

SOUTH AFRICA / JUDGMENT

# Johnny Bravo Construction CC v Khato Consulting Engineers CC (2315/2014)

## [2015] ZAFSHC 5 (5 February 2015)

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## COURT

Free State High Court, Bloemfontein

## BEFORE

L. J. Lekale

## CASE / FILE NUMBER

2315/2014

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IN THE HIGH COURT, BLOEMFONTEIN

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: 2315/2014

In the matter between:

JOHNNY BRAVO CONSTRUCTION CC .....Applicant

and

KHATO CONSULTING ENGINEERS CC .....Respondent

CORAM: LEKALE, J

**JUDGEMENT:**

LEKALE, J

HEARD ON: 27 NOVEMBER 2014 and 11 DECEMBER 2014

DELIVERED ON: 5 FEBRUARY 2015

**INTRODUCTION****AND BACKGROUND**

- [1] This is an opposed motion for enforcement of interim payment certificate issued in favour of the applicant by the respondent's

representative engineer on 5 September 2013 in respect of construction work carried out in Qwaqwa on a project awarded to the respondent by the Maluti-A-Phofung Local Municipality.

- [2] Following its appointment on the relevant project, which entails the provision of water services for network extensions and erf connections for rural areas in Qwaqwa, on the 7th October 2011 the respondent appointed the applicant to provide plant and labour for the implementation of the project in question in terms of the General Conditions of Contract for Construction Works 1st ed of 2004 (the GCC) thereby effectively placing the respondent in the position of the employer viz-a-viz the applicant.
- [3] In terms of clause 49 of the GCC the applicant is entitled to interim payments payable after submission by it of monthly statements and the issue of payment or progress certificates signed by the engineer. The respondent, as the employer, is entitled to retain ten per cent of certified amounts to the maximum of ten per cent of the agreed contract value at any given time. Certified amounts are payable within 28 days of receipt by the respondent, qua the employer vis-à-vis the applicant, of the payment certificate.
- [4] The GCC, further, provides for a defects liability period of one year and renders half of the retention money deducted due and payable to the applicant upon the issue of a certificate of practical completion by the respondent. The balance of the retained funds becomes payable upon the issue of a certificate of final completion viz. within 14 days after the expiry of the defects liability period. Failure by the respondent to effect payment on due date attracts interest at a prime overdraft rate certified by the applicant's bankers.
- [5] On the 1st February 2013 the respondent declared, in writing, that the stage of practical completion had been reached, thereby signifying that the applicant was entitled to 50 per cent of all retention funds. The applicant continued to perform and to render statements and on 5th September 2013 the respondent, as the engineer, issued payment certificate number 20 for payment of R1 161 690.76 to the applicant. The parties, however, got involved in a dispute about payment on the relevant certificate. On 19th February 2014 the respondent paid R72 414.41 on the certificate in question. The respondent, however, refuses to effect further payment on the certificate and contends that the quality of the work rendered was not up to standard.
- [6] The applicant eventually launched the instant application which the respondent in limine opposes on the ground that the dispute between the parties falls to be adjudicated by way of arbitration of clause 58.7 of the GCC. The respondent, further, opposes the motion on the ground that the payment certificate on which the claim is based is tainted by fraud.
- [7] On 27 November 2014 and after presentation of oral arguments on the preliminary point the parties were, effectively, ad idem that the dispute is properly before the court in terms of clause 58.5 of the GCC. The point raised was, thus, bad on the facts and fell to be dismissed with costs.

## DISPUTE

- [8] The parties are essentially in dispute over whether or not the progress certificate is valid with the respondent contending that same is the product of fraud on the part of the applicant and the engineer's representative.
- [9] At the outset of the hearing on 27th November 2014 Mr Grobler, for the applicant, requested that the issue of the validity and veracity of the certificate be referred for oral evidence in the event of the court finding that the respondent genuinely disputes the validity of such a certificate on the grounds of fraud.

