IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 32856/14

Date: 2015/06/02

(1) REPORTABLE: **YES.**

(2) OF INTEREST TO OTHER JUDGES: **YES**

(3) REVISED. **YES**

SIGNATURE

In the matter between

ETESLA CONSULTING EGINEERS [Pty] Ltd — Plaintiff/Respondent

and

ESKOM HOLDINGS SOC — 1ST Defendant/Excipient

ARTHUR BLOFIELD — 2ND Defendant/Excipient

JUDGEMENT

Spilg J;

INTRODUCTION

1. This is an *ex tempore* judgement. The Plaintiff is a firm of consulting engineers which was appointed by Eskom (the first defendant) under a written agreement

concluded in April 2011 in terms of which it was to perform project management and related services:

> *"... on an 'as-and-when' required basis required for Continuous Business Improvement Projects in the Polokwane Area Northern Region of Eskom."*

2. According to the particulars of claim the related services includes initiating and managing reliability and other continuous business improvement projects relating to the quality of electricity supply, quality assurance services, safety management and a number of other essential services.

3. In terms of the agreement the plaintiff was to be paid in accordance with the approved ECSA rates prevailing from time to time. The plaintiff sued Eskom and Blofield (as the second defendant) in respect of unpaid invoices that had been presented in an amount totalling R2 289 345.20. Interest was also claimed.

4. Both defendants, represented by the same firm of attorneys, have excepted to the claim on the ground that it lacks averments to sustain a cause of action because of the failure of a jurisdictional prerequisite; namely, that in terms of the agreement, if a dispute arises then it must be referred to and decided upon by an adjudicator and if that is not done within the periods provided for in the agreement, neither party may subsequently refer the matter to adjudication or arbitration.

THE ISSUES

5. The key issue is whether on a consideration of the plaintiff's particulars of claim a dispute arose as contemplated in the dispute resolution clauses of the agreement.

6. I should firstly indicate that there are two parts to the agreement; the offer/ acceptance and contract data portion which constitute the first part and then the NEC3 professional service contract which includes the dispute resolution clause (being the option that was adopted by the parties under the section headed Option W1.)

7. The following clauses of the agreement which are to be found under Option W1 are relevant:

Clause W 1.1

> *"A dispute between the parties is to be referred to and decided upon by an adjudicator within the time period set out in the adjudication table contained in clause W1.3."*

It is common cause that this was not complied with.

Clause W1.3 (2):

"If the dispute is not notified and referred to the adjudicator within the time period neither party may subsequently refer the dispute to the adjudicator or to an arbitration tribunal."

Clause W1.3 (10)

"The adjudicator's decision is binding on the parties unless and until revised by the arbitration tribunal and is enforceable as a matter of contractual obligation between the parties and not as an arbitral award."

Clause W1.3 (10)

"The adjudicator's decision is final and binding if neither party notifies the other within the stipulated time that it is dissatisfied with the decision and intends referring the matter to an arbitration tribunal."

Clause W1.4 (1)

"That a dispute may not be referred to an arbitration tribunal unless it has first been referred to the adjudicator."

Clause W1.4 (4)

"The arbitration tribunal settles the dispute that is referred to it."

8. It is apparent that the defendants have a second string to their bow; they contend that if the dispute was not referred to adjudication within the period allowed then the plaintiff can never claim either by way of arbitration or through the courts the amount it says is owed to it by the defendants.

9. It is necessary to appreciate that the defendants elected to bring their objection to the particulars of claim by way of an exception seeking the dismissal of the claim, and not on the grounds that the pleading is vague and embarrassing. Consequently, unless the point can be resolved exclusively as a matter of law, and without the possibility of being displaced by evidence, the exception will fail.

WHAT CONSTITUTES A DISPUTE

10., In an able argument *Adv Lapan* referred to several cases which have determined when a dispute arises. I need only refer to a few of them.

