

SOUTH AFRICA / JUDGMENT

Vharanani Properties (Pty) Ltd v Member of the Executive Council, Department of Human Settlements, Gauteng Provincial Government (25110/2021) [2022] ZAGPPHC 388 (1 June 2022)

[2022] ZAGPPHC 388

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

25110/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 25110/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

Date:

1 June 2022

In

the matter between: VHARANANI
 PROPERTIES (PTY)
 LTD
 APPLICANT
and
 MEMBER
 OF THE EXECUTIVE COUNCIL,
 DEPARTMENT
 OF HUMAN SETTLEMENTS,
 GAUTENG
 PROVINCIAL GOVERNMENT
 RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant claims payment of amounts based on two payment certificates. It is not in dispute that the payment certificates are liquid documents. The respondent disputes liability based on three defences – (i) a ‘dispute’ exists on payment certificate 273 that first has to be adjudicated; (ii) an ‘issue with tax invoice 528 in relation to payment certificate 273; and (iii) a plea that payment certificate 295b relates to interest in the alleged late payment of the amount claimed in payment certificate 273.

Common cause facts

[2] The applicant (Vharanani) and the respondent (the Department) concluded a signed written agreement (the building contract) in terms whereof the applicant was appointed to construct low cost housing and rental units in Nellmapius, Extension 22, Heartherly East, Pretoria. The building contract is regulated by NEC 3 Engineering and Construction Contract (June 2005 with amendments) with the conditions of contract being the core clauses for main Option B: Priced contract with bill of quantities, dispute resolution Option W1.

[3] In terms of the building contract:

i. The Department appointed a project manager, K Ntshumaelo - Lekwa Consulting Engineers (Lekwa);

ii. Vharanani is entitled to progress payments during the execution of works;

iii. The project manager is to assess the amount due at each assessment date, and is to certify a payment within one week of the assessment date;

iv. The Department is to make payment of certified amounts within four weeks of the assessment;

- v. If a certified payment is late, or if the project manager does not issue a certificate which he should issue, interest is paid on the late payment;
 - vi. Interest is assessed from the date by which the late payment should have been made until the date when the late payment is made, and is included in the first assessment after the late payment is made;
 - vii. If an amount due is corrected in a later certificate either-
 - by the project manager in relation to a mistake or a compensation event
 - or
 - following a decision of the Adjudicator or the tribunalinterest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified;
 - viii. Interest is calculated on a daily basis at 2% per annum above the prime lending rate and is compounded annually;
 - ix. No change to the contract, unless provided for by the conditions of contract, has effect unless it has been agreed, confirmed in writing and signed by the parties;
 - x. The project manager issues his certificates to the employer and the contractor. The supervisor issues his certificates to the project manager and the contractor.
- [4] As the project progressed, the project manager issued payment certificates at regular intervals.

The applicant's case

Payment certificate 273

- [5] The applicant avers that the project manager issued payment certificate 273, certifying the amount of R5 232 349.14 as being due and payable, on 25 July 2018. A copy of the payment certificate forms part of the annexures to the founding papers. The Department was obliged to make payment within 4 weeks of the assessment, failing which interest would accrue. The Department failed to make payment by 22 August 2018, as it was, according to Vharanani, obliged to do.
- [6] It is apposite to note at this point that the bundle of documents uploaded by the applicant also reflects that Vharanani issued two tax invoices on 25 July 2018. They contain the same reference 'CERT273'. The first invoice with number 482 reflects the amount of R5 232 349.14. The word 'cancelled' is, however, written in hand on this invoice. A second tax invoice with invoice number 528 reflects the amount of R3 915 363.32 as due and owing.

