

SOUTH AFRICA / JUDGMENT

Development Bank of Southern Africa v Sivubo Trading and Projects CC (A5069/16) [2017] ZAGPJHC 409 (8 December 2017) [2017] ZAGPJHC 409

COURT

South Gauteng High Court, Johannesburg

BEFORE

van der Linde, Modiba, Siwendu

CASE / FILE NUMBER

A5069/16

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5069/16

GJ CASE NO: 30230/15

Not reportable

Not of interest to other judges

Revised.

8/12/2017

IN THE MATTER BETWEEN

DEVELOPMENT BANK OF SOUTHERN AFRICA APPELLANT

AND

SIVUBO TRADING AND PROJECTS CC RESPONDENT

Judgment

Van der Linde, J

Introduction, background and litigation history

- [1] This is an appeal, with the leave of the Supreme Court of Appeal (the “SCA”), against a judgment and order of Nkosi, AJ in which the learned acting judge granted judgment against the appellant in favour of the respondent for payment of R261 732.69, interest and costs. Since the matter concerns a construction contract I will refer to the appellant as “the employer” and the respondent as “the contractor”.
- [2] My sisters Modiba and Siwendu, JJ agree with the conclusion to which I come below, namely that the appeal is good and that the order of the court a quo should be set aside, and be substituted with an order dismissing the application with costs. Modiba, J arrives at that conclusion along a different route and although my point of departure is different, I agree with her reasoning, with respect, given her point of departure. My own approach is the following.
- [3] The matter had come before the court below on motion, the contractor having launched the application on 25 August 2015. The relief sought, which in the event was granted, arises from a construction contract in terms of which the contractor undertook to construct the Gobidolo Junior Secondary School pursuant to the award by the employer on 6 May 2014 of a tender to the contractor.
- [4] The letter accepting the tender stated that the tender had been “conditionally accepted”, the conditions being the

provision by 16 May 2014 of fifteen identified documents. It said further that provided these requirements had been complied with, the contractor was to sign the contract documents, including a standard form contract, the JBCC Series 2000 Principal Building Agreement (March 2005 Edition 4.1). The contract was a priced bills of quantities contract, and the contract amount, subject then to remeasurement, was R19 421 506.69.

- [5] The date for site handover was provisionally scheduled for Monday 19 May 2014, and the construction period was said to be nine months. The contractor accepted the appointment under these terms in writing on 16 May 2013. This date was an obvious typographical error, and should have been 16 May 2014.

- [6] In the event the contract was cancelled before the contractor commenced work on site according to the submitted programme, or at least so the employer wrote on 10 July 2014. The contractor responded on 18 July 2014, contending that the employer’s

cancellation was unlawful, and inviting the employer to withdraw it by 21 July 2014. When the employer did not respond to this

invitation, the contractor wrote to the employer on 23 July 2014:

“DBSA’s letter of 10 July 2014 is a clear repudiation of the contract which repudiation our client has instructed us to accept, as we hereby do. Accordingly, the contract between DBSA and our client is hereby cancelled.”

[7] The employer disputed the contractor's challenge to the employer's cancellation, and on 30 March 2015 appointed a fresh contractor to construct the school. In the meantime, on 7 October 2014, the principal agent under the contract between the two protagonists prepared what it called a "Final Account (Termination Account)," and under a heading "Final

statement (excl penalties and interest)", it included a computation with various line items, the final one of which read:

"Final amount now due – R261 732.69." Two of the line items were respectively "Penalties" and

"Damages", and in both cases no amount was entered, but simply " – ".

[8] On 9 July 2015 the contractor launched an application in this court against the employer and the principal agent compelling them to deliver two items: a status report of the work executed by the contractor, and a final account. It is necessary and of pertinent relevance for what follows that the two primary prayers be quoted:

"1.1 A report on the status of the work executed by the applicant in respect of the project from the commencement of the contract on 22 May 2014 to 11 July 2014, as contemplated by clauses 36.5.2 and 38.5.3 of the JBCC Series 2000 Principal Building Agreement (March 2005, Edition 4.1) ("the contract").

1.2 A final account, as contemplated by clauses 36.5.3 and 38.5.4 of the contract, for work completed by the applicant from the commencement of the contract on 22 May 2014 to 11 July 2014."

[9] The application that gave rise to this appeal was issued, as I have said, on 25 August 2015; but, as transpired when the matter was argued before us, before that date the contractor had already issued summons against the employer for damages resulting from what it called the employer's breach of the contract.

