

SOUTH AFRICA / JUDGMENT

Basil Read (Proprietary) Limited v Regent Devco (Proprietary) Limited (41108/09) [2010] ZAGPJHC 75 (9 March 2010)

[2010] ZAGPJHC 75

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mokgoatlheng

CASE / FILE NUMBER

41108/09

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IN

THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NUMBER: 41108/09

DATE: 09/03/2010

REPORTABLE

In the

matter between:

BASIL

READ (PROPRIETARY) LIMITED Applicant
and

REGENT

DEVCO (PROPRIETARY) LIMITED
Respondent

JUDGMENT

MOKGOATLHENG J

The applicant (as the contractor) seeks an order against the respondent (as the employer) for the payment of the sum of R 29 554 941.97. The cause of action is predicated upon a payment certificate issued by the respondent's principal agent.

On the 22 May 2007 the parties concluded a written contract in terms of which the respondent undertook to build 99 luxury residential

apartments in one block with two basements and 19 floors at a site at West Road South, Morningside, Sandton, for a contract sum of R 213 466 742.02.

The material terms and conditions embodied in the standard contract approved and recommended by the Joint Building Contracts Committee (JBCC) are set out in full to obviate reference thereto in the body of this judgment. These are:

Clauses 5.1 and 5.3 provide: “The respondent shall appoint the principal agent with full authority to act on its behalf bind it and issue instructions in terms of the contract;”

Clause 31.1: “The principal agent shall issue an interim payment certificate until the issue of the final payment certificate. Should the applicant take issue with this, it can refer a dispute in respect thereof for adjudication as envisaged by clause 40 of the contract;”

Clause 31.9: “The employer shall pay to the contractor the amount certified in an interim payment certificate within seven (7) calendar days of the date for issue of the payment certificate.... ;”

Clause 40.3 and Rules 1.1 and 7.1.4 of the Adjudication Rules; “The adjudicator’s decision shall be binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator in terms of clause 40.5.”

Clauses 40.1 and 40.2; “Should any disagreement arise between the employer or his principal agent or agents and the contractor as to any matter arising out of or concerning this agreement either party may give notice to the other to resolve such disagreement and if unresolved shall submit such dispute to adjudication in terms of the JBCC Rules of Adjudication;”

FACTUAL MATRIX

On 25 August 2009 the principal agent issued an interim payment certificate certifying that the sum of R 29 554 941.97 was due and payable by the respondent to the applicant by no later than 1 September 2009. The respondent is contractually obliged to pay this sum to the applicant, but has failed to do so.

The applicant alleges that the principal agent on issue of the payment certificate took into account the adjudicator’s

determination

that the applicant was entitled to an extension for the date of practical completion and associated costs.

The respondent denies liability and alleges that the adjudicator’s determination based on the payment certificate is unlawful, unenforceable and void for a number of reasons, consequently, the amount reflected in the payment certificate is not due and payable in terms of the contract.

The respondent alleges that on 18 August 2008 and thereafter, the applicant submitted claims for an extension of working days and payment for expenses not provided for in terms of clause 29.6. The principal agent dismissed the claims, whereafter the applicant referred the dispute for adjudication in terms of clause 40.

In the adjudication the respondent contended that the applicant was not entitled to an extension of time and payment of expenses incurred in respect of the two claims. The adjudicator found in the favour of the applicant. The respondent alleges that the adjudicator did not give consideration to the evidence placed before him by the principal agent, and wrongly accepted misrepresentations by the applicant which, influenced his determination, consequently, his determination is unlawful, unenforceable and void. Aggrieved by the determination, the respondent referred it to arbitration.

The respondent alleges that the applicant unlawfully seeks to place reliance on the misrepresented facts, and the adjudicator's determination in order to obtain payment of penalties in the sum of R16 030 00.00 and additional preliminaries in the sum of R 9 288 399.12 respectively.

Firstly, the respondent contends that the applicant cannot seek an order the consequence whereof, is to give effect to an improperly obtained

determination

because this subverts the intention of the contracting parties as recorded in clause 29 of the contract. Secondly, it was never the intention of the parties that they would be bound by an improperly obtained determination.

The respondent alleges that the adjudicator exercised his contractually conferred discretion inappropriately and unreasonably, consequently, his determination has no contractual force and is susceptible to review and ought for the reasons explained to be set aside.

