THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 222/2018

In the matter between:

SIZAZONKE ELECTRICAL CC	**FIRST APPELLANT**
ROSHELLA KISHUN	**SECOND RESPONDENT**
GERT ABRAHAM CORNELIUS VAN WYK	**THIRD RESPONDENT**

and

ESKOM HOLDINGS SOC LIMITED	**RESPONDENT**

Neutral citation:	*Sizazonke Electrical CC v Eskom Holdings* (222/2018) ZASCA 36 (29 March 2019)
Coram:	Tshiqi, Mbha and Zondi JJA and Davis and Carelse AJJA
Heard:	15 March 2019
Delivered:	29 March 2019

Summary: Contract – damages for loss of profits – what constitutes repudiation – respondent lawfully cancelled contracts due to misconduct committed by first appellant – no repudiation proven – appeal dismissed and decision of court a quo dismissing appellants' claim upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mothle J sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The appellant is liable to pay the costs of the postponement of the trial in October 2016, including the costs of two counsel.

JUDGMENT

Mbha JA (Tshiqi and Zondi JJA and Davis and Carelse AJJA concurring):

[1] This appeal is against the order of the Gauteng Division of the High Court, Pretoria, (Mothle J), which dismissed the appellants' claim for damages for loss of profits based on an alleged repudiation of various agreements between the first appellant (Sizazonke) and the respondent (Eskom). The claim for loss of profits is founded on contract, alternatively in delict. In dismissing the claim, the court a quo found that Eskom was justified in suspending Sizazonke from participating as a service provider for a period of 5 years, which resulted in the lawful cancellation of contracts that were in existence at the time of the suspension. This appeal is with leave of this court.

[2] The background facts are largely common cause. There was a contractual relationship between Sizazonke and Eskom. The second and third appellants (Ms Kishun and Mr Van Wyk respectively) are members of Sizazonke. Sizazonke was listed on Eskom's database as a service provider, together with other entities for allocation of work from time to time. In this instance, work would be allocated from bulk contracts in terms whereof a service provider would be apportioned work from the main contract. Sizazonke also procured other work from Eskom through specific contracts where it had successfully tendered for such work.

[3] Over and above the aforementioned bulk and specific contracts, the relationship between both parties was also governed by the following instruments which formed part of the contracts between them, namely (a) the NEC 3 Engineering and Construction Contract; (b) Eskom's Business Conduct Policy and Guidelines; (c) Eskom's Procurement and Supply Chain Management Procedure; (d) Eskom's Vehicle and Driver Safety Management Procedure; and (e) Eskom's Health and Safety Standards.

[4] Clause 2.2.10 of Eskom's Vehicle Driver Safety Management Procedure required all drivers and passengers to wear seat belts where fitted whilst travelling in a motor vehicle. Clause 2.2.12 provided that the employer shall ensure that no employee, including contractor employees or any other person, when performing work for Eskom, will be allowed to be transported in the back of open vehicles. In addition, no person could be transported in the back of a vehicle closed by means of canopies, unless provided with proper seating and safety belts.

[5] Clause 2.7 of Eskom's Vehicle and Driver Safety Management Procedure stated:

'2.7 Disciplinary process

2.7.1 Misconduct

Eskom takes a ZERO TOLERANCE stance on health – and safety – related at-risk behaviour. Eskom will thereof view any lack of adherence to the following rules, regarding but not limited to, at-risk behaviour, in a very serious light

. . .

. . .

c) All drivers, including contractors and contractor employees, when performing work for Eskom, must ensure that they and their passengers are seated and wearing seatbelts at all times

d) No employee may be transported in the back of any open vehicle, where this is not allowed

. . .

2.7.2 If any driver does not adhere to the rules for the identified risk areas/ at-risk behaviour, this will result in a disciplinary process and if it is found that a breach of rules did occur, it could result in a severe penalty (including but not limited to dismissal).'