[10] Next in the chronology was a judgment taken by default on 10 September 2015 before Burman, AJ, in terms of which the principal agent was directed to issue to the contractor a payment certificate in terms of what it called a final account of 10 July 2015, which final account reflected that an amount of R261 732.69 was due to the contractor. In the record before us there was only one final account, and its date at the end was rendered as "07/10/2014".[1] It may be that this was erroneously read as being "July 10", but the year still does not match the document in the appeal record. I will assume then that there was only one final account, being that of 7 October 2014.

[11] Next in the chronology came the judgment of the court a quo on 26 April 2016, that which is on appeal before us; and on 6 May 2016 the employer applied for leave to appeal. On 19 May 2016 the employer applied urgently for an order interdicting the contractor from levying execution pending the determination of the application for leave to appeal. Such an order was granted on 19 May 2016 by Fisher AJ (then), directing the contractor's attorney to pay the costs de bonis propriis.

[12]The contractor applied for leave to appeal the order of Fisher AJ, but on 5 September 2015 her ladyship dismissed the application with costs de bonis propriis. The contractor's application to the SCA for leave to appeal the judgment of Fisher AJ was dismissed. The contractor then applied for leave to appeal to the Constitutional Court, but withdrew its application after the employer's answering affidavit was filed.

[13]Next, on 28 February 2017 three orders were made: one by Mudau J in which the learned judge dismissed an application by the contractor against the employer and the principal agent for being in contempt of the court order of Burman, AJ. The learned judge also rescinded the default judgment of Burman AJ on the same date. The third order on that day was by Theron AJ remitting the taxed bill of costs against the contractor's attorney back to the Taxing Master, but also ordering the contractor's attorney to pay the costs of the application before the learned acting judge, de bonis propriis. The contractor's attorney applied for leave to appeal the order of Theron AJ, who dismissed the application, again with costs de bonis propriis.

[14]Thereafter the contractor's trial for contractual damages came before Tsoka ADJP for a separated hearing of the employer's special plea that the construction contract in fact never came into existence. The learned judge upheld the special plea. The contractor

applied on 21 September 2017 for leave to appeal that order, but it was dismissed. In October 2017 the contractor applied to the SCA for leave to appeal the judgment of Tsoka, ADJP. That application is pending.

The application before the court a quo

[15]Before the court a quo the contractor's case was that the pending dispute in the trial action between the parties concerning whether a contract had come into existence and, if so, who lawfully cancelled it, was irrelevant to the relief it was seeking in the application.[2]It said in its founding affidavit: "I underline, however, that the action is irrelevant to the present application which relates to payment of an amount of money which is due to the applicant." [3]

[16]In fact, this attitude of the contractor was persisted in before us, since it submitted in its heads of argument that it did not matter whether it was the employer or the contractor who had cancelled the contract; either way, the principal agent was obliged to procure the completion of the final account and, absent objection by the employer, the principal agent must issue the final payment certificate.[4]

[17]The employer's attitude before the court a quo was equally plain. It recorded that its primary contention was that no contract at all had been concluded,[5] but in the alternative it contended that the employer had lawfully and properly cancelled the contract due to the contractor's breach.[6]

[18]Before the court a quo the employer argued that the application was premature for the very reasons that the first issue to be determined was whether the agreement had come into existence and, if so, who had lawfully cancelled it – the very issues that were before the trial court.[7] However, the court a quo found that these issues were irrelevant[8] and rejected the argument. The employer’s notice of appeal pertinently takes the point that the learned judge erred in finding that the question concerning cancellation was irrelevant to the proceedings before the court.[9]

[19]There can therefore be, as I see it, no doubt at all that the relevance or otherwise of who had lawfully cancelled the contract was squarely an issue a quo.

Discussion

[20]In oral submissions before us, the contractor’s stance changed. Accepting now that the contractor’ contention was that it had lawfully cancelled the contract by accepting the employer’s repudiation of the contract, it submitted that it was nonetheless entitled to rely on the employer’s cancellation of the contract, and the consequential application of the provisions of clause 36 of the contract, because that clause, particularly clause 36.5.10, contained rights that had accrued to it prior to the contractor’s acceptance of the employer’s repudiation. On this basis, it submitted, it was entitled to claim payment of that which the final account reflected was due to it.

