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

CASE NO: 2020/11544

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

18/03/2022 Malindi
DATE SIGNATURE

In the matter between:

TÜV SÜD SOUTH AFRICA (PTY) LTD Applicant

and

ESKOM HOLDINGS LIMITED Respondent

Delivered: This judgment 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 of the judgment is deemed to be 18 March 2022.

JUDGMENT

MALINDI J:

Introduction

[1] The claimant, TÜV SÜD South Africa (*"TÜV"*) alleges that:

1.1 It was a contractor to the respondent Eskom Holdings Limited (Eskom) from March 2015 to the end of 2017. The services it provided to Eskom were carried out at Eskom's Matla power station ("Matla").

1.2 Its claims are for payment in respect of services rendered in September, October and November 2017. These are:

1.2.1 for the balance owing by Eskom to it for services rendered in September 2017, and for the full amount in respect of services rendered in October and November 2017; and

1.2.2 the amounts owed by Eskom to TÜV, were checked and verified by Eskom in payment assessment certificates/payment applications, as being due, owing and payable.

[2] Eskom resists the claim on the following grounds:

2.1 Whereas the applicant's case is that these services were rendered exclusively in terms of a Task Order, the respondent disputes:

2.1.1 the contract relied upon by the applicant;

2.1.2 that the services were rendered; and

2.1.3 that it is indebted to the applicant for the monies claimed in these proceedings.

2.2 Eskom avers that the applicant was made aware of the Eskom's position as far back as September 2018.

2.3 The applicant thereafter took close to two years before instituting these proceedings in Court even though it appreciates that there is a dispute resolution mechanism in terms of which disputes between the parties ought to be resolved.

2.4 Eskom contends further that:

2.4.1. There are disputes on the terms of the agreement,

2.4.1. TUV's interpretation of the terms of the hybrid agreement that is relied upon do not support its claims.

Background

[3] The applicant and the respondent concluded a written agreement in January 2015 in terms of which the applicant could provide boiler and turbine NDE services in sections, and maintenance during outages on an "as-and-when" basis for a period of two years at Eskom's Matla power station ("the agreement").

[4] The agreement was concluded pursuant to a tender process in terms of which the applicant submitted a tender to Eskom, which was thereafter accepted. Eskom at all

material times recognised that the agreement was concluded pursuant to a tender submitted by the applicant.

[5] The start date for the agreement was 2 March 2015, and the duration of two years was to lapse on 1 March 2017.

[6] The agreement comprised of the following:

6.1 The standard form NEC3 Engineering and Construction Short Contract (June 2005) ("the standard conditions");

6.2 The agreement and Contract Data;

6.3 The Pricing Data;

6.4 The Scope of Works, including the Works Information; and

6.5 The Site information.

[7] The agreement contained a dispute resolution mechanism in terms of which disputes between the parties would be referred, first to adjudication, and if unresolved, to arbitration.

[8] It is common cause that the agreement was extended. What is in dispute is how this agreement was extended and what the terms were.

8.1 The applicant contends that it was extended for six months when "de Jager ... advised the applicant's construction manager ... Lazarus Govender ...

that the respondent needed to extend the works agreement for 6 months". The applicant concedes that this alleged extension was without any formal written agreement;

8.2 Eskom, however, contends that De Jager had no authority to extend the agreement on its behalf, and that the agreement was in fact extended through the written Task Order.

[9] It is common cause that a Task Order was issued to the applicant by Eskom. The Task Order was signed by Clive McDermid ("McDermid") on behalf of Eskom, and Lazarus Govender ("Govender") on behalf of the applicant. McDermid is recorded in the Task Order as the "Employer's Delegated Authority".

[10] The terms of the Task Order are as follows:

10.1 Works were to be carried out in the Matla power station's Unit 6;

10.2 The agreed starting date was 1 July 2017;

10.3 The agreed completion date was 30 September 2017;

10.4 The "Total of the Prices for this Task Order" was R13 274 502.

[11] The terms of the Task Order are confirmed by the applicant as follows in its founding affidavit:

"The work to be carried out under the task order was described as 'Unit 6 MGO [Mini General Overhaul] Boiler Inspections and NDT', with an agreed start date of 1 July 2017, and an agreed task completion date of 30 September 2017."

