IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 035918/2023

DATE: 2024-10-31

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED. YES
DATE 26 November 2024
SIGNATURE [redacted]

In the matter between

**TRENCON WBHO JOINT VENTURE FUND** Applicant

and

**GOVERNMENT EMPLOYEES FUND** First Respondent

**PUBLIC INVESTMENT CORPORATION SOC LIMITED** Second Respondent

---

**J U D G M E N T**

---

**WANLESS J**

**Introduction**

[1] In this application the Applicant is TRENCON-WBHO JOINT VENTURE, a joint venture between TRENCON CONSTRUCTION (PTY) LTD and WBHO CONSTRUCTION (PTY) LTD *("the Applicant").* The First Respondent is the GOVERNMENT EMPLOYEES PENSION FUND *("the GEPF")* and the Second Respondent is the PUBLIC INVESTMENT CORPORATION SOC LIMITED *("the PICS")*. It is common cause that, at all material times, the PICS acted as the agent of the GEPF, duly authorised thereto.

[2] As more clearly set out in the Applicant's Notice of Motion the Applicant sought the following relief, namely:

2.1 that judgment be granted against the GEPF for payment of the amount of R27 029 001.80.

2.2 interest thereon, compounded monthly in arrears;

2.3 costs of suit against the GEPF on the scale of attorney and client; and

2.4 costs of suit against the PICS only in the event that the PICS opposed the application.

[3] The PICS opposed this application. Arising therefrom, the Applicant also seeks an order for costs against the PICS.

[4] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be *"converted"* or more correctly *"transformed"* into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex-tempore* basis.

**The facts**

[5] The facts which are either common cause or not seriously disputed by the parties in this matter, are the following, namely:

5.1 on or about the 6th of May 2018 the Applicant was appointed as the building contractor for the tendered sum of R605 309 673.12;

5.2 on or about the 8th of August 2019 the Applicant and the GEPF concluded a written JBCC Series 2000, edition 5.0, July 2007, Principal Building Agreement *("the agreement");*

5.3 in terms of the agreement:

5.3.1 the GEPF, as the *"employer",* appointed the Applicant as the *"contractor"* for the execution of the works, described as the *"construction of Tlhabane Square comprising of retail mall of approximately 27 000m²and an office building of approximately 7300m² as well as associated external works and placements"* for the amount of

R605 309 673.12;

5.3.2 the appointed *"Principal agent"* was Betts Townsend Construction Management *("Betts")* with full authority to act in terms of the agreement;

5.3.3 the appointed *"Quantity Surveyors"* were Crane Construction Consultants *("Crane")*;

5.3.4 *"Works completion"* was defined as *"the stage of completion where the work on the works completion list has been completed as certified by the principal agent."*;

5.3.5 the *"certificate of works completion"* was defined as "*a certificate issued by the principal agent to the contractor stating the date on which works completion of the works was achieved*";

5.3.6 *"Final completion"* was defined as *"the stage of completion where the works is free of all defects as certified by the principal agent"*;

5.3.7 the *"certificate of final completion"* was defined as *"a certificate issued by the principal agent to the contractor stating the date on which final completion of the works was achieved"*;

5.3.8 the principal agent was obliged to issue an interim payment certificate every month until the issue of the final payment certificate;

5.3.9 *"contract data"* was defined as *"the defined listed variables applicable to this agreement"*;

5.3.10 an issued certificate of final completion would be conclusive evidence as to the sufficiency of the works and that the contractor's obligations have been fulfilled other than for latent defects;

5.3.11 the employer would pay the contractor the amount certified in the final payment certificate within seven (7) calendar days

of the date of issue of the final payment certificate. Where the contractor did not receive payment of the amount due in the final payment certificate by due date, the employer would be liable for default interest on such amount, calculated at the rate of the Reserve Bank of South Africa. The interest would be calculated from the due date for payment up to and including the date on which the contractor received payment. The amount due and the interest thereon would be recoverable by the contractor from the employer as a debt. Such interest would be calculated at the rate of one hundred and sixty percent (160%) of the rate of the Reserve Bank of South Africa for that month; and

5.3.12 the agreement was the entire contract between the parties regarding the matters addressed therein and no representations, terms, conditions or warranties not contained in the agreement would be binding on the parties. No agreement

or addendum varying, adding to, deleting or terminating the agreement, including the relevant *"non-variation"* clause, would be effective unless reduced to writing and signed by the parties.

5.4 during or about the period 19 August 2020 to 8 March 2022, Crane assessed site instructions resulting in a budget overrun;

5.5 on the 26th of September 2022, Crane issued the final payment valuation for the final payment certificate and certified the payment valuation in the amount of R27 029 001.80 *(VAT inclusive);*

5.6 on the same day (the 26th of September 2022), Betts issued a "*Payment Certificate"* in terms of 31.0 of the agreement, certifying the amount of R27 029 001.80 *(VAT inclusive);*

5.7 also on the 26th of September 2022 the Applicant issued an invoice to the GEPF for payment of the amount of R27 029 001.80 *(VAT inclusive);*

5.8 final completion of the works was reached on the

28th of September 2022 and Betts issued a *"Certificate of Completion"* on the 30th of September 2022;

5.9 if this Court finds that the GEPF is liable to pay the Applicant the sum of R27 029 001.80 *(VAT inclusive)* then that sum was due to be paid on the 3rd of October 2022.

**The Applicant's case**

[6] The case for the Applicant, in its most simple form, is that the "*Payment Certificate"* issued by Betts on 26 September 2022 is a liquid document, in which, *ex facie* the document itself, the GEPF acknowledges a debt in favour of the Applicant.

[7] It is common cause that the amount of R27 029 001.80 claimed by the Applicant exceeds the contract sum for the building work. On the Applicant's version the aforegoing excess arises from contract instructions issued by site agents" to *whom the principal agent (Betts) has delegated its authority"*. Further and in this regard, the Applicant states, in reply, that, *inter alia,* the said instructions were *"recorded in numerous site*

*instruction books".*

[8] The defence by the GEPF, namely that Betts issued the Payment Certificate in error based upon site instructions issued by agents with no authority to do so, as well as the other defences raised by the GEPF, will be considered at an appropriate stage of this judgment. At the end of the day the Applicant's cause of action is based *solely* on the Payment Certificate. It is submitted, on behalf of the Applicant, that this document places the defences raised by the GEPF beyond the consideration of this Court. On the Applicant's version that document is *"the end of the matter"*. Put another way, the Applicant submits it is "*sacrosanct"*.

**The defences raised by the GEPF in respect of the Applicant's claim**

[9] These defences are the following:

9.1 the Applicant is not entitled to payment of R27 029 001.80 arising from site instructions where none of the site instructions are before this Court;

9.2 the only agent authorised to allow increases to the contract value was Betts. It being common cause that the site instructions were not issued by Betts in its capacity of Principal Agent, the Applicant is not entitled to payment as claimed;

9.3 the Payment Certificate fails to evidence the indebtedness of the GEPF and, as such, is not a liquid document upon which the Applicant can rely to claim payment from the GEPF; and

9.4 in terms of subclause 34.5 of the agreement, the Final Payment Certificate could only be issued subsequent to the date of the Certificate of Completion, and, as the Final Payment Certificate predates the dates of final completion by two days, it is invalid for want of the principal agent's authority.

