NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: 3113/2013
Date heard: 24, 25 August 2015
Date delivered: 1 September 2015

In the matter between

WERNER DE JAGER N.O.	**First Plaintiff**
HOMBAKAZI NCEDIWE BULUBE N.O.	**Second Plaintiff**

Vs

ARMAMENTS CORPORATION OF SOUTH AFRICA LIMITED t/a ARMSCOR	**Defendant**

JUDGMENT

PICKERING J:

[1] The two plaintiffs are the liquidators of East Cape Field Services Close Corporation (in liquidation) it being a duly incorporated close corporation which was provisionally liquidated by order of this Court on 14 March 2013, with a final order of liquidation being granted on 18 April 2013.

[2] Defendant is the Armaments Corporation of South Africa Limited, trading as Armscor, a public company incorporated in accordance with the Armaments Corporation of South Africa Limited Act, 51 of 2003.

[3] Plaintiffs, in their capacities as joint liquidators of the close corporation, instituted two actions against defendant in cases no 3074/2013 and 3113/2013 respectively. On 17 December 2014 the two separate actions were by agreement consolidated in terms of Rule 11, it being ordered that the consolidated actions be heard together under case number 3113/2013.

[4] It is common cause that during or about January 2010 and at Pretoria, alternatively King William's Town, the close corporation and the defendant entered into written executory contracts in terms whereof the close

corporation was to render certain services to the defendant in terms of defendant's General Conditions of Contract, dated 8 May 2009 (POC1).

[5] In case 3113/2013 plaintiffs claim payment of the value of certain partially completed work and spares supplied prior to the liquidation of the close corporation, in the sum of R419 489,37, as well as payment of the agreed value of R157 811,24 in respect of spare parts acquired by the defendant from the close corporation in liquidation.

[6] Although the claim for R157 811,24 was denied in defendant's plea Mr. Politis, who appeared for defendant, conceded at the outset of the trial that plaintiffs were entitled to judgment in respect thereof.

[7] In case 3074/2013 plaintiffs claim payment of the sum of R305 370,86, which sum represents 10% of the value of invoices which was withheld by defendant from payment on the basis that the close corporation had not complied with those provisions of the contract which related to Broad-Based Black Economic Empowerment ("*BEE*").

[8] It will be convenient to deal firstly with the issues relating to case 3113/2013.

[9] It appears from the evidence of Mr. du Preez that during or about 1994 at a time when he was the sole member of the close corporation, the close corporation commenced a business relationship with the South African National Defence Force in the course of which it rendered certain services to the defence force, including the repair of its military vehicles. He confirmed that during January 2010 the close corporation and defendant had entered into the aforementioned written executory contracts which were governed by the General Conditions of Contract and that, acting in terms thereof, the close corporation had rendered services to defendant, including the repair of its military vehicles, and had also provided spares to the defendant. In terms of the contract the close corporation was only entitled to payment for its services upon completion of the work.

[10] It is not necessary to detail the events leading up to the liquidation of the close corporation. Suffice to say that, because of certain problems relating largely to the provision to the close corporation by BAE Systems of spare parts, the close corporation was unable to continue repairing defendant's motor vehicles in accordance with its contract with defendant and, because it was only entitled to claim payment upon completion of the requisite repairs, it was unable to meet its various financial obligations and was in due course liquidated. He confirmed that at the time of the granting of the provisional order of liquidation a number of repairs to defendant's vehicles were only partially completed.

[11] In his evidence Mr. de Jager, the first plaintiff, stated that immediately after the granting of the provisional order of liquidation the plaintiffs took control of the assets of the close corporation and commenced an investigation into whether there was a possibility of the liquidators completing the outstanding work on the semi-completed repaired contracts. Because, *inter alia*, of a refusal by the major creditor, Absa Bank, to provide further funding, as well as the unavailability of the requisite spare parts and qualified personnel, the liquidators concluded that it was not viable to do so.

[12] Mr. de Jager addressed a letter to two employees of defendant namely, Mr. Gouws, the project manager and Mr. van Vuren, the local representative, 2quality control. In this letter he advised them that he would liaise with defendant's finance division in order to obtain payment of the outstanding invoices. He thereafter met with Gouws and van Vuren on a number of occasions, in consequence whereof, on 23 April 2013 he addressed a further letter (A53) to the defendant stating, *inter alia*, "*you have indicated during out telephonic discussion that the reason for not having paid various invoices, inter alia, includes the fact that the required supporting documentation has not been provided.*" He requested defendant to advise the liquidators of its outstanding requirements in order for payment to be effected in respect of the unpaid invoices.

