

SOUTH AFRICA / JUDGMENT

Dragon Contractors (Pty) Ltd v Superway Construction (1851/16) [2017] ZAGPPHC 571 (22 August 2017)

[2017] ZAGPPHC 571

COURT

North Gauteng High Court, Pretoria

BEFORE

Malatji

CASE / FILE NUMBER

1851/16

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 1851/16

Not

reportable

Not

of interest to other judges

Revised.

22/8/2017

In

the matter between:

DRAGON
CONTRACTORS (PTY)
LTD Applicant
and
SUPERWAY
CONSTRUCTION (PTY)
LTD Respondent
THE
MINISTER OF PUBLIC
WORKS Third
Party

JUDGMENT

MALATJI, AJ

1. In this matter the applicant seeks an order in terms of which the respondent is instructed to implement an adjudicator's award. The respondent has been appointed by the Third Party, the Department of Public Works, to effect certain repairs, renovations and refurbishments of Innes Chambers in Johannesburg. Arising from that, the respondent in turn appointed the applicant under a sub-contractor agreement in order to perform certain works related to the main contract that has been concluded with the third party.
2. The main contract is in the nature of the well-known Conditions of Contract of the JBCC Series 2000 Principal Building Agreement ("JBCC Contract") (Edition 4.1 of March 2005). The sub-contractor agreement is in turn subject to the conditions of the JBCC Contract.
3. A dispute arose between the applicant and the respondent as regards payment certificate number 12. The applicant contended that the said certificate is incorrect in certain respects and referred the matter for determination by adjudication in accordance with the provisions of the JBCC Contract (incorporated into the sub contract agreement between the parties).
4. Needless to say, the adjudicator returned a finding in favour of the applicant and accordingly instructed the respondent to amend payment certificate number 12 in certain respects, in particular in relation to quantum, the removal of certain penalties that were imposed as well as to reverse certain charges that were made, and finally, reducing and altering the retention amount to R500 000.00 exclusive of VAT.
5. The nett effect of the adjudicator's findings was that an amount of the R3 473 029.31 would have been additionally due to the applicant together with interest.
6. The respondent issued two further payment certificates. The first one is a revised interim payment certificate number 12 which brought the content thereof in line with the adjudicator's award. In this respect, the court must point out that the respondent did not accept the adjudicator's award and it has therefore declared a dispute which will be the subject matter of arbitration proceedings, if pursued.
7. In addition to a revised Interim Payment Certificate number 12, the respondent issued Interim Payment Certificate number 13. This certificate contains penalties imposed by the respondent as the main contractor against the applicant as a sub-contractor. The applicant contends that this certificate is in direct contravention of a determination made by the adjudicator and therefore in contempt thereof.
8. Interim Payment Certificate number 13 effectively wipes out any payment that the respondent would be due to make to the applicant in terms of the award by the adjudicator but moreover it has reversed the position in that the applicant is now indebted to the respondent.

9. The applicant resolved to institute these proceedings so as to obtain an order to enforce the adjudicator's award. In addition, in answering the aforesaid papers, the respondent joined its principal, "the employer" as referred to in the JBCC contract and argued that if the court ultimately determines that there is a payment to be made to the applicant then the third party as the employer in the JBCC Contract should equally be ordered to pay such amount to the respondent.
10. A number of legal issues have been raised in relation to the matter. I do not intend to deal with each of those except those that are dispositive of the matter. The first issue is whether the respondent is indeed indebted to the applicant in the amount certified as amended by the adjudicator's award. The second issue is whether if the amount so determined by the adjudicator's award is payable by the respondent to the applicant, should the department, qua its position as employer in the JBCC Contract, be ordered to pay such amount to the respondent to enable it to pay the said amount over to the applicant.
11. In relation to the first issue, the respondent contends that payment is not due. It does so on two bases. The first one is that in the agreement with the Sub Contractor Agreement with the applicant there is clause 9 which expressly indicates that "payment will be made within 7 working day after payment has been received by the main contractor from the employer".
12. I must agree with Mr Van Zyl's submissions that the objection to reliance on provisions of clause 9 which deals with payment paid was not raised as a defence before the Replying Adjudicator and further that the Applicant is precluded from relying upon such in line with the provisions of clause 40.3 of the general conditions of the contract. Nothing in the Adjudicator's award orders that payment be made forthwith and nothing in that award can override the provisions of clause 9 which expressly provides that the applicant will be paid when the respondent is paid.
13. This is what is known commonly in the industry as a "pay when you are paid clause". In light of the fact that the respondent has not received payment from the third party, payment is therefore not yet due which consequently means that the application for enforcement of the adjudicator's award is premature.
14. The second ground upon which the respondent relies for not honouring the adjudicator's award is that an Interim Payment Certificate number 13 has been issued. In terms of that certificate, a further penalty of R10 215 700.00 has been imposed upon the applicant. The result is that the applicant is in fact indebted to the respondent as opposed to the respondent being indebted to the applicant.
15. The applicant contends that the issuance of this Interim Payment Certificate number 13 is in contempt of the award made by the adjudicator who disallowed the interest imposed, as reflected on the original Interim Payment Certificate number 12. The respondent contends on the other hand that the adjudicator's award in relation to interest cannot be on that basis that he could not make a determination that such penalties as appear on Interim Payment Certificate number 13 could not be imposed . He could not and does not have the

jurisdiction to determine any future possible penalties that may be imposed.

16. This submission I agree with because otherwise the adjudicator would have been making an award in respect of the facts and circumstances which are not even before him.
17. In the result, it is my considered view that the adjudicator's determination is yet to be enforceable and even if it was, it gets defeated to the extent that its quantum is exceeded by that of Interim Payment Certificate number 13.
18. What remains for me to deal with is the question of the joinder of the third party. In my view it was indeed a prudent move. The employer did not participate and object to that which was put before the adjudicator which resulted in his award. The respondent is but a contractor appointed under the JBCC Contract and any payments to be made in terms thereof, including by virtue of an award by an adjudicator, are payments which are due to be made by the third party in its capacity as employer in the works.
19. I therefore do not find any merit in any of the points that have been raised relating to the joinder of the third party. The third party notice was properly formulated and served in accordance with Rule 13. Most importantly, there is no doubt that there is an overlap of issues between the applicant and respondent as there would be between the respondent and the third party.
20. The bottom line is the employer ultimately is a person that is responsible for payment in relation to the works which it has mandated the respondent to attend to. In the event that the court orders that a payment has to be made to a sub-contractor, then that particular payment is not a payment that can be liability for the contractor under the JBCC Contract but it is clearly liability due by the third party as the employer who contracted the respondent.
21. In the result I made the following order:
 - 1.1. The application is dismissed with costs, such costs to exclude the costs of the third party;
 - 1.2. The third party is ordered to pay the costs of the applicant, relation to the opposition of the Rule 13 proceedings.

TSS MALATJI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

Date of Judgment: 22 August 2017

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/571.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/dragon-contractors-pty-ltd-v-superway-unknown-topic-agpphc-2017>

Prepared on 13 October 2026 · Esheria