[10] The pertinent issues to be decided by this Court were set out in the Joint Practice Note filed on behalf of both parties and as dealt with hereunder.

**The issues requiring determination as per the Applicant**

[11] The signature of the final payment certificate by the GEPF's principal agent *(Betts)* is accepted by the GEPF. However, the GEPF contends that the Final Payment Certificate was issued in error and it is *"neither fair nor reasonable to either party"*. The GEPF then proffers the following justification in support of its allegation that the Final Payment Certificate was issued in error:

11.1 the Final Payment Certificate was based on *"unratified site instructions"* that are contrary to the terms of the agreement and prevented Betts from properly exercising judgment and certifying fair value as required;

11.2 the amount that the Applicant claims exceeds the contract sum and, as the full contract sum was already paid to the Applicant, it is not entitled to payment of its current claim;

11.3 only Betts is entitled to issue site instructions and, insofar that site instructions were issued by the agents, it required ratification from Betts as the principal agent (in clause 1 of the

agreement and *"agent"* is defined *"as a party named in the contract data and/or appointed by the employer to deal with specific aspects of the works"*. It is common cause that the *"agents"* are those six entities listed in the agreement *(Contract Data EC* and are respectively the two sets of Architects, Quantity Surveyors, two sets of Structural and Civil Engineers and the Electrical Engineer, as is correctly listed by the GEPF in its Answering Affidavit.);

11.4 the Applicant contends that the GEPF's defences are unsustainable and unmeritorious both in fact and in law and accordingly fall to be dismissed.

**The issues requiring determination as per the GEPF**

[12] According to the GEPF the issues to be decided by this Court are:

12.1 whether the document *(annexure GR8 to the applicant's Founding Affidavit)*, *ex facie* the document itself and without resort to extrinsic

material, constitutes an unequivocal acknowledgement of indebtedness by the GEPF and is a liquid document as contended for by the Applicant. The GEPF contends that it cannot be ordered to pay the Applicant on the strength of the document in that it does not, *ex facie* its own terms, establish that an amount is due by the GEPF. The "*Government Employees Pension Fund*" appears nowhere on the face of the document itself. In the circumstances the Applicant must rely on the terms of the underlying contract to explain the liability;

12.2 whether the GEPF is entitled to raise defences to payment against the document assuming it *is* a liquid document. The GEPF contends that it is entitled to raise any defence in law to a claim for payment on a payment certificate;

12.3 whether the Applicant is entitled to payment on motion where a dispute exists as to the amount claimed and the *(lack of)* authority of site agents to issue site instructions for extra work to the value of R27 029 001.80. The GEPF contends that a dispute concerning the value of

that final account is to be resolved by way of arbitration in terms of the agreement.

**The principal issues to be decided by this Court**

[13] Arising from the aforegoing it was submitted, *inter alia*, by the GEPF and the PICS, that the two principal issues which is necessary for this Court to decide are the following, namely:

13.1 whether the Court is permitted to consider the GEPF's defences to payment of the additional amount; and

13.2 if so, whether the Applicant is entitled to payment of R27 029 001.80 arising from site instructions where (a) none of the site instructions are before the Court and (b) it is common cause that the site instructions were not issued by the principal agent.

**The law**

[14] The Applicant, after pointing out that it is armed with a duly issued Final Payment Certificate, submits that the

legal principles to be applied in such an instance can be summarised as follows:

14.1 the Final Payment Certificate binds the GEPF, as employer, to pay the amount stated therein within the time limit provided for in the agreement. The Applicant, as contractor, is entitled to sue for payment upon the expiry of the time limit without any further steps;[1]

14.2 a final payment certificate has to be treated as a liquid document as it is issued by the employer's agent. That places the employer in the same position it would have been if it had itself signed an acknowledgment of debt in favour of the contractor. It is thus regarded as the equivalent of cash or an acknowledgment of debt;[2]

14.3 the Final Payment Certificate embodies an obligation on the part of the employer, to pay the amount set out and gives rise to a new

[1] *Martin Harris & Seuns OVS (Edms) Bpk v Qua-Qua Regeringsdiens; Qua-Qua Regeringsdiens v Martin Harris & Seuns (Edms) Bpk 2000 (3) SA 339 (SCA) at paragraph [37]; Joob Joob Investments (Pty) Ltd v Stocks Mabundla ZEK Joint Venture 2009 (5) SA 1 (SCA).*
[2] *McKenzie's Law of Building and Engineering Contracts and Arbitration, PA Ramsden, 7th edition page 208; Finsen's The Building Contract, A commentary on the JBCC agreements, 3rd edition, Stan Segal, page 211; Martin Harris & Seuns (supra); Joob Joob Investments (supra).*

cause of action;[3]

14.4 the employer, as a rule, may not dispute the correctness of a Final Payment Certificate and the contractor need not prove the amount claimed[4];

14.5 negligence or mistake on the part of the principal agent is not a sufficient ground for attacking the validity of a certificate[5] although the principal agent's negligence may found an action against him by the employer.[6]

[15] In respect of the defence raised by the GEPF that the Final Payment Certificate was issued in *"error"*, it was submitted, on behalf of the Applicant, that this defence did not raise a real, genuine or *bona fide* dispute of fact and/or is clearly untenable, justifying this Court rejecting it merely on the application papers.[7] It was further submitted *(correctly in the opinion of this Court)* that a real, genuine and *bona fide* dispute of fact can

[3] *Joob Joob Investments (supra) at paragraph [27]; Ocean Diners (Pty) Ltd v Golden Hill Construction CC 1993 (3) SA 331 (A) at 334E; Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd 1973 (4) SA 181 (D) at 186G-188G.*
[4] *Ocean Diners (supra)*
[5] *Smith v Mouton 1977 (3) SA 9 (W) at 13; Ocean Diners (supra)*
[6] *McKenzie's Law of Building and Engineering Contracts and Arbitration (supra) at page 212; Hoffman v Meyer 1956 (2) SA 752 (C); Ocean Diners (supra).*
[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at 634E-635C*

exist only if the Court is satisfied that the party who raised such dispute has, in its affidavit, seriously and unambiguously addressed the facts said to be disputed.[8]

[16] The GEPF submits that whilst the Applicant relies on a number of authorities to support its case, those authorities all reiterate general principles that are trite and none of them address the key issue, namely, whether this Court is empowered to consider the GEPF's defences in the face of a certificate issued under a building contract. It is further submitted that, in resisting a claim on a payment certificate, a respondent has all the defences it would ordinarily have (a) under the contract and (b) in law. In support of the aforesaid submissions the GEPF relies upon Bertelsmann, Van Loggerenberg, Erasmus, Superior Court Practice *("Erasmus")* where the learned authors note[9] that a Court will not grant payment on a payment certificate in the face of a dispute concerning the value of the works for which payment is sought.

