IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 31/10

In the matter between:

TSOELOPELE CONSULTANTS & CONTRACTORS (PTY) LTD **APPELLANT**

and

LESOTHO ELECTRICITY CO. (PTY) LTD **RESPONDENT**

CORAM : RAMODIBEDI, P
SCOTT, JA
FARLAM, JA

HEARD : 7 APRIL 2011
DELIVERED: 20 APRIL 2011

SUMMARY

Construction work – delays – imposition of penalties – objection by contractor – contractor failing to apply for extensions of contract period as provided for in contract – appeal dismissed.

JUDGMENT

SCOTT, JA

[1] This is an appeal from a judgment of Lyons AJ sitting in the commercial Division of the High Court. The sole question in issue is whether the respondent was entitled to apply a penalty provision for the late completion of the works in terms of a written contract entered into between the parties on 7 July 2006. The contract was for the construction and installation of certain electrical works forming part of the electrification of Butha-Buthe. The appellant was to supply the labour, transport and machinery and the respondent was to supply the materials necessary for the execution of the work. The contract price was M330 400-00. The contract period was 10 weeks commencing on 3 November 2006 and the finishing date was 12 January 2007. Certain extensions were granted by the respondent but in the event the work was completed

some 92 calendar days later than the extended completion date. The contract made provision for a penalty of M500 per calendar day for failure to meet the completion date, subject to a maximum of 10% of the contract price. The respondent accordingly deducted the sum of M33 040 from the contract price. The appellant subsequently instituted motion proceedings for an order declaring the imposition of the penalty to be wrongful and for the release of the amount deducted. The matter was referred for the hearing of oral evidence, whereafter Lyons J gave judgment dismissing the application with costs.

[2] It is necessary to quote certain relevant provisions of the contract. (The reference in the contract documents to the contractor is a reference to the appellant and a reference to the employer or to L.E.C. is a reference to the respondent).

[3] Clause 15 of the General Conditions of Contract reads:

> "15. Delays in the Contractor's Performance.
>
> 15.1 Delivery of Services shall be made by the Contractor in accordance with the time schedule prescribed in the quotation.
>
> 15.2 If at any time during performance of the Contract the Contractor or its subcontractor(s) should encounter conditions impeding timely delivery of Services, the Contractor shall promptly notify the Employer in writing of the fact of the delay, its likely duration and its cause(s). As soon as practicable after receipt of the Contractor's notice, the Employer shall evaluate the situation and may at its discretion extend the Contractor's time for performance, with or without liquidated damages, in which case the extension shall be ratified by the parties by amendment of Contract.
>
> 15.3 A delay by the Contractor in the performance of its delivery obligations shall render the contractor liable to the imposition of liquidated damages unless an extension of time is agreed upon without the application of liquidated damages."

I pause to observe that provisions such as those contained in clause 15.2 are typically found in construction and engineering contracts. The object of the clause is to ensure that claims by the contractor that it was delayed are raised at the time when the delay is encountered so as to afford the employer or engineer the opportunity of investigating

the cause immediately rather than at some later stage when it is more difficult to verify the cause of the delay.

[4] The Installation Specifications, constituting part 8 of the contract, include provisions for the ordering and collecting of materials by the contractor from the employer as well as for the procedure to be adopted in the event of a possible late delivery. Clause 8.3 of the Installation Specifications reads:

> "8.3 Material Handling
>
> All materials to complete the contract works as described in this contract, will be provided by LEC. The contractor will be responsible for ordering from LEC stores, collecting, and arranging for off-loading of materials and equipment and shall include the cost thereof in the tender prices.
>
> The contractor shall make the necessary arrangements for safe storage on site, offering adequate protection against theft, damage and weather. The responsibility for insurance of materials against any form of damage, or theft after issue thereof, also rests with the contractor.
>
> In cases where the contractor meets the required lead-time for delivery of material on site and the material is not available, any resultant standing time or additional expenditure incurred will still be the responsibility of the contractor. The onus is thus on the contractor to ensure timeous delivery of material on site.