11. In *Montmasure County Council v Kotselow and Kemple* 1965 (5) DLR 83 Lord Denning MR said that:

> *"For there to be a dispute or difference there must be a claim by a contractor and a rejection of it."*

See also *AWB Construction Services Ltd v Rocking Motor Speedway Ltd* 2004 EWHC888TCC paras 134 and 135. However, ultimately a dispute requires the existence of competing contentions.

12. In this regard I refer to Southwood in *Communications Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 597 G-H.

> *"Ordinarily a dispute can arise only when there are at least two parties who hold different points of view on a particular issue. That would follow from the meaning of 'dispute' in The Shorter Oxford English Dictionary: 'an argumentative contention; a controversy; also in a weakened sense, a difference of opinion'. And that is the approach in the decided cases ....: It seems that at the very least the word postulates the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions: see Durban City Council v Minister of Labour (supra at 712)."*[1]

13. Plewman JA said the following in *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) at para 12 where Plewman JA:

> *"It follows that some care must be exercised in one's use of the word dispute. If for example the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitrations can be entered upon."*

[1] *Durban City Council v Minister of Labour and Another* 1953 (3) SA 708 (N)

In *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at para 7, Cloete JA after referring to this extract from *Telecall* emphasised that:

> *"A failure to pay does not without more imply that there is a dispute as to liability."*

THE CLAIM

14. I turn to consider whether the plaintiff's claim admits to a dispute between the parties. After identifying the plaintiff and Eskom, as the first defendant, the particulars deal with the second defendant, Mr Blofield, in the following way, which I believe is of importance.

> *"An adult male program manager who was employed, at all relevant times of this action, by Eskom."*

15. After setting out the agreement and the services that the plaintiff was to provide (to which I have already referred) there follows another significant paragraph (para 6.2) which refers to clause 25.2 of the agreement :

> *"Eskom will provide all access required to complete the service (clause 25.2), including access to Eskom's staff and any relevant sites."*

16. After dealing with the basis of remuneration paragraph 6.6 of the particulars reads:

"Eskom nominated Blofield as its agent and authorised him to carry out all its actions in the contract with the exception of those required by clause 20 (clause X10.1)"

Then an averment is made that at all material times there was in existence a policy and procedure known as Eskom's Procurement and Supply Chain Management Procedure 33-1034 revision (Eskom's P&SCM) of which Blofield was aware and to which he was bound.

17. Paragraph 8 of the particulars reads:

"In terms of Eskom's P&SCM Blofield would be personally liable for the costs of any services procured by him without adherence to procedures therein."

Paragraph 9 continues:

"Pursuant to the conclusion of the agreement, Blofield, acting within the course and scope of his authority as Eskom's agent, issued instructions as Eskom's agent, issued instructions to the plaintiff from time to time to render services to Eskom."

18. Paragraph 10 deals with certain instructions issued on or about 20 June 2011 regarding services that the Plaintiff was to perform in the nature of audit work and the line inspection of four feeders in Limpopo identified in the particulars as

situated at Pietersburg Braksloot, Kareesbos Marulabult, Elmadal Ysterberg and Brockled SAUK.

19. Paragraph 11 of the particulars avers that:

> *"On 1 September 2011 in terms of the agreement Čolić of the plaintiff, notified Blofield in writing that the audit could not be completed timeously and within the allocated budget due to the plaintiff experiencing problems accessing certain sites, which access problems were causing delays in completing the audit. Čolić furthermore notified Blofield of increase costs in completing the audit due to the said delays."*

20. At this stage it should be mentioned that in terms of the agreement Čolić was under the authority of Blofield.

21. It should also me mentioned that nowhere does the plaintiff contend that a dispute arose regarding any of these issues. That is not the plaintiff's case.

22. I turn to paragraph 12 of the particulars which reads:

> *"Blofield did not consent to the termination of the audit as a result of the aforesaid notification."*

Again plaintiff does not contend that a dispute arose between it and the defendants in relation to this aspect.

