



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **4204/2019**

In the matter between:

RAUBEX CONSTRUCTION (PTY) LTD

Applicant

and

PHUMELELA LOCAL MUNICIPALITY

1st Respondent

**THE MINISTER OF THE DEPARTMENT OF
WATER AND SANITATION**

2nd Respondent

CORAM: JP DAFFUE, ADJP

HEARD ON: 28 NOVEMBER 2019

JUDGMENT BY: JP DAFFUE, ADJP

DELIVERED ON: 28 NOVEMBER 2019

I INTRODUCTION

- [1] A construction company submitted a tender on invitation by a Local Municipality for the construction of the Cornelis River Dam and Appurtenant works. On 30 September 2016 the tender was awarded to it by the Municipality and the contract works commenced on 31 October 2016. On 22 July 2019 the Municipality's agent, the engineering company, RudNat, issued a final approval certificate to the construction company. Notwithstanding this, the Municipality fails to make payment to the construction company of certain retention monies.

II THE PARTIES

- [2] The parties are Raubex Construction (Pty) Ltd, herein represented by Adv JJ Buys, duly instructed by L&V Attorneys.
- [3] The respondent is Phumelela Local Municipality, herein represented by Adv SS Jonase, duly instructed by Ponoane Attorneys, Bloemfontein.
- [4] The Minister of the Department of Water and Sanitation was cited as an interested party. The Minister filed a notice that he/she will abide by the decision of the court.

III THE RELIEF CLAIMED

- [5] Applicant seeks payment of payment certificates 29 and 30 in the amounts of R2 131 421.41 and R3 197 132.12 respectively

together with interest and costs on an attorney and own client scale.

IV THE DEFENCES

[6] I found it difficult to understand the defences relied upon by the respondent. It is perhaps apposite to summarised the averments as follows:

6.1 The Division of Revenue Act ("DORA") is applicable and in terms thereof the retention amount / fees "has been allocated for the 2019/20 financial year and Gazetted as such. In this case the retention value should be in line with the contractual value of R89 808 331.49 Vat inclusive."¹

6.2 The claim for payment of certificates 29 and 30 is irregular and unlawful as it exceeds the contract value of the project and the gazetted amount.

6.3 Although applicant is entitled to a retention amount in respect of payment certificates 1 to 24 in the amount of R4 422 025.90,² this amount is not payable as the respondent has made a recommendation in favour of the applicant to the Department of Water and Sanitation for payment of this amount (and apparently the Department has not come forth with any payment and/or failed to grant permission for the amount to be paid).

¹ Para 3 of the answering affidavit, p 87

² Para 7, pp 88 and 89

6.4 The amounts claimed far exceed the retention amount mentioned in the previous sub-paragraph³.

6.5 The variation of the contract amount has not yet been approved by National Treasury⁴ and any increase of the contract price can only be valid upon approval by National Treasury and the Department of Water and Sanitation, Free State Province.⁵

V EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE PARTIES

[7] It is common cause that the initial contract price was R89 808 331.49 and that there was a contract price adjustment to the contract of R2 868 661.78.⁶

[8] It is also common cause that a variation order was supported by the Department of Water and Sanitation, Free State to increase the contract price to R102 374 280.00.⁷ The only issue that respondent has with the approval of the variation order is that National Treasury has not approved the increase in the contract price. In this regard Annexure “FA15” reads as follows: “In light of National Treasury requirement Phumelela Local Municipality is advised to submit the VO to National Treasury for approval.” Respondent is vague in the extreme as to what it did pertaining to the advice received

³ Para 11, pp 89 and 90

⁴ Para 12, p 90

⁵ Paras 12 & 19, pp 90 & 91 respectively

⁶ Para 6.3.3 of the Founding affidavit, p 14, read with para 18 of the answering affidavit, p 91

⁷ Para 6.3.4, p 14 read with p 18 of the answering affidavit, p 91, read with annexure “FA15” on p 69

from the Department, *i.e.* whether it applied for approval from National Treasury, if so when and in such an event whether National Treasury granted the approval or not. Fact of the matter is that the letter of the Department is dated 13 April 2018 and thus during the contract works. More than a year later the contract works were finalised and according to the papers before me, nobody ever suggested and/or complained about the fact that the variation order was not approved by Treasury.

