IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : 4646/2014

In the matter between:-

HAW & INGLIS CIVIL ENGINEERING (PTY) LTD Applicant

and

THE MEC: FREE STATE PROVINCIAL GOVERNMENT: DEPARTMENT OF POLICE, ROADS AND TRANSPORT Respondent

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HEARD ON: 17 APRIL 2014

JUDGMENT BY: RAMPAI, AJP

DELIVERED ON: 8 MAY 2014

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[1] The matter came to court by way of motion proceedings. The applicant initially sought the relief whereby the respondent was ordered to pay the sum of R22 749 819.65, interest thereon and costs. The application was launched on 13 November 2013. The respondent opposed the application.

[2] In its founding affidavit the applicant alleged that the respondent owed it the aforesaid sum of money for services that the applicant had rendered to the respondent for the rehabilitation of the provincial road known as P9/30. The road

in question links together Heilbron in the north and PetrusSteyn in the south.

[3] The applicant is a construction company based in Cape Town. It specialises in road construction and road rehabilitation works. It primarily focuses on major national and provincial arterial roads and urban highways.

[4] During October 2009 the respondent department invited tenders for the provision of services relating to the rehabilitation of the aforesaid road. The tender was styled Contract No PR+T 04/2009. On 29 June 2010 the respondent formally instructed the applicant to establish itself on the construction site and to proceed with the rehabilitation works. On 22 July 2010 the respondent formally accepted the offer of the applicant. A written agreement was then concluded between the parties.

[5] The salient terms of the written agreement, as identified by the applicant, were *inter alia* that:

> "11.9.3 The respondent would effect payment to the applicant of the amount agreed upon for the services rendered, to the total value of the tendered amount of **R300 000 000,00.**
>
> 11.9.4 The works had to commence on **2 July 2010** and be completed by **22 July 2013**. The initial contract period was accordingly 36,5 months. This period

was later on extended by agreement to 38,27 months.

11.9.5 Payments for work would be effected by means of **Haw & Inglis** submitting completion and payment certificates to the Department as the work progressed under the project.

11.9.6 These payment certificates would be independently certified by **the Department's** agent and consulting engineer on the project (I shall revert on this aspect below) and once so certified, the payment certificate would be submitted to **the Department** for payment.

11.9.7 All certificates were to be paid no later than 28 calendar days after the date upon which any such specific certificate was submitted to **the Department**.

11.9.8 **Haw & Inglis** would be entitled to the payment of interest on any and all overdue amounts, at the prime overdraft rate of the Contractor's bankers, calculated from the 1st day of *mora* until date of final payment. Certificates could be submitted for interest payments due, once again certified by the consulting engineer.

11.11 The Department had appointed **Vela VKE Consulting Engineers (Pty) Ltd** as agent and consulting engineer on the project. **Vela VKE** is part of the **SMEC Group** of consulting engineers. I will henceforth refer to this entity simply as **"SMEC"**.

11.12 The role of the consulting engineers was to independently certify the payments claimed as the works progress, to certify that the works had been done satisfactorily and that the amount claimed in the payment certificate was in actual fact due and payable. When **SMEC** would then so certify that the works claimed have been completed, and the amount is due and owing, the primary obligation would fall to the Department to effect payment – as I have said – within 28 days of receipt of the payment certificate."

[6] The applicant started with the rehabilitation works. Since the applicant started with the execution of the contract, it submitted several certificates to the respondent from time to time for payment.

[7] The applicant's claim was twofold. In the first place, the applicant's case was that most, but not all, of the certificates in respect of the capital claim have been paid by the respondent. The applicant alleged that the unpaid capital claims concerned the following four capital certificates:

7.1 Certificate no. **26** and to the amount of **R909 303,23**. This certificate was allegedly submitted to the respondent on **27 September 2012** and remains unpaid. *Vide* "anx fa5".

7.2 Certificate no. **31** and in the amount of **R871794,94**. This certificate was allegedly submitted to the

respondent on **28 February 2013** and remains unpaid. *Vide* “anx fa6”.

