

SOUTH AFRICA / JUDGMENT

Axton Matrix Construction CC v Metsimaholo Local Municipality and Another (2778/2011) [2012] ZAFSHC 129 (28 June 2012)

[2012] ZAFSHC 129

COURT

Free State High Court, Bloemfontein

BEFORE

L J Lekale

CASE / FILE NUMBER

2778/2011

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 2778/2011

In the matter between:

AXTON MATRIX CONSTRUCTION CCApplicant

and

METSIMAHOLO LOCAL MUNICIPALITY Respondent

MONDE CONSULTING ENGINEERS & Joining Third-Party

PROJECT MANAGERS CC and AQUA

CONSULTING ENGINEERS & PROJECT

MANAGERS

(acting as a joint venture under the name of

MONDE – AQUA CONSULTING ENGINEERS

AND PROJECT MANAGERS)

HEARD ON: 14 JUNE 2012

JUDGMENT:

LEKALE, J

DELIVERED ON: 28 JUNE 2012

INTRODUCTION**AND BACKGROUND**

[1] This is an application for an order directing the respondent to, inter alia, pay the applicant as follows:

1.1 R463 837,13 on the basis of a certificate of interim payment issued in favour of the applicant by the engineer appointed by the respondent to administer the construction contract between the parties;

1.2 R459 978,06 in respect of the balance, inclusive of VAT, of the monies retained by the respondent with regard to the defect liability period agreed upon by the parties.

[2] The applicant is a construction close corporation contracted by the respondent under contract number 17/2008 to construct sewer reticulation in its area of local government authority.

[3] The respondent is a local municipality established in terms of the Local Government: Municipal Structures Act No. 117 of 1998.

[4] The third party is the engineer appointed by the respondent to administer the contract between it and the applicant in terms of the provisions of applicable general conditions of contract (GCC)

[5] On 20 December 2008 the respondent accepted the applicant's tender for the construction of sewer reticulation with the contract price of R8 447 898,75 inclusive of VAT together with contingency amount of R250 000,00.

[6] The agreement between the parties incorporated the provisions of the General Conditions of Contract for Construction Works (2004) published by the South African Institute of Civil Engineers, 1st Edition, Fourth Print (GCC).

[7] The GCC provides, inter alia, for the appointment of an engineer, as the respondent's agent, as well as for certification by the engineer, of interim payment to the applicant, among others.

[8] On 26 July 2010 the engineer issued certificate no. 11 in favour of the applicant for payment of an amount of R463 837,13 and the same was received by and for the respondent on 27 July 2010.

- [9] In terms of the GCC the respondent was supposed to pay the certified amount to the applicant within 28 days after receipt of the certificate in question. The respondent, however, did not oblige and the applicant, eventually, invoked the provisions of clause 57.1 of the GCC and gave the engineer notice of disagreement with regard to non-payment by the respondent on 6 October 2010.
- [10] On 12 October 2010 the engineer gave a ruling on the disagreement as contemplated by clause 57.2 of the GCC.
- [11] After a number of interactions between the parties in an attempt to resolve the matter, the applicant, on 11 April 2011, notified the respondent of its intention to cancel the contract and demanded payment of both the outstanding amount as certified and the balance of retention monies inclusive of VAT as set out in paragraph [1] above.
- [12] The applicant, eventually, launched the present proceedings on 19 July 2011 and, thereby, expressly cancelled the contract between the parties. It, eventually, secured an order it sought by default on 11 August 2011.
- [13] On 14 March 2012 the respondent filed opposing papers after the relevant order was rescinded on 9 February 2012.
- [14] The respondent, further, simultaneously delivered a third party notice claiming a contribution or indemnification against the engineer on the grounds that the latter unlawfully exceeded its mandate and contravened the clear provisions of the tender by effectively certifying that an amount of R8 764 824,73 inclusive of VAT was due and payable to the applicant.
- [15] Respondent, furthermore, counter applied for payment of R2 034 729,00 against the applicant and the third party jointly and severally for work not performed alternatively for defective work and breach of contract.
- [16] The engineer, as the third party, filed an opposing affidavit on 28 May 2012 in terms of which it, inter alia, raised a point in limine of prematurity against the respondent's claim on the basis that the latter had failed to exhaust dispute resolution procedures agreed upon by the parties before it embarked on the current proceedings.
- [17] The matter, eventually, served before me on 14 June 2012. Mr. Cronje, for the respondent, inter alia, submits that the respondent's counter application should be referred to trial in order for damages to be proved.
- [18] On behalf of the third party, Ms Kock, contends that the time for the engineer to file answering affidavits has not expired and, as such, the third party notice should be postponed to enable the engineer to deliver heads of arguments.

[19] Mr. Pienaar, for the applicant, maintains that the respondent's counter application should be dismissed and that the main application be disposed of as it can be adjudicated upon separately from and independent of the third party proceedings.

