IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No:- 10672/2018P

In the matter between:

ICON CONSTRUCTION (PTY) LIMITED Applicant

and

MSUNDUZI MUNCIPALITY Respondent

REASONS FOR JUDGMENT

Vahed J:

[1] This matter was argued before me on 14 May 2019, after which, on the same day, I granted the relief sought in terms of the Notice of Motion (which I set out in more detail later) and indicated that reasons therefor would be furnished upon request.

[2] A Notice of Motion, incorporating a request for such reasons, was delivered by the respondent's attorneys to the office of the Registrar on 21 May 2019. That fact was not drawn to my attention, but instead the Registrar's office incorrectly construed the Notice of Motion to incorporate an application for leave to appeal. There the matter lay awaiting my return to the Division at the commencement of term on 7 October 2019. The respondent's attorneys were content to let the matter lay thus without enquiry and it was not until the applicant's attorney enquired after the outstanding reasons that the fact that reasons had been requested came to light.

[3] These then are the reasons for the order I made.

[4] The applicant operates in the construction industry. On 16 February 2016 it was awarded a tender by the respondent municipality. The tender related to the construction of reservoir outlets, bulk meter installations, PRV installations with chambers and associated ancillary works for Vulindlela.

[5] The award of the tender was constituted by a series of written document and consisted of:

a) A letter of appointment on the letter head of the respondent's finance business unit dated 18 February 2016;

b) The applicant's tender document;

c) The General Conditions of Contract for Construction Works ("the GCC"), second edition, 2010, issued by the South African Institute of Civil Engineering.

[6] Those documents then constituted the agreement between the parties and it was not seriously in dispute or common cause that the material terms of that agreement included;

a) The appointment of the applicant by the respondent as a contractor for the construction of the reservoir outlets, bulk metre installations, PRV installations with chambers and associated and ciliary works for the area of Vulindlela;

b) That the contract price was R12 246 791, 00 excluding value added tax and contingencies, subject to the provisions of the GCC which allowed, *inter alia*, for variations and measurement of the work;

c) That an engineer would administer the contract as agent for the respondent in accordance with the provisions of clause 3.1.1 of the GCC;

d) That the applicant would deliver to the engineer a monthly statement for payment of all amounts the applicant considered to be due to it and the engineer would, by signed payment certificate issued to the respondent and the applicant, certify the amount he considered to be due to the applicant;

e) The engineer would deliver to the applicant and the respondent the said payment certificates within seven days of the receipt by the engineer of the applicant's statement and the respondent would pay the amount due to the applicant within 28 days of receipt by the respondent of the payment certificate signed by the engineer. That payment would be subject to the applicant submitting a tax invoice to the respondent for the amount said to be due in terms of such payment certificate;

f) That in the event of failure by the respondent to make payment by due date it would pay the applicant interest at the prime overdraft

rate as charged by the applicant's bank on all overdue payments from the date when such payment ought to have been made.

[7] It is also common cause that initially the engineer appointed by the respondent to supervise the contract and to assume the obligations I described earlier was an entity known as JOAT/MAP Africa JV and that thereafter the applicant substituted them with an entity known as Emzansi (Pty) Ltd. That substitution occurred on or about 26 January 2017 and was communicated by the respondent to the applicant at a meeting on or about the same day.

[8] The application concerned a claim for payment based on three certificates issued by the engineers. Two were issued on 13 June 2017, signed by the engineers, and certifying for payment the amounts of R874 686,50 and R254 677,12 respectively (both certificates including value added tax). The third certificate was dated 19 July 2017, was signed by the engineers, and certified an amount of R1 062 232, 09 (including value added tax). All three certificates certified payments due by the respondent to the applicant.

[9] In due course the respondent was issued with the requisite tax invoices by the applicant in terms of which payment was sought in accordance with the relevant engineer's certificates.

[10] When payment was not forthcoming, this application was commenced.

[11] The application is resisted by the respondent on the basis that the contract price has reached its maximum of R12 246 791,00 (excluding value added tax and contingencies) and that accordingly nothing more was due to the applicant.

Thus, it was contended the certificates in question had been erroneously issued alternatively were wrongfully issued and not valid and binding.

[12] To counter that contention the applicant asserts that the contract price stipulation of R 12 246 791, 00 was an annual figure for a three year contract and not confined to one year only as contended by the respondent.

[13] The matter thus turned upon an interpretation of a number of provisions in the contractual documents.

[14] The letter awarding the contract was introduced in the following terms:-

> "In connection with the above contract, I am pleased to advise you of the Msundeni municipality
> **ninety one rands only)** excluding VAT and Contingencies."

[15] Later in the letter awarding the contract the following is stated:-

> "It is noted that the contract shall span over a period of thirty six (36) months commencing from c

[16] In addition thereto the tender document conditions contained clause 6.7.1, said to be relevant by the applicant:

> "No quantities have been set out in the schedule of quantities and this shall be confirmed by the
> and 3 quantities will only be confirmed in those years using the same rates supplied for year 1 and escalation the pride. Additionally the total parentage after Year 1 invoicing of fixed times P&Gs versus total invoiced value shall be used for all subsequent invoices from Year 2 and 3."

[17] In the original of the above extract the word *other* in the printed document has been struck out, and the words within the brackets, have been inserted in manuscript and that alteration has been acknowledged by marginal initialling.

[18] The respondent's position was accordingly that the contract was subject to two constraints, firstly a monetary or budgetary constraint of the figure of R12 246 791,00 and secondly the time constraint of 36 months.

