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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 17186/2014

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

24/11/2022

In the matter between:

MADISHA AND ASSOCIATES CC

Applicant

and

PASSENGER RAIL AWAY OF SOUTH AFRICA

Respondent

JUDGMENT

MAKUME J:

THE PARTIES

[1] The Plaintiff is Madisha and Associates CC a Close Corporation duly registered and incorporated in terms of the Close Corporations Act 64 of 1984 with Registration number CK 93/32222/23 its registered address is at 41 Keyes Avenue Rosebank, Johannesburg.

[2] The Defendant is Passenger Rail Agency of South Africa (PRASA) Soc Limited a state owned company with its registered office situated at Umjanthi House 30 Wolmarans Street, Johannesburg.

BACKGROUND FACTS

[3] In this matter the Plaintiff claims damages against the Defendant arising from a repudiation of the contract between the parties details of which will be sketched hereunder.

[4] It is common cause that on or about the 16th July 2003 and at Johannesburg Intersite Property Services (Pty) Ltd acting on behalf of the South African Rail Commuter Corporation being the predecessor in title of the Defendant appointed the Plaintiff to perform certain civil structural engineering services and repairs at the Braamfontein Electric Running Shed (ERS).

[5] The Appointment as set out in a letter dated the 16th July 2003 was for the Plaintiff to provide consulting engineering services in terms of the South African Association of Consulting Engineers Model Forum of Agreement of July 2003 (“the Agreement”).

[6] The work to be performed by the Plaintiff was divided into 13 priority portions and in turn each priority number was divided into various stages.

[7] It is not disputed that the Plaintiff completed priorities 1 to 5 including all its stages and was duly remunerated for it.

[8] During or about November 2012 the Defendant without notice to the Plaintiff repudiated the agreement by appointing another contractor to complete stage 6 to 13. The Plaintiff accepted the repudiation and cancelled the agreement.

THE PLAINTIFF'S CLAIM

[9] The Defendant accepted that it repudiated the agreement and admits liability. What is in issue is how a certain portion of the Plaintiff's claim has been calculated or computed.

[10] For a better understanding of the issues to be determined in this matter I deem it necessary to record verbatim the clauses in the agreement giving rise to this action.

CLAUSE 4.6

PAYMENT DUE UPON SUSPENSION OR TERMINATION

"Should instructions having been given by the client to the Consulting Engineer to proceed with any of the stages of services and the whole or part of the works is cancelled or abandoned or postponed for a period of more than six months, the Consulting Engineer shall be remunerated for services performed, plus a surcharge of one tenth of the full fee which would have been payable to the consulting Engineering had his services been completed in terms of his engagement."

CLAUSE 4.7

"The completion, suspension or termination of the agreement shall not prejudice or affect the accrued rights or liabilities of the parties."

CLAUSE 5.1

REMUNERATION – GENERAL

5.1 "The client shall remunerate the consulting Engineer for services rendered in accordance with the details stated in the specific provisions which forms part of this form of Agreement and shall further pay for any additional or exceptional services in accordance with the principles contained in the specific provisions or at rates and prices agreed between

the client and the Consulting Engineer. Where a payment schedule has not been agreed then the Consulting Engineer will be entitled to render interim monthly invoices based on progress throughout the duration of the service.”

TIME FOR PAYMENT

5.2 “Amounts due to the Consulting Engineer shall be paid in full on the agreed dates or within thirty (30) days of the date of issue of any invoice. If the Consulting Engineer does not receive payment by the time stated, then the Consulting Engineer shall be paid interest at the prevailing prime overdraft rate of the Consulting Engineer’s bank plus 2 percent points per annum compounded monthly calculated from the due date of payment. A certificate from a duly appointed official of the Consulting Engineer’s bank shall be prima facie proof of the overdraft rate charged by such bank.”

DISPUTED INVOICE

5.3 “If any item or part of an item in an invoice submitted by the Consulting Engineer is disputed by the client the client shall give notice before due date of payment with reasons, but shall not delay payment on the remainder of the invoice. Clause 5.2 shall apply to contested amounts which are finally determined to be payable to the Consulting Engineer. Where the client inadvertently overpays, the Consulting Engineer shall refund excess amounts on the same basis as in clauses 5.2 and 5.3.”

[11] As a consequence of the repudiation which repudiation is not disputed by the Defendant the Plaintiff now claims damages in the total amount of R6 773 565.77 which amount is set out in following invoices sent to the Defendant for payment:

11.1 Invoice no MA 089/2012/877A	R 499 510.38
11.2 Invoice no MA 089/2012/992A	R5 881 926.23
11.3 Invoice no Ma 089/2012/872B	R 392 128.46

EVIDENCE

[12] The Plaintiff called one witness Mr Lesiba Johannes Madisha a Professional Civil Engineer who is also the sole member of the Plaintiff. His evidence was not seriously challenged in that the Defendant had conceded that it repudiated. At the end of the cross-examination of Mr Madisha the case put to him by the Defendant's Counsel was that the Defendant concedes that it owes the Plaintiff the amounts as stipulated in the invoice save for the interest raised on the outstanding invoices including how the capital was arrived at.

[13] The Defendant closed its case without calling any witnesses to contest the only issue being the levying of interest on the invoices raised by the Plaintiff which invoices the Defendant has now agreed to pay albeit some ten (10) years later.

[14] Mr Madisha testified that the first amount claimed being the sum of R499 510.38 is made up the 10% surcharge for cancellation of stage four of priority 6 in which the Plaintiff would have rectified uneven floors and walk ways in workshop the capital amount is R438 167.00 plus VAT in the amount of R61 343.38 the two make a total of R499 510.38 as set out in invoice MA 089/2012/872A. That invoice is dated the 23rd October 2013.