[12] The Task Order makes no reference to the (NEC) standard conditions, or to De Jager being Eskom's representative.

[13] Further to the above background, the following transpired in respect of the contractual relationship between the parties:

13.1. TÜV, as does its predecessor TÜV SÜD South Africa Pro-Tec (Pty) Ltd ("Pro-Tec"), provides specialist quality assurance services in respect of components including boiler, turbine, high pressure piping and auxiliaries, during scheduled and unscheduled outages, and other normal maintenance activities associated with the power plant.

13.2. TÜV and Pro-Tec have provided these services to Eskom at Matla since 2011, in respect of components and services supplied to Eskom by third parties.

13.3. In August 2014, Eskom put out for tender a contract for the provision of "Boiler and Turbine NDE Services, inspections and running maintenance during outages including monthly maintenance on an "as and when" required basis at Matla Power Station for a period of 2 years".

13.4. Pro-Tec was the successful tenderer resulting in the conclusion of the works agreement described in paragraphs 19 to 21 of the founding affidavit.

14. The conditions of contract applicable to the works agreement were the NEC3 Engineering & Construction Short Contract of June 2005 (ECSC3), and the period of this contract was from 2 March 2015 to 1 March 2017.

15. In September 2016, the works agreement was ceded and delegated from Pro-Tec to TÜV as appears from TÜV's letter of 14 September 2016. This letter was addressed to Eskom's Pitzer at Matla Station. The cession and delegation was accepted by Eskom through its representative/contracts manager, Johan de Jager, who signed the consent on 29 September 2016.

16. In February 2017, De Jager advised TÜV of the need for a 6-month extension to the works agreement at unchanged rates (as requested by Eskom's Pitzer).

17. Apart from the informal extension of the works agreement, on 20 March 2017 Eskom issued a task order for "Unit 6 MGO Boiler Inspections and NDT". As originally issued this task order refers to an agreed starting date of 1 July 2017, an agreed task completion date of 30 September 2017, and the total of the prices of R13 274 502 (excluding VAT).

18. The task order was issued with attachments. It is not necessary to deal with these annexures.

Issue for Determination

19. The issue for determination is whether the applicant is entitled to payment by the respondent of an aggregate amount of R5 961 441.25 (five million nine hundred and sixty-one thousand four hundred and forty-one rand and twenty-five cents) (excluding VAT), for services rendered in September, October and November 2017.

20. The applicant seeks to found a claim or its claims on the basis of the Task Order issued on 20 March 2017 for services which the respondent has not paid for or has part-paid in respect of the September services. The question that arises is whether the Task Order was a self-standing agreement or part of the NEC3 agreement of 20 January 2015.

21. In paragraph 32.2 of its replying affidavit the applicant states:

"The works carried out pursuant to the extended works agreement period are not to be confused with the works carried out by the applicant in terms of the task order."

22. In oral argument Mr Kemah SC, appearing for the applicant, submitted that the respondent's submission that the Task Order is a stand-alone contract is wrong as the Task Order is subject to the original contract, that is, the agreement of January 2015 as extended.

23. The extension to the works agreement under Contract No 4600056231 was confirmed by the applicant in its letter of 21 February 2017. The relevant Task order issued on 20 March 2017 for Unit 6 MGO: NDT and Boiler Inspection coincides with the scope of work set out in the agreement, the site and its duration. I am satisfied that the Task Order has to be construed and interpreted in terms of the agreement.

The Claims

24. It is common cause that services were rendered in terms of the three claims. The respondent raises several defences which raise disputes on the validity of the Task Orders and the assessment of the works, which in turn gives rise to the appropriate dispute resolution mechanism.

25. The three amounts claimed are:

    25.1. The sum of R2 759 056.75 (excluding VAT);

    25.2. Interest on the sum of R2 759 056.75 calculated at the rate of 10.50% *a tempore morae* from 14 November 2017 to date of final payment;

    25.3. The sum of R1 935 652.60 (excluding VAT);

    25.4. Interest of the amount of R1 935 652.60 calculated at the rate of 10.50% *a tempore morae* from 15 December 2017 to date of final payment;

    25.5. The sum of R1 266 743.00 (excluding VAT);

    25.6. Interest on the amount of R1 266 743.00 calculated at the rate of 10.50% *a tempore morae* from 14 January 2018 to date of final payment.