[17] The learned authors state, *inter alia*, in the context of

[8] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at paragraph [13]*
[9] *At D-103*

Provisional Sentence, the following:

*"**Architect's certificate.** An architect's 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 owner. The summons must contain an allegation that in certifying the architect acted as the defendant's duly authorised agent*

*.*

*There have been conflicting decisions on the question whether, if the authority of the architect derives from the building contract, it is necessary to annex a copy of the contract to the summons.*

*If the certificate contains no indication that the amount certified as being payable is in fact payable by the defendant, the certificate is not a liquid document, nor can it be made liquid by having regard to the provisions of the building construction contract between the parties.*

*Provisional sentence will not be granted on an engineer's progress or final certificate where there is*

*a genuine dispute which in terms of the contract between the parties, has to be referred to arbitration."*

[18] Also, in the matter of *Concor Construction (Cape) (Pty) Ltd v Simonstown Municipality*[10] it was held:

*" The certificate which forms the basis of the present provisional sentence proceedings was issued to plaintiff by the consultant engineer under a covering letter of even date, and from the terms of this letter it is apparent that the certificate has been misnamed a progress certificate. It is in fact not a progress certificate but is, as stated in the concluding paragraph of the covering letter, the final certificate. From the body of letter it is apparent that the certificate is not only issued for the payment of the outstanding retention monies but for the amount assessed by the engineer as been due to plaintiff in respect of the outstanding disputes between the parties. These disputes relate to whether plaintiff is entitled to payment for certain material supplied and work done in rectifying the defects in the filters and interest and finance*

[10] *1978 (4) SA 414 (CPD) at 419*

*charges occasioned by the delay caused by having to rectify the filters.*

*The certificate sued upon is not a progress certificate but a final certificate and a dispute has arisen as to the final amount due to plaintiff, and in terms of clause 22 of the contract, this dispute must go to arbitration. Plaintiff is therefore not entitled to provisional payment pending the conclusion of the arbitration proceedings. Provisional sentence must consequently be refused."*

[19] Both Counsel for the Applicant and Counsel for the GEPF relied upon the matter of *Ocean Diners (Pty) Ltd v Golden Hill Construction CC.*[11] As dealt with earlier in this judgment the Applicant's reliance thereon was that a final payment certificate embodies an obligation on the part of the employer to pay the amount set out and gives rise to a new cause of action.[12] Further, the Applicant relied on *Ocean Diners* as support for the proposition that the employer, as a rule, may not dispute the correctness of a final payment certificate and the contractor need not prove the amount

[11] *1993 (3) SA 331 (AD)*
[12] *Concor at 334E*

claimed.[13] On the other hand, Counsel for the GEPF relied upon *Ocean Diners* as authority for the fact that a final payment certificate is not indefeasible and is subject to the various defences that may be raised in an action based on a final payment certificate.[14]

[20] A further matter giving rise to dissention between the parties is the fairly recent decision in *Umlazi Civils (Pty) Ltd v Concor Construction t/a Conradie Development and Another.*[15] The GEPF relies on this decision on the basis that the applicant in *Umlazi* sought final relief, on motion, on the basis of a payment certificate and the Court in that matter dispelled the notion that a payment certificate was *"sacrosanct"* or beyond defence.

[21] Applicant's Counsel sought to distinguish between *Umlazi* and the present matter on the basis that, *inter alia*:

21.1 the payment certificate in *Umlazi* was an interim payment certificate whilst the payment certificate in the present matter is a final payment certificate *(but see Joob Joob)*;

[13] *At subparagraph 14.3 ibid.*
[14] *Ocean Diners at 340*
[15] *(20967/2021) [2023] ZAWCHC 161 (10 July 2023)*

21.2 the consideration of the certificate in *Umlazi* took place under very specific factual circumstances and the facts in *Umlazi* differ materially from the facts of the present matter;

21.3 the Applicant's claim in *Umlazi* was based upon a different building contract to that which forms the basis of the Applicant's claim in the present matter and in terms of which the certificate was issued;

21.4 the amount claimed in the interim payment certificate in *Umlazi* remained in dispute when the matter was heard by the Court and stood to be determined in the pending arbitration proceedings; and

21.5 *Umlazi* can also be further distinguished from the present matter on the basis that, in the present matter, the Respondent has admitted the final certificate.

[22] As to the liquidity of the certificate in the present matter, the GEPF relied, *inter alia*, on the matter of

*Fraser & Chalmers SA v Tuckers Land Development Corporation Ltd*[16] to support the principle that, *inter alia,* the certificate is not a liquid document. Counsel for the Applicant responded, in turn, by relying on the matter of *Moriatis v De Canha and Another*[17] which, whilst citing *Fraser* with approval and declining to follow the reasoning of Van Heerden J in *Randcon (Natal) (Pty) Ltd v Florida Twin Estates Ltd*[18] where it was held that a court could not rely on an underlying agreement to decide whether a document is liquid or not, nevertheless held that it *is* permissible to take into account the averments as set out in a defendant's affidavit. These averments could well cure any deficiencies in the relevant document which would otherwise negate its liquidity.[19] Hence, submits the Applicant, also relying on an *obiter dictum* of Muller J in *Coetzee and Solomon Real Estate (Pty) Ltd v Texeira,*[20] approved in *Randcon* and *Moriatis*, where,in the present matter the GEPF, in its Answering Affidavit, has admitted that the payment certificate exhibits payments due by the GEPF the GEPF cannot avoid payment on the basis that, *inter alia*, the said certificate is not a liquid document simply because

[16] *1977 (2) SA 465 (W) at 468A-C*
[17] *1984 (1) SA 420 (W)*
[18] *1973 (4) SA 181 (D)*
[19] *Moriatis at 427*
[20] *1970 (1) SA 94 (D) at 95F-96A approved in Randcon and Moriatis*

such an indebtedness does not appear *ex facie* therefrom.

[23] As to the defence raised by the GEPF that, *inter alia*, Betts issuing the final certificate before the date of completion, which is in conflict with the terms of the agreement and is either in error or by negligence on its behalf, giving rise to the fact that the issuing thereof is invalid for want of Betts' authority, Counsel for the applicant relied on the decision in the matter of *Trackstar Trading 20 (Pty) Ltd v Maykent.*[21]

[24] In *Trackstar* the Court was similarly faced with a matter where the issue of a principal agent's authority was at stake. The facts in *Trackstar* share a remarkable similarity with the facts in the present matter with the employer similarly relying on a clause of the JBCC agreement and claiming that the Final Payment Certificate was not proper as it was issued before the completion certificate and that it could only be issued once the certificate of final completion was issued.[22] The Court rejected this argument and held:

*"This is an untenable submission. The first*

[21] *2013 JDR 2431 (GNP)*
[22] *At paragraphs [20] and [26]*

*defendant's agent, the second defendant, had issued the final payment certificate. It was the second defendant's task to issue certificates. The plaintiff cannot be held responsible for the second defendant's failure to comply strictly with the terms of the JBCC."*

**Discussion**

**Is this Court permitted to consider the GEPF's defences to payment of the additional amount?**

[25] The Applicant submits[23] that the *"principal"* defence relied upon by the GEPF, as set out in the GEPF's Answering Affidavit, namely that the Final Payment Certificate was issued by Betts *"in error"*, is not a good defence in law as a mistake on the part of the principal agent is not sufficient ground for attacking the validity of the Final Payment Certificate. It was also submitted that the aforegoing could, however, present the GEPF with a claim against, *inter alia*, Betts. Arising therefrom the Applicant submits that a finding in support of these submissions brings this matter to an end and the Applicant is entitled to judgment as set out in the Applicant's Notice of Motion.

