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

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 866/2016

In the matter between:

THABULA TRADE & INVEST 3 (PTY) LTD — Applicant

and

RUWACON (PTY) LTD — 1st Respondent

THE MEC: FREE STATE PROVINCIAL GOVERNMENT DEPARTMENT OF HUMAN SETTLEMENTS — 2nd Respondent

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JUDGMENT BY: ZIETSMAN, AJ

HEARD ON: 26 MAY 2016

DELIVERED ON: 2 JUNE 2016

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[1] The applicant in this matter represented by Mr Grobler, applies for payment of the amount of R1 085 655.07 from the first respondent together with interest thereon at the rate of 9,5% per year *a tempore morae*, on the Hobhouse project from 5 November 2015 until date of payment and on the Ladybrand project from 26 December 2015 until date of

payment. The applicant also move for an order of costs against the first respondent.

[2] The applicant only applies in the alternative from second respondent on the basis that if it being found that the second respondent has failed to effect payment of any retention monies withheld and due to the first respondent on the projects called Hobhouse project and Ladybrand project, that the second respondent be ordered to effect payment of the amounts as in the first paragraph of the notice of motion to first respondent, and in turn that payment be effected to applicant on that basis. Second respondent did not oppose the application.

[3] The legal relief sought is based upon a building project in terms of which the second respondent entered into a building contract on two projects, being the Hobhouse project and the Ladybrand project, with the first respondent as main contractor to effect the construction of the various houses referred to in the main contract. In turn the first respondent contracted with the applicant as subcontractor to effect the building projects on its behalf.

[4] Although the main contract is incorporated in the two separate sub-contracts, the two sub-contracts consist of two separate written agreements with its own terms as the agreements entered into between the first respondent and the applicant.

[5] The main dispute between the parties relates to the interpretation of the retention clause in both agreements, to which I will refer to herein beneath, as well as the question whether the applicant is entitled to approach a court for legal relief in the light of a clause in the two separate sub-contractor agreements under the heading dispute resolution, from which it is argued on behalf of the respondent by way of a point in *limine*, that the applicant was obliged to utilise the dispute resolution procedure referred to in clause 14 of the different agreements, which determines amongst others that should any dispute between the contractor and sub-contractor arise out of the provisions of the subcontract or the execution of the subcontract works, "… either party may, one week after having advised the other party of his intention to do so, refer the dispute to an adjudicator." Mr Cilliers on behalf of the first respondent argued that the dispute resolution procedure is obligatory, in so far as clause 14.2 of the agreement refers to the fact that the adjudicator's opinion as to the fair resolution of the dispute shall be final and binding on both parties.

[6] Mr Grobler argued that clause 14.1 makes it clear that either party "may" and the word "must" is not used. He further argued that clause 14.2 can only be applicable in the event that the parties chose to utilise the dispute resolution procedure. I am in agreement with Mr Grobler on this issue and the point *in limine* therefore has no merit.

[7] As refer to herein above, the main bone of contention is the interpretation of the retention clause which is clause 17 of

each of the different subcontracts. On the Ladybrand contract the clause reads as follows:

> "The contractor shall retain 10% of all payments due to the Subcontractor. The amounts thus retained shall remain in retention until the retention period provided for the Contract shall have lapsed and all retention work shall have been done to the satisfaction of the engineer on site."

[8] On the Hobhouse project the specific clause 17 reads as follows:

> "The Contractor shall retain 10% of all payments due to the Subcontractor. The amounts thus retained shall remain in retention until the retention period provided for the Contract shall have lapsed and all retention work shall have been done to the satisfaction of the engineer on site. 5% of the retention held will be released on final completion and 5% of the retention will be released six months after final completion."

[9] It is common cause that the engineers on the project was Fresh Harvest Consulting Engineers and Project Managers, and it was common cause between the parties that such engineers filed a close-out report on both projects, with the following conclusion:

"• Confirmation that the project has been completed as per scope and budget, for further clarity kindly contact the consultants (Fresh Harvest Consulting).

- Based on the agreement between the department and the contractor we recommend the department to release the final 2,5%, (two comma five present) retention as the contractor has achieved completion."

Just beneath the aforesaid conclusion a reference is made to clause 16.2 and 16.2.1.2.1, obviously referring to the main contract between the department and Ruwacon.

