

SOUTH AFRICA / JUDGMENT

Alto Management CC v Wingtip Crossing Shopping Centre (Pty) Ltd (59545/2018)

[2024] ZAGPPHC 808 (12 August 2024)

[2024] ZAGPPHC 808**COURT**

North Gauteng High Court, Pretoria

BEFORE

S J R Mogagabe

CASE / FILE NUMBER

59545/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 59545/2018

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE:

12/08/24

SIGNATURE

In

the matter between: -

ALTO

MANAGEMENT CC

Applicant

(Registration

No: 2002/097938/23)

and

WINGTIP

CROSSING SHOPPING CENTRE (PTY) LTD

Respondent

(Registration

No: 2013/048828/07)

This judgment was handed down electronically by circulation to the parties' legal representatives via email and by uploading it to the electronic file of this matter on Caselines. The date of judgment is deemed to be 12 August 2024.

JUDGMENT

Summary: Building contract- interpretation thereof – legal effect of interim payment certificates- material dispute of facts- referral to arbitration or trial- defences available to challenge payment certificates.

MOGAGABE AJ

INTRODUCTION

[1] This is a claim founded on interim payment certificates arising from a building contract concluded by the applicant (Alto) and the respondent (Wingtip). Alto claims payment in the amended sum of R7 022 117.72 against Wingtip in terms of six interim payment certificates that were issued and signed by the quantity surveyor and certified by Wingtip's duly appointed principal agent. Wingtip is resisting the claim based on the defences set out hereinbelow. However, before dealing with same, it is appropriate in the circumstances to provide the background that triggered this application as briefly outlined hereafter. In the written agreement (contract) Alto is referred to as "the contractor" and Wingtip as "the employer".

FACTUAL BACKGROUND

[2] The salient features of this matter are as follows. In September 2014 Alto and the Wingtip concluded a written agreement in terms of which Alto was appointed as a contractor to build a shopping centre in Montana, Pretoria for Wingtip. The terms thereof are embodied in a standard contract prepared by the Joint Building Contracts Committee (JBCC). In terms of clause 5.0 thereof Wingtip appointed a certain Mr Beukes van Heerden of JHI Project Managers as principal agent in respect of this building project. Clause 5.3 thereof stipulates that only the principal agent has the authority to bind Wingtip. It reads as follows:

"5.3 The principal agent shall be the only party having the authority to bind the employer, except where agents issue contract instructions under delegated authority [5.3.2]. Without detracting from the above, the

principal agent shall be the only party empowered to:

5.3.1...

5.3.2 delegate to other agents authority to issue contract instructions and perform such duties as may be required for specific aspects of the works, provided that the contractor is given notice of such

delegation.” (My emphasis).

[3] Pursuant to the provisions of clause 5.3.2, the principal agent duly delegated the function of preparing and issuing interim payment certificates in terms of clause 31.0 to the Quantity Surveyor, a certain Mr Anthonie Botha of Maiwashe Fourie & Swanepoel t/a Quanticost Quantity Surveyors.

[4]

In terms of clause 31.9 of this agreement, Wingtip (as employer) was enjoined or obliged to pay Alto (as contractor) the amount certified in the interim payment certificate within seven (7) calendar days from the date of issue of the payment certificate.[1]

[5] Pursuant to the agreement the quantity surveyor duly issued and signed interim payment certificates 1-19 and Wingtip in turn in the performance of its obligations in terms of the agreement made payment to the applicant in respect of such payment certificates.

REFUSAL OR FAILURE BY WINGTIP TO MAKE PAYMENT IN TERMS OF CERTIFICATES 20-25

[6]

Wingtip failed and/or refused to pay interim payment certificates 20 to 25, despite the fact that all these payment certificates were issued and signed by the quantity surveyor pursuant to the provisions of clause 31.0 of the agreement, as well as payment thereof having been certified and approved by the appointed principal agent, the said Mr Beukes van Heerden in terms of clause 5.3 of the agreement, so outlined above.

[7]

These interim payment certificates which form the subject matter of the present application, became due and payable as follows:

7.1. payment certificate 20 became due and payable on 28 November 2015 in the sum of R3 901 629.40,

7.2. payment certificate 21 became due and payable on 11 December 2015 in the sum of R1 908 960.60,

7.3. payment certificate 22 became due and payable on 26 December 2015 in the sum of R4 987 352.44.

7.4. payment certificate 23 became due and payable on 20 February 2016 in the sum of R511 490.14.

7.5. payment certificate 24 became due and payable on 15 March 2016 in the sum of R480 744.48.

7.6. payment certificate 25 became due and payable on 26 April 2016 in the sum of R175 682,79.