[23] Paragraph [14] ibid

[26] The GEPF, (*correctly in the opinion of this Court*) accepts the general principles relied upon by the Applicant and the authority cited by Counsel for the Applicant in support thereof. The criticism levelled, however, by the GEPF is that these are general principles only which must be applied to the facts of each case.

[27] If this Court understands the case for the GEPF correctly, it is the contention of the GEPF that before this Court can apply the general principles in respect of a claim based upon a liquid document, this Court must be satisfied that the payment certificate relied upon *(solely)* by the Applicant, satisfies the requirements thereof. In the premises, the GEPF raises the defence that, in the first instance, the payment certificate is *not* a liquid document. This *"defence"* is aimed at challenging the liquidity of the document itself rather than the *"merits"* of the Applicant's claim based thereon. In retrospect, it would have perhaps been simpler had the parties referred to this defence raised by the GEPF to the liquidity of the payment certificate as a *"point in limine"*.

[28] This point taken "*in limine*" by the GEPF is based on the fact that the GEPF alleges that the payment certificate fails to evidence the indebtedness of the GEPF and, as such, is not a liquid document upon which the Applicant can rely to claim payment from the GEPF.[24]

[29] In this regard, it is common cause that the payment certificate does not name the GEPF as the party that is indebted to the Applicant in the amount stated therein but, rather, names the PICS. This was the principal issue taken with the liquidity of the document as set out in the Heads of Argument filed on behalf of the GEPF and the PICS and as dealt with during argument before this Court. It was, however, also pointed out on behalf of the GEPF that the inscription at the bottom of the certificate of *"Betts Townsend Construction Managers"* does not accord with the correct name of the principal agent, namely *"Betts Townsend Construction Management"*. In the premises, it is submitted that that document, *ex facie*, is not signed by the duly authorised agent of the GEPF.

[24] *Subparagraph 9.3 ibid*

[30] Relying on *Fraser,*[25] to qualify as a liquid document, a document must, *ex facie*, its terms and having regard to the document by itself, evidence an acknowledgement of indebtedness by the GEPF to the Applicant. The document must speak for itself and it must show that the debt is due by the GEPF. Following thereon, it is further submitted that the document on which the Applicant seeks payment does not satisfy that requirement. In addition to the aforegoing, there is no statement in the document that the GEPF binds itself to pay the amount claimed.

[31] Counsel for the GEPF submitted that payment on the certificate is only competent where the indebtedness of the GEPF appears *ex facie* the document itself. That is, the document in and of itself must be absolutely perfect. The liability of the debtor, in this instance the GEPF, must appear without recourse to the provisions of the building contract. Equally, the authorised principal agent, correctly cited, must appear on the document itself.

[32] Counsel for the GEPF once again relies on *Erasmus*[26] where the learned authors state that a liquid document

[25] *At 468A-C*
[26] *At D-100*

is one which:

> "*...evidences by its terms and without resort to evidence extrinsic thereto, ...an unconditional acknowledgement of indebtedness in an ascertained amount of money...*
>
> *If the certificate contains no indication that the amount certified as being payable is in fact payable by the defendant, the certificate is not a liquid document, nor can it be made liquid by having regard to the provisions of the building construction contract between the parties.*"[27]

[33] In *Fraser (a decision of this Division)* this Court held, *inter alia*, the following:

> "*...in the present case there is no statement whatsoever in the engineer's certificate that the amount certified as being payable to the plaintiff is payable by the defendant. Counsel for the plaintiff sought to argue that a proper construction of the document would lead to the inference that the amount was due and liable by the defendant because of the reference numbers at the top of the document and because the document was addressed to the defendant. I am unable to accept this*

[27] *Emphasis added*

*argument. On the document as it stands I do not find any indication that the amount certified as being payable is in fact payable by the defendant...*

*Of course, if this document were to be read against the background of the main contract between the parties, which was a building construction contract, it would make sense to the extent that one would then understand that it was then intended in this document to certify that the amount in question was payable by the defendant, but counsel for the plaintiff quite correctly conceded that no reference should be made to the main contract between the parties for the purpose of determining whether the engineer's certificate was liquid or not.*

*The concession was clearly correct because it is well-known that, to qualify as a liquid document, a document must, ex facie its terms, that is having regard to the terms of the document by itself, evidence an acknowledgement of indebtedness by the defendant to the plaintiff.*[28]

[34] *Fraser* emphasises the strict scrutiny that the Court applies to the document that is in question. Counsel

[28] *Emphasis added.*

for the GEPF submitted that the document itself must be unassailable. No reference may be had to the agreement to understand that where the certificate says "PIC" it actually means "GEPF".

[35] Most importantly, this requirement was confirmed by the Supreme Court of Appeal (*"the SCA"*) where it held, in relation to the liquidity of a document, the following:

> *"...Upon a proper construction thereto, evidenced by its terms and without resort to evidence extrinsic thereto an unconditional acknowledgement of indebtedness in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted."*[28a]

[36] The Applicant relies on *Randcon* in its Heads of Argument. In that case the Durban and Coast Local Division considered that it was permitted to look at the building contract where the certificate was defective. In that case there was a defect in that the principal agent had not indicated on the certificate itself that it signed as agent of the employer.[29]

[28] *Emphasis added.*
[29] *At 185E-F*

[37] The Court in *Randcon* did not consider the earlier decision in *Fraser*, a decision of this Division. The latter remains the binding authority in this Division, being cited in a later decision, also of this Division (*Moraitis)* with approval.

[38] In *Moraitis* (*supra*), this Court rejected *Randcon* and reiterated that for a document to be liquid it must speak for itself without reference to the underlying contract:[30]

> *"The books are by no means harmonious. A convenient point to begin a discussion of them is with the judgment of Van Heerden J in Randcon (Natal) (Pty) Ltd v Florida Twin Estates Ltd 1973 (4) SA 181 (D). The action was based on an architect's certificate issued in terms of a building contract. It certified that the monies were due by the defendant to the plaintiff but did not show that the architect was the plaintiff's agent to create the debt, although it was so alleged in the summons.*
>
> *The existence of the agency emerged from the building contract which had found its way into the defendants' answering affidavit. The learned Judge said at 185C-H:*

[30] *At 427 to 429.*

*A copy of the contract forms part of the papers. There seems to be no reason why the contract cannot be looked at to ascertain in what capacity the certificates were signed..."*

[39] Having considered *Randcon* this Court, in *Moriatis*, held:

*"There is a great attraction in reasoning of this kind. It avoids excessive technicalities and artificial results...*