> Written notification shall be given to the Project Manager the moment the contractor suspects a possible late delivery. Should a late delivery occur, due to a problem of national proportion then the Project Manager will determine the extent of lost time, however an extension of time shall only be considered if the delay is on the critical part (sic) of the contractor's program".

It appears from the evidence that the procedure adopted was shortly as follows. As and when materials were required the appellant's project supervisor or contracts manager would inform the respondent's project supervisor who would generate a requisition (or from sometime in January or February 2007 onwards, a document called a "picking slip"). The request would be approved and the requisition or picking slip would be sent to the appellant's Store. When the materials were ready for collection the appellant would be informed. On taking delivery of the materials at the store the respondent was given a waybill to enable it to proceed through the security gate.

[5] Of particular importance in the present case is the final paragraph of clause 8.3 of the Installation Specifications quoted above. The object of this provision, once again, is to ensure that any complaint concerning a late delivery that could result in lost time would be investigated immediately. Indeed, the intention was clearly to preclude claims that the contractor was delayed being raised at a later stage when more difficult to investigate. Whether a delay in the delivery of materials would result in lost time would depend on a number of factors including the state of the works and the critical path of the contractor's programme.

[6] The appellant commenced work in November 2006. Certain delays were experienced and acting in terms of clause 15.2 of the General Conditions or Clause 8.3 of the Installation Specifications, the appellant wrote to the

respondent recording the delay and requesting an extension of the contract period. Thus on 4 December 2006 the appellant wrote to the respondent recording a delay in the delivery of specified materials and attaching a copy of its revised programme to demonstrate the consequence of the late delivery. The appellant sought an extension of four weeks ending on 9 February 2007. The claim was presumably investigated and on 26 January 2007 a variation order was issued extending the contract period to 9 February 2007 as requested.

[7] It appears, however, that the respondent was far from happy with the progress on site. The minutes of a meeting held on 12 February 2007 contain the following:

> "LEC [respondent] mentioned that it is concerned with the delay in construction of the project . . . LEC granted the contractor time extension to 9 February 2007. But the progress on site is far from completion as the excavations are not yet complete and there is no LV conductor strung to-date. The Contractor mentioned that lack of transformers delayed the progress on site, however LEC did not agree with this as the transformers come at a later stage of the

> Project (when HT and LV lines are strung and the transformers structures are in place).
>
> Tsoelopele responded that rain delayed the project by 5 days and funerals in the village by 3 days.
>
> LEC stressed that it cannot afford further delays of the project, so the contractor assured LEC that they will complete the project within 14 days from 12 February 2007. The contractor will submit the request for further extension of time on 13 February."

[8] On the same day the appellant, as required by clause 15(2) of the General Conditions, submitted its claim in writing for an extension of the contract period to 23 February 2007 on account of inclement weather and funerals in the village. The respondent responded by letter dated 14 February 2007 granting an extension to 23 February 2007 as requested. The respondent, however, warned that it would invoke the penalty provisions in the contract in the event of the work not being completed by 23 February. The letter reads:

> "We acknowledge receipt of your letter dated 12th February 2007, requesting two weeks contract extension to 23rd February 2007. We would like to stress our disappointment in the manner that you are executing this Project. Our personnel attended the site meeting on the 07th February 2007 that was arranged between LEC

and yourselves, but you failed to attend and did not apologize. We established during site inspections that you do not have resources like vehicles on site, and also that the remaining activities cannot be completed within two weeks, as conductor stringing has not started.

However we will grant you an extension of two weeks that you requested, but be aware that we will impose penalties as per clause 15.3 of our contract agreement should you fail to complete the remaining works by 23rd February 2007".

[9] There were no further applications for extensions of the contract period. On 16 May 2007 the respondent wrote to the appellant saying:

"The Butha-Buthe project is under penalties as we warned you in our letter dated 14 February 2007".

On 4 June 2007 the appellant replied to the letter of 16 May 2007 in relation to the Butha-Buthe project as follows:

"Botha Bothe: Work is complete except for some mostofer brackets awaiting supply of materials from LEC.