[21]In my view the contractor’s approach is fundamentally flawed. The starting point of the discussion is to understand exactly what the issue was before the court a quo. Clearly the contractor did not ask the court a quo to decide the matter on the facts, because it appreciated that the factual disputes that existed between them was a matter for the trial court. It argued, as is borne out by what has been set out above, that the matter could be decided on either the employer’s case of lawful cancellation by it, or on the contractor’s case of cancellation of lawful cancellation by it. It did ask the court to accept that it was common cause that the contract had been entered into, because it argued – and this was accepted by the court a quo – that this point could be decided on the papers.

[22]But the contractor was wrong on both scores. The court a quo was not equipped to decide the question whether the contract had been entered into at all, because that involved an irresolvable factual dispute, specifically raised as such by the employer. And the subsequent event of the finding by Tsoka, ADJP bears this out. Of course, all that this point would lead to, submitted the contractor, is that the court a quo should have stayed the application pending the trial.

[23]I would not agree with that consequence. It must not be forgotten that in fact it was the contractor that had instituted the pending action, and then in the face of that action, had brought the application before the court a quo.

[24]The fact that the question of who had cancelled the contract was squarely relevant, was specifically raised by the employer, as I have pointed out. It seems to me then that the true question that cannot be escaped is whether the contractor – and the court a quo – was correct respectively in contending and in finding that it was, in law, irrelevant who had cancelled the agreement. And it is to that question that I now turn.

[25]The rules that apply when a contractant accepts the repudiation of the other party are well-trodden: the contract falls to ground, at least as far as the innocent party is concerned, and no reliance may be placed on any of its terms to obtain relief. There is a single exception: if rights had accrued to the innocent party before that party had cancelled the agreement by accepting the repudiation of the guilty party, then the innocent party remains entitled to enforce those rights.

[26]Some of the cases that articulate these principles are the following. In *Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk*[10] the then Appellate Division discussed the topic of an anticipatory repudiation of a contract and its effects. At 870A Holmes JA quotes the following passage from the judgment of Greenberg J (as he then was) in *Walker's Fruit Farms Ltd v Sumner*: [11]

"No doubt it is correct that, where there is a repudiation and where the other party elects to treat the contract as at an end, the latter cannot thereafter enforce the contract. But it appears to me that this only applies to the executory portion of the contract; but where a certain right has accrued to the one party before the election, such right is not affected after the election. He treats the contract as at an end as from the date when he makes his election; up to that date the rights have come into existence and can be enforced."

[27] At 870G Holmes JA states the rule as follows (emphasis supplied):

"To sum up on this aspect, the rule in the Walker case supra is confined to cases where, prior to the rescission of a contract by one party's acceptance of the other party's repudiation, there exists a right which is accrued, due, and enforceable as a cause of action independent of any executory part of the contract."

[28]As Nicholas AJA succinctly said in *Culverwell and Another v Brown* (emphasis supplied):[12]

"Plainly, where a party elects to terminate the contract (upon the other party's repudiation), he cannot thereafter change his mind: the contract is gone."

[29]So I think the contractor who accepted the employer's alleged repudiation found itself unable to enforce the terms of the contract against the employer. This is not a case of "Contractor's Cancellation" in terms of clause 38 of the contract, because acceptance of repudiation is not one of those instances specifically listed[13] in which the contractor would be entitled to cancel. It is only when the contractor cancels on one of the bases there listed, that the provisions of clause 38 apply; see the introductory part of clause 38.5: "Where the contractor cancels this agreement in terms of 38.0 the following shall apply: ...". So where the contractor accepts the repudiation by the employer, the contractor is left only with its residual common law remedies,

outside of any entitlement to rely on the terms of the written contract.

[30]It seems clear that the contractor has simply assumed throughout, erroneously so, that it is entitled even where its cancellation takes the form of the acceptance of a repudiation, still to rely on the terms of the written contract.

[31]Had any rights accrued to the contractor when it accepted the repudiation? In my view not. It would have been a different matter if by then payment certificates had been issued; but none had.

[32]The contractor's case all along has been that it is entitled to enforce the final account in terms of clause 36.5.10. But that case is flawed for at least three reasons. First, that clause only applies if it is the employer's cancellation that had brought the contract to an end, as is evident from the entire clause 36. The contractor never accepted that the employer's cancellation cancelled the contract. That issue is before the trial court and is yet to be determined. And there is no authority for the suggestion that in one court the innocent party is permitted to adopt one attitude as to who brought the contract to an end, and in another court to adopt the opposite attitude.