*Nonetheless, I am not persuaded. It may well be appropriate in an example such as the one I have given above to look at the defendants' affidavit to see whether the missing averment is admitted, or in order to grant an amendment. That type of averment does not relate to liquidity of the document.*

*...I am unable to see how, in a case such as the present, reference to another document, albeit admitted and produced by the defendants, can turn a document which is illiquid into one which is liquid...*[31]

[40] In the end the Court in *Moriatis* retained the *"stricter"* position in *Fraser:*

[31] *Emphasis added.*

*"I am unable to reconcile this statement of the law with what was said by Van Heerden J in the Randcon case in the passage which I have already quoted, and for the reasons which I have given I prefer to follow what was said by Botha J in the Fraser & Chalmers case.*

*I have accordingly come to the conclusion that I am unable to take cognisance of the written agreement apparently referred to in the bills of exchange. As I have already indicated, looked at by themselves, the bills are not liquid and the third point in limine must succeed."*[32]

[41] Following a careful consideration of the aforementioned authorities, it is the opinion of this Court:

41.1 that in order for a document to be truly liquid and for judgment to be granted in respect thereof, it should be carefully scrutinised and strictly interpreted *(Fraser; Joob Joob and Moraitis)*;

41.2 when doing so, it is not permissible to have regard to extraneous evidence such as, *inter*

[32] *Emphasis added.*

*alia*, the contract between the parties or any underlying agreement;

41.3 however, it *is* permissible for regard to be had to the contents of a defendant's plea in an action or a respondent's answering affidavit in motion proceedings. In this manner, deficiencies in the document may well be cured, resulting in a finding that the document relied upon is indeed a liquid one. *(Moraitis; Randcon and Coetzee)*.

[42] Applying the aforesaid principles to the facts of the present matter, it becomes clearly evident that *(as relied upon by the Applicant)* it is incumbent upon this Court to consider the averments as set out in the answering affidavit filed on behalf of the GEPF and the PICS. In this regard, it was submitted by the Applicant's Counsel that the GEPF (and the PICS) had admitted the allegations made by the Applicant in its founding affidavit that:

*"On 26 September 2022 <u>the appointed principal agent, Betts Townsend Construction Managers</u>, issued the final payment certificate, i.e., certificate 31, and certified the amount R27 029 001.80 (VAT*

*inclusive), as due and payable by first respondent to the applicant."*[33]

[43] The response in the Answering Affidavit[34] to the aforesaid allegations in the Founding Affidavit reads *(verbatim)* as follows:

*"Subject to what I have said above, I do not dispute the averments in these paragraphs (sic) insofar as they are consistent with the contents of annexure "GR8"".*[35]

[44] The Answering Affidavit may best be described as consisting of two halves. In the first half the deponent sets out that it is not his intention to deal with each and every paragraph in the Founding Affidavit but to deal with the broad issues raised and to address *"...the substance of the challenge."*. Then, in the *"second half"* of the Answering Affidavit, after describing, *inter alia*, the context within which the GEPF operates, together with the legal and factual basis upon which the GEPF opposes the relief sought in the application, the deponent responds *"...to the averments, contentions, and arguments in the individual paragraphs of the founding affidavit."*

[33] *Emphasis added; paragraph 19 of the founding affidavit.*
[34] *At paragraph 81.*
[35] *Emphasis added.*

[45] In that response, it is averred by the deponent that, *inter alia*, he had *"...already covered virtually all of the issues and will seek to avoid unduly burdening the papers by repeating submissions."* Importantly, it is stated that:

*"My responses must be read in the context of this affidavit."*

Moreover, it is further stated that:

*"Any failure to respond to a particular averment should not be construed as an acceptance thereof but should be understood to be a denial of the averment.*

[46] Then dealing with the individual paragraphs of the Founding Affidavit the deponent to the Answering Affidavit has been true to the aforegoing and has dealt with these paragraphs *"and the averments set out therein"* succinctly.

[47] In the Answering Affidavit the GEPF, after dealing with, *inter alia*, the alleged differences between the report of the Quantity Surveyor and the payment certificate which, it is alleged, is based upon uncertified site instructions and the fact that the cost of the project has exceeded *(considerably)* the budget, makes the averment that:

*"...certificate based on unratified site instructions is contrary to the Principal Building Agreement and prevents the principal agent from properly exercising judgment and certifying fair value as required. A certificate issued by the principal agent in error is neither fair nor reasonable to either party."*

This portion of the Answering Affidavit, read with the other averments therein *(both in the "first half" thereof and the specific answer to paragraph 19 of the Founding Affidavit)*[36] clearly negates the Applicant's reliance upon the fact that the GEPF has admitted the liquidity of the payment certificate.

[48] From the contents of the GEPF's Answering Affidavit, considered in their entirety, it is clear that the GEPF did *not* admit the *correctness* of the payment certificate nor that the said certificate complied with the requirements of a liquid document. The only *"admission"* that was made on behalf of the GEPF was insofar as the averments relied upon by the Applicant were consistent with the *contents* thereof. It could never be said that in the context that this *"admission"*

[36] *Paragraphs [42] and [43] ibid*

was made in the Answering Affidavit, that the GEPF admitted that the document was a liquid one upon which the Applicant could solely rely in support of its claim against the GEPF. Such an admission would have been in stark contrast to the GEPF's entire case.

[49] The Applicant submitted that in light of the fact that the GEPF had not directly raised the liquidity of the certificate as a defence as set out earlier in this judgment[37] that the GEPF should not be entitled to do so at this late stage. It is true that the GEPF did not, in its Answering Affidavit, raise the *specific* defence that the certificate did not reflect the indebtedness of the GEPF and does not reflect the principal agent as the party who issued same. However, as mentioned earlier in this judgment, this point would have been better described as a *"point in limine"*

[50] Whilst raising the *"lateness"* of this point as taken by the GEPF, the Applicant nevertheless proceeded to deal with same during the course of argument before this Court *(having also filed Supplementary Heads of Argument).* In the premises, these issues have been fully ventilated. Moreover, the facts pertaining thereto

[37] *Paragraph [28] ibid and paragraphs following.*

are common cause. Taking the aforegoing into consideration, it is the opinion of this Court that it is Nin the interests of justice that the GEPF be entitled to take this point. This finding is vindicated by the fact that since the Applicant has elected to institute its claim solely on the basis of an alleged liquid document the onus falls upon the Applicant to prove, on a balance of probabilities, that the certificate complies with the requirements of a liquid document. In the premises, the GEPF should be entitled to raise the defence that this particular certificate is not a liquid document in that it does not comply with the requirements thereof.

[51] Arising therefrom, is imperative to note that, *inter alia*, the Applicant, in its Founding Affidavit, has failed to deal with the shortcomings of the payment certificate in relation to the liquidity of that document. In the premises, it can hardly be argued in the present application *(applying trite principles of law)* that the Applicant has discharged the onus incumbent upon it to prove, on a balance of probabilities, that the payment certificate is indeed a liquid document and that, *ex facie* that certificate, the Applicant is entitled to payment from the GEPF.

