IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: 24603/2001
Date heard: 7 October 2008
Date of judgment: 14 October 2008

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
13/10/2008
DATE SIGNATURE

In the matter between:

JSW ELECTRICAL (PTY) LTD PLAINTIFF

and

SBB JOINT VENTURE DEFENDANT

JUDGMENT

DU PLESSIS J:

Towards the end of 1998 the defendant appointed the plaintiff as its sub-contractor in respect of the electrical installation at the Machadodorp Toll Plaza. The plaintiff commenced with the work and the defendant paid to it three progress payments in accordance with payment certificates issued in terms of the written subcontract. It is common cause that, before completion of the work, the subcontract was terminated on 21 January 1999. It is also common cause

that the defendant terminated the contract because it contended that the plaintiff's work was behind schedule and was in certain respect sub-standard.

It is further common cause that, on termination of the subcontract, the parties made a written agreement. The essential terms of this written agreement, to which I shall refer as the "termination agreement", were, first, that completed work was to be "measured, agreed and paid for at schedule of rates". In the second place, the termination agreement provides that "MOS (materials on site) will be taken over and paid for as agreed" between the parties. The termination agreement further provides: "Sub standard work will be measured and not paid for". The final clause of the termination agreement provides that measurements were "to be completed, agreed and signed for by 5pm 25.1.99". On the pleadings it is common cause that in terms of the termination agreement the parties had fully and finally settled all rights accruing to them and all their obligations.

It is the plaintiff's case that on Monday, 25 January 1999 its director, Mr Siegl, and the defendant's representative, a quantity surveyor by the name of Soepboer, measured materials on site and agreed on the materials for which the defendant was to pay the plaintiff. As to completed work, Soepboer had already in December 1998 measured and quantified work that the plaintiff had done up to that stage. The plaintiff contends that, also on 25 January 1999, Siegl and Soepboer agreed not to re-measure completed work up to that date, but that he

defendant would pay the plaintiff in accordance with the December certificate while the plaintiff would then not be entitled to payment for work completed after the date of the certificate. Accordingly, the plaintiff now claims from the defendant payment of R432 784,77 comprised of the amount of the December certificate, with some adjustments, the value of the materials on site and retention money that had been withheld in respect of progress payments in terms of the subcontract.

Mr Siegl was the plaintiff's only witness. He testified that between September and December 1998 the plaintiff received progress payments in terms of three payment certificates that Mr Soepboer had issued in accordance with the subcontract. In December 1998, Soepboer prepared the fourth certificate in terms whereof an amount of R106 696.30 plus VAT, a total of R121 633,78, was to be paid. The witness criticised aspects of the certificate to which I shall return in due course.

Siegl further said that the work had fallen behind schedule and that the defendant wrongly blamed the plaintiff for it. On Monday 18 January 1999 he attended a site meeting that was called to discuss the progress and quality of the plaintiff's work. The defendant's representative indeed raised a number of complaints during the meeting, the minute of which form part of the bundle of documents (Exh. A18). The defendant's representative confirmed the discussions by way of a letter dated 19 January in which the plaintiff was warned

that the contract would be terminated if problems were not addressed. On Thursday 21 January 1999 a further site meeting was held during which the defendant's representative raised further problems. At the end of the meeting, the defendant's representative requested a separate meeting with Mr Siegl. During this latter meeting Mr Siegl was informed that the subcontract between the parties was terminated. A brief discussion followed pursuant to which the termination agreement was written and singed there and then. On the next day the defendant wrote to the plaintiff that its (defendant's) quantity surveyor would "be on site this weekend to measure work completed by your company. I would suggest that you be on site Monday morning 25/01/00 to agree a final certificate with our commercial department".