7.3 Certificate no. **37** in the amount of **R11 461 790,32**. This certificate was allegedly submitted to the respondent on **30 August 2013** and remains unpaid. *Vide* “anx fa10”.

7.4 Certificate no. **38** an amount of **R80 436 484,04**. This certificate was allegedly submitted to the respondent on **1 October 2013** and remains unpaid. *Vide* “anx fa12”.

The total of R21 242 888,49 represented the alleged outstanding capital component of the applicant’s claim.

[8] In the second place, the applicant’s case was that certain certificates in respect of the interest component of the claim remained unpaid by the respondent notwithstanding lawful demand. The applicant alleged that the unpaid interest claims concerned the following five interest certificates:

8.1 Certificate no. **33(a)** in the amount of **R393 626,89**. This certificate was allegedly submitted to the respondent on **6 May 2013** and remains unpaid. *Vide* “anx fa7”.

8.2 Certificate no. **35(a)** in the amount of **R486 857,25**. This certificate was allegedly submitted to the respondent on **27 June 2013** and remains unpaid. *Vide* “anx fa8”.

8.3 Certificate no. **36(a)** in the amount of **R116 114,83**. This certificate was allegedly submitted to the respondent on **6 August 2013** and remains unpaid. *Vide* "anx fa9".

8.4 Certificate no. **37(a)** in the amount of **R20 536,32**. This certificate was allegedly submitted to the respondent on **30 August 2013** and remains unpaid. *Vide* "anx fa11".

8.5 Certificate no. **38** an amount of **R8 436 484,04**. This certificate was allegedly submitted to the respondent on **1 October 2013** and remains unpaid. *Vide* "anx fa12".

The total of R1 070 447,12 represented the alleged outstanding interest component of the applicant's claim.

[9] On 21 October 2013 the applicant caused a notice to be given to the respondent under clause 58.6.1 of the general conditions of the contract. The applicant forewarned the respondent that unless the outstanding amounts, inclusive of those specified as per certificates numbered 38 and 38(a), were paid by 29 October 2013, court proceedings would be instituted. According to the applicant the outstanding balance then was R30 632 901,79. Included in that total sum was an amount of R9 006 454,48 claimed as per certificate numbered 36. That amount had become due and payable on 3 September 2013. The respondent had already paid the capital certificate in question on 4 October 2013 – 25 days before the applicant dispatched the said notice in terms of clause 58.6.1.

[10] From the aforesaid allegations the applicant concluded:

10.1 That the respondent was still indebted to the applicant for the services rendered under the agreement concluded in the amount mentioned in the notice of motion.

10.2 That the amounts claimed and the work done have been certified to be correct by the respondent's agent.

10.3 That all the amounts under the certificates have been payable for some time but that, in material breach of the agreement between the parties, the respondent had failed to effect payment to the applicant.

10.4 That the applicant was entitled to *mora* interest on the certificates issued, by virtue of the relevant provisions of the Prescribed Rate of Interest Act, 55 of 1975."

That then was the applicant's case.

[11] The notice of the respondent's intention to oppose was filed on 20 January 2014. The answering affidavit was filed on 7 February 2014. In the answering affidavit the respondent did not deny numerous averments made by the applicant. Among others, the respondent admitted that the parties had entered into a written agreement; that the salient terms of the agreement were correctly extrapolated by the applicant; that the applicant duly executed the contract and that payment

certificates were issued by the respondent's appointed agent Vela VKE Consulting Engineers (Pty) Limited.

[12] The aforesaid admissions, notwithstanding the respondent pertinently pleaded that it was no longer indebted to the applicant in the sum of R22 749 819,65 or any other amount whatsoever arising from the contract for the rehabilitation of the provincial road in question. That then was the gravamen of the respondent's substantive defence.

[13] It was the respondent's defence that by the time the applicant served and filed the current application on 13 November 2013, the respondent had already effected payment of all the amounts due to the applicant in terms of the various completion and payment certificates issued by its appointed consulting engineers. Such payments, the respondent alleged, included the capital and interest components of the claim. To this end the respondent relied on "anx sjm7", payment schedule and "anx sjm8", BAS supplier's report.

