

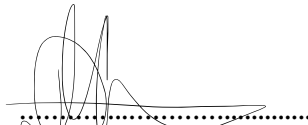
REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2019/28509

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


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SIGNATURE

DATE 8 September 2021

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

QUBEKELA PROJECTS CC

Respondent

In re the matter between:

QUBEKELA PROJECTS CC

Plaintiff

and

EKURHULENI METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

MAHON AJ

[1] This is an application in terms of Uniform Rule 33(4) in which the applicant, the defendant in the main proceedings, seeks:

[1.1] that its special pleas be heard and determined separately, prior to the balance of the issues in the matter; and

[1.2] an order that “... *the hearing of the special plea (sic) may be enrolled on the opposed motion court (sic)*”.

[2] The respondent’s claim in the main proceedings is for payment of an amount of R706 832.81 which is said to be due to the respondent in terms of the provisions of clause 6.8 of the contract concluded between the parties, comprised of the General Conditions of the Contract for Construction Works published by the South African Institution of Civil Engineers (2010) (“the GCC”).

[3] The clause reads, in relevant part, as follows:

“6.8 *Adjustment in rates and/or prices*

6.8.1 *Except as provided in this Clause or elsewhere in the Contract, the rates and/or prices stated in the Pricing Data shall be final and binding throughout the period of contract.*

6.8.2 *If the contract data provides for the application of a Contract Price Adjustment Factor, the value of certificates issued in terms of Clause 6.10.1 (excluding the value of those special materials referred to in clause 6.8.3) shall be increased or decreased by applying a ‘Contract Price Adjustment Factor’ calculated according to the formula and the conditions set out in the Contract Price Adjustment Schedule.”*

- [4] The Contract Price Adjustment Schedule, in turn, makes provision for a formula to be applied to amounts certified to be due to the respondent in terms of any interim payment certificate in order to adjust the amount certified to be due, upwards or downwards, as the case may be.
- [5] The respondent alleges in its particulars of claim that *“the defendant has short-paid the plaintiff the amount of R706 832,81 in respect of CPA due in terms of the construction contract. The calculation of this amount is set out in annexure “B” hereto.”*¹
- [6] Annexure “B” to the particulars of claim purports to set out the respondent’s entitlement to payment of the aforesaid amount by applying the requisite formula to a schedule of amounts alleged to have been certified in a number of interim payment certificates.
- [7] The applicant raises three special pleas, comprised, in essence, of the following:
- [7.1] the applicant contends that the respondent’s claim is premature inasmuch as it has failed to give notice of its intention to institute legal action against the applicant, as contemplated in section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002;
- [7.2] the applicant pleads that the respondent’s claim has been extinguished by prescription as contemplated in section 11(d) of the Prescription Act 68 of 1969 in that its action was instituted more than

¹ Particulars of Claim, par 9.

three years after the date that the respondent acquired knowledge of both the debt and the debtor or ought reasonably to have acquired such knowledge; and

[7.3] The applicant pleads that the respondent is barred from proceeding with its claim by virtue of the provisions of clause 10.3 of the agreement which requires a party to raise an invoice or dispute payment of any outstanding claims within a period of 28-days after completion of work.

[8] Apart from the defences raised in the special pleas, little else remains in dispute in respect of which evidence is likely to be led, apart from the quantification and calculation of the respondent's claim. This quantification and calculation relates to the correct application of an arithmetic formula to the amounts which have been certified as due to the respondent.

[9] It is trite that the overriding consideration when dealing with an application for separation of issues under Uniform Rule 33(4), is the question of convenience to both parties and to the Court.²

[10] The thrust of the applicant's argument, as I understood it, was that the proposed separation would lead to the expeditious finalisation of the matter with the concomitant curtailment of legal costs if any of the special pleas were to be upheld. This is, of course, true, as it would be in every case where a special plea is raised which is dispositive of the matter. However, a consideration of

² See *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D); *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C);

convenience arising from a separation of issues is to be adjudged, as I see it, in the light of the comparison of consequences which would flow from a dismissal of the special pleas on the one hand and the eventuality of the special pleas being upheld, on the other.

[11] Thus, a convenient point of departure, in my view, is to consider the likely extent of time and costs which would be saved in the event of a separation of the special pleas and their ultimate success, when compared with the time, costs and delay, which would follow in the event of a separation of the special pleas but with their eventual dismissal. I consider this to be an appropriate starting point in the present matter primarily because of what I understand the balance of the issues to be which would remain in dispute in the event that the special pleas are not upheld.

[12] On this score, counsel for both the applicant and the respondent indicated that what would remain for determination in such event was confined, in essence, to the quantification of the respondent's claim. As I have previously observed, the quantification of the respondent's claim is arrived at by application of a contractually stipulated formula to be applied to amounts certified to be due by the applicant to the respondent in a series of interim payment certificates tabulated in annexure "B" to the particulars of claim. It is largely an arithmetic exercise.

[13] Both the applicant and the respondent submitted that a hearing devoted to this aspect of the matter would occupy relatively little hearing time.

[14] The applicant submitted, however, that the real benefit in seeking the separation was to have the special pleas dealt with by way of motion proceedings, thereby

procuring a hearing date sooner than would otherwise be achievable if the matter were to proceed by way of action proceedings. It was for this reason that the applicant sought, in prayer 2 of its notice of motion, that the separated issues be disposed of by way of motion. The respondent's counsel indicated, however, that the respondent intended to lead *viva voce* evidence in relation to the special pleas, a right of which it would clearly be deprived if I were to direct that the special pleas were to be dealt with by way of motion proceedings.

[15] Nonetheless, it appears to me that very little advantage is to be gained from the separation which is proposed because very little hearing time in relation to the balance of the issues which are not sought to be separated would be avoided if the special pleas were upheld.

[16] If the special pleas were to be dismissed on the other hand, the parties will have been subjected to a number of months' delay in the finalisation of the matter as a result of the delay in procuring a trial date after the special pleas had been dealt with.

[17] I am also mindful of the following *dictum* of Nugent JA in *Denel (Edms) Bpk v Vorster*:³

"In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discreet. And even where the issues are discreet, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the

³ 2004 (4) SA 481 (SCA) at 485A–B

matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.”

[18] It appears to me that if one were to weigh the relatively nominal saving in hearing time (and I say relatively nominal because the parties are *ad idem* that very little evidence will be required in order to deal with the quantification of the respondent's claim) against the rather extensive delay in finalisation of the matter in that event, it would not be convenient to grant the proposed separation. Whilst it may be true that expert evidence may be required in relation to the quantification of the respondent's claim, both parties, again, submitted that the extent of such evidence would be relatively nominal. Although there may be additional costs associated with the preparation of expert summaries and the like, these do not seem to be significant enough to warrant the risk of a significant delay in the finalisation of the matter due to the wait for a trial date.

[19] Therefore, on a consideration of the issues which arise from the pleadings of the matter, I do not believe that it would be convenient to direct that the special pleas be determined separately or prior to the balance of the issues in the matter.

[20] I accordingly make the following order:

[20.1] The application dated 2 July 2020 is dismissed with costs.



D MAHON

Acting Judge of the High Court
Johannesburg

APPEARANCES:

For the applicant: Adv M Makgato

Instructed by: Madhlopa & Thenga Incorporated

For the respondent: Mr S Bunn (Attorney)

Instructed by: Hewlett Bunn Incorporated

Date of hearing: 7 September 2021

Date of judgment: 8 September 2021