IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA CASE NO: 1822/10

Heard on: 12/08/11

Delivered on: 26/08/11

In the matter between:

AZCON PROJECTS CC/BHS

CONSTRUCTION JOINT VENTURE Applicant

and

O.R. TAMBO DISTRICT MUNICIPALITY 1st Respondent

CHIEF EXECUTIVE OFFICER:O.R. TAMBO

DISTRICT MUNICIPALITY 2nd Respondent

JUDGMENT

NHLANGULELA J:

[1] This judgment concerns the rights of the parties in terms of clauses 25, 27 and 28 of the Conditions of Contract (PW677) to the tender agreement, Tender No. 1323 which was concluded between the parties in 2004 for the construction of the O.R. Tambo Arts and Craft Centre at Port St Johns.

[2] The provisions of clauses 25, 27 and 28 as aforesaid read as follows:

> "25 (1) Any dislocation or delay in the execution of the Works caused by the Director-General or his Representative/Agent or for which he can be held liable in respect of his or their duties under this Contract or any delay caused as a result of an order by the Director-General to stop the work, or a part thereof, shall not vitiate or affect the Contract, or any party thereof, but if the Contractor intends holding the Director-General liable for any loss or damage caused by such dislocation or delay he shall immediately but in any event not later than forty-eight hours (excluding weekends, statutory and building industry holidays) after the commencement of such dislocation or delay with the Representative/Agent of such dislocation or delay and the Contractor shall within

twenty-one days of the dislocation or delay ceasing notify the Representative/Agent of any claim for extra time and/or extra payment claimed, if any. If the Contractor does not comply with the foregoing he shall forfeit his right to claim for such dislocation or delay. In addition, failure on the part of the Contractor to give the Representative/Agent timely warning in writing of an impending dislocation or delay where such dislocation or delay could reasonably have been foreseen will debar him from claiming under this clause.

26 …

27 (1) Should any dispute or difference arise between the Representative/Agent or the Director-General and the Contractor as to any matter relating to the meaning of or arising out of the Contract the Director-General shall have the option of dealing with the claim directly to determine such dispute or difference by a written decision given to the Contractor. The said decision shall be final and binding on the parties unless the Contractor within twenty-one days of the

receipt thereof by written notice to the Director-General rejects the same.

27 (2) Should the Contractor not accept the decision of the Director-General the Contractor shall be entitled to have recourse to the courts of law of the Republic of South Africa provided that any action to be instituted under this clause shall be commenced and process served within six months of the date of the aforesaid decision.

28. The Director-General shall be entitled at any time to terminate or cancel the Contract or any part thereof unilaterally and in such case shall be obliged to pay the Contractor as damages and/or loss of profit an amount not exceeding 10% of the Contract Sum or 10% of the value of incomplete work or his actual damage or loss as determined by the Director-General after receipt by him of evidence substantiating any such damage and/or loss suffered by the Contractor, whichever is the lesser. Save for the above the Contractor shall not be entitled to claim any other amounts whatsoever in respect of such termination or

cancellation of the Contract."

[3] The main relief sought by the applicant is the following terms:

> "That second respondent advise the applicant, within 30 (thirty) days of the date of this order:
>
> (a) of his decision on a claim submitted by the applicant for damages caused by a delay in handing over to the applicant the site for the construction of the O.R. Tambo Arts and Craft Centre at Port St Johns, in terms of clause 25 of the conditions of contract (PW677) forming part of an agreement concluded between the applicant and the first respondent; and
>
> (b) whether he has elected to cancel the said contract pursuant to clause 28 of the conditions of contract (PW677) incorporated in the contract referred to in paragraph (a) above.

[4] The determination of the relief sought depends on the resolution of two issues, firstly, whether the parties concluded a legally binding contract and, secondly, whether the applicant's claims comply with the provisions of clauses 25 and 28.

[5] I must examine both the factual and legal based which are relevant to the granting or otherwise of the relief sought.