[14] As regards the capital component of the claim, the respondent alleged, that save for two amounts now claimed in terms of the founding affidavit as unpaid, the founding affidavit did not precisely correspond with the amounts previously claimed at the payments certificates. The respondent averred that there were only two instances where the founding affidavit and the payment certificates tallied, *viz* capital certificates 37 and 38.

[15] The respondent alleged that generally the respondent fully paid all the amounts as specified in each payment certificate, except where there was an agreed arrangement. In those rare cases where the respondent delayed payment or paid less than the actual amount due, it was by mutual agreement. In such exceptional cases, the agreed arrangement was that the respondent would pay the shortfall, together with the amount of the subsequent payment certificate.

[16] As regards the interest component of the claim, the respondent alleged that all interest for delayed payment were included in the payment certificates. The respondent asserted that the applicant's claims and interest certificates 33(a), 35(a), 36(a), 37(a) and 38(a) were thus fully settled by the respondent as and when each of the corresponding capital amounts were settled at various times prior to the institution of these proceedings.

[17] The respondent averred that the parties had expressly agreed that to apply the rate of interest calculated at the prime overdraft rate as certified by the applicant's bankers – *vide* clause 49.7.2 "anx fa4" – the general conditions of the contract. In view of that clause, the respondent contended that the applicant was not entitled to claim *mora* interest in terms of the Prescribed Rate of Interest Act. Its contention was that the parties were bound by clause 49.7.2. In any event, the respondent further contended that whatever rate of interest the applicant could have applied, would have amounted to charging interest on interest, which was legally impermissible.

That then concluded the respondent's defensive plea.

[18] In the replying affidavit the applicant admitted that indeed the respondent did make certain payments in respect of the capital component before the applicant launched the current application. The acknowledged receipts concerned payment certificates numbered 26 and 31 in the amounts of R909 303,23 and R871 174,94 respectively. It followed therefore, that, as on 13 November 2013 when the application was filed, the outstanding capital balance was in actual fact R1 780 478,17 less than the sum claimed in the founding affidavit.

[19] The applicant replied that the respondent made a further composite payment of R19 898 274,36 on 15 November 2013, two days after these proceeding had been launched. The applicant conceded that the composite payment completely settled the capital component of its claim against the respondent.

[20] However, the applicant persistently denied the respondent's allegations that the respondent was no longer indebted to the applicant in any amount whatsoever. The applicant maintained that the interest component of its claim still remained unpaid. It was the applicant's case that the total sum of the interest component of its claim still outstanding was R1 070 447,12. The finer details of the mathematical breakdown thereof appear from:

- Certificate no 33(a) “anx fa7” p 86
- Certificate no 35(a) “anx fa8” p 87
- Certificate no 36(a) “anx fa9” p 88
- Certificate no 37(a) “anx fa11” p 90
- Certificate no 38(a) “anx fa13” p 13

[21] It was common cause when the matter was argued that there was a great deal of common ground, for instance, the capital component of the claim was no longer a live issue. The crux of the one and only lingering dispute concerns the crisp question as to whether or not the applicant is entitled to claim both certified interest in terms of the contract as well as further interest on such certified interest in terms of the applicable statute.

[22] Mr Grobler, counsel for applicant, submitted that the crucial question should be answered in the affirmative in favour of the applicant. However, Mr Cassim, counsel for respondent, submitted that the answer to the crucial question should be negative.

[23] The undisputed facts of the matter showed that the respondent instructed the applicant by means of a letter dated 29 June 2010 to establish itself on site and to proceed with the road rehabilitation work. A written contract was formally concluded within a month or so after the instructions.

[24] It appeared necessary to have the salient terms of the agreement condensed. The respondent had appointed Vela

VKE, known as SMEC Consulting Engineers, to receive and certify claims submitted by the applicant for work done as the works progressed. Those engineers acted as agent(s) of the respondent at all times. The respondent's allegations to the contrary were legally baseless. Any claim certified and submitted by the appointed agent to the respondent became due and payable within 28 calendar days after the submission of the payment certificate.

