

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/16201

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
SIGNATURE

21/10/2019
.....
DATE

In the matter between:

RPS SWITCHGEAR SA (PROPRIETARY) LIMITED

APPLICANT

AND

ADI INVESTMENTS (PROPRIETARY) LIMITED

FIRST RESPONDENT

ESKOM HOLDINGS LIMITED

SECOND RESPONDENT

MOGALE CITY LOCAL MUNICIPALITY

THIRD RESPONDENT

DEPARTMENT OF ENERGY

FOURTH RESPONDENT

MAGUDU CIVILS (PROPRIETARY) LIMITED

FIFTH RESPONDENT

REYNECK BUTHANI MAGUDU KHOZA

SIXTH RESPONDENT

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application for the payment of monies allegedly outstanding in terms of a contract entered into between the applicant, RPS Switchgear SA (Pty) Ltd, ("RPS") and the first respondent, ADI Investments (Pty) Ltd ("ADI"). The application was certified as a Commercial Court case and after two case management meetings it was referred to oral evidence. Only the first, fifth and sixth respondents oppose the application. The second, third and fourth respondents, respectively "Eskom", "Mogale City" and the "Department of Energy" are all interested parties, hence their inclusion to the present application.

[2] During 2017, Mogale City instructed ADI to prepare a township establishment plan in respect of the Matshelapata Informal Settlement ("the Settlement") in the municipal jurisdiction of Mogale City. The electrification of the Settlement formed part of such plan. Eskom then appointed ADI as the developer of "the Eskom Project". The Eskom project entailed that ADI had to build and supply a network to supply electricity to 1149 households in the Settlement before Christmas of that year. Electricity would be supplied from the Eskom mainline.

[3] On 21 July 2017, RPS entered into an agreement with ADI in terms of which RPS had to deliver 1149 electrical connections in the Settlement. The rate per connection finally agreed upon was R 10,557.47 excluding VAT. ADI also appointed the fifth respondent, Magudu Civils (Pty) Ltd ("Magudu"), being specialists in construction services, as ADI's main contractor on the Eskom project. On 10 November 2017 RPS was requested to electrify a further 162 units at the Settlement and on 28 November 2017 it was requested to electrify 6 further units. The unit price for the 168 additional connections remained the same as had been agreed in the letter of appointment, to wit: R 10,557.47 excluding VAT per connection. The total number of connections

required was thus 1317. The total contract price became R 15,850,774.31 including VAT.

[4] It is common cause that RPS delivered 1317 units before Christmas 2017 as required by the second respondent, Eskom. ADI had paid RPS the sum total amount of R 14,281,688.66 including VAT. RPS therefore complained that ADI had failed to pay the full contract price and that it was indebted to RPS in the amount of R1,569,085.65. Despite demand, ADI refused to pay, and RPS subsequently issued the current application. However, payment of the second retention in the amount of R172 827.04 was not taken into account at the time of the launching of the application. RPS had now recalculated the amount allegedly owed to it, and has reduced the outstanding amount from R1,569,085.65 to R 1,396,258.62.

[5] ADI denies that it owes any money to RPS. It contends that the agreement was varied or novated to the extent that material terms were added which were: (1) Payments for labour and material were separated and ADI would pay for materials provided after RPS has submitted the invoices to ADI; and, (2) Any benefit or loss, in respect of the purchase of the materials would accrue to ADI. ADI therefore contends that the amount of R 1,396,258.62 is not due to RPS, but is actually the amount that was saved by ADI on the materials paid to the suppliers.

[6] ADI also instituted a counterclaim in the amount of R2,698,508.13. During argument the legal representative on behalf of ADI conceded that no there was no evidence in support of the counterclaim. It can, therefore, not succeed.

[7] After hearing evidence, the issues in dispute have ultimately crystalized into only one narrow issue: Was the agreement between RPS and ADI varied, and if so what was the terms of the amended agreement?