[13] Mr. de Jager stated that he then entered into negotiations with defendant's representatives, in particular Mr. van Vuren. An agreement was then reached with the defendant that defendant would pay the liquidators for the value of the partially completed work on their vehicles. In this regard Mr. van Vuren confirmed in a letter dated 16 May 2013 (A118) that once the extent of the completed work on the vehicles had been verified defendant would issue a so-called "*inspection/release/acceptance certificate, form K225.*" The verification process was duly completed and the value of the work done by the close corporation and the parts supplied was determined by Mr. van Vuren and the requisite invoices and K225 documents were thereafter issued. It is not in dispute that the total of those invoices/K225 forms is R419 489,37.

[14] In its plea the defendant had put in issue the right of the plaintiffs to elect whether or not to enforce or to terminate the agreement between the close corporation and the defendant. This issue was correctly, however, not pursued in the course of argument by Mr. Politis, because the legal position is clear.

[15] In Du Plessis and Another NNO v Rolfes Ltd 1997 (2) SA 354 (AD) Zulman AJA dealt with what he stated were "*by now trite principles in regard to the question of the right given to a liquidator or trustee to make an election in regard to executory contracts entered into by an insolvent.*" At 363 B – E the learned Judge, having observed that the common law of insolvency, save only to the extent that it may have been changed by the Insolvency Act or was inconsistent with it, is still of application, and stated as follows:

> "*At common law a liquidator or trustee is not bound to perform unexecuted contracts entered into by an insolvent before insolvency unless he, in conjunction with the general body of creditors, considers that such performance will be in their interests.*"

[16] In Ellerine Brothers (Pty) Ltd v McCarthy Ltd 2014 (4) SA 22 (SCA) Van Zyl AJA stated that to give effect to the concursus created immediately

upon the liquidation of the insolvent, the liquidator must decide whether it would be to the benefit of the community of creditors to continue to perform the inherited obligations of the insolvent under an uncompleted contract. He may elect not to do so.

[17] It is abundantly clear therefore that the plaintiffs acted lawfully in electing not to continue to perform the partially completed contracts. It is furthermore abundantly clear that Mr. van Vuren, acting on behalf of the defendant, agreed that defendant would pay to the plaintiffs the certified value of the partially completed work.

[18] In these circumstances it is puzzling to say the least that defendant persisted in its denial that it was liable to plaintiffs in the sum of R419 489,37. Plaintiffs are accordingly entitled to judgment under case no 3113/2013 in the sum of R419 489,37 and R157 811,24 respectively.

[19] I turn then to consider plaintiffs' claims under case no 3074/2013.

[20] As stated above, this claim is for payment of the 10% value of certain invoices which was withheld by defendant and eventually declared by it to have been forfeited on the basis that the close corporation had failed to comply with certain contractual stipulations relating to the close corporation's BEE shareholding.

[21] On 21 May 2013 the defendant furnished to plaintiffs a summary of the amounts withheld by it as follows:

"*1.*	*Order KT579276*	*R 10 338,71*
2.	*Order KT519279*	*R 5 859.11*
3.	*Order KT541970*	*R 19 696,89*
4.	*Order KT542014*	*R269 203,15*
		R305 370,86"

[22] As can be seen, the retention principally relates to Order KT542014 and it will accordingly be convenient to deal with that particular order. (POC4). The order is dated 2010-12-22. In terms thereof the close corporation undertook:

"1.1.1 to render the following services:

ITEM NO	DESCRIPTION	SUBTOTAL	ARMSCOR ASSET
1	Maintain, repair and delivery of Samil Vehicles for the 2010/2011 and 2011/2012 financial year (SA Army)	R2 328 947,00	No
TOTAL (excluding VATT)		R2 328 947,00	

[22] In his evidence Mr. du Preez stated that the sum of R2 328 947,00 was what he termed "*the complete amount for the two years of this contract*". It was, he explained, in effect a budget determined by the defendant on the basis of the estimation by various units of the Defence Force as to their anticipated requirements during that period, and reflected the money available to the close corporation for the purpose of maintaining, repairing and delivering the Samil vehicles during the 2010/2011 and 2011/2012 financial years.

[23] There was some dispute concerning the effect of clause 2.3 of the contract which provided that the amount of R2 328 947,00 was limited to the 2010/2011 financial year, but, in the light of the view which I take of the matter, it is not necessary to deal therewith.

[24] The General Conditions of Contract (POC1) contain no term relating to BEE but it is not in dispute that the Order introduced a new term or condition in respect thereof into the contractual relationship between the close corporation and the defendant.