- [7] On 12 November 2018 the Department made payment of an amount of R3 915 363.32. On 22 May 2019 Vharanani's attorney demanded payment of the outstanding amount. On 31 May 2019 the Department admitted liability for the amount of R1 316 985.82 but stated that a revised reduced invoice and a permission from the service provider were to be provided before payment could be effected. A reduced tax invoice was submitted to the Department, but no payment was forthcoming. The revised tax invoice dated 30 August 2018 wherein the amount due and owing is reflected as R1 316 985.82, reflects the reference 'CERT 295'. On 10 February 2021 a further demand was made for payment.
- [8] Vharanani claims that it executed the work in respect of which the progress claim was made. Payment of the amount of R5 232 349.14 had been certified by the project manager in accordance with the building contract. It complied with its obligations in terms of the building contract and no lawful reason exists for the Department not to have made payment. In the result, Vharanani contends that it is entitled to the following in terms of the payment certificate 273:

i. Payment of R 1 316 985,82

ii. Interest on the said amount from 23 August 2018 to date of payment;

iii. Interest on the amount of R3 915 363.32 from 23 August 2018 to 12 November 2018 calculated on a daily basis at 2% per annum above the prime lending rate and compounded annually in the amount of R105 220.58

Payment certificate 295b

- [9] On 1 June, alternatively on 3 June 2020, the project manager issued payment certificate 295b certifying the amount of R537 862.20 as due and payable by the Department. The Department was obliged to make payment by 1 July 2020 failing which interest would accrue. Despite demand, no response was received from the Department prior to the filing of the notice of motion. Vharanani claims that it is entitled to payment of the said amount of R537 862.70 and interest thereon from 2 July 2020 to date of payment.

The respondent's answer

- [10] The Department raised a point in limine. It avers that the application is premature and that Vharanani was first supposed to lodge 'the dispute' with the adjudicator in terms of the dispute resolution clause contained in the building contract.
- [11] In regard to payment certificate 273, the Department admits that the payment certificate was signed by the project manager for R5 232 349.14. The respondent states in the answering affidavit that it 'did not' dispute the amount claimed by the applicant. It is necessary to have regard to paragraph 18 of the answering affidavit as it stands:

‘The department did not dispute the amount claimed by the applicant. The respondent contend that the amount claimed by the applicant is not payable to the applicant seeks that this application be dismissed with costs.’ (sic.)

[12] I pause to state that it was not submitted during argument that the content of paragraph 18 of the answering affidavit contains a typographical error. The respondent, however, attempts to provide an explanation for why only the amount of R3 915 363.32 was paid. A contextual reading of the answering affidavit indicates that the respondent disputes that the amount of R5 232 349.14 was due and owing, albeit that the dispute resolution process provided for in agreement, was not followed. It is logical that where

parties can solve a dispute amicably it is not necessary to refer a dispute to the Adjudicator.

[13] It is stated in the answering affidavit that although the amount of R5 232 349.14 was certified as due and payable in terms of payment certificate 273, the amount was disputed by the respondent and this dispute was communicated to the applicant. The amount was then, so it is stated, by agreement reduced to an amount of R3 915 363.32. The project manager issued a revised payment certificate on 8 October 2018. Vharanani also submitted a tax invoice for payment of the lesser amount, although this invoice predates October 2018 as it is dated 25 July 2018. The amount was paid to the applicant on 12 November 2018. The respondent avers that this does

not constitute a late payment since the correct payment certificate was only submitted on 8 October 2018. I pause to mention that no amended payment certificate was attached to the answering affidavit. The document that was attached is evidently not a payment certificate and seems to be an internal document, although the letter sent by the project manager dated 8 October 2018 reflecting that as far as payment certificate 273 is concerned the amount of R3 915 363.33 is certified, was belatedly filed.

[14] The respondent admits that it is liable for payment of the amount of R1 316 985.82 to Vharanani. However, the respondent submits a new payment certificate had to be issued certifying the amount as due and payable, and a new invoice ‘based on PC 273 for the amount’ had to be submitted. The answering affidavit is not clear as to whether the Department only wanted a new tax invoice to be submitted, or a new payment certificate. The respondent claims that Vharanani never formally submitted an invoice

for the outstanding balance on payment certificate 273. The respondent asserts that as an organ of state its finances are governed in terms of the Public Finance Management Act

[15] The Department disputes that it is liable to pay the amount reflected in payment certificate 295b on the basis that the amount claimed is the interest in the alleged late payment of the amount claimed in payment certificate 273.

