apparent that the issue regarding the payment certificates raised by the respondent is not far-fetched, fictitious and/or palpably false. There is in my view a genuine dispute of fact on this issues as to whether the applicant was to

submit payment certificates generated by itself, let alone those which were certified by KMSD Engineer as the applicant was a sub-contractor appointed by the Municipality, which cannot be resolved on papers before me.

[17] The problem faced by the applicant continues in that the respondent has pertinently denied that the applicant has completed the relevant work in terms of the nominated subcontract entered into between the parties. In addition, the respondent's Counsel argued that, the contents of the applicant's purported tax invoices no's 31 and 32 are incomplete in as much as those tax invoices refer to "total construction amount completed as per schedules" in circumstances where the "schedules" referred to, have not been attached to the applicant's founding affidavit, nor had they been attached to the two tax invoices which the applicant based its claim upon.

[18] It is noticeably observed that the applicant has not provided any particulars in respect of the work and or services that were

purportedly completed by it in terms of its appointment as nominated sub-contractor in its papers. In addition, no particulars of work executed and or material supplied by the applicant appear from the reading of the tax invoices no's 31 and 32 as correctly submitted by the respondent. The tax invoice refers to work "as per schedules attached" but as already indicated above the schedules referred to were not attached. The applicant's founding affidavit does not assist this Court in resolving the issue because in paragraph 13.1 thereof it is couched as follows:-

"Part of the Work as reflected in payment certificate number 5" was duly executed and completed by applicant in terms of the contract in the sum of R1 313 650,89". [My Emphasis added]

Once more, no particulars of this "Part of the work done" and or any particulars of material provided by it to the respondent were furnished by the applicant even in its replying affidavit. When asked by this Court to point out in the papers where one can find this information, the applicant's Counsel referred this Court to page 43 of the paginated papers as an attempt to answer this question. The problem with this document as correctly pointed by the respondent's Counsel is that, it does not have a date. As much as it refers to summary of schedules of quantities, it does not tell us whether it is a quotation or work done or materials on hand. The total amount therein in the Column is reflected as "Final Estimate Amount" and is R19 254 600,00 which makes the confusion worse.

[19] It is trite law that the applicant bears the onus to allege and prove that everything which had to be done in terms of the contract on which it sues was done by it. See: *Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd* 1979 (2) SA 56 (A). But above all, the applicant faces an unavoidable fact that there exist a myriad disputes of facts which pertains to: its alleged entitlement to payment; the issue of whether it completed or performed in terms of the contract; including the dispute regarding which Engineer has to sign the payments certificates; all of which cannot be resolved on affidavits. It is disingenuous to say the least for the applicant to attempt to claim payments from the respondent on the basis that it was paid by its employer (the Municipality) and therefore the applicant must be paid without

demonstrating that it had performed according to the contract.

- [20] The last issue which is also a subject of a serious dispute between the parties is whether the applicant is entitled to payment in the amount claimed in terms of the purported tax invoices submitted by it (Invoice 31 and 32). Whilst the applicant claims that the respondent admitted its indebtedness, the respondent on the other hand denies that it has admitted its indebtedness towards the applicant. The respondent instead claims that it has overpaid the applicant. In its papers the respondent alleges that the summary sheet attached to the applicant's founding affidavit was calculated on the strength of the respondent's payment certificate no: 9. The respondent attached a payment certificate analysis which included the respondent's payment certificate no: 9. The respondent maintained that according to this analysis, the total amount of payments due to applicant is R7 169 141-11. From this amount, an amount which according to the respondent must be deducted is: (1) R5 033 786-52 (which amount has to date already been paid by the respondent to the applicant) and (2) R781 223-73 (in respect of equipment rented by the applicant from the respondent) including an amount of (3) R3 320 116-12 (in respect of material purchased by the respondent for utilization by the applicant in the performance of its duties as nominated sub-contractor). According to the respondent, the calculation reveals that up to the date when they deposed to the answering affidavit, it had overpaid the applicant an amount of R1 965 987-26. This is the correct amount which is due after deducting these amounts, which calculation is explicit the payment certificate analysis it attached. It is the respondent's submission that the calculation clearly depicts an overpayment, which they intent to follow as a counter-claim.
- [21] The issue regarding the overpayment and or possible counter-claim did not start in this application. It existed even in 2015 as it will become clearer later in this judgment, in the application that served before Chwara AJ. In addition, the correspondences which the respondent heavily relied upon to claim that there is no real dispute of fact because the respondent admitted its indebtedness does not assist the applicant either because they all dates back to 2014.
- [22] To signify that there existed a foreseeable disputes of fact from a long time ago which cannot be resolved on paper, the history of this matter becomes relevant To date, the applicant has launched several proceedings against the respondent in respect of the same cause of action to wit:-
- The first proceeding was an action against the respondent during September 2015 under case no. 1414/2015 in this Court. Payment of the same amount of R3 603 874-88 was claimed. This is the same cause of action which forms the subject matter of the present application;
 - On 12 October 2015 the applicant launched a Summary judgment application under the same case number;