THE EVIDENCE

[8] RPS called one witness: its managing director Mr. Maurice Sheunesu Makoni. Mr. Makoni confirmed the contents of the founding and replying affidavit. He explained that RPS and ADI had a previous relationship between them arising from the township establishment plan. After Eskom appointed ADI for the Eskom Project, RPS was approached to make an offer to provide all the labour, material, supplies, knowledge and expertise on the Eskom project. RPS then prepared a written offer and submitted it to Magudu, who in turn presented the document to ADI. The first offer was rejected on price and ADI was not willing to make payment in terms of the proposed payment schedule included in the offer, wherein RPS provided for payment on a monthly basis, projected on its cash flow of the project. RPS made a second offer in terms of which the price would be R10,986.56 per unit and ADI would pay on certain percentage or activity completed. The second offer was accepted on 18 July 2017 and RPS was appointed. The contract was a turnkey contract, referred to as an EPC contract, EPC being the acronym for Engineering, Procurement and Construction. RPS's appointment letter was duly signed by Mr. Ntshuxeko Ndlovu ("Ndlovu"), which is described in the documents as the Quantity Surveyor of ADI and the Chief Operating officer of Magudu.

[9] Mr. Makoni testified that after the second offer was accepted by ADI, ADI requested RPS to reduce the price per unit even further. He did so, as he wanted the work. The price was therefore fixed at R10,557.57 (excluding VAT) per unit and ADI confirmed the price in writing to RPS on 22 July 2017. Mr. Makoni testified that the developer, ADI, was however paid an amount of R14 500 per unit by Eskom. This would ultimately result in a profit for ADI of more than R5 million.

[10] It is common cause that RPS invoiced separately for labour and material. It was agreed that such invoices were to be supplied to ADI together with supporting documents as the Eskom project unfolded, to make interim payments to RPS. In some instances, ADI paid suppliers directly, but in other instances payments were first made to RPS who would then pay its suppliers as RPS had an existing relationship with such suppliers which granted RPS discounts and beneficial rates. One of these suppliers was Voltex.

[11] During his evidence Mr. Makoni referred, *inter alia*, to two documents (Exhibits A and B). Exhibit A originated from ADI. According to Exhibit A, ADI paid for certain materials directly to suppliers nominated by RPS. ADI accordingly deducted such amount from the earmarked material spend. Further, Exhibit A confirms that ADI paid RPS a total amount of R13,439,263.90 instead of R15,850,774.31 on completion of the project. The balance outstanding is an amount of R 1,396,258.62. This is, however, reflected on Exhibit A as “project savings from material”. Mr. Makoni explained that Exhibit B is a summary of all the invoices submitted by RPS to ADI. All the invoices were paid by ADI except for one: Invoice 993 submitted on 14 August 2017 in the amount of R1,396 258.62. It was noted that the amount of invoice 993 and the “savings” on material is exactly the same.

[12] On or about 10 November 2017, Mr. Travor Ncube, on behalf of ADI, sent an email to RPS in which ADI instructed RPS to proceed with 162 additional connections. On 28 November 2017, Mr. Ncube, sent a further email in which RPS was instructed to proceed with 6 additional connections. Mr. Makoni testified that, save for increasing the number of connections required, there was no variation to the contract. Importantly, the unit price for the additional connections remained the same as had

been agreed in the letter of appointment, to wit: R 10,557.47 excluding VAT per connection. The total contract price thus became R 15,850,774.31 including VAT.

[13] Mr. Makoni testified that it was agreed between ADI and RPS that invoices for labour and material would be provided to ADI on the 20th of each month to allow ADI to make payment by the end of each month. It is common cause that there were several delays in the payment of the invoices. This led to labour unrest and delay in the delivery of materials. During or about November 2017, Eskom became concerned about progress and adopted an intervention plan by deploying a sub-contractor which cost R142,500.00. The intervention plan was deducted from the contract price. In addition, long lead time materials were supplied directly by Eskom at a cost of R719,787.61 which was also deducted from the contract price. During or about November 2017, mitigation measures were implemented jointly by ADI and RPS as a result of the delay in finalization of the Eskom project and additional 168 connections, which cost R907,711.39. It was agreed that fifty percent (50%) of that amount was to be borne by RPS in the sum of R453,855.69. The 50% was deducted from the contract price.