The applicant’s reply

- [16] Vharanani denies in reply that any dispute exists which is capable of being referred to adjudication because the matter before the court does not relate to any of the types of disputes identified in the Adjudication Table of the agreement. Vharanani's cause of action is premised upon its entitlement to be paid outstanding monies arising from the Department's failure to honour its payment obligations in terms of the contract. Vharanani explains that the Department's payment obligation does not arise from a tax invoice or cease due to lack of a tax invoice, but arises from a payment certificate issued by the project manager.
- [17] Vharanani denies any agreement to claim a reduced price in terms of payment certificate 273. It also submits that annexures MME1 and MME2 do not reflect payment certificates at all and points out that no document dated 8 October 2018, as referred to in the answering affidavit, is attached to the answering affidavit. I pause to note that the respondent sought permission to belatedly upload a document that ought to have formed part of the answering affidavit. I ruled that the document may be uploaded, accepting it provisionally, for me to peruse it before I make a ruling on its admissibility. The respondent's attorney of record failed to upload this document and it was only uploaded on 23 May 2022 by the applicant's attorneys of record after an enquiry from my office.
- [18] After perusing the letter I am admitting it into evidence. The letter was referred to in the answering affidavit but not attached to the answering affidavit. Counsel for the applicant's had sight of the letter prior to it being handed up to the court. He contends that it should not be accepted into evidence because Vharanani did not have an opportunity to respond thereto. Vharanani, however, did not request that it wanted time to respond to the letter in the event that it is accepted into evidence. Although principles of procedure are necessary to ensure that a hearing is fair, court proceedings are not constituting a chess game where one party inevitably gains from another's mistake. The applicant's attorneys of record likewise, inadvertently, neglected to upload one page of the building contract.
- [19] As far as payment certificate 295b is concerned, Vharanani contends that the Department erroneously avers that the amount claimed in payment certificate 295b is the 'interest in the alleged payment of the amount claimed in PC 273 submitted in 2018'. Payment certificate 295b relates to continuous late payments made by the Department on 'almost a monthly basis ranging from payment certificate 25 to payment certificate 239 as is evident from the letter dated 18 June 2019 referred to by the project manager in annexure 'DM9' to the founding affidavit.

Discussion

- [20] Construction and building contracts are contracts that are used within the complex construction and building environment. These contracts are generally based on standard form contracts. Written agreements are concluded specifically to stipulate and regulate the obligations of the parties thereto. It provides certainty as to what parties can expect from each other.

[21] The contract concluded between the parties provides a specific process and timeframe within which payment was to be effected. The project manager has to assess the amount due at an assessment date. Assessments should be done at regular intervals as provided for in the contract. In assessing the amount due, the project manager has to consider applications for payment by Vharanani that was submitted on or before the assessment date. The contract provides for the correction of any wrong assessment but it is important to note that while assessments occur at intervals,[1] the project manager must certify payments within one week of each assessment date, and certified payments are to be made within four weeks of the assessment date. Wrongly assessed amounts are corrected in later payment certificates. Where late payments are made interest is paid on the correcting amounts but is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified, and is included in the assessment which includes the correcting amount.

(i) Dispute resolution

[22] NEC 3 provides for the resolution of disputes. It is stated in clause W1.1 that a dispute arising under or in connection with this contract is referred to and decided by the Adjudicator. W1.3 states that disputes are notified and referred to the Adjudicator in accordance with the Adjudication table. The Adjudication Table provides the timeline within which an identified party may refer a specific type of dispute to the Adjudicator. For example:

(Find table in PDF)

[23] Provision is made in the Adjudication Table for a dispute about “any other matter” that is not specifically identified in the Table, by “either party” between two and four weeks after notification of the dispute to the other Party and the Project Manager.