[8]

The total amount outstanding in respect of the interim payment certificates 1- 25 was in the sum of R60 897 910.45. In fulfilment of its contractual obligations, Wingtip made payment in respect of these interim payment certificates 1-25 in the sum of R52 595 620.87, leaving a shortfall totalling R8 302 289,57 in respect of these payment certificates. This entails that the payment of the sum of R52 595 620.87 did not constitute payment of the full amount owing in respect of these interim payment certificates 20-25, entailing a shortfall or deficit in the sum of R8 302 289,57 still outstanding and due and payable to the applicant. In terms of the parties' latest supplementary joint practice note, Wingtip does not object to the amendment by Alto amending the amount claimed in prayer 1 of the Notice of Motion to reflect the total sum outstanding in respect of the interim payment certificates in the sum of R7 022 177,72 and amending prayer 2 thereof to read “ interest on the aforementioned amount at the prevailing interest rate from time to time calculated from 11 April 2016 to date of full and final payment”. I granted such amendments.

FURTHER AGREEMENT BETWEEN THE PARTIES

[9]

In terms of this latest supplementary joint practice note, the parties further agreed to the following effect: Firstly, that Wingtip takes no issue with Alto's filing of its supplementary founding affidavit dated 6 September 2018 and the parties agree that the filing thereof be condoned by the court. Secondly, that Alto no longer persists with its opposition to Wingtip's condonation application for its late filing of its answering affidavit dated 5 July 2019 and that same be condoned by the court. In the circumstances, condonation as requested was granted.

[10]

Finally, by agreement between the parties Wingtip's Rule 47(1) and Rule 35(14) interlocutory applications were withdrawn. Furthermore, Wingtip abandoned its counterapplication.

ISSUES FOR CONSIDERATION

[11]

In terms of para 7 of this supplementary joint practice note, the parties agreed that the issues that fall to be considered herein are the following:

11.1. whether the applicant is entitled to the relief sought as in the notice of motion as amended as outlined above; or

11.2. whether the application should be stayed pending a referral of the issues to arbitration; or

11.3. whether the application should be dismissed outright or referred to trial in terms of the provisions of Rule 6(5)(g); and

11.4. costs.

This then constitutes the crisp issues that fall for determination as so agreed by the parties.

LEGAL PRINCIPLES RELATING TO THE STATUS OF A PAYMENT CERTIFICATE.

[12]

There are a plethora of cases dealing with the legal status of a payment certificate. It is thus settled law that the legal principles governing the legal status of a payment certificate are as follows:[2]

12.1. a payment certificate constitutes a liquid document and when it is signed by the employer's agent it is as if the employer itself had given an acknowledgement of debt in favour of the contractor;

12.2. the certificate creates a distinct cause of action;

12.3. the underlying contract does not form part of the cause of action;

12.4. the employer is bound by the certificate, subject to the principles of the law of agency;

12.5. the employer is not entitled to dispute the validity of the certificate on the basis that the certificate was given negligently or that the discretion of the agent (usually an engineer or architect) was not exercised properly;

12.6. the certificate can be attacked on a limited number of grounds, such as fraud;

12.7. the architectural professional is usually the employer's agent in respect of the issuing of certificates and instructions in terms of the building contract.[3]

12.8. a principal agent, in issuing a payment certificate, either interim or final does so as an agent of the employer, not as a quasi-arbitrator;[4]

12.9. the principal agent is required to approach the task as an expert using his professional skill and knowledge, and would be liable to the employer for damages arising from negligent mistakes causing financial loss to the employer;

12.10. an architect's certificate duly issued in terms of the building contract binds the employer to pay the amount stated therein within the time limit provided for in the contract. Same applies to an interim payment certificate. Thus a contractor is entitled to sue for payment upon the expiry of the time limit, without taking any further steps;[5]

12.11. a provisional sentence can be granted on a payment certificate as the certificate in law represents an acknowledgement of debt signed by the employer's duly authorised agent.[6] So much then for the background and legal principles. I turn now to deal with the defences raised by Wingtip in resisting this claim.

Referral of the matter to arbitration

- [13] Wingtip contends seemingly in limine, that this application should be stayed pending referral of the matter to arbitration as the dispute between the parties is an arbitral dispute, placing reliance on the provisions of clause 40 of the agreement dealing with settlement of disputes. Clause 40.1 stipulates:

“Should any disagreements arise between the employer, including his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other to resolve such disagreement.

Clause 40.2 provides that where such disagreement is not resolved within ten(10) working days of receipt of such notice it shall be deemed to be a dispute and shall be referred by the party which gave notice to either adjudication or arbitration.

