IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 13677/2010

In the matter between

Shamla Chetty t/a Nationwide Electrical **Applicant**

and

TBP Building and Civils (Pty) Ltd **First Respondent**

KSN Electrical **Second Respondent**

JUDGMENT

Delivered on: 8 June 2011

STEYN J

[1] On 11 April 2011, the applicant sought the following relief:

> *"(1) That the First Respondent is directed to produce within ten days of the date of this order all payment certificates including all available details concerning the quantities of the subcontract works included in each certificate as defined in clause 1.1.15 of the agreement concluded between the Applicant and the First Respondent on the 12th March 2008 and 28th March 2008 which annexure "A" annexed to the Founding Affidavit disclosing the amounts certified as due for payment to the Applicant for the period 1st July 2009 to the 31st October 2010;*
>
> *(2) That the Applicant is granted leave to supplement the papers on receipt of the documentation referred to in*

paragraph 1 of this order to claim the amount so certified as due to the Applicant and to re-approach this Court on notice to the First Respondent for judgment for the amounts certified as due to the Applicant in terms of such certificates.

3) *That the First Respondent be directed to pay the costs of the application excluding the costs of the hearing on the 10th December 2010."*

[2] This application is a sequel to an earlier application. The first application was brought as an opposed application before my brother Wallis J, who struck the matter from the roll with costs. When the application was launched before this court, the applicant changed course and sought amended relief that is final in nature.

[3] The background to this application is that the applicant is the electrical subcontractor and the first respondent is the main contractor, constructing a new multi-level departmental block at the Port Shepstone Hospital. In terms of the contract the applicant had to supply electrical installations as specified in the subcontract agreement. The second respondent is the newly appointed subcontractor. Essentially the dispute could be described as a building dispute between the applicant on one side, it being the sub-contractor, and the first respondent, being the main contractor and the employer as per the

agreement, to wit the KwaZulu-Natal Province.

[4] Pivotal to the application is the agreement concluded between all the parties, more so clause 30 of the agreement that reads as follows:

> *"30.1 The sub-contract shall submit a detailed application for interim payments to the contractor on or before the date stated in clause 39.2.9 of the **sub-contract schedule**. The contractor shall forward the quantum in such detailed application to the **agent** or **employer** provided that such quantum represents a reasonable estimate of:*
>
> *30.1.1 the total value of the **sub-contract works** satisfactorily executed at the date of application, making due allowance for authorised variations and adjustments to the sub-contract sum in terms of clause 28.0*
>
> *30.1.2 the **materials and goods** subject to the terms of the **principal agreement***
>
> *30.1.3 any expense or loss arising from the provisions of clauses 3.3, 6.4, 7.4, 11.3, 15.0, 18.2, 18.3, 22.0 and 33.0*
>
> *30.2 The **sub-contractor** shall furnish to the contractor, for submission with the application for interim payment, any documents which may be required to substantiate the value of the application.*
>
> *30.3 After receipt of an interim **payment certificate**, or after receipt of interim payment should there not be provision for a **payment certificate** in terms of the **principal agreement**, the contractor shall, upon an application by the **sub-contractor**, disclose to the sub-contractor all available details concerning the quantities of the **sub-contract works** included in the **payment certificate** or interim payment"*

(Emphasis as per original agreement)

In the appointment letter, dated 22 February 2008, the following obligations were added to the original agreement, in terms of MW2. Stipulating the following obligations of the subcontractor:

> *"2a. The sub-contractor shall submit a detailed application for interim payments to the contractor two working days before the 20th of each month. This shall be a detailed application in Bill of Quantities format.*
>
> *b. The claims are to be cumulative and represent the total value of the sub contract works satisfactorily executed at the date of application and not simply record the monthly movements.*
>
> *c. Materials and goods delivered to site must be reflected therein.*
>
> *3. Should you fail to submit your application for interim payments in sufficient detail or timeously, we will not be responsible for any subsequent non-payment of the claims due to late submission or lack of detail.*
>
> *4. Original VAT invoices are to be delivered to our offices at 4 Lancaster Terrace, Westville or post to P.O. Box 1293, Westville, 3600, for the attention of the Contract Surveyor, to reach ourselves before due date for payment.*
>
> *5. No payments will be effected by our accounts department until the signed order together with the required documents has been received by us."*

[5] The only aspect on which the parties agreed upon when the matter was argued is the fact that the relief is final in substance and henceforth that the application should be dealt with in accordance with the *Plascon-Evans*[1] rule.

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1 See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I.

[6] Mr de Beer SC, acting on behalf of the applicant, has argued that no party has declared any dispute in terms of the contract and henceforth no referral to arbitration is required, as stipulated in the contract *viz* clause 38. Much emphasis was placed on clause 38.3 that provides as follows:

> *"38.3 Should **any** disagreement between the contractor and the subcontractor arise out of this agreement **other** than a disagreement in terms of clause 38.1, either party may by notice to the other party declare a dispute which **shall** be referred to arbitration."*

(My emphasis)

[7] According to Mr de Beer the application is not about a dispute, or a referral for arbitration, but about the production of documents and details that the applicant is entitled to in terms of clause 30.3. The respondent failed to produce the aforementioned documentation.[2] It needs to be stipulated that the applicant relies on the very agreement in its claim of the payment certificates.

