



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NO: HCAA03/2024

CASE NUMBER: A5472/2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

14/03/2025
Date

Signature

In the matter between:

MIDIRO CIVILS AND CONSTRUCTION CC

First Appellant

LEBAKA CONSTRUCTION (PTY) LTD

Second Appellant

And

ENGINEEREX (PTY) LTD

First Respondent

COLLINS CHABANE LOCAL MUNICIPALITY

Second Respondent

JUDGMENT

NGOBENI J

INTRODUCTION

[1] This is an appeal against an order made by Naude-Odendaal J (court *a quo*), in which the court dismissed the application by the appellants (Contractor/JV) in which the appellants sought an order that the first respondent (Engineer/Engineer) be ordered to immediately sign and issue payment certificate number 15 under contract number TLM29/2015/2016 for R17 165 134-00, which was for the upgrading of the Xikundu Ring Road Project from gravel to tar. Leave to appeal was granted by the court *a quo* to the Full Court of the Limpopo Division of the High Court, Polokwane. The first respondent is not opposing the appeal, and has decided to abide by the decision that this court would arrive at. The second respondent (Employer) is opposing the appeal.

GROUND FOR APPEAL

[2] The appellants submit the following as grounds for appeal:

- (a) That the court erred in finding that the relief sought by the applicants (appellants in this court) negates rather than enforcing the specific provisions of the contract. The court erred in finding that the Engineer has a discretion as to the amount that he considers due despite the lapse of the period of 7 days for submission of the claim,
- (b) The court should have found that in terms of clause 6.10.1, the Engineer had an obligation to certify. In terms of clause 6.10.4, the Engineer should have, within 7

days, delivered to both the applicants and the Employer an issued payment certificate,

(c) The court erred in finding that the certification process served as a jurisdictional requirement in light of the relief sought by the applicants,

(d) The court should have found that the applicants became entitled to certification after the lapse of a period of seven days after the delivery of its account to the Engineer.

FACTS

[3] The facts that led to the granting of the order by the court *a quo* was that the appellants who operated as a joint venture were awarded a contract for the upgrading of the Xikundu Ring Road from gravel to tar by the second respondent, who was the Employer. The period of implementation of the contract was 08 July 2016. The first respondent was appointed as the Engineer by the second respondent. The functions of the Engineer are succinctly outlined in clause 3 of the General Conditions of Contract for Construction Works, second edition, 2010 (GCC)¹. The engineer basically served as the agent for the Employer.

[4] It was agreed between the Employer and the JV that all communication regarding the contract will be through the consultant or agent, being Engineerex Consulting Engineers (PTY) LTD/Engineer, who would also supervise the project of the tarring of the Xikundu

¹ Volume 1 of 5, pages 35 – 101.

Ring Road, and that is according to clause 1 of the Service Level Agreement for Construction of the Xikundu Ring Road (SLA)² which was entered into between the parties.

IN ISSUE

[5] The dispute between the parties is on payment of the amount of R17 165 134 (including vat), which is claimed by the appellants for the work done as per contract number TLM29/2015/2016 (contract). Clause 6.10 of GCC³ provides on how issues of payment should be dealt with after the contractor would have delivered its monthly statement for payment. Clause 6.10 of GCC states that:

“...the Contractor...shall deliver to the Engineer a monthly statement for payment of all amounts he considers to be due to him (in such form and on such date as may be agreed between the Contractor and the Engineer, or failing agreement, as the Engineer may require) and the Engineer shall, by signed payment certificates issued to the Employer and the Contractor, certify the amount he considers to be due to the Contractor, taking into account the following:

“6.10.1.1 The estimated value of the Permanent Works executed and calculated in terms of the Contract up to the date of the Contractor’s said statement,

...

² Volume 1 of 5, pages 27 – 34.

³ Volume 1 of 5, page 73.

6.10.4 The Engineer shall deliver to the Employer and the Contractor the payment certificate referred to in Clause 6.10.1 within 7 days of the receipt by the Engineer of the Contractor's said statement. Any dissatisfaction in respect of such payment certificate shall be dealt with in terms of Clause 10.2. The Employer shall pay the amount due to the Contractor within 28 days of receipt by the Employer of the payment certificate signed by the Engineer. Payment shall be subject to the Contractor submitting a tax invoice, if required by law, to the Employer for the amount due" ⁴.

