REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2023-086081

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE: 3 February 2026

SIGNATURE OF JUDGE: [redacted]

In the matter between:

CAPITAL CIVIL AND BUILDING CONSTRUCTION (PTY) LTD (REG NO: 2018/210358/07	Applicant
and	
MALUSI MOLEWA	Respondent

JUDGMENT

Klopper, AJ

INTRODUCTION:

[1] The Applicant (as the contractor) seeks an order against the Respondent (as the employer) for payment in the sum of **R1 990 806.55**. The cause of action is predicated upon payment certificates issued by the Respondent's principal agent. Applicant further seeks leave to file a supplementary affidavit to the founding affidavit. The application for leave is unopposed.

[2] On 3 April 2022, the Applicant and the Respondent concluded an agreement for the high-end residential refurbishment of erf 232 Silver Woods Country Estate for a contract sum of **R32 828 268.69**.

[3] The material terms and conditions embodied in the standard contract approved and recommended by the Joint Building Contracts Committee ("JBCC"), in edition 6.2 – May 2018, are set out in full to obviate reference thereto in the body of this judgment. These are:

3.1 Clause 6.1

The employer warrants that the principal agent has full authority and obligation to act on behalf of and bind the employer in terms of this agreement. The principal agent has no authority to amend this agreement;

3.2 Clause 12.1.7

The employer shall make payments by the due date;

3.3 Clause 12.2.7

The contractor shall on being given possession of the site commence the works and proceed with due diligence, regularity, expedition, skill and appropriate resources to bring the works to practical completion and to final completion;

3.4 Clause 12.2.12

The contractor shall co-operate with the principal agent in the preparation of cashflow projections and the completion of payment certificates;

3.5 Clause 25.2

The principal agent shall regularly by the due date issue payment certificates to the contractor with a copy to the employer until and including the final payment certificate. A payment certificate may be for a negative or nil amount;

3.6 Clause 25.10

The employer shall pay the contractor the amount certified in an issued payment certificate within fourteen (14) calendar days of the date for issue of the payment certificate including default interest and/or compensatory interest. Clause 25.10 is amended by the Preliminaries contained in the Bill of Quantity to read Payment within fourteen (14) days after receipt of the signed payment certificate by the client;

3.7 Clause 25.11

The contractor shall pay the employer the amount certified in an issued payment certificate within twenty-one (21) calendar days of the date of issue of the payment certificate including default interest;

3.8 Clause 25.17

For purposes of provisional sentence in relation to a payment certificate only, the parties consent to the jurisdiction of any court of law in the country;

3.9 Clause 29.14.5

The contractor may give notice of intention to terminate this agreement where the employer has failed to pay the amount certified by the due date;

3.10 In terms of clause B.20 of the contract data, the law of the country applicable to the contract is the Republic of South Africa;

3.11 In terms of clause 12.0 of the contract data, the date of month for the issue of regular payment certificates is the 25th of each month for the valuation and the certificate was to be issued 7 days thereafter.

BACKGROUND FACTUAL MATRIX:

[4] Subsequent to the filing of Applicant's founding papers, and prior to Respondent filing its answering affidavit thereto, the Applicant filed a supplementary affidavit to its founding affidavit.

[5] The Respondent filed its answering affidavit, to which the Applicant filed its reply.

[6] The Respondent does not oppose the Applicant's interlocutory application for leave to file its supplementary affidavit.

[7] The following factual position as set out in the Applicant's founding and supplementary affidavit is not disputed by the Respondent:

7.1. On 2 December 2022, the principal agent issued interim payment certificate number 8 for an amount of **R1 838 079.50** (including VAT), which amount was due and payable by the Respondent to the Applicant by no later than 16 December 2022. The Respondent was contractually obliged to pay the sum to the Applicant but failed to do so.

7.2. On 12 December 2022, the principal agent issued interim payment certificate number 9 for an amount of **R339 365.41** (including VAT) in favour of the Applicant, which was due and payable by the Respondent to the Applicant by no later than 26 December 2023. The Respondent was contractually obliged to pay this sum to the Applicant but has failed to do so.

7.3. On 14 February 2023, the principal agent issued interim payment certificate number 10 for a negative amount of **-R597 646.90** (including VAT) in favour of the Respondent, which was due and payable by the

Applicant to the Respondent by no later than 7 March 2023. The Applicant was contractually obliged to pay this sum to the Respondent.

7.4. On 27 February 2023, the principal agent issued interim payment certificate number 11 for an amount of **R482 462.31** (including VAT) in favour of the Applicant, which amount was due and payable by the Respondent to the Applicant by no later than 13 March 2023. The Respondent was contractually obliged to pay this sum to the Applicant but has failed to do so.

