

SOUTH AFRICA / JUDGMENT

Lohan Civils (Pty) Ltd v Tokologo Local Municipality (2676/2019) [2020] ZAFSHC 20 (14 February 2020) [2020] ZAFSHC 20

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman

CASE / FILE NUMBER

2676/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE PROVINCIAL DIVISION

Case

No: 2676/2019

In the matter between:

LOHAN
CIVILS (PTY)
LTD[1] Applicant
and
TOKOLOGO
LOCAL
MUNICIPALITY[2]
Respondent

Coram:

Opperman, J

Heard:

14 November
2019

Delivered:

14 February 2020
Summary: Issuing of
certificate for civil works – non-compliance with contractual
processes and remedies

JUDGMENT

I

INTRODUCTION

- [1] The claim that serves before the court on motion is for judgment[3] against the respondent on the basis of a payment certificate. The certificate was issued by an engineer for civil works in construction

work and is alleged to be valid and the payment due.

- [2] The conflict is situated in whether or not the appointed engineer could have, in terms of the contract between the parties, issued the certificate under circumstances where it was incumbent upon the Municipality to approve variation orders first and foremost.
- [3] The legal status of a certificate in this scenario is not in dispute. It was correctly proclaimed by Lohan that: “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.”[4]

II

BACKGROUND

- [4] The relationship between the parties in the case is based on the appointment of the applicant on 1 December 2016 as the successful

bidder for the civil works in relation to the “Construction of a River Inlet Structure, Abstraction Works and Booster Pump Stations with associated work, near Riverton” in accordance with contract number: TLM/BWSBD/ABS/02.

- [5] The contractual relationship is, according to the applicant, governed by the “Project Document”, the “Contract Data” and the “General Conditions of Contract for Construction Works, Second Edition, 2010” (GCC).
- [6] The action that caused the dispute is the said payment certificate that the respondent refuses to honour. The defence is that the certificate is invalid because the payment claimed includes contract price adjustments which could not have been included in the payment certificate and it is not a final certificate. In addition, the payment claimed includes variation orders in an amount of R7 211 509.73 which exceeds 15% of the contract sum and had to be approved by the respondent and not its engineer.
- [7] Enveloping the subject of the validity of the certificate are three

issues.

1. Jurisdiction based on a contractual obligation to refer the dispute to arbitration first.
 2. Non-joinder of an interested party namely the Department of Water and Sanitation. The respondent is funded by the Department of Water and Sanitation and it is alleged that the said department refused the payment.
 3. Mistaken procedure in that the applicant used the wrong procedural vehicle to bring the matter before court; the dispute of facts is too severe for motion procedures.
- [8] The respondent therefor wants for the application to be dismissed because a severe dispute of fact exists and was foreseeable. The applicant to carry the costs for the litigation. They submit that the court may order joinder of the national department but no such indication has been given by the applicant of its intention to seek the relief. The proceedings must, in the alternative, be stayed and the parties forced to arbitration.
- [9] The issues of mistaken process, joinder and arbitration are primary and dictates the outcome of the matter. It is imperative to decide whether the matter is properly before the court in order for it to be effectively adjudicated and cause an enforceable and executable order.
- [10] Whether the certificate was issued in terms of the contract or not; is a factual finding on the veracity of the written statements and documents related thereto.

III MOTION PROCEDURES

- [11] The law dictates that if a court is unable to decide an application on paper, it may dismiss the application or refer the matter for oral evidence or refer the matter to trial.[5] Overarchingly; unless the application is dismissed, the court should adopt the procedure that is best calculated to ensure that justice is done with the least delay.
- [12] In every case the court should examine the alleged disputes of fact and determine whether there is a real issue of fact that cannot be satisfactorily resolved without trial. The emphasis is on proper examination of the facts as it stands on paper.
- [13] The decision is not to be taken lightly. A robust approach may be employed to avoid fastidiousness and abuse of procedure.[6] The approach must be applied with care and the advantages of oral evidence must be carefully weighed to prevent the settling of facts on probabilities. The manner in which viva voce evidence would disturb the balance of probabilities is the yardstick. Whether a factual dispute exists is not a discretionary decision; it is a question of fact.[7]