26. Whilst it is common cause that previously both Mr De Jager and Mr Managa had signed together, I note that the assessment section of the Payment Assessment Certificate is a bit ambiguous regarding who does the certification between them. It says "Certified by Project Leader:" and then provides for the name and signature. It then provides for "Project Manager:" and provides for the name and signature. The role of the Project Manager is not defined as in that of the Project Leader. The would be signatories as certifiers are not set below "Certified by:". That leaves only Mr De Jager as a "certifier".

27. These amounts are claimed on the basis of the assessments and verification thereof by the respondent in terms of clauses 50.1 and 50.2 of the agreement. How the

amounts were assessed and invoiced cannot be disputed, save for the allegation that the invoices were not submitted to and signed by the designated Employer's representative for processing in terms of clause 4.3.

28. The invoices were checked and verified by the respondent's Mr Johan de Jager as Project Leader but not signed by the Project Manager, Mr F Managa. On Mr Managa's own assertions in his affidavit he and Mr De Jager were responsible for checking and verifying the appellant's invoices. They worked in collaboration as Project Leader and Project Manager.

29. The case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] enjoins the Courts, in the process of attributing meaning to the words used in a document, such as the meaning to the use of the undefined words of "Employer's Representative" in this case, to have regard to the context of the document as a whole, the circumstances giving rise to its existence, the language used in the light of the ordinary rules of grammar and syntax, the apparent purpose to which it is directed, and attribute to it a sensible meaning to it. In view of the role that Mr De Jager has played since the inception of the agreement in 2015 it is clear that he was a designated representative to execute the agreement and the Task Order which took growth out of this agreement. Clause 4.3, read with clauses 50.1 and 50.2 together with clauses 10.1 designate an Employer's representative as the person who is familiar with the agreement and the works required to be performed by the applicant. Messrs De Jager and Managa were such persons whilst they held the positions of Project Leader and Project Manager at the relevant period of the existence of the agreement and the carrying out of the Task Order. In the absence of the definition in the agreement of "Employer's Representative" and none of the parties unable to point to any subsequent agreement or minutes of a meeting where

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1 2014 (4) SA 593 (SCA) at [18].

such a designation was made of people different from Messrs De Jager and Managa I hold that anyone of them qualified as such.

30. The invoices and applications for payment became due "three weeks after the next assessment day which follows receipt of an application for payment by the Contractor". They were all certified by De Jager on 19 March 2018, and became due and payable on 15 April 2018.

31. Mr Tshikila, appearing for the respondent, referred the Court to *Universal Piling and Construction v VG Clements*[2] and submitted that clause 50.1 requires the applicant to in fact had "completed" the works in accordance with the works information before an invoice becomes due and payable. He argued that certification by an Employer Representative does not render the invoice due and payable as the invoice remains challengeable by the employer. Para [26] in *Universal Piling* does not deal with how the employer must satisfy itself of the "value of the work carried out". That exercise is to be carried out by the Employer Representative to whom the contractor presents the assessment. Once so satisfied the Employer Representative verifies and, if satisfied, certifies the assessment. That is what happened in this case. There was no need for the applicant to demonstrate in these papers that it had rendered these services as that fact had been verified and certified by Mr De Jager. Mr Managa's challenge to the assessments in December 2018 was belated as the amounts had already become due and payable as certified. That is what the applicant's claim is based on. It is not to prove that it has performed the works carried out. As stated in its replying affidavit at paragraph 27.1:

"I deny that the applicant's claims arise from an acknowledgment of liability. The applicant's claim arise from services rendered for and on behalf of the respondent at its special instance and request, which claims were (1) assessed by the applicant, (2) never corrected by the respondent, (3) never disputed by the respondent, and (4) check and verified by the respondent. These

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2 [2016] EWHC 3321 (TCC) at [17] to [20] and [26].

assessed claims were continually acknowledged by the respondent, as being due, owing and payable."