[6] The argument by the Employer and the Engineer is that the Engineer cannot issue a payment certificate (certificate) as the Contractor did not perform the work as was required, or simply put the Contractor did not finish the work that it was supposed to perform according to the contract. Clause 6.10.1 of GCC makes provision for the Engineer to certify the amount he considers to be due to the Contractor, taking into consideration, amongst others the estimated value of the permanent works executed according to the contract. The Engineer is therefore not inclined to issue a certificate according to the monthly statement of the Contractor, if there was no performance by the Contractor.

[7] The submission by the Contractor is that the Engineer is supposed to issue a certificate according to the work that the Contractor has performed, irrespective of the extent to which the Contractor performed. The fact that the Contractor did not finish the work as per the contract is not a factor that can bar the Engineer to issue a certificate. If no work is done at all, the Engineer can even issue a payment certificate of R0-00, depending on what statement for payment would have been submitted by the Contractor.

⁴ Volume 1 of 5, page 74.

TERMS OF THE CONTRACT

[8] It is important to outline the operation of the terms of the SLA and GCC in relation to the performance in relation to the different roles of the Employer, the Engineer and the Contractor to be able to deal with this Appeal properly.

Clause 6.10.4 of GCC provides as follows:

"The Engineer shall deliver to the employer and the Contractor the payment certificate referred to in Clause 6.10.1 within 7 days of the receipt by the Engineer of the Contractor's said statement. Any dissatisfaction in respect of such payment certificate shall be dealt with in terms of clause 10.2. ..."

[9] If the Employer after receiving the payment certificate is dissatisfied with it, the remedy of the Employer is in clause 10.2 of GCC, which is titled "Dissatisfaction claim" which provides that:

"10.2.1 In respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of clause 10.1, the Contractor or the Employer shall have the right to deliver a written dissatisfaction claim to the Engineer..."

"10.2.2 If in respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of Clause 10.1, the Contractor or the Employer fails to submit a claim within 28 days after the cause of dissatisfaction, he shall have no further right to raise any dissatisfaction on such matter".

[10] It is imperative for the sake of completeness to understand as to whom is the "Dissatisfaction claim" submitted or lodged with. Clause 10.2.2. of GCC makes provision for that and states the following:

"10.2.2 If, in respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of Clause 10.1, the Contractor or the Employer fails to submit a claim within 28 days after the cause of dissatisfaction, he shall have no further right to raise any dissatisfaction on such matter".

[11] In the preceding paragraphs mention is made of clause 10.1, and for the sake of context, it is enough to mention that the said clause deals with how the Contractor lodges its claim, and the steps that the Contractor must take in lieu of completing the work according to the contract on time.

APPLICATION IN THE COURT A QUO

[12] The application that came before the court *a quo* was to request the court *a quo* to order the first respondent (Engineerex (PTY) LTD) to issue payment certificate 15. The letter quoted in the founding affidavit from the first respondent shows that the first respondent visited the site and found that work had not been done on site for a period of one week because of non-payment to the labourers. On 11 June 2018 the JV cancelled the contract, and in this application as stated in the founding affidavit the JV seeks specific performance as per the contract, not seeking damages arising out of the contract.

[13] The application in the court *a quo* was straightforward in that the JV sought payment for the work done, if any, the basis being the issuance of the payment certificate. The Contractor is according to clause 6.10, simply to deliver to the Engineer a monthly statement for payment of all amounts the contractor considers to be due to him, and after such submission the Engineer has to certify the amount he considers to be due to the Contractor, taking into consideration what is stated in clauses 6.10.1.1 to at least 6.10.1.8 of GCC. It is generally accepted in our law that in general, the principle of *pacta sunt servanda*⁵, gives effect to public policy that requires that contracting parties honour obligations that have been freely and voluntarily undertaken⁶.

[14] *Van Huyssteen & Others: Contract, General Principles, 2016*, states on page 55 that a contract is a bilateral juristic act and in the main, liability *ex contractu* is based on the agreement of the parties, and that it is not accepted in our law that an obligation may be created voluntarily by a unilateral act. The Constitutional Court in its judgment in *Beadica*⁷ referred to the affirmation that was made in *Afrox Healthcare Bpk v Strydom*⁸ where the Supreme Court of Appeal explained that courts do not make decisions regarding the enforcement of contractual provisions on the basis of abstract considerations of good faith, reasonableness, fairness, but only on the basis of established legal rules.