- [14] Dismissal may follow if the dispute of fact should have been foreseen.[8] The rule may yield to the interest of justice and a resulting referral for trial. A proper costs order may repair an imbalance that was caused by slovenly or negligent litigation if the dispute was foreseeable or the process abused. The line to be tread between referral for evidence and referral to trial is thin and the merits of each case will direct the final decision.
- [15] The dispute of fact will, more often than not, resort under a wide scope of issues or the eventual scope will be unclear when matters are referred for trial.
- [16] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949
- (3) SA 1155 (T) it was stated that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits as opposed to viva voce evidence. The tendency of resorting to affidavits has been denounced ninety years ago by Tindall, J in *Saperstein v Venter's Assignee* 1929 TPD 14, P.H. A at [71] and is still the law.
- [17] In confirmation of the above; seventy years later in *The National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) Harms, JP ruled at [26] and [27] that:
1. Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause

facts.

2. Unless the circumstances are special, they, motion procedures, cannot be used to resolve factual issues because they are not designed to determine probabilities.
3. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent together with the facts alleged by the latter, justify such order.
4. The court may not impose an onus on the respondent to prove a negative. The rule of evidence, namely that if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a prima facie case, applies to trials.
5. In motion proceedings the question of onus does not arise and the approach set out in the Plascon Evans-matter governs irrespective of where the legal or evidential onus lies.
6. Finally, the more serious the allegation or its consequences, the stronger must be the evidence before a court before it will find the allegation established.

- [18] A person claiming relief acts at his peril in proceeding by motion action; he cannot by electing to proceed by motion deprive his opponent of a number of procedural advantages. The flip side is that the respondent may not sabotage the proceedings that is established law for expeditious and cost-efficient resolve of civil cases.

IV DISPUTE OF FACT

- [19] A real dispute of fact can arise in one or other of the following ways:

1. Where the court is satisfied that the party who purports to raise the dispute has in his affidavit, seriously and unambiguously, addressed the facts said to be disputed;
2. The respondent may deny one or more of the material allegations made on the applicant's behalf and produce evidence to the contrary, or apply for the leading of oral evidence of witnesses who are not presently available or who, though averse to making an affidavit, would give evidence if subpoenaed;
3. The respondent may admit the applicant's affidavit evidence but allege other facts, which the applicant disputes;
4. The respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof, and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, or that certain facts upon which the applicant relies to prove the main facts, are untrue. The absence of positive evidence directly contradicting an applicant's main allegations, does not render a case such as this free of a real dispute of fact. In other words, a respondent is entitled to seek a reference to oral evidence or to trial under circumstances where it is unable to produce affidavits containing positive allegations that prima facie establishes a defence. This requires of the deponent to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Importantly, the deponent must satisfy the court that there are reasonable grounds for believing that the defence would be established.
5. If the respondent's version is farfetched and untenable there is not a dispute.
6. A bare denial is not a dispute.
7. *Mouton v Park 2000 Development 11 (Pty) Ltd 2019 (6) SA 105 (WCC)* summarised the above aptly:

"[85] At the same time, it is equally well established that where a dispute of fact is not a 'real, genuine or bona fide' one the Court will be justified in ignoring it and may proceed to find on the applicant's version thereof. So too, where the respondent's version is clearly or palpably far-fetched or untenable, the Court may take a robust approach and decide the matter on the basis of the applicant's version. As always, in evaluating the contents of the affidavits the Court must have due regard for the treatment which the respondent has given to the averments under reply. In this respect a respondent has

a duty to engage with the facts which are put up by the applicant, and to deal with them fully and comprehensively. Any 'skimpiness' and improbabilities in his version may thus count against him. It is also well-established that when a party deposes to an affidavit (be it an answering or a founding affidavit) he commits himself to its contents, and only in exceptional circumstances will he be permitted to disavow them."

