

SOUTH AFRICA / JUDGMENT

2C Projects CC v Labour Recruitment Specialist CC (7000/2007) [2008] ZAKZHC 59 (22 August 2008)

[2008] ZAKZHC 59

COURT

High Courts - Kwazulu Natal

BEFORE

Ntshangase

CASE / FILE NUMBER

7000/2007

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IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

7000/2007

2C PROJECTS CC PLAINTIFF

versus

LABOUR RECRUITMENT SPECIALIST CC DEFENDANT

RESERVED

JUDGMENT

Delivered on: 22 August 2008

NTSHANGASE, J

- [1] This is a claim for provisional sentence in the sum of R524 996.01 with interest at the legal rate from 26 October 2006 to date of payment. The claim is made on the basis of an architect's final payment certificate "No. 6" dated 7 June 2007, Annexure "A" to the plaintiff's provisional sentence summons which reflects the "amount due for payment to the contractor," the plaintiff, as R524 996.01. The claim arises from what the plaintiff refers to as "variation orders" which amended the scope of work whose contract price was R2 236 500.00 which, with the inclusion of value added tax, totalled R2 549 610.00 in terms of the "principal building agreement", entered into between the plaintiff and the defendant, for work described as "project light industrial development on Erf 4607, Booth Road, Cato Manor."

- [2] The defendant resists the claim, with reference to Annexure “SS9” to its opposing affidavit. Annexure “SS9” is an architect’s final payment certificate “No. 5” dated 5 December 2006 and alleges full payment of the contract price as having been made. The defendant takes issue with the plaintiff’s reliance on the architect’s final payment certificate of 7 June 2007 on the basis that there cannot be two final payment certificates, one of 7 June 2007 and another of 5 December 2006. The amounts reflected on Annexure “A” to the plaintiff’s provisional sentence summons are disputed as neither acceptable nor due, owing or payable by the defendant whose contention is that it has paid the full contract price and R415 701.00 for piling which was regarded as additional work.
- [3] The plaintiff acknowledges receipt of full payment of the contract price but points to the defendant’s failure to take account of variations in the scope of work in respect of which the amount of R524 996.01 is now claimed.
- [4] In this matter, on 7 March 2006, the plaintiff and the defendant concluded a written agreement, a copy of whereof is Annexure “SS2” to the defendant’s opposing affidavit, in respect of building work to be undertaken by the plaintiff. According to the “certificate of completion”, Annexure “SS4” to the defendants opposing affidavit, building works were completed on 26 October 2006.
- [5] While it is not disputed by the plaintiff that it received the full payment of R2 549 610.00 from the defendant, the sum of R524 996.01 is claimed by the plaintiff as the “outstanding amount due by LRS” on Annexure “REP1” to the plaintiff’s replying affidavit under the heading “contract summary”. Such amount is arrived at by a reconciliation which takes account of credits accorded for “omission(s)” and debits entered for “addition(s)” in respect of the building work.
- [6] It is not in dispute that the final payment certificate on which the amount of R524 996.01 reflects as the outstanding amount due by the defendant bears the signature of the architect, Rakesh Jeewanlall of “Rakesh Jeewanlall Architectural”; nor is it in dispute that the architect signed and issued both final payment certificates on behalf of the defendant as the defendant’s duly authorised agent. There is also no dispute about the prima facie liquidity status of the final payment certificate of 7 June 2007 relied upon by the applicant.
- [7] The defendant’s repudiation of the claim is based on the contention that there is nothing before the court which evidences agreement of the parties on any additional work, except for “piling” which was paid for and is not in issue. It is also based on the rejection of the architect’s final payment certificate of 7 June 2007, issued close to eight months after completion of the works and when one other final payment certificate was issued on 5 December 2006, some two months after the completion of the works.

- [8] In regard to the issue of additional work, Mr Naidu, for the defendant made various submissions apart from one which pointed to plaintiff's failure to provide evidence of an agreement on additional work. In support of his submission that the contract provides for no variation he referred to Clause 1.10 of the agreement. It reads:

"This agreement constitutes the whole agreement between the parties and no variation amendment or [indistinct] to any of the terms and conditions shall have any force or effect unless reduced to writing and agreed by both the contractor and the employer."

Mr Naidu argued that the architect did not have any powers to enter into any contract on behalf of the defendant with the plaintiff for any additional work. The architect's function was to value the work which the parties agreed was to be done. He argued that the architect, "only says so much must be paid at this stage." Mr Naidu is correct in so far as his argument postulates for no countenance of any variation to the contract except as provided for in Clause 1.10. However Clause 17 as was pointed out by Mr Voormolen who appeared for the plaintiff provides for the architect's instructions and Clause 17.4 envisages a variation to the contract sum.

Clause 17.1 reads:

"17.1 The architect may issue written architect's instructions to the contractor in regard to: alteration of the design, quality or quantity of the works provided that such instruction shall not substantially change the scope of the works."

