

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MTHATHA**

CASE NO: 4421/2022

In the matter between:

KHULULA SECURITY SERVICES CC

Applicant

and

COEGA DEVELOPMENT CORPORATION (PTY) LTD

Respondent

JUDGMENT

CORAM: PITT AJ

Introduction.

[1] The applicant, Khulula Security Services Close Corporation (“Khulula”), applied for a tender from the respondent, Coega Development Corporation (Pty) Ltd (“Coega”) to build a library in Mount Frere in the Eastern Cape, and was appointed as a contractor by letter on 12 January 2011.

[2] According to Khulula, it completed the building of the library in terms of the appointment on 8 September 2021. This application is for the specific performance by Coega of signing the final payment certificate to Khulula and to make payment of R 461 902.09 to Khulula within 21 days thereof.

Salient facts to the application

[3] It is common cause between the parties that the contractual relationship relating to the project would be governed by the terms and conditions of the JBCC Principal Agreement, edition 4.1 March 2000.

[4] Khulula contends that it duly performed in terms of its appointment and brought the project to final completion on 8 September 2021. Khulula was issued with the final account for approval on 26 April 2022, and Khulula approved and accepted the final account on 28 April 2022.

[5] In terms of the final account, the sum of R 461 902.09 is due, owing and payable to Khulula by Coega, for which the applicant has reached completion of the works as per the agreement. Khulula is awaiting receipt of the final payment certificate and payment of the undisputed amount. The final payment certificate was due to be issued and signed by Coega by 5 May 2022. Coega has failed, alternatively neglected to issue the final payment certificate by 5 May 2022 and to pay Khulula the amount due as per the final account. Coega submitted that Coega is in breach of the agreement. Khulula also submitted that the respondent is bound by the final account as it stands, given that it has been signed by Coega's own principal agent, Ikamva Architects ("Ikamva") and appointed quantity surveyor. Khulula has tendered to issue a tax invoice in accordance with the requirements of clause 34.10 of the agreement immediately upon receipt of Coega's final payment certificate.

[6] Coega filed its answering affidavit some 12 days later than it should have and deemed it appropriate to ask the court for condonation thereof. Khulula did not oppose the condonation application and submitted that it would abide by the court's decision on this aspect. Coega explained that due to staff who had personal knowledge of the subject matter of this case having left the employment of Coega, the officials of Coega struggled to find documents relating to the matter. It also took a long time to source all the relevant documents relating to the agreement. The period of 12 days does not seem inordinately long in the circumstances. Khulula has not alleged any prejudice by the late filing of the answering affidavit, and Coega has provided a reasonable explanation for its lateness. In the circumstances, I am satisfied that Coega should be granted condonation for the late filing of the answering affidavit *in hoc casu*.

[7] Two points *in limine* were raised on behalf of Coega: 1. that the High Court does not have jurisdiction and, 2. that the application is premature because the dispute is not ripe yet. Khulula argued that the High Court does not have jurisdiction to entertain this application because the agreement provides for the settlement of any disputes arising from the agreement to be referred to an arbitrator for resolution through adjudication. Coega also contended that even if Khulula is owed a sum of money by Coega, which is denied, the debt is not due yet because there was no compliance with the terms of the agreement. Coega alleged that Khulula had not provided Coega with an invoice, and therefore the dispute is not ripe yet as Khulula has not complied with the requirements of the agreement. In response to this allegation, Khulula submitted that it can not issue an invoice as long as the final payment certificate is issued. It would be premature for Khulula to issue an invoice as it would have nothing to invoice against, the final payment certificate.

The parties' respective versions, the law and discussion.

[8] Coega also alleged that the project goes back to 2011 and that the relevant cycles during which the project was budgeted have long passed, and if it were found that Khulula is owed the money, the relevant department will need to make a special allocation of this kind of financial liability. Coega also alleged that the invoice is necessary to enable the department to investigate the merits of the liability if needed and allocate the necessary funds to Coega to pay where it is satisfied.

[9] In addition to the points *in limine* referred to above, Coega also alleged that Khulula started the construction of the library in terms of the agreement and abandoned the unfinished project in 2012. Coega also alleged that Khulula was fully paid for the project in terms of the contract, and that Khulula abandoned the site and reappeared in 2021 to fix poor workmanship identified in the project. Coega admitted that Khulula attended to the remedial work and submitted a final statement around April / May 2022. I understand the final statement to refer to the final account. Coega also alleged that it sent a list of queries relating to the remedial work to Khulula through the principal agent to finalise Khulula's account. Khulula that it was asked to submit relevant documentation to assist Khulula to finalise the account to justify the

expenses with vouchers and invoices on various items including the rate build-up to justify the account to the client concerned. Further, it is alleged that most of the expenses incurred on the remedial work could be attributable to deterioration caused by Khulula's neglect of the project for 9 years and Coega cannot be held liable for those expenses in terms of the contract.