THE APPLICANT'S SUBMISSIONS

Contrary to what is alleged by the respondent, the certified sum of R 29 554 941.97 did not become due and payable upon the handing down of the adjudicator's determination, but became due and payable upon the issue of the payment certificate.

The fact that the respondent disputes the adjudicator's determination does not excuse it from complying with its contractual obligations, which include its obligation to pay the amount certified in the payment certificate.

The contract and Adjudicator's Rules state that the parties are bound to act in accordance with the adjudicator's determination until such time as it is set aside by an arbitrator. Declaring a dispute in relation thereto does not relieve the respondent of its contractual obligations.

The applicant denies that the adjudicator's determination is materially flawed, or that he breached the terms of the contract in handing down his determination. The applicant further denies that the payment certificate has no contractual force, or is unenforceable.

The respondent refuses to honour its contractual obligation because it does not accept or agree with the adjudicator's determination. Clause 40.9 provides that such disagreement is not a valid basis for the respondent's refusal to pay, nor does it relieve it from due and timeous performance of its obligations.

The respondent is bound to give effect to the adjudicator's determination unless and until it is set aside by an arbitrator because an interim payment certificate creates an independent cause of action.

THE RESPONDENT'S

SUBMISSIONS

It is a material term of the agreement that the parties would not be bound by an adjudicator's determination which is in fundamental breach of the adjudicator's contractual obligations, where he does not act with fairness and impartiality as envisaged by clause 40.9.

On 18 August 2008 the applicant submitted a claim for an extension of 12 working days in terms of clause 29.6. The principal agent dismissed the claim. The applicant referred the dispute in terms of clause 40 for adjudication.

The applicant was not entitled to an extension of time and expenses incurred in respect of the two claims. The respondent contends that the adjudicator did not consider evidence placed before him by the principal agent, instead he wrongly accepted the misrepresentations by the applicant, and this rendered his determination unlawful and void.

The applicant misrepresented the facts to the adjudicator with the intention to justify the extension of time sought by it. It is apparent from the adjudicator's determination that he was in fact misled as to what the true facts were, as a result his determination is based on these misrepresented facts.

The applicant unlawfully seeks to place reliance on misrepresented facts, and the determination emanating therefrom, in order to obtain payment of penalties in the sum of R 16 030 00.00 and additional preliminaries in the sum of R 9 288 399.12 respectively.

The applicant cannot seek an order the consequence whereof, is to give effect to an improperly obtained determination because this subverts the intention of the contracting parties as recorded in clause 29. Secondly, because it was never the intention of the parties that they would be bound by an improperly obtained determination, it is not contractually enforceable.

The adjudicator exercised his contractually conferred discretion inappropriately and unreasonably, and did not apply his mind *vitrium boni viri* consequently, the determination has no contractual force, consequently, the applicant cannot seek to give effect thereto. Irrespective of whether or not the determination has contractual force, it is susceptible to review and ought for the reasons explained be set aside.

CONSIDERATION OF EVIDENCE

The applicant's claim is predicated on a payment certificate issued by the respondent's principal agent who has certified the amount reflected thereon as due and payable. It is trite that a payment certificate gives rise to a new cause of action subject to the terms of the contract.

See: *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint; Venture* 2009

(5) SA 1 (SCA); *Ocean Diners (Pty) Ltd v Golden Hill Construction CC*

[1993] ZASCA 41; 1993 (3) SA 331 (A) and 304 E, where it was held: "A final payment certificate had to be treated as a liquid document because it was issued by the employer's agent, with the consequence

that the employer was in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor. Relying further on the *Randcon* case (at 186G 188G), the learned judge held that similar reasoning applied to interim certificates. The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash. The certificates in question all fall within this ambit."

In the case of *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 514 – 515 it was held: "An interim payment certificate issued by an engineer or an architect (as in this case) creates a debt due and as such a distinct cause of action. That much is plain... *Simmons NO v Bantoesake J Administrasieraad (Vaaldriehoekgebied)* 1979 (1) SA 940 (T) at 946F.) The certificate is ostensibly self-sufficient and a plaintiff does not have to travel beyond its terms in order to establish a right of action. The building contract, in particular, does not form part of the plaintiff's cause of action..."