[6] The events giving rise to this matter occurred on 9 July 2010 when Sizazonke transported fourteen of its employees to the Eskom worksite by means of one vehicle. However, that vehicle was designed to carry only a maximum of five employees, including the driver at a time. Three employees, including the driver were sitting at the front cab of the truck, in a place designed for only two persons with provision for only two safety belts. It is obvious one of the three was not wearing any seat belt. The truck was designed to carry a maximum of three passengers on the back part sitting under a canopy. In this regard it had three seats fitted with safety belts at the back cab under the canopy. However, there were eleven, instead of three passengers at the back of the

truck. Only one of them sat in the designated seat in the back of the cab under the canopy without wearing a seat belt. The other ten were sitting in the open truck where there was no provision for seats and seat belts.

[7] Clearly, Sizazonke transported its employees in a manner that was contrary and in breach of Eskom's Driver Safety Management Procedure and Eskom's Health and Safety Standards. Sizazonke conceded that this constituted a breach of the legal instruments governing the contractual relationship between the parties.

[8] On the way to the site, the truck overturned. Two employees died and several others sustained injuries. On being informed of the accident, Eskom issued a work stoppage order to Sizazonke halting all works. The primary purpose of the work stoppage order was to ensure that the immediate work surroundings were safe so that no further incidents occurred.

[9] On 13 July 2010 Mr Van Wyk and Ms Kishun attended a preliminary meeting chaired by Mr Roland Dedekind, Eskom's network services manager in KZN. The purpose thereof was to establish the root cause of the accident. It had nothing to do with whether or not any contract held by Sizazonke should be cancelled. Other than this investigation, Eskom was still going to conduct a further investigation that would have a bearing on the contractual relationship between Eskom and Sizazonke at the time. This latter investigation is a process distinct from the preliminary investigation, a fact known to Sizazonke from the start. Indeed a day after the conduct of the preliminary

investigation, Mr Kishore Asaram of Eskom's Contractor Risk Management, sent Ms Kishun correspondence stating that a corporate investigation would ensue in due course. At the trial, Mr Van Wyk, who had contractually previously worked at Eskom, confirmed that the two stage procedure as aforementioned was the norm after the occurrence of similar incidents.

[10] On 16 July 2010, after the preliminary investigation, the work stoppage order was uplifted and Sizazonke was permitted to continue with the work. A formal enquiry was conducted on 1 November 2010 where Sizazonke was charged with the contravention of Eskom's code of conduct as per Eskom's Procurement and Supply Chain Management procedure. Both Ms Kishun and Mr Van Wyk were in attendance and conceded that Sizazonke had breached Eskom's policy. This enquiry was followed by another meeting on 19 November 2010 where the chairperson of the aforementioned enquiry, Mr Ernest Makua recommended that Sizazonke be suspended from Eskom's database for a period of 5 years, having found it guilty of contravening Eskom's policy.

[11] The outcome of this meeting was that all current work conducted by Sizazonke was terminated and risk associated with current projects was henceforth to be managed by Eskom's Programme Manager. Effectively all contracts Sizazonke had with Eskom were cancelled. Sizazonke was, due to its conduct namely, the breach of its contractual obligations, instructed to immediately withdraw its services from all Eskom's sites.

[12] Sizazonke challenged its suspension by lodging an application for review. On 20 October 2011 the North Gauteng High Court, Pretoria (per Claassen J) reviewed and set aside Sizazonke's suspension from Eskom's database, holding that

'. . . Eskom acted totally within its rights to institute its disciplinary hearing and went about it procedurally as prescribed by the contract. . . .'

Claassen J's basis for setting aside the suspension was that it was harsh. Significantly, the prayer for reinstatement of the contracts was abandoned by Sizazonke and therefore no order for reinstatement of contracts was made.

[13] The primary issue for determination in this appeal is whether Eskom repudiated any contract held by Sizazonke on 19 November 2010, when Sizazonke was suspended for 5 years from Eskom's database. The court a quo found that Eskom did not repudiate the contracts and that Sizazonke did not discharge the onus of proving any repudiation on the part of Eskom. In this regard, it found that Sizazonke's evidence did not support the allegations that Eskom repudiated the contracts.

[14] The law relating to a repudiatory breach of contract is well established. This court has explained the position as follows:

'As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.'[1]

[1] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294H-I.