[52] As to a finding as to whether the payment certificate, as submitted on behalf of both the GEPF and the PICS, is *not* a liquid document in light of the fact that, *ex facie* the said document, no indebtedness of the GEPF is reflected thereon and, further, that it is not reflected that the principal agent is the party who issued same, this Court finds in favour of the GEPF and the PICS.

[53] With regard to the fact that the payment certificate does not exhibit any indebtedness on behalf of the GEPF, it is common cause in this matter that the party reflected in the Payment Certificate as *"Employer"* and consequently the party liable to make payment to the Applicant, is *"Public Investment Corporation"*. In the premises, the GEPF is not reflected as being the entity liable to pay the Applicant but, rather, a completely different and separate entity, namely the PICS is indicated to be that which is indebted to the Applicant. Further, as also correctly pointed out on behalf of the GEPF, there is no statement contained in the Final Payment Certificate whatsoever that the GEPF binds itself to pay the amount claimed.

[54] In addition to the aforegoing *(and this Court considers*

*the following to be decisive on this issue)* is that it is common cause in this matter *(as dealt with earlier herein)* that the PICS acted, at all material times, as an agent for the GEPF. Arising therefrom and without burdening this judgment unnecessarily by carrying out an in-depth discussion of the principles applicable to "*agency*" the PICS *(even if this Court was entitled to look at the underlying agreement which, as dealt with earlier, it is not)* can never be liable to pay the amount claimed by the Applicant. At the end of the day the Final Payment Certificate reflects the incorrect party/entity as the one who is indebted to the Applicant. This destroys the liquidity of the document relied upon solely by the Applicant in support of its claim for payment from the GEPF *(and from no other party or entity)*.

[55] The aforegoing is sufficient to destroy the liquidity of the payment certificate, thereby entitling the GEPF to a dismissal of the application instituted by the Applicant. Nonetheless, in- addition to the aforegoing, it is also common cause that the Final Payment Certificate does not reflect the correct name of the principal agent who allegedly issued it. In this regard, *"Betts"* is described in the document as "BETTS

TOWNSEND CONSTRUCTION MANAGERS" whilst it is common cause that the principal agent is in fact BETTS TOWNSEND CONSTRUCTION MANAGEMENT". Hence, *ex facie* the document, the principal agent has not issued the Final Payment Certificate. Further, in the opinion of this Court, this deficiency in the payment certificate, insofar as it pertains to the liquidity thereof, is compounded by the fact that the description of the party who allegedly issued the document, is not *"expanded upon"* in the same document by, for example, a description as to the type of legal entity the party is and, in the case of a company or close corporation, its registration number.

[56] A further factor, in the opinion of this Court, which supports the finding that the payment certificate is not a liquid document, is that, in the present matter, the liquidity of the document fails the litmus test not just in respect of a single requirement but two. In the premises, the cumulative effect of these deficiencies should be taken into account when deciding upon the liquidity of the payment certificate relied upon by the Applicant.

[57] Moreover, this Court is in agreement with the

submission made by Counsel for the GEPF that, to obtain payment on a liquid document, that document should be *"perfect"* or *"beyond reproach"* when a court examines the liquidity thereof. This *"strict approach"* has not only been accepted and followed by our courts but, in the opinion of this Court, is required as a matter of *"public policy"*.

[58] If an applicant or a plaintiff elects to rely solely on the contents of a document to obtain prompt payment, thereby effectively avoiding a lengthy and expensive process to obtain a final judgment against a respondent or defendant, at the same time denying that respondent or defendant the right to enter into *"the merits"* of a particular application or action, then it should follow that the document relied upon be subjected to detailed scrutiny. At the end of the day, any document solely relied upon by an applicant or plaintiff in an application or action to obtain a final judgment against a respondent or defendant, is not *"sacrosanct"*. The implications of the granting by a court of judgment in favour of one party against another carries with it serious consequences, not least of which are limitations to that party's fundamental and constitutional rights *(to, inter alia,*

*access to the courts and to fully ventilate all of the issues).* Whilst our jurisprudence *(for other equally important reasons)* has *(correctly in the opinion of this Court)* recognised the rights of an applicant or plaintiff, properly armed with a liquid document to obtain prompt payment, these remedies available to such an applicant or plaintiff must, to satisfy public policy, be kept within reasonable limits. The best manner in which to achieve same is to ensure that any liquid document relied upon is not only examined in great detail by the court but that the same document complies fully with all of the necessary requirements pertaining to liquidity.

[59] Having regard to all of the aforegoing and, in particular, the finding of this Court that the payment certificate is not a liquid document, this application stands to be dismissed.

[60] As set out above, the upholding of the points *in limine*, as raised by the GEPF, is effectively the end of the matter. However, should this Court be incorrect in this regard, it is expedient for this Court to determine the first question as raised herein, namely, *whether this Court is permitted to consider the GEPF's*

*defences to payment of the additional amount.* Further, if the answer to this question is in the affirmative, has the GEPF successfully raised a valid defence to the Applicant's claim based on the Final Payment Certificate.

[61] As dealt with earlier in this judgment[38] the Applicant relied upon *Ocean Diners* as support for the proposition that the employer, *as a rule*, may not dispute the correctness of a final payment certificate and the contractor need not prove the amount claimed. This Court has little difficulty in accepting the correctness thereof as a general principle. In addition thereto, this Court understood that Counsel for the GEPF did not dispute the aforegoing. What *is*, however, of great significance, is the reliance placed by the GEPF upon *Ocean Diners* as authority for the fact that a final payment certificate is not indefeasible and is subject to the various defences that may be raised in an action or application based thereon. In this regard the erstwhile Appellant Division held[39] the following:

*"The issuing of a final certificate carries with it certain legal consequences. Their nature depends in*

[38] *Paragraph [19] ibid.*
[39] *At 340D-F*

*the first instance on the proper interpretation of the relevant provisions of the governing agreement. In the present matter the effect of the certificate was to determine the respective rights and obligations of the parties in relation to matters covered by the certificate. It constituted (in the absence of a valid defence) conclusive evidence of the value of the works and the amount due to the respondent. It embodied a binding obligation on the part of the appellant to pay that amount. It gave rise to a new cause of action subject to the terms of the contract. The appellant's failure to pay within the time stipulated entitled the respondent to sue on the certificate (compare Mouton v Smith 1977 (3) SA 1 (A) at 5C-E). However, the certificate is not indefeasible. It is subject to the various defences that may be raised in an action based on a final certificate."*[40]

[62] This Court *(as it is bound to do, giving due deference to the doctrine of stare decisis)* aligns itself fully with the aforegoing and finds that the GEPF is entitled to raise the defences that it has in the present application. It is thus incumbent upon this Court to consider the merit of those defences.

[40] *Emphasis added.*

**Is the Applicant entitled to payment of R27 029 001.80 arising from site instructions when none of the site instructions are before this Court?**

[63] The GEPF disputes the correctness of the value of the works and the authority of the various agents to issue site instructions increasing the tendered contract sum.

