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

Case No. 761/04

In the matter between:

AFRICAN CONTRACTORS FINANCE CORPORATION (Pty) Ltd APPLICANT

and

THE MEC FOR PUBLIC WORKS, NORTH WEST 1ST RESPONDENT

THE MEC FOR HEALTH, NORTH WEST 2ND RESPONDENT

JUDGMENT

GCABASHE AJ.

[1] This application concerns the payment of monies due in respect of two loan agreements which were secured by a cession in *securitam debiti*. Money was advanced by the applicant as bridging finance for a construction contract, which an entity known as Itireleng Joint Venture had secured, subsequent to a tender process, with the first respondent herein. Two tenders were

awarded. These two tenders, NW398/00 and No: 236/01 (hereinafter referred to as the "hospital project" and the "schools project" respectively) had been awarded by the North West Tender Board to Itireleng Joint Venture on 23 October 2001 and on 31 July 2001. The first respondent acted as the contracting department, on behalf of the second respondent and the Department of Education.

[2] In addition to the undisputed terms of the loan agreement, Itireleng ceded in writing, all claims of whatever nature that it had against any of its debtors, including claims in respect of the schools and hospital projects. To complete the picture, it is useful to point out that a specific condition of the tender award was that any cession entered into by the successful tenderer had to be approved by the North West Tender Board.

[3] The respondents brought an application for the condonation of the late filing of their answering affidavit to the applicant's supplementary affidavit which had been filed on 09 March 2005. The applicant opposed the granting of condonation on the basis that no acceptable explanation was advanced for the delay, nor had any indulgence been sought by the respondents when they realized that they were having difficulties with obtaining the required information to submit a comprehensive answer to the supplementary affidavit of the applicants. Having considered the representations of both parties, the application for condonation was dismissed with costs on the basis that no good cause had been shown by the respondents.

[4] It is apposite at this stage to briefly review the history of this

matter. An application for interim relief was brought by the applicant in this court under case number 283/2002. In addition to the above parties as cited herein, ITIRELENG JOINT VENTURE and one MMUTLE BOSIGO were cited as first and second respondents, respectively. The outcome of this application was that Hendler J, on 21 June 2002 granted, by agreement, an interim interdict, pending the final outcome of this application, against Itireleng Joint Venture and MMUTLE BOSIGO receiving any money, related to the two projects, which may be owed to them by the MEC's. Thereafter, on 05 March 2003, the following agreement was made an order of court by Nkabinde J:

4.1 The third and fourth respondents agree to recognize and accept the cessions in security given by the first respondent to the applicant, copies of which are annexed hereto.

4.2 After approval of the aforesaid cessions in security by the North West Tender Board the third and fourth respondents shall effect payment to the applicant of all payments withheld by the third and fourth respondents in terms of the order made by the Honourable Mr Justice Hendler on 21 June as well as any future payments which might become due in respect of the projects.

4.3 The applicant to pay the third and fourth respondent's wasted costs occasioned by today's hearing.

4.4 The application is postponed sine die.

[5] Subsequent these orders, on 02 July 2004 His Lordship Mr Acting

Justice Gura (as he then was) granted an order directing the respondents to render a true and proper statement of account, debate such account, and pay to the applicant what amounts were found to be due and payable. The terms of this order were complied with between 19 July 2004 and 07 September 2004, save that the amounts due and payable were not paid to the applicants.

[6] A dispute has arisen with respect to the amount due and payable to the applicants consequent on the completion of the two projects. It is common cause that contrary to the previous orders of this court, payments have been made to Itireleng Joint Venture, rather than to the applicant. The applicant seeks to enforce the terms of the court orders subsequent to the furnishing of a true and proper statement of account and a debate of the account. The applicants consequently demand payment of:

6.1 the interest accrued on these amounts, being R1449,57 on the initial amount of R188 955,98 paid to applicant on 01 September 2003 (whereas it was due and payable on 09 April 2003);

6.2 the amount of R229 244, 50 plus interest. This amount was paid to Itireleng on 13 September 2002; and

6.3 the amount of R266 781, 66 plus interest. This amount was paid to Itireleng on 17 August 2004.

Applicant argued that the latter two amounts were paid to Itireleng in contravention of the 05 March 2003 court order.

[7] In their defence, the respondents argue that interest payable in respect of the amount of R188 955, 98 should be calculated from 14 May 2003, being the date of the approval of the cession by the North West Tender Board, alternatively, in terms of clause 23(2)(a) of the Conditions of Contract which provides that the amount stipulated in a progress payment certificate shall be due and payable to the contractor within 21 days of the date of such certificate, being 09 April 2003.

