

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2778/2011

In the matter between:

AXTON MATRIX CONSTRUCTION CC

Applicant

and

METSIMAHOLO LOCAL MUNICIPALITY

Respondent

MONDE CONSULTING ENGINEERS &

PROJECT MANAGERS CC and AQUA

CONSULTING ENGINEERS & PROJECT

MANAGERS

(acting as a joint venture under the name of

MONDE – AQUA CONSULTING ENGINEERS

AND PROJECT MANAGERS)

HEARD ON:

31 AUGUST 2012

REASONS FOR JUDGMENT:

LEKALE, J

DELIVERED ON:

24 OCTOBER 2012

INTRODUCTION AND BACKGROUND

[1] On the 28 June 2012 I ruled against the respondent (applicant in the application for leave to appeal) in a motion for payment of

money on the basis of a certificate of interim payment and contract termination. I, further, dismissed the respondent's counter motion with costs.

[2] The respondent felt aggrieved by the whole judgment and lodged an application for leave to appeal to the full bench against the same on the grounds dealt with below.

[3] On the 31 August 2012 I dismissed the application with costs and the respondent had since requested reasons therefor.

[4] Following hereunder are the reasons for the decision as requested.

[5] For the sake of convenience and ease of reference the parties are referred to as in the impugned judgment.

DISPUTE

[6] The issue to be determined is whether or not there is a reasonable possibility that another court would come to a

different conclusion on the facts.

CONTENTIONS AND ANALYSIS

- [7] The respondent contends that the court erred in not concluding that the employer in its shoes will also not be bound to a certificate of payment when the agent has exceeded his mandate in certifying amounts not provided for in the tender/contract and including retention monies to be paid out whilst not then due.
- [8] The foregoing contention, with respect, loses sight of the fact that it was found that the engineer, as the respondent's agent, did not exceed its mandate because an approval for variation in respect of additional expenditure was granted by the respondent on the 1 April 2009 subject to the condition that expenditure should not exceed the project allocation of R22 276 000,00. Even if, in law, the fact that an agent has exceeded his mandate in certifying amounts to be paid out allows the employer to escape liability on the certificate, an escape route is not available to the respondent on the facts of the present

matter.

[9] It is, further, contended for the respondent that the court erred in not finding that an interim certificate differs from a final certificate in respect of the finality thereof and the basis upon which it may be attacked.

[10] In the present matter what fell to be decided was whether or not the interim certificate concerned constituted a cause of action for purposes of saddling the respondent with liability for payment. The conclusion, based on case law, was that such a certificate is the equivalent of cash and that it amounts to an acknowledgment of debt signed by the respondent. It constitutes a separate and self-supporting cause of action which can be challenged only on limited grounds.

[11] The respondent contends, further, that the court erred in not concluding that the respondent, as the employer, was able to attack the validity of the certification by the engineer and the correctness of the same.

- [12] In the instant matter there existed no grounds for assailing the interim certificate involved although the court acknowledged that the same could, in law, be attacked on limited grounds such as fraud. I, further, recognised that such a certificate is not open to attack because it is based on erroneous reports of the agent or his negligence.
- [13] The respondent, furthermore, contends that the court erred in not concluding that cross claims can be entertained in respect of an interim certificate in so far as the contract between the parties specifically made provision for the same.
- [14] In the present matter it was not necessary for the court to make a specific finding in the relevant regard and the respondent's counter claim was dismissed simply because it was not proved on a balance of probabilities. The claim, further, enjoyed no reasonable prospects of success to warrant referral to trial as correctly submitted for the applicant. The respondent effectively desired an opportunity to proof its damages. In the

opposing affidavit, delivered for the respondent, the latter's claim is said to relate to the new contract concluded with another contractor for completion of deficiencies in respect of some 583 connections which the applicant allegedly failed to make. In an annexure to third party notice the respondent, however, claims indemnification of or contribution to applicant's claim against the third party as well as debatement of all accounts and documents in respect of the relevant certificate.