According to Mr Siegl, he went to the site on Saturday 23 January, but nobody turned up to do the measurements. On the Monday he met Soepboer there. Soepboer and the witness made an inventory of the materials on site and Soepboer wrote it down (Ex. A44). Soepboer and Siegl agreed which of the materials belonged to the plaintiff and which to the defendant. Soepboer marked the written inventory accordingly. In evidence Siegl confirmed that exhibit A44 correctly reflected what he and Soepboer had agreed on 25 January. He testified, however, that he realised afterwards that they had made an error and that two items belonging to the plaintiff are shown as belonging to the defendant. Thus adjusted, and based on the rates in the original bill of quantities, the total

owing to the plaintiff in respect of materials on site, inclusive of VAT, is R59 477,20.

Siegl testified that he and Soepboer agreed that they would not measure completed work but that the plaintiff would simply be paid in accordance with the December certificate. Soepboer did not contend that any of the work included in the certificate had not been properly done. The word "cancelled" is written over the certificate. Siegl identified the handwriting as that of the defendant's production manager but said that the word was written there when the subcontract was cancelled and thus not after his agreement with Soepboer.

I have pointed out that the December certificate (A20 with Soepboer's preparatory notes at A19) was for a total of R121 633,78 (inclusive of VAT) and that Siegl criticised aspects thereof. In the first place, Siegl pointed out in the certificate Soepboer deducted an amount of R140 090,00 in respect of electrical cable that the defendant and not the plaintiff had paid for. Siegl testified that the plaintiff had not been credited for this amount in any payment certificate. Moreover, he pointed out, the cable is shown on Soepboer's materials on site inventory (A44) as belonging to the defendant. Accordingly, if the amount is deducted from the payments due to the plaintiff, the plaintiff would be paying for materials that it does not receive. The amount of the certificate must therefore, so Siegl testified, be adjusted upwards by this R140 090.

Siegl's second criticism of the certificate was that the value of work done in terms thereof (R527 178,00) is exclusive of VAT. As is apparent from the certificate itself, VAT was added to payments made to the plaintiff. Accordingly, the amount deducted on the certificate in respect of payments made also includes VAT. In the result, VAT must be added to the value of the work done before payments to the plaintiff are deducted.

Finally, as to the certificate, Siegl pointed out that retention money was withheld in terms thereof and that such must now, on termination, be paid to the plaintiff.

On 28 January 1999, three days after the meeting with Soepboer on site, Siegl on behalf of the plaintiff wrote a letter to the defendant that he had studied the defendant's bill of quantities and had "found grave mistakes either by negligence or non qualification". With reference to the bill of quantities Siegl then proceeded to list many complaints about items in the bill of quantities. The witness was asked why he wrote the letter if an agreement had been reached already on 25 January. He explained that he could not stop himself from venting his frustration with the defendant's conduct. He pointed out, further that nothing was claimed in the letter and said that, in view of the agreement with Soepboer, the plaintiff was in any event not entitled to claim anything.

The defendant called as an expert witness Mr PJ van der Merwe who was one of the defendant's engineering consultants in respect of the project. The effect of Mr Van der Merwe's evidence was that some of the work on the project was defective while other work was incomplete. In his evidence, Mr Siegl commented on the summary of Van der Merwe's expert evidence. For reasons that will follow later, I deem it unnecessary to summarise Siegl's evidence in this regard. Suffice it to state that, save for one or two negligible problems, he denied that work that the plaintiff was claiming for was defective.

The expert witness Van der Merwe was the defendant's only witness. According to the summary of his evidence Van der Merwe did the inspection whereupon his evidence was based in February 1999 after the subcontract had been terminated and after a new subcontractor had taken possession of the site in the plaintiff's stead. Van der Merwe was unable to say whether any of the defects he had found were included in the plaintiff's claim. For reasons that follow, I find that Van der Merwe's evidence was irrelevant to the issues between the parties and I do not deem it necessary to summarise it in any detail.

In argument Mr Rautenbach for the defendant contended that Van der Merwe's evidence was relevant to show that the plaintiff had not done the work it was claiming for in accordance with the subcontract. Accordingly, counsel argued, the plaintiff was not entitled to any payment in terms of the subcontract.

