



IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: 70284/2013

12/6/14

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
12/06/2014	
DATE	SIGNATURE

In the matter between:

RIVERSIDE CHUENE CONSTRUCTION CC

APPLICANT

(Registration No 2005/117988/23)

and

THE MEC, DEPARTMENT OF EDUCATION

RESPONDENT

LIMPOPO PROVINCE

JUDGMENT

MOLEFE, J:

[1] The applicant claims payment from the respondent in the amount of R1 704 196, 51 together with interest thereon at the rate of 160% of the prime rate of interest, compounded monthly from 20 March 2013 to date of payment. The indebtedness arises from services rendered by the applicant to the respondent at the respondent's special instance and request. The respondent opposes the application.

Factual Background

[2] The applicant was, during November 2010, awarded a tender by the respondent to construct certain classrooms in the Sekhukhuni District. A written principal building agreement contract that would govern the relationship between the parties was concluded. In terms of clause 31.9 of the principal building agreement ("JBCC") prepared by the Joint Building Contracts Committee Incorporated, Series 2000, the employer shall pay to the contractor the amount certified in an interim certificate within 7 calendar days of the date for issue of payment certificate.

Clause 31.11 of the JBCC provides that where the contractor has not received payment of the amount due within 7 days from date of issue of the interim payment certificate, the employer shall be liable for default interest on the amount without prejudice to any other rights the contractor may have. Such interest amount shall be compounded monthly from the due date for payment up to and including the date on which the contractor is to receive payment and included in the recovery statement. The principal agent shall calculate such default interest at the rate of 160% (one hundred and sixty percent) of the interest.

[3] The respondent appointed IDNIL Professional Consultants CC ("IDNIL") as the Quantity Surveyor for the project. IDNIL was the principal agent and described in clause 1.0 of the JBCC as *"the party named in the contract data and/or appointed by the employer with full authority and obligation to act in terms of the agreement"*. IDNIL's role would *inter alia* include the preparation of recovery statements and monthly payment certificates certifying the amount due and payable by the employer to the contractor or vice versa in terms of the JBCC payment certificate form. IDNIL was, later substituted by Wepenaar Dikgale Quantity Surveyors ("Wepener").

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[4] The applicant claims payment of the value of the interim payment certificates, together with interest, running from 20 March 2013, said date being 7 days after the date of issue of the payment certificate as contemplated in clause 31.9 of the JBCC.

Respondent's Point in Limine

[5] The respondent's counsel¹ takes a preliminary point *in limine* that the application is premature, seeing as the applicant was enjoined by virtue of the JBCC, to deal with the dispute through the alternative dispute resolution mechanisms contained in the JBCC, by referring the dispute to adjudication or, failing adjudication, to arbitration.

Respondent's counsel relies on clause 40.1 of the JBCC under heading "**Settlement of Dispute**" which provides that:

"40.1 should any dispute arise between the employer, including his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other party to resolve such disagreement".

[6] Clause 40.2 of the JBCC provides that:

"40.2 Where such disagreement is not resolved within 10 (ten) working days of receipt of such notice, it shall be deemed to be a dispute and shall be referred by the party which gave such notice to either:

¹ Adv. T S Madima SC

40.2.1 adjudication where the adjudication shall be conducted in terms of the addition of the JBCC rules for adjudication current at the time when the dispute was declared, or

40.2.2 arbitration where the arbitrator is to be appointed by the body selected by the parties whose rules shall apply”.

[7] Respondent's counsel argues that the letter furnished by the applicant to the respondent dated 1 July 2013 constitutes a notice to resolve a disagreement as contemplated in clause 40.1 of the JBCC. On the respondent's argument, and seeing as no response to this letter was forthcoming from the respondent within ten working days, the non-resolution of the disagreement created a dispute as contemplated in clause 40.2 of the JBCC. The applicant was therefore enjoined to refer the dispute to either adjudication, failing adjudication to arbitration, instead of making the application before the Court, prematurely. It was the argument of the respondent's counsel that the applicant did not exhaust the internal remedies prior to approaching the Court.