[15] The respondent, further, contends that the court erred in not concluding that a certificate of payment can be cancelled by an architect with agreement between the parties and that the relevant certificate was illiquid because the applicant conceded that it was wrong.

[16] The fact of the matter in the proceedings was that the relevant certificate was never cancelled by the engineer in order to correct any mistakes of fact or value. The undertaking by the applicant to adjust the relevant certificate apparently took place in negotiations between the parties and was never carried

through. Only the engineer could correct or adjust the certificate. The negligence of the engineer does not, in law, provide a basis for cancellation or withdrawal of the certificate by the employer. Neither do erroneous reports by the agent entitle the employer to cancel or withdraw the same.

[17] It is, further, contended for the respondent that the court erred in effectively concluding that the certificate issued constituted conclusive evidence of the indebtedness of the respondent to the applicant.

[18] The nature of the certificate as amounting to an acknowledgement of debt signed by the respondent, as the employer, is such that, in the absence of any evidence assailing the certificate, it becomes conclusive proof of indebtedness.

[19] The respondent contends that the court erred in finding that approval for variation in respect of additional expenditure was granted by the respondent on the 1st April 2009 whilst the applicant, in its founding affidavit, relied upon a contract price of

R8 447 899,75 without relying on any approved variations.

[20] I am satisfied from all the evidence before the court that approval for the relevant variation was granted by the respondent. The relevant information came to light in the replying affidavit when the applicant countered the respondent's contention that the agent exceeded its mandate because the contract was not varied. Proof of approval by the respondent was furnished and the latter did not deny the same and only feels that it was not disclosed and relied upon in the founding affidavit. There was further no application for the striking out of the relevant piece of evidence, and no likelihood of unfairness or prejudice on the part of the respondent exists because the parties effectively joined issue.

[21] The respondent contends, further, that the court erred in not finding that the applicant failed to show on what basis the contract was not a "fixed sum" contract. In this regard I can only respectfully refer to paragraph [20] above with regard to the variation.

[22] The respondent, further, contends that the court erred in not concluding that the letter granting approval for house connections does not conclusively show that the contract was varied. In this regard I respectfully refer to paragraph [20] above.

[23] The respondent, furthermore, contends that the certificate includes retention money which had to be kept by the respondent pending the expiry of the defects liability period.

[24] The issue was, however, sufficiently dealt with in the judgment in so far as the relevant General Conditions of Contract were found to allow pay-out of the retention monies on cancellation of contract as a result of failure by the respondent to pay in accordance with payment certificates.

[25] It is, further, contended for the respondent that the court erred in not concluding that the materials on site became the property of the applicant and the respondent was, thus, not liable to pay

for the same.

[26] The principle that the errors attributable to the engineer, short of fraud, are of no effect on the binding nature of the payment certificate is relevant here.

[27] The respondent, further, contends that the court erred in not referring the application and counter application for trial whereas the respondent sought such an order and was supported, in this regard, by the third party.

[28] I can only point out, with respect, that the third party had already delivered an opposing affidavit, *inter alia*, raising a preliminary point of prematurity against the respondent's application. I am, thus, satisfied that the third party's take on the matter was properly before the court. I am, further, satisfied that the interests of expedition and fairness were not in favour of continued delay in finalising the matter.

[29] The respondent, further, feels that the court erred in concluding

that set-off could not take place and that no overpayment was apparent *ex facie* the respondent's papers. I can only reiterate, with respect, that for set off to take place it was necessary for the respondent to prove its claim. None of the respondent's claims were established on a balance of probabilities.

[30] The test is whether or not the respondent has reasonable prospects of success on appeal. As the Supreme Court of Appeal noted in **SMITH v S** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at 570b-c)

“[7] what the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[31] I am not persuaded that such a question can be answered in the affirmative in this matter.

ORDER

[32] Application for leave to appeal is, therefore, dismissed with costs.

L. J. LEKALE, J

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On behalf of respondent: Adv. P.R. Cronjé
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