- [14] In developing this argument, it is contended that this arbitral dispute revolves around the assertion by Wingtip of having overpaid Alto in excess of the amount fixed in the agreement concluded between the parties i.e whether Alto has been paid more than the contract price or certified amounts or payment pertaining to the bulk earthworks services performed by Alto, as well as any payments made by Wingtip to Alto, which it contends Alto was not entitled to. In my considered view, Wingtip's reliance on the provisions of clause 40.1 is in the circumstances misplaced for the following reasons. First, it is apparent from a proper construction of clause 40.1 that the referral to arbitration must be preceded by either Wingtip (as employer) including the principal agent and/or the quantity surveyor giving Alto (as the contractor) notice to resolve the disagreement(s) or vice versa. In casu, no such notification was given by any of the parties. Second, in terms of clause 40.2, a dispute is deemed to exist only in the event where such disagreement is not resolved within ten days from the date of receipt of the notice. In the absence of such notification, no referral to arbitration of a “dispute” as so deemed in clause 40.2 could occur. Thus, the contention to refer the disputes to arbitration is in the circumstances misguided. This being so, cadit quaestio.

- [15] In any event, before litigation, Wingtip chose not to pay, instead of giving Alto notice to resolve the disagreement(s) around the alleged overpayment or any of these disputes.
- [16] In any event, this arbitral dispute about inter alia overpayment or payment relating to the bulk earthworks services, arising from or pertaining to the payment certificates is a dispute between Wingtip and its agents (i.e the principal agent and quantity surveyor) and not a dispute as so contemplated in clause 40.1 as outlined above, namely a dispute between Wingtip or its agents on the one hand and Alto on the other.
- [17] Furthermore, a clear and proper analysis of the agreement shows no prohibition against Alto (as the contractor) launching such application against Wingtip (as the employer). On this score too this contention is devoid of any merit.

Material dispute of facts

- [18] Wingtip further contends in limine that there exists material disputes of fact foreseeable by Alto, incapable of being resolved on the papers as they stand, with the attendant consequence, this being motion proceedings, of the matter either being dismissed outright or being referred to trial, in terms of Rule 6(5)(g) of the Uniform Rules of Court.
- [19] In developing this argument, counsel for Wingtip in the heads of argument and in court, submitted that such factual dispute of fact evolves around the issues summarised as follows:
- (a) on the basis of Wingtip disputing liability to pay Alto the amount claimed in terms of the payment certificates, contending instead that it had paid Alto in excess of the contract price,
 - (b) the dispute relating to the bulk earthworks contract. Alto states that such agreement was separately concluded before the JBCC agreement, whereas Wingtip contends that it forms part of the JBCC agreement. More importantly, Wingtip contends that the bulk earthworks done by Alto after the conclusion of the JBCC agreement had to be performed in terms of the JBCC agreement and not in terms of a separate agreement, asserting that Alto has allocated funds paid to it in terms of the JBCC agreement to the alleged outstanding account relating to the bulk earthworks. Alto maintains that the sum Wingtip paid directly to it related to the bulk earthworks done by it and is not included in the payment certificates.
 - (c) the dispute concerning payment to Alto relating to the “wet work and brickwork” on site, which was certified in terms of the payment certificates, although not done by Alto, contending that this necessitates the adjustment of the contract price as Alto cannot be paid for work done by third parties, as well as work done by a subcontractor to fix the “erroneous work” of Alto. A further dispute concern Alto unlawfully utilising for its benefit a large amount of money that should have been paid out to contractors, as well as a dispute concerning the amount paid to subcontractors.
 - (d) a dispute pertaining to the veracity of the payment certificates.
- [20] This in essence constitutes a summary of the material dispute of facts in terms of which counsel for Wingtip

invited me to either dismiss the claim or refer the matter to trial. For the reasons that follow, I decline such invitation. First, the claim forming the subject matter of these proceedings is based on payment certificates. As alluded to above and elsewhere in this judgment, these payment certificates having been signed by the quantity surveyor and the principal, Wingtip is bound by the payment certificates. Wingtip is not entitled to dispute the validity, veracity or correctness thereof except on very limited grounds such as fraud and the like[7]. Its remedy is not to refuse to make the payment but to sue the principal agent or quantity surveyor (as Wingtip’s agents), for damages. As such, the disputes raised by Wingtip in attacking the payment certificates as outlined above, for purposes of seeking the dismissal of the application or referral thereof to trial cannot avail Wingtip i.e do not and would not have provided a “defence(s)” to this claim based on the payment certificates. Its remedy as alluded to elsewhere in this judgment is to sue its agents for damages for their negligent and reckless conduct in failing to satisfy themselves as to the

correctness of the claims and valuations prior to issuing, signing and approving the payment certificates.