[6] Pursuant to the adjudication of a number of tenders filed by the interested members of the public, including the applicant, the agent for the first respondent, Mazwana Maqethula Person Associates (MMPA), addressed a letter to the applicant dated 04 October 2004. It reads:

> "Duly instructed by our client, and acting on their behalf we are pleased to inform you that your tender for the above project in the amount of R14 586 876.84 (FOURTEEN MILLION FIVE HUNDRED AND EIGHTY SIX THOUSAND, EIGHT HUNDRED AND SEVENTY SIX RAND, EIGHTY FOUR CENTS) for a contract period as stipulated in the tender document is hereby accepted subject to the following conditions being complied with, within a period of 14 days from the date of receiving this letter:
>
> 1. You are to enter into a Departmental Contract Published by National Public Works incorporated in the Bills of Quantities.
> 2. Prior to the signing of the contract you are to furnish us with a fully priced copy of the original Bills of

Quantities which shall be checked and verified by us.

3. You are to provide us with a guarantee or deed of suretyship as required in our tender documents to a value of R1 458 687.68.

4. You are to provide us with proof in the form of a written statement from the Insurance Company concerned that the insurances required by the contract have been effected all in accordance with 13 (*sic*) of the agreement and Schedule of Conditions of this Contract to the value of contract amount 10%.

5. Public liability R2 million

   Replacement is made of the contract sum + 10%

6. You are to provide a signatory authorization as indicated in the tender documents approved by both parties for signing of documents.

7. You are to prepare for our consideration and records a detailed programme for the purpose of the works and demonstrate there your ability to complete the contract timeously.

8. You will be advised in due course of the proposed date for the handover of the site once you have fulfilled the above requests.

Should you require any further information, please do not

hesitate to contact us."

[7] On 29 October 2004 the applicant duly complied with the prescribed requirements, except that a departmental contract was not concluded and submitted to MMPA and the Bills of Quantities were submitted after 14 days. On 05 September 2005 MMPA advised the applicant that the project had not commenced due to a dispute on site ownership between the owner (Transnet Ltd) and the first respondent. It then promised that the applicant would be advised when the dispute had been resolved and the site on which the buildings would be erected has been made available to the first respondent. In reply, the applicant wrote on 20 October 2005 that in view of the fact that the "site hand over" had not happened and the commencement of the project was being delayed by the ongoing dispute on the site a claim in terms of clause 25 (1) of the contract shall be applied. Further, the applicant suggested that the first respondent should cancel the contract in terms of clause 28 and pay the applicant the sum of R1 458 687,68 in *lieu* of such cancellation. On 01 November 2005 MMPA asked for the applicant to provide a detailed cost breakdown of the proposed "claim" so that it is verified before the first respondent was advised about it. I have put the word "claim" in parenthesis because it is not clear to me as to whether the claim

refers to a claim in terms of clause 25 or clause 28. On 04 November 2005 the applicant wrote to MMPA in the following terms:

> "With reference to your letter dated 1st November 2005, we attach a detailed breakdown as requested of our "loss suffered" due to the non-commencement of the above mentioned project.
>
> As you will note that "Clause 28" allows the clients representative to choose the lowest cost of any one method of calculation.
>
> Our detailed breakdown of "loss suffered" (Ref. C) amounts to R2 867 971.97 inclusive of VAT.
>
> As will be noted that the option proposed in our letter dated 0/10/05 is the lesser of the two options.
>
> Should we not receive a favourable response within 10 days, we will then hand this matter over to our legal advisors for further action."

[8] To my mind the claim in the sum of R2 867 971,97 relates to clause 28, it being the higher cost than the lower claim in the sum of R1 458 687,68 which was indicated on 20 October 2005. It is envisaged in clause 28 that

the second respondent would pay the contractor such lesser sum out of the three categories of claims: 10% of the contract sum, 10% of the value of incomplete work, and the damages/loss as determined by the second respondent.