7.5. On 27 March 2023, the principal agent issued interim payment certificate number 12 for an amount of **R456 235.75** (including VAT) in favour of the Applicant, which amount was due and payable by the Respondent to the Applicant by no later than 10 April 2023. The Respondent was contractually obliged to pay this sum to the Applicant but has failed to do so.

7.6. On 25 April 2023, the principal agent issued interim payment certificate number 13 for an amount of **R196 883.99** (including VAT) in favour of the Applicant, which amount was due and payable by the Respondent to the Applicant by no later than 9 May 2023. The Respondent was contractually obliged to pay this sum to the Applicant but has failed to do so.

7.7. On 3 July 2023, the principal agent issued interim payment certificate number 14 (revision 1) for a negative amount of **-R165 797.05** (including VAT) in favour of the Respondent, which amount was due and payable by the Applicant to the Respondent by no later than 24 July 2023. The Applicant was contractually obliged to pay this sum to the Respondent.

7.8. On 13 March 2023, the Applicant sent a notice of default to the Respondent, wherein the Respondent was provided ten working days within which to remedy its default in accordance with the provisions of clause 29.14.5 of the agreement. The notice of default also recorded Applicant's intention to exercise its right to terminate the agreement in the event of the default not being remedied. The Respondent failed to remedy the default.

7.9. On 3 April 2023, the Applicant issued a notice of termination, terminating the agreement.

7.10. On 13 July 2023, the parties reached an agreement in respect of the final amounts due to the Applicant, same of which was embodied in a final account, issued by the principal agent and duly accepted by the Applicant. In terms of the final account, it was agreed that an amount of R6 690 369.99 (excluding VAT) was due to the Applicant by the Respondent for works executed in terms of the agreement as at date of termination thereof.

7.11. In terms of the final account, the interim payment certificates issued to date thereof amounted to **R6 118 379.78** (excluding VAT). Accordingly, the principal agent issued payment certificate number 15 for the difference between what was previously certified and what remained outstanding, due and payable to the Applicant by the Respondent, including a further amount of **R105 235.13** for default interest due to the Applicant as at date of the final account. Payment certificate number 15 in the amount of **R763 023.88** (including VAT), was due and payable by the Respondent to the Applicant by no later than 31 July 2023.

7.12. Despite demand, the Respondent has failed to make payment in favour of the Applicant.

7.13. Following protracted negotiations between the parties, the Applicant and the Respondent reached agreement for settlement of the amounts due and payable by the Respondent in favour of the Applicant. The terms and conditions of the agreement, which appears to have been contained in several correspondence exchanged between the parties during the period 12 October 2023 up until 7 November 2023, appears to be as follows:

7.13.1. The Respondent agreed to pay the Applicant an amount of **R3 007 656,72** in settlement of the Respondent's indebtedness to the Applicant in respect of the payment certificates as referenced above.

7.13.2. The settlement amount appears to be calculated as follows:

7.13.2.1. **R2 990 806.55** in respect of the amounts due and payable in terms of the payment certificates; and

7.13.2.2. **R16 850,17** as contribution towards the Applicant's legal costs.

7.13.3. Payment of the outstanding amount of **R3 007 656,72** to be paid as follows:

7.13.3.1. **R1 000 000,00** to be paid by 15 November 2023; and

7.13.3.2. The balance of **R2 007 656,72** to be paid by 10 December 2023.

7.14. On 9 November 2023, the Respondent made the first payment in terms of the agreement in the amount of **R1 000 000,00** in favour of the Applicant.

7.15. The Respondent failed to pay the remaining amount of **R2 007 656,72.**

[8] The Respondent denies that the amounts claimed by the Applicant is due and payable.

[9] The Respondent alleges that at the time it did not agree with these amounts and never consented to pay these sums as set out in the principal agent's final account signed and issued on 13 July 2023, reflecting an amount of **R6 690 369,99** due and payable by Respondent in favour of the Applicant.

[10] The Respondent alleges that as a result of it failing to pay the balance of the settlement amount during December 2023, the Applicant stopped working and vacated the site, whilst retaining a lien over the property.

[11] The Respondent further alleges that during the end of January and beginning of February 2024, he became aware of various defects that manifested in the works performed by the Applicant and latent defects that have since materialised in the buildings.

[12] The Respondent also alleges that some of the Applicant's sub-contractors were brought back to site during February 2024, to complete certain improper, incomplete or defective work on site. In this regard, the Respondent claims to have paid on 14 June 2024, an amount of **R247 436.48** and **R258 489.12** respectively to two of Applicant's purported sub-contractors.