23. Paragraph 13 of the claim alleges that:

> *"On 29 September 2011 Čolić again formally requested that Blofield, on behalf of Eskom, consent to the termination of the audit."*

Once more, the plaintiff does not contend that a dispute arose between itself and the defendants in this regard.

24. In none of the following paragraphs of the particulars does the plaintiff contend that a dispute arose between the parties.

Paragraph 14:

> *"Blofield and in writing, refused the consent sought by the plaintiff and instructed the plaintiff to continue with the audit."*

Paragraph 15:

> *"In instructing the plaintiff to continue with the audit Blofield:*
>
> *15.1. acted within the course and scope of his mandate as Eskom's agent alternatively represented to the plaintiff the he had the necessary authority to give the said instruction to the plaintiff;*
>
> *15.2. represented to the plaintiff that he had followed the procedures in Eskom's P&SCM to secure additional funding to pay for the procurement of the plaintiff's service in terms of the said instruction;*

15.3. represented to the plaintiff that it would be remunerated in accordance with the agreement."

Paragraph 16:

"*The aforesaid representations were material and induced the plaintiff to continue with the audit."*

Paragraph 17:

"*During the period 29 September 2011 to 29 November 2011, the plaintiff continued to perform the audit on account of Blofield's instruction as aforesaid."*

25. Paragraph 18 of the particulars reads:

"*On 29 November 2011, Blofield instructed the plaintiff to terminate the audit, asserting on account of Eskom's P&SCM having not been followed and thus additional funding to pay for the procurement of the plaintiff's services in terms of the said instruction having not been procured."*

It is in respect of this paragraph that Adv. Lapan contends that the plaintiff identifies a dispute a dispute. I will therefore return to this.

26. Paragraph 19 of the particulars avers:

"*On 29 November 2011, and pursuant to Blofield's instruction of that date, the plaintiff terminated the audit and thereafter, on 15 December 2011, submitted a qualified audit report to Eskom."*

Once again the particulars do not suggest the existence of a dispute in regard to these averments.

27. Paragraph 20 of the particulars alleges that on 15 December 2011 an Eskom Plant Representative together with the Eskom Project Coordinator accepted the plaintiff's audit report, thereby certifying that the plaintiff had carried out the audit in a proper, diligent and professional manner. Nowhere in these averments is there a suggestion of a dispute regarding the manner in which the work was performed; quite the contrary.

28. Paragraph 21 of the particulars contends:

> *"Accordingly, the plaintiff duly performed its obligations in terms of the agreement and in terms of the instruction given to it by Blofield on 29 September 2011 and Eskom has had the benefit of the services rendered by the plaintiff in carrying out the audit."*

There is no suggestion of a dispute regarding the performance by the plaintiff of its obligations.

29. The particulars then refer to the invoice that were submitted, the portion that was paid and then submits in paragraph 26 that:

> *"Alternatively, and in the event that Eskom denies that Blofield was duly authorised to instruct the plaintiff to continue with the audit, then Blofield is liable to the plaintiff in the sum of R2 289 343.20 including interest*

reckoned at the rate charged by The Standard Bank of South Africa from time to time, being the amount of damages that the plaintiff has sustained as a result of Blofield's representations as aforesaid and/or on account of Eskom's P&SCMP as aforesaid."

It is clear that the plaintiff does not contend that a dispute exists between itself and Eskom. It deals with whether or not an internal arrangement that would only be known to Eskom and Blofield was complied with and plaintiff does not enter that issue which does not raise a dispute between the contracting parties. It simply draws the conclusion that if there was such an arrangement , then Eskom is liable. If not, then Blofield is liable.