[10] Both the close-out reports have been signed by one Ronnie, reviewed by one Bongani and approved by one Phuti. On the Hobhouse close-out report, it seems that the date of the approval from the engineer was 5 October 2015 whilst on the Ladybrand project the date appears to be 27th November 2015.

[11] It was furthermore common cause between the parties that the reference to clause 16.2.1.2.1 in both of these close-out reports should have been clause 16.2.1.2.2 of the main contract. The difference being that clause 16.2.1.2.1 deals with practical completion, whilst 16.2.1.2.2 deals with final completion, with reference to the main contract.

[12] It needs to be mentioned that the retention clause in the main contract is taken up in clause 16.2 which reads as follows:

"16.2 **RETENTION**

16.2.1 In the event, a contractor is awarded less than 500 (five hundred) housing units, the following shall apply –

16.2.1.1 The department shall withhold from the contractor, 5% (five present) of all payments made to the contractor before practical completion as security to the department for completion of project;

16.2.1.2 The department shall without any interest release withheld retention as follows –

16.2.1.2.1 2,5% (two comma five present) on achievement of practical completion; and

16.2.1.2.2 2,5% (two comma five present) 6 (six) months from date of achievement of final completion.”

From the wording of both clauses 17 of the subcontracts, it is made clear that the retention money may be withheld pending or until the retention period provided for the contract shall have lapsed and/or retention work shall have been done to the satisfaction of the engineer on site. Both parties were in agreement that all retention work has been done to the satisfaction of the engineer on site on the basis of the close-out reports filed by the engineer. Mr Cilliers however argued that notwithstanding the close-out reports from the engineer there was still outstanding retention work and if the clause is read as a whole, it must be interpreted that the retention period provided for in the contract must also have lapsed before the retention monies could be paid out.

[13] From the subcontracts, and even the main contract no provision is made for a definition or a description of what the "retention period provided for the contract" would mean. According to Mr Cilliers, the only possible explanation for this, is that the contract period referred to herein must obviously be explained with reference to the main contract and more specifically with reference to the retention period which must be deduced from clause 16.2.1.2.2. which says that the balance of the retention money held back by the department, being 2.5%, shall be paid out six months from date of achievement of final completion. His argument is therefore that the retention period must be extended to such six months after the date of achievement of final completion, even on the interpretation that final completion was indeed reached in accordance with the close-out reports on 5 October 2015 and 27 November 2015 respectively on the two projects. According to him the application was therefore prematurely issued because of the fact that the six months after achievement of final completion have not lapsed before the application was issued during February 2016.

[14] Contrary to the aforsaid argument on behalf of the first respondent Mr Grobler argued that the court must interpret clause 17 of the two subcontracts on the basis that the defects liability period is in fact the period during which the subcontractor should finalise or fix problems and other retention work, and that the defects liability period, is indeed the period between practical completion and final completion. He argued that on final completion, the engineer certifies that

the contract has achieved completion, and that the final retention of 2,5% should be released. (with reference to the main contract)

[15] It is trite law in the interpretation of a contract that the court should determine the intention of the parties thereto by interpreting the words with ordinary grammatical meaning, but also in the context of the wording used. The context includes not only such clause wherein the specific wording is used but the context of the contract as a whole. See **Swart v Cape Fabrix (Pty) Ltd** 1979 (1) SA 195 (A) at 202C; **List v Jungers** 1979 (2) SA 106 (A) at 118.

[16] In my view and in accordance with the usual interpretation to determine the intention of the parties from the wording and in the context of the contract of clauses 17 respectively the retention period provided for the contract can only be interpreted to be a period ending at the date of final completion of the contract. It is for the same reason that the engineer certifies final completion and recommends the pay-out of the last retention monies (with reference to the main contract). It is clear from the close-out reports, that such reports forms a certification by the engineer of his satisfaction that all retention work have been done, which in turn means that the retention period provided for in the contract shall have lapsed at such a certification on final completion. The fact that the main contract provides for a payment of outstanding 2,5% retention monies six months after date of final completion is only an extension of the

payment of the balance of the retention money which was agreed between the department and Ruwacon and cannot be ascribed to a further defects liability period during which further retention work must be done by the subcontractor, if the specific clause 17 of the subcontract is read.