[15] From the aforegoing, it can be seen that for repudiation to occur, an element of unlawfulness must be present. It takes place when one party without lawful grounds indicates to the innocent party by words or conduct, a deliberate or unequivocal intention that some or other of the obligations arising from a contract will not be performed.

[16] On the facts, there is no dispute that Sizazonke breached the provisions of Eskom's Vehicle Driver Safety Management Procedure particularly clauses 2.2.10, 2.2.12, 2.4.5 and 2.7.1(c) and 2.7.1 (d).

[17] The breach by Sizazonke was, in my view, serious and material and resulted in two fatalities with a number of other workers sustaining serious injuries. It is common cause that Eskom had forewarned all contractors, including Sizazonke, that it adopts a zero tolerance stance on the breach of health and safety related at-risk behaviour and that it views any non-adherence to the relevant rules in serious light. It must thus be accepted that Sizazonke's conduct justified the invocation of the clause relating to its suspension from Eskom's database.

[18] The consequences of this breach resulted in Sizazonke being found guilty and a sanction was imposed upon it. This was done in terms of the legal instruments governing the contractual relationship between the parties. Even Mr Van Wyk conceded, when he testified on Sizazonke's behalf, that Eskom acted within its powers and correctly in accordance with the prescripts. He also testified that Eskom's

cancellation of the contract could not be faulted and was justified. His only complaint being that the sanction imposed by Eskom was harsh and was never previously imposed on other service providers who had committed a similar transgression.

[19] In light of what I have stated above, I find that the court a quo was correct in its finding that there was no repudiation of the contracts by Eskom. Sizazonke was on its version, unable to sustain the contention in its pleadings that Eskom repudiated the contracts.

[20] During the appeal Sizazonke's main contention was that Eskom had not followed the termination of contract procedure found in clause 90 of the NEC 3 Engineering and Construction Contract. In brief, the submission was that as the termination took place as a result of a breach of a health or safety regulation, Eskom could only terminate the contract if a project manager (from Eskom) was notified that a contractor had defaulted and had not remedied the default within four weeks of the notification. In addition, no termination notice was issued and no final payment assessment was made in terms of the clause. I need to mention that this point was belatedly raised and relied upon by Sizazonke. Neither in their particulars of claim nor in evidence did Sizazonke give any intimation that it was relying on the provisions of clause 90. In fact before us it was conceded by Sizazonke's counsel that the termination procedure was not raised with any witness during cross-examination.

[21] Sizazonke's contention regarding clause 90 is not, in my view sustainable. From a reading of clause 90.1, it can sensibly only be interpreted to require a service provider like Sizazonke to give notice to Eskom should it wish to cancel a contract. Any interpretation that requires Eskom to give such notice will be absurd because it would mean Eskom must give notice and give reasons for cancellation to itself. This is so because the project manager referred to in clause 90.1 to whom notice must be given is an employee of Eskom. To require Eskom to give notice to itself would be a patently futile exercise inconsistent with the general principle of law that the law does not require the performance of a futile or useless act.[2] It is patently obvious that the stipulation in this clause is one designed for the benefit of Eskom which has the right to know whether or not a contractor still carries on with its project. The four weeks notification requirement can also not apply to the facts of this case. It is patently obvious that this would only apply in cases where the nature of a breach is such that it is capable of being remedied. In this instance there was a serious breach resulting in two fatalities in consequence of which Eskom opted for a two stage investigative process as I have demonstrated above.

[22] Upon Sizazonke's clear act of misconduct, Eskom quite appropriately opted to follow the suspension route provided for in Eskom's Procurement and Supply Chain Management Procedure. This instrument expressly provides that upon rejection of an internal appeal, which happened in this case, the presenter must ascertain whether Eskom has a contract currently in place with a contractor or supplier. If this is the case,

[2] *Comwezi Security Services (Pty) Ltd & another v Cape Empowerment Trust Ltd* [2014] ZASCA 22 para 12.

the presenter decides, together with the applicable end user and procurement manager, whether 'to terminate the contract and to suspend the supplier with immediate effect, or to suspend the supplier from date of contract expiry'.