[20] Both parties committed to the facts in their affidavits and it is clear that the monies are due but the process that caused the certificate was blemished by both. There is not a dispute of facts.

V THE FACTS

[21] It is a commonplace fact in this case that: "To survive, the contractor is dependent on monthly payments to be made on the basis of statement." [9] Contracts are sacred in law and all parties thereto must diligently comply with their responsibilities to ensure that projects that, among others serve the community, can be successful. It is in the interest of a sustainable democratic economy.

[22] Reading of the papers unequivocally shows that the events and contractual clauses that lead to and regulate the certificate are not in issue. The facts were complicated and garbled to support the claim and defend unbecoming behaviour.

[23] It stands proven that:

1. Pursuant to a tender process Lohan was appointed in 2016 by the Municipality to do specified work. The total contract price to be R47 653 760.75 including VAT and with 10% contingency margin.
2. The contract appointed engineers for the Municipality. The contract declared that all amounts that would become due to Lohan in respect of the works in terms of the contract shall be claimed by delivering to the engineer a monthly statement. Payment certificates will then be issued and payments implemented.
3. One such payment did not come to fruition. The payment was subject to a common cause understanding and contractual clause that it was up to the Municipality to approve variation orders to the works under agreement.
4. The work came to a halt on 4 December 2018 because Lohan alleged that in breach of contract the municipality failed to process and pay the payment certificates and similarly failed to process the claims and variation orders which were given through to it by the consulting engineers.
5. Due to the frustrating delay the consulting engineer got caught up in the middle. He went forth and issued a certificate for a lower amount notwithstanding the fact that the Municipality refused or neglected to process the variation orders.

“The respondent failed to respond to or comply with the demand for payment and on 20 March 2019 Mr Barnard of Aurecon[10] certified Payment Certificate no. 16 after reducing the amount payable to the applicant from R5 002 002.42 to R4 364 322.94.”[11]

6. The certificate states a contract price adjustment.
7. The certificate is not final and therefore no contract price adjustment could have been included. Page 96 of the GCC decrees this and it is common cause that it is a clause of contract that must be complied with.
8. An adjustment can only be made on the certificate following the issue of the certificate of completion. Compared to the payment certificate it is apparent that a contract price adjustment of four million rand could never have been included.
9. The variation orders of R7 211 509.73 exceeding 15% of the sum of the contract price does not fall within the authority of the engineer.
10. The matter could have been referred to arbitration in terms of the GCC.
11. The allegation that the Municipality failed to deal with the applications might be a breach of contract but does not make the certificate valid. The applicant’s remedy was to cancel the contract due to the frustrations of the payments; not for the engineer to issue the ill-fated certificate.

VI ARBITRATION

- [24] The claim must be dismissed on the basis that the process that preceded the certificate was flawed. The monies might still be due but not on the basis claimed in this motion. The parties have to get their house in order and resolve the quarrel as best as possible. Arbitration was suggested as an outcome.
- [25] The applicant did not deal with the matter of arbitration in their Heads of Argument. They do not dispute the contractually agreed means of solution to their disputes. What often trips the option of arbitration is the delay it might cause. The delay has occurred and must be endured.
- [26] The question is whether the court may force the matter to arbitration? I pondered the wise words of Finsen as quoted[12] by counsel for the Municipality and agree with it. I am however not convinced that Lohan can be forced to arbitration in light of the litigation that has come and gone.

VII NON-JOINDER

- [27] All the above said; the National Department of Water Affairs and Sanitation has a direct and substantial interest in the outcome of the litigation. It would have been in the interest of justice on the facts of this case to join them.

“7.13.8 Insofar as Lohan in its Founding Affidavit deals with any kind of variation orders – it expressly stated that the Municipality

apparently and to its belief committed a breach of contract because it failed to deal with the application of such variation orders. The Municipality refused the request – as did the National Department of Water Affairs.”