[9] It does not appear from correspondence exchanged between the parties or from the affidavits filed that the applicant's claim under clause 28 received a favourable attention of the respondents. The next step taken by the applicant was to repeat the same claim made on 02 December 2005, but this time doing so through Mohammed Moola Attorneys of Durban. This claim was founded on an alleged "breach of contract" by the first respondent. A reply written by MMPA on 07 December 2005 called for a breakdown of cost of the claim and, simultaneously, it conveyed an intention of the first respondent that: "Our client is still have *(sic)* intention to proceed with the project of which your client will be re-imbursed for delays in handing over the site." Thereafter, on 12 January 2006 MMPA requested the applicant to submit a revised bill of quantities for the project in anticipation of release of the site by Transnet Ltd in March 2006. The applicant complied but on 16 February 2006 MMPA objected to the revised bills of quantities on the basis that the price of building materials was quoted

at 15% which was more than the prevailing price in the market. An adjustment was sought. The objection was rejected by the applicant. On 03 March 2006, further discussions between the parties took place, the purpose being an attempt to find each other on a revised contract price. However, the discussions bore no fruits. Then on 01 August 2006 Cox Yeats, the new attorneys for the applicant, made a proposal that if the respondents cannot accept the increased contract price and hand over the site the contract should be terminated by agreement. When the proposal failed to provoke a consensus on the increased price, on 28 August 2006 the applicant advised MMPA that it would not be in a position to commence with the contract regardless of the availability of the site. After that the applicant resorted to bringing this application.

[10] The factual scenario which has been set out in the preceding paragraphs is largely common cause. The second respondent disputes the allegation that it has refused to decide the claim under clause 25 and to advise if it would cancel the contract and pay damages in terms of clause 28. It also appears that there is a dispute with regard to the value of the increased contract price.

[11] In so far as there was no request for the application to be referred to trial for a hearing of oral evidence to resolve the disputed issues the Court is bound to decide the application on the version of the respondent. See the case of *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[12] The version of the respondents is aptly contexualised by *Mr Cole,* counsel who appeared on behalf of the respondents, that the applicant was informed by the respondents as early as on 01 November 2005 that a claim under clause 25 must be formulated first before the respondents could respond to it; but the applicant failed to do so. This submission is correct. The applicant only contented itself with formulating a claim under clause 28, stating that it cannot calculate financial loss incurred through delay in the commencement of the contract because it was ongoing. In my view there was no confusion caused by the respondents in this regard. The claim in the sum of R1 458 687,68 made on 20 October 2005 and the increased claim of R2 867 971,97 made on 20 November 2005 related to a claim in terms of clause 28. These claims were advanced only in the event that the contract is cancelled by the first respondent. An intimation that cancellation of the contract was being considered was never followed by an acceptance of the

applicants's proposal. The submission by *Mr Voormolen*, counsel who appeared on behalf of the applicant, that the claim in the sum of R1 458 687,68 related to a claim in terms of clause 25 (1) is not correct. The applicant merely stated that the claim in terms of clause 25 (1) of the 'Conditions of Contract' (PW677) shall be applied. It did not quantify this claim. In the letter of demand dated 02 December 2005 Mohammed Moola Attorneys referred to this claim as being the damages suffered as a result of breach, without any further clarification. Cox Yeats then stated on 03 March 2006 that: "Once we receive confirmation of the intended site handover our client will be in a position to calculate its claim in terms of the provisions of clause 25 (1) of the contract."

[13] It was submitted by *Mr Voormolen* that the respondents' response to the claim under clause 28 is confused by conflicting answers. On the facts of the case confusion does not exist. The pre-condition for a claim under clause 28 is a unilateral cancellation of the contract by the second respondent. He did not cancel the contract. On 07 December 2005 MMPA advised the applicant that the first respondent's intention was to proceed with the contract. The debate between the parties was then became focused on the revised contract price, the matter on which the parties did not find

common ground.

[14] The respondents stated that a claim in terms of clause 25 (1) was not competent because the delay in the commencement of the contract was not attributable to them. A third party was responsible for it. This allegation was countered with an averment that blame or fault was not a measuring yardstick, but the fact that the site handover was not done by the first respondent resulted in the respondent being liable to compensate the applicant in damages. However, *Mr Voormolen* could not refer to a clause in the contract which creates such an absolute/strict liability. In my view the common cause fact that a third party was the reason for the contract being delayed puts the claim in terms of clause 25 (1) beyond the reach of the applicant.

[15] The submission by *Mr Cole* that the first respondent does not intend to cancel the contract should be understood against the evidence that Transnet has taken the illegal occupiers to Court for them to be evicted. In the circumstances it cannot be said that nothing is being done by the first respondent to get the contract commenced with.