[13] According to the Respondent, the principal agent allegedly concluded that it was necessary to draw a further revision of the final account, which was purportedly done and issued by the principal agent on 26 June 2024.

[14] The Respondent does however, acknowledge the fact that the "revised final account REV2" is not signed by the principal agent.

[15] The Respondent further alleges that the amounts claimed by the Applicant, whether based on the payment certificates or the settlement agreement are both wrong and that these amounts should have been amended or superseded by the actual amounts in the "second revision of final account", or even a third revision thereof.

[16] As a result of the alleged discrepancies, the Respondent contended that a factual dispute exists regarding the correct amount payable to the Applicant.

CONSIDERATION OF EVIDENCE:

[17] The Applicant's claim is predicated on payment certificates issued by the Respondent's principal agent who has certified the amount reflected therein as due and payable and a subsequent "settlement agreement", which deals with an agreed discount and payment terms. It is trite that a payment certificate gives rise to a new cause of action subject to the terms of contract. In the case of **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture;**[1] **Ocean Diners (Pty) Ltd v Golden Hill Construction CC**[2], it was held:

"A final payment certificate had to be treated as a liquid document because it was issued by the employer's agent, with the consequence that the employer was in

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1 2009 (5) SA 1 (SCA)

2 [1993] ZASCA 41; 1993 (3) SA 331 (A) and 304 E

the same position it would have been if it had itself signed an acknowledgement of debt in favour of the contractor. Relying further on the ***Randcon*** *case (at 196 G – 188 G), the learned judge held that similar reasoning applied to interim certificates. The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action, subject to the terms of the contract. It is regarded as the equivalent of cash. The certificates in question all fall within this ambit."*

[18] In the case of **Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd**[3] it was held:

> *"An interim payment certificate issued by an engineer or an architect (as in this case) creates a debt due and as such a distinct cause of action. That much is plain…* ***Simonds NO v Bantoesake Administrasieraad (Vaaldriehoekgebied)*** *1979 (1) SA 940 (T) at 946 F the certificate is ostensibly self-sufficient and a plaintiff does not have to travel beyond its terms in order to establish a right of action. The building contract, in particular, does not form part of the plaintiff's cause of action…"*

[19] McEwan J in the case if **Smith v Mouton**[4] held:

> "2. *The employer should be bound by the act of his agent in issuing a certificate. The position is the same as if the employer himself had signed an acknowledgement of debt… The exceptions are those that apply generally in the law of agency. For example, the employer will not be bound if there has been fraud or the architect has acted in collusion with the contractor to the detriment of the employer…. The employer will also not be bound if the agent has exceeded his mandate….*
>
> *3 The employer is not entitled to dispute the validity of a final certificate vis-á-vis the contractor merely because he alleges that the certificate was given negligently or that the architect exercised his discretion wrongly… subject to what is said below, the same principle would appear to apply in case of an interim or progress certificate.*

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[3] 1986 (4) SA 510 (N) at 514 - 515

[4] 1977 (3) SA 9 (W)

4. *In the absence of any of the factors referred to in para. 2, the employer is bound to pay the sum certified…"*

RESPONDENT'S DEFENCES:

[20] The Respondent can avail itself to recognise contractual defences like:

20.1. Fraud which can be raised to resist a claim for payment based on a payment certificate;

20.2. Its principal agent exceeded the bounds of its authority;

20.3. A claim for damages arising from defective work or delay in achieving completion of the works; or

20.4. Any other competent defence.

[21] The Respondent contends that the Applicant evidently abandoned his reliance on its original cause of action based on the payment certificates and the final account in favour of relying on a "new agreement" that was subsequently concluded between the parties, which superseded and novated Applicant's original cause of action, emanating from payment certificates.

[22] The Respondent also contends that it did not agree at the time with these amounts as contained in the principal agent's final account signed and issued on 13 July 2023, and further never consented to pay these sums to the Applicant.

[23] However, the Respondent failed to render any explanation why it nevertheless agreed on 7 November 2023, to make payment to the Applicant in terms of a settlement agreement, which clearly emanated from the payment certificates issued by the principal agent.

[24] The Respondent alleges that as a result of his failure to pay the balance of the settlement amount to the Applicant during December 2023, the Applicant stopped working and vacated the site.

[25] The above events as alleged by the Respondent stand in stark contrast with the undisputed evidence submitted by the Applicant to the effect that it duly

terminated the original contract in terms of clause 29 (29.14.5) of the contract as far back as 30 April 2023, due to the Respondent's failure to make payment of the amounts certified in the duly issued payment certificates.

[26] Based on the common cause facts between the parties, the Applicant has clearly exercised its contractual right to terminate the agreement within the provisions of clause 28.