[24] The Department alleges that a dispute existed that should have been referred to the Adjudicator. The issue raised regarding disputes is dual in nature. The first nuance thereof is whether a dispute existed that Vharanani had to refer to the Adjudicator. A reading of the papers does not point to the existence of a dispute that had to be adjudicated by the Adjudicator. The facts point to certified payment certificates that were not paid by the Department in terms of the contract. Although the Department frequently refers to the existence of numerous disputes that caused it to question payment certificates and to withhold payment because of the disputes, the averments are made in general and without any substantiation. If any such disputes did exist, those are the kind of disputes that had to be referred for adjudication by the Department if the parties could not resolve it inter partes. The applicant did not err in approaching the High Court for the relief it seeks in this application.

(ii) Payment certificate 273

[25] Having said that, on a reading of the papers as a whole, it is evident that the first certification under payment certificate 273 in the amount of R5 232 349.14 was not followed through despite payment certificate 273 being a liquid document. The documents filed by Vharanani indicates that two tax invoices with different invoice numbers were issued on the same date, both referencing payment certificate 273. The first, reflecting the amount due and owed as R5 232 349.14 contains the word 'cancelled'

wrote on it, and the second was issued for the amount of R3 915 363.32. These documents provide credence to the respondent's

version that the respondent disputed the amount of R5 232 349.14 reflected in payment certificate 273 and that the parties subsequently agreed that an amount of R3 915 363.32 was due and payable under the payment certificate. An additional factor that substantiates this finding is the fact that the invoice dated 30 August 2018 wherein the amount of R1 316 985.82, that is the balance of the initial amount of R5 232 349.14, is indicated as due and payable, contains a reference to a different payment certificate, namely 'CERT 295'.

[26] Despite the fact that no amended payment certificate 273 is before the court, and in the absence of a further written agreement between the parties, the documents filed speaks for itself. On my interpretation of the facts, Vharanani is, however still entitled to claim interest on the late payment of the amount of R3 915 363.32 calculated from the date of certification of the incorrect amount, the date being 25 July 2018 to the date when the correcting amount was certified. The project manager provided the respondent with an amended payment certificate on 8 October 2018. Vharanani is thus, in terms of clause 51.3 of the agreement entitled to interest on the amount of R3 915 363.32 calculated from 25 July 2018 to 8 October 2018. The amount was paid within the prescribed

four weeks after receipt of the project manager's letter dated 8 October 2018 which refers to a payment certificate annexed to it, and in that sense the payment on 12 November 2018 cannot be regarded as late payment. The respondent is wrong in alleging that the obligation to pay the amount of R3 915 363.32 first arose on 8 October 2018. Such a view does not discount clause 51.3 of the agreement.

[27] The respondent admits the obligation to pay the amount of R1 316 985.82. Although Vharanani contends in the founding affidavit that the obligation to pay arose from payment certificate 273, this contention is not substantiated by the fact that Vharanani issued a tax invoice for this amount under the reference of a different payment certificate, namely 'Cert 295'. Neither of the parties provided the court with payment certificate 295. A dispute of fact exists as to when this amount became due and payable. An applicant must make out its case on the papers filed and the uncertainty that exists regarding the time at which the amount of R1 316 985.82 became due and payable, renders it impossible for a court on motion proceedings to determine the date from which interest started to accrue.

[28] The papers filed of record reflect that the project manager amended payment certificate 273 instead of addressing any errors or disputes in a subsequent payment certificate as the contracts prescribes. In a situation, where an applicant's papers provide substantiation for the respondent's version that a dispute arose and that the parties agreed, albeit not in writing, that the amount reflected in the payment certificate (payment certificate 273) be amended, the applicant cannot rely on the terms of the contract its own conduct contradicts. This issue, can be separated from the remainder of the issues that can be determined on motion.