- [9] Respondent could not rely on a bare denial in respect of the absence of approval by National Treasury and more was expected of it in light of the judgment of the SCA in *Wightman t/a JW Construction vs Headfour (Pty) Ltd and Another*⁸ and I quote:

“[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A

⁸ 2008 (3) SA 371 (SCA) at para 13

litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[10] In any event, applicant indicated that approval from National Treasury is irrelevant pertaining to the claim for the remainder of the retention monies due to it as set out in certificates 29 and 30. Applicant indicated with precision that retention monies were deducted in an amount equal to 10% of the original adjusted contract price of R92 670 496.30 and that the variation order has nothing to do with the retention monies withheld. Respondent should be in possession of 10% of R92 670 496.20 which it deducted from the payment certificates issued from time to time.⁹ It is apparent from the papers that payment certificates 29 and 30 represent the second half of the retention monies allegedly due and payable to applicant.

[11] Applicant issued a previous court application in respect of payment certificates 27 and 28 in respect of the first half of the retention monies due and payable, which also included an amount relating to the variation order. That application was also

⁹ Paras 12.5 & 12.6, pp 23 & 24

opposed by the respondent, but Jordaan J granted orders in favour of applicant. An application for leave to appeal that judgment was dismissed by the learned Judge and apparently an application for leave to appeal was filed with the Supreme Court of Appeal. It is mentioned by the applicant that the respondent's claim that it was unaware of the variation order referred to above, was found by Jordaan J to be "blatantly and patently false and misleading." However as mentioned, the variation order is irrelevant pertaining to the applicant's claim *in casu* for the reasons set out above. Mr Jonase also submitted that that application is to be distinguished from the facts *in casu*. There respondent denied liability, whilst a concession of liability in an amount of about R4.4m has been made here.

[12] I do not understand on what basis respondent relies on the defence that monies pertaining to the retention amounts have been allocated or earmarked for payment during the 2019/2020 financial year and "gazetted as such". Fact of the matter is that we are presently in the 2019/2020 financial year insofar as that year terminates on 31 March 2020. I also do not understand the relevance of DORA as the respondent failed to enlighten the court in this regard. Bare allegations without proper supporting evidence does not pass muster as set out in *Wightman supra*.

[13] Respondent tries to impress upon the court that payment of retention monies would be irregular and unlawful expenses, or would be tantamount to irregular and unlawful expenditure, but in the same breath it acknowledges that it owes retention monies, but only in the amount of approximately R4.4 million. This

concession is irreconcilable with all the other defences raised. Mr Jonase submitted that the parties are close to each other and that applicant should have revisited its claim on receipt of the figure stipulated by respondent as the correct amount payable. I have a problem with this approach. Firstly, no calculations have been made by respondent to show how it arrived at the figure. Secondly, this figure and respondent's concession of liability came to the fore for the first time in the answering affidavit. There is no allegation, not to speak of proof, that respondent disputed the correctness of applicant's claim prior to institution of the application and pointed out what was owing to applicant.

- [14] It is trite law that payment certificates such as those relied upon by applicant are regarded as liquid documents since these are issued by the employer's agent. Therefore provisional sentence summonses are often issued on payment certificates. In *Joob Investments vs Stocks Mavundla Zek JV*¹⁰ Navsa JA, writing for a unanimous court, held as follows:¹¹

“[27] Gorven AJ pointed out, with reference to *Randcon (Natal) (Pty) Ltd v Florida Twin Estates Ltd* 1973 (4) SA 181 (D & CLD) at 183H-184H, that a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgment of debt in favour of the contractor. Relying further on the *Randcon* case (at 186G-188G), the learned judge held that similar reasoning applied to interim certificates. The certificate thus embodies an obligation on the part of the employer to pay the

¹⁰ 2009 (5) SA 1 (SCA)

¹¹ Ibid paras 27 and 28; see also *QwaQwa Regeringsdiens v Martin Harris & Seuns (OVS)* 2000 (3) SA 339 (SCA) at 355 E - H

amount contained therein and gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash. The certificates in question all fall within this ambit.