[17] The further argument raised by Mr Cilliers, was that the first respondent cannot be compelled to pay out retention monies to the subcontractors if the first respondent itself did not receive such retention monies from the employer, being the department. For this argument he referred to 13.1.1 of the different subcontracts which reads as follows:

> "13.1.1 The subcontractor shall, at intervals of one month, determine the value of subcontract services carried out in terms of the provisions of this agreement during the month to the end of the preceding month and shall advise the contractor, not later than the end of the month during which the valuation is undertaken, of the details of the valuation which said valuation shall be handed to the project Engineer for certification. The contractor shall, subject to such retentions as may be provided for in the Contract, pay the subcontractor the amount of the valuation thus certified at the end of the month following the month of certification on condition that the contractor has received payment of the latter's certificate for the before mentioned subcontract services."

[18] The argument was that there was a prerequisite of payment of retention monies from the department to Ruwacon, before

Ruwacon could be compelled to pay such retention monies to the subcontractor. In my view clause 13.1.1 of the subcontracts must be interpreted on the basis that the subcontractor is entitled to payment or interim payments at certain intervals pending the valuation of the subcontract services carried out for a certain interval, and shall such interval or interim payments be made to the subcontractor (subject to such retentions as may be provided for in contract) on condition that Ruwacon has received such interim payments from the department upon such valuations as certified. (own brackets)

[19] It therefore means that the repayment of retention monies to the subcontractor is not dependent on receipt by Ruwacon of the retention monies held back by the department. The clause specifically deals with interim payments.

[20] It must be mentioned that there is a difference between the two retention clauses on the two specific projects, being the Hobhouse project and the Ladybrand project. On the Hobhouse project it is determined that 5% of the retention money must be paid out to the subcontractor upon final completion, and the other 5% six months thereafter. In the Ladybrand subcontract, nothing is determined in this regard. In other words on the Ladybrand project, it is clear that the intention of the parties was that the retention money would be paid out on date of final completion.

[21] It is furthermore clear that the application was issued during February 2016, and that the second six months since final completion on the Hobhouse project, would only have lapsed on 5 April 2016. The applicant would therefore not be entitled to at least 5% of the retention money held back by Ruwacon on the Hobhouse project, when the application was issued. I took this point up with counsel for both applicant and first respondent, and was assured that it was common cause between them that the amount claimed by the applicant in the notice of motion does not include the balance of 5% which only became due and payable during April 2016.

[22] The amount claimed in the notice of motion therefore only comprises of 5% of the retention money held back on the Hobhouse project and 10% of retention money held back on the Ladybrand project.

[23] It must be mentioned that Ruwacon is known throughout the Republic of South Africa as a respected building company, and that they were clearly not satisfied with the finalisation of the retention work by the applicant. On probabilities the retention work have not been properly done, which fact was confirmed by the engineer through a further snag list which he provided to the applicant during the beginning 2016. If the retention work was not done properly as at 5 October 2015 and 27 November 2015 respectively, the engineers must be blamed for certifying their satisfaction of the retention work done on the dates.

[24] I am satisfied in the circumstances that the engineers on the project certified final completion on respectively 5 October 2015 and 27 November 2015, and that such engineer was satisfied with all retention work been done. Although it might appear that even the engineer after such completion dates and after such certification had certain reservations as did Ruwacon about further retention work that needed attention, the parties are in my view bound by the respective clauses 17 of the subcontracts read with the close-out reports from the site engineer confirming his satisfaction as at 5 October 2015 and 27 November 2015 respectively on the Hobhouse and Ladybrand projects.

[25] I am therefore of the view that the applicant is entitled to payment of such retention monies and I therefore make the following order:

1. The first respondent is ordered to pay applicant the amount of R1 085 655,07;
2. The first respondent is ordered to pay interest on the aforesaid amount calculated at 9,5% per year *a tempore morae* as follows:
   2.1 On the Hobhouse project as from 5 November 2015 until date of payment;
   2.2 On the Ladybrand project as from 27 December 2015 until date of payment.
3. The first respondent is ordered to pay costs of the application.

P. ZIETSMAN, AJ

On behalf of the applicant:	Adv. S. Grobler Instructed by: Peyper Attorneys BLOEMFONTEIN
On behalf of the first respondent:	Adv. H. J. Cilliers Instructed by: Phatshoane Henney Attorneys BLOEMFONTEIN

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