[8] The respondent tenders payment of the amount of R299 244, 50, plus interest on that amount, calculated from a date 21 days from the date of certification of the progress payment certificate.

[9] With regard to the payment of the amount of R266 761, 66, the respondents argue that this amount was not due and payable by the Department of Education to Itireleng, as the contract with Itireleng was terminated. A new contract for the completion of that project was entered into with another party (P.L. Enterprises) who chose to utilize Itireleng as a subcontractor on that project. This new contractor paid the said R266 761,66 to Itireleng. In any event, argued the respondents, no cession had been approved by the North West Tender Board with regard to the schools project, thus the Department of Education was not liable to pay this amount to the applicant.

[10] Regard being had to the R299 244,50 tendered, the essence of the current dispute revolves around the interest payment due on the amounts of R188 955,98 and R229 244,50, and whether the final payment to Itireleng of R266 761,66 was due and payable to

the applicant by the respondents, given the termination of Itireleng's contract and the issue raised with regard whether the cession, to take effect, had to be approved by the North West Tender Board first. Respondents' argument was that the Honourable Madam Justice B. Nkabinde's order used the specific language that it did for the reason that she took cognizance of the fact that the North West Tender Board had to approve the cessions.

[11] Applicants argue that the new contractor was simply a managing contractor, and that the original contract between the respondents and Itireleng continued to subsist subsequent to the employment of a managing contractor. Further, the applicant argues that the agreement regarding the respondent's acknowledgment of the cession, which was made an order of court, was not dependent on the approval of the North West Tender Board for it to be legally binding on the parties. The respondents, on acknowledging the cessions, knew that the right had been transferred and that any payment to Itireleng had to be made to the applicant. Payment to the applicant is exactly what Gura AJ (as he was then was) had in mind when he made the order of 02 July 2004, they contended.

The payment of interest

[12] I have considered the issues raised with regard to whether the interest payment was due once the payment certificate had been presented on 09 April 2003 and was thus due and payable, or whether such interest payment was only due once the North West

Tender Board had approved the cessions in security.

[13] Assuming that there had been no cession between the applicant and Itireleng, any amount due and payable that remained unpaid would have attracted interest as of the date it became due and payable. In terms of clause 23(2) of the Conditions of Contract, the R188 955,98 would have become due and payable 21 days after 09 April 2003. The fact of an ancillary arrangement arising as a result of the loan agreement between the applicant and Itireleng cannot be said to suspend the accrual of interest. It may affect the payment of the amount plus interest to the relevant party, but it cannot operate to reduce the interest payment due to the appropriate creditor. I cannot agree with the submissions of the respondent that without an approval of the cession, no interest payment accrues.

[14] It is thus my view that interest at the prescribed rate runs 21 days after the progress certificate was presented for payment.

The alleged termination of Itireleng's contract

[15] I have taken cognizance of, in particular, annexure F1 which is a letter addressed by the new contractor P. L. Enterprises to the first respondent. In that letter, the matter of existing contractors is dealt with. P.L. Enterprises refers to itself as a Management Contractor, and makes reference in that letter to a meeting with the architect, the first respondent, the managing contractor as well as the contractors. Therein P.L. Enterprises writes:

> "In the spirit suggested by the Department for handling this project, we suggest the following:
>
> Current contractors will remain involved. If they are not interested to remain involved with the project, the Management Contractor will employ subcontractors – no change to proposed costs.
>
> All payments on the different contracts must be paid into Management Contractors account – to manage the contract."

[16] Further in the letter, P.L. Enterprises acknowledges that before a contractor is replaced, the permission of the respondent will be sought.

[17] The terms of this letter have been acknowledged by the signature of the relevant parties affected by it, save for two who signed a termination agreement. Itireleng, signing under contractor NW 236/01, was represented by its owner, MMUTLE BOSIGO. No reference is made in this document to Itireleng's contract being terminated or to the entity becoming a subcontractor to the managing contractor.

[18] I am satisfied that the terms of participation of the managing contractor did not materially affect the status of Itireleng as a contractor to that particular project. It was the duty of the first respondent to communicate the payment terms of Itireleng to the managing contractor as all payments by the first respondent were by agreement channeled through the managing contractor.

The effect of the non approval of the cession by the North West Tender Board

[19] The respondents argue that as no cession had been approved by

the North West Tender Board, the Department of Education, North West, was not liable to pay the amount of R266 761,66.

