

SOUTH AFRICA / JUDGMENT

Muller NO and Others v City of Tshwane Metropolitan Municipality (54302/2015) [2017] ZAGPPHC 520 (25 August 2017)

[2017] ZAGPPHC 520

COURT

North Gauteng High Court, Pretoria

BEFORE

J G Rautenbach

CASE / FILE NUMBER

54302/2015

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: 54302/2015

25/8/2017

In

the matter between:

JOHANNES
ZAZHARIAS HUMAN MULLER
N.O. First
Applicant
FRANS
LANGFORD
N.O. Second
Applicant
HLALELENI
CATHLEEN DLEPU
N.O. Third
Applicant
ELMARIE
BOOYSE
N.O. Fourth
Applicant
In
their capacities as joint Provisional
Liquidators
of Symbian PNC Property Limited

(in
liquidation)
and
CITY
OF TSHWANE METROPOLITAN
MUNICIPALITY Respondent

JUDGMENT

Rautenbach AJ:

1. This is an application brought by the joint Provisional Liquidators of Symbian PNC against the City of Tshwane Metropolitan Municipality.
2. The Applicants seek an order against the Respondent for the payment to the Applicants of a capital amount of R1 241 361.86 plus interest calculated from 25th March 2013 to date of payment and costs of the application.
3. Symbion was formerly known as Edison Jehamo Power (Pty) Limited ("Edison") before its winding up, conducted business as a specialised electrical contractor which provided quality construction and maintenance services to the electrical power industry throughout Sub-Sahara Africa. One of Symbion's projects was a project in respect of services to the Respondent known as Mamelodi

(Tshwane) Transmission Lines Project. An employee of the Respondent, Mr Gous, was appointed as Engineer to the project.

4. At paragraph 56 of the founding papers certain clauses which may be relevant to this application is set out. They are clauses 13, 13.8, 14.1 and 14.7. What is of particular importance is clause 14.7 and I am going to quote this clause in full:

"The employer shall pay the contractor:

- (a) The first instalment of the advance payment within 32 days after issuing the letter of acceptance and within 21 days after receiving the documents in accordance with sub-clause 4.2 [Performance Security] and sub-clause 14.2 [Advance Payment], whichever is later.
- (b) The amount certified in each interim payment certificate within 56 days after the Engineer receives the statement and supporting documents; and
- (c) The amount certified in the final payment certificate within 56 days after the Employer receives this payment certificate.

Payment of the amount due in each currency shall be made into the bank account nominated by the contractor in the payment Country (for this currency) specified in the contract."

5. The Applicants rely heavily on "JM11" appearing at page 72 of the papers. This is an invoice from Edison Jehamo Power (Pty) Limited to the City of Tshwane.
6. On the invoice appears the following words: (It is not clear whether this was stamped but it was presumably stamped on the invoice)

"Approved for payment.

Project Manager J Gous.

Signature" (There appears a signature apparently not in dispute that that is Gouw's signature)

And a date appearing "14/05/2013"

7. It was suggested on behalf of the Applicant that the certification by the Project Engineer, Mr Gous of the work is a final determination that the work was done and that the amounts are payable. There appears to be no document entitled as a so-called "certificate" or "certification of amount paid".
8. It appears to be common cause that the interim payments according to the contract was made in terms of similar invoices that were approved as the one that is marked "JM11" on page 72 of the papers.
9. It further appears that this particular invoice, "JM11", was not paid by the Respondent and according to the submissions on behalf of the Applicants, the Respondent has no defence against the invoice which was signed as approved for payment.
10. According to the Respondent the contract sum was R84 998 807.29. The contract amount was however adjusted but that only happened after the events of the non-payment of "JM11".
11. The Respondent submits that prior to the winding-up of Symbion the Respondent had paid an amount of R94 189 714.15 to Symbion notwithstanding the fact that only approximately 50% of the work had been executed at that stage.
12. Much was made by the Applicants as far as the Respondent apparently relying on two conflicting versions. The one version is to the effect that a superior of Gous must first approve the payment before such funds could be paid out. It appears that during evidence during an enquiry in terms of Section 417 and 418 of the old Companies Act read with Schedule 9 and Schedule 5 of the Companies Act, 71 of 2008, Mr Gous' version was that he stamped the normal stamp and filled it in and only afterwards when he went through the supporting documents that he was not satisfied with the amount in question. It also appears that Mr Gous was not the Project Manager but in fact the Engineer responsible for certifying the amount outstanding.
13. Although there may exist a contradiction in what is set out in answering papers on behalf of the Respondent and the evidence of Gous during the Section 417 and 418 enquiry, I cannot at this stage come to the conclusion as to whether these two versions can be explained by oral evidence. What is however apparent from the papers is that the Respondent states that