[25] It was of no moment whether the applicant erroneously submitted the payment certificate directly to respondent or to the respondent's appointed engineer. What really mattered was the fact that those payment certificates were verified and certified as correct by the respondent's appointed engineer. The respondent's preliminary contention, that the applicant's claim be dismissed on procedural grounds, was a thin argument.

[26] The agreement also provided that the applicant would be entitled to claim from the respondent payment of interest on any overdue amount, such interest would be calculated at the prime overdraft rate of interest as determined by the applicant's bankers. It would be calculated from the 29th day of the calendar, being the first day of the respondent's *mora* or default, until the date of final payment.

[27] The consulting engineer had to issue interest payment certificates for such accrued interest. That was termed contract interest. The respondent admitted that payment of

certain capital certificates were, by mutual arrangement, delayed. Whenever payment was delayed for a period longer than 28 calendar days, interest accrued.

[28] The essence of the respondent's defence was that it had paid all payment certificates by 12 November 2013. The applicant admitted that capital payments were made on 12 November 2013 and shortly prior to that date, but averred that a substantial portion of the capital component, almost R20 million, was paid on 15 November 2013. The payment concerned certificates 37 ("anx fa10") and 38 ("anx fa12"). The certified interest component which remained unpaid was R1 070 447,12 which represented the composite sum of five interest certificates – 33(a), 35(a), 36(a), 37(a) and 38(a).

[29] The respondent's allegation that it had paid all the certificates, including interest certificates, failed to impress me. The applicant did not by virtue of any mutual agreement waive its right to claim contract interest. The respondent has advanced no sound reason as to why the applicant should be denied such interest. The respondent has not argued that the agreement does not make provision for such interest. The respondent has given no precise details of the alleged timeous payment of the aforesaid interest certificates upon which the applicant relies. Moreover, the respondent has not argued that its agent did not, could not, or should not have certified the interest component of the applicant's claim.

[30] Mr Grobler persuasively demonstrated to me that the payments received from the respondent did not include any interest component of the applicant's claim. It seemed to me that there was no real dispute as to the applicant's entitlement to contract interest. As regards payment certificate number 37 and 38, in other words, par 2.6 and 2.8 notice of motion, the applicant is entitled to contract interest, but only until 15 November 2013, being the date of the final payment.

[31] I would, therefore, uphold the applicant claim in respect of the contract interest. The proven figure of such accrued contract interest is R1 070 447,12. It is my considered view that the respondent is liable for the payment of that amount in favour of the applicant.

[32] The applicant also claimed statutory or *mora* interest on the contract interest itself. The applicant claimed *mora* interest at the rate of 15,5% per annum on the contract interest of R1 070 447,12. The applicant's contention was that it was entitled to do so because there was no specific clause in the agreement as regards the rate of interest on interest.

[33] The respondent's contentions in that regard was that interest cannot be lawfully charged on interest as a matter of substantive law. A similar argument was raised in **The Land and Agricultural Development Bank of South Africa v Rayton Estates (Pty) Ltd** [460/12] (2013) ZASCA 105 (13.09.2013) par [18] – [20]. The court confirmed that unpaid interest attracts further interest. Therefore, the respondent's

contention was untenable. See also **Crookes Brothers Ltd v Regional Land Claims Commission, Mpulanga &Others** 2013 (2) SA 259 (SCA).

[34] The respondent's alternative contention was that the parties had agreed on a specific rate of interest for any outstanding amount. The applicant, the respondent argued, did not apply the prime overdraft rate of interest as determined by its bankers, as the applicant was obliged to do in terms of clause 49.7.2 of the general conditions of the contract. That being the case, the respondent contended that the applicant was not entitled to charge interest at the *mora* rate of 15,5% per annum on the interest component of its claim.

[35] The applicant contended that there was in actual fact no specific clause in the agreement as regards any rate of further interest on the interest component. Accordingly, so the applicant submitted, the normal rate of interest had to apply.