McEwan J in the case of *Smith v Mouton** 1977 (3) SA 9 (W), held: "2. The employer should be bound by the act of his agent in issuing a certificate. The position is the same as if the employer himself had signed an acknowledgment of debt.... The exceptions are those that apply generally in the law of agency. For example, the employer will not be bound if there has been fraud or the architect has acted in collusion with the contractor to the detriment of the employer... The employer will also not be bound if the agent has exceeded his mandate....

3. The employer is not entitled to dispute the validity of a final certificate vis-à-vis the contractor merely because he alleges that the certificate was given negligently or that the architect exercised his discretion wrongly. ... Subject to what is said below, the same principle would appear to apply in case of an interim or progress certificate.

4. In the absence of any of the factors referred to in para. 2, the employer is bound to pay the sum certified....”

The respondent is entitled to raise any contractual defence beyond those delineated in *Smith v Mouton* (supra) because the essence of the applicant’s claim, is predicated on a payment certificate which originates from a contract, not as incorrectly submitted by the respondent, in the adjudicator’s determination.

The respondent does not contend that the principal agent colluded with the applicant, nor does he allege that the principal agent exceeded its mandate in issuing the payment certificate or that fraud was committed in the issuing of the payment certificate.

The respondent erroneously misconstrues the legal consequences of a payment certificate by opining that the applicant intends placing reliance on misrepresented facts and the adjudicator’s unlawful determination in order to obtain payment from an improperly obtained determination. This with respect is a mirage, which deflects respondent’s response from addressing the essence of applicant’s claim.

The respondent’s contention that the applicant seeks an order the consequences whereof, is to give effect to an improperly obtained determination, which order would subvert the parties’ intention not to be bound by such an improperly obtained determination, is with respect, a misconstruction of the applicant’s cause of action.

The respondent conflates two distinct and separate concepts in its response to the application. Firstly, the respondent labours under an erroneous notion that payment became due and payable upon the issue by the adjudicator of a determination and not on the issuing of the payment certificate by the principal agent.

The respondent misconceives the legal consequences of a payment certificate pertinently the effect of its issue. In the aphoristic language of Smalburger J in *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* [1993] ZASCA 41; 1993 (3) SA 331 (A) held: “It constituted (in the absence of a valid defence) conclusive evidence of the value of the works and the amount due to the respondent. It embodied a binding obligation on the part of the appellant to pay that amount. It gave rise to a new cause of action subject to the terms of the contract. The appellant’s failure to pay within the time stipulated entitled the respondent to sue on the certificate.” The learned Judge further held: “A final certificate is not open to attack because it was based on erroneous reports of the agent of an employer or the negligence of his architect. The failure of the employer’s quantity surveyor properly to scrutinise the claims put forward by the

contractor and to rectify any errors, and the possible negligence of the architect in failing to satisfy himself as to the correctness of the claims and valuations before issuing the certificate, will accordingly not provide a defence to an action on the certificate.”

I fully align myself with the learned Judges’ sentiments even if they relate to a final certificate, because, by parity of reasoning the same should obtain to an interim payment certificate.

The respondent's principal agent issued an interim payment certificate at the time when the principal agent knew that the respondent disputed the adjudicator's decision. In acting thus, the principal agent certified that the respondent is indebted to the applicant in the amount reflected in the interim payment certificate.

The respondent concedes that the principal agent was contractually obliged to include the terms of the adjudicator's decision in the interim payment certificate, consequently, the respondent is bound by the conduct of its principal agent and in terms of the contract, and is obliged to pay the amount in the interim payment certificate.

In terms of clause 31.1 the principal agent is obliged to issue an interim payment certificate based on an evaluation prepared within seven (7) calendar days before the stated date in the schedule every month until the issue of the final payment certificate.

In terms of clause 31.2 the applicant, "shall cooperate with and assist the principal agent in the preparation of the payment claim by providing information to the principal agent and all relevant documents and assessment of quantified amounts of work completed.... The principal agent shall not be relieved of his responsibility to issue an interim payment certificate in terms of clause 31.1 whether or not such information is provided by the applicant." (my emphasis)

The respondent was aware of the alleged irregularities contained in the adjudicator's decision, but having instructed the principal agent to notify the adjudicator of its dissatisfaction with his decision, did not prevent the latter from taking that decision into account when issuing the interim payment certificate.

