

SOUTH AFRICA / JUDGMENT

Pro-Care Contracting (Pty) Ltd v ISA & Partners (Pty) Ltd (285/2019) [2021] ZAFSHC 17 (28 January 2021) [2021] ZAFSHC 17

COURT

Free State High Court, Bloemfontein

BEFORE

C Reinders

CASE / FILE NUMBER

285/2019

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

Source record

IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION BLOEMFONTEIN

Case

number: 285/2019

In the matter

between:

PRO-CARE
CONTRACTING (PTY) LTD
[Registration
No.
2010/006882/07]
Applicant
And
ISA
& PARTNERS (PTY) LTD
[Registration
No.
2004/034689/07]
Respondent

JUDGMENT

BY:

RENDERS, J

DELIVERED ON:

28 JANUARY 2021

[1] The applicant in its notice of motion prays for relief in the following terms:

"1. The Respondent is ordered to pay the Applicant the amount set out in prayers 1.1 – 1.3 infra plus interest on the amounts set out in prayers 1.1 -1.3 infra at the rate of 10.25% per annum, calculated from the following dates until date of final payment:

1.1 On Certificate No. 10 in the amount of R 1,363,843.09 from 22 October 2018 until date of final payment;

1.2 On Certificate No.11 in the amount of R 791,755.97 from 27 October 2018 until date of final payment;

1.3 On Certificate No.12 in the amount of R 816,909.76 from 22 October 2018 until date of final payment;

2. The Respondent is ordered to pay the costs of the application."

[2] On 18 June 2020 leave was granted to the applicant to file the duly signed and commissioned confirmatory affidavits of two witnesses as annexures to the applicant's replying affidavit.

[3] Mr Jacobus Greeff, a director of the applicant, avers that the parties entered into an agreement to see to the execution of works after the Setsoto Municipality ("the municipality") awarded a public tender to the respondent company Isa and Partners (Pty)Ltd for the rendering of services in respect of the design and construction for the upgrading and re-alignment of its Van Solen Sewage Pipeline in the Ficksburg/Meqheleng area. The physical construction work on the pipeline was subcontracted by the respondent to the applicant, Pro-Care Contracting (Pty) Ltd. The deponent avers that the agreement between the parties is embodied by the General Conditions of Contract for Construction Works (2nd Edition,2010) ("the GCC") and the contract data which consisted of a letter of the appointment (dated 4 August 2017) and a bill of quantities (including the pricing data). The applicant performed in terms of the said agreement. Nine payment certificates were submitted up to August 2018 which were all paid. The parties agreed that applicant would perform further works which did not form part of the initial bill of quantities. Applicant annexed three electronic mails which consisted of further instructions and a further bill of quantities. In terms thereof the applicant submitted three further payment certificates being the certificates the applicant now seeks to enforce and which respondent refuses to pay.

[4] The respondent through its managing director Mr Christopher Nganga Kimaru avers that an official or "valid" payment certificate issued by the respondent contains the respondent's letterhead and bears his original signature. Such a certificate is only issued after the respondent evaluated the applicant's statement and verified that all amounts claimed and all previous payments and penalties are deducted. A valid certificate is then issued to the municipality and the applicant is supplied with an e-mailed copy thereof. This document is then used by the applicant to generate what is described as a concept payment certificate. The applicant in turn submits this concept certificate to the respondent together with its monthly statement as contemplated by the contract. Respondent would then evaluate the statement, the calculation sheet as signed by both parties and the concept certificate and confirm that the amounts claimed are correct, then make the necessary deductions and give validity to the concept certificate by putting it on the respondent's official letterhead whereafter the deponent signs it. He then denies

that any of the certificates relied upon were approved by the respondent nor clothed with any validity as none of the certificates

were issued having followed the prescribed process. The deponent denies that any of the certificates bears the respondent's letterhead

or his signature. In amplification of his denial he avers that all three certificates bear the same date of issue, namely 17 May 2018. In fact, their purported date of issue predates the last valid certificate being Certificate No 8 (annexed to his affidavit) which was issued in June 2018, and the date of valuation on each of the certificates predates the date of valuation of the said Certificate No 8 which was likewise in June 2018. He concludes that the disputed certificates therefore do not give rise to any contractual liability on the part of the respondent.

[5] In its replying affidavit the applicant insisted that the payment certificates were approved payment certificates and conceded that the payment certificates did not bear respondent's letterhead nor was signed by the managing director of respondent. It is averred that the format constituted the agreed format for payment certificates and that respondent made payments on previous certificates which did not bear the signature of the managing director nor the letterhead of the respondent.

[6] To adjudicate the application settled law prescribes the process I am to follow. The applicant approached court by way of motion proceedings and seeks final relief in the form of judgment in money against respondent. The factual disputes are therefore to be adjudicated on the principles laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E — 635C). In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at paragraphs [12] it was stated:

"Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers..."

[7] In applying the test that I have to, it seems to me that the respondent disputes the very basis of the applicant's cause of action, namely the validity of the certificates. Respondent denies having confirmed or signed the certificates. If I cannot reject the respondent's version as being far-fetched or palpably false, the application cannot succeed. The written memorandum entered into between the parties prescribes that applicant shall deliver to the engineer a monthly statement for all amounts he considers to be due to him and prescribes that the engineer shall, by signed payment certificates issued to the employer and the contractor, certify the amounts he considers to be due to the contractor. Clause 6.10.1 of the GCC prescribes that the amount due to the applicant are to be certified by way of a signed payment certificate issued by the respondent. It would appear therefore that the version of the respondent is supported by the formal agreement between the parties. I can see no reason how I can reject the respondent's version on the papers to be far-fetched or palpably false. The allegation by the applicant that the respondent paid other payment certificates without having signed them in my view cannot assist the applicant to obtain

judgment

where the certificates in casu are in dispute. Even if it should have carried some weight, it carries insufficient thrust to reject the respondent's version as far as the contested certificates are concerned. Differently said, even assuming that respondent might

have paid other unsigned certificates, it does not proof the validity of the present disputed certificates which on face value do not comply with the agreed terms between the parties nor can respondent's version be rejected simply on that basis.

[8] Having reached the conclusion as aforementioned it is not necessary to deal with any of the other defences raised by the respondent, for example that it was agreed that applicant would only be entitled to payment once respondent has received payment from the municipality, which had not occurred yet at the time of the filing of the papers. I wish to emphasize that the conclusion which I have come to must not be considered as a dismissal of the applicant's claims, having the

effect of res judicata. It must be stressed that I am simply of the view that the relief cannot be granted as there is a dispute of fact which I cannot resolve on the papers applying the mentioned legal principles.

[9] I therefore make the following order:

The application is refused with costs.

C. REINDERS J

For the applicant:

Adv. R. van der Merwe

Instructed by: Badenhorst Attorneys

BLOEMFONTEIN

For the defendant: Adv. W.A. van Aswegen

Instructed by:

Phatshoane Henney Inc

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/ZAFSHC/2021/17.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/pro-care-contracting-pty-ltd-v-isa-unknown-topic-afshc-2021--6a3ea51d3b1caa91298141d3>

Prepared on 11 October 2026 · Esheria