[20] Two issues arise from this proposition. First, that the Department of Education, which is not a party to these proceedings, would be the party liable to pay the applicants had the cessions been approved. I wish to summarily dismiss this argument on the basis that the first respondent has for all intents and purposes consistently been put forward as the lead department in coordinating the two projects and in effecting payment, first to the contractors, and later through the services of the managing contractor. Had the joinder of the Department of Education as a party to these proceedings been a material issue, the first respondent would have utilised the Uniform Rules of Court to ensure such joinder.

[21] The second leg of this proposition concerns the rights and obligations of the applicants and the respondents consequent to the acknowledgment of cession that was made an order of court, followed by the order of Gura AJ, which in paragraph 3 directs the respondents to pay to the applicant whatever amounts appear to be due to it subsequent upon a debate of the account.

[22] The cession in security between Itireleng and the applicants gave transfer all of Itireleng's claims with regard the two projects to the applicants in whom ownership of those rights vested on transfer. Due notice of the cession was given to the respondents, who confirmed this by way of the acknowledgment of the cession.

[23] The essence of the respondents' argument is that the cession of

the R266 761,66 debt due on tender No: 236/01 required the approval of the North West Tender Board. The crisp question to be determined is whether the prior approval by the North West Tender Board of the cession in security, in circumstances where the contractor (Itireleng) completed the contract and was paid for services rendered, makes the cession ineffective against the debtor.

[24] The short answer to this question is a categorical "no". The cession in security remains valid. A contractual term of condition in the tender is a matter for the parties to that contract to resolve. Had the North West Tender Board been of the view that a material condition in the tender contract had been breached by the contractor, it would have instituted what remedies were available against the contractor, such as canceling the tender contract.

[25] The available evidence relates to the hospital contract NW398/00, where the North West Tender Board approved the cession on a contract similar to contract No. 236/01. The debtor cannot use a contractual condition between the North West Tender Board and the contractor (Itireleng) to escape liability on a cession it had notice of.

[26] In *Twiggs v Millman NO and Another* 1994 (1) SA 458 (C) at 465 C, Conradie J (as he then was) took the same view in a matter of a similar nature. The second respondent in that matter not only consented to the cession, but where he knew that the cession was intended to secure the debts due by two debtors. In addressing the question of what obligations are owed by a cedent

to a cessionary by virtue of a cession in ***securitam debiti***, Conradie J was of the view that:

> "The cessionary's remedies against the debtor are well established: if notice of the cession has been given to the debtor, he is generally obliged to pay the cessionary and not the cedent... Failure to pay the ceded debt to the cessionary when this should have been done, leaves the debtor open to a claim from the cessionary who, despite payment to the cedent, remains his creditor. The cessionary who retains his claim against the debtor has, for that very reason, no enrichment claim against the cedent. The cedent is enriched at the expense of the foolish or careless debtor, not at the expense of the cessionary..."

[27] This view accords with my understanding of the facts and circumstances of the failure by the respondent to pay the amounts due and owing after the reconciliation of accounts and debate thereof, to the applicant herein. Their laxity flies in the face of three court orders in this matter which direct that subsequent to the preparation and debate of the statement of account, all amounts due to the applicant must be paid to them by the respondents.

[28] In the premises, the applicant is entitled to the relief sought in the notice of motion. The following order is made:

i) That as intended in clause 23 (2) (a) of the Conditions of Contract, interest starts to accrue 21 days after the capital amount is due and payable;

ii) The respondents are ordered to make payment to the applicant of the amount accrued in interest on the capital sum of R188 955, 98;

iii) The respondents are ordered to make payment to the applicant in the amount of R229 244, 50 plus interest at the prescribed rate of 15.5% per annum;

iv) The respondents are ordered to make payment to the applicant of the amount of R266 781, 66 plus interest at the prescribed rate of 15.5% per annum; and

v) The respondents are ordered to pay the costs of this application on a party and party scale.

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L. GCABASHE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	:	25 AUGUST 2005
DATE OF JUDGEMENT	:	27 OCTOBER 2005
COUNSEL FOR THE APPLICANTS	:	ADV A.R.G. MUNDELL
COUNSEL FOR THE RESPONDENTS	:	ADV C.R. ZWIEGELAAR
ATTORNEYS FOR THE APPLICANTS	:	MINCHIN & KELLY INC. (Instructed by Reaan Swanepoel Attorneys)
ATTORNEYS FOR THE RESPONDENTS	:	STATE ATTORNEY