ISSUES IN DISPUTE

[20] The parties are in dispute over whether or not:

20.1 the interim certificate of payment upon which the applicant relies for payment is valid insofar as the respondent, effectively, contends that there was fraud involved and that the engineer exceeded its mandate;

20.2 the applicant was entitled to the release of the balance of retention monies when the present proceedings were launched regard being had to the fact that, in terms of GCC, such monies were to be released only 14 days after the expiry of the defects liability period;

20.3 the respondent's counter application should be referred to trial.

CONTENTIONS BY THE PARTIES

[21] Mr. Pienaar submits to, inter alia, the following effect with reference to case law:

21.1 the engineer is the respondent's agent and the latter is, as such, bound by the acts and omissions of the engineer as if it signed an acknowledgement of debt itself;

21.2 the respondent is not entitled to dispute the validity of a final or interim certificate issued by the engineer on the basis that the latter was negligent or exercised his discretion wrongly or that the respondent considers the work performed to be defective;

21.3 in the absence of fraud, among others, the respondent is bound to pay the sum certified;

21.4 the certified amount is payable as cash and that fact does not mean that the respondent is left without a remedy, because it may still have recourse against the engineer where the latter has certified in respect of defective work, among others;

21.5 the respondent is not entitled to assail the relevant certificate of payment, because it failed to avail itself of such an opportunity after the engineer issued a ruling on payability of the certificate on 12 October 2010 insofar as it did not invoke the provisions of clause 58.1 of the GCC;

21.6 the applicant is entitled to payment of the balance of the retention money, because it cancelled the contract as a result of the respondent's breach of the contract as contemplated in clause 56.2.3 read with clause 54.4 of the GCC;

21.7 the respondent agreed to variation of the contract price in terms of a letter dated 1 April 2009;

21.8 the respondent has not made allegations of fraud or misrepresentation on the part of the applicant and bases its case on alleged lack of authority on the part of the engineer's representative who signed the relevant certificate;

21.9 the allegation that the said representative lacked capacity is without substance;

21.10 the respondent has not proved its alleged damages insofar as no expert evidence was tendered and its counter application should, therefore, be dismissed.

[22] On behalf of the respondent, Mr. Cronje, contends to the following effect, among others:

22.1 the relevant certificate is invalid insofar as it claims more than the contract price to the extent of R317 015,98;

22.2 no variations of the amounts were authorised;

22.3 the engineer exceeded its mandate by certifying more than the contract allows;

22.4 only a final certificate cannot be attacked. The present certificate is assailable insofar as it is an interim or progress certificate;

22.5 the relevant certificate is wrong from inception insofar as it is based on a wrong invoice issued by the applicant;

22.6 as at 19 July 2011 when the present proceedings were launched, the applicant could only claim interim payment and not the retention money;

22.7 the respondent is entitled to claim set-off in respect of an overpayment made on the previous certificate;

22.8 all documents were served on the third party, as required by law;

22.9 the applicant conceded the incorrectness of the relevant certificate when it undertook to adjust the same in its electronic mail of 18 November

2010. The certificate is, therefore, not a liquid document.

[23] Ms Kock, for the third party, holds to, inter alia, the following effect:

23.1 the respondent has failed to respond to the third party's request for documents made in terms of Rule 35(12) of the Uniform Rules;

23.2 the respondent has, further, failed to exhaust internal dispute resolution procedures agreed upon by the parties.

LEGAL POSITION

[24] The engineer appointed in terms of the GCC is the employer's agent and his acts and omissions are binding on the employer, in the position of the respondent, as if they are the latter's own deeds; see generally *SMITH v MOUTON* 1977

(3) SA 9 (WLD).

[25] The employer, in the position of the respondent, is not bound by the acts of the engineer as its agent where fraud is involved. (See *SMITH v MOUTON*, supra, at 13A.)

[26] A certificate of payment issued by the engineer, final or interim, is treated as a liquid document with the result that it amounts to an acknowledgement of debt signed by the employer in favour of the contractor. It is the equivalent of cash. (See JOOB JOOB INVESTMENTS (PTY) LTD v STOCKS MAVUNDLA ZEK JOINT VENTURE 2009

(5) SA 1 (SCA) at par. [27].)

[27] A certificate of payment is not open to attack because it was based on erroneous reports of the agent of an employer or the negligence of the engineer and such negligence on the part of the engineer cannot provide a basis for cancellation or withdrawal of the certificate by the employer. (See OCEAN DINERS (PTY) LTD v GOLDEN HILL CONSTRUCTION CC [1993] ZASCA 41; 1993

(3) SA 331 (A) at 342C.)

[28] Such a certificate constitutes a separate and selfsupporting cause of action which can only be challenged on limited grounds. (See MARTIN HARRIS & SEUNS OVS (EDMS) BPK v QWA QWA REGERINGSDIENS; QWA QWA REGERINGSDIENS v MARTIN HARRIS & SEUNS OVS (EDMS) BPK 2000

(3) SA 339 (SCA).)