[27] Following the termination of the agreement on 30 April 2023, there were neither any contractual obligation, nor any other reasons provided that would require the Applicant's continued work on site.

[28] The Respondent contends that it is currently evident that remedial work requires to be performed by the Applicant.

[29] The Respondent further alleges that a site inspection was conducted on or about 26 January 2024, which led to a purported "re-inspection" of the work by the principal agent and a revision of the final account. In support of this allegation, the Respondent annexed a copy of the purported "final account REV2" to its answering affidavit (annexure "AA3" thereto).

[30] Notably, clause 29.17.1 read with clause 22.3.2 of the agreement, states that latent defects liability period shall end on the date of termination. In *casu* the latent defect liability period ended on 30 April 2023.

[31] Upon due consideration of the purported revised final account "REV2", the following discrepancies are clearly identified:

31.1. The final account, "REV2", is neither signed by the Applicant nor the principal agent as provided for;

31.2. The final account reflects the date of issue to be 26 June 2023 as opposed to 26 June 2024 as alleged;

31.3. Section 4 (final summary) and section 5 (budget amount and final account comparison) appears to be identical to section 4 and section 5 of the final account "REV1", issued by the principal agent on 13 July

2023; and at the bottom of section 2 (final account statement) the following statement appears:

"Amount due to contractor in full and final settlement:

I/we the undersigned do hereby agree that the above statement is correct and accept same in full and final settlement of all claims arising to date of termination (3 April 2023) in terms of this contract."

[own emphasis]

[32] Notably, the above statement as quoted, including the date of 3 April 2023, also appears in section 2 of the final account "REV1".

[33] Notably, none of the allegations relating to the purported draft and need for a final account "REV2", where either confirmed or supported by the Respondent's duly appointed principal agent.

[34] It is not in dispute that on 13 July 2023, the parties reached an agreement in respect of the final amounts due to the Applicant, same of which was embodied in the final account prepared and issued by the principal agent and accepted by the Applicant.

[35] In terms of the final account, the interim payment certificates issued to date thereof amounted to R6 118 397.97 (excluding VAT). Accordingly, payment certificate number 15 was issued for the difference between what was previously certified and what remained outstanding and due to the Applicant. Payment certificate number 15 further provided for payment of default interest due to the Applicant in the amount of R105 235.73 in respect of default interest. Payment certificate number 15 was issued for the amount of R763 023.88.

[36] None of the payment certificates and in particular payment certificate 15 are disputed by the Respondent.

<u>The settlement agreement:</u>

[37] Upon due consideration of the correspondence exchanged between the parties during the period 12 October 2023 and 7 November 2023, all of which are not in dispute, the intention of the parties is made clear.

[38] The purpose of the agreement, which emanated from the content of the correspondence exchanged between the parties, appears to have been aimed at finding an amicable solution to the Respondent's failure to make timeous payment of the agreed amounts due and payable in terms of the original principal building agreement.

[39] There is not a shred of evidence provided by the Respondent to suggest that the parties intended to conclude a new agreement to supersede the original agreement and indebtedness emanating therefrom.

[40] Despite the defences raised by the Respondent in its answering affidavit, it is common cause that the Respondent approached the Applicant in a letter dated 12 October 2023, with the intent to reach an agreement on payment of its indebtedness in terms of the original contract as reflected in the payment certificates issued by the principal agent in accordance with the provisions of the original principal building agreement.

[41] The parties concluded an agreement on 7 November 2023, in terms of which the Respondent agreed to settle its indebtedness emanating from the original agreement, with the Applicant on or before 10 December 2023. On Respondent's own version, it failed to effect payment in accordance.

[42] The original cause of action remains and the mere fact that the Applicant agreed to payment terms in respect of settlement of Respondent's indebtedness in terms of the existing payment certificates, and a discount in favour of the Respondent, does not alter the legal position of the Respondent's indebtedness in terms of the original agreement.

[43] Accordingly, the following order is made:

[1] Leave is hereby granted to the Applicant to file a supplementary affidavit;

[2] The Respondent is ordered to make payment to the Applicant in the amount of **R1 990 806.55.**

[3] The Respondent is ordered to make payment of interest on the aforementioned amount at the rate of 6% above the ruling rate of interest, compounded monthly from the due date of payment, until date of full and final payment.

[4] Cost of the application to be paid by the Respondent to be taxed on scale C.

[redacted]

JA KLOPPER

ACTING JUDGE

HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be on 3 February 2026

Appearances

Counsel for the Applicant:	Adv E Malherbe
Instructed by:	Roelf Nel Inc

Appearance for Respondent: Appeared in person

Date of Hearing: 4 November 2025

Date of Judgment: 3 February 2026