

REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 17452/13

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

.....
DATE

.....
SIGNATURE

In the matter between:

TRENCON CONSTRUCTION (PTY) LTD

Applicant

and

SOUTH AFRICAN AIRWAYS (PTY) LTD

First Respondent

FOCUS PROJECT MANAGEMENT

Second Respondent

JUDGEMENT

CARSTENSEN AJ:

1. The Applicant seeks payment from the First Respondent in the amount of R552 040.38 alternatively, that the Second Respondent be

ordered to issue a final payment certificate in the aforesaid amount.

2. At the outset, both the First Respondent's counsel, Ms H. Mutenga and the Second Respondent's counsel, Ms S Swartz moved for an order that the application be stayed as a consequence of the arbitration clause and that this application be referred to arbitration.
3. I refused the application in the exercise of my discretion and for the reasons given, but in particular that the Respondents had waited until the hearing of the matter to move the application, the First Respondent in fact had sought, at no stage prior to the hearing of the application, for such an order apart from referring the arbitration clause in its affidavit and that in fact, in terms of the arbitration clause, neither of the Respondents had given a notice of dissatisfaction.
4. On the 18th of September 2009 the Applicant and First Respondent had concluded a written construction agreement for the construction of a departure lounge at the OR Tambo International Airport and the Second Respondent was appointed as the principal agent in respect of the works.
5. There was no dispute as to the conclusion or terms of the contract or as to the amount which remained unpaid, as to the Applicant's invoice or that the work reflected on the invoice had been done.
6. It was also conceded by the Applicant that the Second Respondent,

as principal agent, had not issued a certificate of final completion.

7. The Respondents contended that there were defects in the works and these had to be remedied before a certificate of final completion could be issued.
8. It was however, common cause that the defects were not caused by the Applicant, but by a contractor who had preceded the Applicant. The First Respondent pointed out that the appointment of the Applicant followed on the liquidation of the first contractor, T L Steward, which resulted in both the quantity surveyor and principal agent for the project being replaced.
9. At the time when the Applicant took as contractor, the design, manufacture and installation of the shop fronts, now alleged to be defective, had already been done by the previous contractor, T L Steward. The Respondent's contended there were outstanding issues regarding both the design and the glazing of the shop fronts which were not according to the requisite standards.
10. Both the First and Second Respondents argued that the Applicant was not entitled to payment as it had not complied with its obligations, as in terms of the written agreement, particularly clause 8: *"8.2 The contractor shall make good any physical loss and repair damage to the works, including clearing away and removing from site, all debris resulting therefrom, which occurs after the date on which the possession of the site is given and up to the issue of the*

deemed certificate of final completion and resulting from ...”.

11. In terms of clause 8.5 of the agreement, the contract provided “the contractor shall not be liable for the cost of making good any physical loss or repairing any damage of works where this resulted from the following circumstances: ... 8.5.9 design of the works where the contractor is not responsible in terms of 4.0. It was common cause that the Applicant was not responsible for the design of the works in respect of which the Respondents’ complained.
12. The arguments of the Respondents thus critically relied on clause 8.2. There was also no question in my mind that the phrase *“including clearing away and removing from site all debris resulting therefrom”* related to the making good of the loss or repairing the damage and was irrelevant for the purposes of the issue before me.
13. Consequently, 8.2 in my view can be read simply as follows: “The contractor shall make good the physical loss and repair, damage to the works ... which occurs after the date on which possession of the site is given
14. There is no question and neither party contends that the loss or damage occurred after the date on which possession was given to the Applicant.
15. It is indeed common cause that after T L Steward was replaced the Applicant concluded the agreement, namely the JBCC Principle

Building Agreement on the 18th of September 2009, was appointed in terms thereof and took possession of this works as a consequence thereof.

16. I do not agree with either Respondents that it is the Applicant's responsibility, consequently, to make good the loss or repair the damage in question. There is no other provision of the agreement which renders the Applicant liable to repair the defects.

17. It was also argued that the clear intention of the First Respondent was to have the works completed and thus it could not have been intended by the parties that, despite the appointment of the Applicant to complete the works, the Applicant "*could receive payment without the works having been completed*". This argument, however, does not accord with the intention of the parties as appears from the written terms of the agreement. There is also no question that the clause in question is ambiguous.

18. The Applicant argued that the question of the defects is, in light of the provisions of the agreement, in any event irrelevant. This is due to the fact that:

18.1. it was common cause that the Second Respondent had issued a certificate of completion of works on the 1st of February 2012;

18.2. in terms of clause 26.1, the defects liability period being a

90 day calendar day period, had thus commenced on the 1st of February 2012 and terminated on the 2nd of May 2012;

18.3. in terms of clause 26.2, the Second Respondent was required at the end of the defects liability period to inspect the works and issue a certificate of final completion;

18.4. if the Second Respondent was of the view that the works have not reached final completion, then the Second Respondent was obliged forthwith to issue a defects list. No such defects list was issued.

18.5. in terms of clause 26.4 as a consequence of the fact that no defects list was issued, the Applicant notified both parties that there had been a failure to issue a defects list.

18.6. The Second Respondent was then obliged within a further 7 days to issue a defects list. The Second Respondent did not issue any defects list within this further period, or at all.

18.7. Consequently, in terms of clause 26.4, the certificate of final completion is deemed to have been issued and final completion is deemed to have been achieved on that date.

19. Thus, at least, final completion of the works is deemed to have been achieved on the 8th of October 2012 and the certificate of final

completion is deemed to have been issued on that date.

20. Both Respondents argued that it was clear from the e-mails which had passed between the parties over a protracted period of time that all parties were aware of the issues relating to the glazing of the departure lounge. This takes the matter no further in my view.

21. It was not a question as to whether the parties were aware of the defects but the question is what the Applicant was obliged to attend thereto under the contract.

22. It is also clear from the provisions of the agreement that:

22.1. the Applicant was not obliged to make good the loss or repair the damage; and

22.2. final completion had been achieved as a consequence of the deeming provision.

23. It matters not that the Applicant was aware of the defects, as it is quite clear that the Applicant is not liable to repair same which defects occurred prior to the conclusion of the agreement and prior to the Applicant taking possession of the works.

24. Although it was also argued by the Respondents that there was a dispute of fact, there certainly was no dispute of fact on the aspects which are set out above.

25. In the premises, I am satisfied that the Applicant is entitled to the

relief which it seeks particularly in view of the fact that a certificate of final completion is deemed to have been issued.

26. Consequently, I make the following order:

26.1. the First Respondent is ordered to pay the Applicant the amount of R552 040.38 within 10 days from date of this order;

26.2. the First Respondent is ordered to pay the Applicant's costs.

**P L CARSTENSEN
ACTING JUDGE OF THE
HIGH COURT**

HEARD: 15th OCTOBER 2014
DELIVERED: 7th NOVEMBER 2014

COUNSEL FOR APPLICANT: ADV. J BOTH SC
INSTRUCTED BY: GARRATT HUGO & DE SOUZAINC.

COUNSEL FOR 1st RESPONDENT: ADV. H. MUTENGA
INSTRUCTED BY: ADV. S. SWARTZ
MOLOTO STOFIL INC.

(jmt.30.5.13)