· The respondent (as defendant), together with its answering affidavit delivered in opposition of the Summary Judgment, filed an

application for striking out certain vexatious and irrelevant / inadmissible portions of the applicant's affidavit in support

of its summary judgment application;

· Pursuant thereto the applicant withdrew its action it instituted against the respondent. This action remains withdrawn up to date;

· On 28 July 2016 respondent successfully obtained a costs order in that action which the applicant withdrew;

· This action which was withdrawn was in fact preceded by an urgent application launched in April 2015, seeking certain declaratory

relief together with an order whereby it be declared that the "applicant is entitled to damages that were quantified in the

sum of R28 556 247-89 under case no. M141/2015;

· After this urgent application was struck off the roll it was again enrolled on the normal motion Court roll, argued and subsequently dismissed with costs by an Order of Chwaro AJ on the 20 August 2015. It is worth mentioning that in this application the issue of payment of the same tax invoices number 5 and 6 to an amount of R3 603 874-00 was also dealt with by Chwaro AJ amongst other claims. Chwaro AJ dismissed the application solely because he held that there were foreseeable dispute of facts. The following extracts from the judgment are self-explanatory:-

"[6] At the center of the dispute between the parties is the question whether the applicant was entitled to have opted to launch motion proceedings to seek the orders adumbrated above when it should have realised, when launching the application, that a serious dispute of fact incapable of resolution on papers, was bound to develop"

AND

[13] In respect of the claim for an amount of R3 603 87-88 for work allegedly done, it is my considered view that such a claim is a matter of serious factual dispute borne out by the fact that the applicant has failed to attach certified payment certificates in respect of such claims, which would then have assisted the applicant in its contention that the payment is owing, due and payable. The success of the said claim is hampered, at least on the papers before me, by the possible counter-claim which the respondent intends launching in the amount in excess of the claimed amount and for material on site allegedly bought by the respondent". [My Emphasis added]

[23] It can be noted from the above mentioned history that when the applicant launched the current proceeding in January 2016, it was aware of the action that it withdrew and the reasons of the judgment of the application that served before Chwaro AJ. The applicant

brought the current application insisting and claiming that it had cured the defects that were apparent in the two matters mentioned above, by attaching the tax invoice 31 and 32 including payment certificate no 5 and 6, which attachment as indicated above, did not assist the applicant because of the reasons already given above. But of significance in this matter is that the disputes that were initially communicated to the applicant by the respondent even before the launch of the two matters above which disputes Chwaro AJ also found that they were foreseeable, are still the same disputes that in my view are applicable in the current application. There is no doubt that the applicant knew about all of them and also foresaw same. In my view, they cannot be resolved on papers. It begs to question why the applicant withdrew his first action that he instituted, and rather resorted to instituting different types of applications against the respondent on the same matter but on reformulated causes of actions.

[24] In addition to the respondent's opposition to the merits, there were other Points in Limine raised by the respondent as indicated above, but I am of the view that the need to consider them fell away because the Point in Limine that I dealt with above is capable of disposing this application in toto.

[25] I come to the conclusion that there exist foreseeable disputes of facts which the applicant foresaw that cannot be resolved on papers. The applicant has thus instituted an application in circumstances where it was obliged to institute an action.

[26] The following Order is therefore made:-

26.1 The application is dismissed with costs.

A.M. KGOELE

JUDGE OF THE HIGH COURT

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