7.15 Fourthly the Municipality has and indeed is funding the works from a grant received from National Treasury. This Lohan knows as well. But Lohan deemed it fit not to join the Department of Water and Sanitation to the proceedings. If the claim is successful it will mean that either the Municipality or the Department of Water Affairs will have to foot the bill (of course the latter by means of the giving of an additional grant). The National Department thus has a material affect in the outcome of the application and should have been joined.”[13]

[28] The issues of misjoinder are regulated in Rule 10 and the common law. Harms[14] dealt with the law in detail and with reference to case law. I align myself with the findings.

1. If a party has a direct and substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the court is satisfied that he has waived his right to be joined.
2. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder objection.
3. The term "direct and substantial interest" means an interest in the right, which is the subject-matter of the litigation, and not merely an indirect financial interest in the litigation.
4. An academic interest is not sufficient. On the other hand, the joinder of joint wrongdoers as defendants is not necessary, although advisable.
5. Likewise, if parties have a liability, which is joint and several, the plaintiff is not obliged to join them as co-defendants in the same action but is entitled to choose his target.
6. A mere interest is also insufficient. A litigation funder may be directly liable for costs and may be joined as a co-litigant in the funded litigation. This would be the case where the funder exercises a level of control over the litigation or stands to benefit from the litigation.

VIII FINDING

[29] To reiterate, both parties committed to the facts and it is clear that the monies are due but the process that caused the certificate was blemished by their conduct. There is not a dispute of facts. The application is to be dismissed on the premise that the certificate is invalid as result of the flawed process that preceded the issuing thereof. The monies might still be owed but the certificate is contractually invalid. It is not in the interest of justice that the matter be forced to arbitration. The parties have the remedy of arbitration as option in terms of the contract. The non-joinder of the Department is fatal in light of its extensive

interest in and contribution to the case as a whole.

IX ORDER

[30] The application is dismissed with costs.

M. OPPERMAN, J

Appearances

For applicant: Advocates C.D. Pienaar & J.S. Rautenbach

Chambers Bloemfontein

c/o Symington & De Kok

BLOEMFONTEIN

For respondent Advocate S Grobler SC

Chambers, Bloemfontein

c/o Kruger Venter Inc

Bloemfontein

REF: SK/BK/TB0010

[1] “Lohan”. Lohan Civils (Pty) Ltd is a company with limited liability with registration number 2005/000756/07, duly registered and established

in terms of the Statutes of the Republic of South Africa with its address at 14 Barnie Swart Avenue, Groenvlei, Bloemfontein, Free State Province.

[2] “Municipality”. Tokologo Local Municipality, is a local municipality duly established in terms of the stipulations of section 12 of the Local Government: Municipal Structures Act 117 of 1998 with its address at Municipal Offices, Boshof, Free State.

[3] Lohan motions for payment of the amount of R4 364 322.94, interest on the amount of R4 364 322.94 at 10.25%

calculated from 5 April 2019 to date of payment and costs of the application.

[4] At paragraph 2 of the Heads of Argument of the applicant with reference to Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) paragraph 27.

[5] Rule 6(5)(g): Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the afore-going, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be

examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition

of issues, or otherwise.

[6] Harms, Civil Procedure in the Superior Courts, B6.48 Robust approach.

[7] President of the Republic of South Africa and Others v M&G Media Ltd 2012

(2) BCLR 181 (CC); [2012] JOL 28167 (CC); 2012 (2) SA 50 (CC) at

[34] and Hoffmann v Pension Funds Adjudicator and Others [2012] 2 All SA 198 (WCC) at [23].

[8] Harms, Civil Procedure in the Superior Courts, B6.49 Dismissal.

[9] Paragraph 41 of the founding affidavit.

[10] The engineer.

[11] Paragraph 51 of the founding affidavit.

[12] Paragraph 4 of the respondent's Heads of Argument.

[13] Opposing affidavit.

[14] Civil Procedure in the Superior Courts, Edition consulted updated February 2019 - SI 64 at B10.2 Direct and substantial interest.

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