[16] The claims brought by the applicant against the first respondent are premised on the contention that the tender agreement is a legally binding contract. This is denied by the first respondent. *Mr Cole* contends that the failure by the applicant to sign a departmental contract and submit bills of quantities within 14 days from 04 October 2004 rendered the intended contract to be non-existent. *Mr Voormolen* submitted that the applicant did conclude a binding agreement with the first respondent notwithstanding the deficiencies as alleged by the respondent. He contended that since a tender agreement is governed by the provisions of the Prefential Procurement Policy Framework Act No. 5 of 2000 (the PPPF Act) and Regulation 1 (e) of the Regulations promulgated in terms of the PPPF Act a contract is defined to mean "the agreement that results from the acceptance of a tender by an organ of State. The acceptance of the applicant's tender by MMPA on behalf of the first respondent by means of a letter dated 04 October 2004 resulted in a tender which is valid and enforceable in law. In this regard Counsel referred to the case of *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C) at 120B. Counsel then contended that the "conditions" referred to in the letter of acceptance was a misnomer; and moreso in that the signing of a departmental contract and the late submission of the bills of quantities were caused by the revelation that there would be no

site handover due to occupation of the land by illegal squatters. These submissions were not gainsaid as MMPA has stated in various correspondences that the respondents were not prepared to cancel the contract and pay damages. I agree with *Mr Voormolen* that the tender contract exists and that it is valid and enforceable in law.

[17] *Mr Cole* contended that even if the tender contract was enforceable, to hold the first respondent liable for any loss in terms of clause 25 (1) the applicant should have notified the respondents within 48 hours of the delay, and thereafter formulate its claim within 21 days. Counsel contended that these requirements were never met by the applicant because although the delay was recorded on 05 September 2004, the applicant instituted the claim on 03 March 2006. To this *Mr Voormolen* submitted that the time to make a claim only expires within 21 days of the delay ceasing. Since the delay commenced on 05 September 2004, and it has not stopped, the time of "ceasing" as envisaged in clause 25 (1) has not yet been reached. On the facts it is common cause that as at the date of hearing of this matter the respondents could still not make a site handover, which it intends to make, because the dispute between Transnet Ltd and the illegal occupiers has not yet been concluded. In my view the respondents have failed to prove that

the applicant did not comply with clause 25 (1). However, the issue of formulation of loss sustained due to delay and the lodgment of a claim has not yet been done by the applicant. In my view a claim in terms of clause 25 (2) cannot arise because the applicant has not yet brought a claim under clause 25 (1).

[18] It was also submitted by *Mr Cole* that any claim brought in terms of clause 25 (1) would have become prescribed after three years, calculated from 05 December 2005 to 05 December 2008. The provisions of Sections 11 and 12 (3) of the Prescription Act No. 69 of 1969 are implicated in this submission. The issue of prescription has been answered through my judgment that a clause 25 (1) claim has not been brought. The same may be said about the claim for payment of R1 458 687,68 or R2 867 971,97 which was made under clause 28. Since the first respondent had conveyed a decision that the tender contract will not be cancelled prescription of this claim does not arise.

[19] It seems to me that a remedy for reviewing a decision of the first respondent as provided for in clause 27 is not available to the applicant because a claim under clause 25 (1) cannot arise in a situation where the

delay in the execution of works has not ceased. By parity of reasoning, a decision on the claim based on clause 28 cannot be made without the tender contract having been cancelled by the second respondent. The question whether a decision to refuse to cancel the contract is a decision of a kind that can be dealt with in terms of clause 27 will not be answered because the Court has not been asked to do so. *Mr Voormolen's* submission that the applicant's claim under clause 25 (1) has not become prescribed is not an invitation to deal with claims for refusal to cancel a tender contract. Significantly, counsel conceded that no claim for damages or loss of profits can be made by the applicant because the second respondent did not agree to cancel the contract.

[20] In the circumstances the applicant has not been successful. It should pay the costs of the application.

[21] In the result the following order shall issue:

The application be and is hereby dismissed with costs.

_____

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicants	:	Adv. A.V. Voormolen
Instructed by	:	Cox Yeats Attorney & Co c/o HUGHES CHISHOLM & AIREY INC MTHATHA

Counsel for the 1st and 2nd respondents:		Adv. S.H. Cole
Instructed by	:	W.T. Mnqandi & Associates MTHATHA