The alleged irregularities in the adjudicator's determination do not absolve the respondent from honouring its obligations in terms of the contract. The respondent does not contend that the principal agent proceeded to issue the interim

payment certificate contrary to its authority, scope or mandate.

The respondent did not invoke the defence that the principal agent exceeded its mandate when it certified payment to the applicant on the basis of an adjudicator's decision purportedly predicated on a nullity. The respondent cannot claim that the principal agent exceeded his mandate because it at all material times the latter deferred to it before issuing the payment certificate.

The respondent concedes that its principal agent was contractually obliged to take the adjudicator's decision into account when issuing the interim payment certificate, consequently, the provisions of the contract were triggered. The respondent cannot approbate and reprobate the provisions of the contract.

THE PAYMENT CERTIFICATE AS A DISTINCT AND INDEPENDENT DOCUMENT

It is patent that the payment certificate is a distinct, separate and independent entity from the adjudicator's determination. The applicant was within its contractual right to advise the principal agent to reflect the adjudicator's decision in the payment certificate and to include all relevant amounts due and payable. Whether such amounts coincidentally accrued as a result of the adjudicator's determination is of no moment and cannot have a bearing on the independent distinct character of the payment certificate and its legal consequences.

The independent nature of the payment certificate, dictates that for allegations of fraud to assist the respondent at all, it would have been necessary for the fraud to have been committed in the issuing of the principal agent's payment certificate and not in its purported influencing of the adjudicator's determination. The respondent does not claim any fraudulent misrepresentation neither does it raise a defence of fraud to the applicant's claim.

The respondent's debt arises from the payment certificate and not from the adjudicator's determination. The respondent's erroneous notion that there

is a nexus between the adjudicator's decision and the payment of monies due and payable pursuant to the issuing of the payment certificate is ill conceived and legally untenable.

The respondent's attorneys pertinently advised the applicant: "should you seek to enforce the award in terms of the adjudication rules, our client will on an urgent basis bring an application to the High Court seeking an interim interdict pending the review of the adjudication award."

Further: "our instructions are to bring an application to set aside the award and if necessary an urgent application to stay its interim effect pending the finalisation of such an application to set aside". (my emphasis)

It is patent that the thrust of and reason for the respondent's refusal to pay the applicant pursuant to the issue of the payment certificate is not primarily

predicated on its validity as such but is essentially, wholly premised on the purported unlawfulness of the adjudicator's

determination.

The misconception the respondent labours under is that the purported unlawfulness of the adjudicator's determination, vitiates the unlawfulness of the payment certificate rendering it contractually unenforceable. Of course, this erroneous notion is a serious misconception regarding the crux of this matter.

A CONSIDERATION OF THE RESPONDENT'S CONTRACTUAL DEFENCES

The respondent can avail itself to recognised contractual defences like:

- (a) fraud which can be raised to resist a claim for payment based on a payment certificate;
- (b) its principal agent exceeded the bounds of its authority;

- (c) a claim for damages arising from defective work or delay in achieving completion of the works; or
- (d) any other competent defence.

The respondent argues that the adjudicator's decision is a nullity because of certain misrepresentations. For this defence to be sustainable, the misrepresentations have to be fraudulent and ought to have been made to the principal agent on the issuing of the payment certificate. The respondent does not impute fraudulent misrepresentation of any fact by the applicant to the principal agent, or indeed the adjudicator.

The defence encapsulating an action for damages does not arise and is not available to the respondent because the damages it claims to have suffered by virtue of the delay in the completion of the works or payment of preliminaries or penalties were extinguished by the adjudicator's determination. The respondent only has a right to dispute the adjudicator's determination and attempt to set it aside in the arbitration proceedings.

The respondent contends that it was a tacit or implied term of the agreement "the parties would not be bound by any determination by the adjudicator in fundamental breach of the adjudicator's contractual

obligations". The tacit or implied term sought to be inferred by the respondent is wholly inconsistent with clause 40.3 and rules 1.1 and 7.1.4, in terms whereof the parties not only agreed to be bound by the adjudicator's decision, but also agreed to give effect thereto without delay unless and until it was subsequently set aside by an arbitrator. It is impermissible to infer a tacit or implied term which is inconsistent with a valid and express term of a contract.