despite the fact that there was "an approved for payment" signed, the Respondent is of the view that it does not owe the amount to the Applicants and it is in this sense quite important to take cognisance of the allegation by the Respondent that despite having paid an amount of R94 million plus, only approximately 50% of the work had been executed at that stage at least on the version of the respondent.

14. Should the Respondent be able in evidence to prove that this in fact the case, in my view the "approved for payment" part, especially "JM11", will fade in insignificance if it is proved that Symbian owes money to the Tshwane Municipality in respect of being overpaid in respect of the project at the time when the project was terminated.
15. I was referred to the matter of *National Scrap Metal (Cape Town) v. Murray and Robberts* 2012 (5) SA 300 (SCA) (at paras 21 and 22) in which the following was stated:

"21. These factors - particularly collectively - to cast a measure of doubt on the Appellant's version, which is certainly improbable in a number of respects. However as the High Court was called on to decide the matter without the benefit of oral evidence it had to accept the facts alleged by the Appellants (as Respondents below) unless they were so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the Appellants is so farfetched and improbable that it can be rejected without evidence."

16. Something further to consider is whether the Respondent in spite of the agreement has the right at any stage whether before or after any interim payment to require from the Applicants to account as far as the funds paid to it is concerned and the work performed by it.
17. The fact that a party is entitled in terms of a contract prima facie to pay an amount approved in a certificate by an Engineer or someone similar with the authority is never payable as of right that a party is entitled to claim it if generally the other party has a defence against the payments although the payment certificate was approved.[1]
18. There is further the issue that the First Respondent is required to comply with the Municipal Financial Management Act which requires that steps should be taken by the Accounting Officer and other officials of the Municipality to prevent fruitless and wasteful expenditure. In my view this is a further stumbling block in Applicants' claim to obtain judgment in this matter.
19. I am not in a position to merely reject the Respondent's averments in connection that for instance R94 million plus was already paid in respect of an R84 million project despite the fact that only approximately 50% of the work had been executed at that stage. In my view this alone makes it undesirable to attempt to resolve the matter based on a balance of probabilities. I find myself therefore in a position where it is not possible for me to grant the relief sought by the Respondent in this matter.

20. In the circumstances I find myself in the position where I cannot on the papers as it stands merely dismiss the application brought on behalf of the Applicant.
21. In the circumstances I make the following orders:
 1. The matter is referred to trial.
 2. The Notice of Motion and Affidavit will constitute a simple Summons and the Respondent is granted 20 days to file a Declaration and thereafter the Rules that apply to trials will apply.
 3. I further order that costs will be costs in the cause.

J G Rautenbach

Acting Judge of the High Court

Gauteng Division

Pretoria

25 August 2017

- [1] Thomas Construction (Pty) Limited (in liquidation) v. Grafton Furniture Manufacturers (Pty) Limited 1988 (2) SA 546 (A).

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/2017/520.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/muller-no-and-others-v-city-unknown-topic-agpphc-2017>

Prepared on 13 October 2026 · Esheria