32. All three claims are valid and a claim lies in each even though the Task Order was designed to end on 30 September 2017. The orders were issued on 20 March 2017. In *Legator McKenna Inc & Another v Shea*[3] it was held that a defendant or respondent cannot escape liability on the basis that it had not contracted the claimant to deliver the services as long as the respondent has consumed the services. In such instances fairness to both parties requires the consumer to pay for services consumed without protest. I hold so in this case too. The Supreme Court of Appeal expressed its unequivocal approval of the *Wilken v Kohler* rule that

"... where both parties have performed in accordance with the provisions of an agreement, albeit unenforceable, the purpose of the transaction has been achieved and that there is therefore no reason to interfere with the existing state of affairs."[4]

33. Put differently:

"... if both parties to an invalid agreement had performed in full, neither party can recover his or her performance purely on the basis that the agreement was invalid."[5]

34. The *Wilken v Kohler* rule, applied in this case, means that Eskom cannot escape liability where TÜV has delivered on its obligation and Eskom has consumed the service. Eskom's protestation that TUV had already been paid R10 800 of the R13m contract does not avail it to refuse to pay for the extra consumption of the services delivered by TUV without reservation.

35. The suggestion that because the Task Order designates Mr Clive McDermid as the "Employer's Delegated Authority" renders the claims invalid as a result of having been verified and certified by Mr De Jager is a red herring. First, the respondent

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3 (143/2008) [2008] ZASCA 144 (27 November 2008).
4 *Wilken v Kohler* 1913 AD 135.
5 *Legator McKenna* at [28].

asserts throughout that Messrs De Jager and Managa were the respondent joint executors of the Task Order and that the verification and certification was inadequate/insufficient merely for the lack of Mr Managa's signature. There is no claim that Mr Mc Dermid was the "Employer's Representative" for these purposes. Secondly, it can be surmised that Mr McDermid was delegated to enter into an agreement (contract) to procure these "as and when" services which probably fall within his contract limit. I was not addressed on this but it is a safe supposition.

36. As the applicant's cause of action has remained the same in its founding affidavit as in the replying affidavit, I do not comprehend how the case of Treasure the *Karoo Action Group and Another v Department of Mineral Resources and Others; Global Environment Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*[6] assist the respondent's submissions on the connection between the agreement and the Task Order. As held above I find that the respondent was not prejudiced in any way by the elaboration in the replying affidavit of the applicant's case. It is not the respondent's case that it was deprived, unfairly, of the opportunity to adduce further evidence to meet a new cause of action or disprove any material allegations.

37. I am satisfied that on the application of the *Plascon-Evans*[7] rule the respondent's alleged dispute of facts is not a genuine dispute of facts. On the case pleaded by both parties and the evidence in the affidavits, this case is capable of final resolution. It is mainly a question of interpretation of the agreement and the Task Order. Material facts are common cause.

Dispute Resolution Mechanism

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6 [2018] 3 ALL SA 896 (GP); (1105/20190) [2021] ZASCA 13.
7 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

38. Having traversed all of the respondent's defences, it remains to determine if the dispute as a whole or any part thereof should have been referred to arbitration as contended by the respondent.

39. I have found that there exist properly executed and processed payment assessment certificates that make the applicant's case insurmountable on the merits. Therefore the situation is one where the respondent is simply refusing to pay or failing to pay without there being a dispute on the cause of action or any aspect of its merits. The cases of *Body Corporate of Greenacres v Greenacres Unit 17 CC & Another*[8] and *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd*[9] have laid to bed the question as to what constitutes an arbitrable dispute. Failure or refusal to pay does not constitute a dispute as to liability. The claimant can assert its rights in the Courts in this regards. There is no question of liability to be determined by an arbitrator. As stated above, the respondent's failure in all the defences that challenge liability results in there being no dispute to be adjudicated through any form of alternative dispute resolution mechanism.

Conclusion

40. As the respondent has not succeeded in any of its defences and the applicant's claim succeeds.

41. In the circumstances the following order is made:

1. The respondent is to pay to the applicant:

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8 [2008] 1 All SA 421 (SCA) at 425 to 426.
9 2009 (4) SA 68 (SCA) at 73A.

1.1. The sum of R2 759 045.75 (excluding VAT);

1.2. The sum of R1 935 652.50 (excluding VAT);

1.3. The sum of R1 266 743.00 (excluding VAT).

2. Interest on each of the amounts above at the mora rate of 10.5% from 15 August 2018 to date of payment.

3. Costs of two counsel, including senior counsel.

G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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DATE OF THE HEARING:	27 October 2021

DATE OF JUDGMENT: 18 March 2022