[8] Counsel for the applicant² submits that the letter dated 1 July 2013 constitutes a letter of demand for payment by the respondent. There is nowhere in the letter that reference is made to any disagreement between the parties and nowhere is a request made by the applicant for the dispute to be resolved within the 10 days from date of the letter as contemplated in clause 40.2 of the JBCC.

Applicant's counsel further argues that alternative dispute resolution, in the form of either adjudication or arbitration, is directory as opposed to compulsory.

² Adv. S G Gouws

[9] I find the respondent's counsel argument on the point in *limine* without merit. The letter dated 1 July 2013 is clearly a demand for payment from the respondent and the respondent failed to respond to this demand within ten days. I could not find an aired dispute nor disagreement in the letter which could create the basis for alternative dispute resolution. Furthermore, even if a dispute was created by the letter by virtue of the express wording of clause 40.1 of the JBCC, "*either party may (my emphasis) give notice to the other party to resolve such disagreement*". The referral of disputes to adjudication/arbitration is not peremptory and each party has a choice to either invoke the alternative dispute resolution mechanism, or not to. Accordingly, the respondent's point in *limine* fails and is dismissed.

[10] The applicant in its founding affidavit, states that the originally appointed principal agent on the project was IDNIL and that IDNIL was later substituted by Wepener. The respondent's opposition to the claim for payment is the denial of the appointment and, as a corollary thereto, the authority of the principal agent who signed the interim payment certificates. Mzwandile Matthews ("Matthews"), the deponent to the respondent's answering affidavit, and the Administrator of the Department of Education: Limpopo Province, denies the appointment of the principal agent, Wepener and this denial extends to an all-out denial of any knowledge of the existence of Wepener.

[11] Respondent's Counsel submitted that the appointment of a project manager such as was the case with IDNIL, is an elaborate process that is subject to the supply chain management (SCM) processes of the respondent. The resignation of IDNIL from the project, posed, according to the respondent's counsel, a dilemma for the applicant as there would be no principal agent to issue applicant's interim

payment certificates. Counsel contends that the respondent has not appointed any other principal agent in the stead of IDNIL as no new tender has been issued to appoint another principal agent.

[12] The applicant, in its replying affidavit, produces evidence of the involvement and participation of Wepener in the project dating back to 2011. The applicant relies, *inter alia*, on a letter under heading of the respondent and signed by the respondent's Senior Manager: Infrastructure, N.P. Ngubane, wherein Wepener is expressly appointed given the departure of IDNIL from the project. Wepener furthermore produced a report on the project, at the behest of the respondent, wherein the department is informed of the total payment amount due to the applicant subsequent to Wepener's investigation as ordered by the respondent.

[13] Respondent's counsel submits that in the event that the letter is indeed written by N.P. Ngubane, Ngubane had no authority to provide the letter of the appointment of Wepener and that Ngubane acted *ultra vires*. Counsel for the respondent argues that if indeed Wepener was appointed as a temporary replacement, no proper process was followed as there is no provision in the SCM process for interim appointment and on that basis, there has been no appointment at all. The respondent has thereby refused to pay applicant any monies claimed on the strength of the payment certificates issued by Wepener. Counsel further submits that the respondent does not *per se* refuse to pay the applicant and contends that it will do so in due course after the appointment of the principal agent, who will assess the work completed by the applicant and on the payment certificates he issues.

[14] Ngubane's letter to Wepener dated 28 February 2013 *inter alia* states that:

"The Department of Education has been informed that Wepener Dikgale was appointed as an independent Quantity Surveyor to assist with quantification of the revised scope of work for the Sekhukhune Grade R projects in 2011.

Due to recent developments around the withdrawal from the projects by the appointed Quantity Surveyor we request that you assist the Department of Education by providing your professional services to assist with the interim payment of the Contractor while in the process of procuring a replacement professional service provider".