Tsoelopele Consultants and Contractors wish to stress that the delays in supply of materials are problematic for the cost efficient implementation of the projects as these result in cost of labour and transport being considerable higher than estimated. Our workforce can not be utilized effectively and truck transport needs to be doubled as transformers are not available as planned. For example the pillar boxes for Botha Bothe were only supplied two weeks ago.

Provided the materials are supplied the projects can be

commissioned with one days notice".

[10] The respondent appears simply to have ignored the appellant's letter of 4 June 2007. On 23 July 2007 the respondent wrote to the appellant as follows:

> "This letter serves as a follow-up of our letter dated 14th February 2007 (copy attached). Please take note that this project commenced on the 03rd November 2006 and was supposed to have been completed by 12th January 2007. Time extension was granted to you up to 23rd February 2007 without penalties, but clearly indicating that your failure to complete will result in LEC applying penalties as per clause 15.3 of our contract agreement. The total number of calendar days from 23rd February 2007 to 21st July 2007 (Project completion date) are 92 days (excl holidays, rainy and stay-away).
>
> The penalties are as follows: Amount per calendar day is M500.00 x 92 days = M46,000.00. Your net contract amount is M330 400.00, therefore LEC will deduct maximum of 10% of the contract price i.e. M33,404.00 from your remaining project funds".

As recorded in this letter the contract work was finally completed on 21 July 2007. The respondent deducted the sum of M330,040 from the contract price.

[11] The appellant's contention is that the delay in the completion of the works, i.e. from 23 February 2007, being

the extended completion date, to the actual completion date, was due solely to the respondent's delay in supplying materials necessary to execute the work. In this Court counsel for the appellant sought to justify the appellant's failure to apply for an extension on the basis that it was implicit in the site minutes of 12 February 2007 and the respondent's letter of 14 February 2007 (both of which are quoted above) that the respondent would entertain no further application for extension of the contract period. There is no merit in this contention; nor was it advanced in evidence. On the contrary, Mr. Seriti Phate, the appellant's managing director, testified that he complained about the late delivery of materials but not in writing. He said that his failure to put the complaint in writing and to request an extension of the contract period was an "oversight" on his part. Not only was this denied but it is most implausible. The appellant was fully aware of the provisions of the

contract, particularly clause 8.3 of the Installation Specifications. It had previously given the respondent written notification of late delivery of materials. This was the letter of 4 December 2006. The letter not only gave details of the dates when the materials were ordered and delivered but also referred to the appellant's revised programme to demonstrate the impact which the late delivery had on the contract period. The appellant had similarly followed the correct procedure when seeking an extension on account of funerals and rain days. The appellant knew exactly what was required of it. In my view, the court *a quo* was justified in preferring the respondent's version that there were no such complaints or requests for extensions and that the delay was attributable to the inability of the appellant to complete the work on time, whether by reason of lack of resources or otherwise.

[12] As previously pointed out, the very object of clauses 15.2 and 8.3, quoted above, was to preclude claims of late delivery being made long after the event when it was difficult to verify them. But this is precisely what the appellant has sought to do.

[13] Much was made by the appellant of its letter dated 4 June 2007 (quoted in para 10 above). But, as the learned judge *a quo* remarked, the appellant was just "setting up an excuse". I agree. The letter was couched in general terms and lacked particularity. By the time it was written the project was already in the penalty period. It is also necessary to state the obvious. Proof merely that materials were supplied on a particular date is of no assistance. Whether any delay between the request and the availability of materials for delivery had the effect of delaying the completion of the contract would, as I have said, depend on

the critical path of the appellant's programme and the state of the works at the time. For this reason the appellant's belated attempt to place reliance on some waybills and picking slips was a futile exercise.

[14] It follows that the appeal must fail. It is dismissed with costs.

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D.G. SCOTT
JUSTICE OF APPEAL

I agree:

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

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I.G. FARLAM
JUSTICE OF APPEAL

For the appellant : Adv Q. Letsika
For the respondent: Adv S. Shale