[14] Mr. Makoni denied that there was ever a meeting held during which the agreement was amended or novated.

[15] Mr. Ndlovu gave evidence for ADI. He stated that after the agreement was entered into, there was a meeting between him (representing Magudu), Mr. Makoni, and Mr. Cornelius Chibanda (Mr. Chibanda) on behalf of ADI. The meeting was held as a result of RPS's "about turn" demanding that interim payments be made on its behalf, because it did not have the funds to pay for the materials. It was agreed that, since ADI had the most to lose, that it would fund the project. It was further expressly agreed

between the parties during such meeting that, given this new demand, the risk associated with taking on this additional requirement to pay for materials, the benefit or loss would accrue to ADI. He testified that as a result any saving on the materials would accrue to ADI. Mr. Ndlovu was unable to recall the date of the meeting, and stated that the terms agreed upon was not put in writing.

[16] Mr. Ndlovu is the author of Exhibit A. He confirmed that this document reflects the total cost of the contract entered into with RPS. He also confirmed that all the invoices reflected in Exhibit B were paid except for one: Invoice 993 submitted on 14 August 2017 in the amount of R1,396 258.62. Mr. Ndlovu explained that the invoice was not paid as there were no supporting documents from suppliers, and that the amount was accordingly not due to RPS. He testified that this amount reflects the savings on material and that it is a benefit that accrues to ADI.

THE LAW

[17] It is trite that the party alleging the contract must prove the terms of the agreement which it seeks to enforce. The terms of the agreement on which RPS relies, are not in dispute. In its answering affidavit the respondents did not plead an additional term to an existing agreement, but a totally different agreement from the one RPS relied upon. During evidence, however, Mr. Ndlovu somewhat clarified this, and testified that the agreement was varied by agreement between the parties. The *onus* is therefore on ADI, not only to prove an agreement to vary the terms of the agreement, but also the terms of any alleged variation and/or novation. The determination of this issue is essentially a factual one.

[18] RPS called one witness, Mr. Makoni and ADI called one witness, Mr. Ndlovu. Mr. Ndlovu testified that the agreement was varied, whilst Mr. Makoni disputed that there

was any variation to the agreement. When a court is faced with two mutually destructive versions, it requires the court, upon a conspectus of the evidence as a whole and by balancing probabilities, to select a conclusion which seems to be the more natural or plausible (in the sense of acceptable, credible or suitable) conclusion, though that conclusion may not be the only reasonable one.¹ In *National Employers General Insurance v Jagers*² the court held as follows:

“Where there are two mutually destructive versions the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the Court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false.

*.....It is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities”.*³

EVALUATION

[20] Although ADI pleaded that it was Magudu and not ADI that entered into the contract with RPS, this defence was not seriously pursued during the trial. The oral, and the documentary evidence relied upon by the parties, clearly shows that the

¹ *Hattingh v Roux N.O and Others* 2011 (5) SA 135 (WCC).

² 1984 (4) SA 437 (E) at 444 D-G.

³ *Jagers supra* at 441 A.

contract was entered into between ADI and RPS. As stated, the terms of the agreement were also not disputed. The agreement, which is clearly a turnkey contract, was on a cost basis of R10, 557.47 per unit. ADI was the developer and the funder of the project. In the payment schedule in the contract, the price per unit included labour and materials. There is no evidence from either RPS or ADI to suggest that there was any variation to the price per unit. In fact, ADI confirmed the price per unit and the total value of the contract in Exhibit A as well as in correspondence during November 2017.