[23] In any event Sizazonke is not entitled to a claim for damages in view of its own breach of the contract. As stated earlier, Sizazonke conceded to the breach. This concession was repeated by its counsel in the course of his submissions.

[24] To award Sizazonke damages claimed would amount to rewarding it for its own wrong ie its breach of contract. There is authority to the effect that a party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for itself, to the disadvantage of the counterpart.[3]

[25] Sizazonke contends that on 16 July 2010 Eskom made an election not to cancel the existing contracts, because Peter Craig, Eskom's then project manager, gave instructions to Sizazonke to resume its works after it had been given a work stoppage order. In the alternative, it is claimed that Eskom waived its right to cancel the contracts on 19 November 2010.

[3] *Food & Allied Workers Union v Ngcobo NO & another* [2013] ZASCA 45; [2013] 3 ALL SA 351 (SCA); 2013 (5) SA 378 (SCA) para 50.

[26] It is trite that the question whether a party has made an election not to cancel a contract is a question of fact to be decided on evidence. Any inference to be drawn must be based on and be consistent with the proved facts.[4]

[27] Sizazonke's contention on this aspect was, in my view, correctly rejected by the court a quo as being unfounded and not supported by the evidence. It rightly found that Sizazonke's contention in the first instance ignored the difference between the first preliminary investigation and its purpose and the second commercial investigation which resulted in the suspension and lawful termination of the contracts.

[28] The court a quo's finding in this regard must be upheld based on the following. Firstly, Mr Van Wyk, testifying on Sizazonke's behalf stated it was a normal procedure that immediately after an accident of this nature had occurred, a work stoppage order must be issued. He testified that such work stoppage related to the temporary suspension of work to ensure a safe environment and had nothing to do with the cancellation of any contract. Secondly, Mr Van Wyk testified that, at the meeting on 13 July 2010 it was specified that the said meeting was a preliminary one and that a further meeting relating to a commercial contract would be held. Thirdly, Sizazonke was aware that another investigation relating to the commercial contract was still going to be conducted.

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[4] *Bates & Lloyd Aviation (Pty) Ltd & another v Aviation Insurance Co; Bates & Lloyd Aviation (Pty) Ltd v Aviation Insurance Co* 1985 (3) SA 916 (A) at 939-940; G B Bradfield *Christie's The Law of Contract in South Africa* 7 ed (2016) at 639-640.

[29] Mr Dedekind's unchallenged testimony was that, whenever an incident such as the present one occurred, which resulted in serious injuries or fatalities, a preliminary investigation would always be conducted. This was followed afterwards by a second investigation which relates to the commercial contracts. Clearly, these procedures are distinct and they serve different purposes as the court a quo correctly found.

[30] In view of the fact that Sizazonke was aware that a commercial investigation was still going to be conducted, no inference may be drawn that Eskom elected not to cancel the contract or that it waived its right to cancel. In light of what I have found, this appeal must fail. There is accordingly no need to deal with the issue of damages.

[31] Lastly, Sizazonke contends that it is entitled to be awarded the wasted costs for the postponement of the trial during October 2016 which was at Sizazonke's behest whilst its expert witness, Mr Jacques Habig was being cross-examined. It is contended that Eskom was unreasonable at the time by not consenting to the correctness of the financial statements and for cross-examining him on the relevant source documents.

[32] The purpose of the postponement was to enable Mr Habig to consult the source documents, which in my view was something he ought to have done and came prepared for when he first testified. It is established and accepted practice that no respondent can be forced to assist an applicant to prove his or her case. It follows accordingly, that Sizazonke was responsible for the postponement and must accordingly bear the wasted costs for that postponement.

[33] I accordingly make the following order:

1 The appeal is dismissed with costs.

2 The appellant is liable to pay the costs of the postponement of the trial in October 2016, including the costs of two counsel.

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B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant:	R Du Plessis SC (with him R Grundlingh)
Instructed by:	Nothnagel Attorneys, Waterkloof
	c/o Blair Attorneys, Bloemfontein
For Respondent:	M Gwala
Instructed by:	Ngeno and Mteto Attorneys, Pretoria
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