

SOUTH AFRICA / JUDGMENT

Botshabelo Consulting Engineers (Pty) Ltd v Greater Giyani Municipality (5346/2020) [2023] ZALMPPHC 61 (4 August 2023)

[2023] ZALMPPHC 61

COURT

Limpopo High Court, Polokwane

BEFORE

M S Monene

CASE / FILE NUMBER

5346/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 5346/2020

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date: 2023/08/04

In

the matter between:

BOTSHABELO
CONSULTING ENGINEERS (PTY) LTD
PLAINTIFF

And

GREATER
GIYANI MUNICIPALITY
DEFENDANT

JUDGMENT

This Judgement was handed down electronically by circulation to the parties' legal representatives via their e-mail addresses and

released to SAFLII . The date and time for hand down are deemed to be 04 AUGUST 2023 at 10:00

MONENE AJ

[1] On 24 August 2020 the plaintiff issued provisional sentence summons against the defendant raising therein two claims to wit:

1.1 A sum of R3 547 011.24 arising from an interim payment certificate pursuant to a tender contract between the parties.

1.2 A sum of R2 954 133.17 comprising retention monies payable upon completion of the same contract as in the first claim.

[2] Post being served with the provisional sentence summons on 28 August 2020, the defendant filed an opposing affidavit on 20 November 2020.

[3] The matter served before this court on 4 May 2023 for

determination

of whether the two claims in terms of provisional sentence summons should be granted or not.

BACKGROUND**INFORMATION**

[4] Upon or about March 2015 the plaintiff and the defendant entered a written contract in terms of which the plaintiff was to construct and/or develop the Giyani Section E Sports Centre for an initial contract value of R25 273 456.15.

[5] The defendant was, pursuant to the contract, obligated to pay the plaintiff monies upon the plaintiff issuing payment certificates as and when monies became due to the plaintiff during the lifespan of the contract.

[6] A portion of the monies due to the plaintiff was retained by the defendant to be payable upon the production of a certificate of completion in respect of the Sport Centre construction project.

[7] As the contract between the parties evolved, no less than nine payment certificates were issued by the plaintiff demanding payment and all nine were honoured by the defendant.

[8] On 9 April 2019 the plaintiff issued interim payment certificate number 10 indicating an amount of R3 547 011.24 as due and payable.

- [9] The defendant refused to honour this last payment demand.
- [10] On 14 April 2018 the plaintiff issued a certificate of completion of the project and with it an invoice demanding an amount of R2 954 133.17 as contractually agreed to retention funds.
- [11] As it did with payment certificate number 10, the defendant refused to satisfy the plaintiffs invoice regarding the retention funds.
- [12] Consequently in the wake of the defendant's failure to pay the two amounts demanded, the plaintiff issued provisional sentence summons claiming the amounts with interest.

THE ISSUE

- [13] There being on the papers no dispute about the existence of the contract between the parties nor on the fact that the original contract price was subsequently varied, the key issues raised by the defendant in its opposing papers are the following:
- 13.1 Whether the defendant knows about or is aware of the tenth interim payment certificate.
- 13.2 Whether the monies claimed in the tenth payment certificate are contractually due to the plaintiff or whether the plaintiff had by the ninth certificate been paid in full or not.
- 13.2 Whether, in terms of the contract between the parties, the retention amount is only payable upon the plaintiff furnishing a close-out report as pleaded by the defendant or upon the mere provision of a certificate of completion as per the plaintiff's case.

THE APPLICABLE LAW

- [14] The incidence of provisional sentence is provided for in rule 8 of the Uniform rules of court which rule does not need belaboring upon.
- [15] Suffice to state that provisional sentence is a summary remedy available to a plaintiff who has a liquid claim against a defendant whom he believes has no valid defence to the claim. The jurisdictional factors attendant to provisional sentence are thus the following:
- 15.1 A liquid document in the plaintiff's possession proving a liquid claim against the defendant.
- 15.2 Absence of a valid defence, as viewed by the plaintiff, on the part of the defendant.
- [16] The provisional nature of the provisional sentence lies in the fact that even if it is granted the defendant can subsequent thereto upon provision of security still enter the principal case and proceed to trial. It is aimed primarily at stopping a defendant who does not have a claim from kicking the can along the street and unnecessarily and needlessly prolonging proceedings.
- [17] If the provisional sentence granted is left unchallenged it ceases being provisional and automatically becomes a final judgement.