[21] In the answering affidavit ADI alleged that the meeting, during which it was agreed to amend the contract between the parties, took place in August 2017. According to Mr Ndlovu, it was agreed during this meeting that RPS would invoice separately for labour and materials and that any benefit or loss in as far as the payment for materials were concerned would be for the account of ADI. Mr Ndlovu's evidence on this aspect is not convincing. Firstly, he cannot remember when the meeting took place. However, so he says, it must have been after the agreement was entered into. Secondly, RPS had been invoicing separately for labour and materials since the start of the project. This fact is corroborated by Exhibit A. Thirdly, there is nothing sinister about the fact that the suppliers were paid by ADI. These amounts were in any event all subtracted from the contract price. The same result would have been achieved if ADI paid RPS, only for RPS then to pay the suppliers. Fourthly, in terms of the contract, it was agreed that RPS would be paid a certain amount per unit. Included in the price per unit is the costs of material. The price per unit was never changed. Fifthly, if Mr. Ndlovu is to be believed, the agreement was novated and/or amended in such a way that would result in RPS no longer receiving the agreed price per unit, which would further result in RPS making zero profit. I find his evidence on this aspect highly improbable. This evidence is also at odds with the email dated 10 November 2017, sent by Mr. Ncube from ADI

to Mr. Makoni, wherein he requested that RPS install a further 162 connections and in which it was clearly stated that “the rate per connection applicable to this additional scope will be as per the original scope”. In other words, during November 2017, long after the alleged meeting took place, the price per unit was still R10,557.47 excluding VAT. The email makes no mention of an amendment or any discussion with ADI about RPS accepting a lower price per unit. During argument ADI submitted that the email of 10 November 2017 was from Mr. Trevor Ngube and, as he did not testify what was meant by the email, one should not “read into it too much” and to request Mr. Ndlovu to clarify the meaning is “legally unsound”. This argument is misconceived. ADI bears the *onus* to prove an amendment or novation of the agreement. In the absence of any explanation, this email is, in my view, dispositive of the amendment issue.


[22] Mr. Makone was a very good witness. I accept his evidence. There is no plausible reason why he would agree to an amendment of the contract that would result in RPS making no profit. Exhibit A and B as well as the other documents relied upon, as well as the common cause facts, all favour his version. Mr. Ndlovu’s evidence, on the other hand, is contradicted by the objective documentary evidence. His evidence on the alleged amendment was unsatisfactory. He was also unable to explain the email of 10 November 2017 and why there was no written confirmation of the alleged amendment of the agreement. It is common cause that the parties chose to conclude a written agreement which embodied the material terms agreed upon. On every occasion there was written confirmation when there was a variation of the price per unit. On a balance of probabilities, I find it peculiar that in this instance RPS would agree to terms that would result in zero profit, but not put it in writing. His evidence is rejected.

[23] According to Exhibit B, ADI paid all the invoices except for invoice 993. The total amount of the unpaid invoice is R 1,396,258.62. 10. This is exactly the same amount

that is reflected on Exhibit A as "project savings arising from material savings". On ADI's version, RPS was not paid R10,557.47 per unit, excluding VAT. There was no amendment of the unit price and in terms of the contract RPS should have been paid R10,557.47 per unit, excluding VAT. I am satisfied, on a balance of probabilities, that ADI owes RPS an amount of R 1,396,258.62.

[24] in the result the following order is made:

1. Judgment is granted against the first respondent, ADI Investments (Pty) Ltd, for the payment of R 1,396,258.62.;
2. Interest on the aforesaid amount at 9.5% from date of completion namely 7 May 2018 until date of payment, both days included;
3. The first respondent to pay the costs of suit.



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 October 2021.

APPEARANCES

Attorneys for the applicant:

Obert Ntuli Incorporated

Counsel for the plaintiff:

Advocate N. Tee

Attorneys for the 1 st , 5 th and 6 th respondents:	Moodley Attorneys Inc
Counsel for the defendants:	Mr G. Moodley
Date of hearing:	14 June 2021 & 15 June 2021.
Date of judgment:	4 October 2021.