Clause 17.4 of the agreement reads:

"Where execution of an architect's instruction causes a variation to the contract sum it shall be dealt with in terms of Clause 28"

Clause 28.2.2 provides for valuation of variations resulting from the architect's instructions to be "agreed by the architect and the contractor"

Mr Naidu's submission would therefore be incorrect insofar as it suggests that the architect's function was limited to saying "so much must be paid at this stage" and as excluding valuation.

- [9] As stated earlier Mr Naidu is quite correct in stating that no variation to any of the terms and conditions would have any force or effect unless reduced to writing and agreed by both the contractor and the employer, but note should be taken that the agreement in Clause 17.1 even envisages a change in the scope of work as a consequence of the architect's instructions with the proviso that such instructions "shall not substantially change the scope of work" [my emphasis]. Clause 17.1 empowers the architect to issue instructions in regard to alteration of the design, quality or quantity of the works. It is not far-fetched to say that insofar as Annexure "REP1" to the founding affidavit refers to "additions", such "additions" can properly be construed as work which does fall within the sphere of the contemplated "alteration of the design ... or quantity of the works" on which the architect was empowered to issue instructions. In this matter when the architect signed the payment certificate, Annexure "A", he did not only signify his agreement with alterations of the design, quality or

quantity of the works executed within his sphere of competence to commission, he also signified his agreement with the contractor as provided for in Clause 28.2.2 on the valuation of the variations. What the architect did was not a variation of the contract. The parties themselves empowered him in the agreement to do certain things as has been indicated.

[10] Escalation which would have the effect of varying the contract sum was also envisaged in the agreement. Clause 28.11 provides:

“Unless otherwise stated in the schedule the contract sum shall be adjusted in terms of the contract price adjustment provisions [CPAP] recommended by the Building Industries Advisory Council using the base month and region as stated in the schedule.”

Clause 28.11 of the agreement is to be read with Clause 38.5.3 which reads:

“The adjustment of the contract sum shall be in terms of: CPAP : OTHER ”

The parties selected “other”.

The Clause with reference to “other” then reads:

“If ‘other’, state method”:

Then what is stated thereunder, in manuscript inserted by the parties reads:

“proven cost as per letter dated 20 July 2005”

The letter of 20 July 2005, Annexure “SS1” to the opposing affidavit reflects inter alia the contract price and also the following which provides for escalation:

“1. Price is valid for 30 (thirty) days from date hereof thereafter subject to escalation.”

Annexure “SS3”, the defendant’s letter dated 19 July 2006 addressed to the plaintiff provides for payment of more money than the contract price to be paid. It reads:

“The above payment excludes any shortfalls which is to be negotiated between the parties in due course.”

Then Clause 28.1 of the agreement empowers the architect to value such adjustments and it is the same architect who, in that regard signed, on behalf of the defendant, the final payment certificate relied upon by the plaintiff. In my view the non-variation clause is of no assistance to the defendant’s case.

[11] In the other contention advanced by Mr Naidu with reference to payment certificates numbers 5 and 6 which were both issued as ‘final’ payment certificates, Mr Naidu quite correctly argued that there cannot be two final payment certificates. However Annexure “REP3” to the replying affidavit, delivered on behalf of the plaintiff, which bears the same date as the payment certificate “No. 5”, addressed by the architect to ‘Clive Dwarika’, a member of the plaintiff, clearly qualifies the ‘final’ status of the earlier payment certificate “No. 5” as follows:

“This certificate is marked ‘final’ for the purposes of the bank to release payment up to the bond amount.

The final payment certificate relating to the variations and extras that may have occurred to the contract, this will be issued only once the final account has been agreed upon”

This would inform whoever would receive and read payment certificate “No. 5” and Annexure “REP3”, in particular the defendant, that certificate “No. 5” was in fact not a final payment certificate.

[12] In regard to the claimed amount the plaintiff has presented a detailed reconciliation document which evidences the existence of the debt after taking into account the payments relied upon by the defendant for its defence as well as payments the defendant made for work not covered by the agreement. I am satisfied that Annexure “A” to the plaintiff’s provisional sentence summons clearly evidences an unconditional acknowledgement of indebtedness in the amount of R524 996.01 the payment whereof is due to the plaintiff and upon which provisional sentence may properly be granted. In my view the plaintiff must succeed.

[13] It was agreed that in the event of the provisional sentence being granted, interest be set at the rate of 8.75% payable from 12 December 2006, the date of practical completion of works, to date of payment.

[14] I accordingly make the following order:

Provisional sentence is granted with costs in the sum of R524 996.01 with interest thereon at the rate of 8.75% from 12 December 2006 to date of payment.

Date of Hearing: 8 May 2008

Date of Judgment: 22 August 2008

Counsel for the plaintiff: Adv AV Voormolen

Instructed by: Cox Yeats

Counsel for the defendant: Adv K Naidu

Instructed by: Asogan Padayachee & Associates

C/O Logan Naidoo & Associates

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