[10] In reply, Khulula responded to the points *in limine* raised by Coega by denying that the court does not have jurisdiction. Khulula further submitted that a final account was issued in accordance with the agreement and that it simply seeks payment for the outstanding amount recorded as being due in accordance with that final account. Khulula also submitted that Coega complained of a dispute between the parties in support of the point *in limine* that the "dispute is not ripe", yet failed to articulate what that dispute was. Khulula submitted that a certified amount only has to be paid after an invoice has been issued, which invoice could not have been issued because the final payment certificate had not been issued by Coega. There is no dispute about anything relating to the agreement between the parties, according to Khulula. Khulula undertook in the answering affidavit to issue the invoice upon final certification, which is sought in this application. Khulula reiterated that Coega is obliged to pay the amount, which amount was certified by Coega's principal agent.

[11] Khulula denied that it had abandoned the site, that this was patently incorrect, ill-founded and made without any supporting evidence or documentation to justify such an allegation, and without any confirmatory affidavit by Coega's principal agent. Khulula also submitted that practical completion of the project was achieved in 2012 in terms of the completion certificate annexed to the founding affidavit of Khulula. There were inordinate delays with Eskom powering the facility. Coupled with the professional team issuing any works completion certificates. The building was fit for purpose since 2012 when the work to the building was satisfactorily completed. Coega cannot ask Khulula for supporting documents as Coega's agent had already issued and approved the final account in terms of clause 34.1 of the agreement. There is no basis for Coega to call for further information, challenge the final account, or suggest that the delays might result in Khulula being liable to Coega. The value of the work for which Khulula seeks payment has already been recorded in the

final account, which was issued by Coega's principal agent, and does not amount to additional work.

[12] It is Khulula's version that the principal agent, Ikamva, issued and approved the final account on 26 April 2022. As will be seen below, Ikamva acted on behalf of and in the stead of Coega in respect of the contract. Therefore, when Ikamva issued and signed the final account / statement on behalf of Coega, it was as if Coega had done so itself. Coega's submission that Khulula breached the agreement when it abandoned the project around 2012 and re-emerged in 2021 to perform remedial work in 2021 is therefore without merit. The final agreement was issued and signed after this in April 2022. Coega has not denied that Ikamva acted as its agent and is therefore bound by all actions or inaction by Ikamva in relation to the project. Neither does Coega say that Ikamva acted without authorisation by Coega when Ikamva issued and signed the final statement / account.

[13] Coega submitted that it sent queries and requested supporting documents from Khulula but does not specify who the person acting on behalf of Coega was who requested these documents. There is no documentary evidence of the queries and requests, nor the names of persons to whom these requests were made, when and how they had been made. There are also no supporting affidavits by persons who purportedly made the requests to Khulula and when these requests were made. In light of the above, it is unlikely that this version is probable. Ikamva were the appointed principal agent of Coega, and they would have been the ones to make such requests on behalf of Coega to Khulula. Khulula's version that Ikamva had approved and signed the final statement / account is more probable. Khulula provided documentary proof to this effect.

[14] It is trite that in motion proceedings the affidavits constitute the evidence on which the court must decide the issues between the parties.¹ The facts must therefore be set out fully in the affidavits filed by the parties in the particular case,

¹ See *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA (D) at 469C-E.

supported by documents to corroborate the evidence in the affidavits.² Coega has not corroborated its factual allegations with any documentary evidence *in hoc casu*.

[15] In considering the issue of referral of the matter to adjudication in terms of clause 40 of the contract with regards to settlement of disputes, the first question that needs to be asked is whether there is a dispute between the parties. The contract itself is silent on the definition of a dispute. However, it is common knowledge that a dispute means a disagreement between two persons. What then is the dispute which Coega are relying on? This is not clear from the answering affidavit of Coega. If it is the amount of the payment to Khulula which is said to be in dispute, then this cannot be a dispute. The principal agent has accepted, issued and signed the final statement / account on behalf of Coega. There can thus not be said to be a dispute in respect of the amount of R 461 902.09 owed to Khulula by Coega.

[16] The building contract concluded between Khulula and Coega is contained in a recognised standard form agreement prepared by the Joint Building Contracts Committee Incorporated and is more commonly known as the "JBCC Series 2000. Third Edition Code 2101" ("The JBCC 2000"). The relevant JBCC 2000 makes provision, *inter alia*, for the appointment by Coega of a so-called "principal agent". Ikamva Architects were the principal agent of Coega.