[29] A litigant, who uses motion proceedings ignoring the possibility of a real and genuine dispute of fact, which cannot be resolved on papers, arising, takes the risk of the application being dismissed when such a dispute eventuates. (See GOUNDER v TOP SPEC INVESTMENTS (PTY) LTD [2008] ZASCA 52; 2008

(5) SA 151 (SCA) at 154.)

[30] The court has a discretion to dismiss an application in the face of a factual dispute, or to refer the matter for trial or to direct that oral evidence be placed before it. (See TAMARILLO (PTY) LTD v B N AITKEN (PTY) LTD 1982

(1) SA 398 (A) at 430G – 431A.)

FINDINGS

[31] I am satisfied, from available evidence that, as correctly averred for the applicant, an approval for variation in respect of additional expenditure was granted by the respondent on 1 April 2009 subject to the condition that expenditure shall not exceed the project allocation of R22 276 000,00. The engineer can, therefore, not be said to have exceeded his mandate.

[32] I am, further, persuaded that the resident engineer who signed the relevant certificate was, ex facie the electronic mail relied upon by the respondent, not necessarily prohibited from issuing the same. In this regard it should be noted, as correctly submitted for the applicant, that the mail in question states that:

“... therefore he will not sign any legal documents such [as] contractor certificates unless instructed by ourselves...”

There is, therefore, no basis for concluding that the said representative did not have the engineer’s instruction to sign the relevant certificate. The foregoing view is, further, fortified by the fact that a ruling on the payability of the certificate in question was issued in October 2010 by the engineer.

- [33] As correctly submitted by Mr. Pienaar, the undertaking by the applicant to adjust the relevant certificate is of no legal effect on the nature of the certificate because the same was not substituted by the engineer who was the only one competent to issue the same.
- [34] The certificate in question, like a final certificate, is payable as cash and any problems which the respondent has with the engineer, as its agent, have no effect on the binding nature of the certificate on the respondent.
- [35] In my judgment, the applicant became entitled to the balance of the retention monies in terms of clause 54.4 read with clause 56.2.3 of the GCC when it cancelled the contract on 19 July 2011. The foregoing prevails because the cancellation of the contract by the applicant was a direct result of the respondent’s failure to pay the applicant the amount due in terms of the relevant certificate as contemplated in clause 56.1.1.2 of GCC.
- [36] Clause 54.4 of GCC is to the effect that in circumstances where the contractor, in the shoes of the applicant, cancels the contract because of, inter alia, the employer’s failure to pay in accordance with any payment certificate,

“the Contractor shall be paid by the Employer... for all measured work executed prior to the date of cancellation the amount (without

retention) payable in terms of the Contract...”

- [37] In opting to deliver a counter application for payment of damages, the respondent ought reasonably to have foreseen that a factual dispute would arise and should have taken appropriate steps to guard against the same by, inter alia, going the action way.
- [38] I am not persuaded that this is an appropriate case for the court to exercise its discretion in favour of referring the matter to trial, particularly when regard is had to the fact that the applicant launched its application in July 2011. Finality on the matter is essential.
- [39] I am, furthermore, satisfied that the third party procedure has been hampered by the respondent in, inter alia, failing to comply with the third party’s request in terms of Rule 35(12) of the Uniform Rules.
- [40] In line with the respondent-friendly test applicable in motion proceedings, I am satisfied that the respondent’s case, as the applicant for relief against the third party, has not been proved on a balance of probabilities.

[41] The respondent's case, as set out in its opposing papers and counter-application, does not entitle it to set-off insofar as its claim has not been proved. No proof of any overpayment to the applicant is apparent ex facie the applicant's papers.

INTEREST

[42] In terms of clause 49.7.2 of GCC the respondent is obliged to pay interest on overdue amounts at the prime overdraft rate certified by applicant's bankers from the date on which such payment fell due. Interest on retention monies is, therefore, only payable from the date on which the contract was cancelled.

ORDER

[43] In consequence an order in terms of prayers 1 to 5 inclusive of the notice of motion is granted in favour of the applicant subject to the following with regard to interest:

43.1 Interest on R463 837,13 shall be calculated from 24 August 2010,

43.2 Interest on R459 978,06 from 19 July 2011.

[44] The respondent's counter application is dismissed with costs inclusive of the third party's costs.

L. J. LEKALE, J

On behalf of applicant: Adv. C.D. Pienaar

Instructed by:

Lovius Block Attorneys

BLOEMFONTEIN

On behalf of respondent: Adv. P.R. Cronjé

Mphafi Khang Inc

On behalf of third party: Ms V. Kock

Matsepes Inc

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Prepared on 13 October 2026 · Esheria