The respondent relying on the decision in *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22 (SCA), contends that the parties intended to incorporate the rules of natural justice into their contract, and argues that the adjudicator's breach thereof, entitles it to refuse to honour its contractual obligations.

Even if, one were to assume the cogency of this submission, *Jafta JA in Transam Pty (Ltd) (supra)* which pertained to an employment contract, clearly stated that an aggrieved party in alleging a breach of such contract only has recourse to ordinary contractual remedies. It does not mean that when the rules of natural justice are incorporated into a contract and are allegedly breached, that renders such contract a nullity.

The fact is, the respondent's right purportedly incorporated in the contract not to be bound by an improperly obtained determination, does not, derogate from nor encumber the unfettered, distinct independent existence of the payment certificate vis-à-vis the adjudicator's determination.

The respondent's remedy lies in clauses 40.4 and 40.5 which respectively stipulate should either party be dissatisfied with the decision given by the adjudicator, such party shall give notice of its dissatisfaction to the other party, and the dispute will then be resolved by arbitration.

The respondent has clearly exercised its contractual right by referring the dispute to arbitration, consequently, the respondent is locked within the purview of clause 40.3, which prescribes that the respondent shall be bound by the decision of the adjudicator and shall give effect thereto without delay unless and until the adjudicator's decision is set aside by an arbitrator.

The respondent cannot set aside a payment certificate validly issued by the principal agent "in the absence of a contractual provision to the contrary or on the basis of an agreement or waiver", where the principal agent has acted within the authority and the scope conferred to it by the respondent.

It is not against public policy to enforce a disputed interim payment certificate because amongst other reasons, is not a final payment certificate. The respondent has a remedy in the form of an action for damages if the principal agent was negligent in that it failed to act in the respondent's best interests.

The *raison d'être* of an interim payment certificate is that "it is intended to facilitate the applicant's cash flow and ultimately, its ability to complete the works." The fact that the respondent perceives the payment certificate to have been improperly issued because of purported misrepresentations by the applicant to the adjudicator, "is not a situation inherently fraught with unfairness or injustice" which is irreversible.

The respondent has a remedy. Should the respondent be successful in setting aside the adjudicator's determination at the arbitration, whatever financial prejudice it may have suffered can be set off or adjusted in the following payment certificate issued in terms of the contract.

The vexed issues relating to the perceived misrepresentations by the applicant to the adjudicator, irregularities, bias, unfairness, partiality, irrationality and the purported flawed adjudicator's determination, are issues which the respondent will have sufficient opportunity to fully ventilate at the arbitration.

To adumbrate, when the principal agent issues the payment certificate he postulates and certifies at that instance that there are no legal impediments preventing its issue. A claim predicated on a payment certificate can be pursued independently of the existence of the adjudicator's determination, because it is not a *sine qua non* of the latter.

THE COUNTER-CLAIM

The conditional counter-application is ill-conceived and fatally flawed for the following reasons:

The counter-application is stated to be conditional on this Court finding that the adjudicator's decision is contractually

unenforceable. The applicant's claim, however, arises from the interim payment certificate. The payment certificate creates an independent cause of action. The applicant's claim is not based on the adjudicator's decision.

The counter-application is cast in the form of a review of the adjudicator's decision. The adjudicator's decision can, however, only be reviewed and set aside by an arbitrator in accordance with clause 40.3. The adjudicator's determination is still a subject of review by an arbitrator in terms of clause 40.3.

The adjudicator's determination can also not be reviewed in terms of section 33 of the Arbitration Act No 3 of 1965, because it is common cause that the adjudicator was appointed as an expert, and not as an arbitrator, consequently the counter claim must fail.

In the premises the following order is made:

The respondent is ordered to pay to the applicant the sum of R29 554 941.97 plus VAT

The respondent is ordered to pay interest on the sum R29 554 941.97 at the rate of 15.5% calculated from 3 September 2009 to date of payment.

The respondent is ordered to pay applicant's legal costs including the costs consequent upon the applicant's employment of two counsels.

Signed at Johannesburg on this the 10th of March 2010.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 17 November 2009

DATE OF JUDGMENT: 09 March 2010

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