30. I return to paragraph 18. Nowhere in that paragraph, or elsewhere in the papers, is a dispute raised as to whether Blofield was entitled to have instructed the plaintiff to terminate the audit, or that Eskom's P&SCMs had been followed. Quite the contrary; the plaintiff is asserting a position of which it was informed by the second defendant and for the purposes of its claim is prepared to accept. There is therefore no dispute raised by the plaintiff in its particulars.

31. The defendant also made reference to certain correspondence attached to the claim. The contention advanced is that if one has regard to these documents and the allegations contained in the claim, then it appears that the plaintiff had performed work outside or beyond the scope of the task order and when it presented an inflated invoice Blofield told the plaintiff that it was excessive. It was

further submitted that the plaintiff then sought to extricate itself from the contract and avoid its other obligations whereas Blofield insisted that the work be proceeded with.

32. This may well be the case that the defendant will present to Court. But it is not the case made out by the plaintiff. Furthermore, the plaintiff is not limited to only perform the work set out in the task order. The task order stands as such. It provides:

> "*The service provider may not exceed the value of the task order without prior approval from the project manager's agent.*"

The plaintiff's particulars, as formulates, rely on:

(a) A particular rate having been agreed upon; and that;

(b) all work performed was with the approval of the project manager's agent, Arthur Blofield being its authorised contact person in terms of the agreement.

33. I should add that there is a letter which the plaintiff attached to its particulars dated 1 September 2011. It is addressed by Mr Čolić to both Blofield and his subordinate as identified in terms of the agreement itself. The letter states:

> "*Cost breakdown for the period from 17 to 26 Aug 2011 is enclosed. Task order for KMB feeder was for*

R250 520.39 and we are already close to R800 000.00. May I ask you please to issue a new Task Order to the value of R256 921.29 the amount still available under the contract 4600040172. Removing one CoW from the costs, our invoice would amount to R 506 846.79 just below R507 441.78 that the combined Task Orders would amount to..."

This may constitute evidence to support a plea but it does not impact on the way in which the plaintiff's claim has been formulated.

The claim expressly relies on work being done as authorised by Blofield and that the work was properly performed, a contention supported, if not confirmed, by the subsequent audit.

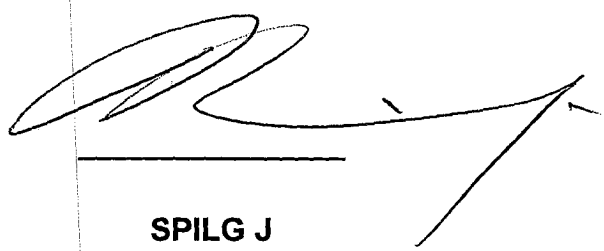
The particulars have been carefully drawn and in its terms seek payment of monies by relying on what the defendants had asserted.

34. There is one further issue which arises. Even if the defendants were to be correct, the plaintiff has already placed before the court allegations, albeit embryonic at this stage (since the case is presently based on enforcing the agreement), relating to the value of the services to Eskom which it actually received from the plaintiff; perhaps not at the remunerated rate claimed, but at least contending that Eskom has received substantial benefits from the plaintiff's services for which it has not paid.

This may well form part of a replication or amended claim in due course. At this stage suffice it that both parties have sought to litigate tactically, which they are entitled to do. From the plaintiff's perspective it wishes to recover payment for services rendered whether under contract or under an enrichment if the plea sets up a case that the contract provisions do not avail. On the other hand the defendant's position in excepting to the claim at this stage is to try and preclude the plaintiff from progressing with an enrichment claim which may fall outside the contract (and hence the dispute resolution clause) and to which one of the defendants may not have a complete answer without exposing the other.

ORDER

For all these reasons the exception is dismissed with costs.



SPILG J

DATE OF HEARING:	1 June 2016
DATE OF JUDGMENT AND ORDER:	2 June 2016
FOR PLAINTIFF:	Adv AJ Lapan
	Mothle Jooma Sabdia Inc
FOR DEFENDANTS:	Adv AW Pullinger
	Nortons Inc