[28] Stocks held three liquid documents, the equivalent of acknowledgements of debt. It could have proceeded to obtain provisional sentence on them but chose to apply for summary judgment.”

[15] Mr Jonase submitted that insofar as a dispute exists in respect of the amount due and payable, the application should be dismissed with costs, alternatively the court should allow the parties an opportunity to file further affidavits, or further in the alternative, the matter should be referred to oral evidence, costs to stand over. I am not prepared to grant any of the orders suggested for the reasons set out herein.

[16] I am satisfied that applicant has made out a proper case for the relief claimed. I agree with applicant that the contract between the parties provide for interest to be paid on outstanding and/or late payments as calculated on the prime overdraft rate of applicant's bank. I am also satisfied that respondent acted grossly unreasonable to oppose the application and therefore, in the exercise of my discretion, a punitive cost order is warranted.

VI THE CONDONATION APPLICATION

[17] Respondent brought an application for condonation for the late filing of its answering affidavit. The application was opposed by applicant, but Mr Buys did not submit with any vigour that the application should not be granted. It is clear that applicant

decided to get finality in the matter and continued to file its replying affidavit in the main application notwithstanding the late filing of the answering affidavit in that application.

- [18] Notwithstanding an order granted on 17 October 2019, respondent failed to file its condonation application on/or before 25 October 2019. It merely filed the founding affidavit on 25 October 2019 while the condonation application was filed three days later and therefore contrary to the aforesaid court order. Applicant in the main application filed its answering affidavit timeously and in accordance with the aforesaid court order, but again, the replying affidavit of respondent was filed on 19 November 2019 only and twelve days late. I also noticed from the order granted by Jordaan J dated 28 February 2019 mentioned above, that respondent had to apply for condonation for the late filing of its answering affidavit in that case as well. I must say that I am not impressed with the manner in which the respondent and its municipal manager in particular has dealt with the matter in flagrant disregard of the Rules and a court order. I also noticed that the respondent's founding affidavit in the condonation application was deposed to on an unknown date as neither the deponent, nor the commissioner of oaths cared to comply with a most basic requirement by inserting the date. I decided to deal with the application based on all the affidavits before the court, there being no compelling reason to dismiss the condonation application. I therefore granted condonation and ordered respondent to pay the costs of the opposed application. My order will again be reflected hereunder for clarity purposes.

VII ORDERS

The following orders are issued:

1. Condonation is granted to respondent for the late filing of its answering affidavit.
2. Respondent is liable for the costs of the condonation application, including applicant's costs in opposing the application.
3. Respondent is ordered to pay the amounts of R2 131 421.41 and R3 197 132.12 in respect of payment certificates 29 and 30 to applicant.
4. Respondent shall pay interest, as calculated on the prime overdraft rate of applicant's bank, on all outstanding and/or late payments to the applicant, as calculated from 5 August 2019 until 3 September 2019 in the amount of R 42 336.45.
5. The respondent shall pay further interest at the rate of 10.5% per annum on all outstanding and/or late payments from 4 September 2019 until date of final settlement.
6. Respondent shall pay the costs of this application on an attorney and own client scale.

J P DAFFUE, ADJP

On behalf of Applicant : Adv JJ Buys
Instructed by : L&V Attorneys
BLOEMFONTEIN

On behalf of Respondent : Adv SS Jonase
Instructed by : Ponoane Attorneys
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