[33]In fact, the authority, such as there is, goes the other way. A litigant can only rely on the opposite party's case if it actually adopts that case as its own, if only in alternative. Compare *Sager Motors (Pvt) Ltd v Patel*,^[14] the headnote of which reads: "Practice

- Trial - Plaintiff failing to establish version of the contract relied on - Plaintiff seeking judgment in the alternative based on defendant's version of the contract - Trial Court ordering absolution from the instance - Plaintiff unsuccessfully appealing."

[34]The second reason is that the final account was only prepared substantially after the contractor, on its case, had terminated the contract by the acceptance of the repudiation of the employer. Accordingly the final account, even if it served to confer rights on the contractor, had not done so by the time the contractor cancelled the contract by accepting the employer's repudiation.

[35]And the third reason is that in any event, the express wording of clause 36.5.10, read with the definition of "final account",^[15] make it plain that the final payment certificate is only issued once the quantum of contractual damages owed by the contractor to the employer has been determined, and the final account has been completed:

"The principal agent shall issue no further payment certificates until the quantum of damages in terms of 36.5.8 has been determined and the final account in terms of 36.5.3 has been completed. The final payment certificate may then be issued."

[36]Since in this case the quantum of contractual damages has not yet been determined, and since the employer expressly reserved the right to claim damages,^[16] the final payment certificate could not yet be issued. The contractor was, in these circumstances, constrained to argue that damages as a concept was included in the final account that was to be prepared by the principal agent, but the definition of "final account" precludes that argument.

[37] In the result it is inevitable that the appeal must succeed, and I make the following order:

- (a) The appeal is allowed, with costs.
- (b) The order of the court a quo is set aside, and there is substituted for it the following order:

“The application is dismissed with costs.”

WHG van der Linde

Judge, High Court

Johannesburg

Modiba, J:

- [1] I have read the judgment prepared by my brother van der Linde J. I agree with his conclusion but for different reasons which I set out below. For convenience, I use the same nomenclature for the parties as in van der Linde J’s judgment.
- [2] I respectfully differ with van der Linde J on what the issues in the appeal are. It is for that reason that I also disagree with the reasons set out in his judgment. In my view there are two succinct issues on appeal namely, whether the pending dispute in the trial action concerning whether the contract between the parties came into existence and if so, who lawfully cancelled it was irrelevant to the relief the contractor sought in the court a quo, and whether the court a quo correctly granted an order for payment on the basis of a final account rather than a payment certificate.
- [3] The facts are as set out in van Linde J’s judgment. The parties have an elaborate litigation history as set out in the same judgement. What is of pertinent import for the purpose of this appeal is the judgment by Tsoka ADJP in respect of which a petition is pending before the Supreme Court of Appeal (‘the SCA) as well as the judgment by Nkosi AJ, which is subject to this appeal.
- [4] Tsoka ADJP determined on a special plea a separated issue in the trial the contractor instituted before it instituted the present

application, seeking contractual damages against the employer. The separated issue is whether the contract between the parties ever came into existence. If it did, the question whether the cancellation of the contract by the employer is valid or whether it is invalid and amounts to a repudiation which the contractor accepted, is part of the remaining issues at the trial. Tsoka ADJP upheld the special plea. He refused leave to appeal. As mentioned above a petition against his judgment is pending before the SCA.

- [4] In the application that served before Nkosi AJ, the contractor sought payment of an amount it alleged is due and payable on the basis of a final account issued by the employer’s principal agent. The basis for this payment is the contract the validity of which the employer

disputed in the trial action. The employer contended before the court a quo that until the issues in the trial are determined, the contractor's claim for payment is premature.[17] Therefore it cannot be, as contended by counsel for the contractor that in the court a quo the cancellation of the contract was common cause between the parties. For reasons that do not appear from that judgment, notwithstanding the pending action, the court a quo determined the application on the basis that the contract was cancelled. The court a quo considered the issue regarding the validity of the contract and who cancelled it irrelevant to whether the payment claimed by the

contractor was due and payable. In an attempt to have this finding sustained on appeal, the contractor contends that the employer never attached the special plea to its answering affidavit. Therefore this court should consider the appeal, including the question whether the contract came into being with reference to the record that served before the court a quo.