[19] The applicant disputed this.

[20] When the claim was disputed on the basis set out, and as the founding papers were essentially based on the three engineer's certificates, the replying affidavit was employed by the applicant to give context to the claim and to set out exactly what was understood, according to the applicant, between the parties.

[21] The replying affidavit demonstrated that:-

a) The contract period was for 36 months;

b) The price of R12 246 791,00 was the sub total for year one of the contract only;

c) Thereafter, the contract was said to continue in years 2 and 3, with the quantities for those years to be confirmed by the engineer;

d) The value of the work required in years 2 and 3 of the contract were to be determined with reference to the applicant's tendered rates and, thereafter, appropriately escalated;

e) The total percentage after the first year of invoicing with regard to fixed and time related preliminary charges and general charges (as a proportion of the total invoiced value) was to be used for the subsequent invoices for the charges for year 2 and year 3.

[22] To demonstrate that position the applicant put up with the reply the quantities priced for year 1. As anticipated by clause 6.7.1 that document is identified as being the document "PER ADD 1" and it contains the detailed charges anticipated for year 1 in exactly the total sum provided for. That document also contains the appropriately escalated totals for year 2 of the contract and year 3 of the contract in the sums of R13 471 470,00 and R14 818 617,00 respectively.

[23] In addition, with the replying affidavit the applicant put up evidence of meetings which took place between the parties and the engineers at about the time the first year was approaching year end, and thereafter. That demonstrated engagements amongst and between parties inconsistent with a termination falling into place at the end of year one or because the stipulated contract sum had been exhausted.

[24] On that basis, so contended the applicant, the respondent's assertion that the contract price being exhausted, the contract had come to an end was untenable.

[25] Against that background counsel for the applicant asserted that with the onus being on the respondent, such onus had not been discharged.

[26] In any event, so said counsel, the entire contract sum had not been exhausted, there being the figure of approximately R89 000,00 still remaining which ought to have been available to satisfy a portion of the applicant's claim.

[27] Counsel for the applicant also relied on the unreported judgment of the Eastern Cape Division, Grahamstown in *Lievero Civils (Pty) Ltd and another v Amatola Water Board* (20 November 2018; case number 2614/2018). There, on a claim similar to the one being dealt with here, the learned Judge highlighted the question as to why no explanation was forthcoming for the engineer in question in that case issuing certificates. In this case similarly there is no explanation as to why the engineers issued the certificates relied upon.

[28] Turning to a simple and business like interpretation of clause 6.7.1 counsel for the applicant also contended that it is significant that the paragraph in question envisaged the quantities in the document for a one year period as opposed to stipulating that the quantities for were stipulated for **the** one year period. In this regard the schedule of quantities put up as being the schedule envisaged by the insertion of the words ***PER ADD 1*** become significant. That interpretation is consistent with the mechanism for interpretation suggested in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 17 – 19.

[29] Finally it was argued that the certificates having being issued and appearing regular and proper at face, they were to be accepted and acted upon until set aside. See in this regard *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

[30] Counsel for the respondent sought to persuade me that the respondent's version was consistent with the express words of the contract and that, in addition, the "extension" of the contract beyond year one was not permissible against those expess words. I do not agree, the express words of paragraph 6.7.1 read with the schedule PER ADD 1 make it abundantly clear that the contract sum was for the first year and that the period was for 36 months.

[31] Respondent's counsel's additional argument to the effect that in any event the applicant's case was sought to be made in reply has already been touched upon. The founding papers were perfectly and validly based on a claim for payment in terms of duly issued certificates. See in this regard *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A). In that respect such certificates (which in this case were certified as being "correct, due and payable") could only be avoided if the engineers exceeded their authority (*Smith v Mouton* 1977 (3) SA 9 (W)) and/or allegations of fraud or collusion or undue influence (*Hoffman v Meyer* 1956 (2) SA 752 (C)). In any of these events, and in the absence of evidence from those who issued the certificates (as is the case here), one would have expected such matters to have been specifically traversed. That is not the case here and the respondent have not resorted to those defences.

[32] To my mind the applicant's arguments were determinative of the questions raised in this case and for those reasons I granted an order in the following terms:-

1) The Respondent pay to the Applicant:

a) R874 686.50

b) R254 677.12; and

c) R1 062 232.09

2) **The Respondent pay to the Applicant interest on the above mentioned amounts, at the rate of 10.25% per annum, as follows:**

   a) **On R874 686.50, from 1 August 2017 to date of payment;**

   b) **On R254 677.12 from 1 August 2017 to date of payment;**

   c) **On R1 062 232.09 from 1 September 2017 to date of payment.**

3) **The Respondent pay the Applicant's costs of the Application, including the costs consequent upon the employment of Senior Counsel.**

_____

Vahed J

Case Information

Date of Hearing:	14 May 2019
Date of Reasons:	18 October 2019
Counsel for the Applicant:	A Troskie SC
Instructed by:	Cox Yeats 21 Richefond Circle Ridgeside Office Park Umhlanga c/o Stowell & Co. Tel: 031 536 8500 Ref: P Feuilherade/sn/11I328023
Counsel for the Respondent:	D Crampton
Instructed by:	Mdledle Inc Shackleton House 187 Hoosen Haffejee Street Pietermaritzburg Tel: 033 345 4022 Ref: E Rooi/LIT256/2018PMB