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2 Clause 30.3 reads:

> *"After receipt of an interim payment certificate, or after receipt of interim payment should there not be provision for a payment certificate in terms of the principal agreement, the contractor shall, upon an application by the sub-contractor disclose to the sub-contractor all available details concerning the quantities of the sub-contract works included in the payment certificate or interim payment."*

[8] Mr Collins, acting on behalf of the first respondent, asked that the court focus and consider the content of the agreement, especially clause 1.1.15 and what it provides. Clause 1.1.15, which forms part of the definitions and interpretations of the agreement, reads:

> *"'PAYMENT CERTIFICATE' means a certificate indicating the amount due and payable by the employer to the contractor in terms of the principal agreement."*

He submitted that there is no contractual provision that the applicant could rely on in its demand that payment certificates be provided. In addition, Mr Collins, argued that clause 38.3 of the agreement is sufficiently wide enough to cover all disputes, which means that the only question that remains is whether a dispute was in fact declared. In his view, annexure L, page 67 of the papers, is a declaration of a dispute. Page 67 contains a letter sent by the firm Pearce, Du Toit and Moodie, dated 1 November 2010. It reads as follows:

> *"Electrical Sub-contract: Nationwide Electrical: Port Shepstone Hospital*
>
> *The seven day notice period referred to in our letter dated 20 October 2010 has now expired and you have not complied with your obligation in terms of clause 30.3 of the contract namely, to disclose details of quantities of the subcontract works which have been certified and included in your payment certificates.*
>
> *Accordingly, please take notice that our client exercises its right to suspend work. During this suspension period no*

other electrical contractor may be brought onto site."
(My emphasis)

In light of this letter, so it has been argued, the matter ought to have been referred to arbitration and since the applicant contests such a referral, the applicant bore the *onus*. It was argued that applicant failed to discharge the *onus* and that the application should be dismissed with costs. Mr de Beer on the other hand has argued that the aforementioned letter does not constitute any dispute since it is purely and simply a notification of suspension of work on the contract. I shall return to this notice later in my judgment.

[9] I shall now turn to the relief sought and then duly consider whether the applicant succeeded in proving, on the papers that she is entitled to the relief sought, since no dispute was declared.

[10] Much of the applicant's case depends on whether the sum of R907 000 was paid and then reversed. Mr de Beer has argued that the respondent is silent on the fact whether such payment had been received. Mr Collins asked that the court

give consideration to the information as reflected on page 104 of the papers, which shows that respondent acknowledged that R907 000 was certified. It was, however, reversed because of the discrepancies in the applicant's claim.

[11] In my view if it is found that any of the parties in this case more specifically the applicant, has declared a dispute then the matter should have been referred to arbitration, which results in the applicant not succeeding in its claim before this court.

[12] The word 'dispute' is defined in the Oxford English dictionary[3] as:

> *"question the correctness on the validity of (a statement or an alleged fact); argue with (a person); contest, strive against, or resist (an action)."*

I fail to see how the following could not be interpreted as a dispute:

> *"you have not complied with your obligation in terms of clause 30.3 . . ."*
> *. . . our client exercises its right to suspend work."*[4]

It is evident that applicant disputed the fact that the contractor

3 See Shorter Oxford English Dictionary 5th edition (Oxford University Press) 2002 at 709.

4 See page 67 of papers.

fulfilled its obligations. This much should be abundantly clear, since it is a disagreement between the parties over obligations arising from the agreement.

It is evident from the founding affidavit[5] that the parties also disagreed over the existence of their rights and duties and that a referral to arbitration should have followed, considering clause 38.3 and its content. Accordingly, in my view, applicant had to convince this court (1) that there was no dispute and (2) failing so, bore the *onus* to satisfy this court that it should not exercise its discretion in favour of an arbitration referral.[6] I align myself with the views expressed by Wallis J, as he then was, in *Aveng (Africa) Ltd formerly Grinaker-LTA t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd*:[7]

> *"[13] I am fortified in this approach to clause 40 by the fact that the modern approach to arbitration clauses is to respect the parties' autonomy in concluding the arbitration agreement and to minimise the extent of judicial interference in the process. The historical desire of courts to protect their own jurisdiction and their consequent suspicion of arbitration as a means of resolving disputes has been replaced by a recognition that arbitration is an acceptable form of dispute resolution with which the courts should not interfere. As O'Regan ADCJ said in* Lufuno Mphaphuli

5 See para 24(b) at page 22.
6 See *Universiteit van Stellenbosch v JA Louw* 1983 (4) SA 321(A) at 333H–334A.
7 2011 (3) SA 631 (KZD).

and Associates v Andrews*:*

> *'[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.' "*

[13] Applicant's case throughout was that there is no dispute. In my view it is evident that there was a dispute in light of annexure "L" and that applicant should have resorted to the agreement and acted upon it. Instead it elected to persist with litigation. I am not persuaded that the disagreement does not fall within the terms of the arbitration clause.

[14] Having duly considered the papers and in applying the *Plascon Evans* Rule, I am of the view that the applicant had failed to establish the requirements of the relief sought before me.

[15] Accordingly the application is dismissed with costs.

Steyn, J

Date of Hearing:	11 April 2011
Date of Judgment:	8 June 2011
Counsel for the applicant:	Adv H De Beer SC
Instructed by:	Pearce du Toit & Moodie
Counsel for the respondents	Adv M W Collins
Instructed by:	V Chetty Inc.