(iii) Payment certificate 295b

[29] As for the amount claimed in terms of payment certificate 295b, the respondent avers that the amount claimed represents the interest owed for late payment in terms of the original payment certificate 273. Vharanani replies and submits that this submission is not correct and that it refers to interest on late payments of which the respondent was already alluded to in correspondence dated 22 January 2018. This date predates the original payment certificate 273. A proper case is made out in this regard.

ORDER

In the result, the following order is granted:

1. The respondent is ordered to make payment to the applicant of the following amounts:
 - 1.1. R1, 316 985.82 (One million three hundred and sixteen thousand nine hundred and eighty-five rand and eighty-two cents);
 - 1.2. The claim for interest on the aforesaid amount is separated from the remainder of the issues and referred to oral evidence as provided for in paragraph 2 below;
 - 1.3. R 537 862.70 (Five hundred and thirty-seven thousand eight hundred and sixty-two rand and seventy cents);
 - 1.4. Interest on the amount of R537 862.70 is calculated on a daily basis at 2% per annum above the prime lending rate and compounded annually from 2 July 2020 to date of payment;
 - 1.5. Interest on the amount of R3 915 363.32 is calculated on a daily basis at 2% per annum above the prime lending rate and compounded annually as from 25 July 2018 to 8 October 2018.
2. The issue of the claim for the payment of interest on the amount of R1, 316 985.82 (One million three hundred and sixteen thousand nine hundred and eighty-five rand and eighty-two cents) is referred to oral evidence before Van der Schyff J at a date and time arranged with her Registrar, unless the parties settle the issue inter partes.
 - 2.1. The evidence shall be that of any witness whom the parties may elect to call, subject to what is provided in 2.1. 2 – 2.1.5 below;

- 2.1.1. The applicant is to serve on the respondent at least fourteen days before the date arranged for the hearing a statement wherein the evidence to be given in chief by the intended witnesses is set out;
- 2.1.2. The respondent is to serve on the applicant at least ten days before the hearing a statement wherein the evidence to be given in chief by the intended witnesses is set out;
- 2.1.3. The court, at the hearing, may permit any person to be called despite the fact that no statement has been served in respect of his or her evidence;
- 2.1.4. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not;
- 2.1.5. No party shall be obliged to call any witness even though such witness was subpoenaed;
- 2.2. Within 10 days of the date in this order, each of the parties shall make discovery on oath of all documents relating to the issue referred to paragraph 2 above, which are or have been at any time in the possession or under the control of such party;
- 2.3. Such discovery shall be made in accordance with rule 35 and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative;
- 2.4. The issue of costs incurred as a result of the referral of the issue to oral evidence shall be determined after the hearing of oral evidence.
3. The respondent is to pay the costs incurred to date, inclusive of the costs of senior counsel where so employed.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant: Adv. L.J. van Tonder SC

Instructed by:

Tiefenthaler Attorneys Inc.

For the respondent:

Adv. T. C. Lithole

Instructed by:

State Attorney

Date of the hearing:

16 May 2022

Date of judgment:

1 June 2022

[1] Clause 50.1 provides- ‘The Project Manager assesses the amount due at each assessment date. The first assessment date is decided by the Project Manager to suite the procedures of the Parties and is not later than the assessment interval after the starting date. Later assessment dates occur: · At the end of each assessment interval until four weeks after the Supervisor issues the Defects Certificate and · At Completion of the whole of the works.’ The assessment interval is stipulated in the Contract date as ‘ between 12:00 hours on the 20th day of each successive month’.

[1] Clause 50.1 provides- ‘The Project Manager assesses the amount due at each assessment date. The first assessment date is decided by the Project Manager to suite the procedures of the Parties and is not later than the assessment interval after the starting date. Later assessment dates occur:

· At the end of each assessment interval until four weeks after the Supervisor issues the Defects Certificate and

· At Completion of the whole of the works.’

The assessment interval is stipulated in the Contract date as ‘ between 12:00 hours on the 20th day of each successive month’.

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