[64] In terms of the agreement only the principal agent (*Betts*) has such authority. As set out in the Answering Affidavit of the GEPF and the PICS:

64.1 *"Clause 17 of the Principal Building Agreement provides that "only the Principal Agent may issue contract instructions to the contractor regarding..." (paragraph 40);*

64.2 *"...many "contract instructions" were not issued by the principal agent but instead issued by unauthorised "Agents", and were not ratified by the principal agent (paragraph 44);*

64.3 *"I pause to mention that the "contract instructions" were not issued by the principal*

*agent but by various "agents" such as the architects and engineers. To the extent that such "contract instructions" exist such require ratification by the Principal Agent in terms of the Principal Building Agreement."*

[65] It was correctly submitted on behalf of the GEPF that the agreement distinguishes between agents *simpliciter* and the principal agent. Only the principal agent has the authority to issue contract instructions. There is good reason and logic for this since the GEPF and the PICS are public entitles entrusted with public money. The tendered contract sum cannot simply be increased by any agent on site. Agents have specific and limited roles. As set out in the agreement, they have no authority to bind the employer.

[66] Subclause 5.3 of the agreement provides that:

*"5.3 The principal agent shall be the only party having the authority to bind the employer except where agents issue contract instructions <u>under delegated authority</u>. Without derogating from the above, the principal agent shall be the only party empowered to:*

*5.3.1 Issue contract instructions, except as provided;*

*5.3.2 Delegate to 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."*[41]

[67] As also correctly pointed out on behalf of the GEPF the Applicant concedes that the extras were not ordered, in writing, by Betts as required by the agreement. The Applicant relies *(in its Replying Affidavit)* upon subclause 5.3.2 of the agreement *(set out above)* for the *delegated* authority of the agents to issue the contract instructions for the amount claimed and alleges that Betts delegated authority to the appointed agents to issue contract instructions. It is also alleged that the Applicant had been notified of that.

[68] Whilst the Applicant relies upon delegated authority *(as provided for in the agreement)* there is nothing in

[41] *Emphasis added.*

the application papers before this Court to support a version based thereon. In particular, there is nothing before this Court to show *"notice of delegation"*. Arising from the aforegoing, it was submitted on behalf of the GEPF *(correctly in the opinion of this Court)*, that if notice of delegation had in fact been given *(denied by the GEPF and the PICS)* then the Applicant would have been in the position to produce same in reply and its failure to do so must resolve this dispute in favour of the GEPF, regard having been had to the fact that the Applicant has elected to proceed by way of application and not action.

[69] At this stage, it is worthy to note that the Applicant does *not* rely on estoppel *(that the GEPF is estopped from denying that Betts delegated the requisite authority to the relevant agents in terms of the agreement)*.

[70] Arising from the aforegoing, it is clear that the Applicant is not entitled to payment of R27 029 001.80 from site instructions issued by way of delegated authority where there is no proof of either and there are *bona fide* disputes of fact in respect of both in these application proceedings. On that basis the

application would stand to be dismissed.

**The defence that in terms of subclause 34.5 of the agreement the Final Payment Certificate could only be issued subsequent to the date of the final completion certificate and as the final payment certificate predates the date of final completion by two days, it is invalid for want of the Principal Agent's authority.**

[71] Upon reflection, this defence, as raised by the GEPF to the Applicant's claim, should also, similar to the defence that the payment certificate is not a liquid document, have been raised as a point in *limine*. This is because, *inter alia*, once again, the facts in relation thereto are common cause and the question as to whether this defence is a valid one, is essentially a matter of law.

[72] The common cause facts upon which the GEPF bases this defence have already been set out in this judgment.[42] In summary, the defence *(in law)* is that in terms of the agreement Betts had no authority to issue the Final Payment Certificate before the issuing of the certificate of final completion. The GEPF submits that in the present matter the condition

[42] *Subparagraphs 5.4; 5.5; 5.6;5.7 and 5.8 ibid.*

precedent to Betts' authority to issue the Final Payment Certificate had not been satisfied since the certificate of final completion had not been issued when Betts issued the Final Payment Certificate.

[73] This judgment has already dealt with the matter of *Trackstar*[43] and the finding therein that, *inter alia*, such a *"defence"* is untenable where one of the tasks of a defendant's agent is to issue certificates and the plaintiff cannot be held responsible for the failure of that agent to comply strictly with the terms of the JBCC agreement where the agent has issued a final payment certificate in the absence of a certificate of completion. As also set out earlier in this judgment was the fact that *Trackstar* was relied upon by Counsel for the Applicant to support the argument that this defence could not be relied upon by the GEPF.

[74] In *Trackstar* the first defendant in the Court *a quo*, namely Makent (Pty) Ltd *("Makent")*, appealed to the SCA[44]. From a reading of the judgment of the SCA in *Makent* it is clear that:

74.1 *Trackstar* was a matter which had proceeded to

[43] *Paragraphs [23] and [24] ibid*
[44] *Makent (Pty) Ltd v Trackstar trading 20 (Pty) Ltd (1036/2013) [2015] ZASCA 14 (17 March 2015)*

trial and the Court *a quo* had heard oral evidence before it reached the decision that it did;

74.2 at the trial in the Court *a quo* the evidence of the representative of *Makent's* principal agent, who had overseen the building work and attended site meetings on behalf of the principal agent, was that he had not worked according to the standard terms of the JBCC contract and did not know that it formed the basis of the parties' agreement. Arising therefrom the SCA noted that the Court *a quo* found that all the parties had proceeded as if the terms of the JBCC contract were *not* applicable and thus held that the provision in the JBCC contract requiring a certificate of completion and *then* a final certificate of payment, was *not* required;[45]

74.3 following thereon, it was also noted by the SCA that the court *a quo* ultimately rejected the defence raised by *Makent* on the basis that the claim by *Trackstar* for the issuing of a final payment certificate and *then* payment, was akin to a claim for a statement and debatement of account and that the summons was, in the circumstances

[45] *Makent at paragraph [7]*

of that particular matter, *not* premature;

74.4 in *Makent*, on appeal before the SCA, the Court noted[46] that *(despite Makent's Heads of Argument)* Counsel did not persist with the argument that the JBCC contract terms were binding upon the parties. Instead, argument before the SCA on behalf of *Makent* was concentrated on the issue of when interest should commence to run on the claim of *Trackstar* against *Makent*.

[75] From the aforegoing, it is clear that *Trackstar* is clearly distinguishable from the present matter. This is by virtue of the fact that, *inter alia*:

75.1. in the present matter the Applicant elected to proceed by way of application and not by way of action;

75.2. as a consequence thereof, this Court did not have the benefit of hearing any oral evidence. Nevertheless *(and this is important)* it was common cause between the parties in the application before this Court that the terms of the agreement, with particular reference to

[46] *Makent at paragraph [8]*

subclause 34.5 thereof, were applicable;

75.3. the claim of Applicant in this application is for payment based solely upon the Final Payment Certificate issued by Betts and *not* on the grounds as found by the Court in *Trackstar*;

75.4. whilst *(as stated in the Applicant's Supplementary Heads of Argument)* the appeal by *Makent* was dismissed by the SCA the SCA did *not* consider the defence raised by *Makent* in the Court *a quo*.