[15] In terms of clause 5.2 of the agreement the above sum of R499 510.38 was due and payable within 30 days from date of invoice. It was not paid it thus attracted interest as stipulated in clause 5.2.

[16] Invoice number MA089/2012/992A was also issued on the 23rd October 2013 and was never paid. The description of the amount claimed is a penalty being payment of the total remaining prioritised project (7-12) for the sum of R5 159 595 plus vat in the sum of R722 341.90.

[17] The last invoice being invoice number MA 089/2012/922B is payment of R343 972.34 being interest levied in respect of the amount due in respect of the prioritised project 6 up to 12 plus VAT in the sum of R48 156.13. The total claimed is the sum of R392 128.46

[18] The Defendant maintain that clause 5 of the agreement applies to payments to the Plaintiff during the period of an existing contract prior to cancellation. It is argued that clause 5 is applicable as a form of enforcement of payment terms during the subsistence of the agreement. In the Defendant's view the Plaintiff is not entitled to interest in terms of clause 5.2 after cancellation of the agreement also that in any case the Plaintiff in its particulars of claim did not claim interest *a tempore morae*.

[19] The Defendant in its amended plea has proposed two scenarios for calculation of the damages due to the Plaintiff. The first scenario is based on the interpretation it places on clause 4.6 of the agreement whilst the second scenario is based on the interpretation of clause 5.2 of the agreement.

[20] The Defendant pleaded without leading evidence thereon that if scenario 1 is accepted the amount due to the Plaintiff shall be the sum of R5 597 752.02 and that in accordance with its calculation based on scenario (2) two amounts are proposed the first amount being the sum of R7 361 007.95 which amount includes VAT. The second amount being R6 879 446.80 on which no VAT has been added.

[21] Clearly the issue in this matter is the addition of VAT on interest claimed. The Defendant is agreeable to make payment of the total stage fees due as at November 2012 which is the sum of R3 439 723.35 plus 10% surcharge in the amount of R2 158 028.67. What scenario 1 omits is interest.

[22] The real question is, is the Plaintiff entitled to payment of interest in the amount of R392 128.46 as set out in tax invoice number MA 089/2012/932B. The answer to that lies in the interpretation of clause 5.2.

THE APPLICABLE LAW

[23] The learned writer EA Kellaway in his book titled "Principles of Legal Interest" writes as follows: "where parties to a contract agree that if one does not perform his obligations the other can claim as damages a stated sum of money Courts with a background of civilian juris prudence have on occasion to decide whether the sum mentioned constitute a fair pre-estimate of damages suffered, or is a *stipulatio in*

terrorem that is a stipulation to pay what amounts to a penalty for breach of contract a sum of money out of all proportion.”

[24] The difficulty that I have with the three scenarios proposed by the Defendant is that no evidence was led to support any of the scenarios.

[25] It is correct that clause 4.6 and 5.2 cater for two eventualities. In terms of clause 4.6 the Defendant becomes liable on termination of the agreement to pay the Plaintiff amounts which would have been paid to the Plaintiff had the services been completed plus a ten percent surcharge on that amount.

[26] Clause 5.2 caters specifically for interest to be charged in the event the amount due in terms of clause 4.6 remains unpaid for a period of 30 days which is what happened in this matter.

[27] In its letter dated the 14th November 2013 addressed to PRASA the Plaintiff making reference to its earlier letter writes as follows:

“At the beginning of November 2012 we noted that PRASA Cres Unilaterally cancelled Madisha and Associates appointed on the above mentioned project in that another service provider was appointed to perform Madisha and Associates scope of work and this was done by PRASA Cres without any communication to Madisha and Associates.

The action of PRASA as mentioned above left Madisha and Associates with no option other than to prepare the cancellation of accounts which were sent to PRASA Cres namely invoice number MA 089/2012/872A fee account number [...] and invoice number MA 089/2012/932A fee account number [...].

The letter of demand from Madisha and Associates dated April 2013 was sent to PRASA Cres in which letter we demanded payment for cancellation fee account as submitted by Madisha and Associates. To date PRASA Cres has still not responded to this letter.”

[28] It is this letter that in my view triggers payment of interest as provided in clause 5.2. I am however, not satisfied that the amount of R392 128.46 represents *mora* interest chargeable in terms of clause 5.2. Invoice number MA 089/2012/932B is misleading it refer to the 10% surcharge from November 2012 to October 2013. This is wrong and should be disallowed.

[29] Plaintiff correctly claimed payment of the amounts due as per invoice MA 089/2012/872A and invoice MA 089/2012/992A both totalling the capital amount of R6 381 437.31 which amounts are inclusive of VAT it is to this amount that *mora* interest calculated in terms of clause 5.2 must be added as prayed for in prayer (b) of the particulars of claim.

[30] In the result I hereby grant judgement in favour of the Plaintiff as follows:

ORDER

[1] The Defendant is ordered to pay to the Plaintiff the sum of R6 381 437.51

[2] The Defendant is ordered to pay to the Plaintiff interest on the aforesaid amount at the rate of interest of the of the prevailing price overdraft rate of the Plaintiff's bank plus two percentage points per annum compounded monthly calculated from due date being November 2012 to date of payment.

[3] Taxed party and party costs which shall include costs of two Counsel.

DATED at JOHANNESBURG this the 24th day of NOVEMBER 2022.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearance

DATE OF HEARING : 31 AUGUST 2022

DATE OF JUDGMENT : 24 NOVEMBER 2022

FOR APPLICANT : ADV FJ NALANE SC

WITH : ADV MHLANGA

INSTRUCTED BY : WEBBER MCHUNU ATTORNEYS

FOR INTERVENING PARTY : ADV TSHUNGU

INSTRUCTED BY : MESSRS MSIKINYA ATTORNEYS