- [5] The employer contends that the court a quo ought not to have found that the pending dispute in the trial action is irrelevant to the contractor's claim for payment. Despite the pending action, it seeks the dismissal of the application on the basis of the second issue in the appeal as set out in paragraph 2 above - a purely legal point.
- [6] In light of the pending petition to the SCA, the employer's special plea remains pending. Should the SCA find that the contract was never concluded between the parties, that finding will put an end to the trial action. Similarly no contractual liability for payment arises for the employer. Contrary to what the court a quo found, whether the contract came into being is relevant to whether the payment the contractor claims in terms of the contract is due and payable. Therefore the court a quo erred in finding that the payment claimed by the contractor is due and payable.
- [7] Similarly, the issue whether the contract was cancelled by the employer or repudiated by the contractor hinges on whether the

contract ever came into it being. If it never did, the question of cancellation by the employer or repudiation by the contractor does not arise. Should the SCA grant the petition, the appropriate order will be to remit the matter back to the trial court for the determination of the separated issues. In these circumstances, it is premature to pronounce on any issue relating to whether the contract came into being and any consequences flowing from it including whether it was cancelled and by whom.

- [8] The employer seeks the dismissal of the application because on the terms of the contract properly interpreted, notwithstanding the pending SCA appeal, the contractor's claim is bad in law. The contractual provision it relies on is the definition of final account and payment certificate and clauses 36.5.2, 36.5.3, 36.5.8 and 36.5.10. It is on this ground that I am on the view that the appeal ought to be upheld.
- [9] For convenience I quote these provisions below:

“Final account” is the document, prepared by the principal agent, which reflects the contract value of the works at final completion or termination [clause1.1];

“Payment certificate” means a document issued by the principal agent certifying the amount due and payable by the respondent to the applicant or vice versa [clause1.1];

“36.5.2 The principal agent shall forthwith compile a report on the status of the portion of the works executed by the contractor and shall issue such a report to the employer and the contractor.

“36.5.3 On completion of the status report the principal agent shall commence forthwith and complete a final account within a reasonable time.

“36.5.8 Where applicable in terms of 30.1 the employer shall be entitled to apply the penalty up to the date of cancellation and thereafter may recover damages from the contractor including, but not limited to, extra costs incurred in the completion of the outstanding work.

“36.5.10 The principal agent shall issue no further payment certificates until the quantum of damages in terms of 36.5.8 has been determined and the final account in terms of 36.5.3 has been completed. The final payment certificate shall then be issued.”

- [10] In terms of the contract, the employer would make payments to the contractor on the strength of a payment certificate issued by the principal agent. As already mentioned the court a quo determined the application on the basis of the contract having been cancelled by the employer. In that event, the employer has the right to apply a penalty up to the day of cancellation of the contract. The contract also gives the employer the right to recover damages from the contractor including but not limited to additional costs incurred to complete the outstanding work. The principal agent may only issue the final payment certificate after damages have been determined and the final account has been issued.
- [11] The principal agent issued the final account. However, the employer is yet to determine its damages. It is unclear how the principal agent issued the final account under the circumstances where the quantum of damages is yet to be determined in terms of 36.5.8. In any event the employer has reserved its right to quantify damages arising from the cancellation of the contract. Notwithstanding that the final account has been issued, the principal agent is yet to issue a payment certificate. Contractually, payment is due based on a payment certificate and not the final account.

[12] Under these circumstances, the judgment for the payment claimed by the contractor ought not to have been granted.

[13] In the premises, the appeal succeeds with costs. The order by Nkosi AJ is set aside and replaced with the following:

1. The application is dismissed with costs.

L.T. Modiba

Judge, High Court

I concur in the judgment of Van der Linde, J

T Siwendu

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Date argued: 29 November 2017

Date judgment: ... December 2017

[1] Earlier in the final account the date is typed out as “7 October 2014.”

[2] Record 1/6/11 – 19.

[3] Ibid.

[4] Respondent’s heads of argument, para 36.

[5] Record 2/94/17 – 21.

[6] Record 2/95/1 – 6.

[7] Appellant’s heads of argument, para 50.

[8] Record 3/146/17 – 19; 3/147/5 – 13; 3/148/14 – 18.

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- [9] Record 3/160/10 – 14.
- [10] 1972 (2) SA 863 (A) at 869B et seq.
- [11] 1930 TPD 394 at 401
- [12] 1990
- (1) SA 7 (A) at 17B-C.
- [13] Record 1/39 in fin – 1/40.
- [14] 1968 (4) SA 98 (RA)
- [15] Record 1/1612 – 13: “ ‘Final account’ means the document, prepared by the principal agent, which reflects the contract value of the works at final completion or cancellation.”
- [16] Record 1/89.
- [17] See paragraphs 10 and 13 of Nkosi AJ’s judgment.
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Prepared on 13 October 2026 · Esheria