[25] The relevant clause in the Order provides:

"*2.4 BEE Shareholding*

2.4.1 It is a requirement of Armscor that a contractor must have Black Equity Ownership of at least 25% or alternatively enter into a Joint Venture with another party which will affect Black Equity Ownership in this order of at least 25%

2.4.2 This order is placed subject to the contractor submitting an acceptable BEE transformation plan within 60 (sixty) days from the date of placement of the order. Failure to submit the BEE transformation plan, Armscor reserves the right to cancel the order and award it to another supplier. (sic)

2.4.3 This plan must be approved by Armscor and implemented by the contractor within the agreed periods as indicated in the BEE transformation plan.

2.4.4 In the event that the contractor does not submit the plan within 60 (sixty) days from placement of the order and implement such a plan within the agreed period as stated in the BEE transformation plan, Armscor may withhold as liquidated and pre-estimated damages 10% of the value of the order until the BEE transformation plan is submitted and implemented.

2.4.5 In the event that the contractor does not submit and implement the said implementation plan within the agreed period as provided in the plan and or within 90 (ninety) days after the final delivery date as contemplated in paragraph 25 of A-STD-002, the contractor shall forfeit the retention held by Armscor as liquidated and pre-estimated damages."

[26] No "*transformation plan*" was submitted by the close corporation to the defendant. Instead, as is common cause, Mr. du Preez identified a suitable person, Mr. Lubelwana, with whom he concluded an Association Agreement and a Sale Agreement in terms whereof 25% of the members' interest in the

close corporation was sold to Mr. Lubelwana. Thereafter, on 21 March 2012, the transfer of the members' interest was registered by the Registrar of Companies and Close Corporations (POC7). In the circumstances the obvious purpose of clause 2.4 regarding transformation was achieved. The fact that this transformation was achieved without a plan having first been submitted to the defendant is therefore, in my view, irrelevant.

[27] The plaintiffs submit accordingly that the close corporation complied with the provisions of clause 2.4, and in particular, clause 2.4.5 in that the transfer of 25% of the members' interests to Mr. Lubelwana occurred within 90 days of the final delivery date as contemplated in paragraph 25 of the General Conditions, such final delivery date, so it was submitted, being 31 March 2012.

[28] In my view the provisions of clause 5.2 of the Order are decisive of this matter. They provide:

> "*5.2.1 Item 1: Delivery shall be completed within twelve months after the date of receipt of Armscor's order. The date of receipt of the order shall be deemed to be twenty-one (21) days after the date stamped on the order.*
>
> *Item 2: Delivery of item 2 shall be on or prior to 15 February 2012.*
>
> *Item 3 Delivery of item 3 shall be on or prior to 15 February 2013.*
>
> *5.2.2 The delivery period for item 1 is not fixed, but the delivery periods for items 2 and 3 are fixed.*"

[29] It is common cause that the applicable delivery period is that set out under item 1.

[30] As set out above the date stamped on the Order is 2010-12-22. The date of receipt of the order is therefore deemed to be 21 days after such date,

namely, 13 January 2011. In terms of clause 5.2.1 the final delivery date was 12 months after 13 January 2011, namely 12 January 2012.

[31] In terms of clause 2.4.5 of the Order the close corporation was therefore required to submit and implement its "*transformation plan*" within 90 days of 12 January 2011, that is, by 11 April 2012.

[32] The registration of Mr. Lubelwana's 25% members' interest occurred on 21 March 2013 within the 90 day period. In the circumstances the close corporation timeously complied with the provisions of clause 2.4.5 and defendant's entitlement to withhold 10% of the invoices accordingly fell away.

[33] Plaintiff are accordingly entitled to judgment in the sum of R305 370,86

[34] The following order will issue:

1. Case no 3113/2013
   Defendant is ordered to pay to plaintiff:
   (a) The sum of R419 489,37;
   (b) The sum of R157 811,24;
   (c) Interest on the aforesaid amounts at the legal rate from date of demand, being 26 July 2013, to date of payment.
   (d) Costs of suit together with interest thereon at the legal rate from the date fourteen days after allocatur to date of payment.

2. Case no 3074/2013
   Defendant is ordered to pay to plaintiff:
   (a) The sum of R305 370,86;
   (b) Interest on the aforesaid amount at the legal rate from date of demand, being 29 July 2013, to date of payment.
   (c) Costs of suit together with interest thereon at the legal rate from the date fourteen days after allocatur to date of payment.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. de la Harpe
Instructed by: Wheeldon Rushmere and Cole, Mr. Brody

Appearing on behalf of Defendant: Adv. A. Politis
Instructed by: Whitesides Attorneys, Mr. Nunn