[17] In *Hyde Construction CC v Blue Cloud Investments 40 (Pty) Ltd and Another*³, the court referred to the same clause 5.0 of the JBCC 2000, and held that it requires the employer to appoint a named person as the principal agent under the contract:

"5.0. Employer's Agents

5.1. The employer shall appoint the principal agent as stated in the schedule. The employer warrants that the principal agent has full authority and obligation to act in terms of the agreement, and where appropriate the associated nominated and selected subcontract agreements.

² See *Venmop 275 (Pty) Ltd v Cleveland Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 86A.

³ (8293/10) [2011] ZAWCHC 304 (1 August 2011).

5.2. The employer may appoint agents as stated in the schedule and may appoint further agents with the contractor being notified thereof.

5.3. The principal agent shall be the only person who shall have the authority to bind the employer, except where agents issue contract instructions under delegated authority in terms of 5.3.2. Without detracting from the above, the principal agent shall be the only person empowered to

5.3.1. Issue contract instructions, except as provided in terms of 5.3.2:

5.3.2. Delegate to the other agents authority to issue contract instructions and perform such duties as may be required for specific aspects of the works, provided that the contractor is given notice of such delegation:

5.3.3. Receive notices on behalf of the employer.

5.4. Should the principal agent or any agent be unable to act or cease to be an agent, the employer shall notify the contractor of the new principal agent to be appointed. The employer shall not appoint such principal agent or agent against whom the contractor makes a reasonable objection in writing within five (5) working days of receipt of such notice."

The court held further that "[i]t will be observed, therefore, that the principal agent who fulfils a variety of roles and functions under the JBCC contract, is an agent in every sense of the word that our law understands that relationship."

[18] "One of the important functions then of the principal agent is the preparation of the final account for submission to the contractor within ninety days of practical completion of the works (clause 34.1).⁴ In the event that there is no objection from the contractor to the final account, the principal agent is required to issue a final payment certificate within seven days (clause 34.5).⁵ In terms of clause 34.11 the employer is obliged to pay the contractor so-called "compensatory interest" on the

⁴ *Hyde supra* at para 37.

⁵ *Supra*.

net amount certified by the principal agent in the final payment certificate.⁶ The principal agent is charged with the function of calculating such interest in accordance with an agreed formula.⁷ In the event that the contractor does not receive timeous payment of the amount due in the final payment certificate, the employer is liable for so-called "default interest" which is similarly payable in terms of an agreed formula to be calculated by the principal agent (clause 34.12).⁸ This amount is recoverable by the contractor from the employer's payment guarantee which the contractor is entitled to request in terms of clause 15.4.2."⁹

Conclusion.

[19] Ikamva had done everything that was required of them to perform their functions in terms of the contract. From the facts in the founding and replying affidavits, Khulula had also performed its obligations in terms of the contract. The same cannot be said about Coega. On the version of Khulula, Coega refuse to accept the final statement of its own principal agent to the contract, despite Ikamva having accepted, issued and signed the final statement.

[20] I am of the view that the applicant, Khulula, has made out a proper case for the relief sought. The version of the applicant is more probable *in hoc casu*.

[21] The applicant has achieved substantial success of the application. I see no reason why the costs of the application must not follow the cause.

Order.

Accordingly, the court issues the following order:

1. The respondent must issue the final payment certificate to the applicant in favour of payment of R 461 902.09 as due to the applicant in accordance with the

⁶ Hyde, para 38.

⁷ Supra.

⁸ Hyde, para 39.

⁹ Supra.

approved final statement within ten days of service of this judgment on the respondent.

2. The applicant must issue the respondent with a tax invoice for payment of R 461 902.09 within ten days of delivery of this judgment.

3. The respondent must pay R 461 902.09 to the applicant within 21 days of issuance of the final payment certificate in 1 above.

4. The respondent must pay interest on the sum of R 461 902.09 at the rate of 7.25% per annum, calculated from 26 May 2022 to date of final payment.

5. The respondent must pay the applicant's party and party costs on High Court scale A.

DV PITT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : D.C. *Botma*
Instructed by : Cox Yeats Attorneys
C/O Smith Tabata Attorneys
Mthatha

Counsel for the Respondents : S. *Genukile*
Instructed by : Tshiki & Associates Inc.
C/O Luzipho Attorneys
Mthatha

Heard on : 15 February 2024

Date judgment delivered : 2 July 2024