[76] This Court was not referred to any decision, either by the SCA or the Constitutional Court, dealing authoritatively with this defence and is not aware of any. In light thereof, coupled with the fact that, in the opinion of this Court, *Trackstar* is distinguishable from the facts of the present matter,[45] this Court is neither bound, or assisted by, any authority.

[77] In *Trackstar* the decision of the Court that the defence was untenable[46] was, with respect, boldly made with little or no reference to either the facts of the

[45] *Paragraphs [70] to [72] ibid.*
[46] *Paragraph [70] ibid.*

particular matter or general and accepted principles of law. That finding was based solely on the fact that the plaintiff in *Trackstar* should not be held responsible *(thereby being rendered without a cause of action)* as a result of the failure of the First Defendant's agent *(the Second Defendant and the First Defendant's principal agent)* failure to comply *(strictly)* with the terms of the JBCC agreement. This finding was *"amplified"* by the Applicant's Counsel's argument before this Court in the present matter when he submitted that, citing various authorities therefore, an employer should look to the principal agent to compensate that employer for any damages suffered by the employer when the Final Payment Certificate was issued, in breach of the agreement, by the principal agent.

[78] Once again, this Court has no difficulty with the general principle that, in the appropriate circumstances, a principal *(in the case of a building contract an employer)* may seek damages *(based either in contract or delict)* against its agent *(in the case of a building contract the appointed principal agent)* where the actions of the latter cause the former to suffer damages arising therefrom. However, this

Court does have difficulties with both general principle *(as set out above)* to the particular facts of the present matter.

[79] The misgivings of this Court, insofar as the finding in *Trackstar* is concerned, have already, to one extent or another, been dealt with herein.[47] Put simply, the finding in *Trackstar* purports to establish a general principle that where an agent breaches a material term of an agreement, the principal should be held liable therefor. Based thereon the Applicant in the present matter submits that this principle is an accepted principle, in law, on the basis that the principal has a remedy in that the principal can seek to recover damages from the agent.

[80] Bearing in mind that it was common cause in the application before this Court that the Applicant did *not* rely on estoppel the fundamental difficulty with the aforegoing is that it is not correct that, as a general principle, a principal is always liable for the actions of its agent. Coupled to the aforegoing is that simply because a principal has a right of recovery against an agent, does not mean that, in every case, the principal becomes liable to a third party arising from the

[47] *Paragraph [75] ibid.*

actions of the principal's agent. In each case, it is imperative that, *inter alia*, before a court can find that a principal is liable for the actions of the agent, that Court must examine (a) the terms of the authority granted by the principal to the agent and (b) the terms of the agreement insofar as they are applicable. It goes without saying that the terms of the agreement may well require interpretation by the Court.

[81] At this juncture, it must be noted that:

81.1 the Applicant elected to proceed by way of application and not by action;

81.2 the application for payment from the GEPF is based *solely* on the final payment certificate; and

81.3 it is common cause that the Applicant does *not* rely on estoppel in that the GEPF is estopped from denying its liability to pay the Applicant the amount claimed on the basis that Betts did not have the requisite authority to issue the final payment certificate on the basis that the completion certificate had not been completed.

[82] The issuing of the Final Account and the Final Payment Certificate are dealt with in clause 34.0 of the agreement. This Court understands that there is no material dispute between the parties in respect of the provisions thereof and that the Final Payment Certificate could only be issued subsequent to the date of the Final Completion Certificate. It is also common cause that this did not happen and that the Final Payment Certificate predates the Final Completion Certificate. In the opinion of this Court and insofar as this Court is required to interpret the provisions of the agreement in order, *inter alia*, to give the agreement business efficacy *(on that which is before this Court)* the reason as to why the agreement provides for the issuing of the certificates in the order that it does, is, in the opinion of this Court, fairly obvious.

[83] In a building contract the importance of the inclusion of a Final Payment Certificate therein, together with the material consequences of the issuing thereof by the employer's principal agent, cannot be over-emphasised. Firstly, the issuing thereof binds the employer to make payment to the contractor in the

amount as set out therein. Secondly, it essentially brings the building contract to an end and the purpose thereof is to attempt, insofar as possible, to avoid any disputes between the parties pertaining to, *inter alia*, the value of the works carried out by the contractor and the final amount payable by the employer to the contractor. In the premises, it is a material term or terms of the said contract that the *"events"*, namely, *inter alia*, practical completion; valuation of works; final completion and the *"certificates"* and other documents to be issued in respect thereof, are done in a specific order.

[84] Earlier in this judgment, it was held by this Court that the Applicant had failed to discharge the onus that, in the absence of site instructions and proof of delegation of authority to appointed agents to issue site instructions, Betts had the requisite authority to issue the Final Payment Certificate. In addition thereto, this Court holds that when Betts issued the Final Payment Certificate before final completion, it did not have the requisite authority to do so. This was simply as a result of the fact that Betts had breached a material term of the agreement by issuing the Final Payment Certificate before final completion. This

renders the final payment certificate invalid since Betts did not have the requisite authority to issue that certificate.

[85] Based on the facts which are common cause in this matter and the submissions made on behalf of the Applicant in respect of this defence as raised by the Respondent, it cannot be accepted by this Court. Conversely, this Court has no hesitation whatsoever Respondent. In the premises, this application should be dismissed.

**Conclusion**

[86] In conclusion, it is clear that certain references herein deal with, *inter alia*, reliance by either of the parties upon certain authorities and/or principles of law which are not fully *"fleshed out"* later in this judgment. This is simply on the basis that same became superfluous for reaching the decision in this matter which this Court has reached.

[87] The Applicant elected to institute this application for payment based solely on the Final Payment Certificate. It has failed to discharge the onus incumbent upon it

to prove, on a balance of probabilities, that it is entitled to such payment from the GEPF. In the first instance, the payment certificate does not satisfy the requirements, *ex facie* the document itself, of liquidity. On this point alone this application should be dismissed.

[88] Even if the payment certificate was held to be a liquid document the GEPF is entitled to place before this Court defences as to why the amount claimed, as set out therein, is not payable by the GEPF to the Applicant. Furthermore, this Court is enjoined to consider those defences and reach a finding in respect thereof.

[89] As set out above, this Court finds that the Applicant is not entitled to payment arising from site instructions issued by way of delegated authority. No proof of these site instructions relied upon by the Applicant was placed before this Court. Also, no proof that the authority to issue site instructions was properly delegated by Betts to the various appointed agents forms part of this application. Finally, there are *bona fide* disputes of fact in respect of both of the aforegoing.

2. The Applicant is to pay the costs of the application.

**BC WANLESS J**

**Judge of the High Court**

**Gauteng Local Division**

**Johannesburg**

| | |
|---|---|
| Date of hearing: | 21 February 2024 |
| Date judgment reserved: | 21 February 2024 |
| Date of *ex tempore* judgment: | 31 October 2024 |
| Date of written judgment: | 26 November 2024 |

**Appearances**

| | |
|---|---|
| For the Applicant: | Adv. C. Acker |
| Instructed by: | Andrew Garrat Incorporated |
| | |
| For the First & Second Respondents: | Adv. A. Russell |
| Instructed by: | Werksmans Attorneys |