## CONTENTIONS BY THE PARTIES

- [10] Mr Van Aswegen, for the respondent, submits that it is clear from the papers that the quality of the works performed by the applicant is so poor that the most plausible inference to draw therefrom is that the engineer's representative, who was pivotal to the issue of the relevant payment certificate, colluded with the applicant to the detriment of the respondent.
- [11] On behalf of the applicant, Mr Grobler contends that there exists no proof of fraud on the part of the applicant and that the real issue concerns alleged unsatisfactory work which, in terms of the contract between the parties, can be rectified during the defects liability period without refusing to effect payment in terms of the certificate in question.
- [12] It is, further, submitted for the applicant that the delay on the part of the respondent to raise the issue further militates against the genuineness of the dispute. The respondent, on its part, retorts that it only became aware of the poor quality of the works concerned after complaints were lodged with the counsellors by the community which the project is intended to benefit.

## APPLICABLE PRINCIPLES

- [13] The parties are correctly in agreement that an interim payment certificate, just like a final progress certificate, embodies an obligation on the part of the employer to pay the amount certified and gives rise to a new and distinct cause of action subject to the terms of the contract. It is regarded as the equivalent of cash. (See *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 10)
- [14] It is, further, correct, as Mr Van Aswegen reminds the court, that where a progress certificate is issued fraudulently same is of no force and effect (See *Smith v Mouton* 1977 (3) SA 9 (W)).
- [15] A real, genuine and bona fide dispute can exist only where the party purporting to raise the same seriously and unambiguously deals with the same in its papers. (See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA)).

[16] In exercising its discretion to refer a matter for oral evidence, the court is largely guided by the prospects of viva voce evidence tipping the balance in favour of the applicant. If on the papers the probabilities are evenly balanced, the court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. (See *Kalil v Decotex (Pty) Ltd and Another* 1988

(1) SA 943 (A) at 379H-I).

[17] As a general rule an application to refer a matter to evidence must be made at the outset and not after argument on the merits. The rule is, however, not inflexible. (See *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 AD at 24I-25D).

[18] In terms of the respondent-friendly test applicable to application proceedings, where there exist material disputes of fact the respondent's version can only be rejected if it is far-fetched or untenable. (See *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 AD).

#### APPLICATION OF PRINCIPLES AND FINDINGS

[19] It is clear from the papers that the respondent seriously and unambiguously deals with the disputed validity of the payment

certificate insofar as it inter alia refers to photographs allegedly depicting the alleged poor works which are allegedly so out of line with accepted standards and

regulations that they allegedly lead to the inference that there was collusion between the applicant and the engineer's representative as the most probable one.

[20] Ex facie the papers the probabilities are, in my view, evenly balanced insofar as the payment certificate is prima facie enforceable while there, further, exists a possibility that same was fraudulently issued.

[21] As correctly pointed out for the applicant, a request for referral to oral evidence was made at the outset and before arguments on merits could be heard. In my judgment there exist prospects of oral evidence tilting the scales in favour of the applicant.

#### ORDER

[22] The preliminary point is dismissed with costs.

[23] The application is postponed to 30 March 2015 for certification, as ready for hearing of viva voce evidence, by the pre-trial judge.

[24] The issue to be determined at such a hearing is whether or not payment certificate number 20 is valid and enforceable regard being had to the respondent's contentions that same is tainted with fraud.

- [25] For the purposes of such a hearing the respondent shall deliver sworn statements of witnesses it wishes to call, inclusive of any supplementary affidavits, within 10 days calculated from the date hereof.
- [26] On its part the applicant shall deliver sworn statements of witnesses it wishes to call, inclusive of any supplementary affidavits, within 10 days calculated from the date on which the respondent shall have delivered statements or was supposed to deliver statements.
- [27] Within 10 days after the delivery of statements or supplementary affidavits by the applicant, the parties shall make discovery under oath in terms of the provisions of Rule 35 of Uniform Rules of Court and the provisions of Rule 35 (6) with regard to inspection and production of discovered documents or items shall apply.
- [28] The costs shall be costs in the application.

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L. J. LEKALE, J

On behalf of the applicant: Adv. S. Grobler

Instructed by:

Peyper Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. W. A. van Aswegen

Lovius Block

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