⁵ The principle of *pacta sunt servanda* is loosely translated to mean that agreements are to be observed.

⁶ *Beadica 231 CC and Others v Trustees of the Oregon Trust and Others* [2020] ZACC 13, 2020 (5) SA 247(CC).

⁷ *Beadie, Ibid, 6.*

⁸ (172/2001) [2002] ZASCA 73, 2002 (6) SA 21 (SCA).

[15] In the case at hand, there are therefore guidelines which directs the Engineer on how to determine the amount that is owed to the Contractor as per their contract. The Engineer cannot simply just not do anything after the Contractor would have delivered a monthly statement for payment. It might be so that the Contractor did not perform according to the contract, but if a monthly statement for payment has been submitted, it is the basis on which the Engineer must work from. The JV can only submit an invoice for payment to the Employer only after the Engineer would have issued the payment certificate.

[16] The court *a quo* reasoned that the Contractor should have made an application for the Engineer to certify first as to what was due to the Contractor before the Engineer could issue a payment certificate. The court *a quo* erred in that regard, because issuance of a payment certificate is the direct consequence of certification of the amount owed to the Contractor, after a monthly statement for payment would have been submitted by the Contractor. The Engineer is therefore as per clause 6.10.4 of the GCC bound to certify payment after receiving the monthly statement from the Contractor, for whatever amount the Engineer finds certification to be appropriate.

[17] The payment certificate is what gives the Employer the greenlight to pay the amount that would have been certified by the Engineer, after receipt of the invoice from the Contractor, if that is required by law. In the absence of the payment certificate the Employer cannot pay, as the JV will not be able to submit an invoice, hence the application in the court *a quo* was for the order for the issuance of that payment certificate number 15.

[18] Volume 4 of 5 of the bundles of documents presented to this court, from pages 316 to 386, are documents which are titled "Lebaka Tax Invoice pertaining to Contractor's Progress Payment Certificate No. 15. The first page of the bundle being page 316 is dated 31/07/2018, and it is certified correct by the Contractor. There is a block next to where the Contractor signed which needs certification by client for payment, but it is blank with no signature. There are therefore documents available to determine the work done by the Contractor which would then allow for payment certificate number 15 to be issued by the Engineer, for whatever amount the Engineer deems fit.

[19] I'm in no way saying that the Employer must pay according to those documents, but all what I'm saying is that there were documents that were submitted to the Engineer to determine the payment from. The fact that the client did not sign to certify the payment, could be an indication that the client was not satisfied with the documents, as clearly stated in the answering affidavit of the first respondent. The Engineer had seven days to issue the payment certificate. Thereafter the Employer would have 28 days to deliver a Dispute Notice to the Engineer.

[20] Logic dictates that in the absence of the payment certificate having been issued by the Engineer, there wouldn't be a Dispute Notice, as there wouldn't be any basis for such a written notice. It is therefore imperative that for the process regarding payment to run the Engineer must issue a payment certificate as was expected in terms of clause 6.10.1 of the GCC. If the Employer would want to react to such certificate, provision has been made for the 28 days that is prescribed by clause 6.10.4 of the GCC. That is the point that the court *a quo* missed when dealing with the application.

ORDER

[21] In the result the following order is made:

21.1 The appeal is upheld,

21.2 The order of the court *a quo* is set aside, and replaced with the following:

- (a) Engineerex (PTY)LTD (First Respondent), is ordered to issue a signed payment certificate number 15 to the Employer (Second Respondent) and the Contractor or JV (First and Second Appellants), for the amount the Engineer considers to be due to the Contractor as required by clause 6.10 of GCC, within seven days of the date of this order,
 - (b) The Contractor shall then submit the tax invoice, if required by law, to the Employer for payment, as required by clause 6.10.4 of the GCC,
 - (c) If no dissatisfaction is raised by the Employer within 28 days of the receipt of the payment certificate, the Employer is then ordered to pay according to the invoice submitted, if any, and payment certificate that would have been issued by the Engineer as ordered in (a) and (b) above,
3. No order as to costs.



J.T. NGOBENI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE


I agree, and it is so ordered

G. MULLER



JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE



M. MAKOTI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I agree

Delivered: This judgment was handed down electronically by circulation to the Parties/their legal representatives by e-mail. The date and time for hand-down is deemed to be at 10:00 on 14 March 2025.

APPEARANCES

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