I do not agree with the argument by the respondent's counsel that Ngubane had no authority to provide *"the letter of the appointment of Wepener"* and that Ngubane acted *ultra vires*. Ngubane's letter is clearly not for the appointment of Wepener but it is a request to Wepener to assist in providing services with the interim payment of the Contractor. By the time Ngubane sent the letter to Wepener, he (Wepener) had been appointed already. The respondent's argument has therefore no merit at all.

[15] An architect certificate given under the usual form of building contract, is a liquid document which will found a claim for provisional sentence if the architect, in issuing the certificate, acted as agent on behalf of the owner³.

The respondent in *casu* denies the appointment and, as a corollary thereto, the authority of the principal agent who signed the interim payment certificates. The denial extends to an all-out denial of any knowledge of the existence of Wepener. This is despite the fact that Wepener's involvement and participation in the project dated back to as early as 2011 and furthermore that the respondent's Senior Manager: Infrastructure confirms his appointment and requests his services.

³ Joobjoob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1

[16] It is also interesting to note that Matthews in the answering affidavit states that a proper procedure does "*not appear*" to have been followed in the appointment of Wepener. I am of the view that this allegation cannot be determinant as to the validity of the appointment Wepener. *Ex facie* the answering affidavit, Matthews draws superficial inferences without having properly availed himself of the correct position. Matthews does not give evidence that for a fact, Wepener was not appointed as a principal agent nor if appointed, no process was followed by the respondent in Wepener's appointment.

[17] Principal agents on projects of this nature are enjoined to facilitate verification of works and payments to contractors through the issuing of interim payment certificates. The respondent's projects remained active after IDNIL's departure and contractors continued with filing claims for payment pursuant to completion of these projects. Under the JBCC, interim payment certificates must be issued monthly, as these payments are essential to keep contractors in funds so as to enable them to continue with their work. It is evident from the evidence before me that, on Matthew's version, more than a year and a half later, the respondent has still not appointed a principal agent despite the fact that the contractors are still allowed to continue with their work. Due to the reasons above-mentioned, I am of the view that Matthews' version is implausible and warrants a rejection.

[18] In **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222**, the court held that until invalid administrative action is set aside by court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked. I am taking my cue from this case and am satisfied that in the event that a proper procedure on the appointment of Wepener was not

followed by the respondent, the legal consequences which in *casu* is the payment of the applicant cannot be ignored nor overlooked.

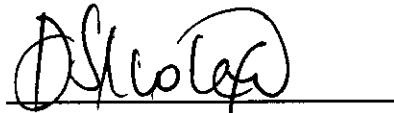
[19] It is significant that the respondent does not deny that the applicant did the work on the project, nor does the respondent deny the value of the work done by the applicant. It is of importance to me to put on record that at every stage of the contracting process, from the negotiations through to the performance of the obligations undertaken in the contract, parties are required to behave in a manner consistent with good faith⁴. My observation in *casu* is that the respondent is not behaving in a manner consistent with good faith.

[20] In terms of section 31.11 of the JBCC, where the contractor does not receive payment of the amount due by the due date, the employer shall be liable for default interest on the amount. The principal agent shall calculate such default interest at the rate of one hundred and sixty (160%) of the interest (160 basis points or 1,6%).

[21] In the premises, I make the following order:

- i) Payment by the respondent to the applicant in the amount of R1 704 196,51 (One Million Seven Hundred and Four Thousand, One Hundred and Ninety Six Rand and Fifty One Cents);*
- ii) Interest on the aforesaid amount at the rate of 1.6% multiplied by the prime rate from time to time, up to date of payment;*
- iii) Costs of the application.*

⁴ Meskin NO v Anglo-American Corporation of SA Ltd and Another 1968 (4) SA 793 (W) at 804 D



D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicants	:	Adv. S G Gouws
Instructed by	:	Verveen Attorneys
Counsel on behalf of Respondent	:	Adv. T S Madima SC
Instructed by	:	State Attorneys
Date Heard	:	3 June 2014
Date Delivered	:	12 June 2014