- [21] Insofar as it concerns the bulk earthwork dispute, same is the subject matter of a pending action instituted by Alto and defended by Wingtip. This being so, it would be impermissible if not improper to dismiss the application or refer same to trial on the basis of a dispute which forms the subject matter of a separate pending action between the parties.
- [22] In any event, these “disputes of fact” on which Wingtip relies, for the reasons outlined above, do not constitute real, genuine and bona fide disputes of fact within the ambit of payment certificates, for the reasons outlined above with the attendant consequence that Wingtip’s contention in this regard is untenable, more so having regard to the fact that Wingtip does not contend that its agents (the principal agent and quantity surveyor) acted fraudulently or exceeded their authorities or colluded with Alto in issuing, signing and approving the payment certificates. It is an established principle that in instances where a dispute of fact is not a “real, genuine or bona fide” one, a court will be justified in ignoring it and may proceed to make a finding on the applicant’s version. Same applies where a respondent’s version is clearly or palpably far-fetched or untenable that a court is justified in rejecting them merely on the papers.[8] Accordingly, the purported “dispute of facts” or “defences” so raised by Wingtip being not real, genuine or bona fide, are in the circumstances untenable. They do not constitute sustainable defences in challenging or disputing the payment certificates.

Alto did not in do the work

- [23] Wingtip asserts that Alto abandoned the building project in December 2015 and never performed any work subsequent thereto. As such it disputes the validity or correctness of the payment certificates, hence refusing to make any payment. This defence cannot avail Wingtip, in that as such defence in the circumstances entails that the principal agent or quantity surveyor negligently or recklessly certified work that was not performed by Alto, Wingtip is not entitled in law to refuse to make payment based on the negligent or reckless conduct of the principal agent or quantity surveyor in doing so. Errors, negligence or recklessness on the part of the principal agent or quantity surveyor in failing to satisfy themselves as to the correctness or validity of the claims and work done before issuing, signing and approving the payment certificates, do not constitute a defence to a claim based on the certificates, nor render the certificates open to attack.[9]

CONCLUSION

- [24] I need to highlight that a payment certificate is in law regarded as the equivalent of cash. It is treated as a liquid document since it is issued by the agent of the employer, with the attendant consequence that the employer is in the same position it would have been if itself had signed an acknowledgment of debt in favour of the contractor. The payment certificates in casu fall within this legal purview.

[25] I am constrained to point out as demonstrated above, the absence of a triable or sustainable defence mounted by Wingtip in resisting the relief sought by Alto herein.

ORDER

[26] In the result, I grant the following order in favour of the applicant:

26.1. The respondent (Wingtip) is ordered to pay the applicant the sum of R7 022 177.72;

26.2. The respondent (Wingtip) to pay interest on the aforementioned amount at the prevailing interest rate from time to time calculated from 11 April 2016 to date of full and final payment.

26.3 . The respondent (Wingtip) to pay the applicant's costs of suit on Scale B.

S J R MOGAGABE AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

E MALHERBE

Counsel for the applicant:

Instructed by Roelf Nel Inc

F KRIEL

Counsel for respondent

Instructed by E Champion Attorneys

Date of Hearing: 29 April 2024

Date of Judgement: 12 August 2024.

[1] Clause 39.1 of the agreement.

[2] Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd 1973

(4) SA 181 (D); Smith v Mouton 1977

(3) SA 9 (W); Thomas Construction Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd 1986

(4) SA 510 (N) at 514-515; Ocean Diners (Pty) Ltd v Golden Hill Construction CC [1993] ZASCA 41; 1993

(3) SA 331 (A); Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA); Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd

[2010] ZAGPJHC 75; Group 5 Construction (Pty) Ltd v Minister of Water Affairs and Forestry 2010 JDR 0512 (GNP) para 13.

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- [3] Universiteit van Stellenbosch v JA Louw (Edms) Bpk 1983
- (4) SA 321 (A).
- [4] Hoffman v Meyer 1956
- (2) 752 (C); Sutcliffe v Thackrah [1974] 4 BLR.
- [5] Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regerings Diens; Qwa Qw a Regerings Diens v Martin Harris & Seuns OVS (Edms) Bpk 2000
- (3) SA 339 (SCA) para 37; Ocean Diners supra at 340E
- [6] Joob Joob Investments supra para [28]
- [7] Ocean Diners at 344C.
- [8] Wrightman t/a JW Construction v Headfour (Pty) Ltd and Ano [2008] ZASCA 6; 2008 (3) SA 371 (SCA) Para 12; Mouton v Park 2000 Development 11 (Pty) Ltd 2019 (6) SA 105 (WCC)
- [9] Ocean Diners at 342C-D & 343C-D.
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