- [18] To obviate the granting of a provisional sentence a defendant must prove some valid defence which at least persuades the court that there can be a triable issue. He can for example challenge the supposed liquidity of the liquid document relied upon or the authenticity of his or his agent's signature on the liquid document relied upon by the plaintiff. In *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa* 2011(3) SA 1(CC) the apex court in our land held that a provisional sentence may be defeated by proof that there is an even balance in the main case which has a reasonable prospect of being tipped in the defendant's favour when oral evidence is lead at trial.
- [19] The Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009(5) SA 1 (SCA) at paragraph 27 stated that a payment certificate is treated as a liquid document akin to an acknowledgement of debt. Indeed as determined by *Radcon (Pty) Ltd v Florida Twin Estates (Pty) Ltd* 1973
- (4) SA 181 (D) at 184 D-H when approvingly quoting Lord Denning in *Dawnays Ltd v F G Minter Ltd & Another* (1971) 2 ALL ER 1389, an interim payment certificate of the kind at issue in the first claim in casu "is to be regarded virtually as cash, like a bill of exchange" which has to be honoured.

APPLYING THE ABOVE LEGAL INSTRUMENTS TO THE FACTS

- [20] As I understand the defendant's case from the answering affidavit, the first claim is challenged in the first instance on the basis that payment certificate number 10 never came to the knowledge of the defendant and not on a view that the certificate is not a liquid document. But this defence flies in the face of the evidence before this court in the form of a letter dated 9 April 2016 which was sent to the defendant by project manager Msibi advising the defendant about the last payment certificate. At any rate, owing to these proceedings the defendant now definitely knows about the said interim payment certificate.
- [21] In the second instance the tenth payment certificate is challenged on unsubstantiated allegations that there is some fraudulent unlawful conduct in its make up. With the allegation flying solo in the realm of unsubstantiated untruths, this does not raise any triable issue which begins to suggest a viable defence should the matter go on trial.
- [22] As already alluded to supra that a payment certificate, duly certified by the plaintiff who is so empowered in terms of the contract certify work done, after having done it itself, is a liquid document almost equivalent to cash needs no belaboring.
- [22] As regards the second claim, the defendant does acknowledge that the plaintiff is entitled to retention funds upon completion. The defendant is also not making an argument suggesting that the plaintiff has not completed work on the project. All that the defendant feebly attempts to say is that before it releases the retention funds to the plaintiff, the plaintiff must have produced a close out report. But there is no clause anywhere in the contract calling for such a report as a requirement before retention funds are released upon completion, making this attempted defence a non-starter.

[23] In all the above premises it cannot be gainsaid that the plaintiff has made out a proper case for provisional sentence in circumstances where the defendant has fallen woefully short of raising any reasonably conceivable defence.

[24] Resultantly the following order is made:

21.1 Provisional sentence is granted against the defendant in the amount of R3 547 011.24.

24.2 Interest on the above amount shall run at the prescribed rate from 7 May 2019 a tempore mora until date of payment.

24.3 Provisional sentence is granted against the defendant in the amount of R2 954 133.17 with interest on this amount running a tempore mora from 14 April 2019 until date of payment.

24.4 The defendant is ordered to pay the costs of this proceedings on a party and party scale.

M S MONENE

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on

:04 May 2023

Judgment

delivered on :04 August 2023

For the Plaintiff :Adv CM Rip Instructed by :Thomas and Swanepoel Attorneys :Tel: 015 307 1027 :Email: maryka@tslegal.co.za :colinrip@clubadvocates.co.za For the Respondents :No appearance

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