That is so, the argument went on, by reason of the application of the *exceptio non adempleti contractus* ("the *exceptio*").

For a number of reasons I hold that the defendant cannot in this case rely on the *exceptio*. In the first place, the defence was not pleaded. I have pointed out that the defence that the defendant pleaded to the plaintiff's claim was that the plaintiff had been overpaid. In argument Mr Rautenbach referred me to the defendant's plea to paragraph 4.1 of the particulars of claim. Paragraph 4.1 of the particulars of claim is part of a narration of the factual background to the claim that, as I have pointed out, is based on the cancellation agreement. Paragraph 4.1 reads: "Pursuant to the appointment as a subcontractor and conclusion of the subcontract agreement the Plaintiff commenced with its obligations in terms of the aforesaid agreement during or about September 1998". The plea to this paragraph reads: "Save to plead that there was incomplete and defective performance by the plaintiff of its obligations in terms of the subcontract ... , the allegations contained herein are admitted". Constituting part of the defendant's reaction to a narrative of the background, this paragraph neither in its terms nor in its context raised the *exceptio* as a defence.

In the second place the defendant cannot in this case rely on the *exceptio* because the plaintiff's claim is not based on the subcontract, but on the termination agreement. The defendant admitted the cancellation agreement and

that it had been entered into in full and final settlement of the parties' rights and obligations.

Lastly, the termination agreement itself provides how substandard work should be dealt with. It is common cause that substandard work was not measured or agreed in accordance with the cancellation agreement. The only evidence as to the execution of the cancellation agreement is that of Siegl who said that Soepboer, representing the defendant, did not raise the issue of substandard work. It will be recalled that Van der Merwe's inspection was not purported to have been in execution of the cancellation agreement.

Siegl's evidence as to his agreement with Soepboer on 25 January 1999 is undisputed. His letter of 28 January might have been an indication that no agreement had been reached on 25 January but I can find no reason to reject his explanation that he was simply venting his own frustrations. The content and tenure of the letter tends to confirm Siegl's explanation: It does not refer to the cancellation agreement but to the bill of quantities and, importantly, it contains no claim contradictory of the cancellation agreement. Siegl's evidence as to his agreement with Soepboer is not inherently improbable. On the contrary, I find it probable and it is accepted.

In four respects the plaintiff's claim deviates from the agreement with Soepboer. First, the plaintiff claims retention money that is not certified for

payment in the December certificate. Mr Rautenbach did not argue, correctly in my view, that the plaintiff is therefore not entitled to payment of retention money. In terms of the cancellation agreement the plaintiff is entitled to be paid for work done, which of course includes money previously retained as retention money.

The plaintiff's claim in respect of VAT that should be added to the value of work done is a matter of arithmetic and in that respect too Mr Rautenbach rightly did not contend that the plaintiff is not entitled to payment.

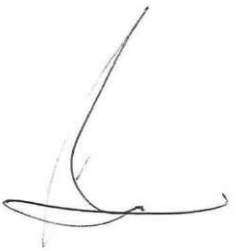
As regards the electrical cable, Siegl fully explained the situation and substantiated his evidence with reference to the materials on site inventory on which the cable is shown as that of the defendant. There is no reason to doubt Siegl's evidence that the price of the cable had not previously formed part of any certificate. Siegl was unable to say exactly which work had been included in the certificate, but that is understandable given the amount of work done. As for the cable, it is a large item and one that Siegl will probably remember.

As to the two items that were wrongly excluded from the list of materials on site, the evidence if uncontroverted and I accept it.

It was not issue that, if Siegl's evidence is accepted the amounts claimed correctly reflect to amount owing to the plaintiff.

In the result the following order r is made:

1. Judgment for the plaintiff against the defendant for payment of the R432 784,77 plus interest thereon at a rate of 15,5% per year from 1 February 1999 to date of payment.
2. The defendant is ordered to pay the plaintiff's costs.



B. R. DU PLESSIS

Judge of the High Court

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