[36] At paragraph 12.3 founding affidavit, the applicant stated through its deponent, Mr A.A. Robinson:

> "For purposes of the applicant's interest claim, as is evident from the notice of motion, interest is claimed from the **29th day** after the date upon which the certificates had been submitted to the Department. The claims under certificates **33(a), 35(a), 36(a), 37(a)** and **38(a)** are for interest calculated in terms of the agreement between the parties, and as at **4 November 2013**. The applicant claims *mora* interest on the amount outstanding after this date."

[37] The applicable clause 49.7.2 reads:

> "In the event of failure by the Employer (respondent) to make the payment on its due date, he shall pay to the Contractor (applicant) interest at the prime overdraft rate certified by the Contractor's bankers, upon all overdue payments from the date on which the same should have been made without limiting any other right which the Contractor may have by reason of such failure to make due payment."

The bracketed words are my own addition.

[38] The applicant contention was very tenuous in my view. Although there was no mention of the phrase "interest on interest" in clause 49.7.2, the words "… upon all overdue payments…" were generously used to mean that the prime overdraft interest rate certified by the contractor's bankers would apply to all outstanding amounts without any exception of whatever nature.

[39] Upon careful perusal of the clause, I discovered that the words: "outstanding amount", "balance", "capital", "interest", "debt", "claim", "interest on interest" or "further interest" – were not explicitly mentioned. In my view the chosen expression "all overdue payment" was generically inclusive of all those words. It was implicitly so intended. The applicant now seeks **payment of interest** on the contract interest at the rate of 15,5% per year *a tempore morae*. The agreed rate of interest applies to "… **all overdue payments**." Accordingly, the prime

overdraft interest rate, and not *mora* interest rate, was applicable to the applicant's claim for further interest.

[40] I am of the view that "all overdue payments" necessarily included further interest. It follows, therefore, that the applicant failed to comply with clause 49.7.2. No reason was given for its failure to obtain the requisite banker's certificate. The applicant's contention that there was no clause in the agreement which expressly specified a distinct and separate rate of interest on interest was misplaced. It did not bolster the applicant's case to argue that those allegations were not attacked at all. The fact of the matter was that they were during argument before me. I am persuaded by the respondent's contention. The applicant was not, in those circumstances, entitled to charge ex contractu *mora* interest.

[41] I deem it unnecessary to deal with certain preliminary points taken by the respondent. In the first place, the respondent abandoned the argument that the applicant did not comply with the peremptory provisions of the statute with the title "Institution of Legal Proceedings Against Certain Organs of State".

[42] In the second place, the respondent persisted with a few points. Among others, the respondent argued *in limine* that the appointment of Vela VKE Consulting Engineers i.e. SMEC was tainted by irregularity; that the respondent had fully paid all the payment certificates submitted by Vela VKE Consulting Engineers until 12 November 2013; that there was a

foreseeably irresolvable dispute of fact in these motion proceedings which rendered such procedure unsuitable or inappropriate; that the interest component of the applicant's claim had been paid together with the capital component thereof prior to the institution of these motion proceedings. All of those points were fragile issues. I considered them, but I could find no substance in any of them. Those points raised *in limine* were not well taken.

[43] Now the costs. These proceedings were moved on 12 November 2013. The bulk of the capital component of the claim was paid three days afterwards. The entire interest component of the claim still remains unpaid. In the light of *those two factors the applicant was entitled to approach the* court. The applicant emerged victorious. The fruit must follow success.

[44] Accordingly I make the following order:

44.1 The respondent is ordered to pay the sum of R1 070 447,12 to the applicant.

44.2 The respondent is ordered to pay the costs of the application.

M. H. RAMPAI, AJP

On behalf of applicant:	Adv S. Grobler Instructed by: Peyper Attorneys BLOEMFONTEIN
On behalf of respondent:	Adv N. Cassim SC with him: Adv C. Georgiades Instructed by: Lebea & Associates JOHANNESBURG c/o Phatshoane Henney Attorneys BLOEMFONTEIN

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